

# Globalizing Legal Drafting: What the Chinese Can Teach Us About Ejusdem Generis and All That\*

Preston M. Torbert

I am honored and pleased to be here today to talk with you about the globalization of law practice — in particular, what the Chinese can teach us about legal drafting in English. In my remarks I will try to answer two questions: *how* is it possible that the Chinese can teach us about legal drafting in English? And specifically *what* is it that the Chinese can teach us about legal drafting?

## Background

Let me start by describing how I came to believe that the Chinese can teach us something about legal drafting. My law practice is a China-centered practice. I am a founder of our firm's China practice and the founder of the Chicago China-practice group that comprises eight people: seven Chinese and, as the other members of the group say, one foreigner — me. We advise American clients about trade and investment in China. A large part of our work concerns joint ventures that American clients establish in China with Chinese partners. Chinese law requires a joint-venture contract that is approved by the Chinese government authorities. Therefore, the joint-venture contract must be written in Chinese.

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Chinese law allows a foreign-language text of the joint-venture contract as well, and if it is signed by the parties, the foreign-language text has equal legal effect with the Chinese text. So a joint-venture contract is a bilingual contract: there is one contract, but with two different texts, one in English and one in Chinese.

How do we prepare these bilingual contracts? Although in theory we could draft the two texts jointly, it is generally easier to draft one text and then translate it into the other language. Since we act for American clients, we draw up the first draft of the contract in English. After making the changes suggested by the client, we complete the English draft, and one of my Chinese colleagues translates the English text into Chinese. The central problem in this process — which arises from the equal validity of the two texts — is how to avoid discrepancies. Since English and Chinese come from completely different language systems, the syntax of the languages is quite different. And since the two cultures in which the languages arose were isolated from each other for so long, their vocabularies are also very different. There are very few cognates between English and Chinese. As a result, ensuring that the two texts are consistent is a very challenging and trying task.

As you can imagine, we find many different types of discrepancies. One of the most difficult occurs when the language of the two texts is equivalent, but the legal effect is different. Let me describe one example of this type of discrepancy and our efforts to overcome it. This will help to show how the Chinese can teach us about legal drafting and what they can teach us.

I've chosen the example of enumerations. One challenge that a legal drafter faces in English (or any other language) is in setting out the precise scope of the parties' rights and obligations. To express these rights and obligations, the drafter will often use an enumeration — that is, a list of three or more items (often nouns or

verbs) separated by commas and with a conjunction before the last item. Typically, an enumeration will contain specific words at the beginning and in the middle and a general word at the end. Examples: *any house, flat, cottage, or other building* and *sold, leased, or disposed of*. These seem innocuous enough, but they aren't.

## The Class Presumption

What makes enumerations interesting in English legal drafting is a rule of interpretation called “*eiusdem generis*.” This is one of the hoary canons of interpretation that are covered in a rather cursory way in most law schools and then only in connection with interpreting caselaw, not drafting contracts. The reasons for this neglect are twofold. First, legal drafting is not emphasized in American legal education, and second, the canons of interpretation have fallen out of favor among law professors. But even though this canon is moribund in the law schools, it's very much alive in the courts. The professors may not teach it, and the students may not learn it, but the judges commonly apply it. A Lexis search reveals 203 Illinois cases in which *eiusdem generis* was an issue, and an average of about 90 cases each year in federal and state courts over the last ten years.

Before continuing this discussion, let's make a concession to reality. Many lawyers, especially those in the younger generation, have never studied Latin, so let's give *eiusdem generis* an English name. Since “*eiusdem generis*” in Latin means “of the same class,” we can call this canon in English “the class presumption.”

What does that mean? It means that, other things being equal, in an enumeration the general term at the end will be interpreted narrowly to fall within the class created by the preceding specific terms in the enumeration. The presumption apparently arose from the effort to keep the common law free from legislative change.

To limit the legislature's power to change the common law, the judiciary interpreted the general item at the end of an enumeration in a more restrictive way than it would ordinarily be interpreted.<sup>1</sup> For instance, the word *building* in the British enumeration *any house, flat, cottage, or other building* would be interpreted not to include a nonresidential building because the class presumption limits the scope of *building* to buildings of the same class as a house, flat, or cottage — that is, residential buildings.<sup>2</sup> Similarly, in an American case, the enumeration *sold, leased, or disposed of* was interpreted to not include a disposal of real estate in bankruptcy because the class presumption narrowed the general term *disposed of* to voluntary transactions like a sale or a lease.<sup>3</sup>

One consequence of the class presumption is that it creates a discrepancy between the interpretations that a lawyer and a layman (or client) would give to an enumeration. A lawyer would understand that the class presumption applies to an enumeration and that a judge will interpret the general term at the end to be narrower than it appears. This is especially true when the general term is preceded by *other*. In the enumeration from the English example, a layman will generally interpret the word *other* to mean “all other types of buildings,” but a lawyer or judge will interpret it to mean only “all buildings of the same class as a house, flat, or cottage” — that is, only those buildings that share the same characteristics as the preceding items in the enumeration.

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<sup>1</sup> See Barbara Child, *Drafting Legal Documents: Principles and Practices* 342 (2d ed., West 1992).

<sup>2</sup> See D.J. Gifford & John Salter, *How to Understand an Act of Parliament* 108 (Cavendish 1996).

<sup>3</sup> *Love v. Pamplin*, 21 F. 755, 760 (W.D. Tenn. 1884).

But neither the Chinese language nor Chinese law has a class presumption. Therefore, assuming that the words of an enumeration in the Chinese text and the words of the English text communicate the same concept, the interpretation of the Chinese text will be different. Hence the challenge for the drafter: how does one resolve this discrepancy?

We can look to American caselaw for assistance. In a number of cases, judges applying the class presumption to enumerations in which the word *other* precedes the general word at the end have stated that, in light of the class presumption, *other* means “other such like” or “other similar,” not “all others of any kind.”<sup>4</sup> One solution, then, to our problem of the different interpretations in English and Chinese would be to insert in the Chinese text the Chinese equivalent for *similar* before the general term. That would achieve the same effect in interpreting the Chinese text as in the English. This solution, however, is not practical. In negotiating the contract, a sharp young lawyer on the Chinese side who reads English will probably catch the discrepancy in the texts — the Chinese contains the Chinese equivalent for *similar*, while the English does not contain the word *similar*. He or she may point this out at the negotiations and accuse the drafter of sloppiness or worse. To then try to explain the class presumption in English legal interpretation is not advisable — clients are not eager to pay for this type of legal education.

There’s a better solution. Change the English text by inserting the word *similar* before the general term. Since the courts have stated

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<sup>4</sup> See, e.g., *Keenan v. Bowers*, 91 F. Supp. 771, 773 (E.D.S.C. 1950) (*other* read as “other such like”); *City of Chicago v. Bethlehem Healing Temple Church*, 236 N.E.2d 357, 360 (Ill. App. 1st Dist. 1968) (*other* read as “other such like”); *City of Grandview v. Madison*, 693 S.W.2d 118, 119 (Mo. App. W. Dist. 1985) (*other* read as “other such like”); *Lasche v. Dearing*, 53 N.Y.S. 58, 59–60 (N.Y. Sup. Ct. 1898) (*other actionable injury* read as “other similar actionable injury”).

that the class presumption has the same effect, this solution does not change the legal effect of the English text. But for this solution to work effectively, the word *similar* should be inserted not while negotiating the contract with the Chinese party, but while drafting the English text of the contract before it is given to the client. Then, when the Chinese text is prepared, the translator will insert the Chinese equivalent of “similar” before the general word at the end of the enumeration. Thus, the English text and the Chinese text will be identical not only in their wording, but also in their interpretation. The problem has been solved.

### **Solving the Problem in English Drafting**

Let’s put aside bilingual contracts and the effort to ensure identity between texts in English and Chinese. Let’s just talk about English legal drafting in a purely domestic context. It’s not only the Chinese who don’t understand that enumerations in English legal documents have a narrower legal effect than expected. No layman without a legal education understands this either. And to judge from their drafting and the litigation it produces, the same goes for many lawyers. (Incidentally, I categorically refuse to answer any questions on how often I have considered the application of the class presumption in the contracts I have drafted in the last 30 years!)

But the difficulty caused by the class presumption in English legal drafting can be eliminated quite easily. All the drafter has to do is to make explicit — make transparent — what he or she is trying to say. If the drafter wants the general term to refer to only those examples that are similar in kind to the specific preceding items, then he or she can add the word *similar* before that general term. If, on the other hand, the drafter wants the general term to include all possible examples of the general term, then he or she can add a phrase like *similar or dissimilar* before the general term or a phrase like *of any kind* after the general term.

To return to the two examples I mentioned before, if the drafter intends the general word *buildings* to include only residential buildings, then the drafter can say *or other similar buildings* (or even omit the word *other* and simply say *or similar buildings*). On the other hand, if the drafter intends that *buildings* be interpreted broadly, the drafter can say *or other similar or dissimilar buildings* or *other buildings of the same or different type*. Similarly, with the enumeration *sold, leased, or disposed of*, the drafter can say *similarly disposed of* or *disposed of in any manner*.

The specific words I'm suggesting here are not the only words that can be used; any functional equivalents will do. Each drafter can choose whatever words he or she thinks are most appropriate as long as they convey the drafter's intention to restrict the class to only similar items or to expand the class to cover both similar and dissimilar items.

I believe that this small change would contribute to making English legal drafting more precise by encouraging lawyers to consider more carefully what scope they wish to give to an enumeration, especially the general word at the end. More attention to the class presumption and how to avoid it or achieve the same result through greater transparency would eliminate many of the surprises evidenced when judges — to the chagrin of the drafters — have applied the presumption.

Now, I imagine that many of you are asking yourselves, "What's the big deal?" Why have I spent so much time explaining such a simple and obvious suggestion for marginally improving English legal drafting? The reason is that the suggestion is new. To my knowledge, the suggestion, while simple and seemingly obvious, has never been offered before. I have reviewed dozens of works on legal drafting — starting with Jeremy Bentham's *Nomography*, published in 1843,<sup>5</sup> and including English works (for example, Ilbert,

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<sup>5</sup> Jeremy Bentham, *Nomography*, in *The Works of Jeremy Bentham* vol. 3, 231–83 (John Bowring ed., William Tait 1843).

Russell, Thornton, and Thring<sup>6</sup>), Canadian works (for example, Driedger, Pigeon, and Dick<sup>7</sup>), Australian works (for example, Piesse<sup>8</sup>) and American works (for example, Dickerson, Hirsch, Haggard, Stark, and Mullins<sup>9</sup>) — and none of them has ever made such a suggestion. A few of them asked the question, What are the implications of the class presumption for legal drafting, as opposed to legal interpretation? But their answers were unduly complex.<sup>10</sup> Why didn't they come up with a simple, practical solution? The answer, I think, is that they did not have the Chinese text to challenge them to think about this familiar issue from a new or different perspective. And that is precisely why we must welcome the inconvenient challenges that a foreign culture, language, or legal system presents: they lead us to see the familiar in a new light and can help us improve our own system.

- <sup>6</sup> Sir Courtenay Ilbert, *The Mechanics of Law Making* (3d ed., Columbia U. Press 1913); Sir Alison Russell, *Legislative Drafting and Forms* (4th ed., Butterworths 1938); G.C. Thornton, *Legislative Drafting* (4th ed., Butterworths 1996); Sir Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (Little, Brown & Co. 1902).
- <sup>7</sup> Elmer A. Driedger, *The Composition of Legislation: Legislative Forms and Precedents* (2d rev. ed., Dept. of Just. 1976); Louis-Philippe Pigeon, *Drafting and Interpreting Legislation* (Carswell 1988); Robert C. Dick, *Legal Drafting in Plain Language* (3d ed., Carswell 1995).
- <sup>8</sup> E.L. Piesse, *The Elements of Drafting* (J.K. Aitkin & Peter Butt eds., 10th ed., Lawbook Co. 1995).
- <sup>9</sup> Reed Dickerson, *The Fundamentals of Legal Drafting* (2d ed., Little, Brown & Co. 1986); Donald Hirsch, *Drafting Federal Law* (2d ed., Off. of Legis. Counsel U.S. H. of Rep. 1989); Thomas R. Haggard, *Legal Drafting in a Nutshell* (2d ed., West 2003); Jack Stark, *The Art of the Statute* (Fred B. Rothman & Co. 1996); M.E. Mullins, *A Handbook for Legislative Drafters* (Ark. Leg. Dig. 1986).
- <sup>10</sup> Russell, *supra* n. 6, at 106 (proposing to add, at the end, *or any other [building] whether of the same kind as the buildings before enumerated or not*); Thring, *supra* n. 6, at 83 (proposing *whether of the same kind as a [house, flat, cottage] or not*; Piesse, *supra* n. 8, at 117 (proposing *or any other [building] whether of the same kind as those [buildings] previously listed or not*).



## Final Observations

I would like to make four additional points in conclusion.

First, the assistance that a foreign culture, language, or legal system can give us does not have to relate to foreign parties or transactions. People may disagree on whether the class presumption is an expression of the common law's genius or just one of its idiosyncrasies, but no one would, I think, dispute that it has deep historical roots in our legal system and is a typical, characteristic aspect of the common-law system. Yet examining enumerations in a completely unrelated language and legal system can help us uncover ways to deal with the difficulties created by the class presumption and thus improve our own legal drafting.

Second, the example of the class presumption is only one of dozens of proposals for improvement that the Chinese text can inspire. Consider proposals inspired by differences in syntax. For example, English suffers from many types of ambiguity that we native English speakers are often not aware of. One of these is ambiguity in postmodification. The prominent English Parliamentary drafter, Lord Thring, said that the most common form of ambiguity in statutes was postmodification ambiguity.<sup>11</sup> His example was the phrase *every factory and every workshop subject to this Act*. Does the phrase *subject to this Act* modify only *workshop* or both *workshop* and *factory*? It's not clear. This ambiguity cannot be expressed in Chinese because the Chinese language uses premodification instead of postmodification, and premodification — while still potentially ambiguous — is more likely to apply to all the following nouns. Therefore, the Chinese text forces us to find ways to draft the English to eliminate the ambiguity so that the English and Chinese texts will be the same. And the

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<sup>11</sup> Thring, *supra* n. 6, at 90.

English text is improved because the postmodification ambiguity is eliminated.

Third, I have used the words “the Chinese” in the title of these remarks because I “do” China, so to speak, and because it sounds a bit provocative and counterintuitive. And because the Chinese and English languages are of course very different, the Chinese language may give us some unique insights. But in many respects, those insights are the same ones that any other language — yes, including French — would give us. An analysis of the French, Spanish, Russian, or Japanese text of a bilingual contract would yield the same insights into the class presumption as the Chinese text. None of these languages or legal systems has an interpretive rule for legal documents like the class presumption.

Fourth, as law practice becomes ever more globalized, we should accept — no, welcome — the differences and insights that a foreign culture, language, or legal system can offer us. And if we can gather together these insights and suggestions, we can make not merely small, incremental improvements to our English drafting. Rather, we will have the critical mass to create a new English *global* drafting style that will have several benefits: it will make the English text of a bilingual contract more easily translatable into a foreign language; it will make international contracts written only in English more comprehensible and less ambiguous to foreign parties; and it will substantially improve our English legal-drafting style used in purely domestic documents for purely domestic transactions by making the legal documents more accurate and more transparent.

In sum, what I am suggesting is this — and the French have a term for it, although they use it in a slightly different context — “Vive la différence!” Let’s appreciate that difference, celebrate it, and *learn* from it.