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AN INTEGRATED MODEL FOR TRANSLATING LEGAL TEXTS

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The paper proposes a model for translating legal texts which is intended to direct the translation process through a series of stages to the final product—a *skopos*-oriented target text in which the potential pitfalls resulting from translating between different legal languages and systems have been considered. The model unites different translation stances (Snell-Hornby's integrated approach, the functionalist views with the *skopos* theory and the concept of *cultureme*, as well as Chesterman's theory of *memes*) with the findings of comparative law regarding differences between legal systems and their impact on legal languages. It consists of ten stages, each addressing one of the specific linguistic and extra-linguistic aspects of legal text types. When translating legal texts, a very specific situation may arise with respect to the cultural embeddedness of the target text, since *memes* of different legal cultures may co-exist on its various levels. This is especially the case when the parties involved in legal communication occurring through translation decide to use a third language as a *lingua franca*, which may lack any direct correlation with the legal culture(s) underlying such communication.

1. INTRODUCTION

The translation model proposed in this paper combines different translation approaches with the findings of comparative law regarding the differences between legal systems and their impact on legal languages and substantiates them with the results of a corpus study of commercial contracts in English, Slovene and German. It follows in large traits Snell-Hornby's (1995) integrated approach to translation, as it foresees a sequence of stages each addressing one specific aspect of contracts with an interdisciplinary focus. It also adopts the functionalist view stressing the importance of the prospective function, i.e. *skopos* according to Reiß and Vermeer (1984) as the decisive factor determining the type of translation to be produced. The basic idea underlying the model is viewing contracts as *culturemes* in accordance with the concept of *cultureme* as first introduced and advocated

by Oksaar (1988) and later adopted by the functionalist approaches to translation which defined *culturemes* as formalized, socially and juridically embedded phenomena, existing in a particular form and function in a given culture (Vermeer 1983, 8; Nord 1997, 34). In the light of Oksaar's theory of *culturemes* the process of entering an agreement and fixing its contents in the form of a contract text is seen as a standardised pattern of communicative behaviour, i.e. a *cultureme*. The *cultureme* as a socio-cultural category is realised through realisational (verbal, paraverbal, non-verbal and extra-verbal) and regulatory behaviouremes (i.e. referring to extra-linguistic aspects e.g. time, space, social order, etc.) When observing the *culturemes* in different cultural settings, differences are established with respect to all behaviourem categories, the most relevant ones in the case of legal texts, however, are those occurring on the verbal (the text form conventionally used in a given culture) and the regulatory level, i.e. the governing legal system which provides the communicative framework to the contract. The behaviouremes mapped at different text levels reflect established cultural practices and thus correspond to the concept of *memes* as proposed by Chesterman (1997, 7), i.e. units of cultural transfer which can only be transmitted verbally across cultures through translation. For translation purposes the source and the target texts are analysed on their extra-linguistic (the extent and contents of the contract as required by or customary in the relevant legislation) and linguistic (i.e. lexical, syntactic, pragmatic, stylistic) memetic levels. The memetic structures thus established are then compared in order to map their common traits and differences.

The model reflects the procedure developed by the author in years of translation practice, i.e. a schematized think-aloud-protocol proposing a sequence of ten steps directing the translation of contracts as legal texts types as described below.

2. IDENTIFYING THE SKOPOS OF THE TRANSLATION

In the initial phase the translator uses the data contained in the translation brief, gathers necessary additional information from the commissioner and/or evaluates the circumstances of the communicative situation for which the translation is needed to define the *skopos*, i.e. the prospective use of the target text. Translations of contracts can serve a number of different *skopoi,* from mere information on the source text for a receiver in the target legal culture who does not speak the source language to a translation which will have the status of authentic text in the target legal culture. Some of the possible functions of the target text are:

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

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

2.1. Defining the type of translation matching the skopos

At this stage, the translator will determine the type of translation which will best suit the *skopos*. According to Cao, there are three categories of legal translation: translation for normative, for informative and for general legal or judicial purposes (Cao 2007, 10–12).

Legal translation for normative purposes implies producing translations of legal instruments in bilingual and multilingual jurisdictions, where the source and the target text have equal legal force. In the case of contracts, this kind of translation is necessary within bilingual/multilingual legislations (such as Switzerland, bilingual areas of Slovenia, Italy, Belgium, etc.), as well as within supranational legislations such as the UN and the EU, but also when contracts as private documents are made in two or more equally authentic language versions.

Legal translation for informative purposes has constative or descriptive functions and includes translations of different categories of legal texts, produced in order to provide information to target culture receivers, whereby the translations only have informative value and no legal force. In the case of contracts only one version is usually defined as the authentic text, while the translations into other languages merely have informative value, but no binding effect.

The third possible translation category is the translation for general or judicial purposes, where source language texts are translated to be used in court proceedings as parts of documentary evidence and thus have an informative, as well as descriptive function. Contracts are often translated to provide evidence of the obligations assumed by the parties and the rights conferred to them. Generally, such translations are commissioned to sworn translators, who produce a certified translation and confirm in a special clause that the translation fully conforms to the original.

Experienced translators will usually be able to establish the *skopos* and the kind of translation best conforming to it, the relevant information however may also be supplied in the translation brief, which, as pointed out by the *skopos* theory, can contribute considerably to the quality and functionality of the translation.

2.2. Establishing the legal systems involved in the translation and their hierarchy

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

2.3. Defining the extent of relatedness of the legal systems involved in the translation

At this stage the translator should identify the legal families to which the legal systems involved in translation belong and establish their degree of relatedness. Sandrini points out that the translatability of legal texts directly depends on the relatedness of the legal systems involved in a particular translation (Sandrini 1999, 17). Hence, a translator should be well acquainted with the major legal families, their differences and common traits and thus be able to anticipate the potential pitfalls resulting from the (un)relatedness of legal systems.

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

The legal systems pertaining to the so-called Civil (i.e. Continental) Law, which includes the Romanic, the German and the Nordic legal systems, are relatively related. They have common foundations in the Roman legal tradition and are characterized by codification. In the case of the continental legal systems, a considerable closeness with respect to the

legal concepts applied can be expected. On the other hand, the legal systems of other countries and cultures, derived from different traditions, are difficult to compare—such as the Far-Eastern, the Islamic, the Hindu and finally, the so-called Anglo-American or Common-Law legal family, based on *common law, equity* and *statute law*.

Taking into account these differences the translator will be able to anticipate that more translation problems are to be expected when translating Anglo-American contracts into the language of one of the continental legal systems as when translating between two legal systems pertaining to the same legal family. A basic knowledge of comparative law will enable him/her to map the areas of law where the extent and markedness of the differences between the legal systems may hinder the translation process (e.g. the Law of Obligations in continental legal orders or *equity* in the Anglo-American legal family).

2.4. Establishing the relationship of the contemplated languages and legal systems

Having established the extent of relatedness of the legal systems underlying the translation, the translator should also evaluate the level of relatedness of the languages involved. In this respect, de Groot points out that the crucial issue to be contemplated when translating legal concepts is the fact that 'The language of the law is very much a system-bound language, i.e. a language related to a specific legal system. Translators of legal terminology are obliged therefore to practice comparative law' (Groot 1998, 21). It is thus the legal system in which the language is embedded and not the general culture underlying it to play an essential role in translation. In this respect, Weisflog (1987) speaks of the 'system gap' existing between legal systems, which in turn results in the gap dividing legal languages. The wider the system gap the higher the degree of translational difficulty and, consequently, the lower the level of equivalence to be expected.

If the contract text is viewed as *cultureme*, the impact of the legal system is directly felt on its extra-linguistic level—through superordinated legal acts (the Law of Obligations in continental legal systems, commercial usage, informal legal sources such as the General Terms and Conditions), which apply to the contractual relations and are sometimes directly mentioned in the contract wording. Such referencing to superordinated legislation is typical of contracts made under continental law where the influence of hierarchically superior regulations affects the macrostructure of the text. Contract elements regulated by such hierarchically superior acts namely do not need to be explicitly and extensively set forth in the text, as they apply automatically. As a consequence, contracts drafted under continental civil legislation are as a rule shorter than comparable Anglo-American contracts, for which such (tacit) application of hierarchically superior legislation is not common. In their study in which they compare German and American business contracts, Hill and King (2004) argue that German agreements are usually only one-half or two-thirds the size of comparable US agreements made for the same or similar purposes.

The relatedness of legal languages in translating contracts will be reflected in the greater or lesser relatedness or similarity of the different memetic levels of the text, such as the use

of the passive voice in German, as well as in Anglo-American contracts on the syntactic level, the differences between the way of expressing the assuming of obligations between languages, e.g. the *shall* future in English and lexical verbs such as *sich verpflichten* in German or *zavezati se* in Slovene (to undertake, to bind oneself) on the pragmatic level.

When translating between different legal systems or families, the translator should thus evaluate the relatedness of the legal systems, but also take into account the affinity of the languages involved in translation resulting in one of the following scenarios according to de Groot (1992, 293–297):

- the legal systems and the corresponding languages are closely related, as in the case of Spain and France, or Slovenia and Croatia;
- the legal systems are closely related but the languages are not, e.g. when translating between Dutch laws in the Netherlands and French laws;
- the legal systems are different but the languages are related; here the difficulty will be considerable, especially as this relatedness of languages implies the risk of *faux amis*, as in the case of translating German legal texts into Dutch or vice versa;
- the most difficult task will be translating between unrelated legal systems, as well as languages, e.g. translating Common Law texts from English into Slovene.

Kocbek (2009, 53–54) argues that de Groot's categorization of translational situations fails to identify two further possible scenarios. The first involves translating within an international or a supranational legal system, e.g. within the UN or the EU, where legal concepts pertaining to the EU law are translated by using terms bound to national legal systems (drawing from national legal terminologies), which may be tainted by the meanings attributed to them in the source legal system. In order to be used within the EU legal system, the existing terms should therefore be 'neutralised', i.e. re-defined (e.g. by adding a footnote specifying their meaning within the EU context).

The second scenario leading to potential pitfalls implies translating between legal systems which are relatively related (e.g. German and Slovene, both belonging to the Civil Law), but using a *lingua franca* bound to a legal system which may be fundamentally unrelated to the legal systems involved, as is often the case with English used as *lingua franca*. Such situations involve specific problems and require a selective application of the principle of cultural embeddedness. In such cases, the specific memetic structure of Anglo-American contract *culturemes* on the syntactic, pragmatic and stylistic level may be envisaged, whereas on the lexical level there is the risk of introducing *memes* from the legal system underlying the *lingua franca* (in the case of English the Common Law), which are alien to the legal systems of the communicating parties and may as such prejudice communication.

When recognizing one of the above presented scenarios, the translator will be able to evaluate where problems are to be expected due to the lack of equivalence as a result of the

unrelatedness of the legal systems, as in the case of typical lexical *memes* of Anglo-American contracts, such as *consideration* (a key concept in contracts under Common Law, implying a right, interest, profit or benefit accruing to the one party of a contract, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party) or with concepts referring to the Law of Obligations in the case of continental contracts.

2.5. Establishing the memetic structure of the source text cultureme

At this stage, the translator will have to identify the *memes* which shape the *cultureme* of the source text on the extra-linguistic and linguistic level. To this purpose, s/he will need a good knowledge of the text conventions applying to contracts in different legal cultures.

On the macro-structural level of the text, extra-linguistic factors (the legal system) determine its extent and those text elements which are considered obligatory or recommendable in a given legal culture ('*boilerplate clauses*'), such as the *Recital* with the *Whereas clauses*, the *Representations and Warranties* in Anglo-American contracts. In analysing this dimension of the text, the knowledge of contract-relevant areas of law in a given legal system proves useful (Contract Law in the Anglo-American legal culture, the Law of Obligations in the continental legal culture). Moreover, the translator should also be acquainted with the specific style of drafting contract texts, e.g. drafting customized contracts which is typical of the Anglo-American culture or using more standardized texts created by adapting sample contract texts typical of the German and Slovene legal culture.

On the micro-structural level *memes* will have to be identified:

- on the lexical level—the specific terms expressing concepts prototypical of the source legal culture, as well as phenomena, such as word pairs (e.g. 'bind and obligate', 'deemed and considered') and word strings (e.g. 'all taxes, levies, duties, imposts, charges and withholdings of any nature whatsoever'), typical of Anglo-American contracts, and idiomatic expressions such as 'lifting/piercing the corporate veil' or archaisms (so-called legal adverbs, e.g. *herein, hereunder*);
- on the syntactic level—the prevailing sentence structures (typical conditional, e.g. introduced by 'provided that'), the use of the passive voice and impersonal verb forms;
- with respect to style—the *memes* marking the level of formality and the language means used to create the effect of objectivity, to stress the official nature of the text (passive voice);
- on the pragmatic level—the language means prototypical of the source legal culture for expressing the essential contractual relationships (assuming and imposing obligations, granting and obtaining rights) which typically have a strong performative power.

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

2.6. Determining the hypothetical target cultureme

By drawing on his/her knowledge of the target legal culture and analysing (a corpus of) parallel target culture texts, the translator will be able to mentally conceive a hypothetical target text, i.e. a skeleton text fully conforming to the conventions of the target legal culture by applying the above described procedure. Drawing on previous knowledge of the source and target legal cultures s/he will be able to anticipate potential translation pitfalls resulting from the gap dividing the legal systems.

2.7. Comparing the source and target culturemes—mapping universalities and divergences

By comparing the *cultureme* of the source text with the hypothetic target text *cultureme,* it will be possible to identify common features (universal *memes* of contract texts), i.e. overlappings between the source and target *culturemes,* as well as the divergences between them on different text levels.

When proceeding to draft the target text, the *skopos*, i.e. the intended function or prospective use of the target text is the key factor guiding the final drafting of the target text. On this account, the translator needs to determine:

- the *memes* to be directly transferred from the source into the target *cultureme*—those identified as common or universal (the use of legal terminology, a formal style), but also *memes* prototypical of the source legal culture which have to be preserved due to the *skopos,* e.g. when the source legal system applies as the governing law;
- the *memes* to be modified (mutated) and adapted to the target *cultureme* (especially when the source text is used as a blueprint for a target contract text adapted to the target legal culture);
- the extent and depth of mutation to be undergone by the source text *memes*, reaching from changes in the surface structure, such as stylistic adaptations (substituting the passive voice in Anglo-American contracts with other impersonal forms in the Slovene texts or word strings in Anglo-American contracts used to convey the concept of all-inclusiveness with shorter structures due to the lack of synonyms in the target language) and/or modifications on the conceptual level (substituting the Anglo-American concept *consideration* with the related, but by no means equivalent concept of price in continental contracts), to completely omitting some *memes* of the source legal culture (e.g. the *whereas clauses* of Anglo-American contracts when translating into a continental legal system/language) or vice versa, creating new *memes* in the target text, which the source text did not contain, but are required/customary to make the text functional within the target legal culture (when using a German/

Slovene sample contract to draft a target text complying with the Anglo-American *cultureme,* the text will have to be amended by adding prototypical elements e.g. the *Recital, Definitions, Warranties and Representations*, etc.).

2.8. Final design of the target text

In this phase the translator designs the final version of the target text. To this purpose, s/he takes into account the findings of the previous steps and applies the *memes* of both the source and target *cultureme* conforming to the *skopos*. An important guideline at this stage of the translation process is the awareness that *memes* of different legal cultures can coexist in the target text depending on the *skopos*.

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

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

On the lexical level, a universal feature of contracts is the use of technical language, i.e. legal terminology and terminology of other areas of expertise contemplated by the contract. Where due to differences between legal systems cases of non-equivalence between terms and concepts have to be dealt with, the source-language term in its original or transcribed version, a paraphrase or a neologism may be used (cf. de Groot 1998, 25) or a calque and/or a borrowed meaning can be introduced (Mattila 2006, 119–121).

In order to avoid the risk of divergent interpretations of the terms used in the contract, terminologising the words and phrases to be used might be useful. Thus, adding the *Definitions and Interpretations* clause, which is a meme of Anglo-American contracts, can undoubtedly improve the functionality of the translation. The analysis of contract texts has shown that *Definitions* as a *meme* of Anglo-American contracts are gradually gaining grounds in contracts made under continental law, as they are obviously perceived as enhancing uniform interpreting and understanding of the contract formulations.

In realizing the remaining text-levels the *memes* identified as prototypical of the individual legal cultures are to be applied. Particular attention is to be paid to the fact that in expressing crucial contractual relationships, i.e. imposing and assuming obligations and/or granting and exercising rights, language structures identified as prototypical of a legal language are applied. Accordingly, it has to be considered that the English *shall* future, which is absolutely the most widely used means of expressing obligations in Anglo-American contracts, has a considerably higher pragmatic force than the German/

Slovene future tense and should therefore be substituted by language structures with a comparable pragmatic impact, e.g. lexical verbs of the type *sich verpflichten* or *zavezati se* (to undertake, to bind oneself).

2.9. Ensuring the legal security of the target text and the transparency of translational solutions

Considering the performative nature of legal language, i.e. the fact that formulations in contracts have a decisive impact on the establishing of contractual relationships, the creating of obligations and rights and are thus binding upon the parties, the translator has to assume the burden of responsibility for potential consequences of (in)adequate translation. To reduce the risk of inadequate translation, Sandrini (1999, 39) proposes to follow two guidelines. The first requires from the translator to safeguard the legal security of the target text by double-checking the legal foundations of contracts. When translating between the Anglo-American and the continental legal systems, the translator will have to take into account the differences in contract drafting under Contract Law or resp. the Law of Obligations and consult legal experts whenever necessary.

The second guideline imposes the transparency of the translational decisions, requiring from the translator to account for the translational solutions applied. To this purpose the translator will need interdisciplinary knowledge of the legal systems involved in the translation, as well as of the corresponding legal languages and *culturemes*.

3. CONCLUSION

The purpose of the presented translation model is to provide a dynamic framework aimed at guiding the translator through a logical sequence of steps and making him/her aware of the potential pitfalls which could compromise the quality and functionality of the target text. Each step takes into account a specific aspect of text *culturemes* by providing a targeted guideline and should lead to producing a target text which is necessarily a cultural hybrid in which *memes* of different legal cultures coexist. A fundamental role is played by the governing law, i.e. the applicable legal system which determines the extra-linguistic and conceptual frame of the text, within which *memes* of source and target *culturemes* are combined in conformity with the *skopos*. Texts written in a *lingua franca* may pose special problems as they imply the risk of introducing *memes* from the legal system underlying such language which may be completely unrelated to the legal transaction regulated by the contract. Thus, the translator should be able to selectively and critically apply *memes* from different legal cultures. By studying *culturemes* of contract texts in different legal cultures and applying the findings of such research in translation, s/he will nevertheless contribute to divulging and spreading knowledge of different legal languages and cultures. And finally, producing *skopos*-customized translations can undoubtedly enhance intercultural legal communication.

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INTEGRUOTO VERTIMO MODELIS TEISĖS TEKSTAMS VERSTI

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Santrauka

Šiame straipsnyje autorė siūlo teisinių tekstų vertimo modelį, sujungiantį ne tik specifinius vertimo aspektus, bet ir lyginamosios teisės tyrimų išvadas dėl teisės sistemų skirtumų ir jų poveikio teisės kalbai, juos pagrįsdama anglų, slovėnų ir vokiečių sutarčių tekstynų duomenimis. Daugiausia laikomasi M. Snell-Hornby pasiūlyto integruoto požiūrio į vertimą, pagal kurį kiekvienas tekstas analizuojamas etapais taikant tarpdalykinių tyrimų metodiką. Be to, laikomasi ir funkcinio požiūrio, pabrėžiama vertimo tikslo (*skopos*), kuris laikomas svarbiausiu veiksniu, lemiančiu verstinio teksto tipą, svarba. Autorė įveda E. Oksaar (1988) apibrėžtą *kultūremos*, t. y. standartizuoto kultūrinio elgesio modelio, sąvoką ir siūlo pažvelgti į tekstus kaip į *kultūremas*. Tekstas kaip *kultūrema* analizuojamas lingvistiniu ir ekstralingvistiniu požiūriu siekiant nustatyti

kultūrines teksto ypatybes, pagal kurias išskiriami įvairūs jo analizės lygmenys. Kultūrinės teksto ypatybės jau turi *memų* (vienai kuriai nors kultūrai būdingų idėjų, elgesio ar stiliaus ypatybių) statusą (Chesterman 1997) ir gali būti perkeliamos į kitą kultūrą verbaline forma tik per vertimą. Todėl straipsnyje analizuojama ir originalo, ir paralelinių vertimo tekstų kultūrinė struktūra. Perkeliant ir transformuojant originalo teksto kultūrą ir įvedant vertimo kalbos *memas* sukuriamas vertimo tekstas.