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## **An analysis of legal speech acts in English Contract Law\***

**‘It is hereby performed’**

### **Abstract**

This paper is concerned with the language used in legal speech acts in legislative texts in the field of English Contract Law as the object of study. It points to a division of legal English in subdomains with ‘the language of the law’ as a particular sublanguage. Interest centers on regulative and constitutive functions, and an analysis of realization patterns of directive acts is reported. The findings show that the language of the law characteristically selects patterns of directives which differ in level of directness from the patterns typically selected in everyday conversational English. This difference can be explained with reference to “felicity conditions”.

### **I. Introduction**

#### **I.1 Characteristics of legal English**

Studies of legal language have been concerned in particular with outlining the characteristics of legal English. There has been little comparative work on legal language, and interest has centered almost exclusively on syntactic and lexical features. Studies undertaken of the structural properties of the register of legal English have labelled the style as ‘frozen’ due to formulaic structures which seem old-fashioned in modern language use (for example, many contracts are not written afresh but make use of old formulas). Furthermore, it is characterized by long sentences (50 words on average), an impersonal style with many formulaic expressions and typical legal vocabulary. Danet (1985, 278-87) provides an overview of linguistic descriptions of the legal register, of which the following is but a very brief summary.

An obvious object of study has been the lexicon of legal English. Legal vocabulary exhibits distinctive lexical features particular to expres-

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sing the concepts of law and, as a consequence, has been subjected to analysis in a number of studies. Thus Danet (1985) has pointed to the following features as characteristic of the legal register: technical terms; common terms with uncommon meanings; archaic expressions; doublets; formal items; unusual prepositional phrases; a high frequency of *any* (see pp. 279-80 for references and exemplification).

Syntactic complexity accounts for many of the difficulties lay persons are confronted with in comprehending legal English. Sentence length and sentence complexity seem to go together. Gustafsson (1975) reports an average of 2.86 clauses per sentence, and typical syntactic features are the prominent use of nominalizations (Crystal/Davy 1969, Gustafsson 1983, Shuy/Larkin 1978, Charrow/Charrow 1979), and a high frequency of passive constructions ((Sales et al. 1977, Shuy/Larkin, 1978, Charrow & Charrow, 1979). The use of complex conditionals was noted by Crystal & Davy (1969), and a high incidence of prepositional phrases further complicates the discourse (Charrow/Charrow, 1979). A characteristic likely to cause misunderstanding is the omission of a wh-form plus some form of the verb *to be* ('whiz deletion') as in the following example: *agreement... (which is) herein contained or implied* (Danet 1980). Further characteristics contributing to syntactic complexity comprise unique determiners (*such* and *said*), impersonality, negatives (in particular double negatives) and binomial expressions.

It must be noted that the characteristics of legal English presented above derive from language use in writings in which the level of formality can be characterized as frozen or formal. The texts examined comprise legislative language, administrative and testament language, jury instructions, and documents such as endowment-assurance policies, hire-purchase agreements, insurance policies. A different picture might emerge if samples of legal English in the spoken medium were considered.

As regards distinctive lexical features, such as technical terms, archaic expressions and common terms endowed with meanings specific to legal usage, these features seem to be unique to legal language.

However, when it comes to comparing legal English with various types of scientific English, the syntactic complexity of the former may not be particularly noteworthy, syntactic complexity being a characteristic of scientific language irrespective of the specific domain (Kurzon 1989, 287). What sets off one domain from another need not be syntactic criteria, although this is the field to which most researchers have turned so far; it may be fruitful to look to other dimensions of linguistic science

in order to point to distinctive features of legal language.

Danet (1980, 1983) has been concerned with prosodic features and presents evidence of assonance, alliteration, and phonemic contrast, and a number of researchers have shown that legal documents conform to the principle of end weight. One area which has been almost totally neglected in the study of legal writings is pragmatics. An analysis of discourse-level features of legal discourse has hardly begun, but Danet (1985,285) has pointed to cohesive devices as an obvious object of study. Furthermore, it would be useful to analyse the various domains of legal language in terms of communicative functions (or rhetorical techniques, to use the term of Trimble 1985). As pointed out by Kurzon (*ibid* p. 288), very little work has been done in this particular field. In this paper we shall be looking at pragmatic aspects of one particular domain of legal English, namely the language of the law. The statute will be viewed as a communicative act, and an analysis is undertaken of the realization patterns of **directives**, in one particular field (or subdomain), viz. the language of **English Contract Law**.<sup>1</sup>

## 1.2 The language of the law

Language is central to human affairs, but it is particularly critical for the purposes of the law. In fact, in a very basic sense, law would not exist without language (Danet 1985,273). There are two primary functions of law; one is the ordering of human relations, the other the restoration of social order when it breaks down (see, e.g. Danet 1980, 1985). With regard to the former, the function of the law is two-fold: **regulative and constitutive**. Law defines relations and tells us which activities are permitted and which are not; and by means of law, new relations are created where none existed before (cf., e.g. marriage ceremonies).

With regard to the ‘restoration of social order’, we are concerned with the way in which language is used to maintain justice in cases of conflict, either between citizens (civil law) or between the individual and the state (criminal law). This paper is concerned with the language used in ‘the ordering of human relations’. As such it is concerned with a particular kind of language (or style) used for the specific purpose of constructing documents, of **laying down the law**, which, in a broad sense, includes not only legislation, but also documents pertaining to private law, such as

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<sup>1</sup> A domain/subdomain may be specified with regard to, for example, type of law (Contract Law, the Sale of Goods Act, etc.), as well as textual function (legislation, courtroom language, etc.)

contracts, wills, and deeds. I shall refer to this language as **the language of the law**, while I use **legal language** as a superordinate term to refer to all uses of legal language.

The language of the law is to be distinguished from other types of legal language, as, for example, the language used in the courtroom, the language of legal textbooks, the language used to talk about the law ('law language') in a formal, as well as an informal setting. See Figure 1 below, in which legal English has been divided according to external factors pertaining to the situation of use.

Figure 1

This way of defining legal language and 'language of the law' is by no means the only way of delimiting the two concepts. In fact, Kurzon (1989,283-84) argues in favour of a twofold division, with the language of the law as one part of language related to the legal domain, and legal language referring to all types of languages used in legal contexts apart from the language of the law, as the other. However, I view the language of the law as part of legal language; furthermore, I find it useful to take a more differentiated approach to what Kurzon (ibid) has classified as legal language. Only with the specification of sub-domains can we begin to look for characteristics specific to a particular legal sublanguage. For this reason, I prefer to keep legal language as the cover term, and specify each subdomain in turn. This position is adopted as a consequence of the way in which I view language, viz. as constructed specifically to fulfill a particular function in a specific communicative situation.

### 1.3 The language of the law as an instance of LSP

As is apparent from the discussion above modern legal English has become a highly differentiated variety of language, the specificity of which has given rise to the question of whether it may be treated as a separate dialect, register, or sublanguage. Charrow et al. (1982) believe that the linguistic differentiation of legal English may be great enough to justify this variety view, while Danet (1985) prefers to consider legal English a special register, viewed in the light of Bolinger's (1975) suggestion that 'register is mainly a matter of formality'. Outlining the levels of formality (frozen, formal, consultative, and casual), Danet places legal discourse towards the formal end of the scale. Frozen, written uses of legal English comprise documents: insurance policies, contracts, wills, etc.; frozen spoken genres include marriage ceremonies or witnesses' oaths (to tell "the truth, the whole truth, and nothing but the truth"). Formal written legal English comprises the language found in statutes, lawyers' briefs and appellate opinions, and spoken language in lawyers' examinations of witnesses in trials, lawyers' arguments in trials and expert witnesses' testimonies. Consultative style is restricted to lay witnesses' testimonies, lawyer-client interaction and the like, whereas casual style is found only in informal conversations, e.g. between judges and lawyers at lobby conferences, lawyer-to-lawyer conversations out of earshot of their clients, etc. (See Danet 1980,474-82, 1985,275-277). In the present paper it will be argued that legal language is a specific domain of Language for Specific Purposes (LSP), which, in turn, can be divided into a number of subdomains presumed to involve linguistic diversification. The language of the law is viewed as one among several sublanguages of legal language. As such my definition is seen within a conception of LSP which views LSP as a range of domains which may be further divided into subdomains involving a number of sublanguages. This conception is in agreement with the East European conception of languages as coordinate systems with a **horizontal** dimension involving the number of domains into which language can be divided, e.g. scientific language, legal language, language for economics, language for medicine, etc. and a **vertical** dimension specifying a specific 'layer' of this domain. The latter dimension is defined according to sociological functions, and yields a number of 'functional styles' (scientific, official, publicist, literary and colloquial styles) (cf. Mikkelsen 1990,6), or it is specified along sender/receiver constellations as preferred by Kalverkämper (cited in Kromann/Thomsen,1989). The horizontal/vertical distinction is represented in Figure 2.

**Figure 2**

The framework to be suggested here differs in so far as I want to add a further dimension relating to communicative function, so that the model becomes at least three dimensional: domain/subdomain, communicative function, sender/receiver constellation, as illustrated in Figure 3.

**Figure 3**

In order to specify sensibly the characteristics relating to a specific sender/receiver relationship (e.g. expert to layman), the particular domain/subdomain in question must be delimited. The language, in turn, varies according to the purpose of the communication. For example, when a lawyer addresses a witness in court, the language to be used will differ from the language to be used by a lawyer addressing a client, even though in both cases he/she would be addressing a layman. When addressing a client, the communicative intention could, for example, be one of informing the client about aspects of the the law of inheritance, and

giving him/her advice accordingly; it could be that of specifying a penalty, collecting a debt, etc.; and, consequently, the rhetorical functions would differ accordingly and involve either the written or the spoken medium. Within the specific subdomain we must be concerned with the function to which the language is put. The speaker's/writer's communicative intention is decisive; the message to be conveyed is at the crux of the matter, no matter what subdomain or sender/receiver relationship we are concerned with.

Mikkelsen (ibid p. 5) admits that it is of course possible to work with more than two parameters at a time, but doubts that this will be fruitful. It is argued here that it is not only to the point, but that it is, in fact, necessary to include the parameter of communicative function in the model in order to be able to specify the criteria according to which the language user can select the linguistic means for formulating a particular message.<sup>2</sup> The number of divisions to be made and functions to be specified will vary, though, according to the domain in question. With regard to function, we anticipate **regulative functions** in legislative texts. In contrast, we expect that legal textbooks will be **informative**, that counsel/witness exchanges are likely to involve rhetorical techniques connected with **argumentation**, and that lawyer/client interaction will involve a number of functions.

## 2. The enactment of the law — a declaration

Within pragmatics, language is not considered independently of the uses to which it is put (see, e.g. Hymes 1979), and non-linguistic elements of the real world play an important role in pragmatic theory or description. Consequently, pragmatics is one of those areas in which genuine interdisciplinary studies may be pursued (cf. Kurzon 1986,1).

The importance of linguistic theory to the study of law has been recognized by legal theorists and practitioners, for example, as a means to improve lawyers' understanding of the linguistic processes important to law. Recently, attention has also been paid to speech act theory (e.g. Kurzon 1986). In fact, lawyers have in practice been aware of the relevance of speech acts and of 'performative verbs'<sup>3</sup> for some time (e.g. Hart 1962, Olivecrona 1971).

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<sup>2</sup> Compare Halliday's (1978) notions of field, tenor and mode).

<sup>3</sup> A 'performative verb' signals the illocutionary force of an utterance, e.g. *I (hereby) order you to leave.*

In the following the laying down of the law will be considered in terms of pragmatic theory, in particular within speech act theory as proposed by Austin (1962), Searle (1969, 1976), Habermas (1970).

This relation finds support in the etymology of the word. The word ‘act’ is derived from Latin ‘actum’ which means ‘thing done’ (OED). ‘Act’ may refer to a parliamentary act, a speech act, or any other act. To avoid possible ambiguity, the word ‘act’ is used here to refer to speech acts, whereas parliamentary acts are referred to as statutes.

In his classification of speech acts, Austin (1962) lists two classes of speech acts as relevant to judicial acts, namely **verdictives** and **exercitives**. Verdictives consist in the delivering of a finding upon evidence; they are performed by judges and serve the purpose of maintaining justice and restoring social order. As such, verdictives are concerned with ‘carrying out the law’, not with ‘laying down the law’.

Exercitives are defined by Austin as follows:

An exercitive is the giving of a decision in favour of or against a certain course of action, or advocacy of it. It is a decision that something is to be so, as distinct from a judgement that it is so: it is advocacy that it should be so, as opposed to an estimate that it is so; ... Its consequences may be that others are ‘compelled’ or ‘allowed’ or ‘not allowed’ to do certain acts. (Austin 1962,154)

Many of the verbs treated by Austin as illocutionary verbs of the class of exercitives, e.g. *permit*, *order*, *command*, *sanction*, do in fact commit the addressee to a course of action. They serve the function of ‘ordering human relations’ and belong to the class of acts referred to by Searle (1969) as **directives**, and by Habermas (1970) as **regulatives**. However, in his class of exercitives, Austin also includes verbs such as *enact*, *nominate*, *declare open*, *declare closed*, which in the classification adopted by Searle (1976) are given a status of their own in the class named **declarations**.

As an attempt to explain the difference between classes which are evidently similar in the sense that they both regulate people’s actions, I shall relate to the notion of **direction of fit** introduced by Searle (1976).

‘Direction of fit’ refers to the way in which the utterance relates to factors in the extralinguistic world. Some illocutions have as part of their illocutionary point to get the words (more strictly — their propositional content) to match the world, others to get the world to match the words (Searle 1976,3).

In representatives, the speaker tries to depict actual states in the world, and the direction of fit is ‘words-to-world’. When issuing a directive, the



speaker tries to influence the action of other people thereby changing the world, so the direction of fit is ‘world-to-words’. Declarations also attempt to get language to match the world. However, they do not attempt to do so by describing an existing state of affairs (as do representatives), nor by trying to get someone to bring about a future state of affairs (as do directives and commissives). The ‘peculiar relation’ in bringing about the fit is brought about by the successful performance of the declaration itself. In Searle’s formulation

Declarations bring about some alteration in the status or condition of the referred-to object or objects solely in virtue of the fact that the declaration has been successfully performed. This feature of declarations distinguishes them from the other categories. (Searle 1976,14)

When a declaration is properly performed (and only then), it brings about a change of the world. To this end, the appropriate linguistic formula must be used. A will written in the wrong formula is not a will at all, and a marriage ceremony performed faultily is not “happy” (in Austin’s and Searle’s sense of the word) (Danet 1985,277). In addition, extra-linguistic institutions must exist and the speaker and the hearer must occupy special places within this institution.<sup>4</sup> It is only on condition that such institutions as the church, the law, private property, the state and a special position of the speaker and the hearer within these institutions exist that one can excommunicate, appoint, give and bequeath one’s possessions or declare war, and this can be done only by employing the accepted formulas, e.g. *I excommunicate you, I appoint you chairman* (see Searle 1976,14-16).

When discussing the direction of fit, it was explained that representatives could be characterized by being ‘words-to-world’, whereas the direction of fit for directives was ‘world-to-words’. For declarations, the direction of fit is both ‘words-to-world’ and ‘world-to-words’. If the acts of excommunicating, appointing, etc. are successfully performed, the people in question are excommunicated, appointed, etc. by the very means of the performance of these acts. The purest form of a declaration is ‘I/we (hereby) declare’ + proposition to the effect that ‘p is the case’.

Now let us turn to the act of ‘laying down the law’. When passing a law, each statute is preceded by what is known as **the enacting formula**.

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<sup>4</sup> An exception (in fact the only one) to the principle that a declaration requires an extra-linguistic institution for its successful performance is the subclass of declarations that concern language itself, e.g. *I define/ abbreviate/name/call/dub*, etc. (Searle 1976,15).

In Britain, the enacting formula, the so-called **promulgation formula**, usually has the following form:

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: — (Minors' Contract Act 1987)

In speech act terms, the enacting formula, which is an explicit performative containing the performative verb to enact, establishes the illocutionary force of the whole text, viz. its macro-function (cf. the notion of a 'master speech act' employed by Fotion 1971). The promulgation formula constitutes the performative part of the act, while the collection of rules constitutes the propositional content.

In the above it has been pointed out that the successful enactment of the law (by means of the promulgation formula) is a necessary condition for 'laying down the law'. In fact, this feature marks the act in question as a **declaration** and is the condition on which a statute is effectuated. In addition, each rule in the statute may, in turn, be considered an enactment in its own right. In the following, the realization patterns of these rules are analysed.

### 3. Empirical design

#### 3.1 Directive acts

With regard to the regulating function, there is a hierarchical relationship in legislative texts. As mentioned above, the promulgation formula functions as a performative establishing the macro-function of the whole text. Thereby, it controls the occurrence of other speech acts, which may be acts of 'ordering' and 'permitting', but not, for example, acts of 'expressing doubts/dislikes' etc. Having defined the language of the law as directive, we shall now consider the "nature" of the directive acts performed in the collection of rules. A directive is an illocutionary act by means of which the addresser tries to influence the behaviour of the addressee. In 'laying down the law' rules are formulated with the intent of ordering human relations. The addresser imposes a certain behaviour on the addressee. Thus directives are **impositive acts** which have been defined as follows:

Impositive speech acts are described as speech acts performed by the speaker to influence the intentional behaviour of the hearer in order to get the latter to per-

form, primarily for the benefit of the speaker, the action directly specified or indirectly suggested by the proposition. (Haverkate 1984,107)

In legislation, a directive is not performed, though, for the benefit of the speaker, but for “the common good”.

A directive is a **face-threatening act** involving a threat to the addressee’s **negative face**, which has been defined as “the want of every “competent adult member” that his actions be unimpeded by others” (Brown/Levinson 1987). An addresser issuing a directive attempts to exercise power or direct control over the intentional behaviour of the addressee and in this way intrudes on the right to freedom of action.

The degree with which the addresser tries to impinge on the behaviour of the addressee is referred to as the **degree of imposition**. In order to lessen the impact of the imposition on the addressee, the addresser has recourse to politeness strategies. The explicitness with which the act to be performed (or not performed in case of prohibitions) is referred to as the **directness level** of the directive.

### 3.2 Directness levels of directive acts

When issuing a directive, various options are available to the addresser. Within the theory of Brown/Levinson (ibid), the directive can be expressed ‘off record’, i.e. with no explicit directive force, or ‘on record’, i.e. with explicit directive force. In the case of the latter, the speaker can voice the directive with or without face redress in terms of mitigating devices. Table 1 (p. 76) gives a list of directives presented at levels of increasing directness. In the case of unmodified imperatives and unhedged performative utterances, the directive is phrased explicitly without face redress and serves as an order. Likewise, modals like *shall* and *must* are employed to impose a high degree of obligation on the addressee. Face-redress, on the other hand, can be obtained by using conventionally indirect directives, either in the form of ‘hearer-oriented’ questions concerning the ability/willingness of the addressee to perform a certain action, e.g. by employing the modals *can/could*, *will/would*, by ‘permission statements’ (employing the modals *may/might*, *can/could*), or by ‘speaker-based’ *want*-statements expressing the addresser’s desires and needs. Finally, directives can be performed indirectly with no explicit marker of the impositive intent (i.e. ‘off record’).

**Table 1**

**REQUEST STRATEGIES** (presented at levels of increasing directness)

Situation: Speaker requests to borrow Hearer's car.

**I INDIRECT REQUESTS**

- |                 |  |
|-----------------|--|
| 1. Hints (mild) | I have to be at the airport in half an hour. |
| (strong)        | My car has broken down.                      |
|                 | Will you be using your car tonight?          |

**II HEARER-BASED CONDITIONS**

- |                        |                                |
|------------------------|--------------------------------|
| 2. Ability             | Could you lend me your car?    |
| Willingness            | Would you lend me your car?    |
| Permission             | May I borrow your car?         |
| 3. Suggestory formulae | How about lending me your car? |

**IIISPEAKER-BASED CONDITIONS**

- |                                     |                                  |
|-------------------------------------|----------------------------------|
| 4. Statement of wishes              | I would like to borrow your car. |
| 5. Statement of desires<br>and need | I want/need to borrow your car.  |

**IV DIRECT REQUESTS**

- |                            |  |
|----------------------------|--|
| 6. Statement of obligation | You must/have to lend me your car.           |
| 7. Performatives (hedged)  | I would like to ask you to lend me your car. |
| (unhedged)                 | I ask/require you to lend me your car.       |
| 8. Imperatives             | Lend me your car.                            |
| 9. Elliptical phrases      | Your car (please).                           |

For previous classifications of directive strategies which build on Austin and Searle's theories, see Ervin-Tripp 1976, House/Kasper 1981, Trosborg 1987, Blum-Kulka/House/Kasper 1989.

### 3.3 The data

The data of investigation have been drawn from a corpus of legal language within the specific field of contract law comprising three individual corpora (Danish-English-French).<sup>5</sup> Each corpus consists of 3 x 1 m running words and covers six types of text relevant to the subject: Statutes, rules and regulations, travaux préparatoires, judgements, contracts, legal textbooks, articles in law journals. The data subjected to analysis are the compiled statutes, rules and regulations:

- Law Reform (Frustrated Contracts) Act 1943
- Corporate Bodies' Contracts Act 1960

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<sup>5</sup> The corpus has been compiled on the initiative of The Danish Research Council for the Humanities to promote research activities in LSP and LSP communication.

- Misrepresentation Act 1967
- Unfair Contract Terms Act 1977
- Minors' Contracts Act 1987.

For a more detailed description of the corpus, see Faber/Lauridsen (forthcoming).

The use of directive acts in English Contract Law is compared to directive acts utilized in everyday conversation. The latter data are part of a corpus (360 conversations) elicited in a variety of social situations from everyday life (private life, at work, at public places, etc.). For the present purpose, the data were elicited by means of role play material constructed on the basis of anticipated illocutionary acts with a directive function. The participants were videotaped in dyadic face-to-face conversations lasting approximately 5 minutes. The role relationships between the two participants varied along two parameters: 'dominance' and 'social distance'. For further description of the data, see Trosborg 1987.

#### **4. The use of directive acts in English Contract Law**

The corpus of legislative texts were analysed for the occurrence of directive acts. Few performatives were used to indicate directive force. Instead, modal auxiliaries were used as 'implicit performatives'. The results (see Table 2 below) show a predominance of direct acts (Cat. IV, statements of obligation and prohibition), which amounted to 47.6% of the total number of observed strategies. Unmarked strategies (Cat. I, constitutive rules) were employed frequently (39.3%). In Cat. II, conventionally indirect strategies, only permission statements were observed (13.1%), while strategies querying preparatory conditions (hearer's ability/willingness) were noticeably absent. Speaker-based strategies expressing wishes and desires (Cat. III) were not observed either. In the following, the realization types of directive strategies observed in the corpus are discussed and exemplified.

##### **4.1 Direct strategies**

As is apparent from Table 2, direct strategies (Cat. IV) are the most frequently used directives in English Contract Law. Statements of obligation amounted to 34.5%, and prohibitions to 11.9%. Imperatives were not observed at all, and only a few performatives were observed.

##### **4.1.1 Performative statements**

As mentioned above, the initial enacting formula acts as a 'performa-

**Table 2**

tive' while the text itself functions as the proposition. In addition to the enactment formula involving the verb *enact*, the performative verb *repeal* occurred as an explicit performative:

The Infants Relief Act 1974 and the Betting and Loans (Infants) Act 1892 are hereby repealed (in accordance with section I of this Act)  
(Minor's Contracts Act 1987)

The verb *declare* may also be used as an explicit performative in British statutes, but in the present data this verb was not observed with performative use. The verbs *authorize*, *entitle* and *amend* are used performatively in American statutes (Kurzon 1986,24). In British statutes, these verbs do not hold the status of performatives, but they were observed in the propositions of specific acts serving as constitutive rules. No perfor-

mative statements involving the performative verbs of ordering (*order*, *command*, *request*, etc.) were observed.

#### 4.1.2 Obligation

The modal *shall* typically expresses obligation in legal acts (21.4%). *Shall* is used to express the illocutionary force of an order. The addresser — the legislature — instructs the addressee to do X. The addressee has no choice but to obey:

Where a person has entered into a contract after misrepresentation has been made to him by another party thereto and as a result he has suffered loss, then, if the person making the misrepresentation would be so liable to damages in respect thereof had the misrepresentation been made fraudulently, that person *shall* be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.  
(Misrepresentation Act 1967)

All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this act referred to as “the time of discharge”), *shall* in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:…  
(Law Reform (Frustrated Contracts) Act 1943)

In the examples above the modal verb *shall* has been employed to state obligations of the court and of a party of the contract, respectively. Note that the human party has been defocalized in the latter example (*All sums ... shall ... be recoverable from him*).

The modal *shall* is also used widely in directives to state rules according to which the law in question operates without mentioning an agent:

Nothing in this section shall be taken to prejudice any other remedy available to the plaintiff.  
(Minors’ Contracts Act 1987)

The use of the quasi-modal *to be to* is observed with a human agent:

Subject to this, it *is* for those claiming that a party does not deal as consumer *to* show that he does not.  
(Unfair Contract Terms Act 1977)

but this verb is employed most frequently with non-animate subjects, (cf. the uses of *shall* employed in constitutive statements with non-human subjects):

...goods *are to* be regarded as “in consumer use” when a person is using them, or has them in his possession for use, otherwise than exclusively for the person of a business; and...

A contract term *is to* be taken — ...  
(Unfair Contract Terms Act 1977)

The modals *must* and *have to*, which are typically used to express obligation outside legal contexts, were rarely observed. In fact, directives with *must* did not occur at all, and *have to* was only observed in the following example relating to ‘Effect of breach’:

Where for reliance upon it a contract term *has to* satisfy the requirement of reasonableness, it may be found to do so...  
(Unfair Contract Terms Act 1977)

The verbs *ought to* and *should* were rarely observed as illocutionary force indicators of directives, which can be explained with reference to the “weakness” with which obligation is expressed:

In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it *should* be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.  
(Unfair Contract Terms Act 1977)

Moral duty, rather than legal obligation, is generally conveyed by the two modals in question.

Past tense modals typically occur specifying the conditions under which a given act holds, compare the use of *could*, *should*, and *would* in the following example with *shall* signalling obligation:

Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard *shall* be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to —

(a) the resources which he *could* expect to be available to him for the purpose of meeting the liability *should* it arise; and

In a case where-... a person is not precluded by this Act from excluding or restricting liability for loss or damage, being loss or damage for which the provisions of the Convention *would*, if they had the force of law in relation to the contract, impose liability on him.

(Unfair Contract Terms Act 1977)

### 4.1.3 Prohibitions

In addition to statements expressing obligation the regulation of behaviour can take place by issuing prohibitions. Prohibitions indicated by *shall not* occur with non-human subjects, as, for example, in the following statute relating to negligence liability:



The following enactments shall not apply to any contract made by a minor after the commencement of this Act — ...

Where -...

the guarantee *shall not* for that reason alone be unenforceable against the guarantor...

(Unfair Contract Terms Act 1977)

or a human body is addressed:

In considering whether any sum ought to be recovered or retained under the foregoing provisions by any party to the contract, the court *shall not* take into account any sums which...

(Law Reform (Frustrated Contracts) Act 1943)

While the modal verb *may* is typically used to indicate permission stating the rights of legal bodies and citizens (see below), the modal verb *can* mostly occurs in negated form stating what cannot take place. These acts are also included as they serve to regulate behaviour:

A person dealing as consumer *cannot* by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness.

(Unfair Contract Terms Act 1977)

Only in some cases are the parties of the contract explicitly mentioned. In the remaining instances in the statute the statements occur in the passive form foregrounding a non-human object of legislation, as, for example, ‘liability’ in the following example:

Liability for breach of the obligations arising under section 2 of the Supply of Goods and Services Act 1982 (implied terms about title etc in certain contracts for the transfer of property in goods) *cannot* be excluded or restricted by references to any such term.

(Unfair Contract Terms Act 1977)

## 4.2 Permission

Permission issues from some authority, which is often the speaker (addresser) — the performer of the speech act. In legislation, the authoritative source is the legislature, which grants permission to the body in question to perform a certain act; it does not order the body to do so (as in the case of statements of obligation), but gives it discretion to do so. Statements of permission may serve to establish the right of legal institutions, such as the court, the arbitrator:

In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party of the contract, the court *may* without prejudice to the generality of the said provisions, include such sum as

appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.  
(Law Reform (Frustrated Contracts) Act 1943)

In the following example, note also the excessive number of conditions to be fulfilled for the act to hold (*where, if, ought to, would*).

Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator *may* declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.  
(Misrepresentation Act 1967)

Consider also an example involving delegated legislation:

For the purpose of subsection (3)(a), the values which *shall* be taken to be the official values in the United Kingdom of the amounts (expressed in gold francs) by reference to which liability under the provisions of the Convention is limited *shall* be such amounts in sterling as the Secretary of State *may* from time to time by order made by statutory instrument specify.  
(Unfair Contract Terms Act 1977)

In the following, permission extends to the rights to set up contracts which *need not* be under seal:

1 Cases where contracts need not be under seal

(1) Contracts *may* be made on behalf of any body corporate, wherever incorporated, as follows: -

(a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith *may* be made on behalf of the body corporate in writing signed by any person acting under its authority, express or implied, and

(b) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, *may* be made by parol on behalf of the body corporate by any person acting under its authority, express or implied.

(Corporate Bodies' Contracts Act 1960)

Statements of permission only amounted to 13.1% of the total number of observed directives.

### 4.3 Constitutive rules without directive markers

Statements which do not include performative verbs, or modals which function as implicit performatives, may still serve the purpose of laying

down the law. Sentences used to explain or define expressions and words in the statute or to supply information concerning the application of the statute, or part of it, are part of constitutive rules (cf. Kurzon 1986,23). Examples typically involve verbs such as *to apply*, *to extend*, *to mean*, *to affect*, which are not performative verbs. Statements with the verbs *impose*, *purport to*, *include*, *exclude*, *fall within*, *come into force*, etc., were also observed as verbs of constitutive statements. Some examples are given below:

In the case of both contract and tort, sections 2 and 7 *apply* (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising -...

The liabilities referred to in this section are not only the business liabilities defined by section 1(3), but also *include* those arising under any contract of sale of goods or hire-purchase agreement.

A person *is not bound* by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another liability which this Part of this Act prevents that other from excluding or restricting.

Nothing in this Act *removes* or *restricts* the effect of, or prevents reliance upon any contractual provision which -

(a) is authorized or required by the express terms or necessary implications of an enactment, or

(b) being made with a view to compliance...

(Unfair Contract Terms Act 1977)

This Act *extends* to England and Wales only.

(Minors' Contracts Act 1987)

A constitutive rule without performative marking (explicit or implicit) was the single strategy which was used most frequently (39.3%).

## 5. A comparison with the use of directives in everyday conversations

When comparing the directives observed in English Contract Law with directives as observed in everyday conversations (see above for a description of the conversational data), it is obvious that the selection of directness levels differs markedly in the two domains. Figure 4 below presents the results for the four main categories of directives subjected to analysis.

The strategies used most frequently in everyday conversational English belong to the category of conventionally indirect directives. This finding is in agreement with the findings of previous studies (see, e.g. Ervin-Tripp 1976 (American English), and House/Kasper 1981, Blum-

**Figure 4**

Kulka/House/Kasper 1989 (British and American English)). Querying the hearer's ability/willingness to perform a given act (*Could you spare me a cigarette?/Would you mind mailing this package for me?*) amounts to 50.6% of the total number of strategies, while statements of the speaker's wishes and desires (*I would like you to send me a parts list*) amount to 16.9%, altogether comprising 67.5% of the total number of strategies. These strategies do not occur as directives in contract law. Within this category, the language of the law employs statements of permission, though only with a frequency of 13.1%.

In contrast, the most frequent category in the language of the law is direct ordering (47.6%), which is the category employed least frequently in the conversational data (9.6%). As for individual strategies, statements employing the modal verb *shall* is specific to legal English. In contrast, imperatives were not observed at all in the language of the law. In everyday conversation, orders are issued downward in rank by means of imperatives (*Bring me the file*), or the strategy is used as an indicator of

solidarity between interactants of equal status (*Hand me the paper, will you?*).

The modal *must* (deontic use) was not observed at all as illocutionary force indicator of a directive. *Must* is used in conversational English in directives issued by authority figures, and it also occurs in statements in which the speaker wants to express enthusiasm as to the realization of the propositional content (*You really must go and see that film*). The modals *should/ought to* were utilized only in rare cases where a directive was intentionally weakened.

The occurrence of statements with directive intention without performative marking constituted part of the data in both domains (22.9% in everyday conversations, 39.3% in the language of the law).

## 5.1 Explaining the findings

The observed differences in the use of directives in English Contract Law compared to the use in conversational English may be ascribed to a difference between the written and the spoken medium. However, on the one hand, samples of directives in written English (a corpus of business letters) also shows a predominance of conventionally indirect strategies (Pilegaard 1990), while, on the other hand, the very direct strategy of commands issued by means of imperatives is observed in conversational English, but not in the language of legislative texts.

A consideration of the “**felicity conditions**” of directives is helpful in throwing light on the uses of directives in the language of the law. Directives cannot be ‘true or false’, as is the case for representatives; instead they may be ‘felicitous’ or ‘infelicitous’. Searle (1969,64-66) has outlined the following conditions pertaining to the successful performance of a command, which is similar in terms of felicity conditions to an enactment (cf. Kurzon 1986,8):

conditions

The ‘preparatory condition’ a) is of little relevance to the enactment of the law, as the legislature would only enact laws that the addressees are capable of obeying. In acting otherwise, the law would become a “dead” letter (Kurzon 1986,15). Hence, the total lack of strategies querying a preparatory condition. Neither is the legislature concerned with the addressee’s willingness to perform according to the law. The authority of the legislature is unquestionable. These factors explain why we do not find directives of the kind *Can/could/would you do X?* in the corpus. This type of directive is by far the most frequent in conversational usage, due to a balance between being adequately polite (conventional indirectness), and a demand for explicitness (the proposition to be performed by the addressee is explicitly stated).

As for condition b), the legislature would not legislate on matters that the addressees would do anyway, such as natural activities (e.g. sleeping, eating) (Kurzon 1986,15).

The total absence in the language of the law of *want*-statements (the speaker’s wishes and desires for X to take place), which in conversation is realized as *I want/would like X* can be explained with reference to the ‘sincerity condition’. This strategy is a statement to the effect that the speaker sincerely wants X to take place. However, as the legislator’s demands become law, when enacted, there is no point in stating sincerity.

The condition of particular relevance to legislation is condition c) authority. The legislator is in a position of authority over the addressee, which factor is decisive in the selection of directness levels utilized in the language of the law. It explains the high proportion of direct acts and may even influence acts seemingly offering the addressee freedom of action.

As regards the examples above employing the modals *may/shall*, the modal verb *may* has been pointed out as indicating the illocutionary force of a permission, while acts employing the modal verb *shall* were treated as having the illocutionary force of orders. Legal writers have stressed the need to distinguish between the two modals of legal language — *shall* to be used with ‘mandatory’ and *may* with ‘directory’ force (Craies 1971,229-230), that is *shall* implies obligation or duty and *may* implies permission.

However, the illocutionary forces of order and of permission have in common an authoritative source — the legislature. As pointed out by Kurzon (1985,23), once an authorized body, such as a court, has been given power by the occurrence of *may* to effectuate the legal rights of a

person or class of persons, it is very difficult for it not to exercise that power.

The distinction between *may* and *shall* may also be neutralized in everyday language, e.g. a manager may tell one of her employees to leave her office by saying *You may leave now*, in which case the manager's wish is to be understood as a command.

The lack of imperatives in legislative texts may be due to the distance between the legislature and the body of addressees, who are never directly addressed. In the case of the citizens, this may be due to the intervention of mediators (as interpreters of the law to laymen). When addressing legal bodies, lack of imperatives may be interpreted as adherence to the principle of face-saving.

Finally, the occurrence of statements with directive intention without performative marking observed in both conversational English and English contract law needs to be commented on. In the conversational data, these utterances are indirect directives (hints), in the sense that the intended directive force can be neglected by a non-cooperative hearer. This is not so with the unmarked statements of the language of the law. In spite of the lack of directive markers, these statements belong to the body of rules which come into function as directives by means of the promulgation formula; hence they function as impositive acts on a par with explicit directives.

## 5.2 The use of politeness markers

In everyday conversations, the illocutionary force of directives are often hedged or mitigated by the inclusion of politeness markers (*I wonder if you could possibly...*). In the language of the law, mitigators are almost absent. However, one device, which has been observed to occur frequently, is defocalization of agent as well as patient. A preliminary analysis has shown that only 19.4% of the observed directives in contract law have a human subject. Depersonalization is one way of mitigating the impact of a directive on the addressee, as in *such sum shall be recoverable, regard shall be had*. Another reason for the high number of directives employing a non-human subject is the fact that the law operates laying down its own constitutive rules with legal actants as subjects, such as 'this act', 'the provisions of this section', 'a statutory instrument', 'the guarantee'. Further discussion of this point is beyond the scope of this paper.

## 6. Concluding remarks

This paper has analysed the occurrence of legal speech acts in English Contract Law. It has pointed to declarations by means of the enactment formula as being unique to legislative texts. Furthermore, an analysis has been presented of directive acts observed in the corpus revealing the communicative acts of statements of obligation, statements of prohibition, statements of permission, as well as constitutive statements as directive acts typical of the language of the law.

When comparing the observed directives to directives observed in everyday conversations, it has been shown that the selection patterns, drawn from a continuum of directness levels, differ. Legislative texts of English Contract Law show a predominance of direct strategies (statements of obligation and prohibition), whereas conversational English favours conventionally indirect strategies.

It was argued that this difference could be ascribed to the external factors of the social situation, rather than to a difference in medium (written vs. spoken). Furthermore, it is not just a matter of English language of the law being more direct than conversational English (no imperatives were observed); it is a question of selecting strategies to express a specific communicative function in a particular sender/receiver relationship within the considerations of the “felicity conditions” of the act in question.

This paper is but a preliminary step towards a pragmatic analysis of legal language, and the comparison to conversational English is admittedly very crude. Future studies may be concerned with the analysis of communicative functions within various domains of legal English (to specify the characteristics of a specific sublanguage), just as comparative studies across domains and sender/receiver relationships, and across languages as well, are needed.

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