

Where legal cultures meet: Translating confrontation into coexistence

Starcie kultur prawnych: Przekład na język angielski jako język komunikacji interkulturowej

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THIS PAPER FORMS PART OF THE AUTHOR'S DOCTORAL THESIS IN LEGAL LINGUISTICS AT THE UNIVERSITY OF LAPLAND. THE AUTHOR LED THE TEAM THAT SET UP AND RAN WHAT APPEARS TO BE THE FIRST ACCREDITED MASTER'S PROGRAMME IN LEGAL LINGUISTICS, AT THE RIGA GRADUATE SCHOOL OF LAW. THE AUTHOR HAS A MASTER'S DEGREE IN EDUCATION IN ADDITION TO BOTH A LEGAL AND LINGUISTIC BACKGROUND; TRANSLATES LEGAL TEXTS INTO ENGLISH FROM GERMAN, RUSSIAN, AND FRENCH; PROOFREADS AND EDITS NNS LEGAL TEXTS IN ENGLISH; AND TRAINS NNS LAWYERS AND TRANSLATORS IN LEGAL ENGLISH.

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Abstract

Increasing supranational legislation and other factors fuel interaction between legal cultures. This leads to greater need both for a new breed of international lawyer and for legal translators. Moreover, the rise of English as the *de facto* global legal language intensifies the need for translation of legal texts into English and, as a corollary, production of legal texts in English. In practice, both involve individuals whose native tongue is other than English (NNS) in an endeavour fraught with traps for the unwary. To illustrate against the relevant theoretical background, legal texts are presented that involve the author as translator into English from French, German, and Russian, and as reviser, editor, and proofreader of English-language legal text prepared by NNS. Findings suggest a need to equip practitioners with certain knowledge and skills, implying a corresponding need for education, training, and legal linguistic.

1. Introduction

This paper examines the changing professional demands on lawyers and legal translators arising from the internationalization of legal life¹. Special focus falls on the reality of non-native speakers (NNS) of English operating as lawyers and legal translators in a professional context increasingly dominated by English. In practice, many of these individuals draft legal texts in English or translate legal

¹ "The younger generation of lawyers, and probably their successors as well, will be faced with an unparalleled 'internationalization' of legal life": Zweigert, K. and Kötz, H. *Introduction to Comparative Law* 3rd revised edition, translated by Tony Weir. Clarendon Press, Oxford, 1998, p. 21.

texts into English². Both tasks require knowledge and skills in order to deal with the challenges arising. This paper discusses the challenges, highlighting the knowledge and skills required to address them and the implicit corresponding training requirements.

1.1. Lawyers and Legal Translators in an Evolving Legal World

The new international lawyer³ is a very different creature from the traditional model dealing with treaties, borders, and sea fishing rights⁴. The new international lawyer⁵ must be ready to advise, give opinions, draft, or litigate – often on more than one body of national law and regarding “laws, treaties, and regulations of international bodies and organizations such as the EU, the WTO, or the IMF, which provide bodies of supranational law”⁶. Other factors include the internationalization of business, financial and commercial activity, along with human rights and dispute resolution (e.g. ICSID)⁷. Today’s international lawyer is required to deal with different legal regimes or cultures and to relate to individuals and institutions⁸ from other cultures⁹. Structuring business entities and creating successful business relationships requires “awareness of the cultural and social values of the participants and the ability to reflect those values in the international entity or relationship”¹⁰. The international lawyer must be able to offer “a legal perspective that transcends the national and cultural perspective of the client”¹¹ and interdisciplinary background knowledge (e.g., economics, business, political science)¹².

By the same token, a greater need arises for legal translators¹³. The ideal legal translator is a comparative lawyer¹⁴, familiar with legal issues involving more than

² See *supra* note 1; also Chromá, M. “Semantic and legal Interpretation: Clash or Accord?” in Šarčević, S. (ed.), *Legal Language in Action: Translation, Terminology, Drafting And Procedural Issues*, Nakladni zavod Globus, Zagreb, 2009 pp. 27-42 at p. 30.

³ Drolshammer, J. & Vogt, N. P. *English as the Language of Law? An Essay on the Legal Lingua Franca of a Shrinking World*, Schulthess Juristische Medien AG, Zürich-Basel-Genf 2003, p. 17.

⁴ *Ibid.* p. 16.

⁵ *Ibid.* p. 2.

⁶ *Ibid.* p.3 and p. 16.

⁷ *Ibid.* p.12: “The internationalization of business activity and dispute resolution has been accompanied by the internationalization of lawyers that serve business and resolve its disputes.”

⁸ The expression “legal institution” is used in its broadest sense, as in Mattila, H. *Comparative Legal Linguistics*, Ashgate, 2006 e.g. pp. 5 (abbreviations), 16 (comparative law), 42 (types of company), 68 and 224 (trust), 75 (murder), 109 (legal terms), 266-7 (*res judicata*) i.e. in the sense of “institutional facts” such as “property” and “marriage”. The regime of a legal institution can be defined as the set of legal consequences that flow from the existence of the institution. See e.g. Boella, G. and van der Torre, L., *Contracts in Multiagent Systems: the Legal Institution Perspective* at www.cs.unipr.it/CILCo4/DownloadArea/BoellavdT-CILCo4.pdf last visited 27 July 2009. See also Zweigert & Kötz *op. cit.* pp22 and 71.

⁹ Drolshammer & Vogt *op. cit.* 4-5.

¹⁰ *Ibid.* p.5.

¹¹ *Ibid.* p. 6.

¹² *Ibid.* p.8.

¹³ “Translation is a dialogue ...possible with the help of a translator. The translator is the medium through which different texts, languages, sign and legal systems can interact. It is through the translator’s work that texts get new lives in new places, not as mere copies, but as translations.” Lindroos-Hovinheimo, S. “On the Indeterminacy of Legal Translation” in Wilhelmsson, T., Paunio, E. and Pohjolainen, A. (eds), *Private Law and the Many Cultures of Europe*. Kluwer Law International. 2007, pp. 367-383, p. 382.

one nation's law¹⁵, familiar with source and target languages¹⁶. Put differently, "in order to be a legal translator, one needs to be every way as legal as one is a translator"¹⁷; in particular, "[d]eep insight into the legal system of the country of the target language is an absolute prerequisite"¹⁸; Gémár affirms that "the translator should combine the competence of the comparative jurist and the know-how of the linguist"¹⁹. This overall view is aptly summarized by Šarčević's profile of the legal translator:

(a) translators need subject expertise in addition to translation skills, and (b) translators must be competent in both translation and law to make legal-linguistic decisions. Legal competence presumes (a) in-depth knowledge of legal terminology, and (b) a thorough understanding of legal reasoning and the ability to solve legal problems, to analyze legal texts, and to foresee how the courts will interpret and apply a legal text.²⁰

Legal translators also require practical and theoretical knowledge of relevant legal specialisms²¹, and ideally translate only into the mother tongue²², to which can be added competence in the specific legal writing style of the target language²³.

¹⁴ See e.g. the Chartered Institute of Linguists Handbook, at p. 2: "Candidates are emphatically advised that those holding a degree in languages generally require additional experience or training" at www.iol.org.uk/qualifications/DipTrans/DipTransHandbook.pdf last visited 16 July 2009.

¹⁵ Drolshammer & Vogt *op. cit.* p.3. See also Kjaer, A. L. "Legal Translation in the European Union: A Research Field in Need of a New Approach" in Kredens, K. and Goźdz-Roszkowski, S. (eds), *Language and the Law: International Outlooks*, Frankfurt am Main, Peter Lang GmbH 2007 69-95: "[I]t is widely acknowledged that translation in the field of law should be based on an interdisciplinary approach which takes as its starting point the legal systems in which source text and target text are to be applied."

¹⁶ See e.g. the Chartered Institute of Linguists Handbook, at p. 3: "A degree in the source language (or a combined degree where that language is examined at final degree level)" at www.iol.org.uk/qualifications/DipTrans/DipTransHandbook.pdf last visited 16 July 2009.

¹⁷ Blomqvist, L. "One Little Word..." in Wagner, A. and Cacciaguidi-Fahy, S. (eds) *Legal Language and the Search for Clarity: Practice and Tools*, Peter Lang, Bern 2006 pp. 303-327 p. 305 (citing Gémár, J-C 1988. "La Traduction Juridique: Art ou Technique d'Interprétation?" in *Meta* 33/2, 305-319 at p. 306; Sparer, M. 2002. "Peut-on Faire de la Traduction juridique? Comment Doit-on l'Enseigner?" in *Meta* 47/2, 265-278 at p. 275; Lavoie, J. 2003. "Faut-il être Juriste ou Traducteur pour Traduire le Droit?" in *Meta* 48/3 394-401).

¹⁸ *Ibid.* p. 305 (citing Šarčević, S. 1985. "Translation of Culture-bound terms in Laws." in *Multilingua* 4/3, 127-133 at p. 132; Smith, S. A. 1995. "Culture Clash: Anglo-American Case Law and German Civil Law in translation." in Morris, M. (ed.) *Translation and the Law*, Amsterdam: Benjamins, 1995.

¹⁹ Gémár, J-C "What Legal Translation is and is not – Within or Outside the EU" in Pozzo, B. and Jacometti, V. (eds) *Multilingualism and the Harmonisation of European Law* 2006 Kluwer Law International 69-77, p. 77.

²⁰ Šarčević, S. *New Approach to Legal Translation*, 1997, Kluwer Law International, The Hague, p. 113, adding (p. 114) "Additionally to these basic legal skills, translators need extensive knowledge of the target legal system and preferably the source legal system, along with drafting skills and a basic knowledge of comparative law and comparative methods. Not surprisingly, these ideal translators do not exist – so what are the appropriate qualifications for legal text translators?" and in fn 17 p. 114 "de Groot sees all legal translation as an act of comparative law (1987: 3), while Bocquet (1994:7) sees the act of comparing between source and target legal system concepts as so important that it forms the second step in a three-step translation process."

²¹ See Chromá, M. "Semantic and Legal Interpretation: Two Approaches to Legal Translation" in Bhatia *et al.* (eds) *Language, Culture and the Law: The Formulation of legal Concepts across Systems and Cultures* Peter Lang, Bern 2008 303-315 at p. 305.

²² See e.g. the Chartered Institute of Linguists Handbook, at p. 3: "Candidates should normally only translate from their source language into their mother tongue (or language of habitual use where this has taken the place of their mother tongue and has reached a comparable standard)" at www.iol.org.uk/qualifications/DipTrans/DipTransHandbook.pdf last visited 16 July 2009.

²³ Smith, S. 1995. *op. cit.* in Morris, M. (ed.) *op. cit.* at p. 181 cited in Chromá "Semantic and Legal Interpretation: Two Approaches to Legal Translation" in Bhatia *et al.* (eds) *op. cit.* p. 305. See also note 63 *infra* for Gotti's comment on drafting and stylistics.

Arguably, this ideal skills set is substantially unattainable in practice²⁴.

1.2. English as an international language of legal communication

Globalization²⁵ and the growth of supranational bodies (e.g., UN, NATO, EU, WTO) have brought an increase in legal documentation (e.g., legislation, regulations, agreements) using English²⁶ as a common language²⁷. The importance of legal English²⁸ lies significantly in its being the medium for international (including electronic) commerce²⁹. English is the standard for many companies³⁰, for take-over bids, for international commercial contracts³¹, for arbitration³², for “almost all cross-border legal transactions and international legal issues in particular”³³ despite all national language legislation³⁴. This holds somewhat less true for the EU, where all languages are in theory equal, but all EU matters relating to e.g. commerce and competition are usually first drafted in English³⁵. English is the language of international law and multidisciplinary professional service firms³⁶. In addition, English may be either source or target language, even the medium or relay language³⁷ between source and target languages. In the context of

²⁴ *Supra* note 21: see comment by Šarčević.

²⁵ For legal English as a global language, see Mattila *op. cit.* pp. 240-252.

²⁶ See e.g. Mattila *op. cit.* p. 25 on the relative importance of, and rivalry between, legal languages, noting the strengthening of the position of English worldwide, including in legal circles, illustrating the point by citing use of the major languages within the UNO.

²⁷ Spichtinger, D. (2000) “The Spread of English and its Appropriation”, p. 8. Master’s Thesis: Vienna University. Available at <http://www.geocities.com/dspichtinger/dipl.htm> last visited 04 July 2009. “English ... is used as **the** global language – spoken in all fields which require international contact and cooperation.” (Emphasis: Spichtinger). For a list see Crystal, D. (1997) *English as a Global Language*. Cambridge: CUP.

²⁸ “International English has its communities..., for example the worldwide community of... lawyers...” Widdowson, H.G. (1997) “EIL, ESL, EFL: global issues and local interests” in *World Englishes* 16/1. 146-53.

²⁹ Spichtinger (*op. cit.* p. 28) suggests that “specialised subgroups of English users (doctors, lawyers) will have their own international ESP variety (regulated by the members of the in-group)”. Evidence for this, and of the growing importance of legal English, is the International Legal English Certificate (ILEC) test recently developed by Cambridge University with a private organization (Translegal) and launched in May 2006 to take its place alongside the Cambridge Business English test and other Cambridge tests in general English. See: <http://www.legalenglishtest.org/> last visited 06 August 2009.

³⁰ Spichtinger, *op. cit.* pp. 49-50.

³¹ See e.g. Mattila, *op. cit.* at p. 261: “During the 19th and 20th centuries, English became the plainly dominant language of international commercial contracts. It is also used where both parties are not from English-speaking countries. This produced an important borrowing phenomenon: a large number of English commercial law terms were adopted in other languages. During recent decades, the same phenomenon can be seen in all branches of modern law, by reason of the global influence of American institutions.”

³² Apparently, the dominance of English in arbitration has brought with it mechanisms peculiar to the common law, e.g. discovery. See Frade, C. “Generic Variation in Cross-examination across legal Systems” in Šarčević, S. (ed.), *op. cit.* 2009 pp. 377-392, p. 377. See also Gotti, M. “Legal Drafting in an International Context: Linguistic and Cultural Issues” in *ibid.* pp. 277-299, p. 280.

³³ Drolshammer & Vogt *op. cit.* p. 55.

³⁴ The spread of English in a global context is a politically charged topic (see Spichtinger, *op. cit.* p. 32); Crystal D. (1997) *op. cit.* Phillipson, R. (1992) *Linguistic Imperialism*. Oxford: OUP. Also Kachru, B. *The Alchemy of English: The Spread, Function and Models of non-native Englishes*. Oxford. Pergamon, 1990.

³⁵ See *infra* notes 133 Guggeis and 134 Kjaer.

³⁶ See Drolshammer & Vogt *op. cit.* pp. 12-13, 17-18, and 55. For other examples see e.g. websites of Rödl & Partner <http://www.roedl.com/> (English and German content) and bnt <http://www.bnt.eu/> (English and German content for all offices, with nine other languages for individual country offices).

³⁷ Interestingly, both English and German are mentioned as relay languages in de Groot, R. and van Laer, C., “The Quality of Legal Dictionaries: An Assessment” (October 21, 2008). Maastricht Faculty of Law Working Paper No 6 2008/6 p. 11/59 (PDF version). Available at SSRN: <http://ssrn.com/abstract=1287603> last visited 04 July 2009.

European academic research “communication between national jurists now takes place in one *lingua franca*, namely English”³⁸. According to Mattila, “legal English is in course of conquering the world”³⁹, while “[a]t the beginning of the third millennium, it seems that the dominance of English is becoming ever stronger in international relations” and “[t]oday, the other major languages are incapable of posing a threat to the position of English as the lawyers’ *lingua franca*”.⁴⁰ This is supported e.g. by Drolshammer and Vogt: “For the legal practitioners, the function of professional legal English has fundamentally changed in recent years: English has become their *lingua franca*”⁴¹. The same authors comment that “English is the language of globalization and its communication”, adding “[t]his also holds true for legal English in the area of communication and law”⁴².

1.3. Cultural factors in producing and translating legal texts

The situation as thus described implies the need for meaningful communication of information and ideas:

- (a) from a wide variety of source cultures, languages, and legal systems⁴³;
- (b) through the medium of English⁴⁴ by lawyers and translators whose mother tongue may not be English;
- (c) for target audiences whose mother tongue may not be English and whose legal systems and cultures may not easily correspond with those of the source, the medium, or both.

At the same time, increased global interaction means that the ability to communicate interculturally⁴⁵ in the world language of English has become an essential skill:

If language is seen as social practice, culture becomes the very core of language teaching. Cultural awareness must then be viewed as enabling language proficiency... Culture in language teaching is not an expendable fifth skill, tacked on... to... speaking, listening, reading and writing.⁴⁶

Different cultures employ different communication styles, different rhetorical patterns. Effective communication of a message depends on the sender’s expression matching the recipient’s impression⁴⁷. To achieve this, the message must comply with the rules and expectations of both sender and recipient. However, in inter-cultural communication, these rules and expectations may differ according to the cultural conditioning of the participants. This implies that

³⁸ Ajani, G. and Rossi, P “Multilingualism and the Coherence of European private Law” in Pozzo, B. And Jacometti, V. *op. cit.* 79-93 fn 11 p. 82.

³⁹ Mattila, *op. cit.*, p. 252.

⁴⁰ Mattila *op. cit.* p. 259.

⁴¹ Drolshammer & Vogt *op. cit.* p. 1.

⁴² Drolshammer & Vogt *op. cit.* p. 51, adding: “This emerging body of globalized knowledge will produce yet another layer of *lingua franca* use of English and legal English”.

⁴³ See e.g. Drolshammer & Vogt *op. cit.* p. 2: “Now is the age of Anglo-American law and of English as the Language of Law”; see also pp 32-34 for more general issues on legal English.

⁴⁴ See *supra* note 38 de Groot & Van Laer.

⁴⁵ The term “cross-culturally” is also used.

⁴⁶ Kramsch, C. (1993) *Context and Culture in Language teaching*. OUP.

⁴⁷ Nixon, J. and Dawson, G. (2002) “Reasons for cross-cultural communications training,” in *Corporate Communications: An International Journal*, Vol. 7, No. 3.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

messages may be misinterpreted, and that, as a consequence, communication may be ineffective. The challenge for people engaged in cross-cultural communication is to develop awareness that what is ‘meaningful and relevant’ may vary according to the cultural values of the people involved⁴⁸. Therefore, culture functions as a frame of reference or a context in which all that occurs is understood. Law is one of the areas in which English assumes a high profile as a global common language in inter-cultural contexts. Moreover, translation should be seen as inter-cultural transfer, with both source and target language embedded in their corresponding cultures.⁴⁹

However, the relationship between language and culture is both complex and intricate; in addition, communication problems may arise from cultural differences; moreover, these factors become particularly acute in professional settings when the interacting parties use the same linguistic code (i.e. English) but not the same cultural style⁵⁰. Thus, although English can be described as a tool “which presents us with unprecedented possibilities for mutual understanding”⁵¹, it can also be argued⁵² that English “can also act as a medium and subject of global **misunderstanding**”⁵³. At the same time, a command of English may play a crucial role in professional advancement⁵⁴.

In the legal context, these factors play a role, since language and law are closely related and are generated through social practices. Indeed, language is the essence of the law, since the law is substantially formulated through language⁵⁵. As Mattila notes:

Law is necessarily bound to language (notably in matters of legal interpretation), and in that sense legal language has existed as long as the law. In certain contexts, the language aspect of law dominates: legal translation, legal lexicography, and legal rhetoric.⁵⁶

Both are formalized communication systems because both are governed by their own rules of creation and reproduction. Although non-language law exists, this is minor and requires little translation – e.g., traffic signs⁵⁷, sirens, traffic police hand signals. At the same time, “[l]egal language differs from most other languages for

⁴⁸ In the legal context, see *infra* example at note 154 Stapleton.

⁴⁹ Kocbek, A. “A Targeted Approach to Legal Translation” in Šarčević, S. (ed.), *op. cit.* 2009 pp. 43-62, p. 44.

⁵⁰ Gémár, J-C, What Legal Translation is and is not – Within or Outside the EU” in Pozzo, B. and Jacometti, V. *op. cit.* 69-77 at p. 70 mentions “cultural constraints” as being “even more acute in the field of law” and (p. 73) “the specificity of languages and cultures”.

⁵¹ Crystal, *op. cit.* p. viii.

⁵² Spichtinger, *op. cit.* p. 16.

⁵³ (Emphasis: Spichtinger).

⁵⁴ “... because a knowledge of ... British or American English may be necessary for international power positions (TOEFL/Cambridge examinations) there is a pressure to conform to an inner circle variety within many ... professions.” (Spichtinger, *op. cit.*, p.34)

⁵⁵ See e.g. Drolshammer & Vogt *op. cit.* p. 2: “Law follows language and language often carries the law” (repeated on p. 55); Tiersma, P.M. *Legal Language*. University of Chicago Press, 2000, pp. 1-2.

⁵⁶ Mattila *op. cit.* p. 6.

⁵⁷ H.L.A Hart *The Concept of Law* 2nd edition. Oxford University Press. 1997, p. 90.

special purposes in that it describes a metaphysical phenomenon. Law does not exist in the physical world”⁵⁸.

The relatively autonomous development and status of legal cultures and legal systems, even those with close links, is reflected in the development and status of both ordinary and legal languages⁵⁹. The result is that “[t]he technical language of jurists is extremely system-bound. Since legal systems vary from state to state, each country has its own independent legal terminology”⁶⁰. Put another way, “[d]ifferent languages get their meanings in different cultures, from different usage. Legal terms get their meaning through legal usage, through communication within the legal system”⁶¹. Moreover, “[i]mportant elements of a particular legal system are its drafting traditions and stylistic conventions”⁶². At the same time, an international technical legal language is noticeable by its absence, except where some areas, such as international and European Community law, have become ‘internationalized’ so that a multilingual terminology is under way⁶³. However, in the EU context the impact of Community law has presented challenges to interpreters of national law and thus “conferred obvious importance upon such expressions as ‘legal culture’ and ‘legal tradition’⁶⁴.

It follows that lawyers and legal translators should be familiar with different cultures and different legal cultures⁶⁵. Put differently, they require intercultural awareness. For, “although legal systems may share many similarities, their fundamental approaches to many legal problems vary to such an extent that they may be considered different legal cultures”⁶⁶. Here we can distinguish between confederations such as the US or Switzerland, which amount to one national jurisdiction, and the common law of Canada and the civil law of Japan⁶⁷.

⁵⁸ Mattila, *op. cit.* p 106.

⁵⁹ Mattila *op. cit.* p. 261.

⁶⁰ “Law, Legal Language and the Legal System: Reflections of the Problems of Translating Legal texts”, de Groot, G.R., (1991), ‘Recht, Rechtsprache und Rechtssystem: Betrachtungen über die Problematik der Übersetzung juristischer Texte’, in *Terminologie et Traduction*, 3, pp. 279-312 in Gessner *et al.*, *op. cit.* 1996 at p 155. Translation by John Blazek, Brussels.

⁶¹ Lindroos-Hovinheimo, S. *op. cit.* 2007, pp 368-383 at p. 375.

⁶² Gotti, M. “The Formulation of legal Concepts in Arbitration Normative Texts” in Bhatia *et al.* (eds) *op. cit.* at p. 30. See also Gémar, J-C “What Legal Translation is and is not – Within or Outside the EU” in Pozzo, B. and Jacometti, V. *op. cit.* 69-77 at p. 70 for translators’ need to “sharpen their writing skills”; and Gotti, M. “Legal Drafting in an International Context: Linguistic and Cultural Issues” in Šarčević, S. (ed.), *op. cit.* 2009 pp. 277-299, p. 278.

⁶³ *Ibid.*, adding: “But for legal areas such as constitutional law, administrative law, criminal law or civil law, an international terminology is fundamentally absent.”

⁶⁴ Ajani and Rossi *op. cit.* p. 83, where fn 11 lists useful literature on the theme.

⁶⁵ “Globalising processes have created one world-wide network of legal communications”. Teubner, G. “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences”, 61 (1998) *Modern Law Review*, 16. Also see Teubner, G. (ed.), *Global Law Without a State* (Aldershot, Dartmouth, 1997).

⁶⁶ Drolshammer & Vogt *op. cit.* p.3.

⁶⁷ *Ibid.* p.4

1.4. Pitfalls for lawyer and non-lawyer non-native users of English in legal contexts

To summarize so far: the rise of English as the *de facto* global legal language intensifies the need for translation of legal texts into English⁶⁸, and – as a corollary - production of legal texts in English, even where the governing law of the contract is not expressed in English⁶⁹. In practice, both involve NNS⁷⁰. Some problems of drafting are followed by a more detailed look at pitfalls⁷¹ facing the translator, although to some considerable extent NNS translators and lawyers may face overlapping difficulties in practice when working in or through English.

Legal drafting: use of common-law language and contract models

Our first example relates to international contracts⁷², largely drafted on the basis of common law models⁷³. Ideally, these might be written in English but conceptualized and structured in line with the governing (i.e. not English) law, taking up the linguistic challenge e.g. expressing legal concepts in a foreign language⁷⁴. However, “international commercial contract practice does not seem to follow this path”:

Not only does the drafter of the contract use the English language, it also applies contract models developed in England, the USA or other common law jurisdictions. This means that the drafter ... thinks and structures the contract according to the common law legal tradition ... and not under the law that has been chosen to govern the legal relationship between the parties.⁷⁵

Use of common law models in English “ensures fluency in the language of the contract and a *prima facie* result which is linguistically much more proficient than if the drafter had translated legal concepts from the governing law”. However, linguistic coordination is required to ensure that conceptually the text conforms to the governing law⁷⁶. This situation is distinguished from that where the parties

⁶⁸ “It is a common feature in legal translation that the text may be written in ... English, but the document’s local legal context is not an English-speaking country.” Lindroos-Hovinheimo, S. *op. cit.* pp. 367-383 at p. 376.

⁶⁹ See e.g. Cordero Moss, G. “Harmonized Contract Clauses in Different Business Cultures” in Thomas Wilhelmsson *et al.* (eds) *op. cit.* pp. 221-239, p. 221.

⁷⁰ Here the author relies on empirical evidence in the shape of his own daily encounters with this phenomenon over several years as a practising legal linguist, including dealing with (i.e. revising, proofreading, editing) legal texts produced in English or translated into English by NNS lawyers and non-lawyers, and training NNS lawyers and translators. See also *supra* note 1.

⁷¹ It is interesting to compare the following language versions see *infra* note 82:

English	French	German	Russian
pitfall	piège	Gefahr	ловушка

⁷² See generally Mattila *op. cit.* pp. 250-252.

⁷³ Cordero Moss *op. cit.* at p. 221-2.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* She pointedly adds (p. 222): “separating proper use of the English language from adoption of the underlying legal structures would have assumed (a) a thorough knowledge of the English or other common law system under which the model had been developed, (b) an understanding of the function of the various contract clauses in that legal system, (c) a systematic comparison with the governing legal system and (d) exclusion or correction of the contract clauses that turned out to be tailored to the legal system under which the model was developed and not to the governing legal system.”

⁷⁶ *Ibid.*

choose English law as the governing law⁷⁷. Interestingly, Drolshammer & Vogt point to the influence of common law terms such as breach of contract on continental European legal systems⁷⁸. This contrasts with EU legal English, which appears to be developed by NNS⁷⁹, thus suggesting the existence of more than one type of legal English⁸⁰.

Legal drafting: use of common-law functional clause models

Drafting in English offers other booby traps⁸¹. Here, Cordero Moss takes up the theme of "poor coordination between the common law contract model and the civilian governing law" in the shape of "ubiquitous representations and warranties clauses" whose function is "primarily connected with the common law distinction between pre-contractual representations and terms of the contract, a distinction which does not exist, at least not with the same legal effects, in many civilian systems."⁸²

Another example is concepts or institutions that exist, or are protected, in the law of the drafting language, English, but not in that of the governing law – e.g. retention of title clauses⁸³, or other contractual security rights in movable property⁸⁴. Cordero Moss lists others as problematic⁸⁵, though referring to still others (e.g. "time is of the essence" in charterparties) that have become widespread or uniform⁸⁶, and suggests a "three-tier approach" to deal with the problem⁸⁷. Salmi-Tolonen presents three types of conceptual and terminological problems that occur in international commercial contracts⁸⁸, at the same time asking "[w]ho carries the risk if the parties ... assign different meanings to the same clause in a

⁷⁷ See e.g. "[I]t may be that English contract law suits the interests of commercial parties better than French contract law", Smits, J.M., "Legal Culture as Mental Software, or: How to Overcome National Legal Culture?" in Thomas Wilhelmsson *et al.* (eds) *op. cit.* pp. 141-151 at p. 148.

⁷⁸ Drolshammer & Vogt *op. cit.* p. 57 including fn 11.

⁷⁹ See *infra*: section on English in the EU.

⁸⁰ *Infra* note 133 Guggeis.

⁸¹ See note 72: English French German Russian
booby trap piège Falle ловушка олуха/ мина-ловушка

⁸² Cordero Moss *op. cit.* p. 223.

⁸³ Verstijlen, F.M.J. "General Aspects of Transfer and Creation of Property Rights including Security Rights" in Drobnič, U., Snijders, H.J. and Zipprow, E.-J. (eds) *Divergences of Property Law, an Obstacle to the Internal Market?* München: Sellier. European Law Publishers, 2006, pp. 23–24.

⁸⁴ "[S]ecurity rights validly created in one jurisdiction may be weaker in effects or completely unenforceable in another". See Juutilainen, T. "Security Rights and the Lack of a Priority Debate: How to Proceed with Choice of Law and Harmonization?" in Thomas Wilhelmsson *et al.* (eds) *op. cit.* pp 343-363, at p. 343.

⁸⁵ Cordero Moss *op. cit.* p. 228.

⁸⁶ *Ibid.* pp 228-9.

⁸⁷ "(a) [T]he private international law phase, aiming at verifying whether adopting a contract model developed under a certain legal system may mean that the parties have chosen the law of that system to govern the contract, (b) the international commercial practice phase, aiming at verifying whether the clauses and the effect that those clauses were meant to achieve in the system under which they had been developed, may be deemed to have become generally acknowledged in international commercial practice and, therefore, may be applicable as a trade usage irrespective of the governing law, and (c) the interpretative phase under the applicable contract law, aiming at verifying what effects those clauses were originally meant to achieve and, if those effects are the same as the originally intended effects, whether they may be obtained under the governing law." Moss *op. cit.* at p. 223 and pp. 223-7.

⁸⁸ She uses "non-conformity", "avoidance", and "impossibility of performance" as examples. See Salmi-Tolonen, T. "Negotiated meaning and International Commercial Law" in Bhatia *et al.* (eds) *op. cit.* pp. 117-139.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

contract?”⁸⁹ Mattila notes the considerable risks involved in transmitting legal messages internationally:

This task is highly difficult and errors often occur in legal translations. Problems linked to these translations are aggravated in cases where there is a need to operate through an intermediary language, before the final translation. A text is translated, let us say, from Greek into English, then from English into Finnish.⁹⁰

As if to corroborate, Bogdan mentions heightened risk of misunderstanding where two NNS lawyers exchange information in English, using terminology foreign to both their legal systems⁹¹.

Legal translation: basic problems

As a complex process, translation emerges through dynamic interaction between influencing factors such as cultural and social contexts; translation norms, traditions, and expectations; ideology and world-view; and text design⁹² - additionally involving close analysis of contexts in which terms are used⁹³. If legal translation is a communicative act within the legal context⁹⁴, the background to it is law’s essential link to:

- a place, in the shape of the legal system or tradition to which that law belongs, and
- a language, in the shape of the legal language in which that law is framed.

This presents challenges in harmonising law⁹⁵, comparing legal systems, and legal translating. That is, law faces the problems of many emigrants on becoming immigrants, in that they relocate but cannot shed the characteristics of their native land and language⁹⁶. Put differently, “[l]aw is clothed in language and it seems that these clothes cannot be changed without the risk of changing the content as well”.⁹⁷ Indeed, “the problem in legal translation is that legal texts are not only

⁸⁹ *Ibid.* p. 134, citing Jayme, E. 1999. *Langue et droit. Rapport général.* Jayme, E. (ed.) *Langue et droit. Xve Congrès international de droit compare.* Bruxelles: Bruylant, 11-34.

⁹⁰ Mattila *op. cit.* p. 37.

⁹¹ Bogdan, M. *Comparative Law* 1994. Kluwer, p. 40 (also cited by Mattila *op. cit.* p. 17 note 45). See also Chromá, M. “Semantic and legal Interpretation: Clash or Accord?” in Šarčević, S. (ed.) *op. cit.* 2009 pp. 27-42 at p. 54.

⁹² Lindroos-Hovinheimo, S. *op. cit.* 2007, pp 368-383 at p.369, citing (fn 7) Longa, V.M. ‘A Nonlinear Approach to Translation’ (2004) 16 *Target: International Journal on Translation Studies*, 209–210.

⁹³ Mattila *op. cit.* p. 263.

⁹⁴ Šarčević, S. *New Approach to Legal Translation* pp. 55–56.

⁹⁵ Glanert, S. “Zur Sprache gebracht: Rechtsvereinheitlichung in Europa” (2006) *European Review of Private Law*, 163. She says that “Die Sprache resistiert der Rechtsvereinheitlichung.”

⁹⁶ Lindroos-Hovinheimo, S. *op. cit.* 2007, pp 368-383 at pp. 367-8. Also Paunio, E. notes that “Legal translations are complex also due to differences in legal traditions and legal systems.”: “The Tower of Babel and the Interpretation of EU Law – Implications for Equality of Languages and Legal Certainty” in Wilhelmsson *et al.*, *op. cit.* pp. 385-402 at p. 386.

⁹⁷ Adding: “The importance of language has been acknowledged, for instance, in the field of comparative law”. Lindroos-Hovinheimo, S. *op. cit.* 2007, pp 368-383 at p. 368 citing van Hoecke, M. and Warrington, M. “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law” (1998) 47 *International and Comparative Law Quarterly*, 532–536 and Legrand, P. “How to Compare Now” (1996) 16 *Legal Studies*, 234–235.

essentially constructed by the language that they are expressed in but also by the legal system they belong to”⁹⁸.

Thus, translation of a legal text implies some knowledge both of the relevant legal system, as well as both the language and the legal language involved so as to understand the text in order to translate it⁹⁹. In practice, this means that translators face an at times bewildering array of combinations “as to the similarity and dissimilarity of legal institutions and their designations”¹⁰⁰. These institutions may or may not correspond¹⁰¹ legally, functionally, or linguistically (e.g. as calques), while literal translation may be misleading or meaningless. The same applies to “words of foreign origin understood on the basis of words outwardly similar in other languages”¹⁰². Despite these challenges, legal systems, languages, and professionals somehow manage successfully to interact¹⁰³.

Legal translation: conceptual problems

Mattila, having identified lawyers’ need to cooperate with foreign colleagues, in the shape of both lawyers and language specialists such as translators, too¹⁰⁴, points to frequency of errors in legal translation, compounded where a need exists to operate through an intermediary language before final translation¹⁰⁵. In addition, he comments that “knowledge of the similarities and differences between legal concepts of various countries helps avoid misunderstandings in international cooperation”¹⁰⁶. In this respect, another challenge to translators arises: “the meaning of legal concepts is never fixed but ‘tends to be in a constant state of flux, being redefined by lawmakers, judges or scholars’”¹⁰⁷. A further challenge presents itself in the shape of lack of equivalence in the target language, touched on implicitly above and now examined in more detail below¹⁰⁸.

Legal translation: the problem of equivalence

Considerable caution is called for as to the notion of equivalence in the field of legal translation, in particular as to its achievability¹⁰⁹. For example, Gémar notes that “difficulties arise because the legal norms (or rules) and concepts do not

⁹⁸ Lindroos-Hovinheimo, S. *op. cit.* 2007, pp 368-383 at p. 379.

⁹⁹ Lindroos-Hovinheimo, S. *op. cit.* 2007, pp 368-383 at p.375, adding: “In a way it is a vicious circle: to get to know the system we must know the language, but to get to know the language we must know the system. What this shows is the fundamental connection between a legal language and its use in a legal system.”

¹⁰⁰ Mattila *op. cit.* pp. 261; see also *supra* note 9 Mattila and *infra* note 116 de Groot.

¹⁰¹ See e.g. de Leo, D. “Pitfalls in Legal Translation”, *Translation Journal* Vol. 3 No. 2 April 1999 available at <http://accurapid.com/journal/o8legal.htm> last visited 22 July 2009.

¹⁰² Mattila *op. cit.* pp. 261-2.

¹⁰³ Lindroos-Hovinheimo, S. *op. cit.* 2007, pp. 368-383 at pp.367-8.

¹⁰⁴ Mattila, *op. cit.* p. 20.

¹⁰⁵ Mattila *op. cit.* p. 37; see *supra* note 91 Mattila.

¹⁰⁶ Mattila *op. cit.* p. 106, citing David, R. and Brierley, J. (1978), *Major Legal Systems in the World Today*, 2nd ed. (London: Steven, 1978) pp. 6-17.

¹⁰⁷ Kjaer, A. L. “Legal Translation in the European Union: A Research Field in Need of a New Approach” *op. cit.* citing Sandrini, P. 1996 “Comparative Analysis of Legal Terms: Equivalence Revisited”, in Galinski, Ch. / Schmitz, K-d (Hg.): *Terminology and Knowledge Engineering* (TKE '96), Frankfurt/Main: Indeks Verlag, 342-351 at p. 345). See also *infra* note 113 Tessuto.

¹⁰⁸ Gémar, J-C. “What Legal Translation is and is not – Within or Outside the EU” in Pozzo, B. And Jacometti, V. *op. cit.* 69-77 notes (p. 76) that “the translator ... strives for *linguistic* equivalence, the lawyer for *legal* equivalence” (emphasis: Gémar).

¹⁰⁹ See e.g. discussion in Garzone, G. “International Commercial Arbitration Rules as Translated/Rewritten Texts” in Bhatia *et al.* (eds) *op. cit.* pp. 47-73 at p. 51 and fn 5.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

correspond"¹¹⁰. Tessuto points to legal concepts being "intrinsically bound up with the national legal systems and principles in which they are formulated"¹¹¹, adding that "[c]oncepts are continually redefined by the legal community, making it more difficult for language users (e.g. lawyers, translators, ...) when a word and concept with an established core of meaning is stretched beyond its ordinary use"¹¹². Kjaer broadly rules out target language equivalent coverage of meaning of source language concepts, adding "[d]ue to interdependency of legal language and legal system, what can be hoped for, at best, is partial equivalence"¹¹³.

Bogdan questions whether even such common terms as "marriage" can be translated with just one word¹¹⁴. Moreover, de Groot asserts that "[w]hen the target language and the source language relate to different legal systems, absolute equivalence is impossible"¹¹⁵, illustrating as follows:

For example, can the German *Ehescheidung* be translated into French with *divorce* or into Italian with *divorzio*? We know that the grounds for divorce are different in Germany, France and Italy and, further, that there are essential differences regarding the nature of the marriage which is dissolved through the divorce, specifically in the field of marital property law. There is thus no absolute equivalence.¹¹⁶

Legal terminology, as the face of, or vehicle for expressing legal concepts in different legal systems also echoes differences between the systems themselves and the attitudes and approaches of lawyers working within those systems, to form the most significant challenge to translators – and lawyers - both between similar and dissimilar legal systems¹¹⁷. The challenge to establishing uniform terminology in law, as opposed to the natural sciences, is explained by absence of full equivalence between terms in differing local cultures. Put differently, "a common language for

¹¹⁰ Gémár "What Legal Translation is and is not – Within or Outside the EU" in Pozzo, B. And Jacometti, V. *op. cit.* 69-77 p. 74, citing Sacco, R. "La traduction juridique. Un point de vue italien", in *Cahiers de droit*, 1987, 28, pp. 845-859 at p. 850.

¹¹¹ Adding: "As well as being socio-culturally determined, they are subject to moral values and traditions of the country concerned at a particular point in time". Tessuto, G. "Legal Concepts and Terminography: Analysis and Application" in Bhatia *et al.* (eds) *op. cit.* 283-302 at p. 286.

¹¹² *Ibid.* See also *supra* note 108 Kjaer.

¹¹³ Kjaer "Legal Translation in the European Union: A Research Field in Need of a New Approach" *op. cit.* citing (fn 22) Cao, D. (2007b) "Translating Law", in *Multilingual Matters* 2007 pp. 53-82; de Groot, G. R. 1999 "Das Übersetzen juristischer Terminologie" in de Groot, G.-R. / Schulze, R. (eds), *Recht und Übersetzen*, Baden-Baden, Nomos, 11-46; de Groot, G.-R., 2002 "Rechtsvergleichung also Kerntätigkeit bei der Übersetzung juristischer Terminologie", in Ulrike Hass-Zumkehr (Hrsg.) *Sprache und Recht. Jahrbuch des Instituts für deutsche Sprache* 2001. Berlin, New York: de Gruyter, pp. 222-239; Šarčević, S. 1997 *New Approach to Legal Translation* pp. 229-249.

¹¹⁴ Bogdan, M. *op. cit.* pp. 50-51 (section on translation).

¹¹⁵ de Groot (1991) *op. cit.* in Gessner *et al.* (eds) *op. cit.* p. 157.

¹¹⁶ *Ibid.*

¹¹⁷ Pozzo, B. And Jacometti, V. *op. cit.* at p. xv, adding: "Indeed, if on the one hand there is difficulty in translating terms such as *trust*, which are Anglo-Saxon in origin and lack direct counterparts in civil law systems, the same degree of difficulty can be encountered in translating terms such as *contract*, *contrat* and *contratto*, which seem apparently interchangeable, but which in reality express profoundly different legal concepts."

law requires a shared basis of principles, concepts and rules which support the instrument of language in a coherent way”¹¹⁸.

Here, de Groot¹¹⁹ notes essential factors as the context and the goal of the translation, followed by the type and importance of the text, with the relative importance of equivalence varying accordingly so that on a line from ‘rough summary’ to ‘authentic text’ “[i]n the latter case, it is extraordinarily important that the concepts in the target text have neither a narrower nor a broader content than that of the source text.” In asserting the need to establish only “‘approximate equivalence’ of concepts in order to be able to conclude that we can use one concept as a translation of another”, he emphasises that at times what is required is a functional equivalent:

It regularly occurs that legal problems in different legal systems are resolved in very different ways – through very different legal institutions... The required equivalence must not only be a *functional* one, but also must be well founded in terms of the technical structure of the legal system.

Translation difficulties are exacerbated between unrelated legal systems, notwithstanding close linguistic links between the relevant technical legal languages. De Groot cites frequent problems between Anglo-American (common law) countries and Dutch (civil law) due to “fundamental systemic differences”. A contrasting situation occurs where two legal systems differ but the legal languages are similar. Here, de Groot cites German and Dutch, linguistic close relatives but with “differences of system and detail” which can lead to “dangerous mistakes” in translations due to very many legal “false friends” between Dutch and German, in the shape of concepts with different meanings in the respective legal systems.¹²⁰

Approaches to problems of equivalence include, e.g.: simply not to translate the word or phrase; devise a loanword; or use circumlocution, in the sense of roundabout expression or indirect description¹²¹. According to Šarčević, “translators regularly attempt to compensate for conceptual incongruity by using descriptive paraphrases, definition, and even borrowings to indicate the law according to which national terms and institutions are to be interpreted”¹²². Ability to do so implies at least some knowledge of the relevant legal systems - possibly, too, of the legal cultures in which those systems operate, as well as an ability to

¹¹⁸ Ajani and Rossi *op. cit.* p. 83.

¹¹⁹ This paragraph paraphrases de Groot 1991 *op. cit.* 157-159.

¹²⁰ *Ibid.*

¹²¹ Blomqvist *op. cit.* at p. 308, adding: “Unless the context makes it absolutely clear as to what the term refers to, all these three solutions will need some explanatory remarks. These solutions are also bound to give rise to disapproving comments from the readers and in particular the legal community. Unfortunately for the sensible veteran translator, there are no other options for solving the equivalence problem.” See also Chromá “Semantic and Legal Interpretation: Two Approaches to Legal Translation” in Bhatia *et al.* (eds) *op. cit.* p. 308: “... the ... recipient should be provided with as explicit, extensive and precise legal information in the target language as is contained in the source text, complemented (by the translator) with facts rendering the original information fully comprehensible in the different legal environment and culture”.

¹²² Šarčević, S. 2000 “Legal Translation and Translation Theory: a Receiver-Oriented Approach” at <http://www.tradulex.org/Actes2000/sarcevic.pdf> in the context of international treaties and conventions. See also de Groot 1991 *op. cit.* under the section: “Substitute solutions in case of insufficient equivalence”.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

conduct some legal research and comparative law studies¹²³, with the legal translator becoming "legal investigator" for "analysis of the legal rules behind the text to be translated"¹²⁴. Finally, in certain circumstances intersemiotic translation may provide a way to bridge the gap between different legal systems. Though differing from what is ordinarily meant by translation, this involves two different sign systems, i.e. expressing a legal message from one system by signs from a different system.¹²⁵

Legal translation in EU law: a special case

In an EU context, significant differences exist between national laws, both in content and in concepts (thus also terminology), as well as procedures. If this were not so, then harmonisation would be unnecessary¹²⁶. Šarčević notes that "the greatest obstacle to uniform application and interpretation is undoubtedly the incongruity of legal systems"¹²⁷. Additionally, "[c]onceptual and terminological difficulties are compounded in the EU, where a multilingual legislature struggles with lack of common EU legal terminology"¹²⁸. Besides, "[a]s EU law uses its own specific terminology, legal concepts possess independent meanings between EU law and national legal systems"¹²⁹. Moreover, "[e]ven if most legal concepts used in EU law express legal notions deriving from national legal systems, their meanings may vary due to differences in legal cultures and legal systems"¹³⁰. Further, "[w]ith the spread in the areas of (EU) intervention... interpreters have had to face the necessity of re-interpreting national law, even common law, in the light of Community policies as expressed in legislation and the case-law created by the Court of Justice"¹³¹.

To complicate matters, EU texts are largely drafted in English¹³² by NNS lacking full command of the language. This results in drafts being "infected" by

¹²³ Samuel, G. 1998. "Comparative Law and Jurisprudence" in *International and Comparative Law Quarterly* 47/4, 817-836 p. 825; Kennedy, R., 2000. "Much Ado about Nothing: Problems in the Translation Industry" in *Temple International and Comparative Law Journal* 14/2, 423-444 (cited in Blomqvist *op. cit.* p. 309 fn 11).

¹²⁴ Samuel, *op. cit.* in Blomqvist *op. cit.* p. 314.

¹²⁵ Lindroos-Hovenheimo *op. cit.* pp. 379-80

¹²⁶ See Kähler, L. "Conflict and Compromise in the Harmonization of European Law" in Wilhelmsson *et al.* (eds) *op. cit.* pp. 126-139 at p. 126: "For if no substantial differences exist between the national private laws, then a process of harmonization is unnecessary... Differences in concepts, structure and content of the law would not matter." He adds (p.138): "... only fundamental differences between national laws can explain the presumed need to harmonize European private law."

¹²⁷ Šarčević, S. 2000 *op. cit.*, citing Gémard, J-C 1995 *Traduire ou l'art d'interpréter* vol. I & II, Sainte-Foy, Presses de l'Université du Québec at II-150.

¹²⁸ Pozzo and Jacometti *op. cit.* p xvi., also Pozzo, B. "Multilingualism, Legal Terminology and the Problems of Harmonising" in Pozzo and Jacometti *op. cit.* pp. 3-19.

¹²⁹ Paunio *op. cit.* p. 398. *CILFIT v. Ministère de la santé*, Case 283/81 [1982] ECR 3415, paras 18-19.

¹³⁰ Paunio *op. cit.* P. 398 citing Schermers, H. and Waelbroeck, D. *Judicial Protection in the European Union* (Sixth edition, The Hague, Kluwer Law International, 2001), p. 13.

¹³¹ Ajani and Rossi *op. cit.* p. 83.

¹³² Guggeis estimates some 72%, adding that "this involves a 'contaminated' form of English with 'foreign' influences, use in constructions and turns of phrase which at times are incomprehensible to the English themselves": Guggeis, M. "Multilingual Legislation and the Legal-linguistic Revision" in Pozzo, B. and Jacometti, V. *op. cit.* 109-117 at p. 115. Compare statistics for the European Commission: Ajani and Rossi *op. cit.* 79-93 p. 82 (fn 11): in the European Commission 47% of oral communications arrive in English, 38 % in French; for written communications abroad, the respective percentages are around 54% in English and 35% French. Citing Quell, C., "Language Choice in Multilingual Institutions: A Case Study at the European

considerable “hidden translation” of inference from the native tongue of the NNS drafter. Put differently, a NNS drafter may choose terminology that fails to correspond to the intended content¹³³. This clearly raises questions as to e.g. standards of English and, in view of the spread of “common law English”¹³⁴, the spectre of more than one brand of legal English.¹³⁵

Ajani and Rossi suggest that “the specialised language used by the Community should... take the conceptualisation by national end-users into greater consideration, with the aim of improving greater comprehensibility and the ‘systematic coherence’ of principles, legal rules and European legal terminology”¹³⁶. They deduce that the “condition for achieving greater uniformity in European law is the existence of a common legal culture”¹³⁷. For them, the task of identifying common concepts lies within the competence of academic commentators¹³⁸. Presumably, translators might work with academics in view of their comment elsewhere that “translators create law... If language is considered as part of the substance of Community legislative production, then the work of translators should be understood as a formant”¹³⁹.

Gallas notes that technical terminology lies at the heart of precision in multi-lingual law-making, suggesting that a neologism should be established where EC law establishes new notions or variants of notions existing in national systems¹⁴⁰. For him, the answer to the challenge of “legislative drafting in several languages lies in the field of comparative legal terminology” to deal with “the coexistence of various legal orders and numerous languages”¹⁴¹. For him, too, this would involve academics systematically comparing legal institutions, concepts, and corresponding terms “covering the whole Community area”¹⁴².

These suggestions should be seen in the light of the reality in the European Court of Justice, which “by using the teleological approach aims at an interpretation that has regard to the real intention of the legislator beyond the constraints of language and culture”¹⁴³. The teleological approach assigns to the Court of Justice the last

Commission with Particular Reference to the Role of English, French, and German as Working Languages” in *Multilingua*, 16, 1997, 63, in particular 67.

¹³³ Kjaer, A. L. “Legal Translation in the European Union: A Research Field in Need of a New Approach” *op. cit.*, citing (fn 12) Seymour, E. *A Translator Writes*: www.europarl.europa.eu/trans/2001-trad_en.pdf

¹³⁴ As we have seen in the earlier section on drafting.

¹³⁵ Kjaer, A. L. “Legal Translation in the European Union: A Research Field in Need of a New Approach” *op. cit.*

¹³⁶ Ajani and Rossi *op. cit.* p. 92.

¹³⁷ *Ibid.* p. 84.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* p. 89.

¹⁴⁰ Gallas, T. “Understanding EC Law as ‘Diplomatic Law’ and its Language” in Pozzo, B. And Jacometti, V. *op. cit.* 119-128 at p. 126.

¹⁴¹ *Ibid.* P. 127-8.

¹⁴² *Ibid.*

¹⁴³ Campana, M.-J. “Vers un langage juridique commun en Europe?”, 2000, 8 *European Review of Private Law*, p. 39 *et seq.* cited in Paunio *op. cit.* p 391 fn 51.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

word in interpreting EU law. In that case, little appears to be left for national courts, academics, translators, or lawyers to decide¹⁴⁴.

To conclude this section, Kjaer's novel deduction¹⁴⁵ that "translation in the EU is not translation in the strict sense of the word" but "interlingual text reproduction" is based on the premise that:

The primary concern when translating legislation in the EU is not the target language legal conventions and target language recipient, but rather the reproduction of words and phrases that can ensure coherence and consistency within and across the 23 equally authentic language versions.

In concluding that "[t]heories and categories usually applied in translation studies cannot account for translation problems, translation solutions, and interpretation methods adopted within the legal framework of the EU", she suggests that an independent interdisciplinary research field be set up to focus "especially on the features of law and language characteristic of the multilingual and multilegal system of the EU."¹⁴⁶

Legal translation: other challenges

Blomqvist asserts that many challenges in legal translation are less the result of source text ambiguity or the fact of two different languages and more the result of "the clash of two different legal systems and their associated culture"¹⁴⁷. An example might be the "limping (legal) relationship" (in German: *hinkende... Verhältnisse*), used to describe an asymmetry in legal norms between two jurisdictions, so that, e.g., a marriage is legal in one country but not recognized in another. This also connects with legal uncertainty.

Equivalency and other challenges stemming from differences between legal systems are compounded by the poor quality of many legal dictionaries¹⁴⁸. In that case, the need for comparative law knowledge among lawyers operating internationally would be so much the greater. The same would apply *a fortiori* in the case of legal translators.

An entirely different question is the point of translating – and therefore publishing – certain texts at all, from the legal-cultural perspective. For example, in

¹⁴⁴ This is a separate matter from translation at the ECJ: see Wright, S. "From Academic Comparative Law to legal translation in Practice" at <http://www.uni-kassel.de/~dippel/justitia/proc/08%20Wright.%20Translation.pdf> last visited 30 July 2009.

¹⁴⁵ Kjaer, A. L. "Legal Translation in the European Union: A Research Field in Need of a New Approach" *op. cit.*

¹⁴⁶ *Ibid.*, adding "Without abandoning comparative law and translation theory, the research field should take its point of departure somewhere else – as suggested in Kjaer 2004b a meaningful place to start is Habermas' theory of communicative action and Wittgenstein's functional approach to meaning."

¹⁴⁷ Blomqvist *op. cit.* p. 305, fn 1: "Sacco 'made powerful case for the view that the cultural connection between law and language renders contract in English law and contract in French law incommensurable'" (citing Sacco, R. 1991. "La Comparaison juridique au service de la Connaissance du Droit". Paris: *Economica*, p. 20 in Kasirer, N. 1999. *Lex-icographie Mercatoria. The American Journal of Comparative Law* 47/4, 653-675).

¹⁴⁸ See de Groot and van Laer *op. cit.*, who assert that many law dictionaries are next to useless.

individualist countries such as the United Kingdom, the “preference for a free market approach and freedom over equality implies a less dominant role for the state”¹⁴⁹. This is mirrored by lower taxes, so that the political impact of the term “taxpayers’ money” differs from that in e.g. France or Germany¹⁵⁰. Again, the UK’s high intercultural ranking in individualism relates not only to the free market approach but also to protection of individual freedoms¹⁵¹. Thus, an article¹⁵² arguing that protection of the vulnerable is a core moral concern of common law tort law:

would not be published in France or Germany because it would only discuss what is obvious and self-evident in these legal systems. In the individualist common law world (the author) advocates something which is outside the main stream.¹⁵³

These two examples suggest that translated texts may look “foreign” or “strange” for two reasons: attitudes or ideas; and words or phrases. Background legal-cultural knowledge is a distinct advantage in translation decisions, even to the extent of commenting on the advisability of translating at all.

To round off the section on translation difficulties, Mattila points to two main dangers. The first is void literal translation, e.g. where “the designation of a legal institution or organ is meaningless to a foreigner if literally translated: it is dictated by the country’s original history.” Mattila cites examples linked to the legal profession such as the French *maître* and the English Queen’s Counsel¹⁵⁴. (Blomqvist also gives an interesting account¹⁵⁵ of an EU law case in the Court of First Instance¹⁵⁶ involving a mistranslation of the Swedish version of the Court’s Rules of Procedure, where “lawyer” was erroneously translated as *advokat* instead of *jurist*). The second is misleading literal translation, which Mattila characterises as “more dangerous than a meaningless one”, such as the status and functions of a legal institution or organ differing wholly from what a literal translation in the target language suggests¹⁵⁷. He further divides this category into three subtypes. The first of these is manifestly misleading translations, where “linguistic interaction between legal cultures has been more important than legal interaction” so that “the designations of legal institutions or organs may be similar, in spite of a great divergence in content”¹⁵⁸. The second is translations misleading due to polysemy, where “an identical concept stands behind terms similar in two or more

¹⁴⁹ Van Dam, C. “European Tort Law and the Many Cultures of Europe” in Wilhelmsson *et al.*, *op. cit.*, pp 58-80 at p. 72.

¹⁵⁰ *Ibid.* By the same token, lower taxes are mirrored in state unwillingness to shoulder liability, including liability for lawful acts.

¹⁵¹ The English reluctance towards strict liability is related to the concern for unfathomed economic consequences. See Markesinis, B.S. and Deakin, S. *Tort Law* (Oxford, Clarendon Press, 2003). p. 545. See also Collins, H. “European Private Law and the Cultural Identities of States”, (1995) 3 *European Review of Private Law*, 353–365.

¹⁵² Cited in van Dam, C. *op. cit.* at p. 72. See also *supra* note 50 Stapleton and *ibid.* note 154.

¹⁵³ Stapleton, J. “The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable” (2003) 24(2) *Australian Bar Review*, 135–148.

¹⁵⁴ Mattila *op. cit.* p. 262.

¹⁵⁵ Blomqvist *op. cit.* pp. 318–322.

¹⁵⁶ Case T-219/00 *Ellos v OHIM (ELLOS)* (2002) ECR II-753.

¹⁵⁷ Mattila *op. cit.* p. 262.

¹⁵⁸ *Ibid.* See also de Groot *supra* notes 116 and 117.

languages in certain contexts of usage but two or several divergent concepts in certain other contexts”¹⁵⁹. The third subtype is misleading legal nuances, such as *curia/tribunal*, or *bankrupt/banqueroute*, with their different connotations in different legal systems¹⁶⁰

Examples from own practice as a legal linguist

To illustrate the challenges that face NNS drafters and translators working in English, as well as mother-tongue translators, we look at examples from the author’s practice as a legal linguist with clients throughout Europe, all NNS. Texts prepared in English by NNS are followed by examples of the author’s work as a translator and reviser.

Proofreading text in English prepared by NNS

To begin with, the anecdotal case of an individual who had in fact been divorced but whose translated foreign certificate clearly showed the English word “nullity”. This caused some initial difficulty when presented to the UK authorities when the individual wanted to remarry. Happily, the registrar decided to overlook the discrepancy, accepting the explanation that the source language text read “divorce” in the relevant language and had simply been mistranslated. This type of error suggests lack of legal conceptual knowledge between two legal systems, as well as simple lack of legal knowledge in family law.

The next example stems from an enquiry from a law firm concerned with the meaning of “prosecuted party” in the following text, sent as an email attachment¹⁶¹:

7. ARBITRATION

7.1. All disputes and differences, which may arise during the execution of present AGREEMENT, are to be considered by agreement with both parties.

7.2. Should the dispute of parties not be solved by an agreement, it shall be decided by a competent law-court. Its competence shall be determined by Latvian law when the prosecuted party is the customer and by Slovak law when this party is the provider.

The parties were a regional airline (the customer) and a global oil company (the provider). The object of the contract was supply of fuel. The text, clearly prepared by a NNS English speaker, is unsatisfactory both legally and linguistically. From the linguistic aspect, the text contains errors of grammar, punctuation, syntax, and semantics. From the legal standpoint, the clause cannot be an arbitration clause because it contains no arbitration mechanism. In fact, the clause deals with dispute resolution and forum selection. From the legal linguistic aspect, the term “prosecuted party” is from criminal law; presumably, the parties intended “defendant (in civil proceedings)”. This type of error suggests lack of legal conceptual knowledge between two legal systems, as well as simple lack of legal

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Email and attachment in author’s possession.

knowledge in criminal and civil law. Even when that is clear, problems remain with understanding the meaning of clause 7.2. This is because “Its competence” refers to “law-court” in the previous sentence. As a result, the text suggests that Latvian law determines the competence of the court where the customer is defendant, while Slovakian law determines the competence of the court where the supplier is defendant.¹⁶² This still leaves the forum unclear: indeed, that is why the matter came before the court.

Next we examine examples of working documents dealing with linguistic questions. The first is an email exchange¹⁶³ at the International Criminal Court (ICC) in The Hague, where the author was working as temporary consultant in the translation department.

Internal email from colleague (French) to author:

I just read the editing of the decision mentioned above. I just have one question, you changed "in camera" for "closed session", could you explain me the reason, because we already issued some weeks ago a decision convening an in camera meeting ...

(Reply)

Yes, I discussed this with D..., who saw my original edit (this morning) and commented that we are supposed to use ‘closed session’ except for one specific document, which (in error) used ‘in camera’. I then changed my original draft to the one that you now have. I should add that in legal English generally, latinisms are strongly discouraged.

The only comment here is that the NNS translator into English had not made a mistake but was rather unaware of changes in legal English prompted by the plain English movement.

The following contains extracts from an Estonian government report, translated into English by an Estonian translator (the client), with the author proofreading and copy-editing the English text. In each case, the relevant text is followed by comments from the author (in italics) and the client, with the relevant words shown in bold. These are taken from the original texts¹⁶⁴.

Text 1

...whether they are adopted or **under curatorship**, whether...

Guardianship (the relationship of guardian and ward)?

This concept is a bit ambiguous for me too. The Estonian law says that a curator is appointed by a guardian to take care of a person. It seems to be a kind of caregiver of a person without capacity.

The Min of Justice quote OED in their terminology database in connection with this term: “caregiver - one appointed as guardian of the affairs of a person legally unfit to conduct them himself, as a minor, lunatic etc”.

The law also says that a caregiver is not a person’s legal representative while a guardian is.

¹⁶² From author’s email to client, in author’s possession.

¹⁶³ Copies of originals in author’s possession.

¹⁶⁴ Electronic copy with original exchange of comments in author’s possession.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

In England, curators take care of museums!:) We cannot use “under care” because this could be confused with “in care”= “in local authority care” but perhaps “fostering” is right – this is far less formal than guardianship and even less than adoption, but could be both short- or longer- term. For example, some couples foster many children. Foster parents generally need some kind of approval from the local authority, and generally receive state help. Perhaps here “adopted or fostered”.

I am almost willing to accept “adopted or fostered”, but I found that “curatorship” is used in some international instruments, see e.g. <http://hcch.e-vision.nl/upload/text34d.pdf> Art 3(c) (there is parallel text also in French and German). Do you still think it may mean the same as “foster”?

‘curator’ is the civil law equivalent of the common law ‘guardian’ (in this case) or ‘trustee’ (in others) - see attachment - but both are legal representatives. I was not able to access the text you mentioned but I did find a reference in an English-language document to curatorship (attached) - from South Africa, where English is one (but not the only) language of law, whereas the law is mainly civil law based on Dutch (Mattila mentions it on p. 131.) Maybe better to use ‘curatorship’?

I think I will use “curatorship” (because this was used by our Min of Justice and exists in a couple of European civil law Conventions) and if the readers do not understand this, the Government will have to explain what they mean.

I agree to use ‘curatorship’.

The problem here was that common law English has no single term equivalent for the civil law expression “curatorship” but the solution adopted was one of those mentioned above – using “curatorship” as a loan word. Incidentally, the reference to Mattila was to the text here frequently cited, of which the client has a copy.

Text 2

Such acts are punishable by a **money penalty** or up to three years’ imprisonment.

I really like “money penalty”, but again, could you just explain to me what exactly is wrong with “pecuniary punishment”.

“pecuniary punishment” just sounds so strange, though I can’t say it is wrong. It is certainly rather quaint, especially “pecuniary” – straight from the Latin “pecunia”= “money”.

Here, the author had substituted “money penalty” for “pecuniary punishment”. The client’s choice of words was not “wrong” but simply did not collocate.

Text 3

Sexual intercourse with a **descendant**

A parent, a person with the rights of a parent, or a grandparent, who engages in sexual intercourse with their child or grandchild is punished by up to five years’ imprisonment.

This looks strange in English. Descendants, like ancestors, are usually separated by a gap of several generations.

Can you think of any other word that covers the relationships mentioned in this paragraph (parents/grandparents vs children/grandchildren)? Offspring?

I would use the expression “(person) within the prohibited degrees of relationship”, which covers both close blood relatives (‘consanguinity’) and adoptive parents or grandparents and others ‘in loco parentis’ (exercising parental authority).

Note: the first line is a subheading. In this text, the client’s meaning was clear but the semantic choice in English required refocusing to fit with intended meaning.

Translating text from French to English

Mattila notes the complex relationship between legal English and legal French, where multiple misleading events occur, in particular “terms that appear identical do not necessarily express the same concepts”. For this reason, he suggests that:

translators of texts between French and English should be especially cautious in drawing conclusions on the basis of the similar appearance of the terms of these two legal languages. Even if the meaning of English and French terms is often the same, in many cases this appearance is misleading¹⁶⁵

Elsewhere he notes:

Where polysemy occurs, interpreters of the text should be able to assign to the term the meaning appropriate to the context. They should be aware of the fact that the term may also have meanings other than the one first perceived¹⁶⁶

In a recent French-English translation, the most interesting example of polysemy was the French word “solidarité”¹⁶⁷, which has two entirely different meanings in English: “liability”, and “interdependence”. While in general this should not cause difficulty for translators, the problem in this case lay in the fact that the word, which was widely used throughout the text, could have had either meaning in some contexts.

Next, two more email exchanges¹⁶⁸ at the ICC, between the administrator and the translation section, with the words in question marked in bold. The first reads:

*Have you guys established a hard and fast translation of **tache tache** such as in the sentence, “une tenue militaire qu’on appelle tache tache”. It came up in witness statements.*

(Reply from the author)

*I spoke with S..., who said that even in Swahili this kind of ‘camouflage spot’ (MIL slang: ‘**camo-spots**’) uniform was called ‘**tache tache**’,*

¹⁶⁵ Mattila *op. cit.* p. 201.

¹⁶⁶ Mattila *op. cit.* p. 111.

1. ¹⁶⁷ *Passim* in the following text which the author translated from French to English: “Déontologie Infirmière Universelle. De la Déclaration universelle de droits de l’homme au Code déontologique du Conseil international des infirmières” Gilles Devers, Lamarre 2005. Electronic and hard copy in author’s possession.

¹⁶⁸ Copies of originals in author’s possession.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

*which suggests that Swahili borrowed it from French. Actually, ‘**camo-spots**’ would be not bad.*

Here, the full translation would have been “a military get-up known as camo-spots”. Though not strictly legal, the expression arose in a legal context: witness statements from the Democratic Republic of the Congo in connection with a pending prosecution. While a literal translation would give e.g. “speckle-speckle”, “spot-spot”, or “blotch-blotch”, none of these sounded “English”, nor did they convey the intended meaning for a type of camouflage uniform. This explains the choice of “camo-spots” as a brief circumlocution doubling as a credible neologism in English to capture the spirit of the French original, at the same time fully informing the reader in English.

The next ICC internal emails¹⁶⁹ are from the author to the administration and their reply, again with the words in question shown in bold:

*...understand that you prepared a list of suggested terms covering certain areas. These may be of help in our team’s current task: witness statement translations (Fr-En) from DRC ¹⁷⁰. So far, we have come across ‘**quartier**’ (=‘**neighbourhood**’?) and ‘**commandant**’ (=‘**commander**’?), both of which – so rumour has it – could be on your list.*

(Reply from administration)

*As regards terminology, I can confirm that we are using **neighbourhood** and **commander**.*

This correspondence arose from the need to establish uniformity of terminology in witness statements, where more than one option was available for translation. As to “quartier”, the problem was that DRC is a huge country with many administrative territorial divisions, which were difficult to transpose into English in a meaningful intercultural context.

Translating text from German to English

A classic example of lack of equivalence is presented by the common law English expression “consideration”¹⁷¹. The question here is whether to render the German “Gegenleistung” as “consideration” in German-English translations, as indeed the author has seen. However, not only do the two expressions fail to correspond conceptually but for linguistic reasons, too, “consideration” could mislead the NNS reader in English. On that basis, the author prefers “performance and counter-performance” or “mutual performance” in most cases.

¹⁶⁹ Copies of originals in author’s possession.

¹⁷⁰ The Democratic Republic of the Congo.

¹⁷¹ See discussion in Zweigert & Kötz *op. cit.* pp. 390-399 and references to Chloros, A.G. “The Doctrine of Consideration and the Reform of the Law of Contract” 17 *International and Comparative Law Quarterly* 137 (1968) p. 164 f. “English law would lose nothing if consideration were to be abolished” and Wright, L. “Ought the Doctrine of Consideration to be Abolished from the Common Law?” 49 *Harvard Law Review* 1225 (1936) at p. 1251 “I cannot resist the conclusion that the doctrine is a mere incumbrance.”

The next example is of potentially void translations similar to those mentioned by Mattila¹⁷². Again, the relevant words are shown in bold.

*...ist stets an der Zusammenarbeit mit interessierten und motivierten **Referendarinnen** und **Referendaren** als **Stationsreferendar/in** oder in Nebentätigkeit interessiert.... mit dem Betreff (Referendar/Praktikant)*

*...is in constant co-operation with interested and motivated **junior lawyers/associates** interested in **compulsory in-house training** (Stationsreferendar/in) or in part-time work...with the reference (**junior lawyer/trainee Referendar/Praktikant**).*

Here, the author was translating into English the entire website of a German law firm with offices throughout Central and Eastern Europe¹⁷³. The problem stemmed from national differences in stages of lawyer training i.e. no full equivalent. With offices in so many countries, presumably the problem was multiplied several times. The choice of a brief descriptive near-equivalent followed by the original German in brackets appeared the most effective choice for dealing with the problem both in English and the other languages¹⁷⁴. Interestingly, the matter was later reviewed in the wider context of a hierarchy of professional designations within the firm to satisfy both employees and clients. In short, the words “junior” and “trainee” were removed on the basis that they appealed to neither employees nor clients, so that the lowest designation became “associate”.

Coincidentally, another of the author’s law firm clients, with offices in four countries, recently copied the author into an email to all those involved in public communication in English:

Titles of our lawyers have been agreed as follows: **Partner, Specialist Counsel, Senior Associate, Associate, Legal Trainee, etc.**
From now on titles of our lawyers should not include any of the following words: Attorney-at-Law, Advocate or any other similar references.¹⁷⁵

This follows extensive consultation and discussion over more than a year and forms part of the firm’s policy guidelines for legal writing in English. These aim at clarity, implying removal of terms that might confuse, such as “attorney-at-law” and “advocate”.

To conclude the section on German-English translation, and to give a flavour of the legal linguist at work, the author offers some extracts from notes on translation of a contract¹⁷⁶ from German to English, prepared for the client by the author and his American assistant:

The text suggests that this is a hastily-prepared ‘traveling draft’. That is, it resulted from meeting notes and is used as a base for further discussion, with consequent additions. For example, some articles seem incomplete,

¹⁷² *Supra* note 155 Mattila.

¹⁷³ bnt website *supra* fn 37.

¹⁷⁴ Currently (Bela)Russian, Czech, Estonian, Hungarian, Latvian, Lithuanian, Polish, Slovak, Ukrainian.

¹⁷⁵ Original in author’s possession. See also *supra* notes 156 Blomqvist and 155 Mattila.

¹⁷⁶ Original in author’s possession.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

the text is full of abbreviations, not to mention spelling mistakes, with an overall lack of discipline - presumably to be put right when all terms are finally agreed.

In addition, the author does not seem to have a legal background, and there are noticeable traces of Austrian-German. Moreover, the text is full of IT-specific expressions. The client should definitely have this checked by somebody knowing programmers-English.

Therefore, as a text it is formulated very badly (from the perspective of both legal terminology and 'common terminology'. Formulations are often vague and ambiguous, and different terms appear to be used for same object (e.g. for the SIM contract: document, agreement, contract).

Now, translating into good legal English, i.e. good English + maintaining the legal meaning, involves retrieving the exact legal meaning from the German original. Unfortunately, this was often not possible. Thus, translating more freely into good English would risk interpreting the text and giving it a meaning that the author did not intend.

This, in turn, involves sticking as much to the original formulations and wording as possible - even when it sometimes sounds a little bumpy and like 'translated-English'. At the same time, this enables the translated text to reflect all ambiguities and vagueness and leave the interpretation to the courts later on ☺...

... Any time the following words or phrases are used in the original:

"entsprechend"

"jeweils / jeweilig",

"Im Sinne von"

"Im Rahmen"

bzw. (beziehungsweise)... (mostly, but not always, just replaced with "and")

These can be very problematic to translate, particularly if you don't know the author and don't know everything about the context they are being used in. Often they are used vaguely, in hopes of covering up a weak point in a text, and so become even more difficult to translate...

The above should be self-explanatory, and is offered as a simple illustration, so that no further comment is needed.

Translating text from Russian to English

For reasons of space, this section focuses on one example, chosen for its interest as a possible mistranslation which has become "respectable with age" and therefore difficult to dislodge. The text was a doctoral thesis on Russian law¹⁷⁷, which the author was proofreading and copy-editing. The local theme was "(justice of the peace) courts and peace judges/justices of the peace"¹⁷⁸ based on the "Federal law

¹⁷⁷ Copy in author's possession.

¹⁷⁸ Butler, W.E. *Russian Law*, 1 ed., Oxford, Oxford University Press, 1999, p. 154. See p. 33.

on Justice of Peace Courts”¹⁷⁹. The text began with some background explaining the judicial reform of 1864 after emancipation of the serfs, establishing a new hierarchy of courts. These were to be open to all, including serfs. Two new courts were set up: peace courts (*sic*) and *volost* courts. The latter applied customary law. Both courts were accessible to ordinary people; they cost little, did not rely solely on written documentation, and dealt mostly with petty disputes. The institution lapsed after the 1917 Revolution and was reinstated following collapse of the Soviet Union.

The problem was twofold. First, even if the translation was correct, the terminology used was likely to confuse if not mislead the reader in English, since the organization and purpose of the Russian civil “justice of the peace courts” presided over by judges wholly differs from the English version: magistrates’ courts with mainly criminal jurisdiction presided over by lay magistrates, also known as “justices of the peace”.

Next, and more interestingly, was how the terms “(justice of the peace) courts and peace judges/justices of the peace” came to be applied in the first place. The adjective *mirovoi* in the terms *mirovoi sud* and *mirovoi sudja* are based on the Russian word *mir*, in cyrillic script written **мир**. Most dictionaries give only two meanings: “peace, and “world, universe, planet”. However, a third obsolete meaning appears elsewhere¹⁸⁰:

- “1) peace;
- 2) world, universe; planet;
- *obsol. (peasants’) community (meeting)”

The client’s description strongly suggests that the original 19th century courts had indeed been “community courts” and the judges “community judges” so that *mirovoi sud* and *mirovoi sudja* should have been so translated, i.e. within the now obsolete meaning. However, it seems the term *mirovoi* was twice abused: first when misunderstood by a translator lacking background legal knowledge and knowledge of Russian¹⁸¹, exacerbated by failure to perform legal analysis¹⁸²; second when the translator applied inappropriate and ill-fitting names to suit the closest apparent semantic equivalent in English¹⁸³. The client confirmed that the English term had been in use for a very long time, i.e. it presumably predates the 1917 Revolution and rejected correction of the error on the ground that the error has become embedded. The only remaining solution was for the client to add an explanatory footnote clearly distinguishing the English from the Russian version.

Revising text translated from Russian to English

The last illustration involves a remote banking agreement, translated from Russian into English by the bank’s NNS Russian-speaking translator. When revising the

¹⁷⁹ Dmidov, V. V. and Zykov, V. M. *Kommentarii k Zakonodatelstvu o Mirovyx sudjax*, Moscow, 2001. p. 8. Federalnyj zakon nr 188 "O mirovyx sudjach Rossijskoj Federatsii" 17 December 1988.

¹⁸⁰ RusUSA.com online dictionary <http://www.rususa.com/dictionary/russian.asp> last visited 30 July 2009.

¹⁸¹ See on interpretation of source language text, Chromá, M. “Semantic and legal Interpretation: Clash or Accord?” in Šarčević, S. (ed.) *op. cit.* pp. 27-42, in particular pp. 28-29 as to the primary requirement for the translator to fully understand (=correctly interpret the legal information in) ST so as to properly translate.

¹⁸² *Ibid.* p. 40.

¹⁸³ See *supra* note 158 Mattila

English text against the Russian original, the author made numerous comments. However, just one will suffice to illustrate. The following piece shows the original and the translation with the relevant words in bold, followed by the author's comment.

Original text

1.36. Пользователь **несет имущественную ответственность** перед Банком и Клиентом за соблюдение настоящих Положений

Translation

The User **bears full property liability** to the Bank and the Customer for compliance with these Terms and Conditions.

Author's comment

Another translation problem from the Russian original: the expression '**property liability**' [**imushyestvennaya atvestvennost**] does not exist in English. The Bank must check to ensure that the words 'full personal accountability' are the right ones.

Here, the problem was again one of lack of equivalence. Moreover, the translator had added "full", which did not appear in the original Russian text, between "bears" and "property liability". However, use of the word "full" did suggest that the nearest equivalent might be "full personal accountability". The author took the precaution of "putting the ball in the bank's court" to deal with.

2. Findings and Discussion: need for knowledge, skills, and research

Here, we recall that this paper focuses on challenges to (especially NNS) lawyers and translators producing or translating legal texts in and into English, in the dual contexts of internationalisation of the law and legal practice and of English as the global language of legal communication. An examination of the main challenges suggests a need for certain knowledge and skills, with likely overlap¹⁸⁴ between legal and linguistic needs of lawyers and translators¹⁸⁵. These are collated below under main headings of convenience, to some extent interlinked, along with comments from the literature, although for reasons of space the latter are rather brief.

Comparative law for lawyers and legal translators

Comparative law appears first due to its links with several of the headings below. Among comparative lawyers, Bogdan points to the need for jurists to command comparative basic principles including hierarchies of sources of law, legal methods¹⁸⁶, and an understanding of legal concepts and terminology¹⁸⁷. As for

¹⁸⁴ See e.g. *infra* note 219 Mattila.

¹⁸⁵ This overlap in requirements perhaps to some extent echoes that between translators and interpreters. At the May 2008 FIT (Fédération Internationale de Traducteurs) conference in Tampere, two presenters made an impromptu joint presentation, one involving translator skills, the other interpreter skills, explaining that they had discovered sufficient overlap between their topics to justify doing so. The author was present but can identify only one presentation: "Should an interpreter also translate?" (Driesen) at <http://www.box.net/shared/upud8nfkoo> last visited 02 August 2009.

¹⁸⁶ As for translators, see Šarčević *supra* pp. 2-3 and note 21.

¹⁸⁷ Bogdan *op. cit.* pp. 85-6.

translators, an example arises in international arbitration and cross-border litigation, which require translators who are expert in international and comparative law to promote “conceptual understanding of how the law of one jurisdiction operates as opposed to that of another jurisdiction”¹⁸⁸. Zweigert & Kötz emphasize lawyers’ need of comparative law¹⁸⁹ - a call echoed elsewhere for translators¹⁹⁰ - and include the sociology of law on “the causal relationships between law and society”¹⁹¹. They also note the minimal input of comparative law at universities¹⁹², at the same time warning against focus on national law¹⁹³.

Legal systems and specialisms for lawyers and legal translators

Here, a link exists with comparative law. Šarčević emphasises translators’ need for subject expertise and “knowledge of the target legal system and preferably the source system”¹⁹⁴, the first supported by Chromá¹⁹⁵, the second by Kjaer¹⁹⁶. Additionally, Kocbek notes the need for “a thorough knowledge of the legal systems from the stance of comparative law, as well as of the repercussions of the discrepancies between legal systems on the corresponding legal languages”¹⁹⁷, suggesting a link with legal concepts and terminology. Lawyers’ need here is clear, too.

Comparative legal cultures for legal translators and lawyers

Translation can be seen as intercultural transfer, in that source and target languages are culturally embedded, so that the translator operates as an “intercultural expert” in the sense of comparing cultures¹⁹⁸. Put differently, the translator should be familiar with both source and target text cultures: a matter of cross-cultural pragmatics, on the basis that laws should not be seen in isolation from the culture in which they are rooted¹⁹⁹. In addition, “[k]nowledge of legal and cultural backgrounds can contribute to a better understanding as to why countries look at certain issues as they do”²⁰⁰. At the end of the day, learning about legal cultures is about “[l]earning about each other’s legal mentalities . . . and ways of solving concrete legal problems”²⁰¹. Legal cultural awareness could form an

¹⁸⁸ Domijan-Arneri, M. “Problems in multilingual Litigation – A Practical Perspective” in Šarčević, S. (ed.), *op. cit.* 2009 pp. 345-360, p. 350.

¹⁸⁹ Zweigert & Kötz *op. cit.* p. 22-24.

¹⁹⁰ Gémar, *supra* note 20 and Šarčević, de Groot, Bocquet, *supra* note 21, Kocbek *op. cit.* pp. 43-44.

¹⁹¹ Zweigert & Kötz *op. cit.* p. 10-11 and 21.

¹⁹² *Ibid.* pp. 3, 22. Echoed by Drolshammer & Vogt see *infra* note 210.

¹⁹³ *Ibid.* pp. 29-30.

¹⁹⁴ *Supra* note 21 Šarčević.

¹⁹⁵ *Supra* note 22 Chromá.

¹⁹⁶ *Supra* note 16 Kjaer.

¹⁹⁷ Kocbek *op. cit.* p. 44.

¹⁹⁸ Kocbek, A. *op. cit.* p. 44 citing Vermeer, H. J. (1987). “What does it mean to translate?” *Indian Journal of Applied Linguistics* 13 (2): 25-33 and Nord, C (1997). *Translating as a Purposeful Activity: Functionalist Approaches Explained*. Manchester: St. Jerome.

¹⁹⁹ Chromá, M. “Semantic and legal Interpretation: Clash or Accord?” in Šarčević, S. (ed.) *op. cit.* at pp. 34-35 citing Wierzbicka, A (2003). *Cross-Cultural Pragmatics*. 2nd ed. Berlin, New York: Mouton de Gruyter and Lessig, L. (1993). “Fidelity in Translation.” *Texas Law Review* 71. Austin TX: University of Texas, 1165.

²⁰⁰ Adding: “For example, it helps to understand why in the United Kingdom strict liability is considered to be a threat to mankind whereas in France it is seen as the basis of civilization.” van Dam *op. cit.* at p. 78; compare *supra* notes 151 van Dam and 152 Markesinis/Deakin; and Collins.

²⁰¹ Van Dam *op. cit.* p. 80 note 107, citing van Gerven, W. “The ECJ-Case law as a Means of Unification of Private Law?” in *Towards a European Civil Code*, A. Hartkamp *et al.* (eds) (3rd edn, Deventer, Kluwer, 2004), p. 123.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

explanatory or contextual element of comparative law²⁰², perhaps under the heading of style²⁰³, again not only for legal translators but also for lawyers who aim to operate internationally or to translate legal texts.

Legal methods for translators

Legal translators require analytical and interpretation skills, to know “how lawyers think”. These skills imply subject-specific knowledge²⁰⁴, as well as the ability to “intervene in the text semantically, stylistically, and intellectually”²⁰⁵. Šarčević, too, emphasises the need for translators’ “ability to solve legal problems, to analyze legal texts”²⁰⁶. Knowledge of legal methods is of course implicit for lawyers, although as we have seen the usefulness of comparative methods advocated by Zweigert & Kötz²⁰⁷ appears an undeveloped theme in lawyer education and training²⁰⁸.

Legal English for lawyers and legal translators

Drolshammer & Vogt argue convincingly, from the empirical standpoint, on the need for legal English²⁰⁹ including formal in-house training in legal English e.g. for professional service firms²¹⁰, also stressing legal English as “an essential element in bringing about the necessary comparability, compatibility, and interoperability of legal cultures”²¹¹. This applies as much to NNS translators working in English as to lawyers operating in international contexts. Legal English writing style would feature here. Finally, Drolshammer and Vogt assert that “the predominant use of English as a legal language blurs the conceptual and institutional differences between the various legal systems and cultures of the world. Unfortunately this is coupled with a decline in comparative law and international law as teaching subjects”²¹².

Translation skills

Šarčević affirms translators’ need for translation skills as supplemental to both legal and language skills²¹³, on the basis that “translators must be competent in both translation and law to make legal-linguistic decisions”²¹⁴, noting elsewhere

²⁰² In view of difficulties in defining legal culture: see e.g. Nelken, D. “Comparing Legal Cultures: An Introduction” in Nelken, D. (ed.) *Comparing Legal Cultures*, Dartmouth Publishing 1997 pp. 1-9.

²⁰³ Zweigert & Kötz *op. cit.* p. 68, break this into five components: historical background and development; predominant and characteristic mode of legal thinking; distinctive institutions; legal sources; ideology.

²⁰⁴ Lessig, L. *op. cit.*, 1195-1196.

²⁰⁵ Joseph, J. E. (1995). “Indeterminacy, Translation and the Law.” In M. Morris (ed.) *Translation and the Law. American Translators Association Series*, Vol. VIII, 1995. Amsterdam/Philadelphia: John Benjamins Publishing Company, pp 13-36 at pp. 33-34.

²⁰⁶ *Supra* note 21 Šarčević.

²⁰⁷ Zweigert & Kötz *op. cit. passim* but e.g. p. 23 on different approaches.

²⁰⁸ *Supra* note 192 Zweigert & Kötz.

²⁰⁹ Drolshammer & Vogt *op. cit.* Note (p. 21): “The reluctance or disinterest in dealing with English as a legal language coincides with the state of education in legal English outside the Anglo-Saxon world”.

²¹⁰ Drolshammer & Vogt *op. cit.* p. 49.

²¹¹ Drolshammer & Vogt *op. cit.* p. 32.

²¹² Drolshammer & Vogt *op. cit.* pp. 27 and 57.

²¹³ Šarčević, S. *New Approach to Legal Translation*, p. 115.

²¹⁴ *Supra* note 21 Šarčević.

the need to be able to perform conceptual analysis of legal vocabulary in the search for equivalence²¹⁵. According to Kocbek:

given the specific requirements of legal translation, these translation skills would have to unite several stances, i.e. the findings of legal linguistics, comparative law and those approaches in translation science that particularly suit translation in legal environments.²¹⁶

Kocbek's nine-stage approach to legal translation implies knowledge of interdisciplinary skills in intercultural legal communication and of the principles of cultural embeddedness, in turn involving familiarity with the language (terminology and concepts) used in different legal systems, and comparative legal science²¹⁷.

Legal linguistic skills for lawyers and legal translators

Mattila recommends legal linguistic skills both for lawyers and translators. As portrayed by him²¹⁸, these skills appear to overlap with other skills requirements noted here.

Legal writing and drafting for lawyers and legal translators

Self-evidently, both lawyers and translators require knowledge and skills in comparative legal writing styles in the languages in which they operate²¹⁹. Mattila notes that lawyers typically acquire legal style, along with terminology, during studies and training, though are not required to purposively study legal language²²⁰. Chromá points out that “the consequences of a poorly drafted legal text or a poorly translated source legal text essentially do not differ”²²¹.

Concepts and terminology for lawyers and legal translators

Bogdan²²² notes lawyers' need for a grasp of concepts and terminology, while Šarčević affirms that, for translators, “[l]egal competence presumes ... in-depth knowledge of legal terminology”²²³. Of interest here is Sandrini's four-step transcultural comparison of legal concepts of different legal systems, usable by

²¹⁵ Šarčević, S. (1989). “Conceptual Dictionaries for Translation in the Field of Law”, *International Journal of Lexicography* 2/4: 277–293, p. 290.

²¹⁶ Kocbek *op. cit.* p. 43.

²¹⁷ *Ibid.* pp. 43-62, in particular pp. 43-44.

²¹⁸ Mattila, *op. cit.* p. 20: “Lawyers with an overall picture of the history, structure, and basic vocabulary of a foreign legal language are better placed to learn more easily and rapidly the particular terminology and style of this language in the field of their specialism (e.g., royalties, consumer law)... familiarity with the history and features of legal languages operates as an aid to better understanding of the linguistic factors bearing on, e.g., creation of neologisms, and translation between two languages.... The translator needs information on the characteristics of legal language from a universal standpoint, as well as on the history and features of the legal languages concerned.”

²¹⁹ See also Šarčević *supra* note 21, Chromá note 22, Gotti note 63.

²²⁰ Mattila *op. cit.* p. 20.

²²¹ Chromá, M. “Semantic and legal Interpretation: Clash or Accord?” in Šarčević, S. (ed.) *op. cit.* pp. 27-42, in particular p. 27, citing Goldstein, T. & Lieberman, J. K. (1991). *Lawyer's Guide to Writing Well*. Berkeley / Los Angeles: University of California Press, pp. 4-5; and Oettle, K. F. (2007) *Making Your Point. A practical guide to persuasive legal writing*. New York: ALM Publishing, pp. 8-10.

²²² *Supra* note 187 Bogdan.

²²³ *Supra* note 21 Šarčević.

*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

legal translators and comparative lawyers²²⁴. Ajani and Rossi note that “[a] perspective on the language of law implies the deployment of a broad range of research techniques, assisted by linguistics”²²⁵; they promote the technique of terminological research, describing specialised legal vocabulary less by way of definitions, more through conceptual relationships and practical usage²²⁶. Tessuto suggests terminographical work to produce resource data of which one application would be in legal translation and information retrieval²²⁷, which falls under the next heading: legal informatics.

Legal informatics for lawyers and legal translators

This emerging discipline constitutes the application of information technologies to the field of law and the use of these technologies by legal professionals. Legal informatics, which unites computing and telecommunications, has rapidly developed with the internet. Unfortunately, this paper has space only to mention it, but no more.

Summary

We now very briefly see how the knowledge and skills requirements outlined above appear to fit into more general visions of legal education. This is followed by a note on the need for legal linguistic research and a brief conclusion.

The future shape of legal education

According to Gessner *et al.*, globalisation requires legal education to prepare practitioners *inter alia* “to deal with foreign legal systems, and to defend their own positions in cross-cultural negotiations”, implying the need for legal knowledge, familiarity with legal cultural differences, and sufficient mastery of the English language.²²⁸ They see modern legal education as an interdisciplinary exercise²²⁹, foreseeing “recreation of a common European Legal Culture”²³⁰.

Drolshammer & Vogt call for new strategies in legal education²³¹; pointing to the need for analysis of the effects of globalization on the legal world, they list areas for training. These include: substantive law training in the national law of the lawyer’s home jurisdiction; training in other legal systems; foreign and international legal

²²⁴ Sandrini, P. “Der transkulturelle Vergleich von Rechtsbegriffen” in Šarčević, S. (ed.), *op. cit.* 2009 pp. 151-166.

²²⁵ Ajani and Rossi *op. cit.* p. 89, citing (fn 29) Durieux, C. “Traduction et linguistique textuelle”, in *Terminologie et traduction*, 1, 1997, p. 50 ; P. Lerat, “Vocabulaire juridique et schémas d’arguments juridiques”, in *XLVII Meta*, 2, 2002, p. 155.

²²⁶ Ajani and Rossi *op. cit.* p. 90, citing (fn 30) J.C. Gémard, “Le plus et le moins-disant culturel du texte juridique. Langue, culture et équivalence”, in *Meta*, *XLVII*, 2, 2002, p. 163 ; and (fn 31) P. Sandrini, *op. cit.* 1996.

²²⁷ Tessuto, *op. cit.* at p. 299, adding: “translators may not be experts in the subject-field, which often results in incorrect or wrong translations; or research materials available in both TL and SL are inadequate in order to decide on priorities of the translation strategy in culture-specific contexts, or no easy access to subject-field specialists is available for translation”.

²²⁸ Gessner *et al.* (eds). *op. cit.*. 1996 at p xv. Translation by John Blazek, Brussels.

²²⁹ *Ibid.*

²³⁰ *Ibid.* pp. xv-xvi. See also Zweigert & Kötz *op. cit.* pp. 15 and 29 on the effect of nationalism and national codes on the *ius commune* with the “deplorable result that lawyers stopped looking beyond their national borders”.

²³¹ Drolshammer & Vogt *op. cit.* p.1.

research abilities; an understanding of the international legal profession; proficiency in relevant foreign languages; interdisciplinary background knowledge; general educational background; experience in global transactions.²³²

Salmi-Tolonen asserts that “we need expert knowledge, we need legal knowledge and, on top of these, we need linguistic knowledge”²³³, stressing the need to “adjust our mental models by acquiring more multidisciplinary knowledge and paying attention to the implications that can be drawn from the scientific study of legal language.”²³⁴

Glenn asserts: “[i]f law is no longer considered exclusively in terms of national sources, then it is the discipline of law in its entirety which must assume the cognitive burden of providing information on law beyond national borders.”²³⁵

Husa affirms that “[g]lobalisation and the expansion of transnational law changes law in the sense of rules, principles, institutions and procedures” and that “legal education should be able to answer the call of the wild *i.e.* face the promises and perils of transnational legal education.”²³⁶

Legal linguistic research

Mattila calls for jurilinguistic research on legal institutions and concepts²³⁷, also noting various ways in which comparative law can promote research in legal linguistics, such as concepts on which terms are based, linked to analytical work in legal translation and legal dictionary compilation, and micro-comparative research work into comparative legal institutions²³⁸. Asserting the importance of comparative law in relation to the study of different legal languages²³⁹, he proposes a legal linguistic approach for clarifying comparative law analyses, e.g. a focus on the legal linguistic distinction between concept as a mental abstraction and term as the appearance of a concept, at the same time noting the existence of comparative law texts that do not deal adequately with the challenge of legal language²⁴⁰. To this could be added research into different types of legal English, especially intercultural aspects of English as an international language of legal communication²⁴¹. Drolshammer & Vogt note, firstly, the need for research into legal English as “a specific object of analysis”; secondly that the complex intrinsic relationship

²³² Drolshammer & Vogt *op. cit.* pp. 7-8.

²³³ Salmi-Tolonen, T. “Negotiated meaning and International Commercial Law” in Bhatia *et al.* (eds) *op. cit.* 117-139 at p. 135.

²³⁴ Salmi-Tolonen, T. “Legal Linguistic Knowledge and Creating and Interpreting Law in Multilingual Environments” 1167-1191 *Brooklyn Journal of International Law* [Vol. 29:3 2004] at p. 1191.

²³⁵ Glenn, H.P. “Aims of Comparative Law”, in *Elgar Encyclopaedia of Comparative Law* 57, 59 (Jan Smits ed. 2006).

²³⁶ Husa, J. “Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind”, *German Law Journal* No. 7 (1 July 2009) <http://www.germanlawjournal.com/article.php?id=1129> last visited 17 June 2009.

²³⁷ Mattila *op. cit.* pp. 265-267.

²³⁸ Mattila *op. cit.* p. 16, citing (note 41) Sandrini, P. (1996), *Terminologearbeit im Recht. Deskriptiver begriffsorientierter Ansatz vom Standpunkt des Übersetzers*, Wien, TermNet, p. 169.

²³⁹ Mattila *op. cit.* p. 16.

²⁴⁰ Mattila *op. cit.* pp. 16-17, though noting certain exceptions (footnotes 43, 44, and 45).

²⁴¹ See Drolshammer & Vogt *op. cit.* p. 52: “This lack of in-depth language analysis also applies to the analysis of the effects of globalization on the legal world... legal English will play a prominent role”.

between law and language requires further specialist analysis from the viewpoint of commensurability and translatability²⁴² both from legal and linguistic perspectives²⁴³, thirdly that “[i]nternationalization has brought about the need to have English as a *lingua franca* amongst all members of the legal profession”²⁴⁴.

2.1. Conclusion

This research, in highlighting the knowledge and skills needs of lawyers and translators, does indeed appear to confirm that the corresponding education and training requirements do appear to overlap significantly in certain areas. This would be truer in the case of NNS lawyers and translators operating in English. However, with universities under pressure to focus on ECTS credits in main areas of the curriculum, it may be more realistic to achieve the required input in dedicated interdisciplinary²⁴⁵ programme modules jointly for legal translators and for lawyers who aim to operate internationally or to translate legal texts.

Clearly, much work remains to be done in the legal linguistic field which this paper encompasses. Equally clearly, this involves a very considerable team effort. Lawyers, linguists, translators, and judges, whether native or non-native speakers of English, can all valuably contribute to conceptual and terminological development and harmonisation of legal language in the context of legal English as global legal *lingua franca*. This implies collaboration, with each taking into respectful account the views of the others, but no group claiming to be the ultimate sole arbiter.

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²⁴² Drolshammer & Vogt *op. cit.* pp. 20-21 and 56-7.

²⁴³ Drolshammer & Vogt *op. cit.* p. 20, adding “The degree of their interrelatedness is evidenced e.g. in Markus Nussbaumer’s exemplary annotated bibliography... (Language and Law)”. [Footnote 8 refers to Nussbaumer’s “Sprache und Recht”, *Studentenbibliographieren Sprachwissenschaft*, Heidelberg 1997 (Language and law, Bibliography, Philology)].

²⁴⁴ Drolshammer & Vogt *op. cit.* p. 26. See also suggested issues to be dealt with at pp. 32-34.

²⁴⁵ See also Šarčević *supra* pp. 2-3 and note 21.

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Translating confrontation into coexistence*

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*Christopher Goddard: Where legal cultures meet:
Translating confrontation into coexistence*

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