

The expression of the concepts of *dolus* and *culpa* in Chinese legal language: distinctive features and criticalities

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Abstract: The reception of the Romanist legal tradition in China has led to the formation of a specialized lexicon which, along with the translation and production of Roman law-related works, has been subject to constant growth. This kind of terminological transposition has often resulted in the emergence in Chinese of more than one translantant for the same Latin word. As a concrete example of this phenomenon, this paper aims at providing a synoptical overview of the rendering in Chinese of the concepts of *dolus* and *culpa*, two legal institutions also largely connected to the field of commercial law. More specifically, this paper will try to answer the following questions: what is the historical evolution of the main terms used in Chinese to express the concepts of *dolus* and *culpa*? What are the criteria adopted by Chinese translators and authors in choosing these terms? What are the main features and issues related to the linguistic rendering of the two legal institutions? As for the results of this study, attention will be paid to one of the peculiarities of the linguistic rendering of the concept of *culpa*, that is the use of two different translantants: *guoshi* 过失 and *guocuo* 过错. At the same time, another aspect on which this paper will shed light is the existence of a

plethora of translantants related to the concept of *dolus* (*qizha* 欺诈, *guyi* 故意, *zhaqi* 诈欺, etc.). In this sense, on the one hand, it will be shown how the presence of multiple translantants is acceptable and useful when they are used to express the different shades of meaning conveyed by *dolus* and *culpa* that cannot be rendered by means of one single translantant for each of these two notions; on the other hand, this paper will highlight the necessity of a higher homogeneity and standardization of the Chinese Romanist lexicon.

Keywords: Chinese legal language, Chinese Romanist lexicon, legal translation, *dolus*, *culpa*, fault, fraud, intent, negligence

L'espressione dei concetti di *dolus* e *culpa* nel linguaggio giuridico cinese: caratteristiche distintive e criticità

Abstract: La recezione del diritto romano in Cina è coincisa con la formazione di un lessico specialistico che, di pari passo con la crescita della letteratura romanistica cinese, si è costantemente arricchito. In tale processo, la resa terminologica dei contenuti propri della tradizione giuridica romanistica si è spesso manifestata con la comparsa in cinese di più di un traducevole per lo stesso termine latino. Come esempio concreto di questo fenomeno, il presente studio mira a fornire un quadro sinottico relativo alla resa in cinese dei concetti di *dolus* e *culpa*, istituti giuridici anche ampiamente connessi con la sfera del diritto commerciale. Più specificatamente, questo contributo proverà a rispondere ai seguenti quesiti: qual è l'evoluzione storica dei principali termini impiegati in cinese per esprimere i concetti di *dolus* e *culpa*? Quali sono i criteri adottati da traduttori e autori cinesi nella scelta di tale terminologia? Quali le principali caratteristiche e criticità connesse con la resa di questi due istituti giuridici? Quanto ai risultati della presente indagine, particolare attenzione sarà posta ad una delle peculiarità della resa linguistica del concetto di *culpa*, ovvero l'uso dei due diversi traducevoli *guoshi* 过失 e *guocuo* 过错. Al contempo, un altro aspetto che verrà messo in luce è l'esistenza di una pleora di traducevoli per *dolus* (*qizha* 欺诈, *guyi* 故意, *zhaqi* 诈欺, ecc.). In tal senso, da un lato sarà evidenziato come la presenza di molteplici traducevoli appaia in taluni casi fondata e funzionale all'espressione delle diverse sfumature di significato convogliate da *dolus* e *culpa*; dall'altro, sarà, altresì sottolineata la necessità di una maggiore uniformità del lessico romanistico cinese, nonché di una sua ulteriore standardizzazione.

Parole chiave: linguaggio giuridico cinese, lessico cinese romanistico, traduzione giuridica, dolo, colpa, colpevolezza, frode, doloso, colposo

1. Introduction

As is known, the interest in Western law that began to spread in China in the second half of the 19th century initially consisted in an interest in Western international law: it derived from an urgent need to protect the country from the more and more aggressive imperialism of the Western nations and to find a way to interact with them on a legal basis. In this context, several works of international law were translated into Chinese, mainly by the *Tongwenguan* 同文馆 (School of Combined Learning, Beijing) and similar structures¹. The very last years of the Qing dynasty were characterized by an even more severe political and social crisis that urged the Chinese government to reform the legal system: in the last decade of its imperial history, China started a legal reform that ‘culminated’ in the Draft Civil Code (*Da Qing min lü cao’an* 大清民律草案, 1911). Being much influenced by the German civil code, it clearly showed China’s will to draw inspiration from the Romanist legal system². Though the draft could never become effective due to the fall of the empire, China later confirmed its choice to adhere³ to the Romanist legal family⁴.

¹ The interest in international law – which belonged anyway to the Romanist legal system – brought, for instance, to the translation, done by Western missionaries, of a series of volumes such as *Ge guo lüli* 各國律例, 1839 (partial translation of E. de Vattel’s *Le Droit de Gents*, London 1758, by the American missionary P. Parker and the interpreter Yuan Dehui 袁得輝 from the English version *Law of Nations* by J. Chitty), and all the works translated by W.A.P. Martin and his students, like *Wan guo gongfa* 萬國公法, 1864 (*Elements of International Law*, H. Wheaton, Philadelphia, 1836), etc. For more information on the introduction of international law in China, see for instance: Zhang 1992 and 魯納 (Svarverud) 2009.

² On this topic, see for instance: Pazzaglini 1991.

³ By saying ‘adhesion to the Romanist legal family’ or ‘reception of Roman Law’, I do not mean that China traditionally lacked a legal system and simply ‘imported’ the Romanist one: China did have a long-established legal tradition but, in the last years of its existence, the Qing government realized that it needed to be reformed and, after careful consideration, chose the Civil law system as a model for reform.

⁴ As pointed out by Cao (2021: 42), in modern China after the end of the imperial dynasties, the Republic of China adopted a largely Western-style legal code in the 1920s and 1930s, with the core of modern Chinese law heavily influenced by the European civil law, and later socialist law, in addition to traditional Chinese thoughts. On China’s orientation towards the Civil law system since the last decade of the empire, see also Schipani 2005; Jiang 2005a; Mi 2005.

The history of the reception of Roman Law in China is a long-lasting process that can be divided into several different phases and, to some extent, is still ongoing. One fundamental chronological subdivision has been proposed by Xu Guodong (2014), who distinguishes two main different phases: the first and the second reception. The former, spanning from the end of the 19th century to the late 1980s, refers to the beginning of the introduction of Roman law-related knowledge in China and is characterized by a general lack of direct fruition of Roman law primary sources (i.e. the *Corpus Juris Civilis*⁵) by the first generation of Chinese Romanists; the latter, from the end of the 1980s till nowadays, pays specific attention to the study of the primary sources and their translation into Chinese (initially from other European languages – mostly English - and then directly from the original Latin texts)⁶.

As pointed out by Cao (2021: 48),

“the vast amount of translation and lawmaking activities by the reform minded Chinese scholars and jurists in translating and introducing Western law to China were seminal in laying the foundation of modern Chinese law and modern Chinese legal language as we know it today”,

therefore “modern Chinese legal language is largely a translated language” (Cao 2021: 51). In this sense, the reception of the Romanist legal system in China has led to the formation of a specialized vocabulary which, along with both the translation of legal works and the composition of volumes by Chinese Romanists, has been subject to constant growth and stratification. This process in some cases determined the emergence in Chinese of more than one translantant for the same Latin word and of a consequent lexical richness or lack of homogeneity. As a concrete example of this

⁵ This compilation, known collectively as the *Corpus Juris Civilis* (AD 528-534), consists of four different parts: the *Digest* (*Digesta*, AD 533), the *Code* (*Codex*, AD 534), the *Institutes* (*Institutiones*, AD 535) and the *Novels* (*Novellae Constitutiones*, created by legal scholars in AD 556 to update the *Code* with new laws issued after AD 534 and summarize Justinian’s own constitutions).

⁶ In this sense, the translation into Chinese of Justinian’s *Institutes* by Zhang Qitai 张企泰 (1989), from an English version, is symbolically important. For more information on the history of the reception of Roman Law in China, see Fei 1994; Xu 2002; Colangelo 2015.

phenomenon, we will focus on analyzing the rendering in Chinese of the concepts of *dolus* and *culpa* in the field of civil and commercial law. *Dolus* in English is rendered as ‘fraud’, ‘(fraudulent) intent’, ‘intentional misconduct’, ‘malice’, ‘deceit’, ‘criminal intent’, etc., while *culpa* is translated as ‘guilt’, ‘(actionable) fault’, ‘negligence’, etc., according to the context. Given this abundance of English transliterations, in this paper I will use the Latin words *dolus* and *culpa* as much as possible, without translating them into English, in order to avoid interference from it. This method of keeping the original Latin terms is quite widespread in the English legal literature on this topic (and on topics originally not belonging to the Common Law system)⁷.

As for the sources used for this study, I chose to analyze Roman Law-related works written in Chinese, ranging from the earliest manuals published at the beginning of the 20th century to recent documents, translated or directly composed in Chinese. To this end, I created a corpus by means of purposive sampling, mainly due to the following two reasons: electronic databases or digital corpora specifically and exclusively focused on Roman law sources, from a diachronic perspective, seem to be currently unavailable; besides, the existing legal databases or corpora do not include, in any case, the most ancient Romanist sources: the earliest Roman law manuals of the late Qing or early Republican period, kept in Chinese national libraries, not only are not available in electronic version, but in most cases, they are also not even accessible to the public since they are classified as rare or ancient, like the volume by Fan Shuxun (1905), held in the National Library of China (Beijing), which, according to the data collected up to the present time, is the earliest Roman Law manual composed by a Chinese author⁸.

More specifically, the sources analyzed focus on the civil and commercial field and include both doctrinal and normative texts,

⁷ For instance, this method was already used by Monro, at the beginning of the 20th century, in his translation of the *Digest*, and it is considered by him as the most appropriate way to deal with Latin technical expressions without an English corresponding term (Monro 1904: III). This method was also listed by De Groot (1999: 208) – and later by Schmidt-König (2005: 225-226) and other scholars – among the possible solutions translators can resort to in case of lack of (full) equivalence.

⁸ I was able to consult this volume thanks to the help of professor Fei Anling, to whom goes my deepest gratitude.

which therefore correspond to what Šarčević respectively defines as informative and regulatory functions (1997: 11) or, also, descriptive and prescriptive functions (Šarčević 2006: 26), i.e.: Roman law and commercial law manuals translated into or directly composed in Chinese, the translation into Chinese of the *Digest*⁹, legislative documents (the Civil Code and several laws of the PRC). In each of these sources, I identified and analyzed all the occurrences of the translantans for *dolus* and *culpa* (in the case of translated works, which could be compared with the original text in Latin) or of the terms used to express these two concepts (in the case of works composed by Chinese authors). Whenever possible, I used the electronic version of the sources (such is the case, for instance, of the laws and the Civil Code of the PRC, available online¹⁰).

In the following paragraphs, first I will provide a concise explanation of the meaning of *dolus* and *culpa* in Roman law, in the form of brief but necessary considerations of a doctrinal nature to better understand the object of this linguistic study; secondly, I will illustrate the diachronic evolution of the terms used in Chinese for the rendering of these two concepts; lastly, I will try to highlight the main features and criticalities connected to their expression.

2. *Dolus* and *culpa*: definition and meaning

Dolus in Roman law and modern civil law has two fundamental meanings. The first one is related to the field of unlawful acts, it refers to the will behind a delict or a crime and also to the willful and wanton misconduct itself. In this sense, *dolus* represents the intention to perform an act, but it also implies the awareness that this act is harmful to others (Luzzatto 1964: 715). The second meaning of *dolus*, on the other hand, refers to *dolus* as a ‘vice of consent’ (‘vice of will’) in a juridical act. In this sense, the intention to harm others finds its

⁹ The *Digest* is made up of 50 books (abbreviated to *D.+the number of the volume*), some of which have been translated into Chinese. For this study I analyzed the translations of the following books, published between 2012 and 2016: D.4, D.9, D.16, D.17, D.23; complete bibliographical information is provided in the References below.

¹⁰ The specific links will be provided when directly citing each source.

expression in a complex of artifices or scams that detrimentally influence the agent's will (Luzzatto 1964: 715) and the will of the act produced under the influence of *dolus* is not a free or a spontaneous one since it has been deliberately misled by other people's bad faith (Funaioli 1964: 738). More generally speaking, as we can read in the 4th book of the *Digest*, Ulpian, quoting Labeo, defines *dolus* as any sort of "artifice, deception, or machination, employed for the purpose of circumventing, duping, or cheating another"¹¹. Therefore, as pointed out by Viana (2014: 317), *dolus* as a broad semantic category encompasses a plethora of elements such as malice, fraudulence, deceit, awareness of performing a scam, mendacity - and, in some cases, even *culpa gravis* (gross negligence). All these semantic shades share a strong psychological and intellectual connotation which is the most characterizing feature of *dolus*: the intentionality and the awareness of the unlawful nature of the act causing harm.

Similarly, *culpa* has two fundamental meanings as well. *Culpa* in the broad sense refers to all actionable fault or misconduct (for both unintentional and intentional acts). It implies responsibility for wrongdoing or failure. The broad meaning includes, therefore, *dolus*. *Culpa* in the strict sense, on the other hand, refers to any behavior or its omission causing harm to others, without there being intentionality of the agent. Therefore, *culpa* in the narrow sense does not include *dolus*, it is to be considered as opposed to it. More specifically it consists in the failure to use due care and diligence. As reported in the 9th book of the *Digest*, Paulus, citing Quintus Mucius, states that *culpa* occurs "when provision was not made by taking such precautions as a diligent man would have done, or warning was only given when the danger could not have been avoided"¹². As pointed out (Schipani 2009), this definition takes into consideration the predictability of the harmful event and the consequent duty to avoid it;

¹¹ D.4.3.1: "omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita". The English translation of the 4th book of the *Digest* done by S.P. Scott (1932) and cited above is available at https://droitromain.univ-grenoble-alpes.fr/Anglica/D4_Scott.htm#III (accessed February 15, 2023).

¹² D. 9.2.31: "culpam autem esse, quod cum a diligente provideri poterit, non esset provisum, aut tum denuntiatum esse, cum periculum evitari non possit". The English translation of the 9th book of the *Digest* done by S.P. Scott (1932) and cited above is available at https://droitromain.univ-grenoble-alpes.fr/Anglica/D9_Scott.htm#II (accessed February 15, 2023).

in this sense, *culpa* refers to negligence, imprudence, lack of skill, non-compliance with the rules that, in a given situation, should be observed by who acts in such situation. As we can see, what distinguishes *dolus* from *culpa* in its narrow sense is the presence of intentionality, since

“*dolus* refers to an intentional act that one shouldn’t have wanted <to happen> (...), *culpa* refers to an unintentional event that one shouldn’t have produced (...); in both cases, the subject has acted in a manner dissimilar from what was required by the law” (Mantovani 1988: 304)¹³.

More specifically, in the justinianean sources, although there seems not to be an exhaustive definition of *culpa*, this concept is frequently identified with an omission of diligence (Talamanca 1960: 518) and, as we will see, this has probably influenced to some extent the terminological choices of Chinese Romanists (especially with regard to the translation of the *Digest*).

3. The rendering of *dolus* and *culpa* during the ‘first reception’ of Roman law

One of the earliest mentions of *dolus* can be found in the manual *Luoma fa* (“Roman Law”), written by Yang Tingyuan in 1912. The term he uses to express *dolus* is *zhaqi* 诈欺: this compound, pre-existing in Chinese¹⁴ is made up of two characters both meaning ‘deceive’, ‘cheat’, ‘disguise’, and as we will see is also used in later works and in today’s legal texts. Yang Tingyuan lists *dolus* among the

¹³ The English translation of this passage from F. Mantovani’s article is mine.

¹⁴ *Zhaqi* can be found, for instance, in the *Han Feizi* 韩非子, 3rd c. BC, containing the fundamental principles of the legalist philosophy, and in the criminal law section of the *Jin Shu* 晋书 (“Book of Jin”, AD 648) which covers the history of the Jin dynasty (AD 266-420). The *Han Feizi* and the *Jin Shu* can be consulted respectively at <https://www.8bei8.com/book/hanfeizi.html>, <http://www.guoxue.com/shibu/24shi/jinshu/jinshuml.htm> (both accessed February 15, 2023).

vices of will, together with *metus* (*qiangpo* 强迫¹⁵) and *error* (*cuowu* 错误), in the chapter on obligations (Yang 1912: 42). On the other hand, no mentions of *culpa* can be found in this volume.

One of the earliest works including mentions of both *dolus* and *culpa* is the manual by Huang Youchang (1918¹⁶). A brief paragraph dedicated to *dolus* is included in the chapter on juridical acts. As in the above-mentioned manual by Yang Tingyuan, *dolus* is translated as *zhaqi*. The definition given by Huang (1918: 276) specifically underlines the two fundamental categories to which the various activities connected to *dolus* belong: *suggestio falsi* ('false statement') and *suppressio veri* ('suppression of truth'):

“诈欺有二。一为不实（*suggestio falsi*）（.....）一为不尽（*suppressio veri*）。”

“There are two types of *dolus*. One consists in the false statement (*suggestio falsi*), (...) and one consists in the suppression of truth (*suppressio veri*)”¹⁷.

In the heading of this paragraph, “诈欺（*dolus*, ‘fraus’）”, Huang Youchang (1918: 276) provides, in brackets, the original Latin word *dolus* together with the term *fraus* ('scam', 'fraud'). This is a clear sign of how the partially undifferentiated use of the Chinese terms for *dolus* and *fraus* has distant origins, tracing back to the first generation of Chinese Romanists. As will be addressed in paragraph 5, the meaning of the two Latin words, *dolus* and *fraus*, is similar but not identical, and therefore different translantants should be used, at least in some cases.

In the same section on obligations, Huang includes a specific chapter on *culpa*. He translates it as *guoshi* 过失, with the Latin term given in brackets. Pre-existing in Chinese¹⁸, this term was later used,

¹⁵ I.e. 'duress'; the expression *qiangpo* has been replaced by *xiepo* 胁迫 in Chinese later sources.

¹⁶ The first edition of Huang's manual was published in 1915 and is kept at the National Library of China (Beijing), but since it is not accessible to the public, I was only able to consult the second one.

¹⁷ The translation of this passage and all excerpts from the Roman Law manuals written in Chinese is mine.

¹⁸ The earliest occurrences of *guoshi* can be found in philosophical works, like the *Zhou li* 周礼 ("Rites of Zhou", 3rd c.-2nd c. BC), listed among the classics of

and is still used, to indicate *culpa* in the narrow sense (i.e. not including *dolus*), and it is in this sense that Huang Youchang utilizes it. More specifically, he defines it as a “lack of diligence” (Huang 1918: 354):

“过失者，谓缺注意 *diligentia* 之程度也。”

“By *culpa* we mean the degree of lack of attention (*diligentia*)”.

It is noteworthy that, unlike the definition given in more recent works by other authors, Huang’s explanation of the concept of *culpa* does not seem to refer to its broad sense (i.e. including *dolus*).

This situation, characterized by the presence of one translant for *dolus* (*zhaqi*) and one translant for *culpa* (*guoshi*) in its narrow acceptation, remains unchanged in later manuals of the Republican era, such as the revised edition of Huang’s manual (Huang 1930) and Qiu Hanping’s manual (Qiu 1933). However, some remarks about the rendering of *dolus* in Chen Chaobi’s manual (Chen 1936) should be made. In this volume, the author uses two different translantants for *dolus*: *zhaqi*, which, as we have seen, had already appeared in Romanist sources, and *guyi* 故意, which I haven’t found in earliest Roman law-related works. In the paragraph about juridical act included in the first part of the volume, Chen (1936: 92) uses *zhaqi* to refer to *dolus* as a vice of will, together with *error* and *metus* (as in Yang 1912 and later works):

“至影响自由意思之特殊情形，计有三种，即错误（*error*），诈欺（*dolus*），胁迫（*metus*）是也。”

“There are three types of exceptional circumstances that influence the <subject’s> will: *error*, *dolus* and *metus*”.

In this regard, Chen also mentions the *actio doli* (*zhaqi zhi su* 诈欺之诉) and the *exceptio doli* (*zhaqi zhi kangbian* 诈欺之抗辩).

Confucianism (Cai 2005: 190); *guoshi* later began to be used in a legal context, as in the criminal law section of the *Han Shu* 汉书 (“Book of Han”, 1st c. AD - 2nd c. AD), available at <https://ctext.org/han-shu/xing-fa-zhi/zhs> (accessed February 15, 2023). According to He Qinhua (2009: 354-355), since the Western Jin period (3rd c. AD) this term became widely used in legal documents and is regulated in the penal code of the Tang dynasty (*Tang li* 唐律), 7th c. AD.

The term *zhaqi* is also used by him (Chen 1936: 135) in the paragraph on obligations where he lists *dolus* among the private delicts (i.e. the “acts that directly violate the law”), together with theft, robbery, duress¹⁹ and damage to property. In the same paragraph, when Chen introduces the “acts that violate the contract”, he provides an explanation of *dolus* and *culpa*:

“明知其行为害及他人之权利而立意为之者，谓之故意（*dolus*）。（……）对于应加注意（*diligentia*）之事，怠于注意者，谓之过失（*culpa*）”。

“*dolus* occurs when a subject intentionally performs an act, being aware it is harmful to other people’s rights. (...) *Culpa* occurs when a subject fails to exercise due diligence²⁰”.

As you can see, in this passage, Chen uses *guyi* to render the Latin *dolus*. Preexisting in Chinese²¹, *guyi* is quite common in later Romanist sources and today is one of the main terms used in Romanist – and, generally speaking, legal – documents to express the concept of *dolus*. As we will see in several later sources, compared to the other translantants for *dolus*, *guyi* emphasizes the intentional element of an action. At the same time, it also refers to an act performed by the subject (mostly causing negative consequences for others) even if he/she knows he/she shouldn’t: in this regard, its meaning is close to that of the Latin *dolus*. On the contrary, whereas the use of the term *dolus* is limited to the legal field, *guyi* in Chinese is not subject to this restriction (even though its earliest occurrences can be found in documents of a legal nature [He 2009: 355]).

The terminological framework related to the concepts of *dolus* and *culpa* in the sources produced during the phase of the ‘first

¹⁹ The delicts in the strict sense (i.e. those described by Justinian and Gaius in their *Institutes*) are: *furtum* (‘theft’), *rapina* (‘robbery’), *injuria* (‘injury’) and *damnum injuria datum* (‘damage to property’); however, several later authors also include *metus* (‘duress’) and *dolus* among them.

²⁰ The term *zhuyi* 注意, used here to express the Latin word *diligentia* (provided in brackets by the author), literally means ‘attention’.

²¹ As pointed out by He Qinhua (2009: 355), the concept of *dolus* is already present in pre-Han sources. In these texts, the terms used to this end are mainly monosyllabic words, such as *gu* 故 or *duan* 端, which later fell into disuse. The earliest occurrences of the disyllabic compound *guyi* (in this specific semantic acceptation) can be found in the above-mentioned *Jin shu*.

reception’ is basically constituted by the above-mentioned translantants (*zhaqi* and *guyi* for *dolus*, *guoshi* for *culpa*). The first decade of the PRC’s history represents a stalemate in the process of introduction of the Romanist legal science in China: even though in this period great importance is attached to law and, after the abrogation of the legislation of the Republican era, an intensive legislative production takes place, Western knowledge is, generally speaking, considered as an expression of the capitalist world and therefore no longer directly and officially absorbed²². The period of the Cultural Revolution is even less ‘productive’ in terms of the reception of Roman law, being characterized by a total refusal of the Western and ‘bourgeois’ cultural elements and therefore usually referred to as the “legal nihilism” phase (Cavalieri 2015). A new “awakening of the spirit of Roman law” (Jiang 2005b: 49) and, consequently, as we will see in the following paragraph, a new phase in the evolution of the Chinese Romanist lexicon will take place after the end of the Maoist era, since the ‘80s.

4. The rendering of *dolus* and *culpa* during the ‘second reception’ of Roman law

As mentioned above, since the end of the 1980s, China sees a renewed interest in the study of Roman law, which manifests as both the production of Roman law manuals and the translation into Chinese of the justinianean sources. At the same time, an intensive legislative activity takes place in the civil and also specifically commercial field through the promulgation of numerous laws, eventually culminating in the Civil Code of the PRC (effective on January 1, 2021). This paragraph will provide a detailed illustration of the terminological framework related to *dolus* and *culpa* in the legal literature of this new phase. For practical purposes, the contents will be divided into two sub-paragraphs corresponding to the macro-categories to which the analyzed sources belong: 1) manuals (translated or composed *ex novo*) and translations of the justinianean sources, 2) legislative documents.

²² The only foreign legal tradition still ‘accepted’ in the ‘50s was Soviet law: in this sense, being Soviet law, in turn, based on the Romanist tradition, Roman law continued, to some extent, to influence Chinese law (Ding 2005: 103)

4.1 Manuals and translations of justinianean sources

Compared to the Romanist sources produced in China during the phase of the ‘first reception’, the volumes published since the late 1980s reflect a different and more complex scenario. Examples of this heterogeneity will be provided below, but a necessary remark should be made first: the following description does not aim at evaluating the adequacy of the single terminological choices of each Chinese author or translator cited, which are in any case legit; it aims, instead, at giving an overall illustration of the lexical richness and variety which emerge from a comprehensive view of the sources, and which, as will be discussed in paragraph 5, per se are undoubtedly a resource, but in some cases may become redundant or unclear.

Some substantial differences from the lexical situation before the late 1980s can be found in the manual by Jiang Ping and Mi Jian (1987), in which *dolus* is treated in two different paragraphs. The first one is included in the section on contract law and defines *dolus* as a type of vice of will:

“一般情况下，影响当事人意思真实表达的原因有三种：即错误、诈欺、胁迫” (Jiang and Mi 1987: 232) .

“In general, three are the causes that influence the authenticity of the subject’s declaration of will: *error*, *dolus* and *metus*”.

In the second paragraph, *dolus* is classified as a delict:

“诈欺 (*dolus malus*)：即以蒙骗欺诈的手段使他人一定法律行为，进而从中谋取不法利益。它作为私犯的一种” (Jiang and Mi 1987: 282)”.

“*Dolus [zhaqi]*²³ (*dolus malus*) means causing others to perform a juridical act by deceptive and fraudulent means, thus obtaining unlawful benefits. It is a type of delict”.

Similarly to some of the aforementioned earlier manuals by other authors, Jiang and Mi illustrate the two fundamental meanings

²³ In my English translation of the Chinese sources, for reasons of clarity, in some cases, I provide in squared brackets the Chinese word used in the original text.

of *dolus* in civil law: *dolus* as a vice of consent and as the psychological element of an unlawful act. The word that they use for *dolus* is *zhaqi*, which, as we have seen, is already present in Yang (1912), Huang (1918) and others. However, together with *zhaqi*, they also use the word *qizha* 欺诈, in quite an undifferentiated or interchangeable way: not surprisingly, in the passage on *dolus* as a delict that I have just cited (Jiang and Mi 1987: 282), the authors use *qizha* to explain the meaning of *zhaqi*. Likewise, in the following passage, *qizha* is placed next to the other two vices of will, in the same manner as *zhaqi* in the above-cited excerpt (Jiang and Mi 1987: 232), so it is clearly employed as a translant for *dolus*:

“不得存有错误、欺诈、胁迫所致的意思表示，是为‘意思的瑕疵’。在此情况下，契约无效。” (Jiang and Mi 1987: 242).

“<The declaration of will> must not be induced by *error*, *dolus* or *metus*, i.e. the so-called ‘vices of will’. In these cases, the contract is void”.

Besides, there are cases in which the original Latin expressions provided in brackets by the authors further confirm their use of *zhaqi* and *qizha* as interchangeable translantants for *dolus*, for instance: “‘诈欺 [*zhaqi*] 之诉” (actio de dolo)” (Jiang and Mi 1987: 283), “防止欺诈 [*qizha*] 的担保之要式口约 (De dolo cautio)” (Jiang and Mi 1987: 250). The compound *qizha* is made up of the same characters as *zhaqi* but they are in reverse order²⁴. The presence of two different translantants, moreover so similar and used in the same context, seems to be unclear or even questionable. *Qizha* can also be found in later sources and today is one of the main terms used to express *dolus*: it is yet to be clarified whether *zhaqi* and *qizha* are perceived by Chinese authors as synonyms or as words that have a similar but not identical meaning (as we will see, in the sources analyzed for this study, in some cases they appear to be synonyms, in others they seem to be partially different). Furthermore, the situation

²⁴ The word *qizha* was preexisting in Chinese, its early occurrences, in documents of a historical - not strictly legal - nature, can be found, for instance, in the *Zhan guo ce* 战国策, “Strategies of the Warring States” (uncertain date, the surviving version was edited in the 1st c. BC). The section containing *qizha* is available at <https://ctext.org/zhan-guo-ce/yan-er/zhs> (accessed: February 15, 2023).

related to the expression of the concept of *dolus* in Jiang and Mi's manual is even more heterogeneous, due to the presence of another translantant, i.e. the above-mentioned *guyi*: “在古典法中，违法 (*injuria*)被等同于故意和过失 (*dolus* and *culpa*)” (“In the classical law, *injuria* was equated with *dolus* [*guyi*] and *culpa* [*guoshi*]”). In this volume, *guyi* is used several times and, as in this passage, always occurs matched with *guoshi* in expressions like: “故意和过失/ 故意或过失” (*dolus* and *culpa*/*dolus* or *culpa*). As we will see, this use of *guyi* combined with (or, actually, as opposed to) *guoshi* is quite frequent in later sources.

As for the rendering of the concept of *culpa*, *guoshi* is the main term used by Jiang and Mi who, analogously to what we have found in earlier manuals, explain it as a lack of diligence:

“过失，‘*culpa*’指欠缺勤谨注意（*diligentia*），故为主观心理状况的体现。” (Jiang and Mi 1987: 287).

“*Culpa* refers to a lack of diligence²⁵ (*diligentia*), it therefore constitutes the manifestation of a subjective psychological state”.

However, together with *guoshi*, Jiang and Mi also use another term: *guocuo* 过错²⁶. The authors do not provide a definition of *guocuo*, but they mostly use it to express *culpa* in the broad sense (inclusive of *dolus*). See, for instance:

“由上可知，罗马法中私犯的有关规定已具备了近现代侵权行为成立的一般要件。即违法、致害、过错、因果关系。” (Jiang and Mi 1987: 281).

“From the foregoing, it appears that Roman law regulations about private delicts already included the general elements <necessary> for

²⁵ Literally: “diligent attention”.

²⁶ Preexisting in Chinese, *guocuo* can be traced back at least to the 14th century (see, for instance, the *Yuan dian zhang* 元典章, “Statutes and Precedents of the Yuan Dynasty”, a work on the legal and socio-political life in the Yuan period, available at <https://ctext.org/wiki.pl?if=gb&chapter=702612&remap=gb>, accessed: February 15, 2023).

the constitution of tort <liability> in modern law. Namely: unlawfulness, damage, fault²⁷, causation”.

Guocuo is a new element in the terminological scenario of the Romanist sources since in earlier documents of this kind there seems not to be a term referring to *culpa* in the broad sense.

Even though *guocuo* is generally used by the authors to express the broad meaning of *culpa*, there is one case in which they presumably use it, instead of *guoshi*, to refer to the narrow sense:

“对于财产的损害（*damnum injuria datum*）：又可称作“对物私犯”，指因故意或过错而不法加害于他人的行为。”（Jiang and Mi 1987: 282).

“The wrongful damage to property (*damnum injuria datum*), also known as delict against property, refers to unlawful acts damaging others intentionally or unintentionally²⁸”.

Guocuo occurs quite frequently in later sources and in today’s documents is still widely used. As we will see, although at present the overall trend is to use it to express *culpa* in the broad sense, there are several cases, in the sources analyzed, in which it is employed – instead of *guoshi* – to express *culpa* in the narrow sense or in which *guoshi* and *guocuo* are used interchangeably.

In the sources analyzed, the first explicit explanation of the two different meanings of *culpa*, together with an explicitly differentiated use of *guoshi* and *guocuo* (respectively for the narrow sense and for the broad sense of *culpa*) can be found in the translation into Chinese of P. Bonfante’s volume *Instituzioni di diritto romano* (“Institutes of Roman Law”), done by Huang Feng in 1992. A brief explanation is given by Huang Feng in a footnote:

“当‘*culpa*’一词是指不同于‘*dolus*（诈欺，故意）’的主观因素时，它被译为‘过失’，以便同包括诈欺形式的广义‘*culpa*（过错）’相区别。”（Huang 1992: 77).

²⁷ Here *guocuo* is to be intended as *culpa* in the broad sense (i.e. ‘fault’, indicating intent or negligence).

²⁸ Here I translate *guocuo* as ‘unintentionally’ since I believe this is the acceptance with which the authors have employed it in this case. However, as already pointed out, the proper term for this meaning would have been *guoshi*.

“When the word ‘*culpa*’ refers to a subjective factor different from ‘*dolus* (*zhaqi, guyi*)’, it is translated as *guoshi*, in order to distinguish it from ‘*culpa* in the broad sense (*guocuo*)’ which includes *dolus*”.

This distinction is later confirmed and further explained by Huang Feng both in his Roman law dictionary (Huang 2002) and his Roman law manual (Huang 2003). Below is the definition of *culpa* provided by Huang in his dictionary:

“*Culpa*: 过错, 过失。拉丁文 *culpa* 有两种含义, 一层含义是指非法行为本身, 相对应的中文术语是“过错”; 另一层含义是指, 判定某人 (特别是债务人) 承担责任的主观标准, 相应的中文术语是“过失”。从前一种含义上讲, *culpa* (“过错”) 也包括出于故意 (见 *dolus*) 而实施的非法行为; 从后一种含义上讲, *culpa* (“过失”) 是一种不同于故意的归责标准, 主要表现为不同程度的疏忽, 即: 勤谨注意 (见 *diligentia*) 的缺乏。” (Huang 2002: 77).

“*Culpa: guocuo, guoshi*. The Latin word ‘*culpa*’ has two meanings; the first one refers to the unlawful act per se, its corresponding Chinese term is *guocuo*; the second one refers to the subjective criterion to judge one person’s responsibility (especially the debtor’s), its corresponding Chinese term is *guoshi*. From the perspective of the first meaning, *culpa* (“*guocuo*”) includes unlawful acts committed intentionally²⁹ (see: *dolus*); from the perspective of the second meaning, *culpa* (“*guoshi*”) is a criterion for liability imputation, different from *dolus*, and it consists in different degrees of negligence, i.e. lack of diligence³⁰ (see: *diligentia*)”.

As for the rendering of *dolus*, Huang Feng’s terminological choices show some kind of variation in time (i.e. in his three volumes). In his translation of Bonfante’s manual, Huang (1992: 77) uses both *zhaqi* and *guyi*, initially placing them side by side, so as to indicate that they’re synonyms (even though, in fact, *guyi* is not used by him to express cheating, it is only used to indicate intentionality, whereas *zhaqi* is used in both ways). Moreover, in this volume Huang also uses *qizha*: this time, however, *qizha* is not employed as a synonym for *zhaqi* to express *dolus* (as in Jiang and Mi 1987), but as a translantant for *fraus* (‘scam’, ‘fraud’) which, in some cases, also

²⁹ The term used here by Huang is *guyi*.

³⁰ Literally: ‘diligent attention’.

happens in Zhou Nan's manual³¹, published two years later (Zhou 1994). This is even more evident in Huang's dictionary (2002): *dolus* and *fraus* are listed as two different entries, with the former translated with the three different terms *guyi*, *zhaqi* and *e yi* 恶意, and the latter translated as *qizha*. It can thus be seen how, in the sources described above, *qizha* is used in different manners: as a translant for *dolus* in the manual by Jiang and Mi (1987), as a translant for *fraus* in the volumes by Huang Feng (1992 and 2002), and as a translant for both *dolus* and *fraus* in Zhou Nan (1994); as it will be shown, this situation of 'varied' use of *qizha* and, generally speaking, of undifferentiated translants for *dolus* and *fraus* persists in some of the later sources. It should also be noted that, in the dictionary, although the author provides three translants for *dolus*, he only uses *zhaqi* in the explanation given right after (Huang 2002: 92)³², and while *qizha* appears again later in the volume as a translant for *fraus*, *e yi* is only mentioned once, as a translant for *dolus*, with no further explanation. Literally meaning 'bad intentions', *e yi* had actually already appeared in Romanist sources³³, i.e. in the manual published by Zhou Nan in 1994 (which, for reasons of space, I do not describe here in detail), both as one of the translants for *dolus* and as a term to express the concept of *mala fides*, 'bad faith' (Zhou 1994: 643). As we will see, *e yi* continues to be used in later sources, sometimes as a translant for *dolus*, but in most cases as a translant for *mala fides*.

As for the rendering of *dolus* in the manual published by Huang one year later (2003), some variations should be noted. In the first place, *e yi* is no longer listed as a translant for *dolus*. In the

³¹ In his manual, Zhou uses *qizha* both as a translant for *dolus* (e.g. 1994: 590), interchangeably with *guyi* and *e yi*, and as a translant for *fraus* (e.g. 1994: 794).

³² For reasons of space, the text is here only partially reported: "Dolus 故意, 诈欺, 恶意: 此术语在罗马法中不仅表示一种有着明确意识和意愿的心里状态, 而且可以用来表示欺骗行为, (.....) 罗马法学家将诈欺区分为'恶诈欺 (dolus malus)'和'善诈欺 (dolus bonus) ' (.....)", "*Dolus: guyi, zhaqi, e yi*. This term in Roman law not only refers to the fully conscious and intentional state of mind <of a subject>, but may also be used to express <his/her> act of cheating, (...) Roman jurists distinguished two types of *dolus*: *dolus malus* [*e zhaqi*] and *dolus bonus* [*shan zhaqi*] (...)"

³³ In other kinds of Chinese sources there are much earlier occurrences of *e yi*, for instance in the above-mentioned *Han Shu* (for the related passage from this work see <https://ctext.org/pre-qin-and-han/zhs?searchu=%E6%81%B6%E6%84%8F>, accessed February 15, 2023).

second place, *qizha* is not used as a translant for *fraus*, but as a translant for *dolus*. It is, in this sense, employed by Huang as a synonym for *zhaqi* and *guyi*. More specifically, the two terms *zhaqi* and *qizha* are used interchangeably by him, both singularly and as part of more complex locutions (see, for instance, the translation of *actio doli: zhaqi zhi su* 诈欺之诉讼, Huang 2003: 25, and *qizha zhi su* 欺诈之诉, Huang 2003: 208). The cases of this terminological overlapping are numerous, below is one of the most irrefutable, represented by the repetition of the same sentence in two different parts of the volume, the first time using *qizha* and the second time using *zhaqi*:

“欺诈是一种重大过失。” (Huang 2003: 269).

“*Dolus [qizha]* is a type of *culpa lata*³⁴”

“诈欺是一种重大过失。” (Huang 2003: 342).

“*Dolus [zhaqi]* is a type of *culpa lata*”.

As will be argued in paragraph 5, the use of different translantants in such situations may appear unnecessary.

An even more heterogeneous terminological framework can be found in later sources, such as Roman law manuals and the translation into Chinese of the *Digest* (2012-2016). The rendering of *culpa* seems to consolidate into the binomial *guocuo/guoshi*, even though there are cases of not fully differentiated use, such as:

“罗马法有两种过错形态：故意和过失。（……）故意是行为人主观意愿上的欠缺或曰意思瑕疵，而过失则是行为人理解力上的欠缺，广义的过失是包括故意在内的。” (Fei 2009: 355).

“In Roman law, *culpa* in the broad sense [*guocuo*] is of two types: *dolus [guyi]* and *culpa* in the narrow sense [*guoshi*]. (...) *dolus* is a deficiency in the subjective will of the person performing the act, also known as vice of will; *culpa* in the narrow sense is a deficiency in his/her understanding; *culpa [guoshi]* in the broad sense includes *dolus [guyi]*”.

³⁴ The author refers to the following passage from the *Digest* (D.16,3,32): “*culpa lata dolo aequiparatur*” (*culpa lata* is to be equated with *dolus*). *Culpa lata* (or *gravis*) is usually translated into English as ‘gross negligence’.

In this passage, the author first uses *guocuo* to refer to the broad meaning of *culpa* (i.e. ‘fault’, including both *dolus* and *culpa* in the narrow sense), and then resorts to the expression *guanyi de guoshi*, instead of using *guocuo*, to refer to *culpa* in the broad sense.

Likewise, we find *guocuo* instead of *guoshi* in this passage from the translation of the 9th book of the *Digest*, even though the Latin term *culpa* here refers to its strict sense:

“D.9.2.31 (...) *culpam* autem esse, quod cum a diligente provideri poterit, non esset provisum, aut tum denuntiatum esse, cum periculum evitari non possit.

D.9.2.31 (.....) 而过错就是, 一个谨慎的人能够预见却没有预见的和预防, 或者只是在危险已不可避免时方做出警告。” (Li and Mi 2009: 69)

“Because it is negligence³⁵ when provision was not made by taking such precautions as a diligent man would have done, or warning was only given when the danger could not have been avoided”.

At the same time, it should also be noted that, in some cases, Chinese authors or translators use another term to express *culpa* in the narrow sense, namely *shuhu* 疏忽 (literally meaning ‘carelessness’, ‘inattention’). In the translations of the *Digest*, *guoshi* and *shuhu* are sometimes both used to render *culpa* (without a clear differentiation, basically as synonyms). In this sense, *shuhu* appears for instance, as a translant for *culpa*, in the following passage from the translation of the 23rd book:

“D. 23, 3, 46 (...) sed neque periculum dominus praestare debebit (si forte debitor mulieris dotem promiserit) neque *culpam*.

(...) 但是主人不承担风险或疏忽 (如果妻子的债务人承诺嫁资)” (Luo 2013: 107)

“The latter, however, will not be responsible for any risk, or for negligence, if the debtor of the woman promises the dowry”³⁶.

³⁵ We are citing again here Scott’s translation: he uses ‘negligence’ to render the word *culpa*, used in its narrow sense in the original Latin text. The Chinese translators have opted, instead, for *guocuo*.

Not only is *shuhu* in some cases used interchangeably with *guoshi* as a translant for *culpa*, but it is also used in Romanist sources to express the Latin word *neglegentia* (‘negligence’), as in the translation of the 17th book of the *Digest* (Li 2014: 63). As will be addressed in paragraph 5, being the concepts of *culpa* and *neglegentia* quite similar, their translantants may coincide in some cases, but in others, if their translantants are not clearly differentiated, terminological ambiguity may occur.

The situation related to the rendering of *dolus*, on the other hand, continues to show a greater variety and lack of stability in the works produced since the ‘90s: *guyi*, *zhaqi*, *qizha* and sometimes other translantants (e.g. *e yi xingwei* 恶意行为³⁷) are often used interchangeably. This can be seen, for instance, in the above-mentioned manual edited by Fei in which *dolus* is translated mostly as *zhaqi*, *qizha*, *guyi* but in some cases also as *e yi* (2009: 255) and even as *qipian* 欺骗 (‘deceit’):

“罗马人区分 ‘恶意的诈欺’ *dolus malus* 和 ‘善意的欺骗’ *dolus bonus*” (Fei 2009: 115).

“The Romans distinguished *dolus malus* [*e'yi de zhaqi*] from *dolus bonus* [*shan'yi de qipian*]”.

The above-cited lexical variety is also quite evident in the translation of D.9, in which the same expression, *exceptio doli*, is rendered as *e yi kangbian* but also as *qizha kangbian* and *guyi kangbian* (respectively: Li and Mi 2009: 81, 121, and 139).

Moreover, the use of *zhaqi* and *qizha* continues to appear rather unclear: some authors only use one of them for *dolus* and others both of them; some other authors (e.g. Dou 2012, in D.4,1,7,1) use the former for *dolus* and the latter for *fraus*. In general, it should be kept in mind that in the last decade *zhaqi* seems to occur at a lower frequency³⁸. This is particularly evident in commercial law-related sources, in which the frequency of the word *qizha* is much higher: in

³⁶ Translation by Scott (1932), available at https://droitromain.univ-grenoble-alpes.fr/Anglica/D23_Scott.htm#III (accessed February 15, 2023).

³⁷ See for instance in D.16.3.1.7.

³⁸ Although *zhaqi* is currently less frequent than *qizha*, it is still undoubtedly used as a translant for *dolus*, as can be seen in authors like Chen Xingliang who states that *zhaqi* and *qizha* are synonyms (Chen 2019), Xu Guodong (Xu 2016: 875), etc.

the manuals of commercial law analyzed (Zhao 2015, Fan and Wang 2015, Qin 2017, Shi 2018, Fan et al. 2022, etc.) the *dolus*-related terms are *qizha* and *guyi*³⁹, and *zhaqi* appears in one manual only (Zhao 2004), together with the other two terms. However, it should be noted that, in the field of commercial law, *qizha* is frequently used to specifically refer to the concept of *fraus* ('fraud'), for instance when addressing themes like fraud on the customer (e.g. Zhao 2004: 439; Fan and Wang 2015: 334), securities fraud (e.g. Shi 2018: 144), bankruptcy fraud (e.g. Zhao 2004: 783, 789, etc.). As for *zhaqi*, it occurs in Zhao (2004) as a synonym of *qizha*: the expression *zhaqi pochān* 诈欺破产 (bankruptcy fraud) is used when citing article 366 of the Japanese Commercial Code (Zhao 2004: 783)⁴⁰, whereas the expression *qizha pochān* 欺诈破产 is used in the specific paragraph on this topic (Zhao 2004: 789).

4.2 Legislative documents

In the legislative documents analyzed, the terms used to refer to *dolus* are almost exclusively *guyi* and *qizha*, the former frequently employed as opposed to *zhongda guoshi*, to refer to intentionality, the latter mainly used together with *xiepo*, to refer to the vice of consent. This can be seen, for instance, in the Contract Law of the PRC (1999)⁴¹ and in the Civil Code of the PRC (effective: 2021)⁴²:

³⁹ *E yi* also occurs in rare cases (e.g. Fan and Wang 2015).

⁴⁰ *Zhaqi* appears here when Zhao directly quotes the translation into Chinese of the Japanese Commercial Code (by Wang Shujiang and Yin Jianping, 2000), while in the rest of his volume Zhao uses *qizha*. However, it is still noteworthy that different Chinese authors employ different terms to refer to the same specific expression ('bankruptcy fraud').

⁴¹ The original text of the law is available at http://www.gov.cn/banshi/2005-07/11/content_13695.htm (accessed February 15, 2023); unless otherwise specified, the English translation cited below has been taken from the National People's Congress of the PRC's website: http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/11/content_1383564.htm (accessed February 15, 2023).

⁴² Both the original Chinese text and the English translation of the Code are available at the National People's Congress of the PRC's website, see respectively: <http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml>, <http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d6941>

Lara Colangelo: The Expression of The Concepts of Dolus ...

Contract Law

“第五十三条 合同中的中的下列免责条款无效:

(.....) (二) 因故意或者重大过失造成对方财产损失的。
(.....)”

“Article 53 The following clauses on liability exemption in a contract shall be invalid: (...) 2) those causing losses to property to the other party by intention or due to gross negligence (...)”.

“第五十二条 有下列情形之一的，合同无效:

(一) 一方以欺诈、胁迫的手段订立合同，损害国家利益。 (...)
”

“Article 52 A contract is invalid under any of the following circumstances: (1) either party enters into the contract by means of fraud or coercion and impairs the State's interests; (...)”.

Civil Code of the PRC

“第一千一百二十五条 继承人有下列行为之一的，丧失继承权: (一) 故意杀害被继承人; (.....) (五)以欺诈、胁迫手段迫使或者妨碍被继承人设立、变更或者撤回遗嘱,情节严重。”

“A successor is disinherited if he has committed any one of the following acts: (1) intentionally killing the now decedent; (...) (5) through fraud or duress, compelling or interfering with the testator to write, alter, or revoke a will, and the circumstances are serious”.

In legislative documents, *zhaqi* doesn't seem to be used, neither do other translantants (different from *qizha* and *guyi*) employed in some cases in manuals and non-legislative documents. *E yi* is used in rare cases, mainly meaning 'bad faith' (see, for instance, art. 459 of the Civil Code or art. 4 of the Trademark Law of the PRC⁴³).

[9d1e/files/47c16489e186437eab3244495cb47d66.pdf](http://www.gov.cn/guoqing/2020-12/24/content_5572941.htm) (both accessed February 15, 2023). For an Italian translation of the General Part of the Civil Code with a valuable set of explanatory notes, see Monti (2019); for an Italian translation of the whole document and a detailed introduction, see Huang (2021).

⁴³ Approved in 1982, lastly revised in 2019. Available at http://www.gov.cn/guoqing/2020-12/24/content_5572941.htm (accessed February 15, 2023).

As for the rendering of *culpa*, in legislative documents the differentiated use of *guoshi* for the narrow sense and *guocuo* for the broad sense seems quite consolidated. A clear example of this contrastive use of the two Chinese terms can be found in art. 406 of the Contract Law, which includes both:

“第四百零六条 有偿的委托合同，因受托人的过错给委托人造成损失的，委托人可以要求赔偿损失。无偿的委托合同，因受托人的故意或者重大过失给委托人造成损失的，委托人可以要求赔偿损失。受托人超越权限给委托人造成损失的，应当赔偿损失。”

“Article 406 Under a commission contract for value, if the principal sustains any loss due to the fault of the agent, the principal may claim damages. Under a gratuitous agency appointment contract, if the principal sustains any loss due to the agent's intentional misconduct or gross negligence, the principal may claim damages”⁴⁴.

Further examples of the differentiated use of the two terms can be found in several other laws of the PRC, such as the Insurance Law (see for instance articles 108 and 129)⁴⁵, the Company Law (e.g. articles 94 and 207)⁴⁶, and in the Civil Code as well (e.g. articles 43 and 171). In the legislative sources analyzed, no cases of terms other than *guoshi* and *guocuo* seem to be used to express the notion of *culpa*.

As we have seen, the rendering of the concepts of *dolus* and *culpa* in legislative documents is characterized by a minor terminological heterogeneity. This is likely due to the prescriptive function of this type of document, less inclined to terminological variety than descriptive documents.

⁴⁴ Translation mine.

⁴⁵ Available at <https://flk.npc.gov.cn/detail2.html?MmM5MDImZGQ2NzhiZjE3OTAxNjc4YmY3YzQwNjA4MTE%3D>, (accessed February 15, 2023).

⁴⁶ Available at http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-11/05/content_2065671.htm, (accessed February 15, 2023).

5. Discussion

As mentioned in paragraphs 3 and 4.1, the Chinese terms to express the concepts of *dolus* and *culpa* were not created in parallel with the beginning of the process of reception of Roman Law in China, they were preexisting and in most cases also used in legal texts. Therefore, they cannot be classified as neologisms in the strict sense (i.e. terms originally not present in the TL) nor can most of them be considered as neologisms in the broad sense, namely words originally not existing in the legal system of the TL (De Groot 2000: 145). In this sense, they may be viewed as semantic equivalents. Legal language is culture-bound (Wiesmann 2011; Peruginelli 2008: 19), and legal lexicon is legal system-bound (Cao 2007: 25): since legal concepts refer to things, relations, acts and procedures which are typical of a specific national legal system, the semantic equivalence between the SL and the TL is not to be intended as a one-to-one correspondence (Šarčević, 1997: 234). As pointed out by Cao (2016: 170-171),

“on the one hand, SL and TL legal concepts that have a sufficient degree of similarity need to be translated as equivalents for consistency, comprehensibility and due to the systematic nature of language. (...) On the other hand, (...) laws and most legal concepts in different countries are not identical. In most cases, concepts in the SL and TL legal system may only partially correspond”

and

“when there are existing words in the TL that are linguistic equivalent to the SL, these words in the two languages may only carry partially equivalent meanings in law or sometimes may not be functionally equivalent in law at all” (Cao 2007: 55).

Analogously, Sacco underlined (2000: 126) that unlike other specialized languages, especially scientific languages, in which full semantic correspondence is possible in nearly all cases, legal language is in some cases characterized by a lack of total equivalence between terms belonging to different systems. For this reason, given the ‘distance’ between the Chinese traditional legal system and the Romanist one, the equivalence between the Latin terms *dolus* and *culpa* and the corresponding Chinese terms is not full. Nevertheless, as highlighted by Ajani (2005: 26-27), “if we abandon the illusion of

the existence of literal correspondence between two legal terms, translating law is (almost) always possible”⁴⁷. Likewise, Cao (2007: 32) maintains that:

“it is futile to search for absolute equivalence when translating legal concepts (...) Real life experience, and successful experience at that, tells us that translating law, irrespective of what systems and families are involved, is not only possible but highly productive”.

As mentioned above, the Chinese translantants for *dolus* and *culpa* were originally employed in non-legal contexts or legal contexts of a strictly penal nature and were later subject to a semantic expansion due to China’s process of modernization and reception of Roman law. In this sense,

“the old Chinese characters (...) were revived or re-coded and re-engineered so to speak, to signify new and foreign legal concepts, legal thinking and practices. In modern Chinese legal language, the traditional inherited meanings related to law and the more recent introduced foreign meanings are encoded and superimposed” (Cao 2021: 56).

Therefore, the Chinese terms for *dolus* and *culpa*, even if preexisting, later acquired a partly different meaning, more similar to the Romanist one. In this regard, for instance, as pointed out by He (2009: 356), *guoshi* was traditionally used only to refer to unintentional homicide. It wasn’t until the beginning of the 20th century that it assumed its modern meaning, with the new codification activity initiated by Shen Jiaben 沈家本 (as a member of the commission appointed by the Qing government) and continued in the following decades. Analogously, the other terms used to express *culpa* and *dolus* underwent a similar process and started to be used in civil contexts that weren’t originally regulated by the Chinese legal system, traditionally focused on criminal law.

However, also partly due to the above-cited lack of full semantic equivalence, the rendering of the two Romanist institutions shows peculiarities and also discrepancies or criticalities which emerge from the data reported in paragraphs 3-4 and which will be further illustrated below.

⁴⁷ The English translation of this passage from Ajani’s work is mine.

In the previous paragraphs we have seen how the expression of *dolus* is characterized by the use of several different translantans. As is known, in some cases using more than one translantant for the same word can be acceptable, if there is some criterion or reason: words may in fact be equivalents in certain contexts but not in others (De Groot 2000: 139; Megale 2008: 92, etc.). Therefore, more than one translantant may be required in order to express the different shades of meaning of the same Latin word⁴⁸. As for the possible semantic reasons for using more than one translantant for *dolus*, what is noteworthy is that *zhaqi* (or *qizha*) and *guyi* underline different psychic aspects: *zhaqi* and *qizha* emphasize the deceiving nature of an act, while *guyi* stresses the intentional one. In Latin these two aspects (the cheating element and the intentional one) coexist in the notion of *dolus*, since *dolus* has a very broad semantic extension. On the other hand, in Chinese there seems not to be a word that can express these two aspects at the same time. More specifically, while it is true that the concept of ‘deceiving’ conveyed by *zhaqi* and *qizha* is implicitly connected to an intrinsic intention inherent to the act of deception, the concept of ‘intentionality’ expressed by *guyi* does not necessarily imply the existence of a deceptive intent. For this reason, *guyi* is frequently used as opposed to *guoshi* (or *zhongda guoshi*) to indicate the intentional aspect, whereas *zhaqi* and *qizha* are often used to refer to the vice of will. In this sense, in the commercial and legislative fields, the use of *qizha* to this end is highly prevalent. However, the use of the various terms for *dolus* is not highly or systematically differentiated and, in particular, the two terms *zhaqi* and *qizha* do not appear clearly distinguished. Furthermore, the plethora of terms for *dolus*, which can be found in part of the sources, seems in some cases excessive. If we consider the types of documents analyzed, referring to the above-mentioned distinction between descriptive and prescriptive functions employed in the field of legal linguistics by scholars like Šarčević (2006: 26) and in that of legal philosophy by

⁴⁸ I have also evaluated the hypotheses of a differentiated use of terms for *dolus* and *culpa* according to the different syntactic functions they have in the sentence. However, in line with the Chinese language flexibility in terms of word classes, in the sources analyzed the various terms for *dolus* and *culpa* seem to be used without this kind of restriction. For instance, even though *zhaqi* (or *qizha*) in the strict sense is classified as a noun, it can be used as an adverb or an adverbial phrase in syntagms like ‘诈欺地’, ‘以诈欺的手段’, etc.

Kelsen (1979: 76) and others, greater terminological freedom may appear acceptable in doctrinal (i.e. descriptive) texts like Roman law manuals; however, this should not result in a pleonastic use of ‘synonymous’ translantants. In this sense, the use of more than one translantant in very similar contexts might create confusion and appear redundant. Such is the case, for instance, of the translation of *exceptio doli* in Li and Mi (2009) using three different terms for *dolus*, and of the repetition of the same sentence first using *qizha* and then using *zhaqi* in the above-cited manual by Huang (2003: 269 and 342). Besides, the use of translantants other than the already widespread in literature *zhaqi/qizha/guyi* does not always seem well grounded and should be avoided, since, as pointed out (De Groot 2000: 139-40), we can only deviate from already existing translantants for valid reasons, otherwise we might jeopardize the standardization and homogeneity of legal language.

Another peculiarity, which might constitute a criticality as well, is the lack of clear differentiation between the translantants for *dolus* and *fraus* and between those for *dolus* and *mala fides*. As for the first binomial, in Chinese sources *qizha* (or *zhaqi* or, rarely, another term) is sometimes used to refer to both *dolus* and *fraus*. The two concepts are indeed quite similar and even in the Western legal doctrine their distinction on a theoretical level is a debated question. However, they are not identical notions: *dolus* refers to both the psychological state (the intention of harming others) and the unlawful act itself; *fraus*, on the other hand, while being “a malicious act that aims at harming and deceiving others (...), also means using legit and lawful schemes to the detriment of other individuals” (Tacente 2013: 191)⁴⁹. Consequently, at least in some cases, *dolus* and *fraus* should have different translantants. As for the second binomial, even though *e yi* is mostly employed to express the concept of *mala fides*, it is sometimes used as a translantant for *dolus*. This kind of use may be well grounded when the Chinese translator (or author) feels the need to stress the aspect of bad faith connected to *dolus*. However, using *e yi* to render the concept of *dolus* is not always suitable, since in Latin (and in Italian) *dolus* and *mala fides* are two different concepts and words, even though similar: *mala fides* is a prerequisite for *dolus* (and *fraus*), it is a “state of mind (...) that is static and passive”

⁴⁹ The English translation of this passage from Tacente’s article is mine.

(Tacente 2013: 191)⁵⁰ and based on the awareness of the potential harm that might be done to others, but it doesn't imply *dolus*. *Dolus*, on the other hand, is not just a mere awareness, it is also an act that aims at harming others (Funaioli 1964: 738).

In the previous paragraphs, it has also been highlighted that in Chinese there doesn't seem to be one single word conveying both the two fundamental meanings of the term *culpa* which are, therefore, rendered by means of two different translantants, *guoshi* and *guocuo*, respectively referring to the strict sense and the broad sense of this legal institution. This procedure is based on a specific criterion and appears reasoned and justified; however, in the sources analyzed there are cases of not fully differentiated use of *guoshi* and *guocuo*, and more precision in this regard would be advisable. Moreover, even though the number of translantants different from the aforementioned ones is limited (and much lower than the number of translantants for *dolus*), for matters of lexical homogeneity, resorting to other translantants should be avoided: this applies, for instance, to *shuhu* ('carelessness', 'inattention', 'negligence'), which is in some cases used to express *culpa* in the narrow sense.

Finally, another lexical feature emerging from the data provided in the previous paragraphs is the lack of terminological differentiation between *culpa* in the narrow sense and *neglegentia*. The distinction between these two terms is actually a controversial issue even in Roman law (and in Latin), hence the difficulty of translating them into Chinese. If, on the one hand, in the Romanist sources in Latin these two words are quite similar, on the other hand, they are in some cases presented as opposing, especially in expressions such as *culpa aut neglegentia* (*culpa* or *neglegentia*), *culpa et neglegentia* (*culpa* and *neglegentia*). More specifically, even though *culpa* in the narrow sense is often intended as a lack of diligence, this kind of *culpa* is not just related to negligence but also to imprudence (*imprudencia*) and lack of skill (*imperitia*). Besides, as pointed out by Schipani (1995: 440), the term *culpa*, even in its narrow sense, has a more general meaning (it is "less descriptive") and is oriented to reprimand. For this reason, two different words are used in Latin to refer to the two concepts of *culpa* and *neglegentia*; likewise, the two Latin words require, at least in some cases (such as

⁵⁰ Translation mine.

the translation of the justinianean sources), to be expressed with two different terms in Chinese (i.e. *culpa* with *guoshi* and *neglegentia* with *shuhu*).

6. Conclusions

This paper is an attempt to outline the history and evolution of the rendering of the Romanist concepts of *dolus* and *culpa* in Chinese sources, from the beginning of the reception of Roman law to recent times. The diachronic analysis has shed light on the main features and on some possible issues related to the expression of these two legal institutions. In this sense, it has been shown how the Chinese terminological scenario is quite heterogeneous. On the one hand, this variety appears in some cases well-founded and based on specific criteria (for instance, the use of two distinct words to express the two fundamental meanings of *culpa*, or the use of different terms to express the multifaceted aspects of *dolus*: intentionality, deceit, bad faith, etc.). On the other hand, the presence of multiple translantants may in some cases cause inhomogeneity and lexical ambiguity: this occurs, for instance, when a specific expression (e.g. *actio doli*, *exceptio doli*, etc.) doesn't have a 'fixed' or 'official' translantant and is rendered in several different ways by different authors or even by the same author, or when different translantants for *dolus* or *culpa* are used interchangeably in identical contexts in the legal literature or even in the same work, or also when the same translantant is used to render two Latin words that are similar but not – or not in all cases - synonymous. In this regard, this paper highlights the necessity of a further refinement of the process of standardization of the Chinese legal lexicon related to the field of Roman law. The above-discussed criticalities may also be seen in light of the relatively recent formation of the Chinese Romanist lexicon. Therefore, it is likely reasonable to assume that, with time, the lack of lexical homogeneity or accuracy will gradually subside, along with the further normalization of the Chinese Romanist lexicon.

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