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## **THE COMPLEX CONCEPT OF LEGAL TRANSLATION – EXAMPLES FROM A GERMAN LAWYER'S PROFESSIONAL LIFE**

### **Abstract**

*By giving examples from the author's professional life where he is confronted with texts/translations primarily in German and Norwegian, the article wants to outline the practical relevance of some problems discussed in translation studies. Distinguishing between intra- and interlingual translation, the article stresses the complex situation when dealing with or even translating legal texts. In order to handle this complex situation, the article concludes with the best practice rules of the law firm the author is working in.*

### **FIRST PROBLEM: INTRALINGUAL TRANSLATION**

Every lawyer is, or at least should be, aware of the fact that he is dealing with two different sets of terms – the set of terms that the professionals use and the set of terms that ordinary people use.<sup>i</sup> Also translation studies are aware of the problem that the intended receivers of a translated text (TT) might not have insight in its full meaning due to their lack of legal understanding.<sup>ii</sup> The lawyer's strategy to compensate this lack of legal understanding is to explain. I regard explicitation of a source text's (ST) connotation<sup>iii</sup> as a form of explanation but across language borders. A lawyer's explanation of legal technical terms to his clients is close to intralingual translation as understood by Jakobson (1959: 233). Jakobson distinguishes intralingual, interlingual and intersemiotic translation. He defines intralingual translation as "an interpretation of verbal signs by means of other signs of the same language" and interlingual translation as "an interpretation of verbal signs by means of some other language".

### **EXAMPLE: BEWEISMASS**

A German term that might be needed to be explained is *Beweismaß*. Its meaning is the degree of likelihood necessary to prove a fact in court. It could be translated into English by 'standard of proof'.<sup>iv</sup> I am pretty sure that almost no layperson in Germany and just few German lawyers know this word. They simply never think about this as an issue of court because they take the standard of proof as a given. From my point of view a lawyer has to explain the meaning of 'standard of proof' whenever this becomes relevant to the client. By doing so the lawyer interprets verbal signs by signs of the same language – he is using intralingual translation.

### **EXAMPLE: FIRMA I**

Another even more complex problem is that some words exist as terms in legal language and as lexical units in ordinary language but have a different meaning. The standard example to show that German lawyers understand some terms slightly different than non-lawyers is *Firma*. In technical German legal language *Firma* means nothing more than the name of the merchant is registered in the public commercial register [*Handelsregister*]. For non-lawyers *Firma* means the entity which is registered in the commercial register. Sometimes it is understood in an even broader sense. For example I once read an association's statute on graded membership rates. This stated approximately the following:

students: x

individuals: y

*Firmen*: z

By writing *Firmen* the association meant not only merchants who are registered in the commercial register but every legal entity with the intention of realising profits.

### **EXAMPLE: KINDERGARTEN I**

When regarding the German legal language, it becomes difficult to define the exact meaning of *Kindergarten*. The federal law *Sozialgesetzbuch VIII* (hereafter *SGB VIII*) distinguishes in § 22 I between *Kindertageseinrichtungen* and *Kindertagespflege*, where the former means an institution wherein children stay and are fostered the whole day or part of the day (institutionally based relationship). The latter means personal relation between children and a distinct person where the children stay and are fostered by the distinct person (personally based relationship). The federal legislator does not state age limits for *Kindertageseinrichtungen* or *Kindertagespflege*. The federal legislator does not use the expression *Kindergarten* but leaves it to the federal state's legislator to decide upon the use of the expression.<sup>v</sup> So, theoretically there might be different understandings of the word *Kindergarten* in every of the sixteen federal states. For example Art. 2 I 2 Nr. 2 *Bayerisches Kinderbildungs- und -betreuungsgesetz*

(hereafter *BayKiBiG*) defines *Kindergarten* as *Kindertageseinrichtung* for children predominantly used by children between the age of three years and first day at school. For children younger than three years Art. 2 I 2 Nr. 1 *BayKiBiG* states instead the expression *Kinderkrippe*. I have experienced that ordinary German people are not automatically aware of this vast terminological difference. Some use *Kindergarten* for childcare for children aged younger than 3 years<sup>vi</sup>, some stick to the use of the Bavarian legislature. The only way to judge their exact understanding of *Kindergarten* is to estimate it from the context they use it in or to simply ask them. Serious misunderstandings of using an ambiguous expression might otherwise be the result. So be critical, be cautious and take care of the expression's context and the intended receiver's knowledge.

## **SECOND PROBLEM: INTERLINGUAL TRANSLATION**

A translator usually interprets verbal signs by means of signs from some other language. So according to Jakobson he is translating interlingually. Whether texts are translatable is not a specific problem of translating legal texts but a general problem of translation studies.<sup>vii</sup> From my point of view texts are generally speaking translatable simply because translation usually works. A lot of authors group the problem around the keyword 'equivalence'.<sup>viii</sup> Can there be two idioms in two different languages that are fully equivalent? What shades of equivalences do exist?<sup>ix</sup> I am not a linguist. I cannot provide a scientific answer to these questions. But because I have to explain German law to Norwegian clients in Norway, I also have to deal with these interlingual translation problems in my professional life.

### **EXAMPLE: RENTE VS. RENTE, PENSION VS. PENSJON**

Under the topic "interlingual translation" I also want to mention the "false friends"-category. This category is especially dangerous in related languages – like German and Norwegian. The German word *Rente* ('retirement pension') does not at all correspond to the Norwegian word *rente* ('interests') and the German word *Pension* ('retirement pension for civil servants') does not fully correspond to the Norwegian word *pensjon* ('retirement pension regardless if whether the person who receives it was a civil servant or not'). To avoid this: Be critical and cautious.

### **EXAMPLE: SCHWÄNGERUNGSPERIODE**

It is trivial: Watch out for quality. I once had to work with a translation of a Norwegian judgment containing: *Eine Schwängerung am [...] ergibt eine Schwängerungsperiode von 255 Tagen. Schwängern* means making someone pregnant. That for sure did not last for 255 days. From the context everyone understands the intended meaning as (*Schwangerschaft* = childbearing). Therefore this translation mistake will not lead to serious misunderstandings.

### **EXAMPLE: GERICHTSVERHANDLUNG GEHOBEN**

I am not sure whether the following example belongs to the category "Watch out for quality!" or to the dichotomy verbatim vs. free translation. The translator of the above mentioned judgment translated *retten hevet*, a formula which means that the hearing is closed, with *Gerichtsverhandlung gehoben*. A verbatim word-by-word-translation of *retten hevet* might lead to *Gerichtsverhandlung gehoben*. But *gehoben* will be understood as lifted. How to lift a hearing? Taking into account that the translator was sworn translator (*statsautorisert translator*) and that the translation was made in 1967, when verbatim translation was more common than today,<sup>x</sup> it could be that the translator really intended to translate it the way he did. I rather would have translated it differently because – as mentioned above – in the original text it is a formula. This formula has a corresponding formula in the target language. So why not use the target language's formula?

### **EXAMPLE: FIRMA II**

The above mentioned example regarding the different meanings of *Firma* gets even more complex when interlingual translation is considered. Here emerges the problem how a translator should deal with obvious mistakes. Just translate? Garbage in, garbage out? Translate the obviously intended meaning? Or translate and annotate? I typically recommend the latter. By annotating, the translator shares his relevant additional knowledge regarding the translated term. But in this case we face the fact that both Norwegian and German have a word which features the same ambiguity – *firma* is also in Norwegian a word which can mean both the name of an entity and the entity itself.<sup>xi</sup> In this case I would prefer just translating it.

### **EXAMPLE: KINDERGARTEN II**

In English, for example, *Kindergarten* is a loanword taken from German. Native English speakers have an idea of the meaning of *Kindergarten*. By saying *Kindergarten* a person with background from the United Kingdom, the United States of America, Russia or Sudan<sup>xii</sup> means probably an institution wherein children, aged three to six, stay and are fostered the whole day or part of the day.<sup>xiii</sup> The word is the same in English and German but the meaning might<sup>xiv</sup> differ.

In Norwegian there is the word *barnehage*. It consists of *barn*, Norwegian for *Kind*, and *hage*, Norwegian for *Garten* – the two components are similar but are they equivalent<sup>xv</sup>? By saying *barnehage* the Norwegian person means probably an institution wherein children, aged three month to six years, stay and are fostered the whole day or part of the day.<sup>xvi</sup>

As we have seen above, the exact meaning of the word *Kindergarten* is already difficult within the German language. When translating from German to Norwegian or vice versa, a word that is seemingly easy to translate such as *Kindergarten* or *barnehage*, respectively, becomes difficult to translate. Using Jakobson's distinction between intra- and interlingual translation, we operate at the interlingual level. But we have to take (German) intralingual aspects into account.

### **THIRD PROBLEM: COMBINATION OF INTER- AND INTRALINGUAL TRANSLATION**

As we have seen above there is a need for intralingual translation whenever the signs of either the source or the target language are ambiguous. Acting on the assumption that the translator has to seek equivalence, it is hard or even impossible to translate an ambiguous expression the "right" way without making the intended meaning explicit (explicitation). The translator might be able to find out/discover the intended meaning of a ST's expression by analysing the ST – especially by taking into account the context, the type of the text and so on. But the translator might probably not be able to find out how a target text's expression will be understood by its receivers – especially when assuming that different receivers will understand the expression differently. Whenever there is doubt about the intended meaning, I favour explicitation very much.

#### **EXAMPLE: KINDERGARTEN III**

For example I have experienced that Germans are not automatically aware of the ambiguity regarding the word *Kindergarten*. Some use it like the Norwegians, some stick to the use of the Bavarian legislation, most of them mix it up. The only way to judge their exact understanding of *Kindergarten* is to estimate it from the context or to simply ask them. Serious misunderstandings of using an ambiguous expression which can be understood not quite right might otherwise be the result. So even if almost the whole world limits the use of *Kindergarten* to the age three to six years and both German and Norwegian are Germanic languages and the components of the expression are very similar, the intended receivers could misunderstand the expression. When translating *Kindergarten* from German to Norwegian the translator has to analyse (ask himself) what was meant by the expression in the ST. Did the author of the original text also mean day-care for children aged younger than three years? Then the German expression rather should be *Kindertageseinrichtung*. This could be translated simply by *barnehage*.<sup>xvii</sup> Otherwise the originally intended meaning has to be made explicit by translating *barnehage for barn mellom tre og seks år* ('Kindergarten for children between three and six years').

#### **EXAMPLE: EIGENTÜMER VS. BESITZER**

Another example are the two German expressions *Eigentümer* and *Besitzer*. German legal language means the possessor of a thing when the expression *Besitzer* is used, while *Eigentümer* designates the owner of a thing. But a lot of Germans use *Besitzer* when the correct term would have been *Eigentümer* from a lawyer's point of view. Additionally we face the problem that the Norwegian language uses a similar couple in a similar indistinct way. There is *eier* for *Eigentümer* and *besitter* for *Besitzer*. A lot of Norwegian dictionaries do not even include the word *besitter*.<sup>xviii</sup> So how to figure out the existence and the use of the word *besitter*? For me it worked with looking it up in (electronic) dictionaries, searching for it on the internet and – most efficiently – looking it up in texts deriving from the legislator. Schirmer suggests in (Schirmer, 2011): 91 *eier*, *innehaver* for *Besitzer*. Also <http://www.heinzelnisse.info> suggests *eier* for both *Besitzer* and *Eigentümer*.<sup>xix</sup> Simonnæs (1994: 270) suggests *besitter* for *Besitzer*. In lots of documents accessible on <http://lovdata.no> one can find the word *besitter*.<sup>xx</sup> Here one has to be aware of the grammatical forms since there is also the verb *å besitte* which has the form *besitter* in present tense. Therefore one has to be aware of the word's form. A good example is section 5-9 subsection 2 *tvangsfullbyrdelsesloven* [Act on enforcement], first sentence: [...] *eiendom som saksøkte helt eller delvis eier eller **besitter*** (emphasis added). *besitter* is here used as a verb – in contrast to the verb *å eie*. In the next sentence of the same section: [...] *har saksøkte og besitteren plikt til* (*ibid.*) is *besitter* used as a noun. By close reading we can find out, that – despite the fact that the word *besitter* is lacking in some dictionaries – it exists. Furthermore we found out that *å besitte* is used in contrast to *å eie*. Moreover it seems that Norwegians have the same couple of words but tend to prefer the other word (*eie*) in colloquial/general language.

How should a translator translate the German sentence "*Ich bin Besitzer des Autos.*" if one knows from the sentence's context that it is not the mere possession that should be stressed but the ownership? Translate the wording? Translate the obviously intended meaning? Or translate and annotate? Here I think it depends on the particular context. If it is absolutely sure that the ownership should be stressed I

would highlight this by translating it this way. An annotation might be a good idea nevertheless. My Norwegian sentence would therefore be "Jeg er bilens eier [NB: egentlig besitter istedenfor eier men fra konteksten går det frem at det er eierforholdet som skulle fremheves]." Please note that we stated above that *Besitzer* in German and *eier* in Norwegian are the words that have become more common even for situations where the opposite would have been correct from a lawyer's point of view.

#### **EXAMPLE: AKSJESELSKAP**

Another example is the translation of German and Norwegian terms for particular forms of companies. In Germany there are traditionally two (major) forms of companies – the *Gesellschaft mit beschränkter Haftung* (*GmbH*) and the *Aktiengesellschaft* (*AG*), while in Norway there used to be just one – the *aksjeselskap* (*AS*). Because of EU regulations<sup>xxi</sup> which are based on the German model with two different forms of companies, the Norwegian legislator also had to introduce two forms of companies. These are nowadays called *aksjeselskap* (*AS*) respectively *allmennaksjeselskap* (*ASA*). So how to translate *GmbH*? Is the Norwegian equivalent to a German *GmbH* really the *AS* as Morck (2007) postulates?<sup>xxii</sup> On the one hand these are the most common forms for companies in the two countries. Both have a body, *Geschäftsführer/daglig leder*, responsible for the day-to-day operations. Both company forms also require less registered capital than respectively the *AG* and the *ASA*. But from my point of view *GmbH* cannot be translated with *aksjeselskap* – at least not without adding the original designation. The two legal institutions are simply too different. For example the *GmbH* has a body responsible for day-to-day operations and another body supervising it – the meeting of shareholders (*Gesellschafterversammlung*). There is also a meeting of shareholders at the *AS*. But the *AS* has also in addition to that a mandatory organ with competences for business transactions which exceed day-to-day operations – the *styre* 'board'.<sup>xxiii</sup>

This illustrates that a translator might need to compare the SL's and TL's law. This is a hard task even for lawyers. So take care when using functional equivalents of the TL.<sup>xxiv</sup> I would solve the above mentioned problem by asking if the nuances between the legal institutions – here *GmbH* and *AG* on the one hand and *AS* and *ASA* on the other hand – are important for the intended receiver. If so I would leave the SL's expression untranslated but annotated. If not I would use a TL-orientated translation.<sup>xxv</sup>

#### **EXAMPLE: PLIKTDEL**

Another word that is only seemingly easy to translate is the Norwegian *pliktdel* – which might be translated into English as 'compulsory share' (of inheritance). It consists of *plikt* and *del*. These nouns can be translated into German as *Pflicht* and *Teil*. There is also a German word for compulsory share called *Pflichtteil*. But the connotation of *Pflichtteil* for a German lawyer is that this has no effect *in rem*. That is to say the person entitled to a *Pflichtteil* becomes not heir to the heritage but has only a claim *in personam* against the heir. In contrast, the person entitled to a compulsory share in Norway becomes (automatically) heir because the testator cannot testate over the compulsory share.<sup>xxvi</sup> If it is of interest for the intended receiver it is desirable that a translator provides such information. Here the uncommon German word *Mindesterbteil* could be used. This designation stresses that the one who is entitled to a compulsory share directly becomes heir, not just claimant of a claim *in personam*.

#### **EXAMPLE: SAMBOER**

Difficult to translate is also *samboer*, which means cohabitant in the sense of one person living together with another person like a married couple without being married. Translating this with *nichtehelicher Lebenspartner* one could think of *Lebenspartner* in the sense of the German *Gesetz über eingetragene Lebenspartner* [Act on Registered Life Partnerships] – which are same-sex marriages. Here I would always tend to leave the Norwegian expression untranslated but annotated.

#### **OUR BEST PRACTICE RULES**

It is said that learning (foreign) law is learning another language because of legal technical terms and because the meaning of some terms differ in the sets of terms used amongst professionals and ordinary people. This gets even more complex when different languages are concerned. If you have clients from a foreign country, you often have to work in both the foreign legal and the foreign ordinary language. So in fact one has to deal with four languages.

This is one reason why translating legal texts is so complex and because of this complexity it is very difficult. In addition, inaccurate translation of legal texts can have serious effects. Therefore the translator has to be aware of his responsibility for the target text and the people affected by it. Our best practice rules to take this responsibility are therefore to

- be critical
- be cautious
- be aware of the context

- be aware of the intended recipient's skills
- be aware of the TT's and the ST's genre and purpose
- use dictionaries, specialist books and texts which derive from the legislator critically.

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<sup>i</sup> For differentiation between legal language and ordinary language cf. for example Stengel-Hauptvogel (1997:22 et seqq.).

<sup>ii</sup> Cf. for explicitation Simonnæs (2012: 211 et seqq.).

<sup>iii</sup> Cf. Simonnæs (2012: 211 et seqq.).

<sup>iv</sup> <http://dict.leo.org/#/search=beweisma%C3%9F&searchLoc=0&resultOrder=basic&multiwordShowSingle=on> [last accessed Februar 6<sup>th</sup> 2015]

<sup>v</sup> Struck in Wiesner (2011: § 22 sub. Nr. 3.).

<sup>vi</sup> Cf. e.g. <https://en.wikipedia.org/wiki/Kindergarten#Germany> [last accessed February 6<sup>th</sup> 2015]

<sup>vii</sup> Cf. Pescatore (1999: 97 et seq.); Simonnæs (2012: 176 and 222).

<sup>viii</sup> E.g. Jakobson (1959: 233).

<sup>ix</sup> Cf. Matulewska (2013: 21 et seqq.) and Williams (2013: 31 et seqq.).

<sup>x</sup> For the development from literal to free translation cf. e.g. Šarčević (1997: 23 et seqq.).

<sup>xi</sup> <http://www.nob-ordbok.uio.no/perl/ordbok.cgi?begg=+&ordbok=bokmaal&s=n&alfabet=n&renset=j&OPP=firma> [last accessed February 6<sup>th</sup> 2015].

<sup>xii</sup> List could be extended.

<sup>xiii</sup> <https://en.wikipedia.org/wiki/Kindergarten> [last accessed February 6<sup>th</sup> 2015]

<sup>xiv</sup> For the use of the word *Kindergarten* in German see above.

<sup>xv</sup> I use the expression equivalence here without further specification. For an overview over the types of equivalence discussed by the year 2013 see Matulewska (2013: 21 et seqq.).

<sup>xvi</sup> <http://en.wikipedia.org/wiki/Kindergarten#Norway> [last accessed February 6<sup>th</sup> 2015];

<http://nob-ordbok.uio.no/perl/ordbok.cgi?begge=+&ordbok=bokmaal&s=n&alfabet=n&renset=j&OPP=barnehage> [last accessed February 6<sup>th</sup> 2015].

<sup>xvii</sup> This could be solved differently when the text contrasts childcare in general to childcare of children of a special age. Then translating *Kindertageseinrichtung* with *barnehage* and *Kindergarten* with *barnehage for barn mellom tre og seks år* could also lead to confusions.

<sup>xviii</sup> <http://www.nob-ordbok.uio.no> (hereafter referred to as UiOs online dictionary) suggests as circumscription for the verb *besitte* the verb *eie* [last accessed February 12<sup>th</sup> 2015].

<sup>xix</sup> Last accessed February 6<sup>th</sup> 2015.

<sup>xx</sup> <http://lovdata.no/sok?q=besitter> results in 146 relevant documents [last accessed February 6<sup>th</sup> 2015].

<sup>xxi</sup> The Norwegian legislator had to comply with these EU regulations because of the EFTA treaty.

<sup>xxii</sup> Christoph Morck postulates (Morck 2007:56) that the German word *GmbH* has to be translated with *aksjeselskap* or *AS* without giving a reason for that.

<sup>xxiii</sup> There is the possibility that also the *GmbH* has an *Aufsichtsrat* (supervisory board), § 52 GmbHG (Limited Liability Companies Act). If the *GmbH* has more than 500 employees, it has to have an *Aufsichtsrat*, § 1 I Nr. 3 DrittelBG (Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat). But the great majority of *GmbHs* has no *Aufsichtsrat*.

<sup>xxiv</sup> See Simonnæs (2012:224) for further reading on strategies about translation of legal institutions.

<sup>xxv</sup> Since the essential difference between the *AS* and the *ASA* is that the *ASA* is designed to be listed on the stock exchange, I would use *AS* whenever the *GmbH* or *AG* is not listed on the stock exchange. Since one essential difference between the *GmbH* and the *AG* is that the *AG* always has an *Aufsichtsrat*, I would translate both *AS* and *ASA* with *AG*.

<sup>xxvi</sup> Frantzen et al. (2014) recommend, that the *pliktdel* should be payable in cash (NOU 2014:1 page 146). Because of that there might be legislative actions in the future that lead to a claim *in personam*.