

**ASSORTING,  
UNDERSTANDING, AND  
TRANSLATING CONTRACT  
CLAUSES (054)**

#ata59



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Professor.

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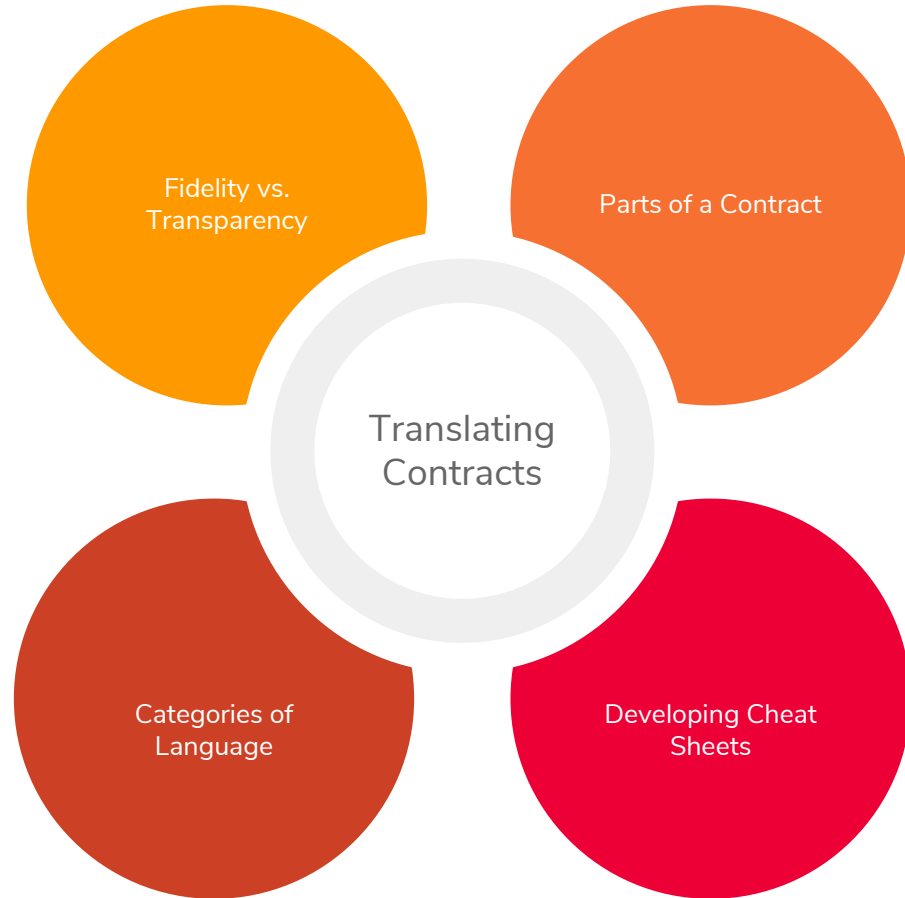
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The team (left to right)  
Hegel, Chief of Naps  
Lucky, Chief of Cuddles  
(not in photo)  
Pablo Klammer, co-director



# What's on today's agenda?



# 1.

## Fidelity vs. Transparency

*Finding some middle  
ground*



# Transparency vs. Fidelity

## The concept of **FIDELITY**

Many legal translators understand fidelity to source as meaning strict adherence to source, without adding or subtracting as much as a comma, even if that means the target text will read like a translation.

## The concept of **TRANSPARENCY**

Transparent renditions are those that flow as if originally written in the target language, conforming to the target language's grammatical, syntactical, and idiomatical conventions.



The last thing any lawyer wants is for a Court to breathe meaning into her contract.

# 2.

## PARTS OF A CONTRACT

*The Devil is in the systems*



CIVIL LAW

COMMON LAW

MUSLIM LAW

CUSTOMARY LAW

MIXED SYSTEM

# Civil Law, Common Law or Mixed?

The parts of a contract will vary across legal systems.



Source: University of Ottawa



Parts of  
Common  
Law  
Contracts

## THE FRONT

The title, the introductory clause, the recitals, and the lead-in

## THE BODY

Articles, Sections, Sub-Sections, and Enumerated Clauses

## THE BACK

The concluding clause, the signature blocks, consents, and attachments

# Parts of Civil Law Contracts

## Title

Indicating type of contract

## Body

The introductory clause, Articles, Sections, Subsections, etc.

## Assertion of (Non-Normative) Facts

## Normative Facts

Incorporation of codes by reference

## Closing

## Attachments

# 3.

## CATEGORIES OF LANGUAGE

*What they are and  
how to use them*



It's all about  
the process

**What are the parties trying  
to accomplish?**

**What category of language  
does that fall into?**

**How should I *interpret* this  
clause?**

Regardless of source word choice.\*

## Title: Sale and Purchase of Assets

Subject to the terms and conditions set forth herein, Acme shall sell to Wile E. Coyote and Wile E. Coyote shall purchase from Acme, all of the Assets, free and clear of any Lien other than Permitted Liens.

**What's wrong with this picture?**

# 1

We know this is a sale and purchase agreement. So we know that the contract itself is intended to make that sale and purchase possible, which is another way of saying that the parties want to perform the sale and purchase by means of this contract.

## Title: Sale and Purchase of Assets

Subject to the terms and conditions set forth herein, Acme shall sell to Wile E. Coyote and Wile E. Coyote shall purchase from Acme, all of the Assets, free and clear of any Lien other than Permitted Liens.

Are they selling and purchasing now or on a future date? Willingly? Conditionally? Are there any additional steps required or are they buying and selling by means of the speech act of saying I'm selling/I'm buying?

1

Language of  
performance

To accomplish an action by means  
of a speech act

Subject to the terms and conditions set forth  
herein, Acme hereby sells to Wile E. Coyote and  
Wile E. Coyote hereby purchases from Acme,  
all of the Assets, free and clear of any Lien  
other than Permitted Liens.

**hereby + active voice+ simple present**

## Title: Insuring Agreement

Wile E. Coyote shall be responsible for giving notice in writing as soon as is practicable: a) in the event of the cancellation of any Underlying Insurance; and b) of any notice given or additional or return premiums charged or paid in connection with any Underlying Insurance.

**What's wrong with this picture?**



2

An insuring agreement is the portion of an insurance policy in which the insurer promises to make payment to or on behalf of the insured.

## Title: Insuring Agreement

Wile E. Coyote shall be responsible for giving notice in writing as soon as is practicable: a) in the event of the cancellation of any Underlying Insurance; and b) of any notice given or additional or return premiums charged or paid in connection with any Underlying Insurance.

**Unnecessarily convoluted?**

2

## Language of obligation

To impose duties on one or more parties

Wile E. Coyote shall give notice in writing as soon as is practicable: a) in the event of the cancellation of any Underlying Insurance; and b) of any notice given or additional or return premiums charged or paid in connection with any Underlying Insurance.

**If translating into English, consider using must instead of shall**

“

*If you want to retain **shall**, then make sure that in each sentence in which it appears, it's the **equivalent of must**.  
Otherwise, cut it.*

*- Bryan A. Garner*

## Title: Provision of Goods and Services

Acme shall be entitled, in its sole discretion, to review the qualifications of subcontractors and to reject, without affecting any of Acme's rights under the Contract, a proposed subcontractor that Acme reasonably considers is not qualified to perform obligations under the Contract.

**What's wrong with this picture?**

3

The key here is that Acme will be using its discretion to determine whether a subcontractor is qualified or not.

## Title: Provision of Goods and Services

Acme shall be entitled, in its sole discretion, to review the qualifications of subcontractors and to reject, without affecting any of Acme's rights under the Contract, a proposed subcontractor that Acme reasonably considers is not qualified to perform obligations under the Contract.

**May?**

## Language of Discretion

To grant one of the parties discretion as to whether or not to take a specific action

Acme may, in its sole discretion, review the qualifications of subcontractors and reject, without affecting any of Acme's rights under the Contract, a proposed subcontractor that Acme reasonably considers is not qualified to perform obligations under the Contract.

**May means “has discretion to,” “is permitted to,” “is authorized to”**

Congratulations!  
You've survived  
the hardest part  
of this  
presentation.



# 4.

## Developing a Cheat Sheet

*Because life's too  
short!*

*Work Smarter  
Not Harder!*





Keep the  
magic  
questions  
handy!

**What are the parties trying  
to accomplish?**

**What category of language  
does that fall into?**

**How should I *interpret* this  
clause?**

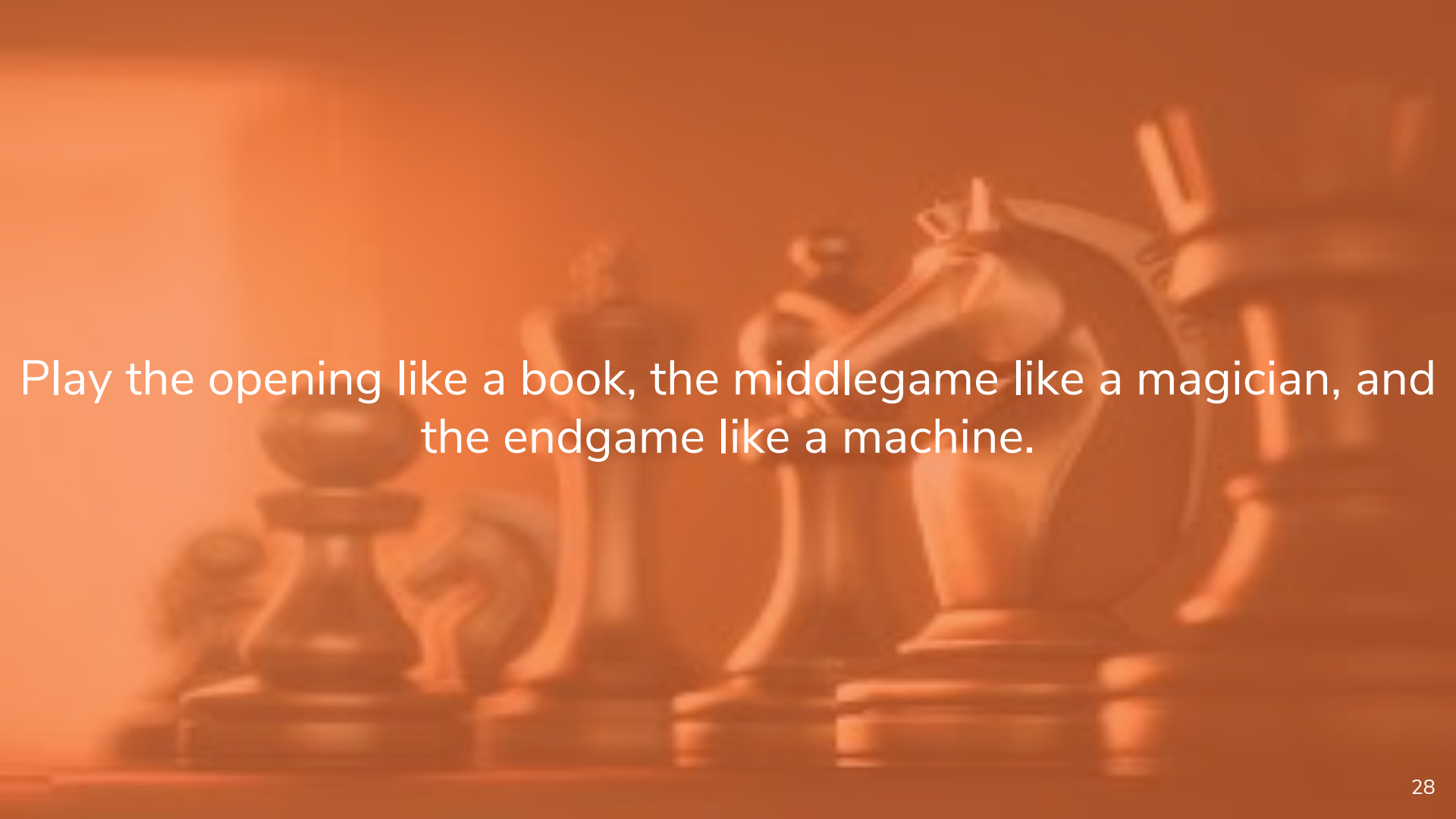
Regardless of source word choice.\*

Remember for each purpose or intention, there is a category.

<b>Purpose of the provision</b>	<b>Category of Language</b>
To accomplish an action by means of a speech act	Language of Performance
To impose duties on one or more of the parties	Language of Obligation
To grant one of the parties discretion as to whether or not to take a specific action	Language of Discretion
To prohibit the parties from doing something	Language of Prohibition
To impose duties on the parties that do not expressly require action or inaction on their part	Language of Policy
To declare facts by means of verbs of speaking	Language of Declaration
To state opinions on the legal implications of fact	Language of Belief
To address issues that can't be legally established by the parties in a contract and would ultimately be determined by the courts	Language of Intention
To make a recommendation to the other party for the purpose of avoiding dispute	Language of Recommendation

For each category there are rules.

Language of Obligation	<p><b>Tense:</b> avoid simple present</p> <p><b>Voice:</b> passive + shall for obligation or active + must</p> <p><b>Mood:</b> indicative</p> <p><b>Useful words:</b> <i>shall</i> to mean 'has to' only, <i>must</i> to replace <i>shall</i>, when applicable</p> <p><b>Red flags:</b> agrees to, undertakes to, promises to, covenants to, commits to + gerund, shall be obligated to, receive, is entitled to, covenant</p>	Wile E. Coyote must pay Roadrunner a monthly rent of \$X.
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A blurred background of chess pieces in a warm, orange-red light. The pieces are out of focus, creating a sense of depth and atmosphere. The lighting is soft and directional, highlighting the textures of the pieces.

Play the opening like a book, the middlegame like a magician, and  
the endgame like a machine.



Thank you very much  
for your time

Remember, you can find me at:

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End of  
Presentation



Y U NO CLAP

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