

Power dynamics and legal English

CELINA FRADE*

ABSTRACT: English is tacitly accepted as the world language in various areas of international activities. Likewise, legal English, the language of the common law, is the lingua franca of international commercial and legal transactions by means of contracts. Within the present globalized scenario, there has been a reordering of power dynamics in the relationship of world Englishes parties towards a more symmetrical and cooperative type. This paper critically discusses power dynamics in legal English in world Englishes in the light of new trends in the international petroleum business. Qualitative research was conducted contrasting a former concessionaire contract dated 1934 and modern petroleum contracts dated after the 1950s. The conclusion is that the new texturing resulting from changes in the real world is not integrally reflected in the legal English of petroleum contracts.

INTRODUCTION

It is widely acknowledged that the relationship between language and power is a fundamental and all-pervasive aspect of human societies. Thus it is not surprising to find it of central concern in restricted domains each with their particular viewpoint, be it cultural, political, historical, or legal.

Legal English, broadly defined as the language of Anglo-American common law, is regarded as the lingua franca of international commercial and legal transactions, and has spread with the common law and British and American colonial influence to Outer and Expanding Circle countries. In these contexts, legal English has been interpreted as standing for the hidden power of Anglo-Saxon law and culture, but now seems to play a dual role, also representing the multiplicity and the mixture of cultures, ideologies, and legal systems of developing countries. This phenomenon can be called “legal globalization”, and covers all legal relations in a global society under the primacy of common law and its language, resulting in a reordering of the power dynamics of legal English.

This paper critically explores power dynamics in legal English in world Englishes in the light of new trends and innovations in the international petroleum business.¹ In particular, I am concerned with whether some new trends and innovations in the real world have resulted in a new texturing, i.e. in the way legal English is deployed in modern petroleum agreements to reflect the new power dynamics in the oil business, in contrast with the former concessionaire systems. Also, I discuss whether former and current power-holders – companies or governments – still hold their privileged position, or instead are moving towards a more symmetrical and cooperative type of commercial and legal relationship. I begin by providing an overview of the current status and power of legal English. Next, I explain the selection of the data, followed by qualitative analysis and the

*Federal University of Rio de Janeiro, Rua Professor Abelardo Lobo, 62/101, Rio de Janeiro – RJ, Brazil. E-mail: celinafrade@uol.com.br

results of the findings. In conclusion, I suggest further research on how power dynamics is realized in other legal genres in world English and, more specifically, in arbitration agreements.

THE STATUS OF LEGAL ENGLISH

Broadly speaking, legal English can be defined as the language of the common law. Also called “judge-made law” or “fuzzy law”, common law was developed in England from the time of the Norman Conquest (AD 1066) and was spread throughout the world by British colonial activity (trade and settlement), being adopted in the United States, Australia, Canada, India, and New Zealand. Its fundamental principles are based on the “gradual accumulation of individual precedents from case decisions together with individual cases and on customs and usages” (Campbell, 1996: 1) rather than on codified written laws, as in civil law.

Legal English encompasses several distinct oral and written genres depending on the communicative purpose they serve, the contexts in which they are used, the relationship between the participants engaged in the activity and the background knowledge shared by the participants (Bhatia, 1987).² Amongst its distinguishing features we can point out the frequent use of formal words; the deliberate use of words and expressions with flexible meanings; attempts at extreme precision; and wordy, unclear, and complex syntactic constructions.

In the present day, legal English is the lingua franca of international commercial and legal transactions, and has continued its spread from Inner and Outer Circle countries to those of the Expanding Circle. The result is a gradual process of legal globalization intended to cover all legal relations in a global society under the primacy of common law and its language. The process constitutes a reordering of sociolegal relations between actors – from national (or local) to global – since nations can no longer view their laws and legal systems in isolation.

My concern here is to investigate whether, in order to achieve pragmatic success in the current globalized environment, legal English has partly lost its role of standing for the hidden power of the developed countries, and plays instead the dual role of standing also for the multiplicity and the mixture of cultures, ideologies, and legal systems of the developing countries. We are in fact concerned with the power dynamics of legal English in world Englishes.

THE POWER OF LEGAL ENGLISH

Of the three kinds of power in discourse presented by Scollon (1997: 389), one reads that “*power is the ability to frame discourse events and utterance*” (emphasis original). Bearing this definition in mind, we assume that the (overt and hidden) power of legal English in contracts lies much more in framing *how* and *by whom* clauses are written rather than *what* the rules really mean.

The most common linguistic resources to cope with *how to frame* rules in contractual clauses are conventions and standardization. Conventions perform interactive functions at different levels: at a social level they guide and constrain the communicative activities of professional communities; at a textual level, conventions feature repeated patterns in the structure, lexis, rhetorical features, and style of texts (Paré and Smart, 1994: 147).

Standardization is necessary to “make contract negotiation more scientific and the agreement a more predictable matter” (Gao, 1994: 225). The results are twofold: on the one hand, the sophistication of the contractual production wherein provisions are detailed, clearly defined and upgraded; on the other hand, contractual convergence and synthesis in such a way that most of the operative clauses in contracts are the same irrespective of their labels. In fact, most forms of contract being used nowadays are remarkably similar. The standardization of contracts seems to follow the current attempts of states and organizations to unify and harmonize legal rules, which include “the widespread use of boiler plates, standard contracts and general conditions and the harmonization of legal education” (van Houtte and Wautelet, 2001: 91).

One of the most powerful properties of legal English is the non-attribution of authorship of written documents (other than cases wherein authors are explicitly mentioned) such as legislation and contracts. Due to their frozen, formulaic, and conventionalized properties, such genres may seem somewhat anonymous pieces of writing, as there are no linguistic signs to indicate who really wrote them; but their nature displays “a multitude of *voices* – an array of institutional, [organizational] and social groups – in ‘dialogue’ with one another” (Frade, 2005: 65). In international contracts, for instance, the two parties are the addressers and addressees represented by lawyers on behalf of their corporations, law firms, and clients “since they have put down on paper what rights and obligations they have vis-à-vis the other party” (Kurzon, 1986: 29). The principle is that a symmetrical relationship between two parties of a contract is expected, as pointed out by Trosborg (1997: 113), “each holding something of value for the other party (promise and consideration)”. Thus it is not a question of one party exercising power to gain authority over the other party; instead, it seems a question simply of “explicitly stating who does what” (p. 113).

While adopting a dynamic perspective on the study of dialogue understood as any interaction through language, Linell (1990: 147) sees “the power of dialogue dynamics” as:

the interplay of participants’ initiatives and responses, quite apart from the discourse itself, [which] generates a web of social relations, commitments and responsibilities, and possibly also shared knowledge, attitudes and perspectives. (Emphasis original.)

Patterns of symmetry versus dominance (asymmetry) emerge from these initiatives and responses partly due to reproductions of cultural regularities and constraints on communicative activities. These patterns are not static, however, but are prone to change as they reproduce sociopolitical and economic changes and innovations in the material world.

Similarly, though from a more critical viewpoint of power relations, Fairclough (1989: 34) claims:

Power relations are always relations of struggle, using the term in a technical sense to refer to the process whereby social groupings [of various sorts] with different interests engage with one another.

This author also claims that it is quite difficult to separate language from other social elements. Thus legal discourse, as part of legal practices, is subject to social conventions and includes “representations of the material world, of other social practices, reflexive

self-representations of the practice in question” (Fairclough, 2004). It is expected, then, that as international legal practice has changed with legal globalization, the texturing of legal discourse as a whole, i.e. the process of making it “a facet of social action and interaction” (Fairclough, 2004), is also prone to changes and innovations resulting from the reordering of legal practices in the material world. However, the issue raised in Fairclough (1989: 61) is not the apparent power egalitarianism in professional discourse but rather “power *behind* discourse”, i.e. the power behind the conventions of a discourse type in the hands of “institutional power-holders”.

International contracts seem a suitable locus for the study of power dynamics in legal English. International contracts are those in which the agreement made by the parties is potentially submitted to two or more legal systems which, in turn, may provide for different rules on the same issue. At the micro-level, contracts constitute sites of engagement for the parties’ rights and obligations, while at the macro-level they constitute the semiotic mediation for other social practices, other social groups, and their sociocultural, political and economic changes.

As a genre, rather than being static and imposed, the contract is construed socially (and thus prone to be adapted, changed, improved, fused, and decayed) to meet the needs of professional communities in the repeated emergence of new situations (Miller, 1984). Again, from a more critical viewpoint, the generic nature of the contract seems to include “representations of the material world, of other social practices, reflexive self-representations of the practice in question” (Fairclough, 2004). The concept of “generic power” introduced in Bhatia (1997: 362) also holds in the case of the contract, an illustration of the saying “Knowledge is power”:

[The] power to use, interpret, exploit and innovate novel generic forms is the function of generic knowledge which is accessible only to the members of the disciplinary [and professional] community.

With the purpose of investigating how power dynamics in legal English is realized, I selected the data described in the next section to consider changes and innovations in the petroleum industry since the 1950s.

THE DATA

One challenge for the researcher in legal English, and particularly in contracts, is that there is hardly any access to authentic material, owing to the inherently confidential nature of legal documents. However, sources of authority, such as well-known legal organizations, associations, legal advocates, counsels and law firms, provide some accessible compilations of authentic and legally valid samples of cases, materials, and contracts.

The data selected to illustrate the claims here were drawn from a corpus of authentic international modern petroleum contracts in English (Barnes, undated),³ compiled and edited by International Energy Counsel, Houston, Texas, USA. Although versions in other language (such as French and Spanish) now have some recognition, the predominance of English is explicitly stated in Article 6 of the OPEC Statute: “English shall be the official language of the Organization.”⁴ The modern petroleum contract, developed out of the former traditional oil concession agreements prior to the 1950s, has a dual legal character in that it is both a commercial contract like any other ordinary contract and also an agreement with elements of public law, as it deals with state-owned natural resources developed by

an alien. At the micro-level of company–government relationships, petroleum contracts seem to have become of a “symmetrical-and-co-operative” type (Linell, 1990: 169), since the parties strive equally, through collaborative and integrative actions, to achieve greater commerciality and mutuality of interest under globalization.

The main modern petroleum contracts are: the MCC (Modern Concession Contract), the PSC (Production Sharing Contract), the RSC (Risk Service Contract), the HC (Hybrid Contract), and joint-venture, and their substantive content basically refers to risk, control and profit-sharing.⁵ The rationale for selecting these contracts is twofold: first, the parties involved in the international petroleum business can be classified in terms of Kachru’s concentric circles; secondly, very little (or almost nothing) has been written about petroleum contracts in terms of their generic and sociocultural aspects, since most studies seem to focus on their economic and legal aspects.

A qualitative method of analysis was conducted, and the Oil Concession Agreement of 1934 of Kuwait⁶ was added to provide for a contrastive analysis of power dynamics between former and modern petroleum contracts.

POWER DYNAMICS IN LEGAL ENGLISH

Modern petroleum contracts operate on a national and global scale, and display texturing which reflect globalized trends and “generalized tensions between imported international practices and local traditions” (Gao, 1994: 2). While the modern petroleum contract seeks a balance and complementarity of interests, rights, obligations, and responsibilities between the parties, in the former classic concessionaire system, the producing parties had almost total control and management of the petroleum enterprises but little or no advantage, and the foreign companies had “extensive rights, privileges and exclusive appropriation of petroleum benefits with small royalties payments and few other obligations in return” (Gao, 1994: 2).

We will move on to investigate whether these new trends and innovations in the real world resulted in a new texturing, i.e. in the way legal English is used in modern petroleum contracts in order to take account of the new power dynamics in the oil business in contrast with the former concessionaire system. We will focus our analysis on some international trends in legal discourse associated with the specific domain of modern petroleum contracts: cooperativeness, democratization, commodification, and fragmentation (see Fairclough, 2001; Frade, 2002).

Cooperativeness

In modern petroleum contracts, cooperativeness implies mutuality of interests, flexibility and contractual mutability, and is mainly realized at the level of lexical and discursive “cooperative” markers. These include commissive verbs (*agree, settle, coordinate, cooperate, integrate*), nouns (*negotiation, agreement*), adverbs (*jointly, amicably, equally, mutually*), multinomials⁷ (*adjusted, extended, or modified*), and collocations (*by mutual agreement, common desire, deems it convenient, in accordance with, as the case may be*).

Example 1 illustrates explicit markers of cooperativeness (underlined), flexibilization (in italics), and dynamism and mutability (in bold).

(1) 4.12 The Development of the Hydrocarbons discovered must be made before the expiration of a Main Pipeline, shall be carried out in accordance with the work programs presented by Contractor to PERUPETRO, as provided in point 5.3.

The Parties recognize that it is their common desire to *optimize* the Operations and therefore hereby agree that *whenever it is deemed appropriate and necessary* the terms for the presentation of the “Initial Development and Main Pipeline Plan”, or of the annual work programs, *as the case may be*, **may be adjusted, extended, or modified** so as to coordinate, harmonize, or integrate the Development of two or more discoveries in the Contract Area or outside of it, if PERUPETRO *deems it convenient*. For said purpose, the contractor shall submit the necessary proposals to PERUPETRO so that such **adjustments, extensions, or modifications** may be agreed upon. (*Peruvian License Agreement*, p. 23)

In the former concessionaire contract there are very few markers of cooperativeness between the parties, since power and authority are integrally either granted to the Sheikh or to the company but very rarely shared by them, as shown in the underlined terms in examples 2 and 3.

(2) Article (1)

The Sheikh hereby grants to the Company the exclusive right to explore search drill for produce and win natural gas asphalt ozokerite crude petroleum and their products and cognate substances (hereinafter referred to as “Petroleum”) within the State of Kuwait including all islands and territorial waters appertaining to Kuwait as shown generally on the map annexed hereto, the exclusive ownership of all petroleum produced and won by the Company within the State of Kuwait the right to refine transport sell for use within the State of Kuwait or for export and export or otherwise deal with or dispose of any and all such petroleum and the right to all things necessary for the purposes of those operations. (*Oil Concession Agreement 1934*)

As shown in bold in example 3, the power and authority is integrally granted to the oil company. What seems to be the lack of cooperativeness in these two cases is the fact that the parties rarely share commitments.

(3) Article (9)

For the purposes of its operations hereunder the Company shall have the right without hindrance to construct and to operate power stations, refineries, pipelines storage tanks facilities for water supply including boring for water, telegraph, telephone and wireless installations, roads, railways, tramways, buildings, ports, harbors, harbor works, wharves and jetties, oil and coaling stations, with such lighting as may be requisite and any other facilities or works which the Company may consider necessary and for such purposes to use free of all payment to the Sheikh any stone, sand, gravel gypsum, clay or water which may be available and may be required for its operations hereunder, provided always that the inhabitants of the State of Kuwait are not prevented from taking their usual requirements of these materials and that the water supply of the local inhabitants and nomad population who may be depended on the same is not endangered. The Company at its discretion but in consultation with the Sheikh may select the position of any such works. The Company may likewise utilize without hindrance all such means of transportation by land, air and water communication or operation as may be necessary for the effective conduct of its operations hereunder.

But nothing in this Article (5A) shall confer on the Company the right to dispose of stone, sand, gravel gypsum, clay or water by sale, export or otherwise to any other company or person within or without the State of Kuwait. (*Oil Concession Agreement 1934*)

However, we can find few examples of cooperativeness in the former contract, as underlined in example 4:

(4) Article (8)

(b) The Company shall employ subjects of the Sheikh as far as possible for all work for which they are suited under the supervision of the Company's skilled employees, but if the local supply of labor should in the judgment of the Company be inadequate or unsuitable the Company shall have the right with the approval of the Sheikh which shall not be unreasonably withheld to import labor preference being given to laborers from the neighboring Arab countries who will obey the local laws. The Company shall also have the right to import skilled and technical employees. (*Oil Concession Agreement 1934*)

Instance of non-cooperativeness found in the former contract are explained by religious (example 6), sociopolitical (example 6), and nationalistic (example 7) factors which must be respected by the oil company. The imposition on the oil producer company is explicitly stated in the so-called restrictive clauses:

(5) Article (1)

. . . The Company undertakes however that it will not carry on any of its operations within areas occupied by or devoted to the purposes of mosques sacred buildings or graveyards or carry on any of its operations except the sale of petroleum housing of staff and employees and administrative work within the present town hall of Kuwait. (*Oil Concession Agreement 1934*)

(6) Article (1)

. . . provided always that the inhabitants of the State of Kuwait are not prevented from taking their usual requirements of these materials and that the water supply of the local inhabitants and nomad population who may be depended on the same is not endangered. (*Oil Concession Agreement 1934*)

(7) Article (15)

(B) The Company shall use the Sheikh's flag within the State of Kuwait. (*Oil Concession Agreement 1934*)

Democratization

Democratization of discourse concerns the “withdrawal of inequalities and asymmetries of rights, obligations and discursive and linguistic prestige of groups of people” (Fairclough, 2001: 248). In the case of petroleum contracts, we find two main areas of discursive democratization: the adoption of two official languages in order to equalize “interpretive opportunity” for the non-English-speaking parties, and face-saving strategies.

Contractual versions of the local language compensate for minimizing the complexity of legal English and have the same legal status as the English text, either as the official version or as having equal force in construing or interpreting the agreement. It is a case of “reconquest” of the local language domain as strategically important for communication in the field of international petroleum business (see Laurén et al., 2002 for an analysis of language and domains). Thus, English and the local language in question share the same degree of legal and discursive prestige, equalizing interpretive opportunity for the non-English speaking party, as shown in examples 8 and 9:

(8) ARTICLE XXVI. ARABIC TEXT

The Arabic version of this Agreement shall, before the courts of A.R.E. be referred to in construing or interpreting this Agreement; provided however that in any arbitration pursuant to Article XXIII hereabove between EGPC and CONTRACTOR the English and Arabic versions shall both be referred to having equal force in construing or interpreting the Agreement. (*Concession Agreement for Petroleum Exploration and Exploitation between The Arab Republic of Egypt and the Egyptian General Petroleum Corporation and... and... in... .*)

(9) Article 45. Language

This Agreement has been prepared and signed in both Portuguese and English. The Portuguese version shall be the official version for the purpose of establishing the rights and obligations of the Parties. (*Angola Production Sharing Contract*)

But the ‘undemocratic’ imposition of English as the official language still persists in most petroleum contracts, as shown in example 10:

(10) ARTICLE 33. CONSULTATION, EXPERT DETERMINATION AND ARBITRATION

33.6. The English language shall be the language used in the expert or arbitral proceedings. All hearing materials of claim or defence, award and the reasons supporting them shall be in English. (*Model Production-Sharing Contract for Deep Water Areas– Competitive Bid Round 1996– The Government of the Republic of Trinidad and Tobago*).

In the former concessionaire contract, although translation is allowed, English also prevails in case of litigation, as highlighted in example 11:

(11) Article (21)

This Agreement is written in English and translated into Arabic. If there should at any time be disagreement as to the meaning or interpretation of any clause in this Agreement the English text shall prevail. (*Oil Concession Agreement 1934*)

Face-saving strategies are found in both types of petroleum contract in clauses which refer to possible conflict and include Goffman’s (1967) “avoidance process” (see Frade, 2001 for more details). Terms have been “sweetened”, and are better suited for signalling the government’s more realistic and pragmatic attitude and policies in contrast with the “outmoded adversarial and confrontational attitudes of the old days” (Gao, 1994: 221). Nouns denoting “stronger” conflict, such as *litigation* and *conflict*, are avoided and replaced by “less harsh” ones, such as *dispute*, *controversy*, *claim*, *difference* and so on, in order to neutralize the potentially offensive act, as underlined in examples 12 and 13 below:

(12) CLAUSE TWENTY-ONE – SUBMISSION TO PERUVIAN LAWS, ARBITRATION AND JURISDICTION**21.1. Arbitration Agreement**

Any controversy, discrepancy or claim arising herefrom or in relation hereto, such as the constructions, compliance, termination, rescission, efficiency or validity, which may arise between the Contractor and PERUPETRO, and cannot be settled by mutual agreement between the Parties, must be settled by international legal arbitration, in accordance with the provisions contained in the last paragraph of Article 85 of the General Arbitration Act No. 25935. (*Peruvian License Agreement*)

(13) Article (6)

(d) If at any time during the currency of this Agreement any dispute shall arise regarding the accuracy of the accounts of the Company in connection with the amount of the Royalty and / or other payments due to the Sheikh under this Agreement, the Sheikh shall have the right to appoint in consultation with His Majesty's Government - a registered firm of Auditors to examine the books of the Company, on behalf of the Sheikh, at Kuwait and / or in London as he may consider necessary. All expenditure incurred in connection with such auditing shall be paid by the Sheikh. (*Oil Concession Agreement 1934*)

Passivization, where the parties are either suppressed or displaced, also accounts for a "protective orientation" towards saving face. Finally, the impersonal use of the third persons is non-specific and renders the parties' status both similar and "external to the immediate intra-linguistic situation jointly created in the communicative activities between first-and-second-person" (Shotter, 1993: 135). See Example 12 and 13 above for illustration in bold of both phenomena.

Nonetheless, it is worth pointing out that the "hidden power" of the oil companies is still subtly embedded in both former and modern petroleum contracts. For example: the so-called "hard" aspects of the contract, such as the work obligation and financial and fiscal terms, are "increasingly well designed and frequently upgraded, while the "soft" aspects which favour the producing governments, such as employment and training and environmental provisions, are often "ill-drafted" (Gao, 1994: 224).

Let us compare the precise and detailed "hard" clauses (examples 14 and 15) with the vague and general "soft" clauses (examples 16 and 17) in the former and modern contracts below.

(14) Article 12. Production Sharing

The CONTRACTOR's net cash flows for each Quarter are compounded and accumulated for each Development Area from the date of the Commercial Discovery according to the following formula:

ACNCF (Current Quarter)

$(100\% + DQ) \times \text{ACNCF (previous Quarter)} + \text{NCF (current Quarter)} 100\%$ (*Oil Concession Agreement 1934*)

(16) Article (6)

b) The Company shall drill for petroleum to the following total aggregate depths and within the following periods of time at such and so many places as the Company may decide:

4,000 feet prior to the 4th anniversary of the date of signature of this Agreement.

12,000 feet prior to the 10th anniversary of the date of signature of this Agreement.

30,000 feet prior to the 20th anniversary of the date of signature of this Agreement. (*Oil Concession Agreement 1934*)

(17) 13. EMPLOYMENT AND TRAINING OF PERSONNEL

13.2. THE CONTRACTOR agrees to hire qualified personnel in its operations, and once Production begins, it shall undertake the training of the Venezuelan personnel required for labor and professional positions, including administrative and executive management positions. (*Model Operating Services Agreement for Venezuela*)

(17) Article (8)

(b) The Company shall employ subjects of the Sheikh as far as possible for all work for which they are suited under the supervision of the Company's skilled employees, but if the local supply of labor should in the judgment of the Company be inadequate or unsuitable the Company shall have the right with the

approval of the Sheikh which shall not be unreasonably withheld to import labor preference being given to laborers from the neighboring Arab countries who will obey the local laws. (*Oil Concession Agreement 1934*)

Commodification

Partially inspired by Fairclough's (1989, 2001) concept of "commodification", the oil business has commodified some specific sorts of intangible goods other than petroleum itself. These commodities are to be found mainly in spin-off provisions. Spin-off provisions are those whereby the foreign companies agree to undertake more social and economic responsibilities towards the governments of producing countries, such as employment and training of national personnel, preference for local goods and services, and transfer of technology, in order to reduce dependence on aliens and eventually to develop indigenous industry (Gao, 1994), as shown in example 18:

(18) Article 15. Training of Chinese Personnel and Transfer of Technology

15.1. Contractor agrees, in the course of the EOR Operations, to transfer to CNPC and its Affiliates, in accordance with Article 18 of the Petroleum Regulation, the advanced technology and managerial experience including proprietary technology e.g. patented technology, know-how or other confidential technology, etc. used in the performance of the EOC Operations and the necessary data and/or information for mastering such technology and experience, provided, however, such technology to be transferred shall be proprietary to the Contractor and if the transfer of any such technology is restricted in any way during the term of the Contract, the Contractor shall, to the extent reasonably possible, endeavor to obtain permission for the transfer of such restricted technology. The Contractor agrees to train the Chinese Personnel including workers, technical, economic, managerial, legal and other professional personnel, in order to improve their technical and/or managerial capabilities. Details of how transfer of technology and training of Chinese Personnel shall occur are set out in Annex IV (Training of Chinese Personnel and Transfer of Technology)

(Model Contract for Enhanced Oil Recovery Projects for the Exploitation of Land Petroleum Resources of the People's Republic of China in Cooperation with Foreign Enterprises)

In the former concessionaire contract, the process of commodification is restricted to tangible commodities, as shown in the underlined terms in example 19:

(19) Article (5)

(a) For the purposes of its operations hereunder the Company shall have the right without hindrance to construct and to operate power stations, refineries, pipelines storage tanks facilities for water supply including boring for water, telegraph, telephone and wireless installations, roads, railways, tramways, buildings, ports, harbors, harbor works, wharves and jetties, oil and coaling stations, with such lighting as may be requisite and any other facilities or works which the Company may consider necessary and for such purposes to use free of all payment to the Sheikh any stone, sand, gravel gypsum, clay or water which may be available and may be required for its operations hereunder, provided always that the inhabitants of the State of Kuwait are not prevented from taking their usual requirements of these materials and that the water supply of the local inhabitants and nomad population who may be depended on the same is not endangered. (*Oil Concession Agreement 1934*)

There are no spin-off clauses in the concessionaire contract, and the employment of local labour is not followed by training or improvement of professional skills, not to mention transfer of technology, as shown in example 17 above.

The particular meaning of “training” in petroleum contracts refers to a democratic and balanced sharing of technical abilities between expatriate and domestic workers. However, “training” may also imply the transference of institutionalized training procedures to contexts, occasions, and individuals so as to create “decontextualized skills” and leave little room for individuality (Fairclough, 2001: 257–71), as illustrated in example 20:

(20) Article 36. Employment, Integrations and Training of Angolan Personnel

2. In planned, systematic and various ways and in accordance with the provisions of this Article, CONTRACTOR shall train its Angolan personnel directly or indirectly involved in the Petroleum Operations, for the purposes of improving their knowledge and professional qualification in order that the Angolan personnel gradually reach the level of knowledge and professional qualification held by the CONTRACTOR'S foreign workers. Such training will also include the transfer of the knowledge of petroleum technology and the necessary management experience so as to enable the Angolan personnel to use the advanced and appropriate technology in use in the Petroleum Operations, including proprietary and patented technology, “know-how” and other confidential technology, to the extent permitted by applicable laws and agreements, subject to appropriate confidentiality agreements. (*Angola Model Production Sharing Agreement For Deep Water Blocks*)

A complex and scarce commodity has been recently reassessed in some (but not yet all) modern petroleum contracts: the environment (example 21). Regarded as a “common social ‘good’ like education”, which is of great value for both present and the future generations and which someone has to pay for, environmental protection and safety is, to date, “a non-issue in the legal frameworks for international petroleum exploration and exploitation” (Gao, 1994: 214–37).

(21) Article 23. Environmental Protection and Safety

23.1. In the performance of the EOR Operations, the Operator shall be strictly subject to the laws, decrees, regulations and standards on environmental protection and safety promulgated by the Chinese Government and perform the operations in accordance with the international practice. The Operator shall make its best efforts to protect farmland, aquatic products, forest resources and other natural resources and prevent pollution and damage to the atmosphere, oceans, rivers, lakes, underground water, harbors, land, other environments and ecology and secure the safety and health of the operating personnel.

(*Model Contract for Enhanced Oil Recovery Projects for the Exploitation of Land Petroleum Resources of the People's Republic of China in Cooperation with Foreign Enterprises*)

There is no mention of environmental concern in the former concessionaire contract, Oil Concession Agreement 1934, under analysis.

Fragmentation

The process of “fragmentation” in modern petroleum contracts concerns the loss of efficacy of applicable international laws in favour of domestic legal systems. The domestic legal system is “*prima facie* the proper law for the contract”, and principles of international law or principles used in petroleum-resource countries may supplement the producing country's legal system (Gao, 1994: 228).

Petroleum development operates within a “legal, commercial, and political context at both the international and national levels” (Gao, 1994: 7). This process is made clear in the text by the expression of a relationship between two different “space-times”: the “global” (in italics in example 22) and the “local” (underlined). The relationship between these two levels is realized in discourse by recontextualizations, in that petroleum contracts act

metaphorically as a “site” for “the dynamic transfer-and-transformation” (Linell, 1998: 154) of international and national laws and concepts, such as general principles of law and good practice, shown in examples 22 and 23:

(27) Article 27 – The Applicable Law

27.1. The validity, interpretation and implementation of the Contract shall be governed by the laws of the People’s Republic of China. Failing the relevant provisions of the laws of the People’s Republic of China for the interpretation or implementation of the Contract, the principles of the applicable law widely used in petroleum resources countries acceptable to the Parties shall be applicable

27.2. If a material change occurs to the Contractor’s economic benefits after the effective date of the Contract due to the promulgation of new laws, decrees, rules and regulations or any amendment to the applicable laws, decrees, rules and regulations made by the People’s Republic of China, the Parties shall consult promptly and make necessary revisions and adjustments to the relevant provisions of the Contract in order to maintain the Contract’s reasonable economic benefits hereunder. (*Model Contract for Enhanced Oil Recovery Projects for the Exploitation of Land Petroleum Resources of the People’s Republic of China in Cooperation with Foreign Enterprises*).

(23) 21.1. Submission to Peruvian Laws

The Agreement has been negotiated, drawn up and signed in accordance with laws of Peru and the content, enforcement and other consequences resulting therefrom shall be governed by the internal laws of the Republic of Peru.

The present contract is subject of the rights and liabilities of Private companies as established in Article 12 of Law 26221. (*Peruvian License Agreement*)

In the former concessionaire contract, Oil Concession Agreement 1934, fragmentation is realized not by means of local versus international law but rather by the interests of both the oil, producing country and the oil company, as underlined in example 24:

(24) Article (6)

(a) The Company shall maintain in the region of the Persian Gulf a Chief Local Representative to represent it in matters relating to this Agreement with the Sheikh. The Sheikh has the right to select on the first occasion the chief Local Representative in consultation with His Majesty’s Government. (*Oil Concession Agreement 1934*)

RESULTS

The findings show that the new trends in oil business have in fact resulted in a new texturing of legal English embodied in the petroleum contracts. However, when contrasted with the former concessionaire contract, Oil Concession Agreement 1934, it seems clear that the modern petroleum contracts still retain some similarities in terms of power dynamics favouring the more powerful party, be it the oil-producing country or the oil company. We can conclude that the trends analysed – cooperativeness, democratization, commodification, and fragmentation – did not result in a complete “break” in the “tendential ecological dominance”⁸ (Jessop, 2000: 331) of the oil companies over the producing countries. This dominance still persists, but it has taken new hidden forms: it is no longer unilateral and uniform, but quite unstable and variable in a fast-changing globalized situation.

Power, also in world Englishes, is not a “permanent and undisputed attribute of any one person or any social group” but rather, as Fairclough puts it (1989: 68):

those who hold power at a particular moment have to constantly reassert their power, and those who do not hold power are always liable to make a bid for power. This is true whether one is talking at the level of the particular situation, or in terms of a social institution, or in terms of a whole society: power at all these levels is won, exercised, sustained, and lost in the course of social struggle.

To sum up, the new trends in legal discursive practices are not in opposition. On the contrary, they interact with each other and partly reflect the reordering of power dynamics in international petroleum transactions at the socioeconomic, political, and ideological level, without reducing any of them to discourse.

CONCLUSION

Under globalization, the nations' sociocultural, economic, and political changes have resulted in a reordering of power dynamics in the relationship of the parties in commercial and legal transactions, towards a more symmetrical and cooperative type. New trends have been set up, and as a consequence new texturing has also developed in discursive practices, be it cultural, political, historical, or legal.

This paper has critically discussed power dynamics in legal English in world Englishes in the light of new trends and innovations in the international petroleum business. The conclusion is that the new texturing resulting from changes in the real world is not integrally displayed in the legal English of petroleum contracts. Markers of "hidden power" still persist, and seem due to the standardization of international contracts, with strong conventions and without explicit authorship.

I conclude with a few suggestions for further research. It would be interesting to investigate power dynamics in other legal genres (oral and written) used in the Circles, mainly in situations where developing world countries have little or no power for bargaining. Financial contracts, for instance, seem imposing and immutable despite changes in the international scenario, because of the extreme power conferred on financial institutions of the developed world and the extreme vulnerability of economies of the developing world to foreign capital. With the strengthening and spread of arbitration worldwide, it would also be interesting to undertake a comparative analysis of the functioning of power dynamics across arbitration laws in the Circles.

NOTES

1. In this paper, I use "oil" and "petroleum" with the same meaning; the same holds for "contract" and "agreement".
2. For extensive research on the history of legal English and its main lexico-grammatical, discursive and pragmatic features, see Mellinkoff, 1963; Danet, 1980; Maley, 1987 and 1994; Bhatia, 1993; Trosborg, 1997.
3. See <http://www.opec.org/library/opec%20statute/pdf/os.pdf>, accessed on 26 June 2006.
4. See <http://www.opec.org/library/opec%20statute/pdf/os.pdf>, accessed on 26 June 2006.
5. Source: <http://www.moo.gov.kw/Default.aspx?pageId=75&>, accessed on 27 June 2006.
6. Source: <http://www.moo.gov.kw/Default.aspx?pageId=75&>, accessed on 27 June 2006.
7. A multinomial is a linguistic device of "an enumerative sequence [which] may contain several members, according to the varying situation in the topic we are talking about" (Gustafsson, 1975: 17).
8. "Ecological dominance" in social systems refers to the "capacity of a given system in a self-organizing ecology of self-organizing systems to imprint its development logic on other system's operations to a greater extent than the latter can impose their respective logics on that system" (Jessop, 2000: 329).

REFERENCES

- Bhatia, Vijay K. (1987) Language of the law. *Language Teaching*, **20**, 227–34.
- Bhatia, Vijay K. (1993) *Analysing Genre: Language Use in Professional Settings*. London: Longman.
- Bhatia, Vijay K. (1997) The power and politics of genre. *World Englishes*, **16**, 359–72.
- Campbell, Lisbeth (1996) Drafting styles: fuzzy or fussy? *E Law: Murdoch University Electronic Journal of Law*, **3**. Available at <http://www.murdoch.edu.au/elaw/issues/v3n2/campbell.txt>, accessed on 22 October 2006.
- Danet, Brenda (1980) Language in the legal process. *Law & Society Review*, **14**, 445–564.
- Fairclough, Norman (1989) *Language and Power*. London: Longman.
- Fairclough, Norman (2001) *Discurso e mudança social [Discourse and Social Change]*. Brasília: Editora UnB.
- Fairclough, Norman (2003) Semiotic aspects of social transformation and learning. In *New Direction in Critical Discourse Analysis: Semiotic Aspects of Social Transformation and Learning*. Edited by R. Rogers. London: Erlbaum.
- Frade, Celina (2001) Mitigating conflict in arbitration clauses through language. *LSP & Professional Communication*, **2**, 8–25.
- Frade, Celina (2002) The legal cooperative principle: an essay on the cooperative nature of contractual transactions. *International Journal for the Semiotics of Law*, **15**(4), 1–7.
- Frade, Celina (2005) The dialogistic nature of Brazil's Arbitration Law 9.307/96. In *Contemporary Issues of the Semiotics of Law*. Edited by A. Wagner, T. Summerfield and F. S. B. Vanegas. Portland, OR: Hart, 56–69.
- Gao, Zhigo, J. S. D. (1994) *International Petroleum Contracts: Current Trends and New Directions*. London: Graham & Trotman.
- Goffman, Erving (1967) *Interaction Ritual Essays on Face-to-Face Behavior*. New York: Anchor.
- Gustafsson, Marita (1975) *Binomial Expression in Present-Day English: A Syntactic and Semantic Study*. Turku: Turun Yliopisto.
- Jessop, Bob (2000) The crisis of the national spatio-temporal fix and the tendential ecological dominance of globalizing capitalism. *International Journal of Urban and Regional Research*, **24**, 323–60.
- Kurzton, Dennis (1986) *It Is Hereby Performed... Explorations in Legal Speech Acts*. Amsterdam: Benjamins.
- Laurén, Christer, Myking, Johan and Picht, Heribert (2002) Language and domains: a proposal for a domain dynamics taxonomy. *LSP & Professional Communication*, **2**, 23–9.
- Linell, Per (1990) The power of dialogue dynamics. In *The Dynamics of Dialogue*. Edited by I. Marcová and K. Foppa. London: Harvester Wheatsheaf, 1–20.
- Linell, Per (1998) *Approaching Dialogue: Talk, Interaction and Contexts in Dialogical Perspectives*. Amsterdam: Benjamins.
- Maley, Yon (1987) The language of legislation. *Language in Society*, **16**, 25–48.
- Maley, Yon (1994) The language of the law. In *Language and the Law*. Edited by J. Gibbons. London: Longman, 11–49.
- Mellinkoff, David (1963) *Language of the Law*. Boston: Little, Brown.
- Miller, Carolyn (1984) Genre as social action. *Quarterly Journal of Speech*, **70**, 151–67.
- Paré, Anthony and Smart, Graham (1994) Observing genres in action: towards a research methodology. In *Genre and the New Rhetoric*. Edited by A. Freeman and P. Medway. London: Taylor & Francis, 146–54.
- Scollon, Ron (1997). Attribution and power in Hong Kong news discourse. *World Englishes*, **16**, 383–94.
- Shotter, John (1993) Social accountability and the social construction of 'you'. In *Texts of Identity*. Edited by John Shotter and Kenneth J. Gergen. London: Sage, 133–51.
- Smith, Ernest E., Dzienkowski, John S., Anderson, Owen L., Conine, Gary B. and Lowe, John S. (1993) *Materials on International Petroleum Transactions*. Denver, CO.: Rocky Mountain Mineral Law Foundation.
- Trosborg, Anna (1997) *Rhetorical Strategies in Legal Language: Discourse Analysis of Statutes and Contracts*. Tübingen: Narr.
- van Houtte, H. and Wautelet, P. (2001) International lawyers and uniform law. In *The Internationalization of the Practice of Law*. Edited by J. Drolshammer and M. Pfeifer. Alphen aan den Rijn: Kluwer Law International, 89–107.

(Received 1 September 2003.)

Copyright of *World Englishes* is the property of Blackwell Publishing Limited and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.