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The Impact and Translatability of Modality on Legal Contracts Between Arabic and English Languages: Hints on Teaching Them

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Abstract

This paper aims at studying the impact and translatability of modality in legal contracts and agreements from English into Arabic, and vice versa. It is an attempt to examine how modal verbs used in legalese can affect and be translated between the study two languages, Arabic and English. Randomly twenty legal texts covering the commonly used modal verbs in contracts and agreements were selected and translated into Arabic. The modality used in such contracts and agreements had different meanings and scopes where directly or indirectly brought about its impact on the contexts and extent of translatability. As a result of such attempt, it has become definitely clear that modal verbs play a significant role in shaping the degree of relationship between those concerned in a certain legal text. Also, it is necessary to pinpoint that modal auxiliary verbs used in daily conversation and writing are not as same as the ones used in legal domain. In daily English language, the function of shall is to make a reference to futurity, while may make a reference to permissions. This study came up with results disclosing that the use of modality has a wide range of impact on the content of legal texts within a certain contract or agreement. Legal modality is an indication to rights and duties, hence there shall be a good mastery of the function of modality, to know its impact and translatability between the study languages.

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1. Introduction

The fact that the world has become smaller day by day, and become borderless results in a tremendous interest among those considered themselves fans of legal discourse. They work hard to facilitate and explain the legal discourse. Efforts have been made to shed much light on the effect and translatability of legal texts. In the present study, there is a dire need to elaborate on the effect and translatability of modality, modal verbs such as shall, will, may, etc., used in legal texts. Unlike ordinary language used among us and laymen, legal language is a professional language adopted by a certain class of people concerned with legality. It is a language tagged to be peculiar. The structures embedded in the legal texts and archaism of vocabulary used are clear confined to such characteristics of legality (Wiersema, 2004). It is the language used by those work under court domes or translators recruited to translate contracts or agreements, no longer used in common venues, archaic dated back to centuries ago (Smejkalová, 2009). Those who are outside this circle of interest are a bit buzzled by the formality of the legal language use. The impact and use of modality is only accessible by people lived with legality, whether in courts or contracted with to translate a certain contract or agreement. Bhatia (2010) made it clear that the legal discourse has many objectives including imposition of obligations and giving rights, or denoting prohibition.

Through the use of legal discourse characteristics mainly modality, people can get acquainted with their rights and duties. Failing to do so, could result in being behind jail bars or costing a lot of money as fines (Bhatia, 2010). However, it is important to mention here, as made clear by Bouharaoui (2008), the inclusion of modals in legal texts, whether contracts, agreements, and the like, cause a degree of difficulty where the interpretation and translation of a certain text would be difficult. Modality, or modal verbs used in legality are not the ones referred to in normal daily talk. The modal “shall” does not make a reference to futurity in legal texts, but to obligation or duty (Tiersma, 1999). As far as “may”, as a modal verb, is concerned, according to Sabrah (2003), it is used in legal texts to function as a reference to “possibility”, for people to do or things to be done.

Mohammed, Alawi and Fakhouri (2010) supported the view that the main goal of legal translation is to maintain the message as it is in the target language, which means the focus of a translation should be

guided towards the function not lexicons of a certain text. On the same token, they emphasized that translators are better to opt for functional concept rather than lexical or syntactical one.

2. Literature Review

This section is an attempt to pinpoint other papers of this major studied the impact and translatability of modality in in legal texts. Here, there is a focus on how legal texts dealt with in other studies as to the use of modality, its impact and its translatability.

2.1 Adoption of Modality

First, Vethamani, Abd Manaf and Akbari (2008) pinpointed that, from a grammatical perspective, auxiliary modals are not merely helping verbs, but more than this, they bring about semantic meanings. It is understandable that auxiliary modal verbs have a tangible role in imposing obligation, necessity, prohibition, permission, etc. of the legal content. Legally speaking, those who work under the court domes, those concerned with commercial documents are acquainted with the different uses of modal verbs, but to some extent laymen, who studied the use of modals in general speaking atmosphere, are struggling to get the exact meaning of a certain advent of a modal in a legal text due to its complexity and to some point, its uncertainty of use, objective and meaning (Curto, 2018). Such modality clearly shows an adequate relationship between those concerned parties. Without full mastery of the use of modality, translation of a certain texts would be legally a bit unreadable.

2.2 Impact of Modality

First, Sarcevic in a study conducted in 2000 pinpointed that translators, or to be more specific legal translators have to put into consideration that their principle objective is to come up with a translation holding the same legal impact of the source one. Sarcevic went on further saying that terminology-related equivalence is not as much significant as the legal equivalence, hence translators should be oriented to this fact before any attempt to translate a legal document.

Second, it is a common notion that modal verbs are not much used in daily speech, but widely used in legal texts for different accounts (Coates, 1983). Law has its own necessities and requirements for

accomplishing certain concepts of relationship between some relevant parties (Biel, 2014). He went on saying that in order to impose the sense of obligation, there shall be an adoption of the modal verb “shall”, to impose the sense of permission, there shall be an adoption of the modal verb “may”, for possibility, there shall be “can”, along with their negation and past forms.

2.3 Translatability of Modality

First of all, and as stated by Orts in 2015, the legal language, used as a means of communication within the scope of legality, in a court, official institute and the like, between relevant parties, has its own weight and form which cannot be absorbed by ordinary people. Ashipu and Umukoro made it clear in their study in 2014, legal language is a stiff, rigid and sophisticated language due to the backlog of abnormal characteristics of legal discourse including the use of archaic technical terms, the special use of modal auxiliary verbs of certain goals within a certain legal context, the adoption of interwoven grammatical structures, long list, no more used in daily communication, It is of high importance to break the ice and, as translators, work hard to translate auxiliary modal verbs adequately because failing to do so, could lead to a distorted message in the target language. Also, Konig and Gast in a study carried out in 2009 made it clear that each language has and enjoys its own form and structure including the use of auxiliary modal verbs, and the use of dictionary, whatever they are, to be bi-lingual or mono-lingual, they would be of limited benefit when there is an attempt to translate a certain legal text into another language. Because the meanings of modal verbs within the scope of legality is more and more different from that confined to normal language used by all including laymen.

3. Analysis and Discussion

As stated above, this study has appeared as a result of non-stopped misunderstanding of the use of modal verbs. Still translators look at such modals as no more than grammatical auxiliary modal verbs used to cover futurity, ability, possibility, et., with no efforts to differentiate between what is in the scope of legality and what is used in daily talk between laymen. This paper has mapped out the main uses, functions and meanings of different modal verbs used in legality. Chesterman (1998: 54) disclosed concerns that the translation of modal verbs including “shall, will, ought to, have to, may, can”, and

their past and negative forms if not functionally brought about equivalent translation in the target language, the meaning of those above mentioned modal verbs would be a bit meaningless.

Exactly (20) randomly chosen texts, extracted from agreements and contracts, are translated into Arabic to weigh up the impact and translatability of modal verbs. As far as the use and functionality of modal verbs are concerned, the appendix 1 contains (20) modalised legal short texts translated into Arabic, where their impact and translatability have been revealed adequately.

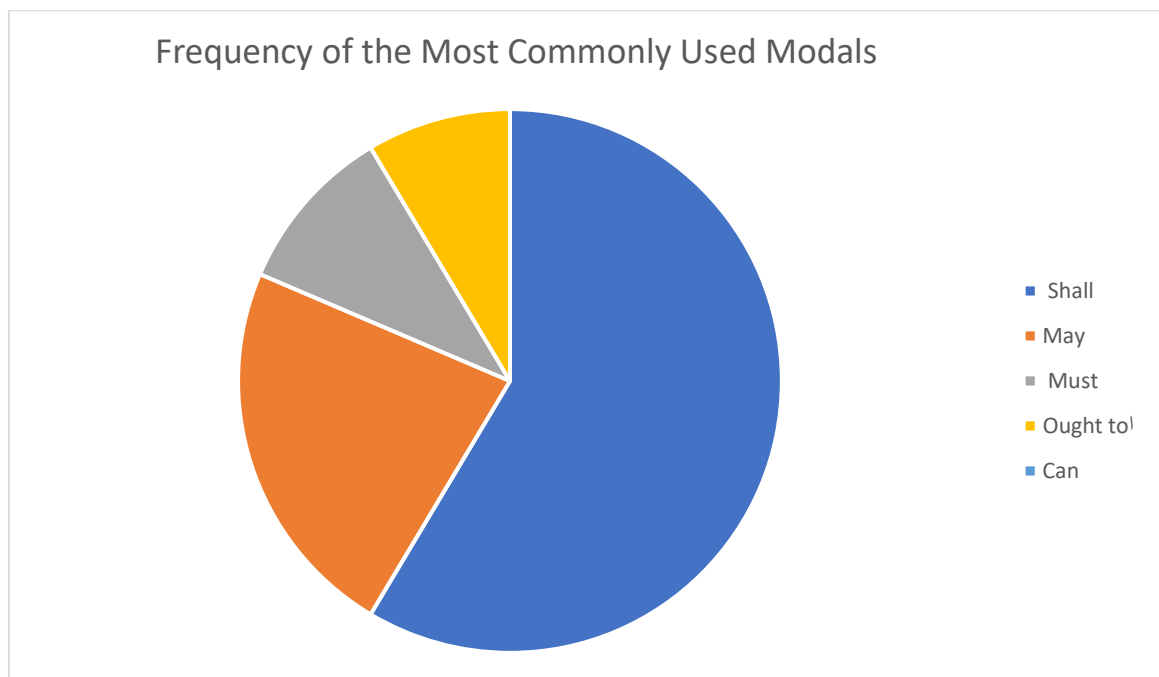


Figure 1: Frequency of the Commonly Used Modals

The figure (1) above has shown the frequency of modals used in legal contexts, where the use of “shall”, as an indication for obligation, was superior to the rest of others, followed by “may” which referred to the notion of permission. Then, it was the use of “must”, where the meaning was a reference to necessity, followed by the use of the modal “will”, which is less frequent compared with “shall”, or it is a bit rarely used in this concern. Also, it was the use of “ought to”, where the meaning referred to was obligation, but it was not as strong as the use of “shall”. In the end there was a modal called “can”, to refer to possibility, as shown below:

First, the use of the modal verb “shall” has shown an obligation, and translated into Arabic using the present simple form, as follows:

The bank guarantee shall remain in full force and effect until issue of the FINAL ACCEPTANCE CERTIFICATE or until all outstanding financial matters have been settled, whichever is the latest.
يبقى الضمان المصرفي ساري المفعول وبكامل الأثر القانوني حتى إصدار شهادة القبول النهائي أو حتى يتم تسوية جميع الأمور المالية المتعلقة، أيهما أحدث.

Second, the use of the modal verb “may” has shown a possibility, and translated into Arabic, as follows:

..... and that such functional system may be used by CONTRACTOR for the performance of the commissioning activities.
..... وان هذا النظام الوظيفي يمكن أن يستخدمه المقاول لأداء أنشطة التشغيل التجريبي.

It is of high importance to mention that “may” has another sense, that is permission, as exemplified below:

The EMPLOYER may request the SUPPLIER to replace the Bank Guarantee accordingly and provide a new Bank Guarantee from an approved Bank. All Bank Guarantee replacement charges shall be the SUPPLIER responsibility.
يجوز لصاحب العمل أن يطلب من المورد استبدال الضمان المصرفي وفقا لذلك، وتقديم ضمان مصرفي جديد من مصرف معتمد. يتحمل المورد مسؤولية جميع رسوم استبدال الضمان المصرفي.

Third, the use of “must” refers to the legal sense of necessity, as exemplified here:

SUPPLIER must invoice COMPANY for services performed pursuant to this AGREEMENT, or any of its SECTIONS, or a Change Order, as the case may be, based on the rates and prices established hereof.
ينبغي على المورد إرسال فاتورة إلى الشركة مقابل الخدمات التي يتم تقديمها وفقا لهذه الاتفاقية، أو أي من أقسامها، أو طلب التغيير، حسب الحالة، بناء على الأسعار والمعدلات المحددة في هذه الاتفاقية.

Fourth, the use of “will” refers to the legal sense of obligation, but rarely used and abandoned in this regard, as exemplified here:

The FORM OF AGREEMENT will be signed by CONTRACTOR’s authorized representative and shall clearly detail the name and title of the same.

يتم توقيع نموذج الاتفاقية من قبل الممثل المفوض للمقاول، وعليه أن يوضح بالتفصيل اسم وعنوان الممثل القانوني.

Fifth, the use of “will” refers to the legal sense of obligation, but rarely used and abandoned in this regard, as exemplified here:

Paragraph 2 of Article “Invoicing” of the General Conditions ought to be suspended by the following:
يتم تعليق الفقرة ٢ من المادة “إعداد الفواتير” من الشروط العامة من خلال ما يلي:

Sixth, as far as the use of “ought to” is concerned, it refers to the legal sense of obligation, but not as much as the use of “shall”, as exemplified below:

Subject to APPROVAL by COMPANY of CONTRACTOR’s invoice, the invoice ought to be paid within (45) days of receipt, in the currency indicated in Appendix A – Compensation Schedule to CONTRACTOR’s designated bank account as indicated below.
رهنًا بموافقة الشركة على فاتورة المقاول، يتم دفع الفاتورة في غضون (٤٥) يوما من الاستلام، بالعملة الموضحة في الملحق أ - جدول التعويضات للحساب المصرفي المعين من قبل المقاول كما هو موضح أدناه.

Seventh, “can” is used to denote possibility, as exemplified below:

The CLIENT and its CONTRACTORS and SUBCONTRACTORS cannot enter the worksite premises without a written consent from the EMPLOYER.
لا يمكن للعميل ومقاوليه، ومقاوليه الثانويين، دخول أماكن العمل دون موافقة خطية من صاحب العمل.

Finally, the use of “have to”, which is in reality not a modal verb, but does and expresses the functionality of obligation, as follows:

In this Memorandum of Understanding, words importing the singular have to include the plural and vice versa.

في مذكرة التفاهم هذه، يتعين أن تتضمن الكلمات التي تشير إلى المفرد الجمع، والعكس صحيح.

4. Results, Conclusions, Recommendations & Future Research

This research paper was an attempt to disclose the translatability and effect of modal verbs on legal contracts. Also, the study shed much light on the fact that modal verbs are frequently used in legal

discourse such as *shall, may, must, can, will, have to, ought to* and their negative and past forms. As Wang and Chen (2014) stated that the use of a modal verb in legal texts of high significance for its mission to convey a certain meaning whether to be obligation, when “shall” is used, permission, when “may” is used, prohibition, when “must not” is used, etc. They added that any attempt to drop any modal verb would cause a negative impact on the enforceability of a certain judicial verdict or an Article of a certain contract.

In the same token, this study has come up with some recommendations to be followed by legal translators, one of which is that a legal translator has to understand the exact meaning of a certain modal verb and its function within a certain legal text. Because, as made clear earlier, knowing a meaning and function of a specific modalised text can facilitate the process of translation without any distortion. Also, legal translators shall be equipped with a full understanding of occurrence and frequency of modal verbs used in legal atmosphere. This phenomenon gives those concerned with legality a full mastery of professional translation with zero probability of modality meaning and function misunderstanding.

As future studies are concerned, more and more studies are needed to cover modalised texts because yet no much research has made in this regard.

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Appendix 1

English Texts	Translation into Arabic
No payment shall be made by COMPANY to CONTRACTOR at a bank account different to that indicated in the CONTRACT.	لن تقدم الشركة أي مدفوعات للمقاول في حساب مصرفي يختلف عن ذلك المبين في العقد.
..... and that such functional system may be used by CONTRACTOR for the performance of the commissioning activities.	... وأن هذا النظام الوظيفي يمكن أن يستخدمه المقاول لأداء أنشطة التشغيل التجريبي.
Paragraph 2 of Article "Invoicing" of the General Conditions ought to be suspended by the following:	يتم تعليق الفقرة ٢ من مادة "إعداد الفواتير" من الشروط العامة من خلال ما يلي:
The bank guarantee shall remain in full force and effect until issue of the FINAL ACCEPTANCE CERTIFICATE or until all outstanding financial matters have been settled, whichever is the latest.	يبقى الضمان المصرفي ساري المفعول وبكامل الأثر القانوني حتى إصدار شهادة القبول النهائي أو حتى يتم تسوية جميع الأمور المالية المتعلقة ، أيهما أحدث.
Subject to APPROVAL by COMPANY of CONTRACTOR's invoice, the invoice ought to be paid within (45) days of receipt, in the currency indicated in Appendix A – Compensation Schedule to CONTRACTOR's designated bank account as indicated below.	رهنًا بموافقة الشركة على فاتورة المقاول ، يتم دفع الفاتورة في غضون (٤٥) يومًا من الاستلام ، بالعملة الموضحة في الملحق أ - جدول التعويضات للحساب المصرفي المعين من قبل المقاول كما هو موضح أدناه.
The FORM OF AGREEMENT will be signed by CONTRACTOR's authorized representative and shall clearly detail the name and title of the same.	يتم توقيع نموذج الاتفاقية من قبل الممثل المفوض للمقاول، وعليه أن يوضح بالتفصيل اسم وعنوان الممثل القانوني.
Each of the Parties, together with their Affiliates, as relevant, shall appoint one arbitrator, within thirty (30) days of receipt of notice of the commencement of arbitration.	يتعين على كل من الأطراف، جنبًا إلى جنب مع الشركات التابعة لهم، حسب الاقتضاء ، تعيين محكم واحد ، في غضون (٣٠) يومًا من تاريخ استلام إشعار ببدء التحكيم.

Supplier shall not disclose any Confidential Information to any other Person other than to SUPPLIER's representative, COMPANY or COMPANY's representative.	لا يحق للمورد الإفصاح عن أي معلومات سرية لأي شخص آخر غير ممثل المورد أو الشركة أو ممثل الشركة.
All written Confidential Information provided by COMPANY will be promptly returned upon written request of COMPANY or, at the election of COMPANY, destroyed, and no copies shall be retained thereof by SUPPLIER, its representative or any member of its Group.	سيتم إعادة جميع المعلومات السرية الخطية المقدمة من الشركة على الفور بناء على طلب خطي من الشركة أو ، بناء على اختيار الشركة ، يتم إتلافها ، ولن يحتفظ المورد أو ممثله أو أي عضو في مجموعته بأي نسخ منها.
Company can issue instructions to Contractor at any time to make any variations to the Services which are within the capability and resources of Contractor.	يمكن للشركة إصدار تعليمات للمقاول في أي وقت لإجراء أي تغييرات على الخدمات التي تكون في حدود قدرة والموارد المتوفرة لدى المقاول.
If First Party fails to or refuses to carry out its obligations pursuant to Clause 11.2 above within the time period specified in the relevant notice, Second Party may at its sole discretion engage a third party to perform any part of the Services which has not been performed or re-performed pursuant to Clause 11.2 above.	في حال أخفق أو رفض الطرف الأول تنفيذ التزاماته وفقا للبند ١١,٢ أعلاه خلال الفترة الزمنية المحددة في الإشعار ذي الصلة، يجوز للطرف الثاني وفقا لتقديره الخاص إشراك طرف ثالث لأداء أي جزء من الخدمات التي لم يتم تنفيذها أو أعيد إجراؤها وفقا للبند ١١,٢ أعلاه.
The data should not therefore, under any circumstances, be relied upon as the basis for any drilling, completion, well treatment, production or financial decision, or any procedure involving any risk to the safety of any drilling venture.	لذلك، لا ينبغي الاعتماد على البيانات تحت أي ظرف من الظروف كأساس لأي عمليات حفر أو استكمال أو معالجة بئر أو إنتاج أو قرار مالي أو أي إجراء ينطوي على أي خطر على سلامة أي مشروع حفر.
The EMPLOYER may request the SUPPLIER to replace the Bank Guarantee accordingly and provide a new Bank Guarantee from an approved Bank. All Bank	يجوز لصاحب العمل أن يطلب من المورد استبدال الضمان المصرفي وفقا لذلك، وتقديم ضمان مصرفي جديد من مصرف معتمد. يتحمل المورد مسؤولية جميع رسوم استبدال الضمان المصرفي.

Guarantee replacement charges shall be the SUPPLIER responsibility.	
As a result of such audits, COMPANY may claim for omissions, corrections, overpayments and other errors in charges and credits for COMPANY's account as billed by VENDOR, its affiliates and Subcontractors.	كنتيجة لعمليات التدقيق هذه، يجوز للشركة المطالبة بالتعويضات عن الإغفالات والتصحيحات والمدفوعات الزائدة والأخطاء الأخرى في الرسوم والأرصدة لحساب الشركة، وفقا للفواتير الصادرة عن المورد والشركات التابعة له والمقاولين من الثانويين.
SUPPLIER is also required to utilize local resources from within the Block-9 Contract Area to the maximum extent, where the Service will be carried out, as part of the SUPPLIER's social responsibility so as to avoid any disruption of Service by local tribes/communities.	يطلب من المورد أيضا استخدام الموارد المحلية من داخل منطقة العقد بلوك ٩ إلى أقصى حد. حيث سيتم تنفيذ الخدمات، كجزء من المسؤولية الاجتماعية للمورد وذلك لتجنب أي انقطاع للخدمات يتسبب به القبائل / المجتمعات المحلية.
The CLIENT and its CONTRACTORS and SUBCONTRACTORS cannot enter the worksite premises without a written consent from the EMPLOYER.	لا يمكن للعميل ومقاوليه، ومقاوليه الثانويين، دخول أماكن العمل دون موافقة خطية من صاحب العمل.
Workplace drilling sites will be checked on daily basis to make sure that the said sites are free of hazardous materials and work is smoothly operated during the project scheduled period.	سيتم فحص مواقع الحفر في أماكن العمل على أساس يومي للتأكد من أن المواقع المذكورة خالية من المواد الخطرة، وأن العمل يتم تشغيله بسلاسة خلال الفترة المحددة للمشروع.
Customer must comply with all regulations and instructions stipulated by the EMPLOYER at all times during the Contract period, otherwise the CONTRACT will be terminated.	يلتزم العميل بالامتثال لجميع اللوائح والتعليمات المنصوص عليها من قبل صاحب العمل في جميع الأوقات خلال فترة العقد ، وبعبكسه سيتم إنهاء العقد.
SUPPLIER must invoice COMPANY for services performed pursuant to this AGREEMENT, or any of its SECTIONS, or a Change Order, as the case may be, based on the rates and prices established hereof.	ينبغي على المورد إرسال فاتورة إلى الشركة مقابل الخدمات التي يتم تقديمها وفقا لهذه الاتفاقية ، أو أي من أقسامها ، أو طلب التغيير ، حسب الحالة ، بناءً على الأسعار والمعدلات المحددة في هذه الاتفاقية.

In this Memorandum of Understanding (MOU), words importing the singular have to include the plural and vice versa.

في مذكرة التفاهم هذه، يتعين أن تتضمن الكلمات التي تشير إلى المفرد الجمع، والعكس صحيح.