Christopher Goddard, *Legal terminology in English: the challenges of international contexts*
ESP Across Cultures vol. 18, 2021: pp. 105-123
ISSN 1972-8247 - ISBN 979-12-5995-006-2 - DOI http://dx.doi.org/10.4475/0062_6

LEGAL TERMINOLOGY IN ENGLISH: THE CHALLENGES OF INTERNATIONAL CONTEXTS

Christopher Goddard
(Riga Graduate School of Law, Latvia)

Abstract

With English dominant in global trade, individuals communicating in legal English as a genre of ESP in cross-border settings require an assortment of skills and competences to ensure they are equipped to meet professional standards. Being equipped requires awareness of legal-linguistic, cross-cultural and comparative legal factors involved in using legal English terminology and underlying concepts in cross-border contexts. It also requires an ability to ensure that meaning and legal effect are mutually comprehensible between the parties and in line with the governing law. For ESP professionals operating cross-border between two or more legal languages or systems, research in this field is a task of the discipline of legal linguistics. Law and legal systems, along with their related concepts framed in legal language, do not exist in a vacuum, nor does legal language itself: all are shaped by surrounding events and ideas so that each legal system is specific to its own jurisdiction. These factors are reflected in laws and legal instruments, and their expression in legal language. This chapter explores a selection of specialist literature in a field where English dominates, by reviewing and analysing five academic texts, synthesizing them by identifying overlapping common themes, potential pitfalls, and solutions for practitioners. The overall aim is to uncover skills needed by lawyers, to open avenues that may lead towards approaches to teaching, learning, and using legal terminology and drafting legal texts in 'cross-system' contexts and further comparative legal linguistic research in the field of legal ESP.

1. Introduction

This chapter continues an investigation into the author's hypothesis in the context of doctoral research [1], namely that (comparative) legal linguistics should form an integral part of modern legal education and training (see, e.g., Goddard 2009, 2010, 2013, 2016, 2018). What is unclear is the nature of legal and linguistic skills that tomorrow's

* *The author appreciates input from the two anonymous peer reviewers and the series editors, which has greatly improved the quality of this chapter.*

[1] This paper forms part of the author's ongoing PhD research in legal linguistics at the University of Lapland.

lawyers need to learn and how best to ensure it. This, in turn, would involve establishing key (i.e. central 'must-do') teaching components, what methods to apply, and what teachers need to know in order to promote learning.

This interdisciplinary research in a fledgling field takes place at the interface between law, language, education, and training. With that in mind, the research question in this chapter is narrow: can we use the results of several distinct but overlapping studies about legal terminology to develop something resembling a general approach to teaching and learning such terminology and drafting legal documents in cross-system contexts? Further questions that track the content of this chapter are: (1) Can qualitative research such as the kind here reviewed help to develop approaches to teaching, learning, and using legal terminology and drafting legal texts in 'cross-system' contexts? (2) Does the research reviewed in this chapter point the way toward developing such approaches for legal terminology and legal texts in 'cross-system' contexts?

Section 2 begins by illustrating the challenges and complexities of achieving agreement on the content of legal terminology of international significance.

Section 3 briefly reviews and analyses five high-scoring master's theses defended under the legal linguistics master's programme at the Riga Graduate School of Law (RGSL), each focusing on English in international legal contexts and chosen for their overlapping legal and linguistic themes and their novel subject-matter to form a corpus in its own right from a specialist programme [2]. Only two other theses might have met these criteria [3] but they were reluctantly discarded due to length limitations in this article. This section first considers two theses on maritime legal English, their novel subject-matter not found in any publication to the best of my knowledge, then two on contracts in international contexts, and finally one on share and asset purchase agreements, again with novel subject-matter not found elsewhere. Following a concise review summary of each of the five texts, the analysis consists in comparing their salient points with a view to identifying common themes as a basis for discussion.

The notion of 'plain English', especially in legal contexts, has been extensively discussed in the literature. For those unfamiliar with this notion, a wide bibliography is available (e.g. Mellinkoff 1963, 1982; Kimble 1992; Garner 2009, 2013; Adams and Scherr 2015; Bain Butler 2013; Johnson 2015; Plain Language Association International n.d.; Williams 2004, 2011, 2015; Riera 2015; US Government n.d.; Loranger 2017; Schriver 2017; Burton 2018; Zödi 2019: Cutts 2020; Torrez 2020; Azuelos-Atias and Plato-Shinar 2021; Singh 2022). In addition, Ingersone (2014: 5-9) in this chapter defines plain legal English. Section 4 discusses the results from Section 3 in greater detail. Section 5 concludes by answering the research questions.

[2] All RGSL programmes are interdisciplinary, with all instruction in English and students drawn from Latvia and abroad. Many former students operate in English in international, cross-jurisdictional contexts. The master's degree in legal linguistics, launched in the academic year 2007-2008, continued until the end of the academic year 2015-2016. So far as is known, RGSL is the only institution to have run such a programme (see also Goddard 2018: 39-42).

[3] *Is there a case for the abolition of 'shall' from EU legislation?* (Paul Cooper) and *Arbitrability: problem issues of the legal term* (Natalja Freimane).

2. Defining a common meaning in legal terminology: 'rule of law'

An important first step is to see how the meaning of seemingly incompatible, mutually irreconciliable terms – a recurring theme in the theses under review and analysis – is negotiable due to the importance of finding a common understanding. This would especially apply to key terms used internationally.

Establishing meaning of legal terms in English that is acceptable in multiple legal systems requires discussion and negotiation. A practical example is the Venice Commission Rule of Law Checklist on establishing a common understanding of the concept of 'rule of law'. This needed very considerable discussion and was tentatively drafted twice, in 2011 ('VC Report 1' in European Commission for Democracy through Law (Venice Commission) 2011) and 2016 ('VC Report 2' in European Commission for Democracy through Law (Venice Commission) 2016).

VC Report 1 highlights (European Commission for Democracy through Law (Venice Commission) 2011: 3 (Introduction, para. 4) [footnote omitted]) that:

[a]lthough the terminology is similar, it is important to note […] that the notion of 'Rule of law' is not always synonymous with that of 'Rechtsstaat', 'Estado de Direito' or 'Etat de droit' (or the term employed by the Council of Europe: 'prééminence du droit'). Nor is it synonymous with the Russian notion of 'Rule of the laws/of the statutes', (*verkhovenstvo zakona*), nor with the term 'pravovoe gosudarstvo' ('law governed state').

VC Report 1 (European Commission for Democracy through Law (Venice Commission) 2011: 9 (In Search of a definition, para. 34) justifies and explains the need to define a common meaning of the concept of 'rule of law': "it needs to be understood and therefore be defined, both because it appears in many legal texts, and because the rule of law is accepted as a fundamental ingredient of any democratic society."

VC Report 1 (European Commission for Democracy through Law (Venice Commission) 2011: 10 (In Search of a definition, para. 41)) presents six elements that comprise the essential components of the rule of law. Additionally, its annex presents a checklist to establish whether a state complies with those components ((European Commission for Democracy through Law (Venice Commission) 2011: 15-16. Annex: Checklist for evaluating the state of the rule of law in single states).

VC Report 2 builds on the results of VC Report 1 to develop benchmarks (European Commission for Democracy through Law (Venice Commission) 2016: 11-33) to test whether the criteria for essential components are met. A second step to the test sets certain defined standards (European Commission for Democracy through Law (Venice Commission) 2016: 34-46).

Given the time and expense involved, could this rule-of-law model be applied to other legal terms? This is a question to bear in mind concerning the five texts examined in this chapter. However, the significant input into negotiating the meaning of 'rule of law' suggests that a terminological item of international importance requires more than a mere brief dictionary definition. This factor, too, should be kept in mind in analysing the texts in Section 3, which begins with highlights of the main themes followed by a concise review summary of the focus, analysis, and recommendations of each thesis, explored further in the discussion in Section 4, with further details of certain terminological items in the Appendix.

3. The five theses considered

Three key themes of these theses are (1) maritime legal English, with one thesis on legal English as used in contracts of carriage of goods by sea and another on the terms *seafarer* and *shipowner*; (2) commercial contracts, covering two theses, on (a) civil-law and common-law approaches and on (b) legal English in international commercial contracts; and (3) plain English, covering not only a thesis on plain English in Latvian asset purchase agreements but also the plain English concerns raised in some of the other theses. These themes are developed further in Sections 3 and 4, with further detail in the Appendix on 'problem terminology' between the civil-law and common-law legal systems.

3.1. *Legal and linguistic characteristics of maritime legal English*

Prikule's (2014) study devoted to maritime English (ME) as an international language used at sea and to one of its subsystems – maritime legal English (MLE) – undertook a legal-linguistic analysis of MLE in a contract of carriage of goods by sea: a time charter party [4], in the light of plain English principles. After explaining why and how English became the international language used at sea and its relation to MLE, an example of English for Specific Purposes (ESP), Prikule examines the origin, usage and reflection of ME standards in legal instruments issued by the International Maritime Organization. Against that contextual background, she analyses the notion of MLE as a subsystem of ME, examines contracts of carriage of goods by sea, narrows the view to time charter parties, and discusses MLE terms encountered in a time charter [5]. These include *ship*, *delivery*, *hire*, *seaworthiness*, and *suitable port* (*ibid.*: 29-38), though none of these are suggested as impeding comprehension of a time charter party and thus do not fall within the focus of this chapter. However, Prikule's detailed legal and linguistic analysis of time charter ExxonMobil Time 2005 ('Charter') identifies the following lexical and syntactic characteristics of MLE that influence – i.e. are factors likely to impede – comprehension of a time charter party by a non-lawyer:

(a) Use of archaisms (e.g. *hereinafter*, *thereof*, *whereof*, *said* and *aforesaid*). As we shall see, this factor arises again in the thesis by Jakubane.

(b) Compound constructions > Plain English equivalent, e.g.:

for a period of	for
have the option of	may
in the event that	if
prior to	before
in order to	to
in connection with/in relation to	about, concerning
in accordance with	by, under

[4] A time charter party is a contract whereby the lessor places a fully equipped and crewed ship at the disposal of the lessee for a period for a consideration called hire. The lessor may be the shipowner and the time charterer will be the lessee.

[5] Briefly put, a time charter involves leasing a vessel for a fixed period, on a per-day rate, where the charterer is free to use the vessel. The owner only looks after maintenance-related cost. Clauses are inserted to protect the charterer from having to pay for hours that were spent due to events that could not have been foreseen.

(c) Passive structures

Giving many examples, Prikule observes that "use of passive voice […] reflects the drafter's awareness of the ambiguity the passive voice can create. Therefore […] the doers of the actions are mentioned. However, if the doers are known, then the active voice should be used so that sentences have the usual order of words" [6] (*ibid*.: 49).

(d) Synonyms (doublets): e.g. *over and above*, *null and void*, *full and complete.*

(e) The deontic modal *shall* as used in its multiple meanings leads to confusion. Citing well-known authorities (e.g. Wydick 1998; Tiersma 1999), Prikule (2014) proposes avoiding *shall* as unsuitable to make legal language more precise and avoid ambiguity, and advises using other modal verbs (e.g. *must*, *may*, *will*), giving many examples of how this can be achieved.

Among many examples of 'before and after' the following will suffice (*ibid*.: 54):

Before	After
Charterer shall be entitled to deduct from hire payments […].	Charterer is entitled to/may deduct from hire payments […]

Prikule's analysis shows that proper understanding of a charter party requires knowledge of the basic concepts of shipping law, a factor that would apply to the MLE terms examined, though it should not apply to items other than MLE terms. On that basis, Prikule suggests that, since non-lawyers might also need to read the Charter, the text should be redrafted according to the principles of plain English but retaining its legal and linguistic meaning.

3.2. *Concepts of* seafarer *and* shipowner

Lielbarde's (2014) study examines the link between a legal concept and its eponymous legal term, in this case *seafarer* and *shipowner* – both key concepts in international maritime labour regulation codified by the Maritime Labour Convention 2006 (MLC), in force since 2013 and seen as an important international regulation in terms of securing seafarers' rights. The MLC significantly affects a shipowner's responsibility in respect of seafarers' employment on board ship, in that it determines the scope of its own application. However, Lielbarde stresses that the meaning of both concepts is controversial and was intensely discussed during development of the draft MLC text, as well as after adoption and entry into force of the MLC. A clear and uniform understanding of these key concepts is essential for effective implementation and application of the MLC.

Lielbarde defines the goals of the research as follows: to address problems associated with a seafarer's employment agreement in shipping practice; to perform a conceptual and linguistic comparative analysis of the concepts of *seafarer* and *shipowner* in international maritime labour regulation; to analyse the implementation of both concepts in

[6] While the recommendation that the passive be avoided in cases where the doers are known is a standard one in discussions of plain English, it flies in the face of research into the pragmatic factors favouring use of the active or passive (e.g. Ward *et al.* 2002: 1443-1447) on which length limitations rule out discussion here.

national law; and, finally, to address the effect of the new MLC-guided concepts *seafarer* and *shipowner* on enforcing ship arrests for seafarers' claims.

These terms are the technical designation of concepts belonging to the conceptual system of a language for special purposes: maritime (legal) English, which we have already encountered in the thesis by Prikule. Lielbarde examines dictionary and other definitions of *seafarer*, in particular several International Labour Organisation (ILO) and other conventions, citing a summary of multiple *seafarer* legal definitions in existing maritime conventions.

A similar examination of the term *shipowner* reveals that the term can even apply to persons or organizations that are not actually shipowners and that some ILO conventions simply do not define the term at all (*ibid*.: 14).

The wording of the definition *seafarer*, while clear, is also very wide, covering not only categories of persons traditionally associated with the seafarer's profession such as master, engineer, first mate, officer, bosun, but also other categories which may be involved in work on board ship, such as cruise ship personnel (e.g. cleaners, entertainers, casino personnel, kitchen staff, fitness instructors), cadets, harbour pilots and port workers, ship inspectors, superintendents, repair technicians, and on-board armed security personnel (*ibid*.:15).

An MLC resolution (*ibid*.: 35) provides member states – whose final decision it is – with guidelines to take into account in deciding whether to grant seafarer status to a specific occupational group. Factors to consider include:

(i) duration of stay on board;

(ii) frequency of working periods spent on board;

(iii) location of the person's principal place of work;

(iv) the purpose of the person's work on board;

(v) protection normally available as to labour and social conditions to ensure comparability to the Convention (*ibid*.: 18).

Lielbarde (*ibid*.) concludes that there was a clear legislative intention to apply MLC standards to those working on board passenger ships in a capacity other than related to operating the ship to cover "persons employed in the cruise and passenger ship industry who are working on board for a considerable period of time but do not perform tasks that are normally regarded as maritime".

As with *rule of law*, achieving these definitions, according to Lielbarde, required a series of tripartite meetings involving the ILO and representatives of shipowners and seafarers, as well as governments. These meetings also defined the term *shipowner* to address current shipping practice involving diverse contractual arrangements and organizations involved in operating a ship. However, from a seafarer's perspective, Lielbarde finds that a direct answer is still lacking as to how to establish which of these can be considered a shipowner – the one with final responsibility.

Lielbarde notes that the shipping term *shipowner* and the general labour law term *employer* cannot be considered fully equivalent: the two can only be considered fully equivalent when they are one and the same. Importantly, only the shipowner has the asset – the ship – which can be arrested for enforcement of seafarers' maritime claims.

3.3. *Legal drafting of contracts in a comparative perspective. Civil law and common law approaches*

The aim of Jarkina's (2014) comparative analysis of different doctrinal approaches to contract law in civil-law and common-law legal systems is to explore the possibility of attaining equivalence in legal drafting between the terms of these two legal systems and to develop guidelines for legal contract drafting acceptable to both systems.

Jarkina observes that both systems retain significant differences stemming from fundamental legal concepts influencing legal terminology in contract drafting. These differences hinder attaining equivalence in legal contract drafting and legal thinking between the civil-law and common-law legal systems.

She adds that learning contract drafting technique requires at least a basic knowledge of the legal system from which that technique derives. From this she infers that, to achieve improved contract drafting, lawyers should be acquainted with general differences between civil-law and common-law legal systems as well as different approaches to some practical legal aspects (Jarkina 2014: 38).

Jarkina asserts that one of the clearest distinctions between civil-law and common-law systems is the existence of a codified law system in civil law, whereas common law is not created by means of legislation but remains based largely on case law [7].

Jarkina goes on to summarize in great detail the problematic concepts and terms between the civil-law and common-law systems, with particular focus on common-law concepts and terms in light of the predominance of English in international contracts (see also Adams and Scherr 2015; Cilotta 2015; Boyd 2021). Many of these overlap with the concerns of Jakubane (see Section 3.4) and – because full focus on them here would interfere with the flow of the main text in this chapter – are referred to in Sections 3 and 4 with more detail in the Appendix.

Jarkina's (*ibid*.: 39-40) recommended practice for better contract drafting and choosing drafting technique would be that contracts should be originally drafted in the chosen language even if this is not the native language of the drafter(s). She notes that non-compliance with this rule may lead to a vague and poorly drafted contract and adds that this mostly relates to a contract where contracting parties are from different legal systems having different legal approaches and absence of some mutual legal concepts.

Jarkina suggests that general recommendations for civil-law and common-law drafting techniques could be a useful tool for minimizing the gap between drafters from different legal systems. For example, contracts should be drafted in plain language, in the chosen original drafting language, and in the style appropriate to the legal family to which that language belongs. While claiming that attaining equivalence in legal drafting between common-law and civil-law legal systems is impossible, Jarkina nevertheless suggests that further research and studies are needed on possibly harmonizing different legal approaches within common-law and civil-law systems in order to create a unified coherent contract drafting technique.

[7] The view of the common law as based largely on case law has long been seen as an overstatement – in other words, nowadays the common-law world "largely operates through statutes enacted by a country's democratic legislature" (Bennion 2001: 1; for similar views, see also e.g. Scalia 1997: 13).

3.4. *Use of legal English in international commercial contracts*

Jakubane (2011) analyses the use of legal English in international commercial contracts drafted by parties from different countries and often different legal systems: contracts governed either by common or civil law. Contracts written in common-law style where at least one party represents a civil law-system country require coordination between different legal traditions in order to interpret the contract. This implies the ability – vital in international practice – to communicate concepts across the legal-cultural divide (*ibid*.: 7).

Jakubane's goal is to identify the main legal English words, terms and phrases causing difficulties in contracts between non-native English contracting parties drawn by non-native English speakers. In addition to legal literature, research is based on eleven sample international commercial contracts chosen to illustrate mistakes due to English language use or misinterpretation of contractual terms. Underlining the requirement of a meeting of the minds [8] between the parties, she stresses the need, so as to avoid unnecessary misunderstandings, to distinguish between routinely used specific common-law words, terms and phrases without meaning – or with a different meaning – in a civil-law system, and vice versa. The thesis examines specific common-law terms without meaning in the civil-law system such as *consideration*, *equity/equitable*, *estoppel*, *representations and warranties*, and *remedies*, potentially problematic interpretation clauses [9] of agreements, and – like Prikule – legal archaisms, which are often suggested as best avoided even within domestic agreements drafted by native English speakers under the common-law system. Jakubane offers possible solutions to avoid problems arising due to use of legal English in international commercial contracts, as well as other recommendations.

Jakubane's concerns overlap with those of Prikule (archaisms), Jarkina (incompatibility of common-law terms in civil-law legal systems), and Ingersone (problems in drafting in legal English in civil-law jurisdictions and the advantages of using plain English in preference to 'legalese' [10]), and are referred to in Sections 3 and 4 with more detail in the Appendix.

Jakubane offers the following suggestions for legal practitioners:

(a) Drafting international commercial contracts is a functional and purposeful art, not a systematic and dogmatic one.

(b) Contract drafters should assess their choice of governing law and language clauses, which are of prime importance in international commercial contracts.

(c) Standard interpretation clauses deserve more attention. Civil-law lawyers should be cautious when encountering them in draft agreements and discuss their application with their contracting partner before signing the document.

(d) Avoid obsolete words, i.e. archaisms. Clearer language better reveals the parties' intention.

[8] A common understanding or *consensus ad idem* (in common modern parlance 'reading from the same page') in the formation of the contract.

[9] An interpretation clause is used to express the rules which the parties wish to apply to interpretation of their agreement.

[10] Technical legal jargon and complex sentence forms beyond the comprehension of non-lawyers.

(e) Definitions may protect against misinterpretation; so include them when encountering an unfamiliar English legal term.

(f) Lawyers and legal linguists should collaborate in drafting important international commercial contracts. Misinterpreted terms may result in litigation possibly taking place outside the defendant's domicile.

(g) Invite common-law practitioners to lecture on application of specific common-law terms in contracts and to hold workshops for domestic lawyers involved in drafting international commercial contracts.

(h) Use of legal English in international commercial contracts requires further legal-linguistic analysis (research projects) to benefit practising contract lawyers.

3.5. *Plain English in Latvian contract drafting practice*

Ingersone (2015) explores the concept of plain legal English from theoretical and practical aspects, starting by defining the term, followed by its key principles illustrated by an overview to reflect the key elements of the concept, in terms of structure, choice of words, and so on. Noting inherent problems about drafting legal texts in English throughout civil-law jurisdictions relating to the entirely different legal system that English legal terms stem from, Ingersone analyses the benefits of legal drafting in plain English: efficiency, precision, impact on litigation, access to ordinary readers and drafting quality. This is supported by detailed rules and principles of plain-English contract drafting: no redundant wording, base verbs instead of nominalizations, verbs in the active voice rather than the passive, short sentences, clear layout, concrete and familiar words, careful punctuation, and finally uniformity of chosen terms throughout an entire document to avoid discrepancies and disputes.

Ingersone presents a long and detailed 'before/after' chart of recommended revisions with a view to discovering what impact applying the key principles of plain legal English would have on contract drafting practice. She avers that the original examples revised in the chart are taken from real-life drafting experience: contract clauses from share and asset purchase agreements. The revision applied all the principles illustrated in the theoretical part to practical examples, e.g.:

Before	After
The Parties are obliged to	The Parties must
The Purchaser will be bound by such obligations…	The Purchaser must fulfil such obligations…
The Parties have freely and expressly agreed…	The Parties agree…

These examples from the section 'General part' must suffice, due to space limitations. However, the chart also includes entries on 'Purchase price', 'Representations and warranties', 'Conditions precedent to closing/Due diligence', 'Closing procedure / Payment procedure','Confidentiality', and 'Termination'.

Ingersone asserts that use of plain English, as opposed to legalese, likely makes legal language legally more precise and certain, leading to less litigation. Her analysis shows that contract language can significantly benefit from applying the principles of plain legal English. The revised clauses, while retaining at least the same level of legal precision, become significantly shorter, clearer and easier to comprehend compared to the original. She maintains that an elaborate guideline for an audience of legal drafting practitioners would be of great benefit.

In conclusion, Ingersone suggests further research, in particular on linguistic inconsistency and inherent problems about legal drafting in English throughout civil-law legal systems as a major issue in legal drafting.

4. Discussion: overlap among the five theses and identifiable key areas

An analysis of the five theses suggests three broad areas of interest.

4.1. *The relationship between legal concepts and related terms*

This area is especially important for Prikule (2014) and Lielbarde (2014). Some of the concepts that these authors cover include those related to shipping such as *seafarer* and *shipowner*. Lielbarde (*ibid*.: 41) points to the difficulty in pinning down an internationally acceptable meaning of terms.

4.2. *Conceptual and terminological incongruity between common-law and civil-law legal systems*

Ingersone (2015) characterizes inter-systemic incongruity in terms of inherent problems about drafting legal texts in English throughout civil-law jurisdictions relating to the entirely different legal system that English legal terms stem from. This is covered in some of the other theses discussed, in particular Jarkina (2014) and Jakubane (2011). Jakubane mentions common-law terms without meaning in civil-law systems (echoed in Jarkina) and problems of drafting in legal English in civil-law jurisdictions.

In brief, these works discuss (1) the fact that common-law and civil-law terms often reflect either concepts that do not exist in the other system or have similar but not truly equivalent meanings in the other system (Jarkina 2014; Jakubane 2011; Ingersone 2015), e.g. *stare decisis, consideration, estoppel, equity, non-waiver, representations and warranties, remedies* (common law), *pacta sunt servanda, force majeure, good faith* (civil law) (for more detail, see Appendix); and (2) a consequent need to reconcile those differences for drafting contracts in 'cross-system' contexts, including through further research into harmonizing different approaches and creating a unified contract drafting technique for use in such contexts, e.g. the need to coordinate meaning between similar but not equivalent terms in different legal systems, e.g. *force majeure, frustration / impossibility of performance* (Jarkina 2014; Jakubane 2011). In this context, the assertion by Jarkina (2014: 45) – that attaining complete equivalence of legal meanings and terminology in contract drafting within civil- and common-law legal systems is impossible – sits ill in light of the clear legal-linguistic inferences to be drawn from the Venice Commission reports, namely that internationally important terminological items (a) may require extensive discussion between stakeholders leading to coordination of terms stemming from different legal systems, and (b) need more than a brief dictionary definition. This is partly supported by the process involved in defining *seafarer* and *shipowner* as described in Lielbarde (2014), though discussion here was as much between stakeholders as representatives of different legal systems.

4.3. *Poorly written legal English and the need for plain legal English*

This area covers, in particular, the use of archaisms and legalese, compound constructions, doublets, passive verbs and, finally, *shall* (Prikule 2014; Jakubane 2011).

This aspect is reflected by emphasis in three of the five theses on the need to avoid unnecessarily complex language to promote use of plain English in legal texts. Here, one suggestion was to redraft important texts, e.g. Exxon Mobil Time 2005 (Prikule 2014: 57), in line with plain English principles, but retaining the legal-linguistic meaning. According to one thesis, the use of plain legal language (cf. legalese) would likely be legally more efficient, precise and accessible to ordinary readers, thus leading to less litigation (Ingersone 2015: 22).

4.4. *Some other needs raised in the five theses*

This subsection covers further items to add to the 'basket' of skills and awarenesses that law students need as 'takeaways' for their future legal practice. These are:

(a) Define key terms in specific fields of law (Lielbarde, Jakubane).

(b) Drafters need to understand the basic concepts of (shipping) law in order to understand a charter party (Prikule).

(c) The need for uniformity of terminology throughout a contract (Ingersone).

(d) Develop guidelines for contract drafting acceptable to both systems (Ingersone).

(e) Lawyers need to know the general differences between civil-law and common-law legal systems (Jarkina).

(f) Lawyers/legal linguists need to collaborate on drafting important international commercial contracts (Jakubane).

(g) Common-law practitioners need to lecture on use of common-law terms in contracts and hold workshops for lawyers involved in drafting international commercial contracts (Jakubane).

4.5. *Implications for legal linguistics in modern legal education*

The analysis above can itself be broken down between (a) the key components of legal and linguistic skills that tomorrow's lawyers need to learn or at least be aware of, and (b) other areas of concern that fall outside the scope of this chapter.

As to establishing key components that future lawyers need to acquire during education and training (i.e. the basics of (comparative) legal linguistics), two areas stand out as being realistically achievable.

Promote awareness of the general differences between the civil-law and common-law legal systems, in particular conceptual and terminological aspects.

This would include, for example:

(a) the problematic use of common-law terms in civil-law contracts and vice-versa (Jarkina; Jakubanne).

(b) non-equivalence between terms in common law/civil law (Jarkina; Jakubanne).

(c) the relationship between concepts and eponymous legal terms both general and specific to a given field of law (Prikule; Lielbarde).

(d) the need to understand the basic concepts of different fields of law in order to understand relevant legal texts (Prikule).

Promote use of plain (legal) English

This would involve introducing student/trainee lawyers first to legal language in general. Elements might include its purpose, functions, features and varieties, influ-

ences on development, the challenges of writing in international legal contexts, law in cross-cultural contexts, legal culture(s). This could be followed up by focusing on legal English within the frame of English as a global language, guidelines for better legal English, and finally a focus on good legal writing, with emphasis on plain language.

Other areas of legal-linguistic concern

These could provide a useful focus for research/projects/thesis writing, e.g.

(a) Defining key terms of international importance in specific fields of law. Certain terms need to be understood and therefore be defined, both because they appear in many legal texts, and because legal certainty is accepted as a fundamental ingredient of any democratic society. Meetings among stakeholders may be needed to achieve universal definitions of important terms and set interpretative guidelines. This was the case with *rule of law* [11], *seafarer* and *shipowner*, where meaning was negotiated by a series of high-level meetings. Involvement of practitioners and legal-linguistic scholarship would be advisable here.

(b) Seeking equivalence in legal drafting between common-law and civil-law systems. This might involve addressing legal-linguistic challenges impeding comprehension and coordinating important items of legal terminology between civil law and common law that are widely used in international commercial and other contracts, e.g. the civil-law concept of *force majeure*, which might be reconciled with the common-law concepts of *impossibility* and *frustration of purpose*; also the common-law concepts of *consideration*, *equity/equitable*, or the civil-law concept of *good faith*. These can be placed in much the same category as *seafarer* and *shipowner*, in that resolution would require discussion among stakeholders, with the aim of attaining equivalence of legal concepts and terminology in contract drafting between both legal systems.

(c) Research on harmonizing different legal approaches within common-law and civil-law systems towards the foundation of a unified coherent contract drafting technique. Collaborative effort might work on developing illustrative guidelines for contract drafting acceptable to both civil-law and common-law systems. The time and cost involved should be balanced against the benefits in terms of promoting comprehension of international contracts with concomitant savings of time and costs in dispute resolution.

(d) Collaboration between practitioners and legal linguists in redrafting important texts by coordinating terminology and meaning between similar terms in different legal systems, at the same time applying plain English principles to general language items that impede comprehension. Uniformity of terms could appear under this heading, as well as focus on interpretation and language clauses.

5. Conclusions

The research and analysis in this paper clearly suggest, in response to the main research question, that we can use the results of several distinct but overlapping studies about legal terminology to develop something resembling a general approach to teaching and learning such terminology and drafting legal documents in cross-system

[11] The fundamental ingredient of any democratic society.

contexts. The answer to the follow-up questions – namely: (1) Can qualitative research such as the kind reviewed in this paper help to develop approaches to teaching, learning, and using legal terminology and drafting legal texts in cross-system contexts? (2) Does the research reviewed in this paper point the way toward the development of such approaches for legal terminology and legal texts in cross-system contexts? – seem to be partly in the affirmative. However, further research would be needed in other areas of law with a view to establishing whether achieving conceptual congruence and mutuality of comprehension between at least some domains of common-law and civil-law legal systems could be a reality.

Although this research tends to strengthen the argument that (comparative) legal linguistics should form an integral part of modern legal education, the precise model of teaching and what methods to apply, and indeed what teachers themselves need to know in order to promote learning, remain to be fully addressed elsewhere. However, it would not be unrealistic to suggest that some key legal-linguistic items – such as the use of plain English in legal contexts – could be taught at an introductory level and reinforced from time to time throughout legal education and training. In addition, items such as incongruity of concepts and terms between legal systems could be introduced at an introductory level and reinforced on courses in specific areas of law.

Other areas of legal-linguistic concern, as detailed above, might be approached through research projects, with high-level support, for example from stakeholders.

Overall, the five theses summarized and reviewed both individually but especially as a synthesized body arguably represent a valid contribution to legal-linguistic research. In addition, they have provided useful, apposite material for teaching legal English writing skills to law firms and law students.

References

Adams K.A. 2015. Eliminating the phrase *represents* and *warrants* from contracts. *Tennessee Journal of Business Law* 16: 203-229.

Adams K.A. and R.M. Scherr 2015. Top ten tips in drafting and negotiating an international contract. At https://legal.thomsonreuters.com/en/insights/articles/top-10-tips-in-drafting-and-negotiating-international-contracts.

Azuelos-Atias S. and R. Plato-Shinar 2021. Simplifying the interaction between banks and their customers: towards modernization of the banking contract language. *51 Mishpatim - Hebrew University L. J.*: 713-767.

Bain Butler D. 2013. Strategies for clarity in legal writing. *Clarity* 70: 31-37.

Bennion F. 2001. *Understanding Common Law Legislation: Drafting and Interpretation*. Oxford: Oxford University Press.

Boyd M.S. 2021. *English for Law: Theory and Practice*, 2nd Revised Edition. Molfetta, Italy: Neldiritto Editore.

Burton S. 2018. The case for plain-language contracts: why it's time to kill legalese. *Harvard Business Review*. January-February issue: 134-139. At hbr.org/2018/01/the-case-for-plain-language-contracts.

Cilotta Pablo 2015. Contract drafting and negotiation in multiple languages. At www.iicj.net/store/index.php/papers/contract-drafting-and-negotiation-in-multiple-languages.html.

Cutts M. 2020. *The Oxford Guide to Plain English*. Oxford: Oxford University Press, fifth edition.

European Commission for Democracy through Law (Venice Commission) 2011. Report on the Rule of Law adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011). At https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e.

European Commission for Democracy through Law (Venice Commission) 2016. Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). At default.aspx (coe.int).

Exxon Mobil Time 2005. At Print Layout 1 (wordpress.com).

Feito Torrez M.V. 2020. Plain language as a requisite for an effective access to justice. Editorial Astrea: 1-15.

Fon V. and F. Parisi 2006. Judicial precedents in civil law systems: a dynamic analysis. *International Review of Law and Economics* 26/4: 519-535.

Garner B.A. 2009. *Garner on Language and Writing: Selected Essays and Speeches of Bryan A. Garner*. Chicago: American Bar Association.

Garner B.A. 2013. *Legal Writing in Plain English*. Chicago: University of Chicago Press.

Gelowitz M., G. Hunnisett and E. Farkas 2020. Force majeure clauses: contractual risk allocation and the COVID-19 pandemic. At: https://www.osler.com/en/resources/critical-situations/2020/force-majeure-clauses-contractual-risk-allocation-and-the-covid-19-pandemic).

Goddard C. 2009. A professional Master's programme in Legal Linguistics: a model for translators and lawyers? in L. Sočanac *et al.* (eds), *Curriculum, Multilingualism and the Law*. Zagreb: Nakladni zavod Globus: 149-174.

Goddard C. 2010. Legal linguistics as an academic and professional discipline: identifying clients, customers, stakeholders. In C Heine and J. Engberg (eds), *Reconceptualizing LSP. Online proceedings of the XVII European LSP Symposium 2009*. Aarhus: Aarhus University: 1-16.

Goddard C. 2013. Learning to fly: the prospects for legal linguistics in the academic curriculum… and beyond. In G. Tessuto and C. Williams (eds), *Language in the Negotiation of Justice: Contexts, Issues and Applications*. Farnham, UK: Ashgate: 279-299.

Goddard C. 2016. A voice in the wilderness? Legal linguistics in search of a place in the curriculum. Riga Graduate School of Law *RGSL Research Paper No. 12*. At https://www.rgsl.edu.lv/uploads/research-papers-list/11/goddard-christopher-final-for-print.pdf.

Goddard C. 2018. RGSL: leading the way in legal linguistics. In *Twenty Years of Innovation: Eyewitness Accounts of Riga Graduate School of Law*. Riga: Riga Graduate School of Law: 39-42. At https://www.rgsl.edu.lv/data/publikacijas/rja-jubilejas-gramata-iekslapas-atverums.pdf.

HG.org. 2021. What are equitable, compensatory, and declaratory relief? At https://www.hg.org/legal-articles/what-are-equitable-compensatory-and-declaratory-relief-35593.

Ingersone I. 2015. *Principles of plain legal English and their application in Latvian contract drafting practice*. [pdf with author].

International Contracts 2012. Language clause in international contracts. At internationalcontracts.net/contract/blog/145-language-clause-in-international-contracts.

Investopedia 2022. At Force Majeure Definition (investopedia.com).

Jakubane I. 2011. *Use of legal English in international commercial contracts*. [pdf with author].

Jarkina V. 2014. *Legal drafting of contracts in a comparative perspective. Civil law and common law approaches*. [pdf with author].

Johnson L.D. 2015. *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*. Scholarly Commons @ UNLV Law.

Kimble J. 1992. Plain English: a charter for clear writing. *Michigan Bar Journal* December 1992: 1302-1307. At 92_dec.pdf (michbar.org).

Lawgazette.com.sg 2009. Cross-border insolvency issues. At lawgazette.com.sg.

Legal Dictionary 2021. Equitable remedy (legal definition). At thefreedictionary.com.

Lielbarde S. 2014. Concept of *seafarer* and *shipowner*: before and after the Maritime Labour Convention 2006. At wcms_090250.pdf (ilo.org).

Loranger H. 2017. Plain language is for everyone, even experts. Nielsen Norman Group. At www.nngroup.com/articles/plain-language-experts.

Mellinkoff D. 1963. *The Language of the Law*. Boston, MA: Little, Brown &Co.

Mellinkoff D. 1982. *Legal Writing: Sense & Nonsense. Eagan, MN:* West Publishing Co.

Plain Language Association International n.d. About plain language. At http://www.plainlanguagenetwork.org/About_Plain_Language/aboutplainlanguage.html.

Prikule D. 2014. *Legal and linguistic characteristics of maritime legal English*. [pdf with author].

Reed Smith. 2015. Entire agreement clauses – do they work or not? Reed Smith Client Alerts 2 December 2015. At https://www.reedsmith.com/en/perspectives/2015/12/entire-agreement-clauses--do-they-work-or-not.

Republic of Latvia Supreme Court Senate 2021. At https://www.at.gov.lv/en/tiesu-prakse/judikaturas-nolemumu-arhivs/administrativo-lietu-departaments/klasifikators-pec-lietu-kategorijam/administrativais-process/tiesibu-principi/tiesiskas-palavibas-princips?lawfilter=0.

Riera C. 2015. Plain English in legal language: a comparative study of two UK Acts of Parliament *Alicante Journal of Legal Studies* 28: 147-163.

Scalia A. 1997. *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press.

Schriver K.A. 2017. Plain language in the US gains momentum: 1940-2015. *IEEE Transactions on Professional Communication* 60/4: 343-383.

Singh Y. 2022. Cultivating plain language in law *The Leaflet* 29 March 2022. At theleaflet.in/cultivating-plain-language-in-law/.

Tiersma P.M. 1999. *Legal Language*. Chicago: The University of Chicago Press.

Trans-Lex Principle 2012. I.1.1. Good faith and fair dealing in international trade. At Trans-Lex.org (uni-koeln.de).

UN Convention on Contracts for the International Sale of Goods 1988. The Vienna Convention. At https://digitallibrary.un.org/record/159982.

US Government n.d. Plain language in the legal profession. At plainlanguage.gov.

van Dam C. 2006. European tort law and the many cultures of Europe. In T. Wilhelmsson *et al*. (eds), *Private Law and the Many Cultures of Europe*. The Hague: Kluwer Law International: 57-80.

von Mehren A.T. 1959. Civil-law analogues to consideration: an exercise in comparative analysis. *Harvard Law Review* 72/6: 1009-1078.

Ward G., B. Birner and R. Huddleston 2002. Information packaging. In R. Huddleston and G.K. Pullum (eds), *The Cambridge Grammar of the English Language*. Cambridge: Cambridge University Press: 1363-1447.

Williams C. 2004. Legal English and Plain Language: an introduction. *ESP Across Cultures* 1: 111-124.

Williams C. 2011. Legal English and Plain Language: an update. *ESP Across Cultures* 8: 139-151.

Williams C. 2015. Changing with the times: the evolution of plain language in the legal sphere. *Alicante Journal of Legal Studies* 28: 183-203.

Wydick R.C. 1998. *Plain English for Lawyers* 4th ed. Durham, NC: Carolina Academic Press.

Yam Seng Pte Ltd v International Trade Corporation Ltd. 2013. EWHC 111. At https://www.bailii.org/ew/cases/EWHC/QB/2013/111.html.

Ződi Z. 2019. The limits of plain legal language: understanding the comprehensible style in law. *International Journal of Law in Context* 15: 246-262.

Appendix
Problem terminology as between civil-law and common-law legal systems

Stare Decisis (Binding Precedent): this doctrine is a key factor in causing language to play such a significant role in common law (Jarkina p. 9). In practice, the doctrine – unknown in civil law – means that lower courts should follow higher court decisions that establish legal standards and regulation for similar legal issues (Jarkina p. 12). This may result in inclusion of particular wording in contracts because of decisions of the court (Jarkina p. 12). However, in deciding any given legal issue in many civil-law jurisdictions, precedents serve a persuasive role. Civil-law courts are expected to take past decisions into account when there is a sufficient level of consistency in case law (see e.g. Fon and Parisi 2006).

Doctrine of *consideration*: under this doctrine a contract must be supported by something of commercially measurable value (Jarkina, p. 13). This is a common-law concept, whereas in civil law a contract has binding effect once the parties agree the essential elements of the contract with the goal of mutually binding each other. (Jakubane p. 14 (footnote omitted)). Note, however, that civil-law analogues of consideration have been recognized for decades (see e.g. von Mehren 1959).

Promissory (or Equitable) Estoppel: as with consideration, the doctrine of promissory estoppel is unknown in civil law. In legal theory, the definition of promissory estoppel is divided into five elements:

(a) a promise or representation about future conduct;

(b) the promisee relies on the promise or representation;

(c) the promisor's duty not to waive the promise;

(d) promissory estoppel does not remove the promisor's rights;

(e) promissory estoppel should not be confused with a cause of action (Jarkina 17 (footnote omitted)).

Note: administrative law in both common-law and civil-law systems has the principle of legitimate expectations e.g. in Latvia (Republic of Latvia Supreme Court Senate). This can be seen as analagous to *estoppel.*

Equity: this doctrine is unique to common law, so that seemingly no equivalent or even similarity exists in the civil-law legal system. Equity is a specific common-law concept of justice and fairness that prevails over the law. From a legal perspective, equity is a sort of special remedy. However, this does not mean that equity is the same as a remedy in the context of legal means to recover a right, or compensation for infringement, as Jarkina stresses (p. 22 (footnote omitted); also Jakubane p. 4 (footnote omitted)) As suggested by Jakubane, the word *equity* in international commercial contracts should be replaced either by *reasonable commercial practice* or *natural justic*e (p. 15 (footnote omitted)).

The closely related term *equitable* is generally found in the synonymous phrases *equitable remedy/equitable relief*. These refer, not to a reasonable and fair remedy, but to a system of redress developed in the common-law legal system. This generally

consists of court-ordered action or inaction, e.g. *specific performance* (Jakubane 15 (footnote omitted)) [12] (Legal Dictionary).

Interpretation Clauses and Language clauses [13]: Jakubane finds these both useful and necessary.

***Entire Agreement* (Merger clause)** [14]: this common-law notion means that a contract includes all terms within the parties' agreement, so that in the event of a dispute neither party can introduce oral evidence to say otherwise (Jakubane p. 21 (footnote omitted)). Lawyers drafting agreements under civil law should avoid this clause or redraft it according to the circumstances (Jakubane p. 22 (footnote omitted)). This clause has been a reason for many court cases, decisions for which are not identical (Reed Smith client Alert Dec 2015; Lawgazette 2009-8).

Good Faith, Fair Dealing: in common law, the concept of parties' obligation to negotiate and act in good faith is not as strongly supported as it is in civil law (Jarkina p. 27 (footnote omitted)). However, in recent years common-law legal systems have become more open to this important international business concept (see e.g. *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111; Principle I.1.1 - Good faith and fair dealing in international trade | Trans-Lex.org (uni-koeln.de))

Force Majeure: in the common-law system, where *force majeure* is not a fundamental concept, it often appears as a phrase in commercial contracts. Nevertheless, common-law system rules achieve similar results to *force majeure* through the doctrine of impossibility and frustration of purpose (Jarkina p. 32 (footnote omitted)). According to *Investopedia* (see also Gelowitz *et al.* 2020 for a practitioner's perspective):

The concept of force majeure originated in French civil law and is an accepted standard in many jurisdictions that derive their legal systems from the Napoleonic Code. In common-law systems, such as those of the United States and the United Kingdom, force majeure clauses are acceptable but must be more explicit about the events that would trigger the clause (see also Gelowitz *et al.* 2020 for a practitioner's perspective).

Pacta Sunt Servanda (sanctity of contracts)**:** this, the most important principle of the classic law of obligations in civil-law systems, means that contracts are binding in any event. By contrast, under common law, profitability and a logical approach prevail over the bindingness of a contract (Jarkina p. 33)

Non-waiver: this common-law notion means that failure by a contracting party to protect its rights provided by the agreement does not mean surrender of those rights (Jakubane p. 22 (footnote omitted)). However, this conflicts with the principle of [*non*] *venire contra factum proprium*, of civil-law origin (Jakubane p. 22 (footnote omitted)) which prevents a party from changing their position to the detriment of others and

[12] But the whole idea behind "equitable relief" is achieving greater fairness between the parties (see e.g HG.org. 2021. What are equitable, compensatory, and declaratory relief? At https://www.hg.org/legal-articles/what-are-equitable-compensatory-and-declaratory-relief-35593).

[13] **The language clause**,used in international contracts drawn up in two or more languages, establishes which version prevails over the others. (See also International Contracts 2012; Adams & Scherr 2015; Cilotta, 2015)

[14] **An entire agreement clause** aims to make clear that the agreement between the parties is solely what is stated in the written contract, and to prevent the parties to the contract from subsequently raising claims that statements or representations made during contractual negotiations, and prior to the signing of the written contract, form part of the contract itself.

sanctions a party who, by their contradictory behaviour, abuses the justifiable trust of their opponent. This comes close to the common-law principle of estoppel.

Representations* and *warranties: under common law, party A can rely on party B's *representations* (of fact) as being true and, if they prove to be false, to rely on the warranty given for securing the representations (Jakubane pp. 25-26 (footnote omitted)). By *warranty*, a party assumes responsibility for potential damage arising from a false statement of fact (Jakubane p. 26 (footnote omitted)). The term *warrants* can be replaced by the word *states* or *declares* (Adams 2015; Adams & Scherr 2015; Common-Law Drafting in Civil-Law Jurisdictions).

Remedies: these are the means for providing relief (Jakubane p. 32 (footnote omitted)) under the common-law system. Civil law did not recognize the term *remedies* until adoption of the UN Convention on Contracts for the International Sale of Goods. Now *remedies* forms part of most international commercial contracts, though this does not mean that drafters and interpreters of those contracts are fully aware of the real meaning of the term. The problematic point about using *remedies* in international commercial contracts, especially if governed by civil law, is that civil law's focus is more on rights and obligations, whereas common law focuses on courts' jurisdiction to grant the remedy sought (i.e. remedies trump rights) (Jakubane p. 33 (footnote omitted)) (see also van Dam 2006: 61).