

## DEAL-MAKING ON FRENCH TERMS: HOW FRANCE'S LEGISLATIVE CRUSADE TO PURGE AMERICAN TERMINOLOGY FROM FRENCH AFFECTS BUSINESS TRANSACTIONS†

### INTRODUCTION

On August 4, 1994, the French Parliament enacted a law making the use of French mandatory in all official, and many commercial, contexts.<sup>1</sup> While this "Loi Toubon" purports to achieve the "cultural objective" of promoting the French language, its impact on the international business community could be far more significant because advertising, trademarks, product documentation, and contracts come within the scope of the statute.<sup>2</sup>

This Comment studies past and present efforts to regulate the French language, in an attempt to determine the extent to which the new law will directly affect deal-making with France, and indirectly with the entire European Economic Area.<sup>3</sup> Part I explores the reasons for language legislation in France. Part II discusses initial executive regulation of French. Part III analyzes the 1975 Loi Bas-Lauriol, which, although disguised as a consumer protection law, was France's first modern language use statute. Finally, Part IV examines the "Loi Toubon" of 1994 and its scope of application, especially to the areas of trademark protection, labelling and

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1. Law No. 94-665 of Aug. 4, 1994, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Aug. 5, 1994, at 11392 [hereinafter Loi Toubon].

2. The Loi Toubon mandates the use of French in publicity, and research, international conventions and contracts when one of the contracting parties is carrying out a public function, and in all events subsidized by the State. *Id.* arts. 2-7. Although the new law does not outlaw the use of foreign languages, the requirement to use French means, at the very least, that translations, which are often very costly, will have to be appended to foreign language texts. *Id.* art. 4. Jean-Pierre Péroncel-Hugoz, *Les travaux du parlement: les députés adoptent le projet de loi Toubon relatif à l'emploi de la langue française*, LE MONDE, July 4, 1994, at 7 [hereinafter *Les travaux du parlement*].

3. Goods, services, capital and persons circulate freely within the fifteen-member European Union (France, Germany, Italy, the Netherlands, Luxembourg, Belgium, Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Sweden, Austria and Finland). *EIB Grants 7.5 Mecus to Develop Northern Ireland Harbours*, REUTERS, Feb. 20, 1996, available in LEXIS, World Library, CRNWS file. Member countries of the European Free Trade Association (Norway, Iceland, Liechtenstein and Switzerland) established a free trade area with the E.U., which is called the European Economic Area (Switzerland voted against the Agreement to form the E.E.A. and does not belong to the organization). KLAUS-DIETER BORCHARDT, *THE ABC OF COMMUNITY LAW* 41 (4th ed. 1994). Because goods, services, persons and capital may flow freely within the eighteen-member E.E.A., products exported to any of France's E.E.A. partners might easily end up in France, in which case the Loi Toubon will apply. *Id.* For discussion of European Union law, see *infra* text accompanying notes 50-54.

advertising, and explores the law's possible violation of supranational European law. This Comment concludes that while the recent law will probably not have a great impact on how French is spoken in France, it will undoubtedly alter the way trading partners do business there.

## I. REASONS FOR LANGUAGE LEGISLATION

### A. Faded Glory and the English Juggernaut

Just as the English language was initially spread throughout the world through colonial conquest, French was transplanted to four continents, where it continues to be widely spoken.<sup>4</sup> Long before that, French was the quintessential *lingua franca*<sup>5</sup> of the world's aristocracy<sup>6</sup> and cultural elite.<sup>7</sup> French still plays an important role in international bodies such as the United Nations, where it is a working language on an equal footing with English; the Arab League; and the Olympic Games.

Elsewhere, however, French is losing ground to English, most strikingly in the European Union. Although all twelve languages<sup>8</sup> of the fifteen-country European Union are "official languages," French officials complain that since English became a "working language" in the European Community in 1972,<sup>9</sup> French translations of Community documents are often distributed

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4. Andrew Higgins, *French Language Purists Losing Battle Against English Invasion*, REUTERS, Sept. 2, 1987, available in LEXIS, News Library, ARCNEWS file. Worldwide, 110 million people in Africa, Southeast Asia and the Americas speak French as their main language, while another 50 million are fluent. All told, countries where French is spoken by at least part of the population comprise up to 400 million people. See François Raitberger, *La Francophonie Grows to Challenge English Advances*, REUTERS, Oct. 14, 1993, available in LEXIS, News Library, CURNWS file. See also *infra* note 14. A number of African countries continue to use French as their official language or as the language of education and commerce. See Chris Bissell, *Lingua Franca*, THE GUARDIAN, Oct. 25, 1994, at 14. Today, French and English are the only two languages spoken in virtually every region of the world, although, in the aggregate, English is spoken by three times as many people (about 500 million). *Murdering Language*, S.F. CHRON., Feb. 2, 1994, at A18.

5. *Lingua franca* is, of course, Latin for "French language."

6. Edwy Plenel, *Langue vivante, puissance défunte défensif, le projet de loi sur l'emploi du français exprime la nostalgie d'une gloire perdue*, LE MONDE, May 4, 1994, at 1. French was the language of the English court until the fifteenth century, and of educated Russians until the reign of Tsar Alexander II in the nineteenth century. Janet Marsh, *Passionate Remains of Imperial Love*, FIN. TIMES, Sept. 15, 1984, at 113.

7. French was often the preferred mode of expression, even by foreign writers. For example, the legendary Italian lover, Casanova, chose to write his memoirs in French; but, even then, lamented that "French is the only [living language] which its presiding judges have sentenced not to enrich itself at the expense of the other languages." 1 GIACOMO CASANOVA, HISTORY OF MY LIFE 37 (Williard R. Trask trans., 1966).

8. French, German, Italian, Dutch, Danish, English, Irish, Greek, Spanish, Portuguese, Swedish, and Finnish. See *Commission Has No Plans to Change Language Regime*, Sept. 1, 1993, REUTERS, available in LEXIS, News Library, ARCNEWS file.

9. When the United Kingdom and Ireland joined the then customs union.

long after the English versions.<sup>10</sup>

This exemplifies the diminished status of French today, even in Europe. Because English is also the language of the United States, President Pompidou declared in 1972 that "Europe will never again be completely European if ever French lost its place as the working language of [the Continent]."<sup>11</sup>

America's emergence as the economic, commercial and military juggernaut of the post-war era, set the stage for the accession of English as the uncontested universal language of the twentieth century.<sup>12</sup> Today, French has not only lost its position as the preferred international tongue, it is being "corrupted" by the very language which supplanted it on the world stage.<sup>13</sup> In response to this encroachment on its linguistic turf, the new French language legislation not only mandates the use of French,<sup>14</sup> but to a

10. All the languages of the member countries of the Union are official languages, used for documents to be distributed beyond the European Commission. However, only English, French and German are "working" languages, for internal use by the Commission. *EC: News of the Week from 31/8 to 5/9 1993*, AGENCE EUROPE, Sept. 7, 1993, available in LEXIS, News Library, ARCNWS file; *EC: Linguistic Regime Remains Unchanged*, Sept. 2, 1993, available in LEXIS, News Library, ARCNWS file. English is set to overwhelm French as the most frequently used working language of the Union. One reason is that Sweden has agreed to forgo Swedish in favor of English in most meetings. Boris Johnson, *Tower of Euro-Babel is Faced With a Collapse into Cacophony*, DAILY TELEGRAPH, Nov. 33, 1993, at 11. French remains the sole working language of the European Court of Justice. Sean Flynn, *John Murray Pleased With His Role at EC Court*, IRISH TIMES, June 26, 1993, at 8.

11. Plenel, *supra* note 6, at 10. See also Jean-Pierre Péroncel-Hugoz, *La première année de Mme Tasca à la francophonie "une bataille pour le français est indispensable dans les sciences, au sein des organisations internationales, et même sur les murs de nos villes," nous déclare la secrétaire d'État*, LE MONDE, July 15, 1992, at 5 [hereinafter *La première année de Mme Tasca*].

12. Joel Kotkin, *Munich '92: How the West Was Lost; Why The Sun Won't Set On The Empire Built by the Anglo-Americans*, WASH. POST, July 5, 1992, at C1. American terms adopted into post-war French included military or combat terms such as "le tank," "le sniper," and "le jammer," which were eventually replaced with French terms, most often by ministerial order. Although the new French terms are mandatory for entities receiving subsidies from the State, many of the new terms such as "tireur isolé" (isolated shooter) for "sniper" are ignored by French speakers in everyday speech. Thus, the measures taken by the government had only limited effect. Roderick Munday, *Legislating in Defence of the French Language*, 44 CAMBRIDGE L.J. 218, 228 (1985). See also Ministerial Order of Aug. 12, 1976, J.O., Nov. 9, 1976, at 6499 [hereinafter 1976 Ministerial Order]; Ministerial Order of Oct. 5, 1984, J.O., Dec. 30, 1984, at 12196 [hereinafter 1984 Ministerial Order].

13. This practice has given rise to a form of speech called "*Franglais*," a composite of the French words for French and English (Français and Anglais). David White, *France Goes to War on Franglais*, FIN. TIMES, Jan. 29, 1983, at 1A. *Franglais* is believed not only to corrupt French but also to diminish the influence of France in the world. *Id.* However, some linguists dismiss this supposed threat to French. See the statement by Claude Hagege in Higgins, *supra* note 4.

14. The French believe that reinforcing their language at home will give French more credibility abroad. France views itself as a linguistic power of premier importance and has had some success in leading a loose alliance of the French-speaking countries in the world. See also Munday, *supra* note 12, at 224. Over fifty countries are members of an international French-speaking community known as "*la Francophonie*" (a notion first conceived in 1880). Michael Rose, *Pursuing a Dream at a Gallic Summit*, MACLEAN'S, Feb. 24, 1986, at 22. This "linguistic commonwealth" is one weapon in the battle against perceived Anglo-Saxon encroachment. *La Francophonie* is taken so seriously in France that a constitutional amendment was proposed in Parliament which would have given membership in the Francophonie commonwealth the same

certain extent, it also regulates how the language itself is used.

## II. THE BEGINNING OF MODERN REGULATION

The practice of borrowing American words became a political issue in France as early as the 1950s when an independent commission formed to examine the status of technical vocabulary in French.<sup>15</sup> Although the government did not take action until ten years later, on-going reports from the commission helped to alert public opinion to the growing number of American words flowing into French.<sup>16</sup>

### *A. Presidential Decrees Jumpstart The Regulation Process*

In 1966, the first modern language regulation emanated from Elysée Palace, seat of the executive branch of government, rather than from Parliament.<sup>17</sup> President Charles de Gaulle took steps to revive the long-

force of law as membership in the European Union. Another Francophonie amendment bill is currently being presented to the French Sénat. See *La première année de Mme Tasca, supra* note 11, at 5; Jean-Pierre Péroncel-Hugoz, *Divergence parlementaire sur la francophonie; le débat sur le projet d'amendement constitutionnel devait s'engager mercredi 7 février, au sénat*, LE MONDE, Feb. 8, 1996, at 3.

15. The work of the commission was so extensive that its findings were not published until 1973. See *TERMES TECHNIQUES FRANÇAIS: ESSAI D'ORIENTATION DE LA TERMINOLOGIE* [TECHNICAL FRENCH TERMS: ESSAY ON TERMINOLOGY] (Hermann Combet ed., 1973).

16. Munday, *supra* note 12, at 220. A growing number of American terms are surfacing in pop culture, often as new slang expressions, such as "soft" and "hard," which mean, respectively, "watered down" and "violent." *"Soft et Hard," les nouveaux mots anglais du "Petit Larousse" français*, AGENCE FRANCE PRESS, Sept. 6, 1994, available in LEXIS, News Library, ARCNWS file. These words often lose part or even all of their meaning once transplanted into French, for example, athletes wear "baskets," (sneakers) to play "le foot" (soccer) and families drive around in "breaks" (station wagons), which they park in their "box" (garage). White, *supra* note 13, at IA. See also Eiko Fukuda, REUTERS, Mar. 24, 1984, available in LEXIS, News Library, ARCNWS file; Paul Klebnikov, *Minister Toubon, Meet General Gamelin*, FORBES, May 22, 1995, at 292. Worse still, absurd English-like words have surfaced in French, such as "le footing," which on the American side of the Atlantic might conceivably evoke a way to get one's bearings, or a new dance, but in French means "jogging." See Sharon Waxman, *Unspeaking Truths for the French*, WASH. POST, June 28, 1994, at B1. Further distortion occurs when English words are pronounced *à la française*, such as "le pipeline" (which rhymes with "keep clean"). Thus, "*Franglais*" may well involve words devoid of their English meanings, such as "le body" (not a corpse but a skin-tight leotard), new words only rooted in English, such as "le squatterisation" (ghetto-like living conditions), and even non-words such as "le smoking" (tuxedo). Higgins, *supra* note 4; David Buchan, *The French Choose Their Words Carefully: Not Everyone is Enthusiastic About France's Attempt to Preserve its Language*, FIN. TIMES (London), Aug. 6, 1994, at 18.

17. Decree No. 66-203 of Mar. 31, 1966, J.O., Apr. 7, 1966, at 2795 [hereinafter Decree Creating the High Committee]. Although the Legislature rules supreme in the French civil law system, the President may issue decrees in the area of administrative law without consulting Parliament. See generally RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* (5th ed. 1988). The written law of France consists of statutes enacted by the Legislature and decrees mandated by the President of the Republic. *Id.* Article 37 of the Constitution vests the executive branch of the government with the exclusive power to legislate by decree on all subjects not enumerated in Article 34, on which only the Parliament can legislate. FR. CONST. arts. 34, 37. Thus, executive decrees are regarded as administrative acts, even though they are legislative in nature.

dormant language movement<sup>18</sup> by issuing the first in a succession of presidential decrees to monitor and transform the use of French.<sup>19</sup>

For many French people, President de Gaulle holds a special position among French leaders. His name remains synonymous with French independence, nationalism and power;<sup>20</sup> not surprisingly, these same themes lurk just below the surface of the language debate.

## 1. Regulatory Bodies To Defend the French Language

### a. From High Commission to General Delegation

In 1966, the de Gaulle decree mandated the creation of a High Committee for the Defense and Expansion of the French Language (High Committee), to act as the symbolic standard-bearer of the national language.<sup>21</sup> Although chaired by the Prime Minister, the High Committee was initially granted only limited powers, which involved "studying measures" and "encouraging initiatives" to advance French, as well as "establishing necessary liaisons" with cultural organizations.<sup>22</sup> These activities were devoid of any real impact on language use, which is why the High Committee would not hold any real clout until the scope of its powers was expanded

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Any interested party may petition the Conseil d'État, which is the country's highest administrative tribunal, by way of *recours pour excès de pouvoir* (recourse against an action ultra vires or against abuse of power), to annul a decree that is incompatible with the constitutionality of recognized principles of law. See generally SCHLESINGER ET AL., *supra* note 17.

18. The earliest measure, called the "*Loi de Villiers-Cotterêts*," traces back to 1539, when King François I imposed the use of the French language in all official texts, including registration of births, baptisms, marriages and deaths. Plenel, *supra* note 6, at 5. Previously, Latin had been the official written language of France. Jaques Dupâquier, *La Portée Réelle de L'Ordonnance de Villiers-Cotterêts*, HISTORAMA, Jan. 1994, at 12-13. During the Revolution, two and one half centuries later, the victorious Jacobin faction enacted a statute based on the principal of "one nation, one language," which mandated that all official and commercial documents registered under private seal were to appear in French, notwithstanding the local dialect. Law No. 118 of 2 thermidor an II de la République Française (Law No. 118 of July 20, 1794). At the time, French was not spoken in many parts of the country. This is why the Revolutionary government sought to unify the country through language regulation. Plenel, *supra* note 6, at 5.

19. Decree Creating the High Committee, *supra* note 17.

20. *France Honors "Le General" a Quarter-Century Later*, SAN DIEGO UNION-TRIB. Nov. 10, 1995, at A18. General Charles de Gaulle, leader of the Free French during the second world war, and president of France from 1945 to 1946, and again from 1958 to 1969, militated unwaveringly in favor of what he termed "une certaine idée de la France" (a certain vision of France), in the sense that France has a special destiny in the world. He embodied the greatness of France in what many consider to be that country's darkest hour, and continued to influence policy throughout the post-war era even beyond his death in 1970. See Johnson, *supra* note 10; 8 ENCYCLOPEDIA AMERICANA 635-37 (Int'l ed. 1991). Indeed, in 1995, the "Gaullist" party candidate Jacques Chirac, won the presidential election. Craig R. Whitney, *Chirac, Leading the Right, Wins Presidency of France*, N.Y. TIMES, May 8, 1995, at A1.

21. Leading political figures, academics, and prominent writers were allowed to become honorary members of the High Committee. It was chaired by the Prime Minister, whose task was to issue directives for ministerial orders to be enacted in defense of French. Decree Creating the High Committee, *supra* note 17.

22. *Id.* art. 1.

through several later decrees.<sup>23</sup>

The second High Committee decree of 1973<sup>24</sup> required the Prime Minister to preside over the meetings where the High Committee's annual reports were submitted.<sup>25</sup> Although this seemed to underscore the importance of the body in shaping how language was used in France, its impact was still largely symbolic. A third High Committee decree followed in 1980, to reaffirm the mandate of the original 1966 decree.<sup>26</sup>

In 1984, a fourth decree rescinded the 1966 decree in favor of the creation of a General Commissariat and Consultative Committee for the French Language.<sup>27</sup> The new Committee was vested with the power "to study . . . the usage and dissemination of French . . . and to submit proposals and recommendations [to promote French] to the Prime Minister."<sup>28</sup>

Five years later, another body was created called the General Delegation for the French Language.<sup>29</sup> The Delegation currently works with the Superior Council of the French Language, an advisory board created by the same 1989 decree, to carry on the earlier mandate and "to define language policy in defense of French."<sup>30</sup>

## b. Terminology Commissions

After the initial 1966 decree set up the High Committee, further measures

23. Decree No. 73-194 of Feb. 24, 1973, J.O., Feb. 28, 1973, at 2204 [hereinafter Second High Committee Decree], Decree No. 80-414 of June 11, 1980, J.O., June 13, 1980, at 1451 [hereinafter Third High Committee Decree], Decree No. 84-91 of Feb. 9, 1984, J.O., Feb. 10, 1984, at 544 [hereinafter Consultative Committee Decree], Decree No. 89-403 of June 22, 1989, J.O., June 22, 1989, at 7729 [hereinafter Superior Council Decree]. The membership of the Superior Council was renewed in 1993. Decree of Sept. 27, 1993, J.O., Sept. 28, 1993 [hereinafter Renewed Superior Council Decree].

24. Second High Committee Decree, *supra* note 23. A 1978 decree attempted to infuse European French with more dynamic vocabulary by providing for the participation of linguistic experts from other French-speaking cultures such as Quebec. Decree No. 78-493 of Apr. 3 1978, J.O., Apr. 4, 1978, Notes Complémentaires, [N.C.] at 1483 [hereinafter Second Terminology Commission Decree]. In some ways, Quebec, the French-speaking province of Canada, has proven more vigilant than France in the protection of the French language. For example, Quebecers use the translated "end of week" (*fin de semaine*) for "le weekend," which is still the term used in France, and call hamburgers "*hambourgeois*." *Parlez-Vous Anglais?*, THE IRISH TIMES, Oct. 30, 1993, at 9.

25. Second High Committee Decree, *supra* note 23.

26. Third High Committee Decree, *supra* note 23.

27. Consultative Committee Decree, *supra* note 23.

28. *Id.* art. 2.

29. Superior Council Decree, *supra* note 23. This decree rescinded the earlier 1984 decree. *Id.* art. 13.

30. *Id.* arts. 8-9. The members of the Superior Council include the Prime Minister, the Perpetual Secretaries of the Académie Française and Academy of Sciences, the Minister of Education, and the Minister of Francophonie, who are to examine "issues relating to the use, practice, promotion, enrichment, and dissemination of French in France and abroad." *Id.* art. 4. Several members of the Superior Council, such as the historian Alain Decaux are also members of the Académie Française. See *infra* note 36 and accompanying text. See also Renewed Superior Council Decree, *supra* note 23.

were needed to carry out its mission. Thus, in 1970 and 1971, so-called “terminology commissions” were formed by ministerial order to compile lists of non-French words being used in sectors within the purview of the Ministry of Industrial and Scientific Development and the Ministry of Finance.<sup>31</sup> The commissions were then to issue proposals to help eliminate any undesirable foreign terms.<sup>32</sup>

Although the terminology commissions initially held only an advisory role within the government, in 1972 a decree was issued to allow the commissions to take a more active role in language regulation by mandating which words could not be used.<sup>33</sup> This meant that the commissions were now able to ban “undesirable borrowings from foreign languages.”<sup>34</sup> These unwanted borrowings (such as “*le fog dispersal*”) were then replaced with existing French terms or, if necessary, with newly invented vocabulary.<sup>35</sup>

In this respect, the terminology commissions are charged with a mission similar to the centuries-old vocation of the revered literary institution called the Académie Française,<sup>36</sup> created by Richelieu in 1635 to promote “the

31. Ministerial Order of July 7, 1970 (unpublished), and Ministerial Order of June 16, 1971, J.O., June 20, 1971, at 5945, [1971] *La Semaine Juridique (Juris-Classeur Périodique)* [J.C.P.] III, No. 38009. Terminology commissions would eventually become commonplace in other government ministries.

32. Munday, *supra* note 12, at 220.

33. Decree No. 72-19 of Jan. 7, 1972, J.O., Jan. 9, 1972, at 388 [hereinafter First Terminology Commission Decree]; modified in 1978 by President Giscard d'Estaing. Second Terminology Commission Decree, *supra* note 24. In 1983, the role of the terminology commissions was further expanded. Decree No. 83-243 of Mar. 25, 1983, J.O., Mar. 29, 1983, at 955 [hereinafter Third Terminology Commission Decree]. The 1983 decree was repealed by a new decree in 1986 which gave even more power to the terminology commissions. Decree No. 86-439 of Mar. 11, 1986, J.O., Mar. 16, 1986, at 4255 [hereinafter Fourth Terminology Commission Decree]. See also *infra* text accompanying notes 67-71.

34. First Terminology Commission Decree, *supra* note 33, art. 2.

35. *Id.* The terminology commission replaced “*le fog dispersal*” with “*dénébuler*.” Ministerial Order of Jan. 12, 1973, J.O., Jan. 18, 1973, at 754 [hereinafter 1973 Ministerial Order]. Other technical terms replaced by the terminology commissions include “*retombées radioactives*” for “radioactive fallout,” “*porosité de drainage*” for “drainage effective porosity,” and “*coiffe*” for “nosecone.” Ministerial Order of Nov. 30, 1989, J.O., Dec. 27, 1989, at 16156; and Ministerial Order of Apr. 7, 1987, J.O., May 15, 1987, at 5349; Ministerial Order of Feb. 20, 1995, J.O., Mar. 29, 1995, at 5001. While the use of these new terms was sometimes discretionary within the Ministries, more often than not, it was required by law. Munday, *supra* note 12, at 221. One advertising agency satired the work of the terminology commissions by drawing up its own list of translations, for example, “*appel de sexe*” (call for sex) for “sex appeal.” Waxman, *supra* note 16.

36. Munday, *supra* note 12, at 221. The Académie Française is a forty-member assembly comprised of the literary elite of France. It acts as watchdog of the French language and creates a sort of “moral magistrature.” The statutes of the Académie Française stipulate that, “[T]he principal function of the Academy shall be to labor with due care and diligence to provide certain rules to our language, and to render it pure, eloquent and capable of treating the arts and sciences.” Reprinted in *DICTIONNAIRE DE L'ACADÉMIE FRANÇAISE ix* (ed. Julliard 1994). Academicians are known as “the Immortals,” referring to the *immortality of the French language*. The “Immortals” rank just below Cabinet Ministers. See Mary Blume, *Guardian of French Worries About English*, INT'L HERALD TRIB., July 15, 1995, at 20. Every Thursday the Immortals gather together under the Académie's Louis le Vau cupola, carrying jeweled swords and wearing 17th century tricorne hats to work on the Dictionary, which is constantly being revised, and to hold learned discussions. William Langley, *Return to Gender*, EVENING

French notion of its civilizing mission in the world” and to protect the nation’s linguistic treasure.<sup>37</sup> The Académie Française was called upon to work in tandem with the terminology commissions to purge extrinsic terminology, frame new words, and, wherever possible, to frenchify unsuitable foreign “borrowings.”<sup>38</sup>

### III. THE 1975 LOI BAS-LAURIOL

Until the mid-nineteen seventies, modern language law was handed down from the executive branch of government, in the form of presidential decrees and ministerial orders. However, in 1975, the Legislature entered the picture by enacting the first modern language statute, known as the “Loi Bas-Lauriol.”<sup>39</sup>

#### A. Provisions of the 1975 Statute

Curiously, the Legislature framed its linguistic protection statute as a consumer protection law which prohibited misleading language in the sale of goods and services.<sup>40</sup> In practice, this meant that the use of French became

STANDARD, Nov. 23, 1992, at 19. See also *infra* note 37 and accompanying text.

37. Alan Riding, ‘Mr. All-Good’ of France, Battling English, Meets Defeat, N.Y. TIMES, Aug. 7, 1994, at 6. The Académie compiles the Dictionary, now in its ninth edition after 360 years of labor. Its mission, as described in the 1932 eighth edition, is “to defend the French language against all types of corruption, such as the invasion of foreign words, technical terms, slang and the barbarous expressions which crop up from day to day.” See DICTIONNAIRE DE L’ACADEMIE FRANÇAISE iv (8th ed. 1932). The latest edition of the Dictionary, published sixty-two years later, sets out the Académie’s mandate as the protection of French specifically “against incursions from German in the area of philosophy, and the invasion of English and American terms in the commercial and technical fields.” DICTIONNAIRE DE L’ACADEMIE FRANÇAISE, *supra* note 36, at x.

38. The work jointly produced by the terminology commissions and Académie Française appears in the DICTIONNAIRE DES NÉOLOGISMES OFFICIELS [DICTIONARY OF OFFICIAL NEW WORDS] (1984). Examples of French neologisms include frenchified words such as “*la bougue*” for a (computer) glitch or “bug,” and “*conteneur*” for “container.” Ministerial Order of Dec. 30, 1983, J.O., Feb. 19, 1984, at 1740; Ministerial Order of July 18, 1989, J.O., Aug. 12, 1989, at 10200. Translations have been devised for words such as “*la cusinette*” to replace “kitchenette,” and “*base de données*” for “database.” Ministerial Order of Feb. 17, 1986, J.O., Mar. 21, 1986, at 4874 [hereinafter 1986 Ministerial Order]; Ministerial Order of Dec. 22, 1981, J.O., Jan 17, 1982, at 624. New terms include “*objet piégé*” for the unwieldy “*le booby trap*,” and “*le chalandage*” for “*le shopping*,” an Anglicism still in common use despite the new term. See 1976 and 1984 Ministerial Orders, *supra* note 12; 1973 Ministerial Order, *supra* note 35. In some instances, the English term is allowed to remain, along with a French variation, i.e., “*gasoil*” or (the recommended) “*le gazole*,” and “*le bulldozer*” or (at first recommended, now obligatory) “*le boteur*” for “bulldozer.” 1973 Ministerial Order, *supra* note 35; 1986 Ministerial Order, *supra*. Although the Académie has as its vocation the safeguarding of the French language, not all Academicians agree that foreign words pose a threat to French. For example, in the view of novelist Jean d’Ormesson, “we must accept foreign words. Don’t be afraid of saying ‘weekend’ or ‘parking.’ It is a spirit of adventure that will save the French language not a spirit of conservatism.” Higgins, *supra* note 4.

39. Law No. 75 1349 of Dec. 31, 1975, J.O., Jan. 4, 1976, at 189 [hereinafter Loi Bas-Lauriol].

40. *Id.*



mandatory in all commercial exchanges such as public tenders, advertisements, receipts, labels, quality certificates, and warranties.<sup>41</sup> More specifically, the “use of French” meant that foreign terms appearing in the terminology commission censor lists could not be used.<sup>42</sup>

Other provisions stipulated that employment contracts, public notices, and displays were to appear in French.<sup>43</sup> Also, all contracts concluded with public bodies came within the purview of the law.<sup>44</sup> Subsequent ministerial circulars clarified and extended the scope of the statute. For example, one in 1977 categorized the types of documents to be drawn up in French,<sup>45</sup> and another, five years later, concerned all documentation relating to imported goods.<sup>46</sup>

The law did provide for an exception to the “use French” rule when the word for a product had no French equivalent, such as “blue jeans,” and “sandwich.” Other exceptions also applied. For example, trademarks<sup>47</sup> and well known overseas specialties such as couscous, vodka, and paella were exempted from the ban on foreign words.<sup>48</sup> These exceptions are also provided in the Loi Toubon of 1994 which replaced the Loi Bas-Lauriol.<sup>49</sup>

### B. Supranational European Law

Domestic law which violates supranational European law may be invalidated. According to the European Court of Justice,<sup>50</sup> by adhering to the Treaty of Rome, member states join a Community which “constitutes a new legal order . . . for the benefit of which the states have limited their sovereign rights.”<sup>51</sup> This means that in areas covered by the Treaty, the national courts of member states are bound to apply Community law, even when national law conflicts. The supremacy of European law, although not

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41. *Id.*

42. *Id.* art. 6.

43. *Id.* arts. 1, 4-5.

44. *Id.* arts. 6-7.

45. Ministerial Circular of Mar. 14, 1977, J.O., Mar. 19, 1977, at 1483 [hereinafter 1977 Ministerial Circular].

46. Ministerial Circular of Oct. 20, 1982, J.O., Oct. 21, 1982, at 9419, [1982] J.C.P. III., No. 53321 [hereinafter 1982 Ministerial Circular] See also *infra* text accompanying note 55.

47. For example, Aeroflot, the name of the Soviet airline, came within this exception. See UNION DES ANNONCEURS, PUBLICITÉ ET LANGUE FRANÇAISE, May 1995, at 23 (unpublished circular on file with author).

48. 1977 Ministerial Circular, *supra* note 45.

49. See *infra* text accompanying notes 173-75.

50. The European Court of Justice (E.C.J.) is vested with the responsibility to ensure that the interpretation and application of the Treaty of Rome is observed. Issues of European law may be brought in national courts or directly at the E.C.J. If national courts are involved, they have jurisdiction to rule on the matter because European law is part of domestic law. They may, however, refer the issue to the E.C.J. See generally BORCHARDT, *supra* note 3.

51. Case 26/62, Van Gend En Loos v. Nederlandse Administratie Die Belastingen, 1963 E.C.R. I. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 5, reprinted in 298 U.N.T.S. 11, 17 [hereinafter TREATY OF ROME].

expressly articulated in the Treaty of Rome, has been inferred from Article 5—which imposes a general obligation of loyalty to European law—and from European case law.<sup>52</sup> For example, in the words of the French High Court, “the [Treaty of Rome], by virtue of [Article 55]<sup>53</sup> of the [French] Constitution, has an authority greater than that of statutes.”<sup>54</sup>

The 1982 extension of the statute to include import documentation involved a possible violation of Article 30 of the Treaty of Rome which prohibits unjustified restraints on the free movement of goods.<sup>55</sup> Although the validity of the *Loi Bas-Lauriol* was never directly determined by a court under European law, the statute did come under the scrutiny of the European Commission<sup>56</sup> in October 1982 by way of a procedure of inquiry under Article 169 of the Treaty of Rome.<sup>57</sup>

The inquiry was commenced to determine whether France’s language statute might amount to a trade barrier.<sup>58</sup> There was concern that, in the lingo of the European Community, the burden on foreign companies caused by the French language requirements might produce “effects equivalent to

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52. GEORGE A. BERMAN ET AL., *EUROPEAN COMMUNITY LAW* 192-93 (1993). In *Costa v. Enel*, the E.C.J. ruled that Italian courts were obligated to apply European law because, “[b]y contrast with ordinary international treaties, the E.E.C. treaty has created its own legal system which . . . became an integral part of the legal systems of the Member States . . .” Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585. See also Case 213/89, *Queen v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, 6 E.C.R. I 2-450 (1990); Judgment of May 24, 1975, (*Administration des Douanes v. Société Cafés Jacques Vabre & J. Weigel et CIE Sarl.*), 2 C.M.L.R. 336 (Cass. ch. mix. 6ème) (Fr.).

53. FR. CONST. art. 55. This article stipulates that “once published, properly ratified or approved, treaties or agreements have priority over municipal law, provided that the other contracting parties fully apply them.” However, such treaties which alter legislation may be ratified or approved only under statute, which means that, in the end, Parliament retains front-end control of the legislative process. KAHN-FREUND ET AL., *A SOURCE-BOOK ON FRENCH LAW* 24 (3d ed. 1991).

54. *Société Cafés Jacques Vabre*, 2 C.M.L.R. at 368-69.

55. TREATY OF ROME art. 30. The European Commission’s inquiry into illegal import restrictions was never brought to term because France agreed to remove from the scope of the *Loi Bas-Lauriol* any merchandise (i.e. imports) “among professionals.” This means that the use of French would not be obligatory for customs clearance but only once the items were sold on the domestic market. Customs Circular of Apr. 13, 1983, B.O. des Douanes, N.C. 4332, Apr. 13, 1983, *modifying* 1982 Ministerial Circular, *supra* note 46. See also UNION DES ANNONCEURS, *supra* note 47, annex 7. The Court of Cassation upheld this interpretation of the statute in a case against an importer of goods labelled in English. See *id.* at 56 (summarizing Judgment of Oct. 22, 1985, Cass. Crim.).

56. TREATY OF ROME art. 155. The Treaty of Rome lays out the duties of the Commission. These duties include overseeing compliance with Community law. The Commission is a neutral body made up of appointees from all Member States, and may serve no interests other than those of the Community. Because of this, a Commission inquiry is the starting point for every Community action. See also BERMAN, *supra* note 52, at 57.

57. TREATY OF ROME art. 169. This Article empowers the European Commission to investigate and submit a reasoned opinion on whether a Member State has failed to fulfill an obligation imposed on it by Community law. If the State does not comply with the Commission’s opinion, the Commission may then “bring the matter before the Court of Justice.” *Id.*

58. UNION DES ANNONCEURS, *supra* note 47, annex 7.

quantitative restrictions.”<sup>59</sup> To defend its statute, the French government admitted that the impetus behind the Loi Bas-Lauriol was not, in fact, the need for consumer protection but rather the need to rescue the national language.<sup>60</sup> By claiming that the statute was designed for “the safeguarding of the cultural status of the French language,”<sup>61</sup> the French authorities attempted to justify the law under the public policy exception contained in Article 36 of the Treaty of Rome.<sup>62</sup>

Thus, the French government conceded that the Loi Bas-Lauriol was really a language regulation statute in disguise. In light of this admission, it is not surprising that the scope of the statute was broadened through subsequent judicial interpretation to imply a more general defense of the French language.<sup>63</sup>

### C. A Language Association To Enforce Linguistic Policy

In 1976, the High Committee set up a body called the General Association of French Users (*l'Association Générale des Usagers de la Langue Française* or AGULF),<sup>64</sup> “to defend the linguistic and cultural patrimony of

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59. In other words, a violation of Article 30 of the Treaty of Rome, which states, “Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.” TREATY OF ROME art. 30.

60. Munday, *supra* note 12, at 225.

61. *Id.*

62. TREATY OF ROME arts. 30, 36. This is because the obligation to apply Article 30 of the Treaty of Rome is attenuated by a public policy exception contained in Article 36, which stipulates that the freedom to provide goods and services may be restricted on grounds of public policy so long as such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between member States. *Id.* arts. 30, 36. It is possible that the language statute might have passed European law scrutiny on Article 36 grounds. See Commission Directive 70/50 of Dec. 22 1969, [1970] J.O. (L 13/29). See also *La première année de Mme Tasca*, *supra* note 11, at 5. The Loi Toubon might also pose similar problems of European law. See *infra* text accompanying notes 191-98.

63. Most cases appeared to turn on this factor, rather than on allegations of consumer fraud. But see Judgment of Sept. 15, 1987 (AGULF v. LeMonnier), Trib. pol. Paris, No. 123.307 (on file with author). In this case, the Bon Marché department store sold wool bearing instructions for use which appeared “entirely in a foreign language.” *Id.* at 3. The Bon Marché was fined a total of 2,300 francs (350 U.S. dollars). *Id.* Here, a narrow reading of the statute sufficed in that consumers might be misled by the untranslated foreign markings. *Id.*

64. AGULF was a non-profit entity created on Feb. 17, 1976, under the association-formation Law of July 1, 1901. It was modeled after non-profit consumer action organizations but functioned as an arm of the government. The association comprised politicians, scholars and consumer-rights advocates, and was presided over by the Prime Minister.

French speakers.”<sup>65</sup> The AGULF was charged with bringing court actions against state-owned as well as private entities suspected of engaging in the “non-use of French.”<sup>66</sup>

#### D. Expanded Role of Terminology Commissions

In 1983 and 1986, new presidential decrees allowed the High Committee, and then its successor, the General Commissariat of the French Language, to appoint additional terminology commissions to monitor language use in all the administrative bodies of the central government.<sup>67</sup> Under this more extensive regulatory framework, language teams were to compile annual performance reports on how well the various Ministries advanced the cause of the French language in a given year.<sup>68</sup>

In addition to monitoring the Ministries, the language teams continued their earlier mandate of assembling lists of illicit words and their official

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65. The president of AGULF explained its agenda as a so-called consumer-rights body in these terms, “our objective is to avoid the pollution of the French language by fashion, by a certain snobbish taste for words that belong to no culture in particular.” Fukuda, *supra* note 16. The initial zeal of AGULF is perhaps best illustrated in a suit against Aeroflot for the non-use of French. The airline company was being sued for displaying the words “Soviet Airlines” on its windows, next to its stylized emblem of a hammer and sickle. The Tribunal found that the words in English merely described a foreign brand, well known to the public, which is specifically allowed for by the statute. Judgment of Nov. 24, 1987 (AGULF v. Glouchkov), Trib. pol. Paris, No. 131.254, at 4 (on file with author). See *supra* note 47.

66. This is the official charge which is brought against offenders. The courts have used the 1975 law in conjunction with other statutes. See, e.g., Judgment of Apr. 24, 1984 (AGULF v. Slot), Trib. pol. Paris, No. 116.291 (on file with author). In addition to the language statute, this judgment invoked Articles L. 311-4 and R. 361-1 of the Code du travail [Labor Code], the former of which was integrated into Article 5 of the Loi Bas-Lauriol. The defendant was the president of Stork Protecon Systems, a company which placed job advertisements for a technician and a secretary in (obviously translated) English for two positions in France. *Slot*, at 2. The defendant was fined 4,000 francs for damages and 2,500 francs in other fines (a total of 1,300 U.S. dollars). *Id.* at 1.

67. Third and Fourth Terminology Commission Decrees, *supra* note 33. See also Consultative Committee Decree, *supra* note 23. In 1989, the latter decree was rescinded by a further decree creating the Superior Council for the French Language and a General Language Delegation. See Superior Council Decree, *supra*, note 23. The original High Committee’s discretion was not unbridled, however, in that the approbation of the Minister of Education was also required before new terminology commissions could be formed. First Terminology Commission Decree, *supra* note 33.

68. Fourth Terminology Commission Decree, *supra* note 33, art. 7. The reports were submitted directly to the Prime Minister. The language commission’s field of action was laid down in the following terms under Article 4:

To compile lists of lacunæ to be found in French vocabulary within a given field, taking into account the language user’s needs; to collect, propose and revise terminology and neologisms as required; to contribute . . . to the acquisition and harmonization of this terminological data by drawing on the riches of French as it is spoken abroad; to promote the dissemination of the new terminology among those who are to employ it.

French-sounding replacements, for publication in the *Journal Officiel*.<sup>69</sup> Once compiled, the spurious terms were outlawed and could not appear in any government documents or in publications made possible through State subsidy.<sup>70</sup>

For the first time, language guidelines had wide-ranging impact on publications at least. However, the new measures mainly affected technical and literary works.<sup>71</sup> This restricted application meant, however, that the government regulation could not transform the language where it really mattered: how French was spoken by everyday people.

### *E. Case Law under the Loi Bas-Lauriol*

#### 1. Trial-Level and Appellate Court Rulings

From the outset, the courts construed the Loi Bas-Lauriol as a bona fide language use law. In *AGULF v. Puaux*,<sup>72</sup> one of the earliest cases brought under the 1975 law,<sup>73</sup> the Court of Appeal held, in accordance with Article 1 of the statute,<sup>74</sup> that the use of French was mandatory for most messages falling within the public thoroughfare.<sup>75</sup> In this case, the National Opera was found guilty of the "non-use of French" for selling a five-page concert program in English for a production of the play "Bubbling Brown Sugar,"

69. Fourth Terminology Commission Decree, *supra* note 33, art. 12. The *Journal Officiel de la République Française* is the bulletin issued by the French Republic which gives details of laws and official announcements.

70. *Id.* art. 13. In 1994, the obligation to use officially sanctioned French was struck down (except in narrow circumstances) by the Constitutional Council, a body created under France's 1958 constitution to safeguard the rights and freedoms of French citizens. FR. CONST. arts. 56-63. See also Ordonnance No. 58-1067 of Nov. 7, 1958, reprinted in KAHN-FREUND ET AL., *supra* note 53, at 48-50. See *infra* text accompanying notes 119-26.

71. New commissions were established to monitor terminology in the sectors of foreign trade, computer science, sports, the environment, electrical technology, housing and in the areas of "quality of life" and aging, just to name a few. See DICTIONNAIRE DES TERMES OFFICIELS DE LA LANGUE FRANÇAISE [DICTIONARY OF OFFICIAL FRENCH TERMS] 358-62 (1994). Certain businesses have tried to forestall language regulation in their areas of expertise, for example, the computer giant IBM, which invented the French term for computer ("*ordinateur*"). In 1992, IBM employed about fifty persons working as "frenchification" experts. Liliane Delwasse, *Expériences de la langue de la gestion*, LE MONDE, Nov. 25, 1992, at 30.

72. Judgment of Dec. 20, 1983 (*AGULF v. Puaux*), Cour d'appel Paris, No. 5.244/83 (on file with author).

73. See *International News*, REUTERS, Feb. 21, 1983, available in LEXIS, News Library, ARCNWS file.

74. Loi Bas-Lauriol, *supra* note 39, art. 1. Article 1 stipulated that French was mandatory in the designation, offer, presentation, written or oral advertising, instructions for use, and warranties of a good or service, as well as in all invoices and receipts. Article 1 provides that one or more translations may "complement" a French text.

75. *Puaux*, at 4.

with only a cursory extract in French.<sup>76</sup> In its decision, the court of appeal pointed out that while the pamphlet included a synopsis of the history of Harlem and its music in English, the French extract was so condensed that it did not even mention Mr. Bojangles, one of the central characters of the play.<sup>77</sup> Thus, although the Court agreed that the *Loi Bas-Lauriol* allows translations to accompany a French text, it ruled that the law did not allow foreign versions to be more extensive.<sup>78</sup>

Subsequent trial-level rulings consistently followed the *Puaux* interpretation of the law.<sup>79</sup> Four years after the *Puaux* case, the Paris Metropolitan Transit Authority (RATP) was fined for advertising bus and subway passes exclusively in English.<sup>80</sup> However, in a similar case brought against it, this time for posting ads in English on bus panels, the RATP successfully defended its use of English.<sup>81</sup> In this case, the blurbs "1 minute phone call," and "send a snapshot from France," were accompanied by French translations, as required under Article 1 of the law. In its ruling, the Court seemed undisturbed by the fact that the French version was "four times as small."<sup>82</sup>

This case, for the first time, presented the troublesome issue of "equivalent size," an issue still largely unresolved in the later 1994 language statute. Although AGULF argued that the statute required French versions to appear

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76. See the trial level opinion, Judgment of Feb. 8, 1983 (AGULF v. Askanasy), Trib. pol. Paris, No. 116.650, at 3 (on file with author). The producers of the play, who were German, had signed a contract with the National Opera stipulating that French law would govern the transaction. The National Opera had participated in ticket sales, the advertising campaign, and had performed other related services in the staging of the play. *Id.* at 7.

77. *Puaux*, at 4. The defendant was fined the equivalent of 3,460 francs (500 U.S. dollars). *Id.*

78. *Id.*

79. *E.g.*, Judgment of July 1, 1986 (AGULF v. Charles Alfred, et al.), Trib. pol. Paris, No. 126.699, at 2 (on file with author). In this case, the defendant, owner of the *Centre International d'Art Contemporain*, was found guilty of using pamphlets written entirely in English to invite French artists to an international exposition of paintings. A fine of 600 francs was levied on each of the company's owners, along with 5,500 francs in damages, 3,000 francs to cover costs of publication of the judgment in *Le Monde*, and 1,000 francs to the court for costs (a total of 2,000 U.S. dollars). *Id.* See also Judgment of June 24, 1986 (AGULF v. Barouin), Trib. pol. Paris, No. 125.499, at 2 (on file with author). The defendant, president of the FNAC department store, was charged with the non-use of French and fined. In this case, the store sold a video game called "Quick Shot," with instructions available only in English. Other cases, however, show that use of a commonly used English term for which a French term does not exist—such as the word "showroom" printed in an advertising catalog—was not a violation of the 1975 law. See, e.g., Judgment of Dec. 11, 1984 (AGULF v. Steiner), Trib. pol. Paris, No. 148.705, at 3 (on file with author). This consistency is significant inasmuch as there is no *stare decisis* to bind lower courts in the French civil law system. The lower courts nonetheless adopted the broader interpretation adopted by the court of appeal and the Court of Cassation to extend the scope of the law beyond the plain meaning of the statute.

80. The poster said, "All of Paris For Just One Ticket, Paris Sesame, A2, 4 or 7 Days Ticket For Unlimited Travels on Metro-Buses and RER Lines A and B (B South of Gare du Nord)." Judgment of Dec. 8, 1987 (AGULF v. Reverdy), Trib. pol. Paris, No. 132.966, at 3 (on file with author). The defendant was fined about 4,000 francs (a total of 800 U.S. dollars). *Id.* at 9.

81. Judgment of Nov. 10, 1987 (AGULF v. Essig), Trib. pol. Paris, No. 129.670 (on file with author).

82. *Id.* at 6-7.

as prominently as the translation,<sup>83</sup> the court rejected this position in favor of a more literal interpretation of the statute, which states that foreign texts may “complement” the French.<sup>84</sup> Because the statute did not require equivalent typeface size, advertisers seized on what many considered a loophole in the law and continued using texts in English, with a barely visible French translation.<sup>85</sup>

## 2. High Court Ruling

In 1986, the Court of Cassation<sup>86</sup> was called upon to interpret the statute in a case against the French fast-food franchise Quick.<sup>87</sup> Here, the High Court quashed and remanded an appellate court ruling in favor of the chain.

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83. *Id.* at 3.

84. The Court did not construe the exigency of “complementing” a foreign text as meaning that translations in French must be of “equivalent size.” *Id.* at 7.

85. In August, 1995, similar advertisements in English, German, and Spanish still appeared on bus side panels and in bus shelters, along with much smaller French translations. However, these advertisements did not violate the new 1994 language statute because the implementing decree for the Loi Toubon, which replaced the Loi Bas-Lauriol in 1994, stipulated that the requirement to use an “equally intelligible” French version of foreign advertising slogans in the public thoroughfare would not take effect until September 7, 1995. Decree No. 95-240 of Mar. 3, 1995, art. 16, J.O., Mar. 5, 1995, at 3514 [hereinafter Implementing Decree]. See also Loi Toubon, *supra* note 1, art. 23.

86. The Court of Cassation [Cour de Cassation] is the highest court in France, which deals with non-constitutional and non-administrative issues. Constitutional law issues are reviewed by the Constitutional Council [Conseil Constitutionnel] and administrative appeals are heard by the State Council [Conseil d'État]. Unlike the lower court of appeal, which conducts a de novo review of the factual record and admits new evidence, the Court of Cassation may only review points of law. An appeal to the Court of Cassation, if successful, does not affect the rights of the parties because the lower court decision is merely quashed and remanded for further adjudication in a different appellate court, the court of renvoi, which is not obligated to follow the Court of Cassation's ruling. However, if new issues are raised on remand, these new issues may be appealed to the Court of Cassation and remanded again. If the Court of Renvoi then disagrees with the decision of the Court of Cassation, the latter Court may review the issue, this time in plenary session. Only at this point is the Court of Cassation ruling final and without further recourse to appeal. See generally SCHLESINGER ET AL., *supra* note 17. It should be noted that under Articles 371 & 464 of the Criminal Procedure Code, a judgment of guilt enables the criminal court to award damages to the civil party as well as costs not covered by the State, as stipulated under Articles 375 & 475, as amended by Articles 12 & 29 of the Act of Dec. 16, 1992. CODE DE PROCÉDURE PÉNAL, [C. PR. PÉN] arts. 371, 375, 464, 475. See also CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 205 (London, Sweet & Maxwell 1993). For an explanation of how civil parties may sue in criminal court, see *infra* note 199. In the Quick hamburger restaurant case, the court of renvoi agreed with the higher court's ruling. The court of renvoi also rejected Quick's European law defense, as did the Court of Cassation to which the case was yet again appealed. Articles 30-36 of the Treaty of Rome only concern imports and exports, while this case involved only domestic products. Judgment of June 24, 1987 (AGULF v. Jambon), Cour d'appel Versailles (unpublished), *aff'd*, Judgment of Apr. 25, 1989, Cass. crim., 1989 Bull. Crim., No. 167, at 431.

87. Judgment of Oct. 20, 1986 (AGULF v. Jambon), Cass. crim., No. 85.90.934, available in LEXIS, Intlaw Library, FRPRCS file. See also Judgment of Dec. 14, 1984 (AGULF v. Jambon), Cour d'appel Paris (ch. 13) and Judgment of Feb. 14, 1984 (AGULF v. Jambon), Trib. pol. Paris, No. 61/84 (on file with author). Daniel Jambon, France-Quick's president and defendant in the case, when interviewed after the trial court's ruling, commented that AGULF's arguments symbolized “the reactionary age in which we live.” Fukuda, *supra* note 16.

Quick was hauled into court because the restaurant had posted menus, conducted part of its advertising campaigns, and delivered receipts in English. The Court ruled that the Loi Bas-Lauriol was violated even though the restaurant's menu (exclusively in English) was illustrated by photographs, ostensibly to protect non-English speakers. The Court found that jawbreakers such as "bigcheese," "fischburger," [sic] and "coffee-drink" constituted the non-use of French.<sup>88</sup>

In line with earlier lower court rulings, the Court reasoned that the Loi Bas-Lauriol was meant not only to protect consumers against fraud and deceit, but also to ensure the integrity of the French language.<sup>89</sup> Ironically, the Court seemed unaware that the accused terms sound more like bastardized than "borrowed" English, and might arguably constitute the non-use of English.<sup>90</sup>

The court of renvoi to which the case was remanded agreed with the High Court's interpretation,<sup>91</sup> adding that the terms did not qualify for the "well-known foreign brand" exception to the law,<sup>92</sup> which allows the use of terms such as "hamburger" and "hot dog," but not, for example, "cheeseburger."<sup>93</sup> After five years of litigation on this issue, Quick ultimately managed to circumvent the statute altogether by registering its menu items as trademarks.<sup>94</sup> Other companies, such as Nike, followed suit by registering their advertising slogans as trademarks.<sup>95</sup>

### C. Impact of the 1975 Law

Overall, the 1975 language statute, perhaps because it was camouflaged as a consumer-protection law, had little impact on the increasing number of Anglo-American terms being used in everyday French.<sup>96</sup> Standing alone, the law did not provide for penal sanctions. To do this, courts had to apply the

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88. Judgment of Oct. 20, 1986 (AGULF v. Jambon), Cass. Crim., No. 85.90.934, at 2.

89. *Id.* at 4.

90. Indeed, it is likely the terms were the fruit of a somewhat slippery grasp of our language by the restaurant chain's French management. When asked by the press after the trial-level ruling why his company had chosen to sell its hamburgers under English labels, the president of the company explained that "it is a simple question of marketing." Fukuda, *supra* note 16.

91. See Judgment of June 24, 1987 (AGULF v. Jambon), Cour d'appel Versailles (unpublished). See *supra* note 86 and accompanying text.

92. Loi Bas-Lauriol, *supra* note 39, art. 2.

93. Which brand is "well known" is determined by the language regulation bodies. See *supra* text accompanying notes 21-29. See generally Véronique Staeffen & Laurence Veyssière, *Législation: La nouvelle loi en matière de protection de la langue française*, LES PETITES AFFICHES, Nov. 25, 1994, at 19.

94. Buchan, *supra* note 16.

95. *Id.* See also Jacques Legendre, Commission of Cultural Affairs, Report No. 309, annexed to Sénat, séance du 6 avril 1994, cited in Christophe Bigot, *Publicité Et Usage De La Langue Française: Réflexions sur la loi du 4 août 1994*, GAZETTE DU PALAIS [G.P.], Mar. 5-7 1995, at 5-6; Staeffen & Veyssière, *supra* note 93, at 21.

96. See Plenel, *supra* note 6, at 1.



law in conjunction with other consumer protection laws, such as a 1905 statute on the suppression of fraud and adulteration in foodstuffs,<sup>97</sup> and the Criminal Procedure Code.<sup>98</sup>

Poor drafting, which required broad judicial interpretation to redefine the statute, coupled with inconsequential fines, made the statute largely unsuccessful in limiting the use of English, especially by the advertising industry.<sup>99</sup> Thus, although thousands of companies and individuals were investigated under the 1975 law, the language ban was routinely defied or circumvented.<sup>100</sup> These factors combined to make the courts reluctant to spend time or energy in what seemed a futile attempt to stop the flow of foreign words.

Failure to invoke the statute after the initial flurry of cases in the 1980s was widely seen as a reflection of growing ambivalence to the language issue.<sup>101</sup> The perceived lack of political will to save French prompted a newly elected conservative Parliament to revive the movement by enacting the more stringent law in 1994,<sup>102</sup> preceded by a constitutional amendment which proclaimed French the national language.<sup>103</sup>

#### IV. THE 1994 LOI TOUBON

##### *A. The Language of the Republic is French*

In an attempt to pave the way for the new statute, the French Parliament amended the Constitution to make French the country's official language.<sup>104</sup> The amendment did not, however, make France a unilingual nation, nor did

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97. Law of Aug. 1, 1905, art. 13, [1906] *Recueil Périodique et critique* [D.P.]. See also Decree No. 84-1147 of Dec. 7, 1984, art. 4, J.O., Dec. 21, 1984, at 3925. This turn-of-the-century consumer protection law also set the amount of fines to be imposed by the courts from 540 to 27,000 francs (110 to 5,300 current U.S. dollars) which was typically set at between 600 and 1,300 francs. This statute was repealed by the Consumer Code in 1993. Law No. 93-949 of July 26, 1993, J.O., July 27, 1993, at 10538. See also Staeffen & Veysière, *supra* note 93, at 14.

98. See C. PR. PÉN. art. 475-1. See also C. TRAV., art. R. 361-1.

99. *Les travaux du parlement*, *supra* note 2, at 7.

100. Four thousand eight hundred investigations between 1990 and 1994 uncovered nearly one thousand cases of non-compliance with the statute, most notably in the area of advertising and instructions for use. See *Information sur la Loi Toubon*, available on Internet, at [http://www.culture.fr/culture/dgll/prs\\_com.htm](http://www.culture.fr/culture/dgll/prs_com.htm).

101. Bigot, *supra* note 95, at 2.

102. Loi Toubon, *supra* note 1. See also Sharon Waxman, *French Tells English Users: Just Say "Non,"* CHI. TRIB., June 14, 1994, at 1.

103. Constitutional Law No. 92-554 of June 25, 1992, J.O., June 26, 1992, at 8406 [hereinafter Constitutional Law No. 92-554].

104. FR. CONST. art. 2. (declaring that "The language of the Republic is French"). See Constitutional Law No. 92-554, *supra* note 103.

it place the people in a monoglot straight jacket.<sup>105</sup> This because the Constitutional Council, France's high court on constitutional matters, ruled that, although French is now the language of France, as stipulated in Article 2 § 2 of the Constitution, this does not mean that words from other tongues cannot be employed in daily discourse.<sup>106</sup>

### B. *The Long Arm of the Loi Toubon*

The "Loi Toubon"<sup>107</sup> was enacted to replace the Loi Bas-Lauriol, which had fallen into disuse.<sup>108</sup> Like this earlier "consumer-protection" law, the Loi Toubon requires instructions for use, such as "rewind" and "timer set" to appear in French.<sup>109</sup> However, the new law articulates on its face the "cultural objective" which the Loi Bas-Lauriol had only implied.<sup>110</sup>

By clearly stating the statute's mandate, the Legislature was able to expand the scope of the new law to include not only mercantile exchange such as consumer information (advertising, instructions for use, and warranties)<sup>111</sup> and the workplace,<sup>112</sup> but also education,<sup>113</sup> the audiovisu-

105. French is not the only indigenous language in France. There are the Latin-based languages of Occitan, understood by at least eight million people in the south; Corsican, spoken on the island of Corsica; Catalan, along the border with Spain; and Italian, on the south eastern border with Italy. Breton, spoken in Brittany, is a Celtic language similar to Irish and Welsh. Alsacien, a dialect of German, is spoken on the eastern border with Germany; Flemish, a variant of Dutch, is spoken in the north-east; and Basque, spoken in the south west, is unrelated to any known languages. There are also large immigrant populations whose native tongues are Portuguese, Spanish, Arabic, and Vietnamese. See Bissell, *supra* note 4, at 14. Article 21 of the Loi Toubon specifically provides for the use of regional languages. Loi Toubon, *supra* note 1, art. 21. See *infra* text accompanying notes 189-90.

106. Constitutional Council Decision No. 94-345 DC of July 29, 1994, J.O., Aug. 2, 1994, at 11240, [1995] J.C.P. II., No. 22359 [hereinafter Constitutional Council Decision No. 94-345 DC].

107. The Loi Toubon was named after Jacques Toubon, the Minister of Culture and Minister of "Francophonie" at the time of promulgation. He was also one of the statute's staunchest supporters. Mr. Toubon is currently Minister of Justice, the French equivalent of the Attorney General. Julie-Emilie Ades, *Polémique après la censure partielle de la Loi Toubon, le ministère de la culture refuse une subvention à une manifestation publicitaire francophone*, LE MONDE, Aug. 18, 1994, at 10.

108. See Loi Toubon, *supra* note 1, art. 24.

109. See also François Raitberger, *Public Called to Arms by French Language Watchdog*, REUTERS, Apr. 4, 1995, available in LEXIS, News Library, CURNWS file. See also Bissell, *supra* note 4, at 17. The Loi Toubon completes a ministerial circular issued three months earlier which makes promotion in the public sector conditioned on "the interest and zeal that each civil servant displays in respect to the French language." *Les travaux du parlement*, *supra* note 2, at 7.

110. Loi Toubon, *supra* note 1, art. 1, para. 1.

111. *Id.* art. 2, para. 1. This involves words written or spoken in public areas, providing public information. See Anne Gaughan Lechartier, *Cultural Preservation, Toubon's Law Aimed at Preserving the French Language*, EUROWATCH Sept. 8, 1995, at 13.

al sector,<sup>114</sup> and scientific gatherings.<sup>115</sup>

An area of the new statute which may pose problems of interpretation is the requirement that private individuals or entities engaged in "public sector" activities comply with the language regulation.<sup>116</sup> However, the term "public sector" is not defined by the statute. Public bodies which fall within the purview of the Loi Toubon include all local and regional French authorities, as well as state-owned companies such as the National Railways, the Electricity Utility, France Telecom and the Postal Service.<sup>117</sup> Violators of the statute risk substantial fines, aggregated for each infraction, and up to six months of prison.<sup>118</sup>

### 1. Constitutional Guarantees

The initial version of the Loi Toubon (passed on June 30, 1994)<sup>119</sup> attempted to achieve what the constitutional amendment of 1992 could not: to incorporate private entities performing private transactions (i.e. not in the

112. Employment contracts, company regulations, and job descriptions must appear in French. Loi Toubon, *supra* note 1, arts. 8 & 9. Provisions of the new law which mirror the Loi Bas-Lauriol include: foreign terms are only allowed if no French equivalent can be found, in which case, a definition of the term must be provided in French. *Id.* at 10. A foreign employee may request a translation into his native language, in which case, only the translation may be used against the employee. *Id.* art. 9. See Lechartier, *supra* note 111. See also Loi Toubon, *supra* note 1, arts. 4-5.

113. Loi Toubon, *supra* note 1, art. 11. Article 11 stipulates that French is the language of education, exams and competitions, as well as dissertation defenses; except when otherwise needed for language learning or cultural reasons, and when foreign lecturers are involved. It also exempts foreign and international schools from the French language requirement.

114. Loi Toubon, *supra* note 1, art. 12. Article 12 provides that French is required for all radio and television shows and advertising. Exceptions include musical works, original version films, and language learning programs. For a discussion of such exceptions, see *infra* text accompanying notes 176-83.

115. Loi Toubon, *supra* note 1, art. 6. The only exemption involves conferences which concern only foreigners, conferences organized to boost foreign trade, and similar gatherings organized by foreign individuals or companies. *Id.* See Lechartier, *supra* note 111.

116. Loi Toubon, *supra* note 1, art. 5.

117. *Id.* arts. 5 & 14. See Antonin Besse, *Mandatory Use of French in Financing Agreements*, 14 INT'L FIN. L.R. 22 (1995).

118. Fines for violations of Article 2 are graded: 5,000 francs (1,000 U.S. dollars) for individuals and 25,000 francs (5,000 U.S. dollars) for legal entities. The Loi Toubon provides for fines up to 50,000 francs (10,000 U.S. dollars), in accordance with Article 433-5 of the penal code, for a violation of Article 17 which involves obstruction of justice. Loi Toubon, *supra* note 1, art. 17. See Law N.C. 92-686 of July 22, 1992, J.O., July 23, 1992, at 9893, which revised Article 433-5 of the penal code. The court is given the discretion of opting for an injunction instead of criminal sanction for violations of certain provisions contained within Articles 2-4. These articles involve the description of and instructions for use of products; written, spoken, or audiovisual advertising; information appearing in the public thoroughfare and in public transport; and the "as legible, audible, and intelligible" French version requirement. Implementing Decree, *supra* note 85, art. 1. See also CODE PÉNAL [C. PÉN.] arts. 132-66 to 132-70. See also *infra* note 146.

119. See Jean-Pierre Péroncel-Hugoz, *Les députés adoptent le projet de loi Toubon relatif à l'emploi de la langue française*, LE MONDE, July 4, 1994, at 7.

“public thoroughfare”) within the scope of the statute.<sup>120</sup> However, this extension of the law into the sensitive area of privacy rights was successfully challenged under constitutional law by opponents to the bill<sup>121</sup> as an excessive constraint on the freedom of expression.<sup>122</sup>

Relying on Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen,<sup>123</sup> which states that “the free communication of thoughts and opinions is one of man’s most precious rights, any citizen may therefore speak, write, and print freely, except where such expression is an abuse of liberty as provided by law,” the Constitutional Council ruled that an individual could be precluded from using foreign terms only when acting in an “official” capacity, in which case the higher standard of “terminology commission” French may be imposed.<sup>124</sup>

The Council held that individual expression may be regulated by the Legislature under two circumstances: in order to make freedom of expression more effective, and to reconcile this liberty with other constitutional

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120. The original version was amended by the Constitutional Council. The unamended law would have imposed official French translations on private citizens, companies, and the news media. See Constitutional Council Decision No. 94-345 DC, *supra* note 106.

121. In accordance with Article 61 of the Constitution, the Constitutional Council was petitioned by a group of sixty parliamentarians. See FR. CONST. art. 61(2). In the civil law, and in France in particular, a statute may be challenged under very limited circumstances: a Constitutional challenge must be timely submitted to the Constitutional Council, i.e., before promulgation, and by a group of at least sixty elected government officials. FR. CONST. art. 61. The constitutionality of a law may be challenged in two other ways: members of government may seize the Council during parliamentary debates under Article 41, and after the law has been put in effect, under Article 37, paragraph 2. FR. CONST. arts. 41 & 37(2). Private individuals have no standing to challenge a statute, unless a question of European law is involved. See generally SCHLESINGER ET AL., *supra* note 17; BERMAN ET AL., *supra* note 52. Judicial review of the constitution is virtually non-existent because of the long tradition of parliamentary supremacy. The Constitutional Council, however, has developed into a central agent in the governing process. F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89, 90 (1988). Cf. Declaration of François Autain, Sénat, séance du 12 avril 1994 (debates), J.O., Apr. 13, 1994, at 965. See also Xavier Buffet-Delmas, *French IP in 1994*, MANAGING INTELL. PROP., Dec. 1994 - Jan. 1995, at 32.

122. The Council ruled that “freedom of expression implies the right of each citizen to choose the most appropriate terms to express his thought.” Constitutional Council Decision 94-345 DC, *supra* note 106.

123. THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (1789), reprinted in JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 261-63 (1992). The Declaration, which has been incorporated into the preamble to the French Constitution, has the force of law. It is perhaps the most hallowed document to emerge from the Revolution and is a classic example of the Age of Enlightenment when individual rights were put above collective rights.

124. Constitutional Council Decision 94-345 DC, *supra* note 106. The Constitutional Council specifically exempted the radio and audiovisual sectors from the obligation to use “terminology commission” French, otherwise required for public sector-type transactions. *Id.* See also “*Considérant que la Déclaration des Droits de l’Homme . . .*,” LE MONDE, July 31-Aug. 1, 1994, at 7. In response to the High Court ruling, Edouard Balladur, the Gaullist Prime Minister at that time, countered that, “*il ne pouvait pas être question de considérer comme une expression de la liberté individuelle le droit de s’exprimer autrement que dans la langue du pays*” [individual liberty does not involve the right to express oneself in a foreign tongue]. *Loi Toubon sur la langue française: le gouvernement fait contre mauvaise fortune bon coeur*, AGENCE FRANCE PRESSE, July 31, 1994, available in LEXIS, News Library, PRESSE file.

principles or laws.<sup>125</sup> The Council attached this caveat because those guarantees provided by the Declaration must be weighed against equally germane provisions of the Constitution, such as the 1992 constitutional amendment proclaiming French the national language.<sup>126</sup>

Although the ruling of the Constitutional Council narrowed the scope of the Loi Toubon to the "public sphere," this does not mean private individuals and entities are altogether exempted from compliance with the statute. Unless a transaction is of a purely private nature, not involving in any way the "public thoroughfare or sector," the Loi Toubon will apply.

## 2. The Extensive Reach of the Public Sector

Article 5 of the final version of the Loi Toubon specifically targets any public sector *activity*.<sup>127</sup> This means that private entities will have to comply with the language regulation whenever they provide goods or services of a public-service nature.<sup>128</sup> Although this requirement may appear straightforward, in practice it may be difficult to delineate under what conditions the "public sector" provision is triggered.

The law does not provide any criteria by which to establish when the line between private and public functions has been crossed.<sup>129</sup> This poses a problem of interpretation when a private company's connection to a public entity is remote, as where one private entity subcontracts work to another private company for the benefit of the public sector.<sup>130</sup> Further complications may surface when private entities enter into agreements with legal entities subject to public law.<sup>131</sup>

Thus, private international contracts, for example, which involve work subcontracted from a state-owned company, will undoubtedly have to be drawn up in French. The only exception to the language requirement in such a situation would arise when a legal entity *subject to public law* engages in a commercial or industrial activity to be performed outside France.<sup>132</sup>

This provision particularly affects international finance transactions,

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125. Constitutional Council Decision 94-345 DC, *supra* note 106.

126. Constitutional Law No. 92-554, *supra* note 103.

127. Loi Toubon, *supra* note 1, arts. 5 & 14.

128. *Id.*

129. It remains to be seen whether this provision will be interpreted liberally by the courts. Because the intent of the Legislature tends to hold more weight in the French civil law courts than the actual wording of the statute, courts may well decide to draw the line at a more direct connection. See Olivier Bertin-Mouroit & John Hamilton, *Law Mandates Use of French in Deal Documents*, THE NAT'L L.J., Sept. 4, 1995, at C10.

130. *Id.*

131. This would include, for example, agreements with La Poste (the Post Office), l'Electricité de France (the electric company), Gaz de France (the gas company), and la Société Nationale des Chemins de Fer (the national railways company), all of which rely heavily on work subcontracted to private suppliers. *Id.*

132. Loi Toubon, *supra* note 1, art. 5.

where English is the common *lingua franca*,<sup>133</sup> because deals contracted with “public” entities will *not* be “performed outside France” when payments are transferred to or from an account domiciled in France.<sup>134</sup> In that event, “terminology commission French” must be used in the contract, although a foreign translation of the agreement is allowed and may be given equal force of law.<sup>135</sup> Curiously, the statute provides no analogous exception for *private entities* which undertake a public service function.

It should be noted that this narrow exception to the language requirement (granted only to public entities) might leave the contracting parties without recourse if a suit is filed in France, or if French law applies to the contract, even if suit is brought in another forum. Under Article 5 of the statute, French courts cannot enforce contract provisions drafted in a foreign language against a party which invokes the law, even if that party is non-French.<sup>136</sup>

Thus, even public entities performing abroad would be well advised to draw up all contracts in French, or, at least, to append a French version to the document, even though this task might add to the cost of doing business.<sup>137</sup> In any event, because the Loi Toubon is framed in terms of public policy, parties may not contract out of its provisions.<sup>138</sup>

### C. Innovations in the 1994 Statute

It is important to note that while the Loi Toubon requires the use of French, foreign texts may still be used so long as a French translation is provided.<sup>139</sup> As a result of the ruling by the Constitutional Council on the

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133. *Law on French Language Sown Confusion*, COMPUTERGRAM INT’L, July 13, 1995, available in LEXIS, News Library, CURNWS file.

134. Bertin-Mouroit & Hamilton, *supra* note 129, at C10. This provision is particularly relevant to international financing deals with “public” entities because a contract is not wholly performed outside France when payments are made to or from an account in France. *Id.* To resolve this question, courts will have to look to general principles of private international law. *Id.* See also Besse, *supra* note 117, at 22.

135. See also Besse, *supra*, note 117, at 22.

136. Loi Toubon, *supra* note 1, art. 5. Foreign terms may not be used in contracts involving the *public sector* if an official French term has been provided by official decree. For example, “cash flow” must be called “*marge brut d’autofinancement*,” and “futures market” is now “*le marché de contrats à terme*.” Ministerial Order of Feb. 18, 1987, J.O., Apr. 2, 1987, at 3654. See Lechartier, *supra* note 111; Buchan, *supra* note 16.

137. Companies involved in complex financial deals, for example, might incur an extra cost of up to sixty percent according to one expert at Gide Loyrette Nouel, a prominent French law firm. *What’s French for Cock-Up?*, THE ECONOMIST, Aug. 12, 1995, at 61. This may make it more difficult for public entities to borrow in foreign capital markets because foreign lenders may not want to sign contracts written in French. *Id.*

138. Loi Toubon, *supra* note 1, art. 20.

139. *Id.* art. 4, para. 2. Curiously, advertisements need only provide one translation while signs or notices made by public entities or private entities carrying out a public service must provide two translations. For example, toll booths will have to post three versions of “*paiement à la sortie*,” so that this “toll on exit” sign might also include, for example, “*pagamento all’uscita*” or “*peaje a la salida*.” The law does not specify which languages should appear along with the French. See *La Loi Sur L’Emploi De La Langue Française*, distributed by the association “Future of the French Language” (on file with author).

initial version of the Loi Toubon,<sup>140</sup> this translation need not be written in “terminology commission” French, except when the public sector is involved.<sup>141</sup>

However, Article 4, when read in conjunction with Article 3, mandates that all translations in French of “inscriptions in the public thoroughfare” must be “as legible, audible or intelligible as the presentation of the original foreign-language text.”<sup>142</sup> It appears that advertisers may no longer be able to circumvent the language requirement simply by providing a French version of a foreign text in tiny lettering.

### 1. Does Legible Mean of Equivalent Size?

Because so many advertisers were using tiny French translations, the Legislature tightened up what many critics of the previous law condemned as an inadmissible loophole.<sup>143</sup> Unfortunately, since Article 4 does not specifically state that the French translation must be of *equivalent size*,<sup>144</sup> it is unclear how the courts will interpret the provision.<sup>145</sup> Thus, advertisers will undoubtedly be tempted to continue using English slogans with diminutive (even though intelligible) French translations. If such practices are

140. Constitutional Council Decision No. 94-345 DC, *supra* note 106.

141. *Id.* (interpreting Loi Toubon, art. 5). This means that, in such cases, what is or is not “French” will have to be decided through judicial interpretation. *Information sur la Loi Toubon*, *supra* note 100.

142. Loi Toubon, *supra* note 1, arts. 3-5 & 12. The latter provision concerns audiovisual and radio advertising in particular. These sectors are exempted from the obligation to use terminology commission French. *See supra* note 124 and accompanying text.

143. Rapporteur, Assemblée Nationale, 2ème séance de 4 mai 1994, No. 27 A.N. (C.R.), J.O., May 6, 1994, at 1482 [hereinafter Assemblée Nationale]. For example, the German industrial group Grundig was singled out during the Parliamentary debates for running an English-language campaign to promote its electronics equipment, using the slogan “sea, sex, and sound.” The slogan was a play on the words of a hit 1978 song by popular French singer Serge Gainsbourg, titled (in English), “Sea, sex and sun.” The slogan appeared in large letters while the insipid French version “*fait pour vous*” (“made for you”) was barely visible in a shadowy corner of the billboard. *See* Staeffen & Veyssièrre, *supra* note 93, at 23. This practice was condemned by the Bureau for Verification of Advertising. *See* Bigot, *supra* note 95, at 10 n.59. Similar abuse by other advertisers was specifically targeted during the Parliamentary debates on the new law. Assemblée Nationale, *supra*.

144. The new rule has been widely criticized. Even Minister Toubon questioned the feasibility of such a provision, stating during the debates that this requirement would be impracticable, noting that “there would be no room to place a French translation of equal size beside the text of a film subtitled in a foreign language.” Assemblée Nationale, *supra* note 143, at 1482. Advertisers criticize any attempt to extend the law as a “material aberration,” which would stifle creativity and constitute an excessive extension of the 1975 statute. Staeffen & Veyssièrre, *supra* note 93, at 23. Advertisements in the street and public transport system in Paris for the state-owned telecoms company, posted as late as August 1995, exhorted foreigners to “call home” in large letters, with only a small French translation to the side of the billboard. Lechartier, *supra* note 111. *See supra* note 85 and accompanying text.

145. The problem of how to interpret this so-called “parallelism of form” requirement was not specifically debated on the floor and does not appear in the final text of the Loi Toubon. *See* Ministerial Circular of Mar. 19, 1996, art. 2, J.O., Mar. 20, 1996, at 4258 [hereinafter 1996 Ministerial Circular]. *See also* Staeffen & Veyssièrre, *supra* note 93, at 23.

found to contravene the statute, violators of Article 2 will face criminal sanctions in the form of fines.<sup>146</sup> The Legislature might have precluded this potential source of litigation through clearer drafting, or by allowing for discrete translations so long as they were comprehensible.<sup>147</sup>

## 2. Special Case of Advertising Slogans and Trademarks

The foreign language trademarks of private entities remain unaffected by the law, so long as the private entities are not engaged in "public sector" activities, in which case they fall under the "public entity" requirement. Private entities falling under this requirement must choose a word or term, if one exists, for their trademark from "terminology commission" French. However, these provisions only affect trademarks registered after the application of the statute.<sup>148</sup>

The Loi Toubon offers few changes in the area of commercial advertising, the definition of which has been extensively litigated.<sup>149</sup> However, Article 2 of the statute<sup>150</sup> mandates that all slogans and advertising messages registered with the trademark must appear in French.<sup>151</sup> This provision is aimed specifically at companies such as Nike,<sup>152</sup> which were able to

146. While the court may opt for an injunction under certain circumstances rather than criminal sanctions, the statute's implementing decree specifically provides for criminal fines to be multiplied by a variable of five (i.e. up to 25,000 francs [5,000 U.S. dollars] per infraction) when certain provisions of the statute are violated by companies rather than by individuals. These violations include the non-use of French: in documents presenting goods, products or services under Article 2 of the Loi Toubon; in written, spoken, or audiovisual advertising under Article 2; in information in the public thoroughfare under Article 3; during conferences under Article 6; in documents which specify employee obligation and work instruction under Article 9; and when a translation is not "as legible, audible, or intelligible" as the foreign text, under Article 4 of the Loi Toubon. Implementing Decree, *supra* note 85, art. 4; Loi Toubon, *supra* note 1, arts. 2-4, 6 & 9. See C. PEN., art. 131-41. See also *supra* note 118 and accompanying text.

147. Bigot, *supra* note 95, at 7.

148. Loi Toubon, *supra* note 1, arts. 2 & 14. Terminology commission French will apply, but only to public entities. It should be noted that the legal rights gained under trademark law are not affected by the Loi Toubon. This means that companies are not prevented from registering their foreign-language slogans, just from using them. See Bigot, *supra* note 95, at 7.

149. See F. CORONE, LA NOTION DE PUBLICITÉ COMMERCIALE À TRAVERS LA JURISPRUDENCE [THE CONCEPT OF COMMERCIAL ADVERTISING THROUGH AN ANALYSIS OF CASE LAW] 26 (1993).

150. This provision corresponded to a European Commission Directive on the Use of Languages for Consumer Information in the Community, which applied to all foreign names. Commission Directive 93/456, O.J. (L 341) 68.

151. See Loi Toubon, *supra* note 1, art. 2 para. 4.

152. See Sénat, séance du 26 mai 1994 (debates), No. 38 S (C.R.), J.O., May 27, 1994, at 1901. In regard to the new requirements, the English press mused that "Nike will just have to do it [sic] in translation." *French to Ditch Franglais in Quest for Le Mot Juste*, THE OBSERVER, Apr. 3, 1994, at 13. Nike management sees its company's ubiquitous slogan of "Just Do It" as valuable equity it has built up in its brand. In 1993, Nike spent 70 million francs (about 14 million U.S. dollars) on this English-language advertising campaign in France alone. Daniel Tilles, *France Bars English From Ads*, CAMPAIGN, July 8, 1994, available in LEXIS, News Library, CURNWS file. Jacques Noe, the director of external relations for Nike France, has



sidestep the requirements of the earlier Loi Bas-Lauriol by registering their foreign phrases and slogans as part of their trademarks.<sup>153</sup>

Thus, the Loi Toubon allows private trademarks to appear in a foreign language. However, "public sector" trademarks are beyond the reach of the law only so long as they were registered before the statute took effect. In contrast, the provisions of Article 2 on advertising messages provide no such backward-looking protection. This means that most advertising messages will have to be translated into French, even those registered or used prior to the enactment of the law, unless it can be shown that the slogan is an "evocation" (no translation requirement because the foreign word is part of the trademark) rather than merely a "description," (translation is required because the word is not part of the trademark) of the product.<sup>154</sup>

As a result, the distinction between trademark and slogan will be of paramount importance for the continuation of an advertising campaign in a foreign language. The determination will turn on whether the advertising messages share the identifying or descriptive characteristics of trademarks, such as the textile company Benetton's now apparently illegal, "United Colors of Benetton"<sup>155</sup> or the evocative qualities of a trademark such as the permitted "Aeroflot."<sup>156</sup>

The dichotomy between the trademark and its slogan and the differing standards they invoke could lead to incongruous situations where one company would be allowed to use a trademark consisting of several foreign words, while another would not. For example, the Loi Toubon allows for trademarked "French Airlines" writing pens, yet these very same words are

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stated in response to the new restrictions that, "we can't say if we will challenge the law or not. We have no official position as to what we will do." *Id.*

153. See Francisque Perrut, Rapporteur, Assemblée Nationale, séance du 4 mai 1994 (debates), No. 27, A.N. (C.R.), J.O., May 6, 1994, at 1456.

154. See UNION DES ANNONCEURS, *supra* note 47, at 23. It is interesting to note that while the Loi Toubon outlaws foreign language logos and slogans, company names and signs are exempt. This exception was also provided in the 1975 statute. See 1977 Ministerial Circular, *supra* note 45. However, case law under the Loi Bas-Lauriol did extend the French language requirement to signs when they were designed to substitute for advertising. Cf. Bigot, *supra* note 95, at 9 n.56 (citing Judgment of Mar. 19, 1977, Paris, [1972] J.C.P. II., No. 17081, *aff'd*, 1974 Bull. crim., No. 191). If the "company mark" provision of the Loi Toubon is extended, through judicial interpretation, to include a general ban on company signs, companies will be forced to comply with the law either by changing their names, providing translations, or registering the signs as trademarks. If the latter measure is adopted, the freedom of corporate expression will turn on whether or not a company's name can be considered a trademark. As previously discussed, this determination will rest on largely subjective factors. See Bigot, *supra* note 95, at 6.

155. See Staeffen & Veyssi re, *supra* note 93, at 22. This issue may well be litigated because, according to Oliviero Toscani, Benetton's creative guru, "you can't mandate something like this by law," insisting that the company has no intention of changing its slogan in the French market to "Couleurs Unies de Benetton," the phrase it is obligated to use in Quebec under a similar language law. Tilles, *supra* note 152. In response to this claim, a top adviser to Minister Toubon asserted that Benetton might have to establish its right to keep the English through litigation because "[Benetton's] advertising message would have to change unless it was integral to the brand, [i.e., a trademark]." *Id.*

156. See UNION DES ANNONCEURS, *supra* note 47, at 23.

not allowed to follow A.O.M. (the name of a French domestic airline) as had been the case, unless a translation in French is also provided.<sup>157</sup> The somewhat fuzzy distinction between trademark and slogan will have to be made on a case-by-case basis because the Legislature provided no precepts in the area to help guide the courts.<sup>158</sup>

#### D. Living with the Loi Toubon

##### 1. Provide a French Translation

The simplest way to steer clear of the Loi Toubon is to append a translation in French to all deal documents, ads, work contracts, public notices, and any other form of expression which might possibly fall within the statute's provisions. It should be noted that public entities and companies engaged in a public sector function must provide "dual translations."<sup>159</sup> Thus, if translations are needed, three texts are required, one in French, along with two foreign versions.<sup>160</sup>

In addition to the "equally intelligible" mandate previously discussed,<sup>161</sup> translations in French must be comprehensive enough to convey the message adequately, although there is no length requirement. Thus, the English term "green," when used in the ecological sense, could not be translated as (the color) "*vert*"; it would have to resemble something akin to "contributing to the protection of the environment."<sup>162</sup> The problem with opting for this strategy is that it may prove quite costly in time and effort.<sup>163</sup> This is why businesses will look to a more convenient exception to the language requirement.

157. *Id.* The crux of the matter here is whether the term is descriptive, because if this is the case, French must be used. Thus, while "British Airways" is acceptable because it is the name (i.e. the trademark) of a foreign company, the foreign language term "French Airlines," when used to describe a French airline, is not. Jacques Toubon, Assemblée Nationale, séance du 13 juin 1994 (debates), cited in UNION DES ANNONCEURS, *supra* note 47, at 22.

158. It is curious that the vagueness of this provision was not challenged in the Constitutional Council before the law was promulgated inasmuch as slogans and trademarks in English might conceivably be held to violate Article 2, thus opening up the possibility of a jail term of up to six months under Article 17 if the defending party impedes the investigation of the case by "*agents de police*" or the "*police judiciaire*" either directly or indirectly. See Loi Toubon, *supra* note 1, arts. 16 & 17. The police are charged with enforcement of Articles 2-4, 6, 9 paras. 1, 2, & 10. See 1996 Ministerial Circular, *supra* note 145, art. 3. Interpretations will likely be constrained by the higher standard of "general principles of legality" applied to criminal law. See C. PÉN., arts. 111-3 & 111-4. This means that courts will probably be reluctant to opt for a strict enforcement of the provision. See Bigot, *supra* note 95, at 6.

159. Loi Toubon, *supra* note 1, art. 4, para. 1. See *supra* note 139 and accompanying text.

160. *Id.* There is, however, uncertainty as to whether the translation requirement applies to contracts, invoices, and other documents being sent from overseas, or via a foreign intermediary. Christiane Féral-Schuhl, *Loi Toubon: le décret du 3 mars 1995*, LES ECHOS, Mar. 31-Apr. 1, 1995, at 7.

161. See *supra* text accompanying notes 143-47.

162. UNION DES ANNONCERS, *supra* note 47, at 19.

163. Bertin-Mouroit & Hamilton, *supra* note 129, at C10.

## 2. Exceptions to the Requirement for French

There are nine areas where translations need not be provided: well-known foreign products,<sup>164</sup> original version films,<sup>165</sup> musical compositions,<sup>166</sup> foreign language learning,<sup>167</sup> international schools,<sup>168</sup> international carriage,<sup>169</sup> certain trademarks,<sup>170</sup> the written press,<sup>171</sup> and, under limited circumstances, during international conventions.<sup>172</sup>

### a. Well-Known Products Exception

Just as in the Loi Bas-Lauriol, the Loi Toubon provides an exemption from the French language requirement for certain brand names so long as they are well-known foreign products.<sup>173</sup> However, once again, the Legislature provided no guidelines to help the courts determine when a foreign brand is more than merely popular and thus deserving of the "well-known brand" exception. Just as in the case against the hamburger restaurant Quick,<sup>174</sup> this provision will have to be given substance through interpretation by the courts, perhaps in tandem with other legislation.<sup>175</sup>

### b. Original Version Films Exception

The area of so-called "original version" films and television programming

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164. Loi Toubon, *supra* note 1, art. 2.

165. *Id.* art. 12.

166. *Id.*

167. *Id.*

168. *Id.* at 11.

169. *Id.* art. 4.

170. *Id.* art. 14.

171. *Id.* art. 7.

172. *Id.* art. 6.

173. *Id.* art. 2 para. 3. For example, "hamburger" is allowed but "cheeseburger" is not. Thus, MacDonald's, for example, should now have to advertise its cheeseburgers as "*hamburgers avec une tranche de fromage*" (hamburgers with a slice of cheese). Raitberger, *supra* note 109. See also David Pallister, *French Purists Harness Law to Speak on their Own Terms*, THE GUARDIAN, July 2, 1994, at 1.

174. See *supra* text accompanying notes 92-93.

175. For example, the Code of Intellectual Property empowers the National Institute of Intellectual Property to approve a brand name; however, only the courts may decide whether or not that name is protected by intellectual property law. VII C. PROP. INTELL., Law No. 91-7 of Jan. 4, 1991, J.O., Jan. 6, 1991, at 316. The courts are sometimes quite strict in determining whether a foreign name is "an essential characteristic" of the product, especially if the term is not understood or used by the general public as well as professionals of the sector of activity where that product is pigeon-holed. See Staeffen & Veysière, *supra* note 93, at 20.

is also exempt from the translation requirement.<sup>176</sup> An "original version" means the foreign language film is not dubbed over. This exception is in apparent contradiction to France's vigorous support of its own cinematographic and television industries, as seen in the showdown between the French and the Americans over broadcasting quotas and controls in Europe.<sup>177</sup>

This provision may be explained as an attempt to placate the public because the French are connoisseurs of "original version" films. In any event, the vast majority of these films comply with the Loi Toubon either because they are subtitled (thus translated) in French, or if not, they are being shown to teach the foreign language.<sup>178</sup>

### c. Musical Works Exception

Musical works may remain in the foreign language.<sup>179</sup> This exception to the translation requirement could prove especially useful to the advertising industry because music is used as a mood-setter in many television and radio commercials.<sup>180</sup> The statute does not, however, make clear whether songs and jingles used in advertising would be subject to the restrictive provisions appearing under Article 2, or to the musical works exception to be found

176. Loi Toubon, *supra* note 1, art. 12, para. 1. This exception is particularly remarkable because the use of French is mandatory in all radio or television advertising, whatever the means used to distribute the products. *Id.* It is unclear, however, whether the ban extends to all forms of commercial communication, such as the sponsoring of events where no advertising message is relayed except the name or brand of the product. See Bigot, *supra* note 95, at 7 (citing Decree No. 92-280 of Mar. 27, 1992, art. 18-III, J.O., Mar. 28, 1992, at 4313).

177. The French are pushing for more stringent regulation of foreign broadcasts in Europe. Under the European Union's so-called "Television without Frontiers" directive, at least fifty percent of programming must be of European origin, if practicable. Urging even tighter control of such programming, Minister Toubon appeared before the European Parliament to argue that the plethora of American audiovisual products in Europe amounted to U.S. "cultural imperialism" and was undermining the continent's heritage. Sarah Helm, *France Issues Call to Arms in European "Culture Wars,"* THE INDEPENDENT, Feb. 2, 1995, at 11. See also Council Directive 89/552 of 3 October 1989 Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23.

178. There is no significant departure here from the 1975 statute, which prohibited foreign terms from being used in television and radio broadcasts, except when the program was meant for a foreign audience. See Loi Bas-Lauriol, *supra* note 39, art. 1, para. 2. See also *infra* text accompanying notes 182-83 (the language learning exception).

179. Loi Toubon, *supra* note 1, art. 12 para. 2.

180. Advertisers would probably be reluctant to dub in French words to American songs, for example, because they would lose their effect, or worse still, appear ridiculous. Rone Tempest, *U.S. Motifs Advertise Everything From Cookies to Cars,* L.A. TIMES, Dec. 27, 1990, at A1. This means certain advertisers might eschew the French television market, which would affect an important source of revenues in that industry, already heavily subsidized by the State. Yves Mamou, *La préparation du budget de la communication à l'Assemblée Nationale, Nicolas Sarkozy se dit déterminé à régler tous les dossiers en suspens,* LE MONDE, Oct. 7, 1994, at 14.

under Article 12.<sup>181</sup> As with the other gray or overlapping areas of the statute, this issue will undoubtedly have to be settled through judicial interpretation.

#### d. Cultural Expression and International Schools Exceptions

These exceptions exempt audiovisual programming which has the educational objective of teaching a foreign language or presenting cultural programs.<sup>182</sup> Article 11 allows schools "having an international vocation" to ignore the use-French rules.<sup>183</sup> However, the vagueness of the provision leaves the door open to the possibility that such schools might choose to offer a curriculum entirely in English, even if most of their students are French.

#### e. International Transport Exception

Article 4 of the statute, which deals with "public service" functions contains a caveat to the language requirement, as applied to international carriers.<sup>184</sup> This provision specifies that the application of this exception to the translation requirement is to be laid out by the statute's implementing decree,<sup>185</sup> which states that transport "in transit or through coastal navigation on French territory" is exempt.<sup>186</sup>

#### f. Exemption For Literature and the Written Press?

Literary pieces and the written press are not expressly targeted by the translation requirement. However, "publications, reviews and communications distributed in France" which come under the public sector definition, and private entities receiving subsidies from the State, must provide a French summary of the document. It remains to be seen if literature and the written press will benefit from this omission or whether the courts will extend the

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181. Bigot, *supra* note 95, at 7. This being said, the *Conseil Supérieur de l'Audiovisuel* [High Council on Audiovisual Programming], a governmental regulating body which is charged with enforcement of Article 12 of the statute, has ruled that, as under the 1975 statute, texts sung in a foreign language will be allowed under the exception as long as they do not convey a commercial message, that is to say, they may only be used as background to the commercial. *Id.* at 10 n.62 (citing letter of C.S.A., No. 61, Oct. 1994, at 21). It remains to be seen, however, whether the courts adopt this view under the new law.

182. Loi Toubon, *supra* note 1, art. 12, para. 3.

183. *Id.* art. 11, para. 2.

184. *Id.* art. 4.

185. *Id.*

186. Implementing Decree, *supra* note 85, art. 15. However, international airports and seaports are not exempted. *Id.*

scope of the statute to include newspaper and magazine articles, as well as books.<sup>187</sup>

### g. International Congresses and Gatherings

Article 6 provides that documents used in colloquia, congresses, and conventions must be drawn up in French, while preparatory works may appear in a foreign language so long as a summary in French is provided. However, these requirements do not apply to gatherings where only foreigners attend, or where France's foreign trade interests are being advanced.<sup>188</sup>

## 3. Regional Languages are Allowed

Because France is not, and has never been, a unilingual country in the sense that regional languages such as "Breton," a fast-disappearing reminder of France's Celtic past, still subsist in certain parts of the country, the Loi Toubon does not "oppose their usage."<sup>189</sup> Any other position would have violated public policy because the government actively promotes the development of the country's linguistic heritage, just as it encourages the *learning* of other (non-indigenous) languages.<sup>190</sup>

### E. Compliance with European Union Law

National legislation must comport with European Union law.<sup>191</sup> This is why the Loi Toubon seems to anticipate a possible challenge to its provisions under European law, by stating that the statute is an expression of

187. Loi Toubon, *supra* note 1, art. 7. It should be noted, however, that Article 10 of the statute expressly prohibits the publication in the press of job offers written up in a foreign language when a *service* is to be performed in France or even abroad if either the hired party or the employer is a French national, and even when knowledge of the foreign language is a prerequisite for the job. *Id.* art. 10. When the job can only be described by a foreign term for which there is no French equivalent, the provision nonetheless requires a "sufficiently detailed" French description of the job. *Id.* The only exception to this requirement involves publications appearing partially or wholly in a foreign language. *Id.* It should be noted that Article 10 of the statute modifies Article L. 311-4 of the Code du travail, which also did not allow for the use of foreign terms in job offers. Violators of Article 10 risk fines beginning at 3,000 francs (600 U.S. dollars) per infraction. *Id.* See also C. TRAV. arts. L. 311-4 & R. 361-1.

188. Loi Toubon, *supra* note 1, art. 6. See also Féral-Schuhl, *supra* note 160. The foreign trade shelter has already been used to avoid application of the language law. It remains to be seen how far this exception can be stretched. For example, in 1995, it was invoked, with apparent success, to allow for a mathematics congress (held exclusively in English) in Fontainebleau. See *Information sur la Loi Toubon*, *supra* note 100. See also *supra* note 115 and accompanying text.

189. Loi Toubon, *supra* note 1, art. 21.

190. *Id.* arts. 11 & 21. In fact, the statute specifically refers to France's linguistic policy that French children "master French, and learn two other languages." See also Law No. 89-486 of July 10, 1989, art. 1, J.O., July 14, 1989, at 8860.

191. See *supra* notes 50-63 and accompanying text.

French public policy.<sup>192</sup> Thus, while the Loi-Bas Lauriol only implied that language regulation was a matter of highest national interest,<sup>193</sup> Article 1 of the Loi Toubon articulates the need to safeguard French, declaring the national language to be a “fundamental element of the personality and patrimony of France.”<sup>194</sup>

Nonetheless, such a defense might not survive scrutiny by the European Court of Justice because the public policy exception is usually allowed only in cases where the fundamental welfare of society is at stake.<sup>195</sup> Also, European law specifies that any restrictions resulting from the exercise of public policy must be “indistinctly applicable” to domestic as well as foreign providers of goods and services.<sup>196</sup> Thus, if interested parties, such as

192. Loi Toubon, *supra* note 1, art. 20. Article 36 of the Treaty of Rome provides a public policy defense to national laws which may adversely affect the free flow of imports. Other provisions in the Treaty mirror this article, for example, in the case of freedom to provide services, or the free movement of persons. TREATY OF ROME art. 36. There is some basis to conclude that the Loi Toubon may constitute overreaching and a disproportionate restriction on the freedom to provide services. *See, e.g.*, Case 353/89, Commission v. The Netherlands, 1991 ECR 4088. In this case, the E.C.J. rejected the argument under Article 36 of the Treaty of Rome, that a Dutch law restricting radio and television broadcasting services was necessary to promote Dutch culture, as a matter of public policy. *Id.* at 4097; TREATY OF ROME art. 48. For a discussion of such exceptions in European law, *see generally* BERMANN ET AL., *supra* note 52.

193. *See supra* text accompanying note 89.

194. Loi Toubon, *supra* note 1, art. 1. *See also id.* art. 20 (stating that the statute represents a matter of public policy).

195. This being said, language restrictions were allowed by the E.C.J. in *Groener v. Minister for Education*, an action brought to challenge alleged discriminatory employment practices in Irish public schools. A degree of Irish language proficiency was required for employment as a school teacher in Ireland. The Court ruled in favor of the defendant under the public policy exception to discriminatory employment practices provided in Article 48 (which mirrors the commercial discrimination exception of Article 36) of the Treaty of Rome. Case 379/87, *Groener v. Minister for Education*, 1989 ECR 3967. However, the minority status of Irish in Ireland was a major factor influencing the Court. *Id.* at 3975-76. In contrast, French is certainly not a minority language in France.

196. The principle of measures “indistinctly applicable” might qualify under the exception provision inasmuch as French parties must also comply with the Loi Toubon. However, non French-speakers (i.e. all France’s European Union partners except Belgium and Luxembourg, only parts of which are francophone) will have a much harder time complying with the statute. If the effect of the law amounts to de facto discrimination against France’s E.U. trading partners, the statute will be invalidated under European law. *See* Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung Für Branntwein (Cassis de Dijon)*, 1979 ECR 649; Case 8/74, *Procureur du Roi v. Dassonville*, 1974 ECR 837. This being said, on November 10, 1993, the European Commission issued the following statement to inform the other European Union Institutions (i.e. the Council and Parliament) of its view on the use of language as it concerns consumer information, “the Commission considers that linguistic policy naturally falls under the purview of the Member States, especially in light of the application of the principal of subsidiarity.” Communication De La Commission Au Conseil Et Au Parlement Concernant L’Emploi Des Langues Pour L’Information Des Consommateurs Dans La Communauté, COM (93) 456 final. “Subsidiarity” is a new concept in European law, under which Community institutions should exercise their powers only to the extent that Community law governance provides advantages over domestic governance in the various Member States. BERMANN ET AL., *supra* note 52, at 46.

European nationals or residents, and legal entities registered in Europe,<sup>197</sup> are able to demonstrate that the Loi Toubon severely impedes their ability to trade with France, the new statute could be invalidated by supranational European law, notwithstanding the statute's purported status as an assertion of national public policy.<sup>198</sup>

#### F. Successors to the AGULF

The Loi Toubon provides for a number of private linguistic watchdog associations to enforce its provisions.<sup>199</sup> These new private associations, such as the Association for the Future of the French Language (*Avenir de la Langue Française* or AALF), replace the AGULF which operated as an arm

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197. This means that an American person or company, for example, might be able to invoke European law provided that the requisite connection to Europe exists. TREATY OF ROME art. 173. However, in order for European Union law to intervene in such an exchange, imports from one European country to another must have "originated" in the other member country. This means that products first exported, for example, from the United States to Holland, then sent to French customs by means of extracommunitarian transit, would not be protected by European Union law because there would be no exchange among European partners. However, if the product is first distributed in Holland, then exported to France, European law will attach. *Libre Circulation des Marchandises*, DICTIONNAIRE PERMANENT DU DROIT EUROPÉEN DES AFFAIRES [DICTIONARY OF EUROPEAN COMMERCIAL LAW] Feuillet 21, at 1712 (July 1, 1994).

198. *Id.* On June 12, 1995, the Council of Ministers of the European Union adopted a Decision on Linguistic Diversity and Plurality in the European Union, in which the ministers recognized the essential role played by "diversity of language" in sustaining European identity and cultural heritage. Available on Internet at [http://www.culture.fr/culture/dgll/aff\\_gen.htm](http://www.culture.fr/culture/dgll/aff_gen.htm). This decision might be used as an argument for the validity of the Loi Toubon.

199. It should be noted that under the French Civil Law system there are three ways to sue for compensation when the penal code is violated (certain provisions of the Loi Toubon call for sanctions under the penal code). Wronged parties may seek compensation in criminal court either via the public prosecutor, or as individual plaintiffs. If the latter option is followed, the suit is called an *action civile* (a civil action in criminal court) and the plaintiff is the *partie civile*. The individual plaintiff may also seek compensation in the civil court, as would be the case under the common law. The reason many plaintiffs opt for the *action civile* in criminal court is because they may use evidence collected by the public prosecutor or the *juge d'instruction* (the examining magistrate investigating the allegation), thus reducing their litigation costs. KAHN-FREUND ET AL., *supra* note 53, at 206-07. Associations which have been certified to sue in criminal court enjoy all three options, while those which have not been certified may only sue in civil actions (under the *droit commun*, i.e., in civil court) or wait for the public prosecutor to intervene. *Id.* Civil servants are also allowed to administer the new statute, for example, officers from *le Direction de la Concurrence, de la Consommation et de la Repression des Fraudes, le Conseil Supérieur de l'Audiovisuel* (for radio and television) and customs officials may investigate and verify non-compliance. See 1996 Ministerial Circular, art. 3, *supra* note 145. Of course, their findings may be used by the individual *partie civile*, which is why the Associations often alert these administrative bodies to alleged infractions for investigation. Loi Toubon, *supra* note 1, arts. 13, 16-18. Buffet-Delmas, *supra* note 121. Five associations have been certified to sue for penal sanctions under the Loi Toubon: the *Association Francophone d'Amitié et de Liaison*, the *Association des Informaticiens de la Langue Française*, *Avenir de la Langue Française*, *Conseil International de la Langue Française*, and *Défense de la Langue Française*. See Ministerial Order of May 3, 1995, J.O., May 12, 1995, at 8017 (certifying language associations under the Loi Toubon) [hereinafter 1995 Ministerial Order].



of the government under the 1975 statute.<sup>200</sup> These associations must request certification<sup>201</sup> from the General Delegation for the French Language,<sup>202</sup> before they may bring civil suit in criminal court.<sup>203</sup>

Once these associations have been in existence for two years, they may sue for damages in criminal court but only under Articles 2-4, 6-7, and 10 of the Loi Toubon.<sup>204</sup> This means that active but recent associations such as the somewhat Orwellian-sounding "Right to Understand" (*l'Association le Droit de Comprendre* or ADC), which was formed on October 7, 1994,<sup>205</sup> will not be able to bring this type of suit until the waiting period has expired. Other provisions of the statute may only be enforced by governmental authorities; for example, the Superior Council for Audiovisual Works is the only body certified to sue violators in the broadcasting sector.<sup>206</sup>

### G. First Attempts to Enforce the Loi Toubon

The French Post Office and Disney have been the only defendants to be sued by the language associations under the new language statute.<sup>207</sup> Although neither case was decided on the merits because the plaintiffs lacked

200. See 1995 Ministerial Order, *supra* note 199; Implementing Decree, *supra* note 85, art. 11. Any association formed in defense of the French language and certified to sue as *partie civile* may request official status for a renewable period of three years. *Id.* The associations such as AALF (but not the Association Right to Understand), were named through ministerial order as certified for three years to bring suit for penal sanctions under Articles 2, 3, 4, 6, 7, and 10 of the Loi Toubon. 1995 Ministerial Order, *supra* note 199, arts. 1 & 2. See also J.O., Dec. 30, 1992, at 3844; J.O., Oct. 26, 1994, at 4236. The AALF describes its mission as the "combined defense of our language with openness toward foreign languages and cultures—contrary to anglomaniac fundamentalism." See Raitberger, *supra* note 109.

201. In order to be certified to bring suit, an association must represent a class of consumers which has been harmed (this has been interpreted to mean more than one consumer) and must have been in existence at least two years before an *action civile* can be brought against violators of the Loi Toubon. See Loi Toubon, *supra* note 1, arts. 2-4, 6-7 & 10, in conjunction with Implementing Decree, *supra* note 85, art. 9.

202. Implementing Decree, *supra* note 85, art. 10. Certification is actually granted by an order issued jointly by the Minister of Justice and the Minister of Francophonie. *Id.* See also *supra* text accompanying notes 29-30.

203. Associations are certified for renewable periods of three years. *Id.* See also *supra* note 200.

204. These articles deal principally with matters of consumer rights (Article 2), public advertising (Article 3), number of translations for public sector activities (Article 4), scientific congresses and publications (Article 6), publication, reviews and communications emanating from public sector and state-subsidized entities (Article 7), and want ads in the press (Article 10).

205. See J.O., Oct. 26, 1994, at 4236.

206. Loi Toubon, *supra* note 1, art. 13 (modifying Law No. 86-1067 of Sept. 30, 1986). Buffet-Delmas, *supra* note 121. See also *supra* note 199.

207. It should be noted that on January 16, 1996, the Body Shop, a British chain of "natural beauty" shops, was indicted by the Procureur and fined 1,000 francs (200 U.S. dollars) by the Tribunal de Police de Chambéry in Savoie for violating Article 2 of the Loi Toubon because the shop sold products such as pineapple facial wash, body spray and bath bubbles with labels which had not been translated into French. *Un magasin est sanctionné pour ne pas avoir traduit en français les instructions portées sur les étiquettes*, LE MONDE, Jan. 23, 1996, at 9. The language associations did not directly participate in this litigation. See also Andrew Jack, *Body Shop Hit by French Move*, FIN. TIMES (London), Jan. 20, 1996, at 2.

standing,<sup>208</sup> both suits are interesting because they demonstrate the kinds of arguments that parties will put forward under the Loi Toubon. Indeed, it appears from these two cases that the Loi Toubon will undoubtedly be challenged under European law. This pivotal issue will determine the ultimate legality, and thus the impact of the statute.

### 1. A Postal Service by Any Other Name

Chronopost, a subsidiary of the national Post Office, which provides an overnight delivery service, was the first violator of the language law to be targeted by the language associations.<sup>209</sup> The ADC<sup>210</sup> and AALF<sup>211</sup> joined forces to sue La Poste and Chronopost under Article 14 of the Loi Toubon<sup>212</sup> for offering a service called "Skypak."<sup>213</sup>

The plaintiffs sought to prevent the national post office from advertising or distributing the service, explaining that the use of the English-sounding word "Skypak" "profoundly alters the image of public postal service."<sup>214</sup> However, the court ruled that the plaintiffs had no standing to sue for two reasons: (1) the charge involved a violation of Article 14 of the statute, which is not among the articles under which private associations may sue in criminal court,<sup>215</sup> and (2) one association had not been in existence for the requisite period of two years prior to filing suit.<sup>216</sup>

The defendant warned the court that the language protection associations were waging a "violent campaign," notably in the press, to exclude all foreign words from French.<sup>217</sup> It claimed that in demanding that Chronopost *give up* its "Skypak" service rather than merely changing its foreign-sounding

208. In both cases, the newly formed ADC was at least one of the plaintiffs. Judgment of Apr. 10, 1995 (AALF et ADC v. La Société Chronopost et La Poste), Trib. gr. inst. Aler Nanterre (on file with author); Court Order of Mar. 6, 1995 (ADC et Madame Françoise Vivier v. La Société The Disney Store (France) S.A.), Trib. gr. inst. Paris, Ref. 52514/95, No. 1/JP; Court Order of Mar. 30, 1995, Trib. gr. inst. Paris, Ref. 52514/95 No. 1/FF (on file with author).

209. Even the name "Chronopost" has been criticized for resembling English (there is no "e" at the end of the word, as would be the case in French). See *Language Police Pursue Post Office, Disney Store*, AGENCE FRANCE PRESS, Feb. 28, 1995, available in LEXIS, News Library, CURNWS file.

210. Although the ADC is a legal association, it has not been certified under the statute's implementing decree to sue as *partie civile* under the Loi Toubon. See J.O., Oct. 26, 1994, at 4236; 1995 Ministerial Order, *supra* note 199.

211. J.O., Dec. 30, 1992, at 3844. Unlike the ADC, this association has been certified. 1995 Ministerial Order, *supra* note 199.

212. Brief for ADC/AALF at 7 (on file with author).

213. *Id.* at 6.

214. Brief for La Poste at 4 (on file with author).

215. Plaintiffs argued vigorously, based on Article 2-14 of the New Code of Civil Procedure, that Article 19 of the Loi Toubon, which lays out the conditions under which private associations may sue violators of the statute, could be construed to include more than the articles enumerated in Article 19. See Brief for ADC/AALF at 7-8.

216. Brief for La Poste at 7.

217. *Id.* at 4.

name, the associations were really promoting the interests of Chronopost's American competitors such as United Parcel Service, rather than the French language.<sup>218</sup>

Chronopost anticipated an attack under the "public sector" provision of Article 5 by arguing that it was a private company which carried out a private competitive task rather than a "public service mission."<sup>219</sup> In the likely event the Article 5 argument failed,<sup>220</sup> Chronopost further contended that because there is no official equivalent for the word "Skypak," no translation was possible.<sup>221</sup> Had it not dismissed the case for lack of standing, the court would undoubtedly have ruled that even though "terminology commission" French was not available, an appropriate French-sounding equivalent could have been found or a translation provided.

Chronopost further argued that the language requirement contravenes Articles 30 and 59 of the Treaty of Rome<sup>222</sup> because Chronopost delivers a "European service" in that "Skypak" is offered in several European Union countries.<sup>223</sup> According to the defendant, the nexus with European law springs from the fact that Chronopost is a subsidiary of Sofipost, a holding of the National Postal Service, which subcontracts with Global Delivery Express Worldwide, a Dutch company also set up to provide the service called "Skypak" outside France.<sup>224</sup>

Plaintiffs countered that European law was not violated because removing the service "Skypak" from among the services available at the Post Office would not prevent the product from being distributed by other means.<sup>225</sup> Because this argument is so fact-sensitive, it is unclear how the court might have ruled on this issue. In any event, had the suit gone forward, the first case brought under the Loi Toubon might have been its downfall because if Chronopost had prevailed on its "European service" defense, the Loi Toubon's application to any product or transaction involving its European partners would have been invalidated.

Chronopost also put forward a trademark defense, claiming that it qualified for dispensation from the language statute under Article 14 because it was a private entity.<sup>226</sup> It argued that the public sector exemption would also apply because "Skypak" had been used as a trademark in France since

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218. *Id.* at 5.

219. *Id.* at 5; Brief for Chronopost at 9-10 (on file with author).

220. For a discussion of Article 5, see *supra* text accompanying notes 127-38.

221. *Id.* at 12.

222. Brief for Chronopost at 8. Articles 30 and 59 of the Treaty of Rome forbid quantitative restrictions on the free flow of goods and services in the Community. TREATY OF ROME arts. 30 & 59.

223. Brief for Chronopost at 2-3.

224. *Id.* at 8.

225. Brief for ADC/AALF at 14.

226. Brief for Chronopost at 9.

1981, well before the law came into effect.<sup>227</sup> However, the plaintiffs countered that the French company Chronopost had not actually used the name until August 6, 1994. It merely adopted the “Skypak” name from foreign companies that had used it earlier, and was thus precluded from using the trademark defense under the law.<sup>228</sup> It appears that most, if not all of the defendant’s arguments would have failed. However, Chronopost might have prevailed under its final argument: that it qualified for the Article 4 “international transport” exception to the translation requirement. However, this provision would shelter Chronopost from liability only if “Skypak” were found to involve mere “transit” over French territory.<sup>229</sup>

## 2. Disney Parries Toubon’s Sword

The Disney Corporation, to many in France the unparalleled symbol of American cultural imperialism,<sup>230</sup> was the second defendant to be pursued under the Loi Toubon.<sup>231</sup> The ADC, along with a private consumer, sued the Disney Store, which sells toys and apparel, under Article 2 for selling non-French sounding items such as “Mickey’s Egg Ring,”<sup>232</sup> “Goofy’s Blow Pipe,”<sup>233</sup> and “Born in the USA Pen Party.”<sup>234</sup> Other products being sold included a stencil called “Mickey’s Stuff for Sun Gleams,” “Captain Hook’s Sword,” “101 Dalmatians Bubble Kids,” “Minnie [*sic*] Ice Cubes,” “Donald’s Head Pen,” and a “Snow White and the Seven Dwarfs” doll.<sup>235</sup> In their

227. *Id.* at 9-11. See also Lechartier, *supra* note 111.

228. Brief for Chronopost at 9-11.

229. *Id.* at 12-13.

230. Commenting on the case, Minister Toubon quipped to Forbes Magazine that “the danger is that the mouse will kill all the other animals in the kingdom.” Klebnikov, *supra* note 16, at 292.

231. Court Order of Mar. 6, 1995 (ADC et Madame Françoise Vivier v. La Société The Disney Store (France) S.A.), Trib. gr. inst. Paris, Ref. 52514/95, No. 1/JP, at 2; Court Order of Mar. 30, 1995, Trib. gr. inst. Paris, Ref. 52514/95, No. 1/FF, at 2 (on file with author).

232. Procès-Verbal de Constat of Feb. 15, 1995, submitted by Augeard (Huissiers de Justice, Trib. gr. inst. Paris), at 3 (on file with author). This was a mold, for the purpose of shaping scrambled eggs into the form of Mickey Mouse. One of the charges against Disney involved misrepresentation because non-English speaking consumers might believe the product was a toy such as a mask, rather than a cooking implement. Plaintiffs argued that even if the mold’s purpose was clear by its appearance, the package should have contained a warning that children might be endangered because the product was to be used in the kitchen. Court Order of Mar. 6, 1995 (ADC et Madame Françoise Vivier v. La Société The Disney Store (France) S.A.), Trib. gr. inst. Paris, Ref. 52514/95, No. 1/JP, at 2; Court Order of Mar. 30, 1995, Trib. gr. inst. Paris, Ref. 52514/95, No. 1/FF, at 2 (on file with author).

*Huissiers de Justice* are court bailiffs who perform various services for the court such as the enforcement of judgments, collection of debts, service of process, or as in this case, the drawing up of *constats* (official reports on factual situations, excluding opinions of fact or law) which are used as evidence before a court of law. DADOMO & FARRAN, *supra* note 86, at 125.

233. Procès-Verbal de Constat of Feb. 15, 1995, submitted by Pinot & Farruch (Huissiers de Justice, Trib. gr. inst. Paris) at 3 (on file with author). While Mickey Mouse is called by the same name in French, Goofy is known as “Dingo.”

234. *Id.* at 2.

235. *Id.* at 2-9.

pleadings, the plaintiffs claimed that, not only did the Disney Store fail to remove the offending items, but even products otherwise properly labelled in French contained warnings appearing only English.<sup>236</sup> For example, the *Roi Lion* (Lion King) change purse, and Goofy's Blow Pipe, which included balls small enough to choke a toddler, carried no safety warnings in French.<sup>237</sup>

In its pleadings, Disney challenged the ADC's standing on the grounds that the association was not certified to sue under the statute's implementing decree, and that associations may only represent a class of consumers while here ADC was suing in conjunction with an individual plaintiff, a shopper named Françoise Vivier.<sup>238</sup> In its substantive arguments, the Disney Store admitted selling the toys labelled in English, but asserted that it had not violated the Loi Toubon because the English language labels were merely "decorations," designed to make the packaging more attractive to consumers.<sup>239</sup> Disney contended that because these labels conveyed no consumer information, the markings appearing in English, such as "born in America," did not violate Article 2 of the statute.<sup>240</sup>

Disney further invoked Article 30 of the Treaty of Rome<sup>241</sup> and argued that it would be violated if Disney were obligated to pull the toys from its shelves because these goods had been imported from Great Britain.<sup>242</sup> Citing a recent European Court of Justice case, which held that "national law could not impose the exclusive use of one language on labeling . . . when consumer information can be provided by other measures,"<sup>243</sup> Disney argued that the Loi Toubon's obligation to provide a translation was an "unjustifiable obstacle to intra-community commerce" because other means were possible to describe the product.<sup>244</sup> However, the Loi Toubon does specifically allow for the use of other languages, in conjunction with the national language.

As to the second charge, that warning labels appearing in English also violated Article 2, Disney pointed out that it had pulled those toys which did not have French warning labels from its shelves.<sup>245</sup> Despite these arguments, it seems that Disney would not have prevailed under the statute had the case been allowed to go forward. Indeed, even though it dismissed the

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236. The statute's implementing decree stipulated that the law came into effect with regard to packaging as of March 7, 1995 (but provisions regarding information in the public thoroughfare, and those requiring legible, audible or illegible translations, came into effect on September 7, 1995). Implementing Decree, *supra* note 85, art. 16. See also *supra* note 85 and accompanying text.

237. Brief for ADC & Mme. Vivier, Mar. 2, 1995, at 5 (on file with author).

238. Brief for Disney, Mar. 2, 1995, at 3-7 (on file with author).

239. Answering Brief for Disney, Mar. 23, 1995, at 3 (on file with author).

240. *Id.*

241. *Id.* at 4.

242. *Id.*

243. *Id.* at 5 (quoting Case 369/91, *Piageme v. BVBA Peeter*, 1991 ECR 2971, 2985).

244. *Id.* Disney did not, however, explain which alternatives might be available.

245. *Id.* at 6.

case, the court determined that the ADC would have had standing to sue if the association itself had been harmed.<sup>246</sup> In the end, the Disney Store removed all the items which did not provide French labels even though the court did not order it to do so. Therefore, in a sense, Disney seemed to acquiesce that Article 2 of the Loi Toubon, which specifically refers to the labelling of goods and services, had been violated.

### CONCLUSION

The long history of language laws in France has demonstrated that the French regard the integrity of their language as the cornerstone of national unity, identity, and social cohesion. Yet the much ballyhooed cultural objective of the Loi Toubon remains frustrated because the statute as worded is unable to affect the way French is spoken in “everyday discourse,” which is where a language truly exists. The Legislature itself has recognized that, because of this constitutionally imposed “limitation” in the scope of the statute, the latest attempt to regulate French carries more symbolic than legal punch.

For the business community, however, the Loi Toubon is more problematic. Although in many ways it merely duplicates the 1975 statute it replaces, the new law extends the language requirement to new areas—but often without providing clear guidelines to help elucidate Legislative intent. This is especially troublesome because non-compliance with the statute will expose violators to substantial fines, and possibly even prison terms.

Even though the Loi Toubon is laden with exceptions, many areas involving commercial transactions do not escape its provisions. At the very least, the obligation to translate communications falling within the public thoroughfare, such as advertising, will drive up the cost of doing business in France. Even certain nominally “private” communications will be affected, such as deal documents in which a private entity contracts to perform “public service functions.” It remains to be seen how stringently the new law will be enforced and, consequently, the extent to which promotion of the French language might cost France investment and trade opportunities.

In the event the statute survives scrutiny under supranational European law, the real import of the Loi Toubon will ultimately be determined through judicial interpretation. But because French courts are unfettered by the doctrine of *stare decisis*, it is likely that the law will be challenged repeatedly. The resultant bevy of potentially inconsistent judicial interpretations

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246. The court ruled that individuals were not certified to sue under the Loi Toubon because only the Procureur (district attorney) or certified associations could sue “in the interest of the law under the Loi Toubon.” Court Order of Mar. 6, 1995 (ADC et Madame Françoise Vivier v. La Société de la Disney Store (France) S.A.), Trib. gr. inst. Paris, Ref. 52514/95, No. 1/JP, at 2; Court Order of Mar. 30, 1995, Trib. gr. inst. Paris, Ref. 52514/95, No. 1/FF, at 2 (on file with author).

might well lead to much uncertainty and confusion for firms attempting to comply with the language requirement.

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\* Licence (B.S.) 1987 and Maîtrise (M.S.) (Highest Hons.) 1993, Economics, Université de Paris, France; J.D., 1996, California Western School of Law. I dedicate this Comment to my Mexican mother, Magdalena Estela Reyes and to my American father, Joseph Winston Nelms for my bi-cultural upbringing which gave me the desire to explore other horizons. Special thanks to Marc Jobert of Marc & Michel Jobert Partners for providing access to some of the more elusive research materials when I was working as his intern in Paris, and for sharing his invaluable insight into the workings of the French legal system. Special thanks to Cheri Attix of the *California Western International Law Journal*, for her superb editorial assistance and unflinching moral support. Thanks to Law Review office manager Lana Linderman for enduring the Sisyphean task which this Comment represented to all of us.

