

# ИНОСТРАННЫЕ ЯЗЫКИ: ЛИНГВИСТИЧЕСКИЕ ИССЛЕДОВАНИЯ, МЕТОДИКА ПРЕПОДАВАНИЯ

## CHALLENGES IN TRANSLATING COMMERCIAL AGREEMENTS

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The article studies the incongruity of stylistic organization of an agreement as one of the types of legal discourse in English and Russian. The comparative analysis of certain stylistic differences (lexical, grammatical, and syntactical) and the tips for translation suggested in this concise work are aimed at better understanding and interpreting the legal document of the given format.

**Key words:** commercial agreement, pronominal adverbs, doublets, triplets, word strings, schedule, addendum, pro-forms, and/or, passive forms, shall/will, conditionals and hypothetical formulations.

Being a pioneer is very challenging, exciting and responsible. Two years ago the department of foreign languages of the law faculty of the Peoples' Friendship University of Russia launched an innovative master's programme "Legal Translation and Interpreting" as a pilot academic course in Russia. It attracted candidates with different educational backgrounds (foreign students among them) who have been most motivated and enthusiastic in their studies. Both instructors and students have been doing their best to reach the targeted results, to give and gain knowledge, to master necessary competences and to acquire practical skills in various aspects of legal English. Who could then think that I, an associate professor of the department, would in two years' time write an article to the scientific journal with my graduate, a successful lawyer working in one of the Western companies, on linguistics? We both have made great progress in learning and are now on our way to finish the course. The focus of our efforts is the master's dissertation paper devoted to translation of commercial agreements. That is the sphere of my graduate's professional interests so the issue of practical implication of the research is really vital.

For those two years we have studied various legal discourse issues and methods of translating legal texts, strict translator's ethics and specifics of court interpreting.

But there is still a lot to investigate because as you know the process of education is limited only by a life time and the first experience in tackling the topic of the research have revealed lots of challenges.

As a matter of fact translation practice unveils numerous non-correspondences in the English-Russian pair of languages which is not a surprise as they belong to different language groups (Germanic and Slavonic). These dissimilarities are evident on all the levels be it word, grammar, style or syntax. Another important factor is that Russia and English-speaking countries are governed by different legal systems (civil-law and common-law respectively). Thus the content of legal texts entails legal norms and legal provisions, which are difficult to follow, not to mention creating legal effects identical to those prescribed by the norms relevant in the targeted language. Moreover the document rendered into the foreign language is to be clear and understandable to the targeted reader so that “the need to strike a delicate balance between fidelity to the source text and compliance with target-language conventions of the genre” should be respected [15]. This means that translators have to be equally knowledgeable in legal and language matters to do accurate translation of legal texts drafted in different traditions.

The focus of this article is some of the difficulties translators can encounter dealing with commercial contracts within English-Russian pair of languages.

**Lexical challenges** are associated with Latinisms and archaic diction, translation of purely technical terms, pronominal adverbs, excessive redundancy, formal words and phrases, and so on (Ingels, Alcaraz & Hugues, Haigh, Popov and others). Let us look at some of them.

#### ***Hereof/thereof/everywhereof***

The old-fashioned legal formulae comprise words hereof/thereof, herein/therein, hereafter, hereunder and related adverbs. These formal wordings are recognized as legalese and often traced to U.S. legal English. Borrowings from Germanic languages pronominal adverbs still strike as alien in the system of the English language. This impression is supported by the fact that many dictionaries do not mention them. However the meaning is not difficult to understand. Typically, the *here*-part refers to the document in which it is written, whereas the *there*-part addresses the reader to other related documents. Most of Russian translators widely use these words for obvious reasons, i.e. to avoid the repetition of names of things in the document and very often, the document itself (compare: *далее именуемый Продавец* — **hereinafter** referred to as the Seller). The example of absurd overuse of this kind of adverbs may serve as a good reason for revising the accepted practice in drafting and translating legal texts (compare: *NOW, THEREFORE, in consideration of the mutual agreements and mutual covenants contained herein, and intending to be legally bound, the parties hereto hereby agree as follows*).

It should be noted that in most cases the use of such words is strictly unnecessary as their function can be performed by prepositions, ex., *the parties hereto* — *the parties to this contract*, *the provisions contained hereinafter* — *the provisions contained to later on in this contract*. “Here-, there- and where-words persist in modern legal usage largely as a consequence of legal tradition rather than usefulness” [10. P. 49].

### ***Doublets/triplets/word strings***

The study of doublets and triplets, synonyms and quasi-synonyms, binomials and word strings in legal discourse is no doubt the pet topic in the research of many experts in legal translation (Alcaraz & Hughes, Haigh, Ingels and others). We cannot ignore it either as this category of distinguishing legal features is abundant in every legal text irrespective of the genre. However in this work we will not dig into the linguistic depth of these phenomena but rather look at them from the translator's perspective.

Practice of doubling or even tripling words which are near synonyms originates from Latin to French when certain words were pairing an English word (or a more archaic Anglo-Saxon word) to ensure understanding. Most frequent examples are: *by and between, for and on behalf of, make and enter into, null and void, fit and proper, have and hold, terms and conditions*. Very often a doublet is taken as a single term as both words mean about the same thing (ex., *have and hold*), situation which can be described as “a distinction without a difference” [2. P. 10]. In other cases the string of words describes the legal concept by highlighting separate specific features thus contributing to the completeness in meaning (ex., *terms and conditions, sole and exclusive*). The tactics of a translator most often depend on whether they can find similar combinations ready to hand in their own languages or they will have to decide whether, on the whole, the English expression implies a genuine distinction. Thus the doublet *alter and change* is a candidate for simplification to the equivalent of *alter* whereas *final and conclusive* can tolerate literal rendering [ibid].

The same refers to triplets (ex., *dispute, controversy or claim; full, true and correct; convey, transfer and set over; right, title and interest; cancel, annul and set aside*, etc.) and longer strings of words (ex., *The Company's objects (the Objects) are: (a) to enable, assist, promote and promulgate wider participation in the creation, dissemination and expansion of information and educational resources covering the world's knowledge and languages to all persons, everywhere;*). In making a decision which of the tactics is the best a translator should bear in mind that in law each word may carry different meaning and therefore certain legal consequence. Lawyers in common law countries are trained to go to great length to draw up agreements that attempt to cover every possible situation, event, matter or contingency that may or may not arise [16]. Therefore a translator should choose from the considerable variety of possible solutions the one that would best suit the targeted reader both in legal and language matters.

### ***He/she/they/their/it***

According to the general approach and established tradition Russian legal formula of the third person singular is masculine *he* irrespective of whether the function of the mentioned position is performed by a male or a female (ex. Директор, Продавец, etc.). Political correctness of English-speaking legal drafters does not allow following this simple rule, thus translation from Russian should take this into consideration. Compare:

*В. Директор не присутствует на заседаниях, на которых обсуждают:*

*В. The Director is absent from the part of any meeting at which there is discussion of: его трудоустройство или вознаграждение, или любой другой пункт заключенного с НИМ договора; или*

*his or her employment or remuneration, or any matter concerning the contract; or*

The current tendency to avoid excessive numeration of possible situations (*he/she, his/her*) is to use the plural form *they/their*. This is a good workaround especially with the Oxford English Dictionary's sanction to use the form *their* to refer to a person 'whose sex is not specified' [9. P. 68]. In this way we can avoid using gender inclusive or sexist language. We should bear in mind however that the possessive pronouns should agree with the noun in number (*they — their*, but not *client* and *their rights*).

On the other hand a translator should be aware that the parties to the agreement (*Buyer and Seller, Lessor and Lessee*, etc.) are addressed as *it* in the texts of legal instruments and with the reflexive pronoun *itself* if necessary, ex., *The Principal agrees not to appoint any other agent in the territory, and not to seek nor enter into sales itself within the Territory during the period of the Agreement*.

#### ***Schedules/addendum/appendices/supplement to an agreement/annex***

Contract law typically holds that a written agreement represents the entire agreement with all the details and information. This may include, for example, any terms or conditions that might have been agreed on prior to the written agreement or a very detailed price list for various kinds of goods to be sold. Instead of cluttering up the main body of the document with information of this kind it is put in an *addendum* or *schedule*. This section of the agreement is incorporated as its integral part and forms the part of the substantive agreement between the contracting parties [12].

In contrast *appendices* most often contain referenced documents to the agreement and do not necessarily form part of the substantive agreement. This is the section where drawings of the machinery or specifications for the goods can be placed for illustrative purposes [10. P. 94].

However the above difference in the sense of these terms (*appendices, addendum*) does not seem to be absolute as the dictionaries define them as “a section giving extra information at the end of a document/a section giving extra information that is added to the document” whereas the term *schedules* is described as “a written list of things, for example prices, rates or conditions”(Oxford Advanced Learner’s Dictionary). Among other technical words we came across in the legal discourse are the terms *annex* (or *annexe*), which is defined in Collins English Dictionary as "something added, esp. a supplement to a document” and *supplement* ('an extra separate section' — Collins English Dictionary) which may be recognised as a generic term.

This semantic confusion causes difficulties in translating extended agreements with additional information as an essential supplement to the instrument into English. We hope that these comments will give some guidance as to how represent certain legal content in English.

**Grammatical challenges** comprise nominalisations, unfamiliar pronouns/pro-forms, modal and phrasal verbs, abundant passive forms, *and/or* and many others. This work studies only few of them.

#### ***Pro-forms***

The use of pro-forms belonging to different parts of speech (for example, *the same, the said, the aforementioned, the foregoing*, etc.) is one of the hallmarks of lega-

lese. They are frequently used to refer to different parts of the document thus suggesting economical way of laying down the text. However they are defined as archaic and adding nothing to the normal equivalents *the, this/these* or *that/those* (compare: *All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with **the said** Rules.*) The idea will be more clear if we use the determiner *these/those* instead of the pro-form *the said*. This effect is reached because determiners refer directly to an antecedent.

Similarly, the miscellaneous clause given below would only benefit in clarity if rearranged so that to avoid using the pro-form *the same*. Compare: *Validity. If any aspect of this Agreement shall be found invalid, **the same** shall not affect the validity of the remaining Joint Venture Agreement./ Законность положений. В случае, если одно из положений настоящего Договора будет признано не имеющим юридической силы, остальные положения Договора о совместном предприятии сохраняют юридическую силу.* Suggested back translation: *If any aspect of this Agreement shall be found invalid, the remaining Joint Venture Agreement shall be deemed valid.*

Among other options to avoid this category of terms in drafting (and translation) Bryan Gamer [9] suggests applying so called *echo links* and *explicit connectives* techniques. Echo links are words or phrases that echo a preceding condition, qualification or concept. An echo link between two provisions of an agreement builds a strong connection and is therefore very effective to avoid ambiguity. An echo link often appears together with the determiner *such* (ex., *such Rules...*). As a matter of style it is also worth considering the use of the definite article or adverbs *this/these, that/those*.

Still another option is the employment of explicit connectives. Under explicit connectives Gamer understands words intrinsically making a transition, such as *further, also, therefore* [9. P. 67—71]. No doubt those explicit connectives considerably contribute to clarity of an agreement because the coherence of provisions increases. Employing them a translator can build cohesion within the legal text to different effects (adding a point — *further*, summarising — *that is*, introducing a result — *therefore*, contrasting — *conversely, alternatively, adversely*, sequencing — *firstly ... secondly ... finally, etc.*).

#### ***And/or***

The formulation *and/or* is frequently used in the drafting of legal documents, but can in certain situations lead to ambiguity. The reason for this is that the use of *and* and *or* together is often confusing. This is the situation when the drafter imposes on the reader the necessity to do the thinking which he failed to do. Moreover it gives each party the possibility to pick either *and* or *or* as the most favourable interpretation which undermines the principle of accuracy of the technical text. Given this the *ICC International Standby Practices* [14] contain provisions on the “use of this redundant or otherwise undesirable term” which are as follows: *A standby should not use the term 'and/or' (if it does it means either or both); unless the context otherwise requires “A or B” means “A or B or both”, “either A or B” means “A or B”, but not both, and “A and B” means “both A and B”.* Typically, it is sufficient to write *or*, because it captures *or both* as well.

### ***Passive forms***

It is estimated that approximately one quarter of all verbal constructions in prescriptive legal English take the passive form [18]. This holds true for the grammar of the agreements, ex., *If the bill **is paid** within \_\_\_ (number of) days, then there will be a \_\_\_% discount off the total amount due; Prices **may be changed** by Seller to Seller's prices charged to other customers on the date of delivery.* The common effect of the passive form is to "suppress the identity of the agent responsible for the performance of the act" [2]. It is particularly relevant when the import of the statement is universal (ex., *no submissions **will be accepted** after the date stated*) or when the implied subject is too obvious to need stating [2. P. 20] (ex., *If any invoice **is not paid** when due, interest will be added to and payable on all overdue amounts at 2 percent per year, or the maximum percentage allowed under applicable laws, whichever is less*).

When translating into the target language it is important to preserve the equivalent effect of the message thus emphasizing the activities, rules or requirements rather than the agent (Compare: *Настоящий договор составлен и должен интерпретироваться в соответствии с действующим законодательством Российской Федерации.* / *This agreement shall be governed by and construed in accordance with the current legislation of the Russian Federation*), however it is not imperative that the passive structure is employed in the target language (ex., *The Joint Venture shall be dissolved upon the completion of any of the following events: (a) Bankruptcy, (b) The sale of the Joint Venture, (c) By mutual agreement of the parties.* / *Совместное предприятие прекращает свою деятельность по завершении любого из нижеперечисленных событий (а) Банкротство, (б) Продажа совместного предприятия, (в) Взаимное согласие сторон*).

### ***Shall or will?***

The general approach to expressing modality in legal documents distinguishes between modal verbs *will* and *shall*. It suggests that *shall* should be used for party obligations but the contract policy rules should be signalled by *will* (implying that both verbs may actually co-exist within one contract) [11]. In other words you may find both of these forms in the rights and obligations section of the agreement which is the essence of the deal the parties enter into. In this part the seller will promise to sell and deliver goods of a certain specification and quality and the buyer will promise to pay for them. It may also contain clauses describing what happens if the seller fails to deliver or the buyer fails to pay.

Analyzing the use of modal verb *shall* Ken Adams describes different types of contract language:

(a) provisions imposing an obligation on a party (ex., *The Buyer in accordance with its shipping instructions **shall** pay reasonable shipping costs*).

(b) provisions signalling an obligation on a third party (ex., *The parties agree that Party C **shall** first deliver the raw materials*).

(c) provisions addressing, as a matter of policy (not necessarily requiring any action), a consequence upon the occurrence of a specified event (ex., *The items as listed*

above **shall** comply with the Seller's quote to the Buyer that is dated \_\_\_/\_\_\_/\_\_\_ and is hereby incorporated into this Sales Agreement by this reference), where *shall* would more appropriately be replaced by *will* [1].

It should be noted that modality of *shall/will* is not always highlighted in translations into Russian. The present tense of the verb is enough to describe obligations, rights and duties of the contracting parties as well as the general policy expressed in an agreement. Compare: *Seller will generally follow Buyer's shipping instructions, but may make reasonable changes thereto without liability and at Buyer's cost. On Buyer's request, Seller shall obtain and send to Buyer documents necessary to enable Buyer to obtain insurance.* / *Продавец следует инструкциям Покупателя по доставке товара. По просьбе Покупателя Продавец предоставляет Покупателю документы, необходимые для оформления страхового полиса.*

**Syntactical challenges** are associated with complexity of syntax, conditional and hypothetical formulations, different types of negation mixed with other kinds of logical links within the text, repetition and abundant descriptive phrases, etc. Some of these phenomena have been looked at in another article by the authors (see: *Agreement Text Contrastive Analysis: English vs Russian*). In this work we focus only on conditionals as one of the logical tools in legal discourse.

#### ***Conditionals and hypothetical formulations***

Legal texts such as agreement must provide for various procedural rules, many possible situations, exceptions and scenarios. As a result the language of this legal instrument is unusually rich in conditional clauses. The syntactic signals of condition and hypothesis fall into positive (when, if, whenever, where, wherever, in the event of, so long as, should, provided that and others) and negative (should ... not, unless, except as/if, but for, failing and so on). Compare: ***Whenever*** *Seller's supply of the Goods, materials or means of production is insufficient to meet the estimated delivery schedule or **in the event of** any occurrence mentioned above in Subsections A and B, Seller, in its sole discretion, may allocate its supply to its own use or other customers.* / *Neither party shall be liable to the other for any death or injury **unless** it is caused by the negligence of that party or its agents, nor shall it be liable to the other for any other loss or damage whatsoever **unless** it is caused by its wilful default or that of its agents.*

Practice-oriented authors call for vigilance to ensure that translator deals adequately with complex conditions (Asensio, Alcaraz & Hughes, Haigh). They may involve a mix of positive and negative possibilities or double or more hypotheses, which may lead to difficulties in comprehension and accurate wording a scenario in the targeted language. The following clause is a good example of these kinds of challenges: *Where either party fails to perform their side of the bargain, then, subject to clause 15 above, if notice of non-performance is given in writing by the injured party within seven days, or, in the event that communication is impossible until the ship reaches a port of call, as soon thereafter as it practically possible, the injured party shall be entitled to treat the contract as discharged except as otherwise provided in this contract* [2. P. 20].

## Conclusion

Standing at crossroads of legal theory, language theory and translation theory legal translation is challenged to apply the rules of those without losing the sight of the addressee. The mission of translator is to interpret culturally determined texts with technical accuracy and clarity within the legal and language conventions familiar to the targeted reader. The numerous practice-oriented works by leading translation scholars argue that conservative legal language of official documents should be simplified into understandable for a layman texts avoiding legal jargon. The temptation is really high however close study of legal texts speaks about great resistance of conservative legalese to these innovations. Indeed, formulae that have been tested before courts for centuries and were designed to avoid ambiguity cannot be easily replaced by modern language patterns without the risk of “unsuspected deficiencies” [4. P. 194]. However as a general guidance in interpreting commercial agreements from Russian into English we would advise neither to resort to legalese extremes nor to simplify the content by using common vocabulary and 'lighter syntax' but to find the right stylistic balance between the legal character of the text and language means that “transmit the message in a form which cannot miscarry or be lost to view” [15. P. 288].

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## **ТРУДНОСТИ ПЕРЕВОДА КОММЕРЧЕСКИХ ДОГОВОРОВ**

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В статье изучается вопрос несоответствия стилистической организации текста договора как одного из жанров юридического дискурса в английском и русском языках. Сравнительный анализ некоторых стилистических особенностей (лексических, грамматических и синтаксических), а также рекомендации по переводу, предложенные в настоящей статье, направлены на более точное понимание и интерпретацию юридического документа данного формата.

**Ключевые слова:** коммерческий договор, местоименные наречия, парные и тройные термины, цепочки слов с близким значением, местоименные формы, приложение/дополнение к договору, модальные глаголы *shall/will*, условные и гипотетические формулы.