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***Pełnomocnik substytucyjny* as an example of incongruity of terms of Polish and English legal systems**

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ABSTRACT

There are several degrees of terminological incongruity, ranging from identical concepts or near equivalence to conceptual voids without any equivalents in the TL. The degree in question can be measured as differences between essential and accidental features (Sarčević 1997: 237-8).

The present paper constitutes an attempt to find the functional equivalent of the Polish term *pełnomocnik substytucyjny* (*pełnomocnik dalszy, substytut*), a term used in Polish doctrine. Beginning with the definitions of a term and equivalence, types of attorneys under Polish and English civil law are presented, revealing the uncertainty of distinguishing between *pełnomocnictwo substytucyjne procesowe* 'substitutive power of attorney in proceedings at law' and *zastępstwo procesowe* 'representation in proceedings at law' in the Polish legal system. In the process of searching for the functional equivalent, English equivalents of the term in question suggested in the bilingual dictionaries are presented. Definitions of the following terms appearing in the English handbooks and dictionaries of law were also analysed: 'substitute,' 'agent,' 'sub-agent' and 'attorney'. Finally, following completion of the research, a functional equivalent of the term *pełnomocnik substytucyjny* was proposed. Nonetheless it was concluded that the occurrence of system-bound terms as well as the phenomenon of the incongruity of terms make the process of translation extremely challenging.

KEYWORDS

Equivalence, terminological incongruity, term, power of attorney, functional equivalent, partial equivalent, system-bound term, civil law.

1.Term

In this paper the semantic unit *pełnomocnik substytucyjny* is assumed to be a term in accordance with the definition of a term by Lukszyn and Zamrzer: "a word (a phrase) of a conventionally determined, strictly defined conceptual structure, as a rule monosemic and uninterpretable, of an emotional character, able to create systems" (2001: 9) and:

Within specialized vocabulary two main classes of words are distinguished depending on the type of an object being denoted. In professional activity we deal with either an object which is experienced materially, namely a real object, or an object established on the basis of an intellectual construction, i.e. an ideal object. (...) The words belonging to the first class are nomenclatural names unlike terms – words belonging to the other class (Lukszyn, Zmarzer 2001: 8).

The phrase *pełnomocnik substytucyjny* also has the features of a term enumerated by Hejwowski: "Terms, as a rule, should be precise and monosemic" (2007: 31), as the definition of *pełnomocnik substytucyjny* (quoted below) appears in handbooks of law. Even *język prawny* 'language of law,' including *język prawniczy* 'legal language' to which the

term in question belongs (in accordance with the division into *język prawny* and *język prawniczy* by Wróblewski) is characterised by precision, which is one of its most important features (Mellinkoff 1963: 399 in Jopek-Bosiacka 2008: 49). It should be emphasised that the precision of *tekst prawny* 'text of law' is achieved inter alia thanks to consistent usage of legal terms, the occurrence of which is one of the main sources of incomprehensibility of *teksty prawne*. According to Jopek-Bosiacka (2008: 30,31),

The choice of the right term constitutes the key phase of text translation and requires a given level of specialist, cultural and linguistic knowledge (including translation competence). This concerns in particular texts coming from different legal systems and legal cultures. At the same time translation of Polish *teksty prawne* 'texts of law' created under a civil law system which was established on the basis of the Roman law into English and vice versa is one of the more difficult ones as regards the linguistic combinations and the possibility of comparison of legal institutions and semantic fields of terms.

Lawyers define *a term (name)* as "a concept that is a set of content concerning a given term as opposed to its designatum" (Łopatka 2001: 18). Morawski distinguishes two types of terms, namely, legal terms and actual terms. A legal term is a term occurring in *teksty prawne*, all the application criteria of which are defined by the law and expressed by legal definitions—classical or partial. By contrast, an actual term is a term the application criteria of which are not formulated in *tekst prawny* (Morawski 1980: 187). Taking the above definitions into account one can state that the phrase *pełnomocnik substytucyjny* is not a legal term since it does not appear in *tekst prawny* 'text of law' but in *tekst prawniczy* 'legal text.' On the other hand, its synonym, *substytut* (the term in question), constitutes a legal term since it appears in the Polish Civil Code.

2. Equivalence, incongruity of terms

The concept of equivalence is closely connected with the phenomenon of incongruity of terms, i.e. non-coincidence of their semantic fields. Roman Jakobson, a Russian structuralist, in his article from 1959, having distinguished three types of translation, states that in interlingual translation "there is ordinarily no full equivalence between code-units while messages may serve as adequate interpretations of alien code-units or messages." In his opinion however, translation from one language into another includes replacing messages in one language not with separate code-units but entire messages in another language (Jakobson 1959: 233). Thus the translator "recodes and transmits a message received from another source" and as a consequence "two equivalent messages in two different codes" appear. Jakobson says that 'equivalence in difference' is the central concern of linguistics. The concept of equivalence plays a vital role in translation studies but it is understood and defined in different ways by various authors. There is no one universal definition of equivalence but the concept of formal and dynamic equivalence by E. Nida

seems to be one of the most acknowledged. The author (1964, 1977, 2001) distinguishes 'two basic orientations,' 'two types of equivalence.' In order to achieve 'formal equivalence' the translator focuses on the source text characteristics (e.g. sentence structure, type of text, formal characteristics) and tries to preserve them in translation. By contrast, 'dynamic equivalence' is based on 'the principle of equivalent effect', where "the relationship between receptor and message should be substantially the same as that which existed between the original receptors and the message" (1964: 159). When translating, the translator must aim to find "the closest natural equivalent to the source language message" (Nida and Taber 1969: 12).

Jopek-Bosiacka (2008: 47) states that the multitude of legal systems is often the source of non-equivalence of concepts or non-coincidence of semantic fields of terms. Moreover, she (2008: 48) says that as a consequence of this fact each legal system as a product of different institutions, history, culture and sometimes even socio-economic principles has its own legal realities, system of concepts, and even structure of knowledge (after Vanderlinden 1995: 328-337 in Jopek-Bosiacka 2008: 48). Legal terminology characteristic of different legal systems is to a large extent conceptually incongruent (Sarčević 1989: 278). What is more, Hejwowski (2007: 32), disagreeing with Bergenholtz and Tarp, states that the degree of equivalence does not refer only to specialised disciplines determined culturally. He emphasises that terminological gaps can occur everywhere.

Translators should treat searching for an equivalent as solving a legal problem. The nature of the problem should be identified and the way of dealing with it in the target legal system must be determined, which would lead the translator to the concept or institution (of the target legal system) having the same function as the institution of the source legal system. (Minck 1991: 464 in Sarčević 1997: 235). Thanks to the process described the translator finds a 'functional equivalent.' A functional equivalent is defined in translation studies in different ways (e.g. Reiss and Vermeer 1984). In this paper I follow the definition by Sarčević, namely, "a term designating a concept or institution of the target legal system having the same function as a particular concept of the source legal system" (1997: 236). Finding a functional equivalent is the first step in the decision-making process (Sarčević 1997: 236). "In order to determine the acceptability of a functional equivalent, translators must compare the target and source concepts to establish their degree of equivalence" (Pigeon 1982: 280 in Sarčević 1997: 236). It is necessary to determine the conceptual characteristics of the source term and the functional equivalent and classify them as 'essential' or 'accidental' in order to measure the degree of equivalence. According to Lane (1982: 224-225 in Sarčević 1997: 237-238), in the case where all the essential characteristics of the source term coincide and only a few of the accidental ones do not, the concepts are considered to be 'identical,' while where

most of the essential characteristics and only some of the accidental ones match up, the concepts are considered 'similar,' and if only a few or none of the essential features coincide, the concepts are 'non-equivalent' and in such a case the functional equivalent is not acceptable. According to Sarčević, when measuring the degree of equivalence, one should take into account the phenomena of 'inclusion' (where characteristics coincide) and 'intersection' (where characteristics overlap) occurring between terms. Consequently she proposes three categories of equivalence: 'near equivalence,' 'partial equivalence' and 'non-equivalence.' 'Near equivalence' occurs "when concepts A and B share all of their essential and most of their accidental features (intersection) or when concept A contains all of the characteristics of concept B, and concept B all of the essential and most of the accidental characteristics of concept A (inclusion)" (Sarčević 1997: 238). 'Partial equivalence' appears when concepts A and B share most of their essential and some of their accidental features (intersection) or when concept A includes all of the characteristics of concept B but concept B only most of the essential and some of the accidental characteristics of concept A (inclusion). When only a few or none of the essential characteristics of concepts A and B coincide (intersection) or when concept A has all of the characteristics of concept B but concept B only a few or none of the characteristics of concept A (inclusion) non-equivalence occurs and the functional equivalent is considered as unacceptable (Sarčević 1997: 238-239). It seems that searching for a functional equivalent is included in the dynamic translation concept by Nida since the process focuses on the target legal system.

Due to the differences within legal systems, especially those established on the basis of different sources, e.g. Polish and English law, a translator encounters institutions which occur only in the source legal system and do not appear in the target legal system. Sarčević refers to them as 'system-bound terms' which "designate concepts and institutions peculiar to the legal reality of a specific system or related systems" (1997: 233).

Biel (2006) seems to be correct in stating that "the techniques of dealing with incongruous concepts may be placed along the continuum between two extremes: domesticating and foreignising strategies"—concepts formulated by Venuti (1995).

3. Research

Polish legal system

Pełnomocnik ('an attorney') is a subject authorised to act on behalf of another person (Encyklopedia prawa 1999: 474). Polish civil law distinguishes between statutory representation based on statutory law and the power of attorney based on the declaration by the person represented (Kierzkowska, Miller 2000: 19).

According to the Polish Civil Code *pełnomocnictwo ogólne* 'general power of attorney' confers the authorisation for acts of ordinary management. Legal acts exceeding the scope of ordinary management require a power of attorney specifying their kind unless statutory law requires a power of attorney for a particular kind, which constitutes the division with regard to the scope of authorisation (Pazdan 2002: 495).

Pełnomocnictwo rodzajowe 'specific power of attorney' is the source of power to perform legal acts of one category (for example the sale of a thing), including legal acts exceeding the scope of ordinary management. Types of activities exceeding the scope of ordinary management should be clearly determined in a power of attorney (Ziemianin 1999: 264).

The division based on who grants the power of attorney creates two subgroups, namely, a power of attorney granted by the principal is *pełnomocnictwo główne* 'main power of attorney', while a power of attorney granted by the attorney in the name and on behalf of the principal is *pełnomocnictwo substytucyjne* 'substitutive power of attorney' (Pazdan 2002: 495).

Still another division is the one into *pełnomocnictwo samodzielne* 'independent power of attorney' and *łączne* 'joint power of attorney.' When a principal appoints only one attorney this is obviously an independent power of attorney. Doubts are raised the moment a principal appoints several attorneys. The rule of *pełnomocnictwo samodzielne* 'independent power of attorney' is provided for in Article 107 of the Polish Civil Code in accordance with which if a principal appoints several attorneys with the same scope of authorisation each of them may act independently unless something else follows from the contents of the power of attorney. This provision is also applicable to attorneys appointed by a principal him/herself. It should be noticed that "attorneys appointed for the principal by the attorney him/herself are *substytucji*" (the term in question) (Pazdan 2002: 497).

Longchamps de Berier (1999: 135) states that in the law to date it has been disputable whether an attorney may be substituted by another person, i.e. whether an attorney may transfer the power he/she is granted to another attorney.

Due to the fact that the power of attorney is a relation of trust, it is assumed in *Kodeks Zobowiązań* 'Code of Obligations' that one cannot substitute one another. The substitution is nevertheless permissible on condition that the possibility to substitute was clearly provided for in the act of empowerment or a law or results from the legal relationship forming the basis for the power of attorney. In other words, always a specific title to substitution has to exist—Article 102§1 (Longchamps de Berier 1999: 135).

Among lawyers there has been so far no common position concerning the two institutions *pełnomocnictwo substytucyjne procesowe* 'substitutive

power of attorney in proceedings at law' and *zastępstwo procesowe* 'representation in proceedings at law.' It is not clear whether the two mentioned institutions are identical or they constitute two different relationships with regard to their function, the persons being the parties thereof as well as obligations and liability arising from them. The Supreme Court in its resolution (Resolution of the Supreme Court of 28 June 2006) stated that the legislator clearly distinguishes between *pełnomocnictwo substytucyjne procesowe* and *zastępstwo procesowe*. Nevertheless, the situation is not clear since after reading another resolution (Resolution of the Supreme Court of 9 March 2006), one can state that the Supreme Court finds no difference between the institutions in question. Nevertheless, in accordance with, as it seems, the prevailing position presented in the doctrine, the terms in question stand for two different institutions. There are significant differences between *pełnomocnictwo substytucyjne procesowe* and *zastępstwo procesowe*. In the case of *pełnomocnictwo substytucyjne procesowe*, between *substytut* (the term in question) and a party there is formed the same relation as between a party and its attorney, while in the case of *zastępstwo procesowe* no legal relation between them is formed, and thus "zastępca, a person granted representation in proceedings at law is not liable under the contract (contractual liability) to a party but to the principal" (Resolution of the Supreme Court of 28 June 2006). The objectives of the two institutions in question are also different—the institution of *pełnomocnictwo substytucyjne procesowe* facilitates the activity of an attorney and makes the acts under the power of attorney more efficient, whereas representation in proceedings at law serves an educational purpose (Resolution of the Supreme Court of 28 June 2006).

Due to the aforementioned situation, namely the fact that there is no certainty about the two mentioned institutions being identical legal relationships or not, this paper focuses on the institution of attorney within the civil law of England and Poland, with no reference to civil proceedings.

English legal system

In the English legal system an attorney is "one who is appointed by another to do something in his absence, and who has authority to act in the place and turn of him by whom he is delegated" (Jowitt's Dictionary of English Law 1959: 177). In the Powers of Attorney Act, the legislator mentions the general power of attorney as well as "donees acting jointly or acting jointly or severally," which on the basis of their definitions in *Jowitt's Dictionary of English Law 1959* can be compared to the Polish *pełnomocnictwo ogólne* and *pełnomocnictwo samodzielne* and *łączne* respectively. Within English law there has been developed a division into private and public attorneys.

"A private attorney is a person appointed by another to act in his place or represent him for a certain purpose. Private attorneys include all agents employed in any

business or to do any act *in pais* for another; also a person acting under special agency whose authority must be expressed by deed, commonly called a power of attorney” (Jowitt’s Dictionary of English Law 1959: 177).

“A power of attorney which authorises the attorney to do all acts of a certain class from time to time, such as to carry on a business, collect debts, etc. is sometimes called a general power, as opposed to a special or particular power, or one which is confined to a specific act or acts” (Jowitt’s Dictionary of English Law 1959: 1379).

Still another type of power of attorney under the English legal system is ‘enduring power of attorney’ regulated by the Enduring Powers of Attorney Act. Legal dictionaries also mention the division into limited and unlimited powers. Neither an enduring power of attorney nor a limited or unlimited power of attorney exists within the Polish typologies of powers of attorney. In dictionaries and handbooks of English law one does not find any division which would, with regard to the function of the institution, correspond to the Polish pair of *pełnomocnictwo główne* ‘main power of attorney’ and *pełnomocnictwo substytucyjne* ‘substitutive power of attorney.’

Equivalents in bilingual legal dictionaries

Below there are presented English equivalents of *pełnomocnik substytucyjny* and *pełnomocnictwo substytucyjne* and their synonyms appearing in the Polish doctrine, i.e. *pełnomocnik dalszy*, *pełnomocnictwo dalsze*, provided in bilingual dictionaries.

pełnomocnik substytucyjny

Dictionary	English	other related terms
Jaślan	---	---
Łozińska-Mańkiewicz	---	---
Myrczek	---	---
Ożga	---	---
Pieńkos	---	Pełnomocnik przez pełnomocnika – by proxy

pełnomocnictwo substytucyjne

Dictionary	English	other related terms
Jaślan	---	---
Łozińska-Mańkiewicz	substitutive power of attorney	---
Myrczek	---	---
Ożga	---	---
Pieńkos	substitutive power of attorney, substitute power	---

pełnomocnik dalszy

Dictionary	English	other related terms
Jaślan	---	---
Łozińska-Małkiewicz	---	---
Myrczek	---	---
Ożga	---	---
Pieńkos	---	pełnomocnik przez pełnomocnika – by proxy

pełnomocnictwo dalsze

Dictionary	English	other related terms
Jaślan	---	---
Łozińska-Małkiewicz	---	---
Myrczek	---	---
Ożga	---	---
Pieńkos	---	---

As can be seen from the chart above, only Pieńkos and Łozińska-Małkiewicz suggest an English equivalent, i.e. 'substitutive power of attorney', 'substitute power.' Additionally, there appears the term 'by proxy' referring, to my mind, to the legal relationship between an attorney and a *pełnomocnik substytucyjny*. One has to state that there is no equivalent suggested for the Polish term *pełnomocnik substytucyjny*.

Etymological equivalent

The etymological equivalent of *pełnomocnik substytucyjny*, namely 'substitute', occurs in the Powers of Attorney Act only in the following context: "A power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and persons deriving title under him to that interest, and those persons shall be duly constituted donees of the power for all purposes of the power but without prejudice to any right to appoint substitutes given by the power", which may suggest a function similar to that of the *pełnomocnik substytucyjny* in the Polish legal system. However, in the dictionaries of law there is no definition to support the hypothesis of identity or at least similarity of the function of *pełnomocnik substytucyjny* and 'substitute'. Curzon's dictionary provides the reader with the term 'substitution' only in connection with the procedure of adding and substituting parties (2002: 307). The dictionary of English law (Jowitt's Dictionary of English Law 1959: 1694) defines a 'substitute' as an heir, strictly referring to the law of inheritance. Furthermore, the term 'substitute' appears in the Enduring Powers of Attorney Act 1985 only in the following context: "A power of attorney which gives the attorney a right to appoint a substitute or successor

cannot be an enduring power". Judging by this provision, there is no certainty whether the legislator refers to another attorney or a legal successor.

Taking into account the definitions of 'substitute' in the English handbooks and dictionaries of law, it can be assumed that in the English legal system the term in question definitely denotes an heir (law of inheritance) and presumably a number of different institutions concerning replacement (e.g. substitution of parties, a replaced thing) (Birks 2001: 355). Furthermore, Polish equivalents of 'substitute' and 'substitution' provided in bilingual legal dictionaries support the assumption. The vast majority of Polish equivalents do not refer to the institution of representation. Only Ożga understands substitution as an element of civil proceedings. Furthermore, there are two terms referring to the law of inheritance.

Substitute

Dictionary	Polish	other related terms
Jaślan	1.substytut 2.zastępca 3.surogat	---
Łozińska-Małkiewicz	1.substytut 2.zastępczy	---
Myrczek	---	substitute heir – spadkobierca podstawiony
Ożga	1.zastępca 2.substytut	---

Substitution

Dictionary	Polish	other related terms
Jaślan	1.substytucja, przekazanie prawa (pełnomocnictwa) 2. zastępstwo	---
Łozińska-Małkiewicz	1.zastąpienie 2.substytucja 3.podstawienie	---
Myrczek	1.podstawienie, zastąpienie, substytucja 2. zastępstwo	---
Ożga	substytucja, przekazanie prawa, zastąpienie, podstawienie	substitution of an heir– podstawienie spadkobiercy; substitution of heir on

		trust–podstawienie powiernicze; substitution of a party– podstawienie strony; power of substitution – prawo substytucji; substitution in court proceedings– substytucja procesowa
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Functional equivalent

Taking the above into account, it can be assumed that in the English legal system there is no institution corresponding to the Polish *pełnomocnik substytucyjny* – firstly, as there is no classification of power of attorney in the dictionaries and handbooks of English law which would with regard to their function correspond to the Polish division into *pełnomocnictwo główne* ‘main power of attorney’ and *pełnomocnictwo substytucyjne* ‘substitutive power of attorney.’ Secondly, the etymological equivalent (‘substitute’) appearing in the mentioned acts and doctrine does not refer to a principal–attorney relationship. As the term in question is probably a system-bound term it is worth considering whether the term ‘sub-agent’ could serve as its functional equivalent.

In the English doctrine the following definitions of an agent can be found: “An agent is a person who acts on behalf of another person (the principal) by his authority express or implied” (Jowitt’s Dictionary of English Law 1959: 84), “Agent – a person authorised to act for another (who is the principal)” (Rossini 1996: 116). On the basis of the quoted definitions, one can assume that the term ‘attorney’ can be a synonym of ‘agent’. Furthermore, the term ‘agent’ seems to be a hypernym of ‘attorney’, and ‘attorney’ a hypernym of ‘agent’, as *Jowitt’s Dictionary of English Law* says: “As regards the principal and the agent *inter se*, agents are of two kinds – gratuitous and enumerated. A gratuitous agent, when formally appointed, is commonly called an attorney,” “Private attorneys are also called attorneys in fact and include all agents employed in any business or to do any act *in pais* for another” (Jowitt’s Dictionary of English Law 1959: 177).

In order to consider the acceptability of the suggested functional equivalent it is necessary to measure the degree of equivalence, starting with enumerating the essential and accidental characteristics of the term in question and the functional equivalent. The essential characteristics of *pełnomocnictwo substytucyjne*, being an institution under Polish law, presumably are 1) its function, i.e. acting on behalf of another person, 2) source of the legal relationship being established—existence of a legal basis for establishing the same legal relationship between a *pełnomocnik substytucyjny* and a principal as the one between a party and its attorney

(the establishment of which is possible on condition that the possibility to substitute was clearly provided for in the act of empowerment or a law or results from the legal relationship forming the basis for the power of attorney), 3) mutual responsibility of an attorney towards a principal and of a principal towards an attorney resulting from the legal relationship thereof.

It can be assumed that the above three features are shared by the legal institution under English law denoted by the term 'sub-agent.' Firstly, the term 'sub-agent' refers to the legal institution whose function is to act on behalf of another person, which can be concluded from the definitions of the term 'agent' quoted above. Secondly, under English law the relationship between a principal and an agent can be established in duly specified cases ("In the absence of an agreement to the contrary, there is no privity between the principal and the sub-agent"). Thus in both legal systems establishing a legal relationship between a principal and an attorney is dependent on the existence of a legal basis for establishment thereof. Thirdly, under the English legal system "in the absence of an agreement to the contrary, there is no privity between the principal and the sub-agent; therefore, the principal is not liable to the sub-agent for his remuneration, and he cannot sue the sub-agent for negligence or misconduct; only the agent can be sued" (Jowitt's Dictionary of English Law 1959: 1691); consequently the mutual responsibility is also common to both institutions.

The term 'sub-agent' presumably constitutes the English equivalent of the Polish term *subagent*, which refers to a party of an agency agreement. The agency agreement occurs in both systems, and thus the legal institution under English law denoted by the term 'sub-agent' also shows characteristics which make it different from the Polish institution of *pełnomocnik substytucyjny*.

Taking the above into account, it can be assumed that the term 'sub-agent' can serve as a functional equivalent of *pełnomocnik substytucyjny* denoting a legal institution characteristic for the Polish and not appearing under the English legal system. The equivalent may be classified as a *partial equivalent* since, as it seems, the majority of the essential characteristics of *pełnomocnik substytucyjny* and 'sub-agent' coincide.

It has to be emphasised that the choice of the right equivalent is definitely a difficult task due to terminological incongruity between the English and Polish legal systems. Translation seems to be challenging when a translator has to deal with system-bound terms.

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