

Legal Translation and Translation Theory: a Receiver-oriented Approach

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I. Introduction

In this age of globalization, the need for competent legal translators is greater than ever. This perhaps explains the growing interest in legal translation not only by linguists but also by lawyers, the latter especially over the past 10 years (cf. Berteloot, 1999:101). Although Berteloot maintains that lawyers analyze the subject matter from a different perspective, she advises her colleagues also to take account of contributions by linguists (ibid.). I assume this includes translation theory as well. In the past, both linguists and lawyers have attempted to apply theories of general translation to legal texts, such as Catford's concept of situation equivalence (Kielar, 1977:33), Nida's theory of formal correspondence (Weisflog, 1987:187, 191); also in Weisflog 1996:35), and, more recently, Vermeer's *skopos* theory (see Madsen's, 1997:17-26). While some legal translators seem content to apply principles of general translation theory (Koutsivitis, 1988:37), others dispute the usefulness of translation theory for legal translation (Weston, 1991:1). The latter view is not surprising since special methods and techniques are required in legal translation, a fact confirmed by Bocquet, who recognizes the importance of establishing a theory or at least a theoretical framework that is practice oriented (1994). By analyzing legal translation as an act of communication in the mechanism of the law, my book *New Approach to Legal Translation* (1997) attempts to provide a theoretical basis for legal translation within the framework of modern translation theory.

Like other areas of translation, the translation of legal texts is (or ought to be) receiver oriented. With this in mind, this paper focuses on the reception of parallel texts in the mechanism of the law, showing how legal texts authenticated in two or more languages are interpreted and applied by courts in various plurilingual jurisdictions. It is not concerned so much with methods of interpretation but rather with the implications for the decision-making process of translators. Above all, it attempts to show how translation strategy is affected by the communicative factors of reception in bilingual and multilingual jurisdictions. Since the success of an authenticated translation depends on its interpretation and application in practice, the ultimate aim is to encourage interaction between translators and the judiciary.

Vested with the force of law, authenticated translations enable the mechanism of the law to function in more than one language. Translations of legislation, treaties and conventions, judicial decisions, and contracts are authoritative only if they have been approved and/or adopted in the manner prescribed by law. In accordance with the theory of original texts, all authenticated translations are just as inviolate as the original text(s). Hence, they are not regarded as "mere translations" but as originals and are not even referred to as translations (Šarcevic, 1997:20; Berteloot 1999:112). This is perhaps the reason why parallel texts, as they are referred to here, have been neglected by most translation theorists or mentioned only in passing. Today the situation is changing.

II. Role of the Receiver in Modern Translation Theory

One of the main tasks of translation theorists is to identify criteria to aid translators select an adequate translation strategy. This presupposes, of course, that the translator is vested with the authority to make

such decisions. For a long time the main factor determining translation strategy was text type, thus leading to the creation of text typologies, the first of which were based on subject matter. In 1971 Katherina Reiss made a significant contribution to general translation theory by proposing a text typology that takes into account not only the subject matter but also the function of the particular text type (1971:32). The new emphasis on function turned the attention of translation theorists to the pragmatic aspects of texts, causing many of them to turn their backs on linguistic theories of translation. Shifting the emphasis from interlingual to cultural transfer, German scholars (Vermeer, Holz-Mänttari, Nord, Hönig, Kussmaul) now view translation as a “cross-cultural event” (Snell-Hornby, 1988:43) embedded in an act of communication. Released from his/her commitment to reproduce the source text, the translator is a text producer who creates a new text on the basis of the communicative factors of reception in each situation. At first it was believed that translation strategy is determined primarily by the type of audience to whom the target text is directed, thus leading to the “discovery” that the same text can be translated in different ways for different receivers. Thereafter, the main emphasis was shifted to the communicative function or purpose of a translation. As in Hans Vermeer’s *skopos* theory, the functional approach requires translators to produce a new text that satisfies the cultural expectations of the target receivers for texts with the intended *skopos* (1998:41-45).

In essence, the *skopos* theory has modernized translation theory by offering an alternative to traditional translation. In traditional translation, where the translator is expected to reconstruct the form and substance of the source text in the target language, the function of the target text is always the same as that of the source text. While Vermeer insists that the *skopos* theory also applies to traditional translations without a shift in function (*Funktionskonstanz*), it clearly focuses on translations whose function differs from that of the source text (*Funktionsänderung*). Departing from tradition, the functional approach presumes that the same text can be translated in different ways depending on the communicative function of the target text. Guided by loyalty to the *skopos*, the translator is free to produce a new text that differs considerably from the source text in both form and substance.

Vermeer’s claim that the *skopos* theory applies to all texts has recently been criticized by myself and other authors as well (see Šarcevic, 1997:18-19, 65-66, 71, 104-106, 108-110; Madsen, 1997:17-26; Nord, 1997:109-122). Although Vermeer now admits that the *skopos* theory is a subtheory of Holz-Mänttari’s more general theory of translational action (*translatorisches Handeln*) (Vermeer, 1996:65; cf. 1998:49), he still insists that it is a general theory, meaning that “no exceptions are known” (1996:23). In earlier publications Vermeer used the example of an insurance contract to prove his point. Attempting to show that contracts can be translated in different ways depending on their communicative function, he concluded that target-language formulae are to be used in translations intended for use in practice, whereas source language ones are to be imitated if the translation is to be used as court evidence (1986:34). Vermeer’s example oversimplifies the decision-making process of legal translators to the point that it is misleading. By suggesting that the translation strategy for contracts is determined primarily by function, he disregards the fact that legal texts are subject to legal rules governing their usage in the mechanism of the law. When selecting a translation strategy for legal texts, legal considerations must prevail. In regard to contracts, the decision whether and to what extent target-language formulae are adequate is determined primarily by the law governing the particular contract, not function (Šarcevic, 1997:18-19, 68). Madsen comes to the same conclusion in her article, which was published nearly the same time as my book (1997:17).

III. Legal Translation and Translation Strategy

For the sake of preserving the letter of the law, legal translators have traditionally been bound by the principle of fidelity to the source text. As a result, it was generally accepted that the translator's task is to reconstruct the form and substance of the source text as closely as possible. Thus literal translation (the stricter the better) was the golden rule for legal texts and is still advocated by some lawyers today. For example, Didier maintains that translations of legislation and other normative texts require absolute literalness (1990:280, 285). At the same time he says that judgments can be translated more freely, thus recognizing that text type also plays a role in determining the strategy of a legal translation (*ibid.*). A lawyer translator, Weisflog is more thorough in his differentiation of text types and also notes a difference in function by distinguishing between authentic texts of national legislation and legislative texts translated "purely for information purposes, i.e., for the information of foreign lawyers, businessmen, and other foreign readers" (1987:195). In regard to translation strategy, he advocates literal translation regardless of text type and function. In particular, Weisflog sees little to no room for freedom in translations of texts of national legislation (authentic or non-authentic), international treaties and conventions, as well as instruments of primary and secondary Community law (treaties, regulations, directives, etc.) (1987:191). It should be noted that this generalization is missing in Weisflog's revised manuscript, which was published in book form (in German) at the end of 1996. Among other things, the revised manuscript systematically incorporates a number of principles of modern translation theory, including the communicative approach (1996:36). Pescatore, former justice at the European Court of Justice, also endorses the communicative approach in a recent article (1999:93), as do the linguists Madsen (1997:17-26) and Sandrini (1999:15-19).

In view of the special nature of legally binding texts, it is agreed that substance must always prevail over form in legal translation. Nonetheless, the issue of whether authenticated translations should be literal or free is controversial. As practice shows, translation techniques and methods often vary from jurisdiction to jurisdiction, even for the same type of text. In regard to legislative texts, Weisflog now agrees that authenticated translations must be comprehensible, however, he is not ready to recommend that they be written in the genius of the target language. In his opinion, it is the words that count in translations of normative texts (1996:54). On the other hand, Koutsivitis (translator at the EU Commission) emphasizes sense, maintaining that the translator's task is to transfer the sense of the original. Advocating idiomatic translation, he contends that EU translators are permitted to be creative with language in so-called non-restrictive parts of primary and secondary EU legislation (Koutsivitis, 1988:344; cf. Weyers' comments in 1999:152). This approach is endorsed by Pescatore, who goes even further by suggesting that the ideal translation for EU translators is one that reads as if it were drafted originally in that language (1999:92). It is the Canadians, however, who have put this very idea into practice by developing methods of bilingual drafting (see Šarcevic, 1997:101-108). Although Swiss translators followed suit by introducing their own methods of co-drafting, the results are very different in practice. While considerable stylistic diversity is tolerated in the French texts of Canadian federal legislation, the three parallel texts of Swiss federal legislation are still coordinated as closely as possible (Šarcevic, 1999:116-117).

Unlike Vermeer's example, there is no shift of function in authenticated translations of legislation, and other normative instruments for that matter (Šarcevic, 1999:104 and 1997:21). Nonetheless, as seen above, authentic legislative texts are translated differently in different jurisdictions, thus suggesting that generalizations about translation strategy based primarily on function are insufficient in legal translation. In order to identify which criteria are decisive in determining a translation strategy for legal texts, it is necessary to analyze the communicative factors in each situation. This appears to be what

Pescatore means when he says: “Der Übersetzung ist ein Kommunikationsvorgang vorgelagert” (1999:93) and when Weisflog speaks of “situationskontextuelle Betrachtung” (1996:36-37). Neither, however, undertakes such an analysis.

IV. Plurilingual Communication in the Mechanism of the Law

For our purpose, translation is regarded as an act of communication between text producers and text receivers. As in general communication, a distinction is made in legal communication between direct and indirect receivers or addressees (Kelsen, 1979:40). According to Kelsen, the indirect receivers of legislation (national, international, and supranational) include all persons affected by the particular instrument, including the general public. On the other hand, the direct receivers are the specialists empowered to interpret and apply the particular instrument, i.e., the competent law-applying organ(s). The groups of direct receivers include persons trained to administer the law (public officers in government and administrative agencies), as well as persons responsible for the administration of justice, i.e., the judiciary. Since most legal disputes are ultimately adjudicated by a court of law, it follows that the primary receivers of legislative texts are judges (cf. Kelsen, 1979:41). Thus it can be said that communication in the legislative process occurs primarily between two groups of specialists: lawmakers who make the law (policymakers, drafters, legislators) and lawyers who interpret and apply the laws (administrators, judges). In plurilingual jurisdictions there is a third group of participants: translators, revisers, and coordinators.

Traditionally, the translator has been regarded as a mediator between the source text producer(s) and the target text receivers. In fact, this is still the case in linguistically oriented theories of translation in which translation is generally regarded as a two or three-step process of transcoding. Weisflog takes this approach (1996:34), as does Bocquet, who, however, adds a new step consisting of a comparison of corresponding institutions from the source and target legal systems (1994:7). Today, the notion of the translator as a mediator has been challenged by theorists who regard the translator as an independent text producer who produces a new text based on criteria determined by the target receivers. Turning their backs on the source text, Vermeer and Holz-Mänttari now view the translator as a text designer whose task is to “design a target text capable of functioning optimally in the target culture” (Vermeer, 1998:50). To a certain extent, a similarity can be found in Canada where francophone translators of federal legislation interact with anglophone drafter(s) in the role of co-drafters. Regardless of the degree to which legal translators are incorporated in the communication process, it is essential that they do not act in isolation. In other words, legal translation should not be a monologue or an act of one-way communication, as Wilss once called it (1977:74).

Today, all the authenticated texts of a legal instrument are usually equally authentic. This means that each authentic text is deemed independent for the purpose of interpretation by the courts and that no single text (not even the original) should prevail in the event of an ambiguity or textual diversity between the various language versions. As equally authentic instruments of the law, parallel legal texts can be effective only if all indirect addressees are guaranteed equality before the law, regardless of the language of the text. To guarantee the underlying principle of equal treatment, plurilingual communication in the law is based on the presumption that all the authentic texts of a legal instrument are equal in meaning, effect, and intent.

Although the presumption of equal meaning is codified in Article 33(3) of the Convention on the Law of Treaties, lawyers are the first to admit that it can rarely be achieved in the parallel texts of a legal instrument (Hardy, 1962:82; Kuner, 1991:958; also Gémard, 1995-II:154). While it is generally

accepted that translators cannot be expected to produce parallel texts that are equal in meaning, they are expected to produce texts that are equal in legal effect. (cf. Didier, 1990:221) To produce a text that leads to the same results in practice, the translator must be able “to understand not only what the words mean and what a sentence means, but also what legal effect it is supposed to have, and how to achieve that legal effect in the other language” (Schroth, 1986:56-56; cf. Šarcevic, 1989:286-297 and 1997:71-72; Gémar, 1995-II:148-154). According to Koutsivitis, this is the most serious matter to be considered by translators in their decision-making process (1988:49).

Whereas the presumption of equal meaning is subordinate to that of equal effect, both are subordinate to the presumption of equal intent. Hence, the translator should strive to produce a text that expresses the intended meaning and achieves the intended legal effects in practice. In jurisprudence this usually implies the legislative intent (legislation), the intent of the States parties (treaties, conventions), or the will of the contracting parties (contracts). This issue raises sensitive questions about the translator’s role as interpreter, which cannot be dealt with here (see Gémar, 1995-I:158-162). It suffices to say that it is generally accepted that the translator must understand the source text but not interpret it in the legal sense. Above all, the translator must avoid value judgments (to the extent possible). In this sense, the view is generally held that the translator’s task is to convey what “is said” in the source text and not what he/she believes it “ought to say.” This principle is currently being challenged in jurisdictions where translator/co-drafters enjoy greater decision-making authority. Similarly, the principle of fidelity to the source text is losing ground to the principle of fidelity to the single instrument (see Šarcevic, 1997:112, 215; cf. Nord’s concept of loyalty to the source text producer’s intention in 1997:125-126). From the legal point of view, all authentic language versions of a particular legal instrument are regarded as constituting a single instrument. Thus the translator’s task is to produce a text that preserves the unity of the single instrument, i.e., its meaning, legal effect, and intent. Since the success of an authenticated translation is measured by its interpretation and application in practice, it follows that perfect communication occurs when all the parallel texts of a legal instrument are interpreted and applied by the courts in accordance with the uniform intent of the single instrument. Thus it can be said that the ultimate goal of legal translation is to produce parallel texts that will be interpreted and applied uniformly by the courts. This is known as uniform interpretation and application.

V. Obstacles to Uniform Interpretation and Application

The greatest obstacle to uniform interpretation and application is undoubtedly the incongruity of legal systems (cf. Gémar, 1995-II:150). The fact that each national law has its own terminological apparatus and underlying conceptual structure, its own rules of classification, sources of law, methodological approaches and socio-economic principles, makes it extremely difficult—in some cases impossible—to achieve uniform interpretation and application in practice. Since a legal text derives its meaning from a particular legal system or systems (Šarcevic, 1997:67-70 and 1989:277-283; cf. Sandrini, 1999:18), it follows that the chances of judges attaching the same meaning to the authentic texts of a single instrument are greatest when all language versions derive their meaning from the same legal system. In such cases, the source and target legal systems are the same, thus greatly simplifying the interpretation process. This is the case when receivers interpret the parallel texts of the national legislation of plurilingual countries with one legal system, as in Switzerland, Belgium, and Finland. The process of interpretation is considerably more complex when more than one legal system comes into play. In such instances, the source and target legal systems differ, thus posing the threat that the text or parts thereof will be interpreted according to conflicting legal systems. This occurs in plurilingual countries with two legal systems or a mixed legal system, such as Canada, India, Israel, South Africa, Sri Lanka, and,

more recently, China. In such cases the chances of achieving uniform interpretation and application are greater if the legal systems in question belong to the same legal family.

The situation is similar in international law and European law. Despite efforts to unify international law and develop a European law, international and even European instruments are forced to resort to institutions and concepts from national legal systems or legal families. As a result, such instruments frequently derive their meaning from a number of legal systems (Kjaer, 1999:73). Above all, however, it is the changed circumstances of the communication process that pose the greatest threat to interpretation and application in international and supranational law. It is generally accepted that each increase in the number of authentic texts complicates not only the production but also the interpretation of parallel texts, increasing the chances of linguistic diversity and placing additional burden on judges, who are expected to consult all the language versions and determine the common meaning of the single instrument (Tabory, 1980:146).¹ Even more detrimental, however, is the increased number of States parties and hence courts participating in the interpretation process. Whereas plurilingual countries have succeeded in promoting uniform interpretation and application by establishing effective controls in their municipal judicial systems, this has not yet been achieved in international law where most disputes are resolved by national courts. Diversity in the decisions of national courts is inevitable and can have devastating effects on international treaties and conventions.

VI. Judicial Control and Translation Strategy

Lawyers realized at an early date that one of the best ways to promote uniform interpretation and application is to establish effective judicial control over the interpretation process. To avoid the mistake of international lawyers, European lawyers created an effective judicial mechanism that limits the jurisdiction of national courts and also makes them accountable to a specialized court (European Court of Justice) with special powers to ensure the uniform interpretation and application of European law. This, in turn, has affected translation strategy in the EU, enabling translators to enjoy a certain amount of freedom despite the large number of parallel texts of EU instruments. Moreover, the European Court has developed special methods of plurilingual interpretation that focus on broad principles rather than narrow wording; this is also said to have a notable impact on translation (see Morgan, 1982:110).

In municipal law, judicial control is exercised by a hierarchy of courts subject to certain checks and balances. At the top of the hierarchy of courts in Canada, the Supreme Court of Canada has developed a pragmatic and sophisticated bilingual approach to interpretation known as bilingual cross-construction (Beaupré, 1986:4-11). These principles were codified in section 8 of the Official Languages Act of 1969, which was later repealed; however, the principles therein are still practiced. With the aim of promoting uniform interpretation and application of federal legislation in all parts of Canada, the general rule in section 8(2)(a) provides that, whenever there are differences in the meaning of the two versions of an enactment, the courts should strive to give “the like effect” to the enactment in all parts of Canada. In particular, paragraph (2)(b) encourages the courts to reconcile terminological conflicts by reading both texts to determine their highest common meaning, i.e., the meaning that is “apt” to both texts within the context of both legal systems. If this is not possible or would be contrary to the purpose of the given instrument, paragraph (2)(d) allows judges to give priority to the language version that, “according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects.” Accordingly, Canadian judges enjoy considerable discretion and are frequently relied upon to correct the “imperfections” of translation.

For their part, translators are encouraged to limit judicial discretion by producing texts that are clear and unambiguous. Since most disputes involving textual diversity turn on terminological questions, translators need to exercise special caution especially when selecting equivalents. By favoring a certain type of equivalent, the translator effectively sends a signal to the courts as to how that term should be interpreted, i.e., according to which legal system it should be defined. Confusion arises when the signal is unclear or imprecise, thus forcing judges to use their discretion to ascertain the intended meaning. Canadian federal law (both private and public) is modeled primarily on the common law and common law concepts; however, it must also be applied in Quebec, thus causing confusion when the English text is interpreted in a common law context and the French text in a civil law context (cf. G mar, 1995-II:150). The following case shows what can happen when technical terms of the civil law are used as functional equivalents for common law terms.

In *Gulf Oil Can. Ltd. v. Canadien Pacifique Lt e*, ([1979] C.S. 72), an action for damages for breach of contract, Canadian Pacific invoked the provision of an order made under the National Transportation Act and the Transport Act. Whereas the English text of the disputed provision stated that a carrier is not liable for loss caused by an *act of God*, the French version used the term *cas fortuit ou de force majeure*. This led to a problem because a set of facts that qualifies as *cas fortuit* under Quebec law does not always qualify as an act of God at common law. Despite this discrepancy, the Superior Court of Quebec upheld Quebec law and ruled according to the French version. Maintaining that the act of the third party – in this case, a truck that hit a locomotive – was a *cas fortuit*, the court exonerated the defendant railway company from liability, although the same set of facts would not qualify as an act of God in a common law province. The court explained in its reasons that, if the intent had been to apply the common law concept, the translator should have translated the term *act of God* literally as *acte de Dieu*, which would have served as a reference to the common law concept. Since the civil law term *cas fortuit* appears in the French text, the court interpreted this as an indication that the term was to be interpreted according to Quebec law (Beaupr , 1986:134-135).

To avoid misinterpretations and promote uniform application, translators should attempt to compensate for conceptual incongruity whenever possible. This was done in the translation of the French text of the Crown Liability Act where the technical term *tort* is translated as *d lit civil*, a lexical expansion that delimits the sense of the civil law term *d lit* to civil wrongs. As a result, the Crown's arguments in *Mart Steel Corp. v. R.* were easily dismissed by the Federal Court in Montreal ([1974] 1. F.C. 45 (T.D.)). Attempting to refute charges that the Crown was liable in respect of a tort committed by its servants, Counsel for the Crown based its argument on the meaning of *tort*, arguing that, "by using the word *tort* the Crown Liability Act was intended to have no application in the province of Quebec, where the concept of *tort* is foreign." The argument was dismissed by reference to the term *d lit civil* in the French text. Moreover, in the definitions, the translator defined *d lit civil* as meaning *d lit* or *quasi d lit* in respect of any matter arising in Quebec, thus making it clear that the term is to be interpreted according to Quebec law (Beaupr , 1986:133).

The situation is different in translations of provincial legislation where the legislative intent is to apply the law of that province. Although the use of technical terms of the common law as functional equivalents in civil law legislation is regarded as "misleading" and "inappropriate," translators continue to use them, relying on the courts to correct the terminological incongruity. For instance, in *Lalibert  v. Larue, Trudel and Picher et al.*, a case that reached the Supreme Court of Canada ([1931] S.C.R. 7), the defendant bondholders based their argument on the English version of the Civil Code of Lower Canada, claiming that the use of the terms *mortgage* and *mortgaging* as equivalents for *nantir* and *nantissement* implied conveyance of title to the real estate in question. Since the property was

located in Quebec, the Court rejected their argument on the ground the intention was not to introduce a new legal institution into the Quebec law of property. The Court's ruling that the "statute should not be interpreted according to the rules governing *mortgage* of the English common law" later became statute law in section 8(2)(c) of the Official Languages Act of 1969, which *de facto* provides that common law terms used as equivalents for technical terms in civil law statutes shall be interpreted according to the original civil law concepts (and vice versa) (see Beaupré, 1986:121). Although repealed, the escape mechanism in paragraph (2)(c) of section 8 is still in tact. This is unfortunate because it gives translators a green light to use functional equivalents without fearing that the intent will be misinterpreted. As such, the equivalent operates as a type of *renvoi*, referring back to the source legal system.²

VII. International Treaties and Conventions

The changed circumstances of the communication process and the special nature of international treaties and conventions place additional constraints on translators of international instruments, requiring them to exercise extreme caution in their decision-making process. Regardless of the sensitivity of the subject matter, treaties and conventions that are negotiated texts leave little to no *Handlungsspielraum* for translators. One of the greatest fears of international lawyers is that translators will "scuttle" the intent of the parties by attempting to clarify clauses that are intentionally vague, obscure, or even ambiguous (Rosenne, 1983:783). The message is clear: translators should not run the risk of upsetting the delicately achieved balance of an international instrument by attempting to clarify vague points, obscurities, and ambiguities. As shown by the disputed clause in UN Security Council Resolution 242, an apparently harmless linguistic diversity can later lead to major differences in interpretation. The fact that the definite article was used in the French and Spanish texts (*des territoires, de los territorios*), as opposed to no article in the English and Russian texts (*from territories, s territorii*), later raised the question as to whether the intention of the negotiators was to oblige Israel to withdraw its forces from *all* or just *some* of the occupied territories. The demand for flawless decision-making automatically places additional pressure on translators, forcing them to carefully weigh each and every word, giving special consideration to all possible interpretations and misinterpretations when formulating the text. Thus the priority in such translations is to achieve the greatest possible interlingual concordance so as to prevent any ambiguity that could result in international disputes, unnecessary litigation or legal uncertainty.³ At the same time, however, translators are advised to avoid the "word-for-word mentality" (Hardy, 1962:89).

In view of the conflicting interests at stake, it is highly unrealistic to expect that judges of national courts will interpret and apply treaties and conventions and other multilateral instruments uniformly. The tendency for judges of national courts to use their own domestic rules of interpretation is especially detrimental. This occurs particularly in jurisdictions where treaties are incorporated into domestic statutes, such as in Canada and Great Britain. As Kuner points out, "whatever the merits of the English courts' literal method of interpreting domestic statutes, it is out of place when interpreting modern multilingual treaties" (1991:961).

Whenever a comparison of the authentic texts discloses a difference of meaning that cannot be removed by ordinary rules of interpretation, Article 33(4) of the Convention on the Law of Treaties instructs judges to ascertain "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty." Since the Convention does not specify which methods should be used to reconcile the texts, it is left to the courts to determine how the parallel texts of treaties and conventions can best be reconciled in each case. The high degree of judicial discretion in resolving disputes arising

from treaties and conventions puts greater pressure on translators to express the uniform intent of the single instrument in language that is clear, precise, and, if possible, neutral. This is particularly important in situations where there is no judicial control and national courts from jurisdictions throughout the world are involved in the interpretation process. Failure to follow this advice has often resulted in conflicting decisions by national courts, sometimes defeating the very objective of the convention. This occurred in the case of the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, where the use of common law and civil law terms in a key provision in Article 25(1) ultimately led to the failure of the Convention.

In the disputed article, which determined whether the carrier's liability could be limited or excluded, the term *dol* in the French original is translated by *willful misconduct* in the English text. This unfortunate translation was approved despite warning by the English delegate that *willful misconduct* includes acts performed with intention as well as acts performed carelessly without regard for the consequences. Instead of searching for a common meaning or agreeing on the intended meaning, judges of continental courts tended to rule in favor of limited liability in similar cases where American courts declared the carrier to have unlimited liability. Such conflicting decisions occurred particularly in cases involving deaths and bodily injuries resulting from acts not caused with intention (see cases in Mankiewicz, 1962:467). Since this key provision served as an exclusion clause enabling plaintiffs/claimants to evade the thresholds of limited liability provided by the Convention, the conflicting decisions not only frustrated the object of the treaty but also directly encouraged plaintiffs/claimants to evade the treaty and shop for a more favorable forum, thus resulting in the failure of the Convention.

The incongruity of the disputed terms was later corrected in the Hague Protocol of 1955 amending the Convention by discarding both terms and incorporating a definition of *dol* into both texts that enumerates the circumstances in which acts or omissions qualify as *dol*. In this sense, the amended French text reads: "*soit avec l'intention de provoquer un dommage, soit téméairement et avec conscience qu'un dommage en résultera probablement,*" and the English text: "*done with intent to cause damage or recklessly and with the knowledge that damage would probably result.*" The addition of the qualifier "*recklessly and with the knowledge that damage would probably result*" in the English text prevents common law judges from applying the provision in respect of acts that would qualify as *willful misconduct* but not as *dol*. Although substantive equality is achieved in the amended texts, it was considered too late to rectify the damage already done.

Today, translators regularly attempt to compensate for conceptual incongruity by using descriptive paraphrases, definitions, and even borrowings to indicate the law according to which national terms and institutions are to be interpreted. The use of borrowings is particularly effective in the parallel texts of international conventions because national courts have no other choice but to apply the foreign concept. With this in mind, the working group of UNIDROIT decided to use the terms *force majeure* and *hardship* as borrowings in the parallel texts of all instruments drafted under the auspices of the Rome Institute (Tallon, 1995:343, note 13).

VIII. Judicial Control as the Last Resort

Recognizing that the success or failure of an international instrument does not depend entirely on the translator's ability to formulate the uniform intent in clear and precise language, lawyers came to the conclusion that real uniformity cannot be achieved by merely agreeing on a uniform text in various languages. Fearing that the very objective of adopting conventions for the unification of law could be

defeated by conflicting and even contradictory court decisions, international lawyers began to emphasize the need to introduce judicial controls similar to those in the municipal law of plurilingual countries (Mankiewicz, 1962:457). Above all, there are two proposals: 1) to establish international courts whose decisions have the force of binding precedents on national courts (like the European Court of Justice), or 2) to establish a specialized court with exclusive jurisdiction for resolving disputes arising under a particular treaty or convention. Progress has already been made by establishing the International Tribunal for the Law of the Sea and, more recently, by action taken to establish a permanent International Criminal Tribunal. Although these courts do not (will not) have exclusive jurisdiction,⁴ it is hoped that, by virtue of their authority, their decisions will serve as guidelines for national courts in matters relating to the subject matter.

In view of the large number of States participating in the communication process, the establishment of a specialized court to resolve disputes arising from the parallel texts of international instruments has definite advantages, especially if the court is empowered with exclusive jurisdiction. Most importantly, this creates an effective control over the communication process because all the language versions of the instruments are interpreted and applied by the same court. From the legal point of view, this enables the court to develop special rules of interpretation for ascertaining the common meaning which “best reconciles” all language versions “having regard to the object and purpose” of each instrument. This, in turn, encourages interaction between translators and judges. Such interaction is important because it enables translators to predict with certainty how their signals will be interpreted, thus enabling them to select an optimal translation strategy that is coordinated with the rules of interpretation. This is perhaps what Tallon meant when he wrote: “La traduction doit toujours avoir présentes à l’esprit les règles d’interprétation du pays vers lequel il traduit” (1995:341). As such, the success of an authenticated translation depends on the translator’s ability to interact with the judiciary. As far as translation theory is concerned, such a situation of reception is truly unique because the source and target text receivers are identical. This unique communication process defies both traditional and modern definitions of translation, which presume that a translation is never directed to the same receivers as the original (see statements by Nord in 1988:58 and Vermeer in 1986:33).

Notes

¹ In regard to UN instruments, Butler reports that the increase in the number of authentic texts from four to six seems to have caused “no disproportionate increase in the number of international disputes turning on issues of disparities in texts” (1985:64-65).

² Following the Canadian model, Hong Kong lawmakers enacted legislative controls containing a similar escape mechanism to ensure that the new equivalents in the Chinese texts of common law ordinances will not be construed as a reference to Chinese law (see Pasternak, 1996:44).

³ On the other hand, EU treaties are essentially legislation, not highly sensitive political texts. As a result, the European Court presumes that the “occasional differences in the different versions of the Treaty are not normally the result of different meanings put on the Treaty by the negotiators for different countries but rather accidents due to the haste in which the various translations were prepared” (Morgan, 1982:110).

⁴ While the International Tribunal has only shared jurisdiction over matters relating to the law of the sea, all disputes concerning the international sea-bed are to be resolved by the Sea-Bed Disputes Chamber, which is empowered to act in the capacity of a specialized court.

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