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Special issue:

Legal Chinese.

Issues of

Mistranslation

in the Business Field.

Part 1

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Preface to the Special Issue

This issue of *Comparative Legilinguistics* is the first of two guest edited by Federica Monti. Both issues are devoted to Legal Chinese, with special emphasis placed on the Issues of Mistranslation in the Business Field.

The first paper authored by Jacques Henri Herbots (titled: *The translation of the Chinese Civil Code in a perspective of comparative law*) focuses on notable difficulties in translating legal texts in China, which emerged when the primary source language shifted from German, particularly during the period of abundant legislation under Dèng Xiǎopíng. The main challenge at that time was to discover or create suitable Chinese equivalents for the German terms of art. However, the situation later reversed as Chinese became the source language for translating Chinese statutes into English. This shift posed a fresh and distinct challenge for translators, as English legal terms are rooted in the common law system, whereas Chinese law stems from the Germanic legal tradition.

The adoption and enactment of the Civil Code of the People's Republic of China 中华人民共和国民法典, as part of the country's regulatory edification and modernization process, has served Herbots as a comparative reference to develop an intriguing terminological examination (from foreign languages to Chinese and vice versa) which sheds light on the rendering of some lemmas of great legal value. In particular, examples of pitfalls and errors in the English translation of the Chinese Civil Code are *right of subrogation* for *dàiwèiquán* 代位权 or *entrusted contract* (as a neologism) for *wěituōhétóng* 委托合同 or brokerage contract for *hángjìhétóng* 行纪合同, among others.

The lack of division between civil law and commercial law, which at the normative level is reflected in the failure (to date) to adopt

a Commercial Code kept distinct from the Civil Code of the PRC, also makes Herbots' analysis of great relevance to studies of Chinese commercial law, as well as of the underlying lexicon and legal structures that characterize it.

The paper by Lara Colangelo (titled: *The expression of the concepts of dolus and culpa in Chinese legal language: distinctive features and criticalities*) presents a rich and comprehensive overview of how the concepts of *dolus* and *culpa* are translated into Chinese. The terms denote two legal principles strongly related to the field of commercial law. The author addresses the following inquiries: (i) the historical development of the primary terms employed in Chinese to convey the ideas of *dolus* and *culpa*; (ii) the criteria followed by Chinese translators and authors in selecting these terms; as well as (iii) the key characteristics and challenges concerning the linguistic translation of these two legal concepts. Particular attention is given to one interesting aspect of the linguistic rendering of the concept of *culpa*, wherein two different terms are utilized: *guoshi* 过失 and *guocuo* 过错.

The universalistic and systematic character of Roman law, particularly suited to a country that decided to move in a decisive, although slow, way toward codification, has been studied and analyzed by the author to authentically answer three interesting 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/authors in choosing these terms? What are the main features and issues related to the linguistic rendering of the two legal institutions?

We hope that the readers will find the issue interesting and rich as food of thought.

On behalf of the editorial board:

Aleksandra Matulewska and Federica Monti

The translation of the Chinese Civil Code in a perspective of comparative law

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Abstract: Observing the challenges of the translation of legal texts in China, it is noteworthy that the source language, until the plethoric legislation under Dèng Xiǎopíng, was mainly German. The challenge eventually consisted in finding or ‘inventing’ adequate Chinese terms to render the German terms of art. Then the pendulum swung back. Chinese became the source language as Chinese statutes had to be translated into English. The challenge for the translators is a new and different one, because the English legal terms refer to the *common law* system (while Chinese law belongs to the Germanic legal family). What is for instance for a Chinese court the legal value of a translation which leads an existence beside the original text, e.g. of the English translation of a disposition of the Chinese Civil Code? A court is, generally speaking, only bound by an ‘authentic’ translation, – not by a simple official or by a private translation. Moreover, in the hypothesis that both language versions are authentic, the court has, in case of divergence between them, the obligation to reconcile the two versions. For a court – or an arbitrator, a legal counsel or a scholar – having to interpret and apply a particular disposition in a pending case, the added value of a translation is the following one. The interpretation which the translator himself gives of the text which he has to translate, can influence and facilitate their subsequent

understanding, even in the case of a non-authentic translation. One could say that the text is ‘chewed’ already. The translation, if made timely, could also help the legislator to draft a final text which would be more clear and readable. For the drafter of an international treaty or of a commercial contract the same is true. The obvious negative aspect of a translation is that it can contain inconspicuous juridical errors and by consequence create confusion and misunderstanding by those who will have to apply the disposition. In the recent Chinese Civil Code some examples of such mistranslation can be given. In case of translation of a legal text of a non-*common law* jurisdiction a special warning about the danger of introducing in a surreptitious way foreign *common law* concepts in the target law system, is not superfluous. The process of translation of a legal text requires first an understanding of the precise legal meaning of it, and subsequently the conveying of that meaning in the target language in respect of the coherence of the concerned target law system. That last point precisely is the challenge. Two recommendations can in conclusion be made, one concerning the timing of starting the translation process, and another one concerning a desirable supervision by a comparative lawyer during the translation process.

Key words: agency contract; authentic translation of a legal text; cause and consideration; Chinese legal terminology; commission contract; comparative law; good faith; hardship and frustration; Hohfeldian analysis, multilingual legal text; oblique procedural action; official or private translation of a legal text; public policy; trust.

Introduction

On January 1, 2021 the new Civil Code of the PRC came into being, after a long period of expectations and preparatory works (Herbots 2021: 39–49). This was great news for the comparative private lawyers all over the world. The PRC – a political and economic world power – belongs to the Germanic legal family (Zweigert and Kötz 1998; Glendon, Carozza and Picker 2015). In spite of the difficulty of the Chinese language, the Code – primordial source of law in a continental style system – was for the Western lawyers immediately accessible in translation. It is now waiting for the interpretation of the Code by the Chinese courts.

The present contribution concerns the English translation of the Code. Professor Chen Weizuo (2004; 2020) of the Qinghua

university in Beijing, who years ago translated the German Bürgerliches Gezezbuch (BGB) into Chinese, is now working on his own private English translation of the new Chinese Civil Code, changing the source language of his translations. Getting that news in an e-mail from him, the thoughts of the author of this contribution (who wrote a book on legal translation and interpretation problems, cf. Herbots 1973: 183) began wandering to the history of the legal translation in China which shows a similar swung of the pendulum since the end of the Qing dynasty, and, starting from there, to other thoughts about legal translations in general, hence the idea of writing this paper. Paragraph 1 of this contribution places the topic of the translation of *legal* terms of art in the historical perspective in China. The further paragraphs situate the issue in the broader and comparative context of the translation of legal texts. Paragraph 2 draws attention to the danger of introducing by error foreign *common law* concepts in the Chinese law via the English translation. In paragraph 3 legislative changes in terminology are mentioned. Paragraph 4 distinguishes *authentic* language versions from non authoritative ones. A translation too can be authentic. This does not only concern statutes, like the Civil Code, but also treaties and commercial contracts. In case of divergence of the different language versions, only in the hypothesis of *more than one authentic* version a court has the duty to reconcile the divergent texts. Paragraph 5 raises the issues of the conveyance of the exact meaning of a legal source text into the other language. The existence of an authentic translation will be beneficial for a court. But in paragraph 6 it is demonstrated that also the non-authentic translation of a legal text may have benefits. It may also benefit the legislator himself. Unfortunately, there is another side of the medal. A translation of a legal text can be a source of errors, and often is. Some examples of such errors in the new Chinese Civil Code are given in paragraph 7.

1. The reversed phenomenon of the translation of legal texts in China. Historical overview

1.1. Imperial China¹

In the Chinese Imperial times which ended by the creation of a republic in 1911, no precise legal terminology came into being. Although there were during all those dynasties (221 B.C. – 1911) magnificent periods of flowering philosophy, arts and literature, no pure legal science emerged like it had been the case in the Roman Empire. The national statutory law and the brilliant dynastic Codes contained mainly criminal law and sophisticated rules governing the well-functioning imperial administration. The reason of this lack of interest for private law is to be found in the Confucian philosophy (or as the Chinese say the philosophical movement of Ruism), which since the Han emperors became the state philosophy.

According to Confucius (Kǒngzǐ 孔子) it was not the role of the written penal law (the *fǎ* 法) to regulate the relations between the citizens in society, as on the contrary the Legists asserted, but it is the role of the *lǐ* (the rituals, the social etiquette and protocol, the moral standards and the customs). Traditional Chinese society was characterized by the rule of *lǐ* 礼 as opposed to the rule of *fǎ* 法. The imperial State was not interested in regulating private law. The Qing Code called civil matters ‘minor matters’ that should primarily be dealt with outside the formal legal system. The main practical function of the law was not to protect citizens and to allocate rights to them, but rather to strengthen and protect the power of the ruler. The emphasis was put on the idea of punishment and not on the protection of an ideal of justice. There existed no class of lawyers before 1911, as it existed in Rome, since there was no specific legal education. The cultivated elite corps of the mandarins was selected by difficult exams which dealt mainly with literature and Confucian philosophy. No Ulpianus, Paulus, Gaius or Pomponius, no Cicero. Each district magistrate, a mandarin, had a secretary who would assist him in the criminal cases. He was a lower civil servant, who was not highly esteemed. His daily practice only gave him his specialization. This is the only person whom we could call a ‘lawyer’. There were neither

¹ See Bodde and Morris (1967); Chang (2016); Bodde (1982), Mac Cormack (1996).

advocates for the parties before 1911. A former legal secretary who for remuneration could write a complaint for a party, corresponds most closely to a legal counsel.

No wonder that no precise legal terminology came to existence in imperial China. Let's take the example of the concept *contract*. The concept of contract finds its origin in the ancient term *qì yuē* 契约, which, however, was never clearly defined. There are several equivalent concepts in Chinese history, like *zhì jì* 质剂. The word is ancient Chinese and can be found in the Rites of Zhou, which state that people use larger and longer pieces of bamboo, *zhì* 质, to *sell* slaves and livestock, while *jì* 剂, which are smaller and shorter, are used to *sell* iron and jewellery. Since the West Zhou dynasty the lender and the borrower had to write their *loan* agreement on a piece of cloth, and then tear it into two parts; each party would get one part to prove the agreement. When a conflict arose, the parties could bring both parts together to recreate the written agreement. The same would be done after the invention of paper in the second century B.C. The parties wrote *hé* 合 and *tóng* 同 on the paper, and each got a part with either *hé* 合 or *tóng* 同 on it. A *hétóng* 合同 comprised the two parts of the paper. In the 20th century the modern Chinese legislation adopted the term *hétóng* 合同 for *contract*. Early Chinese law never developed beyond the stage of recognition of several distinct types of agreement to which legal consequences were attached. No Law of contract emerged comparable to that developed in Rome at roughly the same epoch. The main reason for the difference between Rome and China lay in the lack of emergence in China of a class of private lawyers resembling the Roman jurists. The consequences of this situation are still to be felt.

1.2. The end of the Qing and the republic

The modern Chinese legal terms are mainly terms of art translated from Western legislations. This process of translation started in 1839 when a high imperial official organized the translation in mandarin of chapters of the book of Emerich de Vattel on international law. In 1862 the imperial college for the spread of Western science was established and a time of more systematic introduction of Western law

started. As regards legal terminology, sometimes the corresponding Chinese terms existed, like *hétóng* 合同 for *contract* or *hélǐ* 合理 for *reasonableness*. Sometimes the concept didn't exist in Chinese. The three manners of integrating foreign terminology in the Chinese language were then: to give a new signification to an existing Chinese term, or to introduce a neologism, or finally to use loan words. Many neologisms were introduced and are still used today, like *zhǔquán* 主权 (sovereignty), *fǎyuàn* 法院 (court of justice), *zérèn* 责任 (liability). Other terms were modified later, like *gōngfǎ* 公法 (international law, now: *guójí fǎ* 国际法) or *lǜfǎ* 律法 (law, now: *fǎlù* 法律). During the second half of the nineteenth century the Chinese used Japanese legal terminology as an aid for the translation of the Western legal text. In Japan the law developed in the Meiji period (1868 – 1914), consisted mainly of Japanese translations of continental European statutes. The concept of *constitution* for instance was unknown. The Chinese borrowed from Japan the term *xiànfǎ* 宪法, to designate the Western concept of constitution (*xiàn* 宪 meaning: first, earlier, ancestral; *fǎ* 法 meaning written law). To designate the concept of subjective right, which was an unknown term of art, they formed the neologism *quánlì* 权利 from *quán* 权 (power) and *lì* 利 (advantage).

During the late Qing dynasty emperor Guāngxù mandated a special hand-picked committee to draft a Western style Civil Code for China. Mainly the German model was followed. The drafters faced a big, but fascinating semantic problem, namely the translation of the German terms of art in Chinese. That Code, however, would never be enacted, because the Republic was proclaimed in 1911. After the formation of a national government finally in 1928, a legislative committee was charged to draft a civil code following the model of Guāngxù. It was successful and the first Chinese Civil Code, following mainly the model of the BGB, was enacted in 1930. It is still in force in Taiwan, but in the PRC it was, together with the whole legislation enacted under Chang Kai-Shek, repealed in 1949. As regards the semantic problem, a fine example is given by the concept of *good faith* which appears in the Civil Code of 1930, as well as later in the Law of contracts of 15 March 1999 and now in the Civil Code of 2020. To render the term *Treu und Glauben*, used in the BGB, the Chinese drafters had to create a new word, *chéngxìn* 诚信, a contraction of *chéng shí* 诚实 (*honesty*) and *xìn yòng* 信用 (trustworthiness), two concepts from the classical Confucian writings.

Before the Kuo Min Tang Code, the term *chéng xìn* 诚信 (in abbreviated form) was unknown in the Chinese legal language. It means literally *honesty and trustworthiness*. The translation of the Chinese Legal System Publishing House is *good faith* (Novaretti 2010: 953–981). It should be stressed, from the point of view of comparative law, that in a Common Law jurisdiction (like Hong Kong) *good faith* has a meaning which differs totally from the legal term of art ‘good faith’ (‘Treu und Glauben’) in the law of contracts in Continental jurisdictions, like the one of Mainland China.

1.3. The socialist market economy

After the Maoist period, and the reform and opening up of the economy in 1978 under Dèng Xiǎopíng a plethora of Western statutes were transplanted (Cohen, Chan and Míng 1988; Cohen, Edwards and Chang Chen 1980; Cohen 1970). Concerning the legal terminology, one continued to take the path taken in earlier days, i.e. to use the three manners of integrating foreign terminology in the Chinese language. Those terms belong now completely to the Chinese legal language. Another example of the same barrel: *fairness* or *equity* in a contract, in the sense of Aristotelian commutative justice, was rendered in Article 5 of the law on Contracts of 1999 and now in Article 6 of the new Civil Code by the neologism *héng píng fǎ*, 衡平法 derived from the words *héng* 衡(measure), *píng* 平(equality) and *fǎ* 法 (legal rule).

After the flood of legislation following 1978 it can be said that the law of the PRC possesses a thesaurus of legal terms of art based on the translation of German sources. Speaking of a legal thesaurus, however, the record ought to be set straight in comparison with German law. A Western legal language is a specialized technical language. A Western native speaker needs a legal training to understand it. By contrast, the Chinese language used in the statutes is ordinary, almost banal and very simple from the viewpoint of a Western lawyer. Chinese legislation is characterized by an absence of legal jargon (cf. Lubman 1970: 13; Cao 2004: 94f; Peerenboom 2002: 247, 251) Compared with the very precise German legal language, the Chinese legal style and terminology is yet not well developed. In the

context of the opening of the Chinese market and the accession of the PRC to the W.T.O. in 2001, the Chinese legislation is officially translated in English, the *lingua franca* also in South East Asia.

2. The danger of ‘pollution’ by *common law* concepts

At this stage of the contemporary history, the phenomenon of translation of statutory texts in China changes, and at the same time the challenges for the translators. The pendulum swings back. It is no longer the challenge of the translation of German texts into Chinese which is predominant. It becomes the reverse. The challenge of the translation of modern Chinese texts into English becomes that the translation must respect the coherence of the Chinese system which belongs to the Continental Law system, and may not be ‘polluted’ with *common law* concepts via the English terminology.

To make this idea of ‘pollution’ clear, a good example of such a pollution can be given which was caused by a wrong translation in South Africa in the late nineteenth century². As comparative law specialists know, the concepts of *cause* and *consideration* are totally distinct from each other. Chief Justice de Villiers, who like all the South African judges had received his legal education in the English inns of court in London, had in a case of 1885 to translate the term *causa* [*oorzaak*] used in the Roman-Dutch law of contracts (a law system belonging to the continental law family and not to the *common law*). He translated it wrongly by *consideration*. This became a precedent and so, by an erroneous translation of the Chief Justice the doctrine of consideration was imposed into the Roman-Dutch law which had to be applied in South Africa and which did not contain it. De Villiers plucked the English doctrine from its surroundings and from a system of which it forms a well understood part, and grafted it upon a legal system to which it is wholly foreign. It lasted unfortunately till 1919, when in the case *Conradie v. Rossouw* the doctrine of consideration was rejected.

² The South African case given as an example was discussed by Herbots (2000: 457–481).

Qíngshìbiàngēng and ‘frustration’

One may be afraid that similar mistakes happen, when Chinese commentators who, like De Villiers, got their legal education in the *common law* for instance in Hong Kong, write commentaries on the Chinese Civil Code which belongs to the Civil Law tradition. Some commentaries on Article 533 of the new Chinese Civil Code may give an example of a possible pollution of the Chinese law by using concepts of the *common law* through the intervention of a wrong translation. Ten years after the refusal of the doctrine of hardship (‘la théorie de l’imprévision’) by the National People’s Congress at the vote of the Contracts Act of 1999, the Supreme People’s Court recognized that doctrine, called in Chinese the doctrine of the change of circumstances (*qíngshìbiàngēng* 情势变更). A remarkable “interpretation contra legem”! The Guiding Opinion of 7 July 2009 makes use of the *hélǐ* 合理 (reasonability) standard in an instruction wherein the Supreme People’s Court states that in dealing with cases affected by a significant *change of circumstances* courts shall “reasonably adjust the interests of the parties”. The new Article 533 of the Civil Code incorporates this interpretation and pushes a progressive agenda:

“Where the basic conditions of a contract undergo a material change which was unforeseeable at the time of the conclusion of the contract, and which is not a commercial risk to be assumed after the formation of the contract, rendering the continuation of the performance of the contract grossly unfair for either party, the disadvantaged party may renegotiate with the other party; and if the negotiation fails within a reasonable time limit, the party may request the People’s Court or arbitral institution, to modify or terminate the contract. The People’s Court or arbitral institution shall change or terminate the contract based on the actual circumstances of the case, in accordance with the principle of fairness.”

Some Chinese scholars, writing their commentary in English, use in this content the concept of *frustration of the contract*. This is like comparing apples and oranges. In *common law* systems (like that of Hong Kong) relief for hardship is never granted in the absence of an express contractual provision. The *doctrine of frustration* is something different from that of hardship. It excuses performance of the contract when *the circumstances have changed so much* that the

performance required by the contract is *radically different* from that which was initially undertaken by the parties.³ An *economic* hardship will *not* render a contract frustrated. So, integrating the doctrine of frustration in the Chinese law system would lead directly and in the shortest time to misunderstanding. These are two different doctrines, both based on a change of circumstances. As William Shakespeare wrote in the Twelfth Night, “Words are very rascals. The flavour of a sentence is apt to change or disappear in a translation; and just this flavour may change the aspect of the case.” This is all the more true concerning the translation of a legal text.

3. Amendments in the terminology

In the contemporary period it happens that the legislator amends the Chinese terminology and the English translation. An example in the Civil Code, is given by the modification of the term *social and public interests*. The *common law* concept of *public policy* (*ordre public et bonnes moeurs* in the French terminology) is an ‘open-ended’ concept. It refers to the rules which establish the legal foundations on which the economic or moral order of the society rests. It has been left to the courts to determine in particular cases whether an agreement between individuals is incompatible with the interests of society and therefore unenforceable. It introduces an element of indeterminacy in the legal discourse. It is, however, not left to an arbitrary evaluation by the courts. But in the Chinese Law on Contracts of 15 March 1999 (Article 7) it is not only stipulated that the parties shall respect *social morals* (which is the term used in the BGB to mean *public policy* (*Gute Sitten*)), but also that they may not disturb the social and economic order or harm *social and public interests*. This is a much broader concept than public policy, which is narrowly defined and is in practice foreseeable. The Arbitration Law contains the same too broad term: *the award which violates social and public interests will be denied enforcement by the People’s court*. This opens the door to arbitrariness. Article 8 of the Civil Code abandons that term and provides now that a contract shall respect *public order*

³ The source of this doctrine is the famous case *Krell v. Henry* (1903), in which *Taylor v. Caldwell* (1863) was cited as a basis.

(*gōnggòngzhìxù* 公共秩序). The broader term *social and public interests* (*shèhuìgōnggòngliìyì* 社会公共利益) allowed the People's courts to take the concrete circumstances of the case into consideration to judge if the contract was void. The changed and narrowly defined term in Article 8 C.C. is more in line with international practice. Could it be that the English translation made the Chinese legislator think twice about a too broad term in the earlier law which is a danger for the certainty of the law?

4. The difference between an authentic version and official or private translations

Let us now turn to the theoretical question of the legal value of a translated legal text. The Chinese text of the Civil Code which was enacted by the National People's Congress in 2020, is the only *authentic* text of the Code⁴. There came, however, an *official* English translation (Legislative Affairs Commission of the Standing Committee of the National People's Congress 2021). What does such a translation mean for a Chinese court? In this short paper we look at analogous phenomena of multilingual legal texts in other countries.

4.1. The authentic version of a multilingual legal text

That the mandarin linguistic version of the Civil Code of the PRC is the only *authentic* version of it means that, if a difference with the *official* translation should appear at a later moment, only the authentic text is binding for the courts. From a comparative point of view one can point at other countries where *more than one version* of the multilingual statutory text is authentic. This is the case for example in Belgium, Switzerland, Canada, Quebec or in the European Union. This is also the case in the autonomous administrative region of Hong

⁴ In Belgium, as *mutatis mutandis* in China now, there existed until 1961 only an authentic French linguistic version of the Civil Code; in Dutch there was only an official translation. Since 1961 the two language versions are authentic. See Herbots (1986: 35–72).

Kong. The Swiss Civil Code for instance is published in three language versions, which are all equally authentic: French, German and Italian.

4.1.1. The court must reconcile the divergent versions

A problem arises in these systems when, at the stage of interpretation of the statute, a divergence appears between the two versions, and one of the litigating parties bases his argumentation on one version, while the other one favors the other version. How will the court then arrive at reconciling the divergent text versions, which are presumed to have the same meaning?

The Belgian Law of 30 December 1961 offers the following solution:

“Controversial topics based on a divergence between the Dutch and the French texts are decided according to the will of the legislator which is determined according to the usual rules of interpretation.”

In other words, the version should prevail which is the closest to the legislature as ascertained by the regular rules of interpretation of deeds and statutes; that version shall prevail which is most consistent with the intention of the concerned Article, and the ordinary rules of legal interpretation shall apply in determining such intention.

The Chinese Civil Code says the same in Article 466.2 for the analogous problem of divergence between two authentic versions of a multilingual *contract*:

“Where a contract is made in two or more languages which are agreed to be equally authentic, the words and sentences used in each text shall be presumed to have the same meaning. Where the words and sentences used in each text are inconsistent, interpretation thereof shall be made in accordance with the related clauses, nature, and purpose of the contract, and the principle of good faith, and the like.”

If there is *more than one* authentic version of a multilingual legal text, and if a divergence between them appears the court has to *reconcile* the versions. It is not the version in the *language of the procedure* that shall prevail, neither the “*original*” text [this is the text

in the working language used in the drafting process (*die führende Sprache*)]. The words and sentences of both authentic texts are presumed to have the same meaning and must be reconciled.

4.1.2. Several authentic language versions in China

In China too this could be the case, for instance if there was a divergence between the Chinese and the English text of the Vienna Convention. The Vienna Convention on the international sale of goods was ratified by the PRC and became as a Uniform Law part of the domestic law of China. There are five authentic versions of the CISG. The English version of it is not only an *official* version. The Chinese and the English *authentic* versions are on a foot of equality before a Chinese court.

This would also be the case in China, if a translation of a contract governed by Chinese law was declared by a contractual clause to have authentic value, or if a translated version of an international treaty entered by the PRC and another State or with an international organization was agreed to be authentic.

4.1.3. The reason of the existence of translations which are declared authentic

How to explain the worldwide phenomenon of several *authentic* versions of a statute? The reason lies in susceptibilities and nationalist sentiments. In the Justinian Roman empire, when nationalism did not exist yet, the issuing of several novellae in authentic Latin and Greek versions was due to the need to make them understood by everybody in the empire. In contemporary China the reason for an *official* translation in English of the unique authentic version in Mandarin Chinese of a statute is different. It is, certainly since the accession of the PRC to the W.T.O. in 2001, the need to make the legislation known to *foreign* investors, traders and expats, English being the *lingua franca*, also in East Asia.

4.2. The private translation and the official translation

A statutory text can be translated by a scholar. The Chinese Code or part of it can for instance be translated in Italian (cf. Monti 2020). A private institution can do the job, like for instance the Max Planck Institute for comparative law and international private law who made a German translation of the Chinese Civil Code⁵. A private translation can be considered as having the same value for the interpretation, as a scholarly writing (*la doctrine*). As Dölle (1961: 27) writes:

“When the translation is made by a private person, it earns to be treated in the same way as any other scientific explanation of the meaning of the text (‘Sinndeutung’), and can in this respect be used as a legitimate tool for the interpretation.”

This is equally true for an *official* translation. An *official* translation is made under the exclusive responsibility of the legislator after the enactment of the original text. This is the only difference with a private translation. A court cannot base the interpretation of the normative text on its official translation (except if that translation has been declared by the legislator to be authentic). But the official non-authentic translation may have a value similar to that of an authoritative scholarly writing.

5. The art of translation

5.1. Understanding the *legal* meaning in the first place.

The process of translation requires a broad and profound understanding. The problems of translation are closely connected to semantic analysis and the theory of the significance-in- context. This is well explained in an English court decision, *Dies v. British and international Mining corporation ltd*:

⁵ For the German translation of the Chinese Civil Code see Ding, Leibkühler, Klages and Pißler (2020: 207–417).

“The precise mental process of translating a word or sentence spoken or written in one language into another language is or may be somewhat complex. In fact, to say that you translate one word by another seems to me to be a summary method of stating a process, the exact nature of which is a little obscure. A substantive word is merely a symbol which unless it be part of a tale told by an idiot signifies something. If that something is a concrete object such as an apple or a particular picture, the process of translation from one language to another is easy enough for any one well acquainted with both languages. Where the words used signify not a concrete object, but a conception of the mind, the process of translation seems to be to ascertain the conception or thought which the words used in the language to be translated conjure up in his own mind, and then, having got that conception or thought clear, to re-symbolize it in words selected from the language into which it is to be translated. A possible danger, when the document to be translated is one on which legal rights depend, is apparent, inasmuch as the witness who is in theory a mere translator may construe the document in the original language and then impose on the court the construction at which he has arrived by the medium of the translation which he has selected.”⁶

If the text which has to be translated is a legal, normative text, the translator should by consequence be a lawyer. That is obvious. How could a non-lawyer understand fully a difficult legal text?

5.2. Conveying the meaning into the other language.

Having understood the text, the translator has to render it in *the target language*. An imprecision of language indicates a concomitant imprecision of thought. A translated term in English should accurately convey the meaning of the original Chinese text. Otherwise, it would mislead the target readers. Let's take the legal concept *land ownership* as example. According to the Constitution of 1982 all agricultural land is *owned* by *collectives*. What kind of *right* does a Chinese peasant have on his plot of land, knowing that he may not sell or mortgage it? What means the Chinese term rendered by the English term *ownership*? Wesley Newcomb Hohfeld, in his seminal book on

⁶ The court decision *Dies v. British and International Mining Corporation Ltd* (1939) I, K.B. 724, p. 733, per Stable, J.. Concerning this topic, see the writings of one of the founders of the modern discipline of translation studies, Nida (1964); Nida and Taber (1969).

fundamental legal conceptions as applied in judicial reasoning (1919), attempted to disambiguate the term *right* by breaking it up into eight distinct concepts. He demonstrated that there is no such thing as a legal relation between a person and a thing. A legal relation always operates between two people. The *right* of a Chinese peasant on his land must be defined by using this Hohfeldian analysis. Such a dissection of the *right* of a Chinese peasant on his land needs a more profound study. How to translate the Chinese term rendered by the English term *collectives* which is enigmatic? Instead of the term *collectives*, Jing An and Jiahui Sun (2022) use *rural collective economic organizations*, a paraphrasing, which refers to the three types of collective economic organizations which emerged since the reform and opening up, including town, village and group based on the Agricultural Cooperation Movement and the People's Commune. This translation is an example of a correct and good way of conveying the meaning of a Chinese legal term into a target language⁷.

6. Benefits of a translation

What are the benefits of an (authentic or non-authentic) translation, on the one hand, and the hidden reefs and shoals of it, on the other hand? The fact must be stressed that a legal text which is presented in several linguistic versions, enriches the toolbox of the court when it has to interpret that legal text. The timely translation offers benefits also to the drafter or the drafting commission. The advantages or problems created by the translation of a legal text are not limited to plurilingual *statutory* texts; plurilingual *treaties* and commercial *contracts* present the same challenges.

⁷ The authors give other interesting examples: State ownership, land, real estate, immovable property, real property / personality rights / quasi-contract / *negotiorum gestio* / unjust enrichment.

6.1. Benefits for the interpretation of the source text

It cannot be denied that a good and nuanced translation which is not limited by a word-by-word rendering, may clarify the original text, and can even be more precise. A seminal case of the Hong Kong High Court, *R. V. Tam Yuk Ha* (1996) illustrates the problem of interpretation of a multilingual normative text in case of divergence between the authentic versions (Hong-Kong Department of Justice 2017)⁸. The lady, appellant, a licensee of a store selling fresh meat and fish, was convicted of placing metal trays outside the designated area of the shop without written permission from the Urban Council. She was found by the magistrate court to be in breach of a by-law, according to which

“no licensee shall cause or permit to be made in respect of the premises to which the license relates: (a) any alteration or addition, which would result in a material deviation from the plan (...)”.

One of the key issues the case turned on, was whether the phrase *any alteration or addition* was in conflict with the corresponding phrase *gēnggǎi huò zēngjiàn gōngchéng* 更改或增減工程 in the Chinese version of the by-law. As the presiding appeal judge argued this phrase clearly means *alteration or addition works*. No one who understands the Chinese language would come to the conclusion that the placing of metal trays would be a *zēngjiàn gōngchéng* 增減工程. In his view the English language term of *addition to the plan* is ambiguous and the Chinese language term is clear and plain. The only reasonable step for the court is to give effect to the text which favors the appellant.

This case concerned a divergence between two authentic language versions. In the case of divergence between an authentic and an *official (or a private)* version also, the non-authentic text may be considered similar to a (possibly contrary) scholarly, doctrinal legal opinion which can be inspiring for the court. There are many

⁸ This case was discussed in the following official document: “A paper discussing cases where the two language texts of an enactment are alleged to be different”, Hong Kong E-Legislation, Database established by the Department of Justice (1998). https://www.elegislation.gov.hk/othdissem?OTH_DISSEM_CONTENT_ATTACH_ID=24

examples of this in the comparative literature, cf. Herbots (1985: 959–972; 1973: 183).

6.2. Benefits for the drafting of the definitive text

Let's now turn to the legislator – or the drafter of a treaty or of a contract – himself. If the translation happens before the enactment or the signature, it can help to enhance the quality of the text which has to be translated. It can at least prevent legal errors. To formulate a thought in another language has often a simplifying or clarifying influence on the drafting in one language. That a legal text is drafted in several languages can sometimes be a blessing in disguise. It obliges to be more careful than usual in choosing the terms, and so often allows discovering that the text of a first project is uncertain or could cause confusion. It happened sometimes in Genève for instance that the English version of a French project expressed the intention of the conference more exactly than the original text; it happened also that one discovered during the translation that a technical term used in a text was inappropriate. Concerning the Swiss Civil Code Gutteridge (1953: 147) writes:

“The fact that a French translation had to be made of the Civil Code led to a change of the German text to make it match the French expressions; a greater clarity of the German text was inevitably the consequence.”⁹

7. Examples of pitfalls and errors in the English translation of the Chinese Civil Code

The medal has, however, another side. The danger of a translation, the hidden reefs and shoals, should be stressed. A translation can be a source of errors¹⁰, and often is. Ivraakis (1960: 214) for instance writes:

⁹ My own translation. For this topic see also Keller (1960).

¹⁰ See also Schlesinger (1960: 477).

“Experience and state practice has demonstrated that so-called official translations of international instruments, supplied by governments themselves, presented at times terminological discrepancies which were more or less misconstructions of the original text.”

Let us give some examples of legal errors in the translation of the Chinese Civil Code. A supervision of the translation process by a comparative lawyer’s team (like it happens in the Directorate-General of Translation of the European Commission) would have prevented these errors.

7.1. The right of subrogation¹¹

An example of misleading translation is to be found in Article 535 of the Chinese Civil Code concerning the *dàiwèiquán* 代位权, a claim by *right of subrogation* according to the English translation. Article 535 is inspired by the French law on the *oblique action*. It is a remedy which enables a creditor of an insolvent debtor to exercise the indolent debtor’s claim, except those which are purely personal to him. The creditor is allowed by law to act as representative of the debtor, but he is not *subrogated* in the rights of that inert debtor.

The term *subrogation* in a civil law system points to a concept, which is related to the payment of a debt. This is not the case in the hypothesis of Article 535 of the Chinese Civil Code. The term *subrogation* indicates that if another person than the debtor, for instance a surety pays the creditor, that person is *subrogated* into the place of the paid creditor. Who pays, steps into the shoes of the paid creditor. The claim of the paid creditor is not discharged, but passes to the person who paid, together with possible other securities held by the paid creditor. In the different hypothesis of Article 535 of the Chinese Civil Code, namely the indolence of the insolvent debtor to exercise his claim against his own debtor, the creditor of the inert debtor is not *subrogated* in the rights of his inert debtor. It is misleading to use the translation *by subrogation* instead of *by way of an oblique legal claim*. For a translator who is only a linguist,

¹¹ The erroneous usage of the concept of subrogation was already pointed at and discussed by Herbots (2021).

however, a correct legal translation of Article 535 was an impossible task. Indeed, the legal term *oblique legal claim* does not exist in the English language, for the good reason that the “oblique legal claim” is unknown in the *common law*. This may make us think of the difficulties of the drafting commission of the Chinese Civil Code of 1930, which had to translate into Mandarin German legal terms like *Treu und Glauben* (*good faith*) which did not exist in Mandarin. Likewise *oblique action* does not exist in the *common law*.

The cited German private translation of the Chinese Civil Code follows the lead of the English translation. The blind leading the blind... It uses the term *Subrogationsrecht*, adding however prudently in footnote *Wörtlich: Recht zur [Ausübung eines Rechts] anstelle [des Schuldners]*.

7.2. The commission contract¹²

A second example can be found in the nominate contracts related to agency, i.e. the legal representation of a person, a general concept which is treated in the General Part of the Chinese Civil Code (Articles 161 and following). The two discussed nominal contracts are the *wěituōhétóng* 委托合同 (Article 919) and the *hángjìhétóng* 行纪合同 (Article 951).

The *wěituōhétóng* 委托合同 is translated by a neologism, *entrustment contract*. In the German translation of the Chinese Civil Code it is translated by *Geschäftsbesorgungsvertrag*, [although it is said in footnote *wörtlich: Auftragsvertrag*]. This neologism is not wrong, but for clarity’s sake it would be preferable to choose *mandate contract* (or agency contract, agency being used already in the official translation of Book I, the General Part, of the Code). The concept of mandate is very well known in continental law.

The *hángjìhétóng* 行纪合同 is translated by *brokerage contract*. This is clearly a wrong translation. The German Commercial Code regulates a contract, called *Kommissionsvertrag*, by which a person desirous of purchasing or selling goods or securities gives a

¹² The incorrect translation of the notion of *hángjì hétóng* 行纪合同 was pointed at and explained by Herbots (2021).

mandate to an intermediary versed in this type of business (*Kommissionär*). The customer giving the mandate is called the *Kommitent*. The *Kommissionär* dealing with a third party, acts in his own name, but for the account of the *Kommitent*, receiving for his services a commission (a percentage of the sales price). This concept is unknown in the English *common law*. The contract is the model for the Chinese nominate contract *hángjìhétóng* 行纪合同, which should by consequence be translated by *commission contract* for lack of a better word. The German private translation says correctly *Kommissionsvertrag*. In the *common law* a brokerage contract is not precisely defined. It is not advised to translate a well defined concept by a vague concept of another law system.

A third nominate contract, called in the official translation of the Code the *intermediary* contract, does not concern the concept of representation. The Chinese intermediary - unlike the English broker - does not conclude a contract and does not represent his client. His services consist only in bringing the two (future) contracting parties together. In the German private translation that particular nominate contract is rendered literally by *Vermittlungsvertrag*. *Maklervertrag* would be more adequate.

7.3. The trust

Two examples of clear translation errors in the English versions of the Chinese Civil Code were given above. The *common law* concept of ‘trust’ (used to translate the Chinese term *xìntuō* 信托 illustrates the challenge created by the translation of a Chinese legal text into English. The non-paraphrasing of the term *trust* may create confusion and may therefore also be characterized as an error.

In China, the *trust idea* appeared when, at the end of the 19th century, so-called trust companies were introduced. That was first in 1890 a company based on Japanese capital, and then in 1913 the *Dalian trust company*, followed by others. The financial unrest in 1921 convinced the republican government of the necessity to regulate (only) *administratively* those financial institutions. Surprisingly, the trust industry developed without any legal basis. There was a dichotomy between the buoyant life of the so-called trust-companies

in the sectors of banking, insurance and securities and the law; a dichotomy in other words between the economists and the lawyers. The lawyers had to wait and the first ‘trust’ law was enacted in 2001, modeled on other Asian systems. However, in this Chinese law of 2001 the trust is *not conceptualized* (Jian 2021). Since, after the economic reforms of Dèng Xiǎopíng, one started to work on the drafting of a future Civil Code, a possible integration of a trust law in the Civil Code was discussed, but in the definitive version of the Code of 2020 the trust – or any trust-like device like the (French) fiduciary contract – was left out of the Code, except in one Article, namely Article 1133,4. It only mentions the *trust*, stating that “a natural person may, in accordance with law, create a testamentary trust”. The ‘trust’ law of 2001 is retained *outside* the Code, as a separate law for financial institutions only. The Chinese Civil Code of 2020 continues the Civil law tradition followed since the very beginning of the reception of Western law in China, and refuses to integrate the trust.

It is well known in comparative law that the trust and the trust law are very typical for the *common law*. It is impossible to insert it as such in a Civil law system, like the Chinese or the German one (notwithstanding the possible creation of trust-like devices which can be conceived, as the French legislator did in 2007). A trust-like device as the French *fiducie* (fiduciary contract) has to match the requirement of coherence with the legal Civil law context. An Anglo-American trust is not a contract, and belongs rather to the domain of the ‘real rights’. A fiduciary device is a (nominated or innominated) contract. So, again, let us not mix apples and oranges. Nothing in Chinese law forbids an individual, however, to make a fiduciary (trust-like) contract or a testament providing for a *separate fund* at the disposition of a *beneficiary* and *created by a fiduciary contract*. That seems the meaning of Article 1133.4.

In the already cited German translation of the Chinese Civil Code the term *xìntuō* 信托 in Article 1133 (in the English translation *trust*), is rendered by *Treuhand*. One should keep in mind, however, that the German case law does not recognize the institution of the trust, as it is incompatible with the dogmatic foundations of German law. Nowhere in German law any single institution can be found which *by itself* performs all the functions for which the *common lawyer* deploys the trust. However, contemporary German law has several ‘trust-like devices’, which work differently, but perform functions similar to the ‘trust’. In some situations a person holds rights

for the benefit of another, via a device described by the umbrella term 'Treuhand'. So, *Treuhand* may refer to the *Treuhandanstalt*, an agency of the German government charged with privatizing numerous state-owned companies in East Germany some time before the reunification of Germany in 1990.

The word *Treuhand*, however, is not a clear term in German; it can, moreover, not be exclusively described as *an Anglo-American trust* (Gvelesiani 2016: 93). It has no equivalent in English. *German trust-like device* – is the best English translation of the term *Treuhand*. This analysis will help to get rid of the ambiguities of the translation. In the same vein it would be preferable not to translate the term *xìntuō* 信托 in Article 1133.4 of the Chinese Civil Code as 'trust'. The term *trust* in the English translation of the Chinese Civil Code and the term *Treuhand* in the private German translation are both ambiguous. 'Chinese trust-like device' would be better to render the concept of that device with Chinese characteristics, called *xìntuō* 信托 in the Chinese legislation and in the practice of the financial institutions.

8. Conclusion: clearer text, better law

At the start of the modernization of the Chinese law the source language for the translation of western model texts was German. The challenge for the translators consisted in finding and inventing Chinese indigenous concepts to render the unknown German concepts. At the moment of the reform and opening up of the economy of the PRC in 1978 the new legal terminology was assimilated and digested. The modern Chinese law had now to be in his turn translated into English, the worldwide *lingua franca*. This means a new challenge for the translators. It becomes crucial not to introduce in the Chinese law foreign (*common law*) concepts via the English translation. This would lead to misunderstandings of the own Chinese law.

The translation of a legal text must not only be linguistically good, but also juridically correct. In order to enhance the juridical quality of a translation two techniques are available. The translation of a multilingual legal text – be it a bill, a project of a treaty or of a commercial contract – should be effectuated not only by linguists –

how excellent they may be –, but in cooperation with specialized comparative lawyers.

Moreover it is suggested that the original text should be translated *before* the enactment, or *before* the signature of the treaty or the commercial contract, and not, as is actually the case, *after* that moment. The drafter or the drafting commission would then still have the time to improve the quality of the text by taking into account what the difficulties of the translation – whether *authentic* or simply *official* – revealed about the original text. Hence, the redaction of the definitive text will become clearer. How clearer the text, how better the law.

Three examples of legal errors in the translation which could have been avoided if there had been a supervision of the translation by a team of comparative lawyers, were selected in the Chinese Civil Code: Article 535 does *not* create subrogation; the *hángjìhétóng* 行纪合同 in Article 951 is *not* a brokerage contract; the *xìntuō* 信托 in Article 951 is *not* an Anglo-American trust.

Those mistakes don't, however, create a pressing problem for a court, because the Chinese Civil Code has *only one* authentic text, so that the court is not obliged to reconcile the divergent language versions.

Even for a *non-authentic* translation of a Chinese statutory text – like it is the case for the Civil Code – a supervision of the translation as described above is desirable. A non-authentic translation too can, as we saw, play a role in the interpretation of the multilingual text. A good translation enriches the toolbox of the court. And may the comparative lawyer have the last word? A good English translation will allow a more intense academic dialogue and more fertile discussions between specialists in the concerned branch of the law.

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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 translant 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 acceptance, 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 translants 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 translantans (*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 translantant for *fraus*, but as a translantant 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>

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](https://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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