

TRANSLATIONAL CREATIVITY: TRANSLATING GENRE CONVENTIONS IN STATUTES

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A long-established approach to legal translation focuses on terminological equivalence making translators strictly follow the words of source texts. Recent research suggests that there is room for some creativity allowing translators to deviate from the source texts. However, little attention is given to genre conventions in source texts and the ways in which they can best be translated. I propose that translators of statutes with an informative function in expert-to-expert communication may be allowed limited translational creativity when translating specific types of genre convention. This creativity is a result of translators adopting either a source-language or a target-language oriented strategy and is limited by the pragmatic principle of co-operation. Examples of translation options are provided illustrating the different results in target texts. The use of a target-language oriented strategy leads to target texts that contain genre conventions expected by the target audience and at the same time retain the substantive legal contents of source texts. This, I argue, results in translations that are both factually and conventionally correct seen from the point of view of the intended target audience.

1. INTRODUCTION

Translating legal texts has long been regarded as a process with little room for creativity. The substantive legal contents of source texts must not be sacrificed to give way to elegant, but factually wrong prose. This well-established approach to translation supports the notion of the sanctity of source texts, which is particularly dominant in interlingual expert-to-expert communication in the field of law. However, advances in translation research during the last couple of decades have led to an increased focus on target texts so that the relationship between source and target texts has become more balanced. Some of these findings may also be extended to legal translation and their impact is relevant for novice as well as seasoned translators.

Translational creativity does not mean that translators are free to do anything they like. In translating legal texts, translators may have restricted freedom to choose

between a limited number of options in appropriate circumstances. At a very general level, legal translators operate with three focal points: terminology, linguistic structures, and textual conventions. Most of the literature on legal translation gives priority to equivalence of terms and some also discuss the structural differences in syntactic means available, e.g. Schroth (1986), de Groot (1988), Šarčević (1997) and Cao (2007) and some address creativity in legal translation Šarčević (2000) and Pommer (2008). However, contributions discussing the translation of textual conventions in legal texts and the options available to translators are few and far between, e.g. Nielsen (2000) and Martínez (2009). This paper examines the concept of textual conventions in statutes in expert-to-expert communication with a view to identifying verbal and non-verbal conventions with potential relevance for legal translation between the languages Danish and English. This involves a discussion of selected translation strategies and how they may allow translators to be creative without affecting the substantive legal contents of the message in the source text.

2. TEXTUAL CONVENTIONS ARE FEATURES OF TEXT GENRES

A hallmark of textual conventions is the concept of intertextuality. Textual units are only elevated to the class of conventions if they share characteristics with identical units in other texts that can reasonably be grouped together by applying various criteria. The concept of genre is helpful to place textual conventions in a general framework and they are often referred to as genre conventions to accentuate their affiliation with specific types of texts. Swales (1990, 58) offers a useful definition of genre:

‘A genre comprises a class of communicative events, the members of which share some set of communicative purpose. These purposes are recognized by the expert members of the parent discourse community, and thereby constitute the rationale for the genre. This rationale shapes the schematic structure of the discourse and influences and constrains choice of content and style.’

This definition is relevant for translators for two reasons. Firstly, one of the stages in the translation process is the analysis of source texts (e.g. Bell 2000, 62–75). Knowledge of genres is useful for translators so that they can classify their source texts into the various sub-genres of the overall legal genre. This knowledge allows them to recognise and identify specific textual conventions that are relevant for the practical translation tasks and without this knowledge translators would not be able to understand the message of the source text properly.

Secondly, both senders and receivers of the type of legal translations discussed in this paper are legal experts and they classify legal texts within different genres in law partly because they use and recognise schematic structures and style. Translators

are then involved because they facilitate communicative events in the legal discourse community and knowledge of genres and conventions in the source-language and the target-language becomes imperative. For the purpose of this discussion, the following definition applies:

Genre conventions are graphic representations of instances of language use that are set ways of writing accepted or believed to be accepted in practice by expert members of a discourse community in texts belonging to a specific genre or sub-genre.

Textual conventions that characterise genres vary from one genre and sub-genre to another. Asensio (2007, 52) highlights the importance of conventions in specialised translation by arguing that a genre can be described as a class of texts that is recognised as such by readers because these texts contain recognisable conventions regarding their structure and other linguistic elements and because they are produced in similar communicative situations. Some conventions are found in what may broadly be called the general layout of texts (sometimes referred to as the textual macrostructure) whereas others are part of individual words and phrases (sometimes referred to as the textual microstructure), and each culture and genre has its own way in which to realise the conventions.

Translators may find it helpful to identify conventions in the microstructure of source texts. This is, however, only a first step towards producing translations that conform to the conventions in the target-language culture without changing the substantive contents of the source texts. Knowledge about genre conventions is important as some conventions are shared by several genres, whereas others are only found in one genre. The relevance of this type of textual knowledge is recognised by translation scholars, for instance Eubanks (1998), who discusses genres in relation to LSP translation in general terms, and by Nord (2005, 22):

‘In order to be able to find out which text features are conventional and which are not, the translator needs comprehensive (intralingual or contrastive) descriptions of genre conventions.’

Legal translation students cannot be expected to be familiar with legal genre conventions in their own language let alone genre conventions in foreign languages and foreign legal genres. Even advanced students and experienced translators can be expected to know only some of the source-language and target-language genre conventions in relation to a few legal sub-genres. As pointed out by Audi (2003, 111) knowledge of conventions is empirical knowledge and therefore intralingual and contrastive descriptions of genre conventions must be based on observations of linguistic behaviour. It follows from this that knowledge of genre conventions is

not about words, but empirical knowledge about language use. Translators should therefore consider making such comprehensive descriptions of genre conventions by analysing texts from selected sub-genres within their native-language universe of legal discourse followed by similar analyses of texts from the same sub-genres within the foreign-language universe of legal discourse. By doing so, translators will have contrastive descriptions that can be useful when linked to the translation strategy adopted.

3. TRANSLATION STRATEGIES DETERMINE HOW TO TRANSLATE GENRE CONVENTIONS

The increased emphasis on target texts and their receivers in general translation studies directly affects legal translation. Source texts are no longer considered sacrosanct and the receivers' perception of target texts is an issue that has now come into focus. Faber, Hjort-Pedersen and Klinge (2002, 16–27) explain that two translation strategies are particularly relevant for legal translators. The source-language oriented strategy focuses on the semantic contents of the linguistic material and genre conventions of source texts with the result that recipients of target texts will immediately notice that the textual material and genre conventions in the translations differ from what they would expect to find in legal texts of the same genre written in the target-language culture. In contrast, the target-language oriented strategy borrows linguistic material and genre conventions from original texts in the target language. These original target-language texts must belong to the same genre as the source texts and the linguistic material and genre conventions that are borrowed must have the same pragmatic functions as those in the source texts. One advantage of this strategy is that translators will produce translations in which recipients will recognise familiar utterances and genre conventions. By adopting a target-language oriented strategy, translators would, therefore, seem to comply with the co-operative principle found in pragmatics:

‘Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged’ (Grice 1975, 45).

The cooperative principle assumes that parties to a conversational event co-operate in understanding the utterances made. The task of translators is to make utterances in one language understandable in another language and one way in which they can do that is to enter into some sort of co-operation with intended readers of the target texts. If this line of reasoning is accepted, the principle of co-operation has dual effect for legal translation. First of all, translators who choose to replace source-language conventions with target-language conventions, provided that this is at all acceptable in

a given situation, will comply with the pragmatic principle by co-operating with the readers of the translations. Furthermore, this pragmatic principle can be used to set the limits of translational creativity. The constraints imposed by the principle allows translators to select only those target-language conventions that will or are likely to be recognised and accepted by the readers of target texts that fall within the sub-genre concerned in a given communicative event. It is impossible to illustrate all potential options for translating genre conventions according to this principle, so the following discussion will be limited to selected examples from the legal sub-genre statutes involving translation from Danish into English.

4. GENRE CONVENTIONS IN STATUTES MAY BE TRANSLATED IN DIFFERENT WAYS

The imaginary brief may be summarised as follows. A Danish lawyer who is to make a presentation at a conference on sales law attended by Danish and British lawyers wants to prepare some handouts. The handouts contain excerpts from relevant Danish statutes. He wants the handouts to be translated into English so that the UK lawyers at the conference can understand the substantive legal provisions the Danish lawyer will present. This is thus a situation of expert-to-expert communication with experts from two different legal systems and cultures familiar with genres and conventions in their own system, culture and language. An important point to note is that any translation of Danish statutes will be non-authoritative and intended to have an informative function rather than resulting in legally binding documents.

Danish statutes contain a number of conventions which are always present in this genre. Statutes are divided into textual paragraphs called '*paragraffer*' and each '*paragraf*' is introduced by the symbol § followed by an Arabic numeral. This is illustrated in *Example 1*, which contains an excerpt from the Danish '*aftalelov*' (Contracts Act):

§ 5. Afslås tilbud, er det bortfaldet, selv om fristen for svar endnu ikke er udløbet.

Example 1. Excerpt from the Danish Contracts Act showing the use of genre conventions introducing '*paragraffer*' (Retsinformation 2010a). For an English translation, see *Example 2*.

Example 1 contains two conventions found in Danish statutes. First, the text starts with a non-verbal element, in this case the symbol §, and secondly, the symbol and the number are highlighted by the use of the integrated linear suprasegment boldface. These conventions function as signposts helping readers to find their way through statutory texts. Translators adopting a source-language oriented translation strategy will produce a translation like the following:

§ 5. If rejected, the offer lapses, even if the reply period has not yet expired.

Example 2. Source-language oriented translation of genre conventions introducing ‘*paragraffer*’ in Danish statutes.

Example 2 shows that the symbol § and boldface have been retained in the translation. However, translators who adopt the target-language oriented strategy will need to make a comparative study of genre conventions used in statutes in order to determine whether other options are available to them. In this case, the imagined target audience of the translation are lawyers in England and Wales. A look at English (i.e. United Kingdom) statutes reveals that statutory draftsmen use somewhat different genre conventions for the same functions as those identified in the Danish source text. *Example 3* shows the conventions in English statutes that match the Danish conventions.

16 Application to Crown

This Act applies to individuals in the public service of the Crown as it applies to other individuals.

Example 3. Excerpt from the Bribery Act 2010 showing the use of genre conventions introducing sections in UK statutes (Office of Public Sector Information 2010a).

English statutes are divided into textual paragraphs in the same way as Danish statutes, and these are called ‘sections’. *Example 3* shows that sections are not introduced by a symbol followed by a number but section 16 is introduced merely by an Arabic numeral. Similar to Danish statutes, English statutes use the integrated linear suprasegment boldface. Translators who wish to co-operate as much as possible with readers of their translations may elect to replace the Danish conventions with the English ones and thereby produce a translation like the following:

5. If rejected, the offer lapses, even if the reply period has not yet expired.

Example 4. Target-language oriented translation of genre conventions introducing ‘*paragraffer*’ in Danish statutes.

The translation in *Example 4* accentuates an important point, namely that a source-language oriented strategy adopted for the translation of the Danish genre convention does not sacrifice the substantive legal content of the statutory source text. The reason for this is that the comparative description of genre conventions has identified an English genre convention that is a functionally identical equivalent of the Danish convention. If comparative analyses of genre conventions reveal the existence of such matches, this finding allows translators to choose between the identified options. If

they elect the option in *Example 2*, translators can be said to co-operate with readers of the source text, whereas they co-operate with the intended readers of the target text if they elect the option in *Example 4*.

Danish statutes contain separate text parts other than ‘*paragraffer*’. Each ‘*paragraf*’ can be further divided into textual sub-paragraphs called ‘*stykker*’, which are introduced by the abbreviation *Stk.* followed by an Arabic numeral. This genre convention is illustrated in *Example 5* by an excerpt from the Danish ‘*købelov*’ (Sale of Goods Act):

§ 54. Har køberen ikke inden to år efter genstandens overgivelse til ham meddelt sælgeren, at han vil påberåbe sig en mangel, kan han ikke senere gøre den gældende, medmindre sælgeren har påtaget sig at indestå for genstanden i længere tid eller har handlet svigagtigt.

Stk. 2. Bestemmelsen i stk. 1 finder ikke anvendelse, hvis salgsgenstanden i henhold til et påbud fra en offentlig myndighed skal tilbagekaldes eller destrueres, fordi den udgør en fare.

Example 5. Excerpt from the Danish Sale of Goods Act showing the use of genre conventions introducing ‘*stykker*’ (Retsinformation 2010b). For an English translation, see *Example 6*.

The excerpt in *Example 5* illustrates the use of the text conventions discussed above and in addition the convention of using the abbreviation *Stk.* and a number to introduce the textual sub-paragraph. *Example 5* reveals that an integrated linear suprasegment is applied to this convention as well, but this time it is italics. This convention also creates signposts guiding readers through the texts. Translators adopting a source-language oriented translation strategy will produce a translation like the following:

§ 54. In any event, the buyer will lose his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were handed over to the buyer, unless the seller has provided a guarantee concerning the goods for a longer period or the seller has acted fraudulently.

Stk. 2. The provisions of stk. 1 shall not apply if a public authority has ordered the recall or destruction of the goods because they are dangerous.

Example 6. Source-language oriented translation of genre conventions introducing ‘*stykker*’ in Danish statutes.

In *Example 6*, the verbal element ‘*Stk.2*’ and italics have been retained even though this abbreviation is unknown to the intended target audience. Similarly, the abbreviation has been retained in the cross-reference to the provisions of sub-paragraph 1 and this

time without italics so as to match the source text. Again, translators adopting the target-language oriented strategy will have to examine the use of genre conventions in UK statutes in order to determine which options are available. An analysis of UK statutes reveals the use of functionally identical genre conventions that differ from those identified in the source text. *Example 7* contains conventions in English statutes that match the Danish conventions.

32 Restriction on deductions: interest or other financing costs

(1) No deduction is allowed for payments of interest or other financing costs by the permanent establishment to any other part of the non-UK resident company.

(2) But the restriction in subsection (1) does not apply to interest or other financing costs that are payable in respect of borrowing by the permanent establishment in the ordinary course of a financial business carried on by it.

Example 7. Excerpt from the Corporation Tax Act 2009 showing the use of genre conventions introducing subsections in UK statutes (Office of Public Sector Information 2010b).

Sections in UK statutes are divided into textual sub-paragraphs in the same way as Danish statutes, and these are called ‘subsections’. *Example 7* shows that subsections are introduced by an Arabic numeral inside round brackets. In contrast to the Danish example, this English convention does not contain an integrated linear suprasegments but an additive linear suprasegment, i.e. the brackets. Translators who wish to help readers of their translations may choose to replace the Danish conventions with the English ones and produce a translation like the following:

54.-(1) In any event, the buyer will lose his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were handed over to the buyer, unless the seller has provided a guarantee concerning the goods for a longer period or the seller has acted fraudulently.

(2) The provisions of subsection (1) shall not apply if a public authority has ordered the recall or destruction of the goods because they are dangerous.

Example 8. Target-language oriented translation of genre conventions introducing ‘*stykker*’ in Danish statutes.

The translation in *Example 8* demonstrates how it is possible to replace source-language genre conventions with target-language conventions and still retain the substantive legal content of the source text. Again, the comparative analysis of genre conventions has identified English conventions that are functionally identical to the Danish ones. This analysis also shows translators the conventional way of writing cross-references from

one subsection to another and the UK convention has been adopted in the translation: writing the full word ‘*subsection*’ and placing the number inside round brackets. Moreover, the use of the target-language oriented strategy entails the use of a genre convention in the target text that is absent from the source text. A closer examination of *Examples 5* and *7* shows that subsection 1 is explicitly indicated by a genre convention in UK statutes if the section contains more than one subsection, whereas subsection 1 is not indicated by a genre convention in Danish statutes. Translators who choose to add this genre convention may be said to establish cohesion in their target texts based on the principle of co-operating with the intended readers of the translations by taking the expectations and genre knowledge of the audience into consideration.

Both Danish and UK statutes are occasionally amended by the legislatures and this affects the use of genre conventions. A typical result of amendments to existing statutes is the incorporation of new provisions by way of sections that extend existing provisions. Such amendments are explicitly indicated in Danish statutes by conventional means, as illustrated in *Example 9*:

§ 77 b. Køberen kan ikke påberåbe sig en mangel, som køberen var eller måtte være bekendt med ved aftalens indgåelse, medmindre der er holdepunkt herfor i aftalen eller sælgeren har handlet i strid med almindelig hæderlighed.

Example 9. Excerpt from the Danish Sale of Goods Act showing the use of genre convention for amendments (Retsinformation 2010b). For an English translation, see *Example 10*.

The number of the amending section is immediately followed by the letter *b* to indicate that it is an amendment; the original section 77 retains its number unchanged. The Danish genre convention is thus to introduce the section by using the symbol § followed by an Arabic numeral which is followed by a letter in lower case. The number of the first amending section is followed by the letter *a*, the second by the letter *b* and so on. A source-language oriented translation would read as follows:

§ 77 b. The buyer may not rely on any lack of conformity that he knew or could not have been unaware of at the time of the conclusion of the contract unless supported by evidence in the contract or the seller acted contrary to the requirement of good faith.

Example 10. Source-language oriented translation of genre conventions for amendments in Danish statutes.

In *Example 10*, the verbal element ‘§ 77 b’ and boldface have been completely retained. If they want to adopt the target-language oriented strategy, translators have to analyse the use of genre conventions in UK statutes to look for possible options. An examination of UK statutes shows that UK legislators incorporate amending

sections into statutes in the same way as the Danish legislature does and that they use functionally identical genre conventions that differ slightly from those identified in the source text. *Example 11* contains the conventions in English statutes that match the Danish conventions.

5B Power to make regulations

(1) The Secretary of State may make regulations about proposals made in response to an invitation issued on or after the day on which the Sustainable Communities Act 2007 (Amendment) Act 2010 comes into force.

Example 11. Excerpt from the Sustainable Communities Act 2007 (Amendment) Act 2010 showing the use of genre conventions for amendments in UK statutes (Office of Public Sector Information 2010c).

Example 11 shows that amending sections in UK statutes are introduced almost in the same way as in Danish statutes, i.e. by placing a letter after the number of the section and using boldface. In contrast to the Danish convention of using lower case letters, UK legislators use upper case. Translators who wish to adopt a target-language oriented strategy may choose to replace the Danish conventions with the English ones and produce a translation that reads as follows:

77B. The buyer may not rely on any lack of conformity that he knew or could not have been unaware of at the time of the conclusion of the contract unless supported by evidence in the contract or the seller acted contrary to the requirement of good faith.

Example 12. Target-language oriented translation of genre conventions for amendments in Danish statutes.

Whether the best solution is to retain the genre conventions found in source texts or to adopt the conventions of the target language depends on the translation strategy and the function of target texts. Translators who replicate the Danish genre conventions functioning as signposts when translating statutes into English will produce target texts that may be factually correct but which do not conform to the conventions used in UK statutes. The adoption of a source-language oriented translation strategy will be noticed by English readers and clearly mark target texts as foreign at the level of the types of convention discussed above. If translators use a target-language oriented strategy and adapt their translations to include the relevant English genre conventions functioning as signposts, English readers will find the expected conventions and on that basis classify the target texts as belonging to the correct genre or sub-genre. In such cases, the target audience will regard the translation as both factually and conventionally correct. Depending on the function of the target text according to the translation

brief, the source-language or the target-language oriented translation strategy, or a combination of both (as illustrated above), will be the appropriate one, and this will in turn determine the use or non-use of target-language genre conventions.

4. CONCLUDING REMARKS

Legal translators do have some creative latitude when it comes to the translation of genre conventions. This may be seen as one of the little joys of legal translation. The creative freedom is subject to two important caveats. The first one applies to the target language and is only relevant in some cases. English exists in several variants and the above discussion only applies to the English used in UK statutes. Whether the resulting translations would look the same if the target language had been US English or ‘international’ English may be the subject of another study. Secondly, the substantive legal content of source texts must not be sacrificed to give way to elegant, but factually wrong prose. In addition to the communicative situation, three factors are essential to the successful completion of any translation of legal texts: terminology, textual conventions and linguistic structures. These factors are important for experienced as well as inexperienced translators. Legal translation should not exclusively focus on terms, but translators should learn to identify some of the elements surrounding the terms and to deal with them appropriately. An acceptable legal translation is not one in which all the terms have been translated correctly but the rest of the text is grammatically, idiomatically and stylistically wrong. An acceptable legal translation is one that contains correctly translated terms, utterances that have been translated correctly according to their pragmatic function, and textual conventions that are familiar to the intended readers of target texts and conform with target-language genre conventions.

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KŪRYBIŠKUMAS VERTIME: ĮMONIŲ ĮSTATŲ ŽANRO KONVENCIJŲ VERTIMAS

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Santrauka

Vertimo teoretikai ir teisės tekstų vertėjai jau seniai daug dėmesio skiria dviejų teisės sistemų, į kurias reikia atsižvelgti verčiant iš vienos kalbos į kitą, terminų atitikimo problemai. Neužtikrintumas šioje srityje verčia vertėjus kuo labiau laikytis originalo kalbos teksto, todėl dažnai kyla pavojus, kad vertimas bus pažodinis, neatitiks vertimo kalbai keliamų reikalavimų. Neseniai pasirodė vertimo problemas nagrinėjančių mokslininkų straipsnių, kuriuose teigiama, kad net ir verčiant teisės tekstus galima tam tikra kūrybinė laisvė. Tačiau iki šiol beveik neaptartos originalo kalbos žanrų konvencijos ir tai, kokias strategijas vertėjai galėtų panaudoti jas perteikdami kita kalba. Verčiant įmonių įstatus sukuriamas tekstas, kurio svarbiausia funkcija yra perteikti informaciją profesionalams, gerai suprantantiems verčiamo teksto turinio subtilybes, bet vertėjui lieka mažai kūrybinės erdvės perteikiant specifines šio žanro konvencijas. Šiuo atveju kūrybiškumas tiesiogiai priklauso nuo to, ar pasirenkama į originalo kalbą, ar į vertimo kalbą orientuota vertimo strategija, o kūrybiškumo laipsnį gali varžyti pragmatikoje minimas „bendradarbiavimo principas“ (angl. *co-operative principle*).

Straipsnyje pateikiami Danijos įmonių įstatų žanro konvencijos vertimo pavyzdžiai rodo, kokias pasirinkimo galimybes turi jų vertėjai ir kokie skirtingi gali būti šių strategijų panaudojimo rezultatai. Geriausias rezultatas pasiekiamas tada, kai pasirenkama į vertimo kalbą orientuota strategija ir laikomasi tų žanro konvencijų, kurių tikisi vertimo adresatas, bet kartu išlaikomas originalo kalbos teksto teisinis turinys. Tik tokiu atveju vertimas pasiekia tikslą: vertimo adresatas priima išverstąjį tekstą kaip faktiniu ir žanriniu atžvilgiu teisingą.