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Building the Bridge from Both Sides:
Successful Communication Strategies in Legal Translation and Court Interpreting

Carmen Bestué*

1. Introduction

I will situate this work within the context of legal translation as knowledge communication in the internet era and discuss the evaluation of communication success. Since I will explore some criteria that identify the legal rights of the receiver as an element for assessing the acceptability of a particular translation, I will also make a short foray into the field of court interpreting and discuss how legal terms are, or should be, translated in this context, especially if we take into consideration the right to information as implemented by the EU Directive 2012/13. My perspective seeks to encourage the protection rights of translation and interpretation users that quite often are neglected due to a lack of understanding of the translation process by legislators and legal scholars in general.

Comentado [PA(1]: Please note that some paragraphs were merged throughout the chapter, to attain more readability.

Comentado [cb2R1]: Ok

Comentado [cb3R1]:

I align my position with the one advanced by Jan Engberg.[1] He places the centre of the translation decision among the strategic choices made by the translator considering the receiver of the target text, and states that "[t]ranslating terms in legal documents consists in strategically choosing relevant parts of the complex conceptual knowledge represented in the source text in order to present the aspects exactly relevant for this text in the target text situation **in order to enable a receiver to construct the intended cognitive structure**."[2]

According to my understanding of Professor Engberg's definition, the translator is an agent with deep knowledge of the source culture and the target culture. That translator makes strategic choices in order to present a target text document that is not necessarily equivalent to the source text, but is "good enough" to communicate the source message to the receiver considering the function of the target text and its legal effects. The translator is therefore an agent ("knowledge broker" in Engberg's proposal) in charge of decoding meaning in a source text (ST) and converting it to a target text (TT) in order "to enable the reader(s) to construct a relevant chunk of knowledge."[3] Those strategic choices are preceded by the translator's deep understanding of the context, the legal field, applicable law, and the diatopic variations of the legal concepts, among other factors, to reach successful communication. This approach represents a huge advance in translation theories: a shift from text-centred positions towards a more receiver-oriented approach[4] which, using Moréteau's metaphor, places the translator in the central role of *passeur de frontières*.[5]

These views, however, represent a linear process where legal terms are produced in a source culture and translated into a target culture by a translator that is placed at the centre of the decision-making process, as we try to represent in Figure 1.

* Senior Lecturer~~Professor~~ [____], Autonomous University of Barcelona (Spain).
[1] Engberg 2015.
[2] Engberg 2015, p. 5 (emphasis added).
[3] Engberg 2015, p. 6.
[4] Šarčević 2000, p.1. ~~[PLEASE ADD THE EXACT PAGE IN FOOTNOTES, WHEN AVAILABLE]~~
[5] Moréteau 2009,p.711.

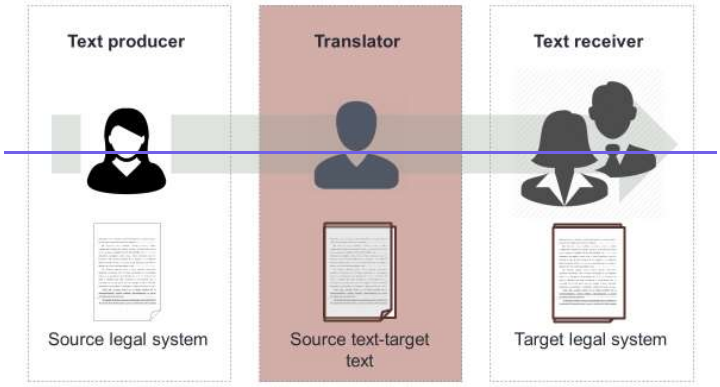
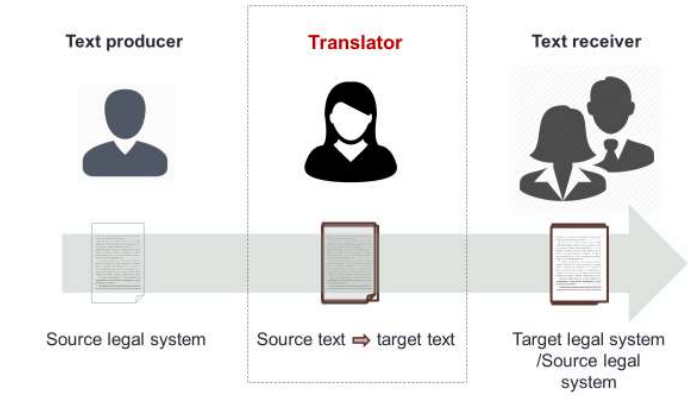


Figure 1.- Translator represents a central role in the translation process.



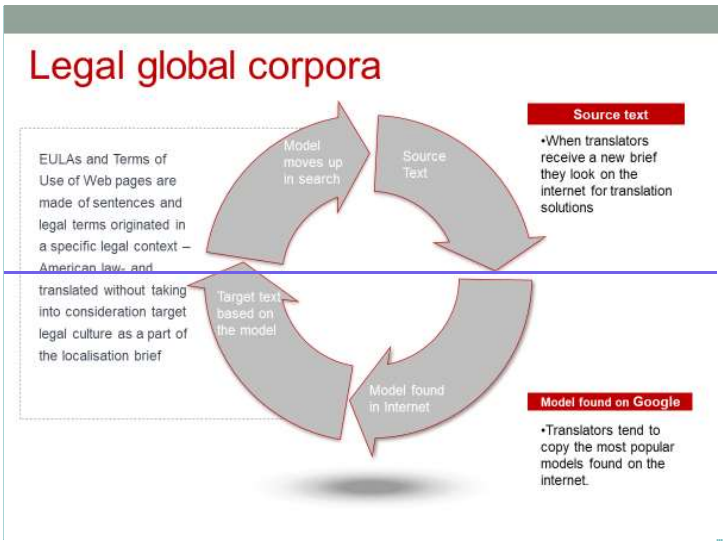
In the opinion of the author of this chapter, this definition only operates in a closed, controlled environment, for example one that might be found in a university or other institutional setting. Here translators, as trained legal translation professionals, are sovereign decision-makers under the auspices of their instructor or reviewers, who are senior translators themselves. Only in this situation can translators conduct proper terminological research, resulting in the selection of certain translation techniques, quite often with a high dose of creativity, and the eventual

Comentado [cb4]: Indeed the legal ysstem depends on the applicable law that in the case of consummers is EU law. I have changed the formulation of the slide, I hope that now is more clear

Comentado [OM5]: Terms and concepts circulate, but they are always to be understood by reference to an applicable law which is not always the law of the target language. As indicated in the comments that follow, please note that we believe it is not correct to understand that the law applicable to a translated contract is the law of the target language. Please consider modifying the text accordingly.

production of a TT that fulfils its communicative purpose considering the applicable law, *parfois au prix d'un compromis*. [6]

Motivated by the globalization and facilitation of communication that the internet has imposed upon the legal translation process, this more formal translation paradigm is changing. The advent of the internet has affected legal language, and as a result, legal translation has become a circular process, as I sought to explicate in previous works.[7]. Every day new legal terms are introduced into the waters of the internet by companies, motivated by purely commercial considerations, that are required to display their legal terms and conditions to potential customers or users. This massive corpus of legal texts and the generalization of its use by translators, a wide range of practitioners, and the public in general, accelerates the process of coining new terms as well as the proliferation of formulaic writing, as shown in Figure 2.



Comentado [PA(6]: Please replace American law by US Law

[6] Gémar 2005, p. 243.
[7] See, for example, Bestué 2016, p. 581.

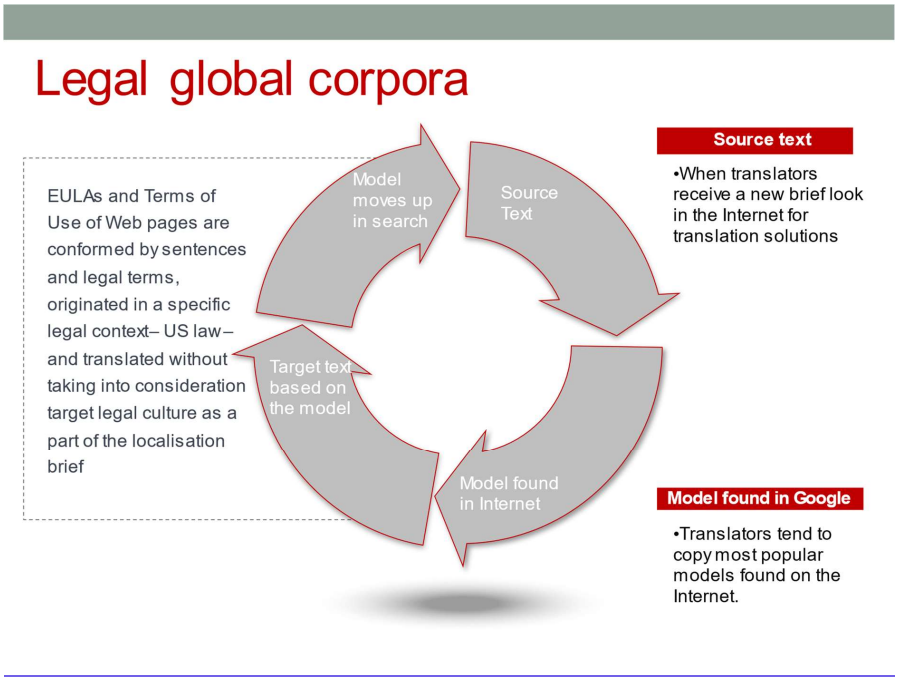


Figure 2.- Legal global corpora.[8]

Meanwhile, established legal terms and formulaic expressions within the target legal system also exist but are reduced to less accessible sources and therefore have less presence on the internet. As the translation industry relies more on broadly accepted electronic language resources and computer applications than traditional reference materials,[9] legal translators need to reconsider their criteria and make their strategic language choices for receivers, who are also themselves users of the internet. Therefore, discussing acceptability of legal techniques[10] or translation strategies requires conducting more empirical, combined legal and terminological, research that takes into consideration legal terminology proliferated across the internet and extending discussion of its acceptability in different TT situations to reach not only the translation field but also legal scholars and members of the judiciary.

[8] See a previous version in Bestué 2016, p. 581.
[9] This was pointed in Laviosa 2011, p. 145.
[10] I use the term "translation technique," (as defined by Molina & Hurtado 2002, p. 509) as a means to analyze and classify how translation equivalence works and how it affects micro-units of the text, taking into consideration translation as a product and functional and contextual element.

Moving forward, I posit three questions that I will endeavour to answer in the following sections:

1) When looking at translation as knowledge communication, how shall we evaluate communication success in the internet era?

2) Does the legal framework of consumer protection reflect new criteria to establish translation acceptability?

3) Should translations of the legal terms used in a court of justice be evaluated considering the right of information of the justice system user?

2. Evaluation of Communication Success in Legal Translation in the Internet Era

The internet has changed translation, and legal translation especially I would add, more than any other influence in history. However, the internet is governed by engineers and entrepreneurs, not by linguists or legal scholars. All content needs to be validated and available worldwide at a fast pace in order to ever-expand new technologies and new products to new markets. Thousands of words are translated every day and posted on the internet immediately, creating a new legal *corpus* that is freely available for new translators confronted by a new translation decision. Legal translation is indeed becoming a global phenomenon, but the attribution of meaning in the target legal system does not automatically follow. It is not only the rapid transfer of legal ideas that I want to point out here but also the internet as a source of terminological origination and the lack of comparative research to counter the associated risks. My intention here is not to talk about the so-called "metaphor of the legal translation"[11] that is employed "when analyzing the transfer of legal ideas and institutions between legal systems," where the US legal system is the predominant influence. When adopting a new legal concept by harvesting it from a foreign institution, its incorporation into the new legal system is not necessarily an exact reproduction of the original model, as was pointed out by Alan Watson.[12]

By presenting this viewpoint, I bring to the forefront the legal parameters that the target legal system imposes on legal communication. My interest lies not in reviewing well-discussed problems regarding equivalence, translation acceptability or quality, or the role of the interpreter, but in approaching the target legal system as both the substrate for transplanting a new TT and as a system that establishes legal protections for the receiver (and therefore some restrictions into the TT), especially as relates to information load.

[11] Langer 2004, p. 5.
[12] Watson 1995.

In a previous work,[13] I generated the hypothesis that, considering European Union law, whenever the receiver of a legal text is a consumer from a different country than the ST, the TT should be held to strict rules of interpretation as summarized within the three following criteria:

- The TT must be translated into the official language of the country.
- The language should be natural and understandable to a native speaker of the target country.
- Legal terms in the TT should be open to interpretation only under the law of the target culture.

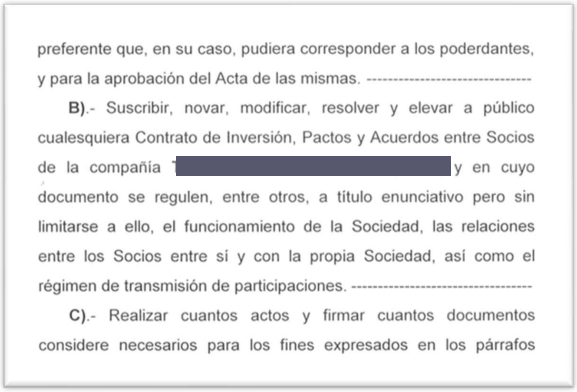
Comentado [OM7]: Unless this imposed by domestic law (this is the case in France for instance) or supranational law (EU), it is only good commercial practice.

Comentado [OM8]: What if the contract opts for the application of another law? That would require that the target legal system imposes the application of its domestic law to all consumer contracts when the consumer is a resident of the target country.

The above criteria were the result of my declination of the formal requirements established in the EU Directive 2011/83 on consumer rights for distance contracts, as noted in art. 8, paragraph 1:

> With respect to distance contracts, the trader shall give the information provided for in Article 6 (1) or make that information available to the consumer in a way appropriate to the means of distance communication used **in plain and intelligible language**. In so far as that information is provided on a durable medium, it shall be legible.[14]

Unfortunately, over time it has been seen that apart from the very first requirement of translating into the official language of the country, which is generally adhered to, the other criteria have not successfully been incorporated. Even worse, distinctive features of legalese English have even colonized legal texts originally written in Spanish.



preferente que, en su caso, pudiera corresponder a los poderdantes, y para la aprobación del Acta de las mismas. ----------

B).- Suscribir, novar, modificar, resolver y elevar a público cualesquiera Contrato de Inversión, Pactos y Acuerdos entre Socios de la compañía [redacted] y en cuyo documento se regulen, entre otros, a título enunciativo pero sin limitarse a ello, el funcionamiento de la Sociedad, las relaciones entre los Socios entre sí y con la propia Sociedad, así como el régimen de transmisión de participaciones. ----------

C).- Realizar cuantos actos y firmar cuantos documentos considere necesarios para los fines expresados en los párrafos

Example 1.- Extract from a Spanish Power of attorney.

[13] Bestué 2016, p.584.-
[14] Emphasis added.

The extract in Example 1 is not a text encountered in the internet. It is a power of attorney signed with a public notary in Spain, drafted by a Spanish Attorney for a Spanish Company with its main place of business in the Spanish market. In the example we want to point out the use of the expression *se regulen, entre otros, a título enunciativo pero sin limitarse a ello*, as a grammatically correct formulation but not idiomatic or natural in Spanish. The back translation would be something like "among others, by way of enunciation but not limited to it." As in Spanish the expression *entre otros* (among others) would suffice to show that the string of words in an enumeration is open to include other elements that are of the same nature, our assumption is that this expression in Spanish is the result of a peculiar translation of the English formulaic expression "including but not limited to." The latter expression naturally introduces, in legal English, an enumeration in the expectation that it will be given an open interpretation of the possible elements included in the list.

Comentado [PA(9]: Here you capitalized Internet, and in other parts no. Please harmonize when applicable.

From a hermeneutical perspective, this incorporation of new formulaic expressions may raise interpretation concerns for more natural formulations (e.g., the expression "among others" in Spanish) that may be abandoned for being considered not explicit enough. From a didactic approach, respect for the genius of the target language should be an essential component of translation, but it could and does at times be not the most common use proposed by search engines. As Jean-Claude Gémar wisely points out: "[p]our la langue française, dans un contexte de communication fonctionnelle, trois attributs ou critères semblent faire la quasi-unanimité des spécialistes, selon lesquels, s'ils étaient respectés, on atteindrait un seuil optimal de qualité. Ce sont, je les rappelle, la **clarté**, la **simplicité** et la **concision**."[15]

The ever changing paradigm of internet communication seems to have had seriously impacted the genius of some languages (even English, with its dominant position, has been transformed, creating what is called "electronic English").[16] It is essential to establish some limits to this impact in order to protect the legal rights of the TT receiver. When the translation receiver are consumers, translation into their language is not sufficient to assess the acceptability of the text intended for them; at least two more conditions need to be met. First, the TT has to be produced in plain and intelligible language; second, the legal terms used in the TT need to be interpreted considering only the target legal system and without resort to any foreign legal concept. In the following section we will approach this question from a terminological perspective.

[15] Gémar 1994, p. 338 (emphasis added).
[16] See Butterfield 2013, p. 57.

3. The Legal Framework of Consumer Protection as Criteria for Assessing Translation of Legal Terms

Some legal concepts travel in a lineal manner, for example, when there is a dominant legal culture that "imposes" a legal institution by way of propagating its most successful works, (e.g., the incorporation of the "plea bargain" into different jurisdictions).[17] In other cases, legal concepts travel in a circular way, generating different terms depending on the jurisdiction and resulting in a diatopic idiosyncrasy that is disregarded when searching the internet for the most accepted term. Circulation of ideas is a positive phenomenon. I believe, however, that the use of legal terms borrowed from a different legal system does not fulfil the requirement of clear and intelligible language, and should therefore be avoided in translations addressed to consumers until they are properly incorporated into the sources of law.[18]

Comentado [PA(10]: Please note that some paragraphs (such as the ones here) were merged throughout the chapter, to attain more readability.

In order to assess acceptability of a certain legal term translation, I offer the term "merchantability." This term is extensively used in international contracts, in the terms and conditions of digital products or services, and in standard clauses easily found on the internet. See the term in context in Excerpt 1, from the Terms of Service published by Google on 22 January 2019:

> Some jurisdictions provide for certain warranties, like the implied warranty of merchantability, fitness for a particular purpose and non-infringement. To the extent permitted by law, we exclude all warranties.

Excerpt 1, Terms of Service of Google as published on 22 ~~January 2019~~January 2019.

The *Black's Law Dictionary* defines "merchantabiliy" as a subentry of warranty: "Implied warranty of merchantability. A warranty that the property is fit for the ordinary purposes for which it is used. Sometimes shortened to *warranty of merchantability*."[19] The term originated in England and Wales, and was incorporated into US law, mainly with the success of the Uniform Commercial Code (UCC), and later adopted into international law through the United Nations Convention on Contracts for the International Sale of Goods (CISG). It was then transplanted into the European Directive, to be ultimately incorporated back into English law in a different form, using instead the term "satisfactory quality."

[17] See Langer 2004.
[18] Bestué 2016, p. 584.
[19] Black's Law Dictionary, St. Paul:West Group, 1999, 7th ed.~~Please mention the complete reference here, including edition~~.

The term "merchantability" was first used in English law to describe the quality of goods that a buyer could expect to receive in a sale. Its warranty was a statement that goods below average quality could be considered as conforming to the contract as long as they were sellable or merchantable. The term was also adopted in the United States, where under Article 2 of the UCC, merchantability is defined as "goods of at least average quality, properly packaged and labelled, and fit for the ordinary purposes they are intended to serve." As H.Ward Classen[ ]~~Ward~~ indicated, the implied warranty of merchantability assures the purchaser that the product falls within the general standards of fitness for ordinary purposes under the product's description, but does not guarantee the product will be ideal or optimal for a particular use.[20] Merchantability is an implied statutory warranty, meaning that it is mandated in every merchant transaction; therefore, the only way to assign the risk of loss in a sales transaction to the buyer is through the use of disclaimers.[21] For a disclaimer of this warranty to be valid,[22] the word "merchantability" needs to be mentioned in writing and in a conspicuous manner. This last requirement for the use of the specific term in writing and its application to both software licensing and online sales and terms of service,[23] is one of the reasons for its pervasive presence on the internet.[24]

The CISG also adopted the concept, but through the use of the phrase "fit for the purposes," which is ~~translated~~ converted into~~by~~ the term "merchantability."~~.~~" when used in contractual documents. This concept from the UN convention demonstrated such huge success in international contracts[25] that the EU decided to transplant it into the EU Directive 1999/44 for consumer sales, where we find again the expression "fit for purpose." Article 2 of the EU Directive includes this warranty as part of the more general requirement of conformity with the contract:

> 1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.
> 2. Consumer goods are presumed to be in conformity with the contract if they:
> (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
> (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;

Comentado [PA(11]: Please add first name of Ward and of all people mentioned in the body of the text. The first name should be mentioned only the first time a person is mentioned.

Comentado [OM12]: With respect this is not true or it is confusing, and needs to be rephrased. The CISG may have borrowed the concept but does not use the term merchantability. Nor does the directive.
For the paragraph that follows, it is important to distinguish the language in the normative instruments such as CISG, Directive and domestic laws implementing it, on the one hand, and contractual documents, that may use the word merchantability because they are conceived in the US and derived from UCC or other texts. These Microsoft and Google contractual documents that you cite are drafted by US attorneys who only care about US laws and ignore foreign laws and the CISG altogether. One has to look into the law applicable to these contracts: don't they include choice of law clauses, selecting the laws of California?

Comentado [PA(13]: Please harmonize the way you refer to the EU Directives throughout the chapter.

[20] Classen~~Ward~~ 2007, p. 52.
[21] Anzivino 1998, p. 508; G.C.L. 1962.
[22] See Section 2−316 (2) of the UCC.
[23] The UCC does not apply to services, but courts have looked at the UCC for guidance for case law on this subject. For more information see American Bar Association s.d.
[24] In a quick search done on Google on 22 April 2020, there were 25.100.000 results for the term "merchantability."
[25] Ervine 2004, p. 684.

(c) are fit for the purposes for which goods of the same type are normally used;
(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

The concept was introduced through transposition into different European jurisdictions without regard for harmonization of the terminology. In the case of England and Wales, the 1995 introduction of the concept into the Sales of Goods Act 1979 provoked the abandonment of the term "merchantability" and the adoption of the term "satisfactory quality" as its replacement. As a result of this circular transmission of "merchantability" as a legal term, we find different terms in different jurisdictions with some conceptual similarity.

In summary, taking into consideration only the English language, the term "merchantability" found in a particular contract may have different legal contents and legal effects depending on the applicable law ~~jurisdiction and the adoption of different forms~~, as shown in Figure 3.

Comentado [OM14]: I would say for better clarity "depending on the applicable law"

Figure 3.- Different standards of merchantability as a supra-notion.

Comentado [PA(15]: Please adapt the font size of words to fit inside the pyramid.

The term "merchantable," as originally defined in English law, could represent products below ordinary quality as long as they were sellable. Under the UCC, the standard for "merchantability" is established on "average quality," and currently in England and Wales a higher standard is adopted in the form of "satisfactory quality."[26] In New Zealand, in the case *Taylor v. Combined Buyers Ltd.*, it was stated that "merchantable" did not mean of good, fair, or average quality, but in today's market terminology, "acceptable quality" has become the adopted standard.

[26] See Ervine 2004, for further development on this term.

We could say, from a legal perspective, that the term "merchantability" is not important since the supra-notion is the concept of "fit for general purposes." As an interpretive matter, the term "merchantability" could be a simple label that does not hide the real function of the concept. However, ~~since~~depending on the applicable law, ~~a standard interpretation~~its meaning could range from below market quality to satisfactory quality, thus the wording of the disclaimers for the implied warranties could become a problem, especially when the *contra proferentem* rule may apply. Moreover, as we have seen, the use of the term "merchantability" is mandated by the UCC and has become recognized as a "magic word" in contract drafting, a precise term that ensures a certain interpretation in case of judicial dispute.[27] The paradox is that to ensure the same legal effect in the TT, maintaining the same wording could be an obstacle more than an advantage, since a pure linguistic translation does not address the restrictions that the target legal system may impose on this type of contractual texts.

Comentado [OM16]: Does not this depend on the applicable law?

Comentado [OM17]: This only makes sense if the UCC via some US state law is NOT applicable. However the contracts you discuss are governed by US laws, so it seems to me. I never studied the Google and Microsoft agreements; nobody reads them by the way, everyone clicks "I agree"… Google Apps Agreement: 13.10 Governing Law. This Agreement is governed by California law, excluding that state's choice of law rules.

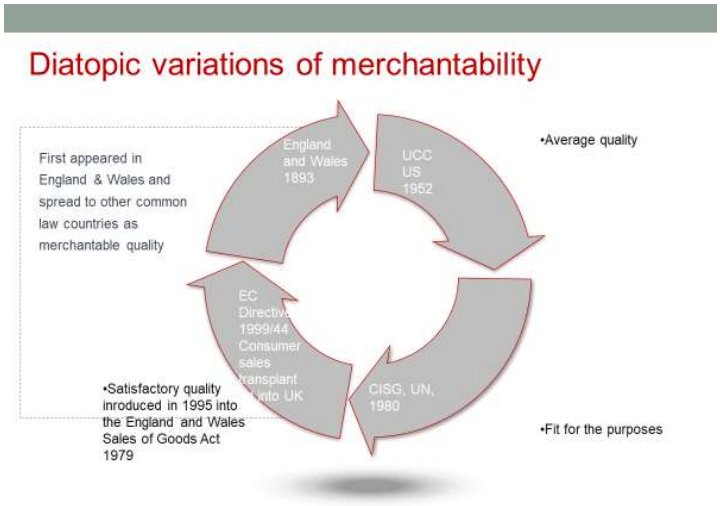


Figure 4.- Diatopic circular variations of merchantability.

We could say, from a translation perspective, that the decision should fall on the translator. For Spanish translations, we offer different methods, depending on the receiver. If it is a company or business, the contracting parties determine freely the wording of the contract and its translations. To that end, we apply the distinction between instrument and document

[27] Bestué 2013, p. 109-110.

translations,[28] which allows us to adopt TT oriented decisions when the TT is intended for consumers located in the target country. Moving from a pure linguistic translation to a proper legal translation (functional), we consider that a translation addressed to a consumer should avoid a calque (*mercantibilidad*) or even a lexical translation (*comerciabilidad*) since neither term exists in Spanish law (or in the dictionary). Both terms are nouns created from an accepted adjective that can also be a noun (*mercantil*, *comercial*), and the addition of a suffix makes them valid translations in international or business contracts. In contrast, for contracts with consumers, where Spanish law applies, the valid translation should be the functional equivalent, which would be either "*garantía de idoneidad para un fin general*" or "*garantía de conformidad de los bienes para un fin general.*"[29]

The terms of service of some well-known companies, however, show a tendency to translate their legal terms to the target languages, yet without taking into consideration the target legal system even though their applicable law is expressly modified depending on the IP identified address of the user, as shown in the translation of Excerpt 1 that we present in Excerpt 2:

Source Text	Target Text
Some jurisdictions provide for certain warranties, like the implied warranty of **merchantability**, fitness for a particular purpose and non-infringement. To the extent permitted by law, we exclude all warranties	Algunas jurisdicciones establecen determinadas garantías, como la garantía específica de **mercantibilidad**, de idoneidad para un fin concreto y de no incumplimiento. En la medida en que la ley lo permita, Google excluye todas las garantías.

Excerpt 2.- Spanish version of the Terms of Service of Google valid until 29 January 2020.

Another example, the Terms of Service of Microsoft, is presented in Excerpt 3:[30]

Source Text	Target Text

Comentado [OM18]: May be so, but you should say that nonetheless the law of California will apply, with its understanding of the concept of merchantability…

Comentado [OM19]: Of course they do not, because the target law does not apply. He first thing translators of contractual documents are said to look at is the applicable law, which in the case of Google is California law.

Comentado [PA(20]: Please rephrase this final part.

Comentado [PA(21]: Please mention that emphasis was added in Excerpt 2

Comentado [PA(22]: Please mention that emphasis was added in Excerpt 3.

[28] Nord 1997, p. 45-52, 127.

[29] For an explanation of the Spanish terms, see Bestué 2013, p. 129-135. To see other terms and their proposed translations, visit www.lawcalisation.com, developed with the funding of the Spanish Ministry of Economy and Competitiveness (MINECO). [PLEASE add this link to the bibliography]

[30] Extracted from (emphasis added) : https:www.microsoft.com/en-us/servicesagreement/ [30 March 2020 date of last accessPLEASE INDICATE DATE OF LAST ACCESS]

12. Warranties. MICROSOFT, AND OUR AFFILIATES, RESELLERS, DISTRIBUTORS, AND VENDORS, MAKE NO WARRANTIES, EXPRESS OR IMPLIED, GUARANTEES OR CONDITIONS WITH RESPECT TO YOUR USE OF THE SERVICES. YOU UNDERSTAND THAT USE OF THE SERVICES IS AT YOUR OWN RISK AND THAT WE PROVIDE THE SERVICES ON AN "AS IS" BASIS "WITH ALL FAULTS" AND "AS AVAILABLE." YOU BEAR THE ENTIRE RISK OF USING THE SERVICES. MICROSOFT DOESN'T GUARANTEE THE ACCURACY OR TIMELINESS OF THE SERVICES. TO THE EXTENT PERMITTED UNDER YOUR LOCAL LAW, WE EXCLUDE ANY IMPLIED WARRANTIES, INCLUDING FOR **MERCHANTABILITY**, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, WORKMANLIKE EFFORT, AND NON-INFRINGEMENT. YOU MAY HAVE CERTAIN RIGHTS UNDER YOUR LOCAL LAW. NOTHING IN THESE TERMS IS INTENDED TO AFFECT THOSE RIGHTS, IF THEY ARE APPLICABLE. YOU ACKNOWLEDGE THAT COMPUTER AND TELECOMMUNICATIONS SYSTEMS ARE NOT FAULT-FREE AND OCCASIONAL PERIODS OF DOWNTIME OCCUR. WE DO NOT GUARANTEE THE SERVICES WILL BE UNINTERRUPTED, TIMELY, SECURE, OR ERROR-FREE OR THAT CONTENT LOSS WON'T OCCUR, NOR DO WE GUARANTEE ANY CONNECTION TO OR TRANSMISSION FROM THE COMPUTER NETWORKS.	10. EXCLUSIÓN[31] DE GARANTÍAS. La aplicación se cede bajo licencia "tal cual", "con todos sus defectos" y "según disponibilidad". El editor de la aplicación, en su propio nombre, Microsoft (si Microsoft no es el editor de la aplicación), los operadores de red inalámbrica en cuya red se proporciona la aplicación y cada uno de nuestros respectivos, distribuidores, representantes, proveedores y filiales (en adelante, "Partes Cubiertas") no otorgan garantías contractuales u otras garantías ni condiciones adicionales con relación a la aplicación. A usted le asisten todas las garantías obligatorias previstas por la ley, pero no ofrecemos otras garantías. En la medida en que lo permita la legislación local, las Partes Cubiertas excluyen cualquier garantía obligatoria, incluidas las de **comerciabilidad**, idoneidad para un propósito específico, seguridad, confort y ausencia de infracción.

Excerpt 3.- Terms of Service of Microsoft [last accessed 30 March 2020~~DATE~~?]

For the last 15 years, I have observed this practice of using legal terms that are non-existent in the applicable law of the legal texts regulating digital products and web pages~~in the~~

[31] Extracted from (emphasis added): https:www.microsoft.com/es-es/servicesagreement/ / [30 March 2020 date of last access]
~~[PLEASE INDICATE DATE OF LAST ACCESS]~~

~~target language of digital products users that are not however adapted into the target legal system~~, and it is only now that I see some cause for optimism. Indeed, while drafting this chapter, I returned to Google's[32] Terms of Service and discovered a version published on 31 March 2020, where an important change in the wording was adopted both in the English and Spanish versions. First, the new text states clearly the distinction between obligations addressed to consumers and businesses. Secondly, the wording of the disclaimers has evolved to abandon capital letters and some legal terms that are completely linked to a specific legal system. In Excerpt 4, I present the wording of the example presented in Excerpt 1 as it currently stands. It can be seen that the strategy adopted is a sort of co-drafting; the English version has also changed, and the result is clearer wording that translates smoothly into Spanish without the need to employ borrowed terms. While the term *razonable* (reasonable) is not a legal term per se in Spanish, it reads as a standard of interpretation that links to the term *diligencia debida* (due diligence).

Comentado [OM23]: For the obvious reason that I pointed above.

Comentado [PA(24)]: Please rephrase for clarity.

Source Text	Target Text
Warranty We provide our services using reasonable skill and care. If we don't meet the quality level described in this warranty, you agree to tell us and we'll work with you to try to resolve the issue. Disclaimers The only commitments we make about our services (including the content in the services, the specific functions of our services, or their reliability, availability, or ability to meet your needs) are (1) described in the Warranty section, (2) stated in the service-specific additional terms, or (3) provided under applicable laws. We don't make any other commitments about our services.	Garantía Ofrecemos nuestros servicios con un nivel de competencia y diligencia razonable. Te pedimos que, si no mantenemos el nivel de calidad que se describe en esta garantía, nos lo comuniques y trabajaremos contigo para intentar resolver el problema. Renuncias de responsabilidad Las únicas garantías que ofrecemos en relación con nuestros servicios (incluido el contenido de los servicios, sus funciones específicas, su fiabilidad, su disponibilidad o su capacidad para satisfacer tus necesidades) son las que están: (1) descritas en la sección Garantía; (2) indicadas en los términos adicionales específicos de los servicios; o (3) recogidas en la legislación aplicable. No ofrecemos ninguna otra garantía en relación con nuestros servicios.

Excerpt 4.- Terms of Service of Google in force since 31 March 2020.

[32] On August 1, 2020 [———], Microsoft informed in its website that they were updating their Services Agreement for consumer online products and services, to take effect on the first October 2020~~30 August 2019~~. ~~[Please check if already updated since date is passed~~]

Still, there are many examples of translations into Spanish that are of dubious quality. Excerpt 5 offers examples of such situations, where the term *dolo* is employed to translate "willful misconduct." This is perhaps not the best option, including a grammar mistake since one can realize an act with *dolo* but not to commit *dolo*:

Source Text	Target Text	Recommended Text
The limitations and exclusions of liability for damages in this section 8 do not apply to […] (iii) liability for damages caused by either party's **gross negligence or willful misconduct**, or that of its employees or its agents, and awarded by a court […]	c. Ni Microsoft, ni sus agentes subsidiarios ni sus representantes legales serán responsables de ningún daño o perjuicio indirecto, lo que incluye la pérdida económica como, por ejemplo, la pérdida de beneficios, salvo que Microsoft, sus agentes subsidiarios o sus representantes legales **hayan cometido, como mínimo, alguna negligencia grave o dolo.**	c. Ni Microsoft, ni sus agentes subsidiarios ni sus representantes legales serán responsables de ningún daño o perjuicio indirecto, lo que incluye la pérdida económica como, por ejemplo, la pérdida de beneficios, salvo que Microsoft, sus agentes subsidiarios o sus representantes legales **hayan cometido, como mínimo, alguna negligencia grave o hayan actuado con dolo.** **Other alternatives:** • Hayan incurrido, como mínimo, en dolo o negligencia. • Sea resultado de una actuación dolosa o negligente por parte de Microsoft, sus agentes o sus representantes legales.

Excerpt 5.- Errors in translations detected in the Terms of Service of Microsoft [15 of September 2019 ~~DATE~~?].[33]

Comentado [PA(25]: Please check that text is not missing, since there is a significant difference. Further, in English there is no reference to C.

Comentado [PA(26]: Is the emphasis in the original ?

4. Considering the Right to Information for Users of Court Interpreting

In the field of court interpreting, significant research has been conducted to analyse role boundaries, professionalization, and other related issues. However, when court interpreters are

Comentado [A27]: Please consider looking at the work of Sylvie Monjean-Decaudin's on this matter (La traduction du droit dans la procédure judiciaire. Contribution à l'étude de la linguistique juridique), where she addresses user perspectives.

[33] Terms of Services, as extracted from https://azure.microsoft.com/en-us/support/legal/basic-support-terms/ [last visited 15 of September 2019].

asked about omissions or other linguistic mistakes, they tend to state that most problems are not related to legal terminology.[34] My goal here is to focus on the translation of legal terminology in court interpreting and to put forth a proposal to improve interpretation techniques by combining the right to interpretation and to information.

There must be correspondence between EU Directive 2010/64 (on the right to interpretation and translation in criminal proceedings for suspected or accused persons who do not speak or understand the language of the proceedings) and EU Directive 2012/13 (on the right to information in criminal proceedings). As pointed out by [---] María Jesús Ariza, it should be obvious that information without comprehension does not constitute a sufficient guarantee for the rights of the defence.[35] EU Directive 2010/64 represents a milestone for the acknowledgement of the translator and interpreter as guarantors of the fundamental rights of persons who do not speak the language of the court.

There is little work in court interpreting that adopts a receiver-oriented approach both in terms of knowledge communication (following Engberg's proposition), and the right to information for suspected or accused persons who do not speak or understand the language of the proceedings. There are two possible explanations for this. On the one hand, there is a lack of comparative research in the field of criminal justice, which until 20 years ago was considered "a long neglected discipline."[36] On the other hand, there is a lack of well-qualified court interpreters in many countries.

On the positive side, the rise of international criminal law has attracted the attention of criminal law theorists as an opportunity to develop a universal theory of criminal law.[37] Unfortunately, the growing presence of foreign nationals in courts of justice does not focus enough attention on accurate legal terminology and the acceptability of certain translations. Additionally, as might be imagined, the quality of court interpreting relies entirely on the qualifications of court interpreters. Specialized training in the field, however, is not yet a reality in many countries, and role boundaries of court interpreters seem to give priority to accuracy and impartiality over information or knowledge communication.

Court interpreters, by which I mean interpreters trained into the profession, abide by a professional code of ethics that requires them to be impartial and accurate, among other ethical considerations. This means that when dealing with cross-cultural differences they are "reluctant

[34] See Hale 2004, p. 287; Stern 2004, p. 63.
[35] Ariza 2018, p. 108.
[36] Heller & Dubber 2010, p. 1; Grande 2012, p. 189.
[37] As defined by Heller & Dubber 2010, p. 3.

to offer clarifications for fear of generalizing, stereotyping, or overstepping their role boundary."[38] This is also the reason why, when searching for equivalence, they tend to prioritize functional equivalents that sound more "legal" and specialized. Even in highly specialized contexts, such as the International Criminal Tribunal for the Former Yugoslavia, they tend to prefer "original-oriented solutions involving cognates, literal translation, synonyms and neologisms."[39] Those techniques may contradict the right to information that assists those persons involved in criminal cases. In a court of justice, the interpreter is the voice of the "non-speaker" of the language of the proceedings,[40] and it is the interpreter's duty to "strive to bridge the cultural and linguistic gap"[41] to put those who are limited language-proficient on equal footing with those who are fluent in the language of the court. It is for this reason that I recommend re-visiting the topic of accuracy of courtroom legal terminology using more comparative research.

Drawing from René de Groot's proposition, when translating from one legal language to another, the terminology of the possible target languages must be consciously chosen.[42] In court interpreting this means that a linguistic choice has to be made to ensure that most speakers of the target language understand the legal term,[43] as well as potentially some other speakers not using their first language.

A court interpreter needs to consider many factors from a legal terminology perspective, I will now focus on a few topics concerning the choice of translation techniques: key procedural and criminal terms, aspects of connotation, and abstract legal categories.

4.1 Translation of Key Procedural and Criminal Terms

As pointed out by John H. [———] Langbein, "A procedural system ~~legal procedure~~ bears the most intimate relation to the institutions that operate the procedures."[44] Compared to substantive law, procedural law is considered very institutionalized and closely linked to the legal culture of each country. Some authors consider it impossible to transfer procedural terms from one language to another[45] but, at least for comparative purposes, translation is a necessary tool to explore a foreign legal system, when the researcher is unfamiliar with the language, and,

[38] Hale 2004, p. 322.
[39] Stern 2004, p. 73.
[40] As indicated by González, Vásquez & Mikkelson 2012, p. 475-476.
[41] Mikkelson 1998, p. 21.
[42] de Groot 1998, p. 24.
[43] Bestué 2019, p. 142.
[44] Langbein 1995, p. 551~~Cited in Woo 2017, p. 62~~.
[45] See, [———] Marcel Storme as cited in Gascón 2017, p. 44.

in the courts of justice, this occurs on a daily basis. In line with Emmanuel [———] Jeuland and [———] Shaheeza Lalani, "there is a need to review the most problematic terms and to reach some form of consensus among a few scholars regarding the best translation of particular procedural concepts."[46] Among those procedural concepts, those that have an impact on the procedural status of the suspect or the accused should be at the top of the list. An example would be the Spanish term *escrito de acusación* (literally, "accusation writing"). As it has been long described, the differences between the respective roles of parties and judges between the adversarial and the inquisitorial models make it difficult to translate the full meaning of this document.[47] Within the Spanish legal system, the *escrito de acusación* is formulated by the public prosecutor (and also the "private" and "popular" prosecutor) at the end of the pre-trial stage for abbreviated proceedings and, as a result, the status of the investigated person changes to "accused." The functional equivalent of this document could be "indictment" or "bill of indictment" (as proposed by IATE), but it hides the specificities of the proceedings. A more neutral translation to be considered could be "charging document," being the one retained by the Rome Statute of the International Criminal Court for International Justice; or a lexical translation, such as "accusation pleadings." More comparative research could unearth a better solution.

The idea is not to impose immovable criteria of acceptability, but instead to join the efforts of legal scholars and court interpreters in order to improve communication in the legal field. To illustrate this point, I will reflect on the term *sentencia firme*[48] which will result in the proposal of an explanatory wording to avoid the functional (partial) equivalent "final judgment," and hence to avoid incongruency. *Sentencia firme* (literally, "firm judgment") is defined in section 245.3 of the Spanish Organic Law 6/1985 and section 141 of the Spanish Criminal Procedural Law. That term points to those decisions against which no appeal is possible, either because it is not prescribed by the law or because the period for appeal has expired, except in the case of actions of impugnation of the *res judicata*. The judgment is declared "firm" as to the merits of the case (i.e., that it has ruled on the facts of the case and not only on formal or procedural issues), thus ending the criminal proceedings with the conviction or acquittal of the accused person.

The judgment has the force of *res judicata*, which can be formal or material. Formal *res judicata* means that it is impossible to appeal the decision. Material *res judicata* means that

[46] Jeuland & Lalani 2017, p. 2 [———].
[47] Grande 2019, p. 69.
[48] Bestué 2019, p. 142-143.

other courts are prohibited from prosecuting a case that has already been decided, also known as the principle of *non bis in idem.*[49] In Spanish criminal cases, this term usually appears in the context of a plea bargain (*juicio de conformidad*), when the parties have reached an agreement on the recognition of the offence and the requested sentence, and the judge hands down the judgment *in voce* with a warning to the defendant that it is a "firm judgment." To further inform the defendant, the judge should also warn that it is a non-appealable judgment, which is not always the case. In Spanish, the term *sentencia definitiva* only indicates that the case is terminated. The term "final judgment" does not exist as a legal concept in Spanish, although it is used on occasions.

Let us look at the English language side of this illustration. *Black's Law Dictionary* provides the following definition for "definitive judgment:" "a judgment which finally and completely ends and settles a controversy. A definitive sentence or judgment is put in opposition to an Interlocutory judgment."[50] As for the English term "final judgment," it does not reflect the precision of the Spanish term, which clearly distinguishes between "sentencia definitiva" (i.e., one that ends the proceedings) and "sentencia firme" (i.e., one that is not subject to appeal). For this reason, we propose the explanatory translation: "final non-appealable judgment." This translation technique allows us to stress the information load of the legal term that is most relevant within the context. The term "definitive judgment," in the latest edition of the *Black's Law Dictionary*, indicates that it is only synonymous with final judgment.

Translation for very specific system-bound legal terms should be proposed from a comparative perspective. This would facilitate the court interpreter's choices, taking into consideration both the context and the information load of each particular term that needs to be conveyed to the receiver.

4.2 Translation (or not) of the Connotative Meaning of Legal Terms

In recent years, there has been a trend towards reducing the pejorative connotation that, from a social perspective, certain legal terms have acquired,[51] as in the case of the names of individuals subject to criminal proceedings. As a result, in Spain the term *imputado* ("charged," in a semantic translation) used in the pre-trial stage has been abandoned in favour of the more

Comentado [PA(28]: I noted that sometimes you use ' others ", and others nothing. Please harmonize

[49] Montero et al. 2013, p. 424-426.

[50] Black's Law Dictionary, St. Paul:West Group, 1999, 7th ed. Please mention the complete reference here, including edition.
~~Please add complete reference.~~

[51] Juanes 2014.

neutral term *investigado* ("investigated"). Even from the perspective of a layperson, some legal terms give clear information about the seriousness of the legal status of a person involved in a criminal case. The average Spanish speaker may understand that an *investigado* is in a better position than an *accused person* (accused, defendant). Whenever there is not complete correspondence in the target language, we advocate for an expanded translation that attempts to convey this information. See for example, the analysis of the term *investigado*:[52]

Spanish	Recommended translations into English
Investigado	• Alleged offender • Criminal suspect • Person under investigation in preliminary criminal proceedings • Person under judicial investigation

Table 1.- English translations of the Spanish term *investigado*. ~~PLEASE ADD NAME AND NUMBER OF TABLE.~~

Similarly, in order to avoid connotation issues, a better choice should be proposed to translate the term *autor del delito* (author of the crime) could be used as a more neutral term than "perpetrator," the latter ~~being the~~being the most frequent rendering in English. Other options such as "wrongdoer," "offender," or "accused" are also connotatively negative terms. In Spanish, the options range from more neutral terms like ~~"~~*sujeto*,~~"~~ ~~"~~*autor*,~~"~~ or ~~"~~*responsable del delito*~~"~~ to more connotatively negative terms like ~~"~~*penado*,~~"~~ ~~"~~*reo*,~~"~~ or ~~"~~*condenado* once the conviction has occurred.

Comentado [PA(29]: I noted there is no consistency when you use non-English words. Sometimes you use italics, others not. Please harmonize throughout the chapter.

4.3 Translation of Abstract Categories of Legal Terms

Translation of culturally bound legal terms belonging to abstract categorizations is one of the most challenging problems in legal translation. While some translators demonstrate a preference for sound "legal" or specialized terms, others prefer to use a borrowed term, a technique that may be not optimal in the context of court interpreting. Vagueness or imprecision of legal terms within the criminal law context conflicts with the principle of legality. A key aspect of criminal law is its communicative enterprise to provide guidance to citizens on what is proscribed, and this is compromised when some legal terms are not uniformly defined across

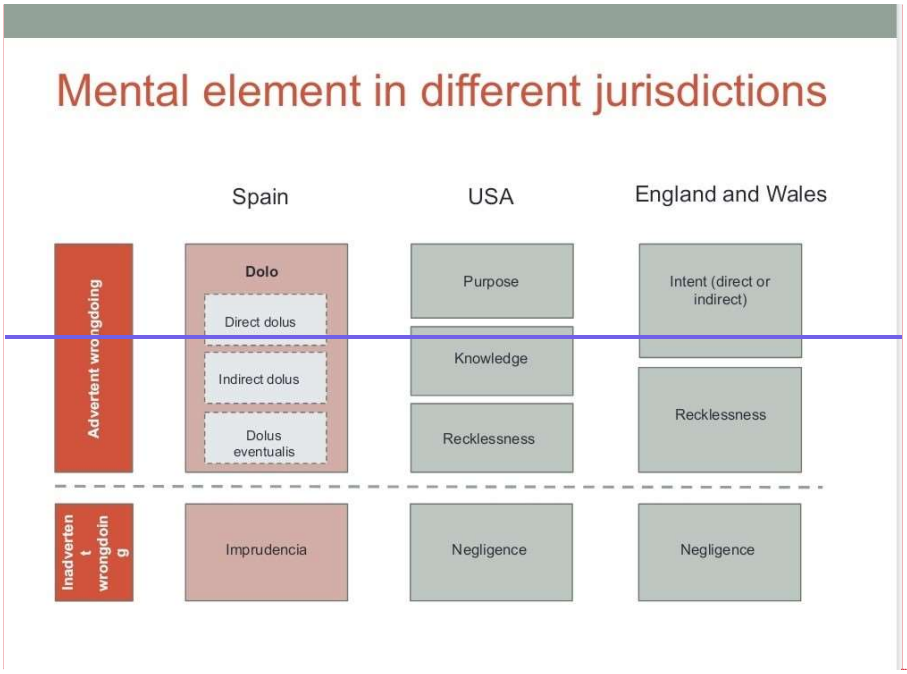
[52] See Jowers 2015, p. 343, for further information on the development of this term.

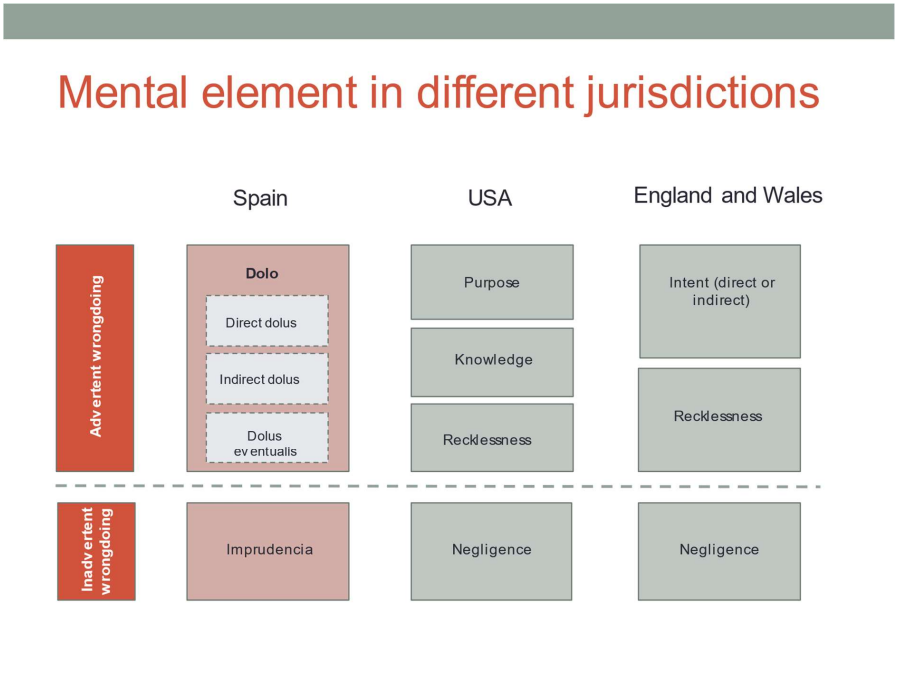
offences.[53] [———]Findlay Stark chooses two *mens rea* terms, "recklessness" and "intention" to demonstrate that in English criminal law they are not consistently defined. Vagueness, in the sense of variability, of legal terms creates inconsistency and uncertainty, which are multiplied when translated into a different legal culture. The approach offered by Stark is not an attempt to eliminate abstract words or words that have an ordinary use, but rather to use them in a consistent manner across offences.

The Spanish term *dolo* (in Latin *dolus*) offers an example of an abstract mental element under Spanish criminal law. The proposed dictionary translations are "intent,"[54] "criminal intent,"[55] and a long list, including "mens rea," "bad faith," "wrong," "wrongdoing," "actual malice," "deceit," "guilty knowledge," "willful misconduct."[56] [———]Iryna Marchuk observed that "over the years, the jurisprudence of English courts has been littered with inconsistent and often contradictory interpretations of various mens rea standards,"[57] and this same pattern can be observed with the Spanish word *dolo*. The most challenging task is to work out precise boundaries between bordering *mens rea* clusters in the different jurisdictions. In an attempt to shed some light on this, I have created Figure 5.

Comentado [PA(30]: Please harmonize the use of , and ; in this enumeration.

[53] Stark 2013, p. 163.
[54] Jowers 2015, p.228.
[55] Mikkelson 1995.
[56] Alcaraz & Hugues 2001, p. 536.
[57] Marchuk 2014, p. 9.





Comentado [PA(31]: Please note that inadvertent has the t in the second line. Please fix.

Figure 5.- The mental element of the crime in Spain, England and Wales, and USA.

Comentado [OM32]: Rearrange figure 5 so that Inadvertent wrongdoing does not get cut at the final letter.

As illustrated by Marchuk:

> Attempting to equate notions originated from common law to the ones employed in continental law jurisdictions does not work smoothly. As an illustration, the notion of recklessness is an intermediate concept in common law positioned between intention and negligence. Continental law jurisdictions do not have a transition notion between intention and negligence with an exception of French criminal law. The interpretation of intention in selected continental law jurisdictions is more lenient and includes a unique concept of *dolus eventualis*, which is the lowest denominator of intentionality.[58]

This conceptual disparity was an important issue during the Rome Conference for the elaboration of the Rome Statute. It was then decided to exclude the term *dolus* in favour of the words "intent and knowledge" (Article 30) as the mental elements of the crime and providing the definitions of both terms under Article 22 (3) of the Statute.

5. Conclusion

In this paper I brought ~~attempted to bring~~ the concepts of legal translation theory to bear upon the problems of communication with certain receivers that are (or should be) especially protected by the law, specifically consumers in contractual situations and non-speakers of the language of the court in criminal matters. I showed ~~My intention has been to show~~ how legal translators and court interpreters can bridge the cultural gap between different legal systems while respecting the legal rights of the users. By placing the receiver's right to information at the centre of the discussion, I have sought to challenge the efficacy of those linguistic translations that are now becoming predominant because of the impact of the internet and its pervasive culture. In highlighting problems encountered within the English-Spanish language pair, I endeavoured to raise awareness about the need to create a framework for court interpreting strategies, especially as concerns minority languages. All the remarks needed to be framed within a legal comparative approach, identifying and explicating, when needed, problematic areas to be solved while respecting the role boundaries of court interpreters.

Comentado [PA(33]: I suggest you change the tone, and replace "I have sought" by "I brought." Similar tone can be followed by replacing "My intention has been" with "I showed."

Given the prevailing inadequate professional conditions of translators and court interpreters in many countries, we should question whether comparative research should be incorporated into the toolbox of court interpreters and translators working in the private market. In any case, the answer has to be affirmative since this is a matter of justice and not only of

[58] Marchuck 2014, p. 67.

formal or semantic equivalence. My proposal for overcoming this problem is to foster knowledge of the law by linguists and legal scholars working together to construct and reconstruct legal concepts in this increasingly globalized world.

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~~**Woo 2017**~~

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