
AGREEMENT TEXT CONTRASTIVE ANALYSIS: ENGLISH VS RUSSIAN

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

Key words: commercial agreement/contract, contrastive analysis of an agreement, date of execution, determiners, force majeure, legal discourse, negation, performative verbs, preamble, warranties, whereas clause

Recent years have witnessed a burst of attention to legal translation within Translation studies due to greater market demand, fueled by globalization, on-going expansion of the European Union, influx of international corporations on the domestic market, mergers and acquisitions, franchising, increased mobility of people involved in business and unprecedented development of information technologies where English is the language of communication. All these have determined the focus on quality translation of legal texts of different genres central of which is an agreement as an instrument of doing business in various fields of activities.

Contracts and agreements are the written texts where language plays a crucial role. Wrongly interpreted terms and conditions may lead to a breach of contract with serious consequences, so accuracy in translation of legal agreements is of prime importance. Translation of these instruments is also concerned with the laws of the specific country of the translation's target language. This forms the requirement for adequate translation, valid and usable as the original document in legal and official matters and clear to the targeted reader.

The focus of this work is a commercial agreement as one of the genres of legal discourse. As a matter of fact translation practice unveils numerous substantial incongruities between Anglo-Saxon and Russian traditions of laying out an agreement (structure and content) and the approaches to the legal language domain (culture and legal practice). In fact the common law lawyers are of the opinion that the meaning and effect of an agreement should be determined solely from the words of the text itself but not from any external evidence [7]. This determines the textual or literal approach as the basic method of interpretation which contrasts with the method accepted in civil law jurisdictions (so called purposive or teleological approach). It is

based on the idea that the meaning and effect of an agreement should be determined by taking account of its object and purpose and the intentions of the contracting parties. The effect is that common law lawyers draft contracts in a way that seeks to cover any possible thing that might go wrong, no matter how remote. This results in long and semantically complicated texts of the document. Another reality that adds to the problem is that many common law countries have lightly regulated free-market economies in which parties' freedom to contract is not much effected by laws. Thus the emphasis is made on remedies and dispute resolution methods to be specifically agreed between the contracting parties [7. P. 95].

Title: Contract or agreement?

The first challenge in translating this type of instrument is which term is more appropriate contract or agreement.

The description of the terms agreement and contract in legal sense given by different dictionaries of common English suggest that they are synonyms, compare:

– agreement — an arrangement, a promise or a contract made with sb (Oxford Advanced Learner's Dictionary)/ a settlement, esp. one that is legally enforceable (Collins English Dictionary);

– contract — an official written agreement (Oxford Advanced Learner's Dictionary)/a formal agreement between two or more parties; a document that states the terms of such an agreement (Collins English Dictionary).

However the Oxford dictionary of law links the term agreement with international law (treaty) while strengthening the legal aspects of contract as a binding agreement. The same emphasis is laid in the definition of this term in Garner's dictionary of legal usage (compare: A contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The key elements of a binding agreement are: offer and acceptance, consideration, intention of the parties to create legal relations, capacity to contract, and formal legal requirements. Strictly speaking if all of these requirements are met the document is recognized as a contract.

Moreover close analysis of the material suggests that these terms are both used in the sense of a formal agreement between two or more parties in documents of commercial character. As for the Russian language it is taken as mistake to translate contract as контракт irrespective of the context. Russian laws employ the term контракт if it is an international arrangement or state treaty whereas the term договор is used when referred to the arrangement between legal entities [11. P. 44]. Compare: commercial agreement/contract — торговое соглашение; agreement/contract of unlimited/indefinite duration — долгосрочный договор; agency agreement/contract — договор поручения/агентский договор; service agreement/contract — договор оказания услуг; employment agreement/contract — трудовой договор; sale agreement/contract — договор купли-продажи; rental agreement/contract — договор аренды; distributor/distribution/distributorship agreement/contract — дистрибьюторский договор; export agreement/contract — экспортный договор. As a matter of observation we can suggest that British lawyers tend to refer to the term agreement whereas American attorneys prefer the term contract to speak about the same types of legal instruments. Thus we would advise to keep the targeted reader in

mind when translating such written documents. Another tip is: be consistent and use only one of these terms throughout the document thus avoiding ambiguity.

Commencement & Preamble:

On the one side/on the other hand?

Russian and English traditions of laying out the preamble of an agreement are different in many ways. First of all this refers to the introduction of the parties to the agreement structured with the help of с одной стороны/с другой стороны pattern. The common English equivalent is on the one part/side/hand and on the other part/side/hand which seems to fall out of the accepted legal English formula, compare:

This agreement dated _____, is made By and Between _____, whose address is _____, («Company»), AND _____, whose address is _____, («Consultant.»)

This section usually sets out the full names and postal addresses of all the parties and may specify a shortened name which will be used throughout the document. This is in line with the Russian legal practice.

Date of execution

Certain attention should also be given to the reference to the date of executing an agreement, which is often worded as follows:

AGREEMENT made this 20th day of March, 2013, by and between _____, whose address is _____, hereinafter referred to as the «Consultant», and _____, whose principal place is _____, hereinafter referred to as the «Company».

Most of translations from Russian ignore these essential conventions; however it is significantly contributing to the formality which is one of the key features of this type of legal discourse.

Whereas clause

In case the contracting parties wish to give some additional information such as identities, interests and relations to one another, and the overall object of the agreement, reasons for the execution of the agreement or its interdependency with other agreements (if any) it can be addressed in a preamble. Traditionally each fact given in this part of an agreement is prefaced in US contracts with a whereas clause (compare: WHEREAS, First Party is engaged in the manufacture of products described on Schedule A (the «Products»); WHEREAS Second Party is engaged in the business of marketing, selling and distributing products within [Country] (the «TERRITORY»); and WHEREAS First Party desires that Second Party market, sell and distribute the Products in the Territory). However this technique has been severely criticized as contributing to legal formalism that clutters legal documents.

Practicing lawyers and translators suggest placing such information in a separate section headed «Recitals» and arrange it as traditional paragraphs with grammatically complete sentences rather than several clauses with Whereas (ex.: This agreement is made with reference to the following facts./The respective Boards of Directors of ___ Corp., and Conglomerate have approved the merger of ___ Corp. with and into Conglomerate (the Merger) upon the terms and subject to the conditions of this Agreement and in accordance with the...).

This section is practically non-existent in Russian drafting however the information given can generally contribute to better understanding of the circumstances and the roles of the parties. Thus this tradition should be taken into consideration if it is an agreement with a western company governed by common law.

The/this/other determiners

The general rule of translating the defined terms of an agreement is that they should be capitalized and used with the definite article or determiner this/these, ex., the Joint Venture, this Agreement, these General terms and conditions, etc. This however does not include the names of the parties. Both in British and American commercial documents you can come across the names of the parties to an agreement which are not highlighted with the definite article (compare: These general terms and conditions apply to all proposals and quotations submitted by Seller, to all purchase orders received by Seller, and to all goods and services sold by Seller, except as otherwise specifically provided in a document issued by Seller; Seller's actions in reliance on Buyer's oral acceptance of a written or oral quotation, or Buyer's receipt of the Goods, will constitute a binding contract under the terms of the Agreement.)

Other determiners or modifiers irrespective of how vague they might be are also very common throughout the legal texts both in English and in Russian, ex.: любое положение настоящего Соглашения/any aspect of this Agreement/any provision contained, оплатить такие убытки/pay such loss; если такое неисполнение вызвано обстоятельствами непреодолимой силы — if such non-fulfillment is caused by the circumstances of force-majeure).

Operative provisions

Performative verbs

The operative provisions begin with a clause stating that the agreement is reached between the parties. The force to it is given with the use of a performative verb which can be: agree, promise, undertake, commit oneself to, but not is obliged to widely used in translations from Russian (better: have an obligation to do sth), ex. Стороны берут на себя следующие обязательства по настоящему Договору/The Parties to this Agreement, intending to be legally bound, agree as follows ...; Стороны заключили настоящий договор о следующем — NOW IT IS HEREBY AGREED by and between the parties as follows ...

Definition by extension/intention

The prime rule of avoiding ambiguity in the legal writing determined the technique of numerous definitions in any business arrangement. A definition is given for each term which the drafters of an agreement wish to be interpreted in a court of law in a certain way. In other words definition is a «means of maximising consistency of terminology and fixing the meaning of words» [9. P. 96]. Examples may include: Авторизация — разрешение, предоставляемое Банком для проведения операций с использованием карты (реквизитов карты) и порождающее обязательство Банка по исполнению распоряжений, составленных с использованием карты (реквизитов карты); «Agriculture» means research, development and commercialisation of plants, terrestrial animals, products derived from plants or terrestrial animals, or micro-organisms, which are used for food, feed, fiber, or ornamental purposes.

Definition may be provided in accordance with either of the logical categories of extension or intension [2]. Thus, a definition by extension specifies the individual categories or subtypes described by a generic term, ex., expenses include costs, charges and necessary outlays ...; Клиент — физическое лицо, заключившее с Банком настоящий Договор путем присоединения к нему. Если не установлено иное, под Клиентом также понимается Представитель Клиента, Вноситель, Вкладчик и Держатель).

On the contrary, definition by intension reduces the possible range of senses or connotations in which the given term is to be understood in the particular context, ex., «Effective Date» shall mean the first date on which You enter into this Agreement in accordance with the first paragraph set forth above. «Расчетный период» — календарный месяц с 00 часов 00 минут первого числа до 23 часов 59 минут последнего дня того же календарного месяца, в котором были оказаны Услуги по Договору на предоставление услуг связи.

Generally speaking definitions comprise the substantive part of an agreement as they determine the scope of meaning that certain words and phrases shall have. According to Heigh's rules of interpreting agreements «when a list of specific items is not followed by general words, it is taken as exhaustive. For example, 'weekends and public holidays' excludes ordinary weekdays [7 P. 96]. Heigh also outlines the possible problems that may arise with definitions when:

- 1) the defined word or phrase is used in the agreement in a different sense to the one in which it is defined;
- 2) the definition is too vague, so that the exact meaning is unclear and depends upon the parties' interpretation;
- 3) the definition is too narrow, in which case it can lead to absurd or unintended meanings in certain contexts;
- 4) a term is defined to be used only once in the agreement;
- 5) the definition contravenes the golden rule of drafting never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning [7].

In case translators recognize these weak points of the document it is their duty to indicate them to the client/drafter. This rule is included in most of the codes of translators/interpreters' ethics in Western countries as it reduces the risk of court involvement which both the drafter and translator are seeking to avoid.

Representation and warranties

This section of commercial agreement sets out any matters of fact given as guarantees by one contracting party to the other. Such assurances may include facts concerning the quality of the goods sold or the services rendered the rights of the parties, and the legal frame of the agreement. A warranty is regarded as a contractual promise a breach of which can have serious legal consequences, for example the innocent party may claim damages. Ex., Seller warrants to Buyer only, subject to the disclaimers and limitations of the Agreement, that Goods to the extent manufactured by Seller shall be free from defects in materials and workmanship, excluding design, at the time of delivery.

Negation

The section of representation and warranties in a commercial agreement is another pitfall of legal translation for a number of reasons. The challenge is dealing with legal

norms and legal provisions difficult to follow doubled by the complexity of syntax and logical links within the discourse. Like no other part of this instrument, 'representation and warranties' introduces rules employing various forms of negation, compare: no agent, employee, or representative; the Goods not contained in the Agreement; unless an affirmation, waiver, representation, or warranty is expressly included within the Agreement; it is not a part of the basis of the Agreement and it is not enforceable; under no circumstances shall the warranty period extend beyond 12 months, etc.

Excessive negation can have its reason in terms of law, but it certainly creates difficulties testing the translator's skills in rendering the legal ideas into the targeted language. Abundant use of formal set phrases together with negative linguistic elements heavily contribute to the rhetoric effect which is not always appropriate in the target language. The tip for clear and at the same time precise rendering of the clause is to find the right balance between the legal idea and the form of its expression familiar for the targeted reader. Compare: Under no event shall the Seller be liable for any consequential damages of any nature./Продавец не несет ответственность за предсказуемые косвенные убытки любого характера.

Boilerplate clauses

Boilerplate provisions are standardized clauses that relate to issues of how the agreement words rather than the essence of the deal itself. Even though they are placed in the back of the document, these provisions are very important. Among others they include such clauses as arbitration, choice of law, jurisdiction, waiver, severability, confidentiality, language, etc.

Force majeure

A force majeure clause is a provision allowing the parties to suspend or terminate their obligations under the agreement when certain events beyond their control arise thus making performance commercially impracticable, illegal, or impossible. This is the provision most scholars keep in mind when referring to complex syntax, repetition and abundant descriptive phrases as one of the key features of legalese. Compare: In case of the Force Majeure circumstances (unforeseen, unpreventable or uncontrolled circumstances) as a result of which the parties are unable to fulfill their obligations under the present Agreement, the party affected by such circumstances shall be released from further fulfillment of its obligations if such party immediately but no less than 10 days upon conference of such circumstances informs the other party in writing about such circumstances and provides documents confirming the conference of such Force Majeure circumstances.

As the agreement has to provide for various possible situations, factual scenarios and rules of performance in circumstances beyond control, it results in the language rich in syntactic indicators of condition and hypothesis. As a matter of fact they can be positive (if, in case, when, wherever, in the event of, should and many others) or negative (should not, otherwise, unless, but for, except as, failing and so on) but used together within a long sentence they may cause difficulties in translation. Practice oriented authors advice translators to be 'especially vigilant to ensure that they deal adequately with complex conditions, which may include double or triple hypotheses and mix positive with negative possibilities' [2. P. 20]. Compare: Any delay or failure in the

performance by either Party hereunder shall be excused if and to the extent caused by the occurrence of a Force Majeure. For purposes of this Agreement, Force Majeure shall mean a cause or event that is not reasonably foreseeable or otherwise caused by or under the control of the Party claiming Force Majeure, including acts of God, fires, floods, explosions, riots, wars, hurricane, sabotage terrorism, vandalism, accident, restraint of government, governmental acts, injunctions, labor strikes, other than those of Seller or its suppliers, that prevent Seller from furnishing the materials or equipment, and other like events that are beyond the reasonable anticipation and control of the Party affected thereby, despite such Party's reasonable efforts to prevent, avoid, delay, or mitigate the effect of such acts, events or occurrences, and which events or the effects thereof are not attributable to a Party's failure to perform its obligations under this Agreement.

Testimonium

Testimonium includes signature, date and execution. The number of copies of the agreement and who witnessed its signing can also be mentioned.

In witness whereof

Witnesses are not required to sign the document for most types of agreements but the signatures of the contracting parties are crucial. Though severely criticized by the advocates of the Plain English the archaic phrase *in witness whereof* (в подтверждении вышеизложенного; в свидетельство чего) can be found in the many formal instruments. Compare: IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written. Signed, sealed and delivered in the presence of... .

The phrase *in witness whereof* is considered to be the tribute to long going tradition originated in Law French however it has lost its primary meaning of 'those present, who may or may not sign the document, attest to its validity'. Thomas R. Haggard calls the cliché an 'antique phrase' and notes that «nothing has contributed more to the bad reputation of legal writing than these archaic terms» [8]. Other examples of equally entranced clichés are: Know all ye men by these presents...; I have hereunto set my hand and caused the seal of...to be affixed...and This Indenture doth witnesseth.

As a recommendation for translation from Russian into English we would suggest avoiding the use of old-fashioned phrases of the above mentioned nature. After all the aim of the translator is to render the document expressly in a simple and clear language. The extremes of legalese in the targeted text would be taken as unnecessary switch to pompous style uncommon in the original language.

In conclusion we would like to offer some general guidelines which can contribute to the successful interpreting of agreement as one of the genres of legal discourse.

1. Do not translate the document unless you read it as a whole. Thus you will have a clear idea about each part of agreement and the entire document.
2. Be sensitive to observe the legal and language traditions of the targeted language without going to extremes (such as legalese).
3. Be consistent in following either British or American variant of English throughout the document.
4. Use the same terms to give the specific meaning throughout the text of the agreement. Change of term will signal the change of meaning.

5. Express ideas in clear language guided by correct grammar and syntactic organisation. Avoid excessively long sentences that may mislead the targeted reader.

6. Refer to statutes and other legal literature for better understanding of the technical words both in source and targeted texts in order to interpret the document accurately.

REFERENCES

- [1] *Adams K.A.* A Manual of Style for Legal Drafting (3d ed.). — American Bar Association, 2013.
- [2] *Alcaraz V.E. & Hughes B.* Legal Translation Explained. — Manchester: St. Jerome, 2009.
- [3] *Darmstadter H.* Here of, There of, and Everywhereof: A Contrarian Guide to Legal Drafting. — American Bar Association, 2008.
- [4] *Espenschied L.E.* Contract Drafting: Powerful Prose in Transactional Practice. — American Bar Association, 2010.
- [5] *Garner B.A.* Dictionary of Modern Legal Usage (3d ed.). — Oxford University Press, 2011.
- [6] *Garner B.A.* Legal Writing in Plain English. — University of Chicago Press. Chicago, 2001.
- [7] *Haigh R.* Legal English (2d ed.). — Routledge-Cavendish, 2009.
- [8] *Haggard T.R.* Legal Drafting: Process, Techniques, Exercises. — West, 2003.
- [9] *Ingels M.* Legal English Communication Skills: Introduction to Writing Skills and Vocabulary Acquisition for the Legal Profession. — Belgium: ACCO, 2006.
- [10] International standby practices («ISP 98»). ICC Publication № 590, 1998.
- [11] *Popov E.B.* Peregovod v sfere dogovornogo prava. — Orenburg: OI MGJuA, 2009.

КОНТРАСТИВНЫЙ АНАЛИЗ ТЕКСТА ДОГОВОРА: АНГЛИЙСКИЙ VS РУССКИЙ

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

Ключевые слова: гарантии сторон, дата подписания договора, декларативная часть договора, детерминативы, коммерческий договор, обстоятельства непреодолимой силы, отрицание, перформативные глаголы, преамбула, контрастивный анализ договора, юридический дискурс.