Loyal to Different Exclusive Masters: 
Language Consistency at the National and Supranational Level

Silvia Ferreri*

ABSTRACT
The special language of the law needs to be consistent, in order to enable citizens to predict the consequences of their actions. For this reason, the legal style is specific, precise and unfamiliar to non-specialists. Efforts to simplify legal texts sometimes run the risk of omitting important information (as in the case of EU directive 261/2004 on air passenger’s rights). Translators face the problem of vague texts, as not all languages accept the same level of vagueness, of missing conceptual equivalents in the target language, and of ‘false friends’. Translations of EU directives or regulations provide numerous examples. While lawyers working in their domestic systems find support in their legal system, in the EU context frequent borrowings from Member States’ traditions occur and this causes uncertainty in understanding European provisions; those interpreting them experience some difficulty in ignoring their national backgrounds. One word may convey both a domestic and an international/supranational meaning. Translators should avoid amphibologies as far as possible; they may also find useful support in networks established in some countries, especially in Scandinavian Member States, where systems of resources have been established to assist those working in EU institutions in identifying neologisms and effective translations.

1. INTRODUCTION
The title refers to the experience of lawyers from different national legal traditions who feel torn between consistency in their native legal language and international (or supranational1) terminology. Apparently similar expressions referring to different legal notions cause uncertainty and dissatisfaction in lawyers.

While translations of literature, especially poetry, have difficulty recreating atmosphere, conveying the same emotions as those expressed in the source text, and replicating the sounds of the original text, legal translation challenges us because we must pay

* Full professor of Comparative Law, University of Turin, Torino, Italy. Member of the International Academy of Comparative Law.

1 By ‘supranational’ lawyers generally mean ‘belonging to an organisation empowered to produce rules immediately binding within the national borders’ as happens for instance in the EU.
attention to another feature: certainty or predictability. People must be able to foresee the consequences of their actions; therefore, texts must be clearly understandable.

For a lawyer, a text stating that ‘rights will become obsolete as times goes by’ is unclear. We need to know when exactly the limitation period starts, how long it will take to extinguish rights or prevent an action, and whether the period may be interrupted or suspended. Many cases arise from precisely this issue in relation to the 1929 Warsaw treaty on air transport.2

Legal texts tend to be analytic, fragmented, full of detail, and generally challenging to read.

Reaction to the style of these texts depends also on who the reader is. Cognitive studies investigating the notion of fluency3 reveal that the layout of a text may affect its perceived readability; most non-specialist readers find a document which is broken up into separate articles difficult to decipher, while lawyers consider this text layout as quite logical.

As is often emphasized by psychologists ‘there is not an inherently superior way of writing a sentence, but readability depends on the possible contrast with the expectation of the reader’.4

A similar consideration applies to multilingual drafting. In fact, ‘considering the existence of different syntactic structures, the resilience of the structure of the original text in translated versions could challenge the expectations of readers’. Translators often complain of the rigidity of systems requiring strict adherence to the source text, and of the need for a 1:1 correspondence, when the different versions must follow the same pattern and visually match each other; this can strain the target language, and make it sound ‘translated’ rather than natural.5

In the research that I directed in 2013,6 the team of researchers concluded that a legal text cannot satisfactorily be simplified (or ‘easified’)7 to the point of being readily accessible to everyone. Colleagues working for international institutions such as

---

2 There has been much disagreement about interpretation of the French expression ‘délai de déchéance’ (the time limit allowed to sue for damages against an air company in the Warsaw Treaty 1929, Art. 29): RODIERE, ABADIR CHAO, Le transport des personnes, Paris, 1973, p. 105 (addressing the issue of varying interpretations between French and other countries’ courts: French judges have interpreted the notion as flexible, subject to interruption and staying of the procedure, in the way ‘prescription’ would normally work). See also: Cour d'Appel, Paris, 24-4:90, in Rev. fr. dr. aér., 1990, 355, also in Rev. dr. unif., 1989, 1, p. 421 ff, at p. 423; GODFROID, L'étendue dans le temps de la responsabilité du transporteur aérien international à l'égard des passagers, in Rev. fr. dr. aér., 1984, p. 26.


4 In this case an additional task for readers is to discern the new structure that they are dealing with. Legal texts often have a codified structure that can pose barriers to understanding. It should be remembered that the division of information under articles and sections, in principle making the text more understandable, will in reality require additional effort of the non-specialist reader, who is not used to reading highly structured texts of this kind. In fact, the reader will have to process additional information concerning the structure of the text. The problem here is one of fluency, of conflict with the deeply embedded expectations of the non-specialist reader. For the same reason a specialist reader, such as a public official, expects a text that is structured in sections and articles and would be required to make additional effort to adapt to a new form.

5 Research carried out (under the Author’s direction) for the EU Commission, DGT, on Document quality control in public administration and international organisations (published in Brussels, 2013), found such similar complaints expressed by officials working in South Tyrol, and in the central translation services of the Swiss Federal Chancellery, especially when dealing with the structure of German sentences. The final results of the research are available at: http://ec.europa.eu/dgs/translation/publications/studies/.

6 Document quality control in public administration and international organisations, quoted above.

Food and Agriculture Organization of the United Nations pointed out that explanations for underprivileged farmers in poor countries need more than simplification: they require visual representations with images, graphs, or pictures. Hence our final recommendation to the EU was that:

A chain of distribution of knowledge should then be put in place, rather than simplifying the language to the point of making it vague and uncertain. Communication science could cover the last part of the path of information. One can envisage a continuum through several steps: expert drafting – plain language – communication experts.

Recently I came across a case, in connection with Regulation (EC) No. 261/2004 on air passengers’ rights, in which the simplification of information was misleading. The version provided to disseminate information to the general public, published in ‘Summaries of EU legislation’ under the heading Delays, states:

‘The Regulation introduces a three-tier system:

- in the event of long delays (two hours or more, depending on the distance of the flight), passengers must in every case be offered free meals and refreshments plus two free telephone calls, telex or fax messages, or e-mails;
- if the time of departure is deferred until the next day, passengers must also be offered hotel accommodation and transport between the airport and the place of accommodation;
- when the delay is five hours or longer, passengers may opt for reimbursement of the full cost of the ticket together with, when relevant, a return flight to the first point of departure.’

No information is provided on this webpage as to the right, when the delay lasts more than 3 hours, to receive a sum of money to compensate the passengers’ inconvenience, as decided by the Court of Justice in its interpretation of the Regulation (Case C-402/07, ‘Sturgeon case’).

Obviously, summaries are meant to simplify information; however, customers reading this page will not learn that an additional opportunity is open to them, even though the interpretation delivered by the Court of Justice is binding on the Member States, and is part of the meaning of the Act.

More precise information may be found in a second document issued by the EU on a website maintained by the Commission titled ‘Your Europe’. However, clearly not all passengers can be expected to double check information on several websites.

8 Document quality control, quoted, p. 236, replies by officials working for UNIDROIT.
11 Available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2d3c30d5896d86928f4417ab0f3e0951b56f70.e34XaxiLc3qMb+40Rch0SaxuNbrz0?text=&docid=73703&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=287112.
2. CHALLENGES FOR TRANSLATORS

In the search for precision and clarity, translators of legal texts find themselves facing various difficulties.

Some difficulties may depend on the latent ambiguity of the original text; sometimes translators think that their task includes clarification; in a well-known English case, *Corocraft v. Pan American Airlines* (1969) 1 QB 616, the translator amended an unclear provision of the Warsaw convention by inserting an ‘and’, in lieu of a simple comma, thereby transforming a list of items in French that were understandable as alternative requirements, into a cumulative list of mandatory requirements. It goes without saying that clarifying a vague text lies beyond the translator’s brief, although keeping the same level of vagueness is no easy task. In addition, some languages tend to be more explicit and precise than others, according to linguists; difficulty in translation may also depend, therefore, on which two languages are involved. English, for example, is often considered as a highly ambiguous language. The ‘anteposition of the significant’ that is common in Germanic languages is often challenging for translators working into neo-Latin languages.

In some situations the issue is the lack of a corresponding concept in the target language, not necessarily because the concept to be translated is especially difficult, but perhaps because history has simply followed a different path. A good example is the English ‘estoppel’ that roughly corresponds to a principle in civil law systems (*nemo potest venire contra factum proprium*), but has a number of specific features and consequences arising from the jurisdiction of courts of equity. This example is especially useful because, as is well-known, the ECJ has adopted a similar expression, ‘European estoppel’, that covers the core meaning of the common law concept without incorporating all its specific features.

This also occurs in non-legal fields of knowledge: it is often said that translating the German word *Schadenfreude* requires lengthy explanations and circumlocutions because most cultures do not have a specific expression to describe the not-very-flattering feeling of rejoicing at someone else’s misfortune.

A similar difficulty concerns the Portuguese word *saudade* with its meaning a particular nostalgic feeling of loss, expressed in *fado* singing, and specific connotations connected with ships leaving on long ocean voyages and the possibility of something dreadful happening.

---

13 The incorporating Act in the UK listed the specifications required in Art. 8 (1)(a) quoting the weight, the quantity and the volume or dimensions of the goods. The original French text, however, reads: le poid, la quantité, le volume ou les dimensions de la marchandise [Emphasis added].


17 According to Antonio TABUCCHI only Portuguese people experience this feeling, as only their language has a specific term to express it: Letter by Antonio Tabucchi to Remo Cesariani, L’araba Fenice. Tentativo dissennato di definire a un amico una parola indefinibile, in Studi di Letterature Comparative in onore di Remo Cesariani - Lettere e Riflessioni Critiche (Vol. 1), edited by Mario Domenichelli [et al.], Vecchiarelli Editore, Roma, 2003, pp. 347–354: ‘La Saudade è una cosa che solo i portoghesi hanno perché hanno una parola per dire che ce l’hanno, ha scritto Pessoa.’ Available at: http://www.centrostudilusofoni.unibari.eu/index.php?option=com_content&task=view&id=42&Itemid=1.
In the area of philosophical studies, challenging issues of translation also arise. An incorrect translation may obscure meaning and undermine the development of reasoning and theory.

However in the field of law, the consequences of mistranslation may be especially perilous: for example, if an order is not understood or complied with, the court may impose a penalty, such as a fine or a prison sentence.

The problem of ‘false friends’ is another less critical but still troublesome issue: these are common in law, partly because the English courts often absorbed terms from canon law and later adapted them to specific areas of common law.

An interesting example is the word ‘material’, which has caused some misunderstanding in the field of company law. While in English ‘material’ includes the meaning of ‘relevant’, in Italian it only means ‘concrete’ or ‘physical’; hence a *falso materiale* (literally ‘material falsehood’, generally translated as forgery), occurs when a physical alteration of a material support is performed (as opposed to a *falso ideologico*, literally ‘ideological falsehood’ or misrepresentation).

There are many more examples. Some, in my experience, are: ‘transaction’, easily confused with ‘transazione’ which means ‘out of court settlement’; ‘condition’ in a contract, easily confused with ‘condizione’, meaning a future uncertain event that affects the efficacy of a provision; ‘corporation’ (not a medieval guild of craftsmen as a ‘corporazione’); and ‘statute’ (not a communal ‘statuto’ of the 13th century). Many institutions have lists of these terms, often published electronically; for instance, the OECD (like the EU) publishes a *Style Guide*, available via their online information system, OLIS.

Difficulty has arisen with the word ‘compensation’, used in EU Regulation 261/2004 (air passengers’ rights, Article 7). The lump sum paid to travellers who have had their flight cancelled is referred to without using the word ‘damages’ because of possible conflict with the pre-existing Montreal Convention on air transport (Article 29). Unfortunately the word ‘*compensazione*’ used in the Italian version has a specific meaning in the law of obligations in civil law systems, which is similar to the common law concept of ‘set-off’ (the right of a creditor to balance mutual debts with a debtor).

In Italian a similar sounding legal term also exists, ‘*compenso*’, but it means a fee, that is the price to be paid for a service.

We may still be able to understand a provision, even if a term is incorrect, by referring to the context. However in this case ‘*indennizzo*’ might have been a more appropriate

---

18 See Art. 2621 c.c. (*false comunicazioni sociali*), and Art. 2622 (*false comunicazioni sociali in danno dei soci e dei creditori*), regulating cases where administrators and directors of corporations report ‘*fatti materiali non rispondenti al vero [ancorché oggetto di valutazioni]*’ in balance sheets in order to gain unlawful profits. The expression could mean ‘relevant facts’, rather than ‘concrete events’ (as the standard Italian meaning would be). Consider Art. 2622, 4th paragraph: ‘*la punibilità è esclusa se le falsità o le omissioni non alterano in modo sensibile la rappresentazione della situazione economica*’ (false information and omissions that do not misrepresent the financial situation to any real extent will not cause liability).

19 Consider also: *préjudiciel* (as in ‘*renvoi préjudiciel à la Cour de Justice*’) sometimes rendered as ‘prejudicial’, rather than ‘reference for preliminary ruling’. Many other words cause similar misunderstandings, including ‘tribunal’ (in common law an institution not belonging to the judiciary); ‘jurisprudence’ (*general theory of law*, rather than case law); ‘consideration’ (an exchange advantage in contract, a ‘quid pro quo’ in common law, but not in civil law); ‘counsel’ (a lawyer). See: S Ferreri *Falsi amici e trappole linguistiche* (Giappichelli Torino 2010).

20 The ECJ in the IATA and ELFAA case (C-344/04, judgement of 10 January 2006) distinguishes actions for damages that would conflict with the Montreal convention from any ‘other form of intervention’, especially ‘action … envisaged by the public authority to redress’ (par. 45).
This word is often used in the Italian civil code to indicate sums that are paid not to fully redress damage, but to reach a compromise between conflicting interests. It suggests a margin of discretion, and a notion of 'fairness'.

I should add that, in non-specialist language, the notion of 'compensazione' is sometimes connected to diet and psychology, often related to issues of obesity, as in the example given here:

Spesso l’eccessiva alimentazione che porta all’obesità è solo un mezzo per compensare la mancanza di affetto con un altro elemento fondamentale per la vita: il cibo.  

This meaning also exists in English:

The compensation mechanism of increased food intake as a reaction to stress and psychic upset is known to play a role in obesity.

The meaning conveyed here is that of reward or gratification for those suffering from stress: so perhaps a strained reading of the Italian version of the regulation could conclude that the choice in EU legislation is not completely off track if the effort is that of making the waiting period for a next flight more agreeable to passengers (and hence something that may indeed be welcome to passengers forced to undergo a long delay before a flight).

3. SUPPORT FROM THE LEGAL FRAMEWORK

(A) Where Are Lawyers Looking for Support in Their Search for Certainty?

The answer obviously depends on whether we are considering the translation of isolated international texts (so-called conventions orphénelles) or of agreements that are part of a system, be it the UN or any other organization, such as the Organisation of American States, the OHADA (Organisation pour l’Harmonisation en Afrique du Droit des Affaires), or the EU.

Sometimes the framework provides support by contextualizing terms and providing useful data bases of information.

The point is relevant because of the context to which a translator may have to refer. It also has implications for lawyers who sometimes have the impression of being trapped between two loyalties: to the national legal system and to the international system.

21 In the French version of the Ministère de l’écologie, de l’énergie, du développement durable et de l’aménagement du territoire, the word « indemnisation » is used: « Cet arrêt [CJCE du 19 novembre 2009] spécifie qu’un retard de vol de plus de trois heures …, ouvre droit à une indemnisation dans les mêmes conditions qu’en cas d’annulation de vol ». (http://www.developpement-durable.gouv.fr/Que-faire-en-cas-de-retard-refus-d.html) [Emphasis added].

22 http://lanotadeldietologo.blogspot.it/2013/01/psicologia-e-obesita.html.


24 ‘Specialised agencies of the UN often develop their own terminology databases …’. The FAO’s terminology database contains 13 thematic glossaries in the six UN official languages and the agency manages currently 11 terminology projects. Another example is the ILOTTERM, a glossary for social and labour terminology in the UN official languages’ (DGT, ‘Study on Language and Translation in International Law and EU law’, 2012, p. 18). See: http://www.fao.org/termportal/projects4/en/.
I am not referring here to conflicting legal rules, but to inconsistent or contradictory languages. An obvious example is the word ‘regulation’ itself: it refers to secondary, administrative sources in some national legal systems, but to generally binding norms, in the EU.

Lawyers are generally aware (and sometimes proud) of the fact that legal rules are not isolated, but elements of a wider web of ideas which are interconnected and, hopefully, coherently organized.

Lawyers have often justified their role by arguing the existence of an ‘artificial Reason’ beyond individual commands. Legislators cannot freely create new laws without paying attention to pre-existing concepts, reciprocal links, and possible reverberations that may be involved when an amendment is introduced into some part of the complex organism which a legal system constitutes.

Certainty is safeguarded by keeping a solid framework into which single interventions can be inserted; details may change depending on varying circumstances over time, but the overall structure maintains its strength and provides support when occasional exceptions, doubts, gaps, and omissions arise. When interpreting a written rule, both in specialist or non-specialist terms, lawyers always have in the back of their minds this context that helps them to assign meaning to a single, isolated rule.

This web of background notions is not necessarily completely logical; it may rather be determined by historical reasons, by transplants from other experiences, by evolution, and by procedural needs. We must remember, however, that a sort of hidden mechanism is at work when we approach a document of a legal nature. Students know how difficult it is to acquire the skill of relating a specific element to the general picture; this movement from the very specific to the very general is not naturally ingrained in our thinking. It requires years to discover the lie of the land of the legal mind, to be able to place a case in the correct context, or sometimes in a number that meet at one point.

The difficulty we face as lawyers, when we enter someone else’s legal culture, is that our points of reference and our orienteering aids are subverted and we have to learn to find our way all over again.

We are obviously at an advantage if our education has trained us to work with several models, rather than encapsulating us in just one pattern of thought. The great benefit for those from mixed legal systems, such as Quebec’s, is that from the beginning of their legal experience they combine different mindsets in classifying events, and in seeking solutions in different compartments, and they can be flexible in their legal terminology. Training in comparative law may provide a tool to understand different concepts and different vocabularies.

4. THE EU DIMENSION

When we first had to operate within the European dimension, it was obvious that flexibility would be required in order to deal with unfamiliar categories and pigeonholes. But it was perhaps not clearly perceived how demanding this would be.

25 We shall not deal here with the most extreme versions of this self-representation of lawyers in 19th century Germany where the construction of a perfectly symmetrical system of legal norms became a goal in itself; the excesses were strongly criticized by Rudolph von Jhering and scholars following in his steps.
This is not a unique experience: federal legal systems are familiar with the problem of moving between local and federal systems of notions.26 The novelty in the EU lies in the fact that the Member States’ traditions vary so much. Furthermore, the EU freely draws what is best suited to its needs from the different repositories of legal knowledge, according to circumstance. For example, we have seen the Court of Justice adopting the concept of ‘proportionality’ from German administrative law, the notion of ‘estoppel’ from the common law experience, the ‘effet utile’ doctrine from France, and the principle of ‘vested rights’ perhaps from Italy.

Unfortunately for us lawyers, the EU’s selective borrowing from various legal systems often creates ‘amphibologies’ or ‘syntactic ambiguity’ because the concept absorbed at the European level does not perfectly correspond to the original source; it may be adapted and modified. Indeed the ECJ decisions often contain the familiar, ritual phrase:

community law uses terminology which is peculiar to it. [Furthermore, it must be emphasized that] legal concepts do not necessarily have the same meaning in community law and in the law of the various member states.27

The problem we face, therefore, is that of being trapped between two different loyalties: to our domestic system of concepts and to the European network of concepts, which is constantly increasing and evolving. The feeling often emerging is that of uncertainty, and of core concepts having rather blurred margins.

Terminologists working for the EU seem doomed to failure: if they adopt an expression belonging to a Member State’s system, the lawyers will complain because the expression has been removed from its original context and takes on new shades of meaning. If they create a new expression, lawyers will complain because the neologism is vague, and lacks clear limits.

5. A WAY OUT?

(A) What Should Translators Do?
The first recommendation is obvious: whenever possible, expressions that already have a specific meaning within a national legal system should be avoided at the EU level, if the two concepts do not coincide.

Translators should not expect too much of their readers: sometimes readers do not know where a word originated, they may find the expression already embedded in the local sources that adapt national legislation to EU directives, and some readers do not know how to locate the original context; some international acts appear to be domestic law because they have been incorporated into national legislation, with no indication that the original source was international.

26 Federal systems, e.g. know well that the NY State Supreme Court is actually a court of first instance (a trial court) and not a court of last resort, at the highest judicial level. See: http://www.nycourts.gov/courts/1jd/supctmanh/General_Overview_of_the_Court.shtml.

27 ECJ, Case 283/81, generally known as ‘CILFIT case’: srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, decision by the ECJ of 6 October 1982.
In theory some sign or affix could be developed that would warn lawyers that a certain word relates to the EU rather than to the domestic domain. This practice is not unknown: a certain construction can be specific to a certain area. In ecclesiastic language many words retain the Latin form rather than the ordinary Italian version; for example, "annuncia-zione" v. "annuncio"; "visita-zione" [by St Elisabeth] v. "visita"; "conce-zione" v. "concepimento"; "ascens-ione" v. "ascesa"; "resurre-zione" v. "resuscitamento".

Translators who are familiar with European law may be able to identify specificities used in EU language (such as, for instance, the plural forms of "Politiken" or "Kommunikationen"; these are not common in domestic legislation in Germany).

Lawyers may learn to live with amphibologies; they already have done so to a certain extent. We are well aware that the word ‘conversion’ does not have the same meaning in the law of trusts and in the law of tort. The same applies to any legal system where a specialized area may use a legal word with a particular EU meaning.

Lawyers have also learned in time to be flexible with EU sources.

Most are familiar with well-known examples, such as ‘professionnel’ or ‘professionista’ from Regulation EC 13/1993 (‘unfair terms in contract’), to render the notion of business ‘seller or supplier’ rather than the traditional notion of ‘intellectual profession’; or the ambiguous ‘habitual residence’ (in Staff Regulations, Annex VII, Article 4(1)(a), which has a different meaning in Council Regulation (EC) No. 2201/2003 concerning jurisdiction and enforcement of judgments in matrimonial matters and matters of parental responsibility, Article 3).

Yet, each inroad into the traditional patrimony of legal terminology holds risks and may produce costs in litigation.

6. SUPPORT FOR TRANSLATORS?

(A) How Can EU Translators Know When These Misunderstandings Are Likely to Occur?

It is clear that translators cannot possibly research all terms to check whether they have a second meaning in the legal system which a new provision will enter. Translators work under pressure of time, and they are not always lawyers.

The best solution I have seen so far seems to be the network created in the Scandinavian countries, starting in Sweden from the early 2000s.

In our research on the quality of documents, the Finnish respondent also referred to the work carried out by the ESKO:

A network for the translation of EU legislation (ESKO) was established in the summer of 2009 to facilitate cooperation between Finnish translators at EU institutions and national officials especially in the drafting and translation phases of...
the EU’s legislative work. It was set up on the initiative of the Finnish language department at the Commission’s Directorate-General for Translation. The network can contribute to the terminology selected for the Finnish translations of EU legislation ... . The ESKO network is coordinated by the Government Translation Unit ... located at the Prime Minister’s Office.

Constant cooperation between lawyers in the Member States and legal translators at the EU level is recommended. Only by working together with linguists can lawyers develop dialogue that is productive. Sporadic, occasional, ad hoc interventions do not achieve the same results. A fragmented reply from various ministries, depending on the specific matter involved (immigrants, environment, transport, consumers, etc.), does not seem as effective as a centralized service that collects information and holds an overall picture of the process.29

29 Several countries are setting up systems similar to the Scandinavian model: e.g. REI (Rete di eccellenza dell’italiano istituzionale) is trying to assist European translators into Italian. See: http://ec.europa.eu/translation/italian/rei/index_it.htm.