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ABSTRACT

In un'epoca in cui l'interdipendenza e l'interazione tra soggetti, individui ed entità statali e sovranazionali è all'ordine del giorno, la traduzione acquista un ruolo sempre più importante. Non solo essa risulta auspicabile ma necessaria. Si traduce perché anche coloro che non possiedono le competenze adatte per comprendere un testo scritto in una lingua straniera possano avervi accesso. Questo vale per qualsiasi cosa, dal manuale di istruzioni della lavatrice, ai classici della letteratura francese, ma anche per qualcosa di invisibile, che riguarda tutti noi e condiziona i nostri comportamenti: il diritto. Partendo dal principio "l'ignoranza del diritto non è scusata", si capisce come il destinatario di norme che sanciscono i suoi diritti e obblighi sia tenuto a conoscerle e non solo, ha anche il diritto di potervi accedere. Oggi più che mai che, in particolare per noi Europei, la centralità dello Stato come fonte di norme comportamentali inizia a lasciare spazio a soggetti sovraordinati come le organizzazioni internazionali, la traduzione di testi giuridici si rende necessaria. Ecco che legislazioni nazionali e accordi internazionali vengono resi disponibili in più versioni linguistiche, sia con valore di legge e quindi vincolanti, che a mero scopo informativo e/o educativo. A questo proposito, fondamentale in ambito di traduzione giuridica è il concetto di validità che distingue le "semplici" traduzioni dalle traduzioni autentiche, che non solo hanno valore di legge ma che sono leggi nel vero senso della parola, con le stesse implicazioni e produttrici degli stessi effetti. Portando queste considerazioni al limite, la traduzione non esiste. Esiste come processo ma non come risultato. Il risultato è legge. Il traduttore ha quindi una responsabilità non indifferente nei confronti del testo di partenza e di quello di destinazione, che lo pone in una posizione intermedia tra colui che ha concepito il testo giuridico e il suo/i suoi destinatario/i, ricoprendo allo stesso tempo il ruolo di primo destinatario e secondo produttore, produttore di un testo nuovo a tutti gli effetti e

indipendente rispetto al testo di origine. Va sottolineato e tenuto a mente, infatti, che il testo tradotto non deriva dall'originale, tra i due non c'è un rapporto di tipo gerarchico né di derivazione. Non c'è un primo e un secondo, e *originale* non è sinonimo di "quello che fa fede". I due testi sono contemporaneamente lo stesso testo e due entità separate e autonome. Una volta che il documento viene tradotto, avendo in mente un destinatario preciso, per quest'ultimo esso cessa di esistere, non ha importanza né valore alcuno. L'unico testo rilevante è il frutto della traduzione, che però traduzione non è. Ecco perché il termine impiegato non è traduzione bensì versione linguistica. Possiamo quindi parlare propriamente di traduzione solo riferendoci a testi privi di validità legale e gerarchicamente inferiori rispetto al testo da cui nascono, traduzioni a meri scopi informativi che non rilevano dal punto di vista giuridico. Questo è vero per leggi, regolamenti, accordi a livello nazionale e internazionale, che coinvolgono entità statali o sovrastatali, in ogni caso di carattere pubblico, ma lo stesso vale a livello privato. La crescente interazione tra individui provenienti da nazioni diverse si traduce in documenti legali, come accordi e contratti tra privati, che sempre più spesso fanno sorgere un problema linguistico, risolto per mezzo di traduzioni o tramite l'espressione di un consenso affinché il documento sia valido in una lingua piuttosto che un'altra. Versioni linguistiche e traduzioni, rispondendo a bisogni diversi (informazione versus prescrizione), hanno priorità diverse e seguono regole più o meno diverse. Allo stesso modo la traduzione di testi vincolanti, a prescindere dal fatto che l'outcome sia vincolante o meno, differisce da quella di testi che hanno come oggetto il diritto, che riguardano il diritto, ma che diritto non sono. Ne sono un esempio libri di testo, trascrizioni di conferenze stampa e interviste o articoli di riviste specializzate, catalogabili sotto la dicitura "legal texts" ma giuridicamente irrilevanti. Ecco perché questo lavoro verterà su testi con forza di legge, vale a dire legislazioni nazionali, accordi internazionali e documenti legali privati.

Va sottolineato che l'aspetto prettamente giuridico della traduzione giuridica è solo un lato della medaglia. Essa si posiziona infatti a cavallo tra

giurisprudenza e linguistica/teoria della traduzione, in una situazione in cui queste due discipline così lontane vincolano, in modo diverso ma altrettanto forte, la libertà del traduttore. Dal punto di vista linguistico, la prima e fondamentale difficoltà, che si traduce poi in limite, che si incontra è proprio data dal fatto che la traduzione è legge, e come tale va trattata, in termini di formulazione e peso che le parole acquisiscono. La differenza sostanziale tra un testo di qualsiasi genere e un testo con valore legale risiede nella sua natura vincolante e negli effetti che produce. L'approccio che sembra essere il più adatto ai testi di natura giuridica è quello funzionalista che, appunto, ponendo l'accento sulla funzione del documento e sugli effetti che questo è nato per produrre tende a non curarsi di aspetti prettamente formali, prediligendo i contenuti. Ciononostante non bisogna commettere l'errore di pensare che stile e formulazione non abbiano alcun peso nella traduzione di un testo giuridico da una lingua all'altra, anzi. Il traduttore giuridico dovrà sottostare a regole dettate dalla lingua giuridica nella quale sta traducendo, e sottolineo giuridica. Le regole sintattiche e stilistiche che dovranno essere rispettate non saranno, infatti, quelle della lingua *tout court* (per quanto di un registro alto) ma quelle della lingua giuridica di destinazione. Questo introduce un altro degli argomenti salienti di questo lavoro, ossia il fatto che il diritto faccia riferimento ad una lingua speciale e specialistica rispetto a quella parlata comunemente. Non si tratta tanto di un sottoinsieme di quella parlata nel paese in questione ma è più un suo clone leggermente alterato, creato per soddisfare bisogni particolari, esprimere concetti particolari e univoci, che risponde a regole sintattiche, semantiche, stilistiche e talvolta anche morfologiche, diverse. Ma le due differiscono in particolar modo, e questo vale per tutte le lingue speciali, a livello terminologico. La peculiarità del linguaggio giuridico, però, sta nella sua somiglianza con la lingua di tutti i giorni. Non è raro che esso utilizzi termini appartenenti al linguaggio corrente, ma anche se spesso questo non pone problemi di significato, non è la regola: il più delle volte termini apparentemente comuni acquisiscono un significato particolare, ma soprattutto diverso da quello comune. Il problema sta nelle ripercussioni e negli effetti che un'interpretazione piuttosto che

un'altra possono avere a livello giuridico. Questo perché, come già detto, ogni testo giuridico ha come obiettivo la produzione (o la non produzione) di determinate conseguenze, basandosi totalmente sulla parola. Ecco che il traduttore giuridico deve essere più attento dei suoi colleghi che si occupano di altre discipline e inoltre, e forse soprattutto, consapevole. È necessario quindi che il traduttore giuridico abbia non solo una preparazione linguistica adeguata, non solo dev'essere in grado di comprendere ed esprimere concetti in (almeno) due lingue, ma deve disporre di un certo grado di competenza giuridica. Questo perché deve essere in grado non solo di rendere esattamente il significato del testo di origine in quello di destinazione ma anche di prevedere gli effetti giuridici che entrambi avranno, e produrre quindi un testo che porti esattamente alle stesse conseguenze, compito estremamente difficile per un traduttore completamente estraneo al mondo del diritto. Viceversa, un tecnico non può improvvisarsi traduttore, benché disponga di elevate conoscenze linguistiche. La domanda sorge spontanea, chi traduce? L'ideale sarebbe un ibrido, ma un grado elevato di conoscenze in entrambe le discipline è forse chiedere un po' troppo. La soluzione sembra essere una collaborazione, collaborazione che può avvenire a diversi livelli e in diverse fasi del processo produttivo di un testo giuridico, dalla redazione all'applicazione, passando ovviamente per la traduzione. Abbiamo detto che privati a parte, sono le organizzazioni internazionali i maggiori produttori di documenti che necessitano di essere tradotti, proprio per il loro carattere internazionale. Non tutte però sono produttrici di testi giuridicamente vincolanti. Anche quelle (poche) investite di potere legislativo, presentano ovviamente caratteristiche peculiari rispetto agli stati e allo stesso modo i documenti da loro prodotti vanno analizzati separatamente. Non solo, com'è ovvio che sia, per i trattati da esse conclusi, ma anche per la legislazione che queste producono. In più, essendo composte da più entità statali si pone anche il problema di quali debbano essere le lingue utilizzate nella redazione di documenti legali, un problema non solo tecnico ma che va a toccare anche aspetti politici e sociali. Queste sono le ragioni per cui, dopo aver affrontato le particolarità e le problematiche della traduzione giuridica e del linguaggio

giuridico, e dopo aver analizzato la figura del traduttore giuridico, l'ultima parte di questo lavorò si focalizzerà su due situazioni in cui la traduzione giuridica è all'ordine del giorno: due delle organizzazioni internazionali più importanti e influenti sulla scena mondiale e che si distinguono dalle altre non solo per la loro vocazione e composizione, ma per il loro ruolo di produttrici di testi giuridicamente vincolanti. Stiamo parlando dell'organizzazione intergovernativa per eccellenza, dotata di lawmaking power, le Nazioni Unite, e dell'esperimento sovrannazionale forse più ambizioso, che è una via di mezzo tra organizzazione e governo federale e che in termini linguistici si pone come stato multilingue, ovvero l'Unione Europea.

INTRODUCTION

On ne peut pas se permettre de traduire une loi comme on traduit un autre texte, car la traduction est aussi loi[(1)].

This sentence summarizes perfectly the assumption from which this work has been thought and drafted. Nowadays, in a time where interdependence and interactions among (legal) subjects are the rule, translation acquires an increasingly important role. Not only it is desirable but necessary. We translate so that, those who are not able to understand a text written in a language different by their own, may have access to it anyway. This is true for all kinds of documents, and consequently also for something intangible we perceive and are conditioned from constantly: law. It is the nature itself of this discipline what gives the translator hard times. The peculiarity of legal texts, so, rests in their nature and most of all in the discipline they are born from. Law is an inflexible and intransigent social science, characterized by its looking for precision and univocity, setting therefore limits and boundaries within which the translator can move to deliver a new text. This search for accuracy and univocity collides with the nature itself of language which is tendencially ambiguous and indeterminate. Law itself, paradoxically, looks for certainty by being uncertain, trying to provide hypothetical cases which can suit more than one concrete situation, even though this is true in different measure according to the kind of law system we are dealing with. Accordingly, from the linguistic point of view the first and non-negligible difficulty, which becomes a limit, is due to the fact translation *is* law, and has to be treated as such, in terms of formulation and weight words acquire. The crucial difference between any text and a legally authoritative text rests in its binding nature and in the effects it produces. Given these intrinsic features of

(1) LEGAULT G. A., Fonctions et structure du langage juridique, *Meta : journal des traducteurs / Meta: Translators' Journal,* vol. 24, n° 1, 1979, p. 19

language and law, it is not difficult to understand how, in a subject in which they melt together, and on top of that more than one language and law system are involved, these problems are doubled if not squared. Legal translation is right in the middle between language and law, in a situation in which these two disciplines bind, in different but equally strong ways, the work of the legal translator. They bind and direct at the same time, contemporarily simplifying and complicating his/her job. It may sound absurd but by being so strict, legal translation sets out the pattern the translator should follow leaving little to no space to his/her personal initiative. The combination of the two disciplines poses a problem of priorities, which one should be favoured? The answer to this question is useful to understand who should be charged with the translation of legal texts, if a law or a linguistic/translation expert. A problem of duality is related to languages and legal systems, as well. The thing is that, if a text needs to be translated, with every probability the translator will have to deal with two legal systems, in which not necessarily he/she will find the same concepts. Plus, which is the language he/she should know best? The source or the target language? And what about culture and legal systems? Is it necessary for *two* experts (one coming from the source world and the other one from the target one) to collaborate to understand completely what they are working on and leave space to no doubts? These are just a few of the issues this work deals with. The translator is asked to deliver a new legal text in a different language, sharing with the source contents, purposes and desired effects. It is commonly shared that "in view of the special nature of legally binding texts [...] substance must always prevail on form"[(2)]. As for structure and style, the translator should adopt the ones typical of the target legal system and language. This witnesses one of the main features of legal translation, which, as all special purpose translations, favours target rather than origin, resulting in a receiver oriented approach. In any case, it is clear

[(2)] SARCEVIC S., *Legal Translation and Translation Theory: a Receiver-oriented Approach*, Legal translation: history, theory/ies and practice. International colloquium University of Geneva, February 17-19, 2000: [proceedings]. - Berne, p. 3

how the legal translator should be more attentive and careful with respect to his/her homologous dealing with other subjects, and on top of that, conscious and doubly competent. Legal translation, straddling between language and law, makes it necessary for the translator to master both. He/she is supposed to have adequate linguistic skills as well as a certain degree of knowledge in the legal field. This is due to the fact translation is first of all a matter of understanding. And in legal translation understanding acquires a double meaning: understanding in terms of language and vocabulary and understanding in terms of contents and technical nuances. Once the meaning, that is what needs to be delivered in the translated text, is clear, the translator should be able to express it effectively and accurately. In order to do that, he/she should be able to foresee the effects the new text is going to produce, conceiving and drafting a text which would lead exactly to the same consequences, and this is obviously challenging for a translator completely out of the juridical world. Similarly, a legal professional cannot act as translator, because lacking of linguists' sensibility and competence. Since a perfect master of both disciplines is not only uncommon but also difficult to achieve, the more efficient solution would be, and actually is, collaboration between the two sides, a cooperation that may take place at different stages of the process leading to the publication of the new version of the legal text, from drafting to application, passing from translation, obviously.

It is worth underlying, legal texts are not all equally important. The first distinction concerning original texts one should make is, for as obvious as it may seem, between texts *about* law and law itself. They do not require the same care and attention, even though this does not mean translating texts of the first kind (e.g. articles of specialized magazines or textbooks) is easier than translating law; it is just that the approach the translator should have with regard to the text is slightly different. This is due to the different function they have, and related to the already mentioned importance of effects. The approach that seems to be the more suitable is the functionalist approach, which stresses the importance of function and the effects the text is going to produce, as determinant in order to translate it, having the

tendency of favouring contents over merely formal aspects. Nevertheless one should not assume style and formulation are of no importance at all. Conversely, the legal translator is supposed to follow rules dictated by the legal language into which he/she is translating. The syntactic and stylistic rules to be observed are not the ones of the target language *tout court* but the ones of the *legal* target language. This introduces us to another topic this work deals with, namely the existence of a special language law makes reference to. It is a special language, related to the common one but relatively independent from it. It is not a kind of it but more its slightly altered clone, born to respond to particular needs and express special, specific and unambiguous concepts, obeying to different syntactic, semantic and stylistic rules. But the main difference between the two concerns vocabulary, as it happens for every language for special purposes. Yet, the peculiarity of the legal language rests in its being similar to everyday language. Not seldom it does use terms belonging to the current language, but with a different acceptation. The problem is related to the repercussion and the effects one interpretation rather than another may have at a legal level. The reason why is, as already mentioned, every legal text has a goal: the realisation of certain consequences, and to do that they rely completely on words.

Of paramount importance, is the notion of authenticity, which distinguishes "pure" translations from authentic translations that not only have force of law but *are* law, with the same implications and producers of the same effects. Taking it to the extreme, translation does not exist. Or better, it does exist as process but not as result. The result is law, and this is why the translator has a certain degree of responsibility with respect to both the origin and the target text. Here is the intermediary role of the translator, between the conceiver and the receiver of the text, playing both the role of first addressee and second producer, producer of a new text, independent from the text of origin which ceases to have any value and importance at all from the moment it is translated. We should point out and keep in mind, the translated text does not derive from the original, there is no hierarchic relationship between the two. The two texts are at the same time the same

text and two separate and autonomous entities. There is no first and second, and *original* does not mean the one to refer to, the one one should consider, the valid one. On the contrary, once it is translated it ceases producing effects for the target of the translated texts, for whom it has no validity at all. The only text that matters is the result of translation, that by the way is not a translation. This explains why we do not talk about translation but rather of linguistic versions. We can actually speak properly of translation making reference to texts with no legal validity and therefore hierarchically inferior with respect to the text they mirror, translation for mere informative purposes, irrelevant from the legal point of view. All this is true for laws, regulations, agreements both at a national and international level, involving both private and public subjects. The increasing interaction between individuals coming from different realities gives birth to legal documents of all kinds, like contracts and agreements which more and more often arise a linguistic problem, solved by means of translation or language clauses, establishing which is (are) the language version(s) to be considered authentic. Linguistic versions and translations are born from different needs (information vs. prescription), have different priorities and follow different rules. Similarly, the translation of binding texts, regardless of the fact the outcome is binding or not, differs from the one of texts *about* law. This is the reason why text having force of law are the object of this work, that is to say national legislation, international agreements and private legal documents. Once again, I am not saying the translation of non-authoritative texts is easier but I had to make a choice and it fell on the more rich in ties, limitations and implications from a legal point of view.

With these premises, it is quite clear this work will focus on authoritative texts, namely international treaties, national legislation and private legal documents, which will be analysed in the first chapter. As we will see they do share some features but dealing with different subjects and having different objects, they do present differences in terms of approach and translation strategies. International agreements, being texts negotiated by parties defending particular interests, present a relatively vague and potentially

ambiguous formulation. If on the one side this simplifies the achievement of an agreement, on the other it may be source of disputes and legal arguments. The fundamental problem here is interpretation, since a possible multiple interpretation of the text may result in conflicts among the parties. Given the multiplicity of parties and languages involved in the agreement, international law provides the parties are supposed to find an agreement on the languages to be declared authoritative, with the goal of improving the certainty of law. For the same reasons, international agreements tendencially follow a specific structure. And this is what happens with private acts, as well. Different is the case of national legislation which may be translated basically for two purposes: legal, in case of a bilingual and multilingual country and informative, in case of a monolingual country. The outcomes will have different force and effect: the different language versions of statutes and laws in a multilingual country are equally authoritative and producers of the same legal effects. On the other hand a translation of a national legislation of a monolingual country has no legal value at all and produces no effects in that language. This leads to different implications and obstacles the translator has to deal with. The major one is related to the strict and indissoluble relation among legal systems and legal languages, and this is the reason why translating a legislation making reference to a particular legal system in a legal language that has nothing to do with it, may be particularly challenging. The difficulty is, once more, double sided: the more distant the two systems are, the more difficult the translation is going to be, and the same is true for languages, because the correspondence between concepts and terms is not evident at all. On the contrary, with proximate languages and legal systems the task would be less complex. Difficulties are at their lowest in case of multilingual countries, in which we will always find a one to one correspondence of terms, referring to the same concepts.

After dealing with text typologies, the attention will be drawn on legal translation itself and on the person in charge of it. We will try to understand what makes legal translation different from the other special purposes translations and then which is the approach the legal translator should have

to such a complex discipline, and most of all who the legal translator should be. The problem of interpretation will arise again, together with the degree of fidelity that the target text should bear with respect to the original. Once again, it is a matter of priorities and limits; the translator is first of all committed to the meaning and the effects of the text more than to the text itself, in terms of words and formulations. But we will see how despite of all these limits an accurate translation is possible to achieve.

Yet, the core of this thesis is chapter three in which, after having described object and subjects of the legal translation, we will finally face the problems it sets out both on the legal and the linguistic side. We will start analysing the features of the legal language and its controversial relation with the common language, which is at the basis of many of the problems it arises. Then we will focus on function, determinant in terms of translation strategies, and on the legal language paradox mentioned above, i.e. the fact it requires precision and vagueness at the same time. Provided law is a social science, we will relate legal language, law and legal systems clarifying which are the most problematic situations, why it is so, and how the legal translator is supposed to remedy them, with a focus on the opposition Common/Civil Law. A more linguistic section will follow, analysing the main issues related to language and its possible solutions. Mistakes are unavoidable, anyway, and this is why international law provides for their regulation; anticipating the protagonists of the last chapter we will see how the UN and the EU deal with errors and how they class them.

Last but not least, something more concrete: leaving privates aside, international organisations are the main producers of internationally relevant documents, which require translation. Yet, not all international organisations are producers of legally binding texts and even those (few) which are invested of legislative power are not to be treated the same way and obviously present peculiar traits with respect to states. This is why the acts they produce need to be treated separately. Not only as international agreements are concerned, but also for the legislation they produce. Plus, being them gatherings of separate and independent States, one should

consider the problem of which language(s) is (are) to be used in the drafting of the legal documents, and most importantly which are to be considered the official languages in which the document is considered authentic and authoritative. We will see how this poses not only technical but also political and social issues. And this is what chapter four is about. The last part of this work will focus on two contexts in which legal translation is an everyday practice, two of the most important and influent international organisations on the international scene that differ from the others not only for vocation and composition but, again, for their role of producers of legally binding texts. It comes as no surprise these are the governmental organisation *par excellence*, endowed of law-making power, i.e. the United Nations, and the probably most ambitious supranational experiment, halfway between an international organisation and a federal government, which in terms of languages and law is more similar to a multilingual country than an organisation: the European Union.

All this does not, evidently, make up the issue of legal translation completely. Every section could have made up a thesis on its own, but I chose to try to give a, though relatively detailed, overall idea of the subject rather than focusing on one specific aspect. In line with what I asserted throughout the whole work, I tried to keep it balanced, choosing not to lean too much neither on technical linguistic nor on the legal side of the story. The most notable absentee is undoubtedly the International Institute For The Unification Of Private Law, also known as UNIDROIT, the intergovernmental organisation which aims at the modernisation, harmonisation and coordination of private, and especially commercial law, between States and group of States, and at the establishment of uniform principles of law to attain those goals. The reason of these pondered omission, besides the fact it would have probably deserved an entire dissertation, is that it would have led us a little bit out of the path because, if it is true that it does deal with homogenisation and harmonisation also by the linguistic point of view and that it does deal with international law, it is also true that translation is not

its primary function and that its subject is a very precise and technical one, namely commercial contracts.

CHAPTER ONE: LEGAL TEXTS

CONTENTS: 1.1 The features of legal texts. – 1.2 International Legal Instruments. – 1.3 Domestic Legislation. – 1.4 Private Legal Documents

When talking about legal translation the first thing to consider is what makes it necessary and why it is so important. Growing interactions among states, coming together inside those more and more significant bodies known as international organizations or as single subjects of international law, and among citizens of an increasingly interconnected world, gives translation a newly found weight in everyday life. We are less and less bound to a state-dimension and increasingly feeling as belonging to an international reality, this is why all aspects of life are nowadays subject to translation and law is no exception. Now, what is the object of legal translation? Legal translation concerns all that has to do with the legal world, from the transcription of a press conference held after a summit to the introduction of a new EU regulation. Each and every text bears peculiar traits and has to be handled with more or less care according to function and legal force, and therefore the effect it is meant to produce, if some. Nevertheless, they share some features that make up what is called the Language of law, on which we will focus in chapter 3. There is a debate going on, on whether legal language should be treated as a technical language on its own or as ordinary language used for, and adapted to, special (legal) purposes, what is sure is that it does resemble ordinary language and that, again according to texts and their role, it can be more or less technical and consequently understandable to the layperson. We will thus focus on those official writings that, producing legal effects, are more complex and have to obey to more restrictive and rigid rules, both from a formal and substantial point of view, with respect to an

article, for instance, even if coming from a specialized journal. Legal translation can come to light at different levels: on a national basis, in the case of a bilingual or multilingual country, on an international basis, i.e. when an international organisation is concerned or in the case of an international treaty wanted by two or more countries that do not share the same language, or even when regulating legal relationships among privates coming from different legal systems and/or speaking different languages. We are talking about national legislations, international legal instruments and private legal documents, that will be the topic discussed in the second part of this chapter. But not before having dealt with the prominent features of the legal text.

1.1 THE FEATURES OF LEGAL TEXTS

As an author argues, "le texte juridique présente trois caractéristiques qui le distinguent des autres : il s'agit d'un texte *normatif* disposant d'un *style* et d'un *vocabulaire* particuliers"[3]. So, even though they are peculiar to the legal system they are expression of, we may say legal texts share some features, regardless of the language in which they have been written, as well.

If it is true that what makes legal texts different from other kinds of texts is the language in which they are drafted (meaning here not English, Dutch or French but legal language as opposed to ordinary language), it is also true that this is not the only thing. The paramount distinctive feature of legal documents *strictu sensu* is undoubtedly their constraining nature, the decisions of the legislator being reflected in law. Constraints not only for the addressees of the texts, but also implicit constraints for the translators, different according to the kind of text, as we will see throughout this chapter.

Related to this, legal texts tend to follow peculiar stylistic and structural rules, that need to be observed not only by the text producer, to whom they are natural and taken for granted, but by the legal translators as well. This acquires more and more importance when dealing with some texts in

[3] GEMAR J-C., Le plus et le moins-disant culturel du texte juridique. Langue, culture et équivalence, *Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 47, n° 2, 2002, p. 166

particular (e.g. treaties and contracts), in which form is as relevant as content.

Generally speaking, legal texts relevant to this work are "all documents which are or may become part of the judicial process"[4], we are therefore referring not only to the word of the legislator, expressed through binding acts, but also the word of the participants of the legal process (judges, lawyers, witnesses..), and everything used and coming to light in a courtroom, from the texts consulted by judges to attain the judgments, to their interpretations and verdicts, the doctrine they make reference to, and so on and so forth.

Different classifications may be done according to the approach we decide to have with legal texts. A legal approach will give us first of all a distinction between authoritative and non-authoritative texts and then a distinction in terms of involved subject and scope of action. From the linguistic point of view what should be considered are language implications and the nature of discourse of the text we are analysing.

Several classifications have been put forward by linguistics experts when trying to define legal texts but, as we will see throughout this entire work, it all seems to derive from function. So, first of all a legal text is a special-purpose text. We have now to establish *which* is the function or are the functions of it. Linguists such as Jumpelt and Reiß came to the conclusion legal texts are nothing but informative texts, i.e. texts in which the aim is to provide the reader with some information. We do agree with Sarcevic when she says, they got it wrong[5], or to say the least they did not catch the full nature of legal texts: their function may vary according to context and typology. It follows, legal texts *may* have an informative purpose but this is definitely not the only function they have. I would rather say, their main function is normative, or *regulatory*[6] as Sarcevic said, since they normally do prescribe how people should or should not behave, commonly through the use of the imperative. But if taken out from their context and put, let's say, in

[4] HARVEY M.,What's so Special about Legal Translation?, *Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 47, n° 2, 2002, p. 178

[5] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997 p. 7

[6] *Ibid,* p. 10

a textbook, the function they acquire is different: the same words and concepts are not there to produce any effect except the one to educate the student. The same is true for doctrine, that is commonly included in normative texts but is not productive of juridical effects, at least not directly.

So, the function of a legal text does not depend on something intrinsic, but has to be traced back to the communicative situation, the context which produced it and the one that is about to receive it. As a consequence, the same text can be authoritative and then have a prescriptive function for the citizen that has to abide it, but may have a purely informative purpose for a citizen of a third country that is not bound by that legislation.

We do agree, then, that what makes legal texts special is the function they have. As Sarcevic notes, in legal theory, language has two functions: regulatory (i.e. prescriptive) and informative (i.e. descriptive). Accordingly, legal texts may be divided into *primarily prescriptive*, *primarily descriptive but also descriptive*, and *purely descriptive*[7]. The first group includes the first documents that come to our minds when speaking about legal texts: legislative texts, that is to say "regulatory instruments containing rules of conduct or norms"[8], this is the case of laws and regulations, contracts, codes, treaties and conventions, in other words *documentary sources of law.* The second category comprises "judicial decisions and instruments used to carry on judicial and administrative proceedings"[9] making up a sort of hybrid category, containing both functions, whereas in the third one we may find all of those non-binding texts that cannot be referred to as sources of law but rather as documents *about* law, that may however have a more or less direct and visible impact on law. We are talking about doctrine, essays and articles written by legal experts, as well as textbooks. This classification seems to perfectly overlap the one made by Bocquet in his *La traduction juridique: Fondement et méthode,* where he distinguishes normative texts from judicial

[7] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997 p. 11
[8] *Ibid.,*
[9] *Ibid.,*

text and doctrine[10], attaching a specific mood to every classification: performative, descriptive and descriptive of other text of legal nature. What is important to underline here, is that their influence and authority may vary according to the law system in which they are inscribed.

Structure depends on the kind of text we refer to, that is why linguists found it necessary to categorise legal texts.

Talking about authority, it may be a term of classification, too, distinguishing authoritative from non-authoritative legal texts. We could say that authoritative texts are legal texts *strictu sensu*, i.e. the ones bearing the most important and distinctive feature of legal texts: efficacy. Authoritative texts are meant to produce legal effects and include documents such as national and international legislations (including constitutions, codes, statutes, international agreements, charts, conventions..), private legal texts (e.g. contracts, deeds and wills), judicial texts and texts produced in trials (e.g. orders, judgments and decrees, pleadings, …) all of which tend to present their own stereotypical format, i.e. they tend to follow a predetermined structure, responding to some unwritten rules consolidated through practice, and which remains more or less the same regardless to the language of the text. Translators need, therefore, a legal competence, including being familiar with the format of the legal texts and, as much obvious as it may seem, they need to have clear in mind the function of each of its parts, to be effective text producers. For at the end of the day this I what they are, their role being writing a new text, independent from the original one even though sharing contents, meaning and objectives.

Conversely, non-authoritative texts include all those texts written in the domain of law but which have no legal force. They should not be mixed up with non-authentic translations that are translations of authoritative texts with no value in terms of enforcement and cannot be used as helping tool for interpretation. Common to both is, by the way, the purpose, which is not prescriptive but mainly informative.

[10] BOQUET C., *La Traduction Juridique, Fondement Et Méthode*, De Boek, Bruxelles, 2008, p. 10

Regardless of the stylistic peculiarity of each legal system, on a broader level, legislative texts are usually made up of preliminary, principal and final provisions.

Text and language are, as a matter of fact, strictly bound and it is difficult to speak about legal texts without making some considerations about legal language. This is why, even though a specific paragraph is dedicated to language issues, it is worthy anticipating some consideration here, as well. One feature shared by all kind of legal texts is the prescriptive role of language, aiming to the fulfilment of a specific goal. This is true, as we will see, for national legislative texts, international treaties and contracts, all aiming to modify the behaviour of the parties through the imposition of obligations, permissions, authorisations and/or prohibition, put forward in the principal provisions, i.e. the body of the text. The prescriptive nature of law, manifested through language, witnesses legal texts are no ordinary speech, even though they look like one. Some implications make them different, one above all the effects it is meant to produce. In linguistic terms this means legal productions are invested of *illocutionary force*[11], making legal speeches themselves producers of law[12]. Anticipating what we will deal with more in details in chapter three, starting from a small unit, legal rules are commonly made up of two parts: prescriptive and descriptive. The first is the *prescriptive statement of law*[13], the characterizing part, including the norm itself and *concerned mainly with expressing* legal content; on the other hand we have the description of the fact-situation, meaning the condition under which what is provided for in the first part takes place. Linguistically speaking, it is the principal verb in the statement of law which determines whether the legal actions has the illocutionary force of ordering, permitting, prohibiting or empowering. To lessen the degree of directness of

[11] BOQUET C., *La Traduction Juridique, Fondement Et Méthode*, De Boek, Bruxelles, 2008, p. 114
[12] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, 1997, London, p. 134
[13] *Ibid.*, p. 137

legal norms implicit performatives are usually employed instead of explicit performatives[14].

Contextualising these assumptions to legal texts, it follows that what is common and clearly visible is the formal way in which they are drafted. G. Cornu, law teacher and jurist, in his work *Linguistique Juridique,* recognizes almost the same categories put forward by Bocquet, to which he adds the *discours coutumier* and lingers over the linguistic features of each group. As far as law is concerned, he points out that a sort of *art legislative* exists, responding to the same essential rules: clarity, brevity and concision. The tone used in legal texts of this kind is usually neuter and this is of course related to the objective nature of law. He then focuses on some stylistic effects used by the legislator in order to stress what is essential, such as putting the verb or the sanction at the beginning of the sentence or using the passive voice, or writing pedagogically using repetitions, absolute terms and redundancies.

This is a linguistic classification, just one side of the coin; a purely legal one, would have made another distinction, based on the branch of law the texts belong to. The reason why is every branch (constitutional, commercial, administrative, criminal, civil, contractual, property, tort law etc.) has developed its own special language and way of writing. But we do not have to think neither from a merely linguistic nor from a merely legal point of view. When considering translation, we have to keep in mind that we are dealing with a two-sided subject, placed halfway between law and language. Plus, we have to proceed having in mind both source and target texts (but this is true also for language, cultural background, legal systems etc as we will see), and the translator should know in which perspective he should operate, always with a view to the expected effects. According to the purposes of target legal texts, legal translation can be classified in three categories. Firstly we have *translation for normative purposes*[15] which refers to the creation of

[14] BOQUET C., *La Traduction Juridique, Fondement Et Méthode*, De Boek, Bruxelles, 2008, p. 137
[15] CAO D. , *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 10

parallel[16] texts of laws. The translation, having the same legal force of the source text will enjoy the status of nothing but law itself. This happens with domestic legislation in bilingual and multilingual countries, and with international agreements on an transnational level. As we will see later on, these are usually drafted in one language and then translated in the other(s), but they may also be drafted simultaneously in both (or more seldom all) the official languages, as it happens for European law. In order to be considered authoritative, these texts should go through the authentication process prescribed by law. We then have *translation for informative purposes*[17] with descriptive functions. Translations of monolingual countries legislation fall in this category, the only text bearing any force of law remains the original one while the target text has been created just to make the document accessible in one or more other languages. It is created for reference only and cannot be asserted as proving anything**.** This classification continues with *legal translation for general legal and judicial purposes*[18], that can be placed halfway between the other two: even though their function is mainly descriptive, they may be used in court as part of documentary evidence.

For as non-sense as it may seem, the fact of a text being available and authentic in more than one language does not necessarily make it a translation, at least not officially. Peculiar cases are Canada, where national legal texts are simultaneously drafted both in English and French resulting in what is known as co-drafting, and the European Union, which does not translate after the entry into force and the publication of the texts, but formally drafts them in all its official languages[19]. These text will therefore not be considered translation, but once again we should talk of versions, all enjoying the same status. And it is not even always the case that all translation have force of law. We may find ourselves reading a translation of a legal text, be it of international, national or private relevance, that not only

[16] By parallel we mean equally authentic
[17] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 11
[18] *Ibid.,*
[19] Most of the language versions are actually translated from one of the languages in which the negotiation phase took place, but they are translated before their publication and entry into force. This is why translation is part of the drafting phase.

is not binding but has no legal power and meaning at all. It cannot be used by judges for interpretation, nor be referred to in order to appeal to one's rights. An international agreement may be translated in whichever language basically for informative purposes, so that the texts can be accessible not only to people speaking the official languages.

The distinction between authoritative and non-authoritative is true for translation as well. As we will see in details in the next paragraphs, translations do not enjoy the same status: some of them have exactly the same force of the original texts from which they are produced, some others are born just for informative purposes. Their function once again changes according to context, receiver and legal system.

1.2 INTERNATIONAL LEGAL INSTRUMENTS

The sources of law recognised by art 38 of the Statute of the International Court of Justice[20], annexed to the UN Charter, are: international conventions, international customs, and the general principles of law recognized by civilized nations. To these, one should add the so called subsidiary means, namely doctrine and jurisprudence, with different incidence and force according to the legal system. Being general principles of law and custom non-written sources, they are not relevant for the purposes of our work. On the contrary, we are interested in one category article 38 does not mention, because they are a sort of indirect sources: resolutions, regulations and all those documents issued by international organisations we take account of because binding and producer of legal effects at an international level, as provided by the constitutive treaty of the organisation itself[21]. The focus will be on UN and EU acts, to which chapter four is dedicated.

[20] *See* Statute of the International Court of Justice consulted at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 last accessed on 05.02.2013, art. 38

[21] This is the reason why we call them indirect sources. The constitutive treaty of the international organisation, providing one (or more) of its organs has (have) legislative powers, assumes the acts and documents have force of law, thus making them sources of law to all intents and purposes.

Looking at the vocabulary concerning international instruments we start to understand how important words are and how careful you have to be with them within a legal context. Suffice it to think about the apparently synonymous terms used to refer to written international agreements: treaty, agreement, convention, charter, protocol, covenant and accord[22], all with a slightly different meaning according to producers, subject, involved parties, validity and scope of application. Given the nuanced differences among the terms, it is clear immediately how translating them in another language may be problematic. As we will see in details when talking about the problems arisen by legal translation, the challenge lays not in language but in the legal system from which the language has derived. Comparing several sources we see that to the same term in the source language, may correspond more than one terms in the target language or vice versa.

1.2.1 DEFINING TREATIES

By international agreement, i.e. treaty, as article 2 of the Vienna Convention on the law of treaties[23] (signed at Vienna on 23 May 1969 and entered into force on 27 January 1980) suggests, we mean a manifestation of willingness, expressed in writing, by two or more subject of international law (States and/or international organisations) to be bound in the ways and within the limits provided by the treaty itself. International agreements are considered secondary law, since they derive from the brocard/custom *pacta sunt servanda* and are regulated by two conventions: the Vienna convention on the Law of the Treaties, held in the Austrian capital in 1969, containing all the provisions concerning validity, form, observance, reservations, amendments, interpretation, invalidity, termination, suspension etc, and the Convention on the Law of Treaties between States and International

[22] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 135
[23] *See* Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, as consulted at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf last accessed on 23.10.2012, art. 2

Organizations or between International Organizations, done at Vienna in 1986.

As Cao pointed out, we may recognise three classes of treaties: general multilateral treaties, binding for all the members of a certain organisation/parties adhering to a convention; treaties that establish a collaborative mechanism for states to regulate or manage a particular area of activity, and bilateral agreements, i.e. agreement signed between two parties[24].

It is common to use the term convention and agreement, in their general significance as synonyms of treaty, even though they do have a specific meaning. When talking about convention as a specific term, we refer to "instruments negotiated under the auspices of an international organisation"[25], such as agreement signed in the UN or WTO framework.

The term international agreement refers, on the other hand, to a less formal instrument than a treaty. But the main difference between the two lies in the fact that agreements tend to have a more specific matter as object (usually financial), while treaties usually codify broader subjects[26].

Last but not least, we have all those nonbinding instruments that therefore, according to article 38 of the Statute of the International Court of Justice, cannot be considered source of law. They are usually product of international organisations (e.g. UN recommendations) and are commonly referred to as soft law, providing the parties states with conduct guidelines and moral suggestions.

As far as we are concerned, the problem with treaties is they are negotiated texts. By definition treaties should be agreements, but most of the times what we read looks more like "a disagreement reduced to writing"[27]. Being difficult for the parties to find a common solution or meet halfway, they often sacrifice precision and clarity for the sake of obtaining consensus. This is why

[24] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 135
[25] *Ibid.,* p. 141
[26] *Ibid.,* p. 140
[27] Tabory in SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 204

international agreements are characterised by vagueness and ambiguity which, by the way, should not be solved by the legal translator during translation. Ambiguity here is the result of a choice and, as we will see in details in the next chapters, has to be maintained as such in the target text, too.

1.2.2 WHICH LANGUAGE?

No doubts international conventions and agreements are the most translated legal texts. As a general rule, bilateral and multilateral legal instruments are multilingual because, consistent with the principle of equality among States, they aim not to favour (even though not in a formal way) one of the parties, but also "to demonstrate the broad acceptance that the international treaty achieved and the sovereignty of the states that are parties to the agreement"[(28)]. Having its own language as official language of a treaty is an expression of cultural identity, as well. But we do have some exceptions of treaties drawn in one language only, and if it has to be one it tends to be English.

By definition, treaties presuppose the participation of several States, most of the time differing in terms of legal system, apart from language, that is why they tend to be less "technical" than national legal instruments. The use of terms referring to, or that could be associated with, a particular legal system are, in fact discouraged, favouring more neutral solutions or obviously elements common to all the involved legal systems. Yet, it is difficult to find fully coincident concepts, and a special attention should be drawn to false friends, undisputedly one of the most insidious traps of legal translation[(29)]. Anyway, the priority in such documents is to attain the greatest possible

[(28)] EUROPEAN COMMISSION, *Studies on translation and multilingualism. Language and translation in International law and European law*, Publications Office of the European Union, Luxembourg, 2012, p 15

[(29)] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 219

interlingual concordance[30] so as to avoid ambiguities that could lead to international disputes, unnecessary litigation and/or legal uncertainty.
The legislative process of an agreement implies a dialogue among the parties (negotiation), which usually takes place in one of the languages of the contractors, chosen by them, unless the organisation within which the agreement is concluded provides differently. This language is generally referred to as *working language* and will be, in all probability, the one in which the text will be drafted, enjoying the status of *official language* as well. The fact remains, a treaty may have more than one official language, if agreed by the parties. The official language is the language in which the treaty is considered authentic and therefore producer of legal effects. It may be the official language of one of the involved countries, or of both States in case of bilateral treaties, or even a third language designate by the parties. The equivalence working language - official language is almost a rule (v. multilingualism within the European Union), but not vice versa: official language are not all necessarily used during the drafting phases, on the contrary they usually take place in only one language and despite this, one or more languages may be added as official at the end of the process. This is when translation becomes necessary but, at the same time, acquiring the status of authentic version, it loses the one of translation, becoming a normative text, producer of legal effects (it does create rights and duties for the parties) to all intents and purposes.

1.2.3 Principle of Equal Authenticity and Presumption of Equal Meaning

Concerning this, the 1969 Vienna Convention, assists us with the principle of *equal authenticity*, that we find in article 33 (1) of the section of the convention regarding the interpretation of treaties. In case of a treaty being authenticated in two or more languages, "each authentic text is deemed independent for the purpose of interpretation by the court and no single text

[30] SARCEVIC S. Legal Translation and Translation Theory: a Receiver-oriented Approach, Legal translation: history, theory/ies and practice. International colloquium University of Geneva, February 17-19, 2000, Berne

(not even the original) should prevail in the event of an ambiguity or textual diversity between the various language versions"[31]. The point is, as stated in the article, that each language version is equally authoritative, it follows that no language should prevail when applying the treaty, especially in the case of discrepancy (or apparent discrepancy) among different texts, unless the parties have agreed differently. What should be underlined here is the use of the expression "language version", and not translation, leaving no space to doubts whether a hierarchy among authenticated texts in different languages exists. By authenticated, that is by far the most important word of this sentence, we mean a text that has been invested of legal force being 'adopted by the treaty-adopting body itself'- The translation ceases to be a translation, then, becoming law to all intents and purposes.

Related to the concept of equal authenticity, is of course the *presumption of equal meaning*, codified by the third paragraph of the above mentioned article 33 of the Convention on Law of Treaties. It goes without saying, that if all language versions are considered equal on a legal basis, this means they all should have the same meaning, resulting from the same intent and producing the same effects. Problems arise when ambiguities and discrepancies are at stake. Experts seem to agree, in fact, that it is very unlikely for two or more texts to have exactly the same meaning, and this is when comparison and interpretation come into play. Lawyers and judges may use different language versions in order to extract the real meaning from the text; but if this may facilitate their task, it may also make it more difficult, increasing doubts and uncertainties. Given the principle of equal authenticity it seems not clear how should they decide whether to stick to one or the other version, but we should not forget that, according to the principle of presumption of equal meaning, all version are assumed to bear the same sense, aim in the same direction and be born for the same purpose. So choosing one or the other actually makes no difference. This is why some

[31] SARCEVIC S., Legal Translation and Translation Theory: a Receiver-oriented Approach, Legal translation: history, theory/ies and practice. International colloquium University of Geneva, February 17-19, 2000, Berne, p. 4

lawyers affirm the presumption of equal meaning is not a principle that set them free, allowing them to make comparisons and work on more texts, but something that binds them to one version only, unless discrepancies and ambiguity are found[32]. In this case, the work of the judge becomes problematic since he/she has to "compare the various language versions and reconcile any discrepancies in meaning that might occur"[33].

The thing is, which *meaning* should be the right one? In other words, how should judges interpret the words they are reading, in order to fulfil the aim the legislator had in mind when drafting the treaty? Being all texts bearer of the same meaning, the meaning the judge has to ascertain is the one common to all texts. "Since the art does not specify which methods should be used to reconcile the texts, it is left to the court to determine how the parallel text should be best reconciled in each case"[34]. Basing her statement on a decision of the International Court of Justice, Sarcevic affirms that "if one or more meaning is broader than the other(s), the meaning signifying the lowest common denominator of all the texts should prevail"[35]. Paragraph four of article 33 was thought as a key to try to solve this issue: in case of discrepancies emerging from the comparison of more than one version of the treaty, these should be solved making reference to the so called *travaux preparatoires* of the treaties and the circumstances of the treaty's conclusions[36]. If this should prove itself not enough, they should take account of the prevailing understanding in order to promote uniformity. Should this attempt fail as well, the treaty should be interpreted according to its object and purpose. The formulation of this article implies a former

[32] Kruner in SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 67

[33] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 198

[34] SARCEVIC S., *Legal Translation and Translation Theory: a Receiver-oriented Approach*, Legal translation: history, theory/ies and practice. International colloquium University of Geneva, February 17-19, 2000, p. 9

[35] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 198

[36] *See* Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, as consulted at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf last accessed on 23.10.2012, last accessed on 24.10.2012, art. 31

application of articles 31 and 32 of the Convention, respectively establishing the general rules for the interpretation of treaties (according to *what* you should interpret a treaty, what should be taken in account during interpretation, i.e. context, previous or following agreements applicable in the relations between the parties) and the so called *supplementary means of interpretation.* Critiques have been put forward concerning a non-solving nature of art 33(4), complaining it does not specify concrete methods to be used to reconcile the meaning of divergent texts[37]. Plus, the practice seems to go in another direction, giving more importance to the supposed original text[38], thing that is not only not envisaged but even outlawed by article 33.

1.2.4 TEXTUAL FEATURES

States (and international organisations) are free to contract obligation in the way that best suits them. There are no fixed rules on how to draw an international agreement in terms of textual features, but the practice shows how states tend to conform with a model, giving the treaty a contact-like form. The legal instrument ruling international treaties itself, namely the 1969 Vienna Convention on the Law of the Treaties, may be taken as a model, showing clearly all the components we are about to examine. As shown in one of Cao's works, *Translating Law*, treaties present the following elements:

- Title
- Preamble
- Articles covering the substantive provisions
- Final clauses
- An attestation clause or testimonium, and signature block; and

[37] SARCEVIC S. , *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 199
[38] *Ibid,* p. 198

- Annexes, which may include protocols, exchanges of letters, agreed minutes or schedules. Exchange of notes and letters, when intended to constitute a treaty , …[39]

As for private legal texts, in case it is provisioned that the parties should conform to a certain model, form acquires the same value of contents.

Let's analyse briefly the components. Leaving aside the title, which is nothing but an immediate mean of identification of the text we are reading, the preamble contains the "names of the High Contracting Parties, the reasons, the designed plenipotentiaries, the exchange and review of powers, the agreement clause"[40], in other words it expresses background, object and purpose of the treaty and may result a very useful instrument for judges during the process of interpretation. It is usually formulated as a single sentence even if divided graphically in separate sentences to make each and every component clearer, and ending with a quasi-fixed formula (including or just stating *have agreed*) introducing the *corpus* of the treaty, i.e. the so called substantive provisions, generally containing definitions, rights and obligations of the parties, enforcement and dispute resolution clauses, formulated as it happens for national legislation, with a descriptive and a prescriptive part, as already mentioned (§ 1.1). But what is peculiar and relevant for our study, lays in the final provisions. Besides rules about potential modifications to the text of the treaty, settlement of disputes, the status of annexes, signature, entry into force, ratification, accession, ratification etc [41], final clauses usually include authentic texts provisions, stating the official languages of the treaty, underlining the fact these versions are *equally* authentic (cfr. Art 85 of the Vienna Convention on the Law of Treaties, art. 320 of the United Nations Convention on the Law of the Sea …).

Given the role and the force translations acquire, a few words should be spent on the verification of the work of the translators. In bilateral

[39] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon 2007, p. 143
[40] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 133
[41] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 147

agreements, verification is an integral part of the treaty process. The reason why is reducing the possibility of future disputes about interpretation providing an "impartial confirmation" [42] that all the language versions are completely in accord and therefore equivalent. So called legal revisers are involved in this phase, asked to make sure the legal meaning of the translations that are going to be authenticated, is exactly the same.

1.3 DOMESTIC LEGISLATION

When talking about legal translation at a national level we are considering two possible scenarios with two different outcomes, in terms of enforcement and effects. The first one is the case of monolingual countries, whose legislation is obviously authentic and authoritative in the official language of the country only. Translation is therefore not only not necessary, as far as the state itself is concerned, but also irrelevant by a legal point of view. Translating national statutes, constitutions, laws and regulations does not give birth to any legal instrument, nor translations can be used by judges and lawyers in court, and there is actually no reason why they should. Going back to functions, we can classify translation in monolingual countries as having a merely informative, i.e. descriptive, purpose; on the other hand the regulatory, i.e. prescriptive, function characterizes translations in bilingual and multilingual countries. In states as Canada and Switzerland, every citizen has the right to have access to his/her legislation and to be trialed, listened and take part in the judicial process in his/her language, this is why there should be one version of each text composing the national legal framework, written in every official language of the country. As already mentioned when talking about international legal instruments, the target texts (translation) and the source texts are equally authentic. The latter losing therefore the status of translation and acquiring the one of law. Having the legislation of the countries written in all the official languages, can be the result of two processes: on the one hand, the law may be drafted first in one of the

[42] *Ibid.,*

languages and then translated into the other(s), on the other hand, as it happens in Canada, for example, law may be drafted in two or more languages simultaneously, in a process known as co-drafting. The texts are formulated in more than one language at the same time, hoping to avoid all those problems that could derive from translation: not only actual errors but also potential interpretation errors due to ambiguities. Co-drafting solves the problem of the missing contact between legislators and translators that leads to uncertainty by the part of the translator when trying to render the text in the target language. So why, even though successful, co-drafting is not that common? It is mainly a matter of time: the text takes not only forever to be drafted, but it has to pass through crossed controls anyway. Plus, the process seem to be affordable only with two languages: thinking about a drafting taking place in six languages, as in the case of the United Nations, or even worse, twenty-three as in the European Union, seems more than a hazard. They actually made an attempt at the UN, for the third UN Conference in the Law of the Sea in 1970, with the constitution of a Drafting Committee in charge of ensuring that all the authenticated texts were unambiguous expressions of the same legal intents[43]. But it was definitely a too long and complex process, costing more than the benefits it gave.

As already pointed out in the previous paragraphs, experts seem to agreed legal texts follow a model, consolidated through years or even centuries of practice. The common structure of statutes seem to present more or less the same constituents in all jurisdictions and languages:

- Long title
- Date
- Preamble
- Enactment clause
- Substantive provisions: including parts, articles and sections
- Exceptions or provisos

[43] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 209

- Short title or citation
- Schedules or forms [44]

This structure may vary slightly except for the compulsory elements, namely title and substantive body. Additional possible clauses, which typically come at the end of a statute, may relate to matters such as administration of the act, enforcement, transitional provisions, repeals of earlier acts.

Norms do vary from country to country and jurisdiction from jurisdiction, not only in terms of content and language but also in terms of *way* of rendering the same meaning. Each (legal) language obeys to its own rules, and has its own expressions and formulas, but national legislation in general seem to be characterised by length and complexity, at a syntactical level. Plus, since the aim is the same, namely regulating human behaviour, the force of which they are invested is the same. As briefly mentioned above, we are talking about *illocutionary force,* typical of all juridical documents and one of the prominent common traits of domestic legislations. It is a concept that was put forward by the Oxford University philosopher J. L. Austin in the framework of his studies on speech acts. He affirmed some kind of utterances bear a sort of hidden meaning, i.e. they do not simply mean what the words they are made up with mean, but their goal is producing some effects. In general terms, the question "may I have some water?" is not meant to be given an answer, but to produce the effect of having some water. The illocutionary force is, therefore, the effect the speaker wants his/her utterance to have on his/her interlocutor. As Cao states, a legislative text "as a rule-enacting document" is a speech act invested of illocutionary force[45]. It is at the basis of permissions, obligations and prohibitions, that is what law is made of, and it is conveyed differently from language to language. According to the effect the statement is aiming to, illocutionary forces of legislative provisions may be classified in three groups: facultative language, conferring

[44] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 104 & Peter Tiersma, The Creation, Structure, and Interpretation of the Legal Text, http://www.languageandlaw.org/LEGALTEXT.HTM last accessed on 09.12.2012

[45] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 115

a right, privilege or power, expressed in English with the use of *may*; imperative language for obligations through the use of *shall* and prohibitive language, obviously forbidding someone to do something through the use of *shall not*[46].

We will deal with this more in details when talking about the features of legal language in chapter three.

1.4 PRIVATE LEGAL DOCUMENTS

Last but not least, legal translation may have as object documents regulating relations among privates, such as contracts, wills and leases, and court documents, e.g. statutory declarations, pleadings and judgements. We can talk about private international law when private situations mobilise the application of more than one national law at the same time. Provided it is impossible to apply unilaterally national law, we should understand which is the legal system that should regulate the specific case. If when talking about international agreements we were in the public sphere of law, when dealing with privates we enter the international private law domain that is actually a branch of national law, dealing with transnational private relations. Private international law is nothing more than the extension of private national legislation to situations presenting what is known as *foreign element*[47].

This is the reason why it deals simultaneously with two or more national legal systems, and one of the reasons why translation is required. Private legal documents may require translation in different situations and for different purposes, and once again aim and context both concur in giving the translation a different status.

Besides the situations in which two individuals coming from different Countries (and therefore probably speaking different languages and coming from different legal systems) get together in a court, the most frequent case

[46] BOWERS F., *Linguistic aspects of legislative expression*, University of British Columbia press, Vancouver, 1989, p. 182

[47] BALLARINO T. , Diritto Internazionale Privato, Simone, Napoli, 2011, p. 13

of internationally relevant private documents are contracts. We could affirm, they do share a lot of features with international agreements. Treaties and convention could be considered as nothing but contracts stipulated by states, that are to the international legal system as citizens are to the national one. This is why we may recognise more or less the same features outlined when talking about international legal instruments, in particular concerning structure, form, languages and authority. Private legal documents come into being as opposed to public texts; hence the distinctive traits concern the involved subjects: privates vs. States or international organisations. Yet, private is not synonym of individual nor citizen, at least not only. We should therefore put a stress on the differences among these terms. Briefly, the term citizen comes into play as related to state, being it each person entitled with rights and duties as established by the national legislation. Individual and private are broader terms, which express no relation with a higher entity, but once more they are not equivalent: private may refer to an entity including more than one individual, as well (e.g. a private company) and comes into being as opposed to public, i.e. all that is related to state.

Going back to texts, a private legal document is usually translated or drafted in more than one language when the contractors speak different languages and/or come from different juridical system. This is to warranty equal treatment and make the text accessible to both (all) parties. But once again, having two or more texts written in two or more languages does not make them equal. Their legal status changes according to the will of the contractors. They may agree that the translation and the original text have equal force in the court of law in case of litigation, attaching them with a prescriptive function, or else specify nothing, so that translated texts will be considered just for informative purposes, giving them no legal status at all.

Private legal documents are product of one national system, and therefore follow the rules imposed by that particular jurisdiction, this is especially true for contracts. By definition, an agreement has to fulfil some requirements in order to be considered a fully legally binding contract, on pain of invalidity: the contract must be drafted in the appropriate form (with 'appropriate'

meaning the one that is prescribed by the law), the parties must clearly intend it to be binding in law and they must enter the contract voluntarily, and its content must not be impossible to carry out. It is therefore clear, as Cao points out, how "in these texts, the linguistic form is often as important as the content"[48]. This makes the work of the translator particularly problematic, and even more if we consider that more than one legislation are to be taken in account.

This kind of text seem to be characterised by long sentences with a complex structure as a mean to cover the conditions and possibilities in which such an event may occur, plus there are exception to be taken in account that concur in making sentences even more complex. Looking at private legal documents drafted in whichever language, we realise the elements and structure that make them up are pretty much the same:

- date of the agreement;
- names and addresses of the parties;
- recital;
- definition clause;
- rights, obligations and liabilities of the parties;
- *force majeure*;
- termination;
- breach and remedies;
- dispute resolution;
- notice;
- assignment;
- waiver;
- warranty and exclusion;
- entire agreement clause;
- governing law;
- language clause if two or more languages are involved;

[48] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 85

- signature, date and execution.[49]

Let us say that when we say that translation is needed, it means it has to be done because it is provisioned by law or, in the case of contracts, by contracts themselves. As seen when dealing with international treaties, the language in which the contract is valid is the one the parties *want* to be authentic. The language of the contract is presumed to be the only official language, unless the parties choose differently, but this choice should be stated clearly in the document. This is done through the *language clause*, typical feature of agreement between parties speaking different languages. The formulation of language clauses is officially free but once again seems to follow a model. Cao in her *Translating Law,* gives us a couple of examples of typical formulation of language clauses:

> "The contract shall be written in both … and English and both language versions shall have equal force. In case of inconsistency of the two language versions, the ... version shall prevail."[50]

> "This Agreement and any attachments hereto are rendered in both ... and English. In the event of any conflict between the provisions of the English version and the ... version which the parties cannot resolve by mutual agreement, then ... provisions shall apply."[51]

We can see how language clauses not only fix the languages in which the document is authentic and authoritative, but also the text that should prevail in case of divergence. Once more it is important to underline the word *version,* which, as said for international agreements, assumes the two (or more) texts to be equally authentic.

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[49] *Ibid.,*
[50] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 87
[51] *Ibid.,* p. 88

CHAPTER TWO: THE TWO SIDES OF THE COIN

LANGUAGE AND LAW

CONTENTS: 2.1 Legal Translation. – 2.2 Between The Devil And The Deep Blue Sea: The Legal Translator

When talking about legal translation one should not make the mistake of thinking it is just a matter of transcoding words from one language to the other, not only because literal translation in the domain of law is impossible and more than that unadvisable and ineffective, but also for some implications related to the obvious but not evident, difference in terms of target and source and all the annexed implication they bring with them. It may sound unnecessary to point out, but a text is written for an intended receiver and when translating it into another language, the receiver will obviously change. Leaving the mother tongue aside, the intended receiver of a translation is usually homologous to the receiver of the source text but when dealing with legal texts it is not necessarily the case. This is due to the fact, law is not universal but it still is deeply related to its national dimension. So that, even when considering international law, the cultural and social background of the receiver of the translation will be, in all likelihood, different from the one of the receiver of the original. This brings us to two considerations: first of all that a translation can either be target or source oriented, and then that according to this and to the aim that is meant to be achieved by the translation, translation strategies may change.

In addition to this, since the birth of legal translation, experts have been debating about the role of the legal translator, about whether he/she should be a jurist or a linguist, about his/her relationship with source and target legal texts, and the discretional power he/she should enjoy. The challenging nature of the legal translator's job comes, by the way, from the essence of legal translation itself, as we will see in the first paragraph of this chapter. We will then deal with the delicate and multitasked role of the legal translator.

2.1 LEGAL TRANSLATION

Regardless of the nature of the text one should translate, the principle is the same: to convey a message from one text to the other, so that it can be understood by its addressee(s), the receiver, which has to be identified clearly by the translator before starting his/her job. This is due to the fact the approach to translation largely depends on the nature of the receiver, and that legal translation in particular, is concerned with the delivery of the message, regardless to the way it was conveyed in the original text. In very truth, the receiver oriented approach alone presupposes a minor degree of fidelity to the original text[52]. It follows, the approach to translation, especially in our case, is pragmatic[53]: the only thing that really counts is meaning, a meaning the translator should be able to deliver to the receiver, no matter how.

As a start, a few words on translation in general. First of all with translation we may designate both a result, the translated text, and a process, the act of translating, where by translating we mean take what is written in one language and turn it into an equally meaningful text written in another language. Traditionally, translation should follow three rules, mentioned by Tytler in his *Essay on Principles of Translation*:

1. Translation should give a complete transcript of the ideas of the original work
2. Style and manner of writing should be of the same character with that of the original
3. the translation should have all the ease of the original composition[54]

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[52] GONZALEZ – MATTHEWS G., *L'équivalence En Traduction Juridique : Analyse Des Traductions Au Sein De L'accord De Libre-Échange Nord-Américain (ALENA)*. Consulted at : http://archimede.bibl.ulaval.ca/archimede/fichiers/21362/21362.html on 20.10.2012, p. 72

[53] GEMAR J-C., Le plus et le moins-disant culturel du texte juridique. Langue, culture et équivalence, *Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 47, n° 2, 2002, p. 169

[54] JOSEPH J. E., Indeterminacy, translation and the law, in Morris M., *Translation and the law*, John Benjamins Publishing Company, Amsterdam/Philadelphia, 1995, p. 16

In other words he is referring to the importance of meaning, that should be rendered equally in the target text; form and style of writing, that should respect the rules laid down by the original document, and finally the fact the message should be conveyed as clearly as in the source text. All this can obviously be applied to legal translation. With some reserves about correspondence of style and form. Beside the fact they are generally speaking less important in legal translation (as in all translations for special purposes) than in literature, their importance is related and depends on the receiving legal system rather than concerning the source text. Style should be adapted to the rules governing the drafting within the target legal system in order to be sure the text will be understood, interpreted and applied correctly, i.e. respecting will and intents of the legislator. What is missing in this definition, and what actually typifies legal translation, are purpose and result.

We realise that immediately when looking at the classification Holmes made, based on the relation the translation has with the source text. He identifies different translation typologies according to the fidelity they bear respectively to form, function and sense[55]. Regardless to the subject, in order to produce an accurate translation, a certain degree of conformity should be kept with all these aspects and it is also true they are not only related to one another, but also interdependent. Nevertheless, it is impossible to achieve all of them at the same level. As we are about to see, legal translation, shows a major commitment to function. We will then go through the other outstanding features of legal translation, namely its being multifaceted, bound by its legal side, swayed by context and, after all, nothing but law.

[55] GONZALEZ – MATTHEWS G., *L'équivalence En Traduction Juridique : Analyse Des Traductions Au Sein De L'accord De Libre-Échange Nord-Américain (ALENA)*. Consulted at : http://archimede.bibl.ulaval.ca/archimede/fichiers/21362/21362.html on 20.10.2012, p. 33

2.1.1 Legal Translation as Translation for Special Purposes: a Functionalist Approach

On a general level, when favouring function, the translator aims to attain the same (or at least a similar) result of the original; this is exactly what happens with legal translation. As already mentioned, we can talk about it as a special purpose translation, meaning the subject of translation is not ordinary but technical, it is written using a special language and it is addressed to specialists, even though the ultimate receiver of a legal text can be anyone.

Legal translation is a special purpose translation, then, the goal of which is to preserve the meaning of the source text and lead to the same results in practice. It falls under a specialist category, technical translation, since it involves the use of a special language (technically speaking a LSP, language for special purpose) within a technical context, namely the one of law. It is therefore distinguished both from ordinary language and from special languages of other domains. Being inscribed in the discipline of law, for legal translation we can speak about Language for *Legal* purpose (LLP)[56]. LLP is a peculiar kind of LSP, as we will see in chapter 3.1, and due to its relation with ordinary language, legal translation shares features both with general and technical translation. As we already saw when talking about legal texts, legal translation has a double purpose, we can either have legal translation for normative or descriptive purposes and this is the consideration from which our entire discourse originates.

Traditionally, when dealing with special purpose translation, the main objective was to transfer the meaning of the source text to the target text with content prevailing on form, and translation strategies were chosen accordingly. This was the rule until Vermeer came along, in the1970s, with his *skopos theory*. According to his theory, when translating a text the first thing to take account of is the function it has, i.e. the effect that it is meant to produce on the receiver. Showing that the same text could be translated

[56] CAO D., *Translating Law*, Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 8

differently depending on its communicative aim (*skopos* in Greek), he created an alternative to the meaning-based translation[57]. His departure point was the conviction that the function of the target text is always different from the one of the source text since the receiver is different. Some contested Vermeer's idea, saying it is not applicable to special purpose translation since having by definition a pre-set end, the one of the original text and the one of the target text will coincide. This is mostly true, but it is not seldom the case the same text will have a different purpose according to the target it is addressed to. The concept at the basis of Vermeer's assumption is the fact the meaning itself of the text will change according to its function, depending in turn on the cultural and social context and the communicative situation. Consequence of this, is the leading principle of the theory, namely the fact the function of the translation is the main criterion to determine which translation strategy should be adopted. By saying so he is also assuming a literal approach to legal translation is not wise because it does not take in account all that has to do with non-linguistic aspects, in our case the legal principles, and all those cultural implications behind it. The condition to achieve a functionally adequate result would be, according to the German scholar, a negotiating process through which translator and the person who commissioned the translation should put their minds together to establish clearly the purpose of the translation. More precisely, what the translator should consider in order to ascertain the function of the translation are: sender, his/her role and intention, receiver, receiver's expectations, text medium, place, time and last but not least, intent. The major concern for the translator is therefore the target text, giving to the source text a new found role, more similar to guidelines than a Bible to follow thoroughly. The principles of the *skopos theory* may be applied in three different ways, having therefore three different dimensions. First of all it can be employed during the translational process, and therefore to its outcome, then straight to the result of the translation and consequently to it functions, and last but not

[57] SARCEVIC S., *New Approach to Legal Translation*, Kluver Law International, London, 1997, p. 65

least to the way of translating and thus to the intent behind it[58]. In order to understand the *skopos theory* completely, we should take a step back and spend a couple of words on a complementary functionalist theory: Reiss theory based on text typology. She defined translation as a communicative bilingual process aiming to reproduce in a target language an equivalent text to the source one. According to Reiss, this process includes a mean, i.e. the text in the source language and the one in the target language, and a medium, the translator. She also affirms translation means inevitably a change in the conveyed message due to the impossibility of finding perfectly equivalent solutions[59]. Each text typology should be translated in a specific way, associating then a particular translation strategy to a given kind of text. Vermeer's theory, indeed combines its own principles to Reiss's theory, giving us a receiver oriented functionalist approach depending on the typology of legal texts.

So, which is the main function of a legal text? As we already saw when talking about legal texts, their function is mainly prescriptive: when writing a juridical document, the legislator or the parties of an agreement of any sort (be it bi- or multilateral, among public subjects or privates etc) establish rules aiming to produce a legal effect.

Bound

Related to its prescriptive function is the fact that legal translation is the most rule-bound and constraint-marked domain of translation[60]. One may even dare say it is also the most problematic, not only because of its inflexibility but also for its implications of social, cultural, linguistic and methodological nature. As we will see in details, law is a social phenomenon, the product of one culture, and should therefore always be considered in relation to the environment which produced it, since it is only in the light of it

[58] GONZALEZ – MATTHEWS G., *L'équivalence En Traduction Juridique : Analyse Des Traductions Au Sein De L'accord De Libre-Échange Nord-Américain (ALENA).* Consulted at : http://archimede.bibl.ulaval.ca/archimede/fichiers/21362/21362.html on 20.10.2012, p. 40

[59] *Ibid.,* p. 36

[60] *Ibid.,* p. 70

that one can understand a legal text properly. Plus, it is only through a full understanding that one can hope to produce an exact translation. On top of that, law is strictly bound to language that is not only the mean through which it is conveyed but the way it is realized. Texts are, in fact, not (or not only) a mean to explain law but its concrete realisation, its principal tool. Language is indeed "mean, process and product"[61].

Legal translation becomes necessary in more than a situation and most importantly for different purposes. A legal text may need translation, as already mentioned, for informative and prescriptive purposes, with differences of outcome in terms of legal force as well. Translation may be needed at an international level, during the drafting of a bilateral or multilateral treaty involving parties speaking different languages, or during the writing of a contract, for the same reason, as well as at a domestic level in the case of a bilingual or multilingual country, both for its law and for the regulation of disputes among people belonging to different language communities. Non-binding texts (such as judicial decisions) may be translated as well, creating a precedent in common law countries and for a merely informative purpose in the others. Law, doctrine, private law documents, judicial decisions may be, then, translated in any language just to be accessible to everybody and of course for educational purposes. We could then say, legal translation has a multiform nature, due on the one side to the variety of the juridical contexts that may make it necessary (different from the cultural and social environment that produces it), and the multiplicity of the legal texts that may be object of translation. As far as the context is concerned, we may distinguish four fields of law in which translation comes into being, that correspond to the categories in which we formerly divided legal texts. The first one that will come into everyone's mind is the context of public international law, within the framework of international organisations. This first kind of translation has as a result the creation of law, since translating an international agreement means producing an equally

[61] *Ibid.,* p. 80

authentic and authoritative text as the one of origin. Nowadays translation is actually giving way to multilingual drafting, as it happens in multilingual countries and organisations such as the European Union and lately also the United Nations. Then we have legal translation in the private international law domain, including contracts, wills and all kind of texts regulating relationships among privates coming from different legal systems. Here we are not talking about law production but translating in order to apply law, since these kinds of documents put into practice what national legislation provides for. The third scenario is the courtroom, and therefore all those acts or documents in general, product during trials (including transcriptions),i.e. the judicial context, which can be further divided in administrative, criminal and civil. It encompasses the decisions taken in court by judges and represents a way of communicating between judges speaking different languages. Last but not least we have doctrine and all those "scientific" texts written by law experts; this is the case in which translation acquires an educational purpose, and becomes in a way instrument of comparative law.

Taking the second way of classifying legal translation, Gémar talks about pragmatic and aesthetic texts. Assuming all that has been said, it is not difficult to affirm law texts belong to the first group, and can be subdivided, according to Bocquet in: normative texts, texts of decisions which apply those norms and, finally, those texts which explain the contents of the rules of law(62), respectively produced by the legislator, judges, and scholars and lawyers.

Practically speaking, legal translation means translating a legal text from one legal language, bound to one legal system, to another legal language which could either belong to the same legal system (in case of a multilingual country) or to a different one. For as obvious as it may seem, attention should be drawn on the fact legal translation has to use the technical language of law and in addition it should be the one of the right legal system. In other words, the resulting text should not be written in the ordinary language of the

(62) BOQUET C., *La Traduction Juridique, Fondement Et Méthode*, De Boek, Bruxelles, 2008, p. 10

destination, and the translator has to use concepts/terms belonging to the target legal system, if the text is meant to produce effects there, and of the source legal system in case of a text with informative purposes. In any case, consistency should be the rule: using vocabulary belonging to one legal system and at a certain point choosing terms of the other may only lead to doubts and misinterpretation. This gives us the second distinctive trait of legal translation, namely the fact it is a system-bound discipline. Hence, the crucial importance of context.

Swayed

Differently from other disciplines that are characterised by unique interpretation and meaning, regardless from the environment that produced it, law is indissolubly related to context. A text should not be taken as separate from the situation that produced it, and narrowing the field the same is true for words – one word could bear a different meaning according to the text in which it is placed. Here is the reason why we can say the basic unit for (legal) translation is not the word but the text on the whole, and affirm literal translation is definitely not the right choice when translating a legal text. Non literal is not synonym of free, by the way, because free translation is as much as unconceivable when talking about law. House(63) put forward the idea an analysis of the situation should take place before translating. It should be carried out on two levels: focusing on the user of the language and on the use of the language on the whole. To draw the exact meaning from the text, considering the context is essential. But which is the context one should take account of? We are undoubtedly speaking about "local context" but, again, it is not enough. First of all one should consider the legal context, meaning the legal system that produced the text, and the one that is going to receive it, and then we have the cultural and the social

(63) GONZALEZ – MATTHEWS G., *L'équivalence En Traduction Juridique : Analyse Des Traductions Au Sein De L'accord De Libre-Échange Nord-Américain (ALENA).* Consulted at : http://archimede.bibl.ulaval.ca/archimede/fichiers/21362/21362.html on 20.10.2012, p. 83

context, because the way a society is organised in a given country influences the way in which law is conceived and applied .

As Gémar maintains, legal translation has to pay a particular attention on: the nature of the text (law, contract, treaty, sentence); its *charge notionelle,* meaning not only contents but also the impact the notions contained in the legal text will have on the receiver and on the target legal system on the whole; its function and last but not least its destination. The accuracy of the translation will thus depend on the way the translator managed to cope with these aspects[(64)].

Translating law equals making law

Non negligible is the role of the *caractère contraignant,* as Gémar called it, of the legal text[(65)]. The binding nature of legal documents is not only the basis of legal language but it sways the role of the translator and the attention he/she has to pay to his/her work, as well. The legal translator should weigh each and every word, relating it not only to the textual context it belongs to, but also to the broader target context that will receive the text at the end of the translating process.

Clearly enough, translating is not simple transposition. This is a universal statement, true for translation in general but essence of legal translation in particular. The bases for an affirmation as such lay in the fact that when translating law, what you have to convey is not a merely linguistic translation but a legal one, meaning what should be rendered is not the text *per se* but the legal message words are expressing. As already mentioned, it is typical for legal translation to have to do with more than one legal system so that translation should not only be terminological but also conceptual, in a way. Translators should therefore be able to produce a text not only understandable in terms of words, but also ideas. This brings us to

[(64)] GEMAR J-C., Traduction Specialisée et droit. Langages du droit style et sense, in *Insights Into Specialized Translation* - Maurizio Gotti, Susan Sarcevic, Peter Lang AG, Bern, 2006, p. 79
[(65)] GEMAR J-C., La traduction juridique et son enseignement, Meta : journal des traducteurs / Meta: Translators' Journal, vol. 24 n° 1, 1979, p. 35 - 53

considerations about whether legal translation should be strictly literal or not. A literal approach puts the stress on terminology, replacing words and phrases of the source language with equivalents of the target one. But as we saw this cannot be done when working on legal documents since more implications are on the scene, especially context. This is why we could even dare say, legal translation is basically a process of translating legal systems[66], which brings us to another consideration: the intertwine of legal translation and comparative law. It is hard to say which discipline is tool to the other, since if legal translators need the technicity of comparative lawyers to dissipate conceptual doubts, comparative lawyers ask for the help of translators when facing terminological or, broadly, language-related issues. Legal translation straddles between legal systems and so does comparative law, what is different is the approach and the aim the two have. Saying legal translation is a comparative law instrument would mean leaving aside the role of translator in the legislative process, and their role of producers of law when translating authoritative texts. We will go through this topic more deeply in the next chapter.

Multifaceted

What else makes legal translation peculiar and more complex with respect to other areas of translation, is the fact it is an interdisciplinary field, on two levels. On the one side its being interdisciplinary is due to the fact three disciplines are involved: linguistics, translation theory and law, each of them responding to special rules. The problem here is that these disciplines are all characterised by indeterminacy, despite their being technical. Quoting John E. Joseph of the University of Hong Kong:

> Translation always falls short of its goal of conveying the meaning and the style of a text in a new text that reads like an original composition in the

[66] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 229

> second language. The law is always subject to interpretation; the idea that it is "carved in stone" is only an illusion. Nor is the meaning of words ever fixed: the kind of precision the law demands of language, and formal semantics attempts to represent, is again based on an illusion of human linguistic behaviour, which has evolved very efficiently for a large number of purposes, though pinning down precise meaning is not among them. This has implication for translation as well, for if indeterminacy is already the condition within languages, it holds *a fortiori* between languages.[67]

The translator should then try to cope with this triple indeterminacy that paradoxically collides with the strict nature of law itself.

Going back to interdisciplinarity, what we saw is true for all kind of translation for special purposes, except for metalinguistic translation. But when talking about legal translation, interdisciplinarity makes it twice as complex: not only, as for any translation, we have to face two languages (for legal translation we may even have cases of multilingual translation) but to this intrinsic difficulty we have to add another, typical of the special domain of law: law is not universal. There is no law as such, and if translation is needed, it probably means more than one legal system are involved, and I'm not only referring to legal families such as common law and *droit civil* but to national legislations, as well. It is indeed this double complexity that made several experts question themselves on whether legal translation is actually possible. Plus, as L. Focsaneanu said,

> la traduction juridique ne saurait jamais être rigoureusement exacte. C'est une opération approximative, dont il convient d'apprécier la marge d'erreur. En somme, une traduction juridique constitue une simple présomption, que les intéressés doivent toujours pouvoir contester en se référant au texte authentique**(68)**

This could be considered a conflict between substance and appearance. The translator seems to be in charge of the layout, limiting him/herself to take the

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(67) JOSEPH J. E., Indeterminacy, translation and the law, in Morris M., *Translation and the law*, John Benjamins Publishing Company, Amsterdam/Philadelphia, 1995, p. 14

(68) FOCSANEANU L., Les langues comme moyen d'expression du droit international. In*: Annuaire français de droit international*, volume 16, 1970, p. 262

words from one language and replace them with their equivalents in the other language, while everything concerning contents should be left to specialists, be them lawyers or scientists. On the other hand, legal translation draws its interdisciplinarity from the nature of law itself, since law deals with anything, from agriculture to finance, from life to death, employing technical terms of each and every involved subject.

Dealing with legal translation, then, means dealing with a two sided subject, going back and forth between law and language; this is why its definition is double too. Legal translation has to be considered as a "cross-cultural and interlingual communicative process and as a complex human and social behaviour"[(69)], as a subject constrained by law on the one hand and language on the other.

2.2 BETWEEN THE DEVIL AND THE DEEP BLUE SEA: THE LEGAL TRANSLATOR

No doubts about the fact that the task of a translator is to establish a relationship of equivalence between the source and target texts. But assuming legal texts are particularly problematic, due to their complex nature, the task of the legal translator results a real challenge.

Given the interdisciplinarity of legal translation, the first thing one may wonder about, is whether the person in charge of translating legal documents should be a linguist or a lawyer. Interdisciplinarity actually characterizes all kind of language for special purpose translations, be it in the field of nanobiotechnology or cooking. But no one would ever argue that in these cases the translator should be a translator and not a biotechnologist or a

[(69)] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 5

cook. So why is this "legal" particle so problematic? What makes the legal field more complicated than even an extremely scientific and complex one, when coming to language? It would be reductive to affirm it is just a matter of the effect the correct translation will produce, because medicine seems to me as much as a delicate matter. The thing is, these are scientific subjects, made up by unambiguous words, bearing univocal meanings. So that any specific term of the source language has its exact correspondent in the target language, leaving little to no room for mistakes. What is problematic with law is that it lays on words. And on top of that, these words not only are not always clear for outsiders (the same happens with all other special languages) but most of the time bear resemblances with common words or indeed are exactly the same but with a different meaning, and even when dealing with technical terms it is not always the case they do have *one* meaning: they may acquire a (slightly or significantly) different significance according to the context.

2.2.1 INTERPRETING?

All this seem to point in one direction: law is about interpretation. Judges have to interpret the meaning of a given document in order to apply it to the concrete situation, but can the translator do the same? Does he/she have the right competence in doing it? In case of ambiguity, translators finds themselves at a crossroad, the choice between one solution or the other is fruit of interpretation, and interpreting is not part of their job. The ambiguity should rather be retained, leaving the last word to the judge, whose job is, precisely, interpreting the law in order to enforce it.

It may sound obvious, but the first task that should be accomplished by the translator is understanding. We cannot expect him/her to translate a text properly without really and fully understanding it. The comprehension should not be limited to a word-to-word scale, anyway, but should have has reference the text on the whole. Context is, in fact, crucial when talking about legal matters since the same word can be interpreted differently according to

the situation within which it is inscribed. Once again we have to be careful with words, because, as Sarcevic points out, whereas understanding is a spontaneous and in a way involuntary process, interpreting is a voluntary act of reflection and choice, deriving from a case of ambiguity or unclarity in the text. It is not always easy to draw a line between the two, but insiders seem to agree that "the translator's duty is to express what is said in the source text and not what he/she *thinks ought to have been said.*"[70]. Plus, translators should go beyond what they are reading, understanding and predicting the results these words will have in practice, adapting their translation strategies in order to achieve that legal effect in the other language[71]. It is therefore not sufficient for them to understand but as Legault maintains, translators should be able to *make* understand as well[72]. The sense of the source text should be clear for them, but they should convey it to the reader as clearly. Here we see for the first time how the role of the translator is double and more importantly in the middle between producer and receiver.

2.2.2 FIDELITY VS. CREATIVITY

Being law so full of implications and consequences, legal translators have been traditionally bound to words, choosing literal translation rather than a more liberal one. The principle to be observed was fidelity, meaning they tended to translate following thoroughly the source text, reproducing its style, syntax and terminology, often in an unnatural way, as closely as possible. Little to no room was left to creativity. To understand the reasons why, we have to go back once again to function and therefore effect. Function and effect allow us to make a distinction, too: when working on legal texts with an informative purpose, translators are obviously more free with

[70] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 92

[71] SARCEVIC S., Legal Translation and Translation Theory: a Receiver-oriented Approach, *Legal translation: history, theory/ies and practice*. International colloquium University of Geneva, February 17-19, 2000, p. 5

[72] LEGAULT G. A., Fonctions et structure du langage juridique*, Meta : journal des traducteurs / Meta: Translators' Journal,* vol. 24, n° 1, 1979, p. 19

respect to legally binding texts, working on which they have to consider the effects they will produce, too, being left with less room for stylistic personalization and initiative. This tendency was supported by the belief the most important unit to be considered was the word and, as a consequence, changing wording the desired effect might be missed[73].

As Koutsivitis put it, the legal translator is constantly under the pressure exerted by two opposing forces[74], one keeping him/her as close as possible to the text of origin, respecting precedents to avoid imprecisions, misunderstanding and biased interpretations, the other leaving more room to more or less free reformulations, focusing on understanding and rendering the message. As a consequence, the translator may choose either a lexical/literal approach or favour the so called *functional equivalence,* and therefore a more interpretative approach. Fidelity is the result of the first attitude, and is linked more to single terms than to global meaning, looking for the impossible full/perfect equivalence and have to make do with a partial one. The translated technical term should, therefore, beyond its substantial sense, present all the terminological qualities of the original term; as for standard phrases, very common in the legal language, the translator should look for the correspondent expression in the target language. Here the rules of the game become more inflexible, making the possibility of leaving the phrase untranslated not only conceivable but sometimes even advisable. In such circumstances the translator should provide an explanation for it, in brackets or with a note.

Gradually switching from a passive to a more active role, during the years, legal translators have acquired a higher degree of independence from the source text and discretion, reaching a stage, now, in which they may also participate in the drafting process. This puts them in the position of feeling (and being) entitled to make not only linguistic but also legal decisions. This

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[73] HARVEY M., What's so Special about Legal Translation?, *Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 47, n° 2, 2002, p. 180

[74] KOUTSIVITIS V. G., La traduction juridique : standardisation versus créativité, *Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 35, n° 1, 1990, p. 226

does not mean the attention to fidelity is no longer here, just the perspective has changed. The fidelity translator aim to is now a more global one, stressing conformity to the *uniform intent*[75] pursued by the legislator when drafting the text, rather than more formally (and I would dare say superficially) to the source text itself. In other words, in a dispute between fidelity to the "letter" or the "spirit", the supporters of the latter seem to have won[76]. Admitting that, means allowing a certain degree of creativity for the translator who may adapt his/her translation to the rules set out by the target context, including language, culture, legal system and so on. Supporting this vision, i.e. relative freedom of translation, Koutsivitis maintains the translator should not make do with transcoding the entire text, on the contrary he/her should "look for the intended meaning wanted by the author, interpret it and reformulate it into the target language". A stress should be put on the phrase *make do*, he is implying the performance would not be as good and accurate as it should, but it would be a choice sprang merely from rigidity, from the fact they have a tunnel vision. He suggests a certain degree of initiative, that will make the translator see beyond the surface and justifies his claiming describing law as an interpretative science, saying each and every legal text is potentially subject of interpretation.

Thus, the borderline between creating and interpreting seems to be more than blurred. Precisely, as already stated when dealing with interpretation, even when recognising the legal translator nowadays is less bound to the source text, we do not have to forget *creativity* is a relative concept, keeping him/her always more faithful to the original than their colleagues translating other disciplines. Despite being freer, translators dealing with law still have to comply with some constraints deriving from the nature of the subject itself. Besides the already mentioned importance of effects, it is the tendencially standardised nature of legal texts that represents a further

[75] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 112

[76] KOUTSIVITIS V. G., La traduction juridique : standardisation versus créativité, *Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 35, n° 1, 1990, p. 180

constraint, especially for those kinds of texts in which form is as important as content (e.g. contracts). Equally relevant is consistency, which comes into play at different levels. First of all we have harmonization: given the complex nature of legal language and its intrinsic paradox of coexisting vagueness and precision, legal translators should be consistent, in syntax, style and vocabulary, with their choices throughout the entire text. As a result, synonyms are discouraged[77] because the reader (or worse the judge, meant to enforce the norm) may be led to think the concept to which reference is made is not the same. On the other hand, we have concordance, which means assuring consistency of terminology and presentation between the different authentic versions of a given legal text. It may sound like a paradox, but the legal translator should guarantee *interlingual* consistency, in order to achieve uniform interpretation and application by preserving the unity of a single instrument. It used to be preserved through literal translation but, as we already saw and we will see when talking about equivalence, absolute concordance is impossible to achieve[78]. At a broader level and for the same reason, translators should try being consistent with other texts produced on the same subject, too, using the same equivalents already adopted in a given context. As Sarcevic maintains, "since authenticated texts are considered final and definite, the language therein has the status of precedent"[79]. Translators should therefore conform with already adopted solutions, refraining from correcting and improving already existing authenticated translations, that, once more, have the force of law. The question arises spontaneously, whether, at the final stage of the harmonization process, when comparing the different texts, one should be considered the version the others should conform with. Now, if we assume we are talking about a co-drafting process, resulting in several equally authentic texts, no version should prevail. On the contrary, for every case of divergence, texts producers should find the version which best expresses the common intent for that specific matter,

[77] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 118
[78] *Ibid.,* p. 203
[79] *Ibid.,* p. 118

regardless of the language, and use that as a reference. Eventually, terminological, stylistic, syntactical concordance and harmonization should lead to the ultimate goal of legal translation: juridical concordance, resulting in uniform interpretation and application and achieving the same legal effect(s) of the original text.

As already mentioned, it looks like producing completely identical versions of the original is impossible, the reason why laying in the nature of translation itself, demanding the search for a compromise between obviously different languages and cultures. It may sound evident but it is not. As we will see in the next chapter, language is product of culture and as such it responds to the needs of that particular environment, that are not necessarily the same of the one of origin. It is therefore impossible to have two absolutely equal texts, not only in terms of words (literal equivalence being impossible, as we will see) but also meaning, because some concept may not find a perfect correspondent in the target language, culture and legal system; nevertheless, translators are supposed to produce texts equal in legal effects[80].

2.2.3 Considerations On Effect, Meaning And Intent

The goal of every translation is to give the reader a text as close as possible to the original he would not understand. The interesting thing is what we mean by "as close as possible". No doubt the first thing that has to be conveyed is meaning. But let's think about poetry, translating a poem being concerned about sense only, would mean losing the poetry itself of the poem. It is clear, meaning is essential but not sufficient. What tells us which are the other aspects to take account of, is the function of the text that has to be translated. Taking literature, we have to consider its expressive function, and

[80] SARCEVIC S., Legal Translation and Translation Theory: a Receiver-oriented Approach, *Legal translation: history, theory/ies and practice*. International colloquium University of Geneva, February 17-19, Berne, 2000 ,p. 11

try to render not only the meaning but a feeling. A translator facing the translation of a novel has to re-write it obeying to the rules of writing, just as a writer does. And here we realize two things: first, that the role of the translator goes beyond simple transcoding, reaching production in the true sense of the word and second, that he/she has to be aware of the principles ruling the domain that gave birth to that particular text. The same thing is true for legal translation, the only thing to add is the difference in the effect the texts should produce. If the effect of an expressive text is to convey some kind of emotion, prescriptive texts such as law have a behaviour as a result or a punishment in case the rule is not respected . Thus, the translator has to have clear not only the meaning of the text but also the effects it is meant to produce. He/she should "strive to produce a text that expresses the intended meaning and achieves the intended effects in practice"[81]. Even though, as already mentioned, translators do not interpret the text, they should be able to predict in which situation it will be applied and how the judges will interpret it. The translator has thus to make sure that the effects produced by the translation are the same effects produced by the original texts, being the two equally authoritative. As a result, we should have two texts equal in meaning and effects, but it all should be subordinate to equal intent. Taking the distinction Sarcevic made, we can recognize two kinds of intent, micro and macro intent, referring respectively to the "specific purpose of that particular text" and to the overall aim of the text producer[82]. Regardless of the particular effects of every treaty, code, norm or disposition, the general outcome the translator should aim to is uniform interpretation of the text by the judges, that will result in uniform application, as intended by the legislator. The thing is, as we will see more in details in the next chapter, that dealing with different legal systems, it is not evident that the same concept will have an equivalent in the target system. This problem goes under the

[81] *Ibid.*, p. 5

[82] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 73

name of *conceptual incongruence*[(83)], and may compromise the uniformity in interpretation and application. It is source of debate among experts as much as interpretation and creativity: on the one side we have those maintaining that the translator should compensate for conceptual incongruity, on the other side the ones convinced of the fact a translator should limit his/her job on linguistic matters. And this raises another problem, compensating means having an active role in the process of law production, potentially modifying the text. This is something that goes beyond the typical translational competences, the translator should therefore have a more or less deep knowledge of law, the risk being altering the meaning substantially, and consequently the effects the application of that text is going to produce.

2.2.4 LAWYER OR LINGUIST?

From the considerations made so far, it follows that what should be rendered are not words but the message on the whole, the concept the legislator had in mind when drafting the legal text. It goes without saying, the legal translator, as any other LSP translator, besides linguistic, translational and methodological competences should have a certain degree of competence in the special field he/she is operating in, namely law. Looking at the phrase *legal translator*, in English as in other languages (*traducteur juridique* – French, *traduttore giuridico* – Italian, *juristische Übersetzer* – German etc) we realize immediately that *legal* and its equivalents are adjectives, characterizing the noun *translator*, so this may lead one to think that a legal translator is first of all a translator. This is the idea maintained by D. Cao, who starts defining the legal translator as someone in possess of translation competence and proficiency, two concepts she borrows from theoretical linguistics. By competence we mean the knowledge one has on a certain subject, that is different to the ability he/she has in doing something. It is related to theory and learning. The concept of competence should go together

(83) *Ibid.,*

with the one of proficiency[84], meaning putting into practice the translation competence. She then outlines a model of translation proficiency as the result of the combination and interaction of what she calls translational language competence, translational knowledge structures and translational strategic competence, within the *context* of situation[85]. Doing this she keeps on putting the stress on the linguistic part of the story. On the other hand, we have the supporters of the conviction a legal translator should primarily be a legal expert. In all truth, lawyers seem to agree that a legal translator should be a lawyer whereas linguists maintain he/she should be a linguist.

Going back to the concept of competence, we can decline it legally, as well. Legal competence presupposes not only deep knowledge of legal terminology, but also a full understanding of legal reasoning and the ability to solve legal problems, to analyse legal texts, and to foresee how a text will be interpreted and applied by courts[86]. Translation, as Gémar maintains[87], is first of all a matter of understanding. Reading is the first and most crucial phase of the entire translating process, and this of course means the translator needs to be extremely competent in the source language, in order to seize each and every nuance of the original text, but also that he/she should be able to understand the meaning of what he/she is reading, entirely. By doing so Gémar is recognising the importance of having some kind of legal background. The ideal situation would be the one of a person equally competent on linguistics and law, but a double education as such is difficult to be achieved. His final word is not a one way solution, he states lawyers willing to approach legal translation should first attain some degree of knowledge in translation and, vice versa, translators should be formed in law as well[88].

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[84] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 39

[85] *Ibid.,* p 40

[86] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 113

[87] GEMAR J-C., Le traducteur et la documentation juridique*, Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 25, n° 1, 1980, p. 142

[88] GEMAR J-C., La Traduction Juridique: Art Ou Technique D'Interpretation?*, Meta : journal des traducteurs / Meta: Translators' Journal*, Volume 33, numéro 2, juin 1988, p. 313

These considerations lead us to an important issue concerning the role of the legal translator: collaboration. If we assume that the legal translator is, by formation and experience, primarily a linguistic professional, we cannot expect from him/her a perfect *maîtrise* of law. The same is true the other way round: a lawyer cannot be supposed to know principles and rules governing the art of translation. Thus, cooperation is advisable on both sides: on the one hand the translators could find themselves in need of consulting the text drafter(s) during the process of translation, in order to be sure of giving the text the right interpretation especially in case of ambiguities, on the other hand they could be needed by the judge at court when applying the disposition of a translated text, for the same reasons. It comes as no surprise, then, that legal translators may be called for direct examination concerning translation, at court. They may even be useful during the drafting process of a legal texts: since their familiarity with texts and words, they may detect some unclarities and ambiguities in the text, their producer is not aware of. This is a way of eliminating doubts from the source, before they represent a problem not only for translators but especially for judges. A collaboration between legislator and translator may result not only in a more accurate translation but also in an improved source text. Summing up, since the success of an authenticated translation depends on its interpretation and application in practice (judge) the ultimate aim is to encourage interaction between translators and judiciaries[89]; plus, when legal translation derives from the contact of two or more legal systems, the involved subjects should not only be legal translators but also comparative lawyers.

All this shows perfectly how the translator finds himself/herself in the middle, between who drafts the text and who has to apply it, between the source text and the target text, between the original language and the destination language and sometimes even straddling two legal systems. Here

[89]SARCEVIC S., Legal Translation and Translation Theory: a Receiver-oriented Approach, *Legal translation: history, theory/ies and practice*. International colloquium University of Geneva, February 17-19, Berne, 2000.

is one of the roles of the legal translator: mediator[90] between who produces the law (in language A) and the receiver (language B). Now, if it is clear who the text producer is, a few words should be spent about the receiver. Following Sarcevic, we have two kinds of receiver: direct and indirect. Those who are in charge of enforcing law, i.e. judges, belong to the first group, whereas the object of the effects of the legal text, i.e. the layperson, is the indirect receiver. We could venture to say the translator is, himself, a receiver at a certain point[91] being the last person to receive the text before it is translated. But at the same time he/she is the second sender, producing a text that should be received by a third subject. This is why translation is perceived as secondary communication. In his/her role of intermediary, the translator has to foresee how the court will interpret what he/she is writing and thus formulate it so that the intended effects are achieved. According to the type of receiver, the translator's approach to the text will be different. Everything seems to bring us back to the function theory, since "the decisive element in determining the translation strategy is communicative function which, in turn, determines to whom the text is addressed in the target culture"[92].

This is why it is commonly shared, translation should be receiver oriented. Assuming that the situations of origin and destination differs under several aspects (language, culture..), the receiver should have the latter in mind, since it is in that situation that the legal text is going to be interpreted and applied by a subject coming from that culture, speaking that language and so on, and therefore working on different basis with respect to the ones of the legislator. During the process of translation, the legal translator should take account of the context in which the text will be received, by context meaning legal and cultural environment, and the context in which the text comes into place, i.e. the context of the communication act. Besides, of paramount importance are purposes and therefore effects of the texts (diversity is

[90] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p 87
[91] *Ibid.,* p. 89
[92] *Ibid.,* p. 79

tolerated if result is the same), intent and last but not least the message that should be conveyed to the receiver. It is evident how, regardless of the perspective, whether we are talking about languages, texts, cultures, legal systems or involved subjects, the stress should always be put on the outcome, on the target text, on the target language, on the receiver etc, this is once more related to the importance of effects and explains us why the translator should know better the destination (language, culture etc) than the origin. Hence in principle, the (legal) translator translates only into his/her mother tongue. Illustrative is the position of the European Commission, where the legal translator is required to master the source language but have the target language as mother tongue. As mentioned in one of the European Commission publications, EC translators "must have a perfect commend of the target language (usually their mother tongue) and a thorough knowledge of at least two other official languages. A knowledge of an additional language is an advantage. Translators work exclusively into their mother tongue"[(93)]. As a consequence he/she will be familiar with culture and legal system of destination, too, and will be able to be aware and most importantly foresee exactly which effect will be produced by the text he/she is translating in a context he/she is familiar with. It should be clear by now, the incidence of the translator in the texts increases, leaving behind the commitment to fidelity to the source text and reaching a level in which he/she creates a new text based on the "communicative factors of the reception in each situation"[(94)].

The other role played by the legal translator is, thus, the one of producer, or as Koutsivitis called him, the "deuxième rédacteur"[(95)], he/she goes from having a passive role to participating actively in the process of law production. This is true for those translation of legal documents that enjoy

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[(93)] EUROPEAN COMMISSION, The European Commission Translation Service, *A Multilingual Community at Work,* Office for Official Publications of the European Communities, Luxembourg, 1999, p. 12

[(94)] SARCEVIC S., Legal Translation and Translation Theory: a Receiver-oriented Approach, *Legal translation: history, theory/ies and practice*. International colloquium University of Geneva, February 17-19, Berne, 2000, p 2

[(95)]KOUTSIVITIS V. G., La traduction juridique : standardisation versus créativité, *Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 35, n° 1, 1990, p. 227

the same status of the originals. This role endows the translator with a new responsibility and authority[96], stressing once more the importance of a legal grounding for him/her as well.

Talking about responsibilities, three of them may be identified[97]: first of all the legal translator has an obligation of means. He/she should use all the resources language offers in order to render the meaning, intent and achieving the result of the source text. This means he/she should be very careful with words, and do not make do with the first solution that comes to his/her mind. This is related to the tricky nature of the language of law, using words of the ordinary language but giving them slightly different meaning, making them most of the time no longer interchangeable. This is the reason why translators should be suspicious of synonyms and, if possible, refrain from using them. But if it is relatively easy to avoid using synonyms, and weigh words, more challenging are the second and the third obligations, regarding the result we expect to be achieved by the legal translator, focusing therefore on contents, and the obligation to reliability. He recognises that different typologies of legal texts, namely law, judicial acts and doctrine, are constrained differently. The result of his considerations is illustrate in the following table, where we can see how the responsibility of the legal translator goes well beyond the one of any other translator. The consequences of an error can have heavy results, in particular when talking about texts of the first and third group (the second one acquiring relevance in common law countries only).

[96] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p 79

[97] GEMAR J-C., La Traduction Juridique: Art Ou Technique D'Interpretation?*, Meta : journal des traducteurs / Meta: Translators' Journal*, Volume 33, numéro 2, juin 1988, p. 308

Tableau des obligations du traducteur juridique*

Nature des textes à traduire	Niveau de difficulté (1 à 3)	Obligation de moyens	Obligation de résultat	Obligation de garantie
Loi, règlement	1	+	++	++
Jugements et actes de procédure		±	++	±
Actes juridiques (contrat, testament...)	3	±	++	±
Doctrine	1	++	++	++

* Le signe + indique le degré de contrainte auquel est soumis le traducteur. Le signe ± dénote un certain degré de latitude laissé au traducteur. Le niveau de difficulté des textes est indiqué de la façon suivante : 3 = difficulté moyenne ; 2 = difficile ; 1 = très difficile.

Source: GEMAR J-C., La Traduction Juridique: Art Ou Technique D'Interpretation?[98]

In conclusion, we expect from him/her the improbable task of taking law, delivered through a text, following the rules dictated by the legal system behind it, and express its message in the target text according to the criteria of the target language of law. Worse comes to worse, the translator will be asked to put together the competences of the comparative lawyer and the *savoir-faire* of the linguist. Master of translation, he should play the "law interpreter" in order to predict the effects of his/her work[99].

[98] GEMAR J-C., La Traduction Juridique: Art Ou Technique D'Interpretation?, Meta : journal des traducteurs / Meta: Translators' Journal, Volume 33, numéro 2, juin 1988, p. 310

[99] GEMAR J-C. , Les enjeux de la traduction juridique, principes et nuances, in *Traduction de textes juridiques : problèmes et méthodes*, Equivalences 98, Séminaire ASTTI du 25.9.1998, p.16. Consulted at http://www.gitrad.uji.es/common/articles/Gemar1998.pdf on 30.10.2012

CHAPTER THREE:

GOING DEEPER – THE PITFALLS OF LEGAL TRANSLATION

CONTENTS: 3.1 Features of Legal Language. – 3.2 Terminological Issues. – 3.3 Facing Languages and Systems. – 3.4 Correcting Mistakes

Here we are to the core of this work: problems. We saw what should be done, from who and how, but we also kept on speaking of legal translation as a challenge, a hard work, a strife, and we will end this thesis calling it battle. Why? Which are the traps it sets out? Against what should the translator fight and which are the weapons he/she should fight with? And what if our knight falls? Which are the ways to remedy to false steps? This is what we will deal with in this chapter, analysing the features of legal language first and the culture-related issues then. And with such premises and assuming that *errare humanum est* we will briefly see how, according to international law, errors may be corrected.

3.1 FEATURES OF LEGAL LANGUAGE

Let us eventually deal with our Pandora's box and try to understand why is it so problematic. Legal language has two main features that make it hard to be managed: technicity and its being system- and culturally bound. The problem of technicity is typical of all languages for special purposes but the cultural-related aspect is particular, even though not exclusive, of legal language and especially of its terminology, because of the close relationship between legal systems and legal language(s). In the end, we could even affirm all problems brought about by legal language are terminological issues, even those which seem to be conceptual, because at the end of the day, the problem is generally not the lack of understanding something that is not actually part of your *Weltanschauung*, but translating it into words, since words are what is missing in your language.

3.1.1 TECHNICAL LANGUAGE OR ORDINARY LANGUAGE WITH SPECIAL PURPOSE?

We assumed "LSP" was the rule since the first pages of this work, as the starting point was realising that what really matters in legal language and translation is the effect a sequence of words should have on its addressee and indirectly on society on the whole. Dealing with a language with special purpose means assuming a certain degree of technicity, but the peculiarity of legal language is that it looks exactly as ordinary language. Even technical terms are in disguise, their graphical and phonetic form being often exactly the same of a common word but their meaning being (slightly or deeply) different. The polysemic character of legal language is precisely related to the difficulty one has in tracing clearly a dividing line between ordinary and legal language. The legal translator is called to detect the legal meaning and separate it from the ordinary one before rendering it properly in translation[(100)]. This is the first deception, that brings someone to wonder whether one can actually speak of technical language or if the language of law is nothing but part of the ordinary language, just with a special purpose: achieving a legal effect. To a larger extent this could be considered true for any language for special purpose, since all technical languages finally employ the syntax of the language they belong to. Belonging or making reference to? That is the point. Looking at things from the first perspective, legal language would be "parasitic on ordinary language"[(101)]. If we take the second point of view, instead, it would be a language on its own, as it is inseparable from the legal system it derives from, and assumes the existence of rules of law, which give legal language meaningfulness, and a special (technical) meaning ordinary language does not have.

But is law just a matter of words or can we speak of a proper, full-fledged language? We could relate this question to the literal vs. non literal approach to translation. Affirming legal language is actually limited to terminology

[(100)] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 67
[(101)] *Ibid.*, p. 16

would be indirectly accepting word-to-word translation, which we agreed is not equivalent to accurate translation. The unit to be considered when translating a legal text, is the text in its entirety because of the importance of context and because of the rules governing word order, voice, structure and other grammatical and syntactical aspects.

Being a LSP, the language of law is characterised by some traits which make it unique and very complex. The major distinctive feature of legal language is undoubtedly terminology, including technical terms borrowed from ordinary language and foreign languages as well, Latin words and expressions, formal and refined terms and archaic words. However, vocabulary is just the tip of the iceberg, since the language of law can organise the components of sentences in a peculiar way with respect to language in general. Plus, it employs a solemn tone which gives it an unfamiliar turning, and in the attempt of achieving extreme precision, it has recourse to over-complex (and therefore often unclear) sentences. Finally, legal language is one of the most polysemic LSP since the meaning of its terms has been fixed in a particular context and in relation to a specific case. Its vocabulary has, as we will see, a specific but imprecise character[102]. Furthermore, as Gémar maintains, legal language has an initiatory nature, meaning the layperson is not able to understand it unless he/she has been introduced to the domain of law, its language, its institutions, its mechanisms and so on. Polysemy itself concur in rendering law inaccessible to most people.

Beside its being technical, legal language is highly institutionalised and conventional. But if on the one hand this assures some guidelines that should facilitate their job, it explains also why the hands of drafters, and even more those of translators, are tied.

So, legal language shares a lot of features with ordinary language, maybe more than it should, plus it does look like it. This are the reasons why problems arise, but indeed it differs from it in terms of substance. The form

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[102] GONZALEZ – MATTHEWS G., *L'équivalence En Traduction Juridique : Analyse Des Traductions Au Sein De L'accord De Libre-Échange Nord-Américain (ALENA).* Consulted at : http://archimede.bibl.ulaval.ca/archimede/fichiers/21362/21362.html on 20.10.2012, p. 97

may mislead us, syntax may look the same but it actually follows some specific rules that make it a language on its own. Words, phrases and sentences may look ordinary, but when entering the legal field everything assumes a different weight and meaning and follows more rigid and binding rules, that differ from the ones of ordinary language. Constructions are different and less flexible, a few words are actually interchangeable and some words can only be accompanied by other words (technically speaking co-occurrence and collocation) resulting in fixed expressions and phraseologisms, not necessarily obvious for the layperson[(103)]. All these arguments, together with terminological issues, explain why someone cannot act like a legal translator or legal drafter. We are assuming that a translator is actually a text producer who should therefore master at least some legal notions. Suffice it to think to reformulation, nothing riskier and less advisable when dealing with law. The risk is jeopardizing the meaning and the effect those words have, because if such a sequence was chosen it means no other combination of words could suit that purpose better. Needless to say, this issue is doubled in legal translation where problems other than language are involved.

We should indeed not speak about one legal language but about legal languages, one per language, since, as there is no universal law, there is no universal legal language either. And, again, I am not referring to words only, which obviously differ from one language to the other, but to patterns and rules, unique to every language.

3.1.2 THE IMPORTANCE OF FUNCTION

The uniqueness of legal language rests in its normative and performative nature. Normative since it is related to norm creation, production and

[(103)] LERAT P., Vocabulaire juridique et schémas d'arguments juridiques*, Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 47, n° 2, 2002, p. 156

expression and therefore imposes duties upon its addressee, who must act accordingly, the violation of these rules being punished by sanction.

Each language has its ways to express legal commands, that once again, are based upon fixed specific rules which differs from the ones of the language of the source text and the ones of ordinary language. This is why the legal translator should not only be linguistically competent but also familiar with the legal way of writing of the language into which he/she is translating. Legal obligation in English, for instance, is not expressed through the modal *must,* even though teachers always told us it is the strongest expression of obligation and necessity. This is undoubtedly true, at least as far as ordinary language is concerned. Now, which is the other way of expressing obligation? *Have to*. Of course it is, but once again you will never find it in any law. Nor you will find explicit performatives such as *order*, *forbid* and *permit*. To lessen the degree of directness of legal provisions (and this is a cultural factor), English legal language employs implicit performatives, namely *shall, may* and *may not* respectively in order to express obligation, permission and prohibition. The legal translator has therefore to be careful not translating, for example, shall with the future tense, not because it is wrong but because it is not what the *legal* language of destination requires, the rules to be followed being always the one of the target language. Indeed, French, for example, acts differently using the indicative present of the principal verb and occasionally by special, explicitly performative verbs such as *être tenu, être obligé* and indicative expressions (e.g.*il faut*)[104].

This shows the performative nature of legal language, used mainly not to explain things but to do things[105]. Once again this feature is not exclusive of the language of law, nor law employs exclusively performative utterances, but it does rely heavily on them. Language in law does confer rights, prescribe prohibitions and grant permissions. Thus, "legal speech acts are

[104] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 139

[105] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 14

said to be constitutive of their effects"[106]. That is why legal language is a LSP, it has the aim of regulating human behaviour and society through obligations, permissions and prohibitions.

3.1.3 THE PARADOX OF LEGAL LANGUAGE

We agreed on the fact legal language is a LSP to handle with care because of its purposes and the effects it aims to produce. Needless to say, one of, if not *the*, paramount principles to respect is precision, which should guarantee certainty of law. But the only certain thing is legal language is neither unambiguous nor clear at all. Paradoxical? Yes, and here is another problem to try to solve. As a start, language is inherently indeterminate[107]. But legal language is more indeterminate than ordinary language because of the nature itself of law that, ironically, requires generality and vagueness: the drafter has to provide provisions that should be applicable to a foreseen fact-situation. He/she is forced to keep a certain degree of vagueness and generality in order to make the norm likely to fit more concrete situations. We can affirm then, vagueness is most of the time not only intentional but also necessary and therefore intrinsic to legal language. Legal language is not only vague and elusive, but it employs a lot of abstract concepts as well, such as *justice*, *due diligence* etc, undetermined by definition. Nonetheless, law requires exactness and precision, the lack of which may lead to disagreement, contentious and disputes. To the point of absurdity, one may even argue norms are created in order to solve disputes that are sometimes result of the indeterminacy of language itself[108].

We should make a distinction between linguistic uncertainty and legal indeterminacy, that may look as two sides of the same coin but are actually in a cause-effect relationship. The first refers to language features such as vagueness, ambiguity and any other unclarity in the application of linguistic

[106] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 14
[107] *Ibid,* p 19
[108] *Ibid*

expressions that may lead to the second, legal indeterminacy, i.e. when there is no one-way solution to be adopted in a question of law.[109]

Things get more complicated when talking about translation, since the faults of one language are mirrored by the ones of the other. We therefore have two perspectives: intra- and interlingual uncertainty[110]. In the first case uncertainty is found within a language, in the second one it arises when two languages are compared or, as in our case, when a language is translated into another language. So that, if we already have ambiguities in the source language they will double during the translating process, adding those of the target language.

Plus, the difficulties encountered in the translation of vague terms come from the fact they make reference to imprecise notions, often intentionally vague in order to give a certain degree of discretional power to judges and courts during interpretation. In order to make texts more easily applicable, ambiguity should be maintained in translation, but then, the problem is finding an equally ambiguous term in the target language.

International law, especially for treaties, which are negotiated texts, and in case of international legislation produced within the framework of international organisations, as the European Law, putting together wills and needs of Member States, is often the result of political compromises. The use of vague and generalising expression may be, thus, a strategic tool used in order to gain consensus on a given matter. Due to the fundamentally egoistic nature of States, a too precise provision may be looked at as an exaggerate, and therefore unacceptable, limitation to one's sovereignty. The use of broader terms and formulae, which can be interpreted more or less discretionally by each parties, entice them to accept being bound by the agreement. It is of course a double edged sword, which may easily lead to interpretative and translational issues, which may result in contentious among parties that will obviously try to give the text the interpretation that favours them. This is why courts are often asked to give definitions of certain

[109] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 75
[110] *Ibid.,*

terms employed in legal text or during trials. In order to prevent this kind of disputes from happening, drafters may provide definitions and interpretation rules within the text itself. Another possible solution to (unintended) uncertainty, that may be reflected in translation, is standardisation of terms.

Interestingly enough, the lack of clarity and uniqueness in the source text, which may result in inconsistency and drafting errors, may also lead to an improvement of the text during translation. This happens because the translator needs to be over-careful to and with words, developing a major sensibility to linguistic nuances, so that he/she may be able to spot grey areas which need to be clarified. Yet, this is a very delicate operation which may require a dialogue between drafter and translator.

Translating, precision may also be sacrificed on purpose in order to avoid making more grave errors than the ones that might result from inaccurate interpretation. Sacrificing technicity and precision is a way of favouring elimination of ambiguities and the risk of using *faux amis*. We could see it also as a way of shifting responsibility on the judge, which is something more advisable than taking the initiative, especially when translator are not extremely competent in the field of law.

Words should be calibrated but despite attention is paid to employed terms, the infinite variety of factual combinations is destined to cause doubts as to their meaning in the particular case.[111]

3.2 FACING LANGUAGES AND SYSTEMS

As made clear from the start, the real problem concerning legal translation is not related to language *per se*, which is just its manifestation, but to the conceptual differences of notions belonging to different national legal systems. Language and law are indeed the expression of culture and

[111] BOWERS F., *Linguistic aspects of legislative expression,* University of British Columbia press, Vancouver, 1989, p. 130

historical background of a nation, this is why legal translation is problematic, because it involves both, arising doubts on translatability.

Languages and legal systems are tightly intertwined and reciprocally influencing one another. A legal system is indeed made up of concepts, conceived through historical evolution, related to culture, and expressed through language. The fact legal systems influence languages, created this strict legal concept-legal term correspondence unique to every language. And here is the problem: the relationship between the two is not the same in all languages, and if this is not relevant when national systems are kept apart, it becomes problematic in translation and in international legal arguments. Every legal system works as a lens through which one can observe a nation, the graduation of which is given by language. We perceive this double-sided influence if we look at two of the circumstances in which legal translation is needed: one legal system – more than one language vs. several legal systems corresponding to different languages. Crépeau, professor of public international law at Mcgill University (Canada), calls them respectively "transposition linguistique simple" and "transposition linguistique complexe"[(112)], stressing a direct relation between complexity of translation and the bond between language and legal system. Being inside the same juridical system, in the first case difficulties will appear essentially, even though not exclusively, on a linguistic level, whereas when dealing with complex translation one should have recourse to comparative law, since translational problems would be related mostly to legal content and the difficulties of conceptual transfers among different (legal) cultures.[(113)] The opposition is by the way not easy-difficult but simple-complex. It is just a matter of weight, meaning on the one side linguistic issues will prevail on legal matters and vice versa. The degree of difficulty, instead, is related to function.

[(112)] Crépeau in TERRAL F., L'empreinte culturelle des termes juridiques, *Meta : journal des traducteurs / Meta: Translators' Journal,* vol. 49, n° 4, 2004, p. 878

[(113)] TERRAL F., L'empreinte culturelle des termes juridiques, *Meta : journal des traducteurs / Meta: Translators' Journal,* vol. 49, n° 4, 2004, p. 879

The relations between language and law are well summarised in the following table:

	UN SYSTÈME JURIDIQUE	PLUSIEURS SYSTÈMES JURIDIQUES
UNE LANGUE	*Ex. : droit français en langue française.* Pas de problème de traduction.	*Ex: droit français et droit belge (en version française).* Différences conceptuelles ou non. Difficulté soit linguistique soit juridique. Recours au droit comparé.
PLUSIEURS LANGUES	*Ex: Belgique, Suisse.* Pas de différence conceptuelle. Difficulté plus linguistique que juridique.	*Ex: Canada (législation fédérale).* Différences conceptuelles. Difficulté juridique. Recours au droit comparé.

Source: Terral F., L'empreinte culturelle des termes juridiques [(114)]

Taking a closer look, when dealing with different legal systems using the same language, different legal concepts are expressed through the same language most of the times in different ways. This is the case, for example, of French, used in France, Belgium, Luxembourg and some ex-colonies, or English spoken in England, Wales, Scotland, Ireland but also Commonwealth countries including India, Australia and the United States. Different, also deeply different, realities may use different legal terms to convey the same sense. It follows, we should distinguish between ordinary and legal language, confirming what we saw when defining legal language as a separate system from the ordinary one. These countries, then, use the same ordinary language but different legal languages. If it was not like this, different legislations using one language would use the same expression to express the same meaning. Similarly, the same legal term may be used to convey a different meaning in a different legal system, leading us to polysemy, even though if we assume we

[(114)] TERRAL F., L'empreinte culturelle des termes juridiques, *Meta : journal des traducteurs / Meta: Translators' Journal,* vol. 49, n° 4, 2004, p. 879

are talking about different languages, polysemy would be only apparent, closer to homonymy. This may cause interpretation problems one may not expect from two legal system using the same (ordinary) language. This is why to a certain extent, we may talk about translation in such cases as well, a translation within the same language, an intra-language translation, for as absurd it may seem. Two situations may come into being: same concept, different terms will create an essentially linguistic problem related to a difference in denomination. When the same word acquires a different meaning according to the legal system, the problem would be essentially juridical, deriving from a notional discrepancy. In order to avoid misinterpretations related to homonymy the drafter/translator may provide an explanation of the term.

Yet, the most common case of legal translation is the one involving more legal systems and more languages, it usually has an informative purpose unless private law documents (e.g. contracts) should be signed by parties speaking different languages and most importantly, coming from different legislative realities. It is a forced, unnatural situation, since the translator is asked to translate into a language that has nothing to do with a given original legal system, in order to express concepts foreign to the legal system that produced that language. The language of destination should be moulded to render concepts which do not belong with it. This is why, legal translation is with all probability the most difficult kind of translation one may deal with. The problem, then, arises not on a terminological level but on a conceptual one, since even though the target language may have terms formally translating source concepts, it does not mean the conveyed meaning would be the same, "due the respective regulatory framework or the legal traditions of the other system (system-specificity of legal language)"[115]. Such an operation implies the translator has a certain degree of legal competence, and in particular that he/she should be familiar with comparative law, for the

[115] EUROPEAN COMMISSION, *Studies on translation and multilingualism. Language and translation in International law and European law,* Publications Office of the European Union, Luxembourg, 2012, p. 67

translation of a legal term would necessarily imply the understanding of the legal concept in the source language and legal system, first, in order to be able to find a partial or near equivalent[116] in the target language and system. These are what Sarcevic calls *system-bound terms* as they "designate concepts and institutions peculiar to the legal reality of a specific system"[117] and raise, for these reasons, doubts about their translatability. This is the case of countries in which we find a coexistence of bilingualism and bilegalism, which most famous example is Canada, where French and English coexist and are respectively related to *droit civil* and common law, and of the one of a kind international organisation of the European Union[118].

3.2.1 The Role of Comparative Law in Legal Translation

To date, the approach to legal translation seems to be a highly linguistically connoted one; one should not forget, by the way, legal translation is first of all a matter of comparison of legislations, being and remaining at his core, related to the contents of the respective legal institutions it deals with. The consequence of this affirmation, together with the consideration made on system-bound terms, is quite obvious and brings us to comparative law, born primarily to attain a deep knowledge of legal systems, that is, as should be clear by now, one of the conditions for an accurate legal translation.

As legal translation may be reduced to the process through which "a legal term under legal system A, understood as a systemic term, is transformed into another term under legal system B by finding a term that corresponds with the function of the legal term under legal system A"[119], it all seems to

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[116] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 238

[117] *Ibid.,* p. 233

[118] TERRAL F., L'empreinte culturelle des termes juridiques, *Meta : journal des traducteurs / Meta: Translators' Journal,* vol. 49, n° 4, 2004, p. 876-890

[119] GALDIA M. , Comparative law and legal translation, *The European Legal Forum* (E) 1-2003, p. 3

become a matter of denotation, more than meaning (in its linguistic acceptation). The two linguistic equivalent terms may, indeed, lack a common denoter. The point is, as we already saw, a competence going beyond language and translation theory, is required from the legal translator. What we are adding now, is it should not simply be a legal competence but a comparative one. Still, the translator is nothing but human so the full master of all these disciplines is maybe too much to ask. A joint work of translation and legal comparison would therefore be desirable, the approach of comparativists being perfectly in line with the one we agreed the legal translator should have.

Two apparently, or, more properly, linguistically non-equivalent terms, may be considered comparable in the light of function and effect, which are the guiding light of comparative lawyers and should be the ones of skilful legal translators, as well. So, on the one hand, comparative law seems to be an indispensable instrument to attain accuracy in legal translation. Interestingly enough, the vice versa is true as well: legal translation may be considered an essential tool for comparativists, as it serves the need of law comparison, allowing to have access to a legislation drafted in a foreign language.

Yet, the main difficulty of legal translation is not related to linguistic differences but to the affinity of the involved legal systems and legal traditions. This is why comparative law seems to be not only useful for legal translation but its basis. Assuming that translation is less complex when involving close, i.e. belonging to the same family, languages and legal systems, the more different the legal systems are the more necessary a contribution coming from comparative law will be. Comparative law deals indeed with these families. Assuming that societies face the same legal and social problems, it studies legal systems by grouping them into families according to the features they share. We have then Continental Civil Law, Common Law, Socialist Law, Hindu Law, Islamic Law, African Law and Far East Law,

separated by conceptual differences. Inside each category we have several national legal systems that are obviously not equivalent but that share more features among them then with systems belonging to different families. It follows, comparative law helps translation, which is hindered by differences, by matching legal system and finding common points one may not be aware of. The thing is, it is the result of an artificial process, and the risk is forcing things too much, distorting the real meaning of dispositions and words trying to find equivalences.

So basically, in the case of two substantially different legal systems in their classifications and concepts, translation becomes rather an exercise in comparative law, looking for equivalence.

3.2.2 Law and Language as Social and Cultural Product

It all originates from the binary relation tying law and culture together. They can indeed be considered product and producer of one another. Law is a social and cultural product, and this explains why legal texts abound of culturally loaded terms which represent such a challenge for legal translators. Actually, the cultural problem presents itself when dealing with whichever translation, since the transfer of cultural contents is seldom easily achieved. This is particularly true for law and legal texts, the roots of the problems resting in the fact law is culturally and jurisdictionally specific. Law is indeed produced by, for and responding to the need of a particular society, this is why it is numbered among social sciences.

A legal system is first of all a national phenomenon, produced by historical processes and indissolubly related to culture. This is why every legal system/family has its own terminology, its own way of formulating, interpreting and applying norms, resulting from the way society and social order are conceived, giving birth to one of a kind institutions, hierarchies and judicial procedures. This underlying incongruence of legal systems explains why the elements of the source system cannot be transposed into the target

language/system without being adapted[120]. The question here is whether one should sacrifice the almost forced application of the rule of law and the aim of absolute equivalence or the expression of it. [121]

Despite incongruences, comparative lawyers managed to group legal systems into families, stressing similarities, instead. But, as already pointed out, they are artificial and the distance among them concurs in complicating tasks both for legal translators and comparative lawyers. Comparative law, looked at in negative, helps us understanding why legal translation is such a complex subject, showing us the obstacles the legal translator has to face, deriving precisely from dissimilarities:

> The absence of an exact correspondence between legal concepts and categories in different legal systems is one of the greatest difficulties encountered in comparative legal analysis. It is of course to be expected that one will meet rules with different content; but it may be disconcerting to discover that in some foreign law there is not even that system for classifying the rules with which we are familiar. But the reality must be faced that legal science has developed independently within each legal family, and that those categories and concepts which appears so elementary, so much a part of the natural order of things to a jurist of one family, may be wholly strange to another. […] Some matter of primary importance to one may mean nothing, or have only limited significance to another.[122]

The degree to which languages and legal systems share features result in different degrees of complexity of translation. The combination of relations between languages and systems leave us with four possible scenarios. The less problematic one, is undoubtedly the one implying two close legal systems and languages, whereas on the opposite extreme we have a situation in which both languages and systems are unrelated. In the middle we have an half-way situation that is maybe trickier than this last one: when dealing with

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[120] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 25

[121] Beaupré M., La Traduction Juridique – Introduction, *Les Cahiers de droit,* vol. 28, n° 4, 1987, p. 742

[122] David and Brierley in SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 14

two distinct legal systems but two affine languages, the risk is taking language similarities for granted, running up against *faux amis*. Lastly, a combination of different languages and similar legal systems should not raise particular problems, since, due to the affinity of legal systems we should find equivalents in the two languages.

Linguistic differences are therefore the expression of the notional gap between one legal system and the other.

3.2.2.1 Common vs. Civil Law

Common and civil law are the pillars of western legal world, and the two legal systems that one way or another find themselves face to face mostly. They do coexist in bilegal countries, such as Canada, and within the framework of international organisations. Even though sharing several features, due to their western nature and since through history their coming in touch resulted in reciprocal influence, they differ under non-negligible aspects. For the same reasons, the work of the legal translator is further complicated by the fact the languages to which those system make reference to are often similar or at least reciprocally influenced.

Common Law and *droit civil* present differences both from the formal and the substantial point of view. Substantial dissimilarities are related to the more hidden aspect of law coming from cultural backgrounds which made national law as unique as it is. Language undergoes exactly the same process. Combining the two things together we understand how law is a system which uses a particular vocabulary, correspond to certain concepts, puts together peculiar rules and implies some rules are followed in the formulation of the norms that will make it up. The concepts of common and civil law themselves are fictional, since there is actually no full correspondence between national legal systems and most of all there is no common law or civil law legislation. They are just conventions, not to be mistaken with generalisations, useful to make different systems comparable in order to better understand them.

The *droit civil* is the heir of the Roman and Germanic legal traditions, including most of European legislations, and is considered to be scholastic, for the importance it gives to doctrine, whereas Common Law is typical of Anglo-Saxon countries, and is regarded as forensic for its reliance on case law. If on the one hand Civil Law is not related to a particular reference language, English and Common Law are two inseparable aspects of the same culture: no common law system has ever developed independently of the English language; plus, Common Law has always had a non-negligible advantage, since, based on a unique language, its tradition has long been related to a common culture, as well.

Substantial systemic differences result in different drafting needs, which are consequently expressed through different legal styles. This is due to the fact legal tradition and culture have had a lasting impact on the way law is conceived and written. It follows, written legal language reflects the essential elements of the legal system it is related to[123].

As for Common Law, it relies in large measure on judicial precedents and case law, legal opinions tend to be "long and containing elaborate reasoning"[124], whereas Civil Law judicial opinions, not making references to case law but to legislation only, are usually shorter and more formal both in nature and style[125]. As a consequence, the way of writing both norms and trial-related documents, is different:

> Common Law judgments extensively expose the facts, compare or distinguish them from the facts of previous cases, and decide the specific legal rule relevant to the facts. In contrast, Civil Law decisions first identify the legal principles that may be relevant, then verify if the facts support their application.[126]

Legislative drafting, too, follows different patterns resulting in *concise* statutes and codes in Civil Law countries and *precise* texts in Common Law countries. This is due to the fact, in Civil Law statutory provisions, general

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[123] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 29
[124] *Ibid*
[125] *Ibid*
[126] *Ibid*

principles do not require an explanation for they are not going to be read restrictively, but need to be stated succinctly if the code is to be exhaustive. Common law statutes respond to other needs and do not require brevity, since they "cover only the specific part of the law to be performed, but must be precise, because the Common Law courts restrict rules to the specific facts they are intended to cover"[127]. This precision is witnessed by the presence of a sort of dictionary as attachment to many English statutes[128], providing definitions and explanations of drafting and stylistic choices in order to clarify potential obscure points, as much as possible.

To put it simple, Civil Law has the tendency of using abstract forms in order to assure a wider scope of application of the norm, the role of judges assumes therefore a relevant importance since it is his/her duty to interpret the norm and make it applicable to the concrete situation, resulting in a deductive[129] method. On the other hand, Common law method is inductive[130]: Anglo-Saxon jurists focus on fact patterns and analyse situations, presenting similar previous cases, for the decisions of the judges constitute a precedent with legal force, to which one can make reference in following analogous cases. Detailed definitions and enumerations of specific applications or exceptions[131] characterise Common Law legislation, which leaves less discretion to the judges with respect to Civil Law.

The different approach to norms (value, interpretation and applicability) implies different writing techniques the translator should be aware of. When translating from a common law text into a language related to a civil one, he/she shall know the rules governing drafting and interpretation both of source and target language/system and therefore refrain from approaching the source text in the genius of the target context, regardless of the implication of the source legal system and language. These stylistic

[127] *Ibid,* p. 113
[128] *Ibid,* p. 114
[129] *Ibid,* p. 30
[130] *Ibid*
[131] *Ibid*

differences may also be reflected in international treaties which are often influenced by one of the two legal systems.

The difference in systems presupposes a difference not only in the way of conceiving norms but also of denomination of institutions, professions, sources and concrete situations. As for institutions, for instance, translator should first understand if a given institution exist in the target system, if so, he/she should verify if it has the same role in both systems, the risk being, once again, to be deceived by *faux amis*. Suffice it to think to "parliament", linguistically equal in many western languages (en. Parliament, it. Parlamento, fr. Parlement) but not necessarily referring to completely identical institutions. In such cases translators usually choose to leave the original name in the translation, or at least they do specify the two institutions are different, since using the correspondent of the target language *tout court* could mean assuming the two institutions to be identical.
We realise, then, the large majority of the problems arising from legal translation, especially when concerning the translation from one legal system to another and even more when these belong to different legal families, is related to vocabulary. And this is exactly the object next paragraph will deal with.

3.3 TERMINOLOGICAL ISSUES

By now, it should be clear the major problem of legal translation is being able to convey a message, not only from a language to the other but also, and mainly, from a legal system to another. This is particularly clear at a terminological level.

First of all let us start looking at the smaller unit of the legal discourse: the legal term. It is made up of two essential constituents: its linguistic form, i.e. the graphic word we read and the sounds we hear, and its substance, the

concept behind those conventional signs, expressed through them[132]. What makes things complicated is the fact legal concepts are born from national legal systems and therefore reflect them. The major challenge is, indeed, represented by the apparently contradictory coexistence of two methodological needs: on the one side the respect of the original content coming from each of the compared systems, and on the other side the desired symmetry between them.[133] Paramount aim of any terminological issue is clarity of communication, excluding any kind of misinterpretation and ambiguity, difficult to achieve for the reasons we will look at in the next paragraphs.

3.3.1 EQUIVALENCE VS. UNTRANSLATABILITY

Translation longs for equivalence. Equivalence is a term borrowed from mathematics, presupposing a balanced and equal relationship. Assuming translation is an activity which aims to producing equivalence, means assuming equivalence is the essence of translation. It therefore does not refer to terminology only: equivalence is the degree to which target words, sentences and texts can be considered equal and equivalent to the original[134]. To a certain extent we could even say translation *creates* equivalence since, before being translated, two terms are just two distinct entities belonging to different systems. Translation artificially generates correspondences, it looks for them and find them through a process of adaptation and, in the end, scarification and compromise. For perfect equivalence seldom exists, and translators have to break source words and

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[132] SANDRINI P., *La terminologia giuridica: Difficoltà di traduzione e elementi per una metodologia specifica,* consulted at: http://homepage.uibk.ac.at/~c61302/publik/termgiur.pdf on 02.11.2012, p. 1

[133] THIRY B., *Equivalence bilingue en traduction et terminologie juridiques : Qu'est-ce que traduire le droit ?* , consulted at :http://www.tradulex.com/Actes2000/Thiry.pdf on 02.11.2012, p. 2

[134] GONZALEZ – MATTHEWS G., *L'équivalence En Traduction Juridique : Analyse Des Traductions Au Sein De L'accord De Libre-Échange Nord-Américain (ALENA).* Consulted at : http://archimede.bibl.ulaval.ca/archimede/fichiers/21362/21362.html on 20.10.2012, p. 43

concepts down into smaller semantic units to put them back together in order to find (or should we say create?) something akin to equivalence. We may speak of full equivalence just in one case, namely when the source language and the target language relate to the same legal system. Yet, even when they relate to different legal systems, near full equivalence may occur. Beside the diverse insertion of a term in a legal system as a whole, de Groot and Van Laer identify two cases in which something very close to near equivalence occurs if:

> a) there is a partial unification of legal areas, relevant to the translation, of the legal systems related to the source language and the target language;
>
> b) in the past, a concept of the one legal system has been adopted by the other and still functions in that system in the same way, not influenced by the remainder of that legal system.[135]

Plus, equivalence is a relative concept depending on the context and the purpose of the translation, as almost everything we saw so far. They are indeed the aspects which determine whether the differences between source and target term are enough to make the latter unusable in the translation. So, it may be the case a solution may be acceptable in a given context and not acceptable in another[136]. Another thing that should be considered, is whether the translation aims to give the receiver, who does not speak the source language, an overall idea of the contents of the text or whether the text will have force of law. In this case it is important to make sure the terms employed in the target version are neither narrower nor broader than those used in the source text, the risk being altering the applicability of the norm. According to the perspective we choose to work from, we may recognise different kinds of equivalence. Starting with a simple one, formal equivalence occurs when we have linguistic homogeneity between source and target text, and is achieved through word-to-word translation, which once more, cannot be considered always accurate from our point of view.

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[135] DE GROOT G-R, VAN LAER C. J-P. (2006), *The Dubious Quality of Legal Dictionaries*, International Journal Of Legal Information, Vol. 34:1, p. 67

[136] *Ibid.,*

In the legal field, equivalence acquires a slightly different acceptation from the ordinary one, stressing contents and therefore reasoning more on discourse than language *tout court*. Being legal texts a particular kind of texts, not much of attention is paid to style and grammatical features neither, favoured respectively by stylistic and paradigmatic equivalence. More interesting from our point of view are semantic and referential equivalence, focusing respectively on meaning and context, and the so called dynamic equivalence, aiming at obtaining the same effect of the source text, paying particular attention on the intention of the conceiver of the original text[137]. But legal translation approaches equivalence from a peculiar perspective, fil rouge of this work: function. Following the assumption literality is not the solution, we should rather focus on notions and purposes. Notional equivalence may be leagues apart from literal equivalence but, as far as effects and concepts are complied with, it would be the right choice to make. Functional equivalence is the process through which the translator looks for linguistic, contextual and conceptual elements in the target language, able to produce a new text which will lead to the desired effect, that should be the same of the source text. Translating according to functional equivalence means realising and accepting a non-existing perfect correspondence between languages and concepts. So, this is when linguistic constraints are sacrificed[138].

Especially in a problematic and complex domain as law, even when there are existing words in the target (ordinary) language that are linguistic equivalent to the source language, they may bear partially equivalent meaning in law or, even worse, may not be functionally equivalent in law at all. Once more we have to keep in mind that a discourse on legal translation should be carried out on two levels: formal and notional, since homonymy seldom equals to notional identity. In case similar words exist, they are usually employed even though the sense is not completely the same, specifying nuances verbally. Sarcevic, basing her considerations on an

[137] *Ibid,* p. 52
[138] *Ibid.,* p. 62

analysis carried out from the Berlin Internationales Institut für Recht- und Vervaltungssprache, distinguishes between essential and accidental features of a legal concept, i.e. the core of the concept itself without which we cannot talk about correspondence at all, and all those accessory attributes that concur in rendering the two concepts more or less equivalent. She then identifies different types of equivalence occurring in the domain of legal translation, according to the degree of correspondence between source and target concepts and terms: near equivalence, partial equivalence and no equivalence[139]. Most of the times concepts are only partially equivalent, meaning "they share most of their essential and some of their accidental characteristics, or when concept A contains all of the characteristics of concept B" and some other accidental characteristics concept B does not have. This is the case of hyponyms and hypernyms.

Near equivalence is more difficult to find but it is the highest degree of equivalence one may hope to attain. It occurs when two concepts are almost completely overlapping, sharing all their essential and most of their accidental features or when the departure concept includes all the features of the target one, and some more; the additional features of the first one should not be too much or too relevant, in any case, since it would wander off to no equivalence[140].

If the first and the last options do not actually represent a choice for the translator, who will say yes to near equivalence and no to no equivalence, the halfway alternative poses a problem of acceptability. In case of partial equivalents translators should base their decision on the textual context and keep in mind partial equivalence is not reciprocal, for the translation of A into B may be acceptable but B into A may not[141]. As a general rule, lawyers agree an equivalent is acceptable as far as it is not misleading, so rather than similar it should not be different. Nonetheless, one must be capable of understanding when a term is misleading and when it is not, and this implies

[139] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 238
[140] *Ibid.,*
[141] *Ibid.* ,p 241

a certain degree of legal competence of the translator, who should evaluate potential effects of both source and hypothetic target term which, as we know, largely depend on the situational context of the receiver.

It follows, one has to evaluate the weight the single features of the concept have, and most of all, pay attention to what are known as false equivalence, plurivocal equivalence and uncertain equivalence, relevant more in terms of words than concepts, and this is why they are potentially more dangerous. False equivalence is the weak and deceiving brother of near equivalence; it occurs when a term of language A and a term of language B, even though commonly considered equivalent, actually present some non-negligible distinctive traits so that the use of the term of language B would compromise the accuracy of translation and concordance among versions[142]. Plurivocal equivalence, on the other hand, may be mistaken for polysemy and ambiguity at first blush, but it actually does not refer to multiplicity of meaning but multiplicity of correspondences in the target language. There is basically no univocal equivalent in the target language but more than one term may translate the source one. Task of the translator is finding the one that best suits the case, according to context and receiver[143]. Last but not least, we have uncertain equivalence, and here we come to ambiguity: the source text is ambiguous, so that the translator is not sure about *what* to translate, not only how to translate it. The perspective is different from the previous cases, the problem being related not to doubts on the target but on the source text. The translator needs to interpret the original, trying to ascertain the intended meaning. The risk when more than one target language are involved (e.g. when translating for the EU), is that different translator may give the ambiguous term different interpretations, jeopardising linguistic homogeneity[144].

But the worst scenario is no equivalence or more simply untranslatability, that by the way may have different declinations. Untranslatability means lack

[142] COSMAI D. , *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p. 137
[143] *Ibid.,* p. 134
[144] *Ibid.,* p. 138

of equivalents in the target language. This could derive from a mere terminological deficiency, when there is no exact linguistic equivalent, but borrowing the foreign term, using an hypernym or creating a new word the concept is perfectly understandable in the target language. At worst, it may derive from a root problem, a substantial untranslatability related to the absence of the concept itself to which the rule makes reference to. Unfortunately this is not an exception, since as we already saw, legal language is made of system-bound terms.

Regardless to the degree of equivalence, legally speaking the seal to equivalence is put in black and white by the legislator within the legal text itself, accordingly with what is provided for by article 33 of the 1969 Vienna Convention on the Law of Treaties, confirming the idea equivalence is fruit of an artificially deliberated process more than a natural condition.

3.3.2 Ambiguity and Vagueness

As already mentioned, even ordinary language cannot boast a one-to-one relationship among words and the concepts behind it or between sentences and their logical meaning. Dealing with uncertainty at a word level, we may distinguish between ambiguity and vagueness, that may seem synonymous but actually refers to different phenomena. In both cases the terms are open to different interpretations, but if with ambiguity we are not sure about which meaning we should attach to a given word among some, with vagueness we have a too wide and unspecified term to which more than one meaning, especially in terms of nuances and grade, could be attached. When we have more than one meaning that can be given to the same word we usually speak indistinctly about ambiguity and polysemy, but technically speaking they refer to slightly different situations with different implications in terms of translation as well.

Ambiguity is one of the ordinary words that acquire a more precise meaning if related to law. In common language ambiguity occurs when we

have more than one meaning for a word, in legal language "any kind of doubtful meaning of phrases or longer statutory provisions"[145]. The difference is not straightforward, but reading the sentence twice it is quite obvious: the problem is not multiplicity of meaning but *uncertainty* about meaning and the unit in exam is not necessarily a word but may also be a phrase or a sentence. Beside terminological ambiguity (related to words) we have syntactical ambiguity which has as reference a larger unit, the sentence. When coming to translation, the tendency, contrarily to what happened in the past[146] and as it happens for words, is to keep ambiguity in the target text, as well. Yet, syntactical ambiguity is not as evident as terminological ambiguity. So that the translator has first to detect it, and then try to understand how to translate it in the destination language. Examples of syntactical ambiguity are sentences including the conjunction "or" raising doubts about whether to consider it including or excluding one of the alternatives.

The meaning of ambiguity is wider, then, including polysemy (one word more meanings) and homonymy (same graphemes, more meanings but words are actually different, it is just that they are spelled the same way). The intended meaning of a polysemic word can usually be derived from its context. In case of a word with an ordinary and a technical (legal) meaning, the latter should always prevail. Polysemy is generally originate by a process of meaning change such as specialisation, generalisation and metaphoric transfer. The strange thing is that ambiguity is not unclear, since the senses may be plain but potentially misleading[147]. As for legislatives expressions, ambiguity *strictu sensu* (polysemy and homonymy) is hard to find; homonymy in particular does not worry the translator/drafter, for it is rather easy to understand which is the intended meaning, and as already mentioned polysemy in statutes deals mainly with technical words which may bear both

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[145] GONZALEZ – MATTHEWS G., *L'équivalence En Traduction Juridique : Analyse Des Traductions Au Sein De L'accord De Libre-Échange Nord-Américain (ALENA).* Consulted at : http://archimede.bibl.ulaval.ca/archimede/fichiers/21362/21362.html on 20.10.2012, p. 131

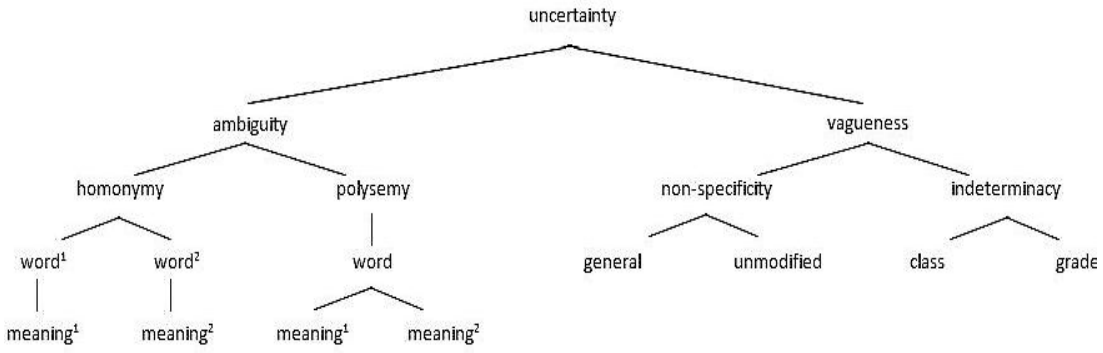
[146] *Ibid.*, p. 142

[147] *Ibid.,* p. 135

an ordinary and a special meaning, We could talk about a legal-non legal polysemy [148], then, which indeed is not polysemy at all: since as we are in a legal context the alternative to choose is undoubtedly the technical one.

Either ways, the translator must always keep in mind purposes and objectives and interpret the ambiguous text accordingly. For if ambiguities can be solved this occurs at the level of interpretation, by the translator (if sure a hundred per cent about the sense that should be given to the text) or by the judge, in case the translator chose to retain ambiguity and was able to find an equally ambiguous term in the target language.

As for vagueness, we can consider it as lack of specification (the meaning is clear but general) or indeterminacy of meaning. An expression is vague, or imprecise, if more concepts may fall within its scope, admitting borderline cases in practical use[149]. The problem with a vague concept is to determine whether it applies or not to a given situation and if so, if the intended meaning can be ascertained by the reader. To a certain extent vagueness can overlap with generality, occurring when an expression may be employed to "any one of a number of things whose differences are not denied or necessarily overlooked"[150].



Source: BOWERS F., Linguistic aspects of legislative expression[151]

[148] *ibid.,* p. 146
[149] CAO D., *Translating Law,* Multilingual Matters, Topics in Translation, Clevedon, 2007, p. 74
[150] *Ibid.,* p. 75
[151] BOWERS F., *Linguistic aspects of legislative expression*, University of British Columbia press, Vancouver, 1989, p. 137

Another terminological problem is that a legal term may have several synonyms and some of them may resemble one another but differ in law.

But so it is, legal language is ambiguous not only because it is a feature of language in general but, as we saw, also as a result of a choice. It depends on and take advantage from the linguistic properties of generality and vagueness, which are source of uncertainty but at the same time extend the scope of application of norms. Yet law is an objective, social science which needs and its based upon precision and uniqueness, perfect antonyms of vagueness and ambiguity. And one of the major problems related to polysemy and ambiguity stays in the fact the text producer (producer of ambiguity as well) is most of the time not consultable.

Despite imprecise words, certainty of right have to be assured and one way of doing it is through the use of definition and interpretation clauses, usually in the form of footnotes within the legal text.

3.3.3 SOLUTIONS

The aim of legal translation is not only transferring a message, but also delivering a text which will have as a result exactly the same effects of the source text or at least (in case of legal translation for informative purposes) bearing the same meaning. This is the task that should be fulfilled by the legal translator regardless of how he/she does it.

If the more immediate way of translating is equivalence, it is also true it is not always possible and, even when it is, the (low) degree of equivalence may not be enough to make it the proper solution to take. If acceptable equivalents cannot be found in the target legal language/system, the translator has to fall back on alternative solutions. These are: descriptive paraphrases, calques, reformulations, neologisms and last but not least the transposition of the original word in the target text without translating it. All these solutions, but especially the last one, may go with a definition, aiming at dissipate potential doubts arising from a non-straightforward translation.

Some of them are more advisable than others depending on the situation, and in any case they are not an easy choice to make, each of them implying considerations on context, receiver, target language and system, cultural constraints, and to some extent philology, too.

What seems to be the easier thing to do when no (functional) equivalent can be found, is keeping the source word in the translation. Yet, we should have learned by now, nothing is easy when coming to law and its declinations. Using a foreign word in a text is never the first nor the simplest choice. First of all because it goes against the principles of translation itself: if you are translating it means you should write in a different language from the source one, assuming the receiver will not understand, at least not thoroughly, the original text. For even though he/she speaks the language the text was written in, he/she is probably not familiar with the technical language, which is precisely the one the translator may have problem to translate. This is why the translator should refrain from not translating, unless he/she knows the term will be understood by the addressee of the text. A certain degree of transparency(152) is recommended, even though the translator may bypass the problem by providing the reader with a definition or putting a literal translation in brackets.

Transcription should not be mistaken with calque, a word loaned from the source languages and reported in the target language through literal translation. The important thing to underline here is, word-to-word translation presupposes the use of ordinary (and not legal) language, so the translator is basically translating a technical term into a term which does not exist in the target language and therefore it is not necessarily the case it would be understood by the receiver. It follows, calquing presupposes a semantic translation and not a phonetic matching. They are often followed by the transcription of the original term in parenthesis usually set off by italics

(152) DE GROOT G-R, VAN LAER C. J-P., *The Dubious Quality of Legal Dictionaries*, International Journal Of Legal Information, Vol. 34:1, p. 69

or inverted commas[153] (as it happens for transcriptions *tout court*), in order to make clear the term has a foreign derivation and give a hold for possible further examination by the receiver.

Between transcriptions and calques we find transpositions: another kind of borrowing implying a process Sarcevic calls "neutralisation", meaning the linguistic adaptation of a term to the rules of the target language[154]. The foreign term is apparently translated into the target language but it actually is a mere phonetic and morphologic adaptation of the term to make it sound and look like a real target language term.

Even though all these solutions seem to introduce a new term in the target language, we can actually not talk about neologisms. A neologism, literally the use of a new word, is a term that is not part of the vocabulary of the target language legal system, used in it. A brand new word which is going to be part of the technical, legal terminology of the target language. This does not mean, by the way, one may choose whichever word, provided that it does not exist, to create a neologism: it "must be chosen in such a way that the content of the source term is shown to some extent, without using a term which is already used in the target language legal system"[155]. Not only not existing, actually, but nothing that could be related to an existing term, too, since this may lead to misinterpretations; plus, once again the reader should be able, someway, to understand what we are talking about. This is why translators may decide to use terms which had formerly the same meaning of the source term but that are not used anymore, or using Roman law terms[156]. Another way of creating neologisms is assigning a technical meaning to words belonging to ordinary language[157], though it may sound risky, potentially leading to doubts on the meaning it should be given, it is not. As already pointed out

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[153] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 256

[154] *Ibid.,*

[155] DE GROOT G-R, VAN LAER C. J-P., *The Dubious Quality of Legal Dictionaries*, International Journal Of Legal Information, Vol. 34:1, p. 71

[156] *Ibid,*

[157] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 262

when dealing with polysemy, once a term having both a legal and ordinary acceptation is put in a legal context it will always be interpreted in its legal sense. A fourth hypothesis, not always possible, is taking a term from another legal system using the same language of the target system[158], provided the intended meaning is exactly the same.

Another solution is paraphrasing, i.e. using more words in order to describe the concept one should translate. It is useful especially when dealing with something foreign to the system of destination. Sarcevic refers to "descriptive equivalents"[159], when talking about perfect definitions of the source language concepts through paraphrase, in a sort of equivalent made up of more than one word.

It is worthy to point out, it is not a matter of how distant the source term and the final solution are, for the addressee of the text does not know and does not care about the words used in the source text. The important thing is the message is delivered, that the meaning of the concept, the one the legislator had in mind when drafting the text, is conveyed, no matter how.

Definitions may look as banal lengthy explanations of concepts/words introduced in a text for the first time. But this is one more example of how words acquire newly found importance when put in a legal context, insomuch that definitions may not only be found in footnotes or in special dedicated parts of legal documents (i.e. the definition section of preliminary provisions), but within the provisions themselves of a legally authoritative text, as well[160]. First of all, we should distinguish between lexical (explanatory) and stipulative definitions, different in illocutionary force: lexical definitions report, without changing already existing meanings, whereas stipulative definitions establish[161], altering the conventional significations by enlarging or restricting their sense or by creating a completely new meaning. The kind of definitions we are interested in is of

[158] *Ibid,* p. 263
[159] *Ibid.,*
[160] *Ibid*, p. 153
[161] BOWERS F., *Linguistic aspects of legislative expression,* University of British Columbia press, Vancouver, 1989, p. 161

course the second one, usually considered aid for interpretation, promoting uniformity and clarity by reducing indeterminacy and therefore helping attaining consistency[162]. They give a meaning to a word regardless (or at least not necessarily considering) precedents. This is the reason why they are, indeed, always in potential conflict with larger and deeply rooted linguistic conventions of the community. Stipulative equals normative. But not only are they stipulative, demanding changes in the "interpretative behaviour by changing or instituting meanings"[163] they are substantial as well.

The major drafting manuals seem to agree legal definitions have three main purposes: promoting clarity by reducing indeterminacy; achieving consistency and avoiding lengthiness by abbreviation (nicknaming , short titling, indexing)[164]. Nonetheless, Bowers calls this into question saying that by giving a definition one sets out the instruments to understand what to do and achieve uniformity of interpretation, but one cannot take for granted it will happen. Similarly, the third goal seem to be not a semantic matter but "more of a notational convenience to reduce repeated formulae and so on"[165]. Clarity is what we are left with, so that the aim of definitions he recognises are: avoid ambiguities, resolve uncertainties and solve doubts.

Yet, as everything we saw so far, definitions too may reveal themselves false friends, giving an apparent sense of security: enumerating words is not necessarily synonym of clarity, on the contrary it may increase doubts, muddling the interpreter. So that, sometimes it is even better to leave the court with the responsibility of interpreting rather than giving a potentially misleading definition. At the end of the day, definitions are nothing but arbitrary, as they are established by translators unable to find a correspondence in the target language, but how may we know if that is the

[162] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 153
[163] BOWERS F., *Linguistic aspects of legislative expression,* University of British Columbia press, Vancouver, 1989, p. 173
[164] *Ibid.,* p. 171
[165] *Ibid.,*

exact meaning the legislator had in mind? Translation is a matter of faith and of accepting compromises, the receiver should then trust the translator, if doubts should arise, and if he/she feels the need of clarifications, the only possible solution is to turn to the original version of the text, hoping to find there the answer to his/her questions. Still, this is possible only if he/she is skilled enough to understand the source language, if not, faith is the only way. The resulting text is supposed to be equivalent, in any case, if not it would have never been authenticated and published.

We may have combinations of these solutions as well, as in the case of word-to-word translation in parenthesis in addition to the transposition of a foreign word. The reason of this is that word does not exist in the legal language of the target system, so it is translated using words coming from the ordinary language and not from the legal language in which the document is being drafted. Leaving it plain, without any kind of specification, would mean assuming that term is the right one, but it is not, since it does not actually belong to any legal language. The translator is basically coining a new word, but putting it in brackets he/she is in a way, softening the importance of his/her action.

Anyway, definitions may appear in the source text, as well. When translating legal definitions it is important to "express the proper logical relations"[(166)] between defined term and definition: equivalence, inclusion and exclusion as well as their combination. Different languages have their own way of expressing it, suffice it to think to English and French respectively using the verb "means" and nothing (e.g. "person" *means* a natural person, an entity or a personal representative vs. "personne" personne physique, entité ou représentant personnel[(167)]); differences are accepted obviously, as long as the guarantee identical relation and content.

Generally speaking, definitions are more likely to be found in Common Law than in civil law legislations. Either ways, when located in the definition

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[(166)] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 154

[(167)] *ibid,*

section they are formulated as definitions, while when occurring within the normative text they resemble proper provisions to all intents and purposes[168].

3.4 CORRECTING MISTAKES

Presenting legal translation as a difficult task to achieve, and accurate legal translation as even more challenging, means assuming translation errors are part of the subject. As already mentioned, the spare tyres of the translator are generality, which leaves the final decision about interpretation to the judge, and definition, aimed at disambiguate and solve potential doubts. Yet, so far (and probably forever) legal translations have been carried out by humans even though supported by informatics tools. Putting together the intrinsic complexity of legal translation and human imperfection we understand why mistakes are not only foreseen, but legislators provided for their correction, too.

Translation errors may be due to different reasons, among which the rushed nature of the process of translation, the elapsing time between drafting and publication being usually very short. It may also be the case, negotiation and translation phases are separate from each other, preventing translators to ask for clarification to the drafters in order to guarantee that translations reflect the exact meaning of the treaty. And as already mentioned, the original text often reflects heavily achieved compromises abounding in vague and general terms, which may lead to misinterpretation by the translator and a consequent inappropriate translation[169].

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[168] *Ibid,*

[169] EUROPEAN COMMISSION, *Studies on translation and multilingualism. Language and translation in International law and European law,* Publications Office of the European Union, Luxembourg, 2012, p. 24

The errors we are referring to in this section are obviously those occurring in authoritative texts, binding legal documents having force of law, and not translation errors we find in legal texts translated for informative purposes or texts about law. The reason why is in the first case they jeopardise application and effect of the dispositions set out in the legal text. Unsurprisingly, they seldom have specific norms ruling them, but are included among errors *tout court*, since once they are published as authentic versions, one cannot speak of translations anymore. Translation mistakes are therefore nothing but drafting errors.

Before facing specific ways of correcting them, let us say that, generally speaking, legally relevant errors may be divided into three kinds: we may have technical errors in the text, detected and corrected by the parts; substantial errors concerning the conditions for the reaching of an agreement which may invalidate the treaty and finally factual non-fundamental errors that may be overcome without intervening in the text but through interpretation[170], in this case articles 31 to 33 of the Convention on the Law of the Treaty apply (§1.2.3). By the way, practice seems to point out errors of the second type, potentially jeopardizing the validity of the act, are seldom related to language[171]. This is confirmed by article 48 of the just mentioned convention, which excludes the possibility of invalidity in case of errors "relating only to the wording of the text of a treaty".

3.4.1 THE EUROPEAN *CORRIGENDA*

Since translation is one of the major "accessory" activities of the EU and its organs, a verification team at the Council takes care of substantial accuracy and equivalence of the different linguistic versions before their publication and entry into force. Yet, the increasing number of official languages and official versions has, as direct consequence, an increase in errors occurring in

[170] TABORY M., *Multilingualism in International Law and Institution,* Sijthoof & Nordhoof International Publishers B. V., Alpen aan den Rijn , p. 178
[171] *Ibid.,*

the translated documents. Generally speaking, once a terminological error has been detected, its correction is made through change or replacement and it may take place in different ways: if the act is quite recent and the error is related to a specific situation a *corrigendum* may be adopted by the institution that produced it. In case the error was repeated subsequently, affecting more than one act, the situation becomes more difficult, requiring a reformulation of all affected documents[172].

To begin with, errors are not equal: we may distinguish among substantial and formal errors. The first ones are drafting errors, meaning a disposition included in an official text does not comply with the will of the legislator. It is the heaviest error between the two and, since it occurs during the drafting process, it affects all language versions of the texts. So basically the translation is accurate, but the mistake was in the first text so the error has been replicated and repeated in each and every language version. On the other hand, we have errors occurring during the translation phase, which are easier to spot and correct. Yet, the effect these mistakes have is the same, since in both cases they may result in legal consequences deriving from undesired legal effects. This is why and when corrigenda are required. They are not reformulation of the entire documents but a sort of attachment to the original text, from which they derive their authority, published in the Official Journal in the same location of the related text[173].

Due to the different legal processes and kind of documents they produce, every law-making body of the EU needs to find its own way of correcting mistakes. Beginning with the European Commission, the correction procedure depends on the nature of the mistake. Here we should make another distinction, between notional mistakes and obvious mistakes (in the original text) or minor translation errors. Substantial errors, both in translations and original version, entail a correction of the text through reformulation, the procedure being similar to the one followed for the

[172] EUROPEAN COMMISSION, Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 75
[173] *Ibid.*, p. 143

adoption of the act, because the error is with every probability repeated through the entire text. Lighter errors are corrected adopting two Commission instruments. Obvious errors are easily detectable errors, found in the original version of the text and include spelling mistakes, typing errors, printing errors and so on. In such cases the Commission will adopt the procedure set out by one of its instruments dating back to 1977, providing the Secretary General is responsible for corrections of legal acts; minor translating errors caused by mistranslation or the omission of one or more elements of the text without altering the essence of the act on the whole, on the other hand, concern one or more language version(s) other than the original, and should be easily recognisable through comparison with other versions. In this case act of 2008, would be applied, saying the correction should be carried out by the Directorate General for Translation (the translation service of the EC).

As for the Council, the text of reference is the *Manual of precedents for acts established within the council of the European Union* which distinguishes two procedures depending, again, on the nature of the error. For obvious errors detected after the adoption of the text, in one or more versions, original or other linguistic versions, the correction will be made through corrigenda. For non-obvious errors, on the other hand, the Council may decide if a corrigendum is enough or if the spreading and the weight of the error make the adoption of a new act necessary; since we are talking about substantial errors, it may even be decided for the corrigendum to have a retroactive effect. A further distinction is made between corrections made before or after the adoption of the text, insomuch that in French we have two different terms: *Corrigenda* (before adoption) and *Rectificatif* (after adoption)[(174)].

Rule 216 of the rules of procedures of the European Parliament provides for corrigenda by the committee responsible, in the case an error is detected in a parliamentary act. The rule disposes as follows:

[(174)] http://ec.europa.eu/translation/documents/council/manual_precedents_acts_en.pdf on 28.11.2012

> 1. If an error is identified in a text adopted by Parliament, the President shall, where appropriate, refer a draft corrigendum to the committee responsible.
> 2. If an error is identified in a text adopted by Parliament and agreed with other institutions, the President shall seek the agreement of those institutions on the necessary corrections before proceeding in accordance with paragraph 1.
> 3. The committee responsible shall examine the draft corrigendum and submit it to Parliament if it is satisfied that an error has occurred which can be corrected in the proposed manner.
> 4. The corrigendum shall be announced at the following part-session. It shall be deemed approved unless, not later than 24 hours after its announcement, a request is made by a political group or at least 40 Members that it be put to the vote. If the corrigendum is not approved, it shall be referred back to the committee responsible which may propose an amended corrigendum or
> close the procedure.
> 5. Approved corrigenda shall be published in the same way as the text to which they refer. Rules 72, 73 and 74 shall apply mutatis mutandis. (175)

The last paragraph makes reference to the adoption procedure of parliamentary acts. Indeed, when errors in one, two or more language versions occur (i.e. not in the original text) the text should be corrected and verified both by the Council's lawyer-linguists and the Parliament's lawyer linguists. After that, the text should pass to the presidencies of both organs that after each verification should exchange the text between each other. The presidency of the Council will then pass the text to the Council which will then end the process with a formal adaptation or a silent procedure. On the other side, the president of the EP will submit the text to the responsible committee which will then pass it to the plenary assembly which will either vote or go for a silent acceptation.

Corrigenda usually have a retroactive effect, meaning they produce effects from the date of entry into force of the initial text. The reason why lays in the

(175) *See* Rules of Procedures of the European Parliament, consulted at http://www.europarl.europa.eu/aboutparliament/en/00a4c9dab6/Rules-of-procedure.html;jsessionid=369E4EF756B6E5C47911B4C5A52F0248.node2 on 23.11.2012

consequences errors may have, especially in the case of directly applicable provisions[176].

Yet, Corrigenda are not the only way: in case the terminology used in one of the versions of the text is incorrect but not misleading, meaning it may be imprecise, too general, obsolete etc but not leading to consequences different from the intent of the legislator, a simple replacement is the common solution. In case this would lead to inconsistency within the text, the term will not be changed until a full amendment of the text is required[177].

All this applies to internal acts, regarding the Union and its Member States, when the EU is part of an agreement with a third State or another international organisations, rules concerning international treaties derived from the 1969 Vienna Convention apply.

3.4.2 Article 79 of the Vienna Convention on the law of treaties

If these are the provisions set out for European legal documents, the generality of international legal instruments, i.e. international agreements, are regulated by the already mentioned 1969 Vienna Convention on the Law of Treaties. It is of common knowledge, errors are numbered among the causes of invalidity of treaties[178]. But, as stated in article 48, these are not the errors we are interested in, since the article provides for substantial errors only. Nonetheless, paragraph three talks about "errors relating only to the wording of the text of a treaty"[179], making reference to article 79. Formal drafting errors, indeed, do not lead to invalidity (the text does not produce any effect *ab origine*) but to the mere rectification of the treaty.

Article 79 offers general provisions on errors in the first two paragraphs, but in its third part, it specifies those rules apply where the text has been

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[176] EUROPEAN COMMISSION (2010) , Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 148

[177] *Ibid,* p. 149

[178] *See* Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, as consulted at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf last accessed on 23.10.2012, art. 48

[179] *Ibid.,*

authenticated in two or more languages, as well, provided "there is a lack of concordance which the signatory States and the contracting States agree should be corrected". Generally speaking, once the parties agree an error subsists, after the authentication of the text, they have the obligation to correct it. Unless they decide otherwise, the article provides for correction as follows:

> (a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
> (b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
> (c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.[180]

If on the other hand is the depositary State the one which detects the error (§2), it shall inform the signatory parties and propose to correct it, specifying a deadline within which objection to the suggested amendment may be raised. If by that time no objection is put forward, the depositary may take charge of the correction and "execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty"[181]; conversely, in case of objection, "the depositary shall communicate it to the signatory States and to the contracting States"[182]. As for bilateral agreements concluded by the EU, the general rule is the depositary is the Secretary General of the Council, and therefore it is its responsibility to send the corrected text to all contracting parties[183]

After being corrected, the new text replaces the defective text *ab initio*, meaning with a retroactive effect, unless the parties agree otherwise (§4). The Secretary of the UN should then be informed of the amendment (§5). Finally, paragraph six states "Where an error is discovered in a certified copy

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[180] *See* Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, as consulted at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf last accessed on 23.10.2012, art 79(1)
[181] *Ibid,* art 79(2a)
[182] *Ibid.,*
[183] EUROPEAN COMMISSION, *Studies on translation and multilingualism. Language and translation in International law and European law,* Publications Office of the European Union, Luxembourg, 2012, p. 49

of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States."[184].

[184] *See* Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, as consulted at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf last accessed on 23.10.2012

CHAPTER FOUR: BATTLEFIELDS

CONTENTS: 4.1 The European Union. – 4.2 The United Nations

It is now time to deal with something less theoretic and see who actually needs and is at the source of legal translation. Leaving privates aside, we saw how international organisations are indeed the major translation-producing machines due, obviously, to their international nature. But we cannot tar everyone with the same brush, and the first distinction we should make is between international organisations invested with law-making powers, and international organisations that are not. This does not mean that the ones belonging to the second group are not producers of legal texts and/or legal translations, but this distinction is relevant by the point of view of authority and effect of these documents. Once again the difference here is between law, privilege of few, binding and productive of legal effects, and texts about law, potentially writable by anyone, with no legal force and therefore resulting in nothing legally relevant. Since the latter do not present any peculiarity in their drafting process nor are subject to any particular regulation, we will focus on legally binding texts only. The legal texts we are interested in are international agreements concluded among states within the framework of international organisations and regulations issued by their law-making power invested organs. What is important to underline is that none of them has a universal application since they are valid and binding only among/for the member states.

Another distinctive trait between multilingual states and international organisations is the fact that if on a national level we have a common position, expressed through more than one official language, on the international scene we have several States expressing themselves in different idioms and trying to understand each other speaking other languages as well, protecting national interests that not seldom are conflicting. This leads both

to decisional and translational issues, since as we already saw, in order to achieve consensus, precision and clarity may be compromised.

The two international organisations we chose to focus on in this work are the European Union, because of its peculiarities that make it almost like a multilingual state, and the United Nations Organisation, for its almost universal scope of application and its crucial role in regulating relationships among the almost entire international community. Just a couple of words on the title, *battlefields* simply to underline once more how translation represents a struggle for the legal translator, sought after by law on the one side and language on the other. International organisations such as the UN and the EU are indeed where this battle takes place.

4.1 THE EUROPEAN UNION

Having acquired legal personality after the entry into force of the Lisbon Treaty in December 2009, the European Union has become a subject of international law by all means and is therefore entitled to conclude international agreements, looking always more like a federal state than an ordinary international organisation. Behaving exactly like a state, the Union can conclude treaties with third countries, i.e. non-member states, and other international organisations as well, that will bind it together with the member states that compose it. But this is not the only way Europe is involved in the law-making process. Beside deciding to be part of an agreement, the EU is producer of its own law, as well. It disposes of two legislative organs, the European Parliament and the Council, and an executive organ, too, the European Commission, witnessing its being close to national states. The uniqueness of the European legal system is ascribable to its twenty-three equally authentic official languages (multilingualism) and most importantly to the fact it is the only one in which twenty-seven different national legal systems coexist. Despite its indissoluble relations with the legal

systems composing it, EU law is supposed to be *equidistant*[185] from them, a sort of neutral ground which should not bear stricter bond with none of the national legislation. Yet, the weight of the national legal systems becomes evident when coming to interpretation. Generally speaking, when facing no matter what, one would tend to approach it as he/she would do with something familiar, the same happens with EU concepts, which interpretation by national judges and lawyers is influenced, if not modelled, by concepts existing in their own system of reference. This exceptionality produced its own system of law and its own language, or better its own version of all the official languages creating what is known as *Eurocratese.* Being EU languages derived from national legal languages, not seldom we have formal correspondence among EU terms and national ones, so that one may be lead to treat them the same way.[186]

This is what we will deal with in this chapter, tracing a general outline of European Law, we will then go through more specific topics, namely multilingualism, the processes of standardization and deculturalization that are two of its effects, the birth of what seems to be a new language, used by insiders only and fully understood by none, the legal basis of the language policy of the Union and last but not least the organs in charge of translating European legal documents.

4.1.1 An Introduction To EU Law

The law of the European Union is divided into 'primary' and 'secondary' legislation. Founding treaties make up the primary legislation, since they represent the basis for all EU action, suffice it to think about the Treaty of Lisbon[187], which invest the Union with legal personality, meaning with

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[185] GLANERT S., Le juriste subverti : réflexions traductologiques à l'heure de l'uniformisation des droits en Europe*, Meta : journal des traducteurs / Meta: Translators' Journal*, vol. 50, n° 4, 2005, p. 2, citing Bar et Lando

[186] EUROPEAN COMMISSION, Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 132

[187] *See* the 2009 Treaty of Lisbon as consulted on 23.10.2012 at http://europa.eu/lisbon_treaty/index_en.htm

rights and obligations under international law allowing it to adopt laws and treaties. Since the EU legislative power is provided for by the European Founding Treaties, Regulations, Directives and Decisions are considered secondary legislation. They produce different legal effects according to their nature and this has a linguistic consequence, too.

The legislative power of the European Union finds its legal basis in article 288 of the Treaty on the Functioning of the European Union which states that:

> To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
> A decision shall be binding in its entirety upon those to whom it is addressed.
> Recommendations and opinions shall have no binding force.[188]

It introduces us to secondary sources of the Law of the European Union, i.e. Regulation, Directives, Decisions, Recommendations and Opinions, only three of which are entitled of having force of law, each one with its peculiarity. Secondary because deriving from a primary source, i.e. the Treaty on the Functioning of the European Union. Let us go through them briefly.

First of all we have Regulations, defined as legislative acts of the European Union binding the Member States immediately and directly, meaning they do not need go through an adoption process by the Member States. They have general application and unlike Directives, are binding in their entirety. There can be no conflict between an European regulation and the national legislation of the Member States; when coming into force, it prevails on national laws dealing with the same subject and, following the principle *lex posteriori derogat priori,* subsequent national legislation must be consistent

[188] *See* TFEU consulted at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF on 13.11.2012

with and made in the light of the Regulation. Regulations are passed either jointly by the EU Council and European Parliament, or by the Commission alone.

They bear some features which make them different from other international law acts, first of all their "communitarian" nature since they identify as addressee all Member States of the Union, with no exception and to the same degree, and then because of their direct applicability, derived from the supranational state-like nature of the EU, absorbing part of state sovereignty and "confer rights or impose obligations on the Union citizen in the same way as national law"[189].

As far as language is concerned, they are applied in the national legislation with the same wording in which they were published in the Official Journal of the European Union. Regulations must therefore be drafted in all the languages of the EU, with a close interaction between the terms used in national law and the ones used in order to express "European" concepts[190]. In addition, the fact they are immediately and directly applicable explains the tendency of using terms that will be familiar to the national bodies that will be called to apply and interpret Regulations.

Then we have Directives, binding communitarian acts, drafted by the European Commission, which unlike Regulations are not directly (self-executing) and immediately applicable, they are indeed addressed to national authorities, and not to European citizens, that should take actions in order to implement them. In addition, they can be partially applied as well, according to the preferences of the Member State. If on the one side this limits the scope of application of directives, on the other, giving to states the chance of deciding how to be bound, they may assure a more numerous adoption by States willing to be bound by some, but not all, provisions set out by the directives, preventing them to be a failure. Member States adopting

[189] BORCHARDT K-D., *The ABC of European Union law,* Publications Office of the European Union, Luxembourg, 2010, p. 89

[190] EUROPEAN COMMISSION, Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 76

Directives enjoy not only a certain degree of freedom in terms of which provisions to be bound from, but also on the mean that should be adopted in order to achieve the result the directive aims to. In fact, they require Member States to achieve a particular outcome without dictating the means of achieving it. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. "the directive does not supersede the laws of the Member States but places the Member States under an obligation to adapt their national law in line with Community provisions"[191]. Plus, Directives are not necessarily addressed to all member states, they may be addressed only to some of them or even to one state only, this witnesses one of the purposes of Directives, attain uniformity of Union law, i.e. structures to bring different national laws into line with each other, and respecting the diversity of national traditions. The aim of Directive is, therefore, not unification (which is the goal of Regulations) but harmonization of national legislation. The idea is, as Borchardt states, that contradictions and conflicts among national laws and regulations should be eliminate, so that "the same material conditions exist in all the Member States"[192].

Because the States have discretion on how to apply Directives, their wording is freer as well resulting in a tendency of adapting it to national law. Plus, their broader character is reflected in the use of broader terms, too, with respect to the ones that would have been used in national legislation[193]. Still, as we will see more in details, the European Law is characterized by a language on its own so that, for specific and technical matters, the choice of the term to be employed is bound to the uniformity principle.

Last among binding acts, Decisions are drafted by the European Council (usually jointly with the European Parliament) or Commission and, like Directives they are not addressed to all Member States but to specific parties,

[191] BORCHARDT K-D., *The ABC of European Union law,* Publications Office of the European Union, Luxembourg, 2010, p. 90
[192] *Ibid.,* p 89
[193] EUROPEAN COMMISSION, Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 78

involving particular authorities or individuals. But, unlike Directives, they are applicable only in their entirety. They concern specific case only, and may require Member States to do or stop doing something and can also confer rights on them.

We then have Recommendations and Opinions, non-binding documents through which the Union gives its view on a given topic, usually to Member States but they may be addressed to individuals as well. With recommendations, the EU suggests the addressee to conform itself to a certain behaviour, whereas opinions only show the position of the European Union on specific matters and may be the first step towards the creation of binding acts. Thus, the charge of both is mainly political and moral[194].

Placed halfway between primary and secondary sources, international agreements are the third source of law of the European Union. They are born from the necessity of the EU to confront itself with the rest of the world, and therefore see the involvement of the Union on the one side and one or more non-member countries or international organisations on the other. Agreements may be concluded on any matter concerning the life of the Union and its Member States, in particular cooperation in trade and industry. The shape these may take is different, we have, for instance, association agreement, which provide for a "close economic cooperation and wide-ranging financial assistance from the EU for the country concerned"[195]; cooperation agreements, less far-reaching then association agreements and aiming to economic cooperation only, and trade agreements, concluded with individual third countries or groups of them, as well as with international organisations, related to trade and tariffs policies (among these the WTO). Treaties concluded among Member States on whichever subject, are not to be considered part of European Law, but as ordinary international agreements since they do not involve any European institution and are expression of the will of individual states. Nevertheless, they have to comply to European

[194] BORCHARDT K-D., *The ABC of European Union law,* Publications Office of the European Union, Luxembourg, 2010, p. 95
[195] *Ibid*, p. 85

dispositions, not only obeying to but primarily having as purpose, the principle of legislative uniformity within the Union.

Lastly, we have other non-binding *political documents*[196] and administrative documents, which due to their merely institutional relevance, are not significant to our discourse.

4.1.2 MULTILINGUALISM

The ultimate goal of the European Union is set out in article 1 of the Treaty on European Union (TEU): "creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen"[197]. A clause in this Treaty also provides that the Union must respect "the national identities of its Member States." It follows, Multilingualism is one of the fundamental principles of the European Union, for it means that all the official languages are equal in law.

Translation, therefore, acquires a fundamental and funding role when related to EU. It is not only a practical instrument but the realisation of the spirit of union of Europe itself. Translating European law is, indeed, not only a way to facilitate the work of national bodies of the Member States, but it is first of all a citizen-oriented tool, witnessing its different nature with respect to other international organisations. Europe is very close and attentive to its citizens, that is why a paramount importance is given to accessibility: each European citizen should be given the possibility to become familiar with European legislation and institutions. Plus, as article 21 of the Treaty establishing the European Economic Community (drew on by Regulation 1/58) states, every citizen of the Union has the right to communicate with all of European institutions in the language he/she prefers and have an answer in the same language. This article actually makes reference to another article of the same treaty (" [...] in one of the languages mentioned in Article 314"),

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[196] COSMAI D. , *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p. 91

[197] *See* Treaty On European Union (92/C 191/01) Consulted at http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0001000001 on 20.10.2012

which defines the official languages of it (that correspond to the official languages of the Union as a whole), granting equal authenticity to every language version. In the original version of the treaty, the one signed in Rome in 1957, the official languages were the ones of the six signing countries, Italian, French, German and Dutch (being French the official language of France, Belgium and Luxembourg). The number of the official languages of the Union increases at every new accession, since every country should have its language recognized as official. This is expression and guaranty of equality of all Member States and their citizens, one of the founding principles of the Union and the former Community, as we may read in the EU's Charter of Fundamental Rights, which guarantees respect for linguistic diversity, and discrimination on the grounds of language is prohibited, whether a citizen is from a small or large state.

Accessibility is indeed one of the purposes of the Directorate General for Translation of the European Commission, that should, among other things, concur to draw citizens close to the Union policies, favouring legitimacy, transparency and efficiency. This is the reason why the language used in European legal texts is less refined and complex than it usually occurs in the legal field. By supporting the idea of "unity in diversity", EU multilingualism seems a way of preserving and valorise national identities and cultures .

There is of course a less sociolinguistic and more technical-juridical side of the story: European legislation has to be published in all the official languages of the Member States because it becomes law. The principle of direct applicability is indeed one of the reasons why all texts are drafted in all languages, and this is especially true for Regulations. Besides, we have the so called direct efficacy of the communitarian rule, meaning the possibility the citizen has to exercise his/her rights deriving from them, in any language, directly to international judges or to the Court of Justice.

Multilingualism is the basis of equal authenticity of all language versions of legal texts within the EU. Once again the word is *version* and not translation, not to raise doubt about a non-existing hierarchy among languages. Yet, this does not mean that all texts are translated into all the official languages. This

sentence may be read in two ways. Let us first emphasize the word *translated*. We have to make a distinction between translating and drafting. Within the European framework most of the time legislation is not translated from one language to the others after being officialised, but directly drafted in more than one language. It means the writing of acts are accomplished jointly in different languages with intervention and support of legal translators. This is to warranty uniformity as well as diminishing problems of interpretations. 1958 Regulation n. 1 itself, never employs the verb translate but rather says "being drafted". When the negotiation phase is carried out in one language, we will then have twenty-two simultaneously elaborated translation, equal not only with the original text (written in the negotiation language) but also among one another. The drafting language will inevitably have a certain degree of influence in the other language versions in terms of vocabulary, terminology, syntax and grammar. In practice, there may be difficulties in translating terms because of lack of equivalence in the other languages, and even more challenging is when you have two slightly different terms in the source language and only one correspondent in the target language: the translator should find a way of rendering the difference, coining a new term, borrowing the original term, explaining it or paraphrasing. Then, one has to be careful to false friends, meaning terms similar in form but not semantically equivalent. This is called by experts "reciprocal translinguistic lexical attraction"[198], and it takes place especially when dealing with languages belonging to the same linguistic family. In case of affine languages the translator may even be lead to render a foreign term only making it sound more similar to the one of the target language, not realising it actually does not exist. Plus, every language is characterised by its own syntax (i.e. phrasal structures, word order etc.) so the translator should

[198] EUROPEAN COMMISSION, Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 92

keep that in mind, refraining from applying the syntactic and stylistic pattern of the source language.[199]

Eventually, we will have twenty-three equal versions, with no distinction from the legal point of view between the original and its translations. What is more, a translation may even become the source text for another translation. Legally speaking, all authentic language versions of a given legal document make up a single document. Yet, at the same time, in case of doubts on how to interpret ambiguities each and every version may be considered in order to find the intended meaning of the legislator.

Going back to our sentence, the stress may be put on *all the official languages*, as well. It this case we obviously refer to which language(s) the original text is translated into. To put it simple, for all EU internal matters, there should be a version written in every of the 23 official languages. If a third party is involved, be it a non-member state or an organization, in the case of a bilateral or multilateral treaty, the official language will be the one agreed by the parties. Nevertheless, the treaty should be translated into the other languages, since every member state is, even though indirectly, involved. But in this case the translation will not represent an authentic version of the text and cannot be used by judges during interpretation.

By definition, multilingualism is also the capacity EU bodies have to exercise their institutional duties in several different languages, all enjoying the status of official language. All EU languages are officially supposed to be equal, yet this equality seems to be more formal than substantial since some languages are actually used much more than others. The terms *working* languages, *procedural languages* and *core languages* are used to refer to the most used languages, employed not only as mean of communication among European bodies and institutions but also during the drafting process, ending with the translation of the drafted text into the other official languages.

Linguistic equality seems to have been sacrificed favouring uniformity, thus European institutions, except for the European Parliament which due to

[199] *Ibid,* p. 89

its composition is forced to use all official language, and the European Court of Justice whose working language is French, have the tendency of using English, French and German only, as working languages. Nonetheless, English seems to be the favourite, playing the role of lingua franca despite the principle of linguistic equality, especially during the drafting phase. As we will see in details when dealing with Eurocratese, the English we are referring to is not the "real" English, the English of the Common Law, but its European version, a more neutral English, free from cultural constraints[200]. There is a underlying contradiction in choosing, even though not formally, one language as universal foreign language, which should lead to less linguistic diversity having as result a contraction of the volume of translation, and having an increasing of the number of translations in European institutions which obviously result in greater linguistic diversity. This is what Anthony Pym, Professor of Translation and Intercultural Studies at the university of Tarragona, calls "diversity paradox"[201] which may find by the way an explanation, as reminded more than once, in the nature of EU itself, promoting and valorising cultural (and consequently linguistic) oneness and diversity, favouring the maintaining of traditions and particularisms. English plays the role both of official and officious language, official because it is, ex art 1 of Regulation 1/1958, officious because it is not formally invested with the status of one and only official language, prevailing on the others, but that is what actually happens.

Finally, multilingualism may be considered on two levels: at an informal level it describes the language spoken by Eurocrats (functionaries of the EU) and used in Europe-related informative texts, whereas formally speaking it is made up of the languages of the official documents produced by European institutions..

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[200] *Ibid,* p. 90

[201] PYM A., *Translation and International Institutions. Explaining the Diversity Paradox,* consulted at: http://usuaris.tinet.cat/apym/on-line/translation/diversity.html on 08.11.2012

The centrality recognised to the language issue in European matters, is witnessed by article 290 of the Treaty of Rome[202], saying the linguistic regime of the Community is determined by the Council acting unanimously (NOTA). The result of the deliberation of the Council is 1958 Regulation n. 1, to which paragraph 4.1.6.1 is dedicated.

4.1.3 STANDARDIZATION AND DECULTURATION

A hint to the funding principle of the Union "unity in diversity" was made when talking about multilingualism. One of the purposes of the European Community first, and the EU now, is nothing but creating an European citizenship, not only on paper through the right of free movement of persons guaranteed to European Union citizens by the Treaties, and to the rights and duties they share, but a common conscience, derived from common roots. This explains why equality seem to be one of the paramount values defended at all levels: equality for citizens, equality for member states, equality for languages, equality for language versions of legal acts. The thing is, world is no equal. It is inevitable and natural that one ends prevailing on the others, even though not officially. I am not saying equality within the EU is only formal and not substantial. It is substantial, since rules provide for it, but there will always be one or more State(s) having more weight concerning decisions and being able to influence the others, and following the same pattern, some languages, will be used more than others and will affect them one way or another. So making things equal when they are not, means essentially levelling. Besides, putting together different realities implies smoothing the rough edges off. In both cases you lose something, both in terms of content and form. This is in fact at the basis of two of the main features of EU legislation (and to a certain extent of international law in general), that is to say generality, reflected not only in dispositions but also in terminology, and uniformity. They both seem to contrast with other two fundamentals: the technicity of EU law and its concern for particularisms.

[202] Formerly article 217, as stated in the Regulation.

Furthermore, one of the main goals and principles of the EU is indeed conformity to a supranational "standard". National legal systems should progressively modify themselves in order to have a certain degree of uniformity among the national legislations of the Member States. This is *per se* a process of standardisation, implying not only substantial but also formal normalisation. Member States started to adopt a shared, common terminology by harmonising divergent definitions and systems of concepts. The task is obviously less complicated if what you need to harmonise are terms and not concepts, even though as we should know by now, the two things are more than strictly related.

With the number of official languages more than doubling over a few years, harmonising practices and standards became crucial for the smooth functioning of the EU. This processes are to a great extent ascribable to the spreading role of English in every discipline that unavoidably exercise a certain degree of influence on the other languages which end up contaminated by English, more or less importantly, in every aspect from style to vocabulary. This of course helps texts to be homogeneous but does not take in account the difference among languages and above all among legal systems, the risk being incomprehension or more grievously misinterpretations.

In order to produce an accurate translation, a process of *neutralisation*[(203)] of the source text has to take place. Neutralisation in formal/linguistic and cultural/conceptual terms, presupposing a depersonalisation of the source text, is typical of all special purpose translations and legal translation in particular. Related to this in an unclear cause-effect relationship, is the levelling of the text and style of origin, resulting in twenty-three texts that unnaturally differ only in terms of language, essentially all stylistic nuances typical of every language are lost and even improbable solutions are adopted. What we have at the end is a group of texts that would have never been

[(203)] COSMAI D., *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p. 158

written by the national legislator, not only sounding strange but being often unclear, too.

Consistency, which main outcome is precisely uniformity, is one of the paramount principles to be observed in translation in general, legal translation in particular and even more in communitarian translation.

Unfortunately, EU law has never been a really independent legal system, arising from the national legal systems that compose it and to which is applied. For the same reason Eurocratese cannot prescind from the twenty-three languages that will reciprocally influence and be influenced by each other. During the writing of a legal document, the drafting language has to undergo a certain degree of deculturalisation in order to detach it from the national bound legal schemes and attain an identical legislative intent in all languages.

Simplification and standardisation of drafted texts is therefore not only a way to make European law accessible to non-experts as well, but also a way of making translations easier. For these reasons the European Commission, the European Parliament and the Council of the European Union jointly adopted, in 1998, an interinstitutional agreement "on common guidelines for the quality of drafting of Community legislation", providing for general principles on how to draft a text, aiming at clarity, simplicity and precision(204), underlining in the general principles that this has to be done in respect of the multilingual nature of the Community legislation, underlining concepts and terminology coming from a particular legal system should be avoided. Provisions regarding the structure of texts, set out legislative texts should follow the title – preamble – enacting terms – annexes pattern(205). It then examines more in details the structure of every part composing the document.

An opinion following the same intent had been produced by the European Economic and Social Committee three years before, having as subject the

(204) *See* Official Journal of the European Communities 1999/C 73/01
(205) *ibid* p. 2

employment of a simple and clear language[206]. This text is just one example showing the prominence given to communication, considered indispensable in order to fulfil the expectations of European citizens: "for a more open Community a simple and clear language is essential". Reading the document through we realize how important this is not only for accessibility but also for practical reasons related to translation.

As if this was not enough, the EU promotes and supports consistency in the use of terms providing glossaries and terminological databases (suffice it to think to the IATE, InterActive Terminology for Europe, anyone can consult at http://iate.europa.eu/iatediff/switchLang.do?success=mainPage&lang=en) most of the time accessible to anyone, stressing once again the central role given to the European citizen.

Going a step forward, concerning the structure of the texts, one of the principles governing EU legal translations is that all language versions "should correspond paragraph for paragraph, perhaps sentence for sentence, as far as possible"[207]. The reason why is strictly practical: potential updatings and amendments are made easier by having texts with the same structure, since it would be easier to locate the appropriate text within the numbered section. Plus, translation may occur during the drafting process, so that translators may be working on a provisional text sensible to addition and modifications. Despite its concrete advantages the level of final readability may result compromised, or at least the text may sound strange and most importantly unclear. Again, the aim of making EU accessible to the layperson seems just an illusion.

[206] *See* Official Journal of the European Communities 1995/C 256/03

[207] PYM A., *The European Union and its Future Languages. Questions for Language Policies and Translation Theories,* consulted at http://usuaris.tinet.cat/apym/on-line/translation/acrossEU6.pdf on 27.10.2012, p. 3

4.1.4 EUROCRATESE(S)

Since the peculiar nature of the European Union, a legal system in which 27 national systems speaking 23 different languages cohabit, EU language and terminology, as well as law, are in a one of a kind, complicated and complex relationship with their national homologous. As we already saw when speaking of law, they are bound to national languages but at the same time they constitute a brand new language and vocabulary. Considering the importance and role of translation we could even dare say that translation itself is the language of the European Union. For as paradoxical as it may seem, at the end of the day there is no original text and no original language to refer to. There is no perfect version since being simultaneously drafted, they are all the result of a process of accommodation sacrificing precision and style to guarantee uniformity and homogeneity. To do this new words are coined or meanings of existing words are altered, and the same is true for sentence structure and stylistic solutions, resulting in a "fake", or maybe just "new", twenty-fourth language that may sound as a national legal language but that actually is not exactly coinciding with it. What we have to keep in mind is, it is a language on its own, separate from the legal language used in a national context, the dodge being mainly in false friends and identical words referring to different concept. This is due to the nature of the EU itself: a new-born and unprecedented institution, with special functions, powers and organs in need of describing situations that have no equal in other legal systems. If when talking about legal languages and their relation with legal system we said languages are born from the need of describing situations peculiar to a given reality and that this is the essential problem of legal translation, the European Union is the exact incarnation of this. And this explains why translation may be considered the language of the European Union: the EU is born with no language. Born without a language and in need of one, or better in need of as many language as the number of the Member States. It would be a mistake, in my opinion, to define Eurocratese as the daughter of four (then twenty-three) parents, even though a text may sound

as contaminated by other languages, I would rather speak of twenty-three slightly modified clones of the original language they derive from. This vision would give it, or more precisely them (to a large extent it is not even one Eurocratese but twenty-three), an artificial nature; it is indeed not the result of a spontaneous process by native speaker but a set-piece, something product of arbitrary decisions. Technically speaking, even specialists find it difficult to give a definition of Eurocratese: it is sometimes defined as an idiolect[208], meaning a language spoken by an individual, different from the language the other person living in his/her same environment speak. This notion should of course be stretched in order to suit Eurocratese, since it is not the language of one but a language of many. Is it the language of the Eurocrats? A language difficult for outsiders to understand? In this case we could speak about jargon, but some of its terminology comes from language of law in general, even though bearing different meanings. Regardless of its definition, because we would go back to the original problem of European language, new and therefore undefinable, what is sure is Eurocratese is a three times specialistic language[209], first of all because it is related to the communitarian universe, then for its normative nature, and last but not least it is specialistic of the particular sector of each document (medical when concerning health etc).

As far as terminology is concerned, we already said multilingualism can be blamed for "distorting the national language affected"[210] but it may also be responsible for its enrichment and improving. There is no doubt Eurocratese derives from legal language, from which it takes its skeleton, but it needed to be filled with words.

The creation of a special EU terminology is the result of a process combining different strategies, all of them with their own implication and all

[208] COSMAI D. , *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p.2
[209] *Ibid,* p. 26
[210] EUROPEAN COMMISSION, Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 79

concurring to make the language of the law of Europe complicated. To a large extent, they overlap the ones we already saw when talking about legal language in general, but bear some peculiarities derived from the peculiar nature of the environment they derive from. The first way of expressing a new concept is of course creating a new word, neologisms may be of semantic or morphological nature according to the degree of importance given to the word-formation patterns already existing in a certain language[211] or to reflect the meaning of the notion, trying to use an already existing term as starting point. This solution is adopted mainly for job titles and names (documents, bodies, mechanisms, procedures)[212], which tend to be related to a specific EU field. The problem they might create is mainly on a national level, because lawyers and judges are called to understand, interpret and use terms that are on the whole unfamiliar to them. Probably the most problematic solution is resemantisation, i.e. an innovation in the meaning of an already existing word. Through resemantisation existing terms gain a new, additional EU-specific sense that, with time, might even become the one and only sense attached to that word. In the meantime it can easily be source of confusion, uncertainty and ambiguity since one may not be sure about which of the two meanings should be given to it. For this reasons, this solution is most of the time used in EU acts, where a definition of the term is also provided. The risk of semantic innovation is affecting the hard-core of the language we are considering, from a lexical, grammatical, syntactic or stylistic point of view, since in that case one might speak of distortion and not enrichment[213].

A third way is a literal translation of the word or a so called mirror translation of a word coming from another language, which may sound peculiar in the target language but is often able to express nuances of sense[214].

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[211] EUROPEAN COMMISSION, Directorate – General for Translation, *Lawmaking in the EU multilingual environment,* Publications Office of the European Union, Luxembourg, 2010, p. 72
[212] *Ibid,* p. 80
[213] *Ibid,* p. 82
[214] *Ibid,* p. 73

Then we have transliteration of foreign words, commonly known as borrowings, used when it is impossible to find a word that suits the situation and therefore the drafter decides to employ a foreign word exactly as it is in its original form or modifying it slightly in order to make it closer to the target language.

Paradoxically, in order to render new European concepts, national languages may even decide to reintroduce dismissed terms, usually with a slightly different acceptation. This should not arise any problem since, given its abandon, no one would use the original meaning of the "recycled" word.

The main issue is thus related to multiplicity of meanings and inconsistency. The same concept could be rendered with a loan or with the translation of the foreign words leading undermining certainty and unambiguity.

With these premises it is not difficult to imagine how unclear European acts can be, not only for the layperson (who is usually the final addressee of the texts, and to whom multilingualism should guarantee accessibility) but also for Eurocrats themselves, and even more national jurists, confronting themselves with a language that looks like their own but is actually not. An additional difficulty is given by direct applicability of EU legal documents: Regulations are applied as they are without passing through any revision from the national legislative body of the country who is receiving it, and almost the same is true for Directives, whose adoption does not necessarily include a reformulation of the communitarian text.

Phrasal complexity, presence of unclear expressions, an overformal stylistic register, the frequent use of abstract and generic terms and the coexistence of words and expressions apparently synonymous without an explanation of the differences are just a few of the features of Eurocratese that result in a legibility problem[215]. This is amplified when related to translation. If it is true that most of the time we do not have translation but

[215] COSMAI D. , *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p. 51

drafting in different language, it is also true that new member states has to catch up with what they missed, starting translating all European acts written before their access to the Union. This translation has as outcome the creation of a new juridical culture, with new concepts that need to be named.

If on the one hand the uniqueness and novelty of the EU poses some problems in terms of vocabulary, it does facilitate things when coming to technical terms. The speciality of EU-related terms (especially neologisms) and its conceptual homogeneity results in a semantic equivalence among different official languages. From this point of view it does resemble scientific terminology: every communitarian technical term has a perfect equivalent in all the other twenty-two languages, with no slightly different nuances, leaving no room for doubts. This is due to the fact most of the EU official languages were born together. Linguistically speaking it is a case of isomorphism. [(216)] Translation problems do not arise from technical terms, but from apparently banal terms, which, in order to be understood need to be related to context and legislator's intents.

A less-positive common feature of EU legislative texts is the indeterminacy of language and the use of hypernyms[(217)], i.e. words with a more extended and generic sense with respect to more specific terms; Once again it is a way of favouring uniformity and ease of translation but on the other hand, as we alreasy saw when talking about legal translation *tout court*, it may represent source of juridical uncertainty. Drafters choose to adopt general terms because too many legal systems are involved and it would be impossible to conciliate all of them using specific terms. Moreover, no national legal system should prevail, nor there shall be a term that could be related to one particular system, since it would be potential source of problems, so no concept should be borrowed, a broader term should be preferred instead.

[(216)] COSMAI D., *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p.126

[217] *Ibid,* p. 127

4.1.5 ORGANS INVOLVED IN TRANSLATION

Beside the Translation Centre for the Institutional Bodies of the European Union, in charge of translating, revising, proofreading, amending official EU documents always having standardization in mind, each of the main organs of the EU (European Commission, European Parliament, European Council and European Court of Justice) has to deal with translation since the multilingual character of the Union that reflects itself in the bodies that make it up, makes it necessary for them to produce texts in more than one language, if not in all the official languages.

4.1.5.1 European Commission

The European Commission is the executive body of the EU. It is where the legislative process begins and from where proposals of legislative instruments addressed to Council and Parliament are put forward. The Directorate General for Translation is the European Commission's in-house translation service, working in all the official languages of the European Union. Proposals are indeed the core of the translation work done at the DGT, but it translates every kind of document the EC produces and whatever it and its departments need for their work: discourses, press communicates, international agreements, political declarations, legal texts of any kind published in the Official Journal, technical reports, magazines[218]. Once more, not all documents actually need to be translated in twenty-two languages, since most of the time they are simultaneously drafted in more than one language. This means the translation takes place during the process of drafting, before publication, and not at the end of it on the final text. The translated texts should be, according to the principle of equal authenticity, identical and above all having the same meaning.

[218] COSMAI D., *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p. 80

The DGT is the largest translation service office in the world, necessary because all European acts have to be translated in all the official languages before entering into force. This is why we could even say that, lately, the Directorate General has been having a role in European policy-making, being crucially representative of languages and guarantor of multilingualism in the EU[219]. Its purpose is to fulfil the exigencies of the Commission concerning translation and providing linguistic consultancy for any written communication; it sustains and strengthens multilingualism in the EU and concur to the building of a European consciousness by giving European citizens accessibility to European Law[220].

The DGT is subdivided in six departments according to the field of competence, namely:

- A/B: Economic and Financial Affairs, Justice, Competition and Informatics
- C: agriculture and Rural Development, Regional Policy
- D: Service for Foreign Policy Instruments , Taxation and Customs Union, Enlargement, Humanitarian aid
- E: Research and Innovation, Energy, Telecommunication, Entreprise and Industry, Environment, Mobility and Transport
- F: Human Resources and Security, Employment, Social Affairs and Inclusion, Health and consumers
- G: Internal Market and Services, statistics, Communication, Technology and Innovation.

All of which located in Brussels except for F and G, located in Luxembourg. Each of them is further subdivided in twenty-three linguistic unities (one per official language). Each work-group therefore includes crosswise the competences of the general divisions that make up the commission, resulting

[219] EUROPEAN COMMISSION, Directorate–General for Translation, *Translation at the European Commission – a history,* Publications Office of the European Union, Luxembourg, 2010, p. 58

[220] EUROPEAN COMMISSION, The European Commission Translation Service, *A Multilingual Community at Work,* Office for Official Publications of the European Communities, Luxembourg, 1999, p. 4

in the possibility for the Commission to interact directly with services demanders so to fulfil their requests more easily. [221] For instance, if we have an English-drafted documents in the justice division, this will be sent to group A to be translated in the other twenty-two languages, but once the translation is made, the act is re-sent to the competent department of the EC from which it follows the adoption procedure as provided by the Council.

As explained in the European Commission website, there are four different ways in which a translation can be produced by the DGT:

- **traditional method** — translation by translator *into their main language*, often with the help of electronic translation tools (translation memories, IATE, voice recognition, etc.).
- **'two-way' method** — translation by translator *out of their main language*. Obviously, the translator needs an excellent knowledge of the target language for this.
- **relay** — one translator translates a document into a "relay language" (usually English or French) and a second translator then puts it into the target language requested. Used *for uncommon language combinations*, e.g. Estonian into Greek.
- **'three-way' method** — neither the source language nor the target language is the main language of the translator, e.g. when an Italian translator puts an Arabic text into English.[222]

In addition to these departments the EC is provided with a linguistic support unity, helping the six divisions with terminology and the development of multilingual instruments and some decentralised headquarters in Member States.

In case of need the Commission make use of independent translators chosen through competitive tenders.

4.1.5.2 Translating for Councils

Located in Brussels, the Language service at the General Secretariat of the Council helps multilingualism work, providing with translations both the

[221] COSMAI D. , *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p. 79

[222] Taken from the EC official page http://ec.europa.eu/dgs/translation/faq/index_en.htm#5 on 15.11.2012

European Council and the Council of the European Union. The role of the European Council (gathering of heads of state and government) is giving the Union the right push, in order to concur to its development and to define its political orientations and priorities; it issues important policy statements but does not enact legislation. All major European Council policy statements are translated into the official languages. On the other hand, the Council of the European Union (composed of representatives of each member state at ministerial level) has legislative and budgetary functions, as well as policy making and coordinating functions[223]. It adopts EU legislation, most of which coming as proposal from the European Commission and jointly legislate with the European Parliament, in the so called "ordinary legislative procedure"[224]. It follows, the aim of the translation service is providing these two organs with the translations necessary so that the documents on the basis of which the they hold their discussions are available to them in all the official and working languages.

Given the delicate role of the Council, participating in the law-making process, its translation service combines the work of translators and jurilinguists. Translators are divided in twenty-three linguistic unities, translating legislative proposals coming from the EC, debated about and amended several times before attaining the form of Directive or Regulation and being adopted and published in the Official Journal. After translation and before publication, the text is given to a commission composed by lawyer linguists for a final revision, verifying its conformity with the EU law[225], i.e. that they are correctly formulated, and that they follow uniform principles of presentation and legal drafting.

Being the Council involved in any EU field, the translator should have a 360 degrees translational competence, and not specialised as it is for EC

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[223] GENERAL SECRETARIAT OF THE COUNCIL, *The Language Service of the General Secretariat of the Council of the European Union - Making Multilingualism Work,* Consilium, Brussels, 2012, p. 7

[224] *Ibid,* p. 8

[225] COSMAI D., *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p.80

translators. Even if not officially, there actually are small translation groups according to sphere of action to which specific document belonging to particularly complex fields of activities are destined.[226]

4.1.5.3 The European Parliament

The European Parliament is the legislative body of the Union, called to debate and discuss in all EU languages, during its sessions. Plus, all the legislative act it produces have to be translated in all the official languages of the Union, in accordance to the principle of multilingualism and equal authority of language versions, before being published in the Official Journal.

The translation service at the EP follows the pattern of the one of the Council, being formed by twenty-three linguistic divisions, each of which actually deals with all the official languages since at the EP the translation is carried out on a 23 to 23 basis, meaning the language they are specialised in is one, but the destination language could be any so that each language unity has to cover with its staff all the official languages of the Union. As a general rule, translators translate into their mother tongue, but since the 1:22 relation (resulting in 506 possible combinations), it is impossible for each language unit to master all official languages and cover all 506 possible combination of the 23 official languages. In order to solve this problem a system of "relay" languages has been adopted: the original text is first translated into the most commonly used during the drafting process (and better known) official languages, i.e. English, French and German, and then these versions are further translated into the more "particular" languages, guaranteeing a higher degree of quality and precision of translation.

The documents translated by the translation service of the EP are all the documents and act produced by the Parliament and used by it during its sessions, namely:

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[226] COSMAI D., *Tradurre per l'Unione Europea. Problematiche e strategie operative,* Hoepli, Milano, 2004, p. 80

- plenary documents and committee documents: agendas, draft reports, amendments, adopted reports, opinions, resolutions, written and oral questions, minutes and reports of proceedings, notices to Members, etc.;
- documents of other political bodies, such as the joint parliamentary assemblies consisting of Members of the European Parliament and national MPs or elected representatives of third countries;
- decisions by the European Ombudsman;
- information for the citizen and for the Member States;
- decisions of Parliament's governing bodies (Bureau, Conference of Presidents, Quaestors). [227]

as well as transcription of oral parliamentary questioning and relative answers.

The EP employs lawyer-linguist as well, for the implications of the work of translators are considerable since we are talking about the core of the law-making power of the EU. They are involved at all stage of the legislative process and in particular they:

- provide Members and committee secretariats with drafting and procedural advice from the initial drafting of texts up to final adoption in plenary;
- prepare and publish legislative texts for adoption by Parliament in committee and in plenary, ensuring the highest quality of all the different language versions of the amendments in the reports and the smooth course of the procedure;
- are responsible for the technical preparation of amendments tabled for the plenary and for the publication of all the texts adopted on the day of the plenary vote;
- finalise legislative acts together with the lawyer-linguists of the Council. [228]

4.1.5.4 The European Court of Justice

Responsible for the observance of EU law, the European Court of Justice is the judicial body of the Union, aiming at reviewing the legality of the acts of the institutions of the European Union, ensuring the Member States comply with obligations under the Treaties, and interpreting European Union law at

[227] http://www.europarl.europa.eu/aboutparliament/en/007e69770f/Multilingualism.html on 16.11.2012

[228] http://www.europarl.europa.eu/aboutparliament/en/007e69770f/Multilingualism.html on 16.11.2012

the request of the national courts and tribunals[229]. Since each Member State has its own language and legal system, the ECJ is a multilingual institution. Its language policy is unique, as any of the EU official language can be employed as the language of a case. The principle of multilingualism has to be observed fully by the Court "because of the need to communicate with the parties in the language of the proceedings and to ensure that its case-law is disseminated throughout the Member States"[230].

It comes as no surprise, interpreting and translation at the Court are on the agenda. Translation is accomplished under mandatory rules governing languages and, exactly as we already saw when talking about the EP, it covers all the combinations of the official languages of the European Union. The Directorate General for Translation of the ECJ is in charge of the translation of every ECJ-related document and is the institution's largest service.

Since the texts to be translated are not only legal but also highly technical in nature, the DGT employs lawyer-linguists only, fully qualified from the legal point of view and competent in at least two languages other than their mother tongue. The fact they should be law expert is set out by article 22 of the rules of procedures of the ECJ stating that the translation service is to be 'staffed by experts with adequate legal training'[231]. They are equally divided into twenty-three linguistic units except for the French division which counts more employees since French is, by custom, the sole working language of the Court, meaning the language in which the judges deliberate and in which preliminary reports and judgments are drafted. This makes the ECJ the only EU body and the only international court having French as the only working language, and in which the distinction between working and official languages is not only clear but determinant.

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[229] http://curia.europa.eu/jcms/jcms/Jo2_6999/ consulted on 15.11.2012

[230] *Ibid.,*

[231] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, Art 22

Unlike the other organs examined so far, the ECJ works on a specific field: law, this is why the major division concerns languages. The Directorate is divided, then, in two smaller groups. On the one side, directorate A includes the Czech, Danish, English, French, Greek, Italian, Lithuanian, Maltese, Slovak, Slovenian and Swedish units. On the other, Directorate B deals with the remaining languages: Bulgarian, Dutch, Estonian, Finnish, German, Hungarian, Latvian, Polish, Portuguese, Romanian and Spanish units.
Besides, the DTG comprises four *functional units,* divided according to the area:

- **Planning and external translation :** management of requests for translation and management of external translation.
- **Analyses and documentary resources :** analysis of documents to be translated, management of documentary resources, terminological and documentary tasks, archives of the Directorate-General for Translation.
- **Resources and projects :** monitoring of staffing in the Directorate-General for Translation, reception and training, communication and information, internal and inter-institutional projects.
- **Tools to aid translation :** IT and technical tasks relating to the monitoring and development of specific translation tools, preparation of the European Court Reports, pre-processing of documents to be translated and support to users in the Directorate-General for Translation.(232)

The documents subject to translation may be divided into internal and external. Internal documents are texts produced by the Court, characterised by stylistic and lexical uniformity, to be translated from French into the other twenty-two languages. Due to uniformity and restricted/technical field of activity the translation process is not particularly challenging for lawyer-linguists (provided legal translation is difficult *per se*) nevertheless, deadlines are very short since sentences need to be available in every language the same day they are pronounced, plus they make constant reference to previous documents and sentences that cannot be translated freely. So it is not a mere translation activity (and it is not difficult to understand why they are not made by pure translators but by lawyer linguists) but a process involving a contextual source research as well. External texts, on the other

(232) Directorate General for Translation of the European Court of Justice - http://curia.europa.eu/jcms/jcms/Jo2_10744/ on 16.11.2012

hand, are those coming from Member States, through the mechanism of reference for a preliminary ruling, *ex* article 234 of the TFEU.

4.1.5.5 Other bodies and institutions concerned with translation

Being multilingualism at the basis of EU work, translation is carried out within the framework of virtually any European branch. Unsurprisingly, then, other European agencies and institutions have their in-house specialised translation service, to cope with their particular needs.

The European Court of Auditors, for instance, whose aim is to manage EU finance, is in need of translating Audits' relations in all official languages, referring to twenty-two linguistic units. They provide the Court with advices and support its functionaries when abroad. Terminology and language are of course specifically economic and financial.(233)

The same is true for the European Central Bank, concerned with the level of prices within the Eurozone and the stability of the financial system together with the promotion of European integration. Its translation service is composed of both lawyer-linguists, providing it with bank-related legal acts and instruments, and translators, dealing with the linguistic revisions of the English drafted documents (English being the working language of the BCE) and the translation and the revision of draft texts of the BCE destined to divulgation in all EU official languages.(234)

Then we have the translation service of the Economic and Social Committee and the one of the European Investment Bank, both translating working documents and text to be divulged in all twenty-three official languages.

Last but not least, the Translation Centre for the Institutional Bodies of the European Union was born in 1994 with the aim of providing translation services for European Agencies other than the one already provided with a

(233) COMMISSIONE EUROPEA, Direzione Generale Dell'interpretazione, *Interpretare e tradurre per l'Europa,* Ufficio Pubblicazioni dell'Unione Europea, Lussemburgo, 2010, p. 15
(234) *Ibid,* p. 16

translation section, and to give support to those institutions and organs whose translation service is facing high levels of work. Its second purpose is to concur in interinstitutional cooperation among the various translation services of the EU. [235]

Due to multilingualism, all these institutions are provided with an interpretation service as well, employed during the sessions in order to let the speakers talk in the language they wish to and allowing the audience to understand things clearly.

4.1.6 LEGAL BASIS

The early legal basis for multilingualism are set out in the Rome treaty which article 55 lists the official languages of the, at that time, Community. This is drew on by Regulation 1/58 that can be said to be *the* fundament of multilingualism in the EU, as we will see. Worth mentioning are article 24 and 342 of the TFEU respectively concerning the language related effects of non-discrimination of EU citizens and the rules governing the languages of the institutions of the Union.
In this sixth part of the chapter, we will deal first with Regulation 1/58 and then with the language regimes of the main EU bodies.

4.1.6.1 Regulation n 1/1958

Multilingualism finds its legal basis in the first European Regulation ever produced, witnessing how multilingualism has always been in first line within the EU policies. Regulation 1/1958, whose long title explains its purpose: it determines "the languages to be used by the European Economic Community" and has been amended each time a new State entered the Community/Union, in order to include its language as well. It consists of a preamble, mentioning its juridical basis (as already established by the

[235] COMMISSIONE EUROPEA, Direzione Generale Dell'interpretazione, *Interpretare e tradurre per l'Europa,* Ufficio Pubblicazioni dell'Unione Europea, Lussemburgo, 2010, p. 17

Treaty) and eight articles. It concerns every document of legal interest issued by and adopted within the EU, leaving out international agreements concluded by the European Union and third parties, for which the parties should define the official languages, and most importantly, as we already said, are ruled by international law through the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The official languages are set up in the first article, which poses immediately a problem since it makes reference to "official and working languages" without explaining the difference between the two. There actually is no difference in practice, since "Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish" correspond to both definition but, then, why making this distinction? We may see it as a way of preventing doubts to arise since, generally speaking, international organisations have working and official languages which do not coincide. Specifying each language is both a working and an official language, the legislator wanted, then, to underline unambiguously their status. Regulation 1/58 prescribes that all legislative texts of general application should be *drafted* (and not published or translated) in all the official languages (art. 4) and that the same is true for the Official Journal (art. 5), in order to make it accessible to everyone. It follows, that as far as binding acts are concerned there is no translation and no original: from the legal point of view we only have different linguistic versions, as already mentioned in more than one occasion, and that all of them are equally authentic. Translation is therefore not visible, since it just produces an equivalent that does not make any reference to other texts. This has been referred to as "vanishing of source texts"[(236)], and it is typical of any kind of translation: once a text has been translated, it ceases existing for the receiver of the translation, to whom that language version will be the only relevant text. It is worth underlining that the principle of

[(236)] GIBOVÁ K., *EU Translation as the Language of a Reunited Europe Reconsidered,* consulted at: http://www.pulib.sk/elpub2/FF/Ferencik2/pdf_doc/19.pdf on 02.11.2012, p. 3

linguistic equality does not mean that all texts have to be translated in all languages: through articles 3 and 4, the Regulation distinguishes the drafting of individual acts by privates, to be done in one of the official languages, and the drafting of acts of "general applicability", to be drafted in the 23 official languages. The last three articles concern the practical application of the Regulation itself by communitarian institutions and member states, leaving discretional power to institutions allowing them to determine how to give application to the Regulation in specific cases (art. 6), specifying that the European Court of Justice should provide for its own linguistic regime in its rules of procedure (art. 7). Finally, article 8 gives the Member States having more than one official language, free hand on the language to be used.

We are redirected, then, to the statutes of the EU organs. Let us go through them briefly.

4.1.6.2 Languages at the European Court of Justice

"The Court shall set up a translating service staffed by experts with adequate legal training and a thorough knowledge of several official languages of the Court."[237]. This is what the rules of procedures of the European Court of Justice states in article 22, underlining the importance of having not only translators but also legal experts at work, due to the strictly juridical nature of the Court.

Its Statute provides in article 64 that "the rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously"[238], drew on what was provided for in Regulation 1/58, namely leaving the court free hand regarding the language to be adopted in its proceedings. The article

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[237] *See* Rules Of Procedure Of The General Court, consulted at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf last accessed on 21.11.12, art 22.

[238] *See* Protocol (No 3) On The Statute Of The Court Of Justice Of The European Union, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf last accessed on 21.11.2012, art 64

makes reference to the rules governing the General Court, a branch of the ECJ, which chapter five is dedicated to languages. We may read in article 35(1) that the languages of a case shall be chosen from the applicant[239], among Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish[240], namely the twenty-three official languages of the Union. Freedom of choice is the general rule, except for three cases the article mentions in paragraph two:

> (a) where the defendant is a Member State or a natural or legal person having the nationality of a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them;
>
> (b) at the joint request of the parties, the use of another of the languages mentioned in paragraph 1 for all or part of the proceedings may be authorised;
>
> (c) at the request of one of the parties, and after the opposite party and the Advocate General have been heard, the use of another of the languages mentioned in paragraph 1 as the language of the case for all or part of the proceedings may be authorised by way of derogation from subparagraph (b); such a request may not be submitted by an institution.[241]

The provisions laid down in this article apply to both oral and written pleadings, as well as in supporting documents that shall be accompanied by a translation (that may be partial in case of "lengthy documents") into the language of the case. The article does confirm the right of each State to choose its own language even though it is not the language of the case, on the condition that a translation into it is provided. Non Member States of the

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[239] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, art 35 (1)

[240] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, art 35 (2)

[241] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, art 35

Union, parties to the EEA Agreement and the EFTA Surveillance Authority[242] and witnesses may be authorised by the Court to use one of the twenty-three languages whereof under paragraph one, and in both cases the Regiser should provide for the translation into the language of the case. And the same is true for the functionaries of the Court[243].

Article 36 provides, then, that all that is produced by and within the Court shall be translated into all the other languages, at the request of any judge, by the Registar. On the other hand every publication of the Court should have a version in each of the official languages.[244]

The provisions for languages end up reminding the principle of equal authenticity of all language versions of any documents, provided that the Court itself has given its authorisation.[245]

4.1.6.3 European Council and European Commission

As already stated, the European Council operates through all the official languages of the Union. The legal basis of the translation activity of the European Council are set out in article 9 of its rules of procedures, stating that:

> 1. Except as otherwise decided unanimously by the European Council on grounds of urgency, the European Council shall deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages.
> 2. Any member of the European Council may oppose discussion where the texts of any proposed amendments are not
> drawn up in such of the languages referred to in paragraph 1 as he or she may specify

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[242] The Agreement on the European Economic Area, entered into force on 1 January 1994, bringing together in a single market the 27 EU Member States and the three EEA EFTA States (Iceland, Liechtenstein and Norway); and its surveillance authority.

[243] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, art 35 (5)

[244] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, art 36 (2)

[245] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, art 37

On the other hand, the legal dispositions concerning translation at the EC are included in article 18 of its rules of procedures, stating not only each final legal act produced by the Commission should be translated but also every instrument adopted by it during its meeting should be attached to its deliberations in the official language or languages presupposing their translation and authentication[246].

Finally a definition of "authentic language" is given:

> For the purposes of these Rules, 'authentic language or languages' means the official languages of the Communities in the case of instruments of general application and the language or languages of those to whom they are addressed in other cases.

4.1.6.4 Multilingualism at the EP

Differently from the other EU bodies, which generally speaking (except for the ECJ) respond to particular rules establishing which of the official languages should be used according to the case, the European Parliament is the highest expression of European multilingualism. At the EP each of the official languages of the Union enjoys the same status. In accordance with the principle of equality and accessibility, its rules of procedure provide that all Parliament documents are published in all the official languages of the EU and that every member of the EP is entitled to choose the language he/she prefers among the twenty-three. Rule 146 provides, as almost all the articles of the rules of procedures, an interpretation of the rule itself, saying that in case a discrepancy among language versions is detected and officialised by a vote, the President should decide which is the language version that should prevail. It might be the original version, but this is not the general rule, the

[246] *See* Rules Of Procedure Of The General Court, consulted at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf on 21.11.12, art 18

choice should fall on the version which best express the intent of the legislator.
Plus, according to article 24 of the TFEU, every citizen of the Union has the right of addressing the European Parliament in any of the official languages established by the Treaty of Rome through article 55, and receive an answer in the same language.

To sum up, being the versions of European legal texts so numerous, with the number of official languages constantly increasing, the task of guaranteeing their uniform application is more and more challenging. The weight of this rests mainly upon the shoulders of the communitarian translator, who by the way seem to enjoy a certain degree of freedom in translation. This is due to the fact the ECJ, in charge of verifying the observance and safeguard uniform interpretation of the treaties, is concerned more with "broad purposes than narrow wording"[247]. This may seem in contrast with standardisation but we are actually referring to two different aspects of EU translation. Quoting Koutsivitis, translator at the European Commission, we could distinguish between free and restricted parts of EU documents, the first consisting mainly of ordinary discourse and the latter of technical EU writing, characterised by standard formulas and specialised terms. It follows creativity is allowed in "free" parts only, where the translator can write in the *genius* of the target language, provided that the meaning is conveyed properly.

[247] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 224

4.2 THE UNITED NATIONS

The United Nations Organisation is an international organisation based on multilingualism, too. Hence, the translation of the texts it produces into its official languages represents an important political and practical tool for the life of the institution. Despite its official language range is limited with respect to the European one (six vs. twenty-three), the challenges of the UN translator may be harder due to the distance between the languages into which texts should be translated. Distance not only because they belong to different language families but also for their cultural diversity, which as we already saw weighs a lot on legal translation.

4.2.1 MULTILINGUALISM, WORKING AND OFFICIAL LANGUAGES

To a general extent, the mechanisms at the base of the language policy and the difficulties concerning language and authenticated version, mirror the ones already analysed in the previous chapter. I will therefore not linger on obviously common points but on peculiarities.

Specificity is given by the nature of the UN and its work, wider both in terms of participation and scope. The translation of legal documents produced in the UN framework is therefore just the tip of the iceberg of the translation work carried out from the translation service(s) of the Organisation. The topic of the translated documents deriving from all the field in which the UN operates include, besides the codification of international law, environment, human rights, disarmament, economics, diplomacy, trade and al their countless declinations. One substantial difference concerning legal texts of EU and UN is that the latter are not directly applicable in the national legislations.

The language provisions for the United Nations were set out at the San Francisco conference in 1945 within the UN Charter, establishing the organisation. Article 111 states the Charter is equally authentic in its Chinese, French, Russian, English and Spanish versions. It specifies each version

should be signed, making clear each text should be regarded as integral part of the Charter: the translations, thus, make up a single instrument.

During the Conference, English and French only were used as working language. A distinction was made, then, between working and official languages, respectively the languages into which interpretation and translation is always provided and the languages in which documents might be translated and published upon request[248]. The language provisions for the UN bodies were left to the single regulation of each of them, resulting in a temporary situation where the organs of the organisation, except for the International Court of Justice, should have Chinese, English, Russian, French and Spanish as official languages and French and English as working language, for the time being. Then, every organ established its own rules of procedures with dispositions regarding languages, which as we will see have been amended repeatedly ending up with the deletion of the distinction between official and working languages.

At that time an Advisory Committee on Languages was established in order to verify the accuracy, consistency and uniformity of the five language versions of the Charter. Having it been drafted in English and French, the main concern of the Committee was the translations into Spanish, Chinese and Russian, for which one specific panel was formed. Procedural decisions for review and approval of the final texts were taken, too: the Advisory Committee of Jurist and the one on Languages should cooperate in order to assure accuracy both by the legal and the linguistic point of view. The texts should be drafted and compared in English and French first, and then translated into the other official languages. Due to the growing importance attributed to the principle of equality of states, the distinction between official and working languages has gradually disappeared[249]. The first

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[248] *See* Yearbook of the International Law Commission, 1996, consulted at: http://untreaty.un.org/ilc/publications/yearbooks/1996.htm on 24.10.2012, p. 105

[249] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 197

language to acquire the status of working language was Spanish in 1948, then it was the turn of Russian in 1968, followed by Chinese in 1973. Now that all languages enjoy the same status, meaning there are no more distinctions among official and working languages, texts are produced simultaneously in all the official languages, now six due to the official recognition of Arabic both as official and working language by the General Assembly in 1973. Core texts may be translated in German, as well, even though does not enjoy any official status. This evidently witnesses how, at the end of the day, despite official provisions and the principle of equality of States, the political and economic weight of a Country is reflected in practice.

Translation is a phase of document production: the text is usually drafted in one of the six official languages (most of the time English or French) and then translated into the other five before being adopted and published. After translation, it passes through several controls, including typographic and stylistic controls. It is not a mere control but a true harmonisation process: documents should comply with UN standards and be consistent among each other in terms of terminology, grammar, syntax and spelling. This is why, in order to minimize misinterpretation ambiguity, institutions prescribe a standard format for each type of parallel text, which includes not only structure (organisational plan and a division of the text into parts) but also the page layout including spacing, paragraphing, punctuation, and even typographic characteristics. [250]. The aim is having parallel texts which are the mirror images of each other. This would allow the receiver to find correspondences among language versions more easily and, above all, it erases completely any sign of distinction among texts, rendering them a uniform single entity to all intents and purposes.

As we already saw when talking about international agreements first and then dealing with the EU, UN text production, too, is most of the time result of compromise, the basis of diplomacy, so that they may use vague, general and

[250] SARCEVIC S., *New Approach to Legal Translation,* Kluver Law International, London, 1997, p. 117

ambiguous words quite often. Yet, the United Nations calls for brevity, clarity, simplicity of language and logical organisation of material in its writings.[251]

4.2.2 Organs involved in translation and Legal Basis

The General assembly is the main deliberative, policymaking and representative organ of the United Nations, including all members of the organisations. Its rules of procedures[252] deal with language in chapter VIII. Article 51 introduces us to the language of the GA, saying English, French, Spanish, Russian, Chinese and Arabic should be *both* the working and the official languages of the Assembly, its committees and subcommittees. It follows there is no distinction between the two and this is why all subsequent articles do not refer to official and/or working languages but to "the languages of the Assembly". Speeches during plenary sessions are usually held in one of the official languages, and an interpretation is provided by the Assembly. Nevertheless any member of the assembly may speak in a language other than the six, but in his case he/she should provide for interpretation into one of the official languages, the interpretation service of the GA will then provide for the translation from that language into the other five (article 53). The documents translated by the General Assembly are all the documents produced by it or necessary for its work, in particular we have verbatim and summary records, to be "drawn up as soon as possible in all the languages of the General Assembly" (article 54); the same is true for the Journal of the General Assembly which "shall be published in the languages of the Assembly" (article 55) as well as for Resolutions and other *important documents* (article 56). Despite all this every document may be translated in any other language if the Assembly so decides.

The General Assembly houses the Department for General Assembly and Conference Management which includes a Translation Service, responsible

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[251] CAO D., ZHAO X., Translation at the United Nations as Specialised Translation*, The Journal of Specialised Translation*, Issue 09, January 2008, p. 39-54

[252] *See* Rules of Procedures of the General Assembly of the United Nations as consulted at http://www.un.org/en/ga/about/ropga/ last accessed on 20.11.2012

for all translations of UN official documents, meeting records and correspondence at Headquarters from and into its official languages.[253] It also provides reference and terminology services. The translation system, since the high number of potentially involved languages and their possible combination, is based on a relay system, meaning that if a delegation wants to use a language different from the official languages, the text or the speech it is first translated into one of the official language and then from that language to the others.

The rules for the General Assembly apply to all its subsidiary organs and other related bodies unless the GA or the organ itself decides otherwise.

As for the other UN bodies, initially the Security Council had French and English as the only working languages and the other as official languages. Nowadays Arabic, Chinese, French, English, Russian and Spanish are both official and working language and documents should be translated in all six languages as stated in article 45 and 46 of its Provisional Rules of Procedures. Nonetheless speeches may be held and documents may be written in any other language, provided an interpretation and a translation of them are arranged.

As for the Economic and Social Council, things are slightly different: a distinction between working and official language is retained, as stated in rule 32, with obvious repercussions in the following dispositions. English, French and Spanish are the only working language and the only languages in which all records should be drawn up. Nevertheless, if the Council requires so, a partial or full translation in one or all the other official languages may be provided (rule 34). On the other hand if the document is a Resolution, or any other formal decision, the rules provide it should be published in the official languages. Speeches are usually held in one of the official languages, in case any member of the council decides to speak in a language other than them, interpretation in all six languages should be provided (rule 33).

[253] Translation – DGACM website, consulted at:

http://www.un.org/Depts/DGACM/Translation.shtml on 24.10.2012

Different is the language policy of the International Court of Justice, where bilingualism is the rule . The only official languages of the Court are, as stated in article 39 of its Statute, English and French, in which pleadings, trials and its relative documents should be drawn, the parties should decide the language of the case, with the obligation of using the same language from the start to the end of the process. In case the parties do not agree on a language, they may use any language. Still, the Court will pronounce itself in English or French and will decide which language version of the texts should be considered authoritative. Yet, any part may be authorised of using a language other than English and French (article 41). These dispositions are confirmed in its rules of procedures through rule 51, where it is specified that in case a third language is used, a translation into English or French should be attached to the pleading. The parties submitting it should certify it as accurate and the verification of the translations/uniformity of the language versions of the documentation produced in Court should be carried out by the Registar. Paragraph three provides that

> When a document annexed to a pleading is not in one of the official languages of the Court, it shall be accompanied by a translation into one of these languages certified by the party submitting it as accurate. The translation may be confined to part of an annex, or to extracts therefrom, but in this case it must be accompanied by an explanatory note indicating what passages are translated. The Court may however require a more extensive or a complete translation to be furnished.

A footnote to rule 51 points out the pleadings should respect the "usual format", stressing once more the importance of standardisation. As far as verbatim records are concerned, they should be written in the official language of the Court which has been used, in the case the used language is neither English nor French they should be produced in one of the official languages as well. The rules for written documents apply similarly to oral speeches and interpretation.

Similarly the UN Secretariat employs two working languages, English and French.

CONCLUSIONS

Through this work, straddling, like its subject, between the legal and the linguistic world, we tried to shed lights on the appropriate approach one should have to legal translation in order to overstep the traps it sets out. We saw how it does represent a struggle for the legal translator, who finds himself facing one of the most delicate and tricky translation- and law-related issues, but most of all we saw why it is so, and which are the strategies to adopt in order to overcome these innumerable difficulties.

We started analysing the tangible side of the story, what we see, read, hear, study and what we are, at the end of the day, bound from: legal texts. We went through its main features and the different typologies we may deal with, looking at their specificities: international agreements, national legislations and private legal documents. Despite all differences in drafting strategies, we agreed on the fact that the most important and the first thing to establish before starting a translation is its function, i.e. whether the result of the translation process is going to be an authentic and authoritative version of the original (prescriptive function) or not (informative function). In the first case the translation will be nothing but law, aiming to the same purposes and producing the same legal effects, and as a consequence the source text will cease of being of any value for the receiver of the new one. If the translation has a prescriptive, i.e. normative, purpose, the attention the translator should pay is extremely high due to the legal consequences the application of that document will have. The distinction between authoritative and non-authoritative texts is important especially when coming to interpretation and in particular when doubts about interpretation arise. Only

the language versions that have been officially declared authentic, usually by means of a language clause, can be consulted in order to ascertain the intended meaning the legislator had in mind when drafting that text. The translator may have a role in this phase since it may be referred to, if the uncertainties may derive from translation. This introduces us to another topic of this work, namely the role of the legal translators, which could be reduced to a role of intermediate between conceiver and receiver of the legal texts, but that actually goes well beyond that. The translator is indeed more a second producer of the legal text since, as already said, the outcome will be a new text, independent from the original and the one and only that will produce legal effects for its addressee. The responsibility of the translator, towards both the source and the target text, is non-negligible and leads us to question whether maybe, more than a pure translator, he/she should be a legal expert able to evaluate and understand precisely the implications and potential consequences of the text. We came to the conclusion a legal expert, even if bilingual in the best hypothesis, would lack of the linguistic/translational competences, necessary to attain an accurate clone of the original language version, and that therefore, the optimal solution would be a mutual cooperation between the two, if not a person equally skilled in both disciplines.

After having dealt with theoretical aspects of legal translation in general and in particular its being system and language bound, multidisciplinary and influenced by context and function, we came to the heart of the matter, that is to say the challenges and problems legal translation poses to the person in charge of it, which derive from the nature itself of the discipline, with both law and language posing limits to his/her work. On top of that, as a result of the union of two disciplines it seems to have inherited the weaker and

defective genes of both, doubling the problems and the ties law and language set out when kept separate. So first of all we went through the expression of all these difficulties: legal language, stressing out the fact it is a language for special purpose and that, to make things more complicated, resembles the ordinary one, potentially posing problems of ambiguity. We questioned ourselves on whether it should be considered a full-fledged language or just a branch of the ordinary one, but after analysing both hypothesis we concluded it may be considered a language on its own, responding to particular needs, different from the ones of the everyday language, governed by different rules and made up by a special vocabulary. How to justify the presence of identical words in both languages, then? Simple, technically speaking they are not the same word, they just share their graphic and/or phonetic form, but since their meaning and acceptation is different they cannot be considered the same. It may sound as a stretching, but it is born from the same conviction and rational extremism that made me say that, when speaking of legal translation, pushing all the considerations we have made to the limit, translation does not exist. The actual stretching, to say it all, is translation itself, especially when trying to translate a text produced by a legal system into the language of a legal system, that is not only different (it happens virtually always) but culturally distant from the source one. Assuming perfect equivalence and one-to-one conceptual correspondence do not exist (except for multilingual countries) it comes as no surprise, translation is at the end of the day, basically a process of adaptation and compromise. It is forced and artificial, as we saw, just as comparative law, looking for common points and equivalences among legal systems. But this does not mean it is superfluous, impossible or wrong, on the contrary people have the right and are supposed to know the rules that bind them, this is why it is not only useful but

necessary. The two concrete situations I chose to briefly analyse at the end of this work, i.e. the European Union and the United Nation Organisation, are just two examples of this, brought under the light to see in practice the context in which the legal translator has to work and which are the legally binding rules he/she is asked to conform to.

Despite all this, once more, translation is a matter of faith and of accepting compromises, the receiver should then trust the translator, if doubts should arise, and if he/she feels the need of clarifications, the only possible solution is to turn to the original version of the text, hoping to find there the answer to his/her questions. Still, this is possible only if he/she is skilled enough to understand the source language, if not, faith is the only way.

After all these considerations, paradoxes and explanations we could dare say, the aim of this work, after all, was awareness. It should serve both as torch and magnifying glass, helping a disoriented outsider finding the right path through the thick woods of legal translation. Light to see what has always been there, but covered by the darkness of complex words and enigmatic sentences, and lens, to go deeper and become conscious of non-evident mechanisms and elements composing it. Its purpose was first of all making the reader more sensible to law by being more sensible to language and all its components, and then trying to give him/her the instruments to approach the subject the right way.

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APPENDIX

- Regulation n. 1/1958
- 1999 Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation
- 1969 Vienna Convention on the Law of Treaties

►**B**

REGULATION No 1

determining the languages to be used by the European Economic Community

(OJ L 17, 6.10.1958, p. 385)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Council Regulation (EC) No 920/2005 of 13 June 2005	L 156	3	18.6.2005
►**M2**	Council Regulation (EC) No 1791/2006 of 20 November 2006	L 363	1	20.12.2006

Amended by:

►**A1**	Act of Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland	L 73	14	27.3.1972
	(adapted by Council Decision of 1 January 1973)	L 2	1	1.1.1973
►**A2**	Act of Accession of Greece	L 291	17	19.11.1979
►**A3**	Act of Accession of Spain and Portugal	L 302	23	15.11.1985
►**A4**	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995
►**A5**	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

▼B

REGULATION No 1

determining the languages to be used by the European Economic Community

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously;

Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community;

HAS ADOPTED THIS REGULATION:

▼M2

Article 1

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

▼B

Article 2

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

Article 3

Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

▼M2

Article 4

Regulations and other documents of general application shall be drafted in the official languages.

Article 5

The *Official Journal of the European Union* shall be published in the official languages.

▼B

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

▼B

Article 7

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

Article 8

If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

I

(Information)

EUROPEAN PARLIAMENT
COUNCIL
COMMISSION

INTERINSTITUTIONAL AGREEMENT

of 22 December 1998

on common guidelines for the quality of drafting of Community legislation

(1999/C 73/01)

THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to Declaration No 39 on the quality of the drafting of Community legislation adopted on 2 October 1997 by the Intergovernmental Conference and annexed to the Final Act of the Treaty of Amsterdam,

Whereas:

(1) clear, simple and precise drafting of Community legislative acts is essential if they are to be transparent and readily understandable by the public and economic operators. It is also a prerequisite for the proper implementation and uniform application of Community legislation in the Member States;

(2) according to the case-law of the Court of Justice, the principle of legal certainty, which is part of the Community legal order, requires that Community legislation must be clear and precise and its application foreseeable by individuals. That requirement must be observed all the more strictly in the case of an act liable to have financial consequences and imposing obligations on individuals in order that those concerned may know precisely the extent of the obligations which it imposes on them;

(3) guidelines on the quality of drafting of Community legislation should therefore be adopted by common accord. These guidelines are intended as a guide for the Community institutions when they adopt legislative acts, and for those in the Community institutions who are involved in formulating and drafting such acts, whether at the stage of the initial text or that of the various amendments made to it in the course of the legislative procedure;

(4) these guidelines should be accompanied by measures to make sure that they are applied properly, with each institution adopting the relevant measures for its own use;

(5) the role played by the institutions' legal services, including their legal/linguistic experts, in improving the quality of drafting of Community legislative acts should be strengthened;

(6) these guidelines complement the efforts being made by the institutions to make Community legislation more accessible and easier to understand, particularly by means of the official codification of legislative acts, recasting and simplification of existing texts;

(7) these guidelines are to be regarded as instruments for internal use by the institutions. They are not legally binding,

ADOPT THESE GUIDELINES BY COMMON ACCORD:

General principles

1. Community legislative acts shall be drafted clearly, simply and precisely.

2. The drafting of Community acts shall be appropriate to the type of act concerned and, in particular, to whether or not it is binding (Regulation, Directive, Decision, recommendation or other act).

3. The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect.

4. Provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided.

5. Throughout the process leading to their adoption, draft acts shall be framed in terms and sentence structures which respect the multilingual nature of Community legislation; concepts or terminology specific to any one national legal system are to be used with care.

6. The terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field.

   Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language.

Different parts of the act

7. All Community acts of general application shall be drafted according to a standard structure (title — preamble — enacting terms — annexes, where necessary).

8. The title of an act shall give as succinct and full an indication as possible of the subject matter which does not mislead the reader as to the content of the enacting terms. Where appropriate, the full title of the act may be followed by a short title.

9. The purpose of the citations is to set out the legal basis of the act and the main steps in the procedure leading to its adoption.

10. The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations.

11. Each recital shall be numbered.

12. The enacting terms of a binding act shall not include provisions of a non-normative nature, such as wishes or political declarations, or those which repeat or paraphrase passages or articles from the Treaties or those which restate legal provisions already in force.

    Acts shall not include provisions which enunciate the content of other articles or repeat the title of the act.

13. Where appropriate, an article shall be included at the beginning of the enacting terms to define the subject matter and scope of the act.

14. Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act. The definitions shall not contain autonomous normative provisions.

15. As far as possible, the enacting terms shall have a standard structure (subject matter and scope — definitions — rights and obligations — provisions conferring implementing powers — procedural provisions — implementing measures — transitional and final provisions).

    The enacting terms shall be subdivided into articles and, depending on their length and complexity, titles, chapters and sections. When an article contains a list, each item on the list should be identified by a number or a letter rather than an indent.

Internal and external references

16. References to other acts should be kept to a minimum. References shall indicate precisely the act or provision to which they refer. Circular references (references to an act or an article which itself refers back to the initial provision) and serial references (references to a provision which itself refers to another provision) shall also be avoided.

17. A reference made in the enacting terms of a binding act to a non-binding act shall not have the effect of making the latter binding. Should the drafters wish to render binding the whole or part of the content of the non-binding act, its terms should as far as possible be set forth as part of the binding act.

Amending acts

18. Every amendment of an act shall be clearly expressed. Amendments shall take the form of a text to be inserted in the act to be amended. Preference shall be given to replacing whole provisions (articles or subdivisions of articles) rather than inserting or deleting individual sentences, phrases or words.

An amending act shall not contain autonomous substantive provisions which are not inserted in the act to be amended.

19. An act not primarily intended to amend another act may set out, at the end, amendments of other acts which are a consequence of changes which it introduces. Where the consequential amendments are substantial, a separate amending act should be adopted.

Final provisions, repeals and annexes

20. Provisions laying down dates, time limits, exceptions, derogations and extensions, transitional provisions (in particular those relating to the effects of the act on existing situations) and final provisions (entry into force, deadline for transposition and temporal application of the act) shall be drawn up in precise terms.

    Provisions on deadlines for the transposition and application of acts shall specify a date expressed as day/month/year. In the case of Directives, those deadlines shall be expressed in such a way as to guarantee an adequate period for transposition.

21. Obsolete act and provisions shall be expressly repealed. The adoption of a new act should result in the express repeal of any act or provision rendered inapplicable or redundant by virtue of the new act.

22. Technical aspects of the act shall be contained in the annexes, to which individual reference shall be made in the enacting terms of the act and which shall not embody any new right or obligation not set forth in the enacting terms.

    Annexes shall be drawn up in accordance with a standardised format,

HEREBY AGREE ON THE FOLLOWING IMPLEMENTING MEASURES:

The institutions shall take such measures relating to their internal organisation as they deem necessary in order to ensure that these guidelines are properly applied.

In particular, the institutions:

(a) shall instruct their legal services to draw up, within one year after the publication of these guidelines, a joint practical guide for persons involved in the drafting of legislation;

(b) shall organise their respective internal procedures in such a way that their legal services, including their legal/linguistic experts, may, each for their own institution, make drafting suggestions in good time, with a view to applying these guidelines;

(c) shall foster the creation of drafting units within those bodies or departments within the institutions which are involved in the legislative process;

(d) shall ensure that their officials and other servants receive training in legal drafting, making them aware in particular of the effects of multilingualism on drafting quality;

(e) shall promote cooperation with the Member States with a view to improving understanding of the particular considerations to be taken into account when drafting texts;

(f) shall encourage the development and improvement of information technology tools for assisting legal drafting;

(g) shall foster collaboration between their respective departments responsible for ensuring the quality of drafting;

(h) shall instruct their respective legal services to draw up periodically, each for the institution to which it belongs, a report on the measures taken in pursuance of points (a) to (g).

Done at Brussels, 22 December 1998.

For the European Parliament	*For the Council of the European Union*	*For the Commission of the European Communities*
The President	*The President*	*The President*

Declaration by the European Parliament

The European Parliament considers that Community legislative acts must be self-explanatory and that the institutions and/or Member States must not adopt explanatory statements.

No provision is made for the adoption of explanatory statements in the Treaties and it is incompatible with the nature of Community law.

Council Statements

Like the European Parliament, the Council is of the opinion that legislative acts should be comprehensible in themselves. Recourse to statements interpreting legal acts should therefore be avoided where possible and the content of possible statements should, as appropriate, be included in the text of the act.

It should however be noted that insofar as they do not contradict the legislative act concerned and they are made public (as provided for in Article 151(3) of the EC Treaty as it will be amended by the Amsterdam Treaty), such interpretative statements adopted by the Community legislator are compatible with Community law.

The Council finds it desirable that the general principles of good drafting which may be drawn from the 'Common guidelines on the quality of drafting of Community legislation' serve, where appropriate, as an inspiration for the drafting of acts adopted pursuant to Titles V and VI and of the Treaty on European Union.

The Council considers that, in order that the transparency of the Community decision-making process may be improved, it would be desirable for the Commission to provide in future for the statements of reasons accompanying its legislative proposals to be widely circulated to the public by the most appropriate means (for example, publication in the 'C' series of the *Official Journal of the European Communities*, electronic distribution, or other).

The Council takes the view that, in addition to the adoption by the legislator of official codification of legislative acts, the Office for Official Publications of the European Communities should, with a view to improving access to Community legislation when the latter has been subject to frequent or substantial amendments, intensify its work of informally consolidating legislative acts and should improve the advertising of the availability of these texts. It would also be useful to examine with the other institutions the appropriateness of possible measures aimed at facilitating a more structured use of the recasting technique which combines the codification and the modifications of an act in a single legislative text.

Vienna Convention on the Law of Treaties
1969

Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.
United Nations, *Treaty Series*, vol. 1155, p. 331

Vienna Convention on the Law of Treaties
Done at Vienna on 23 May 1969

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I.
INTRODUCTION

Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

Article 2
Use of terms

1. For the purposes of the present Convention:

(*a*) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*c*) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(*d*) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(*e*) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

(*f*) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*h*) "third State" means a State not a party to the treaty;

(*i*) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3
International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(*a*) the legal force of such agreements;

(*b*) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(*c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4
Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5
Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II.
CONCLUSION AND ENTRY INTO FORCE OF TREATIES
SECTION 1. CONCLUSION OF TREATIES

Article 6
Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(*a*) he produces appropriate full powers; or

(*b*) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8
Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10
Authentication of the text

The text of a treaty is established as authentic and definitive:

(*a*) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(*b*) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11
Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12
Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(*a*) the treaty provides that signature shall have that effect;

(*b*) it is otherwise established that the negotiating States were agreed that signature should have that effect; or

(*c*) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(*a*) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(*b*) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13
Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(*a*) the instruments provide that their exchange shall have that effect; or

(*b*) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

Article 14
Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) the treaty provides for such consent to be expressed by means of ratification;

(*b*) it is otherwise established that the negotiating States were agreed that ratification should be required;

(*c*) the representative of the State has signed the treaty subject to ratification; or

(*d*) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15
Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) the treaty provides that such consent may be expressed by that State by means of accession;

(*b*) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 16
Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(*a*) their exchange between the contracting States;

(*b*) their deposit with the depositary; or

(*c*) their notification to the contracting States or to the depositary, if so agreed.

Article 17
Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(*a*) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19
Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not failing under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

Article 20
Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(*a*) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(*b*) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(*c*) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21
Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(*a*) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22
Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(*a*) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23
Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL, APPLICATION OF TREATIES

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III.
OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES
SECTION 1. OBSERVANCE OF TREATIES

Article 26
"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30
Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) as between States Parties to both treaties the same rule applies as in paragraph 3;

(*b*) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35
Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36
Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37
Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38
Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV.
AMENDMENT AND MODIFICATION OF TREATIES

Article 39
General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41
Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V.
INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES
SECTION 1. GENERAL PROVISIONS

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44
Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45
Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

Article 46
Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47
Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48
Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49
Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50
Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51
Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52
Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53
Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54
Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the other contracting States.

Article 55
Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56
Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57
Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the other contracting States.

Article 58
Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) the possibility of such a suspension is provided for by the treaty; or

(*b*) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59
Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60
Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State; or

(ii) as between all the parties;

(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) a repudiation of the treaty not sanctioned by the present Convention; or

(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61
Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62
Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) if the treaty establishes a boundary; or

(*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63
Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64
Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65
Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66
Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(*b*) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67
Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68
Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69
Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70
Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71
Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(*a*) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(*b*) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI.
MISCELLANEOUS PROVISIONS

Article 73
Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74
Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75
Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII.
DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(*a*) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(*b*) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(*c*) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(*e*) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(*f*) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(*g*) registering the treaty with the Secretariat of the United Nations;

(*h*) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78
Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(*a*) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (*e*).

Article 79
Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(*a*) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(*a*) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(*b*) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Article 80
Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII.
FINAL PROVISIONS

Article 81
Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the

Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82
Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83
Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85
Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.