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TRAPS OF ENGLISH AS A TARGET LANGUAGE IN LEGAL TRANSLATION

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Abstract: Translating legal texts into English requires that a translator should make a qualified decision with respect to a variety of legal English, or its modification, to be used as the target language. The analysis should be aimed at choosing the best possible "variety" of legal English at all "linguistic" levels – grammatical (morphology and syntax), semantic and conceptual (relevant terminological choice), textual (relevant text types/genres) and pragmatic (considering potential addressees). The decision relating to "which legal English" should be used may often be motivated by the type of target legal system (e.g. common law, continental law, sharia, etc.) and by an envisaged ultimate recipient of the translated text (whether the recipient has any legal background, previous experience in legal transactions conducted in English, etc.). The paper deals with the relevant aspects of such decision-making and provides examples of both useful options and confusing alternatives.

Key words: legal translation; jurilinguistic analysis; conceptual analysis; legal terminology

Překládání právních textů do angličtiny vyžaduje, aby se překladatel kompetentně rozhodl, jakou varietu právnické angličtiny nebo její modifikaci použije ve svém překladu jako cílový jazyk. Rozhodování by mělo vést k volbě takové variety, která bude optimální ve všech jazykových rovinách (od gramatické, přes sémantickou a pojmovou až po textovou) a bude odrážet relevantní pragmatické aspekty zejména s ohledem na konečného příjemce překladu a jeho právnělingvistické prostředí.

Podstatným faktorem při rozhodování je charakter cílového právního systému (např. rozdíly mezi kontinentálním právem a právem common law) a osoba konečného příjemce, tj. jeho obeznámenost s právem, předchozí zkušenosti s angličtinou v právu apod. Tento text se věnuje podstatným aspektům takového rozhodování překladatele a uvádí příklady dobrých i méně dobrých řešení.

Klíčová slova: právní překlad; právnělingvistická analýza; pojmová analýza; právní terminologie

PUŁAPKI JĘZYKA ANGIELSKIEGO JAKO DOCELOWEGO W PRZEKŁADZIE PRAWNICZYM

Abstrakt: Przekład tekstów prawniczych na język angielski wymaga podejmowania świadomych decyzji translatorskich dotyczących wyboru wariantu języka docelowego i jego ewentualnych modyfikacji. Analiza powinna mieć na celu dokonanie wyboru najlepszego z możliwych wariantów na wszelkich poziomach: gramatycznym (morfologia i składnia), semantycznym oraz konceptualnym (wybór właściwej terminologii), a także pragmatycznym (uwzględnienie potencjalnego odbiorcy tekstu). Wybór wariantu może być uzależniony od docelowego systemu prawnego (prawo kontynentalne, common law, shariat, itd.) i docelowego odbiorcy (jego znajomości prawa, doświadczenia w obrocie prawnym, itd.). Praca dotyczy wybranych aspektów procesu decyzyjnego tłumacza. Autorka ilustruje wywody przykładami przydatnych rozwiązań i niebezpiecznych pułapek.

Słowa klucze: przekład prawniczy; analiza jurilingwistyczna; analiza konceptualna; terminologia prawnicza

1. Introduction

Globalization, apart from various definitions oriented towards economic objectives and outcomes, is a process of massive interaction among people, entities and nations worldwide. In order to make such interaction practicable, swift and efficient a common code is useful and even necessary to enable communicating parties to interact. Despite some historical attempts[1] to develop an artificial language to replace natural languages, which in fact divide people, and to facilitate

[1]Esperanto was developed in 1887 in Poland.

communication between individuals, entities and states with different languages, there has been a gradual but natural process of turning one language – English – into the global language in almost all spheres of human existence including the legal domain.

English is the only natural language that has shown its potential to be a global language. A modest estimate indicates there are more than 1.5 billion users of English worldwide (Crystal, 1997: 61). Naturally, the level of their English proficiency varies[2]. Besides native speakers of English, English has been spoken and written by individuals with different mother tongues, and with varying degrees of competence to use English "properly"; people are usually determined in their use of English by various objective and subjective factors, such as a different purpose for using English, different communication environments and partners (e.g. English native vs. non-native speakers), different degrees of linguistic competence and personal motivation, etc.

The English language has become a means of uniting people in communication and this role has been more or less properly performed; however, the language itself has diversified and transformed into a web of not only geographical varieties of English in "traditional" English-speaking countries and in former British colonies, but also varieties used within specific institutions and subject-areas, such as international organizations (e.g. the United Nations), supranational entities (e.g. the European Union), international commerce or public international law.

[2]English language proficiency has been categorized primarily for the purposes of language teaching. Professor Kachru (1982) introduced a three-circle classification: (a) inner circle, i.e. "traditional" English bases composed of countries and regions where English is a *mother tongue* for an absolute majority of the population; (b) middle (or outer or extended) circle essentially encompassing former British colonies and territories where English is considered a *second language* (ESL); and (c) expanded (and ever-growing) circle where English is used for international communication in the widest sense of this term and is a foreign language (EFL) to most communication partners.

2. Varieties of legal English

Just as there is no uniform general English[3] there is nothing like a universal legal English. As noted by lawyers at the international law office Evershed LLP (2011: 6) about 70 countries use English as an *official* language, i.e., English is used in government, legislation, courts, media and education in these countries. As a result, there are about 70 identifiable geographical varieties of legal English. These would include (a) "traditional" common law countries (cf. Kachru's inner circle); and (b) former British colonies and dependent territories where common law was imposed and original local systems were substantially modified (cf. Kachru's outer circle). Next, there are two larger *groups* of "institutional" varieties of legal English, namely (c) English in international law and international organizations (e.g. the language of conventions, treaties, international judiciary and their case law, etc.); and (d) English of the European Union law (e.g. English of legislation, *acquis communautaire*, EU judiciary and its case law, etc.). One more group deserves mentioning, namely (e) local translational varieties. These are quite often needless "mutations" of varieties of English under (a) – (d). One way a local variety may "form" is through, for example, an inadequate first quasi-official[4] translation of a newly adopted law, such as a translation of a major piece of legislation posted on the official Internet site of a governmental agency. The language of the translation tends to spread rather quickly invading private legal documents[5] such as

[3]All non-native learners of English become very soon aware of at least two geographical varieties – British and American.

[4]In most unilingual countries, i.e. countries having one official language, documents of whatever type (primary and secondary legislation, contracts, legal memoranda, etc.) published wherever in other than the official language are not considered official linguistic versions as soon as any interpretive conflict arises and the issue is brought before a local court.

[5]Private documents under continental law are always filled with quotations of legislative provisions and references to particular legislative clauses, which are slightly rephrased in the document. If there is any published translation of a required legal regulation available to translators they would usually prefer quoting whatever has already been translated rather than translate legal provisions by themselves.

contracts, various deeds, etc. An inadequate translation may be caused, for example, by a varying degree of literal and inaccurate translation of the source legal text (SLT) terminology, which can be partly caused by a jurilinguistic specificity of the source law and presumed "non-existence" of a target law equivalent. In addition, existing translational solutions, whatever relevance and quality these may have, are subsequently (and frequently) employed by translators by tradition[6]. Particularly English terminology within such translational varieties is often perceived by the recipients of a translation as *jurilinguistic realia*, i.e. terms representing concepts typical of, and special for, the particular system of law, whether legally and linguistically justified or substantiated. Two examples may illustrate the point.

Example 1
Needless (and confusing) choice of an English equivalent

An insufficient initial conceptual analysis led a translator to choose the term "**joint-stock company**" for the Czech 'akciová společnost' (spółka akcyjna) in the beginning of the 1990s when a new company law was adopted in Czechoslovakia. Since then this term has established itself as a regular translational equivalent (not only[7]) within the Czech environment for the concept of a business entity designated as a "stock corporation" (US) or "public limited company"

Needless to say, sub-standard legal translations are occasionally also made public (see, for example, Chromá 2014).

[6]It should be noted that most translators of legal texts are non-lawyers by education and their knowledge of source law and target is usually limited, if any. For a translator with insufficient legal background knowledge it is rather difficult to find a relevant target law and language equivalent as most translators would not indulge in comparative jurilinguistic analysis of their topic to identify proper equivalence at least at the level of lexis; in such situation, translators usually resort to bilingual law dictionaries and other sources without checking the quality and reliability of equivalents offered because of a widely spread, but often unjustified, assumption that whatever has been made public is a quality product.

[7]A quick scan of the Internet clearly suggests that the term "joint-stock company" is quite widely spread as an equivalent substituting for a "stock corporation" in many post-communist countries developing their new business law, relating terminology and its potential translational equivalents at more or less the same time.

(UK) or, later, as a "public limited liability company" within EU law. The US term "stock corporation" should have been the primary option for the translator as this term has an unambiguous meaning corresponding to the substance of that entity under Czech law. On the contrary, the English term "joint-stock company" within common law has at least two basic (and widely spread) meanings neither of which reflects the main conceptual elements of the Czech 'akciová společnost': in Great Britain, it is mostly perceived as a terminological archaism denoting an unincorporated entity established to pool the share capital of individual shareholders usually with unlimited liability (see Joint-Stock Companies Act 1856); in the USA, some states, such as Texas or New York, define "joint-stock company" as "a company *usually unincorporated* which has the capital of its members pooled in a common fund; transferable shares represent ownership interest; shareholders are *legally liable for all debts of the company*" [8]. Such entity under US law has some conceptual elements typical of a corporation but others are closer to a partnership (the type of business entity essentially missing in Czech law). What significantly differs if compared with the Czech "akciová společnost" are two conceptual elements indicated in italics in the above definition – often unincorporated entity (i.e. not registered in a register of companies), and personal liability of shareholders for the debts of the entity, which is fully absent in the Czech "akciová společnost" where shareholders are not liable for the debts of their company at all.

Example 2
Justified coining of a new English term

An English translation of a Dutch contract contained the following provision: "An **executory attachment** is made of any substantial part of the Borrower's assets or a **conservatory attachment** is converted into an executory attachment." The Dutch terms would be 'executoriaal beslag' and 'convervatoir beslag' respectively. The former would entail the seizure of assets for the purpose of selling or liquidating them, and so force the debtor to fulfill his or her dues. The latter is a preliminary step, namely to freeze someone's assets to

[8]http://www.thefreedictionary.com/Joint-stock+companies

prevent the debtor from selling or liquidating them by him or herself, which would make it difficult for the creditor to get his or her money. Once conservatory attachment is made, the creditor would nonetheless require a subsequent court decision on the merits, in his or her favor, before converting a ʿconvervatoir beslagʾ to an ʿexecutoriaal beslagʾ and moving ahead with selling of the assets[9]. The translator of this contract from Dutch to English in fact coined English terms designating legal concepts absent in common law and, as a result, missing in its English terminology repertoire; for a reader experienced in the field of judgment enforcement and its English terminology it should not be a problem to interpret those two English translational equivalents more or less correctly. However, it should be noted that if a translator opts for coining a new English term assuming there is none in common law English he or she should provide, in the first occurrence of such term in the translation, a brief explanation or definition of the source law concept which is to be designated by the coined term. The interpretation of such terms may not always be as straight-forward as in this example.

2.1 Which variety

It should be emphasized that whatever variety of legal English one may encounter it always stems from the "original" legal English, i.e. that of common law. German attorney (and British barrister) Volker Triebel, in his explaining why English need not be the best option to choose as the language of a contract, notes: "Legal English and common law grew up together. Many English legal terms and concepts can only be understood against a common law background." (2009: 149). A similar congenital tie exists between legal French and French law (and French and Quebec law), legal Polish and Polish law,

[9]The explanation of the two Dutch concepts was provided by Professor C.J.W. Baaij from the University of Amsterdam Law School in private correspondence with the author of this text.

legal Czech and Czech law, etc. This should be kept in mind by translators of legal texts whatever source and target languages would be at issue: the languages as a means of legal communication would always be deeply rooted in their "original" legal systems and would differ conceptually. As a result, reaching terminological equivalence would require in some cases that translators should resort to substitutive strategies, such as choosing explicative equivalents or even coining new terms.

In practice, most translators of any subject-area texts into English choose either British or American rules of spelling (often supported by their software text-editor). However, spelling is just a marginal aspect of a particular geographical variety of general English; other linguistic phenomena (at the level of lexis, syntax, text, etc.) applied in the translation into English need not belong to the same variety for various (essentially a translator's subjective) reasons. A translator of legal texts should go further in his or her conscious preparation for the translational performance, namely to select such variety of legal English which would facilitate a smooth transfer of legal information from the source text (the source language and the source legal system) into the target text in English that need not necessarily be addressed to a common law lawyer, but should make legal sense to its recipient of any legal background.

There are several factors determining the translator's choice of a variety of legal English for the translation, of which two appear to be crucial: (a) the ultimate recipient of the target legal text (translation), and (b) the purpose of the translation.

The primary ultimate recipient of a translation can, but need not be, directly identifiable. If it is clear that the translated text is to be used by a recipient in a particular (English-speaking) country the translator may choose a relevant variety of legal English at least by selecting proper legal terminology used in the translation[10]. Ascertaining who is to be the primary recipient of a translated legal text may be much easier when private law texts are to be translated,

[10] Visible differences can be found, for example, in procedural terminology reflecting the specificity of proceedings (e.g. US plaintiff vs. UK claimant), and historical and geographical peculiarities of judicial institutions and their designation (e.g. the system of courts and their nomenclature).

such as contracts, where the contracting parties are expressly established[11]. The primary recipient of a translation is also traceable in some public law texts, such as extradition documents (it is always clear which country and which court are requested), judgments to be enforced abroad (e.g. judgment of divorce or judgment determining the maintenance duty), etc. In all other situations where no particular addressee of a translated legal text is indicated the translator should cautiously resort to a more "universal" variety of legal English particularly at the level of lexis with more explicative equivalents, translator's notes describing concepts belonging to the legal reality of the source legal system, etc. The translator should aim at properly informing a potential recipient of the content and sense of the source legal text so that the recipient would not be confused in the interpretation of the translated text and/or application of its content. Example 3 suggests an approach to forming explicative equivalents built upon existing English (common law) terms and supported by the conceptual analysis of the source law terms.

Example 3

Explicative terms as an extension of existing English (common law) terms

Two Czech terms, *předdůchod* and *předčasný důchod*, have an essential conceptual element in common – early retirement; this English term can be then used as the basis of an explicative term. The Czech institutions differ in their sources of funding, which is also the reason why there are two different Czech legal terms employed to

[11]This is the case when the translation is assigned to be completed because the parties are speakers of different languages and the English version of their contract serves, for example, their smoother communication. However, it should be noted that the translated contract can be used in different environments with different recipients, such as a piece of documentary evidence in proceedings before court. In such case – at least in the Czech Republic – the English version of the contract would be translated into Czech because only documents in Czech may be considered by a judge in proceedings: as a result the recipient of the English translation would be a certified (sworn, licensed, court) translator into Czech.

denote the two concepts; as a result the funding element would constitute the complementary[12] (clarifying) part of the term:
předdůchod (no legal equivalent in Polish law) – early retirement *funded from a private pension scheme*
předčasný důchod (świadczenia przedemerytalne) – early retirement *funded from the state social security system*.

2.2 Purpose of translation

The purpose of translation is a more complex category. It usually begins with the question *why is the translation commissioned?*, followed by an analysis of the circumstances under which the translation is to be completed and outcomes (objectives) to be achieved.

Christiane Nord (1991: 72) distinguishes between *instrumental* and *documentary* translation in that they reflect different purposes (within the general theory of translation). The former is a communicative instrument conveying a message directly from the source text author to the target text recipient, having the same or analogous function as the source text. Documentary translations serve as a document of a source culture communication between the author and the source text recipient. To apply this dichotomy to legal texts, instrumental translations would encompass normative and constitutive texts such as contracts, judgments, etc., in the sense that the translated legal text would have the same (or very similar) legal effect as the source legal text. The translation of local legislation into a language not official in the jurisdiction would fall within the category of documentary translation, i.e. the translation of the source legal text can, more or less correctly, transfer legal information contained in the source legal text, but would never be binding on its recipient as the source legal text would be with respect to its primary addressees.

[12]Professor Šarčević designates this type of conceptual elements as *accidental* (2000: 238).

Legal texts within one region having one legal system and using just one natural language are primarily drafted to address individuals and/or entities under the local jurisdiction speaking a single language and their purpose is, generally speaking, to make their addressees to act accordingly, i.e. to apply the substance of the texts in practice. Where bilingual or multilingual translation becomes an issue and legal texts become source texts (ST) essentially two basic situations may be identified and determine the purpose of the translation:

(a) The source legal text is drafted in the source language (SL) within the source legal environment for standard source law recipients, but, subsequently, the need for its translation into the target language (TL) emerges. The translator becomes a secondary – but unintended – receiver and an intermediary between the source text and its potential TL recipient. One should speak of signification[13] rather than communication between the author of the ST and the recipient of the TT (Jackson 1995: 68). Two situations may occur:

(i) the purpose of the target text (TT) differs from that of the source text (ST) – for example, the Czech translation of a contract originally drafted in English, which was commissioned by a judge for the purpose of proceedings before a Czech court would serve only as evidence of the contractual relationship between the parties for the purposes of those court proceedings; or

(ii) the purpose of the TT is close to, or even identical with that of the ST – for example, a judgment issued in one EU Member State should be translated into the language of the Member State where it is to be enforceable under EU law.

[13]Cf. Grice, P. 1991: 359-368. Signification is the process of making sense of the target legal text entirely from the receiver's perspective because there was no intention on the part of the original sender to convey the sense of her message through a different language to a receiver in a different legal environment, i.e. to a member of a remote and different *semiotic group* determined by and using "the same conventions of sense construction" (see Jackson 1995: 5).

(b) The source legal text is drafted for the (intended) recipient who is assumed not to be proficient in the SL (irrespective of whether legally proficient), i.e. translation is presumed from the beginning and the purpose of both the ST and the TT would be essentially identical (for example contracts executed in two languages, EU legislation translated into the languages of EU Member States, an international treaty translated into the language of a Contracting State, and so on).

Naturally, there is a wide range of source legal texts within public and private law oscillating between the two basic groups under (a) and (b) outlined above. A translational approach to dealing with the purpose of a particular translation selected by the translator would depend not only on his or her linguistic competence[14], but what is usually much more important is the translator's awareness or even knowledge of the source legal system and its respective conceptual and terminological repertoire on the one hand; on the other, it would be the translator's competence to select an appropriate variety of legal English and to identify the degree of potential equivalence between its terminological repertoire and the source law concepts in the ST, and his or her ability to deal with cases of non-equivalence[15].

[14]Cf. Cao 2007: 39-48 and her dichotomy between *translation competence* and *translation proficiency* a legal translator should achieve in order to produce as high quality a translation as practicable. In the model of translation competence (2007: 41) she interlinks *translational language competence* (e.g. SL and TL), *translational knowledge structures* (e.g. source law and target law), and *translational strategic competence* which is interdependent with the context of a particular translational situation. Strategic competence in translation can be seen as "the linkage that relates translational language competence to translational knowledge structures and the features of the context in which translation, and hence interlingual and intercultural communication, takes place" (2007: 48). Translation proficiency is then seen as a global skill integrating both the competence and ability to activate this competence in the process of translation (2007: 39).

[15]Cf. Šarčević (2000: 238) distinguishing among near equivalence, partial equivalence and non-equivalence.

3. Translation as interpretation

One of the basic postulates of the theory of legal translation (proved by practice) is that *translators of legal texts are able to transfer into another language only what they understand in the source text*. Lawyers interpret law in order to apply it, translators must interpret a legal text in order to "just" convey the information into another language.

It should be noted in this context that lawyers and translators belong to different semiotic groups. Jackson (1995: 96) explains how a semiotic group may be formed: "Whatever the degree and nature of variation, if the language of a particular profession, or other occupational group, has sufficient peculiarities to form a barrier to comprehension by those not member of the group, then we are in the presence of a group defined by language (a "semiotic group")." In other words it is "a group which makes sense (of law) in ways sufficiently distinct from other such groups as to make its meanings less than transparent to members of other groups without training or initiation." Differences in interpretation of a legal text by these two semiotic groups are caused primarily by the extent of their knowledge of law (substantial and solid in the case of lawyers, and very limited or non-existent in the case of translators). The purpose of interpretation is the second discriminating aspect: application of law by lawyers presupposes their profound understanding of the law and the environment where the law is to be applied, whilst transferring the legal information into another language is built upon a comparative jurilinguistic analysis (i.e. the source language and law, and the target language and law).

The aim of interpretation is essentially to understand, "to ascribe the meaning to, or inscribe the meaning in" the text (Phillips 2003: 90). However simplified the process of translation may be it always proves the common truth that translation is a special kind of interpretation (Eco 2001: 13) and translators are able to transfer into another language (or code) only what they decode in the source text, or how they construe the signification and meaning of the ST message. Or, as Joseph (1995: 33-34) suggests, translators should

interpret the source legal text rather than 'merely' translate, i.e. they should transfer the sense of the ST, not just words, and they should intervene in the text semantically, stylistically, and intellectually, to the extent called for. In other words and more generally, the translator's primary role is to make sense of the source text for the TL recipient: not only should the translator interpret the source legal text correctly but also his or her translation should enable the ultimate recipient to interpret the target text in such a way that its sense is as close as possible to the sense of the source text.

What is crucial here is the clear, unambiguous, formally transparent, consistent and semantically predictable language of a source legal text, which enables the translator to rightfully interpret it and appropriately translate[16]. Similarly, the clear, unambiguous, formally transparent, consistent and semantically predictable language of the translated legal text enables its recipient to rightfully interpret it and act accordingly. Therefore the primary task for the translator of a legal text is to transmit the meaning of the source legal text and its segments into the TL in such a way that the target legal text, as a whole and in all its parts, makes (legal) sense to the ultimate recipient, approximating the sense of the source legal text as perceived by its intended (original) recipient. This is the gist of what can be termed the semiotics of legal translation.

4. Comparative jurilinguistic analysis

Using English as the target language in legal translation would always require an essential analysis of its jurilinguistic potential. Such analysis would be a component part of the process of selection of a suitable variety of legal English for the respective translation. Three segments of such analysis seem substantial, namely purely linguistic elements expressing modality and gender, semantic relations of

[16] Needless to say, it also enables the lawyer to rightfully apply it.

synonymy and polysemy[17], and conceptual differences and their reflection in legal terminology of the source and target languages respectively[18].

4.1 Modality

There is a widespread view that legislative language is reducible to norms expressed in terms of three deontic modalities, that which is required, prohibited and permitted. (Jackson 1999: 17). The correct choice by translators from amongst the relevant modal auxiliaries *shall*, *may*, *may not*, *must, must not* would render possible the correct interpretation of a translated proposition.

The most controversial modal is *shall* which is claimed to be the most misused word in all of legal language (Schiess 2005). Academic lawyers oppose *shall* to such an extent that for example Bryan Garner, editor-in-chief of the Black's Law Dictionary and author of various legal writing books and manuals, called one of his chapters "Delete every SHALL" (2001: 105). The reason for such opposition is quite simple. Banful (2013) clearly explains the unsuitability of this modal for any legal text as follows: "Words are presumed to have a consistent meaning in clause after clause, page after page but *shall* does the opposite and this is why *shall* is among the most heavily litigated words[19] in the English language. *Shall*

[17]We focused on these issues in *Synonymy and Polysemy in Legal Terminology and Their Applications to Bilingual and Bijural Translation.* Research in Language 9/1 (2011), pp. 31-50.

[18]A more extensive jurilinguistic analysis of these aspects for the purposes of translation into English is provided in Chromá 2014a and Chromá 2014b (in Czech).

[19]There is a wide range of judgments in English-speaking countries substantiating the ambiguity of *shall* in various legal texts (e.g. the case decided by the British Court of Appeal *BW Gas AS v JAS Shipping Ltd* [2010] EWCA Civ 68). Some international law offices, such as Allen & Overy, even adopted (in 2010) the principle of excluding *shall* not only in their overall drafting guidelines, recommending to their lawyers to

offends the principle of good drafting. It does not always retain its meaning throughout a document."

The range of meaning of the modal in the legal domain is wide. For example, Garner (1995: 939-941) provides and exemplifies the following functions of *shall*: (a) imposing a duty on the subject of the sentence; (b) imposing a duty on an unnamed person (not on the subject of the sentence); (c) giving permission (in the meaning of *may*); (d) imposing a conditional duty; (e) acting as a future-tense modal; (f) expressing an entitlement not duty; (g) being directory in the meaning of should. The translator should be aware of the risk of using *shall* in the translation into English as interpretation of the modal by a recipient of the translated text need not correspond to the intended meaning of modality in the clause or sentence used in the source text. There are several alternatives for avoiding *shall* in the translation (as well as in original English legal writing). Excellent sources of inspiration in this respect are legislative guidelines published in individual English speaking countries by their legislative bodies[20] to ensure that all laws passed by parliament and all secondary legislation adopted by central executive agencies would be expressed in a clear, unambiguous, formally transparent, consistent and semantically predictable language. For example, the Drafting Guidelines 2011 (p. 14)[21] suggest several alternatives to *shall*, of which three seem extremely relevant to translation into English:

- *must* in the context of obligations (although *is to be* and *it is the duty of* may also be appropriate alternatives in certain contexts);
- the *present tense* in provisions about application, effect, extent or commencement; and

avoid *shall* in their drafting, but also extended this recommendation to their translators into English.

[20]For example, the Office of the Legislative Counsel of the U.S. House of Representatives; the Office of the Parliamentary Counsel, Cabinet Office, London, UK; the Office of Parliamentary Counsel of the Australian Government; etc.

[21]Published by the Office of the Parliamentary Counsel, Cabinet Office, London, UK; retrieved from https://www.gov.uk/government/publications/the-office-of-the-parliamentary-counsel-guidance.

- *is to be* in the context of provisions relating to statutory instruments[22].

Needless to say, an appropriate substitution for *shall* requires that the translator correctly understand and interpret the source text modality. The following example shows how traditional "shall" clauses may be redrafted in order to avoid the modal.

Example 4
Reformulation of contract provisions:[23]

Article I The VESSEL…**shall** be designed, constructed, equipped and completed in accordance with the provisions of this Contract and following the Specifications and Plans of the date hereof, attached hereto and signed by the parties hereto (hereinafter collectively called the "Specifications"), making an integral part hereof…	The BUILDER **will** construct and equip the Vessel in accordance with the provisions of this Contract, the Specifications and Plans …
Article 2 …The Contract Price **shall** be exclusive of the articles to be supplied by the BUYER as provided in Article XVII hereof and described as the BUYER's Supply in the Specifications…	The Contract Price **is** exclusive of the articles to be supplied by the BUYER under Article XVII and described as the BUYER's Supply in the Specifications…
Article VII….Provided that the BUYER **shall** have fulfilled all of its obligations stipulated under	The BUILDER and the BUYER **must** complete the delivery immediately when the Buyer

[22]R. Quirk, S. Greenbaum, G. Leech a J. Svartvik – authors of the authoritative book "A Comprehensive Grammar of the English Language" – classify the phrase *is to be to* as a modal idiom (1985: 137).

[23]The reformulation was part of the "Discussion Paper" written by Philip Carstairs in March 2010 as an Allen & Overy internal document analyzing the function of *shall* in legal drafting and substantiating its overuse (the document was received with courtesy of Allen & Overy's Prague Office).

this Contract, delivery **shall** be effected forthwith by the concurrent delivery by each of the parties hereto to the other of the PROTOCOL OF DELIVERY AND ACCEPTANCE, acknowledging delivery of the Vessel by the BUILDER and acceptance thereof by the BUYER…	**fulfils** all of its obligations under this Contract. Delivery **will be** effected by the Builder and Buyer exchanging the duly executed PROTOCOL OF DELIVERY AND ACCEPTANCE, acknowledging delivery and acceptance of the Vessel by the BUILDER and the BUYER respectively.

Many non-native speakers of English perceive the modal idiom *is to be* much closer to the soft meaning of the modal *ought to* rather than as a phrase imposing an obligation. The following example composed of selected provisions of the British Defamation Act 2013 shows that interpretation of the modal idiom *is to be* unequivocally suggests a duty if used in the English text properly. The context (as always) appears to be crucial in attaining the correct meaning of the modal idiom.

Example 5

> *Section 6*
> "(7) Nothing in this section *is to be* construed— ..."
> (8) The reference in subsection (3)(a) to "the editor of the journal" *is to be* read, in the case of a journal with more than one editor, as a reference to the editor or editors ..."
> *Section 12*
> "(3) If the parties cannot agree on the wording, the wording *is to be* settled by the court."
> *Section 16*
> "(6) In determining whether section 8 applies, no account *is to be* taken of any publication made before ..."

It should be noted that the use of simple present is the most frequent option to substitute for *shall*. Moreover, in some languages including Czech the simple present tense is used regularly in all normative provisions irrespective of the text type (e.g. in contracts, legislation,

testaments, etc.) to express an obligation. Therefore, nothing would be easier for translators but transferring the same tense into English. However, translators essentially follow linguistic patterns in legal texts they are to translate. Since in English "*shall* is the hallmark of traditional legal writing. Whenever lawyers want to express themselves in formal style, *shall* intrudes." (Butt & Castle 2004: 99) many translators of texts into English would try to follow this stereotype and use this hackneyed modal as much as possible.

4.2 Gender neutrality

The requirement that the language of legal texts should preserve gender neutrality, particularly when using pronouns, which is strictly enforced in English legal drafting, need not apply to all languages. Czech is an example of a language stuck with the grammatical gender and the generic masculine in singular should an affiliation with a particular profession or another group be expressed[24].

In this context, a sarcastic complaint expressed by Professor Fillmore decades ago deserves mentioning (1978: 157):

> Since the system of pronouns in English is a closed class of words in which singularity for humans cannot be separated from sex, there is no way of choosing an anaphoric pronoun for an indefinite human antecedent without offending somebody. 'They' offends the grammarians, 'he' offends the feminists, 'he or she' offends the stylists, 'she' is downright hostile, and 'it' just cannot be taken seriously. We could get out of this by speaking Chinese, but that's bound to offend some people, too.

Essentially, there are two options for a translator into English to deal with gender neutrality. An easier way is to use an explicative *gender*

[24]For example, Czech has grammatical gender *she* for a "person" or a "party", which are frequently used nouns in the legal context.

clause[25] in the footnote at the first occurrence of a "problematic" pronoun in the translation[26].

The second option is more complicated. Returning back to the British legislative drafting guidelines[27] (pp. 18-24) the following six rules may help the translator to produce a gender neutral translation[28]:

1. Repeat the noun rather than using a pronoun;
2. Substitute *the* or *that* for the personal pronoun;
3. Use *he or she*;
4. Change to a plural noun followed by *they*;
5. Omit the pronoun;
6. Use a present or past participle.

Neither the drafter nor the translator would avoid a combination of the rules. The following example shows two translated provisions of the Czech Civil Code 2012. The combination of Arabic numerals suggests the combination of the above listed rules 1-6. Words in brackets were used in the original version of the translation and words or phrases in italics are their replacement in order to achieve gender neutrality.

Example 6
Section 1043 (1)

1+1+3

"(1) A person becoming the holder of an ownership right in good faith and in a lawful and genuine manner is regarded as the owner against a person retaining [his] *a* thing *of that owner*, or disturbing [him] *the*

[25]Examples of a gender clause are as follows: (i) "words importing a gender include every other gender" (Section 23 (a) of the [Australian] Acts Interpretation Act 1901, as amended); (ii) "... unless the contrary intention appears – (a) words importing the masculine gender include the feminine; (b) words importing the feminine gender include the masculine" (Section 6 of the [British] Interpretation Act 1978, as amended); (iii) "words importing female persons include male persons and corporations and words importing male persons include female persons and corporations" (Section 33 (1) of the [Canadian] Interpretation Act 1985, as amended).

[26]Alternatively, the gender clause may be put in the footnote in the very beginning of the translation.

[27]https://www.gov.uk/government/publications/the-office-of-the-parliamentary-counsel-guidance.

[28]There are more rules included in the Guidelines for British legislative drafters but not all of them are practicable if translation is at issue since the translator is bound by the source text in the source language, whose typology is usually different.

owner otherwise without having any legal ground for that or [his] *his or her* legal ground is of the same value or weaker."

Section 992 (1)

3+6+1+3+6

"(1) A person believing, upon convincing grounds, that [he] *he or she* holds a right [he has] exercised, is a possessor in good faith. A person is a possessor in bad faith if [he] *the person* knows, or should, due to the circumstances, be aware that [he] *he or she* exercises a right not [belonging to him] *acquired*."

Our own experience quite clearly suggests that if it is necessary to transform the text translated into English to make it gender neutral it would be advisable to do so after the whole translation has been completed. The main reason would be that a relevant degree of consistency should be preserved, which seems more feasible to achieve when the translator may concentrate only on this particular issue rather than being detracted by many issues to be resolved in the process of translation itself (focusing on the content and sense of the source text).

4.3 Conceptual analysis

Although terminology creates no more than 30% of the legal language[29] (and usually its proportion is lower) it is the most visible part of the language of law on which (not only) translators primarily concentrate. Concepts as mental representations (units of knowledge) are essentially context-bound. Terms, strictly speaking, are their spelling or sound forms (lexical units). Every legal term is supported by its definition, containing basic conceptual elements. Every legal system has its own sets of concepts (sometimes expanded in legal

[29]Cf. Chromá, Marta, 2004. *Legal Translation and the Dictionary.* Lexicographica, Series Maior. Tübingen: Max Niemeyer Verlag, p. 16.

institutions); simultaneously, there are sets of legal terms linguistically representing the concepts. Both concepts and terms are unique and historically and culturally anchored in the respective legal tradition. One of the main tasks of the translator is to identify equivalence between source law concepts and target law terminology, if any, and to deal with situations where no equivalence has been traced. In trying to attain equivalence in the translation of legal terms, one cannot dispense with the conceptual analysis of a particular term. Translation need not only require a comparative conceptual analysis of the source term (and the concept behind the term) and its potential equivalent in the target language and/or legal system, but sometimes also comparative research into the wider extra-linguistic and possibly extra-legal contexts.

There are various modes of classifying degrees of equivalence within the theory of translation. Classification by Professor Šarčevič (2000: 238), distinguishing between near equivalence[30], partial equivalence and non-equivalence, is the most appropriate for the purposes of conceptual analysis in legal translation. What matters is the measuring of sameness or closeness or remoteness of two basic types of conceptual elements, i.e. *essential* and *accidental* elements (as Professor Šarčević designates them).

The first step is to identify essential and accidental elements of the respective concept expressed by the source language term at issue; this can be found either in a terminology (interpretation) section of the source text or, alternatively or simultaneously, in relevant legal dictionaries. The second step would be to find a potential equivalent in the target language; identification of essential and accidental conceptual elements would follow. The third step is comparison of essential and accidental elements of the SL term and TL term. Next, the translator can determine whether the terms attain *near* equivalence (a source language concept and its selected target language equivalent share all essential and most accidental elements); or *partial* equivalence (the concepts share most essential and only some

[30]Professor Šarčević intentionally avoids using the attributes "full" or "absolute" in combination with equivalence; House argues that "equivalence is always and necessarily relative", evaluating the phrase *absolute equivalence* as a contradiction in terms (1997: 25).

accidental elements); or they show non-equivalence of their elements (concepts in the source language and target language share a few or none of their essential elements and no accidental characteristics). Finally, the translator should decide whether the chosen term in the target language can be used as such or if it is necessary that some explanatory note should be added (in the form of an explicative equivalent). The following example may roughly illustrate the process of conceptual analysis in comparing essential and accidental elements.

Example 7
The Czech term *daňový únik* should be translated into English. The literal translation is "tax escape" (oszustwo podatkowe).

(A) Definition of the Czech term and its literal translation:

daňové podvody a nezákonné snižování daňové povinnosti, agresivní daňové plánování a snižování daňové povinnosti v důsledku využití mezer v daňových zákonech	tax frauds and illegally reducing one's tax liability, along with aggressive tax planning and minimizing taxes as a result of loopholes in tax legislation

(B) Definitions of potential English equivalents as indicated in the literal translation of the Czech definition:

(a) Black's Law Dictionary:

tax evasion – the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability. Also termed *tax fraud*.

tax avoidance – the act of taking advantage of legally available tax-planning opportunities in order to minimize one's tax liability.

(b) EU:

aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability (e.g. double deduction, double non-taxation).

(c) USA: forms of *escape from taxation*

1. Shifting (process by which tax burden is transferred from one

statutory taxpayer to another without violating the law); 2. Capitalization; 3. Transformation; 4. Avoidance; 5. Exemption; 6. Evasion.

(C) Solution: the Czech term is conceptually much wider than any potential English equivalent. The essential element – illegal activity – is not met in the English terms *tax avoidance* and *escape from taxation*. The English terms *tax evasion* or *tax fraud* meet the essential elements of illegality and reducing one's tax liability but do not include *aggressive tax planning*. In order to attain as much conceptual equivalence as possible an expanded term may be used – *tax evasion including aggressive tax planning* (although the accidental element of legislative loopholes facilitating the reduction is omitted).

5. Conclusion

A legal text is (usually) a conceptual minefield for a non-lawyer and most translators are non-lawyers. Translators are expected to produce a text in the TL the interpretation of which in the TL and within the target law settings would convey information, as precisely as practicable, from the source legal text into the target language, so that the information conveyed *makes sense* to, and does *not mislead*, the recipient.

Just as there is no universal general English there is nothing like uniform legal English. Dozens of varieties of legal English may pose decision making dilemmas on the translator such as which variety to choose and how to deal with it if the target text must be in English but would not be supported by any concrete legal environment stemming from common law. For example, a translation of the Czech Civil Code into English would just serve the purpose of informing persons not speaking Czech but interested for some reason in Czech private law. These persons would include native speakers of different languages coming from different legal systems who have learnt English in order to communicate internationally.

Since legal English is historically rooted in the system of common law and its conceptual and terminological repertoire has been built within its realm the translator should carry out a thorough comparative conceptual analysis (as part of the jurilinguistic analysis of the source legal text) in order to select relevant terminological equivalents in the target language which would make legal sense in the target legal text corresponding to the legal sense in the source text.

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