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Vagueness and precision in contracts: a close relationship

Oggetto di questo studio è il rapporto tra indeterminatezza linguistica e precisione nei testi giuridici (Endicott 2000, Bhatia *et al*. 2005, Cacciaguidi-Fahy / Wagner 2006). In particolare viene preso in considerazione come questi aspetti sono veicolati nei contratti, uno specifico tipo di testo giuridico molto comune e diffuso. Si analizza il rapporto tra vaghezza e precisione nei testi contrattuali, effettuando una breve analisi comparativa rispetto agli altri testi giuridici e si descrivono le strategie linguistiche attraverso le quali vengono veicolate indeterminatezza e vaghezza oppure precisione e chiarezza. Questi aspetti linguistici sono stati ampiamente studiati soprattutto nei testi legali caratterizzati da una vasta applicabilità, quali leggi, regolamenti e statuti (Endicott 2000, Bhatia *et al*. 2005). Questa analisi si prefigge, invece, di osservare la complessità del rapporto tra vaghezza e precisione in documenti che non possiedono tendenzialmente una tale generalità nella loro applicazione, ma riguardano invece circostanze, finalità e soggetti specifici. Dall'esame si osserva la coesistenza e l'interdipendenza degli elementi linguistici dell'indeterminatezza e della precisione linguistica nei contratti, nonostante questi ultimi non debbano rispondere espressamente alla necessità di garantire la più generale applicabilità.

> The lawyer must go to great lengths to ensure that a document says exactly what he wants it to say, that is precise or vague in just the right parts and just the right proportions, and that it contains nothing that will allow a hostile interpreter to find it in a meaning different from what he intended (Crystal / Davy 1969: 212).

Legal language has been the centre of increasing scholarly interest in the last few years (Russel / Locke 1992; Gibbons 1994, 2003; Tiersma 1999; Cornu 2005) and the importance of this linguistic area is constantly growing in LSP studies. My study deals with the relationship between linguistic indeterminacy and precision in legal texts (Endicott 2000, Bhatia *et al*. 2005, Cacciaguidi-Fahy / Wagner 2006) and, in particular, in contracts. The first part presents reflections on the concepts

of vagueness and precision and shows how these aspects are strictly inter-related. It also shows how linguistic indeterminacy and vagueness are conveyed in legal texts, on the basis of studies by Hart (1994), Endicott (2000) and Charnock (2006). The second part discusses a corpus of 12 contracts in English, drafted in England between 2000 and 2006. The study describes the role played by indeterminacy and precision within this text type and examines the linguistic strategies that are commonly used in order to convey indeterminacy and vagueness on the one hand, and precision and accuracy on the other, focusing on syntactic, lexical and stylistic choices. These aspects have been thoroughly studied, especially in texts that are characterized by general applicability, such as laws, rules and statutes (Bhatia *et al*. 2005, Endicott 2000). This study, instead, aims to analyse the complexity of the relationship between vagueness and precision in contracts, i.e. documents that are not usually applicable to society as a whole.

1. Indeterminacy in legal language

Vagueness is an intrinsic characteristic of human language and has been extensively studied (Channell 1994; Williamson 1994; Keefe 2000). It is of significance within specialized language studies, particularly within the legal field (Endicott 2000, Bhatia *et al*. 2005). Essentially, legal texts must accomplish a double role: on the one hand they must be precise and accurate, and on the other they must be *all-inclusive* (Bhatia 1993: 117) and have a wide applicability. This relationship between precision and generality does not necessarily result in a trade-off between the two elements; rather, as Bhatia (2005: 337) has argued, they should be considered as "two sides of the same coin". Charnock's (2006: 65) opinion about the lack of clarity in legal texts is also of particular interest:

> It is inevitable that legal discourse will occasionally appear obscure to those unfamiliar with the specialist vocabulary and the relevant syntactic conventions. To such people it often seems that obscurity is deliberately cultivated by the lawyers as a stylistic device. This is unfortunate as in principle the law is addressed to ordinary people who are presumed to be aware of their rights and obligations.

Applying vagueness to legal norms may appear paradoxical, as "vagueness seems repugnant to the very idea of making a norm" (Endicott 2005: 27). In reality, however, vagueness is an intrinsic element of linguistic formulations in the legal field. Vague legal terms can express extremely generic concepts and therefore be applied to a multitude of different situations. Legal language is closely linked to tradition and to legal linguistic conventions, and vagueness is generally accepted as part and parcel of this type of language; as Frade observes (2005: 133): "the conventional use of vague language has been tacitly agreed on by legal drafters and interpreters".

Vague or contestable terms are inevitable in legal language. It is sometimes suggested that their avoidance would result in greater clarity, but such attempts frequently run into difficulties when it becomes necessary to express general and universal concepts. By way of an example, the eighth amendment of the U.S. Constitution states: "cruel and unusual punishments shall not be inflicted". In this case the adjectives *cruel* and *unusual* are extremely vague and debatable, but it was unavoidable that the articles of the Constitution should be so expressed, because the purpose of the document required universal applicability and the use of more specific terms could narrow the field of application. Vague terms, therefore, should not necessarily be frowned upon: in certain cases, their applicability to a range of differing contexts is of the utmost importance.

Endicott (2000: 8) observes that linguistic indeterminacy has often been described as a sort of 'penumbra'. Hart (?1994: 123) suggests that this indeterminate area, where certainty and uncertainty coexist, is typical of legal language and could be interpreted as "a core of certainty and a penumbra of doubt". Endicott (2000: 1) explains the constant presence of vagueness in legal texts through the idea of an 'indeterminacy claim', which corresponds to the fact that "law is very commonly vague, so that the requirements of the law in particular cases are frequently indeterminate". Endicott (2000: 9) also distinguishes 'linguistic indeterminacy' from 'legal indeterminacy':

> Legal theorists say that the law is indeterminate when a question of law, or of how the law applies to facts, has no single right answer, I will call such indeterminacy 'legal indeterminacy', and I will use 'linguistic

> indeterminacy' to refer to unclarity in the application of linguistic expressions that could lead to legal indeterminacy. I will generally treat 'indeterminacy' as feature of the application of the law, or of an expression, to a particular case (or cases), and 'vagueness' as a feature of the law and of expressions.

Legal indeterminacy may derive from linguistic indeterminacy and from a deliberate lack of clarity (Endicott 2000: 9) and vagueness is therefore a typical feature of law and language. The use of expressions characterized by a high level of vagueness inevitably generates some difficulty in interpreting certain terms or sentences; in these cases interpretation plays a crucial role in the understanding of legal texts and documents. Grice (1989: 177) observes:

> To say that an expression is vague (in a broad sense of vague) is presumably, roughly speaking, to say that there are cases (actual or possible) in which one just doesn't know whether to apply the expression or to withhold it, and one's not knowing is not due to ignorance of the facts.

Vagueness is not usually related to lack of information, but rather to interpretative issues, as it may be difficult to choose the most suitable interpretative criterion to be applied to that specific case.

In particular, Charnock (2006: 65) remarks that "the most difficult and subtle problems of legal construction relate to the understanding of commonly occurring, plain words". Most problematic situations in the interpretation of legal texts arise from expressions that belong to ordinary language because they are more common and tend to be used in different contexts; as a consequence, the matter of their interpretation within a highly specific legal context can become particularly complex. On the contrary, more technical and specialized language can appear obscure to laymen, but in the legal field such terms do not usually create conflicts over their interpretation, as their use is more limited.

Different forms of indeterminacy intrinsically characterize legal language. On the other hand, the need for clarity and precision is evident and drafters must obviously make sure that their words are not interpreted in a way that differs from their intentions. Crystal / Davy (1969: 193) state:

> Any *intentions* of the composer which fail to emerge clearly are not usually considered in arriving at what the document means, and if the composer happens to have used language which can be taken to mean something other than he intended, he has failed in his job.

In order to avoid controversial interpretations, legal documents tend to have a conventional format and to present some specific linguistic expressions that belong to the legal tradition and are not usually modified.

2. *The case of contracts – corpus description*

In modern society contracts are widespread. One of the most significant ways in which they differ from other prescriptive texts, such as statutes and rules, is that, rather than binding society as a whole, contracts only affect those who accept the terms they contain.[1] This study is based on the analysis of 12 contracts, for a total of 167 pages and 50,828 words. They were all drafted between 2000 and 2006 and corpus construction was based on the following criteria:[2]

– *Origin*: the contracts within the corpus were drawn up in England. Consequently, the heterogeneity of the different varieties of English in which a contract could be drafted is not discussed. Legal language is obviously linked not only to the legal system, but also to the local culture, but the numerous differences identifiable in contracts drawn up, for example, on different continents, is not the primary concern of this study. The focus is therefore on a corpus that is quite homogeneous from this point of view.
– *Integrity*: only entire contracts have been analysed, including titles, preambles, and annexes, if present.
– *Typology*: in an attempt to reflect the different types of contract encountered in business life, the corpus comprises a variety of contract types, listed in Table 1 below.

[1] For a detailed analysis of the function and the structure of contracts in the Common Law system see Whincup (1990), McGregor (1993), Elliott / Quinn (2005).

[2] The contracts here analysed are standard formats currently used. Some were publicly accessible on the companies' websites, and others were kindly supplied by the companies on request.

– *Length*: the contracts chosen vary in length; the corpus contains a non-disclosure agreement of two pages (766 words), but also a constitution agreement of 58 pages (19,111 words), as a contract of this type is very complex and needs to be extremely detailed. The average length is about 14 pages, while the average number of words is 4,235 (see Table 1):

	Contract	*Abbreviation*	*No. of pages*	*No. of words*
1.	Agency agreement	C.1	3	805
2.	Licence agreement 1	C.2	14	4,323
3.	Consortium agreement	C.3	9	2,740
4.	Constitution agreement	C.4	58	19,111
5.	Credit agreement	C.5	14	4,473
6.	Distribution agreement	C.6	13	5,327
7.	Agreement for the contracting of services	C.7	5	762
8.	Licence agreement 2	C.8	4	815
9.	Use of data agreement	C.9	3	861
10.	Non-disclosure agreement	C.10	2	766
11.	Sale & purchase agreement	C.11	35	8,558
12.	Terms of business agreement	C.12	7	2,287
Total			167	50,828
Average			14	4,235

Table 1: Contracts included in the corpus under investigation.

Despite the generic homogeneity mentioned above, Table 1 shows how contracts constitute an extremely heterogeneous text type. However, they all tend to have a standard format and include similar clauses. Disputes can arise from the omission of certain clauses that are considered superfluous or, more commonly, because of disputable clauses that are interpreted in different ways. In order to reduce the possibility of disputes, contracts are nowadays standardized. Companies and legal offices tend to use pre-drafted contractual forms, where the parties have only to insert their data; an example is given below:

(1) **THIS AGREEMENT** is made this day of 200

BETWEEN:

(1) [ ] incorporated in [ ] (Company Number[ ]) and having its registered office at [ ] (the "Seller"); and

(2) [ ] incorporated in [ ] (Company Number [ ]) and having its registered office at [ ] (the "Purchaser"); and

(C.11: 2)

This process guarantees a reduction of drafting time and costs[3]. Furthermore, the use of standard linguistic expressions provides some certainty of meaning when the contract comes to be interpreted by another party.

2.1 Vagueness in contracts

Vagueness is a typical element of legal texts and it also plays a very important role in contracts. Danet (1985: 288-289) observes: "It is as if lawyers – or perhaps persons in earlier times, before the modern legal profession emerged – added 'cornstarch' to language, to thicken it, so as to create the illusion of certainty in an uncertain world. Convoluted legal language may in part derive from preliterate times, when verbal formulas were considered a kind of word magic".

Despite the *contra proferentem* principle, vagueness can be a

[3] Stubbs (1983: 485, quoted in Trosborg 1997: 59) confirms that certain types of texts, including contracts, "are never written afresh every time a lawyer has to draw one up. The lawyer uses what are called in the profession 'formbooks' in which documents or paragraphs of documents are set out, and it is up to the lawyer to choose the appropriate paragraph or paragraphs for the particular documents s/he is drawing up. All the lawyer has to do is to add these personal details of the persons involved." Hill (2001: 69) also observes: "Using time-tested forms, and changing them as little as possible, makes sense for many reasons, even where the forms are unwieldy and convoluted. Once a lawyer invests in learning how to use the process and understanding the terms and structure of typical contracts, the incremental cost for each subsequent use of the process will be small, and the process will provide the cheapest and quickest way to produce a contract. Reviewing contracts will be expedited as well. Moreover, the transactional community has considered and interpreted the standard provisions (including both boilerplate and the more substantive provisions) many times".

strategy used by one of the parties in order to facilitate the interpretation of certain clauses to their advantage, as a vague expression can be assigned a different meaning according to the context. Employment contracts represent a good example, as they may contain vague expressions and omissions. Roy and Serfes observe: "The employers may sometimes find it beneficial to hide information regarding the profile of existing skills in their workforce by strategically choosing to remain vague while writing their contracts" (Roy / Serfes 2002: 603). This may be particularly important in contracts that are drafted unilaterally. In such situations, the other party is denied any creative input to the text, and can only accept or reject the terms on offer. In such cases contracts usually have a standard format and they often include generic expressions.

2.1.1 Weasel words

Legal texts present a high number of words and expressions that have a very flexible and changeable meaning. Such terms have been defined as *weasel words* (Mellinkoff 1963: 21) and their meaning is strictly dependent on context and interpretation. Some examples are: *adequate, proper, convenient, doubtless, fair, manifest, negligence, normal, ordinary, palpable, reasonable, satisfactory, safe, severe* and *suitable*.

In the field of contracts, disputes often originate from the interpretation of words that show a certain level of vagueness. For example, if a clause states that one of the duties of a party is "to provide full after-sales operational support to the Customer", the term *full after-sales operational support* can give rise to a variety of different interpretations, as it is difficult to assign an absolutely unequivocal meaning.

Adjectives are the most frequent 'weasel words', as they are often evaluative, and are therefore subjective by definition (Fjeld 2001, 2005). The following table shows the most common flexible adjectives found in the corpus.

	Occurrences	Frequency per 1,000 words
Reasonable	56	1.10
Necessary	29	0.57
Appropriate	24	0.47
Responsible	17	0.33
Good	7	0.14
Proper	4	0.08
Sufficient	4	0.08

Table 2: *Weasel words* in the corpus.

Reasonable is the most common adjective found of this type and its meaning is clearly subjective, as it is related to different factors, such as culture, morality, and ethics. Here are a few examples that are present in the corpus:

(2a) Without prejudice to its obligations set out in clause 5.5, the Licensees shall use *reasonable* endeavours to include, where practicable, in all Digital Copies of artistic or literary works the identity of the author of the artistic or literary work. (C. 2: 6)

(2b) It shall protect Confidential Information with at least the same degree of care as it protects its own confidential and proprietary information, and in any event with not less than a *reasonable* degree of care. (C. 10: 1)

(2c) The Seller shall forthwith upon receipt thereof provide Purchaser with a copy of any such direction, and Purchaser shall retain access at all *reasonable* times during business hours to all books and records retained by the Seller or its Affiliates in relation to value added tax matters concerning the interests. (C. 11: 22)

(2d) * [4] and the Customer shall agree a Credit Limit established by reference to a *reasonable* estimate of the Customer's projected Indebtedness under all its Storage Agreements. (C. 5: 3)

[4] For privacy reasons, names and sensitive data have been replaced with asterisks.

Similarly, the adverb *reasonably* is a common occurrence:

(3) The Parties shall use *all reasonable* endeavours to ensure that the Conditions Precedent are satisfied as soon as *reasonably* practicable. (C. 11: 12)

Evaluative adjectives such as *appropriate* and *necessary* appear frequently:

(4a) The parties to this Agreement shall, as soon as practicable following a nomination described in this clause 4.2.1, take all such steps as may be *necessary* or *appropriate* to procure the appointment of the persons nominated by the Regulator for such positions. (C. 4: 25)

(4b) No other digital manipulation of the work is made whether by way of optical character recognition, morphing, colour or shade adjustment beyond what is *necessary* to make the Accessible Copy accessible to the Authorised Person for whom the Accessible Copy is made; (C. 2: 11)

(4c) The Principal Licensee shall indemnify * in respect of all *reasonable* expenses, damages and legal costs awarded against or incurred by * in respect of any claim made in writing arising out of the Licensees' breach of any term of the Licence and the provisions of this clause 9 shall apply as *appropriate* as if the references to 'Qualifying Claim' were references to a claim under this clause 9.6, references to '*' were references to the 'Principal Licensee' and references to 'Indemnified Persons' were references to '*'. (C. 2: 9)

The term *responsible* is also very common in contractual language, as one of the main functions of a contract is to establish the responsibilities of the parties:

(5) Where the Distributor receives the Information direct from the *, the Distributor is *responsible* at the Distributor's own expense for the installation, operation and maintenance of telecommunication lines, equipment and software to enable the Distributor to receive and use the Information. (C. 6: 4)

The precise meaning of evaluative adjectives may be difficult to determine, especially when they refer to the moral and ethical fields – e.g. *defamatory*, *obscene* and *unlawful* – as these values are culturally determined:

(6) Subject to any statutory obligations relating to retention of documentation, the Licensees shall delete from the hard drives of their central and local servers any and all Digital Copies which may be stored there upon notice from CLA to the Principal Licensee that the copyright holder believes that the Licensed Material contained in the Digital Copies infringes copyright or is, or may be, *defamatory*, *obscene* or otherwise *unlawful*. (C. 2: 6)

2.1.2 Lexical, syntactic and stylistic choices

The choice of verbs can convey indeterminacy, for example the precise meaning of verbs of opinion is intrinsically subjective. Among these we can find *to believe, to consider*, etc.

(7) Taking such other steps as the Board may *consider* appropriate (which may, without limitation, include steps to put the Company into liquidation or administration). (C. 4: 41)

The verb *to think* does not occur in the corpus, because its meaning, 'to be of the opinion that' (Pearsall / Trumble 2002), clearly conveys extremely high levels of indeterminacy and uncertainty. In cases where an element of opinion must be expressed the verb *to believe* is generally preferred, as it has a slightly stronger meaning ("accept as true or as conveying the truth", Pearsall / Trumble 2002: 129) and it apparently expresses less uncertainty. The verb *to believe* is, therefore, commonly used, as in the following example:

(8) Notwithstanding Clause 3.1 the Customer's Credit Limit may from time to time be reviewed and revised by *, on notice of not less than 30 days (or any lesser period agreed by the Customer) to the Customer: […] (d) at *'s request where at any time * has reasonable grounds to *believe* that the effect of the review will be to reduce the Customer's Credit Limit. (C. 5: 4)

Stylistic features can also convey indeterminacy. An aspect that can constitute a source of vagueness is the use of the impersonal voice. Williams (2005: 36-38) highlights the fact that this is a typical characteristic of prescriptive texts, as they usually address multiple subjects and the use of an impersonal style can offer general applicability. In legal texts the use of expressions such as *every person, every citizen, everyone, everybody*, or *no one, no person, nobody* is very common to indicate that the texts are universal, without limitations. Another way in which indeterminacy is often achieved in contracts is by using indefinite pronouns and adjectives. Terms such as *whatsoever* and *howsoever* ensure unlimited applicability, but – at the same time – generate vagueness:

(9) Any Decommissioning Liabilities and any Environmental Liabilities of *whatsoever* nature and *howsoever* arising before or after the Post Economic Date. (C. 11: 13)

The indefinite adjectives and pronouns found in the corpus have the following distribution:

	Occurrences	Frequency per 1,000 words
Any	841	16.5
Such	387	7.6
All	196	3.8
Each	107	2.1
Every	10	0.2
Some	5	0.1

Table 3: Distribution of indefinites in contracts.

The most common element of this type is *any*, which is used to include all possible cases:

(10a) 'Affiliate' in relation to * *any* holding company or subsidiary of * or *any* subsidiary of a holding company of * (in each case within the meaning of section 736, 736A and 736B of the Companies Act 1985 (as substituted by section 144 of the Companies Act 1989)); (C. 5: 1)

(10b) Without prejudice to its right to terminate *any* Storage Agreements, in the Event of Default * may call upon or take *any* step to enforce and realise the Acceptable Security to the extent necessary to recover all Indebtedness. (C. 5: 6)

Such also appears quite regularly:

(11a) Following a request by the Customer under Clause 4.11, * will as soon as reasonably practicable and in any event not more than 10 Business Days after *such* request, release the security, or agree to a reduction in the security to *such* extent or by *such* amount as will permit the condition in Clause 4.13 to be satisfied. (C. 5:6)

(11b) If any such provision shall be held invalid or unenforceable in whole or in part by any court, *such* invalidity or unenforceability shall not affect the remaining provisions. (C. 1:3)

On the other hand, the term *some* occurs in only one document, as this term shows an intrinsic indeterminacy and the impossibility of identifying exactly the elements to which it refers. For the same reason the term *many* is also avoided. Pronouns such as *something, no one, anyone, someone, nobody, somebody* are not encountered in the corpus. The only pronouns of this type found in the corpus are *anything* (6 occurrences), *anybody* (1 occurrence), *nothing* (4 occurrences).

Vague expressions are also common:

(12) All Proposal Forms are to be sent to The Company on the same day or *as quickly as possible* after receipt, and in any event within 28 days of inception of a Policy. (C. 12: 5)

(13) A Licensee shall, if required, complete and return *accurately* and to the best of the knowledge and belief of the relevant Licensee an 'Information Audit' form. (C. 11: 6)

In the former example the phrase *as quickly as possible* could be interpreted in different ways. In the latter case the adverb *accurately* could express different levels of accuracy and cannot be defined without

taking into consideration the context. The fact that linguistic expressions in contracts are strictly context-related is explicitly expressed in expressions such as 'as the context may require':

(14) 'Business Day' means a day, other than a Saturday or Sunday, on which banks are or, *as the context may require*, were *generally* open for normal business in London; (C. 11: 6)

Contract clauses often display a wide range of vague elements; a few examples are given below:

(15a) At *'s request where at any time * has *reasonable* grounds to *believe* that the effect of the review will be to reduce the Customer's Credit Limit. (C. 5: 4)

(15b) In Confidence Information, which shall mean information which may be reproduced and disclosed and/or copied or reproduced only as *properly and reasonably necessary* or *desirable* (*in the opinion* of the provider of such information) for the internal use of the recipient and its professional and technical advisers (but, except in accordance with clause 11.6, not to the Members or the Advisory Committee) and in any event on such terms as do not result in it being made *public* and which maintain its confidentiality; (C. 4: 39)

In these cases several vague terms coexist: common instances include indefinite pronouns, verbs of opinion and adjectives with a flexible meaning.

2.2 Precision and clarity in contractual language

In contracts, as in other legal documents, the relationship between precision and vagueness is very close. On the one hand drafters include elements of linguistic indeterminacy and generality in order to ensure the applicability of certain clauses to a variety of different situations; on the other hand, it is also necessary to express concepts in a clear and precise way in order to safeguard the interests of the parties. It is interesting to note that the legal principle called *contra proferentem* is often applied in

cases of contractual dispute. It states that in private documents, such as contracts, disputes that arise from ambiguity are resolved to the disadvantage of the party that drew up the contract. This rule is designed to reflect the implied duty of the drafting party to avoid ambiguity that may aim to manipulate the outcome (Tiersma 2005: 123).

Especially within the Anglo-Saxon tradition, contracts are highly detailed in order to try and avoid all possible causes of dispute or litigation. Moreover, they tend to use clear and precise references, with a low level of abstraction, as common law is based on the analysis of precedents. The need for as much clarity as possible leads to expressions that could appear superfluous or repetitive, but their aim is to avoid disputes deriving from differences in interpretation. For example, in the expression *within seven (7) days* the repetition of the number of days both in letters and numbers can seem redundant, but it can avoid modifications. Other expressions may sound repetitive, but they are important from a legal point of view, because they reduce ambiguity. An example is the phrase *calendar month*, instead of the simple word *month*, which might refer to the lunar month, or a 30-day time span*:*

> (16) To pay in Sterling to the Agent at the end of each *calendar month* commission of 7% from all Customer payments received during that particular calendar month. (C. 1: 1)

In order to convey precision, and avoid disputes, a contract must be cohesive and coherent. A contractual text must make accurate reference to other clauses of the contract or to other norms and rules. Inter-textual citations are common in contracts, as it is important that every reference is indicated clearly and precisely. References to generic or abstract concepts of the contracts are usually avoided and it is preferable to highlight the specific point that is to be taken into consideration:

> (17) For the avoidance of doubt, where the original is in full colour, Licensed Copies may be made in black and white (known as halftones) provided that no colour separations are made and provided that the Licensees comply with the provisions of *clause 5.2*. (C. 2: 6)

Sometimes linguistic references can concern other parts of the

contract, such as annexes, which constitute an integral part of the contract itself:

(18) The Contractor will carry out the Work specified in Appendix 1 in accordance with the provisions of Appendix 1 of this Agreement. (C. 7: 2)

In contracts, extra-textual and inter-textual references are also very important and lend cohesion and coherence to the text. They are usually references to current rules and norms, as in the following examples:

(19a) The rate of interest prescribed from time to time pursuant to *The Late Payment of Commercial Debts (Interest) Act 1998*. (C. 2: 3)

(19b) Should any provisions of this Agreement be registrable restrictions under the terms *of the Restrictive Trade Practices Act 1976* such provisions shall not come into effect until the day after the terms of this Agreement have notified to the Office of Fair Trading in accordance with that Act. (C. 1: 3)

References can sometimes concern a specific section or clause:

(19c) An Authorised Person is to be regarded as visually impaired for the purposes of this Clause if he or she would be regarded as a visually impaired person in accordance with *s.31F (9) of The Copyright, Designs and Patents Act 1988* (C. 2: 11)

From a lexical point of view, precision can be achieved through particular expressions, such as fixed or binomial expressions, i.e. series of two or more synonymous or nearly synonymous terms, which are very common both in legal texts and in contracts. These expressions have the function of indicating precisely all the cases applicable to the contracts, in order to avoid an omission that might lead to a dispute. Here are some examples:

(20a) If any part, term or provision of the Agreement is *held illegal, invalid or unenforceable*, the validity or enforceability of the remainder of the Agreement is not affected. (C. 6: 13)

(20b) The Seller agrees to indemnify, *keep* indemnified *and hold* harmless the Purchaser against Pre-Economic Date Costs which are paid by the Purchaser. (C. 1: 13)

(20c) Save only as and to the extent set forth in this Clause 6, the Seller makes no representations or warranties in respect of any matter or thing and disclaims *all liability and responsibility* for any representation, warranty, statement, opinion or information *made or communicated* (orally or in writing) to the Purchaser in connection with the transaction contemplated hereby and the Purchaser acknowledges and affirms that it has not relied upon any such representation, warranty, statement, opinion or information in entering into and carrying out the transaction contemplated by this Agreement. Without limiting the generality of the foregoing, the Seller makes *no forecasts or evaluations*. (C. 11: 14)

The following expressions occur within the corpus:

Alienate, transfer and convey
All and any
Any paper or publication
Bankruptcy or liquidation
Business or affairs
Clients or Customers
'Confidential' 'proprietary' or 'secret'
Due and payable
Each and every
Free and clear
From and after
Goods and chattels
Have and hold
Invalid or unenforceable
Invalidity or unenforceability
In full force and effect
Keep and maintain
Null void and of no effect
Obligations and duties
Obligations or liabilities
Purpose and scope

Remise release and quit claim
Rest residue and remainder
Ruled and governed
Save and except
Tasks and duties
Terminate and cease to have any effect
Termination or expiration
Terms and conditions
Valid, legal and enforceable
Whole and entire
Withdrawal or termination

In addition, it is also common practice to use exact repetitions of the same terms. It is a widely held opinion that such seemingly superfluous repetitions hinder comprehension, and that they should be avoided in order to make a contract cohesive and coherent (Bortolotti 1986: 33). However, this element of contractual theory is often contradicted in practice, where systematic repetitions are widely accepted as a way of avoiding debatable interpretations. Repetitions of words, phrases and even entire sentences, are frequent in contracts. Formulaic lists of words may occur several times, and in exactly the same order. This both contributes to the coherence of the text and reinforces the fact that these elements are exactly the same, in order to reduce the potential for interpretative ambiguities:

> (21) 'Environmental Liabilities' means all c*osts, charges, expenses, liabilities and obligations* (other than Decommissioning Liabilities) incurred in respect of the Asset in relation to cleaning up, removing debris or any Asset Property from and for reinstating any area of land, foreshore or seabed, wherever situated, whether such *costs, charges, expenses, liabilities and obligations* are incurred pursuant to any statutory, common law or other obligation and regardless of negligence on the part of the Seller; (C. 11:8)

From another point of view, the identical reproduction of words or phrases can also arise from the need to minimize drafting time and costs. As the following example shows, the differences between the sentences can be minimal:

(22a) 'Pre-Economic Date Benefits' *means all benefits, credits and other value attributable to the Asset to the extent applicable on an Accrual Basis of Accounting to the period* prior *to the Economic Date*; (C. 11: 6)

(22b) 'Post-Economic Date Benefits' *means all benefits, credits and other value attributable to the Asset to the extent applicable on an Accrual Basis of Accounting to the period* after *the Economic Date*; (C. 11: 7)

(22c) 'Pre-Economic Date Costs' *means all costs, charges, expenses, liabilities and obligations in respect of the Asset to the extent applicable on an Accrual Basis of Accounting to the period* prior *to the Economic Date*; (C. 11: 6)

(22d) 'Post-Economic Date Costs' *means all costs, charges, expenses, liabilities and obligations in respect of the Asset to the extent applicable on an Accrual Basis of Accounting to the period* after *the Economic Date*; (C. 1: 7)

Repetitions can appear several times in the same sentence, creating a sense of prolixity and redundancy, as in the following example:

(23) No delay or omission by CSL in exercising any *right, power, privilege or remedy* under this Agreement or the Acceptable Security shall operate to impair such *right, power, privilege or remedy* or be construed as a waiver thereof. Any single or partial exercise of such *right, privilege or remedy* shall not preclude any other or future exercise therefore or the exercise of any other *right, power, privilege or remedy*. (C. 5: 8)

Pronominal references are rare in legal documents: it is considered preferable to repeat the subject(s) or other elements of a sentence in order to convey clarity. Therefore, pronouns are usually avoided. Trosborg (1997: 122) observes that: "in contracts, only a minor proportion of the references obtained makes use of pronouns". Drafters usually prefer to reiterate a term instead of using a pronoun:

(24a) Subject to Clause 5.4, *the Seller* shall pay to the Purchaser an amount equal to the Post-Economic Date Benefits received by *the Seller*. (C. 11: 13)

(24b) In consideration of the sale and transfer of the Asset by the Seller to *the Purchaser, the Purchaser* shall pay the sum of [ ] together with such sum as shall be payable in accordance with the provisions of Clause 7 of this Agreement to be apportioned as follows. (C. 11: 12)

In 'C. 11' (Sale & Purchase agreement) the term *purchaser* could be replaced by a personal pronoun, but the repetition clearly identifies the subject, and any possibility that the pronoun could refer to another subject is removed. Trosborg (1997: 140) observes: "it has become the norm to use lexical repetition and parties are repeatedly identified even in instances in which no ambiguity would arise from using a pronominal reference". In examining one Sale & Purchase contract from the corpus, the word *seller* appears 120 times and the term *purchaser* 111 times, while personal pronouns such as *he* or *she* never appear, and *they* (referring to the terms *seller* and *purchaser*) only appears in two cases.

(25) The Seller and the Purchaser agree that the allocation with respect to the Asset set out in Clause 3 is a just apportionment of the Consideration. The Seller and the Purchaser agree that *they* will each present their returns for tax purposes on the basis of the said allocation and that *they* will use all reasonable endeavours to agree with the Oil Taxation Office ("OTO") the figures so presented. No part of the Consideration attributed to the Balance of Asset allocation pursuant to [Schedule 2] shall be treated as a reimbursement of expenditure which the Seller has incurred whether comprising tangible drilling expenditure or otherwise. (C. 11: 19)

Personal pronouns are also very rare in the other contracts examined and if they do appear, they tend to be in sentences that have only one subject, so that there is no possibility of misinterpretation:

(26) The Regulator may adopt such procedures as *he* thinks fit in considering such appeals. (C. 4: 59)

Other expressions, such as *the former* or *the latter* are extremely rare in contracts, as they could be misinterpreted. Only two cases of *the latter* are found:

> (27a) Where there is an inconsistency between the Terms and Conditions and the Special Conditions *the latter* shall prevail. (C. 7: 3)
>
> (27b) A company is directly affiliated with another company or companies if *the latter* is (are) beneficial owner(s) of shares (or their equivalent) controlling more than fifty percent (50%) of votes exercisable at a general meeting (or its equivalent) of such company; and […] (C. 11: 4)

In some cases the contractual obligations of one of the parties can be listed, avoiding the repetition of the subject, and avoiding therefore ambiguous cases, as the subject is clearly identified immediately before the list, as the example shows:

> (28) The Seller shall:
> (a) not, except with the prior written approval of the Purchaser (such approval not to be unreasonably withheld or delayed) amend or agree to amend any of the Asset Documents […]
> (b) If is considers in good faith that a particular matter or proposal is of a nature which may have an adverse effect on the value of the Asset, notify the Purchaser […]
> (c) As soon as reasonably practicable provide the […]. (C. 11: 22)

The need for clarity and precision is summarized by Trosborg (1997: 140):

> Clarity and precision are given prominence in legal drafting; ambiguity and prolixity must be avoided. Unlike highly inflected language, the English language system makes very few distinctions in terms of number, gender and verb agreement. Lexical repetition is therefore a much safer option in cases where ambiguity of reference may arise and in contexts which do not tolerate ambiguity in general and ambiguity of reference in particular.

The aim is to specify all the possible cases in a detailed way, in order

to increase precision and reduce flexibility and, as a result, avoid ambiguity. Contracts, unlike other legal documents whose applicability is general, are legally binding only for their signatories, who are therefore interested in establishing their own rights and obligations in a clear way. Lists of word usually concern nouns:

(29) This Agreement is drawn up in English which language shall govern all *documents, notices and meetings* for its application and/or extension or in any other way relative thereto together with all *reports, communications, correspondence and technical work* between the Parties and/or with the Commission shall be in English (C. 3: 9)

Lists of verbs are also found in the corpus:

(30a) *To display, copy, reproduce (and to mechanically reproduce* each musical composition included in the Licensed Contract), *exhibit, perform, distribute and to transmit for streaming or download*, any or all of works as detailed in the Licensed Contract through Podcasts, and to license others to do the same; (C. 8: 1)

(30b) The Intermediary shall not *negotiate, adjust, compromise, settle or commit* The Company or The Insurer to any liability with respect to any claim or suit. The Intermediary shall however promptly report to The Company all claims and/or suits arising under or in connection with any Insurance or any matter pursuant to this Agreement, which comes to the attention of The Intermediary and co-operate fully in the investigation and adjustment of all such claims and/or suits. (C. 12: 3)

In some cases the listed elements can also be adjectives:

(31a) In this Agreement, the term 'Confidential Information' shall mean any co*nfidential, proprietary and trade secret* information of the Company, including information and data of an *intellectual, industrial, commercial, technical or scientific* nature and software or firmware either belonging to the Company or which the Company has a duty to protect, provided that such information is clearly marked as 'confidential' 'proprietary' or 'secret'. (C. 10: 1)

(31b) Licensees may supply single Licensed Copies to health professionals or other persons legitimately requesting medical information in relation to the *medical, therapeutic or technical* use and support of any of the Licensees' products, provided that either: […]. (C. 2: 7)

2.3. A close relationship

Contracts concurrently show aspects of vagueness and precision. For example, the role of lists of words is to specify clearly the cases foreseen in the contract. However, the doctrine of *ejusdem generis*, another legal principle often applied to contracts, states that the relationship between words is based on inclusion. Examining these lists in the corpus, one notices that they are often concluded with a generic term that guarantees a vast applicability, which necessarily entails a degree of indeterminacy:

(32a) Subject to any statutory obligations relating to retention of documentation, the Licensees shall delete from the hard drives of their central and local servers any and all Digital Copies which may be stored there upon notice from CLA to the Principal Licensee that the copyright holder believes that the Licensed Material contained in the Digital Copies infringes copyright or is, or may be, *defamatory, obscene or otherwise unlawful*. (C. 2: 6)

(32b) *The liquidation, dissolution or insolvency of the Shipper or any receivership, judicially supervised administration, moratorium, composition of creditors or other analogous event* affecting the Shipper or any of its property; […]. (C. 5: 12)

In the corpus, the final term of the list is usually a superordinate:

(33a) The Distributor will be solely responsible to any Subscriber or subsequent Distributor, for any opinions, recommendations, forecasts *or other comments* made or actions taken by the Distributor, based in whole or in part on the Information as incorporated in the Distributor's Service. (C. 6: 10)

(33b) Notwithstanding the provisions of Clause 4.2, the Licensee may make and supply to any visually impaired Authorised Person a

> copy (an Accessible Copy) of part or the whole of any work within Licensed Material in any alternative format that is more accessible to such Authorised Person, whether in digital or audio format, large or small print copies or embossed copies (whether produced in Moon or Braille or otherwise) *or in other formats* on, and subject to, the following conditions: […]. (C. 2: 10)

The generic expressions that conclude a list of words include all the possible alternatives (*or any other*), as it would be difficult or impossible to list them one by one and perform a summarizing role. The close relationship between the need for clarity and the importance of achieving wide applicability is also evident in the use of other linguistic expressions, such as *and/or,* which clearly aim to include all possible cases.

> (34) For the avoidance of doubt nothing in this Agreement is to be taken to authorise, or to purport to authorise the doing of any act outside of the United Kingdom other than the steps involved in the receipt, opening, viewing and printing permitted by clause 2.7.1; the responsibility for complying with the laws of other countries for any other acts shall rest with the relevant Licensee *and/or* recipient. (C. 2: 5)

Expressions of this type may concern different terms. For instance, they can appear with singular nouns:

> (35) Nothing herein contained shall prevent the communication of the same to the Commission or (against similar undertakings of confidence and for delivery up of such information as are contained in this Agreement) to any Affiliated Member or to any permitted third party insofar as necessary for the proper carrying out of the CEC Contract *and/or* the exploitation *and/or* the commercialisation of Foreground Information of Foreground Patents. (C. 3: 7)

Or plural nouns:

> (36) The Intermediary shall not negotiate, adjust, compromise, settle or commit The Company or The Insurer to any liability with respect

to any claim or suit. The Intermediary shall however promptly report to The Company all claims *and/or* suits arising under or in connection with any Insurance or any matter pursuant to this Agreement, which comes to the attention of The Intermediary and co-operate fully in the investigation and adjustment of all such claims and/or suits. (C. 12: 3)

Or they can refer to a series of several words:

(37) To cite the Publisher in full in any publications or otherwise available materials concerning the Text *and/or* the Research Team's Assessment, Research Work, Development Work or the Associated Materials. (C. 9: 2)

The expression *and/or* can also concern some clauses of the contract:

(38) In the event of late payment, the Purchaser shall pay to the Seller or the Seller shall pay to the Purchaser (as the case may be) interest on such further sums as may be payable pursuant to Clauses 7.1, 7.2 *and/or* 7.3 from the date such sums are due to be paid to the date and sums are paid (both dates inclusive) at a rate per annum [five per cent (5%)] above the Reference Interest Rate calculated on a daily basis using simple interest.(C. 11: 20)

In the corpus these sequences tend to appear in a consistent order:

(39a) In exercising their rights under the Licence, the Licensees shall be responsible for complying with all applicable laws of any kind including (without limitation) moral rights, data protection, the obtaining of any consents which may be required from any person, firm or company (other than those consents relating solely to *copyright and/or database right*), privacy or personality rights of any kind, defamation or obscenity. (C. 2: 8)

(39b) Qualifying Claim shall mean any complaint made in writing that any Indemnified Person (as defined below) acting in accordance with the Licence has infringed *copyright and/or database right* in Licensed Material or in any part of it or in the typographical arrangement of the published edition in which Licensed Material is contained. (C. 2: 8)

Other expressions in which the co-existence of vagueness and precision is evident are the sentences referring to morphological categories. This reference is sometimes explicitly stated, as in the following examples:

(40a) Unless the context otherwise requires, reference to the singular shall include the plural and vice versa, reference to any gender shall include all genders, and references to persons shall include natural persons, bodies corporate, unincorporated associations and partnerships. (C.11: 10)

(40b) Words in the singular may be interpreted as including the plural. (C. 5: 3)

(40c) Words or phrases importing the singular include the plural and vice versa. (C. 6: 3)

In other clauses, both the singular and the plural are used, to emphasize that both possibilities are included:

(41) (A) a company is directly affiliated with another *company or companies* if the latter *is (are)* beneficial *owner(s)* of *shares (or their equivalent)* controlling more than fifty percent (50%) of votes exercisable at a general *meeting (or its equivalent)* of such company. (C. 11: 4)

These expressions give clear instructions as to how the terms should be interpreted; thus, although they may seem superfluous, they are evidently used in order to convey precision. However, in order to do so they simultaneously express a high level of generality, as their role is to specify that all possibilities are included in the contract.

3. Discussion

In legal texts of general applicability it is of prime importance that they should be relevant in different situations. Therefore they present lexical, syntactic and stylistic characteristics that permit the text to be

applied to a wide variety of cases. These types of text must foresee and include all possible cases, according to the principle of *all-inclusiveness* (Bhatia 1993: 117).

Indeterminacy is often present in contracts, and it is not necessarily a defect; on the contrary, it is a fundamental feature of these texts which guarantees the maximum generality in the application of a term. Unlike prescriptive texts of general applicability, contracts do not bind society as a whole, as they are private documents that impose obligations and duties only upon the parties which accept the terms they contain. As a result, they might be expected to display a significantly greater level of precision and convey a high degree of clarity so that ambiguity and vagueness should be avoided completely. In reality from a practical point of view there is a tendency to use certain standard formats for the different types of contracts, so that they can be readily adapted to specific situations, as only specific data need to be altered. This is a very common practice, which is principally employed to reduce the time and cost of drafting. Contracts are not always written *ex novo* and the final draft often retains features of a generic text that can be adapted to fit different needs. Therefore this type of text shows features of generality and indeterminate expressions that permit flexibility in their application.

In addition, contracts may often incorporate expressions which are intentionally vague, in order to allow one party to give a certain clause or article a flexible meaning, so that it may be interpreted in a different way according to the situation. This is particularly common when the contract is drafted exclusively by a single party, a situation which only affords the other party the opportunity to accept or refuse the terms of the completed document.

Furthermore, contractual language is often highly dependent on interpretation based upon specific circumstances. It is certainly difficult to use language in such a way as to exclude any potential for disagreement over the precise meaning of a term. Charnock (2006: 80) observes that: “if all meaning is relative to context, then in spite of the judges’ frequent claims to be following the literal rule, there can be no purely literal interpretation”. From a linguistic point of view it can be considered impossible to interpret legal and contractual language unequivocally. The role played by interpretation is underlined by Charnock (2006: 83):

> The meaning of all words without exception must be taken to depend radically on the context of use. This is particularly clear in the legal field, as judges are often seen to redefine not just common, everyday words, but also technical concepts, in order to take account of new circumstances.

Contracts therefore display multiple cases of linguistic indeterminacy, such as ambiguity, incoherence, contestability and vagueness. The last of these has been extensively discussed, as it is particularly common in such texts. Ambiguity, on the other hand, may be present, but does not normally cause similar difficulties in the interpretation, as it refers to cases in which an expression has two or more distinct and different meanings, and can be easily clarified by analysing the context. More complex controversies of linguistic interpretation are caused when the text is vague. Vagueness is an inherent quality of all language, but particularly of contractual language, in which there are instances where it becomes particularly difficult to assign a definite meaning to a term. It is often contended that instances of vagueness could be eliminated by the use of more specific terms/precise writing in the place of more generic statements. While it is true that, when they can be successfully employed, precise terms may often reduce the range of potential interpretations, they do not, however, eliminate the problem of vagueness completely.

Among the strategies most commonly employed by legal drafters to create vagueness is the lexical choice of words that have 'flexible' meanings. In the light of studies by Fjeld (2001, 2005), this paper has also taken a particular interest in the use of evaluative adjectives. The precise meaning of these, and other similar elements, has been shown to be highly dependent on factors of interpretation as they may often be seen to assume different values, depending on their situation within the contract and the broader context of their application. Several such instances occur within the corpus of contracts analysed within this study.

Another linguistic element that may result in vagueness within a text is the presence of indefinite pronouns and adjectives including *any, such, all* and *each,* which can be difficult to quantify, and therefore difficult to interpret unequivocally. Moreover, the use of certain verbal constructions can also create linguistic indeterminacy. Impersonal

structures, for example, generally contain a certain level of vagueness: in particular, the use of verbs in the passive form tend to hide the agent of the action and this can, in some cases, contribute to a condition of vagueness. Passives are certainly common in the contracts analysed, but the agent is usually clearly identified nonetheless.

4. *Precision and vagueness: trade-off or coexistence? Concluding remarks*

Contracts are generally characterized by a high level of formality and complexity. However, contracts have also been subject to a series of changes whose aim was to improve their level of comprehensibility and to facilitate access to these documents for non-professionals. This has led drafters to avoid certain formalisms and to achieve greater linguistic clarity. Common suggestions for accomplishing this aim include: using shorter sentences and simple words, the active instead of the passive voice and avoiding archaisms. Clarity is fundamental in contracts because both parties have an interest in establishing their mutual rights and obligations in an unambiguous way. While drafting a contract, it is therefore important to express concepts in a precise and accurate way in order to avoid future misinterpretations. As Crystal / Davy (1969: 193) observe: "if the composer happens to have used language which can be taken to mean something other than he intended, he has failed in his job".

Several legal documents, and also contracts, tend to reproduce a standard format and to present expressions that are in accordance with the linguistic tradition. This traditionalism has led to the consolidation of expressions and terms whose meaning is now generally agreed upon. New expressions would lose this advantage of consolidated meaning, and their use may therefore be more likely to cause controversy. The need for precision in contracts is self-evident. Indeed it is of such importance that it is enshrined in the doctrine of *contra proferentem*, which encourages drafters to be unambiguous by ensuring that any controversy that arises from their imprecision will be decided against them.

Linguistic clarity and precision are conveyed by different strategies, such as repetitions, lists of words, lack of pronominal references, etc. Contracts often contain clear intra-textual, inter-textual and extra-textual

references. The corpus also presents several uses of binomial expressions: while these may appear redundant and repetitive, they nonetheless belong to the legal tradition, and improve clarity. The 'lists of words' that occur throughout the corpus are considered by some to be an obstacle to comprehension, and a similar criticism is sometimes made against them. In practice, however, such specification is an important tool in ensuring clarity. Although they do not eliminate completely the possibility of misinterpretation, the function of these lists is to ensure the applicability of the contract to all possible situations. Nonetheless, in order to accomplish this generality, they often conclude with a generic term, which may be considered vague.

The wholesale repetition of certain 'stock phrases' is a common occurrence in contracts, as it is preferable to repeat a term that has already been mentioned in order to improve continuity and consistency; therefore pronouns are not generally used, to avoid the problem of attribution of meaning.

Despite the need to convey precision, vague expressions seem unavoidable and these two aspects are closely linked. This relationship is clearly summarized by Charnock (2006: 101):

> Those who assume that the function of the judge is to apply pre-existing law, and who wish to reduce judicial discretion to a minimum, may see any lack of precision in statements of the law as a problem to be avoided where possible, if necessary through the use of obscure language. However, because all natural language is inherently polysemic and open-textured, ambiguity is theoretically unavoidable. It must therefore be accepted as an integral part of the law.

It is certainly plausible to argue that indeterminacy in legal texts such as statutes, which apply to whole societies, derives from the necessity of expressing generality. We have observed, however, that contracts, which do not have the same breadth of responsibility, and might therefore be expected to display greater precision, also present a high number of linguistically indeterminate elements. Furthermore, there is considerable evidence to suggest that these seemingly contradictory elements, vagueness and precision, are constantly inter-related. Indeed, vagueness is intimately linked to precision, an intrinsic feature of contractual language.

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