Translating contracts as *culturemes*

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Abstract

The paper proposes a translation model for contracts in which different stances, i.e. Snell Hornby's integrated approach (1995), the functionalist views with the skopos *theory (Reiß & Vermeer 1984) and the concept of* culturemе *(Oksaar 1988: 26-27; Vermeer 1983: 8; Nord 1997: 34), as well as Chesterman's theory of* memes *(1997) are upgraded with the findings of comparative law regarding differences between legal systems and their impacts on the corresponding legal languages. The model consists of ten phases, each addressing one of the specific linguistic and extra-linguistic aspects of the contract as a text type. When translating contracts, a very specific situation may arise with respect to the cultural embeddedness of the target text, since* memes *of different legal cultures may co-exist on its various levels in order to meet the* skopos *of the translation. This is especially the case when the contracting parties decide to use a third language as a* lingua franca, *which may lack any direct correlation with the legal culture(s) underlying the contract.*

1. Introduction

International legal transactions involving participants from different cultural settings often need to be regulated in the form of a contract. Contracts made to this purpose have to bridge the differences between different legal cultures and, more specifically, between different legal systems. When negotiating a contract,

the contracting parties thus have to agree upon the governing law, as well as on the language(s) in which the contract will be drafted. Drafting one or more language versions of an international contract thus always involves some extent of translation. Hence, a targeted approach to the translation of contracts has to take into account their linguistic and extra-linguistic dimensions, i.e. combine the stances of contrastive legal linguistics, comparative law and those translation theories which particularly suit legal translation.

2. Translation model

The translation model proposed in this paper combines different translation approaches with the findings of comparative law regarding the differences between legal systems and their impacts on legal languages and underpins them with the results of a corpus study of commercial contracts in English, Slovene and German. A great deal of it follows Snell Hornby's integrated approach to translation (1995), as it foresees a sequence of stages each addressing one specific aspect of contracts with an interdisciplinary focus. It also adopts the functionalist view stressing the importance of the prospective function, i.e. *skopos* according to Reiß and Vermeer (1984) as the decisive factor determining the type of translation to be produced. Moreover, by taking into account the cultural embeddedness of contracts, it views them as *culturemes*, i.e. formalized, socially and juridically embedded phenomena, existing in a particular form and function in a given culture (cf. Oksaar 1988: 26-27; Vermeer 1983: 8; Nord 1997: 34). It furthermore proposes to view the *cultureme* split into several levels where culture-specific features can be identified. According to Chesterman (1997: 7) they have the status of *memes*: units of cultural transfer encapsulating ideas, concepts, cultural practices, etc., which can only be transmitted verbally across cultures through translation. The text as *cultureme* is thus observed in its extra-linguistic (the extent and contents of the contract as required by or customary in the relevant legislation) and linguistic (i.e. lexical, syntactic, pragmatic, stylistic) *memetic* levels.

2.1 Establishing the skopos of the translation

In the initial phase the translator uses the data contained in the translation brief, gathers the necessary additional information from the commissioner and/or evaluates the circumstances of the communicative situation for which the translation is needed to define the *skopos* of the target text (TT). Some of the possible functions of the TT are:

- drafting one of the bi-/multilingual versions having equal legal force within an international legal transaction, where one legal system will be binding, i.e. defined as the governing law;
- the TT will be produced for one of the parties to the contract, but will not have the status of authentic text;

- the source text (ST) will be used as a basis for a new contract in the target legal system and will thus have to be adapted by transferring and mutating *memes* on different text levels;.
- the TT will be produced for receivers in the target legal system who do not speak the source language to enable them to study the characteristics of the source legal system and language;
- the TT will be produced for a party external to the contract, e.g. a financial institution/bank as proof of a future income (e.g. for the granting of a loan);
- parts of the TT will be used in the target environment for publication, e.g. a newspaper article.

2.2 Defining the type of translation in accordance with the skopos

At this stage, the translator will determine the type of translation which will best suit the prospective use of the TT. According to Cao (2007: 10-12), legal translation can be produced for normative, informative and/or general legal or judicial purposes.

Translation for normative purposes implies producing translations of legal instruments in bilingual and multilingual jurisdictions, where the ST and the TT have equal legal force. In the case of contracts this kind of translation is necessary within bilingual/multilingual legislations (e.g. Switzerland, bilingual areas of Slovenia), as well as within supranational legislations (UN and EU), but also when contracts as private documents are made in two or more equally authentic versions.

Translation for informative purposes has constative or descriptive functions and includes translations of different categories of legal texts, produced in order to provide information to target culture receivers. It only has informative value and no legal force. In the case of contracts, this category applies to contracts made by parties pertaining to different legal settings in different language versions, of which one is defined as the authentic text.

Irrespective of its status the translation still has to convey to the receiver all relevant information, especially regarding the rights and obligations ensuing from the contract, while on the extra-linguistic level it has to take into account that both the ST and the TT are embedded in the same legal system.

The receiver of this kind of translation is very often one of the parties to the contract, but it may also be produced for receivers external to the contract or even to the legal environment, such as an educational institution. Common Law contracts can thus be translated for continental legal experts or students for study purposes. Similarly, (parts of) an international agreement can be translated for the media to provide information on the development of relations between companies from different countries.

Cao's third translation category is the translation for general or judicial purposes, where original source language texts are translated to be used in court proceedings as parts of documentary evidence. These translations have an informative, as well as descriptive function. Contracts are often translated to provide evidence of the obligations assumed by the parties and the rights

conferred to them. Generally, such translations are commissioned to sworn translators, who confirm that the translation fully conforms to the original in a special clause. Such certified translations only allow for a minimum of adaptation to the target legal culture, on the lexical level they may require comments on or explanations of specific concepts which have the status of lexical *memes* in the source legal culture, while on the stylistic and pragmatic level the *memes* of the target legal culture may be copied to the extent necessary to render the rights and obligations as unambiguously as in the ST.

Experienced translators will usually be able to establish the *skopos* and the kind of translation best suiting it, while the relevant information may also be supplied in the *translation brief* which can contribute considerably to the quality and functionality of the translation. In the case of contracts, this information should also indicate the legal system to be observed as the governing law (if not contained in the ST).

2.3 Establishing the legal systems involved in the translation and their hierarchy

When translating contracts it needs to be considered that although the translation involves two different legal languages and usually two legal cultures, not all legal systems involved will directly be considered. When translating within an international or supranational legal system, such as the law of the UN or the EU or within a multilingual jurisdiction (Slovenia, Switzerland), only one legal system will be involved and thus binding. In contracts regulating the relationships between parties from different countries, where the contracting parties usually agree upon one legal system as the governing law, there will be two or more legal systems involved, but only one binding and thus hierarchically superior. Hence, this binding legal system will underlie both the ST and the TT.

There is the possibility that in accordance with the *skopos* the ST will have to be translated from the source legal language and thus from the legal system underlying it into the target legal language and target legal system. In this case it will have to be culturally transferred into the target legal system, which in this case shall apply as binding and hierarchically superior. To embed the TT into the target legal culture, adaptations will have to be carried out on all memetic levels. In such situations, two legal systems will be involved and the level of translatability of the text will depend on the extent of their relatedness.

2.4 Establishing the level of relatedness of the legal systems involved

At this stage, the translator should identify the legal families to which the legal systems involved in translation belong and establish their degree of relatedness. Hence, a translator should be well acquainted with the major legal families, their differences and common traits and thus be able to anticipate the potential pitfalls resulting from the (un)relatedness of legal systems.

Zweigert and Kötz (1992: 68-72) group legal systems on the basis of their historical development, the specific mode of legal thinking, the distinctive legal institutions, the sources of law and their treatment, as well as the ideology. They thus distinguish eight major legal families: the Romanistic, Germanic, Nordic, Common Law, Socialist, Far Eastern Law, Islamic and Hindu Laws. The two most influential legal families nowadays are the Common Law ad the Civil Law (i.e. the Romano-Germanic) families, to which 80% of the countries of the world belong. The Common Law family includes England and Wales, the USA, Australia, New Zealand, Canada, some of the former colonies of England in Africa and Asia, while the Civil Law countries include France, Germany, Italy, Switzerland, Austria, Latin American countries, Turkey, some Arabic states, North African countries, Japan and South Korea. Some legal systems are hybrids created through the mixed influence of the Common Law and the Civil Law, e.g. Israel, South Africa, Louisiana in the US, etc. According to Cao (2007: 25), the law of the EU is also to be classified as a mixed jurisdiction.

The legal systems pertaining to the Civil (i.e. Continental) Law, which includes the Romanic, the German and the Nordic legal systems, are relatively related. They have common foundations in the Roman legal tradition and are characterized by codification – the most important rules and regulations are set out in written sources of law. In the case of the continental legal systems, a considerable closeness with respect to the legal concepts applied can be expected. On the other hand, the legal systems of other countries and cultures, derived from different traditions, are difficult to compare – such as the Far-Eastern, the Islamic, the Hindu and finally, the so-called Anglo-American or Common-Law legal family, based on *Common Law*, *equity* and *statute law*. *Common law* is often described as judge-made law, which is not based on written codes but on precedents, i.e. decisions of judges taken in previous legal cases. *Equity*, on the other hand, is a term referring to a system of rules which are applied in addition to *Common Law* and have no equivalent in the continental legal system. Finally, the term *statute law* applies to written law (e.g. the Acts of Parliament), i.e. those legal sources which exist in written form in the Anglo-American legal system.

Due to these differences the translator may anticipate more translation problems when translating Anglo-American contracts into the language of one of the continental legal systems. A basic knowledge of comparative law will enable him/her to map the areas of law where the extent and depth of the differences may hinder the translation process.

2.5 Establishing the relationship of the languages used and the legal systems involved

Having established the extent of relatedness of the legal systems underlying the translation, the translator should evaluate the affinity of the languages involved. In this respect, De Groot (1998: 21) points out that "The language of the law is very much a system-bound language, i.e. a language related to a specific legal system. Translators of legal terminology are obliged therefore to

practice comparative law." It is thus the legal system in which the language is embedded and not the general culture underlying it to play an essential role in translation. According to Sandrini (1999: 17), it is the relatedness of the legal systems, rather than of the languages involved in translation to define the level of translatability of legal concepts.

If the contract text is viewed as a *cultureme*, the impact of the legal system is directly felt on its extra-linguistic level – through superordinated legal acts (the Law of Obligations, commercial usage, informal legal sources in continental legal systems), which apply to the contractual relations and can be mentioned in the contract.

Such referencing to superordinated legislation is typical of contracts made under continental law, where the influence of hierarchically superior regulations affects the macrostructure, i.e. the extent of the text. Contract elements regulated by such hierarchically superior acts do not need to be explicitly set forth in the text, as they apply automatically. Continental contracts are therefore shorter than comparable Anglo-American contracts. In their comparison of German and American business contracts, Hill and King (2004: 894) argue that German agreements are usually only one-half or two-thirds the size of comparable US agreements made for the same or similar purposes.

The affinity of legal languages in translating contracts will be reflected in the greater or lesser similarity of the different *memetic* levels of the text (e.g. the use of the passive voice in German, as well as in Anglo-American contracts, the differences in expressing obligations among languages – the *shall* future in English, lexical verbs such as *sich verpflichten* in German on the pragmatic level).

When translating between different legal systems or families, the translator should evaluate the relatedness of the legal systems, as well as of the languages involved in translation. He/she will thus be able to recognize one of the following scenarios according to de Groot (1992: 293-297):

- the legal systems and the languages concerned are closely related, as in the case of Slovenia and Croatia, which means that translating will be relatively easy;
- the legal systems are closely related, but the languages are not, e.g. when translating between Dutch laws in the Netherlands and French laws, hence this task will not involve extreme difficulties;
- the legal systems are different but the languages are related, thus the difficulty will be considerable, especially as this relatedness of languages implies the risk of *faux amis*, as in the case of translating German legal texts into Dutch or vice versa;
- the most difficult task will be translating between unrelated legal systems, as well as languages, e.g. translating Common Law texts from English into Slovene.

It can be argued that de Groot's categorization of translational situations fails to identify two further possible scenarios (Kocbek 2009: 53 - 54). The first involves translating within an international or a supranational legal system, e.g. within the EU, where legal concepts pertaining to the EU law are translated by using

terms bound to national legal systems, which may be tainted by the meanings attributed to them in the source legal system. To be used within the EU legal system, the existing terms should be re-interpreted, e.g. by adding a footnote specifying their meaning within the EU context.

The second scenario implies translating between legal systems which are relatively related (e.g. German and Slovene, both belonging to the Civil Law), but using a *lingua franca* bound to a legal system which may be fundamentally unrelated to the legal systems involved, as is often the case with English used as *lingua franca*. In such cases, the *memes* of Anglo-American contracts can be considered on the syntactic, pragmatic and stylistic levels, whereas on the lexical level there is a risk of introducing *memes* of the Anglo-American legal system. The problems deriving from the discrepancy between the Common and Continental Law are also felt within the EU where English as the most widely adopted *lingua franca* is used to describe specific EU concepts by using terms tainted by the meaning attributed to them within the Anglo-American legal system (Kjær 1999: 72).

When recognizing one of the above presented scenarios, the translator will be able to foresee equivalence-related problems, as in the case of typical lexical *memes* of Anglo-American contracts, such as *consideration* or *estoppel*, or concepts referring to the Law of Obligations in the case of continental contracts.

2.6 Analysing the ST *cultureme* – Identifying *memes* on different levels

At this stage, the translator will have to identify the *memes* which on the extra-linguistic and linguistic level form the *cultureme* of the source contract text. To this purpose he/she will need considerable knowledge of the text conventions applying to contracts in different legal cultures, and thus recognize the universal, as well as legal culture prototypical features of contract texts.

On the macrostructural level of the text extra-linguistic factors (the legal system) determine the extent and content elements (»boilerplate clauses«) required by or customary in the relevant legislation, such as the *Recital* with the *Whereas clauses*, the *Representations and Warranties* in Anglo-American contracts. In analysing this dimension of the text, the knowledge of relevant areas of law proves indispensable (Anglo-American Contract Law, the continental Law of Obligations). Moreover, the translator should consider the culture-specific style of contract-drafting, e.g. drafting custom-tailored contracts, which is typical of the Anglo-American culture, or using more universal and standardized texts created by adapting sample contract texts in the German and Slovene legal culture.

In studying the linguistic dimensions of the contract source language *cultureme*, the *memes* marking it at its different levels will have to be identified:

a. On the lexical level, the specific terms expressing concepts prototypical of the source legal culture, as well as phenomena, such as word pairs and word strings (typical of Anglo-American contracts), idiomatic expressions such as

bona fides/in good faith, *third party*, *small print* and/or archaisms (so-called legal adverbs, e.g. *herein*, *hereunder)* will have to be identified.

b. On the syntactic level, the prevailing sentence structures (typical conditionals, e.g. introduced by "*provided that*"), the use of the passive voice and impersonal verb forms will be established.

c. With respect to style, the level of formality and the language means used to convey the effect of objectivity, to stress the official nature of the text (passive voice) will be examined.

d. On the pragmatic level, the structures prototypical of the source legal culture for expressing the essential contractual relationships (assuming and imposing obligations, granting and obtaining rights), which typically have high performative power, will be identified.

Having clearly defined the contract source legal culture *cultureme*, the translator will be able to compare it with the prevailing target legal culture *cultureme*.

2.7 Determining the hypothetical TT *cultureme*

Drawing on his/her knowledge of the target legal culture, as well as on detailed studies of relevant corpora of contract texts, the translator will be able to conceive a hypothetic TT *cultureme*, i.e. a skeleton text fully conforming to the conventions of the target legal culture by following the same procedure as the one used in the previous stage and contemplating its extra-linguistic, as well as its linguistic dimensions.

2.8 Comparing the ST and TT *culturemes* – Establishing overlappings and divergencies

By comparing the *cultureme* of the ST with the hypothetic TT *cultureme* it will be possible to identify common features (universal *memes*), i.e. overlappings of the *culturemes*, as well as their divergences on different levels.

When proceeding to the further stages of the translation process, the *skopos* is the key factor determining:

a. the *memes* to be directly transferred from the source into the target *cultureme*, i.e. those identified as universal (e.g. the use of legal terminology, a formal style, structuring the text in articles), but also *memes* prototypical of the source legal culture, which have to be preserved due to the *skopos* (if the source legal system applies as the governing law or the TT will be used to study source legal culture contracts);

b. the *memes* to be modified (mutated) and adapted to the target *cultureme* (especially if the ST is used as a blueprint for a target contract text adapted to the target legal culture);

c. the extent and depth of mutation which the ST *memes* have to undergo. This can reach from changes in the surface structure, such as stylistic adaptations

(substituting the passive voice in Anglo-American contracts with other impersonal forms in Slovene texts) and/or modifications on conceptual level (substituting the Anglo-American concept *consideration* with the related, but by no means equivalent concept of *price* in continental contracts), to completely omitting some *memes* of the source legal culture (e.g. the *whereas clauses* in *Recitals* of Anglo-American contracts) or vice versa, creating new *memes* in the TT, which the ST did not contain, but are required or customary in the target legal culture (when using a German /Slovene sample contract to draft a TT complying with the Anglo-American *cultureme* prototypical elements, such as the *Recital*, *Definitions*, *Warranties and Representations*, etc. will have to be added).

2.9 Final design of the TT

At this stage, the translator will design the final version of the TT, by taking into account the findings of the previous steps and imitating those *memes* of both the source and target *culturemes* which have been identified as complying with the *skopos*. An important guideline at this stage is the awareness that, depending on the *skopos*, *memes* of different legal cultures can coexist in the TT (e.g. if the source legal system is chosen as the governing law, the prototypical content clauses/articles and lexical *memes*/concepts will be maintained in the TT, while on the syntactic, stylistic and pragmatic level *memes* of the target *cultureme* will be introduced).

A corpus study of contract texts has shown that some *memetic* features of contracts have the status of universal *memes* – e.g. the structuring of the text in articles which are very often numbered and titled with corresponding key terms (e.g. *Duration of the Contract*, *Force Majeure*, etc.), a formal and rather impersonal style and the use of complex, long sentences (with extensive use of conditions, qualifications and exceptions), which iconically reflect the complexity and intricacy of contractual elements and relationships.

Contract texts in general are marked by their performative nature which nevertheless requires the use of language-specific structures enabling the realization of the speech acts of establishing and assuming obligations, granting of rights, permitting and prohibiting.

On the lexical level, a universal feature of contracts is the use of technical language, i.e. legal terminology and terminology of other areas of expertise contemplated by the contract. Where due to differences between legal systems cases of non-equivalence between terms and concepts have to be dealt with, one of the following solutions can be applied: using the source-language term in its original or transcribed version, using a paraphrase, creating a neologism (de Groot 1998: 25) or the building of calques and/or borrowed meanings (Mattila 2006: 119-121).

By terminologizing the words and phrases to be used in the contract the risk of divergent interpretations can be avoided. *Definitions and Interpretations* are typical of the *cultureme* of Anglo-American contracts, but if added to any

translated text can undoubtedly contribute to avoiding misinterpretations and communication problems.

The corpus study of contract texts has also indicated that the *Definitions* clause is gradually gaining ground in continental contracts, thus enhancing uniform interpreting and understanding of the terminology used.

In realizing the remaining textual levels of the TT, *memes* prototypical of the target legal culture will be applied. Particular attention is to be paid to the fact that in expressing the crucial contractual relationships, i.e. imposing and assuming obligations and/or granting and exercising rights, the prototypical structures of a given legal language are used. The English *shall* future, which is undoubtedly the most widely used means of expressing obligations in Anglo-American contracts, has a considerably higher pragmatic power than the German or Slovene future tense and should therefore be substituted by other language structures with comparable pragmatic impact, e.g. lexical verbs of the type *sich verpflichten* or *zavezati se* (to undertake, to bind oneself).

2.10 Ensuring the legal security of the TT and the transparency of the translational solutions

Considering the performative nature of legal language, i.e. the fact that utterances in contracts have a decisive impact on the establishing of contractual relationships and are thus binding upon the parties, the translator has to be aware of the risks implied in legal translation and assume the burden of responsibility for potential consequences of (in)adequate translation. In order to reduce this risk, Sandrini (1999: 39) proposes to follow two guidelines. The first requires from the translator to safeguard the legal security of the TT by double-checking the legal foundations of contracts and consulting experts whenever this proves necessary.

The second guideline imposes the transparency of the translational decisions, requiring from the translator to account for his/her translational solutions. When translating contracts, the translator will therefore need interdisciplinary knowledge of the legal systems involved in the translation, as well as of the legal languages and *culturemes* of contract texts.

3. Conclusion

The purpose of the presented translation model is to provide a dynamic framework to the translator's work and raise the awareness as to potential pitfalls which can compromise the quality and functionality of the TT. It is also aimed at stressing the importance of viewing texts as *culturemes*, i.e. established cultural practices which mould the *memetic* levels of texts. In this respect the model also stresses the significance of corpus studies of contract texts for establishing the prevailing *culturemes* in the relevant legal culture. Hence, the translation procedure will yield a cultural hybrid in which *memes* of different legal cultures coexist to best fulfil the intended *skopos* of the TT. A targeted

interdisciplinary approach to legal translation may therefore contribute to divulgating the knowledge and understanding of the different legal languages and cultures and thus enhance intercultural legal communication.

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