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## SHALL WE TEACH *SHALL*: A SYSTEMATIC STEP-BY-STEP APPROACH

**Abstract.** The paper discusses the status of *shall* in today's legal drafting and legal translation, and by presenting typologies by a number of authors briefly addresses the variety of meanings it is used to express, in both legislation and contracts. It introduces the "shall dilemma" faced by non-native legal translators working both from and into English. The dilemma consists in the discrepancy between the promiscuous and abundant use of *shall* in authentic as well as translated documents, on the one hand, and the recommendations found in various drafting manuals promoting either a *shall*-free policy or a disciplined use of *shall*, on the other hand. The research part presents the results of a survey carried out among a carefully chosen sample of professional legal translators to determine what their policy is on the use of *shall*. The results include both quantitative findings and additional comments made by the translators, and confirms the divide between actual practice and the recommendations. In the next section of the paper, the results are applied and a series of step-by-step exercises are introduced which should raise the awareness of legal translation trainees of the ambiguity of *shall* and teach them to use it in a reasoned and disciplined way.

*Keywords:* *shall*, modality, legal translation training, non-native translators.

### Introduction

The modal verb *shall* is often mentioned as a hallmark of legal English (e.g. Butt and Castle, 2013: 262). When students are asked to name typical features of legal English texts, the widespread use of *shall* tends to be mentioned amongst the first. Therefore, it is only logical that the verb must be discussed in any legal English class or any legal translation class with English being either the source (SL) or the target language (TL). In the former case, a knowledge of the intricacies of *shall* is crucial as legal translation trainees, having English as their working language, need to be made aware of the polysemy and ambiguity of the verb. The problem that occurs with *shall* is that it breaks one of the basic assumptions of legal linguistics, namely

that words have a consistent meaning throughout a text, which makes it one of the most litigated words as mentioned by Banful (2013):

Words are presumed to have a consistent meaning in clause after clause, page after page but *shall* does the opposite and this is why *shall* is among the most heavily litigated words in the English language. *Shall* offends the principle of good drafting. It does not always retain its meaning throughout a document.

Being aware of such a “promiscuity” of the verb, trainee translators need to be able to choose the correct interpretation of *shall* in the given context and select a corresponding TL equivalent. It is possible that some legal languages may make use of similar ambiguous words, but more likely the translator will be forced to opt for a more specific and less ambiguous equivalent, thus resorting to interpretation of a sort. In the latter case, i.e. when English is the target language, trainee translators need to be guided to make reasoned and judicious decisions on the use, or non-use, of *shall*, taking into consideration a number of factors discussed later. In this paper, I would like to present the current approaches to the use of *shall* in legal drafting and legal translation and supplement them with the results of a small-scale survey among professional translators as to their preferences on the use of *shall*. This will be a basis for designing a series of exercises, the aim of which is to raise awareness of legal translation trainees as regards the use of *shall*.

Before doing so, two disclaimers must be made. For the avoidance of doubt, I emphasize that the main objective of this paper is not to discuss in depth the legal implications of using *shall* and specific court cases involving its interpretation, and therefore will only briefly describe the number of meanings it is used to express. This is discussed in detail in the drafting manuals referred to throughout the paper, e.g. Adams (2001), Garner (2013), Kimble (2011), Wydick (2005), as well as many others. Furthermore, it is a well-researched topic and as early as in 2006 Williams (2006: 238) claimed that “whether there is still anything worth saying about the issue of *shall* is debatable.” Therefore, the main purpose of this paper is to see what the attitude of professional translators towards the use of the verb is, and based on the results, discuss the possible ways students can best be sensitized to it.

The second disclaimer concerns the teaching context. I am fully aware of the fact that there are cultures and language pairs where the native-speaker principle is applied and translators only work into their mother tongue. This is unfortunately not the case of the Czech Republic. Firstly, the demand for translations from Czech (being a language of limited diffusion) into a foreign language is such that there are far from enough native speakers able to satisfy the demand. Therefore, inverse translation is sim-

ply inevitable, which is confirmed by Svoboda (2011) who found out that 61% of translators active on the Czech market worked both to and from Czech. Secondly, surprising as it may be, translation into a foreign language is required by law. When someone is appointed an official translator in the Czech Republic, they are automatically assumed to be able to work in both directions, and my experience shows that a substantial amount of their work consists of translations into a foreign language. However, this does not necessarily imply poor results. I fully endorse the conclusion of Beeby (1998: 66), who claims that “given access to sufficient documentation, conscientious inverse translators can produce competent translations of the standardized discourse fields which are common in business, science, technology and public administration.” In such a context, legal translation trainees, with law being a good example of a standardized discourse field as referred to by Beeby, must be trained for inverse translation, which in the legal field involves a decision on the use (or non-use) of *shall*, which is an argument for including this topic in a syllabus of a legal translation course. This increases the chances that such legal translators will be conscientious and produce competent translations.

### **Purpose and scope of research**

When trainee translators are asked to translate a legal text into English, they fall into a dilemma as soon as they begin doing their research. Over the course of their training, they are constantly reminded to look for parallel texts and use them in order to adhere to the discursive conventions of the TL. In fact, adhering to such conventions of a particular genre (e.g. a contract) is an inherent part of legal translation competence (cf. Prieto Ramos, 2011: 15). The use of such parallel texts, and even a compilation of ad-hoc corpora consisting of such texts, has recently been promoted by a number of authors, e.g. Gallego-Hernández (2017) for economic texts, or Scott (2012) for legal texts. The inherent problem lies in the fact that the parallel texts abound in the use of *shall* in a number of its meanings as discussed below. The other resource trainee translators are advised to use, especially if asked to translate the genre in question, are contract or legislative drafting manuals (e.g. Lunn, 2017). Such manuals and handbooks provide explanations and guidelines on how to draft the respective documents.

The advice they find in such manuals, however, is very different from what they see in the retrieved parallel documents. The authors of the manuals either recommend applying the ABC (applied by Australian, British and Canadian legislative drafters; thus the name) rule which suggests elim-

inating *shall* altogether, e.g. Garner (2013), Kimble (2011), Wydick (2005), or recommend applying the American rule, e.g. Adams (2001), under which *shall* should be reserved for one meaning only, namely for cases where it can be replaced with “has duty to”, i.e. imposing an obligation on the subject of the sentence, which is sometimes referred to as the “disciplined use of *shall*.” A similar approach is endorsed by Williams (2005: 222) who recommends that drafters should ensure that *shall* is used to convey the ‘core’ meaning, i.e. to denote a duty. The recommendations for the ABC rule can be found in manuals published by the Parliamentary Counsels of the respective countries (see bibliography), but logically began to be referred to by this name later by the above-cited authors of drafting manuals. The situation is slightly more complicated in the United States where legislative drafting manuals exist even for individual states (e.g. Texas, Maine, Alaska), which sometimes promote quite different styles. It should also be emphasized that the labels for the rules do not seem to be valid in all cases today, as the Canadian Uniform Drafting Convention recommends using *shall* for imposing duties and when accompanied by *no* or *not* for expressing prohibitions, which is more in line with the American rule than the ABC rule.

No drafting manual, to my knowledge, recommends using *shall* in the variety of meanings as attested in authentic texts. It should also be pointed out that most of the rules originated as rules for drafting legislation. There is an important difference, however, between the language of legislation and the language of contract, with the latter being a genre that translators will encounter more often in their daily practice. Whereas legislation has a single author (although an institutional one), contracts are drafted by thousands of (non-)lawyers. Therefore, it is much easier to promote style guides for legislation, and some countries have essentially managed to eradicate *shall* and have it replaced, e.g. with *must*; for contracts the situation is less straightforward. Williams (2006: 239) refers to such laws as *shall*-free texts as opposed to what he calls traditional texts. The difference between legislation and other legal genres is also confirmed by Adams (2001: 25), who even states that he has never seen a corporate agreement where *must* would be used to express language of obligation even though it may be gaining ground in other types of legal texts, such as legislation.

Such recommendations can also be found in texts aimed specifically at translators. Chromá (2016) adopts, for example, the “hard-core approach” and following the reasoning of Garner, Banful and others advises against the use of *shall* in any of its meanings. Lunn (2017), in contrast, who has tried to develop a manual for translating contracts into English, based on the recommendations found in English drafting manuals, adopts Adams’s

approach and recommends reserving the use of *shall* only for the language of obligation (see Adams, 2001; Lunn, 2017, for the discussion of various types of language found in contract drafting). Thus, trainee translators face a dilemma whether to follow the discursive conventions of parallel texts, or to choose the systematic and reasoned approach defended by the drafting manuals, but possibly not attested to to such an extent in authentic documents.

Although the present paper does not primarily address the use of *shall* in legislation, it is worth mentioning the case of EU documents as they are readily available as reference material online, and can be thus referred to by many translators and trainees. The English Style Guide of the European Commission mentions (2007: 48) *shall* as a troublesome word because of its absence in everyday speech. As mentioned above, I believe this is not the main problem of the use of *shall*, but rather its ambiguity. In its recommendations on the use of *shall*, the style guide goes on to make a differentiation between its use in main and subordinate clauses. For the former, it is recommended using *shall* for positive obligations, but not being confined to animate subjects as the examples provided indicate (*The T2 declaration form shall be used for all such consignments.*), as well as in declarative provisions where a provision applies to the future or is contingent on a future event (e.g. *This Regulation shall enter into force on ...*). For the latter, the style guides recommend avoiding *shall*. To put the EU guidelines in a broader perspective, the recommended approach is not in line with either the ABC or the American rule. On the one hand, it tries to regulate the use of *shall* and advises against its use in many contexts where it can be found in original documents where no *shall* policy is applied. On the other hand, it is much more permissive in the use of *shall* than the legislative guidelines in English speaking countries. Another EU publication, the Joint Practical Guide for persons involved in the drafting of legislation within community institutions, generally promotes clear drafting of legislation, but makes no specific recommendations on the use of *shall*. It is of interest, however, that it actually uses *shall* in the recommendations themselves, e.g. *Community legislative acts shall be drafted clearly, simply and precisely*. Since it is a guide, the use of *shall* creates rather an impression of an obligation being imposed, and in my opinion *should*, which is actually used in virtually the same set of recommendations in the *Opinion of the Economic and Social Committee on Plain Language*, would be more convenient. Despite the existence of some recommendations, even the EU context is not devoid of the *shall* dilemma as the recommendations in the style guides are not strictly followed in the actual practice as demonstrated e.g. by Felici (2012: 58) who lists six different legal

sentences where *shall* can be found: (i) definitions; (ii) constitutive statements; (iii) deontic modality; (iv) necessary requirements; (v) authorizations and requirements and (vi) prohibitions and negative propositions. This has been confirmed by other authors as well, e.g. Gibová (2011) or Foley (2001).

The polysemous nature of *shall* is emphasized by a number of authors. Trosborg (1995), in her attempt to classify speech acts appearing in contract and legislative language, identified the use of *shall* to express three basic categories of speech acts: constitutives, rights and obligations. She further sub-classifies each of these categories whereby e.g. rights are further subdivided as follows: permission, assignment of benefit, negated assignment, liability, negated liability (Trosborg, 1995: 46). In my classification, however, I will stick to the broader categories only. Other authors identify even a larger number of uses, e.g. Butt, & Castle (2013) identify as many as ten and Garner (2013) identifies seven. Table 1 attempts to correlate the classifications by Trosborg, Butt, and Castle and Garner and provide examples used in the survey (for the sentences used in the survey see Table 3 and 4 below).

**Table 1**  
**Meanings of *shall* identified by different authors**

| Trosborg (1999) | Garner (2013)   | Butt and Castle (2013)           | Survey                                  |
|-----------------|---|----------------------------------|---|
| obligation      | imposing a duty on the subject of the sentence                              | to impose a duty                 | Sentence 1<br>Sentence 2                |
|                 | imposing a duty on an unnamed person (not on the subject of; the sentence); | to give a direction              | Sentence 4                              |
|                 | imposing a conditional duty   |                                  |   |
| right           | giving permission (in the meaning of may)                                   | to grant a right                 | Sentence 12                             |
|                 | expressing an entitlement, not duty   |                                  | Sentence 3<br>Sentence 11               |
|                 |   | to negate a duty or discretion   | Sentence 5                              |
| constitutive    | acting as a future-tense modal  | to express the future            | Sentence 8                              |
|                 |   | to state circumstances           | Sentence 7                              |
|                 |   | to express intention             | Sentence 6<br>Sentence 9<br>Sentence 10 |
|                 |   | to negate a right                |   |
|                 | being directory in the meaning of should.                                   |                                  |   |
|                 |   | to create a condition subsequent |   |
|                 |   | to create a condition precedent  |   |

The fact that not all the uses described in Table 1 appear in the survey below can be accounted for by a number of reasons. First, some of the uses (expressing conditions), as identified by Butt and Castle, are quite rare and archaic in English (e.g. ‘*If the Vendor shall within one month of the receipt of such notice give written notice...* where *shall* expresses a condition precedent) as there is a general agreement that if there is a situation where the use of *shall* is redundant, it is precisely in subordinate clauses. It is only logical then that such uses have not been identified in the translation memory from which the tested sentences were extracted. Second, it is sometimes difficult to classify the uses as some of the shades of meaning may be overlapping. Sentence 8, for example, could be thought of as stating circumstances for AGMs or as expressing the future. Sentence 7 is also difficult to classify; *prima facie* it could be classified as imposing a duty, but in fact the duty is imposed by *be obliged to*, and *shall* rather states circumstances. When interpreting the sentence, however, it is difficult to separate one from the other.

The dilemma, then, may result in situations, where *shall* is actually more widespread in translations than in authentic documents as demonstrated by Giczela-Pastwa (2016), who compared the relative frequency of *shall* in the English translation of the Polish Public Procurement Act (PPP) and the Polish Civil Code (PCC) by three publishing houses and in the corresponding authentic English legislations (EnPP and EnCL) and found the following:

**Table 2**

***Shall* in original English and translated Polish legislation  
(Giczela-Pastwa 2016)**

| SHALL (%)       |               |                 |                 |
|-----------------|---------------|-----------------|-----------------|
| PPP1 <b>1.6</b> | PPP2 <b>0</b> | PPP3 <b>1.5</b> | EnPP <b>0.7</b> |
| PCC1 <b>2.0</b> | PCC2 <b>0</b> | PCC3 <b>1.9</b> | EnCL <b>0.4</b> |

It clearly follows from Table 2 that unless there is a clear *shall*-free policy applied by the publisher, as seems to be the case for PPP2 and PCC2, the use of *shall* in the translated language is more frequent than in the non-translated one.

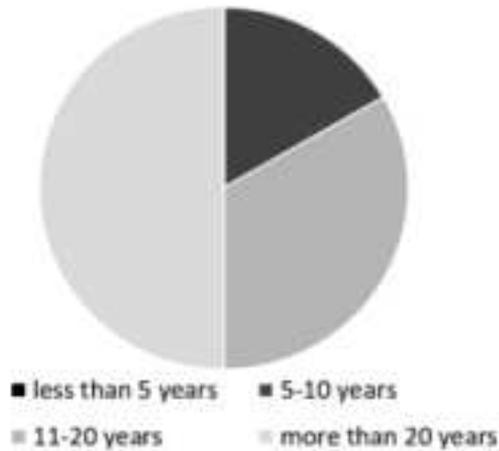
## Methodology

As the authentic non-translated documents and the drafting manuals differ to such an extent with respect to *shall*, it is also important to see how the translators themselves actually deal with the verb. Unfortunately, it is very difficult to collect a sufficient number of private legal documents such as contracts with all the metadata (translator's native language, years of experience, specialization in law) necessary to establish the relevance of the data and compile a corpus. I tried to determine the professional norm regarding the use of *shall* in a less standard manner. For me, the point of departure is the assumption by Chesterman (e.g. 1993) that professional norms in translation are established by the behaviour of competent professionals. Therefore, what they do, establishes the norm.

The Words to Deeds conference entitled Legal Translation to the Next Level organized by Juliette Scott was held in London in January 2017 aimed specifically at legal translators. I assumed that this would be precisely the kind of event that would attract competent professionals in the field, who are willing to invest a significant amount of money in the conference, as in many cases it involved travelling to London and spending a weekend on continuing professional development. I therefore designed a survey with a series of sentences containing *shall* (see Tables 3 and 4 below) and asked the translators to judge them. The sentences were extracted from a CS-EN translation memory of a legal translation firm, and were all approved segments, i.e. they were used in professional legal translations from Czech into English.

The translators were asked to state whether they would use/keep *shall* in the respective sentence in their translation (Table 3) and possibly provide alternatives (Table 4). In addition, the translators were invited to make any additional comments on their personal "policy" regarding the use of *shall* when translating.

As regards the details about the participants in the survey, the survey only inquired whether the participant is a native speaker of English, as non-native speakers were to be eliminated. Thus, the number of eligible answers equalled 12. Another relevant factor which I included was the number of years of experience as I believe this is in fact more important than education. If someone is a successful legal translator, this makes such a person a competent professional in Chesterman's sense regardless of their background. Figure 1 shows the number of years of experience of the participants.



**Figure 1.** Years of experience of the participants

Although it might be objected that the number of participants is rather small, I believe that given the high homogeneity of the group, i.e. native professional legal translators, 50% have experience of more than 20 years, the results presented in the following section are relevant for seeing what the status of *shall* is.

## Results

In this section, the results of the survey will be presented and commented on. Table 3 shows the acceptability ratings for the individual tested sentences.

**Table 3**

### Acceptability rating

| No. | Would you use/keep <i>shall</i> in the following sentences?   | YES |
|-----|---|-----|
| 1   | Seller <b>shall deliver</b> the Goods to Buyer using Seller’s standard methods for packaging.                           | 11  |
| 2   | The Buyer <b>shall inspect</b> the Goods immediately upon receipt.  | 11  |
| 3   | The Contractor <b>shall receive</b> reimbursement for travel and other expenses as authorized in advance by the Client. | 9   |
| 4   | The debtor <b>shall be notified</b> of any action taken by the bank.  | 9   |
| 5   | The Contractor <b>shall not be liable</b> for any defects.  | 8   |
| 6   | The purchase orders made by customers <b>shall be deemed</b> to be offers to enter into an agreement.                   | 8   |

| No. | Would you use/keep <i>shall</i> in the following sentences?   | YES |
|-----|---|-----|
| 7   | The Buyer <b>shall be obliged</b> to pay for the goods and services to the Seller the purchase price as agreed and specified in the Contract. | 7   |
| 8   | The annual General Meeting <b>shall be held</b> each year within four months of the end of the Company's financial year.                      | 7   |
| 9   | This Agreement <b>shall be governed</b> by and construed in accordance with the laws of the Czech Republic.                                   | 7   |
| 10  | The term "Supplier" as used herein <b>shall mean</b> Maxwell Technologies SA Rossens, Switzerland.  | 7   |
| 11  | The board of directors <b>shall have the powers</b> to enact bylaws.  | 6   |
| 12  | The Buyer <b>shall be entitled</b> to cancel the order and receive a full refund or agree a later delivery date.                              | 5   |

Interestingly, Table 3 suggests that there was basically only one translator who strictly adhered to the ABC rule presented above. Two translators seemed to stick to the American rule and reserved the use of *shall* for the "has the duty" cases. Otherwise, the surveyed translators tended to use *shall* in different meanings, and very often not that systematically as similar cases are marked as acceptable and non-acceptable at the same time by the very same translator. It is also noteworthy that the least acceptable example is Sentence 12. It may be argued that the translators feel that *shall* is used to denote obligations, and thus are at odds when using it in a sentence where permission is expressed even if the permission is rather conveyed by *be entitled to* than *shall*, which would fall under a constitutive speech act. Though the least acceptable one, almost half of the surveyed translators would still use *shall* in Sentence 12.

Table 4 shows the alternatives suggested by translators. If more translators suggested the same alternative, it was included only once. Moreover, sometimes the participants rated the use of *shall* as acceptable, but still suggested possible alternatives. In such cases, the suggestions were included in Table 4, as the purpose of the entire survey was to see the potential for replacing *shall* rather than to force the participants to make an either/or choice.

Table 4

## Suggested alternatives

| No. | Provide an alternative to <i>shall</i> that you would use in a translation.                   | Alternative   |
|-----|---|---------------|
| 1   | Seller <b>shall deliver</b> the Goods to Buyer using Seller's standard methods for packaging. | must/delivers |

*Shall We Teach “Shall”: A Systematic Step-By-Step Approach*

| No. | Provide an alternative to <i>shall</i> that you would use in a translation.   | Alternative         |
|-----|---|---------------------|
| 2   | The Buyer <b>shall inspect</b> the Goods immediately upon receipt.  | must/inspects       |
| 3   | The Contractor <b>shall receive</b> reimbursement for travel and other expenses as authorized in advance by the Client.                       | should/will         |
| 4   | The debtor <b>shall be notified</b> of any action taken by the bank.  | must be/will be     |
| 5   | The Contractor <b>shall not be liable</b> for any defects.  | is/will be          |
| 6   | The purchase orders made by customers <b>shall be deemed</b> to be offers to enter into an agreement.   | will be/are         |
| 7   | The Buyer <b>shall be obliged</b> to pay for the goods and services to the Seller the purchase price as agreed and specified in the Contract. | must/is/shall pay   |
| 8   | The annual General Meeting <b>shall be held</b> each year within four months of the end of the Company’s financial year.                      | should/must/will/is |
| 9   | This Agreement <b>shall be governed</b> by and construed in accordance with the laws of the Czech Republic.                                   | is                  |
| 10  | The term “Supplier” as used herein <b>shall mean</b> Maxwell Technologies SA Rossens, Switzerland.  | means               |
| 11  | The board of directors <b>shall have the powers</b> to enact bylaws.  | has                 |
| 12  | The Buyer <b>shall be entitled</b> to cancel the order and receive a full refund or agree a later delivery date.                              | is/will be/may      |

As Table 4 suggests, the alternatives involve *must*, when *shall* expresses an obligation. In other cases, present tense or *will* is suggested. While the present tense as an alternative to some uses of *shall* is well acknowledged (see Williams 2013), *will* is suggested by some (e.g. Garner 2012), who argue that it expresses the fact that the contract parties agree to do something, but it is rejected by others (Espenschied 2010: 141) on the grounds that it does not express the obligatoriness well enough. The translators even propose at times a more elaborate reformulation, e.g. in Sentence 12 where the whole phrase *shall be entitled* is interpreted to express discretion, and *may* is thus suggested as an alternative. Similarly, Sentence 7 in fact expressed the obligation twice (*shall* and *be obliged to*), and thus an alternative reformulation could involve either removing the former or the latter. An interesting alternative to *shall* is *should* as proposed by one translator for Sentences 3 and 7. As difficult as it may be to judge for a non-native speaker, *should* does not seem to convey the feature *mandatory*, which is, to a more or less extent, present in *shall*, and rather has a directory meaning. This is rather an idiosyncratic use by one translator, which should not be recommended to trainees. Otherwise, all the suggested alternatives are worth discussing with students, mentioning possible meaning nuances involved and possibly

referring them to extensive treatment of the issue both in the drafting manuals and elsewhere (e.g. Williams 2005, Chromá 2016). It is also interesting to note that the periphrastic expression *be to*, which is sometimes recommended as an alternative to *shall* (Williams 2013: 110–111), was not suggested at all. This may, once again, be explained by the difference between legislative and contract drafting/translation.

Below are some of the free comments made by the translators, in which I have highlighted the most relevant points:

*I would say that **using shall comes naturally to me** and I can easily decide when I need to use it and when I don't but that all **depends on the overall context, on the overall document.***

*Some **clients insist** on the use of *shall* as they feel it gives the text a **more formal, legal register**. I would keep *shall* in the above sentences for those clients.*

*Shall is often “**wishy-washy**”.*

*Depends on the **style the client wants**.*

***To avoid questions** but also to be consistent, I use *shall* most of the time, but in certain **employment contracts** I would occasionally use the present tense.*

The above comments reveal a number of points. First, whereas the use of *shall* may come naturally to native speakers, it will not come naturally to the non-native trainee translators, which underlines the need for systematic teaching. Another important point, and a limitation of the survey, is the lack of context. Many translators pointed out the lack of context as a factor that made it difficult for them to decide. This is only logical as “terms are context-bound and must be seen exclusively within that particular context” (Williams 2006: 245). Last but not least, the client house style and preferences were mentioned as an important factor taken into consideration. This is undoubtedly a highly relevant point, which needs to be emphasized in the training context as well. Unfortunately, this comment reflects the ideal situations that the translators taking part in the survey enjoy, i.e. knowing their direct clients and knowing what they want. The situation faced by many Czech translators, on the freelance domestic market, is such that they receive a translation commission from an agency without any brief, let alone the client's house style manual. I present the comments by one of the translators in full as they point to an important issue:

## *Shall We Teach “Shall”: A Systematic Step-By-Step Approach*

*I (roughly) follow Ken Adam’s approach to the use of shall in contract drafting, i.e. I mainly use it to express obligations imposed on the subject of a sentence. However, **I am clearly inconsistent at times**, as you can see from the examples above (e.g. I frequently use “In this agreement, ABC shall mean XYZ”). I don’t think that “shall” should be abolished altogether because – to an English-speaking lawyer – **it would look strange not to see any “shalls” in a contractual document** (and may raise concerns on the part of the client as to whether the translator really knows what they are doing...).*

*As a British person, **I find the use of “must” too harsh if used to impose obligations on individuals**. I do, however, use it occasionally where there are no individuals involved. So in your example sentence above “The annual General Meeting **shall be held** each year within four months of the end of the Company’s financial year” I would be comfortable using “must”.*

This comment by one of the translators just adds to the confusion. It demonstrates that even when the translator is acquainted with the drafting manual recommendations, they do not apply them consistently, and sometimes resort to truly subjective and unsystematic decisions, very often relying on the assumed expectations of the client.

With due respect to all the limitations of exploring the professional norm regarding the use of *shall* using a survey with contextless sentences with a relatively small number of participants, the results clearly show a number of important points relevant both for legal translation practice and legal translation training. First, in the “shall” dilemma most translators opt for using *shall* (and may in fact be one of the agents behind its rather widespread use in the parallel documents), and the reasons they give are often client preference or face-saving factors (making the text look legal, clients want it, etc.). This came as a surprise to me given that there are robust arguments advising against the use of *shall*, summed up e.g. by Chromá (2016), or at least arguing that it be used in a disciplined manner (Lunn, 2017). I believe that this mirrors what Butt and Castle (2013: 262) argue about legal drafters in general:

Many legal drafters, otherwise receptive to modern, standard English, feel unable to dispense with *shall* – even though it reeks of legalese. They consider that *shall* gives legal documents an authenticity that cannot be maintained with substitutes such as *must* or *is to*.

Furthermore, many arguments made by the translators derive from their native-speaker competence, and thus are not transferable to non-native translation trainees, who continue to be in need of a more systematic approach.

### Application of the results

In this section of the paper, I present a number of exercises which should help trainee translators come to terms with the use of *shall* in legal texts. The exercises can be grouped into two categories. The aim of the first set of exercises is to raise the awareness of the trainees concerning the ambiguity and polysemy of *shall*. These exercises use the method of guided discovery as applied in language teaching where students are prompted to discover the problems and rules, if there are any, regarding the use of *shall*, themselves.

**What does shall express in the following examples? If an obligation, whose obligation is it?**

1. *The Company shall reimburse the Consultant for all authorized expenses.*
2. *The Consultant shall be reimbursed for all authorized expenses.*
3. *The Consultant shall receive reimbursement for all authorized expenses.*
4. *The board of directors shall have the powers to enact bylaws*
5. *This Agreement shall be construed in accordance with the laws of England and Wales.*
6. *Every notice of the meeting of shareholders shall state the place, date and hour.*
7. *The Society's nominating committee shall nominate one person for the office of President.*
8. *The Franchisor shall not engage in any activity related to the Franchised Business until two years shall have expired as from the date the Franchisor terminates this agreement at his or her option.*
9. *The Contractor shall not be liable for any defects.*

**Figure 2.** Exercise 1

Of course, different sentences may be used. In my selection, I aim to make the problems inherent in the use of *shall* as transparent as possible. For example, Sentences 1–3 are used to discuss how the same situation can be expressed in different ways and whether *shall* actually adds any nuance of meaning. Sentence 7 is used to discuss the ambiguity of *shall* as to whether it expresses an obligation or permission. I try to make students think about such issues by asking additional questions: *Do you think that failure to nominate one person carries a penalty?* Furthermore, students may be asked to create contexts where the sentences may prompt different interpretations.

**Find an authentic contract drafted in English and ask other students to look for all instances of *shall* in the contract and classify the use of *shall* according to various authors (e.g. Adams, Garner, Butt).**

**Figure 3.** Exercise 2

Whereas Exercise 1 involved contextless sentences, in Exercise 2 students work with a whole text and are required to work with language as used in context. This is also a good point to present the students with different classifications of the various uses of *shall* as described above (e.g. Garnet or Butt and Castle) or others. In Exercise 1 the uses were described rather intuitively, whereas resorting to classifications makes trainees use relevant metalanguage. The attempt to classify the uses also challenges the students to think about the pitfalls of any language classifications. This exercise can also be extended to other language functions used in contracts. To this end, I find the classification of contract language by Adams (2017) extremely useful. Once again, this makes trainee translators think about what needs to be expressed in contracts, how it is expressed and how it can be expressed in a systematic and consistent manner.

**Choose a court case where the use of *shall* to impose an obligation was litigated and discuss the reasoning of the parties to the dispute as well as the court. A suitable case is, for example, the BW Gas v JAS Shipping case.**

**Figure 4.** Exercise 3

This exercise is useful as it shows the trainees the possible legal consequences of linguistic ambiguity. In this case the Court of Appeal held that *shall* in 1 (a) does not impose an obligation on the Buyer to supply all the goods and provided extensive reasoning behind such a conclusion (the judgment can be found online; and for a brief discussion see also Chromá (2016, p. 85)). The suggested case is just one of many. Other cases, involving areas of interpretative uncertainty (futurity vs. precondition/direction vs. obligation), are mentioned and discussed e.g. in Butt and Castle (2013, p. 265–268).

Having gone over the proposed set of exercises, trainees are thus acquainted with the troubles involved in the use of *shall* both from a legal and a linguistic point of view. In addition, discussing real cases adds to the authenticity of the material and is found to be highly motivational by students. The other set of exercises tries to raise trainees’ confidence regarding the decision-making on the use of *shall* in their own production.

**Complete the gaps with the verb in brackets in the correct form and a modal, if relevant:**

An order for work, equipment, goods or software \_\_\_\_\_ (make) by the Client in writing, \_\_\_\_\_ (diverge) from the offer and \_\_\_\_\_ (deliver) to the Supplier within the period of validity of the offer. In this case, the Agreement between the Client and the Supplier \_\_\_\_\_ (conclude) upon delivery of the order to the Supplier. By making the order, the Client \_\_\_\_\_ (express) its consent to the entire content of the offer and to these Terms and Conditions. If the order \_\_\_\_\_ (deliver) to the Supplier after the last date of validity of the offer or if it \_\_\_\_\_ (diverge) from the content of the offer, the Agreement between the Client and the Supplier \_\_\_\_\_ (conclude) only if the Supplier \_\_\_\_\_ (confirm) to the Client that it \_\_\_\_\_ (agree) with the order or if it \_\_\_\_\_ (deduce) from the Supplier's conduct that it \_\_\_\_\_ (agree) with the offer. In case of doubt, the Client \_\_\_\_\_ (determine) whether the Supplier \_\_\_\_\_ (agree) with the order. The Client's order for services \_\_\_\_\_ (make) in writing and \_\_\_\_\_ (deliver) to the Supplier or made by telephone at a number specified in the Service Terms and Conditions of the Supplier.

**Figure 5.** Exercise 4

**Reformulate the following disputed provisions from the contract involved in the BW Gas v JAS Shipping case replacing *shall* with other alternatives.**

Article XVII – BUYER'S SUPPLIES§

1. RESPONSIBILITY OF BUYER§

- a) The BUYER **shall**, at its own risk, cost and expense, supply and deliver to the BUILDER all of the items to be furnished by the BUYER as specified in the Specifications (hereinafter called the "BUYER's Supplies") at warehouse or other storage of the Shipyard in the proper condition ready for installation in or on the VESSEL, in accordance with the time schedule designated by the BUILDER.
- b) In order to facilitate the installation by the BUILDER of the BUYER's Supplies in or on the VESSEL, the BUYER **shall** furnish the BUILDER with necessary specifications, plans, drawings, instruction books, manuals, test reports and certificates required by the rules and regulations...
- c) Any and all of the BUYER's Supplies **shall** be subject to the BUILDER's reasonable right of rejection, as and if they are found to be unsuitable or in improper condition for installation...
- d) Should the BUYER fail to deliver any of the BUYER's Supplies within the time designated, the Delivery Date **shall** be automatically extended for a period of such delay in delivery provided that such delay in delivery shall affect delivery of the VESSEL. In such event, the BUYER **shall** be responsible and pay to the BUILDER for all losses and damages incurred by the BUILDER by reason of such delay in delivery of the BUYER's Supplies and such payment **shall** be made upon delivery of the VESSEL. If delay in delivery of any of the BUYER's Supplies exceeds thirty (30) days, then the BUILDER **shall** be entitled to proceed with construction of the VESSEL without installation thereof in or on the VESSEL, without prejudice to the BUILDER's other rights as hereinabove provided, and the BUYER **shall** accept and take delivery of the VESSEL so constructed.

**Figure 6.** Exercise 5

Exercise 4 requires not only *shall* to be completed, but also other modal verbs. In addition, some gaps may be completed in different ways so it also opens some room for discussion. The exercise may also be modified and the source text (in Czech or any other language) may be provided, which makes the trainees more aware of the respective cross-linguistic relations.

Exercise 5 once again makes trainees think about the different meanings and the possible replacements (some alternatives can be found in Chromá (2016: 86–87)). If one works with more experienced students, of course, who may have used *shall* thus far only following the parallel texts, it may be useful to reflect upon their own translations and possibly think about changing their approach. In light of the fact that many translators in the survey mentioned the role of the client’s style, it is also important to make students aware of this. To do this, I use the following exercise.

**Assign a translation of a contract from your source language into English for a specific law firm, give the translators the style guides of the law firm to follow and produce a corresponding translation.**

**Figure 7.** Exercise 6

When I use this exercise, I try to work with style guides of two law firms, each of which adopts a different style (not only regarding the *shall* policy). Some style guides, not only for law firms, are available online (e.g. Eversheds, Adobe, see bibliography). I ask half of the class to follow consistently one house style, and the other half to follow the other style. We then compare the end products and discuss how a translation of a contract may differ, with respect to the discursive conventions, even though the legal content and legal effect should be the same in both cases. I believe that this exercise is also extremely important as it makes trainees aware of the importance and relevance of style guides.

## Conclusions

By way of conclusion, let me compare how the ideal and the real world of legal translators in my context differ. Firstly, in an ideal world, the native speaker principle would be observed and translators would only be working into their mother tongue, and thus could follow their native-speaker intuition when it comes to *shall*. In the real world, this is not the case for Czech translators due to the reasons explained above. Secondly, in an ideal world, translators would always be provided with a translation brief, and

even better, a style guide or preference of the client, so that they could make reasoned decisions in line with the client's preference. Unfortunately, this is rarely the case on the freelance Czech market. Thirdly, when looking for parallel documents, students would find only such documents that would clearly indicate how *shall* is used in authentic documents. In the real world, both *shall*-free and *shall*-rich documents abound on the Internet.

Sad as it is, we live in the real world, not an ideal one, and have to prepare the translation trainees for the real world. This means that students must be made aware of the polysemy and ambiguity of *shall*, and of its possibly even legal consequences. Some exercises to help in this respect were suggested in the previous section of this paper. Although the importance of the briefs and client's style should be emphasized, students should also be provided with some guidance to follow in the absence of any instructions or the client's required style. Again, the exercises presented above may be used to do so. Trainees should be introduced to the ABC as well as the American rule and possibly decide for themselves which one to follow when having the discretion to decide. I believe that less harm may be done when one approach is followed systematically than when *shall* is used arbitrarily to match some of the parallel texts. Furthermore, providing the trainees with some theoretical background and writing on the use of *shall* equips them with arguments when a client comes back to them and complains that their translation lacks "the legal flavour". Williams (2006: 247) states that the problem of *shall* is not in the verb itself, as he believes it serves a purpose when the ideas of obligation and futurity are jointly expressed, but rather in poor drafting habits. This further highlights the importance of discussing the issue of *shall* with translators to prevent them from adopting such bad drafting habits themselves.

In summary, in my legal translation curriculum I devote an entire lesson to *shall*, usually when dealing with the language and translation of contracts, and go over the exercises presented above. I provide no directions to the trainees as to the preferred approach, but when asked which one I follow, answer the American rule in line with Adams and Lunn. It is then up to the students to make their own decision, but whatever their final decision is, I believe that it should be a reasoned one and their use of *shall* should not be arbitrary, but consistent and disciplined.

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REFERENCES

- Adams, K. 2001. *Legal usage in drafting corporate agreements*. Westport, CT: Quorum Books.
- Adams, K. 2014. ‘Banishing Shall from Business Contracts: Throwing the Baby Out with the Bathwater.’ *The Australian Corporate Lawyer*, 24 (3): 12–13.
- Adams, K. 2017. Categories of Contract Language: Quick Reference. Retrieved from <http://www.adamsdrafting.com/wp/wp-content/uploads/2017/02/CoCL-Quick-Reference-2-February-2017.pdf>
- Adobe. 2015. *Adobe Legal Department Style Guide*. Retrieved from <https://files.adobe.com/a/preview/049e2224-211f-4efa-b236-2a91ee9c1463>
- Australian Office of Parliamentary Counsel. 2005. *Plain English Manual*. Retrieved from [http://www.opc.gov.au/about/docs/Plain\\_English.pdf](http://www.opc.gov.au/about/docs/Plain_English.pdf)
- Banful, E. 2013. Supreme Court Decision on Election Petition – A Case for Plain English Drafting. Retrieved from <http://www.modernghana.com/news/493869/1/supreme-court-decision-on-election-petitiona-case-.html>
- Beeby, A. 1998. ‘Direction of translation (directionality).’ in M. Baker and K. Malmkjær (eds.) *Routledge Encyclopedia of Translation Studies*. London/New York, NY: Routledge, 63–67.
- Butt, P. and R. Castle. 2013. *Modern Legal Drafting. A Guide to Using Clearer Language*. Cambridge: Cambridge University Press.
- Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada. *Uniform Drafting Conventions*. Retrieved from <http://www.ulcc.ca/en/home/546-josetta-1-en-gb/uniform-actsa/drafting-conventions/66-uniform-drafting-convention>
- Chestermann, A. 1993. ‘From ‘Is’ to ‘Ought’. Laws, Norms and Strategies in Translation Studies.’ *Target*, 5 (1): 1–20.
- Chromá, M. 2016. ‘Traps of English as a Target Language in Legal Translation.’ *Comparative Legilinguistics – International Journal for Legal Communication*, 26: 71–98.
- Espenschied, L. E. 2010. *Contract Drafting. Powerful Prose in Transactional Practice*. American Bar Association.
- Eversheds. 2011. *Legal Drafting in English*. Retrieved from <http://www.eversheds-sutherland.com/documents/Legal-drafting-in-English.pdf>
- European Commission, Directorate-General for Translation. 2017. *English Style Guide. A handbook for authors and translators in the European Commission*.
- European Communities, Office for Official Publications of the European Communities. 2003. *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons involved in the Drafting of Legislation within European Communities*.
- Felici, A. 2012. ‘Shall Ambiguities in EU Legislative Texts.’ *Comparative Legilinguistics – International Journal for Legal Communication*, 10: 51–66.

- Foley, R. 2001 'Going out in style? Shall in EU legal English.' in: P. Rayson, A. Wilson, T. McEnery, A. Hardie and S. Khoja (eds.) *Proceedings of the Corpus Linguistics Conference 2011*. Lancaster: University of Lancaster.
- Gallego-Hernández, D. 2017. 'Testing a methodological framework for retrieving parallel texts in the domain of business translation.' *Perspectives*, 25: 1–20.
- Garner, B. A. 2012. 'Shall we abandon shall?' *ABA Journal*. Retrieved from [http://www.abajournal.com/magazine/article/shall\\_we\\_abandon\\_shall/](http://www.abajournal.com/magazine/article/shall_we_abandon_shall/)
- Garner, B. A. 2013. *Legal writing in plain English: a text with exercises*. Chicago, IL: The University of Chicago Press.
- Gibová, K. 2011. 'On Modality in EU Institutional-Legal Texts' in A. Kačmárová (ed.) *English Matters II*. Prešov: Prešovská univerzita, 6–12.
- Giczela-Pastwa, J. 2016. 'Researching inverse legal translation: corpus-based study of selected Polish legal acts in English translation.' Poster presented at EST Congress in Aarhus, September 2016.
- Kimble, J. 2011. *Lifting the fog of legalese: essays on plain language*. Durham: Carolina Academic Press.
- Legislative Affairs Agency. 2017. *Alaska Manual of Legislative Drafting*. Retrieved from <http://w3.lgis.state.ak.us/docs/pdf/DraftingManual.pdf>
- Lunn, R. 2017. *How to Translate Contracts in a Teletransporter: A systematic approach to translating contracts into English*. Self-published beta version provided by the author.
- Office of the Legislative Counsel, US House of Representatives. 1995. *House Legislative Counsel's Manual on Drafting Style*. Retrieved from [https://legcounsel.house.gov/HOLC/Drafting\\_Legislation/draftstyle.pdf](https://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf)
- Office of the Parliamentary Counsel. 2017. *Drafting Guidance*. Retrieved from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/666328/drafting\\_guidance\\_Dec\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/666328/drafting_guidance_Dec_2017.pdf)
- Office of the Revisor of Statutes. 2009. *Maine Legislative Drafting Manual*. Retrieved from <https://www1.maine.gov/legis/ros/manual/Draftman2009.pdf>
- Prieto Ramos, F. 2011. 'Developing Legal Translation Competence: An Integrative Process-Oriented Approach.' *Comparative Legilinguistics – International Journal for Legal Communication*, 5: 7–21.
- Scott, J. 2012. 'Can Genre-Specific DIY corpora, Compiled by Legal Translators Themselves, Assist them in 'Learning the Lingo' of Legal Subgenres.' *Comparative Legilinguistics – International Journal for Legal Communication*, 12: 87–100.
- Svoboda, T. 2011. *Průzkum překladatelského trhu*. Prague: Ústav translatologie. Retrieved from [http://www.jtpunion.org/spip/IMG/pdf/UTRRL\\_Anketa-vyzkum\\_trhu.pdf](http://www.jtpunion.org/spip/IMG/pdf/UTRRL_Anketa-vyzkum_trhu.pdf)
- Texas Legislative Council. 2017. *Texas Legislative Council Drafting Manual*. Retrieved from <http://www.tlc.state.tx.us/docs/legref/draftingmanual.pdf>

*Shall We Teach “Shall”: A Systematic Step-By-Step Approach*

- Trosborg, A. 1995. ‘Statutes and Contracts: An analysis of legal speech acts in the English language of the law’. *Journal of Pragmatics* 23, 31–53.
- Williams, Ch. 2005. ‘Vagueness in Legal Texts: Is There a Future for Shall?’ in V. Bhatia, J. Engberg, M. Gotti and S. Hellet (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang.
- Williams, Ch. 2006. ‘Fuziness in Legal English. What Shall we Do with “Shall”?’ in A. Wagner and S. Caccigiudi-Fahy (eds.) *Legal Language and the Search for Clarity*. Bern: Peter Lang.
- Williams, Ch. 2013. ‘Is legal English “going European”? The case of the simple present.’ *Canadian Journal of Linguistics*, 58 (1): 105–126.
- Wydick, R. C. 2005. *Plain English for lawyers*. Durham, NC: Carolina Academic Press.