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Aspects of Language and the Law: Exploring Further Avenues

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As a discipline fundamentally based on text, the law is singular in its total dependence on language: legislators and drafters craft language to encode the law into text which judges, lawyers, jurists and other legal professionals of all times and climes subsequently interpret by detecting, dissecting and decoding the possible linguistic variations and loopholes lurking in between the lines. The discipline of law is, as such, an intensely metadiscoursal one where terms, structures and even punctuation are the subject of analysis, comment, interpretation and reinterpretation.

Curiously enough, in spite of its highly linguistic nature, this metadiscoursal activity remained largely intraprofessional in that it was essentially confined to specialists of law with little involvement of language specialists. Until relatively recently, the idea that linguists and legal professionals could share a common discipline would probably have been met with astonishment if not scepticism.

The fact that, with rare exceptions, linguists and legal professionals followed parallel directions had a number of consequences, namely that linguists studying the language of the law were not always aware of the issues relevant to law professionals, who, in turn, remained essentially unaware of what the academia could offer them, notably with regard to understanding the whys and wherefores of the specialized language and discourse they used, on the one hand, or, on the other, the vital role of this language as a source of dysfunctional communication with regard to that “other” stakeholder, the lay public.

The advent of English for Legal Purposes as a discipline largely contributed to bridging the gap between the hitherto parallel universes, and today, whether as expert witnesses, translators, teachers, trainers or commentators and analysts, linguists have proved themselves to be an indispensable part of the legal environment (see, for instance, Coulthard, 2005; Shuy, 2002, 2008; Ainsworth, 2006).

Once born, the discipline was identified by a variety of names: “language of the law” (Mellinkoff, 1963; Bhatia, 1987), “legal language” (Tiersma, 1999), “language and [the] law” (Olsen et al, 2009; Hutton, 2009; Solan & Tiersma, 2012), “legal discourse” (Bhatia et al. 2008; Gotti, 2009; Wagner et al, 2014), “legal linguistics” or “jurilinguistics” (Mattila, 2006; Gémar and Kasirer, 2008; Cacciaguidi-Fahy, 2008) or “legilinguistics” (Matulewska, 2013). To this may be added such more specialized but nevertheless dominant sub-domains as, for example, “forensic linguistics” (Coulthard and Johnson, 2007; McMenamin, 2002; Gibbons 2003; Gibbons and Turell 2008) or “legal semiotics” (Kevelson, 1986; Isani, 2006, 201; Wagner & Broekman, 2010).

Like the discipline itself, law-related language fields of study are manifold, ranging from oral to written genres: courtroom discourse (Cotterill, 2003; Eades, 2008; Felton Rosulek, 2015), legal lexicology and lexicography (Šarčević, 1989; Campos, 2011; Prieto-Ramos, 2014), legal genres (Borja Albi, 2007; Tessuto, 2012; Breeze, 2013) or even legal humour (Galanter, 2005; Campos, 2016). The issues regarding the all-important domains of legal translation and interpreting soon became leading lines of academic enquiry both in translation studies and ELP as, for example, such seminal works as those by Cao (2007) in translation, Hale (2004) or Mikkelsen (2014) in interpreting, and, more recently, interpretation at war crimes trials (Elias-Bursać, 2015). Language and law has now come to be a multi-faceted and protean area of study and publications devoted to the subject need, necessarily, to reflect this diversity and evolution, as illustrated for instance, by Freeman and Smith’s *Law and Language* (2013) which offers a wide range of papers dealing with legal philosophy, law and literature, semantics or translations.

This special issue of the *Alicante Journal of English Studies* is intended to celebrate the recognition of the intrinsic cross-disciplinary nexus which, like Siamese twins, joins the disciplines of law and language at the hip, while confirming the wealth and diversity of research and analysis on the subject. It also reflects the transcultural nature of the interest for this area of studies, as evidenced by the fact that the authors of contributions to this volume represent four European countries – France, Italy, Spain and the UK – either through their academic affiliation or country of origin while the papers presented cover five different loci (China, France, Spain, the UK and the USA). The ELP sub-domains covered by the contributions may be broadly – but not restrictively – categorized as belonging to the areas of teaching ELP, translation studies, Plain English and power relations and cross-cultural issues.

Given the traditional and dominant interest of teaching in ELP studies, we have chosen to begin this volume with two contributions related to this field of interest. One of the most prolific areas of publication in ELP relates to the production of handbooks and other pedagogic materials. In this respect, teaching and learning legal English has been greatly facilitated and improved over the years with the increasing availability of quality textbooks like Riley (1995), Krois-Lindner & Translegal (2006) or Brown & Rice (2007). Such is the wealth of materials in this area today, that it now makes sense to carry out an “audit” regarding the availability and suitability of materials in certain areas of ELP, such as Contract and Company Law (Chartrand et al, 2009), international

law (Callanan & Edwards, 2010), civil cooperation (Campos et al, 2013), and criminal cooperation (Campos et al., 2015). In a paper entitled “Teaching Legal English for Company Law: A Guide to Specialism and ELP Teaching Practices and Reference Books” (pages 15-35), María José Álvarez Faedo, from the University of Oviedo (Spain), focuses on English for Company law as one of the lesser explored areas of ELP, beginning with a presentation of subject-domain textbooks used by law teachers in a number of English-speaking universities as a starting point, followed by a critical guide to the course books available on English for company law, with suggestions for additional teaching materials.

Probably one of the most dynamic trends in ELP teaching and learning is that related to its connections to what Campos (1998) calls “soft genres”, i.e. those genres which do not pertain to the technical linguistic core of legal language, but are related to broader law-related issues defined in terms of a holistic language-discourse-culture triangulation.

Fiction is a leading area of research and practice with regard to perceptions and representations it shapes and vectors of the specialized environment of law and there is abundant material on the use of literature in law courses (Baron, 1999; Batey, 1998, and the list compiled by Wigmore in 1922). In this respect, one relatively innovative line of approach concerns contemporary, law-related fiction, whether literature, film and television series, which constitutes a dynamic line of academic enquiry within the framework of what has come to be known as *FASP*, or *fiction à substrat spécialisé*. Characterized by its highly specialised fictional narrative, FASP is a genre identified by Michel Petit (1999) and developed by Shaeda Isani (2004, 2006, 2010). Legal FASP is, without any doubt, the most popular and abundant of FASP sub-genres. This volume offers a contribution by Shaeda Isani and Sandrine Chapon, both from University Grenoble-Alpes (France), entitled “A Socio-Cultural Approach to ELP: Accessing the Language and Culture of Law through Fictional Television Series” (pages 103-118) which explores issues related to using American TV series in the dual perspective of learning about the language and the culture of American law.

The law has always been a source of fascination for classic literary authors as well, two emblematic examples being Shakespeare (*The Merchant of Venice*) and Charles Dickens (*Bleak House*). Researchers interested in the language of the law have long evinced a particular interest in The Bard’s knowledge of the law (Sokol & Sokol, 2000; Heinze, 2013), as well as in Modernist literature (Dolin, 1999). In this volume, José Manuel Rodríguez Herrera, from the University of Las Palmas de Gran Canaria (Spain), presents an original angle of approach in a paper entitled “Shakespeare’s Legal Wit: Evolution of the Translation of Shakespeare’s Legal Puns into Spanish from the 20th to the 21st Century” (pages 165-181), in which he sets out to illustrate how Shakespeare’s legal puns have been translated into Spanish through the ages and how omissions or inappropriate renderings have, at times, failed to do honour to the Bard’s imaginative and accurate use of legal language.

Given the global dimension of professional exchanges and transactions today, law has rapidly evolved from its previously introspective character to embrace its new

international and cross-cultural dimension. In an area where not only the language, but also the referential framework may greatly vary, the study of legal discourse across different cultures has become a leading area of academic research (Mattila, 2006; Bhatia et al, 2008). Maurizio Gotti, a widely-published leading ELP specialist from the University of Bergamo (Italy), places his paper, “Aspects of Arbitration Discourse: an Insight into China’s Arbitration Law” (pages 83-101), in one such cross-cultural locus by studying the English version of an important legal instrument and analysing how a different legal and cultural translation reflects specific linguistic and legal traits.

In a similar comparative approach, Marion Charret-Del Bove and Laurence Francoz-Terminal, both from the University Jean Moulin Lyon 3 (France), choose to focus their analysis on two close legal cultures separated by the immense divide of the Atlantic Ocean and over two centuries of history: the UK and the USA. In a paper entitled “How common is the common law? Some Differences and Similarities in British and American Superior Court Decisions” (pages 59-82), they analyse a number of the similarities and differences which exist between the language and procedures of UK and US Supreme Court decisions, and in so doing underline the need for vigilance even, or perhaps especially, when working in the context of legal cultures deriving from the same historical tradition.

One of the leading fields of enquiry in the area of law and language studies today concerns the long neglected question of dissymmetrical power relations resulting from the obstacle that the archaic language of law constitutes for one of the primary stakeholders, the lay public. By persuading practitioners and policymakers to take an interest in the study of communication between legal professionals and the general public, it is perhaps in this field that linguists have succeeded in bringing about wide-sweeping and beneficial changes. This movement, which came to the fore with the Plain English Campaign, (Benson 1985; Butt, 2002; Assy, 2011; Azuelos-Atias, 2010), has undoubtedly contributed to reflection on the extent to which lay users may be denied better access to justice and fairness on account of the fossilized language of the law. In this respect, scholars have cast light on a number of issues, ranging from the general (Flesch 1979; Steinberg, 1991; Asprey, 1996), to the very specific, such as, for example, the use of pronouns, (Eagleson, 1994-1995; Ching, 2001), or the presence and survival of latinisms (Balteiro & Campos, 2010; Dossena, 2005). This volume shows the continuing interest for this area of study, with three papers devoted to this topic. Christopher Williams, from the University of Foggia (Italy), a recognised expert in this field whose work has been evoked in Parliament and cited in the Hansard, offers in “Changing with the Times: The Evolution of Plain Language in the Legal Sphere” (pages 183-203), a detailed description of the battle for clarity, with an overview of the history of the Plain English movement in the domain of law, its main successes, areas of resistance and a glimpse of what the digital world will imply for legal language. In another paper, Anne Brunon-Ernst, from Panthéon-Assas University (France) also pursues the legal language/lay public line of enquiry in a paper entitled “The Fallacy of Informed Consent: Linguistic Markers of Assent and Contractual Design in Some E-User Agreements” (pages 37-58) which focuses on strategies used in e-user agreements

to “nudge” consumers into accepting e-contracts without really being aware of what they are consenting to in each case. In a similar vein, María Ángeles Orts from the University of Murcia (Spain) addresses the power dynamics underlying this issue in her contribution entitled “Opacity in international legal texts: generic trait or symbol of power?” (pages 183-203) in which she argues that the opacity of legal texts, far from being intrinsic to the complexity of legal language, is an intentionally cultivated strategy used by the legal classes to perpetuate its dominance and superiority over the lay recipients of legal texts. Catalina Riera from the University of Alicante (Spain), on the other hand, presents a more positive analysis in her paper entitled “Plain English in Legal Language: A Comparative Study of Two UK Acts of Parliament” (pages 147-163), in which she demonstrates that the tireless struggle led by activists and scholars has produced tangible changes in legislative drafting. Through a comparative analysis of two acts on the same subject matter (the Water Act), she demonstrates how syntax has indeed been considerably simplified over the years.

The editors of this special volume devoted to different aspects of law and language studies trust it will be of interest to researchers and practitioners alike and act as a “nudger” for future developments in an area of study called upon to evolve dramatically in the context of globalization and new technologies. They would also like to take this opportunity to express their gratitude and thanks to the reviewers who agreed to take on that unsung and unrecognised but all important chore of peer review.

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E s s a y s

Teaching Legal English for Company Law: A Guide to Specialism and ELP Teaching Practices and Reference Books

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ABSTRACT

This article discusses one of the less mainstream areas of ESP teaching, that of legal English for students of company law. The author begins by analysing the approach used by subject-domain specialists themselves and the current criticism regarding the conservative textbook approach which continues to dominate teaching theory in this area. To this effect, she presents the results of a study carried out from October 2014 to March 2015 regarding subject-domain textbooks most used in Law Schools in Australia, Britain, Canada and the USA. The paper then addresses the question of teaching legal English to students of company law. After a brief outline of the three main theories underlying language teaching –behaviourist, cognitive and communicative– the author provides a critical guide to the main course books available to teachers in this rarefied area of specialised language learning, listing the types of exercises proposed, and evoking their overall strengths and weaknesses. To conclude, she suggests means of supplementing course book material.

Keywords: Company Law, ESP, Legal English, reference books

The main concerns of ESP have always been, and remain, with needs analysis, text analysis, and preparing learners to communicate effectively in the tasks prescribed by their study or work situation.
(Dudley-Evans & St John, 1998: 1)

To avoid venturing into “the deep waters of the definition of company law” (Bradley and Freedman, 1990: 398), as a non-specialist of the domain, we propose to adopt the definition offered by the online *WebFinance, Inc. Business Dictionary* (2015), according to which company law is the “legislation under which the formation, registration or incorporation, governance, and dissolution of a firm is administered and controlled”,² and, as such, covers two main fields: corporate governance and corporate finance. The former, in the UK, concerns the constitutional separation of powers, shareholders’ rights, employees’ rights, directors’ duties and corporate litigation. The latter deals with debt finance, equity finance, market regulation, accounts and auditing and mergers and acquisitions. However, the focus of this article is not on the subject matter from a legal or economic perspective, but from that of what may be considered a contributory science, i.e., the teaching of English for Legal Purposes (henceforth ELP).

In his article entitled “Using theory to study Law: A Company Law Perspective” (1999: 198), Brian R. Cheffins, professor of law at the University of Cambridge, evokes the role of contributory sciences and interdisciplinarity in the study of law and defines theoretical scholarship “as the study of law from the ‘outside’”, which “implies the use of intellectual disciplines, external to law, to carry out research on its economic, social or political implications. [T]ypically, the techniques and approaches are in fact borrowed from the social sciences and the humanities”.

With this perspective in mind, this article approaches the teaching of company law within the legal English framework from an interdisciplinary and pedagogical point of view. In a first part, we provide a brief overview of the current state of research on the teaching of company law as a specialism, followed by a discussion on new trends in the field. In a second part, the focus shifts to ELP and we discuss several references on teaching legal English for company law.

1. The classic textbook approach to teaching company law

Before discussing concerns related to teaching the specialised language and discourse of English for company law, we propose to examine dominant trends regarding the teaching of the specialism itself.

In her article entitled “The story of a Phoenix, a Chef and some Raptors: Piecing together the Company Law Jigsaw” (2010: 4), Marion Oswald, a solicitor and senior lecturer in law, presents a survey related to the teaching of company law conducted in 1989 to “gather information about company law teaching practices across a range of institutions”, the results of which were published in 1990 in an article entitled “Company law on degree courses: survey report”, authored Ian Snaith, an Emeritus Law Professor at the University of Leicester. Oswald (2010: 4) points out that Snaith’s findings indicate an essentially conservative text-book based approach to teaching company law with a focus on ‘black-letter’⁴ law dominating. Law classes typically adopted the following approach:

A course consisting of weekly lectures and fortnightly tutorials assessed by examination only is the paradigm. The recommendation of a textbook and a casebook is usual and the provision of materials specially prepared by the institution is rare. Course content tends to follow the order and substance of textbooks (Snaith, 1990: 182).

According to Bradley and Freedman such a text-book based approach "... fails to prepare the student for anything other than the examination (or maybe a nervous breakdown)" (1990: 399).

Snaith offered three possibilities that could serve as "conceptual frameworks" to be used "for the selection and organisation of material":

[F]irst, an analysis based on the different interests of various groups, secondly a focus on the way company law affects small businesses and multinationals and thirdly an analysis based on view(s) of society. Snaith acknowledged that none of the possibilities offered "a complete solution" but suggested that further debate could assist company law teachers in providing stimulating courses that developed students' skills (Oswald, 2010: 4-5).

Oswald reports that improving the methodology employed to teach Company Law remains a subject of concern and that researchers and teachers agree in rejecting "a purely doctrinal black-letter approach" (Oswald, 2010: 5) in favour of a broader interdisciplinary outlook. However, they also agree that the need for a broader outlook is essential and that "company law cannot be segmented, even at the start...one needs to start with some idea of the completed picture". To achieve this, "a narrative approach is essential, through lectures and seminars or through books" (Bradley and Freedman, 1990: 339). Oswald offers a brief review of different academic texts⁵ on company law which attempt to offer a new approach that explores the underlying social, political and economic background to the corporate form:

rather than following a format dictated by a core textbook (perhaps more readily assessed by a final examination), it was considered more beneficial to devise a teaching and assessment model that combined an exploration of the law with a narrative, law-in-context, skills-based and experiential approach, and which was supported by a specially prepared course handbook (2010: 6-7).

She concludes by praising the success achieved in designing company law courses in this perspective, arguing that a course "which develops a broad and contextual understanding of the law, and which encourages in students a flexibility and adaptability of approach, may play a small part in preparing students for the challenging legal, economic and social decisions that they will face in the future" (Oswald, 2010: 11).

2. New trends in the teaching of company law

In view of the international context of the teaching of company law, it is worth pointing out that differences of approach exist, especially between the UK and the USA. In this respect, Brian R. Cheffins points out that “the controversy which has arisen in the United States concerning the relationship between law and theory has, as of yet, attracted little attention in Britain” (1999: 197). He nevertheless goes on to suggest that “the emergence of theoretical company law scholarship has not been restricted to any one country. Australian, British and Canadian academics have all carried out important interdisciplinary work” (1999: 209).

Given that the results of the survey discussed above were published 25 years ago, and Oswald’s opinion that the didactic approach to this subject has begun to change, we decided to carry out a study to gain further insight into the approaches used by company law teachers by analysing the type of academic texts and methodology in use in Law schools in the United Kingdom, the USA, Australia and Canada by law lecturers teaching company law.

The study was carried out from October 2014 to March 2015 and concerned the type of academic references and methodology used in law schools in the United Kingdom, the USA, Australia and Canada by law lecturers teaching company law in English over the last fifteen years. Our findings reveal that the most frequently used academic texts on company law are the following (presented in chronological order):

Clive M. Schmitthoff and James H. Thompson’s (eds.). (1992). *Palmer’s Company Law* (London: Stevens): a major reference book. For over 100 years Palmer has provided students and professionals with essential commentary on company law, as well as with revised and up-to-date narrative and source materials.

Simon Goulding. 1998. *Principles of Company Law* (London: Routledge Cavendish): a volume that offers the reader a brief explanation of each issue in company law, a summary of the rules as well as a number of important cases which are analysed and discussed.

Robert Pennington. 2001. *Pennington’s Company Law*. (Kiddlington: Butterworths): considered a classic text and currently in its third edition, this volume is one of the leading works on the subject, with a strong focus on cases and their impact on the existing companies Act.

J. Boyle and Richard Sykes (eds.). 2004. *Gore-Browne on Companies* (Bristol: Jordans, Ltd.): originally published in 1873, the 44th edition of the classic work on company law by Sir Francis Gore-Browne is revised by the editors to take into account new legislation with commentary on issues arising from the Companies Act 2006.

Paul Davies and Sarah Worthington. 2012. *Gower & Davies: Principles of Modern Company Law*. (London: Sweet & Maxwell): a comprehensive text which offers a clear analysis of modern company law, in spite of a certain number of mistakes in relation to

section numbers which still pervade the text in its third edition since the Companies Act 2006.

Brenda Hannigan. 2012. *Company Law* (Oxford: Oxford University Press): a full and thorough academic text and a good source of alternative reading to Gower and Davies. It brings clarity and offers in-depth analysis to a company law landscape that was considerably altered by the 2006 ground-breaking Companies Act.

Len Sealy and Sarah Worthington. 2013. *Cases and Materials on Company Law* (Oxford: Oxford University Press): a well-researched account of the law, which also offers students extracts from the key cases and materials.

Alan Dignam and John Lowry. 2014. *Company Law* (Oxford: Oxford University Press): a reliable guide for students of law at all levels. The book offers a good introduction and its concise texts explain the intellectual challenges each area of the law presents for students.

Derek French, Stephen Mayson and Christopher Ryan. 2015. *Company Law* (Oxford: Oxford University Press): sometimes described as dense, full, factual but boring, its accompanying Online Resource Centre, which provides quarterly updates, is certainly a plus. Besides, it also includes the 2015 Acts, Regulations and Deregulation Act.

Alongside these major reference books that have been and are still used in their updated versions, other new references offering new approaches to company law have been now emerged and, apparently, welcomed in spite of the traditional teaching practices and methods adopted by most company law teachers, a phenomenon that Cheffins (1999: 213-214) comments:

[There are] a variety of possible explanations for the absence of a hostile reaction to the emergence of new approaches in Company Law. First, indifference and ignorance might have played a role. Lawyers and judges who choose not to pay attention to the academic literature are unlikely to react in an adverse manner to new trends. A second possible answer is that practitioners who do follow academic writing are unconcerned by the change in approach because a substantial amount of doctrinal scholarship is still being produced. In Britain, for example, both academics and practising lawyers continue to contribute to a rich body of company law literature devoted to the analysis of cases and the description of statutory measures. Third, those members of the legal profession who are familiar with theoretical company-law literature may be favourably impressed with the work which is being done. There is in fact some anecdotal evidence which supports this proposition and it probably should not be surprising that this is so.

In the last fifteen years, lecturers teaching company law have adopted a broader perspective and incorporated other means of teaching company law⁶ rather than through the classic “textbook” approach, as the following examples show:

- Taking into account that company law is a subject that draws on both statutory and case material, and that statutory material is complex, students are advised to

search for additional material on their own after reading the descriptions in the textbooks prescribed. The idea is that students should become familiar with the structure and drafting of company legislation to gain better understanding of some of the topics covered in the course.

- The use of tutorial sheets, in addition to the relevant case material, including, for instance, relevant case reports from Paul L. Davies' *Gower and Davies' Principles of Modern Company Law*, and Hicks and Goo's *Cases and Materials n Company Law*. Students are also encouraged to consult full reports of cases. Since the facts of the cases are frequently complex, diagrams of company structures and transaction illustrations can facilitate students' understanding of the facts of the cases.
- Tutorials are also concerned with making students consider and discuss issues such as what interests are relevant in the regulation of companies and whether the present structure of company law is adequately designed to meet those interests.
- To add an element of "realism" to the course, some lecturers allocate a specific listed company (i.e., one whose shares are traded on the London Stock Exchange) to each tutorial group which it must subsequently monitor. The companies selected all have websites which enable students to supplement the information provided by lecturers. They are required to collect information on "their" company by visiting <http://www.ft.com/markets/uk> and doing a search from there via "markets and funds data" for the evolution of share prices, etc. Students are also encouraged to check the business pages of other newspapers for comments regarding "their" company, it being up to them to assess the reliability of the source (specialized journal, quality newspaper, official source, etc.). They are also invited to embark on monitored web quests to search for information that may help them solve a problem regarding a particular case.

3. Teaching legal English to students of company law

After the brief overview of teaching trends in company law by subject-domain specialists, we now focus on the teaching of English in relation to this area of studies.

The change in teaching approaches to company law at law faculties –i.e., the introduction of new elements in addition to the classic academic text– in the last fifteen years is an interesting evolution in that it is the opposite to the evolution in English for Specific Purposes (ESP). In the late 1990s there was still a scarcity of what might be considered "textbooks" in ESP, leading Dudley-Evans and St John to conclude that ESP practitioners had often not only to plan the course they taught, but also to create and provide the materials for it: "[For ESP practitioners] it is rarely possible to use a particular textbook without the need for supplementary material, and sometimes no really suitable published material exists for certain of the identified needs" (1998: 14). The scarcity of published material is a problem ESP teachers have been facing, to a

greater or lesser degree according to the subject-domain, since the inception of ESP – a very different situation to that of speciality lecturers, who usually recommend their students buy a textbook and are seldom called upon to create or otherwise prepare “customised” materials for them.

The absence of easily available pedagogic resources naturally led to the role of ESP teachers as “providers of material [a task which] involves choosing suitable published material, adapting material when published material is not suitable, or even writing material when nothing suitable exists” (Dudley-Evans & St John, 1998: 15). As such, the ESP teacher’s role as a provider of teaching materials may be summed up in terms of three variables:

- a) Choosing suitable published material;
- b) Adapting material when published material is not entirely suitable;
- c) Creating material when nothing suitable exists.

The first variable involving “choosing suitable published material” for teaching legal English for students of company law, led us to analyse existing didactic materials available in English for company law. We retained six recent publications which we esteemed worthy of interest:

Ian Mackenzie. 2007. *Professional English in Use: Finance*. Cambridge: CUP.

Gillian D. Brown & Sally Rice. 2007. *Professional English in Use: Law*. Cambridge: CUP.

Jeremy Day with Amy Krois-Lindner and Matt Firth. 2008. *Introduction to International Legal English*. Cambridge: CUP.

Marcella Chartrand, Catherine Millar and Edward Wiltshire. 2009 (1997). *English for Contract and Company Law*. Andover: Sweet & Maxwell.

William R. McKay’s and Helen E. Charlton. 2011 (2005). *Legal English: How to Understand and Master the Language of the Law*. Harlow: Pearson / Longman.

Amy Krois-Lindner. 2011. *International Legal English*. Cambridge: CUP.

An important parameter to be borne in mind in this context is the profile of the target public both with regard to the language level and specialised knowledge of the subject-domain. As regards the language level, the students concerned were a group of 25 second-year law students at the University of Oviedo whose level of English was rated at a minimum of B1 (which is often the case in Law Schools all over Europe). Concerning specialised knowledge, the ELP teacher is confronted with a major handicap in this particular context in that these students do not study company law before the second semester of their second year whereas their ELP course takes place in the first semester. As such they have little or no knowledge of company law and their legal English course is, in fact, their very first exposure to their future area of

specialisation. In view of the above elements, the ELP teacher needs to factor in a relatively low level of language competence and subject-domain knowledge when designing the course.

What of learner profiles with regard to expectations? On the first day of class students are always asked about their expectations and how they would like to learn the specialised language and discourse of company law. Students tend to show a preference for a textbook approach, particularly those students who come via exchange agreements with their universities (Erasmus, for example). It often happens that these students have already taken a legal English course at their own universities based on a textbook approach and expect, as such, to dispose of a “textbook” of legal English and be examined on the basis of its content. Spanish students also showed a preference for disposing of a prescribed book on the grounds that other options would turn out to be more expensive and complicated for them. It is interesting to note that these first impressions were to change completely by the end of the course.

In this context of pedagogic expectations, we also need to take into account such theories of learning, as the Behaviourist Theory, the Cognitive Theory and the Communicative Approach. If the first “portrayed the learner as a passive receiver of information”, the second “takes the learner to be an active processor of information” (Hutchinson & Waters, 1987: 43), whereas the third, first postulated by Dell Hymes (1972), presents teacher and learner as participants in the negotiation of meaning and communication.

The Behaviourist Theory was postulated by Pavlov, in the Soviet Union, and promoted by Skinner in the United States. It regards learning as a “mechanical process of habit formation and proceeds by means of the frequent reinforcement of a stimulus-response sequence” (Hutchinson & Waters, 1987: 40). This led to the assumption that second language learning should imply a reflection and imitation of the perception speakers may have of the process of learning their mother tongues. Accordingly, translating was tabooed since the sequence learners were expected to conform to when learning new elements was that of ‘hear, speak, read and write’. It was also believed that effective learning was achieved through frequent repetition and the immediate correction of all errors. For behaviourists, many detractors believed, learners were only instruments to be manipulated by their teachers.

As regards the Cognitive Theory, Hutchinson (1987: 43) explains that “the basic teaching technique associated with a cognitive theory of language learning is the problem-solving task”. The cognitive theory of learning regards second language acquisition as a thinking process which is conscious and reasoned, and in which learning strategies are consciously used. Learning strategies are defined as ways of processing information to improve comprehension, learning or retention of information, in contrast to the behaviourist approach to language learning which considers language learning an unconscious and automatic process. The cognitive approach insisted on the importance of meaningful practice and, as such, believed in inductive methods, i.e., rules were elicited after exposure to examples.

Communicativists, on the other hand, confer more importance to the semantic content of language learning. In other words, students do not learn the grammatical form before meaning but through it. Therefore, “learning activities are selected according to how well they engage the learner in meaningful and authentic language use (rather than merely mechanical practice of language patterns)” (Richards & Rogers, 2014 [1986]: 90).⁷ If cognitivists postulate the problem-solving task as their basic teaching technique, communicativists claim that theirs is a task-based approach.

Accordingly, the communicative method uses conversation, reading, listening comprehension and writing in order to define its objectives precisely. To that aim, this approach resorts to all means of communication and media, such as newspapers, television, cinema, radio, computers, the Internet, etc., which are commonly used when people seek and exchange information. As such, the textbook is no longer the supreme means of language learning in the classroom.

In the specific context of English for company law, there are a number of publications which focus on this area of ELP. In the context of this study, and with a view to guiding present and future teachers in the relatively unexplored area of legal English for company law, we undertook to analyse these publications to determine which approach –behaviourist, cognitive or communicative– the authors privileged judging from the exercises proposed, and consider which would be most suitable in the context of teaching legal English for company law in a dynamic interdisciplinary perspective.⁸

- **Ian Mackenzie. 2007 (2006). *Professional English in Use: Finance*, Cambridge, CUP.**

This author devotes two chapters out of fifty (chapters 5 to 6 of the section “Accounting”) to “Company Law”, in a book intended for the teaching of financial English to students.

Table 1. Chapters on company law in Mackenzie’s *Professional English in Use: Finance*.

Unit 5	Company Law p. 16	A. Partnerships B. Limited Liability C. Founding Companies
Unit 6	Company Law p. 18	A. Private and public companies B. AGMs

Mackenzie’s target students are “intermediate and upper-intermediate learners of business English”, and the objective defined is that of improving learners’ financial vocabulary (Mackenzie, 2007 [2006]: 6). Each unit covers two pages, the page on the left presenting a text defining each of the topics to be dealt with, while the page on the right contains two or three exercises which are the practical counterpart for the theory displayed on the page opposite.

Table 2. Typology and frequency of exercises in Mackenzie's *Professional English in Use: Finance*.

Exercises proposed	Frequency
Match the two parts of the sentence.	1
Find words from A and B opposite with the following meanings	1
Make word combinations from C opposite using words from box. Then use appropriate word combinations to answer the questions below.	1
Complete the document. Look at A opposite to help you.	1
Complete the table with words from A and B opposite and related forms.	1
Are the following statements true or false?	1
Over to you: questions to reflect on re-using elements learnt in each unit, relating it to everyday activities.	2

This method may be considered as being more influenced by the communicative approach, given the attempt to contextualise what students have learnt in relation to their everyday activities and the absence of any kind of emphasis on repetition. In spite of a certain number of advantages, the book presents a major drawback in that all the units present exactly the same structure, which tends towards a certain degree of monotony. Additionally, it includes no audio-visual material. Consequently, this book would lend itself better to selective use of certain exercises.

- **Gillian D. Brown and Sally Rice. *Professional English in Use: Law*, Cambridge, CUP, 2007.**

These authors devote ten chapters out of forty-five (chapters 19 to 28, i.e., nearly one fourth of the book) to the section "Law in Practice", where they use examples from diverse aspects of company law.

Table 3. Chapters on company law in Brown and Rice's *Professional English in Use: Law*

Unit 19	Business Organisations p. 44	A. Sole trader B. Partnerships Liability C. Limited Companies
Unit 20	Formation of a Company p. 46	A. Incorporation B. Memorandum and Articles of Association

Unit 21	Raising capital by share sale p. 48	A. Share capital B. Share value C. Rights attaching to shares
Unit 22	Debt financing: secured lending p. 50	A. Granting security B. The terms of a charge
Unit 23	Company directors and company secretaries p. 52	A. Qualifications and duties of a company director B. Qualifications and duties of a company secretary
Unit 24	Insolvency and winding up p. 54	A. Insolvency B. Insolvency scenarios
Unit 25	Alternative dispute resolution p. 56	A. Alternative dispute resolution B. ADR procedures
Unit 26	Corporation tax p. 58	A. Incorporation B. Memorandum and Articles of Association
Unit 27	Mergers and acquisitions p. 60	A. Mergers and acquisitions B. Dealing disclosure requirements
Unit 28	Anti- competitive behaviour p. 62	A. Competitive law B. Competition inquiry C. Information gathering, hearings, and remedies

According to the authors, the target students are “learners who have reached an upper-intermediate or advanced level of English”, and may be “lawyers or litigators, paralegals or legal researchers or trainee lawyers” (2007: 6).

Once again, each unit covers two pages, the page on the left presenting a text related to a specific topic, while the page on the right contains two or three exercises which are the practical counterpart for the theory displayed in the page opposite.

Table 4. Typology and frequency of exercises in Brown and Rice’s *Professional English in Use: Law*.

Exercises proposed	Frequency
Matching sentence segments.	3
Replacing words and phrases underlined with alternative words and phrases from A and B opposite.	4

Exercises proposed	Frequency
Making word combinations from C opposite using words from box. Then using appropriate word combinations to answer the questions below.	2
X's client has sent an e-mail asking about shelf companies. Complete X's reply. Look at A opposite to help you.	6
X shows his client a sample memorandum. Replace underlined words and phrases with appropriate legal terms from A and B opposite.	1
Completing definitions. Look at A opposite to help you.	1
Complete this extract with words from the box. Look at A opposite to help you.	3
Complete the table with words from A and B opposite and related forms.	3
Find answers to Y below. Look at A opposite to help you.	3
Choose the correct word in brackets to complete the sentence. Look at A opposite to help you.	2
True or false statements	1
Over to you: questions to reflect on re-using elements learnt in each unit and relating them to everyday activities.	1
Over to you: same as above, but with supporting web page.	9

This book tends to derive from the communicative approach, given the attempt to contextualise what students have learnt in relation to their everyday activities and the absence of emphasis on repetition. Nevertheless, it is worth pointing out that, since both this book and the previous one belong to the same series, it is not surprising that they offer a similar approach. As in the previous case, students are left with a sense of repetition given that all units have the same structure. Additionally, the book includes no audio-visual material. As such, the book is best used on the basis of selective use of exercises in combination with other materials.

Amy Krois-Lindner and Matt Firth. 2008. *Introduction to International Legal English*, Cambridge, CUP.

These authors devote one unit out of nine (unit 5) to “Company Law”, in which they use examples from various aspects of this branch of the law to introduce students to legal English for company law. Two Audio CDs are included with the book.

Table 5. Chapters on company law in Krois-Lindner and Firth's *Introduction to International Legal English*.

Unit 5	Company Law p. 50	A. Company Law
		B. Course in Company Law
		C. Breach of Companies Act 2006
		1. Lecture on Company Law
		2. Directors' meeting
		Speaking
		1. Role-play: lawyer-client interview
		2. Role-play: lawyer-client negotiations
		Key terms 1
		— Who does what in Company Law?
		Key terms 2
		— Public relations
		— Text analysis: reading a statute
		Language use
		— Discussing advantages and disadvantages

The target students for this “intermediate level course” are “law students or newly-qualified lawyers who need to use English in their legal work or studies”.⁹ The unit covers 9 pages and it offers a more diversified range of activities –reading, listening, writing and speaking– in comparison with other books.

Table 6. Typology and frequency of exercises in Krois-Lindner and Firth's *Introduction to International Legal English*.

Exercises proposed	Frequency
Reading	3
Listening	3
Writing	1
Speaking	2
Use of English	5
Text analysis	1

Like the previous methods analysed, this method is also influenced by the communicative approach. The book seeks to “develop the four key skills of reading, writing, listening and speaking” and “is suitable for learners who may not have extensive knowledge of the law, taking them to the point where they can begin using the International Legal English course book and start preparation for the Cambridge

ILEC examination”.¹⁰ However, this book tends towards the cognitive approach as well since it also includes case studies.

Even if this book would appear to be more suitable for use in the classroom because of its combination of the cognitive and communicative approaches, given that its units – though much longer than the ones in the previous two manuals and including audio material– still tend towards a certain degree of repetition, it would thus need to be supplemented by other supports to avoid monotony.

- **Marcella Chartrand, Catherine Millar and Edward Wiltshire. 2009 (1997). *English for Contract and Company Law*, Andover, Sweet & Maxwell.**

The three authors of this book devote three chapters out of six –chapter 4 (The birth of a company), chapter 5 (The life of a company) and chapter 6 (The death of a company)– to “English for Company Law”. Their target students are “non-native English speakers with the English language skills necessary to carry out their legal studies effectively”.¹¹

Densely presented, each unit covers from twenty to thirty pages. The book’s avowed aim is to “enable students to familiarise themselves with the documents they will come into contact with [through] a high level of specific legal content and practical materials, including cases, legislation, legal writings and examples”.¹²

Table 7. Typology and frequency of exercises in Chartrand, Millar and Wiltshire’s *English for Contract and Company Law*

Exercises proposed	Frequency
Reading comprehension	12
Reading (no comprehension exercises)	12
Discussion	11
Filling in the blanks	17
Crosswords	3
Matching exercises	6
Sentence completion	4
Note-taking	1
Summary writing	3
Rewriting	3
Writing	5
Completing grids	2
Text completion	2
Sentence expansion	1
Substitution	1
Vocabulary	1
Putting words in the right order	1

This method is influenced both by behaviourist and cognitive theories. In spite of the density of the units, the purpose of each exercise is not always apparent. Besides, despite the fact that the new edition includes a few crosswords, its lack of audio-visual

material, the book format, and not-very-varied exercises are as out-dated as that of its previous edition.

- **William R. McKay, Helen E. Charlton and Grant Barsoum. 2011 (2005). *Legal English: How to Understand and Master the Language of the Law*, Harlow, Pearson / Longman.**

These three authors devote five chapters out of eleven –chapter 1 (Company formation), chapter 2 (Board meetings), chapter 3 (Shareholders meetings), chapter 4 (Boardroom battle!) and chapter 5 (Marketing agreements)– to part 1 “Business Law and Practice”, in which they use examples from diverse aspects of company law. Their target students are “those aiming to study or presently studying law within an English language jurisdiction (whether for academic or vocational training purposes) [and] those presently involved in the legal or business domain whose work brings them into contact with legal practice” (McKay & Charlton, 2005: 1). The book’s aim is to enhance communication skills through a task-based methodology. Each unit covers from six to thirteen pages.

Table 8. Typology of exercises in McKay, Charlton and Barsoum’s *Legal English: How to Understand and Master the Language of the Law*

Exercises proposed	Frequency
Reading comprehension	6
Drafting documentation	7
Letter writing	1
Role-play	2
Interviewing & advising	1
Use of English	5

This method, as the previous ones, has also been influenced by the cognitive theory, given the presence of task-based exercises, although it also includes a number of role-play exercises, so popular with behaviourists. Unfortunately, as in the previous case, the book retains the out-dated format of the first edition, which does not make it appealing to students.

- **Amy Krois-Lindner. 2011 (2006). *International Legal English*, Cambridge, CUP.**

This author devotes three units out of fifteen –unit 2 (Company Law: Company formation and management), unit 3 (Company Law: Capitalisation) and unit 4 (Company Law: Fundamental changes in a company)– to “Company Law”, in which she uses examples from diverse aspects of this branch in an ELP perspective. Two audio CDs and a CD-ROM with practice tests are included with the book. The target students for this “upper-intermediate to advanced level course” are “learners who need

to be able to use English in the legal profession”, and “the course is intended for law students and practising lawyers alike” (2007 [2006]: 2). Each unit covers from 12 to 16 pages and proposes different exercises to practise reading, listening, writing and speaking skills, as well as general English usage.

Table 8. Typology of exercises in Krois-Lindner’s *International Legal English*

Exercises proposed	Frequency
Reading	11
Listening	6
Writing	3
Speaking	3
Use of English	36
Research tasks, redirecting students to a specific web-site	4

The author clearly indicates that the book “has been written to prepare candidates for the New International Legal English Certificate (ILEC) examination developed by Cambridge ESOL and TransLegal” (Krois-Lindner, 2007 [2006]: 2). The presence of task-based exercises also indicates the influence of cognitive theories even though it also contains material characteristic of a communicative approach. Overall, this book provides a good pedagogic method, although the complexity of some of the exercises proposed could be a drawback to certain students. As such, it would benefit from being combined with other types of tasks and exercises.

To sum up this brief analysis of textbooks which present a certain interest to teachers of legal English for students in Company Law and the different theories they derive from, it is interesting to note that four out of the six books chosen have been designed in the task-based perspective of the cognitive theory, four of them in the communicative perspective and two present some influence from the behaviourist approach, thus clearly indicating the decline of behaviourist theories and the dominance of cognitive and communicative approaches.

4. Conclusion: Suggested methodology for the teaching of the legal English for students of Company Law

Contrary to Dudley-Evans and St John (1998: 15) who lamented the fact that ESP teachers had little published material to avail of, this study shows that, even in the context of such a specialised subject-domain as company law, there is a lot of the published material which is highly interesting.¹³

Nevertheless, given that the pedagogical perspective recommended in this article is based on an interactive multidisciplinary approach, it naturally follows that additional input in the direction of devising and analysing other ways of encouraging students’ participation (problem-solving tasks, case studies and business simulations with original documents, etc.) is inevitable, notably with regard to presenting students with such real-

life professional situations of communication as presentations, negotiations, telephoning, meetings, discussions, etc. In this respect, we would recommend two sources of pedagogic materials which derive from two different spheres: on the one hand, we strongly recommend reinforcing subject-domain knowledge through the use of sources relating to company law used by company law lecturers, professionals, specialised newspapers, etc.; on the other hand, another interesting and rich source of pedagogical material would also be the use of fiction relating to specialised fields, notably, in this age of visual literacy, films related to the world of companies and finance, such as *The Social Network* (2010), *Wall Street 2. Money Never Sleeps* (2010), *Erin Brockovich* (2000), *A Civil Action* (1998) or *Wall Street* (1987), to mention but a few.¹⁴ In ESP, as in law, there is no reason why lecturers should be restricted to a specific method; they should, on the contrary, feel free to combine existing academic texts and materials with non-academic ones and to create their own “customised” material.

Notes

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2. A definition offered by the WebFinance, Inc. *Business Dictionary* (2015). In the United Kingdom, Company Law (or Corporate Law) regulates corporations formed under the Companies Act 2006. Being the primary legal entities to organise and run business, companies are also subject to the Insolvency Act 1986, the UK Corporate Governance Code, European Union Directives and court cases. See Kershaw (2009), Kraakman et al. (2009), Lowry and Dignam (2010), Sealy and Worthington (2010) and Topham (1978).

3. Black Letter Law, according to *Duhaime’s Law Dictionary*, is “a principle of law so notorious and entrenched that it is commonly known and rarely disputed”. (<http://www.duhaime.org/LegalDictionary/B/BlackLetterLaw.aspx>). Retrieved 2015/12/17.

4. “Hicks has argued for a company life-cycle approach by the use of an on-going case study, an approach put into practice in Cases and Materials. In *Company Law in Context*, Kershaw deploys a case-study following ‘Bob’s Electronics’ as the business develops from sole trader, to private limited company to public limited company. Kershaw’s aim ‘is to place the student in the shoes of the business actor; to enable the student to empathise with the problems which a business person faces in setting up a business and the problems she is faced with as the company is formed and developed’” (Oswald, 2010: 5).

“Kingsford Smith advocated a law in context approach to the teaching of company law. She said that such an approach ‘allows policy appraisal to co-exist with theory, doctrinal analysis with interdisciplinary insights. It invites a variety of approaches to teaching and learning... Importantly, it provides tools to ensure that students recognise that there are wider issues at stake than technical rules and norms of corporate practice.’ She acknowledged that the use of problem-based learning should be combined with other techniques; an approach that

overly focused on the transactional context of rules risked substituting ‘another type of narrowness of vision for the much criticised over concentration on doctrine’” (p. 5).

“Copp supported the approach of Cheffins who argued that an interdisciplinary theoretical approach to the teaching of company law has a number of valuable benefits. Although a doctrinal or descriptive approach to teaching company law provided students with the ability to find necessary information, it ignored the social consequences of the law. Cheffins argued that a theoretical approach not only helped to provide ‘the sort of liberal education which a university should be offering’ but also enabled students to weigh up the benefits and burdens of the company law regime. Cheffins admitted that an approach purely focused on theory could be open to criticism: ‘there have been warnings that new approaches to company law should not operate wholly at the level of theory; academics instead should deal with concrete contemporary legal issues (e.g. the implications of the growing influence of institutional investors in public quoted companies)’” (p. 5).

5. The core text-book Oswald chose was *Mayson, French & Ryan on Company Law*, 26th edn. 2009 (Oxford: Oxford University Press).

6. This information has been taken from the Company Law syllabuses and resources of the Schools of Law of the British universities of London, Bristol, Southampton, Reading, Leicester and Gloucestershire and from the Australian RMIT university, from the Comparative Company Law syllabuses of the universities of Auckland (New Zealand) and Wake Forest (North Carolina), from the Law of Business Organisations syllabus of the University of London International Programmes, from the Evolution of Corporate Law and Finance syllabus of the university of Illinois (US), from the Corporate Law and Corporation Law programs and Advanced Corporate Law Seminars of the American universities of Harvard, Chicago and New York or from the Business Associations syllabus of the university of Victoria (Canada).

7. In this respect, see also Arnold, Jane & Dornyei, Zoltan 2015: *The Principled Communicative Approach*. London: Helbling Languages GmbH.; Richards, Jack C & Rodgers, Theodore S. 2014: *Approaches and Methods in Language Teaching*. Cambridge: Cambridge University Press; Hughes, John 2014: *ETpedia: 1000 Ideas for English Language Teachers*. Brighton: Pavilion Publishing; Terrell, T. D. 1991: “The role of grammar instruction in a communicative approach”. *Modern Language Journal*, 75(1), 52-63; Hedge, Tricia 2000: *Teaching and Learning in the Language Classroom*. Oxford: Oxford University Press; Oxford, R. L., et al. 1989: “Language learning strategies, the communicative approach, and their classroom implications”. *Foreign Language Annals*, 22(1), 29-39; Pica, T. P. 1988: “Communicative language teaching: An aid to second language acquisition? Some insights from classroom research”. *English Quarterly*, 21(2), 70-80; Clark, J. L. 1987: “Classroom assessment in a communicative approach”. *British Journal of Language Teaching*, 25(1), 9-19; Morrow, K., & Schocker, M. 1987: “Using texts in a communicative approach”. *ELT Journal*, 41(4), 248-56; Rosenthal, A. S., & Sloane, R. A. 1987: “A communicative approach to foreign language instruction: The UMBC project”. *Foreign Language Annals*, 20(3), 245-53; Dolle, D., & Willems, G. M. 1984: “The communicative approach to foreign language teaching: The teacher's case”. *European Journal of Teacher Education*, 7(2), 145-54.

However, this approach was also criticised, as can be seen in Swan, M. 1985: “A critical look at the communicative approach (1)”. *ELT Journal*, 39(1), 2-12; Swan, M. 1985: “A critical look at the communicative approach (2)”. *ELT Journal*, 39(2), 76-87.

8. See also Fuertes Olivera, Pedro A. 2004: “English for Contract and Company law”, 2nd ed. Marcella Chartrand, Catherine Millar and Edward Wiltshire. London, Published by Sweet & Maxwell, 2003. 208 + vii pages. ISBN: 0421 79870 X”. *IBÉRICA*, 8: 157-59.

9. In http://www.cambridge.org/es/elt/catalogue/subject/project/item2424317/Introduction-to-International-Legal-English/?site_locale=es_ES¤tSubjectID=2561588.

10. In http://www.cambridge.org/es/elt/catalogue/subject/project/item2424317/Introduction-to-International-Legal-English/?site_locale=es_ES¤tSubjectID=2561588.

11. In <http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=3908&searchorigin=english&productid=234200>.

12. In <http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=3908&searchorigin=english&productid=234200>.

13. Enrique Alcaraz Varó's *El inglés jurídico. Textos y Documentos* (2007), a classic in the field for Spanish students and practitioners, and also an excellent tool for those who approach legal English for the first time, includes the analysis of a few texts on the matter, which could be useful. Enrique Alcaraz Varó, Miguel Ángel Campos Pardillos and Cynthia Miguélez's *El inglés jurídico norteamericano* also includes a section on "Derecho societario" (Company Law).

14. For example, one of the exercises students are required to do consists in viewing a film, of my choice, about legal matters on their own and later, arranged in groups, write a follow-up and stage it in English, in the moot-room. The performance is assessed.

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"We need goals, and to set those goals we need problems."

"Things need to be done through successive approaches."

Enrique Alcaraz Varó
Professor on English Philology at the
University of Alicante
Founder of IULMA

The Fallacy of Informed Consent: Linguistic Markers of Assent and Contractual Design in Some E-User Agreements¹

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ABSTRACT

Orthodox contract law theory assumes that parties agree to the terms of a contract before entering into an agreement. However, recent factual evidence points towards the fact that consumers do not systematically read, and thus become informed of, the terms of a contract. Academics are asking for mandatory frameworks to ensure that informed consent is indeed sought and given by parties to a contract. The present study looks into the user agreements of four online companies that provide a marketplace for the sale of goods or free provision of services by other sellers and/or users (Ebay, Tripadvisor, YouTube and Amazon). The aim is firstly to identify the lexical/textual markers and peri-textual features of agreement in order to highlight the fallacy of informed consent. Secondly, the paper lists textual and peri-textual alternative contractual design (here called counter-design) in online user agreement. In so doing, contractual design features are distinguished from nudges. Suggested counter-design features help make informed consent effective.

Keywords: contract design, choice architecture, textual markers, peri-textual markers, linguistic markers

1. Introduction

The founding principle of contract law theory is that parties give an informed consent when entering into a contractual agreement. Indeed, the idea of informed consent

appears at several stages of contract formation. The essential elements of a contract are generally summarized as agreement, consideration and intention to create legal relations (Furmston, 1981: 24-105). Agreement is the requirement that the offeror makes an offer to the offeree about the provision of goods and/or services under certain conditions (price or consideration, quality, etc.), and that the offeree agrees unconditionally to the offer, before communicating this agreement to the offeror. In the very first steps of contract formation, it is assumed that both parties *agree* on essential terms for the provision of goods and/or services (Atiyah, 1995: 56-79). Informed consent is also required with regard to another condition for a valid contract, intention: parties to a contract need to *intend* to be legally bound by the agreement they enter into otherwise the contract is void *ab initio*. Consent –and the capacity to consent– to the terms of the agreement is given by both parties and is essential to the validity of a contract. If this element is missing, then not only will the contract not be binding (thus not enforceable in court), but will be considered as having never been entered into (James, 1989: 275-282).

However, in practice, it is a well-known fact that informed consent is absent from most agreements consumers enter into. Most consumer sales are carried out with standard form contracts (hereafter SFC). On the sellers' part, this means that the contract form is drafted by or with the help of legal counsel and according to standard practice in the industry. On the consumers' side, this implies that they cannot change the terms they are asked to agree to. Contrary to another contract law theory myth, most contracts (and SFCs in particular) are not the outcome of a negotiation between parties. Consumers are asked to agree to non-negotiable terms. This is the first flaw in orthodox contract law theory (Becher, 2007: 119).

Moreover, there is also a practical flaw as consumers do not read standard contracts (Bar-Gill, 2012: 3). There are three main psychological reasons for the no-read phenomenon. The first is that consumers are given so much information they are unable to process it in the time available. The second is the herding effect. Consumers will tend to trust a sale agreement they know others have agreed to. The third is consumer overconfidence. Consumers tend to think that small type or unfavourable provisions making amends for unexpected events are unlikely to happen to them (Avgoulea, 2009: 440f; Ayres and Schwartz, 2014: 545f).²

The present paper focuses on the way in which informed consent –or what can be understood as the reading presumption– displays itself in a legal document. Our research is not so much interested in demonstrating the no-read phenomenon, which has been established for some time now, nor in mapping the fallacy of informed consent as in identifying how these phenomena are displayed at a linguistic level. Thus the linguistic markers of consent need to be identified (section 2). However, in order to carry out our study successfully, presentation of hypothesis, use of concepts and methodology first need to be outlined (section 1). Once the markers of this fallacy of informed consent are highlighted, the paper looks into the alternative markers of consent (here called counter-design) which would be effective in inducing consumers

into informed consent, and thus overturning the practical shortcomings of contract law theory (section 3).

Working on a limited corpus of online user agreements, the paper seeks to identify the linguistic markers of the fallacy of informed consent by establishing the existence of a discrepancy between linguistic (lexical and textual) markers, which seem to help user assent, and peri-textual features, which make effective assent impracticable. By offering some clear linguistic tools (whose effectiveness is discussed in behavioural economics), the study contributes to rebuilding a consistent contract law theory.

2. Methodology

2.1. Concepts

In the present study, markers are neither to be understood as discourse markers nor as pragmatic markers, i.e. sequentially dependent elements (Schiffrin, 1996: 31) which structure texts (Juncker and Ziv, 1998: 4), but considered as observable text features (Condamines and Péry-Woodley, 2007: 2) which impact on contract comprehension. These tools or handles point towards two functions in the user agreements studied here: first, linguistic (lexical) features of assent, and second, text construction (visual features of the document, such as typography and layout) related to agreement.

Lexical markers of assent are lexical tools indicating assent in a given text. They can take any grammatical form, ranging from verbal and noun forms, to phrases (including verbal forms with adverbs and tautologies). Textual markers are to be found in the layout of the documents, including such features as headings (Nunberg, 1990), contrasting disposition and typography (Virbel, 1989). Therefore the study of textual markers looks into document structure more generally (Power, Scot and Bouayad-Agha, 2003), otherwise called text architecture (Virbel, 1989) or layout structure (Delin, Bateman and Allen, 2002).

The study also focuses on peri-textual elements that determine socio-linguistic features of assent. Taking into account peri-textual elements of contractual agreements is consistent with the linguistic theory initiated under Todorov's analysis of Bakhtin's work. Indeed Bakhtin is quoted as writing:

Let us agree to use the familiar word *situation* for the three implied aspects of the extraverbal part of the utterance: the *space* and *time* of the enunciation ('where' and 'when'), the object or *theme* of the utterance (that 'of which' it is spoken); and the relations of the interlocutors to what is happening ('evaluation') (Todorov, 1984: 42, Todorov's emphases).

Time and place (i.e. layout of the text) are relevant peri-textual features in the present research.

2. Genre and Corpus

The genre of the documents is of utmost importance to the assumptions that are made at the outset of the study and for the conclusions drawn from the discrepancies between lexical/textual markers and peri-textual features in the selected corpus. Indeed, the issue of genre is not limited to literary and linguistic studies (Todorov, 1984: 80-85; Firth, 1969) but is essential to anchor the lexical and textual phenomena studied in a particular linguistic usage and with a specific strategy (Condamines and Péry-Woodley, 2007: 16).

The corpus selected for the present study is made up of contracts referred to interchangeably as 'Terms of Service', 'Conditions of Use', 'Terms, Conditions and Notices', or 'User Agreements'. The Terms of Service of four online companies were selected on account of their major position in the e-commerce industry. The prominence of these players in the online market is important as it creates both consumer optimism³ and the herding effect, thus reinforcing the grounds for the no-read phenomena. E-bay is an online auction hosting website,⁴ Tripadvisor offers online travel services⁵ which are content-generated by users, Amazon is an online shopping and content distribution company,⁶ and YouTube is a video-sharing website.⁷ All the documents are therefore legal documents that define the rules governing the use of web-browsing services.

The companies were also selected because they offer provision of free service, coupled or not with purchasing services. E-bay, Tripadvisor, Amazon or YouTube users can browse through any online information on the website (on goods, services, holidays, restaurants, videos), and thus use a free service without having to register. Since to register means to be asked to effectively click on the Terms of Sale to notify agreement, a registered user cannot subsequently claim not to have been given the opportunity to be acquainted with those Terms. As the selected websites do not require registration for the use of the browsing services, they are relevant to study the present type of consent.

Our analysis is determined by the genre of the documents studied. Indeed, in a contract, a term is an utterance, which will become performative on agreement by both parties. That is, on agreement, both parties will be asked to perform particular acts. Thus the performative nature of the lexical terms and textual construction of assent is essential to understanding the function of linguistic markers and peri-textual features in online user agreements.

3. Working assumptions

Assumptions flow from the legal nature of the document. First, as in standard contracts, the paper assumes that Conditions of Use contracts mention the way in which the agreement is made. Signature of a legal document, whose purpose is clearly stated, usually indicates assent. The example below shows a standard form of assent in the real economy:

[...] are entering into this contract this **{date}** day of **{month}**, **{year}**, for the purposes of establishing the provisions of the construction of **{home, property, building, etc.}**, located at **{address, lot number, some way to describe the area where construction will occur}**.

_____	_____
Builder Name	Builder Signature
_____	_____
Client Name	Client Signature ⁸

In certain cases, stress is also laid on the nature of the assent given by the parties to the agreement:

Signing this agreement implies full understanding of the above conditions and the rental agreement.⁹

Thus a contract can lay additional stress on the manner in which consent is given ('signing') and the legal consequence of giving one's assent to the terms of the document ('implies full understanding').

This example shows that markers of agreement need to be found in the choice of both lexical and textual markers. These markers are seen in phrases and terms such as 'entering into this contract', 'agreement', 'understanding', which point towards the performative nature of the lexical terms in the document. However –and this is one of the elements of contracts which sets them aside from any other legal documents– more is required from parties to express their assent than just the existence of words on a paper (which are presumed to have been read); a traditional paper contract will require parties to physically sign the document. The text itself includes a specially designated space provided for signatures. Textual markers are thus of importance to our study.

Though the corpus selected shares features with traditional contracts, it is part of a sub-genre of its own. Indeed all the companies chosen in the present study belong to the virtual economy. Documents in the corpus are e-contracts. The study of online agreements shows how different a standard contract in the real economy is compared with one in the virtual economy. As a consequence assent cannot be given with a physical signature. E-commerce users are familiar with such buttons as those below:



Figure 1. Examples of digital signature icons

Physical signatures are reborn as digital signatures in the e-commerce industry. However, this entails clear textual differences between contracts in the traditional retail and service industry and those in the e-commerce sector. A physical signature is unique and personal to an individual. Copying someone's signature with the intention of inducing someone else to consider it as genuine is an offence qualified as forgery.¹³ A digital signature is an act (clicking on a web button), which is not unique (everyone clicks on the same button) but rests on the assumption that it is personal (it is I, and not anybody else who is clicking on the web button).

Notwithstanding these features of agreement, specific to the real economy on the one hand, and to the virtual industry on the other, the corpus selected here challenges methods of assent. Indeed, agreement is neither given through physical signature, nor by a click on a web button. As the present study focuses on the free provision of information (as opposed to purchasing services), web wrap (or browser wrap)¹⁴ acceptance is the way in which users mark assent to Conditions of Use. In Terms of Service agreements, the user is held to the terms even if he has not read or clicked on an agreement button to indicate assent (Schneider, 2014: 325-8). This well-mapped procedure is nonetheless a major departure from traditional contract law theory, whereby the parties need to indicate agreement to the terms by which they will be bound. One of the assumptions is that these differences can be read into the linguistic features of the agreements themselves. Indeed, the corpus displays a wide range of lexical and textual markers, as well as peri-textual features, of assent.

3. Linguistic Markers of Informed Consent

On account of the virtual nature of the relationship between consumers and companies in the online industry, a certain number of features, such as signature, used to indicate assent in real contracts cannot be used. User Agreements also differ from e-contracts per se, in that assent is not given through clicking on 'I agree' web buttons. In Terms of Service, it is the use of the site that binds the visitor to the Conditions (Schneider, 2014: 328).

Moreover, it must be borne in mind that the e-commerce contracts are SFCs (standard form contracts). The terms of the contract can be neither negotiated nor changed to purpose, and they impose roughly the same conditions of use from one company to another. These are the reasons why the law regulating the agreement cannot be considered as a relevant element to the present study.¹⁵

The browser wrap and standard form features of the agreements in the corpus make it impossible to apply orthodox contract theory that makes voluntary and informed assent to the terms of the contract mandatory to ensure the document is legally binding.

3.1. Lexical Markers of Assent

The legal documents in the corpus share common lexical features. There are three grammatical categories which are used in the four Terms of Service agreements to indicate assent. The most common are verbal forms: ‘agree’, ‘understand’, ‘grant’, ‘acknowledge’, ‘declare’, ‘warrant’, ‘represent’, ‘are responsible for’, ‘consent to’, ‘signify your agreement to’, ‘read’, ‘consent’. Modals are also used: ‘will/will not’, ‘may/may not’. Sometimes assent is reinforced through the use of adverbs (‘hereby declare’, ‘are solely responsible’, ‘forever waive’, ‘forever release’), tautologies (‘understand and agree’, ‘affirm, represent and warrant’), and binomial expressions (‘represent and warrant’). Terms of Use agreements also use some isolated noun forms such as ‘upon your acceptance’.

The following table summarises the frequency of occurrence of the lexical markers in the corpus.

Form	Markers	Occurrence
Verb	acknowledge	8
	agree	76
	consent to	8
	declare	1
	grant	10
	represent	7
	be responsible (for)	28
	signify (your agreement)	4
	understand	10
	warrant	9
Modals	may	160
	may not	29
	will	99
	will not	19
Adverbs	forever	3
	hereby	8
	solely	18
Noun	acceptance	3

Table 1. Frequency of occurrence of lexical markers

The following graph helps to see the distribution of occurrences of verbal forms signifying assent:

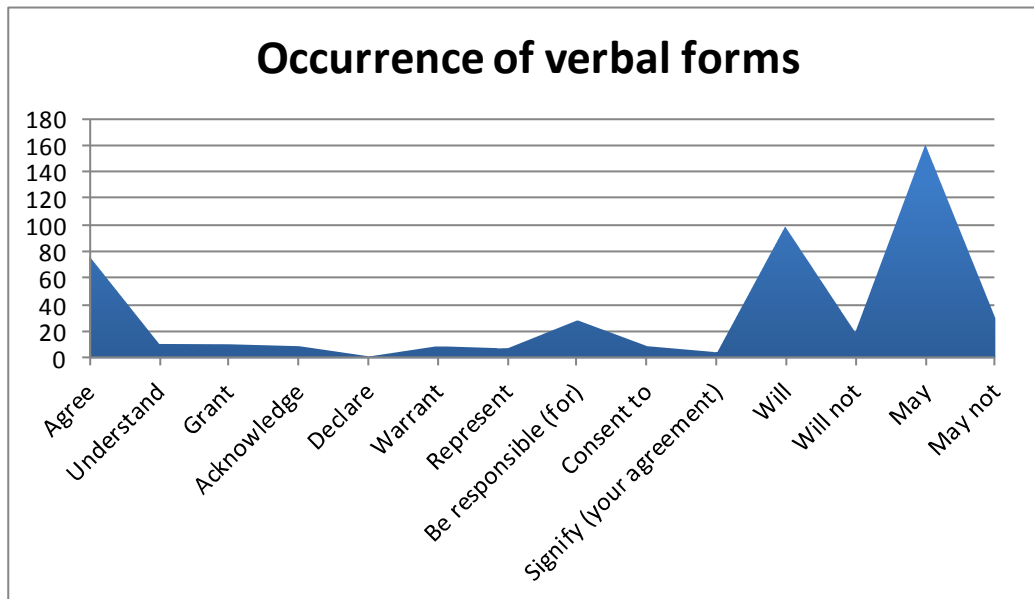


Figure 2. Distribution of occurrences of verbal forms of assent

The predominance of modals (may/may not) is consistent with the literature on the use of modals in legal writing (Richard, 2008), whereby ‘may’ is used to mark acts which are required or banned. Another marker is also used: will/will not. Grammatically, ‘will’ is both a modal and an auxiliary. Indeed it is primarily used as an auxiliary and only secondly as a modal, and as such is somewhat different from the usual modals. In a legal context, generally, ‘will’ is used in oaths or affirmations to mark the speaker’s assent to the terms of the oath (Richard, 2008). This importance of ‘will’ where ‘shall’ should have been used (Richard, 2008) can only be explained by the need to make the meaning of the document accessible to lay users. Indeed, this is an SFC in the e-commerce industry. In accordance both with the contract law theory of informed consent, and with the plain English movement, users are presumed to have very little to no knowledge of the law. Indeed followers of the plain English movement believe that legal documents should be written in a language which is as simple and clear as possible (Mellinkoff, 1953; Wydick, 1994; Steinberg, 1991). Its legal use being excepted, ‘shall’ is rarely used as a modal in everyday language. It is thus consistent both with the plain English movement and with the need for informed consent, that an equivalent and more common modal be used in a consumer SFC.

If the use of modals (‘will/will not’, ‘may/may not’) is excluded, the most recurrent occurrence is the verb ‘agree’, which unambiguously indicates assent. The presence of this lexical marker was to be expected. However, the predominance of verbal forms of assent over noun forms needs to be accounted for.

In more than half of the occurrences (48 occurrences) the verb ‘agree’ appears in ‘you agree’ sentences. Assent can be signified in noun forms also: ‘agreement’, ‘acceptance’. These noun forms can be found in noun forms in sentences such as:

We may also ask you to acknowledge your acceptance of the User Agreement through an electronic click-through.¹⁶

[Y]ou signify your agreement to be bound by these conditions.¹⁷

This Website is offered to you conditioned upon your acceptance without modification of any/all the terms.¹⁸

However, the occurrence of these noun forms is minor in comparison with verbal forms. The first reason given to explain the predominance of verbal forms is the performative nature of the agreement. Indeed, verbal forms in the document are in the present tense. They point towards the performance of the act upon agreement. The second reason given is the need to communicate in clear and unambiguous language in the wake of the plain English movement. Nouns point towards abstract mental phenomena, whereas verbs point towards actions.

Contrary to traditional contracts where parties are mentioned by their functions, in e-commerce standard terms of use, the pronoun ‘you’ is used to refer to the consumer entering into the agreement with the online company. The example below shows an instance of a standard US agreement in the real economy where the names of the parties are referred to by their function:

This contract is an agreement between **{Renter}**, who will be renting a house from **{Owner}**, who owns the house being rented [...]. The owner has a right to enter the house with an advanced notice of 24 hours for any reason. [...] The renter will make his or her best effort to keep the house in good condition.¹⁹

{Name}, henceforth known as “Builder,” and **{Name}**, henceforth known as “Client,” [...] Client agrees to the estimate provided by the Builder on **{date}**, with the following changes (to which the Builder has agreed) [...].²⁰

In standard Terms and Conditions contracts in the virtual economy, the corpus shows the consistent use of ‘you’. The consumer, who is presumed to be the man in the street with only a layman’s knowledge of the law, is addressed to as ‘you’. This complies both with the theory of informed consent, and with the plain English movement.

However, compliance with the plain English movement does not seem to rank high with drafters when they use some categories of lexical markers to reinforce agreement. The markers used in this case are adverbs, tautologies and binomial expressions. The use of these markers needs to be accounted for and in most cases is inconsistent with the overall aim to communicate in easily accessible legal English (Richard, 2014). The binomial expression ‘understand and agree’ is not used in all documents. It is used once in YouTube’s Terms of Use and three times in Tripadvisor’s Terms. Similarly, the use of ‘hereby’, another legal archaism, is to be found only in the Terms and Conditions of these two e-commerce companies. Even though these legal documents are SFCs which share common features with other contracts in the corpus (headings, mode of address, contents, etc.), they differ in that they were drafted by different teams of lawyers. This

difference could account for the more traditional legal terminology to be found in YouTube's and in Tripadvisor's Terms of Service.

Notwithstanding the exception of some antiquated legal adverbs and binomial expressions, the study of the lexical markers of assent in the corpus of e-commerce Terms of Use reveals a clear aim to promote informed assent to the terms of the contract. Indeed, in most instances, the language used follows the requirements of the plain English movement, avoiding legalese (complex legal terminology, noun forms) to help understanding. The lexical markers show that informed consent is clearly sought by drafters of SFCs.

This strategy is reinforced by the use of textual markers. Indeed some of them are embedded in the documents themselves and highlight those terms which users need to be acquainted with.

3.2. Textual Markers of Assent

In all the documents in the corpus there are parts of the document in capitals and/or in bold type. The example below is an instance of this:

Opt-Out Procedure

IF YOU ARE A NEW EBAY USER, YOU CAN CHOOSE TO REJECT THIS AGREEMENT TO ARBITRATE (“OPT-OUT”) BY MAILING US A WRITTEN OPT-OUT NOTICE (“OPT-OUT NOTICE”). THE OPT-OUT NOTICE MUST BE POSTMARKED NO LATER THAN 30 DAYS AFTER THE DATE YOU ACCEPT THE USER AGREEMENT FOR THE FIRST TIME. YOU MUST MAIL THE OPT-OUT NOTICE TO EBAY INC., ATTN: LITIGATION DEPARTMENT, RE: OPT-OUT NOTICE, 583 WEST EBAY WAY, DRAPER, UT 84020.²¹

The textual markers are designed to attract the reader's attention, and thus satisfy the requirement of informed consent. Their impact is reinforced by lexical markers in the heading, which restates the need to become acquainted with the content of the section:

PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS YOUR RIGHTS AND WILL HAVE A SUBSTANTIAL IMPACT ON HOW CLAIMS YOU AND EBAY HAVE AGAINST EACH OTHER ARE RESOLVED.²²

Bold and/or upper case is used only for certain categories of information. Amazon does not use capitals in its conditions of use. It only uses bold to highlight the need to read the terms and the way in which users are bound by these terms (use of Amazon services). The other three companies consistently use upper case in one or two sections in their Terms of Use which relate to warranty and liability disclaimers and/or limitations. One exception is a long provision in the Ebay user agreement which forbids class actions. This provision is headed with a caption highlighting its importance and

the agreement itself starts in its first section with a paragraph in bold indicating that the document contains information relative to legal disputes.

The legal document uses textual markers (bold and upper case), as well as headings and summaries, to identify important information a reader skimming through the document should not miss. These textual markers point towards the fact that effective informed consent on the part of the user is sought by the seller and/or service provider on a certain number of key legal issues.

Peri-textual markers, however, tell another story. As the present Conditions of Use are virtual verbal forms of communication (utterances), the time when the agreement is (or is not presented) to the consumer, as well as the position of the agreement on the webpage (space), are relevant to determine whether assent is effectively sought.

3.3. Peri-Textual Features and Assent

In some SFCs in the online retail industry, it is not unusual for the consumer to receive the Terms of Agreement after the purchase of the goods. This practice obviously challenges the presumption of informed consent (Hillman, 2002: 743-4).²³ In our corpus, the delay in informing users of the Terms is not as excessive, as Terms are accessible prior to purchase. However, peri-textual features of assent show problems of access to the Terms, in the context of web wrap (or browser wrap) acceptance. As commentators have shown, both elements stand in full contradiction with the orthodox contract law theory of informed consent.

The point in time when the user is asked to read the Terms of Use is of essence. For Conditions, it would be reasonable to expect that users be asked to agree to the Terms on first accessing the website. This logical requirement is nonetheless inconsistent with practice as in no case is the user actually asked to read the terms and acknowledge having done so on accessing a website. In all the online companies selected, the consumer is required to find the link to the Terms of Service on the page he/she is browsing on and to click voluntarily on the link in order to have access to the Terms.

In the YouTube website, the link to the Terms of Use is to be found at the very bottom of the home page, on the lower left hand side corner ('Terms'). This does not appear to be unusual as all the other sites in our corpus do the same. In the home webpage of the Amazon.co.uk website, the link to the Conditions of Use of the website is to be found at the bottom of ('Conditions of Use and Sale').

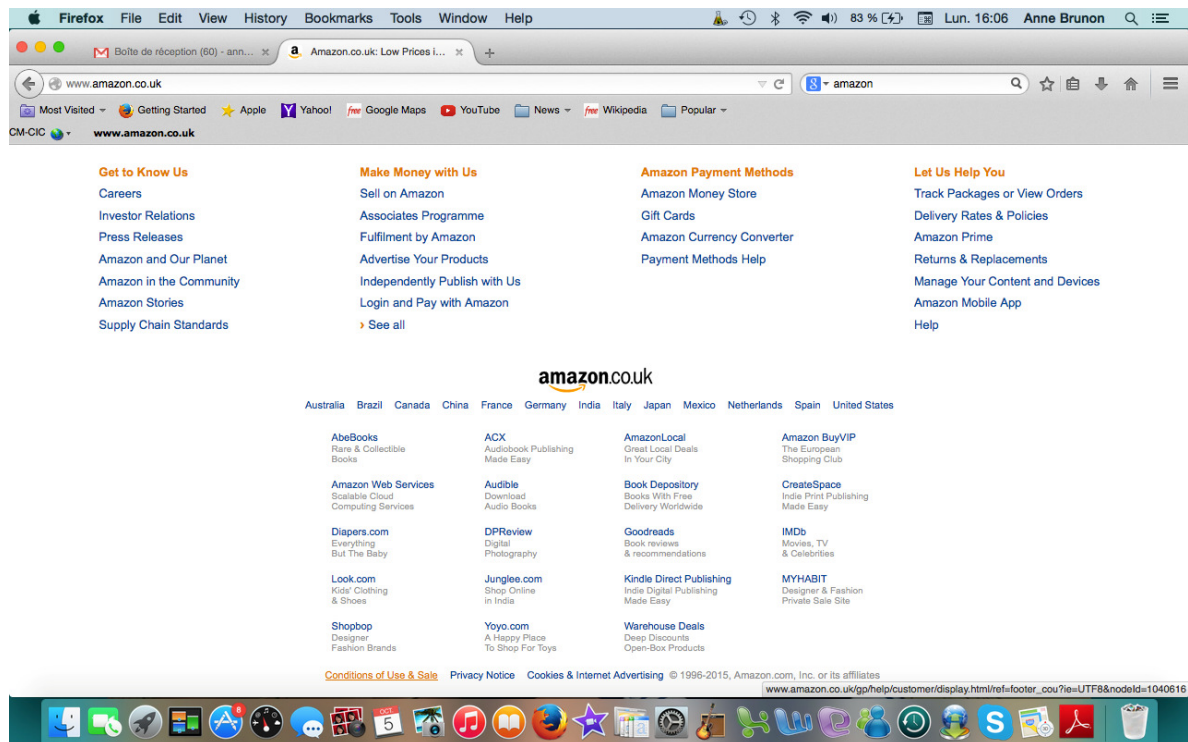


Figure 3. Example of location of the hyperlink to the Conditions of Use on a website

The location of the redirect link to the Terms of Use means that, in practice, the user will browse the site without any knowledge of the Conditions of Use.

Phrases as the following which are found nonetheless in the text of the terms and conditions are therefore of little use if the consumer does not first click on the link to the conditions of use and read the whole of the document:

‘Please read the Agreement carefully’.²⁴

‘Please read these conditions carefully before using Amazon Services’.²⁵

‘If you do not agree to any of these terms, the Google Privacy Policy, or the Community Guidelines, please do not use the Service’.²⁶

‘Please read this section carefully’.²⁷

Such phrases reinforce the fallacy of informed consent. Anybody reading the Conditions of Service out of their context of use will conclude that the utmost was done to ensure that customers have read them. However, the accessibility and timing of the terms seen above and conditions of access to them, as discussed below, contradict the effectiveness of the consent that is given to them.

Lexical markers of assent run through the documents and give the impression that consent is sought and given. However, a closer look at the Conditions of Use shows that consent is given through use, and not through reading the full terms and acknowledging them with a click-through. Sentences as the following indicate the web wrap (or browser wrap) nature of acceptance in these types of agreements:

*By using or visiting the YouTube website or any YouTube products, software, data feeds, and services provided to you on, from, or through the YouTube website (collectively the “Service”) you signify your agreement to (1) these terms and conditions (the “Terms of Service”), (2) Google's Privacy Policy, found at <http://www.youtube.com/t/privacy> and incorporated herein by reference, and (3) YouTube's Community Guidelines, found at http://www.youtube.com/t/community_guidelines and also incorporated herein by reference. If you do not agree to any of these terms, the Google Privacy Policy, or the Community Guidelines, please do not use the Service.*²⁸

*By accessing or using this Website in any manner, you agree to be bound by the Agreement and represent that you have read and understood its terms.*²⁹

*Your continued access or use of our Services constitutes your acceptance of the amended terms.*³⁰

*By using Amazon Services, you signify your agreement to be bound by these conditions.*³¹

It becomes very clear on reading the above extracts that use of the services provided by the website implies consent. Assent is not given through reading the legal document but through use. As assent cannot be given after the user has perused the contents of the agreement, and as the user will nonetheless be held bound to the Conditions of Use, this mode of assent runs counter to orthodox contract theory.

On account of the principle of implied assent, the user is not given the opportunity to agree to the Terms of Service. Moreover, peri-textual features of assent show that s/he is not even given adequate notice of the implied assent s/he is giving to the Terms. The study of peri-textual features (timing and conditions of access) exemplifies the absence of notification of Conditions of Use. Notwithstanding the no-read phenomenon, the peri-textual structure of retrieval of the agreement makes effective access, and thus consent, unlikely. Insufficient notice of terms and the absence of opportunity to assent to them make the principles regulating the operation of browse-wrap agreements incompatible with contract theory of informed consent (Robertson, 2003).

4. From the Fallacy of Assent towards Effective Consent: Linguistic Alternative Design

The study of lexical and textual markers of assent is evidence that legal texts, such as the standard User Agreement studied in the corpus, cannot be taken out of the context in which they are presented to the consumer for assent (peri-textual features). The lexical and textual phenomena are anchored in the features of certain contracts (SFC), in web usage (accessibility of terms on the website) and in the specific strategies that websites develop to give the linguistic impression that consent is sought in earnest, even if it cannot be effectively given in practice.

This is a double fallacy. The first level of deception is to be found in the legal document itself, which displays all the lexical and textual markers of assent as demonstrated above. These markers create a presumption of informed consent. This presumption weakens the judicial protection that could have been afforded to parties,

who cannot then claim that they did not agree to the terms (Bar-Gill and Ben-Sahar, 2012). In court, judges interpreting these Terms of Use would be bound to agree that consent was honestly sought, and that, if the user neither read nor understood the Conditions of Service, the online company cannot be held liable for such failure. The lexical and textual markers of assent clearly contribute to the misbelief that consent was lacking in the agreement the consumer involuntarily entered into, and thus the agreement should be null and void. This is indeed prejudicial to any claim on his/her part and may, as such, explain the insertion of these linguistic features in the Terms of Use, i.e. protecting companies from any claims based on the absence of the user's assent. Another reason may be the standard nature of these documents, since they are all SFCs. The first level of deception cannot be identified if the lexical and textual markers of assent are not put into the peri-textual context in which the Terms are presented to the user for agreement.

The second level of deception is embedded in the first. The textual markers of assent overshadow points the user did not expect to be bound by. Banking on the herding phenomenon and on consumer overconfidence, unexpected clauses are hidden in User Agreements. By highlighting certain clauses, others –which might have been of utmost importance to the consumer– are less likely to be read or identified by the e-consumer (Avgoulea, 2009: 12; Ayres and Schwartz, 2014: 551). Thus, by highlighting certain provisions, others are masked. The present section looks into the peri-textual and textual mandatory disclosure which could be introduced to make sure that consent is truly sought, and that the user has effectively read and understood the Conditions of Use.

4.1. Designing Effective Consent

The peri-textual and textual amendments suggested to improve the no-read phenomenon are part of contract distortions implemented with the aim of carefully designing environments which will make consumer choice of certain options more likely. This environment design is also known as choice architecture (Sunstein, 2012: 6; Sunstein, 2014: 14) and in this respect, any individual who seeks to modify an environment to make certain types of choices more predictable is known as a choice architect.

Nudgers are one type of choice architects. They voluntarily seek to organise an environment to maximise choice according to certain goals (political, health-related, economic, etc.), which are benevolent and, at the same time, cost minimizing. Sunstein (2014: 17) defines nudges as “initiatives that maintain freedom of choice while also steering people’s decisions in the right direction”. Nudges are thus initiatives operating in the interest of the nudgee. Sunstein uses the word ‘right’ in his definition. It is the nudger who determines the right goals for nudgees. The goals are therefore right only in the eye of the nudger, who may have a very different agenda from the nudgee. In this respect, a nudger is a paternalist.³² Nudges are paternalists as they are initiatives devised with a benevolent aim and with the welfare of the nudgee at heart. However, not all

architectural design initiatives aim at benefitting the individual. Some aim at benefitting the financial interests of a company. In a business-related environment, as the one selected for our corpus, the presumption is that the choice-environment will not be designed to enhance consumer well-being, but rather business interests. Nudges are thus less likely to exist in this type of environment. Purists, consequently, would tend to refer to the designs found in our corpus as choice architecture initiatives.

Cass Sunstein explains that a “choice architect has the responsibility for organizing the context in which people make decisions” (Sunstein, 2012: 6; Sunstein, 2014: 14). Some disclosure mandates aim to alter people’s behaviour to induce them to read parts, if not all, of the agreement they enter into. Disclosure mandates have the advantage of being based on a psychology-related scientific method which looks into the reasons why individuals do not read contracts (quantity of information, herding effect, consumer overconfidence, etc.). They devise initiatives (click-wrap agreements, ordering information, and warning boxes) that seek to make the response of individuals predictable.

It is nonetheless important to note that users will not be forced to modify their behaviour and read the document. Even if it may be easier to become aware of a certain number of provisions they are bound to, consumers will still have the choice to select another option, that is, to refuse to read the information provided. Thus, a characteristic feature of the present initiative is that its reversal is possible, and thus the user may override the choice architect’s preference (Sunstein, 2014: 17). This feature may, at first sight, be seen as sharing some common grounds with nudges. As A-L Sibony and F. Alemanno note, “[n]udge is [...] presented as a distinctive, alternative way, characterized as being minimally burdensome, low-cost and choice-preserving, to help promote regulatory goals” (2015: 7). However, as there is no alternative available for any user turning down the Terms, the initiatives studied fail to be nudges on account of the absence of effective reversal of the initiative. If consumers want to make second-hand purchases on the web or if they want to view videos, E-bay and YouTube have a quasi-monopoly on the market. Refusing to comply with the Conditions implies that consumers are barred from access to a service of the same quality on the web. Moreover it is likely that other competitors impose the same conditions. The disclosure mandates will not guarantee that Terms are indeed read, but they will give consumers a fair and time-efficient opportunity to become aware of key (or unexpected) features of the agreement, even if, once aware of the terms to which they are bound, they can neither amend them, nor turn them down, as there is no real alternative on the market.

When it comes to initiatives operating in a business-related environment, the presumption of benevolence is rebutted, as the initiative is likely to enhance business profits at the expense of effective consumer choice. The textual and peri-textual features of the legal documents in the corpus can now be re-read as architectural designs aimed at avoiding actual consumer consent on purpose. The only way to counter consumer misconceptions, which are exploited by sellers and service providers to design their User Agreement structures, is to construct alternative contractual designs (counter-design) to counter the effect of the existing contract designs. Click-wrap agreements

and disclosure mandates are construed as initiatives countering design features (Bargill, 2012).

4.2. Peri-Textual Counter-Design: From Browse-Wrap to Click-Wrap Agreement

Deconstructing contract law principles as they operate in practice is a sterile academic endeavour if it is not coupled with the aim of offering ways in which everyday online agreements can be made compatible with contract law theory. Some legal scholars have argued that browse-wrap agreements should be replaced by click-wrap agreements, whereby the user needs to click that s/he has read and agreed to the terms of use (Robertson, 2003). Web users are familiar with click-wrap agreements such as follows:

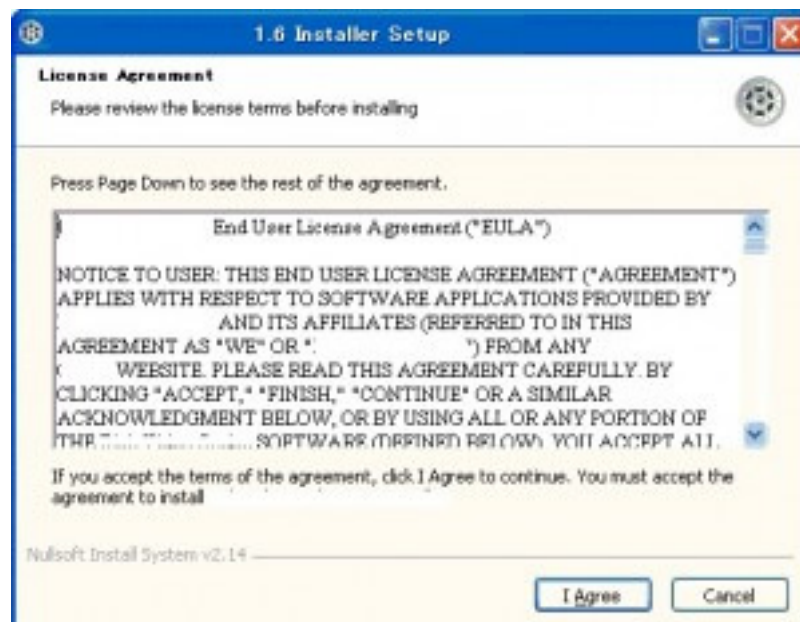


Figure 4. Example of a click-wrap agreement³³

In theory, the suggestion would indeed help notify users of the existence of certain terms regulating the website and of the Conditions of Use themselves through change of the peri-textual features of assent (timing and access). In practice, there is evidence that Courts (in US jurisdictions) are more likely to uphold click-wrap agreements than browse-wrap agreements. Indeed assent to the former is construed as effective, since the opportunity was given to review the agreement and there is the obligation to click-agree to the conditions.³⁴

If the click-wrap agreement suggestion made it possible to improve the opportunity to consent, it would not guarantee effective consent in practice. One of the reasons for this failure is that it does not take into account the no-read phenomenon. Even if consumers were given the opportunity to click-wrap Service Conditions, it would not entail the actual obligation of reading through the Terms themselves. In theory, the principle of contractual assent would be enforced, but in practice, informed consent

would almost never be given as users do not read and rarely scroll down click-wrap pop-up windows.

4.3. Overturning Shortcomings of Contract Law Theory: Textual Organisational Counter-Design

To improve effective assent and uphold contract principles in practice, scholars need to tackle the no-read issue. For almost half a century, the no-read issue has created problems for academics (Lewellyn, 1960; Kessler, 1943; Rakiff, 1983). Lewellyn (1960: 370) famously established the blanket assent theory to justify the enforcement of unread terms. According to that theory, a consumer may give his assent to a reasonable term in an SFC, but will not be held bound by terms deemed unfair.

This approach is of interest for our present study as it introduces a hierarchy of implied consent according to the reasonableness of terms. This reasonableness can be read at different levels. Reasonableness can be a prescriptive standard. A term would be considered as reasonable on account of its being fair in the contractual bargain between parties. Reasonableness can also be a descriptive standard. A term would be considered as reasonable on account of its being generally found in SFCs. An unreasonable term would be an unexpected term.

A certain number of academics have tried to find solutions to the no-read problem by investigating the issue of unexpected terms in contracts (Avgoulea, 2009; Ayres and Schwartz, 2014). This has allowed a more subtle approach to the disclosure strategy, as a means to fight the no-read phenomenon. The focus has shifted from mandatory disclosure regulation, which is costly and prices out poorer consumers (Bar-Gill and Ben-Shahar, 2012), to more optimal disclosure mandates (Bar-Gill, 2012). According to the latter approach, to determine which terms would be unexpected in a contract, legal scholars look into whether consumers held accurate beliefs as to the agreements they were entering into. This term substantiation would be necessary to determine which terms need to be highlighted for the consumer (Ayres and Schwartz, 2014). Only information statistically important for consumers would be disclosed (Bar-Gill, 2012).

In the present corpus, all Service Agreements contain textual markers to highlight certain provisions that are important for the seller or the service provider. The issue is to determine whether the same terms are of relevance to consumers. The SFCs studied here highlight sections in their Terms of Use which relate to warranty and liability disclaimers and/or limitations. Ebay has a long provision in its User Agreement forbidding class actions. Consumers are familiar with User Terms and would expect there to be disclaimers and provisions for preference forums in case of litigation. However, consumers might not be aware of the fact that the rights to any review posted on forums are transferred to the website:

When providing us with content or causing content to be posted using our Services, you grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise any and all copyright, publicity, trademark, and

database rights and other intellectual property rights you have in the content, in any media known now or developed in the future.³⁵

This is an unexpected feature common to all four Conditions of Use in the corpus, a feature which consumers should be made aware of. One way of making sure that consumers read this provision is either to have the information inserted at the beginning of the agreement, or to have warning boxes (Ayres and Schwartz, 2014). The idea underlying the approach of some academics is that if you diminish the amount of irrelevant information, you will increase the likelihood of consumers reading the documents (Avgoulea, 2009). Once the amount of information is diminished, the textual order in which it is presented is of essence (Ayres and Schwartz, 2014). It is indeed a fact established by psychological evidence that assent can be manipulated by the framing of information (Avgoulea, 2009). Information thus needs to be organised in descending order according to consumer importance. If one considers the picture of the click-wrap agreement given above, the important or unexpected information should be visible in the box and thus could easily be read or skimmed through by the consumer, without having to scroll down.

The ordering of information and the textual features of warning boxes should, in principle, be efficient counter-designs features to offer consumers an effective opportunity to agree to the Terms.

5. Conclusion

Working on a corpus of online User Agreements, the present study has offered a two-step critical approach to the mandatory condition of assent in orthodox contract theory. Firstly, the study of the lexical and textual markers of assent in the corpus has highlighted that assent is indeed sought. However, on account of the no-read phenomenon, consent is not effectively given. This absence of effective assent is reinforced by the study of peri-textual features which show that assent is not effectively sought. The first part of the study uncovered the fallacy of consent in online User Agreements. The second part of the study has sought to reconcile real online user agreements by suggesting amendments to the textual and peri-textual features to make assent real, through the use of counter-design.

All around the world, academics, but also politicians and journalists join in to try to work out an assessment of choice architecture.³⁶ The present paper contributes to the debate in presenting a linguistic approach on these new regulatory instruments, which stand at the cross-roads of law, psychology and behavioural economics. Counter-designing is one of the effective (although not compulsory) ways in which the no-read phenomenon can be tackled, thus ensuring true consent for agreements entered into by consumers. In the corpus studied, design will not be found in redrafting the Terms of the Service but in reorganising peri-textual and textual features of the agreements. The linguistic forms of design have thus been highlighted in standard forms of user-wrap agreements of online companies.

The linguistic approach to contract law theory has helped to identify non-legal features (click-wrap agreements, ordering information, and warning boxes) that need careful counter-designing to guarantee theoretical validity of contractual agreements.

Notes

1. A draft of this paper was presented at the École de Droit (Sciences Po, Paris) Nudge Seminar on Friday 27th November 2015, at Assas University. I would like express my gratitude here to the anonymous reviewers of this article and to the French Nudge Project team (<http://frenchnudgeproject.fr>) for their helpful remarks and suggestions.

2. Behavioural economics studies consumer systematic misperceptions to identify behavioural market failures (Bar-Gill, 2012; Becher, 2007; Avgoulea, 2009). These misconceptions can affect perception of product features and use patterns of products (Bar-Gill, 2012). At the time of the assent, psychological studies highlight flaws in the perceptions consumers have of their commitment to the terms. Among these flaws will be sunk-cost effects, cognitive dissonance, confirmation bias, low-ball technique, low-probability risk, availability cascade and self-serving biases (Becher, 2007). Behavioural economic studies make it possible to think outside the standard rational choice theory, to take into account predictable consumer bias which affects choice (Bar-Gill, 2012).

3. This concept from the field of behavioural economics is synonymous with consumer overconfidence.

4. User agreement to be found at: <http://pages.ebay.com/help/policies/user-agreement.html>; last accessed on 28/9/2015.

5. Terms, conditions and notices to be found at: <http://www.tripadvisor.com/pages/terms.html>; last accessed on 28/9/2015.

6. Terms, conditions and notices to be found at: <http://www.tripadvisor.com/pages/terms.html>; last accessed on 28/9/2015.

7. Terms of service to be found at: <https://www.youtube.com/static?template=terms&gl=US>; last accessed on 28/9/2015.

8. *Ibid.*

9. House rental contract template found at <http://www.printablecontracts.com>; last accessed on 29/9/2015.

10. Digital signature request icon found at <https://www.approveme.me/wp-digital-signature-plugin-docs/article/completing-a-signature-request-agree-sign/>; last accessed on 29/9/2015.

11. Digital signature request icon found at <http://www.thinkstockphotos.ae/image/stock-illustration-i-agree-button-click/469806826> ; last accessed on 29/9/2015.ç

12. Digital signature request icon found at <https://eu.fotolia.com/id/45024356>; last accessed on 29/9/2015.

13. See for example the Forgery and Counterfeiting Act 1981, c 45: “A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person’s prejudice.” (Pt I, s 1). Legal provision found at <http://www.legislation.gov.uk/ukpga/1981/45>; last accessed on 29/9/2015.

14. Browse-wrap agreements are usually accessible by clicking on a hyperlink, thus users are not required to affirmatively agree to the terms. By contrast, click-wrap agreements ask

customers to click on a button to show that they agree with the terms of the agreement, which are directly put in front of them.

15. E-bay's agreement is governed by the US laws of Utah, Tripadvisor's agreement is governed by the US laws of Delaware, Amazon's agreement (for the www.amazon.co.uk website) is governed by the laws of the Grand Duchy of Luxembourg, and YouTube's agreement is governed by the laws of California.

16. See E-bay's Conditions of Use.

17. See Amazon's Terms of Use.

18. See Tripadvisor's Terms and Conditions.

19. House rental contract template found at <http://www.printablecontracts.com>; last accessed on 29/9/2015.

20. Construction contract template found at <http://www.printablecontracts.com>; last accessed on 29/9/2015.

21. §Legal Disputes, <http://pages.ebay.com/help/policies/user-agreement.html>; last accessed on 28/9/2015.

22. §Legal Disputes, <http://pages.ebay.com/help/policies/user-agreement.html>; last accessed on 28/9/2015.

23. "In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time." (Robert A. Hillman, 'Rolling Contracts', citing *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

24. <http://www.tripadvisor.com/pages/terms.html>; last accessed on 28/9/2015.

25. <http://www.amazon.co.uk/gp/help/customer/display.html?nodeId=1040616>; last accessed on 28/9/2015.

26. <https://www.youtube.com/static?template=terms&gl=US>; last accessed on 28/9/2015.

27. <http://pages.ebay.com/help/policies/user-agreement.html>; last accessed on 28/9/2015.

28. §1, s.1, <https://www.youtube.com/static?template=terms&gl=US>; last accessed on 28/9/2015 [my emphasis].

29. §1, s.2, <http://www.tripadvisor.com/pages/terms.html>; last accessed on 28/9/2015 [my emphasis].

30. § General, s. 4, <http://pages.ebay.com/help/policies/user-agreement.html>; last accessed on 28/9/2015 [my emphasis].

31. § Conditions of use, s.1, <http://www.amazon.co.uk/gp/help/customer/display.html?nodeId=1040616>; last accessed on 28/9/2015 [my emphasis].

32. S. Conly defines paternalism as: "a practice wherein people are forced to perform actions that bring about good consequences for themselves" (Conly, 2013: 48). It is the beneficent aim of the interfering initiative devised by the paternalist with respect to a dependent that determines the paternalistic nature of the intervention on choice.

33. <http://www.practical-ip.com/2011/12/keep-copies-of-your-click-wrap-license-agreements.html>; last accessed on 9/10/2015.

34. See *Hotmail Corporation v. Van Money Pie Inc., et al.*, C98-20064, 1998 WL 388389 (N.D. Ca., April 20, 1998)

35. § Contents, <http://pages.ebay.com/help/policies/user-agreement.html>; last accessed on 28/9/2015.

36. See for e.g.: numerous articles published in *The Guardian* (Mona Chalabi, "Does a government nudge make us budge?", published on November 12, 2013, in *The Guardian*, Online edition, at <http://www.theguardian.com>, accessed 19/8/2015) or in *The New York*

Times (Catherine Bennhold, “The Ministry of Nudges”, published on December 7, 2013, in *New York Times*, Online edition, at <http://www.nytimes.com>, accessed 19/8/2015). But also in non-English media (Etienne Gless, “Le nudge marketing ou comment vendre sans contraindre”, published on July 16, 2013, in *L’Express*, Online edition, at <http://lentreprise.lexpress.fr>, accessed 19/8/2015).

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How Common is the Common Law? Some Differences and Similarities in British and American Superior Court Decisions

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ABSTRACT

American law and English law belong to the same legal tradition, the common law, characterized by a case-law system based on judicial decisions and the rule of precedent. There are indeed common features between the American and the English common law systems. There is a common language with close expressions, but also similar concepts, principles and procedures. But how common are in fact the American and British legal systems? This paper aims at finding some possible answers through a legal and linguistic analysis of some US and UK superior court decisions.

Keywords: common law, superior courts, discourse structure, legal reasoning, interpretation techniques

1. Introduction: the beginnings and evolution of the Plain language movement

The starting point of this paper is the presumption that, as the United States (US) and the United Kingdom (UK) share a common language (English), their respective legal systems may also share a common law. Obviously, American law and English law belong to the same legal tradition, the common law, characterized by a case-law system based essentially on judicial decisions and the rule of precedent. The common law has

now become one of the most important legal families in the world¹ alongside with civil law. But how common are the American and British common law systems? To paraphrase Bernard Shaw's words, aren't the UK and the USA two countries separated by a common legal system? This paper aims at finding some possible answers through a legal and linguistic analysis of some US and UK superior court decisions that constitute an interesting indicator of two existing patterns of the common law.

In order to account for the possible common or different features of American and British common law systems, one needs to refer to the historical roots of the two systems. The common law –so called because it was intended to apply uniformly to courts of various jurisdictions– was born in England during the 12th century through the development of the *curia regis* (King's court) and royal courts that contributed to the gradual establishment of a state in a feudal society. Circuit judges thus spread local custom across the whole territory, which contributed to the establishment of a common set of legal rules. During the 17th century and the rise of the British Empire, those who had emigrated from England to the thirteen British colonies perpetuated and implemented the laws and rules under which they had lived in their homeland throughout the world.

Nevertheless, the newly independent states of America distanced themselves from their English legal roots because of their situation and living conditions. French legal scholars highlight a “separatist” movement (Levasseur, 2004: 4), or a “distancing phenomenon” (Bullier, 2012: 8) in the USA from British legal traditions. While some commonwealth countries developed their own legal principles consistently with the British common law,² American common law walked an autonomous path, especially since the 1776 Declaration of Independence and the adoption of a single written constitution in 1789. This clearly severed the bonds between the colonies and the British Crown and marked a turning point in the development of American common law, separately and autonomously from English judicial decisions. The latter were no longer used as binding precedents by American courts. Initially the laws of the American colonies were intended not to contradict the laws of the Realm of England, though inevitably “the British common law was eluded when the settlers considered it as inappropriate, inadequate or going against their interests or convictions” (Zoller, 2014: 5),³ as confirmed by Blackstone, in his famous *Commentaries*:

Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties,) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force (1893: 85-86).

Consequently, even though the USA did adopt common law rules and procedures originating from English common law during the 17th and 18th centuries, American law

today is clearly distinct from English law. The multiple and profound changes undergone by American common law were mainly conditioned by their new political environment as well as human experience and geographical living conditions. The traditional English opposition between Chancery courts and common law courts, for example, was not transposed to the USA, as Oliver Wendell Holmes argued in *Black and White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* (276 U.S. 518):

The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else (1928: 533-534).

The strength of the common law is often said to lie in its capacity to develop and adapt to the environment in which it is applied. The fact that American and British societies developed autonomously naturally gave birth to acculturated laws that now differ to some extent in the US and the UK, as stated in the British case *Sue Axon v. The Secretary of State for Health (The Family Planning Association)* [2006] EWHC 37 (Admin) regarding the question of abortion:

[A] second reason why the American cases do not assist in this case is that the social and moral values of American society are very different from those which are prevalent in the United Kingdom. There is sensitivity and a controversy regarding the availability of abortion which does not exist on a comparable scale in this country (Justice Silber, 2006: §37).

Acculturation, in this context, refers to the fact that case law follows the needs and expectations of the society where it is applied, which explains that the common law has evolved in the USA and the UK in keeping with acculturation phenomena. As a consequence, even if American law takes its roots in English law, the two countries being culturally different, their respective legal systems logically diverge to some extent. Amongst the main factors which explain why American common law came to differ from its English counterpart, Levasseur highlights the existence of a federal government, a written constitution and a specific procedure of judicial review (69).

In order to underscore the possible similarities and divergences between American and British common law superior court decisions, our paper focuses on three main areas: the differences between the workings of the US and UK Supreme Courts, an analysis of the discourse structure of US and UK superior court decisions and the terminology used by American and British judges and finally, legal reasoning methods applied in both American and British common law.

2. Differences between the workings of US and UK Supreme Courts

A first common feature of the American and British legal systems lies in the fact that both have a supreme court. The US Constitution, also called “the Supreme law of the land”, provides that the judicial power is vested in one Supreme Court and other federal courts.⁴ This constitutional court, which sat for the first time in 1790 and is currently composed of nine justices (the Chief Justice of the United States and eight Associate Justices), rules on hundreds of appeal cases every year, from early October until July. The current English judicial system, which was first organized by the 1873 and 1875 *Judicature Acts* and its following amendments, was profoundly changed in 2005 with the passage of the *Constitutional Reform Act* which replaced the Appellate Committee of the House of Lords by the UK Supreme Court as the leading judicial authority in charge of scrutinizing the application of the common law within the UK. Currently, twelve UK Supreme Court Justices hear appeals on legal questions of public importance from the beginning of October until the end of July.

At first sight, both supreme courts would seem to share common features: they are situated at the apex of their respective court systems in which a similar notion of hierarchy between inferior courts and superior courts is applied and both US and UK Supreme Court judges decide to grant or deny permission to present the appealed case to the court by selecting the cases they consider worth reviewing in the light of the significant legal issues at stake.⁵ Nevertheless, one important difference lies in the fact that the US Supreme Court exercises a unifying role on federal and constitutional law, whereas in the UK the situation is different inasmuch as Scotland, Wales and Northern Ireland have, to a greater or lesser degree, kept their judicial autonomy, their own court systems and legal principles, as explained on the official website of the UK Supreme Court:

For historical reasons, as a state made up of several separate jurisdictions, the United Kingdom does not have a single unified legal system. Instead, there is one system for England and Wales, another for Scotland, and a third for Northern Ireland.⁶

The UK, then, is a non-unified legal system with three jurisdictions (England and Wales, Northern Ireland, Scotland) leading to the existence of a number of judicial particularities such as, for instance, the High Court of Justiciary⁷ which is Scotland's supreme criminal court. However, the UK Supreme Court retains jurisdiction when an infringement of human rights is alleged under the *Human Rights Act* 1998 or when a devolution or compatibility issue is raised under the *Scotland Act* 2012.⁸ Consequently, even if both the American and British legal systems have a supreme court, it is clear that their roles are not entirely similar.

Federalism is the cornerstone of the American political system of government. As such, the US Supreme Court fulfils two main functions; firstly, it interprets federal (and at times state) laws brought before the court within the framework of a particular case in which one or several legal questions are raised. For instance, in *Lawrence v. Texas* 539 U.S. 558 (2003), the legal question raised was to determine if the criminal convictions

of John Lawrence and Tyron Garner under the Texas “Homosexual Conduct” law (section 21.06 Homosexual Conduct Texas Penal Code), which criminalized sexual intimacy by same-sex couples but not identical behaviour by different-sex couples violated their Fourteenth Amendment guarantee of equal protection under the law. This example, among many others, goes to illustrate the fact that the vocation of the US Supreme Court is not to unify state laws by imposing a federal common law but rather, to guarantee the respect of the U.S. Constitution on the part of all states. Secondly, the US Supreme Court exercises judicial review –i.e. the authority to invalidate legislative acts if contrary to the constitution–since its judges bear the ultimate responsibility of ensuring that legislative, executive and administrative actions are in keeping with the Constitution. In a pending case, the Court is invited to confirm (or not) the constitutionality of the challenged state or federal law(s). Judicial review, even if not explicitly mentioned in the Constitution, is one of the pillars of American rule of law. In the 1803 landmark case *Marbury v. Madison*, the US Supreme Court took the initiative of interpreting the Constitution to mean that one of the key constitutional roles of the judicial branch was to check the constitutionality of a federal statute. From then onwards, American common law acquired a specific dimension alien to English common law.

Unlike the US Supreme Court, the UK Supreme Court is not a constitutional court, strictly speaking. Although guaranteeing the application of the common law in the UK, the protection of human rights and the non-infringement of the body of laws of a constitutional nature,⁹ it does not check the constitutionality of laws.¹⁰ French legal ELP specialist Gibson-Morgan points out the main difference between the US and UK Supreme Courts when she underlines that “The UK Supreme Court was not modelled on the federal Supreme Court” (2014: 94). On the one hand, the UK Supreme Court is bound by parliamentary sovereignty, which prevents it from going against statute law. Additionally, there is no distinction of nature between constitutional principles or texts as the fundamental legal standards, and ordinary legislation passed by the British legislature, both are Acts of Parliament. The role of the UK Supreme Court is then to scrutinize the application of the common law in a non-unified legal system. This role differs from its American counterpart, described as the Keeper of the Constitution that protects individual constitutional rights. On the other hand, considering the different nature of US and UK political systems, the UK Supreme Court is not a federal court even if it guarantees some degree of legal uniformity over the different jurisdictions of the UK.

Finally, there ensues from the differences in function between the US and UK Supreme Courts that distinctions in terminology exist as well. One of the most significant is related to the notion of “judicial review”, a term which exists in both the American and British legal systems but refers to two different concepts. In American English, judicial review refers to “the ability of the court to declare a Legislative or Executive act in violation of the Constitution”,¹¹ as Garner further explains in his *Dictionary of Modern Legal Usage*:

The BrE [British English] uses are quite different because G.B. [*sic*] does not have judicial review in the American sense: courts cannot invalidate primary legislation (though they review the decisions of lower courts). British writers use *judicial review* to refer to a relatively new procedure in England [...] that enables a litigant to challenge an administrative action by a public body (485).

It is clear, then, that the US Supreme Court stands in sharp contrast to its British counterpart when it exercises judicial review. It has played a vital role in America's social and economic life due to its wide power of interpretation, that is to say “judging primary legislation against fundamental constitutional problems [...] checking whether norms are in agreement with the Constitution” (Gibson-Morgan, 2014: 84). This is particularly true of landmark cases in the field of civil rights such as *Brown v. Board of Education of Topeka* (1954), often commented on as a clear example of American judicial activism. The case put an end to the discriminatory principle of “separate but equal” established at the end of the 19th century by US Justices themselves and considered as one of the reasons for decades of segregation in certain states.

After this brief overview of some of the differences between American and British common law systems, notably the American principle of the sovereignty of the Constitution being opposed to the British principle of the sovereignty of Parliament, we now focus on questions of language and discourse organisation through an analysis of some US and UK superior court decisions. These texts, listed in the bibliography, have been selected as they highlight the legal mechanisms used to structure court decisions: implementation of the rule of precedent, distinction between *ratio decidendi* (the principle that the case establishes) and *obiter dictum* (a remark in a judgment that is “said in passing”), adaptation of case law to societal needs and legal reasoning techniques used by common law judges. Such texts consistently illustrate how structural features have shaped legal discourses and impacted legal language.

3. Discourse structure of superior court decisions

In the US, as in the UK, judicial decisions are publicly read during the final hearing and subsequently published in a judgment signed by all the judges. Contrary to French judges who withdraw behind the anonymity of the court, common law judges sign their decisions, aptly called “opinions” in American law. This practice, common to the US and the UK, constitutes the cornerstone of a legal case-law system in which the judges are invited to declare what the law is and justify their statements and interpretations explaining how they reached their conclusion. What does an analysis of the macro-structure of American and British judicial decisions reveal about the divergences and similarities between the US and the UK? To answer the question, we decided to start from what the reader sees at first sight when looking at a court decision in terms of its general layout and formal structure, before moving on to a further analysis of the textual implementation of relevant legal mechanisms.

To start with, the manner of citing cases is not exactly the same on the two sides of the Atlantic. In the UK, as in the US, a judgment is published by a specialized publisher who may add particular indications in order to make the first approach to the document easier. Firstly, we find the publishing references of the case in the different Law Reports such as in Example 1, a screen shot taken from the British Bailii website.¹²

You are here: [BAILII](#) >> [Databases](#) >> [United Kingdom House of Lords Decisions](#) >> *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7 (17 October 1985)
URL: <http://www.bailii.org/uk/cases/UKHL/1985/7.html>
Cite as: [1986] AC 112, [1986] 1 FLR 229, [1985] UKHL 7

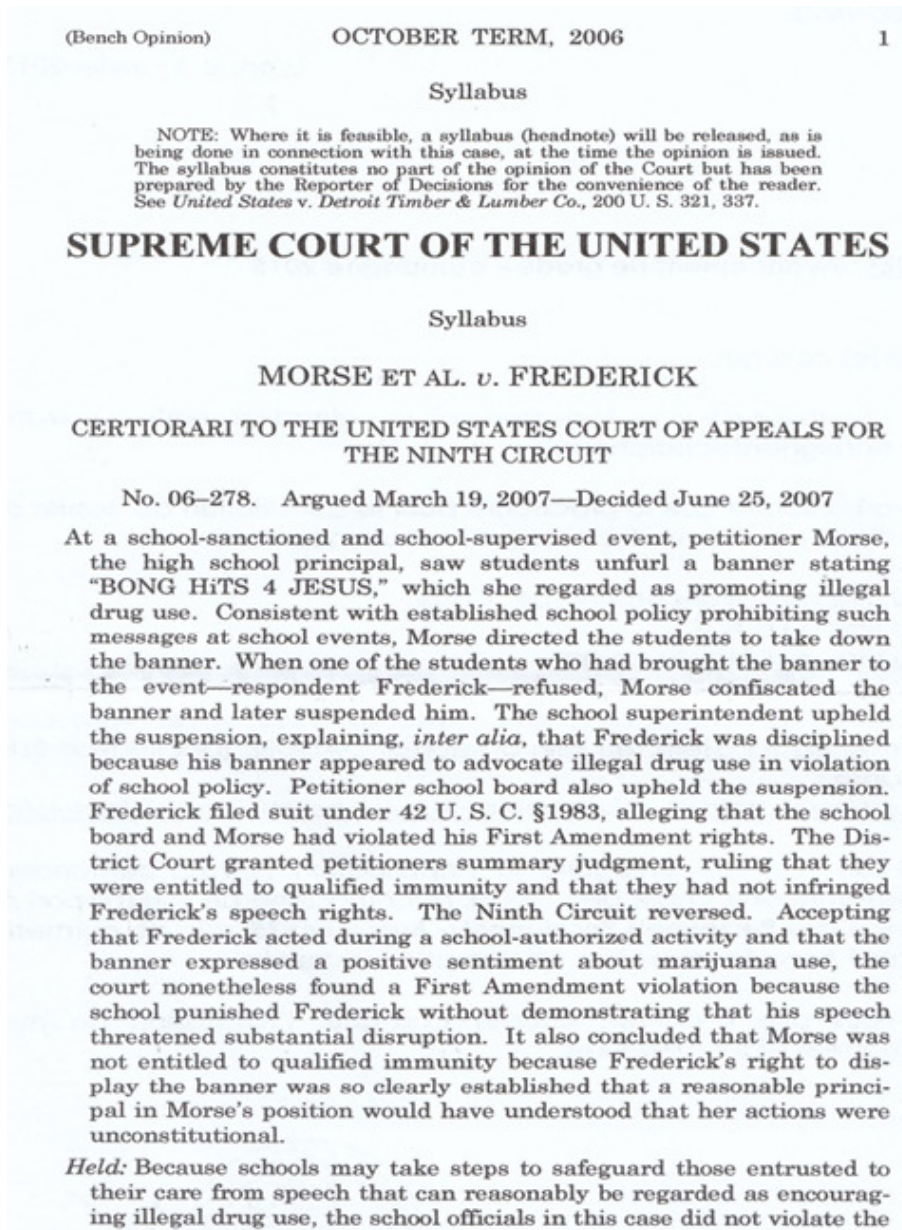
[[New search](#)] [[Printable PDF version](#)] [Buy ICLR report: [\[1986\] AC 112](#)] [[Help](#)]

Example 1. Different publishing references of the Gillick case

Since 2001, the system of neutral citation for cases has been implemented in the UK so as to identify a case without referring to any publisher but to the court of law that handed down the decision. The neutral citation refers to the name of the parties (*Gillick v West Norfolk and Wisbech AHA*), the year of judgment in brackets ([1985]), then the court (UKHL) and finally the case number (7).

To compare if the citation methods are the same, let us take the example of an American case: *City of Richmond v. J.A. Croson Co* is cited as *City of Richmond v. J.A. Croson Co* 488 U.S. 469 (1989). As already mentioned, American judicial decisions are first publicly read, then published by specialized publishers and in this citation, “488” refers to the volume in which the decision was published, “U.S.” stands for ‘United States Reports’, the name of the publisher, “469” refers to the page from which the quotation is taken and, finally, the year the decision was handed down is indicated. There is no system of neutral citation in American law.

Secondly, the macro-structure of UK and US superior court decisions is characterized by the presence of subparts and references that may not be the same in the two systems. In a UK judgment, the different hearing dates, as well as the date of the hearing of the published decision, are mentioned. These indications are absent from the texts of US Supreme Court decisions when published. Next, in the UK some “catchwords”, as referred to by the editing publisher, are inserted which can be useful to identify the legal fields covered by the case at first glance. Such keywords are not included within American judicial decisions. The next subpart, called “headnote” in English law, summarizes the relevant facts of the case and its context. In American common law, when a decision is published, a part is added to the text originally read in court when the decision is announced. This introduction, called “syllabus”, consists in a summary of the decision with the key arguments raised in the majority opinion (see Example 2).



Example 2: Part of the syllabus in an American case
Deborah Morse, et al., Petitioners v. Joseph Frederick 551 U. S. ____ (2007)

Each time a ruling is published, the syllabus is introduced at the top of the first page of the document with the following paragraph:

NOTE: Where it is feasible, a syllabus (headnote) will be released, as being done in connection with the case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 327.

This was clearly indicated in the 1906 Detroit case, when US Justices pointed out that “the headnotes of the opinions of this Court are not the work of the Court, but are simply the work of a Reporter, giving his understanding of the decision ...” (*ibid.*, 327). Consequently, these introductory remarks may simply be interpreted as providing reader guidance as to what was decided and how, but have no legal value per se.

In the judicial decisions of both countries, the headnote (or syllabus) is immediately followed by a short summary of the judgment introduced by the word “Held”. This summary focuses on the leading judgment and the points of law scrutinized by the court. Such a presentation is the same in US and UK superior court decisions as illustrated in the extract above taken from *Deborah Morse, et al., Petitioners v. Joseph Frederick* 551 U. S. (2007). Another difference between American and British common law systems lies in the presence or absence of references to dissenting opinions. In the US, the syllabus does not include any precise references to the existing concurring or dissenting opinions that are actually published in the text of the ruling. On the other hand, in the English part called “headnote”, all dissenting positions are highlighted with reference to the name of the dissenting judge so as to make it easier to find the relevant information in the body of the text.

In the UK, depending on the publisher, other decisions have notes which refer to the paragraphs of the Digest of the Legal Encyclopedia (*Halsbury’s Law* and *Halsbury’s Statutes*) to which the legal issues are related, in order to guide the reader with regard to the doctrinal position on this issue. Such is not the practice in American common law. Next, there follows an exhaustive list of all cases the judges refer to in the *obiter dictum* (see Example 3), which is not a practice used in decisions handed down by the US Supreme Court.

The following cases are referred to in their Lordships’ opinions:

Agar-Ellis, In re (1878) 10 Ch.D. 49; (1883) 24 Ch.D. 317, C.A.
Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.
Hewer v. Bryant [1970] 1 Q.B. 357; [1969] 3 W.L.R. 425; [1969] 3 All E.R. 578, C.A.
J. v. C. [1970] A.C. 668; [1969] 2 W.L.R. 540; [1969] 1 All E.R. 788, H.L.(E.)
Johnston v. Wellesley Hospital (1970) 17 D.L.R. (3d) 139
O’Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 604; [1982] 3 All E.R. 680, C.A.; [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)
P. (A Minor), In re (1981) 80 L.G.R. 301
Reg. v. D. [1984] A.C. 778; [1984] 3 W.L.R. 186; [1984] 2 All E.R. 449, H.L.(E.)
Reg. v. Howard [1966] 1 W.L.R. 13; [1965] 3 All E.R. 684, C.C.A.
Reg. v. Howes (1860) 3 E. & E. 332
Reg. v. Tyrrell [1894] 1 Q.B. 710
Royal College of Nursing of the United Kingdom v. Department of Health and Social Security [1981] A.C. 800; [1981] 2 W.L.R. 279; [1981] 1 All E.R. 545, Woolf J., C.A. and H.L.(E.)
Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] A.C. 871; [1985] 2 W.L.R. 480; [1985] 1 All E.R. 643, H.L.(E.)

Example 3: List of the cases referred to in the Gillick case, extract taken *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] AC 112, 115

Finally, there is the judgment¹³ itself. The judgment of each British judge is presented *in extenso*, one judgment after the other. Each judgment is released in a single block of opinion with an internal structure, usually following the different legal issues that have been assessed,¹⁴ but without any subparts. The dissenting opinions are not eluded; they are published equally to the leading position, but are identified as dissenting for a clear understanding of the decision, as discussed in more detail below. In some of the British decisions selected here, each opinion concludes with expressions such as “I have had the advantage of reading in draft the speech prepared by my noble and learned friend, [...]. I agree with it and for the reasons he gives I would dismiss this appeal” (Lord Templeman, 1994: 2, *Murray v DPP*). In American Supreme Court decisions, US justices explicitly express their disagreement in dissenting opinions as, for example Justice Sotomayor in *Berghuis v. Thompkins* 560 U.S. ____ (2010): “and because the Court’s answers to those questions do not result from a faithful application of our prior decisions, I respectfully dissent” (2010: 2, dissenting opinion).

Finally, the structure of a UK superior court decision stands in sharp contrast with the structure of a US Supreme Court decision. Between 1801 and 1835, under Chief Justice Marshall, the English practice of *seriatim* judicial opinion, i.e. each opinion read individually, was discontinued. Nowadays, the text of an American ruling in a given case is composed of several parts, as illustrated in *Glossip v. Gross* 576 U.S. ____ (2015):

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined (2015: 3-4, syllabus).

First, there is the opinion of the Court, also called the majority opinion, i.e. the enforceable part of the decision which has legal effect, delivered here by Justice Alito. It corresponds to the text agreed upon by a majority of the judges and written either by the Chief Justice if s/he is in the majority or another justice chosen by the Chief Justice. If the latter is not in the majority, the majority will decide who drafts the opinion of the Court. There is also the possibility of having concurring opinions (two in the above example). A concurring opinion is drafted by a judge who agrees with the majority decision but may base his or her own decision on complementary or different arguments. Finally, there are dissenting opinions (two in the above example) when judges in the minority want to draft their own text to express their disagreement with, and at times harsh criticism of, the arguments presented in the opinion of the Court. Each justice may conclude his or her text by saying “I concur” or “I dissent”. And, as illustrated above, it is even possible to concur with a dissenting opinion. Some US Justices are famous for their dissents as, for example, Justice Harlan in *Plessy v. Ferguson* (1896) or Sonia Sotomayor in more recent cases such as *Schuette, Attorney*

General of Michigan v. Coalition to defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by any Means Necessary (BAMN) et al. (2014):

But I part ways with the plurality when it suggests that judicial intervention in this case “impede[s]” rather than “advance[s]” the democratic process and the ultimate hope of equality. *Ante*, at 16. I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. Because I would do so here, I respectfully dissent (2014: 6, dissenting).

In the UK, superior court cases are held in consistence with the position of the majority of judges. Generally, the first judgment presented when a decision is published is the most important one with respect to the legal issues at stake and represents the leading opinion. In lower court decisions, where a consensus is reached on the case, only one judgment may be presented *in extenso*, while the two other judges' opinions are limited to a simple expression, “I agree”. Where no consensus is reached, each opinion counts. In order to make these accessible to legal practitioners, all the opinions are published comprehensively, either concurring with or dissenting from the leading one that ruled the case.

These structural differences may originate from the drafting process which varies between the US and the UK. US Justices hear oral arguments from both sides during generally two weeks. They then spend several weeks deliberating, passing a draft of the decision between each other until the writing of a final text. This version has to be approved by a majority of five votes at least. Judges in the minority will proceed similarly. Due to this collective drafting process, the text of an American judicial decision is composed of different parts. On the other hand, the British drafting process seems different even though it evinces the same plurality of judges and judgments. Where American judges' opinions are presented according to their position (in the majority, concurring or dissenting), no such presentation is highlighted in British cases. In spite of divergences in textual organisation between American and British common law systems, US and UK superior court decisions share one common structuring mechanism, the doctrine of *stare decisis* or the rule of precedent, that similarly shapes judicial discourse.

In the two countries, *stare decisis* is the linchpin of common law. In order to discover how the mechanism of precedent works, English law students are usually taught how to distinguish the two different parts of the decision: *ratio decidendi* (i.e. the rule of law that is binding over cases on similar relevant facts) and *obiter dictum* (i.e. the legal reasoning followed by the judge to argue his/her position, but which has no legally binding framework). Distinguishing between the two is not an easy task considering the number and length of common law judicial decisions since these two parts coexist but are not clearly distinguished. British judges are not expected to construct their legal reasoning on the basis of structured discourse organisation. As a consequence, what belongs to *ratio decidendi*, and what must be read as *obiter dictum*

is left for legal practitioners and academics to discover and is sometimes subject to controversy.

Ratio decidendi is the legal decision strictly speaking. In other words, what will remain as a legal principle and what is intended to become the legal precedent that will bind lower courts in similar subsequent cases. Consequently, *ratio decidendi* is considered as the most important part of the decision, even when it is expressed in a fewer number of words compared to the length of the *obiter dictum*. Most of the time, *ratio decidendi* is formulated unambiguously so as to avoid any diverging interpretation. Following are two examples which serve to illustrate the differences between the two parts of a British judicial decision. The first one is taken from *R v Howe & Bannister* [1987] AC 417:

(...) As I can find no fair and certain basis upon which to differentiate between participants to a murder and as I am firmly convinced that the law should not be extended to the killer, *I would depart from the decision of this House in Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653 and declare the law to be that duress is not available as a defense to a charge of murder, or to attempted murder. I add attempted murder because it is to be remembered that the prosecution have to prove an even more evil intent to convict of attempted murder than in actual murder. Attempted murder requires proof of an intent to kill, whereas in murder it is sufficient to prove an intent to cause really serious injury. It cannot be right to allow the defense to one who may be more intent upon taking a life than the murderer. This leaves, of course, the anomaly that duress is available for the offence of wounding with intent but not to murder if the victim dies subsequently. But this flows from the special regard that the law has for human life, it may not be logical but it is real and has to be accepted.” (Lord Griffiths, 1987: 17, our italics to underline the *ratio decidendi*)

In the judgment of a superior court, where the legal issue at stake is a complex one, several *ratio decidendi* may be highlighted in the same case, *ratio decidendi* being the legal principle that emerges from the case and subsequently considered as binding in a factually similar situation. Indeed, as opposed to the mandatory character of statutes, case law is binding only with respect to the particular facts of the case: a precedent is followed only insofar as it relates to similar facts. It does not set an absolute general rule of law taken in its civilian meaning. Rather, it settles a specific legal issue that arose from a particular set of facts and circumstances, as the Earl of Halsbury L.C. stated in *Quinn v Leathem* [1901] AC 495:

(...) Now, before discussing the case of *Allen v. Flood* (1) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found (para. 1).

Consequently, as A. L. Goodhart pointed out, *ratio decidendi* is rooted in the “material facts of the case”¹⁵ and, as such, the context of the case framed in *obiter dictum* is crucial.¹⁶ The same principle is found in American common law through the legal reasoning of analogy.

A court opinion using legal analogy will cite precedents deemed favorable and attempt to distinguish precedents deemed unfavorable. The court may attempt to distinguish a previous decision by showing that it rests on a different set of facts than the present case or that the rationale of the previous decision is inapplicable to the present case (Regan, 2015: 366).

Under the principle of analogy, like cases should be treated alike in material respects. So if case B is like case A, then case B should be decided the same way as case A. And if case B is not like case A, then case B should not be decided the same way as case A.

In *obiter dictum* judges explain their reasoning regarding the facts and the legal issues at stake. This part of the judgment can be compared to the reasoning followed by the judge to reach *ratio decidendi*. *Obiter dictum*, although not binding, is a very important part of the case in many respects. Indeed, the framework of the case is essential for the legal practitioner who examines the material facts of the case in order to know whether it should be regarded as binding or not. It also helps to identify the context in which the legal principle has been held and shed light on the scope of the decision.¹⁷ Moreover, it is in *obiter dictum* that some of the most beautiful pieces of legal reasoning are to be found and where the implementation of the common law mechanism of precedent is seen in action. Indeed, in *obiter dictum* the judge scrutinizes the previous decisions held on similar legal issues and assesses whether or not they should be regarded as binding upon the present case.

Although the elements contained in *obiter dictum* are not binding, they can be re-used by other judges in their legal reasoning or even in subsequent *ratio decidendi*. In this respect, it is worth quoting the *R. v Howe* case a second time since it is relevant when analysed in relation to *R v Gott* as a good illustration of the way *obiter dictum* can later be re-used as *ratio decidendi* (see Example 4).

<i>R. v Howe & Bannister</i> [1987] AC 417	<i>R v Gotts</i> [1992] 2 AC 412
As I can find no fair and certain basis upon which to differentiate between participants to a murder and as I am firmly convinced that the law should not be extended to the killer, <i>I would depart from the decision of this House in Director of Public Prosecutions for Northern Ireland v. Lynch</i> [1975] A.C. 653 and declare the law to be that duress is not available as a	(...) As lord Griffiths pointed out in the passage which I have just referred, an intent to kill must be proved in the case of attempted murder but not necessarily in the case of a murder. Is there logic in affording the defense to one who intends to kill but fails and denying it to the one who mistakenly kills intending only to injure ?

defense to a charge of murder, or to attempted murder. I add attempted murder because it is to be remembered that the prosecution have to prove an even more evil intent to convict of attempted murder than in actual murder. Attempted murder requires proof of an intent to kill, whereas in murder it is sufficient to prove an intent to cause really serious injury. It cannot be right to allow the defense to one who may be more intent upon taking a life than the murderer. This leaves, of course, the anomaly that duress is available for the offence of wounding with intent but not to murder if the victim dies subsequently. But this flows from the special regard that the law has for human life, it may not be logical but it is real and has to be accepted. (Lord Griffiths, our italics to underline the *ratio decidendi*, the rest being *obiter dictum*)

It is of course true that withholding the defense in any circumstances will create some abnormalities but I would agree with Lord Griffiths that nothing should be done to undermine in any way the highest duty of the law to protect the freedom and lives of those that live under it. *I can therefore see no justification in logic, morality or law in affording to an attempted murderer the defense which is withheld from a murderer.* (Lord Jauncey of Tullichettle. Our italics to underline the *ratio decidendi*, the rest being *obiter dictum*).

Example 4: Illustration of how *obiter dictum* is re-used as *ratio decidendi* in a subsequent case

In American common law, the distinction between *ratio decidendi* and *obiter dictum* is less commonly used since American lawyers and judges use the expression “holding” to refer to the British *ratio decidendi*. Nevertheless, in any ruling handed down by US Supreme Court Justices, there is a part of the decision that will legally bind the lower courts in similar cases. To sum up, the *ratio decidendi* or holding is based, in both countries, on the same legal doctrine of *stare decisis*, i.e. “to keep to what has been decided before.” Even if, at first sight, words or expressions may appear different, the principles and mechanisms at the core of American and English common law systems are widely similar. The rule of precedent is one of them. It first appeared in 1861 when the House of Lords stated that it felt it was bound by its own decisions, and is also applied in American common law. The question, therefore, is whether the rule of precedent is applied in the same way in American and British law.

Some legal scholars argue that the rule of precedent is more flexible in the American legal system than in the UK's. A quotation from *Burnet v. Coronado Oil and Gas Co.* (285 U.S. 393) by Justice Brandeis (dissenting) illustrates this flexibility:

Stare decisis is not, like the rule of *res judicata*, universal inexorable command. The rule of *stare decisis* is not inflexible. Whether it shall be followed or departed from, is a question entirely within the discretion of the court, which is again called upon to consider a question once decided (405-406).

This affirmation emphasizes the flexible nature of precedent in American Common law. It is not uncommon for the US Supreme Court to overrule its previous decisions if they are no longer considered relevant, fair or justified. In 1992, in *Planned Parenthood of Southeastern PA v. Casey* 505 U.S. 833 (1992), Justice O'Connor wrote:

Because neither the factual underpinnings of Roe's central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view, repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided (864).

Perhaps the most spectacular example of overruling precedents is the case *Brown v. Board of Education of Topeka*, mentioned earlier, in which the US Supreme Court struck down the legal principle of separate but equal that it had itself formerly established in *Plessy v. Ferguson*. The interpretation of the Constitution changed between the end of the 19th century and the middle of the 20th century, henceforth granting the court the right to depart from its own legal precedent:

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected (Justice Warren, 1954: 482-483).

Even though British law lords were bound by their own judgments until 1966, it seems that the rule of precedent has also been applied with some degree of adaptability in English common law. As a matter of fact, the notion of judge-made law is frequently presented as being adaptable to the current needs of society. Judges may create or adapt the law in accordance with the new societal context in which it is applicable. An example of the adaptability of judge-made law and the power of creation of judges may be seen in the Gillick case, in which Lord Denning refuses to consider precedents that originated in Victorian England but were still binding in 1985:

(...) I would get rid of the rule in Re Agar-Ellis and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands (...). The common law can, and should, keep pace with the times. It should declare, in conformity with the recent report of the Committee on the Age of Majority (Cmnd 3342) that the legal right of a parent to the custody of a child ends at the eighteenth birthday and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice (Parker L.J., 1986: 129; our italics).

Hence, one might more readily refer to the British common law as being adaptable, in comparison to American common law which could more appropriately be

characterised as flexible. In spite of this minor difference, the rule of precedent gives a good example of one aspect of common law which is common to both the US and the UK.

With regard to dissenting opinions, one may wonder why they are integrated into American and British judicial decisions when only the majority opinion of the US Supreme Court or the judgment of the UK Supreme Court is legally binding.

In American common law, every case is more or less based on a reading of the US Constitution construed through either a narrow or a wide interpretation. The former provides that if the constitution does not say something can be done, then it cannot be done, while the latter says that if the constitution does not say something cannot be done, then it can be done. Based on the plurality of possible constitutional interpretations, American common law allows judges to share their points of view on the case, including in dissenting opinions. As a result, the final text is polyphonic, like a piece of music in which different voices are heard which sometimes harmonize while at other times they are dissonant. It is thus important to be able to detect the linguistic signs underlying the polyphony in US Supreme Court decisions. The 'flashback' structure illustrates this polyphony with expressions such as *ante* used to refer to what has been said previously in another part of the decision, sometimes in the opinion of the Court. In *Deborah Morse, et al., Petitioners v. Joseph Frederick*, a case related to the First Amendment and the constitutionality of the measures implemented by public schools to prohibit students from displaying messages promoting the use of illegal drugs at school-supervised events, one judge, Justice Stevens dissented and wrote:

I would hold, however, that the school's interest in protecting its students from exposure to speech reasonably regarded as promoting illegal drug use, *ante*, at 1, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs (Stevens, dissenting, 2007: 1).

Furthermore, the most significant interest of dissenting opinions from the legal point of view is their persuasive force, i.e. the fact they constitute incentives for lower court judges. In subsequent cases dealing with similar issues, they can reinforce a judge's argument when s/he may want to overrule a precedent and require arguments and justifications to do so. In the UK, judges, and especially justices of superior courts, are highly respected. The foundation of this respect is perhaps as social as it is legal. British legal professionals benefit from it all the more so as senior judges are former barristers who generally receive a knighthood. As such, a minority opinion written by a British senior judge, even though it may have no legal enforceability on the case stated, is nonetheless considered as valuable and worth being brought to the attention of practising lawyers. Moreover, the value of the dissenting opinion may appear relevant later, for example in appeal, when the superior court supports the position of the dissenting judge in the lower court or when the dissenting opinion presented at any given time becomes the one on which case law is overturned later on.

Finally, dissenting opinions can be read retrospectively as an anticipation of what may later occur as can be seen in Justice Black's dissenting opinion in the US case of *Tinker v. Des Moines Independent Community School District* 393 U.S. 503, which related to the constitutionality of a prohibition against the wearing of armbands in public school as a form of symbolic protest:

One does not need to be a prophet or the son of a prophet to know that, after the Court's holding today, some students in Iowa schools -- and, indeed, in all schools -- will be ready, able, and willing to defy their teachers on practically all orders. [...] I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent (Black, dissenting, 1969: 525-526).

Some years later, in *Deborah Morse, et al., Petitioners v. Joseph Frederick*, Justice Thomas wrote in his concurring opinion:

Justice Black may not have been “a prophet or the son of a prophet,” but his dissent in *Tinker* has proved prophetic 393 U. S. at 525. [...] We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either “[g]ibberish,” *ante*, at 7, or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to “surrender control of the American public school system to public school students.” *Tinker, supra*, at 526 (Thomas, 2007: 12-13).

In American and British common law alike, dissenting opinions can thus be seen to play a vital role in a legal system based on case law and as such are fully integrated in the ruling. The final text of the decision is shaped by British and American judges according to their own reasoning methods. However, do judges from both countries have the same legal reasoning techniques? Do these mechanisms have an impact on the language used in superior court decisions?

4. Language and legal reasoning mechanisms

In the UK, when a point of law is raised, judges have to give a decision regarding the points of law and, when necessary, an interpretation of statutory provisions. This interpretation will become as binding as the statutory provisions themselves. As pointed out by David (1972: 81), “English statutes truly become English law after they have been enshrined in judicial decisions”.¹⁸ However, in British common law the judge's power of interpretation is narrowly circumscribed by reading techniques: words must be construed literally sticking to their plain sense, either legal or ordinary depending upon the context. However where no text defines the issue, judges will create new legal terms and principles.

The legal techniques of interpretation are organized according to a hierarchy of rules that significantly limit the power of judges. The literal rule of interpretation, also known

as “the plain meaning rule” –not to be confused with Plain English– prevails in any situation where the terms of the statute are clear enough, even if the result is considered unsatisfactory. However, when the terms of the Act are not clear, the second rule of statutory interpretation, called the “golden rule”, can be used. According to this rule, judges can depart from the literal rule so as to avoid any absurdity in the result of the interpreting process. As expounded by Lord Esher in *R v Judge of the City of London Court* [1892] 1 Q.B. 273:

“(…) If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity.” [*literal rule*] “In my opinion, the rule has always been this - if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.” [*golden rule*] (290, hook brackets added to highlight the use of the literal rule and the golden rule).

Where the first two rules of interpretation cannot solve the difficulty, judges resort to the third called “the mischief” or “defect rule”: they scrutinize Parliament's original purpose and intention when the Act was passed in order to come to an appropriate interpretation of the Act. One famous illustration of this technique can be found in a criminal case relating to six prostitutes who challenged their charges of solicitation under the *Street Offences Act* 1959, arguing that they were soliciting in private premises from behind their windows or from their balconies. In *Smith v Hughes* [1960] 1 WLR 830, Lord Parker provides an illustration of the mischief rule:

(…) Everybody knows that this was an Act to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in this way it can matter little whether the prostitute is soliciting while in the street or is standing in the doorway or on a balcony, or at a window, or whether the window is shut or open or half open (832).

Lastly, it is worth mentioning that the particular technique of teleological analysis has been more recently used by British judges. This technique, which refers to the spirit of the text, is hardly ever applied for interpreting British statutes which usually tend to be very detailed and accurate. Nevertheless, it sometimes helps British judges to interpret European Union Regulations that are mostly written in typically civilian style, with which British judges are neither familiar nor at ease.

In American common law, the question of the interpretation of a (federal or state) law is settled through a reading of the US Constitution. Every case decided by the US Supreme Court boils down to a constitutional question. Justices have to decide if the statutory provisions of the piece of legislation being challenged are in keeping with the supreme law of the land. Justice Frankfurter once said in his concurring opinion in *Graves v. New York* 306 U.S. 466, that “the ultimate touchstone of constitutionality is

the Constitution itself and not what we have said about it” (491-492). Oliver Wendell Holmes, as early as 1899, stated that “We do not ask what the lawmaker could have meant; we do not try to know what the Act means”.¹⁹ An American judge does not consider himself a collaborator of the lawmaker (Levasseur, 2004: 118). His role is not to find the intention of the legislative body behind the text. This is the reason why the main method of legal interpretation in the American common law system is the plain meaning rule, and only if the textual interpretation leads to absurd and unfair solutions will the intention of the lawmaker be analysed.

Finally, when no legal provision regulates the issue at stake, common law judges have the power to create new legal principles that will subsequently rule the issue and bind lower courts. One of the best examples of British judge-made law and its subsequent terminological creations is the well-known “neighbour principle”. The principle was created by Lord Atkin in *Donoghue v Stevenson* [1932] UKHL 100, also known as the “Snail in the Bottle case”, according to which reasonable care must be taken to avoid acts or omissions likely to injure “a neighbour”. The legal principles ruling liability for negligence were based on this case, giving rise to new developments of tort law. This mechanism has subsequently been referred to as the “neighbour principle”:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my minds to the acts or omissions which are called in question (Lord Atkin, 580).

All the legal criteria on which negligence is based are present in this paragraph: negligence can be established when the tortfeasor is in a position where s/he could foresee the damage caused by his/her act to the victim and has failed to prevent it from happening.

Similarly, US Supreme Court Justices have the power to interpret the text of the US Constitution so as to establish rights that have not explicitly been expressed in the supreme law of the land. This was the case in landmark case *Roe v. Wade* 410 U.S. 113 (1973) on abortion:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. [...] This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy (Justice Blackmun, 1973: 152-153).

This quotation illustrates the power of US Supreme Court Justices to create and develop new legal principles through a wide interpretation of constitutional provisions. This is the American version of judge-made law applied pursuant to the doctrine established in 1819 in *McCulloch v. Maryland* 100 U.S. 421:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional (421).

Additionally, the power of creation of common law judges, British and American alike, sometimes goes beyond the establishment of a legal principle, giving rise to practical legal tools for practitioners. When ruling on a case, judges have the possibility to set principles and define tools that may be taken up in future legal situations. In the Gillick case already mentioned, in *obiter dictum* Lord Fraser introduced a comprehensive test that helped medical practitioners assess whether they would be failing to discharge their professional responsibilities by providing contraceptive advice to a minor without parental consent:

(...) But there may well be cases, and I think there will be some cases, where the girl refuses either to tell the parents herself or to permit the doctor to do so and in such cases the doctor will, in my opinion, be justified in proceeding without the parents' consent or even knowledge *provided he is satisfied on the following matters*: (1) that the girl (although under 16 years of age) will understand his advice (2) that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice (3) that she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment (4) that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer (5) that her best interests require him to give her contraceptive advice, treatment or both without the parental consent (our italics, 1986: 174).

Lord Fraser based this test on five criteria that must be assessed by any medical practitioner before making the decision to prescribe such a treatment or procedure to girls who are underage. Though this test was created with “contraceptive treatments” in mind (to quote Lord Fraser himself), it was later considered to be sufficiently clear and useful to be used in any situation when a minor seeks medical advice or treatment without informing his/her parents. Since that date, this test has been known as the “Gillick competence test” for academics and practitioners, and has been adapted to other cases when a practitioner needs to assess the maturity of the child.

Similarly, in the 1966 American criminal case *Miranda v. Arizona* 384 U.S. 436 which gave rise to the famous “Miranda Rights”, US Supreme Court Justices established legal and professional guidelines for law enforcement to respect when a suspect is arrested and taken into police custody:

As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous

opportunity to exercise it, *the following measures are required*. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed (our italics, 444).

These two cases, one British, the other American, underscore the power of common law judges to set out principles and legal tools for professionals both in the UK and the US.

5. Conclusion

This paper has highlighted the existence of some common features in the American and English common law systems such as a largely common language, as well as similar concepts, principles and procedures. English common law undoubtedly remains the original and founding source of American law. The comparison between American and British decisions handed down by US and UK superior courts, through a legal and linguistic analysis, has highlighted these convergences. The rule of precedent is similarly implemented in both legal systems in spite of minor structural differences pointed out in the judicial decisions that have been studied.

Nevertheless, there are differences which indicate quite clearly that the American and the English common law systems not so common after all. The legal terminology is both similar and different, as illustrated by the term ‘judicial review’ present in both systems but which does not refer to the same legal reality. Moreover, while English and American judges are both empowered to create new legal concepts, the way in which texts are interpreted (and court decisions drafted) are distinct. In addition, the flexibility used by American judges is not strictly comparable to the adaptability that characterises English common law – leading us to conclude that, with regard to the cross-cultural aspects of even close-culture disciplines, a constant look-out for “false” or “true” friends is an undisputable prerequisite.

Notes

1. 47 States are pure common law systems, without counting the bi-juridical ones. See <www.juriglobe.ca/fra/sys-juri/class-poli/common-law.php>, consulted on 23 July 2015.

2. See *Waghorn v Waghorn*, 297: Dixon, J., in an Australian case: “Where a general proposition is involved the court should be careful to avoid introducing in Australia a principle inconsistent with that accepted in England. The common law is administered in many jurisdictions and unless each guards against needless divergencies of decision its uniform development is imperilled”.

3. See Zoller (2014): 5, consulted on 23 July 2015.

4. For more information on the US Supreme Court, see the US Supreme Court website: <<http://www.supremecourt.gov/>>, consulted on 23 September 2015.

5. Interestingly, the American term used to refer to the application before the US Supreme Court, “to file for a writ of certiorari”, comes from English common law which abolished this terminology in 1938. The UK has replaced it with the more transparent expression “application for permission to appeal”.

6. See <<https://www.supremecourt.uk/about/uk-judicial-system.html>>.

7. Section 124(2) *Criminal Procedure (Scotland) Act* 1995.

8. On these particularities, see the UK Supreme Court website: <<https://www.supremecourt.uk/docs/jurisdiction-of-the-supreme-court-in-scottish-appeals.pdf>>, consulted on 27 July 2015.

9. The following Acts are of constitutional nature with regard to continental standards: *Magna Carta* 1215, *Habeas Corpus Act* 1679, *Bill of Rights* 1689, *Act of Union* 1707, *Act of Union* 1801, *Human Rights Act* 1998.

10. On the power of the UK Supreme Court with respect to constitutional protections, see Olivier Deparis (July 2011). “La Cour suprême au Royaume-Uni et la question de constitutionnalité”, *Nouveaux Cahiers du Conseil constitutionnel* n° 32 (Dossier: Royaume-Uni). Available online at <<http://www.conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-32/la-cour-supreme-au-royaume-uni-et-la-question-de-constitutionalite-par-olivier-deparis.99061.html>>, consulted on 27 July 2015.

11. For the definition of judicial review, see the website of federal courts in the USA: <<http://www.uscourts.gov/>>, consulted on 23 September 2015.

12. The British and Irish Legal Information Institute (BAILII) website publishes British and Irish case law and legislation, European Union case law, Law Commission reports, and other law-related British and Irish material.

13. In the American context, the word 'judgment' refers to the outcome of the case as opposed to the holding, i.e. the legal reasons and arguments presented to justify the judgment. In the UK, a judgment is used to refer both to the outcome and the legal reasoning from which it ensues.

14. E.g. in the famous Gillick case, Lord Fraser is clearly organizing his reasoning considering the grounds for appeal with digits from 1 to 6. See *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] AC 112, Lord Fraser of Tullybelton's opinion.

15. A. L. Goodhart: “Determining the ratio decidendi of a case” (1930) 40 *Yale LJ* 161 and Goodhart: “The ratio decidendi of a case” (1959) 22*MLR* 117.

16. Cf *Balfour v Balfour* [1919] 2 KB 571 and *Merritt v Merritt* [1970] 1 WLR 1211. In these two cases the enforcement of a maintenance agreement passed between spouses that were not living together was claimed. However, the position of Balfour was not considered as binding on the Merritt case because the context of the agreement was different. In the Balfour case, the spouses were living apart because of some health problem that prevented the wife to follow her husband abroad. In the Merritt case the spouses were living apart because they were about to get divorced. The lack of contractual intention presumption in agreement passed by spouses that was held in Balfour was not extended to an agreement passed by a couple who was about to divorce such as the one in the Merritt case.

17. On this issue, see Hans-Albrecht Schwarz-Lieberman von Wahlendorf (1999), “Le juge ‘législateur’ l’approche anglaise”. *RIDC* 4: 1109-1117.

18. See David, H. (1972). *Introduction à l'étude du droit écossais*. Paris: LGDJ: 81. “la loi anglaise n'est véritablement incorporée au droit anglais que lorsqu'elle a reçu la consécration de la jurisprudence”. Quotation translated into English by L. Francoz Terminal.

19. Holmes, Oliver Wendell (1899). "The Theory of Interpretation". *Harvard Law Review* 12: 417-420. Quoted in *S&E Contractors, INC. v. United States* 406 U.S. 1 (1971).

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Aspects of Arbitration Discourse: an Insight into China's Arbitration Law

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ABSTRACT

The formulation of legal norms is greatly conditioned not only by different juridical systems and drafting traditions, but also by specific linguistic features and socio-cultural aspects. The paper investigates this issue by taking into consideration provisions concerning commercial arbitration in an Asian country. The text selected for our analysis is The People's Republic of China Arbitration Law 1994 (PRCAL, for short). This law can be considered a highly important step in the development of Chinese legislation in this field as it has had a great impact on international arbitration carried out by Chinese companies.

International business exchanges with China have increased enormously over the last few years and even the recent economic recession has not slowed down this growth, making China the biggest Asian market in terms of import-export trade. As a natural consequence, this increase in business deals and contracts has brought about a rise in the number of trade disputes, with a consequent increase in arbitration proceedings.

The aim of this paper is to examine the English version of PRCAL in order to highlight some of the linguistic and legal features present that betray specific cultural values. In some cases, the PRCAL text is compared to the United Nations Model Law on International Commercial Arbitration, with the aim of offering a more detailed understanding of textual phenomena closely linked to differing legal and cultural traditions.

Keywords: arbitration discourse, China, cultural constraints, legislative drafting, conciliation

1. Cultural constraints on legislative drafting

It is a well-known fact that the formulation of legal norms has been found to be greatly conditioned not only by different juridical systems and drafting traditions, but also by specific linguistic features and socio-cultural aspects. Juridical systems may influence legal discourse significantly, as can be seen in the differentiation between civil law and common law texts: the former are mainly characterised by generality, while the latter prefer particularity. Indeed, it is commonly asserted that civil law statutes are written in terms of principle, whereas common law statutes are written in detail, as “the civil code draftsman is eager to be widely understood by the ordinary readership, whereas the common law draftsman seems to be more worried about not being misunderstood by the specialist community” (Bhatia, 1993; 137). This stylistic difference derives from a basic conceptual differentiation underlying the two legal systems: in the civil law system the judiciary is entrusted with the task of applying the general principles outlined in the civil code to specific real-life situations and, as such, privileges stylistic choices such as generality and simplicity of expression. The common law system, instead, is based on the principle of precedence, by means of which the decisions taken by one judge become binding on all subsequent similar cases and consequently regards certainty of expression as the most valued quality in legal drafting.

This conceptual differentiation is reflected in the drafters’ stylistic choices: in common law legislation sentences are very long, consisting of three or more main clauses, each modified by many subordinate clauses; this remarkable sentence length depends on the great number of details to be inserted and the need that specifications should be precise and clear (Tiersma, 1999). Civil law sentences are shorter, with a more flexible use of paragraphing which makes the understanding of the sentences easier, but renders the reconstruction of the relationship between the various sentences more complex. The adversarial nature of the common law system is probably also a factor, causing drafters to address ever more remote contingencies (Hill / King, 2004). Indeed, common law legislation is usually associated with particular emphasis on precision and detail for action in specific circumstances (Campbell, 1996). This explains why laws devote various parts of their text to very detailed terminological explanations and the use of past-participle clauses to state clearly the source of the qualification of a term.

Another reason for divergency in drafting behaviour concerns the degree of exactness or vagueness with which legal drafters phrase their texts, an issue debated in various studies (cf., for example, Endicott, 2000; Bhatia et al., 2005; Poscher, 2012). This divergency depends on the contrasting requirements of an ideal legal text: on the one hand, it needs to be maximally determinate and precise, so that there should be no doubt about what is meant by its words whereas, on the other, it needs to cover every relevant situation, i.e., it has to be all-inclusive. Therefore, if precision and determinacy are achieved through explicitness and absence of vagueness, this process of limiting the possible interpretations of a normative text often leads to the exclusion of aspects that ought to have been covered by it. Indeed, normative texts are meant to be highly impersonal and decontextualised, but at the same time they also deal with the universe

of human behaviour, which means they have to be very clear, on the one hand, and all-inclusive, on the other. As a consequence, the drafters of such texts must be determinate and vague at the same time, depending upon the extent to which they can predict every conceivable contingency that may arise in the application of what they write.

As regards the constraint of specific linguistic and cultural factors in the formulation of normative texts, even a rapid analysis reveals that they perform a very influential role. If we particularly focus on the arbitration field, this is clearly visible in those cases in which the national legislation imposes specific obligations in compliance with local customs and traditions: for example, countries such as Korea and Saudi Arabia uphold requirements of nationality and/or residence for a person to serve as arbitrator (Jarvin, 1999: 60); Saudi Arabia furthermore requires arbitrators to be male and of the Islamic faith (Saleh, 1992: 549). These criteria impose serious restrictions on the choice of arbitration in an international dispute and are usually taken into consideration by foreigners when they have to decide on the site of an arbitration case with a party residing in one of those countries. But even when cultural differences are not so obviously manifest, it is impossible to guarantee a perfectly homogeneous process, as the various legal patterns of the countries involved will re-emerge in some of the procedures described or in a few of the principles set out. Such professional traits will not only characterise the written texts, but will also be present in the minds of the arbitrators themselves, who – no matter how neutral and culturally open they wish to be – will inevitably be conditioned by their own specific legal philosophy. This emergence of the arbitrator's educational and professional background may create problems in the assessment of the parties' behaviour and originate negative consequences on the outcome of the proceedings themselves, a risk international arbitrators are fully aware of:

[A]n arbitrator, without relinquishing the most impartial frame of mind, may nonetheless remain very distant, in educational and cultural terms, from the particular party or its counsel. In such a case, difficulties are likely to arise which have nothing to do with the probity of the arbitrator in question. They are due solely to the fact that said arbitrator reveals a greater intellectual propensity to grasp every detail of the arguments put forward by one party, while encountering objective and honest difficulties in understanding the submissions of the other(s) in the same way. Albeit unwillingly, the conduct of the arbitrator may thus adversely affect the equal treatment of the parties. (Bernini, 1998: 42)

Particularly in those cases in which arbitrators are professional judges, they may be influenced by the different role that such a figure plays in common law and civil law proceedings (cf. David / Brierley, 1985). They are so deeply involved in their own system that they tend to follow the same procedures they are used to adopting in their habitual environment. With the common law 'adversarial' approach, the judge has a more passive role as the final decision is normally taken by a jury rather than the judge himself. In the civil law 'inquisitorial' procedure, instead, judges play a more active role in the conduct of the proceedings as they are not only permitted but expected to take greater initiative in the assessment and evaluation of facts (cf. Borris, 1994, 1999).

This differentiation in the judge's role also derives from the way in which the gathering of evidence is carried out in the two legal systems. In civil law procedure, the parties are required to state their case with all necessary detail and to present all documents and evidence relied on as early as possible. Common law procedure, on the other hand, is typically oriented towards the oral hearing, with greater importance attributed to witness examination; all details of the case deemed relevant by the parties must be pleaded at the oral hearing even if such pleadings have already been made in the written statements. This derives from the fact that the jury is not involved in the proceedings prior to the oral hearing, but decides the facts of the case solely on the evidence presented at the trial. Therefore, in common law procedure the judge generally leaves the examination of witnesses to the parties or their counsel and does not, on his own initiative, encourage the parties to settle the case. In contrast, civil law judges usually examine witnesses themselves and are more likely to encourage the parties to settle the case.

Another differentiation between common law and civil law practices consists in the possibility for a party to give evidence as a witness; this is acceptable in common law jurisdictions, while in civil law tradition this is not generally the case, as it is considered unlikely that a party will give a testimony which may differ from the papers that they have previously submitted. The less formal situation of the arbitration case, however, enables the arbitrator to call a party to make any statement that may be in support of their own case. This testimony is made less binding also by the absence of putting the witnessing party under oath. A similar difference exists as regards written testimony; this is not accepted as evidence in civil law procedure, while it is in common law systems. In international arbitration – where the parties involved are often located in distant countries – written witness statements are admitted. However, in this case too, the arbitrator's cultural background will influence his attitude towards these statements: common law arbitrators will tend to give credence to signed testimony, particularly if it is sworn; civil law arbitrators, on the other hand, will be more cautious in the acceptance of a signed document, as they assume that it was prepared by someone other than the signatory, namely, his lawyers.

Interesting cultural differentiations may emerge also as regards the preparation of witnesses and experts with a view to their participation in hearings before the arbitral tribunal; these too may reflect profound ethical differences between the parties in conflict. In some countries it is considered the normal practice to prepare them for this process (including trial performances recorded on video), a procedure which may be considered shocking and even reproachable from the ethical and professional perspective of jurists from a different cultural background. For example, it is generally considered contrary to Italian professional ethical rules for lawyers to discuss a case in detail with a witness in private prior to calling him to give evidence and a legal representative who breaches this ethical code may expose himself to a complaint to the law society and to disciplinary action (Cavasola / Paton, 1994).

As has been seen, the formulation of legal norms is greatly conditioned by socio-cultural constraints. It is the purpose of this paper to investigate this issue by analysing

the provisions concerning commercial arbitration in an Asian country. The text selected for our analysis is The People's Republic of China Arbitration Law 1994 (PRCAL, for short).¹ This law can be considered a very important step in the development of Chinese legislation in this field as it has had a great impact on international arbitration carried out by Chinese companies. The aim of this paper is to examine the English version of PRCAL in order to highlight some of the salient linguistic and legal features that betray specific cultural values. In some cases, the text of PRCAL will be compared to the UNCITRAL Model Law on International Commercial Arbitration (ML for short),² with a view to offering a more detailed understanding of textual phenomena closely linked to differing legal and cultural traditions.

2. Topical and definitional aspects

The coverage of PRCAL and that of ML does not always correspond in terms of topical content, as the organisation of content reflects the different contexts in which they are embedded: most PRCAL provisions also apply to domestic commercial arbitration with only Chapter VII dealing specifically with international awards. On the other hand, ML approaches the matter more systematically, with no allowance for domestic cases. ML opens with a definition of legal scope, status and interpretation (Chapter I) and then follows a chronological progression from the drafting of a commercial contract to the eventual recourse against the award (particularly in Chapters III-VI). However, in PRCAL further articles have been inserted, where emphasis is given to other aspects, such as reference to local arbitration commissions or special provisions for arbitration involving foreign elements. The amount of legal mapping clearly depends on the different origins of these two texts as well as their purpose.

Moreover, PRCAL gives hardly any terminological definitions, whereas ML devotes several articles to this purpose: for example, Art. 2 provides the definition of the basic concepts of this field, such as 'arbitration', 'arbitral tribunal' and 'court', while Art. 7 clearly specifies the concept of 'arbitration agreement'. This is in line with the common law drafting tradition, which places great emphasis on the precise and detailed wording of the text in order to limit any possibility of ambiguity or misunderstanding (Driedger, 1982). PRCAL, instead, gives hardly any terminological definitions which is also, to some extent, due to the fact that the monocultural background of PRCAL is in fact less likely to require such specifications. Moreover, the Chinese text displays a high degree of intertextual linking as this new law is embedded in the extant body of legislation, and therefore has to be interpreted in the light of several other texts of greater or equal authority, whereas ML is a stand-alone law.

This more precise way of drafting the text is also visible in the choice of the ML drafter to give a title to every article of the Model Law in order to facilitate the comprehension of each specific provision. Such headings are, inversely, missing in the Chinese text. The greater detail in wording the text results in longer formulations of the provisions. Indeed, although the Chinese text has more articles (80 vs 36), the ML

document contains more words (7,207 vs 4,659). In terms of word count, this means that each article in ML is longer and more structured, with a higher number of words per article.

3. References to the local socio-cultural system

The text of PRCAL at times contains terms that seem to have a specific meaning which reflects in particular the Chinese political or legal system or betrays a local cultural aspect. A clear reference to the Chinese political system is traceable in the opening lines of the law, where one of its main goals is identified as the development of the socialist market economy:

- (1) This Law is formulated in order to ensure the impartial and prompt arbitration of economic disputes, to protect the legitimate rights and interests of the parties and to safeguard the sound development of the socialist market economy. (PRCAL Art. 1)

Another case in which local cultural aspects can be detected is in the provisions regarding the selection of arbitrators. In the arbitration process, arbitrators play a very active role and enjoy a great degree of autonomy due to the fact that no jury is involved in the proceedings and that the majority of the disputes are of a technical and complicated nature. Moreover, arbitrators often make proposals for an amicable settlement of the dispute if they see any feasible solutions. It is important, therefore, that the decision-making process should be totally transparent and that the arbitrator should be impartial and independent. This need is particularly felt in the Chinese context, where arbitration has often been regarded as too sensitive to the local parties' interests and pressures as affirmed by Professor Jerome Cohen from New York University, quoted by Jane Moir in an article in the *South China Morning Post* (5 October 2001):

The longer my experience as either an advocate or an arbitrator in disputes presented to CIETAC [China International Economic and Trade Arbitration Commission], the graver my doubts have become about its independence and impartiality. [...] At a minimum, I would surely no longer advise clients to accept CIETAC jurisdiction unless the contract's arbitration clause required the appointment of a third country national as presiding arbitrator (cited in Bhatia / Candlin / Wei 2001: 8).

The situation does not seem to have improved in the last few years and general international opinion about Chinese local arbitration institutions seems to be very skeptical as illustrated by the following remarks about the behaviour of the Hangzhou Arbitration Commission in the proceedings over the dispute between the Chinese Wahaha Group and the French Groupe Danone:

Why the hell would you agree to arbitration in Hangzhou, the home base of your very strong JV [joint venture] partner? Come on, did you have absolutely no leverage in the

negotiation process or did someone screw this one up? (Abrams, 2007, quoted in Corona, 2011: 137)

Zong filed for arbitration, too, with the Hangzhou Arbitration Commission, the kangaroo court in his hometown. [...] Expecting an independent hearing from the Hangzhou Arbitration Commission is like expecting an honest report about Tiananmen Square from the *People's Daily* newspaper. It just isn't going to happen. (Levant, 2007, quoted in Corona, 2011: 137)

These considerations provide an explanation for the specific norms that the Chinese arbitration law has laid down to regulate the challenge of appointed arbitrators. In particular, these norms contain specific reference to such important issues as the arbitrator's competence, impartiality and independence:

- (2) In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal:
 - (1) The arbitrator is a party in the case or a close relative of a party or of an agent in the case;
 - (2) The arbitrator has a personal interest in the case;
 - (3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or
 - (4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent. (PRCAL Art. 34)

In ML, instead, this issue is considered in very general terms:

- (3) [...] The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties. (ML 11.5)

It is evident that the choice of arbitrators is of immense importance: they must be figures of sufficient professional standing to satisfy the parties of their competence in resolving the issue(s) and add personal credibility to the legal validity of the procedure. As a consequence, the PRCAL drafters have decided to provide detailed specifications as regards the qualifications of an arbitrator, thus clearly mentioning specific reasons for challengeability in those cases in which an arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from them, which might imply the arbitrator's embezzlement of funds, acceptance of bribes or involvement in malpractice for personal benefits.

4. Terms with a specific local meaning

The analysis of the PRCAL text has highlighted the use of some terms which have a specific local meaning. Indeed, the formulation of particular legal norms relies on typical cultural implications involved in dispute resolution in the Chinese legal system. This shows that the cultural environment has greatly influenced the outcome of the drafting process.

4.1. Arbitration commission

Some of the terms contained in the text of PRCAL have given rise to disputes as regards their true interpretation as they seem to have a specific local meaning, one of which can be found in art. 10 of PRCAL:

- (4) Arbitration commissions may be established in municipalities directly under the Central Government and in cities that are the seats of the people's governments of provinces or autonomous regions. They may also be established in other cities divided into districts, according to need. Arbitration commissions shall not be established at each level of the administrative divisions. (PRCAL Art. 10)

The term *arbitration commission* is not commonly used in documents relative to international arbitration, where the term *arbitral institution* is usually employed. Although the common interpretation is to consider these two terms as synonymous, in practice they are not, because elsewhere arbitral institutions are independent institutions, while in China they are seen as closely linked with the complex system of local and national government and cannot therefore be established in an autonomous way. This close link with local and national government can be pernicious to a fair and independent resolution of the dispute, as Glück and Lichtenstein aptly observe:

While the legislation requires a strict legal separation between the administrative authorities and these domestic arbitral institutions, it should be noted that, in reality, these legal safeguards are not always effective. Not all domestic arbitral institutions are free from judicial and administrative interference. Local protectionism and political influence are common problems. (2014: page)

Other scholars have expressed much stronger criticism towards the close links between arbitral tribunals and local government, such as, for example, Moser and Yuen's opinion about the degree of independence of the arbitration tribunal of CIETAC (China International Economic and Trade Arbitration Commission):

Foreign parties have frequently voiced concerns about the independence and impartiality of CIETAC tribunals. Despite specific provisions in the Arbitration Law and the 2000 Rules aimed at ensuring impartiality, the fact remains that many Chinese members of the CIETAC Panel of Arbitrators are either current or retired government officials and

CIETAC itself, while officially independent, enjoys close ties to government departments. (2005: 396)

Further problems concerning the term arbitration commission derive from its usage in Article 16 of PRCAL, which reads:

- (5) [...] An arbitration agreement shall contain the following particulars:
- (1) an expression of intention to apply for arbitration;
 - (2) matters for arbitration; and
 - (3) a designated arbitration commission. (PRCAL Art. 16)

The failure to designate a specific arbitration commission in the arbitration agreement has led to the invalidity of the agreement itself and therefore to the impossibility of carrying out such procedure. This has also occurred in cases of an imprecise formulation of the commission's name or due to its vague reference as *local arbitral institution* or a similar expression.

Another question raised by the use of the indeterminate term *arbitration commission* is whether such an expression only refers to Chinese arbitration institutions or also encompasses foreign arbitration institutions. Although the *arbitration commission* referred to in Article 16 of PRCAL could also be interpreted in a broad sense so as to cover any arbitration body wherever it is domiciled (Chang 2001), it is commonly assumed that only local arbitration commissions may be indicated in the arbitration agreement. This interpretation also guarantees a safer recognition of the final award, as aptly pointed out by Tao and Von Wunschheim:

[...] even when an arbitration clause expressly refers to the foreign arbitration institution, it is uncertain whether such an arbitration clause would be regarded as valid in China considering the controversy as to the interpretation of the term 'arbitration commission'. This will not prevent a foreign arbitration institution from handling a Chinese arbitration case, but it may endanger the enforceability of the resulting award. (2007: 324)

This helps to explain the fact that there are no foreign arbitration institutions operating in China and that it is still rare for a foreign arbitration institution to deal with an arbitration proceeding taking place in China. On the other hand, there is a continuous growth in the number of local arbitration institutions being set up.

4.2. Foreign-related arbitration

Another expression which has proved ambiguous in interpretative terms is *foreign-related arbitration*. This term appears in several provisions mainly grouped in Section 7 of PRCAL dealing with "special provisions for arbitration involving foreign elements". The first article in this section defines international arbitration in very vague terms:

- (6) The provisions of this Chapter shall apply to the arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element. (PRCAL Art. 65)

The following article deals with the organization of foreign-related arbitration commissions, but does so in an indeterminate way, which is clearly shown by the use of *may* (instead of *shall*) in two of the three sentences of the provision:

- (7) Foreign-related arbitration commissions may be organized and established by the China Chamber of International Commerce. A foreign-related arbitration commission shall be composed of one chairman, a certain number of vice chairmen and members. The chairman, vice chairmen and members of a foreign-related arbitration commission may be appointed by the China Chamber of International Commerce. (PRCAL Art. 66, emphasis added)

The deliberate use of *may* is intended to give greater decisional powers to the China Chamber of International Commerce, again an institution closely linked with the local government. Also, the analysis of the use of modal verbs in the PRCAL text carried out by Bhatia and Candlin leads them to conclude that “[a]lthough not stated explicitly, it is clear [...] that executive bodies are assigned more power than the parties in the arbitration process” (2008: 135). The powers of the China Chamber of International Commerce in this matter are also clearly strengthened by a subsequent article of the law, which reads:

- (8) Foreign-related arbitration rules may be formulated by the China Chamber of International Commerce in accordance with this Law and the relevant provisions of the Civil Procedure Law. (PRCAL Art. 73)

In this way the law does not explicitly confer exclusive jurisdiction over foreign-related cases to foreign-related arbitration commissions, but rather implies that jurisdiction is meant to be concurrent with local arbitration commissions. Indeed, it has often been pointed out (e.g. Zhou, 2006) that the law would have used *shall* instead of *may* if it had intended to reserve jurisdiction on foreign-related cases exclusively to foreign arbitration commissions.

However, the fact that foreign-related cases are dealt with in a specific section of the law seems to imply that international arbitration cases may be seen as separate from the domestic ones. Indeed, it has been noted that international arbitration cases are commonly dealt with somewhat differently: judicial review of international arbitration is mainly focused on procedural issues, while review of domestic arbitration concentrates on more substantive aspects (Yifei, 2012).

The choice of *foreign-related* rather than *non-domestic* or *international* – two adjectives commonly found in documents concerning international commercial arbitration – seems to imply the willingness to guarantee complete autonomy to the Chinese adjudicating system, without any necessary application of criteria followed

elsewhere. Also the use of the expression *foreign-related arbitration award* found in this law is intended to provide greater autonomy of decision on the part of Chinese institutions as this term is so indeterminate as to be applicable not only to foreign-related arbitration cases carried out in China, but also to those proceedings conducted in a foreign country and which would, thus, be ruled by the New York Convention. However, since China did not sign a reciprocity agreement within that convention, the Chinese legislators did not want to run the risk of any automatic recognition of an award issued in a foreign country.

When PRCAL came into force, the expression *foreign-related arbitration award* was used also for awards deriving from arbitration proceedings held in Hong Kong since at that time this area was still a British colony. When the Hong Kong territory was handed over to the People's Republic of China as a Special Administrative Region, an agreement on mutual recognition and enforcement of arbitral awards between Hong Kong and Mainland China was signed and became effective on February 1, 2000. This agreement permits the High Court of Hong Kong to enforce Mainland Chinese awards made pursuant to the Arbitration Law of the People's Republic of China, and the Intermediate People's Court in China to enforce awards made in Hong Kong. Under this agreement, awards from either place are to be considered domestic, and no longer to be examined according to the New York Convention.

4.3. Public interest

Another element which strengthens the autonomy of the Chinese legal system and its great power over the arbitration decision is the interesting concept of 'public interest', explicitly mentioned in PRCAL in Article 58:

- (9) If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award. (PRCAL Art. 58)

Although this concept is not explicitly mentioned in Section 7 of PRCAL as a reason for challenging or invalidating a foreign-related award, this possibility is implicitly evoked in an indirect way. Indeed, Article 71 states:

- (10) If the party against whom the enforcement is sought presents evidence which proves that the foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the Civil Procedure Law, the people's court shall, after examination and verification by a collegial panel formed by the people's court, rule to disallow the enforcement. (PRCAL Art. 71)

If one analyses the circumstances set forth in the first paragraph of Article 260 of the Civil Procedure Law, one finds that this provision states that Chinese courts may deny the recognition and enforcement of foreign-related arbitral awards according to the 'public interest' criterion. This concept is, of course, quite vague and thus enables local courts to act more autonomously. The use of this term has aroused intense criticism as it

is found only in the Chinese context and is thus more liable to be employed and interpreted in an idiosyncratic way. In traditional international law, instead, the term commonly used is *public policy*, a term which has been amply discussed and clarified in specialised literature all over the world (e.g. Lew / Mistelis / Kröll, 2003). For example, in publications concerning the interpretation of this term as used in the New York Convention, public policy is usually conceived of as narrowly limited to the violation of a state's international public policy or international public order (Zhou, 2006: 448). The meaning of *public interest*, instead, seems to be wider than that of *public policy* and seems to go beyond notions of morality and justice, to include general financial, cultural, environmental and other interests, as Zhou aptly remarks:

Technically, any enforcement may have a substantial impact on the financial situation of an interest group, and the public interest defense may therefore be abused as a ground for defending arbitral awards. This wide-open ground offered a convenient channel for local protectionists in China. (Zhou, 2006: 448)

5. Vagueness

As we have seen, the text of PRCAL presents several cases of vague and indeterminate formulations. Apart from the reasons pointed out in the specific cases dealt with above, a further explanation may be provided by the fact that the vagueness of the English translation examined here may derive from the typical traits of Chinese legal language. Indeed, Chinese legal language has been found vaguer and more ambiguous than other traditions, such as, for example, English legal language (Ross & Ross, 2000). Peerenboom (2002), for instance, claims that Chinese legislation is characterised by generality and vagueness, with frequent cases of undefined terms and inconsistent usage. Keller (1994) attributes this greater vagueness and indeterminacy to the particular need for generality and flexibility that is at the basis of legislative drafting in that country. This higher degree of flexibility derives from the need to guarantee the unitary nature of the state while preserving respect for regional diversity. This also favours greater legislative stability, since it allows broader generality of application by means of varying interpretations of the law rather than actual changes to existing legislation. This is also due to the fact that specific meanings attached to many legislative terms shift with their contexts, a trait that has always characterised Chinese legal language based on Confucian tradition. According to Potter (2001) this traditional indefiniteness of legal terms is also due to the preference of Chinese administrative bodies for broadly drafted laws that may grant them greater freedom in their application in specific contexts. A more general explanation may be found in the fact that China has a civil law tradition, which generally favours broader and more general legal drafting compared to that of common law countries.

To exemplify the indefiniteness of Chinese legal language, Cao (2008) mentions the case of the frequent use of the word *deng* (meaning *etc.*, *such as*, *including*) in Chinese legal texts and adds:

The habitual and sometimes over-frequent use of *deng* which allows for open-ended interpretations can cause a great deal of uncertainty and ambiguity. A further problem is that *deng* can indicate both open-endedness when listing things and can also be used to end a listing, a closure, to be all inclusive, depending on actual use and context. (2008: 112)

Indeed, several cases of open-endedness have been found in the English translation of PRCAL, deriving from the use of *deng* in the original text, as the examples below show (emphasis added):

- (11) An arbitrator shall meet one of the conditions set forth below: [...] To have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level. (PRCAL Art. 13)
- (12) A foreign-related arbitration commission may appoint arbitrators from among foreigners with special knowledge in the fields of law, economy and trade, science and technology, etc. (PRCAL Art. 67)

Moreover, the text often includes 'weasel words' (Mellinkoff 1963: 21), i.e. words and expressions which have flexible meanings, such as *serious*, *equitable*, *justified*, *reasonable*:

- (13) In arbitration, disputes shall be resolved on the basis of facts, in compliance with the law and in an equitable and reasonable manner. (PRCAL Art. 7)
- (14) If an arbitrator is involved in the circumstances described in item (4) of Article 34 of this Law and the circumstances are serious or involved in the circumstances described in item (6) of Article 58 of this Law, he shall assume legal liability according to law and the arbitration commission shall remove his name from the register of arbitrators. (PRCAL Art. 38)
- (15) The arbitration commission shall notify the parties of the date of the hearing within the time limit specified in the rules of arbitration. A party may, within the time limit specified in the rules of arbitration, request a postponement of the hearing if he has justified reasons therefore. The arbitration tribunal shall decide whether or not to postpone the hearing, (PRCAL Art. 41)

Also, the issues that can be subjected to arbitration are not specified in a clear way. The matter is dealt with in Article 3:

- (16) The following disputes may not be arbitrated:
 - (1) marital, adoption, guardianship, support and succession disputes;
 - (2) administrative disputes that shall be handled by administrative organs as prescribed by law. (PRCAL Art. 3)

As can be seen, while the issues concerning civil cases are listed in subclause 1, the ones concerning 'administrative disputes' are stated vaguely and are even more indeterminately referred to as law in general. This indeterminacy has led to the challenging of arbitration awards due to the claim that the matter was not arbitrable. One such case was the dispute over product quality defect between a hospital in Zhouzhou City and Mr Ding reviewed in Yifei (2012). The hospital did not accept the arbitration award of the Zhouzhou Arbitration Commission (which was unfavourable to them), and applied to the Zhouzhou Intermediate Court to cancel it, arguing that the Arbitration Commission did not have the right to accept disputes involving product quality defects, as this matter concerned medical malpractice, and was therefore to be considered an administrative dispute.

6. The use of conciliation in arbitration

Alternative dispute resolution is mainly divided into two main forms: arbitration, on the one hand, and conciliation/mediation, on the other. While in arbitration the procedure results in an arbitration award, which is as binding as the decision of a judge of first instance, in conciliation/mediation, agreement is reached by the parties through the work of a neutral party, who helps them analyze the true interests involved in the dispute and leads them towards a resolution of the dispute, without imposing any decision (Berger, 2006). In theory, mediation and conciliation should have their own fields of application deriving from the specific characteristics of these two instruments, the techniques and the tactics they employ, and the professional preparation of the experts working in each field. In practice, the terms 'mediation' and 'conciliation' are often used as synonyms for the same concept, that is, an informal cooperation towards the solution of a controversy thanks to the neutral participation of a third party.

In Western legal culture the dispute resolution field is clearly divided into three well distinguished areas: litigation, arbitration and conciliation/mediation with no possibilities of mixing the two procedures. In the Asian context instead, conciliation often combines and interferes with the other two legal procedures, i.e. litigation and arbitration. This is due to the fact that conciliation has a long tradition there, and for centuries it has been considered the best way of solving disputes. In the past, a good judge was not supposed to give a judgment but to try to bring about a good conciliation. Indeed, for the Chinese, litigation is seen as a harmful way of dispute resolution as it may result in loss of face and friendship. Although China established a judicial system very early in its history, the Chinese emphasis on morality encouraged individuals or groups in conflict to resolve their differences by means of discussion or compromise rather than adjudication. The traditional Chinese preference for mediation and conciliation over formal methods of dispute resolution has its origins in Confucian philosophy, which views social conflicts as a shameful aberration of morality and as a form of disruption of the natural order of social life. Instead, conciliation and compromise are considered virtues to be used in conflict resolution. Even the radical political and economic changes which have taken place in China in the past seventy

years have not completely affected this culture and a strong emphasis on conciliation has been maintained. The judge's primary obligation is said to be not to decide cases but to educate the parties so as to induce them to terminate their dispute (Liao, 2012).

This explains why one of the main features of the Chinese legal system is the integration between conciliation and arbitration. This concept of hybrid dispute processing is also present in Japanese legal culture (Sato, 2008) which is due, as said before, to the fact that the tradition of using conciliation to settle disputes in Asia dates back to the ancient past. Conciliation is a preferred means of settling disputes whenever possible, but it is neither a necessary nor compulsory step in the arbitration proceeding. If conciliation is successful, a settlement agreement will be reached and the case will be closed by the disputing parties. If, instead, a settlement agreement cannot be reached within a reasonable period of time, the proceeding will continue according to the arbitration procedure. This double possibility is clearly stated by Article 51 of PRCAL:

- (17) The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.

If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect. (PRCAL Art. 51)

As can be seen, there is no clear indication of an exact procedure to be followed in passing from conciliation to arbitration. Article 51 only specifies that conciliation should take place "prior to giving an arbitration award". Usually, after the first phase in which the facts of the case are established, the parties realize how well grounded or not their claims are and therefore become aware of the real possibilities of winning the case. If they think that they are not absolutely sure of achieving a successful result, they may be more than willing to conciliate the case. Referring to a specific case, Trappe (2003) gives a clear description of how such a double procedure can take place:

In the case under review, the conciliators explained to the parties the material aspects of the case [...] in a hearing at which all parties and their representatives attended. In that hearing, they invited each of the parties to move away from its original standpoint, i.e. respectively to decrease its claim or to offer a certain amount of money. They patiently [...] again and again called on each party to make a step forward towards their opponent. Once a stand-off was reached, they adjourned the hearing for a short while and invited the parties to meet alone with the party-appointed conciliator and, later, with the conciliator the other party had appointed. Such separate meetings (unthinkable in arbitration proceedings) were held repeatedly. In these separate meetings, the conciliators tried to convince the respective party that its standpoint, either damaging or defending, did not appear to be justified or realistic. Thus, the proceedings went step by step until the approach of both parties was so close to each other that a meeting of minds occurred and a separate agreement was signed. In the instant case, this stage was reached in the very late evening of the third day, just a short

while before the last plane suitable for the charterer left, so that one of the conciliators wrote down the agreement in manuscript. (2003: 379)

This double possibility combined within the same procedure has been criticized particularly by scholars mainly living in Western countries. Others, instead, with a deeper knowledge of Eastern arbitral practices are less critical, a divergence Moser and Yuen point out:

Many have argued that it is not appropriate for a single person or a tribunal to wear the hats of both conciliator and arbitrator, the point here being that an arbitrator who fails to settle a dispute by conciliation and resumes the arbitration will run the grave risk of infringing the principles of natural justice. However, many have also argued the contrary: provided that certain safeguards are put in place during the conciliation process, the two procedures can work side-by-side. (2005: 401)

7. Conclusion

As can be seen from the analysis carried out so far, legislative drafting is a complex task which is greatly conditioned by different factors relating to the specific cultural, linguistic and legal environments in which it takes place. The discussion of certain linguistic and textual features of PRCAL has provided interesting insights into how the drafting of this document has been influenced by specific legal cultures and standardised professional procedures, and has demonstrated that – in comparison with ML – variations in formulation are to be attributed mainly to the different cultural traits and legal traditions of the communities for which they are intended. This comparison has shown that, in spite of the fact that the two texts are similar in terms of topical content and coverage, they suggest interesting divergences in terms of clarity of expression and conceptual and terminological precision, which may also depend on the common law tradition reflected in the UN document and the civil law perspective adopted by Chinese legislators, the former favouring precision and detailed guidelines for action in specific circumstances, the latter taking a more systematic approach, with arbitration firmly embedded within the country's highly codified domestic legislation.

As the analysis presented here has shown, PRCAL often reveals instances of vagueness. The presence of vague textual formulations is due to several reasons, the main one being that normative texts aim to be as all-inclusive as possible in order to be valid in the widest range of applications. Moreover, in many cases the text is worded in a vague way so as to guarantee the maximal use of the discretionary powers of the judging authority to decide what is appropriate or inappropriate. However, the consideration that legislation on arbitration in the People's Republic of China is not always precise and unambiguous has given rise to the fear outside the PRC that the system does not always guarantee equal opportunities and fair treatment to non-Chinese parties.

Furthermore, the analysis of the specificity of information included in the two texts studied here has shown that they may differ significantly due to variations in socio-cultural expectations and practices that constrain social behaviour in local contexts. A relevant case in point was seen in the comparison of the article concerning the grounds for challenging the appointment of arbitrators: the UNCITRAL text is expressed in more general terms, while in the Chinese arbitration law the constraints are described in greater detail. This substantiates our initial claim that the phenomenon of legal drafting is greatly influenced by the linguistic aspects and legal traditions of the local community to which the drafters belong and to which the provision is addressed. As language is inseparable from set cultural implications and is deeply involved in social norms, linguistic and cultural constraints are bound to arise in the complex process of formulation of legal norms.

Notes

1. PRCAL was promulgated by the Standing Committee of the National People's Congress of the PRC on 31 August 1994 and came into force on 1 September 1995. Although the original text was written in Standard Chinese, also known as Mandarin and Putonghua, here we will be examining its English version, available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=182634>.

2. The *UNCITRAL* Model Law (United Nations document A/40/17, Annex I) was adopted on 21 June 1985 by the Commission on International Trade Law (UNCITRAL) and is available online at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

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A Socio-Cultural Approach to ELP: Accessing the Language and Culture of Law through Fictional Television Series

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ABSTRACT

Although the field of ESP studies is, comparatively speaking, a relatively new area of academic enquiry, it has nevertheless well over half a century of existence and evolution to its name. Present in the most far-flung reaches of the world today, ESP is undoubtedly one of the most cross-cultural of disciplines and as such subject to constant processes of adaptation and reinvention, at times calling into question the epistemological core of the discipline itself. In a two-step approach, this study first presents a theoretical overview of the main epistemological trends in ESP studies today. Having established the general theoretical framework, the paper focuses on practitioner-orientated concerns in relation to implementing a wide-angled socio-cultural approach for university level English for Legal Purposes (ELP). In this dual perspective, it looks at the potential offered by the use of specialised fictional narrative in the form of popular television series or *fiction à substrat professionnel* (FASP).

Keywords: ELP, pedagogic supports, TV series, legal FASP, learner motivation

1. Current epistemological trends in ESP

ESP has traditionally been defined in terms of three central constructs: the inherently symbiotic nature of its interdisciplinarity centred on language and learner specialism interdependence; a pragmatic teaching-based vocation; a corollary focus on learner language needs. These defining parameters have evolved differently over the past 60 years of the maturing of ESP studies. In keeping with the complexity of the times, ESP has followed the evolution of subject-domains away from the notion of autarkic self-contained entities towards increasing disciplinary overlap (“hybridization”, “colonization”, etc.). Likewise, even though the teaching-based vocation of the discipline remains the primary approach to the discipline, emerging research has undertaken a study of specialised varieties of English within the context of their professional/specialised environments, unrelated to teaching concerns, as illustrated by Michel Van der Yeught’s study of the language and specialised environment related to English for Financial Purposes (2012).

Needs analysis, the defining cornerstone of ESP studies, has been the object of even greater epistemological soul-searching over the years and resulted in the emergence of deep divergences regarding the theoretical foundations of the discipline itself. The “P” for purposes in the acronym “ESP” points to the essentially “functional” or “focused” objectives behind language learning in the ESP perspective and, as such, remains largely uncontested. Initially, such “purposes” were unhesitatingly defined in terms of the language competences needed to pursue clearly identified professional target situation goals (TSA). Munby’s pioneering Communicative Syllabus Design (1978), outlining language needs in terms of sometimes over-precise parameters, is undoubtedly the most emblematic work on needs analysis in this perspective. Since then, the identification of learner needs has evolved to take into consideration present situation parameters as well (PSA) and has matured towards a more nuanced analysis of needs based on a learner-teacher-professional triangulation involving the three main stakeholders concerned.

Initial indications of unease regarding the exact nature of learner needs had already begun to emerge in the early days of ESP as evidenced by the vacillations regarding the interpretation of the “S”, ranging from “*Specified*” (Stevens, 1988) to “*Special*” and then to “*Specific*” (Munby, 1978 [1981]).¹ Though there is little documentary evidence formalising the shift,² Munby, one of the leading voices in the field of ESP studies at that time, gives one version of the rationale behind the move:

[...]‘special English’, which is associated with some of the earlier examples of materials in this field, focuses on distinctive features of the language, especially vocabulary, that are most immediately associated with its restricted use, e.g. technical terms in agriculture. ES[pecific]P, on the other hand, should focus on the learner and the purpose for which he requires the target language [...]. It is this that is new about ESP, together with a much more rigorous approach [...], using insights and findings from sociolinguistics, discourse analysis, and the communicative approach to language learning. (1978 [1981]: 2-3)

Since then, even though the consecrated interpretation of the keystone “S” of the acronym has been accepted worldwide to stand for “*Specific*”, there continues to be debate amongst ESP practitioners and researchers as to the most relevant interpretation of “specific” when transposed into terms of approach, content and pedagogic supports. Of the varying approaches to ESP today, three dominant and divergent theoretical approaches stand out in terms of the interpretative variations of the “S” of the acronym: “specific”, “specialized” and “social” or, as Belcher puts it, “the sociodiscoursal, sociocultural and socio-political” (2004: 166).

1.1 English for “specific” purposes or the socio-discoursal approach

Historically the oldest approach, the specific or lexico-grammatical socio-discoursal approach is a narrow-angled vision of oral or written language objectives. These are defined in terms of precise professional tasks and limited contexts of language use, leading Mackay and Mountford (1978) to refer to such language use as “English as a restricted language”. Based essentially on a genre approach to ESP, at the written end of the spectrum we have the classic example of the technician’s handbook and at the oral end we have the no less classic language of international air-traffic controllers, or Airspeak. In the academic environment, a common example of such narrowly-defined objectives concerns writing scientific research abstracts.

Language teachers, not unsurprisingly, are often critical of the over-specific nature and limited scope of such an approach, its lexico-grammatical focus on formulaic genres and “text-without-context” perspective. They tend, like Mackay and Mountford, to consider that “such restricted repertoires are not languages, just as a tourist phrase book is not grammar” (1978: 5).

Whatever the reservations expressed, it cannot be ignored that learning languages for precisely-defined purposes corresponds to clearly defined needs: to want an Airbus wiring technician to develop complex communication skills neither he, nor his employer, nor the job call for is tantamount to ordering a Rolls Royce when a Jeep is what the technical specifications specify. The vitality and relevance of this approach is underlined by the fact that it represents a healthy sector of economic activity, requiring qualified language teachers to meet the technical language needs of many learners in companies, vocational schools, continuous education, chambers of commerce, private language schools, etc.

1.2 English for “specialised” purposes or the socio-cultural approach

English for “specialised” purposes may be considered as an approach which places ESP objectives beyond the basic acquisition of technical language used in a limited exolingual³ context. The aim is to develop a communicative competence destined to enable learners to function and interact as full-fledged members of their global professional communities. Such language objectives are culture-orientated which means that, besides grounding in general English (EGP), and in addition to the acquisition of

specialised language and discourse, ESP objectives also embrace the anthropological dimension of the specialised environment, its institutions, professionals, history, myths and legends, rites and rituals, preoccupations, etc.

The importance of the link between language and culture in general has been highlighted by a number of prominent researchers but it is French linguist and ESP specialist, Michel Petit, who first theorized this approach with regard to ESP studies relative to the French tertiary education sector:

[L'anglais de spécialité est] est la branche de l'anglistique qui traite de la *langue*, du *discours* et de la *culture* des communautés professionnelles et groupes sociaux spécialisés anglophones et de l'enseignement de cet objet. (2002: 2-3).⁴ [emphasis added]

More recently, Parkinson (2013: 156) advocates the same line of thinking when she evokes the notion of “concentric circles” in the context of English for Scientific Purposes (EST), with language featuring at the core, surrounded by successively expanding circles related to skills, genre, disciplinary socialization and finally, disciplinary culture and values.

In spite of the relatively late formal recognition of the cultural dimension of ESP, teachers had long integrated a more cultural angle into their ESP classroom practices through adoption of the situated approach it foregrounds and by breaking down the spatio-temporal confines of the classroom through the introduction of pedagogic supports such as fictional and documentary films, television series, video games, site visits, and internships based on an ethnographic approach of immersion and O&A (Isani 2014).

1.3 English for “social” purposes or the socio-ideological approach

The “social” or “socio-ideological” approach, often referred to as “Critical Perspectives”, emerged during the 1990s and introduced a new set of dynamics into ESP studies. Sarah Benesch in the United States and Alastair Pennycook in Australia, two prominent researchers associated with this line of ESP studies, challenge the most sacred of ESP cows, the needs-based approach. Ideologically orientated, advocates of this movement criticise ESP’s traditional objectives as products of neo-colonialism, capitalism and imperialism designed to promote unquestioning “accommodationist” and “assimilationist” practices with regard to dominant discourse. In contrast to such “vulgar pragmatism” (Pennycook, 1997: 254), advocates of this approach to ESP promote “critical pragmatism” which seeks to emancipate and empower learners by focusing on “rights analysis” (Benesch, 1999) rather than “needs analysis”. In other words, teaching learners how to express their rights vis a vis the Establishment — i.e. institutions, administrations, teachers, employers, etc. — is given precedence over learning to fit into the professional “mould” of the dominant discourse framed by employers.

On the epistemological plane, such objectives prompt the question of whether they may legitimately be considered as ESP: Are we not quite simply in the field of EGP?

What is the subject-domain? Part of the answer lies in the fact that, while the “critical perspective” approach does indeed advocate EGP competence, for advocates of a more militant bent, social empowerment is gained through the specialised language and discourse of unions, demands, industrial action and social conflicts, a sort of ESP for union action. However marginal such an approach may appear in the European academic context, in endolingual learning loci and migrant learner profiles from which the socio-ideological approach arises, it is patent that a language learning environment which seeks to promote learners’ status as entitled interlocutors, can only be conducive to language learning and acquisition processes and subsequent social integration (objective not too far afield from the ones defined with regard to the socio-cultural approach and its objective of socio-professional socialisation).

To conclude on this theoretical part, we would like to underline the fact that no one approach is “better” than the other and that such plurality and diversity of theoretical stances should be widely embraced and seen as a testimony to the dynamism and vitality of the discipline. Given the global magnitude of the discipline, needs are identified and objectives defined according to situated criteria: what is valid *hic et nunc* is less so in other times and loci. Accordingly if, in the past, we have had the occasion to adopt the objectives pursued by the narrow-angled socio-discoursal approach, in the context of the learner public concerned by this study –law students whose language learning objectives are defined in terms of socio-professional integration as full-fledged members of the international community of law– our demonstration hinges on pedagogic concerns related to the wide-angled socio-cultural approach.

2. Implementing the socio-cultural approach in ELP through popular television series

Having explained the rationale behind the adoption of the socio-cultural approach with regard to the learner public of law students, we now address the issue of the pedagogic supports most likely to help attain these socio-professional language objectives.

2.1 ESP pedagogic supports: Ali Baba’s cave or Pandora’s Box?

Free online access has revolutionised the availability and diversity of pedagogic supports and today’s ESP teacher benefits from a plethora of highly varied multimedia pedagogic supports ranging from traditional newspaper articles, novels, short stories, etc., to films, television series, video games, blogs, etc.

This (r)evolution has not been without influencing ELP, an ESP field which, as a reflexion of its subject domain, has tended to focus on the written word, the Verb. The benefits have been two-fold: firstly in that free online access is now available for such previously hard-to-access specialised documents as contracts, legislation, petitions, court hearings, court rulings, verbatims, etc., often referred to in ESP studies as “authentic documents”;⁵ and secondly, in that the plethora of easily accessed law-

related documentary, real-life and fictional filmic supports has helped boost the development of oral skills in a field traditionally focused on written skills.

However, the idea of introducing diverse and sundry filmic supports — such as mass-produced popular television series, for example — into the staid setting of the ELP classroom has inevitably raised eyebrows and led to questioning as to their appropriateness in a disciplinary context which has a high regard for the Word.

Ali Baba's cave or Pandora's Box? To address some of the concerns which divide ELP colleagues and researchers in this respect, the second part of this study foregrounds the use of popular law-related television series as pedagogic supports used to promote a socio-cultural approach in the ELP classroom: after a brief diachronic overview of the evolution in this field, it addresses the issue of whether “authentic documents” or mass-produced popular television fiction are a more efficient means of accessing the language, discourse and culture of the target law community.

2.2 Literature and ESP/ELP: a troubled relationship

The relation between ESP and literature has been a long and troubled one based on cycles of embrace and rejection. No doubt due to the long-standing weight of the written word in our societies, language teaching supports have traditionally been text-based. At the epoch when foreign language learning was the privilege of the erudite and the elite, learning objectives centred less on communication than on being cultivated. In this perspective, pedagogic supports were drawn from the great authors of classical literature and studied more with the purpose of accessing the thinking behind the narrative than the language itself, often relegated to the status of an object of intellectual metalinguistic discussion.

The 1960s saw the emergence of a more democratic vision of language learning based on the acquisition of foreign language communicative competency in the spirit of EGP. The arrival of audio-aural and audio-visual methods heralded the decline of the literary text and made way for authentic documents which existed in two principal forms: articles from the written press, radio or television programmes, documentary films, etc., on the one hand and, on the other, such “functional” texts from everyday life as, for example, bus timetables, menus, tourism brochures, how-to-use instructions, etc. At the same time, the parallel rise of ESP in its early socio-discoursal form based on genre-specific grammar and domain-specific lexicon, introduced the use of specialised documents such as scientific abstracts, legal contracts, financial statements, medical reports, etc.

Not surprisingly, many language teachers decried what they perceived as a nuts and bolts minimalist approach to language competency in contrast to a more cultured approach as, for example, Widdowson's appeal for the reintroduction of literature (1976), Sturge-Moore's argument in favour of introducing “civilisational” content in ESP (1998), or Prodomou's argument in defence of Shakespeare for engineering and business students (2000). We note with interest here that literature was not in any way considered in terms of promoting ESP curricula but a means of drawing the learner

away from the so-called narrow confines of specialism-related ESP towards a more “humanist” universe.

2.3 *Fiction à substrat professionnel*:⁶ FASP

The rise of the socio-cultural approach in ESP studies with its interest in specialised language and discourse situated within the cultural dimension of professional and specialised environments generated a renewed interest in fiction, not, however, in the form of the great literary Classics but in popular contemporary mass fiction. Though ESP teachers had already taken advantage of the possibilities offered by VCRs to introduce films related to learner specialisms in the ESP classroom, it was in 1999 that Michel Petit identified and codified a new fictional genre he christened *fiction à substrat professionnel* (FASP): usually a thriller, the defining convention of FASP is that the characters, the plot and the denouement are embedded in and shaped by a particular professional or specialised environment (the eponymous *substrat professionnel*). Far from turning the learner away from ESP objectives, Petit clearly identified the link between this new genre and ESP studies by titling his seminal article “*Fiction à substrat professionnel: une autre voie d'accès à l'anglais de spécialité*”.⁸

For ESP teachers working in the context of the socio-cultural approach, interest in FASP lies in the fact that it affords a holistic approach to the specialised environment as summed up in the language-discourse-culture ESP triangulation proposed by Petit’s 2002 definition. In comparison to the authentic document, FASP as a pedagogic support is particularly relevant and rich regarding the cultural dimension since, in addition to specialised language, it also fictionalises the specialised culture of the subject-domain and this within the context of the multiple other cultures vectored by characters and loci (national, regional, ethnic, gender, etc.). As such, the use of popular fiction as an ESP teaching tool confutes the concern of researchers who decried the absence of a “humanist” approach in ESP teachers (Isani, 2011).

While legal FASP is undoubtedly the most dominant in volume and variety, there are as many FASP sub-genres as there are professional environments: medical FASP, scientific FASP, art FASP, military FASP, environmental FASP, and so on (Isani 2004). Initially present essentially in the form of novels and films –“legal thrillers” by John Grisham in the United States and by John Mortimer in the UK, for example– FASP is an increasingly multimedia phenomenon, as evidenced by the surge in FASP television series and the emergence of FASP graphic novels, blogs, etc.

Today the wheel has come a full circle in that if certain ESP teachers used to using press articles and authentic documents recognise the *cultural* added-value of FASP pedagogic supports (Richard 2014 unpublished manuscript), others question the factual reliability of popular fiction and its density of specialised lexis as opposed to the authority of authentic documents (Genty, 2009; Charpy, 2009). This study presents recent research carried out in the field of ELP to address these specific issues, namely the reliability of factual representations, on the one hand, and the density of specialised lexicon as compared to authentic documents, on the other.

2.3 Reliability of specialised factual representations in FASP legal television series

The accuracy of factual representations is an issue which evoked with regard to the specialised knowledge related to the *substrat professionnel* and one which reaches out beyond the scope of ESP since it also generates great interest with the general public and produces stimulating online exchanges on the subject of real and perceived errors.⁷

Reservations concerning the reliability of factual knowledge present in FASP should, however, be allayed by the convergence of several factors. The first and perhaps most important concerns the fact that one of the extra-diegetic characteristics of the genre analysed by Petit in 1999 is that, in most cases, FASP authors and scriptwriters are or were themselves members of the professional community fictionalised, as illustrated by the fact that Scott Turow, John Grisham and John Mortimer, all well-known legal FASP authors, are or were practising lawyers. These *auteurs-professionnels* or *professionnels-auteurs* as Petit punned (1999), are insider experts of the specialist-domain they fictionalize and as such guarantors of the reliability of law-related facts vectored by the specialised narrative.

In the case of television series, the validity of specialised factual content is likewise guaranteed by scriptwriters who belong or belonged to the legal profession, as is, for example, the case of the series *The Practice*, *Boston Legal* and *The Firm* which are all co-written by Jonathan Shapiro, a federal prosecutor and law teacher (2014), or by a bevy of consultants specialised in law.

In addition to these significant elements related to authorial creation, a further study was carried out to collect external empirical data regarding this issue by questioning professionals. A first step consisted of gathering the views of American legal professionals (professors and students of law, lawyers and judges) regarding the accuracy of the specialised knowledge presented in legal FASP television series such as *Ally McBeal*, *The Practice*, *Boston Legal*, *Shark*, *Damages*, *Drop Dead Diva*, *The Good Wife*, and *Suits*. As reported by Chapon (2013), the different respondents widely agreed that the specialised facts fictionalized in these series were done so with accuracy. A final step undertaken to confirm or confute the reliability of the specialised content of the *substrat professionnel* consisted of carrying out a comparative study of similar factual data as presented in authentic documents, on the one hand, and in fictional television series, on the other. Once again, the results proved strong correlation between the specialised content of the two texts analysed (Chapon, 2013).

To conclude on this point, in view of the authorial safeguards on the one hand and the endorsement of legal professionals on the other, it is safe to conclude that the specialised content of legal FASP is, on the whole, reliable. However, as the online watchdog community likes to tease out, discrepancies do exist, such as, for example, the fact that no lawyer in his right mind would accuse a judge of corruption in open court (*Boston Legal*, 4x17). However, these discrepancies are on the whole minor peccadilloes, often introduced in the name of poetic licence and/or media constraints. In the ELP context, far from being a hindrance, they offer interesting pedagogic potential in terms of learner interaction and classroom dynamics.

2.4 Density of specialised lexis

The second issue raised with regard to television FASP as ELP teaching material concerns the density of specialised lexis: surely, it could be argued, authentic texts present a higher density of specialised lexis than general public entertainment-orientated legal FASP television series? To test ELP teachers' empirical intuitions on this subject, an experimental protocol was designed to validate the hypothesis that legal FASP television series present an equal if not higher density of specialised legal lexis than a number of professional documents habitually used in the context of ELP teaching (Chapon 2011).

The experimental protocol designed to test the above hypothesis was conducted in 2010 on the basis of a parallel corpus of four heterogeneous types of text united by the fact that they were representative of texts commonly used as pedagogic supports in ELP courses: press articles, authentic documents and episodes from legal FASP television series.⁹ More importantly, a second unifying factor which links the four texts of the parallel corpus is that they are all thematically related to the subject of capital punishment in the United States, more specifically, to the 2008 case of *Kennedy v. Louisiana* and the subsequent landmark decision handed down by the Supreme Court of the United States (SCOTUS) holding that the non-homicide rape of a child could not be punished by the death penalty. The parallel corpus, totalling 37,959 words, was composed of the following texts:

- Press article (14 April 2008) from *The Times-Picayune*, a New Orleans daily;
- Verbatim of SCOTUS oral hearings (16 April 2008) on *the Kennedy v. Louisiana* case;¹⁰
- Episode from the legal FASP television series *Boston Legal* (22 April 2008) entitled "The Court Supreme";¹¹
- 65-page SCOTUS ruling (25 June 2008) handed down in the *Kennedy v. Louisiana* case.

The methodology adopted to determine the density of specialised lexis in each document consisted of identifying and extracting legal terms with a view to establishing quantitative data. Aware of the complexity of determining whether or not a lexical item is a specialised "term" or not, and given that the object of the analysis was not relevant to terminology as per se, a more empirical standard of measure was adopted: in a first step, the four documents were parsed to manually extract all potentially legal lexis; in a second step, the presence of each item was checked in Black's *Dictionary of Law*, an authoritative reference in the field of law: if present it was retained as belonging to the field of specialised legal lexis; if not, it was rejected.

In this context, special mention must be made of a distinction often operated between what Parkinson (2013) refers to as "technical" terms, i.e. monosemous lexical items which have no synonyms outside of their specialised context of use (e.g. *amicus*, *oyez* and *parole*, in the case of the present corpus) and "sub-technical" polysemous

words which have both specialised and non-specialised meanings (e.g. *abuse*, *appeal*, *argue*, *battery*, *concur*, *defend*, *deter*, and *hold* in the case of the present corpus). In spite of their polysemous status, we consider these so-called “sub-technical words” as specialised legal terms in their own right, it being clear that their presence in a specialised context of use clearly identifies them as such, as, for example, is the case with the terms in italics in the following excerpts from the 2008 SCOTUS ruling.

- The Court had not *held* that the Eight Amendment bars the death penalty for child rape (2008: 44)
- torture and *aggravated* battery (2008: 4)
- to *file* a dissenting *opinion* (2008:5)
- ... and KENNEDY, J., *concurring* in part and *concurring* in judgment” (2008:9).

At the end of this process, a total of 174 lexical items were retained as qualifying as specialised legal lexis. In a third and final step, the four texts were processed by concordancer (KWIC version 5.0) to obtain a quantitative analysis of item frequency per text. Given the difference between the length and number of words in the different documents, to bring the findings down to comparable proportions, the density of specialised lexis per document is given in percentages.

Fig. 1 - Density of specialised legal lexis per text

Type of text	Number of words	No. of specialised legal lexical items	Density (%age)
1. SCOTUS ruling	20 924	137	0.65
2. SCOTUS oral arguments	11 653	89	0.76
3. Legal FASP episode	3 310	80	2.41
4. Press article	1 072	53	4.94

Contrary to expectations, the findings revealed firstly, that the two court-related authentic documents presented a startlingly lower density of specialised lexis than the other two non-legal documents and, secondly, that the press article showed a density of specialised lexis twice as high as in the legal FASP episode. Though admittedly surprising, two considerations relative to each textual genre may help in part to explain these findings:

- Firstly, if the SCOTUS ruling is indeed a formal court-issued text, it is intended for public dissemination and therefore does not belong to the category of highly specialised genres reserved for peer-to-peer communication. Consequently, although a specialised legal genre in its own right, it does not present the same degree of language specialisation as would, for example, a text of law or a contract;
- Secondly, with regard to the two oral texts in the corpus, (SCOTUS oral arguments and legal FASP episode), oral discourse, which is a less condensed form of expression than written discourse, naturally resorts to such non-specialised

“diluters” as phatics, self-reformulation, self-correction, repetition, rhetorical questions, etc., thereby increasing the length of the message without enhancing its specialised informational content. As pointed out elsewhere (Chapon, 2011), the exchanges between SCOTUS judges and Counsel during oral arguments are highly interactive in nature, in contrast with the often codified monologues of court procedure. Similarly, the orality of the legal FASP episode goes some way to explain the higher density of specialised lexis in the written discourse of the press article.

In spite of the unexpected nature of some of the findings, especially with regard to the low density of specialised lexis in the authentic court-related texts, the results of this corpus analysis highlight, firstly, that not all specialised documents produced by professionals possess a high density of specialised lexis and, secondly, that the specialised genre of legal FASP presents a lower density of specialised lexis than the press article chosen for the corpus. It also shows that the density of specialised lexis in the authentic oral arguments and its fictional are similar, a fact confirmed by the comment made by Jeffrey Fisher, the law professor who argued the case in front of the SCOTUS, after he watched the show:

It was striking how closely the episode hewed to the real facts in Kennedy, down to the most minute detail, and (certain rants aside) to the real legal arguments the parties are advancing. The producers obviously had studied our briefing quite closely. (in Mauro, 2008)

If these findings certainly highlight the validity of our hypothesis that legal FASP television series present a higher density of specialised lexis than certain similar authentic texts, they do so with a caveat which shifts the focus to questions about the added-value of legal FASP television series as compared to the traditional ESP support, the newspaper article...

In spite of these findings, the full import of the specialised document/legal FASP TV episode debate can only be understood in the context of the language-discourse-culture triangulation that characterizes the socio-cultural approach to ESP/ELP.

Regarding the language-discourse dimension, a newspaper article conforms to its own generic conventions and, as such, is essentially declarative and embedded in the ethos of journalistic stance. Legal FASP TV series, on the other hand, provide greater discursive plurality in that they not only reflect “authentic” samples of specialised language and discourse in action but also a variety of exchanges freed from the habitual constraints of professional propriety: legal professionals are represented in varied situations of communication ranging from highly codified courtroom exchanges to mediated discourse with their clients, interspersed with informal exchanges of everyday intercourse with such varied interlocutors as colleagues, friends and adversaries.

To conclude on this point, it is worth recalling that in addition to the rich interweave of specialised and non-specialised language and discourse, legal FASP TV series also vector in parallel a similarly rich and varied cultural content which situates the culture

of the specialised domain within the context of the multiple cultures related to being, *tempus* and *loci* (Isani 2011).

2.5 Pedagogic bonus: upsurge in intrinsic motivation

In addition to presenting strong correlation with the objectives of a socio-cultural approach, the use of legal FASP TV series offers ELP teachers an invaluable pedagogic bonus in the form of increased learner motivation.

As a sequel to the quantitative analysis of the parallel corpus discussed above, further research was conducted to assess learner motivation with regard to the different pedagogic supports proposed (Chapon, 2015, unpublished thesis): the 68 students involved in the experiment were given the four texts of the corpus related to the *Kennedy v. Louisiana* case to study as a home assignment with a first option of beginning with the one of their own choice and a second option of studying as many as they could within the period of time allotted. The first conclusive finding in relation to this experiment on pedagogic support/motivation correlation was that an overwhelming majority of 72% of the students chose to study the legal FASP TV series episode first.

This preliminary finding regarding the motivational dynamics of fiction in language learning is substantiated by two further sets of data. Firstly, a finer analysis of the way the documents were studied by the students reveals that

- 56% of the students studied the newspaper article from beginning to end;
- 43% did the same for the FASP TV series episode;
- 38% of the students did not read the SCOTUS ruling at all
- 19% did not read it beyond the first few lines, judging it “boring” and/or “too difficult”.

Secondly, and perhaps more interestingly, an additional experiment regarding the motivation factor was carried out (Chapon, 2015, unpublished thesis) based on response to two of the texts presented, the newspaper article and the legal FASP TV episode, neither of which provides any information whatsoever about whether or not the execution actually took place. Two classes (Group A, 38 students) were given the fictional episode and two other classes (Group B, 40 students) were given the newspaper article. In terms of intrinsic motivation, it is highly revealing that while not a single student from Group B was motivated enough to find out for him/herself what the actual outcome had been, every single student from Group A spontaneously carried out an internet search to find out whether or not the execution had actually taken place — a conclusive element regarding the added intrinsic motivational incentive fiction can provide in terms of curiosity and spontaneous learning.

3. Conclusion

Teaching and law both being noble professions, it is understandably difficult for teachers of either discipline to accept that mass-market fiction in the form of popular television series should prove to be more effectual vectors of the language, discourse and culture of the professional environment of law in the United States than authentic documents. In the context of filmic supports, such uplifting films as the cinematographic adaptation of Reginald Rose's *12 Angry Men* (1957), Robert Traver's *Anatomy of a Murder* (1959) or Lee Harper's *To Kill a Mocking Bird* (1962) would, to many of us, seem so much more in keeping with perceptions we forge of our own and our learners' disciplines. But ESP is an intrinsically learner-centred discipline in which teaching goals defined in terms of teachers' personal aspirations risk being perceived in terms of teacher-centred cultural hegemony (Cheung, 2001).

Nevertheless, and in spite of the conclusions of this study revealing, firstly that newspaper articles and legal FASP TV series represent a higher density of specialised lexis than certain authentic law-related texts and secondly, that the former possess low motivational incentive, we would like to underline that it is crucial not to lose sight of the fact that there is little justification for mono-sourced tools in the context of today's ease of access to a myriad of varied ESP pedagogic supports: limiting pedagogic supports solely to newspaper articles or written legal texts would be just as regrettable as focusing exclusively on episodes from legal FASP TV series. However varied pedagogic supports may be, they are essentially complementary and mutually enriching: the natural follow-up of a legal FASP TV series episode dealing with a particular point of law should naturally be the formal text itself, and vice versa – as highlighted by the multi-source pedagogic supports underlining this very research.

Notes

1. Similar debate continues in France today with such variations as: *langues spécialisées*, *langues de spécialité*, *langues pour spécialistes*, *langues de spécialisation*, *variétés spécialisées de la langue*, etc.

2. Trouillon, citing Howatt and Widdowson, suggests 1961 on the occasion of TESOL conference organised by Makerere College of Uganda under the aegis of The Commonwealth Education Liaison Committee (2010: 22).

3. By the terms “endolingual” and “exolingual”, we refer here to their acceptance as defined in the proceedings of The 2013 European Conference on Language Learning held in Sri Lanka:

Foreign language learners could further be distinguished from each other according to the type of learning context they are in: while some foreign language learners study their target language in places where it is used for day-to-day communication (endolingual learning contexts), others learn it in places where the use of the target language is more or less restricted to the language classroom (exolingual learning contexts). — Punchihetti (2013, online)

4. Translation S. Isani: ESP is that branch of English studies which deals with the *language, discourse and culture* of English-speaking professional communities and specialised social groups and the teaching thereof. (Our emphasis).

5. The term “authentic documents” is subject to debate. Construed by some to mean “real-life” documents (Richards, Platt and Platt, 1985), it is considered as misleading by other specialists who argue that newspaper articles, medical reports, legal texts or the FTSE Index cease to be “authentic” once removed from the context of their original addressees and transposed to the “artificial” environment of the language-learning classroom. (Galissou & Coste, 1978). Such supports are now often referred to as texts produced by subject-domain professionals. However, given the widespread acceptance of the term and for the sake of brevity, we continue to use the term “authentic documents” in the context of this study.

6. After discussion and consultation, it was decided to maintain the original French name for the newly-identified genre, in keeping with the term “genre” itself and in line with such other literary genres as *policier, roman noir, roman à clef*, etc.

7. “Fiction à substrat fictionnel: another means of access to ESP” (our translation).

8. The critical eye of the general public regarding television series may be epitomised by a recent article in *The Daily Telegraph* which reports that Queen Elisabeth II is a “hawk-eyed fan [of the series *Downton Abbey*] ready to pounce on any historical inaccuracies the producers allow to slip through the net. [...] She is a huge fan of the series, and loves nothing better than to point out the mistakes that have become a whole sub-plot in themselves for devotees.” (Saturday 5 September 2015)

9. Though the press article and two authentic documents all qualify as professional documents (in opposition to the fictional status of the episode from a legal FASP television series), a distinction must be made in that the first two texts are legal texts produced by law professionals, whereas the press article is not produced by a law professional but by a journalist bound by the caveat to mediate specialised discourse for non-specialist readers.

10. Both the verbatim and the audio version of the hearings are available on the site Oyez.com dedicated to the multimedia archiving of SCOTUS hearings.

11. This episode, which was aired barely six days after the real-life hearings, concerns the fictional case of the death sentence pronounced in the case of a black American man accused of raping his eight-year old step-daughter, a scenario quasi identical to the *Kennedy v. Louisiana* case.

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Opacity in International Legal Texts: Generic Trait or Symbol of Power?

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ABSTRACT

Due to this international character of English, texts in this language –as proffered by several major institutions in the area of public and private law– are deployed as necessary tools of communication in the course of the establishment of transnational commercial and juridical relationships. However, English as the language of the law has been branded as a complex, opaque, kind of discourse. The aim of the present paper is to address the question of the undeniable complexity of legal texts in English as instruments to wield power, their unveiled communicative aim being to separate the ruler from the citizen and the legal message from its user. To demonstrate the validity of such thesis, genre analysis has been applied to three paradigmatic texts, consequential to develop international deals in the transnational contexts: the insurance policies of the London Institute of Underwriters at Lloyd's, the Rules issued by the London Court of international Arbitration and the Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR). The goal of our study will be carried out through different levels to discern whether there exists any possible equation between power and textual complexity: the formal and discursive level, which will scrutinize lexicon, syntax and textual elements (macrostructure of texts and metadiscourse markers) and the pragmatic level, which will study the texts as peculiar generic types of legal agreements where power and commitment between the parties as a set of directives, i.e. obligations exerted by a powerful party over another, the recipient of the text.

Keywords: legal language, power, CMR, Institute Cargo Clauses, LCIA

1. 1. Introduction: complexity in legal English

The present work undertakes the study of two major international legal texts: the Geneva Convention on the Contract for the International Carriage of Goods by Road, (henceforth CMR) and the Arbitration Rules of the International Chamber of Commerce (henceforth ICC), which constitute examples of the role of English as the international medium of professional communication and of the globalization of legal transactions. Our purpose overall will be to determine whether these texts are formally and discursively opaque because they obey to the necessary technical character of English legal texts at large, or because they constitute clear examples of a “dominant discourse” (Bourdieu, 1991) which disguises the wielding of power and power relations (Evangelisti Allori, 2008).

Due to their international transcendence, English legal texts, as proposed by several major institutions in the area of public and private law, are deployed as necessary tools of communication in the establishment of transnational commercial and juridical relationships. Changes in technology and communication have made global contact and cooperation imperative for political and economic reasons: law firms, law schools, universities, courts and other legal institutions must render themselves more “international” to support the national interests of their clients and governments. Consequently, the globalization of business activities and dispute resolution through arbitration between individuals and institutions has been accompanied by a process of ‘legal internationalization’ (Klabbers and Sellers, 2008: 4). However, internationalization is essentially a verbal process which requires a common language for legal officials and scholars to understand one another, and the language is, undeniably, English (Crystal, 1997: 8-10). However, there are adverse side effects to the character of English as an international professional communication tool: language being the key to the construction of reality, the adoption of English as the instrument of legal communication has also entailed the predominance of English logic, worldview and preferences (Focarelli, 2012: 93).

The emergence of a relatively new audience –non-native speakers of English who use the language as a professional lingua franca– has advocated for the creation of plain English legal documents adapted to this audience’s specific needs. Nevertheless, “the Plain English movement has not yet revolutionized English-language legal writing” (Hammell, 2008: 289), and English legal language is still an intricate and elaborate form of discourse. Such complexity has been widely discussed by lawyers, linguists and translators over the years (Alcaraz and Hughes, 2002; Cao, 2007; Tiersma, 1999), with the general agreement that legal language is complex because it has to fit the complex social reality that is law (Palmirani *et al*, 2012). Indeed, supporters of legal language complexity purport that such so-called *legalese* is more precise and specific than plain language (Siegel and Etzkorn, 2013), and that the texts of the law cannot be simplified without sacrificing their legal force and certainty: legal language is conservative by definition and makes use of established formulae which have been tested before courts for centuries. Since these are used by law professionals with confidence, they are considered ‘safe’; it has even been argued that choosing to adopt new, more

domesticated formulations carries a risk of “unsuspected deficiencies” (Crystal and Davy 1969: 194). The reluctance to change this traditional stance is attributed to several factors, among which that of inertia: lawyers uncritically perpetuate the style they have always used, which is transmitted by law schools and reinforced in legal practice. In the adversarial context of Anglo-Saxon law, change is sensed as leading to uncertainty and textual simplicity to ambiguity particularly with regard to a hostile interactant looking for loopholes in a case. There is also a clear need for safety: as pointed out above, the traditional style of legal drafting is ‘safe’, while plain language is not; many terms and phrases have judicially-defined meanings, and substituting a modern term is to lose the benefit of that judicial definition (Butt, 2001: 29-30).

On the other hand, those who attack legal language as being unnecessarily complex (among them, the supporters of the so-called Critical Law Studies, CLS¹) state that law is an authoritative and sophisticated institution which affects and influences every aspect of social life, and which is based upon the deployment and possession of power. According to Salmi Tolonen (2011:1), neither language nor law in themselves have any purpose or power whatsoever, but they become powerful in the hands of those who hold institutional power, and power must be exercised according to the rules laid down by such authority (McDowell, 2010: 160). The power wielded by law as an institution is an instrumental power: the explicit power of the sort imposed by the state, by its laws and conventions or by the organizations for which we work (Barnett and Duvall, 2004; Cutler, 2003). However, the great source of the law’s power is the language through which it enforces, reflects, constitutes, and legitimizes dominant social and power relations without a need for or the appearance of control from outside (Kairys, 1999).

The hypothesis underlying this work is, therefore, that opacity in legal texts may be connected to the authoritative, mandatory character of the specialised communities that issue them. The acquisition or exhibition of supremacy is achieved through the technicality, precision and complexity of the law’s written texts (Gibbons, 2004), which represent an intentional exercise of elitist and exclusionary practices (Goodrich, 1987). Social and professional status in a society in which the law plays an important role is a determining factor contributing to the conservatism and technicality of the language of the law (Tiersma, 1999: 3). The perception of legal language as a “frozen genre” (Bhatia, 2004) or a “fossilized language” (Alcaraz and Hughes, 2002: 9) is partly due to the institutional character of legal discourse, its social detachment from the user and the hierarchical order it wishes to establish.

2. Our corpus in context

As advanced in the previous section, the present work aims to study two paradigmatic texts which play a consequential role in the development of international transactions in transnational contexts. The CMR and ICC Rules analysed in the context of this study have a predominantly normative content, since they regulate road transport and a particular process of international arbitration, respectively. Nevertheless, as Gotti

warns, “the formulation of legal concepts in normative texts in multilingual/multicultural contexts is greatly conditioned by specific economic and sociocultural factors” (2008: 41), which amounts to stating that legal texts with the same regulative purpose are drafted and constructed differently, depending on the legal, cultural and linguistic contexts they spring from. This will be the point of departure from which we will sustain our present research.

Figure 1 illustrates how international legal texts are organized in the area of commerce:



Figure 1. International commercial legal genres

Though the typology and variety of texts in this area are in fact even wider and, as such, susceptible to multiple classifications regarding different aspects of international trade, their purposes and other issues (Hillier, 1998), the presentation in Figure 1 is an attempt to reduce the panorama to manageable proportions and explain the area in which each of the documents that we aim to analyse is situated. As can be seen in the Figure, international economic law is subdivided into public and private law. The former regulates economic relations between states and organizations through Conventions and Treaties, as supranational agreements, whereas the latter is a branch of civil law that controls and standardizes agreements and transactions between private parties, either companies or individuals. Public international law covers a vast number of treaties and conventions; in the private sphere of international law (deservingly called ‘conflict of laws’) there are several domains of interest, among which export transactions, arbitration and private instruments regulating individual operations are included.

The CMR (bottom right-hand side of Figure 1) is one of the Geneva Conventions that deal with commercial transactions, on a par with the CIM, which regulates transport of goods by rail. It was adopted by the United Nations Economic Commission for Europe in 1956, and deals with carriage regulations for international road transport operations, determining the rights and responsibilities of the carrier, consignor and consignee and of each transaction. The CMR Convention belongs to the area of public law, since every road expedition that starts or finishes in countries which have ratified it (41, most of them in the European Continent²), is subject to its stipulations. Usually contracts are confirmed by the issue of a CMR consignment note, which must show the name and address of the consignee, consignor and carrier, a description of the goods, weight and number of packages, etc. In other words, the CMR is both a treaty and the

standardized conditions of a due road transport transaction; in the present study, however, we will deal with the CMR only in its modality as an international agreement, and not as a transport document.

On the left-hand side of Figure 1 is the second subcorpus of our study: the Arbitration Clauses of the International Chamber of Commerce (ICC). The ICC Court of Arbitration was established in Paris in 1923. Because of its transnational character (which makes it different from the London Court of Arbitration, LCIA or those of the American Arbitration Association, AAA), it remains “the world’s leading international commercial arbitration institution and has less of a national character than any other arbitral institution” (Born, 2001: 13). They are, in fact, a result of discussion maintained between dispute resolution experts and representatives of the business community from seventy-five countries.

To further clarify the nature of our documents, we refer to Trosborg’s taxonomy on international documents (1997), according to which international texts are classified as ‘pure’ and ‘hybrid’. The former are those which resist change across cultures, being most often the product of a dominant culture (Trosborg, 1997: 145-146³), while the latter –like EU directives or UN treaties and Conventions– are the result of compromise between cultures. Being a ‘pure’ or hybrid’ text also has an incidence on its relative complexity, since ‘pure’ international texts are imposed on the community, while meaning in hybrid texts has to be negotiated. Therefore, since our texts are drafted in two official versions, English and French, and have to be accepted by a wide and large community of users, we consider them as hybrid instances of texts, but with differing levels of hybridity. Such dissimilarities in hybridity, as we shall see below, have their ultimate origin in the different communicative purposes of the institutions where they have their origin, namely the United Nations Commission for Europe (ECE) that issues the CMR Convention, and the Court of International Arbitration at the International Chamber of Commerce issuing the ICC. The former is the originator of an international agreement that has to bind states, sides, or military forces on a specific subject, and needs to be interpreted in the same way by the courts in the countries which are parties to the convention in order to promote uniformity. In contrast, the Rules (issued in all the major thirteen languages used in international trade) are part of the ADR (Alternative Dispute Resolution), where the choice of arbitration is a discretionary process, and the language, the venue and the substantive and procedural law depend on the participants’ choice. Therefore, unlike the CMR Convention (that offers no alternative norms for the transportation of cargo in the signatory countries), the ICC Rules are presented as one among many methods of arbitration, in competition with those offered by the rest of the courts in the world and ostensibly should be more easily interpreted and understood by a plural community. We hence predict that this degree of hybridity is going to have an incidence on the ways in which either document is drafted, translating a more hybrid nature into greater clarity of meaning.

3. Narrowing the purpose and method of our study: genres and power

The study of power in language is gaining momentum in the area of specialized discourse studies, with rising interest in the role that is played by personal interactions in the elaboration and application of specialized texts, and in the analysis of bureaucratization in the contexts of banking and education (Breeze, 2013; Breeze *et al*, 2014; Sarangi and Slembrouck, 2014). Language control and manipulation for the achievement of social power have been traditionally studied, among others, by Critical Linguistics or CL (Fowler *et al*, 1979; Kress and Hodge, 1979) and Critical Discourse Analysis or CDA (Fairclough, 1989; now in a revised third edition 2014). Both currents are closely interconnected, but the former specifically aims to analyze the discursive strategies deployed to legitimately control or ‘naturalize’ the social order, while the latter studies the opaque processes of domination through language, explaining how language constitutes a powerful social tool at the service of the dominant. Even if the present study is not specifically based upon any of the two doctrines, it does depart from Fairclough’s critical notion of discourse as language use in social practice, which focuses not only upon language and its structuring, but also on the linguistic characteristics of social and cultural processes (Mirzaee and Hamidi, 2012).

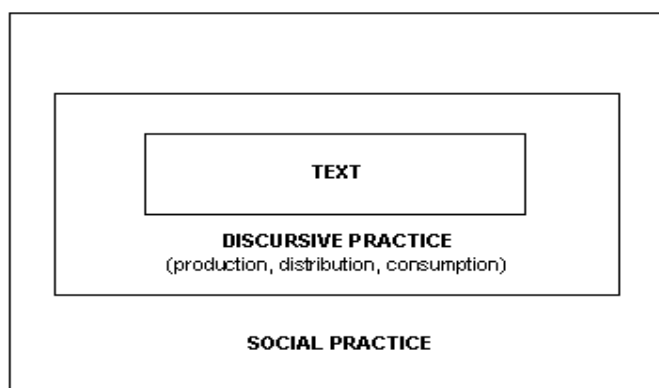


Figure 2. Fairclough’s Dimensions of Discourse. (From Doyle, 2003)

As we can see in Figure 2, Fairclough’s analytic framework includes three levels of scrutiny: the text, the discursive practice, and the sociocultural practice. For Fairclough, the analysis of any text consists of the study of the language structures produced in a discursive event, and how these are part of the discursive practices of a social group. This vision of discourse as a social practice constitutes not a method, but an approach to the analysis of power in discursive practices. Today, such an approach can benefit from the methodologies deployed by genre studies, the trend of linguistics that explains text typologies as structured communicative events designed to enable a due community to legitimately attain their professional purposes. Stemming from Systemic Functional Linguistics and English for Specific Purposes theories, genre theory explains the internal communicative mechanisms that take place among the members of professional and/or specialised communities, as well as between these members and society as a

whole. Hence, the purpose of this work is to analyse our international texts both as an illustrative example of English legal discourse and as genres in their own right, and unravel the interactive entanglement between the participants (law-makers and law-takers) in the communicative acts that the Convention and the Rules constitute.

In the context of the present study, the CMR and ICC are to be considered as genres used to guide, control, or change the behaviour of agents with decision-making capacities (Hermans, 1996). As such, they constitute the manifestation of the communicative strategies of an institutional collectivity that produces norms to be imposed on a specific audience: the parties to a road transport transaction, on the one hand, and the prospective clients of an Alternative Dispute Resolution, ADR, dispute, on the other. The texts will be scrutinized at different levels to discern whether there is any possible equation between their prescriptive character and their quintessential textual complexity. The textual level will account for the presence of words of archaic origin, ritualistic language, specific, technical words, peculiar to legal discourse –which Mellinkoff labelled as ‘terms of art’ (1963: 63)– and density and length in syntactic construction; the discursive level will scrutinize textual elements visible both in the supra-organisation or macrostructure of texts and in their metadiscourse markers; finally, the pragmatic level will study the texts as particular generic types of legal agreements where power and commitment between the parties is not established in the form of a symmetrical relationship but as a set of directives, i.e., obligations exerted by one powerful party over another, the recipient and addressee of the text.

Specifically, our study at Fairclough's textual level will account for the presence of what Crystal and Davy labelled the ‘surface elements’ (1969:201), i.e., the substance, or ‘raw material’ of the text, as well as the particular combinations which can develop into higher units. The study of lexicon and grammar in isolation may not render conclusive results but, considered in the light of our subsequent levels of analysis, it may uncover interesting functional variables. Scrutiny at lexical level will take into account the linguistic choices made as instances of legal discourse, namely the use of technical terms, archaisms and formal and ritual language. A second part will take stock of syntactic choices concerning sentence density and length.

Additionally, the discursive elements of specialised texts are visible in their supra-organisation or macrostructure and in their metadiscourse markers. On the one hand, the macrostructure plays a defining role in framing the textual segment in accordance with the conventionalised social knowledge at the disposal of the discursive or professional community, and how this is organised in the text. On the other hand, the study of metadiscourse markers complements this discursive scrutiny. These markers constitute the set of strategies that reveal the existence of an interpersonal relationship, a dialogical framework between writers and readers of texts (Hyland, 2005; Hyland and Tse, 2004; Dafouz, 2008, among many others). Since writers or speakers do not simply produce a text to convey information and to represent an external reality, but to project themselves in their texts when interacting with their receivers, metadiscourse plays an important role in organizing the discourse, engaging the audience and signalling the writer's or speaker's attitude (Fuentes-Olivera et al., 2001). Since legal texts are

designed as monologic texts intended to be interpreted rather than read and understood, the concept of interpersonality has usually been unheeded in this area and prototypically been linked to fields other than law and its genres. In view of this, the present article will attempt to discern patterns of difficulty or clarity underlying the texts, or, rather, the ways in which law-makers seek to organize information in a coherent and convincing way for addressees.

The final level of our study will focus on explicating the implicit power relationships embedded in the text. Looking at language from its social perspective implies introducing a description of language in use, the specification of its pragmatic discursive meaning, and confronting the linguistic aspects of textual construction and interpretation with the sociocultural factors that underlie the text. The pragmatic or social level will study the texts as specific generic types of legal covenants where power and commitment between parties are not established in the form of a symmetrical relationship but as a set of directives, i.e., obligations exerted by one powerful party over the recipients of the text. Accordingly, we will undertake a study both of the direct directives in the texts –those intended to impose obligation and prohibition–, and of the indirect ones –those intended to attribute rights and grant permission–, with a view to discerning how differently or similarly power between participants is distributed in each text, and how such distribution correlates with the results obtained at textual and discursive levels.

4. Analysis and discussion

4.1 Textual level

To take stock of the main formal traits of our corpus, we first carried out a lexical analysis which filtered the technical terms. As mentioned above, Mellinkoff (1963) remarks on the existence of specialized terms peculiar to the law (such as ‘claimant’, ‘joinder’ or ‘waiver’, for example) which he calls ‘terms of art’ and which, as we shall see, are present in both subcorpora. But in the context of technical terms, it is also worth mentioning Tiersma’s view that, in the law, absolute and fixed meanings are not essential, nor are they usually attainable. In fact, a technical term is also one (such as ‘carrier’, ‘award’, ‘hearing’ or ‘expenses’) that is being used by a specific discipline, either exclusively, or as a deviation from ‘normal meaning’ (Tiersma, 1999: 100-115). Tiersma additionally affirms that, not only does the law have its own ‘special’ terms, but “the legal subdisciplines have their own terminology, and sometimes a term may differ in meaning according to speciality” (1999: 108). This specificity according to subdisciplines is clearly manifest in our corpus, as we will see later on.

Additionally, technical specificity in legal language often goes hand in hand with formal and ritual words. We analysed the ritual and formal traits of our corpus according to the presence of lexical doublets or binomials (Tiersma, 1999: 111), infrequent prepositional combinations like ‘hereby’ or ‘theretofore’, and archaic words,

often of Latin and French origin. Finally, syntactic complexity is also the rule in legal English. Sentences approximating a hundred words or more are common, when legal drafters advise that sentences should be 20 to 30 words long at most (Garner, 2001). Legal syntax is made up of complex structures embedded into one another and the overuse of conditionals with complex prepositional phrases. Passive structures obscure the agent of the sentence and make the prose heavy and unclear. Such convoluted syntax renders comprehension difficult and infuses legal texts with negative and threatening undertones.

Results at this level were collected in different ways. Lexical frequencies and sentence length were obtained with the Wordlist/Statistics Tool of WordSmith Tools 3.0 and parsed manually; typologies of terms were classified with the aid of Black’s *Law Dictionary* and *Merriam Webster Dictionary Online*.

4.1.1 Textual aspects of the CMR

The CMR corpus contains a total of 8,078 words/tokens and 1,018 types, or distinct words without repetitions. However, only 300 types were selected, after discounting words of low-information value such as prepositions, pronouns, modal verbs (to be analysed elsewhere) and finite forms of ‘be’ and ‘have’. Once such parsing completed, we proceeded to work with our dictionaries of reference selecting the terms in the corpus manually. The results divide the terms of art of the CMR subcorpus into three distinguishable areas: firstly, words relating to the Convention and its parts (notably, its articles, paragraphs and provisions), secondly, terms referring to the world of road carriage and, finally, a substantial number of verbs and nouns related to legal obligations and limitations. The terms and frequencies of these three categories are shown in the tables below:

TERM OF ART	FREQUENCY IN TOKENS
Total	419
ARTICLE	175
CONVENTION	59
PARAGRAPH	52
PROVISION	32
CHAPTER	18
CMR	15
SECRETARY-GENERAL	15
ACCESSION	15
TRIBUNAL	12
RATIFICATION	10
CONFERENCE	7
CLAUSE	5
PREAMBLE	4

Table 1: Terms relating to the CMR Convention

TERM OF ART	FREQUENCY IN TOKENS
Total	492
CARRIER	138
GOODS	103
CARRIAGE	63
CONSIGNMENT	45
SENDER	30
DELIVERY	28
CONSIGNEE	27
PLACE	22
PACKAGES/PACKING/ PACKAGING	9
AGENTS	6
VEHICLE	6
TERRITORY	6
SERVANT	6
WEIGHT	3

Table 2: Terms relating to road transport in CMR.

TERM OF ART	FREQUENCY IN TOKENS
Total	457
CONTRACT	51
LOSS	43
CASE/S	38
DAMAGE	37
LIABILITY/LIABLE	37
CLAIMANT/CLAIM	31
ENTITLED	30
PARTY	28
RIGHT	19
ACTION	17
DELAY	15
CHARGES	14
COURT	12
PERFORMANCE	10
RESPONSIBLE	9
TERMS	9
REASONABLE	9
PROCEEDINGS	8
BURDEN	5
NEGLECT	5
WILFUL	5
WRONGFUL	5
DEFAULT	4
DISPUTE	4
EVIDENCE	4
INSTRUMENT	4
JUDGEMENT	4

Table 3: General legal terms in CMR.

All in all, the number of terms analysed in the text amounts to 56, 13 of them pertaining to the Convention itself, 15 to road transport and 27 to the area of general legal terms, respectively. In terms of comparison with the words in the subcorpus as a whole, the lexicon in the text has a terminological specificity of 12.7%. As seen in

Table 1, the terms relating to the Convention refer mainly to the parts into which it is divided (the most frequent word overall in the subcorpus of this group being ‘article’). The main actor referred to is that of the Secretary-General, but the Convention itself –as we shall see below– often takes on the role of one of the main characters, seemingly regarded as an ‘animate’ entity. Table 2, in turn, focuses on the parties to the transportation contract, mainly ‘the carrier’, ‘the sender’, ‘the consignee’ and their agents and servants. Other factors and processes of the transaction such as ‘carriage’, ‘consignment’ or ‘delivery’ are prominent in this group. The last group relating to general legal terms is one with a predominant presence in the CMR, as befits a text with a predominantly juridical flavour.

Formality and rituality are manifest in traits typical of legalese, such as binomials, polysyllabic words of archaic origin and pronominal adverbs in combinations. Binomials in this subcorpus consist of native and French or Latin terms where, as a rule, one term explains or complements the other (as in ‘loss and damage’ and ‘costs and expenses’), or where the binomial contains words originating from the same linguistic source (as in ‘null and void’). Formality is also present in the incorporation of Latin collocations (*prima facie*, *per annum*, *per centum*) and in the abundant use of polysyllabic words –34 types– of Latin origin (‘stipulation’, ‘conversion’, ‘convention’, ‘construction’), from Old French (‘commencement’, ‘judgement’, ‘damage’, ‘indemnification’, ‘preamble’, ‘prejudice’), from Anglo-French (‘claimant’, ‘dangerous’, ‘carriage’), or from Middle French (‘expiration’, ‘ratification’, ‘protocol’). Additionally, the text shows 13 instances of such typical legalese combinations as ‘there+preposition’ (‘thereupon’, ‘thereafter’, ‘hereby’, ‘therein’ and ‘thereto’) and 164 occurrences of the verb ‘shall’ in its ritual sense, with a mandatory or a performative character (Tiersma, 1999: 105).

Regarding syntactic aspects, the text also seems to follow classic patterns regarding length and convolution of legal texts at large. There are 211 sentences, with an average length of 36.87 words per sentence. There are several examples of very long sentences, 134 words (article 232, section 9) and 113 words (article 30, section 1), with the longest reaching 164 words (article 2). Syntactic complexity is also apparent in the marked preference for subordination to coordination, the frequent use of legal qualifications to introduce exceptions or inclusions in the sentences, and an abundance of conditional sentences with ‘if’, ‘unless’ or ‘provided that’, as for example in the extract below:

[If the carriage is performed in vehicles specially equipped to protect the goods from the effects of heat, cold, variations in temperature or the humidity of the air Qualification 1], the carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (d) [main sentence], [*unless he proves that all steps incumbent on him in the circumstances with respect to the choice, maintenance and use of such equipment were taken and that he complied with any special instructions issued to him Qualification 2*] (Article 18, Section 4).

A final but nevertheless consequential trait present in the text is the common use of passive structures. The desire for impersonality of legal texts in general is present

through the 31 passive constructions in our corpus, mainly used in the context of imposing ‘universal’ and ‘impartial’ obligations or penalties to the parties, as in:

The consignee *shall be entitled* to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods (Article 13, Section 1)

The same provision shall apply if the wilful misconduct or default *is committed* by the agents or servants of the carrier (Article 29, Section 2)

4.1.2 Textual aspects of ICC Rules

The ICC subcorpus contains a total of 8,713 words/tokens and 891 types or distinct words without repetitions. However, 320 lexical tokens with an informative value have been selected according to the criteria above, and the categories in this document are lower in number than those in the CMR. In fact, the terms of art in this subcorpus – which has a 20.3% higher terminological specificity rate than that of the CMR– are restricted solely to two areas, i.e., those belonging to the scope of arbitration and general legal terms.

In the first group (with 17 terms), we have included terms that refer mostly to the *personalia* evoked in the text, i.e., the parties to the process –such as the ‘Arbitrator’, the ‘Secretariat’, the ‘President’ and ‘Vice-President’–, and also to the different aspects pertaining more specifically to arbitration and its different stages, such as ‘award’, ‘mediation’, ‘(arbitration) agreement’ and ‘rules (of the Court)’.

TERM OF ART	FREQUENCY IN TOKENS
Total	709
ARBITRATOR	201
ICC	103
SECRETARIAT	77
MEDIATOR	64
AWARD	60
PRESIDENT	55
MEDIATION	41
ARBITRATION AGREEMENT	25
SECRETARY GENERAL	20
COMMITTEE	19
COURT (OF ARBITRATION)	15
VICE-PRESIDENT	11
PRESIDENT (OF THE COURT)	7
SECRETARIAT OF THE COURT	4
CO-ARBITRATOR	3
DEPUTY SECRETARY GENERAL	2
GENERAL COUNSEL	2

Table 4: Terms relating to Arbitration in ICC

The second group consists of 21 terms that refer to the legal character of the process, with terms such as ‘claim’, ‘counterclaim’, ‘party/ies’, ‘costs’, ‘court’, ‘dispute’, ‘proceedings’ and ‘waiver’.

TERM OF ART	FREQUENCY IN TOKENS
Total	1060
PARTY/IES	353
ARTICLE/S	233
CLAIM/S	81
DISPUTE	76
EXPENSES	70
COSTS	68
PROCEEDINGS	52
CLAIMANT	24
RESPONDENT	19
COUNTERCLAIM	15
HEARING	13
LAW	13
CONTRACT	8
JOINDER	8
RULES (OF LAW)	6
EVIDENCE	5
WAIVER	4
STATUTE	4
PLEA	4
INFRINGEMENT	2
FACTS (OF THE CASE)	2

Table 5: General legal terms in ICC

On the other hand, the ICC text is comparatively more formal and ritualistic than the CMR one as concerns the variety and number of formulae : not only are binomials fairly present -- with examples such as ‘null and void’, ‘fairly and impartially’ and ‘facts and circumstances’ --, but several incorporations from Latin have also been found –*mutatis mutandis, prima facie, ex aequo et bono, addendum, inter alia, ipso facto, de jure, de facto, quorum*–, as well as two incorporations from French (compositeur and vis-à-vis). There is also a substantial number of words of archaic origin and/or polysyllabic –50 types in all– mainly of Old French (‘party’, ‘claim’, ‘agreement’, ‘payment’, ‘commence/commencement’, ‘guarantee’, ‘counsel’) and Latin origin (‘transmit/transmission’, ‘terminate/termination’, ‘evidence’, ‘condition’) but also from Middle French (‘court’) and Anglo-French (‘pleading’). Compositions of adverbials are also more frequent and varied than in the previous subcorpus, with 25 combinations of there+preposition –‘thereto’, ‘thereof’ ‘, ‘thereafter’ ‘, ‘thereby’, ‘therein’, ‘therewith’ and ‘thereon’– and here+preposition, such as ‘hereinafter’ and ‘hereby’. Apart from the formulaic use of ‘shall’ (with 169 occurrences) perceived in the previous subcorpus, the ritualistic hue of the text is also present in such archaic collocations as ‘pursuant to’, ‘insofar as’, ‘notwithstanding’, ‘without prejudice to’ and ‘by virtue of’.

Regarding syntax, the ICC subcorpus contains 233 sentences, with an average of 36.03 words per sentence, a slightly lower figure than the result obtained in the CMR subcorpus. The sentences are not as long as the ones in the CMR corpus, even if there

are exceptions, like certain clauses that impose a condition with ‘if’, ‘where’, ‘in the event of’, ‘once’, ‘provided’, ‘by+ -ing and ‘unless’). These sentences contain embedding structures similar to those in the CMR:

[If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration Qualification 1], **the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal [main (coordinate) sentence]**, [unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4) Qualification 2]. (94 words)

In general, there is a prevalence of subordinate sentences, expressing contrast (“although duly summoned”), cause (“as the Court may decide”), place (“the country where the notification or communication is deemed to have been made”), purpose (“so that the arbitral tribunal may make decisions as to costs”), condition (“provided that they are not contrary to any agreement of the parties”) and relative clauses (“the basis upon which the claims are made”). Still, the longer sentences are clearly segmented into paragraphs and divided into subsections of the type (a), (b), (c) separated by a semicolon or a comma, as illustrated by this 194-word extract from Article 4:

The Request shall contain the following information:

- a) the name in full, description, address and other contact details of each of the parties;
- b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;
- c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
[.....]
- h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

Finally, there are 43 passive constructions which mostly refer to the making of claims (e.g., “irrespective of whether such claims are made under one or more than one arbitration agreement”, or “unless any claims are made under Article 7 or 8 in which case Article 36(4) shall apply”), or to the interpretation of the Rules, as in all the cases with “be deemed to be” (e.g., “the notification or communication is deemed to have been made”, or as in “The date [...] shall, for all purposes, be deemed to be the date of the commencement of the arbitration”).

4.2 Discursive level

The discursive elements of professional language are visible at the outset in the supra-organisation or macrostructure which organizes the text into parts and according to

topic, thus facilitating reader access to global comprehension (Trosborg 1997: 145-146). The normative macrostructural rigidity of the texts under scrutiny constitute a predetermined structure that is not susceptible to change, due to the hermeneutical impact that it has on the interpretation of texts that have not been written to be read, but construed and implemented.

The Convention has eight Chapters topically distinguished and preceded by a Preamble, by way of an enacting formula. The Chapters are divided into Articles, some of which are organised in numbered sub-articles. Sometimes these are divided into paragraphs preceded by a letter, especially in the case of Article 6, which articulates the particulars in the consignment note, or Article 17, which enumerates the risks of loss or damage that the carrier is exempt from. Theoretically, organizing the terms of legislation in this way permits users to locate the provisions or details that they need in an unequivocal and easier manner. Such a distribution obeys to a pre-established organization with stereotyped formulae and conventional schemas which are usually present in international instruments at large.

The arrangement of the ICC Rules also shows a visible, coherent organization. There are eight unnumbered sections that categorize the terms and conditions of the different provisions by topic, as in the Convention. Unlike the CMR, however, articles in the ICC text also include explicit headings dealing with each topic and arranging the different categories in a proper sequence. Despite the syntactic density that characterizes the arbitration text, the labelling of its parts makes it easier for the reader to process content, since the numbered or lettered paragraphs correspond to the different parts of a complex sentence. There is a further subdivision into sub-articles (in numbers) and sub-sections (in letters), which also contributes to intratextuality within the text, i.e., the mechanisms of self-reference that integrate its parts, and which make the Rules a united whole.

Additionally, the discursive function is intrinsic to language and exists to construe both propositional and interpersonal aspects into a linear and coherent whole, as Hyland and Tse underline: “With the judicious addition of metadiscourse, a writer is able to not only transform a dry, difficult text into coherent, friendly prose, but also relate it to a given context and convey his or her personality, credibility, audience-sensitivity, and relationship to the message” (2004: 157). As a result, the concept of metadiscourse has been used by researchers to trace patterns of interaction and analyse different aspects of language in use. It has usually and prototypically been linked to areas other than law and its genres, such as, academic writing and press discourse. Nevertheless, Salmi-Tolonen has recently used the concept of metadiscourse in the area of the law (2014: 63-86) to explain how these mechanisms determine the success of communication between law-makers and law-takers of international instruments. She adapts Hyland’s categories to the area of law in an attempt to discern how law-makers make it easier, through use of textual devices, for law-takers to understand a particular text. Though she draws the difference between interactive (purely textual) and interactional (interpersonal) metadiscourse markers, the scope of the present paper bears on the

former (endophorics, transitions, frames, glosses and evidentials) which are considered as facilitators of discourse construction.

When adapted to the context of the law, endophoric markers can be described as the linguistic elements that refer to the earlier materials in the text, so as to support the argument and help law-takers understand the text better (e.g., ‘under’, ‘in accordance with’, ‘specified in’, etc.). Frame markers, on the other hand, are words or phrases that sequence the text, labelling the text stages (e.g., ‘the first’, ‘the second’) or announce a discourse goal, framing it with respect to the rest (e.g., ‘for the purposes of’, ‘where any agreement’, ‘where the parties have agreed’). Transition markers, on the other hand, express semantic and structural relationships between discourse stretches and help readers interpret pragmatic connections by explicitly signalling express relations (of addition, comparison or consequence) between main clauses (Dafouz, 2008: 97). They are mostly conjunctives and adverbial phrases such as ‘in addition’, ‘but’, ‘therefore’, and ‘likewise’. Code glosses are the next category of metadiscourse markers; as Hyland (2005: 52) states, code glosses are “textual devices that supply additional information by rephrasing, explaining or elaborating what has been said, to ensure the reader recovers the writer’s intended meaning” (e.g., ‘namely’, ‘in other words’, ‘such as’, or simply punctuating devices such as a colon or parenthesis). And finally, evidentials refer to the sources of information from other legal texts. The utility of evidentials in law is illustrated with connections in the text to other legal sources that may constitute the legal background for the text at hand.

The results obtained at this level (acquired with the aid of MonoConc Pro and by means of manual tagging) are shown in Table 6, which presents the number and types of discursive markers and their verbalization in the corpus.

<i>Category</i>	<i>Function</i>	<i>ICC</i>	<i>CMR</i>
ENDOPHORIC MARKERS	Reference to other parts of the text	<i>in accordance with the Rules of Arbitration of the ICC</i> <i>under the Rules/the arbitration agreement/Article 6 as specified in the Rules/in Article 4(3)</i> <i>referred to in article/The Rules...</i> <i>pursuant to Article 33</i> <i>subject to the provisions...</i> Total: 88	<i>As specified in/under article..</i> <i>Where the provisions are applicable..</i> <i>In accordance with the provisions...</i> <i>Subject to the provisions...</i> <i>Under paragraph...</i> <i>Referred to in article/paragraph...</i> Total: 53
FRAME MARKERS	Sequencing devices, topicalizers	<i>where claims are made under more than one arbitration agreement.</i> <i>Where the parties have agreed to submit to arbitration under the Rules.</i> Total: 29	<i>For the purposes of this Convention.</i> <i>The first copy shall be handed to the sender, the second shall accompany the goods and the third shall be retained by the carrier</i> <i>Where under this article the carrier is not under any liability</i> Total: 28

Category	Function	ICC	CMR
TRANSITION MARKERS	Relations of addition, comparison or consequence between main clauses	<i>the arbitration shall proceed and any question of jurisdiction (...) may be determined..</i> <i>The Court may also appoint...</i> <i>Unless otherwise agreed...</i> Total : 63	<i>, but no further damage shall be payable...</i> <i>liability shall also be determined in accordance with ...</i> <i>Furthermore, in such a case</i> <i>In addition, the carriage charges (...) shall be refunded</i> Total: 37
CODE GLOSSES	Elaboration of propositional meanings	<i>The following provisions shall apply....</i> <i>(The Request for Joinder)</i> <i>Colon+enumeration</i> Total: 16	<i>As follows...</i> <i>The following</i> <i>particulars/conditions/circumstances....</i> <i>Colon+enumeration</i> Total:38
EVIDENTIALS	Reference to other texts	<i>Appendices annexed to the Rules</i> Total: 6	<i>The Convention on Road Traffic</i> Total:1
TOTAL		202	157

Table 6. Discursive markers in our corpus. (Adapted from Salmi-Tolonen, 2014).

Figure 3 presents the overall interactive activity in either text, whereas Figure 4 illustrates more graphically the contents in Table 6 and visually emphasizes our findings regarding textual marker structures and typology in the subcorpora.

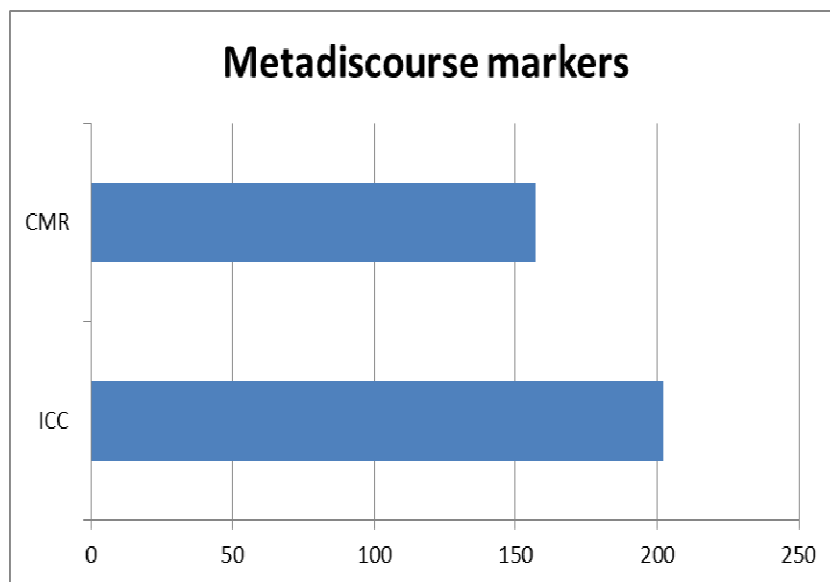


Figure 3: Metadiscourse markers in ICC and CMR

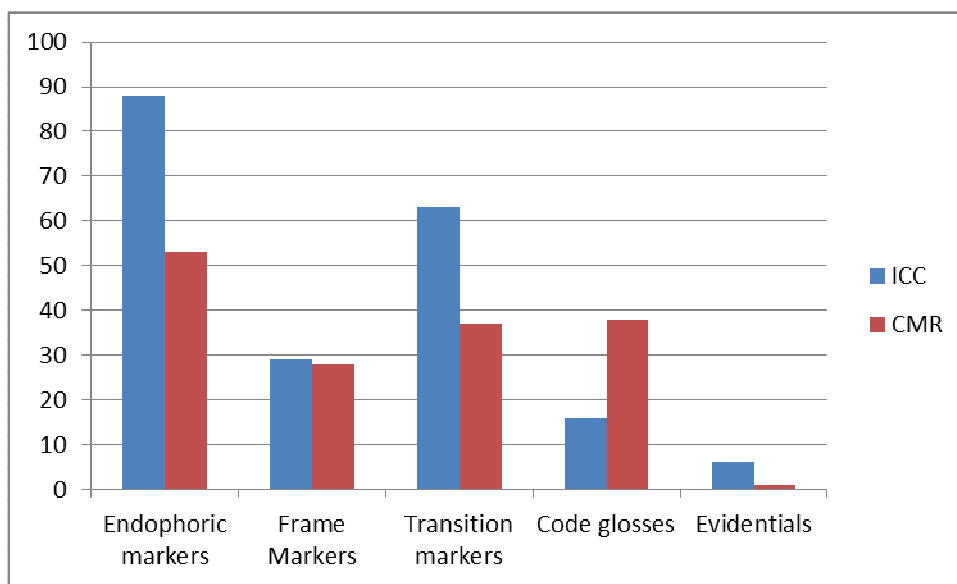


Figure 4: Typology of metadiscourse markers in ICC and CMR

According to Dafouz, readers, in general, prefer to be guided through texts with the aid of metadiscursive markers (2008: 108), rather than to have to reconstruct and reinterpret the text without any explicit signposting. This is the case of the ICC rules, which show the highest number of interactive markers overall, potentially making it a more ‘readable’ text for its users. These markers are mainly of the endophoric kind, appearing in the shape of expressions prototypical of legislative texts (such as ‘under’ or ‘in accordance with’). They are aimed at giving consistency and coherence to the discourse, and portraying the substance of the text as a reality, as a ‘substantial’ normative source. As such, they contribute to the reification of the text itself in the belief that the CMR is an independent, ‘living’ entity with the power and capacity to issue norms. Reification, according to Lukács (1971), is the fallacy that allows for the conception of abstract entities –such as legal texts– as if they were concrete, real events, or physical entities, thus disengaging the addressers of such texts as the ‘intellectual’ originators of the ideas behind them. Though endophorics are not all that abundant in the CMR subcorpus, it does nevertheless, present a much more varied array of constructions of this kind, which convey the impression of the Convention as the autonomous and legitimate, sole issuer of duties and prerogatives.

Transition markers are the second type of discourse marker most present in the corpus. These divide and/or connect the texts into logical sequences and are, again, more varied in the CMR but more abundant in the ICC. They also take the archetypical shape that markers do in legal discourse: ‘but’, for example, appears in the three texts as a connective device, but also indicates exceptions and qualifications to the wording of the stipulations. ‘Also’ has the contrary effect, expressing additions to those stipulations.

As far as glosses are concerned, these are deployed to reformulate or exemplify textual materials, in our texts mainly through the usage of parentheses and colons

followed by lists of explanations. The CMR text presents frequent and varied use of glosses, whereas the ICC text shows a lesser presence of explanations and clarifications. This may be due to the clearer macrostructural arrangement of the Convention, which sacrifices glosses and favours graphetic divisions, and because the ICC is a document where the conceptual world depicted is better followed through intratextual references, such as endophorics, or through transitions.

Frame markers are also present in the corpus in such typical expressions of legislative discourse as, ‘for the purposes of’ or ‘where’, and constitute indicators of discourse acts within the texts, articulating semantic or structural relations between their different parts. In this sense, they are similar to, or compatible with endophorics, inasmuch as they constitute discursual mechanisms that materialize meaningfulness of the texts as bodies of norm. As a consequence, and due to the specific character of the text, frame markers are frequent in the solid world of rules that the ICC and the CMR represent.

Finally, evidentials show a modest but clear presence in both texts, as markers of the intertextuality indexes that signify that legal concepts are to be interpreted in the framework of other texts. Using evidentials, as Hyland puts it, is “the perceived credibility that readers grant to writers” (2005: 67), but the scarcity of this device in our corpus is a clear signal of the solidity that law-makers in this case wish to bestow upon their own texts: for the law-makers of the CMR and ICC, the documents in question are intended to stand by themselves as sufficient sources of law for the law-taker.

4.3 Pragmatic or social level

As indicated at the beginning of this work, legal genres are textual means through which an authoritative set of institutions that constitute the legal community as a whole regulate social behaviour at large. Power is a significant determinant of strategic choice or lack of choice in genres, and pragmatic choices in institutional discourse are related to the modulation of the degree of imposition and the social distance and relative powers of participants, their reciprocal rights and obligations. There are, thus, natural asymmetries which are not immediately evident in the communicative event that is the issuing of norms by law-makers and their reception by law-takers, as users of the law. This dissymmetry finds its expression in English statutory texts mainly through speech acts which Trosborg divide into regulative acts and constitutive rules, according to their function, i.e., to regulate or convey legal effect, respectively (Trosborg, 1995: 35-37). According to Cao (2007), Evangelisti Allori (2008) and Garzone (2008), these regulatives and constitutive rules of the law are conveyed through modal verbs –mainly the mandatory and constitutive ‘shall’ and ‘shall not’, and the facultative ‘may’– as “the major grammatical tool” to express the fuzzy area that surrounds power relations in legal documents (Evangelisti Allori, 2008: 80). In the present article we will measure the slippery area that assigns power levels in the normative texts under scrutiny through a taxonomy formulated according to the studies by Trosborg (1995), Cao (2007),

Garzone (2008) and Evangelisti Allori (2008). Accordingly, modals expressing power and imposition in legal texts have been divided into the following categories:

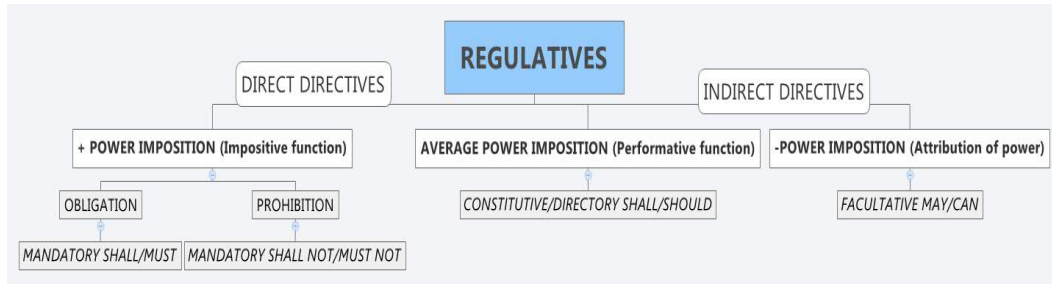


Figure 5. Power imposition and modality in legal discourse

As can be seen in Figure 5, power relations in this paper are represented on a scale from a higher to a lower degree of imposition. Maximum power imposition is stated through direct directives with the utmost impositive force (Trosborg, 1995) and expressed with the mandatory ‘shall’ and ‘must’. In fact, mandatory ‘shall/shall not’, according to Cao (2007:116) are used to impose duties and prohibit conduct, but in present-day provisions ‘must/must not’ are increasingly used with the same impositive force to make legislative language more accessible and less ambiguous to the law-taker. On the other hand, ‘shall’ is used in a directory sense (and not in a regulatory or mandatory sense) when it is aimed at declaring legal effects. It then acquires the performative force of a constitutive rule, aimed at generating a new status quo in the order of things (Evangelisti Allori, 2008: 81). ‘Should’ is also included in this group, since, according to Trosborg (1995: 43), it rarely has the illocutionary force of a directive, indicating 'weakness' in the expression of obligation. Finally, the lesser degree of power imposition is expressed with ‘may’ and ‘can’, which have a facultative function since they either attribute power and confer rights and privileges or grant permission. The results of our analysis are shown in Figure 6 and Table 7:

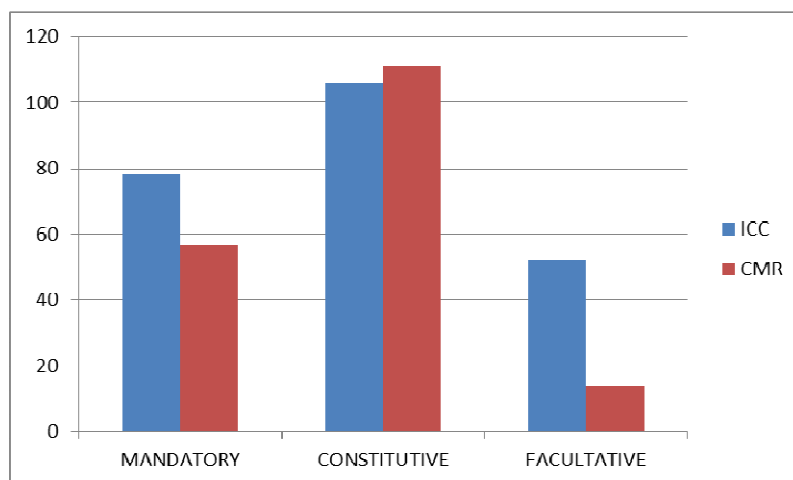


Figure 6: Speech acts in ICC and CMR

SUBCORPUS	MANDATORY	CONSTITUTIVE/DIRECTORY	FACULTATIVE	TOTAL
ICC	OBLIGATION: SHALL: 68 MUST:9 PROHIBITION: SHALL NOT :1 MUST NOT:0	SHALL: 90 SHALL NOT: 11 SHOULD:5	MAY:50 CAN:2	236
CMR	OBLIGATION: SHALL:47 MUST:0 PROHIBITION: SHALL NOT :10 MUST NOT:0	SHALL:94 SHALL NOT:13 SHOULD:4	MAY:14 CAN: 0	182

Table 7. Power imposition and modality in ICC and CMR

As we can see above, overall speech act activity is higher in the ICC subcorpus, mainly occurring in both subcorpora by way of constitutive rules. More specifically, the ICC reunites the highest levels of maximum and minimum power imposition, whereas the CMR subcorpus presents the highest number of constitutive rules. Mandatory expressions are substantially more present in both subcorpora than facultative ones, indicating that these texts are much more instruments of power imposition than of right attribution. This would explain the ubiquity of ‘shall’ in its mandatory, but also constitutive or regulatory modality. As regards ‘shall’ in constitutive rules, this modal verb is the performative marker which has the illocutionary force of establishing the limits and boundaries of the prescriptions and faculties in the two texts. This is especially true in the CMR, where ‘the Convention’ contains a substantial number of ‘shall’ sentences (as in “This Convention shall apply” or “this Convention shall be null and void”, among many others). In this way, the regulatory instrument assumes the main role in creating a new state of affairs. The strategy of rendering human something that is not is a clever scheme to conceal the document’s lack of balance: the obligations and rights imposed by the text are not always directly assigned to the parties, and it is the instrument itself that takes on a life of its own, distributing obligations and rights and creating boundaries in a more impersonal way. In contrast, in the ICC subcorpus, constitutive rules are mostly expressed through ‘shall+passive’ constructions, as in “[...] shall be supplied/sent/deemed [...]”. Constructions of this type are also present in the CMR, but, as seen at the formal level, they are fewer in number. As remarked elsewhere in this paper, passives are also common devices used to belie the stringency of the law, dissipating the force behind the imposition of obligations and prohibitions on the parties.

If we concentrate upon direct directives of obligation, these, again, are also mostly realized through the use of ‘shall’, ‘must’ having a negligible presence in the corpus. In the ICC subcorpus, nevertheless, obligations and prohibitions are equitably distributed among its several participants, namely the ‘Parties’ as a whole, the Claimant and the Respondent separately, the Tribunal of Arbitrators, the Court and the Secretary General. This is characteristic of a truly ADR process, where all the parties would agree as to its development, and regulations have to be negotiated at some point. It is not so in the

case of the CMR, where the burden of imposition is sustained mainly by the carrier and, in a much lesser measure, by the sender and the consignee.

Finally, the assignment of rights and granting of privileges is expressed by means of ‘may’ in both subcorpora, but much more present in the case of the ICC –again with the same even distribution among the several parties involved in the arbitration process– and less so in the case of the CMR, where discretionality is more anonymous, taking the shape of ‘the Parties’ or ‘the persons’, as in “The parties may enter in the consignment note [...]”, or “The person so entitled may [...]”.

4.4 Discussion of results

The results at textual level demonstrate that both texts share the defining traits of legal discourse. Lexically, the ICC shows more specificity than the CMR, and more signs of rituality. In line with this argument, it may be worth pointing out that the International Court of Arbitration of the ICC does not itself resolve disputes; it administers the resolution of disputes by arbitral tribunals set up in accordance with its arbitration rules and is the only body authorized to do so; it is also responsible for the scrutiny and approval of arbitral awards. Despite the higher hybridity expected of this type of text and the resulting tendency towards greater lexical and syntactic “plainness”, lexical precision may be very necessary in a context where meanings need to be clear and well delimited to be understood by both specialised and lay parties. In contrast, the apparent lexical simplicity of the CMR may be devious: with the exception of terms like ‘consignment’, ‘consignee’ (both incorporated into English in the 17th century, with the development of sea cargo) or ‘claimant’, none of the specialised terms possesses any intrinsic univocity and their presence may, hence, be found in general language too. However, and particularly in the group relating to road transport, the terms have a high specificity of meaning and well defined senses. Definition clauses are normally added in normative texts of this kind to describe who is meant to be ‘the carrier’, ‘the consignee’ and ‘the sender’. The apparent simplicity of the terms, their recognisability and the fact that they could have an equivocal translation or interpretation for the lay person, make them even more obscure and undistinguishable than conventional, monosemic terms of art. This is also true of the lexis in the ICC, in the sense that only two words such as ‘waiver’ and ‘joinder’ can be said to be totally univocal in meaning, the others acquiring their specificity in the light of the inside world that the process of arbitration is meant to regulate. The panorama changes slightly but significantly as regards syntax, and the CMR proves to be the more complex subcorpus, with longer and syntactically involved sentences. Lengthy sentence structures is true of both subcorpora, however, because if the average length of legal sentences is generally estimated at 50 to 80 words per sentence (Gustaffson, 1975; Hiltunen, 1984), several constructions in both of the texts in question exceed this length by far. The same may be said about syntactic complexity, both subcorpora showing qualification insertions and embeddings, mainly of the conditional type.

At discourse level, however, the way in which length and complexity are administered in the two texts is visibly different, since in the ICC there is a graphetic and topical segmentation of paragraphs, clearly aimed at making the text more comprehensible and easier to process cognitively. This is evident when examining the macrostructural division of either text, with obvious differences in graphetic disposition. If the CMR is intended as a text of reference where data are to be found in an unequivocal manner in Chapters and Articles, this is even more so in the ICC, where Articles are further divided into sections. These, in turn, are sub-segmented and labelled, ostensibly to make the text more user-friendly for its prospective lay users. Additionally, an analysis of the presence of metadiscourse markers in the text confirms that the ICC makes use of greater rhetorical signposting to allow readers to reconstruct and reinterpret the text, mainly in the form of endophorics, but also with abundant transitions. The lexical specificity and the syntactical involvement of this subcorpus are here downtoned by these markers, which organize information in a coherent and convincing way, making it easier for law-takers to follow the text. The accentuated use of these metadiscourse devices and the scarcity of external references to other texts also underline the intratextual rather than intertextual character of both subcorpora. Intratextual reference is a typical phenomenon that distinguishes Common Law texts from Continental ones (Orts, 2015), since the former holds that the text is an autonomous entity to be regarded and interpreted in the light of the text itself. In contrast, the open-textured nature of legal drafting which is prototypical of the Continental tradition requires the text to be supported by the normative framework in which it stands.

Finally, the pragmatic level plainly reveals the authentic nature of the corpus. It shows that, even if there is a sizeable number of mandatory expressions with 'shall' in both texts, constitutive rules are more abundant, especially in the CMR. The ICC is virtually a prescriptive text with more mandatory expressions than the Convention, the permissions, obligations and promises in it contained being divided among the different personalia in the document, i.e., the Parties, the Court and the Tribunal of Arbitrators. It also grants rights and concessions to those same characters, though to a lesser degree. In contrast, with regard to the CMR, it is mainly the living entity of the Convention which imposes 'universal' obligations and penalties (and, in a much lesser measure, prerogatives) to the carrier, the sender and the consignee. Overall, however, 'shall' in its performative function directs, 'objectively' and behind scenes, the way in which the legal process is going to take place in either text. The results match the number of passive constructions present at textual level, and point at the impersonal vocation of legal discourse: a symbol of the impartiality of the law and its institutional weight, performative 'shall', mostly in passive constructions or with inanimate subjects, is significantly present in our corpus as an index of the concealed power imposition in both texts.

5. Conclusions

A study of two different international legal texts –the Geneva Convention on the Contract for the International Carriage of Goods by Road, and the Arbitration Rules of the International Chamber of Commerce–, undertaken with a view to unveiling the nature of their complexity, has rendered satisfactory results. As prototypical examples of the role of English as the medium of global legal discourse, the texts show the traits that distinguish the complex and all-inclusive discourse of Anglo-Saxon Common law at large, at the same time that they present the hybridity that characterizes texts which are born in a context of negotiation between nations. As we underlined above, the ‘pure’ or ‘hybrid’ nature of text has an incidence on its relative complexity, since ‘pure’ international texts are imposed on the community, while meaning in hybrid texts has to be negotiated and are, hence, more clearly understood by the participants. Additionally, both texts show the natural power asymmetries between interactants that take place in institutional discourse, which is essentially normative, since it does not describe but obliges, gives instructions or confers rights (Salmi-Tolonen, 2014: 64). However, the communicative purpose of either genre, which obeys to the ultimate intentions of the communities that issue them, is what configures their discursive and textual organization. Hence, and despite the common features shared by the two texts (since they both have a primarily prescriptive nature, also sharing the higher porosity of hybrid texts), the institutions from which they are originated –the United Nations Commission for Europe (UNECE) that issues the CMR Convention, and the ICC Court of International Arbitration– are not like phenomena, and neither are their purposes. The former is a UN body that promotes pan-European economic integration, and through the CMR it aims at standardizing the norms that govern the carriage of goods by road and the liability of carriers. The latter is the largest and most diverse business organization in the world and its Rules present one of the many ways and means of arbitration, competing with those offered by the rest of the arbitration institutions in the world such as those of the London Court of International Arbitration, or the ones propounded by the American Arbitral Association, for instance. Arbitration being generally a consensual process (i.e., parties are encouraged to agree to settle their differences), and a flexible one –as compared to most court procedures–, the guiding principle of the Rules is to leave the parties to conduct their arbitration as they wish. The Convention, on the other hand, is to be interpreted as a uniform, universal text, applied in the same way by all the courts of the countries that adhere to it. These major differences reflect the radically different communicative purposes of ICC and CMR, the way in which each text has been drafted (their dissimilarities in readability and comprehensibility), and the subtle linguistic and discursive devices through which law-makers seek to control and dominate their audience, the law users.

Notes

1. https://www.law.cornell.edu/wex/critical_legal_theory.
2. The signatories of the Convention are Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Denmark, Estonia, Finland, France, United Kingdom, Greece, Netherlands, Ireland, Italy, Kazakhstan, Croatia, Latvia, Lithuania, Luxembourg, Morocco, Moldova, Norway, Poland, Portugal, Romania, Russia, Switzerland, Slovakia, Slovenia, Spain, Sweden, Tajikistan, Serbia, Czech Republic, Tunisia, Turkmenistan, Turkey, Germany, Hungary, Uzbekistan and Austria.
3. This is the case of the Baltic Exchange's –BIMCO's– Charter Parties and Bills of Lading, or the insurance policies of Lloyd's Institute of Underwriters, which are implicitly 'imposed' on the business world at large, but written solely in the purest of English *legalese*.

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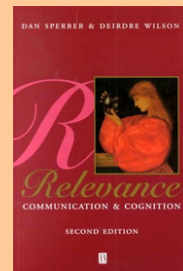
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Plain English in Legal Language: A Comparative Study of Two UK Acts of Parliament

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ABSTRACT

The history of England has left its mark on legal English, a language for specific purposes well known for its complexity and conservatism throughout the world, thanks to the widespread reach of the British Empire. According to many scholars, today legal language is excessively entrenched in the past and has remained the same through years. As a consequence, criticism against traditional legal drafting started to arise in the second half of the 20th century introduced by the Plain English Movement, first in the UK and then, with more momentum, in the US. Its supporters fight for the simplification of the language used in legal documents—and subsequently, all official documents—and propose a series of writing techniques to achieve their purpose of making “legalese” more accessible to the lay public.

The aim of this paper is to see whether the drafting of Acts of Parliament in the United Kingdom (UK) has evolved towards a more modern style of writing leaving behind the conservatism that characterises legal language. In order to carry out the study, two Acts of Parliament of the UK on the same topic, but with a time span of 41 years of difference since their enactment, have been selected for comparison in order to see whether the principles upheld by the Plain English defenders have been applied in the most recent Act.

Keywords: legal English; language for specific purposes; language for legal purposes; Plain English Movement; UK Acts of Parliament

1. Introduction: the Plain English Movement

Legal documents are characterised by a conservative, complex and fossilized style of language, characteristically termed “legalese”. Some of the changes in today’s legal language can be attributed to a number of complaints by the Plain English Movement, which works towards achieving a plainer style of legal drafting so as to make legal documents more accessible to the lay public. Their aim is to encourage legal professionals to write clearly, avoiding awkward and complex language, and taking into consideration the lay reader. Bearing this in mind and in order to modernise and simplify the language of the law, they propose a series of linguistic principles to be followed in the drafting of legal documents.

Though several reformers, such as Jeremy Bentham or George Coode, had criticised traditional legal language during the 19th century, it was not until the second half of the 20th century that more generalised protests began to be heard, especially in the USA. In the 1970s, the consumer movements, in order to protect consumers’ rights, started a number of protests and, as Adler (2012: 69) reminds us, “various initiatives, encouraged by the belief that citizens should be able to understand their rights and obligations, had built up sufficient momentum to be identified as the beginning of the current movement”. One initiative that was considered the initial landmark of the movement in the legal sphere is associated with Citibank in New York which, in 1973, released a promissory note drafted in plain language whose success influenced the writing of insurance and banking fields (Williams, 2007: 168). From then on, the movement started to spread to other English-speaking countries such as Canada, Australia, New Zealand and the United Kingdom.

In 1978, the government of the United States joined the movement when President Carter signed *Executive Order 12044*, which imposed that the regulations issued by the Executive Agencies should be “as simple and clear as possible” and added that the head of each agency should determine that “the regulation is written in Plain English and is understandable to those who must comply with it”.¹ In November of the same year, the State of New York enacted the so-called “Sullivan law”, the first general Plain English statute in America which required the use of clear and common words in drafting of residential leases and consumer contracts. This statute influenced other states, which passed a number of regulations that required the use of Plain English in insurance policies and consumer documents (Butt & Castle, 2006: 101).

One year later, in 1979, the United Kingdom, saw the birth of the most influential organisation around the world, the Plain English Campaign, launched by Chrissie Maher and Martin Cutts to fight “gobbledygook and jargon”. The organisation’s aims in the legal sphere are not only to replace jargon by common words, but also to consider the content and the layout of the text. They also provide services for rewriting documents and courses to train people on the basis of Plain English. In their first booklet, entitled *Writing Plain English*, they provided a number of recommendations such as sticking to the essential information, using everyday words, selecting a clear layout and typeface, and building sentences with no more than two clauses (Butt & Castle, 2006: 81).

Given the status of English as a global language, organisations working to promote the aims of the Plain English Movement are now active all over the world and also exist for other languages. They spread and defend its principles, and to achieve their purpose, provide language services to revise documents and ensure they follow a plain drafting style. Many of them also offer high-quality writing-skill courses to companies and organisations. In the United Kingdom, for example, apart from the Plain English Campaign, there are other organisations which support the application of Plain English such as Clarity (<http://www.clarity-international.net/>) and the Plain Language Commission (<http://www.clearest.co.uk/>). Regarding the United States, the principles of the movement have been supported by many Bar Associations that promote the use of a clear and simple language among lawyers such as the State Bar of Michigan, which includes a monthly Plain Language column in the Michigan Bar Journal (<http://www.michbar.org/journal/home>). One of the most important developments in the US took place when President Barack Obama signed the 'Plain Writing Act of 2010', a federal law that provides for the use of plain writing by federal agencies. Canada is one of the leading champions of the movement, and, as confirmed by Williams (2007: 175), "the Canadian Securities Administration, the federal Department of Finance, the British Columbia Securities Commission, the Office of the Alberta Auditor General, and the Canadian Banker's Association are all in favour of using Plain English". Moreover, the country is the birthplace of the Plain Language Association International (<http://plainlanguagenetwork.org/>), a non-profit organisation of plain language advocates and consultants whose aim is to promote clear communication. In Australia, the most prominent figure of the Plain English Movement is Robert Eagleson, who fought for the rewriting of statutes in Plain English. The organisation in charge of promoting plain language is the Plain English Foundation (<https://www.plainenglishfoundation.com/>). Such is the power of the movement in Australia that "companies can face legal sanction should they be found to have intentionally misled consumers with contracts that contain confusing, unintelligible language" (Barleben, 2003).

Not content with simply protesting against legalese, Plain English advocates have also proposed a series of concrete linguistic techniques to apply to legal texts in order to avoid complexity and obscurity and enhance clarity and comprehension. The following writing guidelines have been taken from the works of Plain English defenders such as Kimble (1992), Plain English Campaign (1996), Butt & Castle (2006), Williams (2007) and Adler (2012). The principles have been divided into two different categories: on the one hand, those related to language and grammar and, on the other, all the techniques related to the design and structure of the document:

- Language and grammar level:
 - Substitute nominalisation by the use of verbs since they make the message clearer and more direct.
 - Use the active voice instead of the passive when possible.
 - Be concise and avoid using complex and wordy phrases.

- Substitute archaisms, and foreign words (Latin and French) by familiar words which tend to be shorter.
 - Avoid doublets (*null and void*) and triplets (*give, devise and bequeath*).
 - Avoid overusing *shall* and replace it by *must* or the present simple, or in some cases by *may*.
 - Keep the Subject – Verb – Object structure and avoid intrusive phrases.
 - Avoid the abundance of negatives.
 - Write according to the grammar rules.
- Design and structure:
 - Reduce the sentence length to an average between 15 and 20 words.
 - Keep paragraphs short using sub-paragraphs in order to avoid long blocks of text.
 - Use lists or fragment sentences.
 - Use blank spaces in margins and between sections.
 - Avoid overusing initial capital letters, which are used in legal documents in terms that have been previously defined. It is better to use them only when the language norm requires it.
 - Use tables, graphs, diagrams and charts to make explanations clearer.
 - Use italics or bold letters for the heading or as emphasizing techniques.

2. Views on the application of Plain English in the language of the law

Not all advocate in favour of Plain English, and indeed the Plain English Movement has its detractors. One such example is Rabeea Assy who, in his article “Can the Law Speak to its Subjects? The Limitation of Plain English” (2011), criticises the Plain English Movement, which he considers has spread the false belief that law can speak directly to its subjects by simplifying its language. He adds that although the law may be written in plain language, it cannot be made sufficiently intelligible as to enable lay people to use it without legal assistance due to the fact that the content of the law is generally too complex for people without legal training to understand. Nevertheless, Assy proposes two different uses of the plain language. On the one hand, he states that plain language can be used to clarify the law for lawyers in order to improve the quality and efficiency of their legal services. On the other, he argues that plain language enhances the capacity of lay people to evaluate the service provided by the lawyers and the legal service.

Brian Hunt, though generally considered a defender of Plain English, nevertheless does agree in some of his publications (Hunt, 2002a, 2002b) that the aim of legislation is not to entertain but to make policies and principles in law effective, which explains that certain terms are used in legal texts for their precision and consistency of meaning. For him, using Plain English to draft complex concepts such as legislation would not be appropriate since it can increase ambiguity and vagueness, giving rise to different interpretations. For this reason, Hunt believes that the best solution is to accompany

each piece of legislation by explanatory material in plain language for the benefit of the lay public.

Regarding the views in favour of the implementation of Plain English, the Plain English Campaign (1996: 16), which tackles the issue of comprehension from a moral point of view, offers the most interesting position, saying that “the ability to understand the law is a basic right and a basic need. [...] if people cannot understand the legal documents which they must live by, you have to ask quite what we mean by a ‘democratic society’”.

Kimble (1994-95: 52), another defender of the modernisation of legal language, declares that the only purpose of plain language is to convey clear and effective communication. The same author (1303) further argues that Plain English does more for precision than legalese, and its “principles can usually make even complicated ideas more clear. Or if not more clear, at least as clear as can be.” In another of his articles (Kimble, 1996-1997: 2), he points out that many projects have proved that complex concepts can be put into Plain English without losing accuracy or precision and adds that “plain language is not just about vocabulary. It involves all the techniques for clear communication – planning the document, designing it, organizing it, writing clear sentences using plain words, and testing the documents whenever possible on typical readers”.

When a new movement arises questioning the effectiveness of what has existed for centuries, it is understandable that different opinions emerge. After this brief overview of the Plain Language Movement and the issues it raises, we now propose to carry out an empirical study of the degree to which plain language has been incorporated –or not– into official legal English in Britain by analysing two Acts of Parliament which present a 41-year difference in their dates of enactment. The analysis is carried out to check whether, as one would expect, the most recent Act has followed the Plain English drafting style, and that the ideas that the movement supports have been applied to any significant extent.

3. Our study: methodology

The first step consisted of finding two Acts of Parliament of the United Kingdom pertaining to the same legal area, the requirement being that one had to be enacted before the Plain English Movement had started developing in the UK in the late 1970s, while the other had to be as recent as possible. After a review of the official website of the British government, www.legislation.gov.uk, which contains all UK legislation from the year 1801 until 2015, it was decided that the Act that best suited the search criteria was the Water Act, one version of which dated back to 1973. This was considered an acceptable date because, although by then criticism against the complexity of legal documents had already begun to be heard, it was not until the end of the 1970s that the movement started to gain some degree of relevance in the United Kingdom. For the second element required for the comparative study, Water Act passed

in 2014, a time when the movement was already very active and influential, seemed appropriate to the analysis criteria.

The object of our analysis being to determine whether Plain English principles are applied in contemporary UK legal drafting or not, the choice of the criteria used for the analysis has been based on the linguistic principles upheld by the Plain English Movement. Some of the linguistic aspects of traditional legal drafting, mentioned in the first section, have been studied in the two Acts; hence we shall comment on the design and structure, modal auxiliaries, the prepositional adverbs, passive sentences, Subject – Verb – Object structure, complex prepositional phrases, and nominalisation. In each part, we shall comment on what the traditional tendency is and what the Plain English defenders say on each matter, to judge whether the Act of 2014 follows the traditional style or has evolved towards Plain English.

4. Our analysis

4.1. Design and structure

The design of legal texts is attached to the principles of precision and avoidance of ambiguity, which explains why these texts contain extremely long sentences, with several qualificational insertions required, and solid blocks of text that end up making the document complex and difficult to understand.

Regarding textual schematisation, both Acts show a schematized structure, that is, the contents of the text are arranged in a schematic way using lists, sections and sub-sections; however, in the 1973 Act there are a number of long textual blocks that make it difficult to understand. Sentence length is another element to be taken into consideration in this context. In the 1973 Act the shortest sentence has 8 words and the longest one 283. Most of the sentences are of considerable length, but the subject of some of them is separated into different sections, which makes the sentence slightly more accessible. Nevertheless, despite the fact that schematisation is a technique used to make long sentences clearer, the 1973 Act also shows an abundance of long textual blocks –the longest being composed of 154 words– that hinder access to the real message. Additionally, the flow of information in the sentence is disrupted by the insertion of several elements that are included to provide further information on a given element.

In the 2014 Act, we can observe that schematisation is more developed. In the old Act there is a combination of solid blocks of texts and of schematised sentences, whereas in the 2014 Act there are no long textual blocks since the division of the sentence into alphabetically itemized lists, sections and sub-sections prevails, mainly in sentences of considerable length, even though shorter ones also follow this layout.

According to Plain English supporters, 15-20 words is the appropriate sentence length to enhance comprehension. In the 2014 Act, though there are only a few sentences whose length agrees with the sentence length required by the Plain English

principles, one can observe a positive evolution regarding the number of solid blocks in the 1973 Act.

4.2. Modal auxiliaries

One of the most specific characteristics of traditional legal drafting in English is the use of the modal auxiliary *shall*. The problem with this auxiliary is the many purposes it has come to serve and the several meanings that have been attributed to it. Some of these meanings are imposing a duty, granting a right, giving a direction, expressing future, negating a duty, stating circumstance, expressing an intention, creating a subsequent or precedent condition, or negating a right (Butt & Castle, 2006: 131). As a result, it causes ambiguity, and precision is lost.

The Plain English Movement opposes the overuse of *shall*, not only because of its ambiguity, but also because in general English its use as an auxiliary of the future tense has declined, not to mention its absence as a deontic. Modern drafters support the total removal of *shall* from legal writing in favour of its replacement by the everyday auxiliaries of obligation, *must* and *be to*.

In the 1973 Act *shall* accounts for 1.5% of the total number of words. The majority of the cases impose an obligation or a duty, and others impose a prohibition using *shall not*, such as in the following examples, taken from the 1973 Act:

Each of the authorities mentioned in subsection (1) above shall be established by an order made by the Ministers and shall come into existence on a day appointed by the order.

Provided that, in the case of an order to which paragraph 16(2) above applies, the notice shall not be published until the expiry of the period of twenty-eight days referred to in that sub-paragraph.

An analysis of the use of *shall* in the Water Act of 2014 shows completely different results since we only find 5 occurrences, which represents 0.005% of the total number of words. The use of *shall*, it may consequently be concluded, has plummeted over the forty-one year period separating the two texts. However, if *shall* has been largely removed from the 2014 Act, other alternatives have been introduced in order to fulfil the functions performed by *shall*. As previously indicated, Plain English drafters support the use of *must* and *be to* for purposes of expressing obligation. In view of this, the use of *must* has been analysed. In Table 1 below, we find the results obtained in the analysis:

Table 1. Evolution of use of alternative modals to *shall* between 1973 and 2014

	1973 Act	2014 Act
	Total no. of words:	Total no. of words:
	48,544	95,542
<i>must</i>	0.004%	0.34%
<i>are to be</i>	0.018%	0.066%
<i>is to be</i>	0.043%	0.15%

It can be deduced from these data that the 41-year period separating these two texts has seen a clear evolution from *shall* to *must* and *be to*, in keeping with Plain English recommendations.

Another modal auxiliary that must be mentioned is *may*, the second most used modal auxiliary in legal texts (Williams, 2007: 121), whose meaning in the affirmative form is that of conferring a power, whereas in the negative form it imposes prohibition. On some occasions, *may* can also express possibility. It is worth noticing how the use of *may* has changed through the years. In the 1973 Act, the frequency of *may* is a mere 0.7% of the total number of words, while in the 2014 Act it increases to 1.04%. As Williams (2007: 121) suggests, *shall not* is more common than *may not* when a prohibition is to be expressed, but he adds that in the texts in which Plain English recommendations have been applied, *may not* is more frequent. The two Acts have been analysed with regard to these remarks, and it has been observed that while, in the 1973 Act *shall not* has a percentage of 0.12% and *may not* only 0.006%, in the 2014 Act, the situation is reversed, and *may not* has a frequency of 0.10%, whereas that of *shall not* is 0.001%, appearing once in the whole text.

Figure 1 below illustrates the data from the comparison. As can be appreciated, *shall* and *shall not* predominate in the 1973 Act, which is drafted in traditional legal style; in the 2014 Act, on the contrary, the use of *shall* and *shall not* is barely noticeable. *Must*, which in modern drafting is used to replace *shall*, has a significant presence in the recent Act, whereas in the old one its use is extremely low. The modal auxiliary that has not completely disappeared but has acquired a larger representation in the modern Act is *may*, both in the affirmative and the negative. Regarding the use of auxiliaries, it can be stated that the drafters of the 2014 Act do seem to have followed the principles upheld by the Plain English Movement.

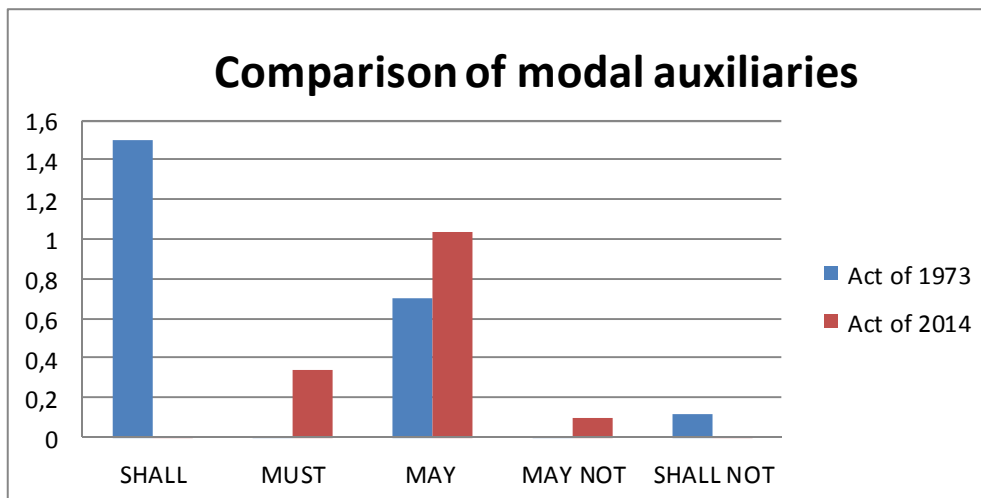


Figure 1. Comparison of the traditional modal auxiliaries in legal drafting in the two Acts.

4.3. Prepositional adverbs

The use of archaic words is another trait of legalese. Lawyers and drafters have a tendency for conservatism, and as a consequence they continue using the same terminology as their predecessors. More significantly perhaps, another justification for the presence of archaic words is the fact that they are thought to give more formality to the document than words from everyday language. The most emblematic archaic lexical items of legalese are prepositional adverbs or “semi-archaic formulations” (Haigh, 2015:7), such as *heretofore*, *thereof*, *hereby*, etc., which are still used in contracts and other legal documents.

As may be expected, the analysis shows that the 1973 Act shows a higher frequency of prepositional adverbial expressions, while in the 2014 Act, such use is consistently low or negligible: the 1973 Act contains cases of *thereof*, *therefor*, *therein*, *therewith*, *thereon*, *thereunder*, *thereupon*, *thereby*, *thereafter*, and *hereby*; as shown in the examples below:

The enactments specified in Schedule 9 to this Act (which include enactments that were obsolete or unnecessary before the passing of this Act) are hereby repealed to the extent mentioned in column 3 of that Schedule.

A person who wilfully obstructs another person exercising any power conferred by this section or any warrant thereunder shall be liable on summary conviction to a fine not exceeding £50.

In sharp contrast but unsurprisingly, the analysis reveals that in the 2014 Act there is not a single case of prepositional adverbs.

The use of prepositional adverbial expressions has been criticised because they are “foreign” to lay readers, and in this way, constitute an obstacle to comprehension and

may lead to misinterpretation in that the relevant preposition has to be identified each time. For example, in the previous examples “any warrant thereunder” refers to any warrant “under the present section”, and “hereby repealed” signifies that the enactments are repealed “by the present act”. Though these expressions are generally only decipherable within the context in which they occur, on some occasions there are several elements that can act as antecedents, therefore adding to the confusion.

Regarding the use of other archaisms, Tiersma (1999: 89) mentions *aforsaid* and *said* as symbols of traditional legal drafting. They are used to refer to something or someone that has already been mentioned previously in the text, such as in these examples taken from the 1973 Act: “the said section” or “the said Schedule 3”. With regard to our study, we observe that the two terms are only present in the 1973 Act, in which we find 31 cases of *said* (0.06%) and 5 of *aforsaid* (0.010%), whereas they are nowhere to be found in the 2014 Act.

Another archaic trait criticised by Tiersma (1999: 91) is the use of *such* in legal documents and which, according to him, performs the same function of *this*, and is undistinguishable from *said* and *aforsaid*. In context of this study, the percentage of *such* is 0.70% in the 1973 Act and though also present in the 2014 Act, it represents a frequency of only 0.47% of the total number of words. *Such* is said to be used wrongly by lawyers since in general language it means “of the character, quality, or extent previously indicated or implied” (*Merriam Webster Dictionary Online*). According to Garner’s *A Dictionary of Modern Legal Usage* (1995) *such* in the legal context can also behave as a deictic to refer to a clear antecedent. Nevertheless, we also find examples with *such* used without a precedent, and also used when *this*, *that* or *the* would be more suitable. In the 2014 Act, most of the cases with *such* do not have a precedent to which they refer. On the contrary, in the 1973 Act, the use of *such* as a reference to a precedent prevails, even though there are also cases of *such* without a precedent. In the following example, we have a fragment from the 2014 Act in which we find two cases of *such* without a precedent:

by order require the supplier to give and the qualifying person to take a supply of water in bulk for *such* period and on *such* terms and conditions as may be specified in the order.

To conclude on this point, the above analysis clearly shows that archaisms in modern legal drafting have largely disappeared, mainly in the cases of prepositional adverbial expressions from Middle English, the same applies to *said* and *aforsaid*, whose presence has become null in the recent Act. The only traditional trait that persists is *such*, which still preserves some of the erroneous uses attributed to legal drafters, instead of other clearer and everyday used in everyday language such as *this*, *the* and *that*.

4.4. Passive sentences

Frequent use of the passive tense is another characteristic of legal language (Mattila, 2006: 73). Though the use of the passive form is often criticised as being used to avoid

attributing responsibility, in the case of these texts it is mainly used for reasons of impersonality since in some cases the author of the action is not stated because it is not relevant. Plain English defenders criticise the overuse of the passive in legal texts, and state that the active voice is more appropriate because it shortens the sentence and is more direct.

In order to study the use of passives in the two Acts, a fragment of a considerable length from each Act with the same number of words was selected. In this case, the part of the text analysed consisted of 23,580 words, which account for 48% over the total number of words of the 1973 Act, and 24.6% of the 2014 Act (although the 2014 Act is twice as long as the 1973 one). A thorough manual analysis was carried out to detect the passives that were used in each Act. Once all the examples were identified, the number of cases was counted. The results obtained show that for the same number of words, there is a 0.89% of passive constructions in the 1973 Act, in comparison to 0.83% of passive constructions in the 1971 Act. The results, therefore, show that though we expected to find an extreme difference in the number of cases in the two Acts, the difference is not all that marked. In the 2014 Act, we find some cases of passives followed with a by-phrase identifying the agent of the action, such as in the example below, in which the agent could be moved to the front and act as the subject of the sentence. Thus, the sentences in which the agent is already mentioned could be arranged in the active voice as the Plain English advocates uphold. The presence of the agent in many of the sentences of the 2014 Act indicates that the passive voice is a grammar resource that still persists in the drafting of Parliamentary Acts, presumably because of the formality this structure provides to the text, and not to mask the doer of the action:

The power under subsection (4) *may not be exercised* more than once by the Secretary of State or the Welsh Ministers.

We note, though, that the types of passives used in each Act are slightly different. In the 1973 Act, the passives with *shall* prevail, together with the present simple passive and the present perfect passive, whereas in the 2014 Act, the construction *is/are to be + participle* acquires considerable relevance, together with passives with *may* and *must*, leading us to conclude that the change towards a more modern style is not reflected in the reduction of passives but through the way this grammar construction is used.

4.5. Subject – Verb – Object structure

English is a language that follows the Subject – Verb – Object (SVO) sentence structure. However, legislative syntax does not usually follow this order, since it demands the introduction of several qualifications that are inserted into the syntax of the sentence. The most common discontinuity these insertions involve may be seen in the separation of the parts of the verb. Plain English advocates are against syntactic interruptions and state that the SVO structure must be kept whenever possible.

As already mentioned, the 1973 Act presents solid blocks of text due to the several qualificational insertions that are embedded in the text, and thus the SVO structure is

frequently interrupted. In this Act, there are several separations of the parts of the verb as in the following example, in which the words in italics highlight the syntactic intrusions, and the rest is the skeleton of the sentence:

If, *within a period of two months beginning with the date on which a draft of any such arrangements was sent by a water authority to the company*, the water authority and the company have not entered into the arrangements, the water authority shall, *within seven days of the end of that period*, notify the Secretary of State of that fact and the Secretary of State shall settle the terms of the arrangements, which shall, *subject to subsection (5) below*, be binding on the authority and the company.

In the 2014 Act there is a prevalence of short sentences instead of the solid blocks of text in the 1973 Act; in these cases the SVO structure is followed in the majority of them, even in sentences that have been broken into different sections. Nevertheless, there are still some sentences with intrusions, such as in the example below, in which the qualifications have been separated from the main text making use of the schematisation technique. In this instance, the Authority is being given instructions that can only be fulfilled if the cases stated in the qualificational intrusions take place:

On the application of the qualifying person or the established undertaker, the Authority *may*—

- (a) if it appears to the Authority that it is necessary or expedient for the purposes of this Part that the established undertaker should permit a main connection into its sewerage system, and
 - (b) if the Authority is satisfied that the established undertaker and qualifying person cannot reach agreement,
- by order *require* the established undertaker to permit the connection for such period and on such terms and conditions as may be specified in the order.

Bhatia (1994: 147) defends the insertion of qualifications in legislative provisions arguing that: “qualifications make the provision extremely restricted. In fact, without these qualifications the legislative provision will be taken to be of universal application and it is very rare that a rule of law is of universal application.” This restricted application could, therefore, be the reason why qualificational intrusions, and the syntactic discontinuity they imply, are still present in today’s legislative texts. However, it is worth noticing that in the 2014 Act, the long intrusions that can hinder the comprehension of the sentence have been drafted using the schematized technique so as to make it more accessible.

4.6. Complex prepositional phrases

Prepositional phrases are another aspect of legal English criticized by the Plain English defenders. These consist of complex phrases whose structure follows a preposition + noun + preposition pattern which is indeclinable, such as “in accordance with” or “on behalf of”, which could be replaced by a single preposition, for example “under” for the

former phrase and “for” for the latter. Plain English advocates claim that if the idea can be expressed in only one word, there is surely no need to use three or more since they slow up the comprehension and irritate the reader (Plain English Campaign, 1996: 76).

These phrases have been analysed in the Acts under study, and classified below together with their frequency. In this case, the significance of the frequencies must be considered in correlation to the number of words of each text.

1973 Act			2014 Act		
Prepositional phrase	No. of cases (48,544 words)	Percentage	Prepositional phrase	No. of cases (95,542 words)	Percentage
by virtue of	54	0.11%	by virtue of	85	0.08%
for the purpose of	22	0.045%	for the purpose of	62	0.064%
in respect of	36	0.074%	in respect of	145	0.151%
in pursuance of	34	0.070%	in pursuance of	23	0.024%
with respect to	34	0.070%	with respect to	38	0.038%
in accordance with	41	0.084%	in accordance with	178	0.186%
in the event of	1	0.002%			
by reason of	6	0.012%			

Table 2. Complex prepositional phrases detected in each Act and their frequencies

Table 1 shows the number of occurrences of the complex prepositional phrases in the two Acts, together with the percentage regarding the total number of words. Although it might seem that in some cases there is a higher presence in the 2014 Act, it is important to focus on the percentage column, since it allows us to establish a more faithful comparison. The two Acts share six complex prepositional phrases, amongst which “in pursuance of” (0.70%), “with respect to” (0.70%) and “by virtue of” (0.11%) have a higher presence in the 1973 Act, whereas the use of “in accordance with” (0.186%), “for the purpose of” (0.064%) and “in respect of” (0.151%) increases in the 2014 Act. These results show that there are no extreme differences between the two Acts and that complex phrases are still present in legal drafting.

Nevertheless, it should be pointed out that in the 2014 Act there are a number of cases of simple prepositions that perform exactly the same role as complex phrases, leading to the conclusion that, in this Act, complex phrases coexist with simple prepositions that could have replaced them. For example, “in accordance with” and “in pursuance of” can be replaced by the preposition “under”. In this Act, we find 1257 cases (1.31%) of ‘under’ that perform the same function as these complex phrases, whereas in the 1973 Act the use of ‘under’ is much lower with 363 cases which represents 0,74% of the total number of words.

4.7. Nominalisation

Nominalisation, together with the passive voice, is a technique that favours not only impersonality but also wordiness due to the fact that the number of words in the sentence tends to increase. The example below is taken from Haigh (2015: 74) to demonstrate the effectiveness of changing nominalisations into verbs:

It is important to effect a reduction of operating costs during the implementation of the agreement.

It is important to reduce operating costs when implementing the agreement.

Garner (1995: 123), who calls nominalisation ‘buried verbs’, is against its use in legal drafting and argues that it is better to resort to action verbs instead, which will humanize the text since the agent of the action will be stated. Moreover, the text becomes less abstract and therefore it is easier for the reader to understand the intention of the drafter.

The majority of nominalisations found coincide in the two Acts. Nevertheless, the layout of the 2014 Act favours the use of action verbs, which explains why there are both the nominalised expressions and its equivalent action verb in the text. Some of the nominalisations most used in this Act are “make provision” (0.14%) for ‘provide’; “have regard” (0.046%) instead of ‘regard’; “give notice” (0.047%) for ‘notify’; and “subject to annulment” (0.016%) instead of ‘be annulled’; these ‘buried verbs’ appear recurrently throughout the text. Although the verb from which they derive is also present in the Act, the nominalised form has a higher frequency than the verbal one. Below, there are some examples of the nominalisation used in the 2014 Act:

Before issuing the revised rules, the Authority must *give notice* to the Minister of its intention to issue revised rules.

A statutory instrument containing an order made by the Welsh Ministers under this section is *subject to annulment* in pursuance of a resolution of the Assembly.

As can be observed in the examples above, they can be replaced by an action verb; thus, if in the previous cases “give notice” were replaced by ‘notify’, then the sentence would gain in economy of words and presumably, clarity. The same happens with “subject to annulment”, which could be simplified to ‘be annulled’. As these examples show, more words are included in the sentence when fewer would convey the message in the same way or even better since, the use of the verbal form makes the sentence more direct. Nominalisation is a technique of traditional legal drafting that still preserves a place in modern drafting, mainly because of the formality it provides to the text.

5. Discussion of results

The purpose of this study was to measure the evolution from traditional legalese to Plain English through the analysis of two British Acts separated by a 41-year span. In the light of the results of the analysis, it may be said that while a number of the principles advocated by the Plain English Movement have been followed in the 2014 Act, other elements continue to adhere to the principles of traditional legal drafting.

Regarding the structure, it may be seen that there has been a change towards a more accessible layout since the techniques proposed by the Plain English Movement, such as alphabetically itemised lists and sub-paragraphs which avoid the ungraspable solid blocks of texts so typical of legal drafting.

In terms of modal auxiliaries, legislative texts have left behind the overuse of *shall*, which sometimes was ambiguous due to the several meanings that it could serve. As a consequence, there is a distinct shift towards *must* and *be to* when expressing obligation. In addition, the use of *may* has increased, namely in the negative, where *shall not* was previously used. As such, it can be said that modal auxiliaries are the most modernised aspect of legal drafting.

Another aspect that has undergone significant change is the use of archaisms. The archaic traits that strongly characterise legalese, such as the prepositional adverbs with *there* and *here*, *said* and *aforesaid*, are almost absent in the 2014 Act. Nevertheless, *such* resists the change and is employed when other alternatives like *the*, *this* or *that* would have been more suitable.

The passive voice is another characteristic of legal drafting most criticised by Plain English supporters. The comparative analysis carried out shows that the passive voice continues to have a significant use in modern legal drafting. However, we note that many of the passives have a *by*-phrase indicating the agent, and thus it is inferred that its persistence is more related to the formality this structure gives to the text rather than the impersonality it may involve.

The analysis of the Subject – Verb – Object structure shows that in the 2014 Act this order is followed in the majority of short sentences, but in some of the long ones the order is broken by qualificational intrusions that are inserted among these three key elements of the sentence. Nonetheless, it may be observed that the use of schematisation has favoured comprehension since in the majority of cases the intrusions have been separated from the main body of the sentence, leaving the sentence's main skeleton more visible.

Complex prepositional phrases have not disappeared totally from modern legal drafting. Many of them are so deeply rooted in traditional legal style that it will certainly take time to dispense with them.

Finally, regarding nominalisation, our analysis shows that it has not disappeared completely from legal drafting. In spite of the fact that it favours impersonality and verbosity, the formality it evokes gives this lexical trait a firm hold in legislation drafting. Nonetheless, it has been observed that the action verbs from which these nominalised expressions derive are also present in the Act. Therefore, although the

frequencies are higher in the nominalised form, the verbal form has begun to acquire a certain presence.

In this sense, the hypothesis posed earlier is partially proved because we cannot see a total incorporation of plain language in all the aspects analysed. The only areas in which a considerable change may be detected are in the avoidance of archaic expressions, the layout and structure of the text, and the shift of modal auxiliaries. Concerning the rest, although elements of traditional legal style persist, in some of them it is possible to see some degree of evolution towards a more modern style such as in complex phrases, nominalisation and in the SVO structure. The element that still resists change is the passive voice whose persistency, as already highlighted, is bound to the formality the text demands and that this structure provides.

6. Conclusion

The language of the law has been entrenched in tradition and maintains a rather archaic and conservative style. Although the Plain English Movement has had a significant impact on the language of legal drafting, legislation is a genre which resists change and which cannot be completely replaced by a modern style in less than half a century.

The results appear to show that the process of adoption of a plain and modern style in these types of legislative text is slow. This slowness is due to the nature and functions of this particular textual genre, which requires a certain degree of responsibility since it deals with issues of utmost importance that affect society as a whole. As a consequence, drafters exercise greatest care in the choice of words and syntax so as to make the text as precise and unambiguous as possible. Readers must interpret from what they read in the text exactly what was intended, and not an unintended message that may be inferred through the ambiguity of the language in which the Act was drafted.

Moreover, legislative texts require a certain degree of formality and thus tend to make use of linguistic elements that satisfy this requirement, such as in the case of the passive voice. Some of the elements that are considered as leading formality to the text are criticised by the Plain English defenders, giving rise to debate whether to follow the Plain English principles or retain formality through the use of the traditional legal drafting techniques. Rendering the text plain does not only entail changing the terms and some linguistic feature into a modern style, but it involves presenting the information of the Act in a simpler way which nevertheless takes into account the principles of precision, unambiguity and all-inclusiveness essential in this kind of text.

It must be mentioned that the conclusions reached in this study are unavoidably limited due to the fact that the analysis has been based on only two Acts of Parliament and the results, therefore, can merely be considered a first approach to the study of the evolution of UK legal drafting towards a more modern style. In this sense, further studies could work with a larger number of Acts so as to have a larger corpus. Another option could focus on the analysis of the degree of intelligibility for native speakers in

order to see whether lay understanding of contemporary legal drafting has increased or not, providing ethnographic data on the subject.

Notes

1. Available on: <http://www.presidency.ucsb.edu/ws/?pid=30539>, accessed: 9th June 2015.


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
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Shakespeare's Legal Wit: Evolution of the Translation of Shakespeare's Legal Puns into Spanish from the 20th to the 21st Century

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ABSTRACT

Shakespeare was law-obsessed and used a considerable amount of law terminology in his plays and sonnets. Though the use of legal terminology was frequent and extended in Elizabethan drama, Shakespeare's handling of such technical language was particularly accurate and imaginative. It being a highly litigious age, Tudor audiences were well acquainted with a wide assortment of legal terms and concepts, and therefore in a position to enjoy the clownish characters' (Launcelot, Gobbo, Pompey, etc.) malapropisms and legal puns. However, what applies to the Tudor audience of those days does not necessarily apply to audiences from other cultures and across different ages of Shakespearean reception. In this study, we look at the question of whether the reception of Shakespeare in the Spanish-speaking world coincides with the established image of the Poet as a playwright and poet who knew how to handle the many subtleties of the legal terminology with ease and grace. Much of this image has been diluted as a consequence of 'loose' renderings in Spanish translations. With reference to legal imagery, malapropisms, or legal 'puns' in particular, many a translation fails to adequately render the corresponding legal overtones in the target text. After a brief overview of Shakespearean translations into Spanish over the centuries, this study focuses on the evolution of the translation of Shakespeare's legal puns into Spanish through the works of three translators starting with Leandro Fernández de Moratín's early 20th century renderings, Manuel Ángel Conejero's version in 1995, and finally Ángel Luis Pujante's recent edition of Shakespeare's comedies and tragicomedies. The paper concludes by problematizing such strategies in the context of "law-worthy" translations as opposed to "stage-worthy" ones.

Keywords: Shakespeare, translation, legal puns, malapropisms, bowdlerization, law-worthy, stage-worthy

“Shakespeare’s legal knowledge manifests itself in large ways and small, in both the grand theme and tiny detail”

(John Shahan, 2013)

1. The Tudor era: an age of litigation

Revenge tragedies remained popular during the whole of the Early Modern Period that followed the late Middle Ages; stage audiences found these stories of murder, blood and vengeance in keeping with the mood of their riotous times since, by the turn of the century, the streets of London were festering with violence, crime and treason. There were, at that time, more prisons in London than in any other European city and Newgate “inspired more poems, dramas and novels than any other building in London” (Ackroyd, 2001: 247).

Furthermore, the enemies outside far outnumbered the enemies within: London was rife with rumors about Spain’s intentions to outfit a new Armada which would suggest that Shakespeare had a similar notion of imminent conflict in mind. Paranoia ran rampant around the streets of London as the Spanish vessels, Londoners feared, were about to land and would be met at the gates of the city, a state of insecurity reflected in Hieronimo’s lament that “justice is exiled from the earth” in Thomas Kyd’s *The Spanish Tragedy*.

Within the fictive walls of the Elsinore, Hamlet is carrying out his own revenge plan. Fatally wounded by Laertes’ poisoned sword in the fencing duel, Hamlet imagines death as a bailiff arresting him by court decree: “Had I but time (as this fell sergeant, Death, /Is strict in his arrest), O, I could tell you— (V.ii)”.¹ Far from being incidental, such analogizing is common in Shakespeare thus showing that matters of the law, its institutions and officers, played an important role in his imaginary. Moreover, his use of legal imagery is both varied and accurate. Shakespeare draws from a wide spectrum of legal sources and gives them free rein in his plays. His selection of law-related references runs the gamut from matters of state and rulers in early Modern England to contractual disputes between individuals. No aspect of the law seemed to be alien to his pursuits.

Indeed, Shakespeare seemed quite at ease with regard to many different legal spheres: contractual matters, court proceedings, land laws, Equities, etc. Allusions to contemporary rulers, institutions (Inns of Court, Chancery), officials of the law (constable, tribune, magistrate, bailiff), contemporary trials, etc., are scattered throughout his plays. In *Coriolanus* alone, almost 200 hundred words and references of some legal import have been documented (Tanselle, 1987: 255).

The use of legal terminology, it must be acknowledged, was common coin in the Elizabethan era. Both in Elizabethan and Jacobean England the law permeated all aspects of daily life with few means of circumventing it. Furthermore, Elizabethans were intensely involved in legal transactions of all kinds and the drawing up of wills and conveyances of property were partly caused by high mortality rates. As Sokol

points out in *Shakespeare, Law, and Marriage*, “many in Shakespeare’s audiences would have negotiated commercial agreements, marriage settlements, employment, and other contractual matters” (2003: 3). They were burdened by the law yet at the same time felt an irresistible attraction for its myriad speculations and contrivances.

One of the most characteristic traits of the Elizabethan society was its passion for litigation of all sorts, to the extent that members of the general public regularly attended the London courts and, in so doing, gained familiarity with all sorts of legalisms and court proceedings. The litigious spirit of the times seized on the lay citizen, whose fancy would take him, maybe later the same day, to go and see one of the popular revenge tragedies playing in the local theatres.

The Tudor theatergoer was hence more than familiar with the legal terminology declaimed on the boards of Elizabethan theatre houses. Far from feeling alienated, the audience instantly recognized many of technical terms heard for the simple reason that they were more or less regularly exposed to them in the course of their daily lives.

Furthermore, the subtext of some of Shakespeare’s plays echoed contemporary cases and trials of public interest. In one of his key legal plays, *The Merchant of Venice*, the penalty devised by Shylock, ‘for an equal pound / Of your fair flesh, to be cut off and taken / In what part of your body pleaseth me’ (I.iii.), mirrors some of the cruel atavistic sentences still decreed by certain local courts in Early Modern England. Some of these punishments went as far as inflicting physical mutilations, even allowing the usurer to participate in the execution of the punishment. Similarly, in another of his legal plays, *Measure for Measure*, Claudio’s imposition of the long-dormant death penalty for fornication can be set against the backdrop of similar punitive demands by the Puritan faction of the Anglican Church.²

2. Origins of Shakespeare’s legal knowledge

Shakespeare’s degree of familiarity with legal concepts, his constant use of legalisms, precise knowledge of legal proceedings and the accuracy of his many references to matters of the law have fueled speculations about his true profession.

Edmund Malone, a 19th century lawyer and Shakespeare scholar and editor, was the first to have openly raised this possibility in 1788.³ Only a professional of the law, he claimed, could have so accurately and imaginatively penned such a great number of law-related terms and references. Other Shakespearean pundits evoke the laws of probability, arguing that the chances of Shakespeare being a lawyer are so high that denying this would be tantamount to opposing the laws of probability.

Whether or not Shakespeare himself was a man of law, it is a profession he seemed to revile as evidenced by the famous “The first thing we do, let’s kill all the lawyers,” spoken by Jack Cade, the rebel leader’s henchman in *Henry VI*. Some lawyers have devised their own way of revenge and retaliated by analyzing in detail every single legal reference in Shakespeare’s works, to assess, as Phillips Hood indicates, “whether or not Shakespeare’s use of legal terms or his treatment of legal problems is ‘correct’” (1972:

119). More than one lawyer has, across the centuries, found fault with Shakespeare's use of certain legal terms, excoriating him for allegedly misusing some of them or, in other cases, simply employing the term in the wrong context (Alexandre, 2001). Nevertheless, it must be admitted that in many of the examples they cite to this effect, it is more a question of figurative use for dramatic effect rather than, *strictu sensu*, an incorrect one.

If not an actual lawyer, Shakespeare could have easily held a law-related occupation such as working as a law clerk to a legal professional. This would ultimately serve to explain his astounding knowledge of the law, procedures, and legal terminology. Other scholars maintain that Shakespeare could have easily acquired his knowledge of the law during his many court attendances. His innate curiosity, imagination and talent would have done the rest.

Additionally, Shakespeare also had other resources which were even closer at hand. Shakespeare's own family had an impressive record of litigations, either as plaintiffs or as defendants, and as such, had been personally exposed to the consequences of similar instruments of chicanery.⁴ As the extant records show, Shakespeare's father found himself involved in around fifty lawsuits⁵ within barely a decade, from 1551 or 1552 to 1600, and the Poet was no doubt a witness to many of them. In fact, Shakespeare himself was involved in numerous legal transactions. In *Equity Stirring: The Story of Justice Beyond Law*, Gary Watt lists some of the lawsuits Shakespeare was involved in, amongst which he records marriage bonds, several purchases, drawing up and revisions of wills, and several litigations.⁶

Another possible explanation regarding Shakespeare's familiarity with legal technicalities and terminology is that it is not unlikely that he enjoyed frequenting such venues as the Inns of Court, a place barristers regularly attend, even today, to socialise and receive instruction on the complex scholastics of legal chicanery. As Thomas Bedford (1872: 51), Church historian, puts it:

if they chance to discourse, it is of nothing but statutes, bonds, recognizances, fines, recoveries, audits, rents, subsidies, sureties, enclosures, liveries, indictments, outlawries, feoffments, judgments,, commissions, bankrupts, amercements, and of such horrible matter.

Whatever the sources behind Shakespeare's skills at legal wordplay and imagery, the question this paper raises concerns the translation of these complex metonymic elements into Spanish and the extent to which they have been correctly rendered in their Spanish equivalents and whether the Spanish renders the many legal subtleties that Tudor audiences would be sensitive to.⁷

In this respect, it must be admitted that Spanish translations have rarely done full justice to Shakespeare's legal wit. This study seeks to develop a better understanding of how such legal references have been rendered in translation, analyzing to what extent the dearth of 'law-worthy' translations of Shakespeare's plays may lie behind many distorted receptions in Spain of Shakespeare's true connoisseurship of law terminology. By 'law-worthy' translations is meant those which seek to privilege an accurate rendering into the target text of the legal nuances present in the original. In order to do

so, the translator would need to have some knowledge of the Elizabethan legal system and its legal technicalities as well as be familiar with Shakespeare's figurative use of Elizabethan legal terminology in his plays.

Stage-worthy translations, on the other hand, are more permissive renderings, allowing for a certain degree of liberty with translating legal terminology for the sake of theatrical effectiveness in the context of stage performances. As such, if a Shakespearean text is to be successfully adapted to other stages in other cultures and still retain its original stage effect, an effective rendering of the legal puns, malapropisms, extended metaphors, etc., is a necessary prerequisite to avoid mistranslation, undertranslation and overtranslation.

3. The gravedigger v. the lawyers: the first translations of *Hamlet* into Spanish

One of the most telling examples of under/over translation with regard to Shakespeare's use of legal puns may be found in the much-debated churchyard scene when Hamlet imagines a skull tossed around by the gravedigger to be that of a formerly litigious lawyer and wonders why it does not take due course of legal action and sue the gravedigger for assault:

There's another. Why may not that be the skull of a lawyer?
Where be his *quiddits* now, his *quilllets*, his cases, his tenures,
and his tricks? Why does he suffer this rude knave now to knock
him about the sconce with a dirty shovel, and will not tell him
of his action of *battery*? Hum! This fellow might be in's time a
great buyer of land, with his *statutes*, his *recognizances*, his
fines, his *double vouchers*, his *recoveries*. Is this the *fine of*
his fines, and the *recovery of his recoveries*, to have his fine
pate full of fine dirt? Will his *vouchers* vouch him no more of
his purchases, and double ones too, than the length and breadth
of a pair of *indentures*? The very *conveyances* of his lands will
scarcely lie in this box; and must the *inheritor* himself have no
more, ha? (V.i) (Legal terms italicised)

Why, one may wonder, such profusion of legal terminology at the end of this revenge tragedy? Though it may sound partially unmotivated –the prince of Denmark somewhat arbitrarily railing against lawyers– Hamlet is in fact making reference to one more injustice to be added to the crime of regicide committed by his stepfather in that, at this point in the tragedy, Hamlet has been dispossessed of his inheritance through Claudius's use of sophisticated legal arguments, hence Hamlet's tirade against "quiddits," "quilllets," "vouchers," "double vouchers," "fines," etc. All these, in one way or another, point to the same direction: legal subtleties, fictions, tricks and artifices used with the aim of either conveying properties or barring unwanted inheritors from finally owning them.

Moreover, Shakespeare often uses legal terms with double-edged meanings: thus, the definition of ‘quillet,’ ranges from ‘pieces of land held by tenures’ to ‘subtle legal fictions or tricks used for protecting or devising this’ (Sokol, 2000: 29). Similarly, the term ‘voucher,’ means ‘a warranty of title used as part of a legal fiction employed in the method of conveyancing known as fine and recovery’ (*op. cit.* 111). As Sokol goes on to hypothesize, perhaps Shakespeare was employing the terms ‘fine and recovery’ here since they were “equivalently great dilemmas for learning and their pairing suggests an Inns of Court student jest” (*op. cit.* 127).

Given the rich interpretative potential of the legal puns woven into the text of this famous scene, the question now arises as to how Spanish translators broached the problematics of preserving them in Spanish.

4. From 18th century Fernandez de Moratín to 21st century Ángel Luis Pujante

It would take almost two centuries for this scene to become accessible for Spanish-speaking audiences. A singular phenomenon of cultural imbalance delayed the presentation of Shakespeare to Spanish audiences in that, while in England translations of Spanish authors first began to appear in the early seventeenth century –the first English translation of *Don Quijote* dates back to 1612–, it was not until the end of this century that the first translations of English authors started to come off the printing presses in Spain. Spanish audiences would have to wait until 1798 to actually read a first-hand translation of *Hamlet*.⁹ The author of this first translation was a Spanish liberal dramatist called Leandro Fernandez de Moratín. Despite being influenced by the French-styled Neoclassicism of his days, he decided to translate directly from the English version and not from the French translation, by then a common practice among advocates of Neoclassicism.

However, Fernandez de Moratín was soon to discover that Shakespeare’s style of composition and manner of structuring dialogues were not always compatible with the tenets of Neoclassical theatre according to which a play should be linear and consistent from beginning to end. Voltaire’s comments on “the monster called Hamlet” in his famous *Lettre à l’Académie* must also have exerted some influence on Moratín who hints at some of his misgivings in his Preface by alluding to certain “flaws that mar and obscure the original.” But it is in the notes accompanying his translated version that he gives free rein to his prejudices and misgivings. Such is the case, for instance, when the ghost of Hamlet’s father, the king of Denmark, appears on the castle wall of Elsinore. Marcellus, one of the officers, exclaims: ‘Peace, break thee off, look where it comes again.’ Moratín translates this sequence more or less adequately (*Mírale por dónde viene!*), but cannot refrain from including the following note: “The apparition of a ghost is both odious and ill-timed. If the tragedy begins with an apparition, how is it to end?” (Zaro, 2007: 37).

Moratín also resorts to voluntary omissions. Thus Hamlet’s words in the Mousetrap scene in which he teases Ophelia with a sexual pun in front of the court by saying

'That's a fair thought to lie between a maid's legs!' –most certainly a source of delight to Elizabethan audiences– is not reproduced in the translation, an omission Moratín justifies on the grounds that "some readers may find it offensive" (Zaro, 2007: 44).

As mentioned earlier, a large number of these Spanish translations never reached the stage. Moratín's version was one of them. His somewhat bowdlerized translation radically alters the number of original scenes to make the text adhere to the rules of the Neoclassical theater which hold that whenever a character enters or abandons a scene, the makeup of the group of characters on the stage must change and, by extension, introduce a new scene. Strict adherence to this rule leads to a considerable increase in the number of scenes. Thus, in Act III, instead of the original 4 scenes he adds a staggering 24 more and in Act V instead of the original 2 we have a total of 11, which renders staging the play quasi impossible. In spite of this, Moratín's prose translation remained quite popular for a long period of time, going through a total of 45 editions, the last one appearing relatively recently, in 1978.

With regard to the punning in the *memento mori* scene, Moratín's rendering of Hamlet's jeremiad against lawyers and their use of all sorts of instruments of legal chicanery, simply obliterates a number of these legal references:

Y esa otra, ¿por qué no podría ser la calavera de un letrado? ¿Adónde se fueron sus equívocos y sutilezas, sus litigios, sus interpretaciones, sus embrollos? ¿Por qué sufre ahora que ese bribón, grosero, le golpee contra la pared, con el azadón lleno de barro?... ¡Y no dirá palabra acerca de un hecho tan criminal! éste sería, quizás, mientras vivió, un gran comprador de tierras, con sus obligaciones y reconocimientos, transacciones, seguridades mutuas, pagos, recibos... Ve aquí el arriendo de sus arriendos, y el cobro de sus cobranzas; todo ha venido aparar en una calavera llena de lodo. Los títulos de los bienes que poseyó cabrían difícilmente en su ataúd; y, no obstante eso, todas las fianzas y seguridades recíprocas de sus adquisiciones no le han podido asegurar otra posesión que la de un espacio pequeño, capaz de cubrirse con un par de sus escrituras... ¡Oh! ¡Y a su opulento sucesor tampoco le quedará más! (1840: 99)

None of the legal subtleties of this scene are present in Moratín's translation: first, his rendering obliterates the reference to legal action as a consequence of an attack on a person's integrity: 'action of battery'; secondly, he overlooks the *double entendre* encapsulated in terms such as 'quilllets' and 'vouchers,' which are essential to understanding this scene as a denunciation of the legal subterfuges by means of which lawful owners are cheated of their property.

Spanish audiences would have to wait almost two centuries to have the opportunity to read a more faithful rendering of this key passage. The translation in question was authored by Manuel Ángel Conejero and his team of translators at the Instituto Shakespeare (Valencia) in 1995. Conejero's interest in the performing arts in general makes him particularly suited for this undertaking. One of the basic features of their translations, as Verdaguer states, "is that this is a collective project, carried out by a team of translators, actors and academics, who before writing the final version, thoroughly discuss all the problems involved in the plays, ranging from the selection of

textual variants to semantic difficulties. The preservation of the theatrical dimension of the plays is, however, their main priority” (1999: 94).

In Conejero’s own words: “the choice of words ought to be in the service of theatrical . . . effectiveness” (1980: 262), i.e. favouring a “stage-worthy” approach. His translations have paved the way for the Spanish translations of Shakespeare in the last decades.

¿no podría ser esta la calavera de un abogado? ¿Dónde quedan ahora sus sutilezas, argucias, sus cartas, títulos y sus trucos? ¿Cómo tolerara ahora que ese patán le golpee la cabeza con su sucia pala? ¿Por qué no le demanda por agravios? ¡Hum! Supongo que este individuo era un terrateniente con escrituras, contratos, dobles garantías, protocolos y finanzas. ¿Eso es todo lo que las garantías le garantizaron al final de sus finanzas? ¿Tener rellenos de fino barro sus finos sesos? ¿Le garantizaron sus garantías, dobles o no, un pedazo de tierra del tamaño de las dos mitades de una escritura? Sus títulos de propiedad apenas cabrían en esta caja –en la que él cabe– aunque poca herencia será esa para su heredero (617)

Unlike Moratín, Conejero has attempted to convey the reference to the legal action pursued in order to denounce unlawful physical assault on a person, the ‘action of battery.’ However, it must be admitted that his rendering of this legal action, ‘*demanda por agravios*’, shows that the translator has confused the ‘action of battery’ (‘*denuncia por agresión física*’) with the ‘action of slander’ (‘*demanda por agravios*’) thus losing the important physical dimension of ‘battery’. Likewise, Conejero’s translation of ‘quillet’ as ‘subtle legal tricks’ (‘*sutilezas,*’ ‘*argucias*’) fails to convey the original *double entendre* implicit in the land/legal tricks previously discussed. Such under-translations notwithstanding, Conejero does succeed in conveying the idea of this lawyer as someone who has resorted to all these legal tricks and artifices in order to accumulate lands and houses (“*Sus títulos de propiedad apenas cabrían en esta caja – en la que él cabe*”).

5. The new 21st century Shakespeare in Spanish: Pujante’s translations of Shakespeare’s complete works

Before discussing the translation of Shakespeare’s legal puns in the 21st century, it is worth mentioning Luis Astrana Marín’s publication of the complete works of Shakespeare in 1929, the first translation into Spanish of the complete Shakespearean corpus. However, even if Astrana Marín is a pivotal figure in disseminating knowledge of Shakespeare in Spain (more than 60 editions have been published up to the present day), his translations, both of the plays and the poems, are rendered only in prose for reasons of ‘Fidelity to the author’. According to Astrana, loyalty to the author is incompatible with verse translations: “no translation in verse,” he claims, “can be good . . . And that is because sometimes the metrics and some other times the rhyme prevent remaining faithful to the author” (17). Unfortunately, Astrana’s achievement probably

had the effect, as Michael Dobson rightly argues, of “discouraging verse renderings for several decades” (2009: 445).

One of the problematic episodes in *Macbeth*, as far as translation is concerned, is the one in which Macbeth, contriving to have Banquo murdered, invokes the night to conceal his murderous act. Macbeth uses legal imagery associated with the term ‘bond’:

Be innocent of the knowledge, dearest chuck,
Till thou applaud the *deed*. Come, *seeling* night,
Scarf up the tender eye of pitiful day
And with thy bloody and invisible hand
Cancel and tear to pieces that great *bond*
Which keeps me pale. Light thickens, and the crow
Makes wing to th' rooky wood.
Good things of day begin to droop and drowse;
Whiles night's black agents to their preys do rouse.
Thou marvel'st at my words: but hold thee still.
Things bad begun make strong themselves by ill.
So, prithee, go with me. (III. ii) (Legal terms italicised)

The primary, literal significance of the term “bond” in this verse is that of the bond of fellowship that binds individuals and the ‘canceling’ and ‘tearing apart of it’ may refer to the tearing asunder of the human obligation to behave humanely toward fellow men. But, as Sokol (200: 39) suggests, the image of tearing up and canceling a bond may also be a strong allusion to “the creation and cancellation (by physical destruction) of a monetary bond.” Astrana’s translation of this particular *double entendre* limits itself to the literal significance of the term:

Que tu inocencia lo ignore, queridísima polluela, hasta que puedas aplaudir el hecho . . .
¡Ven, noche encapirotadora! . . . ¡Venda los tiernos ojos del compasivo día, y con tu
sangrienta e invisible mano rasga en pedazos este gran vínculo . . . (1925: 99)

The 21st century saw a turning point in this field with the translations of Ángel Luis Pujante, professor at the University of Murcia and one of the most prestigious translators of Shakespeare into Spanish, who believes that Shakespearean translations can combine stage-worthiness and academic thoroughness.

The Merchant of Venice and *Measure for Measure* are considered two of Shakespeare’s most representative legal plays, both of them highly emblematic of Shakespeare’s complex treatment of the law and justice. The second act of *Measure for Measure* opens with the trial of Pompey. Elbow, the constable, accuses Pompey, a pimp, and Froth, a gentleman bawd, of villainy. They are judged by Escalus. The scene is intended to be comic: Pompey the pimp provided a mistress, none other than Constable Elbow’s wife, for Froth; in spite of being married, the lady seems to have had no qualms about granting her favours:

Pompey By this hand, sir, his wife is a more *respected* person than any of us all.

Elbow	Varlet, thou liest; thou liest, wicked varlet! the time has yet to come that she was ever <i>respected</i> with man, woman, or child.
Pompey	Sir, she was <i>respected</i> with him before he married with her.
Escalus	Which is the wiser here? <i>Justice</i> or <i>Iniquity</i> ? Is this true?
Elbow	O thou caitiff! O thou varlet! O thou wicked Hannibal! I respected with her before I was married to her! If ever I was <i>respected</i> with her, or she with me, let not your worship think me the poor duke's officer. Prove this, thou wicked Hannibal, or I'll have mine <i>action of battery</i> on thee.
Escalus	If he took you a box o' the ear, you might have your <i>action of slander</i> too.
Elbow	Marry, I thank your good worship for it. What is't your worship's pleasure I shall do with this wicked caitiff? (II.i) (Legal terms italicised)

Constable Elbow confuses Pompey's word 'respected' used in connection with his wife, for 'suspected' (in relation to some sort of lascivious conduct). Shakespeare was prone to encapsulating sexual innuendos within legal terms as is also the case in one of the final scenes of this play when the Duke consents to 'remit' Lucio's other 'forfeits,' meaning 'punishments' but also 'carnal offences.' Shocked and enraged by what he considers a personal affront, Elbow threatens to take legal action against Pompey. However, Elbow's response does nothing but increase the comic effect of this clownish charade for he confuses 'slander' with another personal affront that is legally actionable: the action of battery, which explains why Escalus says mockingly: "If he took you a box o' the ear, you might have your action of slander too." In this respect, Shakespeare is once more portraying what was a real life occurrence, for both legal actions, slander and battery, more often than not went hand in hand in court proceedings since there is an obvious cause and effect relationship between the two offenses in that slander often leads to assault. This scene, with the conjunction of the two offenses, was most certainly a source of amusement for lawyers or those likewise familiar with typical courtroom episodes (Sokol, 2000: 210).

Ángel Luis Pujante's rendering of this riotous scene succeeds in conveying the original comic effect to the Spanish reader and it is easy to imagine audiences roaring with laughter at Pujante's version of this same scene performed on the boards of any stage across the Spanish-speaking world:

Pompeyo	¡Voto a..., señor! ¡Si su mujer es de más reputación que ninguno de nosotros!
Codo	¡Mentira, granuja! ¡Mentira, vil granuja! Aún está por llegar el día en el que sea reputada para hombre, mujer o niño.
Pompeyo	Señor, pues él la reputó bien antes de casarse con ella.
Escalo	¿Quién tiene aquí más juicio, la justicia o la iniquidad? ¿Es cierto eso?
Coco	¡Ah, miserable! ¡Ah, granuja! ¡Ah, malvado Aníbal! ¿Qué yo la reputé antes de casarme con ella? Si yo la he reputado a ella o ella a mí, no me tenga Vuestra Señoría por guardia del pobre duque. Demuestra eso, vil Aníbal, o te demando por violencia.
Escalo	Y si os diera un bofetón, le demandaríais por calumnia.
Codo	Vaya, os lo agradezco, Señoría. ¿Qué decíais que haga, Señoría, con ese vil

granuja? (2012: 914)

In choosing the Spanish term '*reputación*,' with all its variants (as a noun '*reputación*,' as a past participle '*reputado*') to convey the *double entendre* ('respected'/'suspected'), Pujante manages to juggle with a similar wordplay, i.e. the confusion between 'respected' and/or 'suspected of lascivious conduct.' Moreover, the Spanish past participle, '*reputada*' is likewise used to refer to a woman who is highly respectable while at the same time evocative of 'whorish behavior,' since the word '*reputa*' literally means 'more than a whore.' This example is typical of Pujante's ability to inject the implicit meanings of the source text into the target text and thus preserve the burlesque.

Not so burlesque, however, is what we get in the trial scenes of Shakespeare's *The Merchant of Venice*. Shylock has consented to lend Antonio 3000 ducats. Shylock, who hates Antonio for his humanity towards debtors, has the contract registered by a notary to warrant the enforcement of the penalty: 'for an equal pound / Of your fair flesh, to be cut off and taken / In what part of your body pleaseth me' (I.iii.). Antonio has, in turn, lent some money to Bassanio but the terms of the loan, as Raffield states, "differ dramatically from those of the loan made by Shylock to Antonio: once he has obtained the money from Shylock, Antonio will allow Bassanio 'To have it of my trust, or for my sake' (2014: 58).¹⁰

When Antonio proves unable to return the loan, Shylock seeks 'the due and forfeit of my bond' (IV.i.). The dilemma now is whether the courts will decree the execution of the penalty clause or, on the contrary, dismiss it on grounds of cruelty. The play hinges on this legal/moral dilemma: free commerce and profits, warrants for commercial agreements etc., versus a more humane interpretation of such contracts.

Paradoxically enough, Antonio himself alludes to the legal framework for commerce in Venice when he argues, "for the commodity that strangers have / with us in Venice, if it be denied, / will much impeach the justice of the state" (III.iii). The word 'commodity' here is charged with subtle polysemy, for its signification ranges from 'free trade,' 'value,' 'safety,' 'profit' to the 'widely acknowledged legal standing' of the city of Venice. This legal pun offers some idea as to one of the questions underlying this tragedy, i.e., how can free trade and profit be fittingly harmonized within a stable legal framework recognized and accepted by the majority? Strikingly enough, the legal overtones of the 'commodity' have invariably been overlooked in translation. Pujante's translation is, once again, one of the few exceptions to the rule:

El Dux no puede impedir el curso de la ley.
Sería negar los derechos de que gozan
aquí los extranjeros, y empañaría
la justicia del Estado, pues el comercio
y los ingresos de Venecia están ligados
a todos los pueblos. (2012: 403)

Pujante cultivates a triple fidelity: to the dramatic nature of the plays, to

Shakespeare's language and to the target language. His translations, which aim at being "stage-worthy" and not only meant to be read, retain all the expressive elements of the original: Shakespeare's verse and rhythm, figurative language, acoustic effects, and carefully cultivated ambiguities through use of polysemy. Though not quite in the area of legal puns, in the first scene of Macbeth, when the witches are conjuring up an apparition ("Fair is foul, and foul is fair!"), Pujante aptly renders the spell into Spanish by adhering to the original rhythm: "*Bello es feo y feo es bello*". He also manages to preserve some internal cohesion by using similar words to translate Macbeth's 'so foul and fair a day I have not seen' ("*un día tan feo y bello nunca he visto*"). Another instance of a successful translation is to be found when the witches have kindled Macbeth's desire to reach the throne, and the latter expresses his determination and moral dilemma in highly poetic terms:

If it were done when 'tis done, then 'twere well
 It were done quickly. If the assassination
 Could trammel up the consequence, and catch
 With his surcease success; that but this blow
 Might be the be-all and the end-all here,
 But here, upon this bank and shoal of time,
 We'd jump the life to come. But in these cases
 We still have judgment here, that we but teach
 Bloody instructions, which, being taught, return
 To plague th' inventor: this even-handed justice
 Commends the ingredients of our poisoned chalice
 To our own lips. He's here in double trust:
 First, as I am his kinsman and his subject,
 Strong both against the deed; then, as his host,
 Who should against his murderer shut the door,
 Not bear the knife myself. (I.vii)

Pujante succeeds in maintaining the paronomasia of the original ('surcease'/ 'success') by resorting to a similar paronomastic sequence in Spanish: '*suerte*'/ '*muerte*'.

Si darle fin ya fuera el fin, más valdría
 Darle fin pronto; si el crimen
 Pudiera echar la red a los efectos y atrapar
 mi suerte con su muerte; si el golpe
 todo fuese y todo terminase, aquí y
 sólo aquí, en este escollo y bajío del tiempo,
 arriesgaríamos la otra vida (2012: 68)

Similarly, when Launcelot, servant to Shylock, and his father, Gobbo, asks Bassanio to allow Launcelot to enter service in Bassanio's house as a servant, Shakespeare peppers the scene with malapropisms. Both Launcelot and his father repeatedly misuse a number of technical terms, some of them with legal overtones:

- Gobbo Here's my son, sir, a poor boy . . .
- Launcelot Not a poor boy, sir, but the rich Jew's man
that would, sir, as my father shall specify . . .
- Gobbo He hath a great *infection*, sir, as one would say,
to serve . . .
- Launcelot Indeed, short and the long is, I serve the
Jew, and have a desire, as my father shall specify . . .
- Gobbo His master and he, saving your worship's reverence,
are scarce cater-cousins.
- Launcelot To be brief, the very truth is that the Jew
having done me wrong, doth cause me, as my father,
being, I hope, an old man, shall *frutify* unto you . . .
- Gobbo I have here a dish of doves that I would bestow
upon your worship, and my suit is . . .
- Launcelot In very brief, the suit is *impertinent* to
myself, as your worship shall know by this honest old
man; and, though I say it, though old man,
yet poor man, my father. . .
- Bassanio One speak for both. What would you?
- Launcelot Serve you, sir.
- Gobbo That is the very *defect of the matter*, sir.
- Bassanio I know thee well; thou hast obtain'd thy suit . . . (II.ii)
(Legal terms italicised)

In this ping pong, malaprop scene, Shakespeare plays with legal puns to amuse the audience and further characterize Launcelot and Gobbo as clownish figures. Such 'ludicrous misuse of words' would surely have caused great mirth in the audience. Shakespeare often used these comic interims to mitigate the effect of the more somber sequences. In *Much Ado About Nothing*, for instance, Dogberry uses two malapropisms in just one sentence: "One word, sir. Our watch, sir, have indeed comprehended two auspicious persons" (III.v.), a case of a double malapropism: "comprehended" instead of "apprehended" and "auspicious" in exchange of "suspicious."

It is not easy, however, to find translations conveying functional equivalents of these malaprops. Worse still, in some cases, the translator even eschews the legal wordplay even when it constitutes a pivotal factor in the comic build-up of this scene. One such example is to be found in the work of another translator called Menéndez Pelayo whose 1881 translation standardizes the entire sequence, rendering the legal pun non existent and, by extension, incurring the loss of the comic effect for the Spanish target reader: "*Lo cierto es que el judío me ha tratado bastante mal, y esto me ha obligado... Pero mi padre, que es un viejo, prudente y honrado, os lo dirá*" (Menéndez y Pelayo, 1881: 26).

Pujante's translation of the same passage, on the other hand, succeeds in preserving many of the nuances of these malapropisms. Pujante takes stage-worthiness very much into account in his translations of Shakespeare's plays as indicated by his choice to translate Shakespeare's blank verse into a more rhythmic free verse, thus avoiding

excessively lengthy lines in Spanish. Here again his translation proves to be apt for the stage:

Gobo	Señor este es mi hijo, un muchacho pobre . . .
Lanzarote	Muchacho pobre no señor, sino criado de un judío rico que desea, señor, como mi padre especificará . . .
Gobo	Tiene, señor, como se dice, una <i>declinación</i> natural a servir
Lanzarote	Pues bien, breve y largamente, yo sirvo al judío y tengo el deseo, como mi padre especificará...
Gobo	Su amo y él, con perdón de vuestra merced, no hacen buenas migas
Lanzarote	En suma, la verdad es que, como el judío me ha tratado mal, yo debo, como mi padre, siendo, según espero, un anciano, os <i>explificará</i> ...
Gobo	Aquí traigo un plato de pichones que deseo regalaros, y mi petición...
Lanzarote	Abreviando: la petición me es <i>impertinente</i> , como os dirá este honrado anciano, que, no es por nada, aunque pobre y anciano, es mi padre.
Bassanio	Que hable uno. ¿Qué deseáis?
Lanzarote	Serviros, señor.
Gobo	Ese es el <i>maúllo</i> de la cuestión.
Bassanio	Te conozco. Tuyo es el empleo. (2012: 377) (Legal terms italicised)

The nature of the different malapropisms in this comic scene shows that the servants' degree of familiarity with the respective legal terms is very poor, as evidenced by the fact that they mistake 'certify' for 'frutify', amongst many other common blunders.

The comical 'certify'/'frutify' malaprop of the original has been imaginatively resolved in Spanish by coining a new expression '*explificará*' which echoes the semantic confusion taking place in Launcelot's mind. Pujante's translation is law-worthy, in the sense that it is precise in its rendering of legal terminology, puns, malapropisms, etc., and stage-worthy, in the sense that it keeps the wordplay of the original alive by inventing rather appropriate functional equivalents for each case, thus keeping with stage dynamics.

In conclusion to this study on the evolution of translation trends regarding Shakespeare's "legal" plays, it is clear that the "law-worthy"/"stage-worthy" dilemma is central to translating Shakespeare's legal wit. "Loose" translations of Shakespeare's legal punning and malapropisms have led to undertranslation or even obliteration of the relevant passages. Inversely, privileging "law-worthiness" has resulted in 'stage-unworthy' translations, ultimately leading to failed stage adaptations or to the stage directors' decision to reject the text on grounds of its unsuitability for stage production. Fortunately, recent translations of Shakespeare's works seem to point to a more promising horizon. Such is the case with Ángel Luis Pujante's Spanish edition of Shakespeare's comedies and tragicomedies: based on prior study and analysis of the Elizabethan legal system and its terminology, Pujante's translations have made Shakespeare's legal punning accessible to theatre-goers and Shakespearean scholars across the Spanish-speaking globe. Let's not kill all translators!

Notes

1. In one his sonnets, "But Be Contented When that Fell Arrest," Shakespeare referred to death as "*that fell arrest*", with the word 'fell' "standing for something 'savage, cruel, terrible' while the word 'arrest' plays with a two-fold meaning: 'the act of stopping something in its course' and that of being 'taken into custody.'"

2. "The conviction of Claudio and the subsequent sentence of death, for the statutory criminal offence of fornication", Redfield hypothesizes, "may have been a dramatic invention, but it was not that far removed from the clamorous demands made by a vociferous 'puritan' minority in the latter part of Elizabeth's reign and at the accession of James I" (2014:55).

3. The first mention was made by Edmond Malone, a lawyer and Shakespeare editor, in 1778, in a footnote to his edition of Hamlet. Two years later, in his *Prolegomena to The Life of William Shakespeare*, he states that Shakespeare's "knowledge and application of legal terms, seems to me not merely such as might have been acquired by casual observation of his all-comprehending mind; it has the appearance of technical skill; and he is so fond of displaying it on all occasions, that there is, I think, some ground for supposing that he was early initiated in at least the forms of law" (Alexandre, 2001: 52).

4. As Kornstein argues in *Kill All the Lawyers?: Shakespeare's Legal Appeal*, Shakespeare came from a particularly litigious family in a litigious age. (1994: 15)

5. Drawing from the extant records of court proceedings, it seems that "John Shakespeare, from his settlement in that town about 1551 or 1552 down to 1600, was engaged either as plaintiff or defendant in nearly fifty law-suits" (Devecmon, 1899: 45).

6. Both the poet and his father were engaged in such litigations. As Gary Watt records in *Equity Stirring: The Story of Justice Beyond Law*,

We also know that he was directly and indirectly involved in litigation. . . much of it started by the poet to recover debts due to him . . . Shakespeare's father was also a party to the prolonged chancery litigation in Shakespeare v Lambert and on 26 September 1587 William was named as a party to an attempted compromise of that suit. The suit concerned land which had passed to his mother under her father's will and which Shakespeare was in line to inherit, but his father mortgaged the land to Edmund Lambert and it was forfeited when he failed to repay the debt on mine. (2009: 201)

7. In this respect, it is important to keep in mind that Spanish audiences' exposure to Shakespeare's plays as stage performances was, until recently, limited to approximately 1/3 of his plays since many of the translated texts, some of them scholarly editions, were simply not suitable for production in the context of the dynamics of a Spanish playhouse.

8. This *memento mori* scene has to be set in its proper sociocultural context. Shakespeare is parodying a popular case of the day, *Hales v Petit* (Shahan, 2013: 89), a dispute over land between a citizen and a monarch; the crown's claim, it goes without saying, finally prevailed, it being only logical that a king would in such cases exert his absolute power and deploy his army of experienced lawyers, all schooled in the subtleties of legal artifices, for conveying land this way or that.

9. The first Spanish translation of a Shakespearean play, *Hamlet*, translated by Ramón de la Cruz, came out only in 1772, and was not based on the original but on an already 'loose'

French version of the play by J.F. Ducis. Spain was then under the spell of French revolutionary ideals. The bulk of translations into Spanish proceeded from French versions: out of a total of 2200 translated into Spanish during the eighteenth century, 65% of them were translations from French into Spanish, translations from English barely reaching 7%. (Pujante, 2007: xxii).

10. Raffield states the following on this matter:

[I]n juristic terms, the dramatic conflict over the enforceability of Antonio's bond represents the theme of immutable law colliding with a flexible and humane, alternative model. In the Elizabethan legal system, this conflict was embodied by the disagreement between King's Bench and Common Pleas over the status of the promise in contract law. Dissension between the two courts reached its climax in *Slade's Case*, which commenced in King's Bench in 1596 and was finally decided in 1602, 'before all the Justices of England, and Barons of the Exchequer ...' (2014: 61)

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Changing with the Times: The Evolution of Plain Language in the Legal Sphere

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ABSTRACT

As is well known, the Plain language movement has been influential in a number of areas of public life over the last few decades. Within the legal sphere it has raised general awareness concerning the need to make legal matters and legal documents more comprehensible and accessible to non-experts, particularly in today's digitalized world where information is freely available to the general public. In this paper my aim is to provide an overview of the way the Plain language movement has evolved in the legal sphere since the 1970s. In particular, I will highlight the following points: (1) the reasons why the Plain language movement came into being; (2) the major successes of plain language in the legal sphere over the last 40 years; (3) the areas where legalese still predominates, and the reasons for the resistance to change; and (4) the way the Plain language movement has adapted to the digitalized world and the implications for future development. My observations will be mainly restricted to the English-speaking world, including international organizations where English is one of the official languages, but I will occasionally make reference to other plain language organizations outside the English-speaking world where this seems relevant. I also provide a list of the major organizations involved in promoting plain language in English in the legal sphere today as a reference guide.

Keywords: Plain language movement, legal English, legalese, legislative drafting, contract drafting

1. Introduction: the beginnings and evolution of the Plain language movement

Definitions of plain language abound. I will stick to one of the shortest and clearest: “Plain language has to do with clear and effective communication – nothing more or less” (Kimble, 1994-1995: 51).

There are many different narratives about how, where and when the Plain language movement began to make itself felt in the legal sphere. First of all, it should be pointed out that we are referring to a phenomenon involving above all the countries where English is either the only official language, or is one of the official languages, with legal systems that are either predominantly or wholly based on common law, such as England and Wales, Australia, New Zealand, or the United States, or are hybrid systems where common law plays a major role but alongside other legal cultures – notably the civil law system – as in Canada, South Africa or Scotland. Plain language movements can also be found in a number of civil law countries such as Sweden, but generally speaking most civil law countries have been less concerned than their common law counterparts with trying to make their legal language clearer or easier to understand or sound less antiquated. For example, in Italy there is no easy way of translating ‘plain language’ or ‘legalese’ into Italian: some sort of paraphrase is necessary. This is not to say that civil law countries are immune from the problems of obscure legal language and ‘bureaucratese’ – far from it – but as a whole the language of the law has a less anachronistic ring to it and hence is not generally perceived as necessitating urgent reform. There is no direct equivalent in civil law contracts to the kind of antiquated legalese the following extract exemplifies:

NOW THEREFORE THIS AGREEMENT WITNESSETH That in consideration of the mutual promises and covenants set forth herein and within the Agreement, and in order to secure and maintain the services described herein and within the Agreement, the parties hereto, each binding itself, its respective representatives, successors, and assigns, do mutually agree as follows.¹

Without wishing to go over well-trodden ground (see, for example, Tiersma 1999 or Bivins 2008 for an overview), it should be borne in mind that the common law system, with its emphasis on precedent, has traditionally tended to be backward-looking rather than forward-looking, and this has “resulted in a style that uses long, involved sentences, archaic legal expressions, latinisms, and pompous language considered suitable for use in Parliamentary procedures. Not surprisingly, it is often very difficult to read and understand” (Turnbull, 1995: 26). Hence the need to break with this encrusted type of language and move towards something more modern and comprehensible, particularly to laypersons.

Although complaints about legal English go back several centuries, it is generally agreed that it was not until after World War II that we can speak of the beginnings of a ‘movement’ which would coalesce in the United States in the 1960s, thanks to the influence of seminal works such as those of Mellinkoff (1963) in the sphere of legal language or O’Hare (1965) in the field of government communication. The focus of

each of these two writers highlights two of the strands that have been the principal concern of plain language exponents in the legal sphere ever since: on the one hand, modernizing the language of the law, on the other, making official communication clearer and more effective. The two areas, although clearly interrelated, require different sets of skills and priorities. The former has to do, above all, with the way legally binding texts are drafted by removing those elements of ‘legalese’, whereas the latter has to do with how organizations – generally state-run – communicate with the public by removing those elements of obscure ‘officialese’. Clearly, certain types of government-based communication have little or nothing to do with the legal sphere, such as consumer information from the US Food and Drug Administration on chronic health problems such as obesity or diabetes. But in other areas the dividing line is much hazier, and sometimes the information provided may be of a quasi-legal nature. For example, in 1977, “the Federal Communications Commission issued rules for Citizens Band Radios that were written as a series of short questions and answers, with personal pronouns, sentences in the active voice, and clear instructions. These regulations were probably the first to appear entirely in plain English. The current Citizens Band Radio Rules, issued in 1983, continued the plain language style of the 1977 rules” (Locke, 2004)

Here is an example of the Citizens Band Radio Rules of 1983:

PART 95--PERSONAL RADIO SERVICES

Sec. 95.402 (CB Rule 2) How do I use these rules?

(a) You must comply with these rules (See CB Rule 21 Sec. 95.421, for the penalties for violations) when you operate a station in the CB Service from:

- (1) Within or over the territorial limits of places where radio services are regulated by the FCC (see CB Rule 5, Sec. 95.405);
- (2) Aboard any vessel or aircraft registered in the United States; or
- (3) Aboard any unregistered vessel or aircraft owned or operated by a United States citizen or company.²

I will therefore be focusing in particular on the impact of plain language on legal drafting, but I will also take into account the ways in which plain language has affected official communication insofar as such communication is related to the legal sphere.

As has been pointed out elsewhere (see, for example, Williams, 2005, 2011), the Plain language movement was already influential in the United States in the 1970s, particularly in the fields of banking and insurance, whereas in the sphere of government communication there was intermittent interest in plain language starting from the time of the presidency of Jimmy Carter, and later taken up by Bill Clinton and, more recently, by Barack Obama.

During the 1980s plain language spread to other English-speaking countries, especially Canada, the United Kingdom, Australia and New Zealand, and went on to become a worldwide phenomenon. It was further consolidated in the 1990s, by which time post-apartheid South Africa had begun experimenting with plain language, notably in its Constitution of 1996. In the European Union we witness, on the one hand, the

development of the ‘Fight the Fog’ campaign among EU translators and drafters while, on a more official level, the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation laid down the rules for clearer drafting in this multilingual organization.

In recent years there has been a marked shift towards plain language in legislative drafting in the UK, both in Scotland and in Westminster (Williams, 2007, 2011). However, this and other accomplishments of plain language in the legal sphere over the last 40 years will now be examined in greater detail in the next section.

2. Some success stories in plain language in the legal sphere

The history of plain language in the legal sphere has been a chequered one. For a long time its future was uncertain: as late as the mid-1990s, Friman (1995: 108) surmised that “[i]t is difficult to say whether the Plain English Movement will grow or fade away.” With the possible exceptions of Australia and New Zealand which had already espoused the cause of plain language in legislative drafting well before the 1990s, it is only fairly recently that plain language has emerged from its relatively marginal status to become mainstream in many parts of the English-speaking world.

Clearly, each country or international organization has developed its own specific legal culture, and plain language has impinged in different ways and to varying extents in the legal sphere. However, it is also true that individual countries and organizations have been influenced by what has happened elsewhere: tax law rewrite projects and consumer contract legislation are two examples of this phenomenon, as we will see shortly.

In this Section I will outline what I consider to be some of the more significant projects that have been successful – or at least influential or significant – in terms of implementing plain language in the legal field. The list is necessarily a subjective one and is not meant to be exhaustive. However, these summaries of ten milestones in the history of plain language in the English-speaking world may arguably provide a more vivid picture of the phenomenon than a more general account may offer.

1973. US New York Citibank promissory note

The occasion marking “the coming-of-age of the plain language movement in the United States” (Asprey, 2010: 65) was when New York’s Citibank decided to write its promissory note using plain language. The fascinating details behind this “icon of the plain language movement” (Asprey, 2010: 34) are narrated by one of the protagonists, Duncan A. MacDonald (2015a, 2015b), who recounts how former Miss America, Bess Myerson, was hired by Citibank in 1973 because of her “business-like ability to work on big picture ideas and make them happen” (MacDonald, 2015a), and within months Citibank “introduced the first plain-language agreement in the financial services industry” (*ibid.*). MacDonald and Myerson overhauled the original note which “ran

almost 3000 words and was completely undecipherable” (*ibid.*) after discovering “sentence by sentence, paragraph after paragraph, all in tiny print — a nest of sneaky provisions in dense legalese that unfairly tipped the scale in Citi's favor in every possible way” (*ibid.*). The media latched onto this novel approach, and the newly-styled promissory note, reduced to 20 per cent of its original length, was seen as a victory for consumers and hailed as a new way of doing business, even if subsequent events in the 1980s, where ‘deregulation’ and ‘neoliberalism’ became the buzzwords, would dampen this initial enthusiasm about the alleged change of heart of the business world. But plain language had nonetheless been put on the map and was destined to flourish, though not necessarily in ways that could have been predicted at the time. For further reading on the Citibank promissory note and plain language see also Lederer & Dowis, 1995: 30-31.

1976. Canadian Legislative Drafting Conventions

In 1969 members of Canada’s Legislative Drafting Workshop began working on what culminated in the drafting conventions laid down in 1976 (Uniform Law Conference of Canada, 2003). While being less ‘iconic’ in status than the Citibank promissory note of 1973, these conventions have proved to be crucial in Canada’s legislative drafting history and are still in force, albeit following amendments in 1981 and 1986: today they also apply to French texts (Office of the Scottish Parliamentary Counsel, 2006: 24). The plain language ethos is foregrounded in rules such as “An Act should be written simply, clearly, and concisely, with the required degree of precision, and as much as possible in ordinary language” (Uniform Law Conference of Canada, 2003). Since Canada is a federation of states, most but not all drafting offices across the country adopt these conventions, some offices being more attuned to drafting in plain language than others (Office of the Scottish Parliamentary Counsel, 2006: 24). For further reading on Canadian legislative drafting and plain language see also Lortie & Bergeron, 2007; Sullivan, 2001.

1987. Australia Victorian Law Reform Commission Report

Asprey (2010: 68) asserts that the 1987 Report of the Victoria Law Reform Commission constituted “[o]ne of the major catalysts for the plain language movement in the law in Australia”. The Report made 15 recommendations and included a drafting manual both of which have proved to be influential “and have led to many reforms in the language of the law” (*ibid.*). Moreover, unlike Canada where the adoption of plain language drafting has been more piecemeal, Australia stands out as the first English-speaking country to have taken on board plain language drafting both on a national and on a federal level. For many years the Australian Government Office of Parliamentary Counsel has provided a wealth of information and links on plain language (<http://www.opc.gov.au/plain/index.htm>). For further reading on Australian legislative drafting and plain language see also Simon & Wallschutzky, 1997.

1993. US Pennsylvania Plain Language Consumer Contract Act

There are two forerunners to this piece of legislation: the first is the so-called ‘Sullivan law’ of 1978 passed by New York State requiring residential leases and consumer contracts to be “written in a clear and coherent manner using words with common and everyday meanings” (cited in Klass, 2010: 132). The second is the Connecticut Plain Language Law of 30 June 1980 stating that every consumer contract “shall be written in plain language” (Connecticut Plain Language Law 1980). The Pennsylvania Plain Language Consumer Contract Act (PLCCA), signed into law on 23 June 1993, requires lenders, retailers and landlords to redraft their loan, sale, lease and other agreements in order to “protect consumers from making contracts that they do not understand” (Pennsylvania Plain Language Consumer Contract Act 1993: § 2202 (a)). Over 20 years after its coming into force, the legacy of the PLCCA has not been unconditionally positive. According to a local attorney (Hoffmeyer, 2014) it “seems to be relatively unknown”, and van Naerssen (2005) found it wanting in terms of ensuring that contracts drafted after the PLCCA had come into force would be easy to understand. Despite its shortcomings, however, it seems to have provided the blueprint for other similar types of laws, not only in the United States but also elsewhere, and is generally the reference point in studies about consumer contracts and plain language in the English-speaking world. Nevertheless, there have also been less successful cases, such as South Africa’s Consumer Protection Act of 2008 where the section specifying what is meant by plain language is, paradoxically, written in such a long-winded and confusing way that the potential benefits to the consumer may be jeopardized (South Africa Consumer Protection Act 2008, Section 22) (3). For further reading on consumer contract legislation and plain language see also Harrison & McLaren, 1999; Stoop & Chürr, 2013; Termini, 1995.

1994. New Zealand Government ‘Rewriting the Income Tax Act’

Sawyer (2013a: 2) asserts that “the early 1990s were a time when increased complexity in tax legislation received heightened attention by policymakers in numerous jurisdictions.” The document known as ‘Rewriting the Income Tax Act’ was published by the New Zealand Government’s Inland Revenue Department in December 1994. A similar report had been produced in Australia in November 1993 (Simon & Wallschutzky, 1997: 446), but Australia was much slower than New Zealand in completing the tax law rewrite (Sawyer, 2013a: 3). The aim of the New Zealand project was to reorganize and rewrite the 1976 Income Tax Act “in such a way as to make it easier for tax professionals to use and understand. This included the recommendation that the Act be rewritten using ‘plain language’” (McAra, 1997: 54), which meant “applying all the standard principles of removing archaic words, shortening sentences, eliminating double negatives, eliminating ambiguities, using the active voice where possible etc.” (McAra, 1997: 58). The full implementation of its income tax legislation (nearly 3000 pages) took place in 2008 (Sawyer, 2013a: 3). Similar projects were also

undertaken in Australia and the United Kingdom, and in 2009 South Africa announced it would be rewriting its tax laws (Dawyer, 2013a: 2). However, New Zealand was the first to complete its tax law rewrite (*ibid.*) and could therefore be seen as setting the example for other countries. For further reading on the New Zealand income tax rewrite and plain language see also Asprey, 2010: 73-74; Richardson, 2012: 525-530.

1996. South Africa Constitution

The demise of apartheid and the transition to democracy in South Africa in the early 1990s proved to be an opportune moment for introducing not only a radically new constitution in terms of content but one written (at least in its English version) in plain language, thanks largely to the efforts of a Canadian lawyer and plain language proponent, Phil Knight, who sat on the Constituent Assembly. The final draft of 1996, which became law the following year, has been hailed by many as the high point in the history of plain language in the legal sphere. But the country was soon overtaken by more pressing problems, and the impetus for plain language drafting waned. Moreover, one or two later attempts at extending plain language to other laws were criticized, such as the Companies Act 2010 (Rawoot, 2010). However, the 1996 South African Constitution – the “soul of the nation” (Vijoen, 2001: 15) – is still in force and remains a major achievement insofar as it is “accessible for all” (*ibid.*), the result of a language policy which included removing all cases of *shall*, Latin expressions and legalese and ensuring the text was gender-neutral (Vijoen, 2001; Williams, 2009). For further reading on the South Africa Constitution and plain language see also Bekink & Botha, 2007; Deegan, 1999: 15-36; James, 1997; O’Malley, 2009; Williams, 2006: 250-251; 2009a.

1996-2010. UK Tax Law Rewrite Project

The New Zealand and Australian tax law rewrite projects were the models on which the UK Tax Law Rewrite Project was based. All three were concerned merely with rewriting tax legislation to make it more comprehensible but without interfering with the content. Sawyer (2013a: 4) sees this as a weakness: “legislators should instead address complex concepts and substantial policy issues in conjunction with any rewriting of the legislation.” However, the UK project, which took some 14 years to complete, was to prove to be a milestone, not so much because of its effect on legal practitioners and laypersons directly interested in the rewritten tax laws, but above all because of the ‘domino’ effect it would have on drafting legislation in Westminster. What began as a one-off project turned out to be “a brilliant test-bed for innovative drafting techniques” (Heaton, 2013) for the Office of the Parliamentary Counsel which rapidly transformed its legislative drafting ethos to become one of the most forward-looking proponents of plain language, some four decades after the Renton Committee had laid out its proposals for reforming legislative drafting which, at the time (1975),

were largely ignored. For further reading on the UK Tax Law Rewrite Project and plain language see also Rogers, 2008; Sawyer, 2013b; Williams, 2007: 104-109.

2006. Scottish Online Booklet on Plain Language and Legislation

Only a few years after the setting up of a Scottish Parliament in 1998, its Parliamentary Counsel Office began debating the need to restyle its legislative drafting. The outcome was the online booklet published in 2006 'Plain Language and Legislation' which outlined the proposals for modernizing the way laws were drafted in Scotland. The changes were discernible almost immediately (Williams 2007: 109-114) and were implemented for most of the new laws passed by the Scottish Parliament. This was at a time when in Westminster the major focus of attention for plain language drafting was restricted principally to the Tax Law Rewrite Project, so at that moment Scotland's Parliamentary Counsel Office was arguably more attuned to plain language than its counterpart in Westminster. Plain language principles were also evident in the wording of Scotland's referendum on independence of 18 September 2014 ('Should Scotland be an independent country? Yes/No') which differed markedly from the verbosity of certain recent referenda drafted by American states (Badger 2014). The simple wording was the result of consultation by Scotland's Electoral Commission with the Plain Language Commission as well as other stakeholders (4), a clear indication of how far plain language has penetrated institutional discourse in Scotland. For further reading on Scotland's 'Plain Language and Legislation' see also Borisnova, 2013; Williams, 2009b, 2014.

2007. US Federal Rules of Civil Procedure

Although the drafting style of legislative texts in the United States is more traditional than it is in most English-speaking countries, a "major achievement in the US is the effort to 'restyle' all the rules of procedure in the federal courts" (Asprey, 2010: 78). The original rules of procedure had been written in 1937 and were completely overhauled stylistically with the revisions taking effect from December 2006, but, as with the UK Tax Law Rewrite Project, no substantive changes were made. The committee responsible for introducing the changes, made up of lawyers, judges and plain language expert Joseph Kimble, took four years to complete its task (Cutts, 2009: 225), though the original project for restyling the court rules goes back to 1992 when legal writing expert Bryan A. Garner was recruited to assist in the Style Subcommittee (Eichhorn, 2008: 3-4). Eichhorn observes (2008: 17) that "a side-by-side comparison of the old and restyled rule language reveals that more logical organization of the rule's content, along with helpful subheadings, allows the reader to understand the restyled rule much more quickly and easily, even though the substantive meaning remains the same." However, as with the UK Tax Law Rewrite Project, some critics felt this was a missed opportunity to make substantive changes along with the restyling (e.g. Hartnett,

2006). For further reading on the US Federal Rules of Civil Procedure see also Kimble, 2005a, 2005b.

2010. US Plain Writing Act

After years of campaigning by plain language activists, in particular by the Center for Plain Language (for the build-up to the passing of the law see Cheek, 2011; Stabler, 2014: 285-288), on 13 October 2010 President Obama signed the Plain Writing Act of 2010 which requires federal agencies to write all new publications, forms and publicly distributed documents in a “clear, concise, well-organized” manner (US Plain Writing Act of 2010, Sec. 3(3)). Paradoxically, the style of writing used in this legislative text is relatively old-fashioned, but the content has far-reaching consequences because “[b]eginning not later than 1 year after the date of enactment of this Act, each agency shall use plain writing in every covered document of the agency that the agency issues or substantially revises” (US Plain Writing Act of 2010, Sec. 4(b)). The law also provides for the training of agency employees in plain writing. The Center for Plain Language evaluates yearly how well agencies comply with the Plain Writing Act. The upshot of the Act is that US federal agencies as a whole now prioritize (at least on their websites) their commitment to plain writing. Prior to 2010 this commitment was on a more piecemeal basis. However, Stabler (2014) points out that so far many federal agencies have failed to comply with the requirements laid down in the Act. The Plain Writing Act represents the first time the US government has mandated a change in how government communicates with the public: similar attempts had been made (unsuccessfully) under the presidencies of Jimmy Carter and Bill Clinton. For further reading on the Plain Writing Act of 2010 see Cheek, 2011; Stabler, 2014.

3. Areas of resistance to plain language

It is significant that in my appraisal of ten salient moments in the evolution of plain language in the legal field, only one – the first in the list, i.e. the 1973 US New York Citibank promissory note – lies outside the public sphere: the majority are concerned with legislative drafting. As has been stated elsewhere (Williams, 2011: 146), while plain language has penetrated, to an ever greater extent, legislative drafting in the English-speaking world, contracts, wills, insurance policies and other legally binding documents pertaining to the private sphere of drafting have remained relatively immune to the calls of the Plain language movement to overhaul the outmoded, verbose style in which such documents are written, despite the positive media publicity surrounding the Citibank promissory note of 1973 and the constant campaigning of the Plain language movement. For example, Tiersma (1999: 228) remarks that “despite occasional efforts at improvement, the vast majority of wills (and perhaps to a lesser extent, trusts) are still a jumble of legalese.” Lemens and Adams (2015) affirm that even today “the writing in most contracts is fundamentally flawed. Any given contract will likely be riddled with

deficient usages that collectively turn contract prose into ‘legalese’ — flagrant archaisms, botched verbs, redundancy, endless sentences, meaningless boilerplate, and so on.” Balmford (2009) has even surmised that the origins of the current global economic and financial crisis beginning in 2008 can be put down to the impenetrable wording of contracts and documentation in the US banking and financial sectors which was to trigger the collapse of a number of major financial institutions. However, some critics (e.g. Johnson, 2015: 490) have asserted that it may be better in some cases to retain traditional terms of art in a contract rather than follow the precepts of plain language as “such terms serve as a means of lending credibility and persuading audiences within an established discourse community.”

Given the numerous success stories illustrating how plain language has been positively influencing legislative drafting, the contrast with the sluggishness of most contract drafters to take plain language on board is all the more striking. As Lemens and Adams (2015) point out

in the precedent-driven world of contracts, inertia is a force to be reckoned with. Many people don't like change or creativity. They prefer what they're used to, and they don't appreciate anyone suggesting that it's somehow lacking. And in big companies, turf battles can further impede change. Furthermore, some lawyers would likely find it challenging to be instructed to change how they draft contracts: the illusion that one writes well is hard to shake.

At the same time, it is hard to imagine that the old-fashioned legalese typifying most contracts will last indefinitely. Just as the much-publicized photo in August 2015 of a dead Syrian child washed up on a Turkish beach was to trigger a ‘change of heart’ among many European Union leaders about the refugee crisis after years of staunchly denying that it was a European problem that needed to be dealt with comprehensively, a widely publicized case of a contract going spectacularly wrong because of its obscure wording and having worldwide repercussions might have the same effect in persuading lawyers, and above all the companies they work for, that there is a genuine need to do away with the old-fashioned verbiage and draft contracts in plain language. But for the time being, the general mood among lawyers and companies would seem to be that there is no urgent need to reform contract drafting. This is not to deny that a number of companies and lawyers have willingly embraced the plain language ethos, or that the work of those professionals such as Kenneth Adams who have indefatigably campaigned for better contract drafting has been in vain. But plain language contract drafting has not yet become mainstream the way that plain language legislative drafting has in recent years.

A further impetus for change in contract drafting might also come as a result of advances in technology, as we will see in the following Section.

4. Further developments in plain language in the legal sphere: the potential of IT and the Internet

The revolution in information technology and the ubiquity of the Internet have profoundly affected most realms of daily life, and the legal sphere is no exception. For example, modern technology has made it feasible to update drafting style manuals on a regular basis; legislative texts are now readily available on the Net; information of a legal nature abounds through government websites, or through the postings of specific interest groups, such as law-related blogs ('blawgs'); and word processing software has made document design easy and accessible.

The Internet has undoubtedly been a major factor in persuading government agencies to find ways of improving their communication with the general public: most users today (with the exception of the elderly, many of whom are not computer-literate) will initially tend to look for the information and services they need – such as the right to unemployment benefits, maternity leave or a pension – by going on the Net and will only subsequently resort to writing or phoning or going to the office in question if the specific information they require cannot be found or dealt with online. However, when readers access the website of the government agency they are searching for, the real situation may sometimes be less rosy than is stated in some of the claims made concerning that agency's adherence to plain language. Stabler (2014: 316) observes, as regards the US Plain Writing Act of 2010, that "even though the Act has made some progress, it has not done enough." She also points out (2014: 317) that "[e]ven among lawyers, personal experience has revealed that many colleagues, including those in the legal academy, are not aware of the Act or that plain language is now required in many government communications." To overcome this problem she suggests (2014: 318) that, besides introducing enforcement procedures which are currently lacking, "agencies could solicit feedback on their writers. By adopting this technique, agencies will not only inform the public about the Act's existence, but also encourage feedback from their intended audience-readers who need to understand their documents." In such cases, the easiest way of soliciting feedback would seem to be via the Internet.

In the case of official communication with the public, then, we are witnessing – to a greater or lesser extent, depending on how attuned the government agency in question is to adopting plain language – forms of popularization of official discourse.

The question of legally binding texts, on the contrary, poses a different set of problems, also in terms of how Internet users attempt to understand and contextualize such texts. In the United Kingdom, for example, the government-sponsored 'Good law initiative' was set up in 2013 so that users can "experience good law", i.e. law that is necessary, clear, coherent, effective and accessible, to quote the five adjectives used in the website. The 'Good law initiative' is a telling example of how the Internet can be exploited to attract a growing number of readers towards an area that has traditionally been considered the opposite of user-friendly, i.e. the legal sphere. Through a combination of TED and other videos, short texts, and a 'good law blog', the 'Good law initiative' website constitutes an appealing way of conveying complex ideas and of

making matters concerning the legislative sphere, including the consultation of legislation, more accessible to the layperson (see Williams, 2015).

As regards the way legislative texts are drafted, as we have observed, in most English-speaking countries efforts have been made to adopt plain language criteria to make the texts more comprehensible by removing those traditional elements of legalese. However, given the inherently complex nature of most legislative texts, plain language can only go so far in ensuring that they can be understood by a layperson. For several years the UK has also provided Explanatory Notes which can be accessed together with the law itself in order to explain some of the more technical features of the law. These Explanatory Notes, however, were essentially written for legal professionals rather than for laypersons. In 2013 an online survey was carried out in order to find out how satisfied people were with the current format of Explanatory Notes, and since 2015 discussions have been under way to change the format into something that corresponds more closely to what the general public, and not just legal professionals, want. It is revealing that one of the major points highlighted in the survey (UK Explanatory Notes Survey 2013: 1) is that “[t]he audience for Explanatory Notes is overwhelmingly online. Very few people use the printed copies of Explanatory Notes.” Equally revealing is the fact that “[t]he main reason why people don’t use Explanatory Notes is that they don’t know they exist” (UK Explanatory Notes Survey, 2013: 1).

This echoes the point made by Hoffmeyer (2014) and Stabler (2014) about the lack of awareness about the existence of laws or law-related tools that might be of benefit to both legal professionals and the general public, a chastening lesson for those actively involved in making law-related information more accessible to a wider public. On the other hand, we should bear in mind that before the era of the Internet, very few laypersons would have gone out of their way to track down a piece of legislation by going, for example, to their local library or writing to the appropriate authority for a printed copy of the law, probably for a fee. And in any case, even among today’s Internet-savvy general public, legal topics are unlikely to be a ‘must-read’ (or even a ‘might-read’) for most surfers of the web. The big difference with respect to 20 years ago is that law-related information is now immediately available, generally free of charge, should anyone need it.

A further point that the ‘Good law initiative’ has underlined is that although plain language legislative drafting may have become mainstream in most English-speaking countries, the complexity of legislation continues to increase for a number of reasons, including the fact that, for example, European Union countries need to adapt their national laws to comply with the obligations laid down by the EU, and this may often lead to the drafting of longer texts (UK Office of the Parliamentary Counsel, 2013: 8). The quest for simplicity, clarity and conciseness in an increasingly complex world requires considerable effort and determination, and may not always be feasible despite one’s best intentions.

Finally, we return to the question of how to make contracts, wills and other legally binding documents from the private sphere in English more readable via the Internet and modern technology. Adams – who has written prolifically on contract drafting from

a plain language perspective (see, e.g., Adams, 2013) – is aware (2014) that “currently, the materials available for those teaching contract drafting aren’t comprehensive enough.” There are innumerable online courses available on contract drafting itself, some free of charge, but they are mainly concerned with how to write contracts in the current verbose style, not with how to draft them in plain language. There are of course a number of webpages written by plain language exponents or by academics who advocate drafting contracts in plain language, for example Stephens (2014) or Chesler (2009). But because the majority of contracts, wills, insurance policies and other legally binding documents pertaining to the private sphere in the English-speaking world are still written in legalese, most law firms are reluctant to offer a service, such as how to draft a contract, in a style that does not correspond to the way things actually are. Naturally, there are notable exceptions, and some law firms pride themselves in their commitment to drafting plain language contracts (5). However, it would appear that even today, if one searches on the Internet (e.g. by googling “plain language contracts”), the question of introducing plain language into contracts is an endeavour largely pursued by plain language groups, government agencies and academia rather than most practising lawyers.

Stigmatizing and publicizing bad drafting habits as well as praising cases where companies or agencies have visibly improved their drafting style has long been a ploy used by a number of plain language associations, beginning with the Plain English Campaign, and awards are still given in various English-speaking countries for pieces of exceptionally good and bad writing (see Giordano 2014).

Since one of the major reasons for lawyers’ conservatism in this regard is constituted by their fear that the courts may reject any wording that differs from the customary language used in contracts, one avenue worth exploring might be that of persuading judges themselves of the merits of adopting plain language. Recently media attention focused on a case highlighting a judge’s decision at the Ontario Court of Justice to write a judgment in plain language (Benman, 2015; Boyd, 2015). Such cases may still be exceptional today, but then so was the Citibank’s decision to write its ‘iconic’ promissory note in plain language back in 1973. According to Flammer (2010: 199), whose questionnaire was answered by almost 300 judges in the United States, 66 per cent prefer plain English with respect to 34 per cent who prefer traditional legalese. Painter (2009) is one of the better-known cases of a judge advocating the adoption of plain language (though he has now retired as a judge and is a member of a Cincinnati law firm). As he suggests (2007: 18): “Let’s stop writing as if we were using quill pens, slumped over a Dickensian desk. [...] The more clutter and cobwebs you can get out of your document, the more room you have to make your argument.”

Whether or not plain language will finally become mainstream in the drafting of contracts, wills and other legally binding documents – not to mention court judgments – may well depend on the power of the Internet to ‘get the message across’ to growing numbers of legal professionals, particularly lawyers, many of whom may still be unaware – or indifferent to the fact – that there has been a vociferous lobby for the past 40 years or more fighting to change communication in the legal sphere so that it can be

understood by laypersons. Much has been achieved over the past 40 years, but the job is still far from complete.

Notes

1. Agreement of 17 February 2011 between the Charles River Pollution Control District and the Town of Millis, Massachusetts: http://www.millis.org/Pages/MillisMA_Admin/CRPCD%20agreement%20amendment.pdf.

2. <http://www.plainlanguage.gov/examples/government/radio.cfm>.

3. “Few of the provisions of the Consumer Protection Act 68 of 2008 have been more perplexing to attorneys than s 22 which deals with the plain language standard. Perhaps this is because ironically the section which explains what plain language is not written in plain language. Perhaps it is just because attorneys are not used to drafting in this way.” <https://jutalaw.co.za/print/events/Event/14>.

4. See www.clearest.co.uk/news/2013/2/10/scots_referendum_question_is_clearer_now; UK Electoral Commission 2014: 32-33).

5. Examples can be found at the following web pages: <http://www.wolfbaldwin.com/Commercial-Litigation-Articles/Plain-Language-Consumer-Contract-Act.shtml>; <http://www.smartcampaign.org/tools-a-resources/276-loan-contract-summary-handout-mibanco>; <https://www.invigorlaw.com/practice-areas/contracts/>.

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Plain language organizations and associations

An “Inventory of organizations and proponents of plain language, clear communication and literacy” containing many of the links listed below and updated to March 2014 is available in pdf format at the icclear.net website. It is concerned with plain language in general and hence is not restricted to the legal sphere.

The following is a list of some of the major plain language organizations and associations that are concerned with legal drafting or with official communication that is related to legal or law-related matters.

Center for Plain Language (USA) is a non-profit organization helping government agencies and businesses write clearly.

Website: <http://centerforplainlanguage.org/>

Clarity – an international association promoting plain legal language (UK) – is “a worldwide group of lawyers and others who advocate using plain language in place of legalese” which also publishes the journal *Clarity*.

Website: <http://www.clarity-international.net/otherorganizations.html>

Communication Research Institute (Australia) aims “to help organisations communicate with people effectively.”

Website: <http://communication.org.au>

Everydaylaw (Australia) is run by the Victoria Law Foundation and provides “reliable, easy-to-understand legal information” for citizens in Victoria.

Website: <http://www.everyday-law.org.au/>

Law and Justice Foundation of New South Wales (Australia) offers useful resources and guidelines about plain language including a bi-monthly newsletter about plain language developments.

Website: <http://www.lawfoundation.net.au/information/pll/>

Plain English Power “is a network of New Zealand residents promoting the use of plain English in official documents and web sites.” One of its current goals is to convert the New Zealand Plain Language Bill of 2015 into law.

Website: <http://www.plainenglish.org.nz/index.php>

Plain English Campaign (UK) has been “campaigning against gobbledygook, jargon and misleading information” since 1979 and provides commercial services in plain language. Its Crystal Mark “now appears on more than 21,000 documents worldwide.” It also produces the newsletter *Plain English* magazine.

Website: <http://www.plainenglish.co.uk/>

Plain Language Association International (PLAIN) (Canada) is “the international association for plain-language supporters and practitioners that promotes clear communication in any language. Our growing network includes plain-language advocates, professionals, and organizations.”

Website: <http://www.plainlanguagenetwork.org/>

Plain Language Commission (UK) offers a series of plain language services in particular for companies including accreditation of documents with the Clear English Standard and writing skills courses for staff. It also produces the newsletter *Pikestaff*.

Website: <http://www.clearest.co.uk/pages/home>

Scribes: The American Society for Legal Writers (USA) “seeks to create an interest in writing about the law and to promote a clear, succinct, and forceful style in legal writing”, including the publication of *The Scribes Journal of Legal Writing*.

Website: <http://www.scribes.org>

Writemark: Plain English Standard (New Zealand) “is an internationally recognised quality mark originally developed in New Zealand” with the aim of helping bring plain English into common use in New Zealand.

Website: <http://www.writemark.co.nz/>

Governmental organizations which support plain language

Australian Office of Parliamentary Counsel has long been committed to plain language drafting and it devotes an entire section of its website to plain language.

Website: <http://www.opc.gov.au/plain/index.htm>

Good law initiative (UK) is “an appeal to everyone interested in the making and publishing of law to come together with a shared objective of making legislation work well for the users of today and tomorrow” and works in collaboration with the UK Office of the Parliamentary Counsel which has become increasingly committed to plain language in recent years.

Website: <https://www.gov.uk/good-law>

Government of Canada “calls for plain language to be used in its communications with the public” and promotes the use of plain language in its official documents.

Website: <http://www.btb.termiumplus.gc.ca/tcdnstyl-chap?lang=eng&lettr=chapsect13&info0=13>

New Zealand Office of Parliamentary Counsel is “committed to improving access to legislation by ensuring that legislation is drafted as clearly and simply as possible” and has published ‘Principles of clear drafting’.

Website: <http://www.pco.parliament.govt.nz/clear-drafting/>

Office of the Scottish Parliamentary Counsel is “committed to drafting legislation in plain language”, producing the online publication in 2006 on ‘Plain Language and Legislation’.

Website: <http://www.gov.scot/Publications/2006/02/17093804/0>

US Federal Government is responsible for the Plainlanguage.gov website which aims at “Improving Communication from the Federal Government to the Public.”

Website: <http://www.plainlanguage.gov/>

Law-related plain language journals and newsletters

Clarity (<http://clarity-international.net/clarityjournal/index.html>) is the journal of the law-related plain language organization of the same name and produces two issues a year.

Pikestaff (<http://www.clearest.co.uk/pages/publications/pikestaff>) is the free newsletter of the Plain Language Commission which includes short articles on plain language matters, not all law-related.

Plain English magazine (<http://www.plainenglish.co.uk/about-us/plain-english-magazine.html>) is the newsletter of the Plain English Campaign and is published on average three times a year. It includes short articles on plain language matters, not all law-related.

Plain Language Law Newsletter (<http://www.lawfoundation.net.au/publications/newsletters/pll>) is a “bimonthly e-newsletter for anyone interested in new and forthcoming plain language legal information and education resources and initiatives” published by the Law and Justice Foundation of New South Wales.

The Scribes Journal of Legal Writing (<http://www.scribes.org/scribes-journal-legal-writing>) is the official journal of Scribes: The American Society for Legal Writers, whose chief editor for many years has been Professor Joseph Kimble of the Thomas Cooley Law School, Michigan.

The Scrivener (<http://www.scribes.org/scrivener>) is also published by Scribes: The American Society for Legal Writers. It appears between two and four times a year and is a newsletter that may also include information about law-related plain language matters.

TED talks on law-related plain language

Sandra Fisher-Martens: The right to understand. March 2011.
https://www.ted.com/talks/sandra_fisher_martins_the_right_to_understand (in Portuguese with English subtitles)

Alan Siegel: Let’s simplify legal jargon. February 2010.
http://www.ted.com/talks/alan_siegel_let_s_simplify_legal_jargon

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Jaume I University
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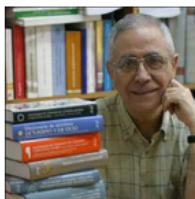
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Llengües Modernes Aplicades
de la Comunitat Valenciana

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Lenguas Modernas Aplicadas
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"We need goals, and to set those goals we need problems."

"Things need to be done through successive approaches."

Enrique Alcaraz Varó
Professor on English Philology at the
University of Alicante
Founder of IULMA

Baigorri, J. and Russo, M. 2015. *La interpretación en entornos judiciales. Monográfico de la Revista TRANS 19(1). (Interpreting in Court Settings. Monograph)* Málaga: Universidad de Málaga.

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This article reviews a ground-breaking monograph on Legal Interpreting which recently appeared in *TRANS: Revista de Traductología*, an open access peer-reviewed Spanish scientific publication. Published annually since 1997 by the University of Málaga (Spain), *TRANS* monitors research progress in translation and interpreting, offering the latest information on international state-of-the-art findings in studies, case reports, theoretical analysis and review articles on a wide range of translation and interpreting-related topics. The journal has a significant impact on international research (it is listed in the FRANCIS, LATINDEX and SCOPUS indexes, and also in the principal Spanish Impact Indexes, including DICE, CIRC, FECYT, RESH and MIAR).

For its first issue of 2015 (2015 has a regular issue and a monograph), *TRANS* presents *La interpretación en entornos judiciales*, a monograph on interpreting in legal contexts containing a number of interesting articles in both English and Spanish. Each contribution to the volume is available on line and throws useful light on recent developments in Court Interpreting in different European countries.

Guest editors Jesús Baigorri (University of Salamanca, Spain) and Maria Chiara Russo (University of Bologna, Italy) are researchers from the Alfaqueque Research Group at the University of Salamanca. The Alfaqueque Group is a team of researchers from four different countries (Spain, Germany, Chile and Italy) that focuses on interdisciplinary aspects of Interpreting and Intercultural Communication. Professor Baigorri has experience both as a prolific academic researcher and as a United Nations interpreter; likewise Professor Russo combines a high academic profile in Interpreting with a long career as a freelance conference interpreter. This combined professional/academic perspective defines the key issues and methods addressed in the contributions selected for publication in this issue of *TRANS*.

Legal interpreting is one of the most challenging fields for the professional Interpreting and research community due to its rapid evolution over the past few years. This monograph describes the current state-of-the-art in legal Interpreting at a key moment in Europe: the still recent *Directive 2010/64/EU*, adopted by the *European Parliament and Council* on 20 October 2010, for the first time explicitly envisaged a right to interpretation and translation in criminal proceedings within the European Union with a clear focus on quality. As highlighted by most of the contributions to this volume, EU members are currently working on safeguarding fair trial standards through the appropriate transposition and application of the 2010 *Directive*. However, early diagnoses presented here show that in some legal settings much still needs to be done, particularly in terms of interpreter training, recruitment, accreditation and service quality.

The volume starts with an overview by the guest editors, presenting the main topics of the seven different contributions selected and the thematic links between them. This introduction guides the reader throughout the volume in a clear, straightforward manner. The editors' opening analysis concludes that, though there remains a lot of work to be done before the demand for qualified interpreters is adequately satisfied in legal settings in Europe, certain positive steps have already been taken in particular with regard to the interesting results of three major projects funded by the European Directorate-General for Justice (see the review of the fourth, fifth and sixth contributions below).

The first contribution is an interesting report by professor emeritus Erik Hertog (KU Leuven), suggestively entitled "Looking back while going forward: 15 years of legal interpreting in the EU". The article provides a comprehensive history of the legislative regulations affecting legal interpreting in Europe between 1999-2015, together with an overview of the most significant research projects and conferences in this field. Hertog then goes on to analyze the key issues associated with the professionalization of interpreters, such as the importance of certification procedures and professional associations like EULITA, before concluding that legal interpreting has come of age and will continue to grow as a cornerstone of a just society.

Marina Pascual offers an account of her work as an interpreter at the European Union's Court of Justice. Her paper, entitled "La interpretación en el Tribunal de Justicia de la Unión Europea", starts by analyzing the institution's regulatory framework and its application of the principle of multilingualism and goes on to look at key issues in this professional scenario, such as ethical considerations, user-types, and mediation as a field-specific service.

Parts four to six of the volume are composed of three reports which address initiatives funded by the European DG for Justice, namely the IMPLI project, the CO-Minor-IN/QUEST project and the Spanish SOS-VICS project.

The first initiative, the ImPLI project (Improving Police and Legal Interpreting), focuses on the right to court and police interpreting in Italy, with emphasis on pre-trial contexts. It also analyzes how Directive 2010/64 EU has been implemented in Italy. Researchers Amato and Mack (University of Bologna) conclude that, despite some slight improvements, the transposition process has obeyed the letter rather than the spirit of the Directive and point out that Italian lawmakers have not been specific enough to effectively guarantee linguistic and procedural rights.

The CO-Minor-IN/QUEST project (2013-2014) focuses on the interactional dynamics of interpreter-mediated child interviews during the pre-trial phase in criminal procedures. Salaets and Balogh's (KU Leuven) main motivation lies in the fact that interpreter-mediated pre-trial child interviews constitute a relatively unexplored area in interpreting studies. This project involved partner institutions from six different EU member states: Belgium (KU Leuven), France (ISIT), Hungary (Eszter Foundation), Italy (University of Bologna), The Netherlands (Ministry of Security and Justice) and the United Kingdom (Heriot-Watt University). Researchers and experts from the different disciplines involved (i.e., interpreting, justice and policing, psychology and

child support) were able to share their knowledge and thus improve interpreter-mediated child interview practices. The main aim of this project was to provide children with high quality interpreting services in the context of criminal cases. Mixed methods were used to analyze the results: a quantitative method to check the significance of correlations between data statistically and a qualitative method to analyze and categorize the remarks, comments, observations and answers to open-ended questions by the respondents in writing. To avoid possible questions regarding observer bias, it was clearly indicated at the outset that the interpreter was the interview participant with whom the other professionals involved in the criminal procedure were less acquainted. The CO-Minor-IN/QUEST consortium has made a sensible, significant move in this field by making proposals for a better and more professional environment for children who find themselves in a threatening and unfamiliar setting.

Abril Martí's contribution titled "Interpreting in Gender Violence Settings: the Spanish Case", reports on some of the most important results obtained in the SOS-VICS project. It reviews the main factors which increase non-Spanish-speaking foreign women's exposure to GV (gender-based violence). The author emphasizes the negative impact of the existing language barrier on victims' capacity to overcome the cycle of violence and then goes on to review current Spanish legislation regulating PSI (Public Service Interpreting) in Spain. Martí first focuses on the status in progress and the particularity of the actual interpreting services in GV contexts and then provides key professional standards that should be guaranteed for women in such situations. The contribution concludes by suggesting a number of mechanisms which might contribute to the professionalization of PSI.

The next two sections deal with language mediation in two specific Italian scenarios. Rudvin and Pesare (University of Bologna) look at interpreting for victims of human trafficking in Italy. They start by explaining the factors which lead to 'emergency migration' in Italy, describing the different detention centers to which undocumented migrants are currently sent (CIEs - *Centros d'Identificazione e Espulsione*) and the roles played by interpreters there, as language mediators, cultural mediators, intercultural mediators and language-cultural mediators –roles which become increasingly complex due to their linguistic-pragmatic, cultural, institutional, emotional and psychological implications. This article is based on the data collected during a 6-month internship by one of the authors at the CIE in Bologna and reflects the working relationship established between the main actors in the process: the victim, the institution and the interpreter.

The project called "Interpreting Wiretapped Conversations in the Judicial Setting: Descriptive Analysis and Operating Methodology", was conceived as the result of a self-perceptive analysis of two telephone interpreting (TI) projects carried out in Italy by Maria Jesús González, author of the next article, who presents a descriptive analysis of the role of the TI and the operational methodology employed, and, more generally, of TI classification as a discipline. She then defines telephone wiretapping and describes its features and specificities in order to redefine TI in a judicial setting, outlining the

methodological complexity of a TI project and the different scenarios in which the interpreter may be involved.

The last contribution, by Ortega Herráez, entitled “Reflexiones en torno al binomio formación-acreditación como elementos constitutivos de la profesionalización de la interpretación jurídica”, examines the criteria underlying the training and certification of legal interpreters in different countries, and the relationships that may arise between these two elements, in order to present a critical analysis of the current situation in Spain and envision possible future developments. Different training and accreditation models are analyzed to justify the professionalization of interpreting as one means of guaranteeing the defendant’s right to due process and a fair trial. Taking Spain’s background and past experience of providing legal interpreting services, and the quality of those services, as a point of departure, Ortega Herráez also questions the potential efficiency of forthcoming official measures in Spain to create a national register of legal interpreters and translators given that no provisions are contemplated for obligatory previous professional training or appropriate accreditation testing.

The timeliness of this volume’s publication is beyond any doubt given the changing times legal interpreting is experiencing in Europe. Despite its recent publication, the monograph has already had an impact in several key Translation and Interpreting institutions and publications. Indeed, it was listed and recommended by the Translation Studies Federation and the European Society for Translation Studies as soon as it was published. Also reviewed by *Intersect*, a US publication on Public Service Interpreting, it was ranked “book of the week” during the first week of October, 2015.

The cutting-edge topic of legal interpreting has experienced a boom in terms of the significant research attention it has attracted in the past few years. This volume exemplifies the quality and the applicability of the research currently being carried out. Hertog’s work, in particular his thorough review of the European legislative background to legal interpreting, will become a must-read for any researcher in the field. The innovative projects and case-based analyses described in the monograph are key to an understanding of paramount emerging issues such as wiretapping interpretation, interpreter training, interpreting for vulnerable interest groups and interpreting within multilingual institutions such as the EU Court of Justice.

Blasco Mayor, M. J. and del Pozo Triviño, M. 2015. *Legal interpreting at a turning point / La interpretación en el ámbito judicial en un momento de cambio. MonTI (Monografías de Traducción e Interpretación)*, issue No. 7. San Vicent del Raspeig: Publicacions de la Universitat d'Alacant. 293 pages.

Reviewed by Juan Miguel Ortega Herráez

Department of Translation and Interpreting Studies, University of Alicante

It is not a coincidence that the 2015 issue of *MonTI (Monographs in Translation and Interpreting)* issue is devoted to legal interpreting. This field has attracted a growing interest within the Translation and Interpreting Studies community in recent years and has allowed the discipline to widen the scope of interpreting research, which had traditionally revolved essentially around conference interpreting.

MonTI is a result of the joint commitment by the three public higher education centres in the region of Valencia (Spain) that offer degrees in Translation and Interpreting (Universities of Alicante, Valencia and Jaume I). Ever since its first issue saw the light of day back in 2009, *MonTI* has published an annual monograph covering highly-specific aspects within Translation Studies, and thus developing its own niche with regard other peer-reviewed national and international journals. As such, despite its young age, the journal has gained significant international academic recognition and is listed in indexes such as Scopus, Web of Science (ISI), Carhus Plus, Dialnet, ISOC, Latindex and Redalyc. Another salient feature of this refereed journal is its commitment to language diversity, allowing for the publication of contributions in five languages (Spanish, Catalan, French, German and English). Its goal is to produce wide international dissemination of research results and academic debate which it does by producing a hard-copy and online versions in which articles not written in English are accompanied by an English translation.

The 2015 issue is the first monograph entirely devoted to interpreting matters. Contrary to the usual expectations in this field, this issue does not address conference interpreting, but focuses on legal interpreting. Although it can be argued that, from a purely professional standpoint, the origin of both genres, conference interpreting and legal interpreting, can be traced back to the same historical event, i.e., the Nuremberg Trials, they have both followed different paths and reached different degrees of professionalization and recognition. The title of this monograph, *Legal interpreting at a turning point*, illustrates the crossroads at which this genre currently finds itself. This issue contains a broad panorama of contributions made by scholars, researchers and practitioners from Europe (Belgium, Montenegro, Spain and the United Kingdom), Asia (Hong Kong), Oceania (Australia and New Zealand) and America (the United States).

Guest editors María Jesús Blasco (Jaume I University – Castellón) and Maribel del Pozo (University of Vigo) are experienced trainers and researchers in the field of translation and interpreting. They are also active members of the Comunica Network, which acts as an academic observatory on Public Service Interpreting in Spain. In addition, Dr del Pozo has co-ordinated the EU-funded Criminal Justice project SOS-

VICS (Speak out for Support) on interpreting for gender-based violence victims, which has obtained significant impact among stakeholders in the field, while Dr Blasco is actively involved in research projects on interpreting quality. Both have been appointed by the Spanish Conference of Translation and Interpreting University Departments and Schools (CCDUTI) to serve on the academic working group that oversees the transposition of *Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings* into Spanish legislation. In this context, they have liaised with legal interpreter and translator (LIT) professional organisations, ministerial representatives, policy makers and other legal stakeholders, and therefore have a privileged background and insight into the intricacies of legal interpreting which can be clearly seen in the selection of contributions for the issue under review and the topics covered.

Is legal interpreting really at a turning point? If so, where? And in what terms? The first three articles help readers gain overall understanding of the topic under discussion and set the basis for further analysis and debate.

The adoption of the EU Directive 64/2010 is certainly the cornerstone that supports any move for change and progress in legal interpreting, at least in the European Union context. With this idea in mind Erik Hertog, emeritus professor at KU Leuven (Belgium), provides an in-depth and thorough analysis of this Directive that enshrines interpreting and translation in criminal proceedings as a fundamental and procedural right that needs to be safeguarded. He begins with an overview of the EU legislative background and the long and complex process that ultimately led to the adoption of the Directive in its present form. He then analyses the Directive and highlights the challenges its different articles may pose to Member States vis-à-vis its appropriate transposition into national legislation. In this regard, he identifies four sets of hurdles that need to be overcome: 1) Challenges in terms of the rights enshrined (translation and interpreting); 2) Cost issues; 3) Assurance of quality and 4) Administrative challenges that the new regulation may pose, and briefly evokes the transposition procedure, acknowledging that “it is an illusion to think that in most Member States the transposition of the Directive will change the LIT landscape overnight”. Consequently, he encourages the adoption of a long-term approach covering eight incremental steps that will attain the goals defined and respect the spirit of the Directive (working group on LIT; overall strategy and quality chain in LIT; implementing good practice information on Directive; training in LIT; videoconferencing; registers; cost management; involving legal operators in training). Prof Hertog concludes by referring to other EU instruments that enshrine fair trial rights, all of which expressly mention the provision of translation and interpreting services. This paper gives us an idea of the importance of Directive 64/2010 and the triggering and mirroring effect that it may produce in jurisdictions and legal settings other than criminal proceedings.

Unlike what is customary in other journals and special issues of a monographic nature, the guest editors of this issue do not contribute a mere introductory overview of the volume, presenting its general goals and the main ideas contained in the articles submitted by the contributing authors, but offer an in-depth contribution entitled “*Legal*

Interpreting in Spain at a Turning Point”, mirroring the general title of the volume. Their aim is to provide an updated overview of the Spanish situation vis-à-vis legal interpreting against the backdrop of Directive 64/2010. They address issues such as the legal framework prior to the transposition of the Directive and the arrangements made for legal interpreting provision, besides reviewing, bringing together and putting forward various proposals that would eventually contribute to attain the ultimate goal of the Directive, i.e., the right to quality translation and interpreting in criminal proceedings. To that end, Blasco and del Pozo’s paper offers valuable and tangible ideas that academics and trainers, court and legal administrators, policymakers and political authorities could jointly implement when it comes to training (both LITs and legal operators working with LITs) and setting up a sound accreditation system and a register of legal interpreters. They acknowledge the relative complexity of some of these endeavours but are confident of success due to the solid research already conducted. To conclude, they highlight that the main issue still missing is the political will to set up a new system that will fully comply with the mandate of the Directive and truly defend fundamental rights.

Under the title “Strategies for Progress: Looking for Firm Ground”, Ann Corsellis, Vice-President of the Chartered Institute of Linguists (UK) presents a general account of the current situation regarding legal interpreting and indicates the best way forward. Corsellis, who has been at the forefront of initiatives deployed in the United Kingdom to professionalize Public Service Interpreting in the past 30 years, advocates a retrospective strategic analysis to determine which approaches have moved the profession forward and which have not. Given the turning point that legal interpreting is experiencing, at least at EU level, Corsellis recommends, in a fairly pragmatic way and presumably based on her own experience setting up the National Register of Public Service Interpreters, to build the profession on solid ground. She suggests that the robust foundations on which legal interpreting must rest should be composed of three fundamental building blocks: 1) LITs as a community of practice; 2) Public services at “local” level, i.e. the public service employees who need quality language services to accomplish their daily tasks and are in a better position to request the provision of such service from their political authorities; and 3) Academia, through rigorous training and research. These three blocks cannot act independently as if they were watertight compartments and collaboration is crucial to allow for a move forward in the field of legal interpreting. Such a move will undoubtedly be of a bottom-up nature and should be made subject to continuous evaluation to ensure an on-going process.

After this initial contextualisation, the issue continues with a series of articles that cover different aspects of legal interpreting, from the state of affairs in specific countries to the role played by interpreters and legal operators in interpreter-mediated legal encounters, as well as the crucial position of administrative instruments such as LIT registers in the professionalization process.

LIT registers are identified by many as the touchstone for ensuring quality and, subsequently, equality under the law in multilingual criminal proceedings, a principle enshrined in the mandate of section 5 of Directive 64/2010/EU. In this respect, the

contribution by Dr Melissa Wallace (University of Texas at San Antonio, United States) is particularly pertinent, as it provides a thorough overview and analysis of the concept of professional register and related matters on both sides of the Atlantic. The article presents a comparison of the different options, either already implemented or at development stage, both in the United States and in the European Union. According to Wallace, appropriate professional registers have a twofold purpose in the process of professionalization: fighting market disorder/disorientation and ensuring public trust. Registers are an invaluable tool in resolving Catch-22 situations whereby unqualified *ad hoc* interpreters providing low quality services for low fees prevent qualified practitioners from entering the market, thus generating and perpetuating among clients and users a general distrust on the ability of practitioners to provide quality services. Further potential usage for well-constructed and transparent registers may be their utility towards the resistance to outsourcing policies in the procurement of LIT services, which have proven to have undesired effects in many countries, and their potential as ladders for career progression among interpreters. Dr Melissa Wallace calls for setting up and rethinking national registers and places professional LITs, as a community of practice, in the centre of the battlefield to achieve this objective and prevent the profession from being shaped by the unilateral decisions adopted by others.

Dr Jasmina Tatar Andjelic, from the University of Montenegro at Nikšić, discusses legal interpreting in Montenegro analysed against a backdrop of negotiations and requirements for future EU accession. Learning about the LIT situation in smaller countries which, on many occasions, may have not received the merit they deserve, is always insightful. After her detailed presentation of the legal framework regulating legal interpreting and translation both in Montenegro and in the neighbouring Balkan countries, Andjelic highlights the elements that need to be amended to fully comply with the current stipulations and, more importantly, with the spirit of EU law. Some of the elements she identifies are the need for a clearer terminological distinction between the two close but distinct domains of legal translation and legal interpreting; improvement in the selection criteria of aspiring LITs and reconfiguration of certification exams so that translation and interpreting skills are tested; setting up specific training both for LITs and for professionals working with them; introducing a quality control system and fostering the creation of a professional association with all its implications. The diagnosis and suggestions for improvement proposed by Dr Andjelic follow elements of the pattern described in previous contributions, thus confirming that in most countries there are similar problems and similar human and intellectual capacities ready to play a role in taking the profession forward.

The two following sections, authored by Angelelli and Ortiz Soriano, adopt a different approach and focus on the role played by interpreters in very dissimilar legal communicative events. Although court interpreting tends to receive greater attention, there are several other legal settings that are equally challenging and can help gain better understanding of the challenging role played by interpreters in ensuring equality before the law. Part of the value of these two contributions lies in the fact that exploring

interpreter-mediated legal proceedings, other than open court hearings, is not an easy task and access to transcripts, records, etc. is not always possible.

Under the somewhat provocative title “Justice for All? Issues Faced by Linguistic Minorities and Border Patrol Agents during Interpreted Arraignment Interviews”, Professor Claudia Angelelli, now based at Heriot-Watt University (Edinburgh, United Kingdom), explores one particular interpreter-mediated communicative event within the US Border Patrol Agency in San Diego (USA). The case presented stems from a professional assignment in which Dr Angelelli was involved as expert witness. We therefore have the unique opportunity of gaining insight into an interpreted-mediated encounter that normally occurs behind closed doors and would have been, as such, of limited access. The article gives an account of the use of inadequate interpreting solutions and analyses the serious consequences that such an approach may entail. The video-recorded interpreter-mediated event and the official all-English non-verbatim written transcript that resulted from the interpreter’s renditions are subjective to a comparative analysis and, not surprisingly, important discrepancies between them are found. Amongst other factors, Dr Angelelli pays special attention to power differentials between primary speakers in the encounter and how the interpreter interferes in the way such power is portrayed and perceived by the interlocutors involved. It must be noted, with respect to this particular case, that the detention resulting from the interpreted interview was later reversed in the appeal process, partly thanks to the conclusions of the expert report where the performance of the interpreter was called into question. Unfortunately, situations like the one described may occur more often than one would expect – which is all the more shocking if one takes into account the bicultural and bilingual nature of the region analysed, the efforts deployed by the US Border Patrol to increase and improve its language capacity and the experience gained in the US in credentialing judiciary interpreters. Professor Claudia Angelelli acknowledges that one isolated situation may not be representative enough to extract definitive conclusions but argues, nevertheless, that in the case at hand equality before the law was not assured simply because quality interpreting and linguistic diversity were not taken into account.

Adela Ortiz Soriano, benefiting from the wider perspective obtained from her role as practicing interpreter, trainer and graduate student at Universitat Jaume I (Castellón, Spain), embarks on the challenging task of discussing interpreter impartiality during police interrogations in her article entitled “Impartiality in police interpreting”. Police interpreting is still an unchartered field in the Spanish context since accessing data has proven time-consuming and unsuccessful for many researchers. Studies in this particular field of legal interpreting are therefore scarce and rarely discuss interpreter-mediated encounters, brings added value to Ortiz’s contribution. She first discusses the concept of impartiality in Public Service Interpreting, against the backdrop of the existing literature, professional codes of ethics and recommendations issued by different instances. She also provides an overview of working conditions in police interpreting. To overcome the problem of data access, Ortiz decided to carry out an introspective, self-analysis of her performance as a police interpreter during 5 different police interrogations of French speaking sub-Saharan and French detainees assisted by duty

lawyers. She is clearly aware of the limitations and risk of subjectivity and bias the approach taken presents, to the point of admitting, from the outset, that she was not impartial during the assignments. Despite such reservations, this contribution sheds light on the reasons behind the author's own behaviour as police interpreter. Ortiz explores aspects that challenge the impartial model of interpreting and —throughout her admittedly introspective analysis— finds several examples that reveal the existing deviation between what theory and codes of conduct propose, on the one hand, and the daily practice of interpreting in a police station, on the other. Ortiz Soriano, a trained conference interpreter herself, attributes her deviations from the impartial model to one common denominator: the lack of specific training regarding both the interpreter and the police officers. Although she acknowledges that she has not found an answer to the ethical dilemmas that led her to conduct this study, she has been able to highlight the shortcomings of the impartial model of interpreting when it comes to police interpreting in Spain.

Training is an element that has been frequently discussed in Interpreting Studies. As we have seen, the need for specific training in legal interpreting at various levels and with different target audiences is a recurrent element which identified in some, if not all, of the contributions reviewed so far. The third large section of the present volume is composed of articles that specifically address LIT-related teaching and training issues.

The first of these papers provides a smooth transition from professional practice and court interpreters' role to the applicability of research findings to training. Dr Eva Ng (The University of Hong Kong) presents "Teaching and Research on Legal Interpreting: A Hong Kong Perspective", in which she provides a detailed account of the idiosyncratic bilingual nature of the Hong Kong court system (use of both English and Chinese as language of proceedings, interpreting provided for the linguistic majority, presence of many bilingual professionals other than the interpreter). Another peculiarity highlighted is the deployment of a bilingual court reporting system, which undoubtedly adds significant quality control to interpreted proceedings and can provide data and real material for both research and training. In her article, Dr Ng presents the findings of a study in which she explored aspects such as the complexity of delimiting the notion of audienceship, which undoubtedly influences the roles each professional may adopt at given moments. Interactional dynamics and power relations are also impacted by this fact. Likewise, the interpreting techniques resorted to in this atypical bilingual courtroom, especially the use of whispered simultaneous interpreting or *chuchotage*, also influence actors' participation, especially in the case of jury members who are not proficient in English which presents a serious risk as to the proper administration of justice. Based on her findings, Eva Ng presents a number of interesting and timely implications for interpreter training in the Hong Kong context. She also proposes a set of recommendations for court administrators that calls for the introduction of solutions —such as team interpreting and simultaneous interpreting equipment—and which would mitigate the implications of having different bilingual actors in the courtroom. More importantly, a specific call is made for the training of court personnel on how to best work through an interpreter. Dr Eva Ng concludes by highlighting that "quality in

interpreting is a shared responsibility among all parties involved”, thus paraphrasing Ozolins and Sandra Hale (2009). It is Sandra Hale who authors the following contribution, precisely on training for legal operators.

Professor Sandra Hale, University of New South Wales (Australia), is well known for her research into the discourse of court interpreting. Under the title “Approaching the Bench: Teaching Magistrates and Judges How to Work Effectively with Interpreters”, Hale’s article addresses a topic that is key for legal interpreting status recognition. Although her proposal has been developed for the Australian context, it could be easily adapted to the specific situation of other countries or legal systems, hence its usefulness and timeliness within the turning point that the profession is experiencing in the European Union. As discussed in the initial contextualising sections of this volume, the training of court personnel on the specificities of interpreter-mediated proceedings is paramount in the quest for interpreting quality. It is with good reason that Section 6 of Directive 64/2010/EU provides for “those responsible for the training of judges, prosecutors and judicial staff [...] to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication”. Hale begins by evoking some of the misunderstandings that prevail regarding the interpreting process and setting out some successful ways for interpreting researchers to get their message across to legal professionals. She then proceeds to present and discuss the structure of a 90-minute workshop that she delivered to new magistrates and judges. Although one may think that little can be done or said in 90 minutes given the complexity of legal interpreting, the format suggested by Hale takes attendees straight to the crucial points and provides them with food for thought. According to Hale, this type of action is not just rewarding but also very productive in professional terms, as they have contributed to raising awareness about legal interpreting among those professionals that are in a better position to trigger effective change. She points to collaborative work between different professions as an element that would undoubtedly contribute to quality interpreting.

However quality interpreting also requires future interpreters to be adequately trained, a task that can prove equally challenging as access to data for research. In the last contribution of the volume “Authentic Audiovisual Resources to Actualise Legal Interpreting Education”, Ineke Crezee, Jo Anna Burn and Nidar Gailani, from the Auckland University of Technology (New Zealand) present the results of a small-scale study carried out among their own legal interpreting students to evaluate the usefulness of audiovisual clips during their training. The study is carried out within the framework of a non-language specific training course that makes extensive use of new technologies in an attempt to achieve situated-learning. This paper provides many tips for trainers that need to accommodate different language profiles in the same classroom and who may have difficulties in accessing real court material. The authors’ proposal to confront students with real-life situations revolves around the use of different audiovisual clips of authentic courtroom interactions available on YouTube, each of which illustrates specific points of the course syllabus. As expected, the experiment proved successful since students reported that their awareness about the nature of authentic courtroom

language had increased with the use of the audiovisual clips, and that they preferred these materials to the previous audio-only interpreting clips used in their training. Such a conclusion reinforces the authors' commitment to situated learning through which students have the opportunity to experience everything that might be said, heard or seen in a courtroom.

Legal interpreting at a turning point has been published at the right moment. Guest editors Blasco and del Pozo, with the invaluable support of the MonTI editorial team and an outstanding panel of referees, have assembled a must-read volume which will provide food for thought to a wide audience. It provides researchers in the field of Interpreting in general, and Public Service Interpreting in particular, access to relevant and inspiring research findings, and offers teachers and trainers proposals coming from the different corners of the world. But more importantly, it is a valuable and reliable source of information for public officials and authorities with decision-making powers. This will hopefully lead to legal interpreting being given the status it deserves and benefiting society as a whole. Last but not the least, aspiring and practising LITs, if they truly envisage becoming part of a professional community of practice, will benefit enormously from the diverse and varied contributions that *MonTI* has put together.

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