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Translating the DCFR and drafting the CESL

A pragmatic perspective

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Pragmatic Issues in Translating the DCFR and Drafting the CESL: An Introduction

*Barbara Pasa and Lucia Morra**

1. A few words on the rationale behind this book on legal translation, after the increasing number of excellent works published in the last decade. Although the need to know something about translation of legal texts in a multilingual environment has been met on a fundamental level, what is still lacking is a common theoretical understanding of this unique enterprise, in the different fields of philosophy, linguistics, legal-linguistics, and law. The motivation behind our project, however, was not only theoretical; we were also looking for a deeper understanding of the complexity of legal translation processes, which involve many institutional and non-institutional actors, each applying different methods of translation. To this end, we thought that it would have been useful to provide an interdisciplinary overview of the application of legal translation mechanisms to two different legal texts, a legislative text (the CESL – Proposal for an EU Regulation on Common European Sales Law) and an academic work (the DCFR – Draft Common Frame of Reference). The aim was to understand what comes *before* and lies *behind* these enterprises of legal translation, that is to say, the fundamental stages and their consequences and effects on the final outcome, both in the case of the formal legislative procedure for the adoption of a European Regulation (the CESL) and in the case of a completely different procedure (the DCFR). We also thought it was worth investigating the role of both the EU Court of Justice and the national courts, to understand what comes *after* the enterprise of legal translation, in interpretation of these sources, the CESL a source of positive law in the strict sense, and the DCFR an authoritative source in a traditional sense. Views and experience were fruitfully exchanged with European colleagues from various fields, an exchange that seems to have sown the seeds for further interdisciplinary exploration of either a practical or theoretical nature in the area of legal translation.

First, we invited a number of highly-qualified colleagues to a conference – “*Pragmatic Issues in Legal Translation – From the different language versions of the DCFR to the CESL proposal*” – that took place in Torino at the end of November 2012. It was organized by the CDCT – *Centro di Diritto Comparato e Transnazionale (Centre for Comparative and Transnational Law)* and by the Department of Law of the University of Torino within the project “The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilization of national legal traditions?”

* This Introduction is the product of a joint project. Although it has been jointly conceived and discussed, Lucia Morra has contributed section 3, Barbara Pasa section 4, while sections 1, 2, 5 and 6 were written jointly.

coordinated by Michele Graziadei, a member of the Conference's Scientific Committee, together with Gianmaria Ajani, Silvia Ferreri, Lucia Morra, Barbara Pasa and Rodolfo Sacco. The enthusiasm with which our guests participated in the project, the collaborative atmosphere in which the conference took place and the interesting discussions raised by the various contributions encouraged us to collect the papers presented and publish them together. This publication includes papers by an emerging vanguard of scholars whose work is worthy of widespread discussion, and by well-recognized scholars in the field of legal translation, such as Susan Šarčević and Rodolfo Sacco. Together they constitute an exceptionally strong community of comparative lawyers, linguists and philosophers capable of building bridges between these inter-connecting fields.

2. The book is structured in four Parts. The first two are more general in approach and look at the historical and philosophical background of legal translation; the third focuses more narrowly on some stages in the translation processes that led to the DCFR and the CESL, of which the fourth Part contains a short selection.

The first Part – *Historical Outline* – outlines the historical background of legal translation, first in general terms (**Chapter 1: Rodolfo Sacco**), and then more concretely with many traditional examples drawn from comparative law (**Chapter 2: Barbara Pozzo**), and finally as applied to the DCFR and the CESL (**Chapter 3: Susan Šarčević**). The last chapter (**Chapter 4: Michele Graziadei**) advances the hypothesis that the laws of the Member States may eventually spontaneously converge in attributing the same meaning to a certain term or expression within the EU.

The history of legal translation is described by a pioneer in this area, **Rodolfo Sacco (Chapter 1)**. He shows (in French, a fitting choice, in view of the book's theme) how debate on legal translation was inspired by philosophical and linguistic research on translation. As is known, the world legal community discovered that translation was problematic only in the second half of the last century. Until then, legal concepts were not only considered to be clearly defined in each legal system, but also to be related to universal and eternal legal concepts shared by all legal cultures and languages. In such a view, the only condition for translation to be performed was finding in the target language the same concept denoted by a term of the source language, a task considered as not always easy, but feasible, at least in principle.

Confidence in the possibility of relatively straightforward translation, however, faded when both the analytical school of philosophy and hermeneutics showed that meaning is necessarily shaped by the conceptual system it is part of, and hence translation must be an indeterminate task. Following this theoretical line of argument, scholars of legal translation began to gather evidence of the impossibility of achieving uniform application of a multilingual legal text even when adopting equivalent translations, given that interpreters (judges) of that text assign it a meaning which will vary according to their legal culture and experience.

More recently, however, as scholars of applied ontology have underlined that it is possible to adopt uniform categories across different languages, and cognitive scientists have stressed that human communities approach reality in much the same way,

the legal theoretical focus has shifted towards the idea of the possibility of translation despite its inherent indeterminacy. Indeed, legal translation is a frequent event, and many legal terms specific to a legal community are translated either by using established solutions produced and used in the development of the *jus commune* (a combination of Roman and Canon law) or by using *legal transplants* (the circulation of rules and concepts, even without a common cultural background, between legal systems). In reality, legal translators can cope with the main difficulty in legal translation (namely that law is expressed by written legal texts *and* by customary law, interpretive strategies, *and* latent notions in the interpreter's culture, which Sacco called *cryptotypes*) when they have been trained by comparative lawyers to consider both the literal meaning of the text to be translated and the operational rule behind its literal meaning.

Building on Sacco's ideas and arguments, **Barbara Pozzo (Chapter 2)** looks at the question of the untranslatability of legal concepts and traditional examples of translations, such as *contract/contrat/contratto/Vertrag* and *property/proprietà/propriété/Eigentum*. She also points out that while within the Western Legal Tradition it is customary to think of law primarily in written terms, in other legal traditions, such as in China or in Africa, this might not be the case, as the unwritten character of customary rules may prevail in the law in action. Furthermore, legal rules, whether oral or written, might be profoundly influenced by invisible patterns of ordering that need to be revealed before the rules are translated. Hence a necessary task in each legal translation process is to understand the culture in which the rules to be translated are rooted, an understanding that in some cases may prove of extreme importance. Lastly, Pozzo looks at the myth of equivalence, a myth that seems to become "a chimera when legal translation has to face the numerous issues and challenges connected with European multilingualism". Pozzo concludes by pointing out that in the European legal context, English is used as a "neutral or descriptive language" associated with a classic civil law background; it has reached the status of a *lingua franca* at the cost of becoming a Continental legal English which differs from British legal English. In the near future a new translation task could then prove necessary: translating EU-English into British English.

Susan Šarčević (Chapter 3) analyzes in detail the specific difficulty of the EU translation enterprise, a complex interplay between different legal languages and different legal systems. The main problem of EU legislation is not the scarcity of terminological equivalences amongst the EU legal languages, but rather the fact that this legislation must be integrated into the legal systems of the Member States and applied by national courts, and hence European legal terms tend to be interpreted according to national rather than EU law.

As regards terminological choices, although translating EU legislation is, or should be, an act of comparative law, most of the European Commission's DGT (Directorate General for Translation) translators have little-to-no knowledge of their own national law and insufficient knowledge of EU law. Therefore, they often prefer to translate terms literally (*calques*) or to use similar lexical units (*loanwords*) without analyzing or understanding the underlying concept, an approach that casts

doubt on the effectiveness of EU translations, since it often leads to a high degree of formal equivalence at the expense of quality. Šarčević considers the impact this practice has on some myths of EU multilingual lawmaking: the principle of equal authenticity (all texts of EU primary and secondary law, including subsequent translations, are deemed ‘originals’ and legally binding), its underlying presumption of equal meaning (all authentic texts of a single instrument have the same meaning), and the principle of legal certainty (the effects of the legislation must be foreseeable). She does it analysing some definitions (i.e. *goods*) and general clauses (*good faith and fair dealing*) in the DCFR and the CESL. She assumes that definitions play a key-role in creating uniform European concepts and are, thus, a vital tool for achieving greater predictability and legal certainty in general.

Michele Graziadei (Chapter 4)) analyses the enterprise of translation of European law in relation to Mikhail Bakhtin’s concept of heteroglossia. Like the Russian linguist, Graziadei assumes that there are no neutral words because all languages represent their own distinct view of the world, characterized by its own meaning and values. In his view, each text enacted by the EU is an “historic artifact representing a plurality of registers, of points of view, of styles, leading to inevitably hybrid utterances, which altogether give voice to the EU in the many languages of Europe”. Each language of the law in all the Member States is strongly enriched by this juxtaposition between different “voices”, that are part of what creates meaning between and beyond EU legal texts. Graziadei, drawing examples from his personal experience, sets out to describe EU multilingual law making and how it shapes language – in particular, interaction and negotiation among members of a working group trained as lawyers in different national contexts. A key practice is resorting to terms and expressions already in use at the level of national law, to express European concepts exclusively associated with European law. This practice in itself is not new: linguists have shown how over time new meanings are regularly associated with pre-existing words. However, the real difficulty in the EU context is grasping under what conditions a given term or expression has a new EU meaning, or a meaning used under the law of a Member State. Deciding on this point involves policy considerations, because the more Europeanized concepts are introduced, the more national private law systems come under pressure.

3. The second Part of the book – *Theoretical Issues in Legal Translation* – introduces the philosophical and legal-linguistic debate on the relationship between law, language and translation, using as examples some parts of the multilingual translations of the DCFR and CESL. Regarding the rhetorical question of translatability *versus* untranslatability, the *leitmotif* of chapters in this second Part is the awareness that only imperfect translation is feasible, and that different translations of the same legal text will necessarily have different nuances.

The question of the feasibility of legal translation, as said above in the first Part, has been investigated in theoretical terms since the second half of the last century, mainly after the philosopher Willard Van Orman Quine illustrated the radical indeterminacy of translation, imaging the situation of a linguist approaching a “hith-

erto unknown language”. Since then, legal scholars have debated the possibility of a determinate translation of legal texts: if the meaning of a legal concept depends to a large extent on the conceptual legal system it belongs to, it follows that it cannot have a determinate translation in another legal system. As said above, many irreducible differences between the concepts characterizing each legal system have been identified since then. At the same time, the need for translations between different legal languages has grown, and translations have been successfully performed despite these differences. After all, the communication between the various legal cultures of the EU negates one of the pre-conditions of Quine’s experiment. Only when there is no previous point of contact between two languages, does translation between them prove to be an indeterminate enterprise, and obviously this is not the case with legal translation in the EU context: the very idea of creating ‘common’, shared, law for different legal systems demonstrates that their legal cultures have been in contact for a considerable time. Despite its inherent indeterminacy, legal translation of EU texts cannot then have the dramatic consequences it has in Quine’s experiment: terminological equivalences chosen by legal translators are surrounded by a halo of indeterminacy, but this is generally restrained by the interpretive praxis of the legal communities. After all, legal translation cannot have a more determinate outcome than ordinary communication: just as communication succeeds in ordinary exchanges despite differences between meanings built by speakers and by their interpreters, in the same way legal translation takes place despite unavoidable differences between the meanings given to the words by the translators.

Thus, the legal theoretical focus considers now what (if anything) makes a legal translation possible, what ‘possible’, or better, ‘successful’ may mean in this context, and how the necessary differences between concepts coined in different legal systems may be mitigated. The idea is that legal translation is possible, and to be successful – and in the case of multilingual normative texts, this means that the different language versions of a statute, regulation or directive have the same legal effects – it needs a common frame of reference, to be either built or retrieved.

A common frame of reference may be described as a shared cognitive environment, namely a set of assumptions shared by a community and widely expected to be easily accessible and retrievable by its members. The relationship of this shared set of values with translation is underlined by Francesca Ervas (Chapter 5). Speakers communicate thoughts using semantic representations (coded meanings, namely meanings conventionally attached to linguistic units, see also Visconti, in this volume), and these representations will only ‘guide’ the addressees in recovering these thoughts. Failures in translation happen because addressees must enrich the semantic representations encoded by an utterance in order to transform them in the proposition expressed – in a complete thought –, and different languages make different strategies of enrichment possible: for instance, a language may be equipped to encode very subtle nuances, whilst another one may express equivalent nuances encoding only vague semantic constraints on the interpretation, thus forcing translators to produce inferences through the interaction of the coded meanings with contextually relevant data (see also Engberg, in this volume). This *pragmatic*

enrichment has multifarious possibilities, namely it may lead to ranges of inferences within which the translators have to choose. When an established common frame of reference is shared by different languages, the oscillations between these multiple possibilities of enrichment are mitigated.

As regards legal translations of EU normative texts, at least in the field of private law (especially contract law), most of this common frame of reference has been built, retrieved, and restated within the academic Draft Common Frame of Reference (DCFR) that the European Commission asked European comparative lawyers to build in order to achieve greater harmonization. Published in 2009, the DCFR is a “trans-systemic instrument formulated for the first time in a neutral meta-language with uniform concepts expressed in a terminology detached from national legal systems and cultures to the greatest extent possible” (Šarčević, in this volume). Still, according to **Jaap Baaij** (Chapter 6), this instrument alone does not prevent implementation of a normative text (a Directive or a Regulation; a national statute; a judgment of a domestic supreme court or the Court of Justice of the EU – CJEU) in the different legal systems from resulting in different outcomes, remedies and solutions, jeopardizing the required equality of legal effects. The uniform understanding of EU law the CJEU required seems then to be a goal which is impossible to reach. Interpreting all language versions in which EU law is enacted consistently is impossible not only when a multilingual legal text is produced by the legislature (as in the case of the Regulation Proposal on CESL) and by the judiciary (as in the case of a precedent, i.e. the CJEU precedents, Art. 267 TFEU) and then translated by official translation services, but also when it is the outcome of a doctrinal work (as in the case of the DCFR), where academics seek to adopt legal terms perceived as ‘neutral’ in the legal culture in which they will be interpreted. The reason for this failure lies in the domain of legal interpretation more than in that of legal translation: the CJEU’s requirement can be accomplished only if all language versions are collectively given a uniform interpretation by the national courts.

The concept of ‘system neutrality’ in the drafting of legal rules which are intended to interact with a variety of domestic legal systems is discussed in detail by **Gerhard Dannemann** (Chapter 7). He asks whether translations should be system neutral or system specific. Adopting a neutral term entails the risk that it will mean nothing to national judges. On the other hand, using a national term (often only partially equivalent to the European concept) entails the possibility of encouraging judges to interpret the term in accordance with its national meaning, thus frustrating efforts to achieve uniform interpretation and application of European concepts. Using a term already belonging to a legal system entails attaching culture-bound connotations to the legal concept that could lead to different outcomes. However, as Baaij (in this volume) notes, the very fact that differences in national implementations can be detected proves that there is a common ground on which these differences may be expressed, and proves the existence of a discursive ground on which these differences may be mitigated – in particular, through interventions by the CJEU and intercommunication between the CJEU and national judges.

Martina Bajčić (Chapter 8) illustrates, through case law, the differences that may arise from the interpretation of European legal instruments by national courts and suggests a cognitive terminological approach that offers a more focused approach for translating law in the EU context. This approach recognises that the context carries legal knowledge and may, in turn, lead to different conceptualization. Correlations between law and language are clear in the teleological approach of the CJEU, and more specifically in perception of meanings in law and language. Bajčić elaborates her theory using, as an example, the concept of *compensation* discussed in the well-known *Messner* case (C-489/07). The concept of *compensation* cannot be understood without considering a related concept in the given context. Therefore, it must be determined whether the broader and related concept of *charges* includes *compensation for use*. If interpreted broadly, *charges* would include the latter, and the consumer might be asked to pay. However, the concept of *charges* is regulated differently in the DCFR and CESL, and this further complicates both interpretation and translation. It is in this respect that a cognitive terminological approach may prove helpful for the problematic interpretation and translation of such vague concepts, perceived as fuzzy categories with no clear-cut edges. She concludes that to be successful, an instrument like the DCFR requires communication between the legal cultures bound by a common project over a period of time.

According to **Jan Engberg (Chapter 9)**, it is precisely through enhanced communication between the members of the legal communities composing the EU legal community that legal differences produced by the transposition of common concepts onto national contexts can be mitigated. As an example, Engberg considers how ongoing interaction between the EU legal communities could help translators to cope with one of the most difficult tasks of legal translation, inherent to the potential vagueness of all (legal) terms. As he shows through examples drawn from the DCFR and the CESL, a ‘specialised’ vagueness of the normative text, signalled through the use of explicit indicators of vagueness (for example vague adjectives, such as *serious* in *serious threats*) must be distinguished from a ‘general’ vagueness, that depends upon inherent characteristics of language, but is not explicitly signalled. When choosing the most appropriate rendering of vagueness in the target text, legal translators should pay attention to this difference. In a legal text containing a signalled vague concept (for instance, the adjective *reasonable*), they can assume that the legislature deliberately opted for an expression whose denotation is not clear-cut, thus delegating power to judges to determine (between a number of alternatives limited by both the semantics of the expression and the context of its interpretation) how some actions should be categorized.

Rendering this intended meaning as faithfully as possible is usually an easy task for translators; for instance, it was so for the rules of the DCFR containing the adjective *relevant*, since all the languages into which the English draft was translated have lexical elements expressing the kind of vague standard intended there. On the other hand, the whole range of possible meanings that each legal term has may lead to an unintended applicative vagueness when the addressees of a legal text like the CESL do not agree upon which of these meanings was meant. In this situation, translators

have to both understand which parts of the potential meanings of a word or expression are valid at any particular point, and try to predict its most likely future path of meaning. This task – the most difficult aspect of legal translation – can be accomplished by acquiring knowledge about the formulation of the text and by evaluating the degree of agreement between the members of the legal communities, and also by considering how the chosen expression may be interpreted by non lawyers – namely, the majority of citizens to which EU law applies. At any rate, however good translators' strategic choices may be, they cannot on their own guarantee the sort of interlingual stability of meaning aimed for in multilingual legal instruments. Even EU judicial activity cannot guarantee uniform interpretation and application, although interpersonal communication among members of the social group of judges tends to mitigate variations in interpretation. This highlights the importance of enhancing interaction between the different legal communities composing the EU.

4. The chapters in the first and second Parts draw on examples taken from the DCFR and the CESL. Part Three of this volume – *Legal Translation Enterprises: the DCFR and the CESL* – analyses the translations of these two legal instruments in detail. These chapters examine some words and expressions occurring in the DCFR and in the CESL, and provide concrete illustration of the conclusions reached in the previous Parts. At the end of the volume, the reader will find an Index of words and expressions examined by the contributors.

4.1 Translating the DCFR. The chapters of this sub-Part 3 of the volume deal with the translations of the Draft Common Frame of Reference (DCFR), the tool-box of definitions and model rules that a network of legal scholars was charged with producing by the European Commission ten years ago, in order to restate the *acquis communautaire* (existing national and European rules) related to private law. As the contributors highlight, the DCFR – originally drafted in EU-English – constitutes not only a common conceptual framework, but also a sort of dictionary of European private law.

The full edition of the DCFR consists of 10 Books. It opens with the *Model Rules*, as if it were a real statute, although it is rather a repository of model rules and definitions which can be used for drafting instruments such as statutes, directives and regulations. The Model Rules deal with the areas of law related to the continental notion of Private Law: contract law (including pre-contractual negotiations, the entire life of a contract and specific contracts), *negotiorum gestio* (benevolent intervention in another's affairs), torts, unjust enrichment, acquisition and loss of ownership of goods, proprietary security in movable assets, and trusts. The Books are written in the form of classic *Commentaries*, article by article, with notes, and scholarly comments; finally, a list of terms is included in *Definitions*.

In an attempt to bridge legal, language and cultural barriers, the drafters of the DCFR followed the example set in Ole Lando and Hugh Beale's well-known *Principles of a European Contract Law* (PECL), an instrument of soft law, not binding but persuasive, produced by European law professors during the eighties. The work car-

ried out by the Acquis Group headed by Gianmaria Ajani & Hans Schulte-Nölke to produce *Acquis Principles* (ACQP), extracted only from the existing *acquis communautaire* on contract law (both B2B and B2C transactions), was particularly valuable in this respect: above all, the insistence on the need to achieve terminological consistency and greater coherence by creating uniform concepts for European private law. Thus, the terms used in the DCFR do not refer to specific concepts rooted in English law. They refer to autonomous European concepts distilled by comparative research from the various national legal systems or formulated on the basis of the *acquis communautaire* (Dannemann, in this volume).

The history of the DCFR is described mainly by Šarčević, Busch, and Ioriatti (in this volume): here we add that most of the drafting was done by the Study Group for a European Civil Code, headed by Christian von Bar, and by the European Research Group on existing EC Private Law (the Acquis Group, mentioned above). English was the language of discussion and agreement used by the working groups contributing to the creation of the DCFR. Hence, this one is a typical source text containing outcomes agreed upon by speakers of many different first languages using one common language, EU-English. The drafting language of the DCFR was not the English of common law; while a number of native English speakers participated in the project, the main drafters were civil lawyers from various legal backgrounds rooted in French-German law. Aware that the use of national terms and concepts is one of the greatest stumbling blocks to legal certainty and uniform application of European law (as shown in the first Part of this volume), they made efforts to avoid legalese and technicalities drawn from any one system, creating 'neutral' terms detached to the greatest extent possible from the connotative meanings associated with national legal languages. Seventeen European universities and research institutes participated in the Academic Network of Excellence *Common Principles of European Contract Law* (CoPECL), which was established in 2005 by the European Commission with the task of writing the DCFR, meaning more than 100 scholars who wrote or commented on the draft in EU-English.

Some aspects of the translation process of the DCFR are also worth noting. The first regards the actors in the process. The DCFR was translated by legal experts working as law professors in universities across Europe, some of whom also took part in the drafting process. The translation task was part of an EU project coordinated by Hans Schulte-Nölke on behalf of the European Legal Studies Institute in Osnabrück, (known as *B-Brussels: translation of legislative models with regard to contract law*). It was an 'academic translation enterprise' with a fundamental policy goal: deciding under which conditions a word or expression would have either a new European meaning or a meaning rooted in the tradition of a legal system.

The second aspect regards the methodology adopted to govern the legal translation process. The coordinator of the translation enterprise made an apparently very sensible request, but one that proved to be almost impossible to satisfy. He asked to attribute only one translation to each word, namely a *total lexical equivalence* (one-to-one correspondence, in the words of Ervas, in this volume). During the translation process, however, this ideal had to be replaced by that of an *approxima-*

tive equivalence (one-to-part-of-one correspondence) and sometimes even by that of a *facultative equivalence* (or one-to-many correspondence).

The third point worth noting in the DCFR translation process relates to sources of inspiration (imitation by prestige). The translators took inspiration from different supranational and international sources, binding and not binding, such as the CISG (Vienna Convention for the Sale of Goods), some European Regulations and Directives which harmonize contract law, the PICC (UNIDROIT Principles of International Commercial Contracts), the PECL and the ACQP principles. Inter-textual analysis of the legal sources that inspired the drafters of the DCFR, mainly the PECL, the PICC and the CISG, for which different language versions are already available, might have improved the quality of legal translation (see Busch, in this volume).

The fourth point relates to institutional assessment. It appears that the European Commission Translation Services looked at the first legal translations (German, French, Italian, Polish and Spanish), and introduced some changes, which, incidentally, were not communicated to the national translation teams. Just a few examples taken from the DCFR *Definitions*: the Italian academic translation of *authorization* was *autorizzazione*, an Italian word that is completely detached from the national legal tradition, and perceived as a 'neutral' word; however, during the institutional assessment of the translation, *autorizzazione* was changed to *procura*, a word which belongs to the Italian legal system, and which has culture-bound connotations. Another example that illustrates the strategic choice of the EU Commission Translation Services to resort to words already in use in national law to express European concepts is that of *buona fede e correttezza nelle trattative*. This expression used by institutional translators to render the English expression *good faith and fair dealing* contains two more words, *nelle trattative*, which are not provided for in the original English text, and that other language versions do not include. The original Italian academic translation was *buona fede e correttezza*. (For more examples, see the table related to the DCFR *Definitions*, in the fourth Part of this volume.)

Let us continue with the example of the Italian translation process of the DCFR (currently available at http://ec.europa.eu/justice/contract/files/european-private-law_it.pdf). It was coordinated by the Turin team, which firstly translated only the Model Rules and Definitions, in order to maintain coherence, accuracy, symmetry, adequate correspondence and an appropriate register in the Italian translation. The team then searched for consistency among different translations of the DCFR, and took into account translations into other languages (French, German and Spanish) to make decisions in difficult cases. The Turin team did not use the same word with the same meaning in different contexts, also because such a correspondence across the original English version does not exist. The team paid great attention to choice of words when there was a risk of confusion for national readers, familiar with their national meanings, and sought to limit vagueness and reduce complexity as far as possible.

The team then distributed the 10 Books containing Comments and Notes, with the Model Rules and Definitions already translated into Italian, to a network of Italian Universities: Law Schools were selected on the basis of their expertise in

comparative law (and availability) of comparative law specialists. In the case of Book VIII (on acquisition and loss of ownership of goods), the option of sub-contracting the translation to a private translation services provider was tried, but the poor result convinced the Turin team to use academic comparative lawyers. In each partner University – Turin, Milan, Genoa, Como, Teramo, Foggia, Brescia – two or three translators were identified for each Book (apart from the shorter Books I and V) and one proof-reader was held responsible for revision of the translation of each Book, involving around 40 law professors and PhD students. At the end of this process, with severe time-limit constraints, the Turin team revised all the translations.

At the end of 2012, the European Commission published online the translations of the DCFR into French (http://ec.europa.eu/justice/contract/files/european-private-law_fr.pdf), German (http://ec.europa.eu/justice/contract/files/european-private-law_de.pdf), Italian (http://ec.europa.eu/justice/contract/files/european-private-law_it.pdf), Spanish (http://ec.europa.eu/justice/contract/files/european-private-law_es.pdf) and Polish (http://ec.europa.eu/justice/contract/files/european-private-law_pl.pdf).

As a member of the Italian University Network coordinated by the University of Turin, **Cristina Amato (Chapter 10)**, of the Brescia team that translated Book VII of the DCFR on unjustified enrichment from English into Italian, describes the methodological and semantic difficulties experienced, which required a thorough examination of problems of both a linguistic and comparative law nature. The challenge in translating Book VII lay both in adapting the use of Continental English in this area and in tailoring the DCFR ‘tool-box’ to the Italian legal system, linking it to Italian legal concepts and categories that do not perfectly match with the European model of restitutionary remedy. Amato presents examples of some interesting results achieved.

Christoph Busch (Chapter 11), as a member of the German team led by Hans Schulte-Nölke, describes his experience using the example of some “small words” deeply rooted in a particular legal culture: through adverbials of time that he calls “expressions of urgency”, which are used in a number of legal provisions contained in the DCFR, his contribution briefly explains the role of temporal adverbials in legal texts, analysing the usage of such terms in the original English version of the DCFR (such as *immediately*, *without delay*, *without undue delay*, *as soon as possible*, *as soon as reasonably practicable*, *within a reasonable time*) and their translation in the French and German version of the DCFR. He then sets out to develop a taxonomy of “expressions of urgency”.

Michel Séjean (Chapter 12), as a member of the French team led by Jacques Ghestin, also describes his experience using concrete examples taken from the translation: he deals with definitions and concepts (such as *conduct*, *divided obligation*, *assets*, *goods*) through which he discloses the sources of inspiration that came to the surface, indirectly and involuntarily, with the French translation of the DCFR, such as Jean Carbonnier’s work as well as the Louisiana Civil Law Tradition, and the teaching materials contained, among others, in the *Vocabulaire juridique de l’Association Capitant*. He concludes that the DCFR definitions give cause for reflec-

tion to French lawyers and that there is a need for translators who are able to adapt the text (DCFR) to the culture of readers.

Finally, as coordinator of the Spanish team, **Carmen Jerez Delgado (Chapter 13)** discusses, again using concrete examples, the fidelity of the Spanish translation of words or expressions (such as *natural person*, *legal person*, *damage*, *fundamental non-performance*, *unfair exploitation*, *representation*) with the original text of the DCFR and (in)sufficient consistency in the translation (for example *value*, *good faith and fair dealing*, *goods*, *business*). She then explains how the Spanish translation process of the DCFR operated. It consisted of two stages: the first one, in which the main actor was a translation company which was able to meet the strict requirements of the European Commission and produced a first draft of the Spanish version; and the second one, in which law professors came into play, proof-reading the first draft. Jerez Delgado shared this task with private law professors, who were experts in each field of the DCFR and some of whom had been members of one of the translation teams constituted for the translation of the DCFR Books. As coordinator of the translation, Jerez Delgado read the Model Rules and intervened to achieve greater coherence. After that, the proof-readers, one for each of the ten Books of Commentaries, could refer to the final version of the Model Rules. Consistency between the different translations of the DCFR was not one of the Spanish team's goals, although as in the Italian experience, the Spanish team took into account translations into other languages to make decisions in difficult cases.

4.2 Drafting the CESL. The DCFR in turn served as the primary reference text for drafters and translators of the CESL: hence the chapters in this sub-Part 3 of the volume focus on the “transition from the DCFR to the CESL” in order to verify if there is continuity between the instruments, whether the European Commission effectively used its ‘tool-box’, the DCFR, in drafting the CESL.

The history of the CESL cannot be recounted here; much relevant information can be found in articles in European law reviews, some of them, for example, critical of the unusual structure of the Regulation, consisting of 16 articles, while the substantive rules on CESL are laid down in 186 articles in Annex I. However, the procedural steps that led to the final text and the translation process in itself are worth noting.

In 2011 the Commission proposed a Regulation on a Common European Sales Law. The CESL will be an opt-in instrument that businesses and consumers will be encouraged to choose only if their rights, obligations and remedies are clear and predictable. It will remove legal barriers to cross-border sales of goods, supply of digital content and related services. To this end, it aims at creating a uniform set of contract law rules applicable to distance contracts, available to businesses and consumers in all EU languages, which should be interpreted *without* reference to national law and traditions.

As an ‘autonomous’ instrument of European uniform law, the CESL will go beyond harmonization or, to put it more precisely, it will by-pass harmonization. Unlike Directives, the CESL will have direct effect in all Member States without

transposition into national law, and unlike other Regulations, it will not require amendments to national law, but it will *co-exist* with the pre-existing rules of national contract law. Thus, definitions of legal concepts and terminological choices play a strategic role in the process of its translation into the 24 official language versions, the EU being built on the principle of the equality of all of its official languages. Once enacted, it will function as a second contract regime which should be identical throughout the Union and exist alongside the pre-existing rules of national contract law, a sort of “first trans-national legislative instrument” to be enacted in the area of private law in Europe (Baaij, in this volume). For all these reasons, legal certainty will play a key role in determining the success of the optional CESL (Šarčević and Bajčić, in this volume). Legal certainty is to be guaranteed both by good technical and stylistic choices, and by legal translation into the EU official languages as well.

The CESL was drafted by the Commission Expert Group on European Contract Law, after the Feasibility Study Draft revised by the EU Commission itself, on the basis of recommendations submitted by stakeholders (any individuals, group of people, institutions or firms that may be affected by the outcomes of the EU projects and reforms) and legal experts. All these preparatory works were drafted and discussed in EU-English. In light of the high political priority of the CESL, the text was edited and revised several times before entering the translation phase.

The entire legislative process for the adoption of the Regulation on CESL is described by **Manuela Guggeis (Chapter 14)**, Head of Unit of the Quality of Legislation Directorate, Legal Service, Council of the European Union. As she explains, the creation of the different linguistic instances of an European legal instrument is a process performed at different stages by independent agents that, step by step, change the text until it reaches its final form. To ensure high quality and reliability of the translations, a number of lawyers were assigned to the translation teams. DG JUST organized training sessions for the translators and revisers, and special reference materials were prepared. The latter included comparative tables for each article of the draft CESL listing the corresponding paragraphs of the relevant reference texts: the DCFR, the PECL, the UNIDROIT Principles and the CISG. Annotated source texts with professional comments on the substance were also provided, as well as annotations indicating the origin of different parts of the text, that is whether the wording was new or had been taken from sources such as the DCFR, the Consumer Rights Directive 2011/83/EU, the UNIDROIT PICC, and the CISG (see also Šarčević and Busch, in this volume). Following the approach to language already adopted in the DCFR, and tested before with the PECL, the drafters of the CESL sought to use a meta-language with uniform concepts expressed in ‘neutral’ terms detached from national legal systems and cultures to the greatest extent possible (see also Dannemann, in this volume). As in the DCFR, the use of descriptive language – which “can be easily translated without carrying unwanted baggage with it” (Sefton-Green, cited in Šarčević) – was encouraged. However, as argued in the first Part of this book, even neutral-sounding words carry conceptual baggage: for instance, generic English terms have diverse connotations for jurists from different

jurisdictions using different languages and are, therefore, translated differently in the various EU languages.

The other contributors to this third Part handle specific issues. **Onofrio Troiano (Chapter 15)** deals with the concept of *mixed-purpose contracts* expressed in Art. 6, Annex I-Reg. CESL. According to Troiano, this is not a common law legal concept: it is a completely new European legal category translated into EU-English; indeed, contrary to the common law legal tradition, only in civil law countries (and in Italian law) could translation of the words *mixed-purpose contracts* make sense (in Italian law *contratti misti*). In his conclusions, Troiano suggests that the European legislature should avoid the use of national legal categories, although this radical solution would not prevent some inconsistency in European provisions. As expected, translation involves interpretation and a sound understanding of the text to be translated. To this end, European institutions (legislature and judges) use ‘guidelines’ (definitions) for the interpretation of EU legal concepts; but it is also necessary a sound understanding of how much legal concepts depend on well-consolidated national legal concepts.

Elena Ioriatti (Chapter 16) focuses on the definition of *obligation* contained in Art. 2, γ) Annex I-Reg. CESL, according to which an obligation is “a duty to perform which one party to a legal relationship owes to another party”. In the case of the CESL, concrete, contextualized definitions are included in a European legal text: they are meant to define only the terms used in that text and avoid reference to meanings inferable from other legal texts. The goal is the uniformisation of sales contracts, to obtain a generally applicable legal instrument, as opposed to individual directives or usual regulations. The definitions given in Art. 2, Annex I-Reg. CESL carry more weight than those usually formulated in other European legislative acts: they will not only provide a guide for legislators drafting future EU acts, but will strongly influence the interpretation of EU acts already in force, because of their collocation and because they are intrinsically general, abstract terms, destined to define the scope of legal categories. Ioriatti investigates whether the definition and the legal meaning of *obligation* in four language versions (German, French, Italian and English) coincides with the terminology of the European *acquis*, where the term *obligation* does not refer to a general category. In this case, the definitions cease to increase clarity and actually make interpretation more difficult, giving a false homogeneity to matters which should remain distinct.

Jacqueline Visconti (Chapter 17) offers examples of comparative textual analysis of the CESL in four language versions (English, French, German, Italian) in the realm of modality and modal verbs after having defined her theoretical framework for the analysis. Like Ervas, she considers interpretation as the result of inferential processes, which take linguistic meaning as a point of departure and enrich it with further information. This information originates in three main components: (i) the co-text, that is the surrounding text; (ii) the enunciative context, that is the physical context in which the text is produced; (iii) the encyclopædia, that is the interpreter’s store of knowledge and beliefs. On this theoretical background, Visconti deals with prepositions and connectives, whose meaning is primarily “procedural” in nature

and which are also called “function” words. These expressions (such as *anyway, so long as, even, may must, shall*) can be seen as the “scaffolding”, or the “glue” of a text. Rather than conveying concepts (the typical function of nouns and other “content” words), the primary role of “function” words is to provide indications on how to combine and process the concepts expressed by nouns or adjectives.

5. In our opinion, the essays included in the third Part confirm the general points raised in the first Part, and highlight some issues of theoretical interest, where further research could well be developed. One of them is that while translation theories usually consider translation as performed by a single agent, the production of EU legal multilingual texts shows that the legal translation enterprise is performed by a number of agencies and agents. This fact is of some consequence in interpretation of the translated text.

On the presumption that a legal text has been enacted as a tool to be concretely applied, its interpreters are authorized to add to its literal surface as much meaning as is necessary to make it operative. This addition may consist either in context-driven adjustment of the concepts occurring in the normative text (narrowing or loosening their range of meaning, for instance) or in context-driven production of *implicatures*, namely in the addition of (ranges of) possible additional information to the normative text in order to make it fit for purpose. In order to produce this addition, interpreters may use, as a lever for interpretation, the argument of the *intention of the legislature*. This intention is functionally built to fit the interpreters’ purpose because the legislature is a collective agency (in the case of EU, it is a jointly-run process between the Commission, the Parliament, the Council, and the national Parliaments or Governments which often have to adopt transposition measures): its specific communicative intention cannot be determined. This result is less dramatic for the ‘checks and balances’ theory than it might appear. Interpreters, indeed, must follow interpretive arguments accepted by the legal community, either by respecting the rationale for these legal texts deducible from preparatory works, or by complying with the literal meaning of the text, or by instantiating a particular social ideal (past or present).

The process of *enrichment* of a text becomes more complex when it cannot be referred to *one* original text, but has to cope with the principle of equal authenticity of the different language versions, as in the case of European interpretation of multilingual normative texts. In interpretation of these texts, the process of enrichment is driven, among other things, by the principle of equal authenticity of the different language versions. This means that interpreters can use another lever for interpretation. By taking for granted that the translator of a particular linguistic version of the text had the communicative intention of producing a version as equal as possible to its counterparts in the other languages, the interpreters can add any information required to make it so.

Thus, in the necessary comparison between the different authentic versions of a European legal text the argument of the *translator’s communicative intention* emerges as one of the parameters according to which the meaning of the multilin-

gual normative text can be shaped. Again, the specific communicative intention of the translator, given the number of agencies involved in the translation process, cannot be determined, and then again interpreters can shape this intention in a way functional to their purposes.

In fact, as the chapters in this volume show, the European principle that all the versions of a multilingual legislative instrument should have the same meaning may be accomplished also through translation choices related to the aspects of meaning to be maintained as 'equivalent' as possible to their counterparts in the other authentic languages. Hence, the interpreters of European legal texts may build their interpretation shaping the translator's communicative intention as respecting different aspects of meaning. Depending on the question to be adjudicated, interpreters may strengthen their interpretation assuming that the translator chose terms with a meaning that was either functional to the goal the legislature had in mind when the multilingual text was enacted (whether this happened or not), or functional to the goal a rational legislature would have had. Again, this interpretive freedom is strongly limited by the axiological foundations accepted by the European legal community. If the translator's communicative intention, as it seems, constitutes one of the possible levers that interpreters of EU law can resort to for enriching the meaning of these multilingual normative texts, a question arises: whether the complex processes through which legal translations are done should not be recorded and be made fully accessible.

Another consequence of this peculiar 'margin of appreciation' that EU judges have is that, as Engberg (this volume) remarked, translators' strategic choices – however good they may be – cannot on their own guarantee the sort of inter-lingual stability of meaning aimed for in multilingual legal instruments. In fact, the implementation of European rules is left to Member States' courts, which interpret those rules. Only when necessary, their interpretation is reviewed by the CJEU through the preliminary ruling mechanism (Art. 267 TFEU): even in this case, however, EU judicial activity cannot guarantee uniform interpretation and application, since it is not carried out by a single hierarchy of judicial officers, and the CJEU is not a trial court. This highlights the importance of enhancing interaction between the different legal communities composing the EU (starting from the interpersonal communication among members of the social group of judges), to limit differences in interpretation that national courts unavoidably develop in their domestic adjudication processes.

6. The fourth Part of this book – *Selected Materials* – contains a selection of both the DCFR and the CESL rules (in English, French, German, Spanish and Italian). This material encouraged the contributors to discuss the issues on a concrete basis, drawing examples from vague or complex words or expressions used both in the multilingual versions of the DCFR and in the CESL, either as a concrete starting point for their contribution or, when the contribution is more theoretical, as examples in support of their argumentation. This has been extremely helpful for

discussion and communication among the different fields involved in our project of making a new European culture.

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