

Legal Language and The Legal Translator

Abstract

It is impossible to set up standards of translation performance and equivalence which will apply to any legal translation because the "languages of law" are as varied as the cases that reach the courts every day. Moreover, the translation of legal texts is often complicated by the lack of exact lexical equivalents in the TL's own legal system so that a transfer involves a high amount of "creative production". Obviously this production should be based on a profound extra-linguistic knowledge of both legal systems involved to avoid the pitfalls which the difference in conceptual meaning necessarily entails. Thus research into the TL's substantive law must be the first requirement in any legal translation context.

1. Introduction

The task of legal translation is often difficult because a particular legal concept does not EXIST in the TL's own legal system. Such situations call for extreme caution in the transference of concepts and the translator will often find it safer to explain his/her way out rather than concocting something "elegant" for which the legal effect is doubtful.

In the process of producing equivalents or near-equivalents the translator should seek to avoid reference to terms of art which have a unique conceptual status in the TL's substantive law and a choice of a "neutral" term is preferable. This is the solution adopted in most international organizations whose translators must constantly endeavour to avoid reference to unique national concepts. (The problem is dealt with in more detail in Section 4, *supra*).

Apart from the extralinguistic knowledge the legal translator is also required to have some knowledge of the most important "stylistic" features in the TL to achieve formal equivalence. In the following some unique features of English legal language are highlighted - all of which reoccur sufficiently

"regularly" to satisfy the requirements of a specific "sublanguage" in the English language (though a closer study will soon reveal that the stylistic characteristics we normally ascribe to legal language are especially predominant in only some of the areas).

The features¹ are the same as were described more than a decade ago, indeed some of the features have been the same for centuries. The recent criticism of the English legal language has, however, resulted in new drafting recommendations within the profession itself and these trends will be treated briefly in the closing part of this article.

2. Main functions of legal language

It is obvious that the translator's main concern should be to establish the function which the particular translation is to serve and subsequently adapt the stylistic devices to the purpose.

In their analysis of the functions of legal language Charrow/ Crandall/Charrow (1982) have given the main factors contributing to the uniqueness of the legal varieties and summarized them in "historical, political, sociological, and jurisprudential factors".

The historical development accounts for the relics of Latin and French in the vocabulary and also to some extent for the "synonym habit" which was once a favourite in English literature as well so that the legal "style" was really a reflection of the fashion of a period rather than a unique characteristic of its own.

As regards sociological factors the performative ("authoritative") function of the language instrument is

¹ The characteristics and recommendations are an extract from a "Practical Translation Guide for Language Students" which is in preparation as a by-product of the writer's main field of research, which is comparative commercial law (English/Danish contract law).

one of the most important of all: In this function the language carries the force of law, underlined by the use of specific formulae, reminiscent of time-honoured rituals which are inherent in the process of law. The ritualistic aspect used to be

considered quite essential to "persuade" the public to obey the laws of the land and deter them from breaking them and to some extent legal proceedings are still dependent on the observance of rituals, especially in the courtroom. The ritualistic character of proceedings is emphasized in the superior courts in England in Counsel's wearing of wigs and robes and the strict adherence to the procedural restrictions regarding addresses in court:

"May it please your Lordship" (introducing Counsel's respectful "submissions" in a graceful way)

"All Rise"

"Your Honour"

"Will Counsel approach the Bench" (to emphasize the impartial function of the judge)

"Swear the Witness"

"My learned colleague" (when Counsel address each other - adding a touch of "congeniality" and mutual respect but it can of course also be used ironically - which is often done)

The language functions here are obviously to stress the solemnity of proceedings in the courtroom - the traditional usage has a formalistic character deliberately linking the proceedings to "antiquity" and are really "verbal handshakes" hallowed by the passage of time. (Buckhaven, Charlotte: Pleading for Learned Court Speak, NLJ, Aug.4 1989, at 868). As such they are hard to replace. Indeed most critics of legal innuendo realize that this usage is probably appropriate in the context it is used but the continued use of robes and wigs has been under attack recently. It is felt that the use of "unusual" dress unnecessarily heightens the drama of a trial (which lawyers no doubt enjoy) and that the barrister's privilege of wearing wigs should be broken.²

² Traditional court dress is criticized e.g. in an article by Peter Reeves whose main target is the criminal trial and the effect of the formal dress on the evidence of witnesses. He believes that it enhances the nervousness already present and may result in hesitancy and

Outside the court room the performative function is undertaken in a slightly humbler way by lawyers acting for their clients in a wide variety of functions, most often with a view to convincing another party in an argumentation. This faculty is considered the most important in the training of law students and different styles are now recommended so that lawyers may "tailor" their communication (especially written) to the audience envisaged:

2.1. The audience in legal written discourse

Identifying the potential reader(s) of legal writings out of the lawyer's office is usually a simple task: He often writes for an audience of "one " person only (another lawyer, a judge, or a client) though the original addressee may occasionally be substituted in case of a dispute. A contract e.g. will often be written for laymen (the parties to it) but should be drafted with a wider audience in mind because of the ever present risk of a dispute in the future whereby third parties may be affected by the contract's terms.

Two important functions collide in the drafting process: that of communication and that of "risk-minimizing": A lawyer never knows WHICH of the clauses he has drafted during a week will ultimately lead to dispute so all major documents have to be drafted with the same amount of care. This is one good reason why lawyers may fail to tailor their writing to the audience and deliberately omit "variety" of styles. Another good reason is the constant

uncertainty which may be falsely interpreted as an indication of unreliability. (New Law journal, Aug. 4 1989, p. 1004).

The modern attitude was tested in *St Edmunsbury and Ipswich Diocesan Board of Finance v Clarke* (1973) 3 WLR 1041: In this case the reasons for wearing traditional court dress were analysed and it was said that robes and wigs "are convenient as an indication of the functions of those engaged in proceedings and as enhancing the formality and dignity of grave occasion: In their appearance they also lessen differences of age, sex and clothing and so aid concentration on the real issue without distraction..."

fear of the "clause-twisting" reader who reads merely with a view to exploiting the provisions for his own purposes: Most writers may reasonably expect their work to be read in "good faith" - while most of lawyers' writings are potentially subject to a "hostile eye" - looking for loopholes in a contract to escape liability for breach; imprecise wording allowing room for ambiguities; gaps in a tabulated description (so as NOT to cover the situation in hand); striking down on minute shades of different semantic content etc.

In the process of writing (and envisaging all these potential risks!) the lawyer may easily give second priority to his communicative function towards the immediate audience, which is perhaps especially unfortunate in legal "messages" of any kind:

"It is a sad fact that most of what lawyers write in their professional capacity is read by people because they have to, not because they want to", as one learned solicitor once said.

The reader's attention is consequently prone to wander so that the message which was meant to be conveyed may be lost in the process, if subdued by an over-zealous application of "legalese". This is one of the most serious charges against the "traditional" legal style of communication.

A brief note may be given on the **jurisprudential** factors of which the most important is considered to be the traditional legal construction rules handed down in common law³ which account for most of the "uniqueness"

³ The main common law construction rules are:

a) The "golden" rule: In construing all written instruments the grammatical and ordinary sense of the word is to be adhered to unless that would lead to some "absurdity or inconsistency with the rest of the document, in which case the sense may be modified so as to avoid that absurdity and inconsistency (Lord Wensleydale in *Grey v Pearson* (1857) 6 HL Cas 61 at 106).

in the semantic area: Court decisions often result in definitions of "common" words which are crucial in a **particular** context. Sometimes the standard meaning of a word may be "twisted" to fit the situation in hand and the result is a standard legal definition which may deviate slightly from ordinary usage. The same applies where a draftsman defines a term for the parties to an agreement but in contrast to the outcome of the draftman's efforts in a contractual setting which will in most circumstances apply only *inter partes*⁴ a definition issued by a court will be officially recognized and its use will trigger off defined legal effects.

A factor any legal translator ignores at his/her peril.

3. Main identifiable characteristics of English legal language

Most stylistic analyses have concentrated on the area of "legal instruments", couched with a certain amount of permanency and authority in view which may stand a test in a court if necessary. The lawyer's insistence on FORM has always been most pronounced here which is easily explained by the extreme practical importance attached to these instruments and the legal effects produced by their execution.

These extralinguistic factors should be borne in mind when analysing the legal documents for "critical" purposes:

b) The *eiusdem generis* rule: When giving an enumeration of specific items followed by general words attention is focussed on the specific items to establish the genus class they belong to. If such genus can be established the general words are read as confined to other items of the same genus.

c) *Expressio unius, exclusio alterius* - also applying to enumerations: where specific words are used, which are NOT followed by general words, only the items mentioned expressly are deemed to be included.

⁴ Under the "privity of contract" principle which debars a third party from suing under the contract.

No experienced lawyer would willingly risk concocting a form of his own in view of the possible consequences to his lay client:

The old traditional forms have already been tested and clauses interpreted in cases so that reliance on an accepted form is only natural from the point of minimising risks. It is also expedient from the point of reducing costs because it is speedier to provide a client with an off-the-shelf form where every possible combination of circumstances and every conceivable misinterpretation that could be put to the words is already envisaged and provided for.

The extralinguistic factors should also be taken into account when translating the forms: It may be expedient to omit some of the features (especially visual and syntactic) but it could be dangerous to "improve" the draftsman's style by cutting down "redundant" words.

Moreover, in most cases of repeated use the solicitor has really no choice in the matter because a specific form is compulsory to give efficacy to the disposition made (e.g. in conveyancing). Also e.g. when filing claims on his client's behalf the use of specific forms is mandatory. Accordingly, any "frozen-style" antagonist should acknowledge these inbuilt hurdles to changes of style and one understands the occasional annoyance within the profession when such factors are conveniently left out of consideration.

The "impartial" linguistic analyst could look for various deviations⁵ from normal standard usage which directly mark the texts as "legal variety" and will come up with deviations on all levels: syntactic, lexical and lexical - most of them emphasizing the general impression of a "hyper-formal", sometimes even frozen style.

3.1. Visual markers

Earlier practice made use of graphological devices to reveal general structure and main contents - necessitated by the simple fact that the documents were written in one compact mass, each line stretching from margin to margin. This "one sentence" practice is rare today but can be met occasionally in e.g. bonds and power of attorneys.

Modern documents make increasing use of paragraphing, a practice first developed in statute drafting from where it spread to business documents. The arrangement usually follows a certain pattern: A number is given to the clause and where more sentences comprise a clause they are arranged in sub-clauses numbered (1) (2) etc. Where further subdivision is necessary (a) (b) will be introduced.

The practice is extremely convenient for translation as well as a means of highlighting themes which are presented in the SL in a "dense" form and need not be transferred with that density.⁶

⁵ Most "markers" can be found in succession and land law which represent the provinces of English law with the longest record of "unbroken continuity" which is often said to be a characteristic of English law generally. Whereas commercial law, including contract law, was influenced by continental concepts and ideologies at an early stage, land law has been allowed to develop along its own "common law" lines for centuries. The situation is, however, changing as a result of the UK's EC membership which does not leave many areas of law untouched and will no doubt eventually reach the couching of land documents as well.

⁶ Sometimes an ambiguity is planned by the draftsman to allow for "flexibility of operation" and where such considerations have been at work the translator should probably not interfere with the lay-out.

3.1.2. Capitalisation

Unlike the one-sentence habit the capitalisation device is still widely used. Originally the use was partly for "decoration" but modern use would seem to provide distinctive visual emphasis only to important **identifying** lexical items in the texts.

Both initial capitalisation and full capitalisation are used - eg. in contracts of any type:

AN AGREEMENT made on...

BETWEEN A.b. of [] (on the one part)

and

C.D. of ... [] (of the other part)

IT IS AGREED AS FOLLOWS:

Items singled out for capitalisation include: the document in hand (WILL, ASSIGNMENT; DEED, MEMORANDUM etc); the parties; the operative words of the instruments, signalling the introduction of the substance of e.g. the agreement made; definitions of any description; and specific institutions and bodies where the use does not differ from ordinary usage.

This practice is very convenient for adopting in translations into English - it makes for quick reference to vital parts and would certainly be welcomed.

The use of capitalisation as "sequence markers" (revealing logical progression) is rapidly **declining** except for the "*testimonium clause*" at the end of documents for which purpose the first two or three lexical items are nearly always capitalised to signal "close" of instrument:

IN WITNESS (WHEREOF) ..the parties have hereunto set their hands and seals the day and year first above written.

3.2. Complexity elements

The complexity elements which have been emphasised by most analysts in their descriptions of legal language are still readily recognisable:

They relate to :

- a) the sentence structure (extreme length with a large number of subordinations and coordinations;
- b) infinitive-splitting (which is a convenient legal device to clarify meaning and as such of course perfectly acceptable in a translation too;
- c) "over-use" of adverbials and "unusual" positioning - solely with a view to clarifying meaning;
- d) absence of anaphora (which is also a means of achieving precision. It is thought expedient to give the parties full capacities under an agreement (as defined at the outset) rather than risk the ambiguities of antecedence a pronoun would give rise to);

Thus: *"The Lessor shall whenever required by the Lessee execute and the Lessee shall whenever required by the Lessor without investigating the Lessors title accept a Lease by deed of the premises to the Lessee"* (Lease Agreement)

If pronouns are used at all there is often a further specification which removes any conceivable doubt as to antecedence (e.g. *as he, my said Attorney, shall find ...*).

The rule is not without exceptions, however. In a case from 1950 the following attestation clause was approved by the court:

"Signed by the Testator in our presence and attested by us in the presence of him and of each other" (In Re Selby-Bigge [1950] 1 All ER 1009)

It is perhaps worth noting the judge's (Hodson,J) remarks in this connection: *"In order to save the labour and for the sake of neatness, every skillful practitioner desires to reduce the number of words to the minimum"*.

The ruling does not seem to support the practitioners' fear of judicial disapproval when they are urged to cut down some of the redundant legalese.

3.3. Lexical markers

One immediately obvious characteristic is the highly "nominal" style of most legal writings. It is indeed the most striking feature in the variety at all and as such it has been treated by analysts both within the profession itself (e.g. Mellinkoff/1963) and by linguists.

Noun groups are not only dominant in terms of quantity but also tend to be long and complicated especially by contrast with verbal groups.

There is still a marked preference for postmodification which contributes to the complexity especially where the POM-element is expounded by an infinite clause or by subordinate embeddings, involving "whiz-deletion", i.e. the use of passives appearing in past participle phrases

e.g.

"the option to purchase hereby given"

"the policy hereby assigned"

"hereinafter referred to/called/described etc"

" the sum now paid"

(The effect, apart from added complexity, is of course again a high amount of precision.)

The English legal vocabulary is characterized by (Mellinkoff/ 1963/4-24):

a) Frequent use of common words with "uncommon" meanings

Examples are almost too numerous to single out, e.g. the word "avoid" meaning in a legal sense "invalidate" as in "*mistake avoids the contract in the following*

circumstances...", i.e. "mistake operates to make the contract void" in the following circumstances.

Or as it is used in the sale of goods law: "*When a seller has a voidable title to them but his title has not been avoided at the time of the sale, the buyer acquires a good title provided...*" (S. 23)⁷

b) Frequent use of Old and Middle English words once in common use_ but now rare

- e.g. all the "here" additions to prepositions: *hereto, heretobefore, herein, hereinbefore, hereinafter, hereunto etc.*

- e.g. as in the designation of parties to deeds or contracts: "*Between Mr. Barley (hereinafter called the vendor) of the one part and Mrs Primrose (hereinafter called the purchaser) of the other part it is hereby agreed:*"

ALL lawyers are very partial to this usage and they are extremely convenient in a translation context as well. Contrary to most critics' view they represent an economy of expression!

"Whereas" is also an old English relic (used in recitals). The semantic legalistic content is approximately "given the fact that" - it does not convey "contrast" as in normal English usage. This is a source of common misunderstanding with translators who often use the "whereas" device to introduce rights or obligations of the second party after the enumeration of those of the first party.

c) Frequent use of Latin words and phrases

- e.g. "*in re, in personam, ex parte* etc. and all the equitable maxims which are still given in Latin, sometimes with their English counterparts.

7

This means that an innocent purchaser for value will get a good title to stolen goods or goods charged with an encumbrance - if he buys in a market overt. It represents one of the exceptions to the common law rule of "nemo dat" in S. 2 of the same Act.

ex turpi causa " (*non ovitur actio*) - in "colloquial" legal terminology "*turpis causa*") : a defence in contract and tort which may bar a plaintiff's claim if the harm suffered arose while perpetrating an "anti-social" act (e.g. barring a burglar's claim for damages when he has incompetently overestimated the quantity of explosive needed to open a safe!)⁸.

res ipsa (loquitur): a concept in tort whereby "negligence" is found as a matter of inference (presumption) from the very existence of a defect causing an injury (product liability).

d) Use of old French and Anglo-Norman words which have not been taken into the general vocabulary

- e.g. *devise* (to "give" - when real property is involved in e.g. a testamentary gift; *tort* (civil wrong) and all the specific land law vocabulary relating to "*estates*" which is a genuine relic of Norman property concepts.

e) Use of terms of art

These are technical words with a specific meaning defined in law, e.g. *injunction* (judicial order to refrain from doing an act); *novation* (substitution of a party for one of the original parties to the contract); *nuisance* (interference with someone's enjoyment of his property) etc.

⁸ Lord Asquith in *NCB v England* [1954] AC 403, 428.

f) Use of "argot"

In this sense argot represents a specialized vocabulary common to the profession, untainted by negative connotations, e.g. *allege* (*maintain*); *without prejudice* (data which cannot be used in evidence unless by consent); *putative* (reputed) *connivance* (knowledge that a wrong is being done); *Blackacre* (or *Whiteacre*/*Greenacre* etc) to denote a hypothetical piece of land for illustrative purposes etc.

g) Frequent use of "formal" words

- eg. *whereas, know all men by these presents; submit* (*think, i.e. it is my opinion that...* used in the courtroom for at least one good reason: Counsel are not **allowed** to proffer an opinion to the court - they can in fact only "submit").

h) Deliberate use of words and expressions with "flexible" meanings

e.g. *adequate* (*consideration, compensation, cause* etc.) used e.g. in contract context in preference to *sufficient* to avoid undue interference with parties' intentions. ("Adequate" is to the legal mind a neutral concept).

gbh (*grivous bodily harm*) leaving it for the court to decide what amounts to "serious" harm in a criminal context.

reasonable (the yardstick in e.g. tort relations) etc.

i) Attempts at extreme precision of expression

- choice of absolutes: *all, none, unavoidable, unbroken, irrevocable, outright* or the opposite: *including, but not limited to,...* or other similar or dissimilar causes.

3.3.1. The Modern use of Latin

The law Latin⁹ used by modern lawyers differs somewhat both in content and design from the Latin of medieval texts. There is nothing "debased" or "corrupt" about the modern use but the trend towards restricting the Latin term for technical use - where an English and Latin term compete in the description of a concept - has been gradually enhanced. Also it seems to be an increasingly adopted practice to use the Latin term in the profession's internal communication (e.g. solicitor to barrister in the *briefs* (instructions on a case) and vice versa) where the term will denote a specific technicality, whereas the English term is provided for the rest of us.

Examples:

<u>Latin</u>	<u>English</u>
<i>donor</i>	<i>giver</i>
<i>donee</i>	<i>receiver</i>
<i>legacy</i>	<i>gift</i>
<i>testis</i>	<i>witness</i>
<i>testament</i>	<i>will</i>
<i>cum testamento annexo</i>	<i>with the will attached</i>
<i>pendente lite</i>	<i>pending the lawsuit</i>
<i>sed quare</i>	<i>enquire further</i>
<i>uberima fides</i>	<i>absolute good faith</i>
<i>ultima ratio</i>	<i>last resort</i>

Other vestigial Latinisms:

The above Latinisms had simple English equivalents with the same connotations but there are also a few current terms and phrases which have no (adequate) English equivalents. Some of these, however, have become so commonplace and standard terms that their Latin origin

⁹ "law Latin" as a designation is not a term of art recognized by the profession - they simply use the term to differentiate the Latin used in the law from other languages used in the law and from Latin words outside the law. In this sense the Latin language is not "dead" and the lawyers actually continue to develop its use.

is hardly noticeable, eg *alibi*, *ex gratia*, *in camera*, *infra*, *in re*, *inter alia*, *inter se*, *inter vivos*, *in toto*, *per se*.

Others are pure terms of art: *actus reus* (the external elements of a crime), *amicus curiae* (friend of the court - assigned to help the court by expounding the law impartially); *animus donandi* (intention to give) and all the animus "siblings" describing intention to do something); *bona fide*; *donatio mortis causa* (a transfer of property in contemplation of the donor's death); *dum casta clause* (so long as the "recipient lives chaste" (eg in separation agreements - an allowance only to be payable as long as the wife lives "chaste". The term may still be met in documents, notably wills).

When used as technicalities in a formal legal context, e.g. in procedure, or for providing delicate "nuances" to a legal text the persistent use of Latinisms is readily understandable. The Latin terms are useful for the description of concepts, which have a long record of established definition behind them and their use allows for quick communication. Also the failure of providing adequate equivalents to important Latin concepts in such fundamental areas as e.g. tort law and land law accounts for the continued dominating use here: It IS simpler to give a tort as an *injuria sine damno*¹⁰ wrong or to state the opposite in *damno sine injuria*¹¹ terms than explaining the concepts in "plain" (?) terms. There is always the risk of ambiguity or misunderstandings if an equivalent is used. Though it would seem that the two general defences, *volenti* (in tort) and *consent* (criminal law) are very much the same the latter has connotations which are not present in the former, viz. deliberation - weighing of "good and

¹⁰ "Legal injury without harm" - tort principle according to which the actionability of the wrong depends on the plaintiff's establishment of an ascertainable loss (negligence).

¹¹ Harm without legal injury. Where this tort principle is applied the injured party has no right of action against the tortfeasor, e.g. because there was no legal duty to refrain from causing the sort of harm involved (e.g. trade competition).

evil" etc . Thus, there is (nearly) almost a valid reason for the use of the Latin term!

3.3.2. "The synonym habit"

The synonym habit in which legal draftsmen still excel had its background in real necessity: With the Anglo-French mixture of languages, coupled with the relics of Latin and Old English a certain amount of double occurrence of the same concepts seems quite unavoidable. How was the draftsman to make a choice between terms which were equally valid and acceptable? How could he be sure they were "equally valid" beyond reasonable doubt?

The uncertainty made lawyers reluctant to make a choice between e.g. a French term (with an established definition behind it) and an English equivalent of less universal professional acceptance and would give each in a document to secure legal effect.

Examples:

<u>French</u>	<u>English</u>
<i>devise</i>	<i>bequeath</i>
<i>maintenance</i>	<i>upkeep (real property)</i>
<i>pardon</i>	<i>forgive</i>
<i>marriage</i>	<i>wedding</i>

<u>Old English</u>	<u>French</u>
<i>deem</i>	<i>consider</i>
<i>keep</i>	<i>maintain</i>
<i>had</i>	<i>recieved</i>
<i>ne</i>	<i>novel</i>

Nor was the practice of multiplying words restricted to legal language in medieval times. The habit is a characteristic of most literary works of the time where it was used for ornamental purposes (and with a view to alliteration and rhythm) and it is certainly possible that the same motives were present in legal writing.

Professional caution and "ornamental embellishment" are not the only explanations, however. Emphasis and precision considerations have also been at work to make a point absolutely clear in a context where conflicting concepts are often present at the same time.

(This does not explain why we still get strings of words all denoting more or less the same thing eg: *in lieu, in place, instead and in substitution of...* which can certainly still be met in modern texts. The persistent use of such strings is slightly baffling today when the English equivalents have proved their efficacy).

Other examples include:

acknowledge and confess
annul and set aside
authorize and empower
covenant and agree
cover, embrace and include
deem and consider

*final and conclusive
force and effect
give and grant
goods and chattels
made, ordained, constituted
and appointed
null and void and of no force
and effect
rest, residue and remainder
etc.*

The habit of "word compilation" which is related to the synonym practice, and which still dominates modern legal writing can best be explained on extra-linguistic grounds, viz. the parol-evidence rule (or "four-corner" rule) applying to interpretation in common law jurisdictions.¹²

A legal draftsman has to cover every conceivable contingency in the document he is drafting because of this stringent rule: Under English law a document (such as a contract) "stands alone" in the interpretation process - the judge is not allowed to take "extrinsic" evidence or data into account when a contract clause comes up for scrutiny in court. Accordingly the documents must be quite detailed out of sheer necessity, giving specific references whenever possible rather than stating general principles which might NOT cover the situation in hand.

The application is not restricted to contract and e.g. a Will may say:

I authorize my Executors to buy, sell, assign, transfer, convey, exchange, divide, invest, reinvest, pledge, mortgage, borrow, lend, lease, release, deed, grant options, compromise, arbitrate make contracts, deeds conveyances, leases, releases, transfers and other instruments in writing....etc,

all of which is stated to stress the unlimited scope of discretion and exercise of the powers bestowed on the

¹² Cf. e.g. Law Commission N_ 154, 1986.

executors. If the solicitor handling the drafting should omit any of these specific references and a dispute arises relating to a disposition made which is NOT expressly stated a cumbersome and expensive litigation may result. This risk is not lightly undertaken and would also be incompatible with the fiduciary relationship between lawyer and client: The client obviously avails himself of the services of the professional draftsman to avoid incurring risks of litigation in the first place or alternatively, if such litigation occurs despite the draftman's efforts -to ensure that adequate precautionary measures have been taken to provide for this contingency as well.¹³

It is not a "myth" that unscrupulous litigants jump at the chance of exploiting "gaps" in an enumeration such as the above to seek invalidation of dispositions - as even a cursory glance at any volume of law reports will immediately reveal.

4. The translator's choice

It is often a formidable task to choose among all these stylistic devices when embarking upon a translation into English legal language. The ultimate choice will always of course be based on idiosyncracies (and as was stressed at the outset: the FUNCTION of the text) and it is probably not settled among translators yet whether we should endeavour to transfer the elements at all!

In my own practice and as a consultant in English legal language I have found some general trends which are probably applicable to many Danish translators' patterns of performance:

¹³ It may be thought that "general clauses" could be used - but under English law a general clause (e.g. to dispose of, assign, transfer etc.) would only confer such powers as are needed to carry out the specifically conferred powers.

The translator rarely uses the delicate lexical devices when translating into English (e.g. the Latin or French terms) and thereby fails to exploit a convenient method of variation and - as has been seen - precision - which we so often seek to achieve in our end product. Perhaps the reluctance is attributable to a fear of introducing "foreign" elements which may not be readily understood (?) but that fear at least could be overcome by the usual device of adding an explanation.

Ultimately it is a matter of "taste" or intuition whether the Latin/French is appropriate to retain from the source text or introduce in the target text but as long as the habit is favoured by the profession itself, it must "be deemed to be" acceptable in a translation as well.

As regards the other characteristics on the lexical level the source text's own degree of formality as evidenced by the occurrence of the characteristics just mentioned will usually signal the target text's level of formality as well: The translator is not bound to "improve" the style but should endeavour to transfer it "*faithfully*" and as accurately as possible. In fact - in an "authorised" translation we confirm in our attestation of the translated text that that is exactly what we have done!

Usually the translator's concern and difficulties are on the conceptual level, however, and for a watertight result there are no short cuts: Research into the target language's own legal concepts in the same fields must normally be undertaken - at least when an area is approached for the first time. The dictionaries (mono-lingual)¹⁴ may be helpful here, combined with sets of forms and precedents which are indispensable in the search for authentic terms.

¹⁴ As regards the bi-lingual dictionaries the market is short of titles of direct application. Most do not contain exact definitions but they may function as stepping stones for further study by introducing a concept treated in more detail in the mono-lingual dictionaries.

Also "primary" sources such as case reports¹⁵ will often be helpful in giving definitions for restricted contexts.

Practical examples:

a) - where a direct equivalent is available:

In Danish contract context on breach the injured party will naturally seek a remedy which will not only compensate him for the loss incurred by the breach but also for the profit he had expected to gain as a result of entering the contract in the first place (his loss of bargain). Danish law allows such performance expectations to be fulfilled in the computation of damages by means of "*erstatning efter den positive opfyldelsesinteresse*" which we contrast with "*erstatning efter kontraktsinteresse*", a remedy merely compensating the injured party for losses incurred in preparing to perform - or simply restoring the parties to their original positions.

The translator who needs to convey the impression of complete performance inherent in "*positiv opfyldelsesinteresse*" looks in vain in the bi-lingual dictionaries which merely suggest "*damages*" to cover both categories of remedy. A closer study of the English damages concept, however, soon reveals that the English system offers exactly the same remedies - at least relating to the effect achieved: English law offers damages either on an *expectation basis* (where the injured party is compensated for both the loss sustained by the breach and the profit he expected to gain by the bargain) or on a *reliance basis* where the aim is exclusively to place the plaintiff in his pre-contractual position .

Thus an "adequate" translation should make the distinction clear, thus:

¹⁵ All England Law Reports are the best sources here and - in the legislative field- "Halsbury's Statutes" could be consulted (for statutory definitions of terms).

"... parterne kan endvidere aftale, at ertatningsudmålingen ved misligholdelse skal tilgodese den positive opfyldelsesinteresse" (e.g. "... further the parties may agree that the measure of damages on breach shall be on an expectation basis")

b) - no direct equivalent in target system

In Danish law we describe a common situation in a contract context in which the promisor (offeror) in the contractual setting is bound for a period and no similar obligation attaches to the offeree as a "*haltende retsforhold*".

In a translation into English it will be necessary to point out where the inequality of burdens lies:

"*Det hyppigste eksempel på et haltende retsforhold finder vi i aftaleindgåelse, hvor det relaterer sig specifikt til tilbudssituationen...*"

- could be transferred as:

"*The most common example of inequality of contractual obligations relates to the formation of the contract, in particular to the offeror's position who will be bound for a period in which the offeree is not similarly bound ...*

Another example - from common law relates to the concept of consideration: "*Consideration*" is a unique common law concept modified to some extent by another unique "equity" concept described as *promissory estoppel*.

In common law "*consideration*" is defined as the "*benefit accruing to one party or detriment suffered by the other*" (Lush J. in *Currie v Misa* (1875) LR 10 Ex 153)¹⁶ and is traditionally regarded as the "bargain" element which is essential in a synallagmatic contractual setting. The same presupposition exists in the Danish contract law though not in express terms. Danish law will also acknowledge that "something in return" for a promise

¹⁶ An alternative definition was given by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd* (1915) Ac 847 as "an act or forbearance of one party, or the promise thereof is the price for which the promise is bought..." (at 855).

must be given to make that promise **enforceable** but this view is based on a general doctrine of "equality of positions" and "fairness" principles. These conceptual differences should not complicate the translator's task unduly, however, as long as we can feel sure that the fundamental ideas are the same we should feel free to adopt them into the target text. One equivalent here might be *modydelse* or *vederlag* (but contrary to some dictionaries - it is NOT the same as "vederlagsforudsætning" in Danish law - which is much wider and a breach of which will give the injured party specified remedies).

Promissory estoppel is an equitable doctrine by which a promisor may be estopped from going back on his promise if certain specified requirements have been fulfilled. Again no direct equivalent is available in the Danish system but we share the fundamental view that a party should be bound by a promise voluntarily given in exchange for a counterpromise where the other party relies on it to his detriment. Accordingly an explanatory translation such as *Icftebegrundet afskæring af kontraktsparts indsigelser mod opfyldelse* is at least acceptable and would convey the idea tolerably.

Judicial officers and institutions

The translation of judicial officers and institutions presents problems of a different kind than the substantive law concepts. Most translators would choose not to translate the various categories of law officers at all because they are part of the cultural heritage unique to the system in which they operate. It makes sense to avoid comparing e.g. the Lord Chancellor to the Danish Minister of Justice because their functions differ widely though they are comparable on some heads. The safe procedure with most law officers would be to retain the term in the TL with a brief note of explanation as to status or main

function, adding an approximate "equivalent" if the context so requires. If not, the introduction of the "foreign" element could be quite natural in an exposition on the legal system of the SL. The reader will expect elements which are not directly applicable to his own cultural (or professional) experience and references to a "Registrar", "Magistrate", "Master" etc. are usually immediately comprehensible without more in the contexts they appear.

At least retaining them is preferable to comparing them to officers in the TL-system who would only from a superficial point of view qualify as equivalents. Assuming such parallels is really one of the most **fatal mistakes** the translator may commit.

As regards the legal institutions they are more or less on a level with proper names which is one good reason for retaining the original term in the TL. Of course some of the institutions are so often referred to in the sociolinguistic context of the target language by their "officially" translated names that the translator could use them as well (e.g. the English *High Court*, which in its jurisdiction is so close to the Danish *landsret* level that a direct comparison is possible). It would not apply to the lower courts, however, where the differences are so pronounced that the translator conveys a wrong impression of similarity if the original term (e.g. *County Court*) is not retained.

Example:

(from an exposition on Danish procedural law where the explanatory note was designed to be "heavy" to avoid ambiguities:

"Civilprocessen omfatter reglerne om behandlingen af borgerlige sager ved de ordinære domstole (byret, landsret og højesteret) så som disse domstoles kompetence og organisation, hvem der kan optræde som parter i retssager, parternes beføjelser og rettergangsfuldmagt, hvilke tvister der kan bringes til

afgørelse for domstolene, grundprincipperne for civilprocessen (forhandlingsmaksimen m.v) bevislær

"Civil procedure comprises the body of rules regulating civil proceedings at the ordinary courts of law (i.e. courts of 1st instance: "town courts"; superiour courts of mixed 1st instance and appellate jurisdiction: "High Courts", and the supreme appellate court in the Danish system "Højesteret" ("Supreme Court") including i.a. the courts' organisation and jurisdiction, the procedural capacity of parties, remedies and powers of legal representation in court proceedings, limitations regarding the character of disputes which may be brought before the courts; the fundamental principles in civil procedure (e.g. the doctrine of negotiation), evidence principles, pari

An example such as the following - where the split-infinitive is used may be "offensive" to a linguist(?) but somehow those reservations will have to be overcome by the translator, at least if the aim is to provide the form familiar in the target language's own system:

The contract, e.g. a lease may say in Danish:

"hvis lejer ikke rettidigt betaler afgifter, skatter eller forsikringspræmier, kan ejer i hvert enkelt tilfælde kræve lejeforholdet ophævet med seks måneders varsel eller straks kræve det ophævet og lade lejer udsætte ..."

"Failure on the part of the tenant to punctually pay the rental, taxes or insurance premiums shall entitle the landlord, in each individual case, at his option, upon giving the tenant six months' notice, to terminate the lease or to terminate the lease immediately and have the tenant evicted ..."

It may not be elegant - but we should probably be willing to sacrifice elegance of expression for the sake of precision -it will not be appreciated that a truly "sophisticated" translation has been made if the meaning has been tampered with to achieve the result!

5. Recent developments in drafting principles

Apart from keeping abreast of the development in substantive law which has already been stressed as an obvious requirement in any legal translation context, the translator will also need to follow developments in current drafting recommendations:

Changes in writing styles, such as they are recommended in the profession itself and are likely to manifest themselves in the SL texts should of course be reflected in the translator's products in the same language. Most of the recommendations seem to be the results of American influence but recently the pressure has started to come from "within" in the UK as well, notably from the pioneer work of Clarity¹⁷ and the Law Commission.

"Plain Language" Movement

¹⁷ A movement for the simplification of legal English whose efforts have been noticeable in the late 80s and especially after Lord McKay's appointment as Lord Chancellor in 1988.

The origin of the criticism of legal writing style cannot be pinpointed with any amount of absolute accuracy; it seems to have been present both in the profession and out of it for decades (at least). Indeed there is evidence as early as 1551 when Boy King Edward VI expressed his pious hope,

"I would wish that superfluos and tedious statutes were brought into one sum together and made plain and short to the intent that men might better understand them" (McBrien,J./1990). Or as Jeremy Bentham put it in 1792: *"The lies and nonsense the law is stuffed with, forms so thick a mist, that a plain man, nay, even a man of sense and learning, who is not in the trade can see neither through nor into it"* (Trutl

More examples can easily be found, in fact "defence submissions" in respect of the traditional style are considerably more difficult to come by!

It is reasonable, however, to trace the origin of the current very profound criticism to the 1970s in the general wake of "consumerism", which brought about so many fundamental changes in important areas of substantive law. The frustration felt by "legally innocent" people when trying to decipher their insurance policies and loan agreements to establish their rights and obligations under them equalled the outrage felt by litigants who had to surrender legitimate claims in the field of personal injury compensation because they had "signed away" their rights when accepting a standard contract, in which a crucial liability exemption had escaped their attention.

The consumer area was thus the first field of law in which "clarity" and comprehensibility of documentation was most readily acknowledged. Since then, as is probably well-known, several American states have introduced plain language style in statute drafting in a large amount of contract areas. Chief credit for the initiation of this development is given to the Carter administration.

The drafting in plain English - outside the legislative field - is now part of the compulsory training in American law schools and the idea is slowly gaining acceptance in the UK as well. The authorities responsible for solicitors' training have been most responsive, whereas barristers are still reluctant and tend to block the way for reform. The attitude displayed by barristers is quite understandable, they fight for their own privileges (like any profession would do) which are enhanced by the retaining of the familiar forms and the language barriers, enclosing the barrister's grounds like a fence excluding trespassers.

Also many solicitors share the "reverence" felt by the profession generally for its common law institutions and principles which applies to language habits as well, and to many lawyers the growing tendency towards everyday language in e.g. pleadings must seem quite offensive on those grounds.

However, this "reverence" does not extend to accepting the "verbosity", semantic "curlicues" and other mannerisms as inevitable appendices to the job. Many lawyers seem to be prepared to do without the redundant legal phrases but will fight to keep what is "un-offensive" in their style.

The offensive ear (or rather eye, as most of this goes for writing only) referred to here and to whom a lawyer may be willing to show "indulgence" is not that of the critical linguist or colleague, but that of the CLIENT.¹⁸

¹⁸ The opposite view is also maintained in many practices: Some clients actually like the old stock phrases and enter the lawyer's office with deep-rooted preconceptions as to how dealings will be conducted and instruments couched: They expect express provisions they have seen "elsewhere" in instruments of the same kind and if their lawyer omits them the omission may be ascribed to "ignorance" or "carelessness" both of which are indeed serious charges against any profession!

Also the "formal setting" - use of formal wording and time honoured rituals tends to emphasize the serious character of the disposition about to be made which may make a client more inclined to consider his moves carefully.

Solicitor v Client

The following are a few authentic examples provided by clients who are critical of their lawyers' persistent use of legalese:

One Clarity member¹⁹ acting for a client had sent a draft underlease to the solicitors for the prospective tenant. One of the clauses provided that the tenant was to pay for the cost of redecoration after moving out, if he left the place in a shambles. Whilst agreeing in principle the other side said in a letter they would like a proviso. "We think it reasonable therefore, that the landlord's surveyor should attend fourteen days prior to the expiration of the lease if so required and present his schedule forthwith"

The client's solicitor saw no problem and drafted as follows:

"...provided the Landlord's Surveyor will on written request prepare a Schedule of Dilapidations two weeks prior to the expiration of the term"

When it came back from the tenant's solicitors the contents of the clause were hardly recognisable:

"...Provided Always as a condition precedent hereto that the Landlord shall on the written request of the Tenant cause its Surveyor or other proper Agent to attend at the demised premises not less than one month prior to the end of the tenancy to examine the state and condition thereof and within fourteen days thereafter to serve a Schedule upon the Tenant of any defects and wants of repair and breaches of this subclause there found and all works required by the Landlord to repair and make good such defects and wants of repair and breaches of covenants as aforesaid" (It is hard not to agree with the client that this is "nut-cracking with a sledge-hammer")

¹⁹ One example among many - kindly provided by the Working Committee of Clarity from their stock (1988).

Another example of "overlawyering" is provided by a grant clause included in a licensing contract (US- style) whose first version read:²⁰

"Licensor hereby grants to Company the right to use Licensor's trademarks and or in connection with the advertisement, distribution and sale of athletic shoes and athletic shoes only."

This wording did not satisfy the client's lawyer's need of precision and watertightness. This is how it came back:

"Use by Company of the Licensor trademark on products other than athletic shoes shall result in immediate termination of this agreement and the forfeiture by Company of its rights hereunder, including the right to dispose of any inventory bearing Licensor's trademarks. Company agrees that Licensor shall have the right to enforce this obligation by injunctiverelief and Company hereby indemnifies Licensor for any and all costs, expenses, damages, claims and expenses, including attorney's fees, for any breach by Company of the foregoing obligations".

As the client rightly points out - virtually nothing of substance has been added to the first version. A party can ALWAYS seek relief if the other party violates the contract (It's one of the reasons for making the contract in the first place) Also, the basic points of law added are today implied in a contract anyway.

What worries this particular client more, however, is the fact that the tone of the argument has changed into "confrontational drafting" - where each party seems to expect the worst from their relationship! It may not be the best starting point of a cooperative arrangement in which the object is for BOTH SIDES to make money.

Quite a few business clients are very much aware of this "side-effect" of "over-lawyering" in their business relations and are instructing their legal advisers to frame documents accordingly:

²⁰ McCormack, M: What They Didn't Teach Me at Yale law School, 1987.

5.1. The impact of client pressure

In the face of vigorous criticism from especially business clients who are working against the clock at all times and find their burden of checking up on the legal adviser's work made harder than it needs to be it is becoming increasingly difficult for the traditional style protagonists to stand their ground.

The modern ideal drafting model taught to business law students in particular, but applicable throughout the profession) is - in simple terms: the draftsman should seek to express the underlying intention of the document in as short and "terse" language as possible while at the same time retaining the formal framework which the document is to constitute for the parties' expressed intention.

The recommendations include i.a.:

- a) Cutting down redundant words (as manifested in the compound prepositions and stock phrases used for decades) - on a line with the recommendations given for *business communication* for years
- b) Avoiding word-doubling and repetitions where they don't lend emphasis at all
- c) Avoiding *recitals* (e.g. in contract models) and go straight to the point (the substance of agreement or "operative" part).
- d) Restrict the use of strictly legal terms to clauses where they are genuinely needed.
- e) Be "brief", where possible.

The list is considerably longer and much has already been said and predicted about the outcome of the "quest for brevity" - most recently accentuated in the award of the plain language movement's trophy to the top judicial officer in the UK - Lord Chancellor McKay of Clashfern for his fight against incomprehensible statutes and forms. It may also be noted in this context that the UK Civil Service

Minister has urged his Department to reduce the legal jargon whenever possible and get rid of incomprehensible forms (NLJ/July 1990).

Thus it seems that the scales are against the old "legal dinosaur" who may be forced eventually to open the gate to the unwelcome intruders of modern language.

Select bibliography

- Buchhaven, Charlotte: Articles in New Law Journal *Battered Images*, March 24, 1989 Pleading for More Learned Court Speak, Nov 25, 1988.
- Burke, John (1977): *Jowitt's Dictionary of English Law*. Sweet and Maxwell.
- Charrow, V./ Crandall,J./Charrow,R. (1982): Characteristics and Functions of Legal Language - In: R.Kittredge and Lehrberger: *Sublanguage: Studies of language in Restricted Semantic Domains*, Gruyter.
- Chrystal,D/Davy,D. (1969): *Investigating English Style*. Longman.
- Freeman, Morton S. (1979): *The Grammatical Lawyer*. Philadelphia.
- Gemar, Jean-Claude (1982): *Langage du droit et traduction*. Linguatech Collection.
- McBrien,J.P.(1989): *Language - one tool of our trade*. Solicitors Journal, vol. 134, No 8.
- McCormack, Mark (1987): *What They Didn't Teach Me at Yale Law School*. Fontana.
- Mellinkoff,David (1963): *The Language of the Law*. Little, Brown & Co., Boston.
- Oerton, R.T. (1987): *The Quest for brevity*. Solicitors Journal, vol 131/965).
- Parker's *Modern Wills Precedents*, 1989 ed.
- Piesse,E.L. & Gilchrist,J (1965): *The Elements of Drafting*, Stevens, London.
- Thring, Lord (1902): Practical Legislation: *The Composition and Language of Acts of Parliament and Business Documents*. Murray, London.
- Weihofen, Henry (1980): *Legal Writing Style*. West Publ. Co.

Woodbine, George (1943): *The Language of English Law*. Speculum, Medieval studies, Vol XVIII.

Wydick, Richard (1985): *Plain English for Lawyers*. Carolina Academic Press.