Spring 2019

Terminology Matters: Dangers of Superficial Transplantation

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TERMINOLOGY MATTERS: DANGERS OF SUPERFICIAL TRANSPLANTATION

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ABSTRACT

The history of legal transplantations from one legal system to another is as long as law itself. It has numerous edifications and names including reception, borrowing, and influence. Legal transplantations from one legal system to another come at various levels of substance and penetration including the transplantation of a legal tradition (English common law to the United States and the English Commonwealth), transplantation of national law (Turkey's adoption of Swiss Civil Code), transplantation of an area of law (Louisiana's adoption and retention of French sales law), transplantation of a rule or concept (Chinese adoption of principle of good faith), and superficial transplantation of a term or word. The focus of this article is on the latter form of transplantation, more specifically, the borrowing of English legal terms by foreign legislatures and judiciaries. The adopting of English terms and concepts into Italian law will serve as a case study. The key feature of superficial transplantations is that the English terminology is severed from the context of the country from which it is borrowed. The transplantation is most dangerous when the transference is without proper definitional and interpretive criteria to provide the means to guide courts and regulatory agencies in their interpretation and application. Superficial transplantations are doomed to failure and likely to cause negative consequences such as jurisprudential chaos. This article answers the following questions: (1) why would a country

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adopt English legal terms when equivalent words are available in its native language? (2) What do recent English term borrowings show as to the reasons and consequences of such transplantations? (3) What factors are determinative of the success of such transplantations? In the end, the trend toward the borrowing of English law terms by non-English speaking countries will continue. It is important for the transplanting countries to realize the dangers of such superficial transplantations and take steps to enhance the likelihood of success.

I. INTRODUCTION

The Honorable Justice Kirby of the Australian High Court recently listed comparative law as one of the major "revolutions" of the past fifty years.[1] By this he meant that legal systems continue to borrow from one another. At first blush, this seems to be an odd assertion given that comparative law analysis has been a longstanding undertaking in European legal scholarship that dates back a number

[1] Hon. Michael Kirby, Editor in Chief, The Laws of Australia, Freshfields Cambridge Lecture at the University of Cambridge Obligations VIII Conference: Legal Obligations. Legal Revolutions, 1, 1 (July 20, 2016), https://resources.law.cam.ac.uk/privatelaw/The_Hon_Michael_Kirby_AC_CMG_Legal_Obligations_and_Legal_Revolutions.pdf [https://perma.cc/74PJ-LZAE].

of centuries.[2] In the common law, there have been some borrowings among systems, especially running from the English high courts to the courts found in the more than fifty countries of the English Commonwealth of Nations.[3] Kirby correctly notes that the direct fertilization and unifying effect on the common law has come to an end with the termination of direct appeals to the Privy Council in the English House of Lords from many of the high courts of the countries of the Commonwealth.[4] The last Australian appeal was taken in 1987.[5] Finally, the United States, never a member of the British Commonwealth, has prided itself as being exceptional in not needing to borrow from other legal systems, although it clearly did borrow from

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[2] The prevailing view in the comparative law literature of past centuries was to compare legislative law and to refrain from a serious analysis of case law. This narrow approach left the researcher with less than a comprehensive view of the laws being compared. In the area of contract law, comparative law was re-energized by the "Common Core Project" undertaken by Rudolph Schlesinger at Cornell and Rodolfo Sacco at Trento, Italy. Their work shifted comparative law from "législation comparée" to droit comparé, that is, from a narrow focus on comparing statutory law to a broader analysis of law in general. *See* Richard M. Buxbaum & Ugo Mattei, Rudolph B. Schlesinger 1909-1996, 45 AM. J. COMP. L. 1, 2-3 (1997) (reviewing Schlesinger's impact on comparative law scholarship); Nik J. de Boer, The Theoretical Foundations of the Common Core of European Private Law Project: A Critical Appraisal, 17 EUR. REV. PVT. L. 841, 842 (2009) (examining Sacco's theory of comparative law). See, e.g., K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998). Common core research continues to the present. *See, e.g.*, OPENING UP EUROPEAN LAW: THE COMMON CORE PROJECT TOWARDS EASTERN AND SOUTH EASTERN EUROPE (Mauro Bussani & Ugo Mattei eds., 2007).

[3] Some of the countries of the Commonwealth include: Australia, Cameroon, Canada, Cyprus, India, Jamaica, Kenya, Malaysia, New Zealand, Nigeria, Singapore, and South Africa. *Member Countries,* THE COMMONWEALTH, http://thecommonwealth.org/member-countries [http://thecommonwealth.org/member-countries] (last visited Sept. 19, 2018).

[4] Kirby, *supra* note 1, at 8-11. The Judicial Committee of The Privy Council ("JCPC") is the court of final appeal for the U.K.'s overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee. In recent years, appeals have come mainly from states of the Caribbean including, Bahamas, Cayman Islands, Jamaica, Trinidad and Tobago, as well as Mauritius. *See Role of the JCPC,* JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, https://www.jcpc.uk/about/role-of-the-jcpc.html [https://perma.cc/72PW-5KQG] (last visited Oct. 18, 2018); *Decided Cases*, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, https://www.jcpc.uk/decided-cases/index.html [https://perma.cc/R9KD-L5NU] (last visited Oct. 18, 2018).

[5] *See* Hon. Justice Logan, *An Australian Perspective on the Removal of Appeals to the Judicial Committee of the Privy Council*, 4 CARIBBEAN J. INT'L REL. & DIPL. 19, 23 (2016).

English Common law well into the nineteenth century,[6] and look to external sources in such areas of human rights and the morality of law.[7]

With the advent of the free trade era and the information age the transplants of legal concepts (hereinafter, "transplantation") continues to be robust.[8] For example, the United Nations Convention on Contracts for the International Sale of Goods ("CISG")[9] borrowed from both the civil and common law systems and was influenced by both the Franco-Romanistic and Germanic families of the civil law.[10] In this sense it acts as a "bridge" between the common and civil law by selecting the better rules from each system or by fabricating entirely new rules.[11] Its purpose was to provide a supranational, harmonized law of sales.[12] An unexpected consequence is that it has also served as the basis of an indirect harmonization through a double or re-

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[6] The seminal English 1854 case of Hadley v. Baxendale (1854) 156 Eng. Rep. 145 (LR Exch.), on the foreseeability requirement in the awarding of damages, continues to be cited in American case law to the present. *See, e.g., Solidfx, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 838-39 (10th Cir. 2016).

[7] *See Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (overturning Texas sodomy laws). Justice Kennedy, writing the majority opinion, referred to the 1957 UK Report of the Committee on Homosexual Offences and Prostitution (The Wolfenden Report), as well as the 1981 decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*. *See id.*; Justice Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 265-66 (2003).

[8] Professor Watson coined the term "legal transplant." *See, e.g.,* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d. ed. 1993); Alan Watson, *Legal Transplants and European Private Law*, 4 ELEC. J. COMP. L. (2000).

[9] The CISG, also known as the Vienna Convention, was adopted on April 11, 1980 and went into effect on January 1, 1988. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3. *See generally* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (3d ed. 1999) (supplying a seminal work on the CISG's legislative history); COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Peter Schlechtriem ed., Geoffrey Thomas trans., 2d ed. 1998) (providing a premier commentary on CISG by one of the "founders" of international sales law).

[10] *See* Sieg Eiselen, *The CISG as Bridge Between Common and Civil Law, in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 612, 613-616 (Larry DiMatteo ed., 2014).

[11] *Id.* at 613. *See also* Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT'L L. REV. 371, 372-73 (2011) (studying the efficiency of select CISG provisions).

[12] *See* Sarah G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N. CAROLINA J. INT'L L. & COM. REG. 109, 110 (1988).

transplantation into national contract laws. For example, the People's Republic of China was one of the original adopting countries of the CISG when it went into effect on January 1, 1988.[13] Eleven years later, China unified its domestic and foreign contract laws with the enactment of the 1999 Chinese Contract Law ("CCL")[14] whose primary sources of rules were the CISG, as well as borrowings from the UNIDROIT Principles of International Commercial Contracts,[15] German law,[16] American Uniform Commercial Code, and the common law.[17] The CISG was also used as a source in the revisions of the

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[13] *Id.* at 109-10.

[14] Zhonghua Renmin Gongheguo Hetong Fa (中华人民共和国合同法[现行有效]) [Contract Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Mar., 15, 1999, effective Oct. 1, 1999), CLI.1.5GS4N93(EN) (Lawinfochina).

[15] For example, "[t]he overview of the rules on contract formation, which were newly introduced into Chinese contract law by the CCL, demonstrated that the drafters of the CCL appear to have been greatly influenced by international practice, in particular the CISG and the UPICC." Nicole Kornet, *Contracting in China: Comparative Observations on Freedom of Contract, Contract Formation, Battle of the Forms and Standard Form Contracts*, 14 ELEC. J. COMP. L. 1, 30 (2010). For the complete set of the UNIDROIT Principles of International Commercial Contracts, *see* UNIDROIT *Principles of International Commercial Contracts 2016*, art. 1.6(2), https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 [https://perma.cc/KFJ7-5KUL] (last visited Oct. 7, 2018).

[16] *See* Chen Lei, *The Historical Development of the Civil Law Tradition in China: A Private Law Perspective*, 78 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 159, 160, 163 (2010).

[17] *See* Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOK. J. INT'L L. 153, 153-54 (2001). The CCL adopts the common law and UCC's notion of anticipatory repudiation and adequate assurance. Article 68 provides a right to anticipate breach:

> The party required to perform first may suspend its performance if it has conclusive evidence establishing that the other party is in any of the following circumstances: (i) Its business has seriously deteriorated; (ii) It has engaged in transfer of assets or withdrawal of funds for the purpose of evading debts; (iii) It has lost its business creditworthiness; (iv) It is in any other circumstance which will or may cause it to lose its ability to perform.

Contract Law of the People's Republic of China, *supra* note 14, at art. 68. Article 69 provides that: "If the other party provides appropriate assurance for its performance, the party [giving notice of anticipatory repudiation] shall resume performance." *Id.* at art. 69.

Dutch,[18] German,[19] and French Civil Codes.[20] In Norway, the CISG has been extended beyond international transactions to domestic sales.[21] Also, in the area of choice of law English as well as Swiss laws continue to be highly influential in international business transactions.[22] American constitutional, corporate, financial and tort law has been influential in the development of the laws of other countries.[23] More recently, Islamic financial law has become an important source of law internationally.[24]

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[18] *See* Arthur Hartkamp, *The UNIDROIT Principles for International Commercial Contracts and the New Dutch Civil Code*, *in* CJHB BRUNNER-BUNDEL 127, 136 (1994); Sonja A. Kruisinga, *The Impact of Uniform Law on National Law: Limits and Possibilities—CISG and Its Incidence in Dutch Law*, 13 ELEC. J. COMP. L. 1, 1 (2009).

[19] *See* Hans Schulte-Nölke, *The New German Law of Obligations: An Introduction*, GERMAN LAW ARCHIVE, (2002), https://germanlawarchive.iuscomp.org/?p=357 [https://perma.cc/WW44-ASZ7] ("Both the [EU Consumer Sales Directive] and this German draft [German Law of Obligations] share the same ancestor. This is, unsurprisingly, the Vienna Convention on the International Sale of Goods (CISG)."); Reinhard Zimmermann, THE NEW GERMAN LAW OF OBLIGATIONS: HISTORICAL AND COMPARATIVE PERSPECTIVES (2005). Zimmerman notes: "As far as the general law of breach of contract is concerned, the [German Reform] Commission followed the lead of the UN Convention on the International Sale of Goods (CISG) in many respects." *Id.* at 32.

[20] Solène Rowan, *The New French Law of Contract*, 66 INT'L & COMP. L. Q. 805, 806 (2017).

[21] *See* Herbert Bernstein & Joseph Lookofsky, UNDERSTANDING THE CISG IN EUROPE: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1997).

[22] "It is very common for non-English commercial counterparties to decide that a contract should be governed by English law." Tom Bolam, *Common Mistakes in Choice of Law and Jurisdiction Clauses*, FLADGATE (Sept. 22, 2015), https://www.fladgate.com/2015/09/common-mistakes-in-choice-of-law-and-jurisdiction-clauses [https://perma.cc/B22S-3RHE]. *See England and Wales: The Jurisdiction of Choice*, LAW SOCIETY OF ENGLAND AND WALES, http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf [https://perma.cc/2F6J-FBEK] (last visited Oct. 7, 2018); Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws,* 34 NW. J. INT'L L. & BUS. 455, 459 (2014).

[23] *See* Lewis N. Klar, *The Impact of U.S. Tort Law in Canada,* 38 PEPP. L. REV. 359, 359 (2011). *See generally* GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE (2009); Albert P. Blaustein, The Influence of the United States Constitution Abroad, 12 OKLA. CITY U. L. REV. 435 (1987); Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 ECFR 378 (2005).

[24] Islamic banking assets have been growing at an annual rate of 17%, rising to about 20% in 2018. *Big Interest, No Interest: The Market for Islamic Financial Products is*

There is deep scholarly literature on legal transplantation or the transferring of laws from one jurisdiction to another, and even more ambitiously, from one legal tradition to another.[25] Transplantations of large historical significance include the transfer of Roman law to the civil law,[26] the inclusion of customary law in the Germanic branch of the civil law,[27] the transplantation of common law from England to the United States and the countries of the Commonwealth,[28] and the reproduction of various laws to less developed countries during the era of empire and colonialism.[29]

Different and even opposite points of view have been expressed on

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Growing Fast, THE ECONOMIST (Sept. 13, 2014), https://www.economist.com/finance-and-economics/2014/09/13/big-interest-no-interest [https://perma.cc/JT8V-ZGBJ]. Islamic finance or banking now total over $2 trillion in assets. There has been a substantial increase of sharia compliant banking in conventional or non-Islamic banks in order to attract deposits and by companies seeking alternative sources of funding. They then use those deposits to create sharia-compliant investment instruments for their Western firms. Most large banks now have in-house Islamic finance departments. In order, to provide more standardization as to what can be considered sharia-compliant, the Islamic Financial Services Board has been established. *Id.*; *see also* International Monetary Fund, *Islamic Finance: Opportunities, Challenges and Policy Options*, Staff Discussion Note (Apr. 6, 2015), https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Islamic-Finance-Opportunities-Challenges-and-Policy-Options-42816 [https://perma.cc/8YWT-CNQY], at 6 (discussing why Islamic finance matters and the complexity of Islamic finance).

[25] *See generally* WATSON, *supra* note 8; Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991).

[26] Roman law was compiled in the Justinian Code laid the foundation for modern civil law, especially in its use in training lawyers. But, it was not a total reception in that customary or local law still heavily influenced such areas as property law. *See* GEORGE MOUSOURAKIS, ROMAN LAW AND THE ORIGINS OF THE CIVIL LAW TRADITION 4, 57, 83, 113 (2015).

[27] *See generally The German Civil Code: Sources—Preparation—Adoption*, 12 AM. L. REG. 685 (1902).

[28] Lord Denning noted the ubiquitousness of customary law: "These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community." R. v. Secretary of State for Foreign and Commonwealth Affairs [1982] 1 Q.B. 892 at 910 (Can.). One scholar has questioned the direction and completeness of the transplantation of English law to its colonies. *See* David B. Schorr, *Questioning Harmonization: Legal Transplantation in the Colonial Context*, 10 THEORETICAL INQUIRIES L. F. 49, 49 (2009).

[29] The theory that supported the colonialism or conquest of other lands is the "Doctrine of Discovery" that allowed the developed countries to impose their laws on their new colonies. *See* Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 847 (2011).

the frequency and success of transplantations or borrowings of law. Alan Watson was the most optimistic in promoting the frequency and success of transplantations. According to Watson, this is especially so in the area of private law: "However historically conditioned their origins might be, rules of private law in their continuing lifetime have no inherent close relationship with a particular people, time or place."[30] Watson's most plausible assertion is that imitation is the most common engine in the evolution of legal systems, more so in some areas than others. He notes that private law is the area most commonly subject to transplantation (often from developed to less developed countries), but that the transfer of generally clear rules of private law does not always result in the transfer of their meaning[31]

On the other side, more nuanced positions are taken by Otto Kahn-Freund[32] and his followers. Kahn-Freund emphasizes that the history of transplants is one of both successes and failures, such as the case of jury trials imported to the European continent.[33] It is difficult to predict how an imitation will turn out in different contexts.[34] Somewhere between the positive and negative views of the feasibility of legal transplants lies the truth. If the term transplant means influence, then there is a stronger argument that foreign laws have to various degrees influenced one another.[35]

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[30] *See* Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV.79, 81 (1976).

[31] "It cannot be doubted either that a rule transplanted from one country to another . . . may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms." WATSON, *supra* note 8, at 20. Comparative law helps in the "discovery of the forces that are permanently and universally at work in all systems of law and . . . the deduction of the rules to which all specific historical legal phenomena can be reduced." Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L. J., 313, 320 (1978). Watson references Roscoe Pound: "History of a system of law is largely a history of borrowings of legal materials from other legal systems." WATSON, *supra* note 8, at 22.

[32] *See, e.g.*, O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974). Alan Watson replied to the arguments put forward by Otto Kahn-Freund in the article *Legal Transplants and Law Reform*, *supra* note 30, at 79. *See also*, Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 113 (1997). *Cf.* Inga Markovits, *Exporting Law Reform – But Will It Travel?*, 37 CORNELL INT'L. L. J. 95, 96 (2004) (reviewing the problems with effectuating effective transplantations in the context of the transfer of laws from Western to Eastern Europe after the fall of the Soviet Union).

[33] O. Kahn-Freund, *supra* note 32, at 17, 20-27 (arguing international labor relations law was another failed transplant).

[34] Eric Stein, *Uses, Misuses—and Non-Uses of Comparative Law*, 72 NW. U. L. REV. 198, 203 (1977).

[35] "In private as well as commercial law, Anglo-American principles are increasingly influencing continental scholars and judges." Gianmaria Ajani, *By Chance*

When such influence is structuralized in a formal transplantation, the likelihood of success is questioned. Later it will be argued that the fit or applicability of the borrowed law or concept to the host country will be the key determinate of success. Unfortunately, the fit is often a forced one in which the contextual nature of the borrowed law is stripped away in order to fit the law to the host country's legal system. The likelihood that the transplant or borrowing will have its intended effect—law reform, harmonization, or fix a specific legal problem—is greatly diminished because context provides meaning and guidance that will be lost in the simplified, formal transplantation of legal terms or blackletter law.[36] Where Watson's assessment goes wrong is that he fails to adjust the likelihood of the success of the transplantation of private law against some measure of quality of transplantation. Simply put, not any private law transplant can be successful; only those few high-quality transplants are likely to have the desired transplant effect. The success of a transplant or borrowing of foreign legal concepts or rules starts with the motivation of the legislator in feeling the need to use foreign legal sources. If the transplants are motivated by legislative laziness, which uses the copying of a foreign law as an alternative to doing the hard work of developing an organically grown domestic law, then the transplant is likely to fail.

It is clear that superficial transplantations or the borrowing of English terms, uprooted from their contextual basis, are not attempts at harmonization of law. This is because such legislative borrowings fail to customize the transplanted law, or provide sufficient guidance, to fit the transplant to a new contextual setting. This ignorance of context and substance dooms the transplantation or borrowing to failure in situations where the context of the adopting country is substantially different than the country of borrowing.

The success of a transplant, whether substantive or superficial, is dependent on its fit with the borrowing country's legal system. René David stated that it would facilitate transplantation if "every state would content itself with determining and to making known the points at which its national law deviates from the model it has adopted in

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and Prestige: Legal Transplants in Russia and Eastern Europe, 43 AM. J. COMP. L. 93, 95 (1995).

[36] Gianmaria Anjani has noted: (1) "the contextual character of legal concepts . . . are linked to their legal sources," (2) "the legal domain is an extreme case where the precise meaning of concepts vary in different contexts and are difficult to pin down," and (3) "[u]nderstanding legal terminology requires a deep understanding of legal culture and social values." Gianmaria Ajani et al., *European Legal Taxonomy Syllabus: A Multi-Lingual, Multi-Level Ontology Framework to Untangle the Web of European Legal Terminology*, 3 APPLIED ONTOLOGY 1, 1-3 (2006).

principle, or the terms of which it has made more precise or to which it has added for reasons of necessity or simple convenience."[37] In this statement, David provides guidance that when transplanting law it is vitally important that the adopting country explains the reasons for the adoption, as well as how the adoption fits the domestic law framework.[38] This information is necessary to absorb the transplant into the current legal system in a holistic way and to provide the means for the national court system to interpret and apply the transplant in a uniform way.

The trend of adopting isolated English legal terminology or concepts is doomed to failure not because the words are empty of meaning,[39] but because they are open to numerous ill-conceived interpretations and applications. The negative effects—misapplication and confusion—are heightened when the term being transplanted is an ill fit to the host country's legal system. The separation of form terms from context eliminates any substantive value from the transplant. Alternatively, the transplanted term is meaningless if it is devoid of its relationships with the other rules or definitional constructs of the foreign legal system from which it was developed, as well as the context of its application, which is often found in case law. The use of English legal terminology, taken from the U.S. and the U.K., is without meaning given the case law basis of the common law, as opposed to the code-based logic of the civil law. In the end, substance comes from context or, more emphatically, context is substance.

This article focuses on the lowest quality transplant (superficial): the borrowing of English terms by a foreign language legal system. In recent times, discussed later in this article, there has been an increased use of English language terms in civil law jurisdictions.[40]

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[37] René David, *The Methods of Unification*, 16 AM. J. COMP. L. 13, 17 (1968). Another scholar has noted this phenomenon as the inapplicability problem. Helen Xanthaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 INT'L & COMP. L. Q. 659, 659 (2008) (arguing "inapplicability leads to failure for the transplanted law").

[38] David, *supra* note 37, at 17.

[39] We owe this insight to Professor Katia Peruzzo of the University of Trieste. Initially, our view was that words taken out of context in a foreign language would prove to be meaningless in the borrowing country. But this would have been incorrect because the transplanted word would still retain meaning. Peruzzo provides this metaphor: "Like a heart transplanted by a surgeon, if the heart and the body are compatible, then the transplant will be successful, otherwise it won't. But the heart being transplanted would in any case be recognized as a heart." Peruzzo comments on manuscript (April 20, 2018). Alternatively, stated a foreign word may have a particular meaning within the foreign legal system, but is susceptible to various meanings in another legal system.

[40] *See infra* Part IV.B.1.

This is troubling because such superficial transplantations or "word-borrowings"[41] often serve little purpose other than sowing misunderstanding and confusion in the adopting country's legal system.[42] Instead of advancing or modernizing the law of the borrowing country and harmonizing law between countries, the transplantation often has the opposite effect. This analysis will use Italy as a case study to illustrate the ill effects of such borrowings.

If superficial transplantations result in negative effects as discussed in this article, then it is important to ask—what are the reasons for the judicial or legislative adoptions of English terms? The transplant's intended effect may be as simple as enhancing the reputation of the law of the host country by attaching it to a legal system held in high regard or to make the host country's law look more international in scope.[43] Implicit in the idea of superficial transplantation or the superficial borrowing of words and legal concepts is that the transplant lacks substance. There seems to be no basis for such transplantations—especially where the words are translatable into the language of the host country and the domestic legal system is not prepared or structured to receive the new terminology—with the consequence of serious misunderstanding by the receiving legal system through the creation of a chaotic jurisprudence.[44]

The best explanation that has been offered is that in certain areas the common law is seen as more advanced.[45] Superficial transplantation is used to project the semblance of modernization of law. The likely effects of such superficial transplantation or word-borrowing are confusion within the community of legal practitioners and chaos within the law as judges flounder for guidance as to the meaning and importance of the transplanted terms. It must always be remembered that legal transplantation is also a linguistic transplantation. The question is: should the transplantation of a legal

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[41] Nigel J. Jamieson, *Legal Transplants: Word-Building and Word-Borrowing in Slavic and South Pacific Legal Discourse*, 42 VICTORIA U. WELLINGTON L. REV. 417, 431 (2011).

[42] *Id.* at 432.

[43] *See* Gilles Cuniberti, *Enhancing Judicial Reputation through Legal Transplants—Estoppel Travels to France*, 60 AM. J. COMP. L. 383, 384 (2012).

[44] *See* Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 4 (1994) (providing a critical review of legal transplantation).

[45] Giuditta Cordero-Moss, *Lectures of Comparative Law of Contracts*, UNI. OF OSLO INST. OF PRIVATE L. No. 166 (2004), http://folk.uio.no/giudittm/PCL_Vol15_3%5B1%5D.pdf [https://perma.cc/LCN5-RCM2], at 36-37.

term or concept be made in the language of the home or native country or that of the borrowing country? The simple answer is this: if there are no comparable words or concepts found in the host country then the language terms of the native country are the only available usage. However, if comparable words or terms are found in the host country then the language of that country should be used to avoid unnecessary confusion, unless the intended transplant effect is tethered to the foreign language terminology.

Another context that determines the usefulness of borrowing words or terms in their foreign language form is the linguistic context of the borrowing country. This is an acknowledgement that the transplanted term cannot stand by itself but will be colored and its function will be determined by the linguistic context in which it is transplanted.

> In practice, the question of viability for any legal transplant or implant is frequently decided by whether there exists a sufficiently receptive linguistic context – one that will confirm the existence of a correspondingly receptive culture – in which the legal implant or transplant can be nurtured and developed; or else that somewhere there exists, or can be made to exist, a sufficiently viable and mutable linguistic rootstock that itself can be transplanted, and to which the already developing legal transplant has been grafted.[46]

This is a tall order and relies on the willingness of lawyers and judges to undertake the grafting work to make the transplanted term viable in a linguistic setting different from the setting that it is was derived from. It is more likely that, unless the legislator does such work, the foreign implant will be ignored or demeaned.

In the spirit of the transplantation literature this article will focus on a most peculiar occurrence in Italian law—the transplantation or use of common law terminology and concepts, often in their English form, to Italian statutory law. The Italian courts are thus confronted with applying English terminology and concepts that are foreign to them. The result is what one would expect: misapplication and disorientation by practitioners and interpretations not consistent with the purpose or function of the English term being borrowed.[47] This article will explore if there are any feasible rationales behind the effort to use English words and legal terminology in the Italian legal system; the experience of the Italian courts in applying this new-fangled nomenclature; and how the phenomenon of transplanting English terms may impact Italian legal education.

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[46] Jamieson, *supra* note 41, at 429.

[47] *See, e.g.*, Cass. 17 December 2009, n. 26516, in Foro it. 2010, 3, I, 869.

As noted above, there are numerous objectives in the reception, transplantation, or borrowing of law including harmonization of law (international sales law and EU private law directives),[48] modernization of law or legal reform (American Uniform Commercial Code and its German influences),[49] promotion of economic or social change (People's Republic of China),[50] the need for convergence in specific areas of law (financial and corporate law),[51] and addressing specific issues and problems within a national legal system (lack of law).[52] The international sales law, CISG, is a direct form of harmonization. Convergence can be seen as an indirect, ad hoc type of harmonization. An example of the later is the convergence in corporate law among countries due to the influence of American law.[53] One commentator notes that the export of the American model of the corporation has resulted in the formal similarity between U.S. and German law and the functional similarity between U.S. and French

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[48] The Preamble to the CISG states: "the adoption of uniform rules which govern agency in all the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade." United Nations Convention on Contracts for the International Sale of Goods, *supra* note 9. *See, e.g.*, Directive 2011/83, Consumer Rights Directive, 2011 O.J. (L 304) (EC).

[49] UCC § 1-103(a) states its purpose to include: "to simplify, clarify, and modernize the law governing commercial transactions." U.C.C. § 1-103(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017). The drafting of the UCC was highly influenced by German law through the work of Karl Llewellyn the Reporter of the UCC and Drafter of Article 1 (General Provisions) and Article 2 (Sale of Goods). *See* Julie E. Grisé, Martin Gelter & Robert Whitman, *Rudolf von Jhering's Influence on Karl Llewellyn*, 48 TULSA L. REV. 93, 116 (2012); James Whitman, *Commercial Law and the American* Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 159 (1987).

[50] *See* Lei Chen & Larry A. DiMatteo, *History of Chinese Contract Law*, *in* CHINESE CONTRACT LAW: CIVIL AND COMMON LAW PERSPECTIVES 3, 5 (Larry A. DiMatteo & Lei Chen eds., 2018).

[51] The creation of an interlocking world economy and financial institutions has led to the development of internationally recognized hard and soft law accounting and financial standards. A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 22-23 (2003).

[52] The most dramatic example was the fall of the Soviet Union and the need of its former republics to replace their communist planned systems with law suitable to market economies. *See* Jan Svejnar, *Transition Economies: Performance and Challenges,* 16 J. OF ECON. PERSP. 3, 4-5 (2002).

[53] *See* Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 332 (2001) (distinguishing between formal and functional convergence).

law.[54]

Part II will examine the benefits and problems related to the transplantation of law. It will differentiate between large-scale transplantation, borrowings, and influences. Part III will examine the nature of legal concepts and their relationship to a given legal system. It will discuss the issue of legal transplantations and their reception into foreign legal systems. It argues that the transfer of concepts and rules, without the transfer of substantive meaning, dooms the transplantation to failure. Failure can be defined as the creation of chaos in the case law or in the courts' avoidance of the transplanted terms or legal concepts.[55] This is the likely outcome of superficial transplantations because they are empty of substance and irreconcilable to a foreign context.[56]

An alternative standard or measure of success is where the meaning of the transplanted law is not fully transplanted, but the transfer is nonetheless successful because the law achieves an adequate level of functionality. The contract law of China will be used as an example of the later phenomenon. Part IV introduces the notion of "superficial transplantation" and will study recent developments in Italian law to determine its existence and meaning. It will also discuss

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[54] Martin Gelter & Geneviève Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law,* BERKELEY BUS. L. J. 92, 97 (2018). ("Overall, we can thus identify an export of the US model, possibly signaling some convergence in corporate law."). Gelter and Helleringer also note different methods of transplantation:

> [W]e have observed two different transplant routes; one is more theoretical and relies primarily on the dialog of scholars (German model). In this case, the medium for the transplant was scholarship, and the precise impact is determined by whether scholars are receptive to foreign influence or not. As we have seen, the receptivity of German scholars has led to an overt parallelism to US doctrinal structures. The other mode of transplantation is more practical and relies primarily on the dialog of judges, as seen in the French model. Institutionalized exchanges such as those of supreme courts judges have facilitated the process.

Id. at 152.

[55] An example is the introduction of "unjust" requirement, taken from English law, in South Africa's law of restitution. Further back in history, unjust enrichment was found in Roman law, which reached South Africa through the Dutch and was then carried forward during English occupation). However, "the role of unjust factors is considerably downplayed, being characterised as at times 'weak' unjust factors whose role bears little or no comparison with that played by their English counterparts, and might on occasion be no more than the indirect indication of an underlying lack of legal basis." Eric Descheemaeker, *New Directions in Unjustified Enrichment: Learning from South Africa*, 18 EDINBURGH L. REV. 414, 415 (2014).

[56] *See generally* Kahn-Freund, *supra* note 32.

the "why" question: what is the reason for the borrowing of standalone English terms in non-English legislation?[57] Part V provides some concluding remarks relating to the dangers of superficial transplantation.

II. TRANSPLANTATION

A. Comparative Law Approach

Borrowings, or the transplantation of laws and legal concepts from one country or legal system to another, are almost as old as law itself.[58] There is an old Chinese saying, "stones from other hills may serve to polish the jade from this one."[59] With globalization and the accessibility of legal databases through the Internet, such cross-fertilization of laws will continue, at an accelerated pace. This can be seen as both a good and bad development. Comparative law has long been viewed as a methodology that can assist law reform.[60] By comparing national laws the scholar, judge, and student realize that the rules of their own legal system are not necessarily the best or most efficient ones. Alternatively, lawyers belonging to a certain national experience will be prompted to ask themselves why the results achieved in their countries are not the same as those obtained elsewhere with similar legislation. Thus, in reforming or revising national laws drafters often look at other legal instruments, domestic and international, and at times use hard and soft laws,[61] to update

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[57] The "why" question—why are legislatures adopting freestanding English terms? —ultimately has to be answered by the courts who are required to apply the terms:

> When a text is interpreted by the courts in the context of a dispute, it is done according to judicial methods. This may lead to interpretations which were not intended or expected by the legislator. Background information on past judicial rulings and the approaches of the courts should be sought from a legal adviser if it could influence the drafting. In particular, ambiguous wording in a text creates such a risk.

Colin Robertson, *Legislative Drafting in English for Non-Native Speakers: Some Do's and Don'ts (With Reference to EU Legislation)*, 7 ESP ACROSS CULTURES 147, 160 (2010).

[58] *See* Sir Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. SOC'Y COMP. LEGIS. 74, 74 (1903).

[59] Han Shiyuan, Culpa in Contrahendo *in Chinese Contract Law*, 6 TSINGHUA CHINA L. REV. 157, 170 (2014).

[60] *See* ZWEIGERT & KÖTZ, *supra* note 2, at 1-48.

[61] Soft law has been given various meanings, but it primarily refers to non-binding "laws" whose influence is based on its normative power. Its normative power is based upon it wide recognition and the source of the soft law. *See generally* COMMITMENT AND

existing codes or statutes.[62] Otto Kahn-Freund noted three purposes for the use of foreign legal sources in reforming law:

> [There are] three purposes pursued by those who use foreign patterns of law in the process of law making. Foreign legal systems may be considered first, with the object of preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce.[63]

Thus, it may be argued that the use of extra-national sources of law is often beneficial in bringing innovation to domestic laws that have become obsolete.

The major disadvantage of using a comparative law approach is that outright transplantations, without proper preparation, often do not work.[64] Legal principles, concepts, and rules are a product of a given culture and legal tradition. When severed from their legal and cultural contexts, the transplanted rules may lose their usefulness or coherency. Professor Peller has asserted that legal language is anchored in national legal and cultural traditions.[65] This is why

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COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2003) (evaluating nonbinding norms and discussing compliance with soft law through an assessment of a wide variety of nonbinding instruments on key subjects).

[62] The CISG has been a model instrument or source in the reforming of national laws. Also, arbitrators often use multiple sources of law, such as international soft or customary international law. *Id.*

[63] Kahn-Freund, *supra* note 32, at 2.

[64] Kahn-Freund asserts that:

> [A]ny attempt to use a pattern of law outside the environment of its origin continues to entail risk of rejection . . . . All I have wanted to suggest is that its use requires knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit, which ignores this context of the law.

Id. at 27. Regarding transatlantic transplants, Kahn-Freund was very pessimistic despite the similarity of the common law in the United States and United Kingdom: "It would indeed be an almost unbelievable 'hazard,' an unexpected coincidence if substantive rules wrenched out of their American constitutional, political and industrial context could successfully be made to fit the needs of a country with institutions and traditions so different from those of the United States." *Id.* at 26-27. Note that his skepticism focuses on areas of public and legislative law and not on private laws, such as contracts, torts, and property.

[65] *See* Gary Peller, *The Metaphysics of American Law,* 73 CAL. L. REV. 1151, 1182

translation of legal terms is difficult; they are derived by particular legal sources. In the words of Peller, "legal discourse can never escape its own textuality."[66]

A second problem dealing with the application of foreign legal concepts is that the comprehensiveness and efficiency of a system of complex rules and principles, such as are found in contract law, is highly dependent on the expertise of the judges and lawyers interpreting and applying the law.[67] Recent history provides two examples of the problem of premature transplantation: the fall of the Soviet Union[68] and the introduction of a market economy in the People's Republic of China.[69] These are cases of the almost *in toto* transplantation of large bodies of Western European law before transplanting countries' respective judiciary and legal systems were ready or able to understand and apply the law being transplanted.

Unless educated in the tradition and law being transplanted, the law being transplanted will be words without substance. The success of a transplantation of law is dependent on the development of legal education systems and judicial training that can build an expertise in the law being transplanted. In China and the former satellite countries of the Soviet Union, legal education and skills training lagged far behind the introduction of the new Western-style commercial laws.[70]

Another problem with massive transplantations of laws, such as commercial and property law is that they are often done in a piecemeal

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(1985).

[66] *Id.*

[67] Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, *in* G-24 DISCUSSION PAPER SERIES 4 (2000), http://unctad.org/en/docs/pogdsmdpbg24d4.en.pdf [https://perma.cc/KE9W-RSE7].

[68] The era of the reformation of Russian law began before the fall of the Soviet Union during the period of *perestroika* beginning in 1985. Scholars have noted that in the early 1990s the "rapidity of the change during this period meant that the civil law in Russia . . . was characterised by a high degree of uncertainty." MARIA YEFREMOVA, SVETLANA YAKOVLEVA & JANE HENDERSON, CONTRACT LAW IN RUSSIA 11 (2014).

[69] *See* Wang Jingen & Larry A. DiMatteo, *Chinese Reception and Transplantation of Western Contract Law*, 34 BERKELEY J. INT'L L. 44, 51 (2016) (identifying the problems of a piecemeal approach to adopting Western-style laws).

[70] Larry A. DiMatteo, *Rule of Law in China: The Interaction Between Freedom of Contract and Cultural Norms*, 45 CORNELL INT'L L. REV. (forthcoming 2018) (describing the lack of expertise and independence that biased Chinese courts applying Chinese contract law). In 2014, Chinese created specialized patent law courts to provide a venue with high-level judicial expertise. Ziv Rotenberg, *China's New Intellectual Property Courts,* LEXOLOGY (Mar. 5, 2015), https://www.lexology.com/library/detail.aspx?g=9c524ea5-4ab3-4eec-87f7-08c5307fc332 [https://perma.cc/N5N7-7GXX].

fashion and are not in sync or coordinated with one another.[71] Cordero-Moss describes the ad hoc rush to transplant or enact Western-style commercial laws by Russia following the fall of the Soviet Union as "tormented."[72] This was largely due to the piecemeal nature of the transplants that were not structured under the guidance of a pre-conceived holistic plan for enacting laws that would fit together in a coherent manner.[73] However, many problems also arise when a grand civil code is transplanted *en masse*. The translation and drafting of a civil code from an existing foreign code results in inter-code inconsistences and contradictions.[74] This is also the case where the transplant is minimal (or fragmented in nature), such as the adoption of individual terms or concepts, which is referred to below as superficial transplantation.

B. Taxonomy of Legal Transplantation

A number of taxonomies or ontologies[75] in the comparative law literature have been offered to describe variants of the concepts of legal transplant and reception.[76] Another one is provided here. The following categorization moves from the fullest or most penetrating of legal transplantations to the least broad or penetrating of transplantations. An overarching taxonomy is the characterization of transfer of law from one jurisdiction to another as transplantations, borrowings, and influences.

Transplantation often refers to the transplant of a broad set of rules or areas of law. This can mean the adoption of another country's grand civil code or it can mean a transfer of an area of law, such as a commercial code or a system of rules related to security or secured transactions. Examples include the Turkish adoption of the Swiss Civil

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[71] *See* Cordero-Moss, *supra* note 45, at 23.

[72] *Id.* at 22.

[73] *See id.*

[74] *See, e.g.*, Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 850-51 (2003).

[75] Another term closely associated with taxonomy.

[76] *See* Miller, *supra* note 74, at 839; Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996). Legal transplant and reception are the same phenomenon, namely the spread and dissemination of legal models in the name of legal reform in the borrowing country. *Id.*

Code[77] and the Japanese adoption of the German Civil Code.[78]

Borrowings include the transfer of a concept, such as the duty of good faith, or of rules pertaining to a particular legal concept. An example is the Chinese Contract Law, which includes both the concept of anticipatory repudiation[79] from the common law and its component in German law, known as the defense of security.[80] Each is found in different articles and sections of the CCL, which has led to much confusion surrounding their roles and which one is appropriate in a given situation or scenario.[81]

Influences involve indirect transfers of foreign law or concepts. An example would be the influence of German law on the CCL.[82] This influence long preceded the adoption of the CCL in 1999 because the earlier reception of the German Civil Code in Japan highly influenced legal thinking in China.[83] This was largely because Chinese students often traveled to Japan to undertake their legal studies.[84]

The tripartite taxonomy of transplantation, borrowing, and influence, although helpful, can benefit by greater specificity. The chart provided below refines the above taxonomy under the umbrella term of transplantation.

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[77] The Turkish Civil Code borrowed directly from the Swiss Civil Code, as well as from the German Commercial Code. Its administrative law borrowed heavily from French law and its Penal law borrowed from Italian Penal Code. *See* Watson, *supra* note 8, at 6.

[78] One scholar noted the heavy influence of German and American law on the Japanese legal system: "[The] Japanese commercial legal system is a unique hybrid of civil law (Germany) and common law (United States) systems grafted onto a legal system based on the customs and values that have existed in Japan for hundreds of years." Elliot J. Hahn, *An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 522 (1983).

[79] Contract Law of the People's Republic of China, *supra* note 14, at arts. 68-9, 69.

[80] The law allows parties to terminate a contract if "before the time of performance, the other party expressly stated or indicated by its conduct that it will not perform its main obligations." *Id.* at arts. 94, 108.

[81] *See* Chunyan Ding, *Perspectives on Chinese Contract Law: Performance and Breach, in* CHINESE CONTRACT LAW, *supra* note 50, at 302; *see generally* James Devenney & Geraint Howells, *Common Law Perspectives on Performance and Breach, in* CHINESE CONTRACT LAW, *supra* note 50.

[82] Ding, *supra* note 81, at 301-02.

[83] *Id.* at 305; Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 718 (1994).

[84] Keller, *supra* note 83, at 718 (discussing that this influence was demonstrated by the enactment of the Japanese "'Six Codes' in the 1930s, [which] appeared to herald China's complete reception of the Romano-German civil law tradition.").

TABLE 1. TRANSPLANTATION TAXONOMY

Type	Definition	Examples
Transplantation of Legal Tradition	The transfer of an entire body of law, along with techniques of legal reasoning, and the role of law in society.	Roman Law to French & German Law; English common law to U.S. & Commonwealth countries
Transplantation of a National Law	A country adopts the substantive law of another country.	Turkey's adoption of Swiss Civil Code; Japan's adoption of German BGB
Transplantation of an Area of Law	A country or jurisdiction elects to create or retain a body of law in a given area.	Louisiana (French sales law)
Particularized Transplantation (borrowing)	Transfer or adoption of specific legal concepts or rules	CCL's adoption of German 'defense of security'
Double Transplantation	A country transplants a specific area of law and then uses that transplantation in the making of a broader law	China's adoption of the CISG; use of CISG as source document for CCL
Indirect Transplantation (influence)	A country's law recognized as being advanced or modern influences the evolution of law in other countries	German law influence on CCL; American influence on foreign corporate law
Superficial Transplantation[85]	Adoption of foreign terminology	Italy's use of English language terms in its national law

The reception of Roman law in the creation of the civil law tradition is an example of the most comprehensive and penetrating of transplantations.[86] However, in this case the reception was neither

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[85] An alternative phrase to superficial transplant to be considered is linguistic transplantation. One scholar notes that: "There are two sorts of legal transplants, the superficially linguistic and the deeply substantive. The superficially linguistic legal transplant is overtly concerned with introducing or re-defining words . . . ." Jamieson, *supra* note 41, at 458.

[86] *See* Charles Sumner Lobingier, *The Reception of the Roman Law in Germany*, 14 MICH. L. REV. 562, 562 (1916) (beginning in the 14th century knowledge of Roman law was considered necessary to the practice of law in Germany); Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L

complete nor uniform. The importance of customary law persisted in some areas of law, especially in Northern France and Germany.[87] Also, the interpretation and adaptation of Roman law was not uniform, as seen in the development of the Franco-Roman and Germanic variants.[88] Another example is the reception of the common law by the American colonies, with exceptions, and other British colonies. In the case of the American colonies and Canada there was no indigenous legal system that was adaptable to European educated jurists.[89] Therefore, the transplantation of the English legal tradition was not only necessary, but generally comprehensive. There are the noted exceptions of Quebec[90] and Louisiana,[91] which were highly influenced by French law.

As noted above, in 1927, Turkey adopted nearly *verbatim* the Swiss Civil Code and the Swiss Code of Obligations.[92] But, this does not mean that the transplanted code's meaning will align with the meaning of the code adopted by the country of borrowing and the country of transplantation, at least, not in the long-term. This is because the law is interpreted by two independent court systems going forward. Also, as new world developments provide novel fact patterns and cases of first instance the two court systems will likely come out with different solutions and outcomes. Eugen Bucher noted that law is larger than a

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& COMP. L. REV. 257, 257 (1981) (describing the reception of Roman law in the civil and common law systems).

[87] Customary law is mostly based upon the community standards and norms. Francesco Parisi, *Spontaneous Emergence of Law: Customary Law, in* ENCYCLOPEDIA LAW AND ECONOMICS 603, 610 (Boudeqijn Bouckaert & Gerrit De Geest eds., 2000). Francesco Parisi states that there are two elements in the creation of customary law: "(1) the practice should emerge out of the spontaneous and uncoerced behaviour of various members of a group, and (2) the parties involved must subjectively believe in the obligatory or necessary nature of the emerging practice (*opinio juris*)." *Id.* at 606.

[88] *Id.* at 605.

[89] This refers to adaptable native law. In fact, Native Americans had a well-developed oral legal system. *See* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 313 (1941).

[90] *See generally* JOHN BRIERLEY & RODERICK A. MACDONALD, QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW (1993).

[91] *See generally* LA. CIVIL CODE ANN. (2002); Agustin Parise, *Private Law in Louisiana: An Account Civil Codes, Heritage, and Law Reform, in* THE SCOPE AND STRUCTURE OF CIVIL CODES (Julio Cesar Rivera ed. 2013) (discussing the enactment of civil codes in the Louisiana legal system); Vernon Valentine Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067, 1067 (2003).

[92] *See* Umut Özsu, *'Receiving' the Swiss Civil Code: Transplanting Authority in Early Republican Turkey*, INT'L J. OF L. CONTEXT 63, 63 (2010).

civil code. First, they can never be comprehensive: codes fail to provide every solution to daily life, present or future. Second, codes are temporal in nature therefore as it is applied in the future, the courts in various countries will interpret and apply the codes differently.[93] In short, codes do not equal law.[94]

Superficial transplantation can be seen in both statutory law and in actual practice through judicial decisions. An example is seen in the French courts' recognition of the common law concept of estoppel as a rule of arbitration law. Professor Cuniberti argues that:

> Beginning in 2005, the French Supreme Court (Cour de cassation) has repeatedly ruled that the 'rule of estoppel' is part of the French law of arbitration, and that it prevents parties from contradicting themselves when challenging arbitral awards before French courts. [The question becomes] . . . why the Court found it useful to openly borrow a common law doctrine although the application of traditional French rules has long enabled the Court to sanction the very same strategic behavior. I argue that, while the economic attractiveness of France may have played a role, this legal transplant is best explained by the Court's desire to enhance its reputation, both as an institution and with regard to individual members.[95]

Cuniberti questions why the French courts feel the need to adopt the concept of estoppel when different provisions of French law serve the same function.[96] He offers the answer that since English is prominent in international commercial law the adoption of English concepts and terms helps demonstrate that French courts possess expertise in international law.[97] Cuniberti further asserts that the use of such terms in the legal and academic communities produces a "cascading effect" that influences the courts.[98]

The use of English terms has become recognized in international

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[93] *See* Eugen Bucher, *The Position of the Civil Law of Turkey in the Western Civilisation, Address Before the Ankara University International Conference: Atatürk and Modern Turkey*, (Oct. 22-23, 1998). Republished with minor amendments in ANNALES DE LA FACULTE DE DROIT D'ISTANBUL, XXXII/49, 2000, S. 7-23 - Türkisch-Schweizerische Juristentage Lausanne 1999, www.eugenbucher.ch/pdf_files/86/pdf [https://perma.cc/YHW6-UY2V] (last visited Oct. 18, 2018).

[94] *Id.*

[95] Cuniberti, *supra* note 43, at 383.

[96] *Id.* at 386.

[97] *Id.* at 400.

[98] *Id.* (citing Cass R. Sunstein, *On Academic Fads and Fashions*, 99 MICH. L. REV. 1251 (2001)).

legal practice.[99] The key being not that the terms are in English but that they have become internationally recognized. An example is the use of "factoring" (trade finance) in Italian law. Factoring in Italian legal English corresponds to what English and U.S. lawyers would call invoice finance or invoice discounting.[100] While Italian law regulating such contracts speaks of "cessione dei crediti di impresa" ("assignment of commercial credits"), Italian legal case law has always labelled the practice as "factoring" in conformity with the prevailing international commercial law practice, as represented by the UNIDROIT's Ottawa Convention on International Factoring of 1988.[101]

Using an English term as a sign of judicial expertise alone is not a reasonable rationale for superficial transplantation. If it is a substantive transplantation then there is the argument that, if successful, the dual benefits of modernization and convergence (harmonization) may result. There are no such consequential benefits achievable in superficial or terminological transplant, but again, the real consequence is likely to be jurisprudential chaos. Such transplantation or word borrowing is likely to fail because of the a-contextual nature of the transplant. In short, the transplanted terms are meaningless in "situations in which contexts, at the receiving end of the legal transplants, are fundamentally at odds with the rules-to-be-transplanted."[102] The problem of superficial transplantation in statutory law will be discussed later, with examples taken from Italian law.

1. Inter-Family and Cross-Family Transplants

Transplants or borrowings from a given legal family or tradition would seem most likely to be successful.[103] In the civil law, borrowings

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[99] *See* Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611, 618 (1997).

[100] *See generally* LEORA KLAPPER, THE ROLE OF FACTORING FOR FINANCING SMALL AND MEDIUM ENTERPRISES (World Bank 2005), https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3593 [https://perma.cc/CRN2-FRVJ].

[101] *See* Cass, 7 July 2017, n. 16850, available at dejure; Cass., 18 October 1994, n. 8497, in Giust. Civ. Mass., 1994, 1241).

[102] Leone Niglia, *Of Harmonization and Fragmentation: The Problem of Legal Transplants in the Europeanization of Private Law*, 17 MAASTRICHT J. EUR. & COMP. L. 116, 116 (2010).

[103] One scholar provides a possible reason for inter-family transplantation:

> One possibility why substantive diffusion may follow legal family lines is that periphery lawyers trained in some core country, familiar with and perhaps

within its two branches—Franco-Roman and Germanic—are common given the structural similarities among the national laws in each of the branches.[104] The same inter-family borrowing is evident among common law countries.[105] This borrowing is understandable because despite a common legal heritage, individual nation states evolve differently and at different paces.[106] This allows for differentiation within the same legal family and the products of differentiation provide the gist for legal reform in countries within the legal family.

Transplants from one legal tradition to another, such as between the common and civil laws, can be better characterized as borrowings. By the various natures of different legal traditions, the transfer of law is mostly done on the micro level where particular rules or concepts not found in one tradition are borrowed from another tradition.[107] The civil law's borrowing of the common law trust is an example.[108] The success of the transfer has varied among civil law systems. Giuditta Cordero-Moss asserts that the common law trust has been successfully transplanted into civil law countries but was not successfully transplanted into Russian Civil Law Decree 2996.[109] She notes that the transplantation was unsuccessful because Russian judges failed to understand the trust's functions (sole purpose of protecting the interests of the beneficiary), legal effect (heightened fiduciary duties), and the remedies provided in common law.[110] Instead, the Russian legal system viewed the trust just as any other contractual relationship.[111] Cordero-Moss concludes that the transplantation of the terminology of the common law trust did not

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> admiring that core country's law, and operating in a legal system that already employs many constructs and templates from that core country, will find it easier to seek out and transplant new rules from that core country rather than from another of which they may not even know the language.

Holger Spamann, *Contemporary Legal Transplant: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1860-61 (2009).

[104] *Id.* at 1829-30. "[E]vidence of legal families' role for (at least formal) diffusion is an important addition to comparative law's picture of the legal families." Thus, whether a transplant is intra-family or inter-family remains relevant "at least for superficial processes of legal change and for the 'external relations' of the world's legal systems." *Id.* at 1853, 1877.

[105] *Id.* at 1830-31.

[106] *Id.* at 1869-70.

[107] *See* Cordero-Moss, *supra* at note 45, at 23.

[108] *Id.* at 24.

[109] *See* Cordero-Moss, *supra* note 45 at 31-34 (citing Decree No. 2996 on Fiduciary Ownership (Trust) (Dec. 24, 1993)).

[110] *Id.*

[111] *Id.* at 33, n.43.

have the intended legal effects.[112]

It should be noted that transplants appear at the judicial level as well as the legislative level. The Italian Supreme Court (Court of Cassation) adjudicated a case in which tobacco companies were accused of misleading advertising of 'light' cigarettes.[113] The court had to grapple with the terms "hazardous activity" and "strict liability."[114] The court noted that the rationale for strict liability was linked in common law jurisdictions to the defendant's '*deep pocket*' ('tasca ricca'), and in the French legal tradition to the '*richesse oblige*' principle.[115] The court then noted the counter-argument that the smoker was in a position to perform a cost-risk analysis before deciding to smoke cigarettes, which would legally prevent a finding of strict liability.[116] The idea of 'deep pockets' or the insurance function served by strict liability does not have an equivalent expression of common usage in Italian.[117] However, the expression 'cost-benefit analysis' certainly has one ('analisi costi-benefici'). There is also a counterpart in Italian for strict liability, 'responsabilità oggettiva.' In the end, the court's recognition of the 'deep pocket' approach led it to decide that strict liability, found in Article 2050 of the Italian Civil Code, applied and rejected the cost-benefit argument.[118] This case illustrates how an Italian court needed to grapple with English terminology, with and without Italian language counterparts. It chose to adopt the English-French strict liability approach based upon the insurance rationale of deep pockets rather than the cost-benefit approach.

In cases where harm is the result of more than one causal event—one natural and the other human (tortious) – Italian law allocated full liability to the human cause of the harm. In 2009, the Court of

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[112] *Id.* at 34.

[113] Cass. 17 December 2009, n. 26516, in Foro it. 2010, 3, I, 869.

[114] *Id.* at 874.

[115] *Id.* at 873.

[116] "La *ratio* di tale accollo del costo del danno [. . .] fu individuato nella *deep pocket* (tasca ricca) negli ordinamenti del *common law* e nella *richesse oblige*, nella tradizione francese, mentre nell'affinamento dottrinale successivo si è ritenuto che la *ratio* vada individuata nel principio dell'esposizione al pericolo o all'assunzione del rischio, ovvero nell'imputare il costo del danno al soggetto che aveva la possibilità della *cost-benefit analysis*, per cui doveva sopportarne la responsabilità, per essersi trovato, prima del suo verificarsi, nella situazione più adeguata per evitarlo nel modo più conveniente." *Id.*

[117] *Id.*

[118] "Non può condividersi l'assunto di parte della dottrina, pur autorevole, secondo cui la fattispecie dei danni da fumo non potrebbe inquadrarsi nell'ambito dell'art. 2050 c.c., e quindi della responsabilità oggettiva, in quanto si può usare la strict liability nei soli casi di prevenzione unilaterale degli incidenti." *Id.* at 874.

Cassation reversed that approach in favor of an apportionment of liability between the human and natural causes on an equitable basis. The Court used the English expression of 'apportionment of liability' rather than the equivalent Italian expressions of 'concorso di causa naturale e umana' ('concurrence of natural and human cause') or 'frazionamento della responsabilità' ('division of liability'), and further equated it to a doctrine of 'equitable-proportional liability.' But the idea of 'apportionment of liability' in common law applies to any concurrence of causes, be they human-natural or human-human, and has no equitable basis.

In 2016, the Court of Cassation heard a medical malpractice case where the disability of a newborn with Down syndrome was further aggravated by mistreatment during childbirth.[119] The Court again reversed course in favor of the traditional approach of full liability to the tortfeasor.[120] In the relevant passage, the Court said:

> It should be first of all observed that joint and several liability implies that a number of different tortfeasors contributed to produce the same injurious event or a number of different efficient causes contributed to produce a unitary harm. [. . .] If one thinks that this is what happened in the case before us (and therefore that, in this case, we do not have a number of different tortfeasors/causes producing different harms) [. . .], it should be underlined that the precedent of Cass. N. 975/2009, applying the scholarly doctrine of the 'equitable-proportional liability' ("*apportionment of liability*") [. . .] has since then never been followed by this Court.[121]

The Court went on to underline that its post-2009 case law "reaffirming the validity of a principle of pure causation ("all or nothing")

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[119] Carmine Lattarulo, *Feto down: inesistente il diritto a non nascere*, ALTALEX (Jan. 1, 2016), http://www.altalex.com/documents/news/2016/01/12/feto-down-inesistente-diritto-a-non-nascere [perma.cc/UCP5-YEXH].

[120] *Id.*

[121] "Va anzitutto osservato che la responsabilità solidale presuppone una pluralità di responsabili nella determinazione del medesimo evento lesivo ovvero di più cause efficienti nella determinazione di un unico determinato danno [. . .] Ove si pervenga alla conclusione che nella specie risulti integrata siffatta ipotesi, e non già quella diversa costituita da una pluralità di responsabili/cause produttivi/e di distinti effetti dannosi [. . .], va al riguardo sottolineato come il precedente costituito da Cass. n. 975 del 2009, che ha recepito la tesi dottrinaria della c.d. causalità equitativo-proporzionale ("*apportionment of liability*") [. . .], è rimasto [. . .] da questa Corte motivatamente non confermato". Francesco Mezzanotte, *Contratto autonomo di garanzia e tutele consumeristiche, in* I NUOVI ORIENTAMENTI DELLA CASSAZIONE CIVILE 433-34 (Carlo Granelli, ed., 2017).

[. . .] has denied the possibility of comparing a human tortious cause with a natural non-tortious cause, insofar as such a comparison can be done only between human tortious behaviors."[122] The court made a curious equivalence between what it called the "principle of pure causation" (that is to say, the relevance of tortious causes only), and the idea of the 'all or nothing' liability rule.[123] The reference is curious because there were plenty of equivalent Italian expressions ("tutto o niente," "responsabilità piena o parziale"). The lesson to be learned is that the Court's imposition of the common law concept of *apportionment of liability* without explanation caused the Court to deviate from its long-held rule of full liability to the tortfeasor. The Court subsequently ignored its own ruling before expressly reversing the decision in its 2016 case.[124] In doing so, the Court injected the English term of the "principle of pure causation," repeating its mistake of interjecting English phraseology instead of suitable Italian language expressions.

III. NATURE OF LEGAL CONCEPTS

This section examines the nature of legal concepts including the ability to separate a concept from the context of its legal tradition and whether the transplant of a concept severed from its legal context results in an empty vessel that is meaningless or without current meaning. In order to address these issues, the introduction of the principle of good faith into Chinese law will be discussed as an example.

A. Separating Concepts from Substance and Tradition

The transplantation of national laws is the literal adoption or translation in total of a civil or commercial code, or common law, from one country to another. This to a large extent is what happened with the Turkish adoption of the Swiss Civil Code and the heavy influence of German law on the Japanese Civil Code.[125] The problem with such

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[122] "Nel ribadire la validità del principio causale puro (c.d. "all or nothing") [. . .] si è in particolare negata l'ammissibilità di una comparazione tra causa umana imputabile e causa naturale non imputabile, potendo essa configurarsi solo tra comportamenti umani colpevoli." *Id.*

[123] *See generally* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 133 (2d ed. 1985) (discussing the problem of too many causes and concluding there are degrees of causal contribution); Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001).

[124] Mezzanotte, *supra* note 121, at 437-38.

[125] *See* Andrea Ortolani, *Japanese Comparative Law and Foreign Influences: a*

wholesale transplantations is the inability to transfer the legal tradition in which such law operates and is applied. A legal tradition provides a thick context developed over a long period of legal evolution. This context includes the "law in action," which includes case decisions, scholarly commentary, and the law as practiced as opposed to the "law in the books."[126] In sum, the literal interpretation of a text often diverges from the law as applied.[127] This divergence increases as the vehicle of the law moves from hard and fixed rules to standards and principles.[128] The abstractness of principles, such as good faith and the doctrine of unconscionability, and standards, such as reasonableness, requires courts and commentators to fabricate concrete factors and criteria in order to apply principles and standards in a rational manner.[129] The law in action may or may not be

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Preliminary Analysis (CDCT, Working Paper 18, 2013); Ozsu, *supra* note 93, at 63; Hahn *supra* note 78, at 522.

[126] The "law in action" approach to law as opposed to "law in the books" is associated with the "Wisconsin School," most notably by the work of Stewart Macaulay. *See* STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION (3d ed. 2011); Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 45 (2003); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 67 (1963).

[127] Laws made up mostly of formalistic rules, such as negotiable instrument and secured transactions law are easier to transplant, than laws that are more contextual in nature. This is because they fixed in meaning and not as subject to interpretive issues. *See* David Nelken, *The Meaning of Success in Transnational Legal Transfers*, 19 WINDSOR Y.B. ACCESS JUST. 349, 356 (2001).

[128] The difference (benefits and costs) of how law is structured is referred to as the rules-standards debate. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 557 (1992) (analyzing how the choice between rules and standards affects costs); Pierre Schlag, *Rules and Standards,* 33 UCLA L. REV. 379, 383-90 (1985) (weighing the rules versus standards dialectic); Kathleen M. Sullivan, *Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992) (arguing the legal directives that govern our lives function in different ways depending on how those directives are designed).

[129] Factors analysis is associated with a statistical analysis to uncover relationships (causal connection) between dependent variables and independent variables (factors) to see how the independent variables affect the dependent variables. Arthur Leff fabricated a factors analysis by bifurcating the doctrine of unconscionability into procedural and substantive unconscionability. His approach requires the courts to find evidence of both types of unconscionability. Thus, the courts look at numerous process factors (adhesion contract, consumer transaction, representation by a lawyer, social and economic class, education and sophistication of the parties). If procedural unconscionability is proven, the courts look to the one-sidedness of the contract or a contract term to see if it is too onerous and overreaching. *See generally* Arthur Allen Leff, *Unconscionability and the Code—The*

susceptible to transplantation as compared to the cutting and pasting of formal law from one country to another. At the minimum, such contextual transplantation is much more difficult to transplant than the transplantation of formal law (text).

As indicated above, the separation of legal text from the context of an embodying legal tradition, at first, robs the text of its substantive meaning. The result is an immediate disconnect between the form and substance of the law being transferred. Words may be translatable, but legal words and concepts are not so easily translatable.[130] The next section discusses legal concepts as empty vessels. A successful transplant usually requires that the adopting legal system or tradition re-embody the transplanted law with meaning. That meaning may be organic—taken and shaped by the legal tradition of the transplanting country, or borrowed from substantive sources, such as commentaries (Continental European) and treatises (Anglo-American).[131]

B. Legal Concepts as Empty Vessels

Initially legal principles, standards, and concepts are empty vessels with no determinant meaning, especially in the transplantation scenario. This is true at least until a period of time passes allowing the law system, including courts and scholars, to provide substance. Similarly situated cases or factors are recognized to provide context for the application of the principle or standard going forward. Examples of the evolution of legal principles or standards include the concepts of good faith in contract law[132] and gross negligence in tort

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Emperor's New Clause, 115 U. PA. L. REV. 485 (1967); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FL. ST. U. L. REV. 1067 (2006) (providing an empirical study showing that procedural unconscionability is the key element for a successful claim of unconscionability and arguing that unconscionability is really a consent doctrine and not a substantive justice doctrine).

[130] One scholar asserts that Alan Watson's view of legal transplants, as the transfer of a legal rule from one jurisdiction to another, was both too narrow and abstract. Instead, any theory of legal transplantation needs to "acknowledge the strong determining role of culture of the 'sending' or 'receiving' society when assessing the fate of any such rule." Prakash Shah, *Globalisation and the Challenge of Asian Legal Transplants in Europe*, SING. J. LEGAL STUD. 348, 348 (2005).

[131] *See, e.g.*, Nelken, *supra* note 127, at 352.

[132] One commentator states: "[T]he good faith doctrine in its contemporary condition is a nearly empty vessel. Courts have come to apply good faith not as a substantive implied obligation, but as a rhetorical proxy for underlying material breach analyses." Emily M. S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 54 (2005).

and corporate governance law.[133] The positive value of principles and standards is that they provide necessary discretion to judges where strict enforcement of fixed rules would lead to injustice.[134] The negative dimension of principles-standards is the fear that the judges will abuse their discretion and over apply general principles to preempt the application of specific, tailored rules resulting in greater uncertainty as to law's meaning.[135] A swinging motion between very precise rules and flexible standards characterizes almost all legal reforms.[136] Apart from the well-known case of the German civil code ("BGB") that includes the general clauses of good faith,[137] fair

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[133] Good faith is considered to be indefinable, resulting in the categorization of poor behavior as acts of bad faith. In the case of obscenity, one Supreme Court justice offered this definition: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In tort law, exculpatory clauses exempt a party for harm caused by its negligent acts, but not its grossly negligent acts. In corporate law, officers and directors are not liable for negligently made decisions, but are liable for grossly negligent ones. How does one define the difference between negligence and gross negligence? *See generally* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984). In corporate law, directors are protected by the business judgment rule from most decisions of the board of directors, even if negligently made. However, the directors are liable for grossly negligent decisions. The courts have cared out areas of gross negligence—failure to monitor the corporation and uninformed decision-making. *See Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. 1985) (providing the seminal case holding directors liable for failing to follow a deliberative process before approving a merger). In the area of monitoring, the 7th Circuit found the directors could be held liable for failing to correct flaws in the company's product assembly after being served by the FDA with numerous notices of safety violations over a six-year period. *In re Abbott Labs. Derivative S'holder Litig.*, 325 F.3d 795, 811 (7th Cir. 2003).

[134] The relative benefits of rules versus standards or principles are referred to in the scholarly literature as the rules-standards debate. *See* Sullivan, *supra* note 128, at 57, 58-59; *see generally* Kaplow, *supra* note 128; Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J. L. & PUB. POL'Y 101 (1997). In 1969 the *Société de Législation comparée* organized in Paris a meeting expressly dedicated to "Standards juridiques." Andre Tunc, *Livre du Centenaire de la Société de législation comparée, t. 2, Evolution internationale et problèmes actuels du droit comparé*, 24 REVUE INTERNATIONALE DE DROIT COMPARÉ 229, 229 (1972).

[135] *See* Sullivan, *supra* note 128, at 58; Kaplow, *supra* note 128, at 609; Korobkin, *supra* note 134, at 39.

[136] *See* Kaplow, *supra* note 128, at 611.

[137] "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration." BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 242 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0466 [https://perma.cc/U5DD-5XZP].

usages,[138] public order,[139] and so forth, the so-called "Ventilbegriff" provisions (or "elastische Bestimmung") allow some flexibility to partially counter the formulaic application of the very strict, formal provisions of the code.[140] The American Uniform Commercial Code ("UCC") also represents a mixture of fixed rules (acceptance is effect upon dispatch) with principles (good faith and fair dealing), as well as standards, such as commercial reasonableness,[141] or what Karl Llewellyn referred to as "open-textured rules."[142]

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[138] "Contracts are to be interpreted as required by good faith, *taking customary practice into consideration*." BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 157 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0466 [https://perma.cc/U5DD-5XZP] (emphasis added).

[139] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 138 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0466 [https://perma.cc/U5DD-5XZP] (Ger.) (discussing legal transactions contrary to public policy).

[140] ZWEIGERT & KÖTZ, *supra* note 2, at 143.

[141] The reasonableness standard is used about four-dozen times in Article 1 (General Provisions) and Article 2 (Sale of Goods) of the UCC. *See, e.g.*, U.C.C. §§ 1-102, 2-402 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

[142] Commentators often refer to Karl Llewellyn the Reporter of the UCC that allowed some leeway in the interpretation of rather detailed provisions in Article 2, by inserting frequent references to good faith, fair dealings, and usages, which is often referred to as the incorporation strategy. *See* Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code,* 71 U. COLO. L. REV. 541, 542-43 (2000). For UCC incorporation strategy, *see* Christopher R. Drahozal, *Usages and Implied Terms in the United States, in* TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION 103, 103 (Fabien Gélinas ed., 2016) ("[The UCC] incorporates commercial practices—course of performance, course of dealing, and usage of trade . . . The 'incorporation strategy' is the centerpiece of U.S. law on usages and implied terms and reflects the view of legal realists like Karl Llewellyn."). *Cf.* Lisa Bernstein, *The Questionable Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 746 (1999) (concluding the existence of the types of trade usages that the Code looks to has never been demonstrated empirically); Lisa Bernstein, *Custom in the Courts*, 110 NW. U. L. REV. 63, 63 (2015). For open-textured rules, *see* John J. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 385-86 (1988).

> In drafting the Code, Llewellyn continuously . . . employed policy and purpose as the central device to convey and clarify statutory meaning. As a result, purpose, policy, and reason are major determinants of what the language of the text means. . . . The patent reason principle also assigns a definite role to the courts in interpreting the open-ended principles of the Code . . . .

WILLIAM TWINING, THE KARL LLEWELLYN PAPERS 81 (1968) (arguing rules need to be open-textured enough to allow the law of society (commercial practice) to illuminate that reason were what the old abstract rules lacked). *See generally* WILLIAM TWINING,

The notion of an empty vessel can be attached to what is called "legalese,"[143] which is often antiquated words and phrases, sometimes in Latin, that serve no apparent purpose in understanding the law. Legalese often causes confusion in its home countries and should not be transplanted to other countries. This article does not discuss the use of English or common law legalese as a further obstacle to a global understanding of borrowed terms.

> But the general situation is that contracts still tend to be plagued with old-fashioned forms of legalese, particularly adverbs such as *hereby*, *therein* or *whereof*. . . . Yet the problem persists, even in this increasingly globalized world where English is becoming ever more the *lingua franca* of international business, and where one would imagine the need for clarity of expression using easily understood, everyday terms would be paramount.[144]

The confusion of legalese has led to what is known as the plain language movement.[145] This movement aims to convert legal terms from legalese to plain English in order to make legal documents more understandable to non-lawyers domestically and aid law reforms contemplating transplanting law from a foreign jurisdiction.[146]

Nonetheless, an acontextual transfer of plain language legal terms is still likely to lead to confusion. It is likely the case that plain language terms are more susceptible to translation if equivalent terms and meanings are available in language of receiving country. This leads to two viewpoints: (1) if terms are easily translatable, then the foreign

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KARL LLEWELLYN AND THE REALIST MOVEMENT (2d ed. 2012) (providing a classic account of American Legal Realism and its leading figure Karl Llewellyn). *See also*, Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 621-22 (1975); GRANT GILMORE, THE AGES OF AMERICAN LAW 140 n.38 (1977).

[143] Legalese is an English term, generally pejorative in nature, first used in 1914 for legal writing that is very difficult for laymen to read and understand. *See Online Etymological Dictionary* at https://www.etymonline.com/word/legalese [https://perma.cc/G3HJ-3CT9] (last visited Oct. 18, 2018); Richard C. Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727, 727 (1978) ("We lawyers cannot write plain English."). *See generally* Rosemary Moukad, *New York's Plain English Law*, 8 FORDHAM URB. L. J. 451 (1980).

[144] Christopher Williams, *Legal English and Plain Language: An Update*, 8 ESP ACROSS CULTURES 139, 146 (2011).

[145] *See* Carl Felsenfeld, *The Plain English Movement in the United States*, 6 CAN. BUS. L.J. 408, 408 (1982) ("One of the dominant events between 1975 and today in United States consumer law was the birth of what has become known as the 'plain English movement.'").

[146] *Id.*

language counterpart should be used over the English term to prevent confusion; or, (2) since the term is easily translatable the likelihood of misunderstanding is greatly diminished and, therefore, little harm will come of using the English term. It is the authors' contention that the first view is the stronger argument. Even plain language terms taken out of context, devoid of definitional properties and other forms of contextual guidance doom the transplant to failure. On the other hand, English legalese may be difficult to translate or be untranslatable. In such a case, the use of the English term may be the only alternative. In such cases, superficial transplantations without contextual meaning will most certainly lead to jurisprudential chaos.

A phenomenon that is not directly related to the topic here is what can be called de-transplantation. This can be defined as replacing English terms already accepted into domestic law with the domestic language. A trend in South African law provides an example. In a review of a prestigious treatise on insurance law, a scholar noted previous criticism of the highly regarded text: "The work remains too strongly attached to English sources and modern Dutch and German publications are not referred to."[147] But, as to terminology, "[t]he use of South African, as opposed to English terminology, is supported by the author for the first time."[148] The reviewer concludes that "[e]diting out all the English terminology would be a major task, but is nonetheless necessary in view of the author's acceptance that South African textbooks on South African law should use South African terminology."[149]

1. Case of China and the Duty of Good Faith

An interesting example of the role of cultural norms in shaping the meaning of a transplanted term or concept is the adoption of the principle of good faith in China's Contract Law ("CCL"), and its subsequent application by the Chinese courts. Instead of taking a conservative approach to the duty of good faith given China's lack of a theory of good faith, the Chinese courts have broadly applied the term beyond what is the norm in most Western legal systems.[150] What explains such a robust use of a foreign transplantation? The answer

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[147] D.M. Davis, *Gordon and Getz: South African Law of Insurance*, 1994 J. SO. AFRICAN L. 392, 392 (1994).

[148] *Id.*

[149] *Id.* at 393-94.

[150] *See* DiMatteo, *supra* note 70, at 28-29; Simona Novaretti, *Le clausole generali nel diritto cinese: la clausola di buona fede e la giurisprudenza, in* MODELLI GIURIDICI EUROPEI NELLA CINA CONTEMPORANEA 339, 397 (2009); Marina Timoteo, IL CONTRA IN CINA E GIAPPONE NELLO SPECCHIO DEI DIRITTI OCCIDENTALI (2004) .

is that such vague concepts as good faith are empty vessels that are filled by the norms and values of the given social-cultural order. China's legal history is one in which customary law, steeped in the Confucian value system, dominated, influenced the later development of civil law types of codes, and then subsequently infused with socialistic principles.[151]

The implied duty of good faith is recognized in most common law countries, such as Australia, Canada, and the United States, but it continues to be rejected under English law.[152] However, the common law has a more restrictive view of good faith as a tool of judicial intervention as compared to the civil law, especially as applied under the German Civil Code.[153] The CCL and the newly enacted Chinese Civil Code-General Rules adopts good faith as a core general principle.[154] Furthermore, the good faith principle is also found in the specific provisions of the CCL.[155]

However, the implied duty of good faith, as with most of the CCL rules, was a product of transplantation from Western sources.[156] But despite the good faith principle's almost universal international acceptance, the principle of good faith was still only an empty concept to the Chinese courts. Unexpectedly, Chinese courts have robustly used the good faith principle in the interpretation and enforcement of contracts.[157] Its reception and use are clearly context-dependent. Instead of viewing it as a foreign concept, the courts were able to internalize the principle quickly due to its affinity to existing cultural

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[151] *See* DiMatteo, *supra* note 70, at 41.

[152] However, one English court held that although good faith could not be implied in law as a general principle it could be an implied in fact term of a given contract. *See* Yam Seng Pte Ltd v. International Trade Corp Ltd [2013] EWHC (QB) 111, ¶ 131. Justice Leggatt has ruled that any hostility of the English courts to a general duty of good faith in contracts is misplaced, after concluding that there is support in previous English case law for the implication of obligations of good faith in commercial contracts. *Id.* at ¶¶ 145, 153.

[153] See Mariana Pargendler, *The Role of the State in Contract Law: The Common-Civil Law Divide,* 43YALE J. INT'L L. 143, 146, 151 (2018).

[154] Article 7 recognizes that each party "shall follow the principles of good faith, adhere to honesty and keep their commitments." Zhōnghuá rénmín gònghéguó mínfǎ zǒngzé (中华人民共和国民法总则) [General Provisions of the Civil Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Mar. 15, 2017, effective Oct 1, 2017), art. 7, CLI.1.291593(EN) (Lawinfochina).

[155] *See, e.g.*, *id.* at art. 65 ("If the actual situation of a legal person is inconsistent with the registered items, it shall not confront the counterparty in good faith.").

[156] DiMatteo, *supra* note 70, at 9-10.

[157] *See* Ewan McKendrick & Qaio Liu, *Good Faith in Contract Performance in the Chinese and Common Laws, in* DIMATTEO & CHEN, *supra* note 50, at 72, 79.

norms, which are based upon Confucian and socialistic values.[158] The problem with the transplantation is that it was not accompanied by a "good faith theory."[159] Without guidance or constraints, the courts have been accused of overusing the good faith concept by using the principle where specific rules clearly apply.[160]

IV. SUPERFICIAL TRANSPLANTATION

This section critiques the use of superficial transplantation or word borrowing as a troubling trend in the creation of modern European law, with an emphasis placed on the use of English terms in Italian statutory law.[161] The danger of such word use is that meaning is contextually determined by its etymology, special legal usage, characteristics of its legal system, and legal tradition. In order to limit the confusion caused by the acontextual use of words, two fields of study have produced positive results—translation and legal science. Translation science has created methods and standards for the translation of words from one language to another.[162] Translation

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[158] *Id.* at 79-80.

[159] Professor Han Shiyuan noted the importance to construct a theory, such as good faith theory, before changes in law can be fully implemented. This has been the case in the expansion of contract liability in Chinese law into the area of pre- and post-contract obligations: "In former Chinese contract law theories, it had been thought that contractual obligations meant obligations agreed by the parties (*Leistungspflicht*). But in the past 10 years, theories on contractual obligations in Chinese civil law science developed a lot. And this profits from theory receptions of foreign cases and theories." Han Shiyuan, *Liabilities in Contract Law of China: Their Mechanism and Points in Dispute*, 1 FRONTIERS L. CHINA 121, 123 (2006).

[160] *See* Gianmaria Ajani, *La Rule of Law in Cina*, *in* MONDO CINESE 18 (2006).

[161] This is a troubling trend since the transplantation of English terminology without any substantive content into a non-English language country with a different legal tradition can only lead to chaos. Professor Spamann discusses the distinction between 'formal diffusion' and 'substantive diffusion,' and argues that formal diffusion without substantive diffusion must be justified in some way: "theories that deny substantive diffusion must explain why formal diffusion occurs, even though . . . it is substantively irrelevant." Spamann, *supra* note 103 at 1852.

[162] For an example of the translation standards, *see* Int'l Standards Org. [ISO], *Terminological Entries in Standards*, at 10241 – 1:2011 (April 2011), https://www.iso.org/standard/40362.html [https://perma.cc/89EZ-6HVF]; Int'l Standards Org. [ISO], *Terminology work—Principles and methods*, at 704 (November 2009), https://www.iso.org/standard/38109.html [https://perma.cc/AWL3-R2XM]. ISO 704 states that the goal of translation is "a clarification and standardization of concepts and terminology for communication between humans and to provide a common framework of thinking and how an organization or group should implement it." *Id.* A legislature can be considered as an organization that should translation standards in performing due diligence in transfer foreign legal concepts into its

science relies heavily on the contextual use of words in their original languages, making it a multidisciplinary undertaking.[163] In cases where translation allows for the transfer of legal terms and concepts,[164] with no substantial loss of meaning, the domestic language should be used. If no such transfer is possible, like in cases where the terminology is unique to a given language, then legal science may provide guidance as to the best method for the transplantation of law. The compatibility of the transplanted terms with existing domestic law should be thoroughly researched, and when written into law the drafters need to include clear definitions, criteria for application, and contextual guidance.[165]

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domestic laws. The principles and standards of translation should be followed whether the task is the translation of foreign words or the use of foreign words within domestic laws. ISO 704 states: "The principles and methods should be observed not only for the manipulation of terminological information but also in the planning and decision-making involved in managing a stock of terminology." *Id.* One scholar notes the importance of legislative due diligence in the transplantation of the law:

> Because of the risk factor associated with every process of linguistic or legal translation as a result of which misunderstanding, confusion, conflict, or outright repudiation can arise, a comprehensive risk factor analysis becomes a prerequisite for any proposed legal transplant no less than would be scientifically required for the biological introduction of any exotic species into an indigenous environment.

Jamieson, *supra* note 41, at 458.

[163] ISO 704 states:

> Terminology work is multidisciplinary and draws support from a number of disciplines (e.g. logic, epistemology, philosophy of science, linguistics, translation studies, information science and cognitive sciences) in its study of concepts and their representations in special language and general language. It combines elements from many theoretical approaches that deal with the description, ordering and transfer of knowledge.

ISO 704, *supra* note 162.

[164] For Translation Studies in general, and Legal Translation Studies in particular, the purpose of the translated texts plays a fundamental role in deciding the most appropriate translation solutions. *See generally* DEBORAH CAO, TRANSLATING LAW 33 (2007); D. Cao, *Legal Translation: Translating Legal Language*, *in* THE ROUTLEDGE HANDBOOK OF FORENSIC LINGUISTICS 78–91 (Malcolm Coulthard & Alison Johnson eds., 2010); Susan Šarčević, *Challenges to the Legal Translator*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 187 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

[165] ISO 704 states that: "Objects, concepts, designations and definitions are fundamental to terminology work. Objects are perceived or conceived and abstracted into concepts, which in special languages, are represented by designations and/or definitions." ISO 704, *supra* note 162.

A. Foreign Terminology: Substance and Language

Justice Kirby noted the difficulty of understanding the meaning of terms when language is detached from context: "In part, access to, and use of, European legal concepts were restrained by linguistic difficulties. In part, the difficulty of comprehending foreign legal concepts existed because of lack about knowledge of their context and the centuries of legal developments that had gone before."[166] An English judge was also very clear on the dangers of quoting foreign law. Lord Diplock in *Fothergill v. Monarch Airlines*[167] noted that citing the court decisions of a foreign court, more specifically a civil law court, interpreting the same international convention is highly problematic:

> As respects to decisions of foreign courts, the persuasive value of a particular court's decision must depend on its reputation and its status, the extent to which its decisions are binding upon courts of co-ordinate and inferior jurisdiction in its own country and its coverage [in] the national law reporting system. For instance your Lordships would not be fostering uniformity of interpretation of the convention if you were to depart from the prima facie view which you had yourselves formed as to its meaning in order to avoid conflict with a decision of a French court of appeal that would not be binding on other courts in France, that might be inconsistent with an unreported decision of some other French court of appeal and would be liable to be superseded by a subsequent decision of the Court of Cassation that *would* have binding effect on lower courts in France.[168]

When one refers to foreign law one never knows whether some doctrine contradicts the official version, whether some courts have a special influence, which is the law *in action*, rather than *in the books*. The next section examines a troubling occurrence involving the Italian

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[166] Kirby, *supra* note 1, at 27 (citing Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, *in* TOM BINGHAM AND THE TRANSFORMATION OF THE LAW 773, 800 (Mads Andenas & Duncan Fairgrieve eds., 2009)); *see* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 1107 (Robert Campbell, ed., 3d ed.1869).

[167] Fothergill v. Monarch Airlines LTD [1980] AC 251 (HL) 251 (appeal taken from Eng.).

[168] *Id.* at 284 (emphasis in original). In a previous passage Lord Diplock also refers to foreign literature and a distinguished commentator pointed out the paradox of quoting foreign writers in the House of Lords where British writers are hardly ever quoted. *See* Francis A. Mann, *Uniform Statutes in English Law*, L. Q. REV. 376, 383-84 (1983).

legislature's adopting *ad hoc* English terms and phrases into laws written in Italian.

B. Case of Italian Statutory Law

The anecdotal use of English terms for no apparent reason in the laws of a foreign language host country, without substantive support, is the epitome of superficiality. Justice Kirby eloquently stated the problem of partial transplantation or superficial transplantation: "Many, especially jurists from the antipodes, are mostly cautious or even hostile . . . Amongst other problems of doctrine they often cite the perils, of unprincipled 'cherry picking' and the dangers of embracing legal approaches that are imperfectly understood by common [or civil] lawyers."[169] From a purely linguistic, non-legal, perspective, the inclusion of foreign words has always helped the evolution of languages. For example, Latin developed with massive inclusions from Greek and other ancient languages, including the Phoenician language.[170] Generally, however, imported words are confined to the wider vocabulary that people can use, but are not used in everyday life.[171] Linguists draw a distinction between the essential vocabulary ("vocabolario di base") and the "common language." The first one is composed by a few thousand words that are most frequently used and corresponds to almost 90% of what we say, the second class refers to expressions that are often recognized, but not used as frequently.[172]

Beginning in the 1990s, the increase in the usage of Anglo-American expressions ("Anglicisms") in everyday Italian speech has been striking.[173] Italians now use Anglicisms more often in their everyday communication.[174] Additionally, an expanding number of semantic fields have been captured by this trend including technical

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[169] Kirby, *supra* note 1, at 27-28.

[170] *See* Roland G. Kent, *The Conquests of the Latin Language,* 24 CLASSICAL J. 191, 194 (1928).

[171] TULLIO DE MAURO, STORIA LINGUISTICA DELL'ITALIA REPUBBLICANA: DAL 1946 AI NOSTRI GIORNI 159 (2014).

[172] In linguistic theory, "loan words" or "loanwords" are common when a word is not present in a given language, leading to the adoption of a foreign word. This is especially common in areas involving technological change, i.e., the creation of new technologies with its own organic nomenclature.

[173] DE MAURO, *supra* note 171; MANFRED GÖRLACH, A DICTIONARY OF EUROPEAN ANGLICISM: A USAGE DICTIONARY OF ANGLICISM IN SIXTEEN LANGUAGES (2001).

[174] *See* Amanda Coletta, *The Anglo Invasion of Italy,* FOREIGN POLICY, (Nov. 27, 2015, 6:17A.M.), https://foreignpolicy.com/2015/11/27/the-anglo-invasion-of-italy-english-italian-language-accademia-della-crusca/[https://perma.cc/YE46-TJFV].

areas, sports, politics, fashion and trivial matters.[175] Most interestingly, this trend can also be seen in formal or official communications that are replete with words such as education, question time, spending review, *austerity*, spread, welfare and so on.[176] More disturbing are the domestic fabrication of words that *sound* English but are actually unknown or difficult to interpret by native English speakers, such as "mister" (the trainer of a football team), "jogging" (exercising by running), escort, and so forth.[177]

In linguistic theory the adoption of foreign words without translation are referred to as loanwords.[178] In reaction to the superficial acquisition of foreign words, a number of scholars founded a group called "Incipit"[179] that offers, whenever possible, accurate translations of Anglicisms.[180] Members of this association have observed that the vocabulary applied to university administrations is replete with English expressions taken from the areas of economics and management.[181]

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[175] See: for social events: happy hour, brunch, flash mob, crowd funding, car sharing; for travel: stop over, check in, airline hub; for sport: downhill, mountain bike, crunch exercise, anti-doping legislation; for style: make up, top model, texture, fard, platform shoes; for IT tools: to scan, to download, to log on/out, default solution.

[176] For an amusing list of borrowings, *see* Tullio DeMauro, *È irresistibile l'ascesa degli anglismi?* INTERNAZIONALE (July 14, 2016, 5:45P.M.), https://www.internazionale.it/opinione/tullio-de-mauro/2016/07/14/irresistibile-l-ascesa-degli-anglismi [https://perma.cc/C96X-449F]. Linguistic theory makes a distinction between "popular" and "learned" loanwords. Popular loanwords are transmitted orally, while learned loanwords are first used in written language, often for scholarly, scientific, or literary purposes. *See* JOHN ALGEO, THE ORIGINS AND DEVELOPMENT OF THE ENGLISH LANGUAGE 248 (6th ed., 2010).

[177] CRISTIANO FURIASSI, FALSE ANGLICISMS IN ITALIAN (2010). An associated phenomenon is the melding of two languages. This is seen in the development of Spanglish, which is a combination of English and Spanish. In the U.S., Spanish-speaking immigrants make new words by pronouncing an English word in a Spanish-style by dropping or replacing certain consonants. *See generally* Jason Rothman & Amy Beth Rell, *A Linguistic Analysis of Spanglish: Relating Language to Identity*, 1 LINGUISTICS & HUM. SCI. 515 (2005).

[178] *See* ALGEO, *supra* note 176, at 248.

[179] Members of the group include: Michele Cortelazzo, Paolo D'Achille, Valeria Della Valle, Jean Luc Egger, Claudio Giovanardi, Claudio Marazzini, Alessio Petralli, Remigio Ratti, Luca Serianni, and Annamaria Testa. *See* Accademia Della Crusca, Gruppo "Incipit," http://www.accademiadellacrusca.it/it/attivita/gruppo-incipit [perma.cc/6XDR-S6H3] (last visited Oct. 18, 2018).

[180] *Id.*; *See also* ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/anglicism [http://perma.cc/WDT4-AS6Z] (last visited Oct. 22, 2018) (defining Anglicism as a "word or phrase borrowed from English into a foreign language").

[181] *See* Press Release, Incipit Group at the Accademia della Crusca, English

The core disciplines, including economics, which make up business education, are infused with Anglicisms.[182] According to T. De Mauro some of these expressions can be traced back to the science of education, or to studies of physics, such as "peer review" and "benchmarking."[183] Another example is the borrowing of the word gamification[184] in Italian health programs.[185]

The main concern of linguists is that the direct borrowing of foreign words without translation or the attachment of meaning will impoverish the Italian language.[186] This impoverishment can be prevented by the creation of neologisms[187] and the adaptation of foreign words to the structure of the Italian language, which occurred in the past when the Italian language absorbed large numbers of French words.[188] This

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Business Terms at the University (June 17, 2016).

[182] *See, e.g.*, Press Release, Incipit Group at the Accademia della Crusca, English Business Terms at the University (June 17, 2016) (student (or client) satisfaction ("monitoraggio della student satisfaction"); executive summary; distance learning; peer review; public engagement; performance (evaluation), summer school).

[183] De Mauro, *supra* note 176.

[184] "The process of adding games or gamelike elements to something (such as a task) so as to encourage participation." MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gamification [http://perma.cc/W49T-2Y87].

[185] "La salute in gioco: Esperienze e prospettive della gamification nei programmi di salute e sanità." POLITOCOMUNICA, http://www.politocomunica.polito.it/events/appuntamenti/(idnews)/9874 [https://perma.cc/8PJV-L3GK] (The meeting has been organized at the Politecnico of Turin, by a private company SOGES working in the field of "formation," updating of employees and professionals, in order to disseminate information on new approaches to learning).

[186] *History of the Italian Language*, EUROPASS, https://www.europassitalian.com/learn/history [https://perma.cc/LWE4-GAYU] (last visited Oct. 18, 2018).

[187] "Often, neologisms are used if other terminology could generate misunderstanding." There is a "sense of frustration in drafters confronted with misinterpretation at the national level." This is because, if the adopted foreign term is not adequately defined, there is no means of determining its meaning in the national language. The neologism becomes an isolated term, word, or phrase that still must enter common use or it will not be fully accepted into the mainstream language. This seems to be a conundrum—the adopted term has no counterpart in the country of adoption, but at the same time the national language must explain it. Thus, the adoption of foreign legal terminology without an interpretive description is sloppy draftsmanship at best, a dereliction of duty by legislative bodies to draft clear laws at worst. Silvia Ferreri, *The Devils in the Details: Undetected Differences in Projects to Harmonize the Law*, *in* EPPUR SI MUOVE: THE AGE OF UNIFORM LAW 316 (2016).

[188] "Even in the years before the Italian language was invaded by French words in the world of fashion, English in sport and German in philosophy and

lack of adaptation stymies the opportunity for the Italian language to grow by increasing the breadth of its vocabulary.[189] An example of reasonable adaptation is the phenomenon where Latin words emigrated into English and their meanings were enlarged and then subsequently reintroduced into the Italian language. This is seen in the case of the verb "to realize" that is now often employed in Italian to mean "rendersi conto" (to become aware) rather than to shape or to transform a project into a reality. The exchange between languages has always worked in this direction; many commercial expressions of Italian medieval merchants have been recognized worldwide as technical terms of commercial law (*giro*,[190] *giroconto*,[191] *disagio*,[192] *accomandita*,[193] *del credere*[194]), that then feed back to the Italian language with new and broader meanings or usage.

1. Predominance of Anglo-American "Legal Solutions"

The adoption of foreign words, without the attachment of meaning or adaptation to the Italian language is especially troublesome when it occurs in the context of enacting new laws.[195] The use of English legal terms in Italian law is not a new event. In certain fields, such as insurance law, English law made a significant imprint on business practice. A statute governing the profession of "insurance

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psychoanalysis." EUROPASS, *supra* note 187.

[189] *See* ANTONIO ZOPPETTI, DICIAMOLO IN ITALIANO: GLI ABUSI DELL'INGLESE (2017).

[190] *Giro* refers to a service of many European banks that permits authorized direct transfer of funds among account holders as well as conventional transfers by check. JONATHAN LAW, A DICTIONARY OF BUSINESS AND MANAGEMENT 278 (6th ed. 2016).

[191] *Giroconto* refers to credit transfers or transfers between banks. ANTHONY W. MARGRAFF, INTERNATIONAL EXCHANGE ITS TERMS, PARTS, OPERATIONS AND SCOPE 10 (3d ed. 1903).

[192] *Disagio* refers to a premium or percentage paid for the exchange of one currency for another or a premium or discount on foreign bills of exchange or draft (often used in connection with trade finance). PETER MOLES & NICHOLAS TERRY, THE HANDBOOK OF INTERNATIONAL FINANCIAL TERMS 161-62 (2005).

[193] *Accomandita* is a name that refers to a limited partnership. PAT BULHOSEN ET AL., POCKET OXFORD ITALIAN DICTIONARY: ITALIAN-ENGLISH (4th ed. 2012).

[194] *Del credere* refers to a type of commercial agency in which the agent acts not only as a salesperson or broker for the principal, but also as a guarantor of credit extended to the buyer. LAW, *supra* note 190, at 191.

[195] *See, e.g.*, Keon Kerremans, Vanessa Andries & Rita Temmerman, *Studying the Dynamics of Understanding and Legal Neologisms within a Linguistically Diverse Judicial Space: The Case of Motherhood in Belgium*, 231 PROCEDIA SOC. & BEHAV. SCI. 46, 52 (2016).

intermediaries" was approved in 1984.[196] Its first article introduces the borrowed English term of "broker" as an intermediary who professionally connects clients with insurance companies, without being bound to the companies by any subordinate ties.[197]

The use of English terms has become common in Italian legislation and legal practice. In competition law, the independent authority overseeing the markets is officially called Autorità *Garante della Concorrenza e del Mercato* (AGCM) but it is commonly known as "autorità antitrust" (antitrust authority).[198] In corporate law, Italian lawyers have adopted the American term "corporate governance."[199] Other examples include, the use of the English term "start-up" business in the title of a 2008 Italian law meant to facilitate the creation of new businesses.[200] In criminal law, Italian law borrowed from the common law model of the adversary trial, as opposed to the civil law's inquisitorial approach, when it adopted the concept of "plea-bargaining" (patteggiamento) as a means to reduce the costs and time of prosecuting cases.

Unfortunately, the notion of plea-bargaining was transposed haphazardly into the Italian Code of Criminal Procedure.[201] For example, the appropriate time for plea-bargaining is left unclear. There are some eight separate references to the plea-bargaining

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[196] Legge 28 novembre 1984, n. 792: Istituzione e funzionamento dell'albo dei mediatori di assicurazione.

[197] Article 1 states: ". . . mediatore di assicurazione e riassicurazione, denominato anche broker, chi esercita professionalmente attività rivolta a mettere in diretta relazione con imprese di assicurazione o riassicurazione, alle quali non sia vincolato da impegni di sorta, soggetti che intendano provvedere con la sua collaborazione alla copertura dei rischi, assistendoli nella determinazione del contenuto dei relativi contratti e collaborando eventualmente alla loro gestione ed esecuzione." *Id.*

[198] *See, e.g.,* Autoritá Antitrust (@antitrust_it), TWITTER, https://twitter.com/antitrust_it?lang=en (last visited Oct. 22, 2018) (twitter account of the ACGM under the username Autoritá Antitrust).

[199] *See, e.g.,* Anna Maria Testa, *Il* caso di governance*/governanza*, in LA LINGUA ITALIANA E LE LINGUE ROMANZE DI FRONTE AGLI ANGLICISMI (Claudio Marazzini & Alessio Petralli, eds., 2015).

[200] Legge 6 agosto 2008, n. 133, "Conversione in legge, con modificazioni, del decreto-legge 25 giugno 2008, n. 112, published on the official journal (G.U.) n. 195 - Suppl. Ord. n. 196: Art. 3. "Start up" (art. 36 of the same act covers the "Class action", while article 66 concerns "Turn over", and art. 82 provides, at letter (g-bis), rules on subordinate work income originating from programs of «stock option»).

[201] Codice di procedura penale [C.p.p.] art. 444 (It.); *see also* C.p.p. arts. 314, 317, 318, 319, 319-ter, 319-quater & 322-bis.

process in the Code that do not form a holistic adoption. One provision places the initiative on the prosecutor to offer a plea, while alternatively the defendant may apply for a plea.[202] There are also different provisions dealing with plea-bargaining prior to and during the trial. The Code also requires that any plea bargain must require the criminal defendant to return the price or profit obtained by committing the offence.[203] The later provision was likely included to deter corruption involving public officials.

2. Inclusion *via* EU Jargon

As a member of the European Union, Italy and other non-English speaking members often introduce English EU jargon into their respective languages.[204] One of the reasons for this is that EU committee meetings are held in English.[205] Certain expressions attached to the procedures of the European institutions are shaped in English, such as the word "comitology," which refers to "a set of procedures through which EU countries control how the European Commission implements EU law."[206] It requires the EU Commission to consult a committee in each member country to discuss how any new law is to be implemented in the member states.[207] Italian lawyers and politicians often refer to EU bureaucratic procedures, especially when applying for economic support. They commonly use English terms, such as making a *call* for funds and providing required documents, such as a *masterplan*, *roadmap*, or intermediate research *report*.[208] This propensity to use English words in EU lawmaking

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[202] C.p.p. art. 444.1 ("L'imputato e il pubblico ministero possono chiedere al giudice l'applicazione, nella specie e nella misura indicata, di una sanzione sostitutiva o di una pena pecuniaria, diminuita . . .").

[203] C.p.p. art. 444.1-ter ("Nei procedimenti per i delitti previsti dagli articoli 314, 317, 318, 319, 319 ter, 319 quater e 322 bis del codice penale, l'ammissibilità della richiesta di cui al comma 1 è subordinata alla restituzione integrale del prezzo o del profitto del reato.")

[204] *See* Ajani et al., *supra* note 36, at 11; Barbara Pozzo, *Harmonisation of European Contract Law and the Need of Creating a Common Terminology*, 6 EUR. REV. PRIV. L. 754, 757 (2003).

[205] *Which Languages Are in Use in the Parliament?*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/news/en/faq/21/which-languages-are-in-use-in-the-parliament [https://perma.cc/7S7W-N7VG] (last visited Oct. 18, 2018).

[206] *See Comitology in Brief*, European Commission, http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home [https://perma.cc/VCZ5-37DQ] (last visited Oct. 18, 2018).

[207] *See* 2011 O.J. (L 55) 13.

[208] It can be argued that the use of terms from different languages is not an arbitrary phenomena, but a rational recognition of a foreign term or phrase that better

reflects not only the reality of English as the *lingua franca* but also that English terms best capture the intended meaning of the EU law drafters.

The innovative nature of the American economy and the inherent flexibility of the English language also makes English terms attractive. The English language has this special prerogative of being able, as Latin did before it, to condense complex legal phenomena into short expressions.[209] The malleability of the English language includes the ability to add "suffissi," suffixes, to change the meaning of words.[210] The problem of using these new words and meanings in a non-English speaking legal system is that the receiving language and existing law may ascribe a different meaning to the words than the English language countries do. European lawyers and judges not steeped in EU practice are often confused by the use of English and other foreign language words in European laws resulting in various meanings being given by different European languages to the English language terms.[211] Examples of the misleading effect of these words include: "when 'derogate' is used for 'repeal' (influence of Spanish), 'motives' for 'statement of reasons on which an act is based' and 'visas' instead of 'citations' (both influenced by various Romance languages), or 'guideline' for 'directive' (influence of German and Dutch)."[212] An absurd example is found in the Italian version of an EU regulation

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captures the term than in other languages. Such is the case with the meanings provided by the French term "acquis communautaire" and the German term"Drittwirkung."

[209] Paolo Coppola, *Boom di dialetti sará una Babele,* LA REPUBBLICA (Apr. 9, 2008), at https://ricerca.repubblica.it/repubblica/archivio/repubblica/2008/04/09/boom-di-dialetti-sara-una-babele.html?ref=search [https://perma.cc/C5TG-WNDP] (quoting University of Padua professor Michele Cortelazzo saying English has a simple grammar that makes it available to a large number of persons, but that it is also vulnerable – as it happened with Latin – to being diversified by usage, so that we may end up having several versions of English, as we had all the neo-Latin languages).

[210] International English is distinct from British English and understanding international English is easier for foreigners than it is for native speakers. *See* Simon Kuper, *Why Proper English Rules OK*, FINANCIAL TIMES (Oct. 8, 2010, 2:36 PM), http://www.ft.com/cms/s/2/3ac0810e-d0f0-11df-a426-00144feabdc0.html [https://perma.cc/28AL-K4N9]; Beata Szpingier, *Una breve sintesi sulla presenza degli anglicismi nel settore delle lingue speciali riguardo all'italiano contemporaneo*, 35 STUDIA ROMANICA POSNANIENSIA 295 (2008) (synthesizing the existence of Anglicisms in the sector of special languages with reference to contemporary Italian).

[211] William Robinson, *Making EU Legislation More Accessible, in* QUALITY OF LEGISLATION: PRINCIPLES AND INSTRUMENTS 263, 274 (Luzius Mader & Marta Tavares de Almeida eds., 2011).

[212] *Id.* at 263, 265.

concerning "exceptional trade measures for countries and territories participating in or linked to the European Union's Stabilisation and Association process."[213] In the Italian translation, the title refers to "prodotti *baby beef*"[214] To an Italian, it is clear that this term makes no sense in the Italian language. The interpreter would have to remove the absurdity through an alternative solution in Italian. The Germans provide at least a partial solution to this problem. They differentiate EU legal words with different meanings offered by similar terms in domestic law by affixing special endings to the EU words, therefore their attendant meanings may be differentiated from the domestic law equivalent.[215]

In recent years, Italian legislators have shown a propensity for using English words in the drafting of Italian laws. Examples include Italian laws making use of English catch terms, such as the "Jobs Act,"[216] laws against *mobbing*,[217] laws against *stalking*,[218] acts against *harassment*,[219] acts ruling on *vouchers* for temporary occupation,[220] and laws permitting *stepchild* adoption for same sex couples.[221] In

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[213] *See* 2011 O.J. (L 347) 1.

[214] The English title—"Regulation . . . laying down detailed rules for the application of tariff quotas for 'baby beef' products originating in Croatia, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia and Serbia, Montenegro and Kosovo"—is rendered as "Regolamento (CE) n. 2008/2006 . . . recante modalità di applicazione dei contingenti tariffari per l'importazione di prodotti *baby beef* originari della Bosnia-Erzegovina, della Croazia, della'ex Repubblica jugoslava di Macedonia, del Montenegro, della Serbia e del Kosovo." *Id.*

[215] *See, e.g.*, Verordnung (EU) Nr. 1255/2010 Der Kommission (2010).

[216] This originally meant to refer to the United States' Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012), however, in Italian, the word is used by association with the English word "job" to designate a group of measures implemented in the field of labor law.

[217] Cons. Stato Sez. IV, 16/02/2012, n. 815; 08/05/2015; disegno di legge presentato alla Camera da Lara RICCIATTI (Art.1-MDP) e altri, C.3110, Introduzione dell'articolo 610-bis del codice penale, in materia di atti di discriminazione o di persecuzione psicologica in ambito lavorativo.

[218] Camera dei deputati, XVI Legislatura, Servizio Studi, Progetti di legge, Molestie insistenti (*stalking*), art. 612 bis c.p., Art. 612 bis. Atti persecutori.

[219] Protection from Harassment Act 1997, c.40 (UK).

[220] Cfr. decreto legge 25/2017 che abolisce la disciplina dei *voucher* (Decreto Legislativo 15 giugno 2015, n. 81, Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n. 183) , published on the *Official Journal* (Gazzetta Ufficiale) March 17, 2017.

[221] The case law of trial courts is extending a possibility governed by L. 184/1983 (referred to the child of a spouse: originally of a different sex) (under the scrutiny of the "Tribunale per i minorenni"). *See* Corte Suprema di Cassazione, decision n.

November 2017, the Italian Parliament introduced a bill aimed at providing *whistleblower* protection for those who report acts of corruption.[222] The Italian equivalent word ("delatori") has a pejorative implication because during past times of racial discrimination, anyone reporting a Jew to the police might have received compensation.[223] Before resorting to English terms, the legislator should question whether the Italian language provides equivalent words. Secondly, instead of using foreign neologisms, why not use new Italian words to create new expressions to deal with new phenomena, as was done in the past? An example of creating new Italian terms is the phrase "*prestazione in luogo dell'adempimento*" (extinguishing an obligation by an alternative performance), which was introduced in the Italian Civil Code of 1942 (Article 1197).[224] Another example is the neologism "fattispecie" created by Italian academics to receive the German concept of *Tatbestand* (the paradigmatic situation where a certain rule will apply).[225]

In more recent times, police probes and task forces have been identified by English expressions. Examples include operation *sleeping dog* (intervention by police overseeing the arrest and

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12962/16 ("stepchild adoption", "l'istituto giuridico che consente al figlio di essere adottato dal partner - eterosessuale o omosessuale - del proprio genitore biologico), una delle forme di adozione «in casi particolari» prevista dalla legge 184 del 1983."

[222] Disposizioni per la protezione degli autori di segnalazioni di reati o irregolarità, already approved at the Senate and on a second reading at the Camera dei deputati, November 14, 2017: http://www.camera.it/leg17/522?tema=protezione_degli_autori_di_segnalazioni_di_reati_o_irregolarit__nell_interesse_pubblico (accessed November 14, 2017) ("La protezione del c.d. whistleblower è prevista da numerosi atti internazionali, . . .) (official website of the House of representatives) referring to the G-20 Anti-corruption working group (Ocse) having drafted the Guiding principles for whistleblower protection legislation.

[223] Mario Portanova, *Da Mussolini ai* delatori, *il* fascismo *fu complice dello sterminio degli* ebrei, IL FATTO QUOTIDIANO (April 25, 2015), https://www.ilfattoquotidiano.it/2015/04/25/25-aprile-da-mussolini-ai-delatori-italiani-complici-di-sterminio-degli-ebrei/1619797/ [https://perma.cc/B65P-HSHX].

[224] Italian Civil Code art.1197 (1942). This legal concept was adapted from the French notion of "dation en paiement" (originally indicated by the "datio in solutum" of Latin origin).

[225] *Tatbestand* translates into English as a "situation of facts" or what English speakers would call scenario or fact situation. LAGENSCHEIDT, https://en.langenscheidt.com/german-english/tatbestand (last visited Mar. 5, 2019) [https://perma.cc/E7QJ-7ZKU].

prosecution of pedophiles),[226] the *darknet*,[227] and *new bridge* (a probe of an organized crime group).[228] In some cases the Latin (or Greek) terms chosen to indicate the rescue operations in the Mediterranean have been Anglicized: the media speak of the *Triton operation* (rather than Tritone, one of the deities of the waters in the Roman Mythology).[229] In financial budgeting, the Italian Parliament has voiced its support for *cluster technologici*.[230]

On the surface, there is little reason to object to the inclusion of English words or foreign expressions when there is no domestic language equivalent, or where the expression provided in Italian is too complex. For example, the expression "flight operated by airline X" translates into Italian as "volo *operato* dalla compagnia aerea X", which may confuse travelers who only have a very vague idea of the intended meaning since the phrase conjures up an image of a surgical operation being performed on an airplane! The criticism posed here is the use of awkward expressions mixing Italian and English, where Italian language equivalents are available. The position of the Italian *Accademia della Crusca*,[231] the institution that oversees the proper development of the Italian language, tends to encourage the creation of new expressions or periphrases relating to foreign words or phrases.[232]

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[226] *See Pedopornografia: la Postale sveglia gli "sleeping dogs,"* POLIZIA DI STATO (Feb. 14, 2014), www.poliziadistato.it/articolo/32136 [https://perma.cc/CK8B-XE8N].

[227] *See Operazione "Babylon": la Polizia Postale e delle Comunicazioni scopre un mercato illecito nella darknet,* POLIZIA POSTALE (July 31, 2015), https://www.commissariatodips.it/notizie/articolo/operazione-babylon-la-polizia-postale-e-delle-comunicazioni-scopre-un-mercato-illecito-nella-dark.html [https://perma.cc/4FQE-TVYV] (describing information delivered by police body protecting web communication).

[228] *See Operazione New Bridge fiumi di droga tra Italia e Stati Uniti*, POLIZIA DI STATO (Feb. 11, 2014), http://www.poliziadistato.it/articolo/view/32072 [https://perma.cc/Z3RT-RCAR].

[229] *See* search results for "Triton," FRONTEX: EUROPEAN BORDER AND COAST GUARD AGENCY, http://frontex.europa.eu/search-results/?q=Triton [https://perma.cc/4XAJ-T4SJ] (last visited Oct. 18, 2018).

[230] Decreto-legge n. 91-2017 (contenente una serie di misure e incentivi per la crescita economica nel Mezzogiorno), approved on 1 August 2017.

[231] The Accademia della Crusca is among the leading institutions in the field of research on the Italian language. *See* Accademia della Crusca, http://www.accademiadellacrusca.it/en/accademia [https://perma.cc/3KNE-5WG8] (last visited Oct. 18, 2018).

[232] *See, e.g.,* CLAUDIO MARAZZINI & ALESSIO PETRALLI, LA LINGUA ITALIANA E LE LINGUE ROMANZE DI FRONTE AGLI ANGLICISMI (2015) (containing addresses from a conference on the subject hosted by the *Accademia della Crusca).*

In all cases of superficial transplantation, lawmakers should analyze whether English terms and phraseology are being used because they deal with situations or phenomena more efficiently in the common law when used in their original English or is English word borrowing an attempt to engage in a universal dialogue that requires everyone to be conversant in English.[233] If the answers are both in the negative, then the English terms should not be used. Currently, the Italian Parliament is discussing a subsidy for people aiding relatives with serious illnesses and handicaps.[234] The proposed law uses the English term "care givers," despite a number of equivalent Italian words, such as *assistente*, *aiutante*, *vigilanti*, and *curanti*.[235]

3. Transplanting a Tree Without the Roots: Jurisprudential Chaos

As stated previously, the transplantation of legal terms severed from their context, purpose, evolution, and application is the road to jurisprudential chaos in the borrowing country. Holger Spamann correctly reasons that unless there is a great deal of similarity between the legal systems, any sort of non-substantive transplant will result in chaos and failure.[236] The haphazard transfer of English words or legal terms will always be a greatly diminished version of an organically grown alternative.[237] Rodolfo Sacco emphasizes that "a legal system cannot borrow elements that are expressed in terms that are foreign to its own doctrine."[238]

At a minimum, a superficial transplantation of English terms must include the purpose for the borrowing and, most importantly, that purpose must fit the problem being addressed, policy being advanced, or the social need being targeted.[239] Put more simply, the question

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233 "Anglicismi" in ENCICLOPEDIA DELL'ITALIANO, www.treccani.it/enciclopedia/anglicismi [https://perma.cc/Q7FN-GDRA] (last visited Sept. 20, 2018).

234 *Legge di Bilancio, Stanziato fondo di 60 mln in 3 anni per sostegno ai caregiver familiari. Emendamento approvato all'unanimità*, GOVERNO E PARLAMENTO (Nov. 27, 2017), http://www.quotidianosanita.it/governo-e-parlamento/articolo.php?articolo_id=56342 [https://perma.cc/2ALD-E3JZ].

235 The proposed law states: "La norma istituisce un fondo di 60 milioni di euro per il triennio 2018-2020 destinato a 'interventi legislativi finalizzati al riconoscmento del valore sociale ed economico dell'attività di cura non professionale del *caregiver* familiare." *Id.* (emphasis added)

236 *See* Spamann, *supra* note 103, at 1853.

237 *See id.*

238 Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (Installment II of II), 39 AM. J. COMP. L. 343, 400 (1991).

239 Xanthaki, *supra* note 37, at 662.

that must be answered is how does the transplantation provide a solution to an issue not properly addressed in the domestic law? Or, in the words of Jhering, Kötz, and Zweigert, what function do the adopted terms intend to serve?[240]

As an aside, the problem not discussed here is that meaning is a moving target—the meaning of a borrowed term or concept may change in the country of origin, creating a divergence between meanings in different countries.[241] Ultimately, this may not be a problem unless the goal of the transplantation was the harmonization of law. Another pseudo-problem is the transplantation of terms that, instead of being applied independently, are mixed with local, customary law.[242]

Most often, a legal term, title, or label is a reflection of a legal concept. Legal concepts by nature are vague and ambiguous. Again, it is the context of the borrowed term and its application in legal practice that provides the parameters of its meaning. At the very least, the borrowing of a foreign language term, detached from its context, must include a clear definition in order to provide minimal guidance to judges and lawyers entrusted in the interpretation of the new terminology. The term, as a reflection of a legal concept, has to be subject to a conceptual analysis when it is applied. Professor Sartori's template for the analysis of concepts requires clear definitions of key terms.[243]

An example of the lack of definitional certainty can be seen in Italy's reform of corporate law in the Italian Civil Code. A new provision relates to the problem of false accounting in the preparation of a company's financial statements. Article 2621 of the Civil Code, under the heading "false corporate communications" (*false comunicazioni sociali*), 2622 (*false comunicazioni sociali in danno della società, dei soci e dei creditori*), 2621 bis (*fatti di lieve entità*), and 2621 ter (*non*

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[240] KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM EINFZHRUNG IN DIE RECHTSVERGLEICHUNG GEBIETE DES PRIVATRECHTS (1996); Konrad Zweigert & Kurt Siehr, *Jhering's Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 228 (1971).

[241] An example is the adoption of the English term "heirs and assigns" in Ghanaian real property law, even though the purpose of such phrases had subsequently changed in English law. *See* Gordon Woodman, *English Terminology and Ghanaian Intentions in Deeds of Conveyance*, 6 REV. GHANA L. 251, 254 (1974).

[242] Ghanaian practitioners mix English phraseology with customary law. *Id.* at 256-57; *see also*, Silvia Ferreri, *Law, Language and Translation in Multilingual Contexts*, 25 KING'S L.J. 271, 285 (2014).

[243] SOCIAL SCIENCE CONCEPTS: A SYSTEMATIC ANALYSIS 63-64 (Giovanni Sartori ed., 1984).

punibilità per particolare tenuità) adopts a materiality standard for maleficence.[244] A party is only liable for falsity or misrepresentation of material facts (*fatti materiali rilevanti*), a standard found in the common law.[245] Unfortunately, the law fails to provide a clear definition of materiality or provide criteria to decide whether the false information is material in nature. This presents a problem because "material" in Italian legal terminology connotes "having corporeal consistency," noting the difference between real property and intangible property, such as copyrights and trademark).[246] The conundrum for lawyers is to assign a meaning or provide a threshold to determine if certain misinformation is "relevant" and "material" without a proper understanding of the terms.

The failure to provide an alternative meaning for the word "material," other than what is found in the Italian language, has left practicing lawyers with the task of tracing back the intended meaning to the English syntagm "material facts."[247] Consequentially, disagreement has arisen between the courts on how to apply the expression to

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[244] Codice civile [C.c.] art. 2621 ("Fuori dai casi previsti dall'art. 2622, gli amministratori, i direttori generali, i dirigenti preposti alla redazione dei documenti contabili societari, i sindaci e i liquidatori, i quali, al fine di conseguire per sé o per altri un ingiusto profitto, nei bilanci, nelle relazioni o nelle altre comunicazioni sociali dirette ai soci o al pubblico, previste dalla legge, consapevolmente espongono ***fatti materiali rilevanti non rispondenti*** al vero ovvero omettono fatti materiali rilevanti la cui comunicazione è imposta dalla legge sulla situazione economica, patrimoniale o finanziaria della società o del gruppo al quale la stessa appartiene, in modo concretamente idoneo ad indurre altri in errore, sono puniti con la pena della reclusione da uno a cinque anni.") (emphasis added).

[245] The material fact standard is found in common law fraud and American securities laws. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §162(2) (AM. LAW INST. 2013). The Restatement defines "material" as follows: "a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent or if the maker knows that it would be likely to induce the recipient to do so." *Id.* Section 10(b) of the 1934 Securities Act and SEC Rule 10b-5 makes it unlawful to make any untrue statement of a material fact. *See* Securities Exchange Act of 1934, c. 404, 48 Stat. 881, § 10(b); 17 CFR 240.10b-5.

[246] *Cf. Beni immateriali,* ENCICLOPEDIA TRECCANI, http://www.treccani.it/enciclopedia/beni-immateriali/ (last visited Mar. 5, 2019) [https://perma.cc/J5JB-DQM3].

[247] A. ALESSANDRI, DIRITTO PENALE E ATTIVITÀ ECONOMICHE 288 (2010) (tracing the origin of the expression back to Anglo-American economic studies and to the European legislation implementing policies to harmonize policies across Member States); *See Osservazioni lessicali sui "fatti materiali rilevanti,"* PRESS (Jan. 11, 2016), http://www.press-magazine.it/osservazioni-lessicali-sui-fatti-materiali-rilevanti/293 [https://perma.cc/8QBK-DE33].

actual cases.[248] This example demonstrates that new legislation must avoid using English terms and adjectives like "material" that have different connotations in English and the language of the borrowing country. Also, the more complicated a legal issue, the plainer the language should be and the greater the need for the law to provide definitions and criteria to show the legislature's intended meaning and purpose.[249]

V. CONCLUSION

In recent years, an unseemly trend has appeared in European law—the borrowing of English legal terminology without legal support or guidance. This article focuses on the use of English terminology in Italian statutes as a case study. This borrowing is especially troublesome when there are perfectly good domestic words, with known meanings, that could eliminate the confusion generated by the use of English terms without definition or context. The use of superficial foreign terminology transplantation in order to connect with

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[248] Cass., sez. V, January 8 2016, n. 6916, (Pres. Zaza, rel. Amatore, ric. Banca X); *contra* Cass., Sez. V, January 12 2016, n. 890 (Caso Giovagnoli). The Court held the criminal relevance of false valuations unaltered, even following the developments introduced by Law No. 69/2015, to the cases envisaged by Article 2621 of the Italian Civil Code. The Court overturned the solution adopted in its first intervention on the subject. M. Masullo, *The new offence of false accounting*, RIV. TRIM. DIR. PENALE CONTEMP. (2016), http://www.penalecontemporaneo.it/d/4511-le-parole-sono-importanti-fatti-materiali-false-valutazioni-di-bilancio-e-limiti-all-esegesi-del-giudice [https://perma.cc/3U2U-LLGD]. M. Fumo, "Le 'nuove' false comunicazioni sociali: sintagmi, locuzioni, litoti ed altre (fuorvianti?) diavolerie linguistiche, DIRITTO PENALE CONTEMPORANEO" (June 7, 2017), https://www.penalecontemporaneo.it/d/5447-le-nuove-false-comunicazioni-sociali-sintagmi-locuzioni-litoti-ed-altre-fuorvianti-diavolerie-linguistiche [https://perma.cc/VB7X-BY7M]. A case causing many comments was reported on the financial newspapers for a bankrupt of 47 million euro: Ivan Cimmarusti, *Interporto Romano, bancarotta da 47 milioni*, IL SORE 24 ORE (April 8, 2017) http://www.ilsole24ore.com/art/notizie/2017-04-08/interporto-romano-bancarotta-47-milioni—122049.shtml?uuid=AEJ0c01 [https://perma.cc/8LCX-4TL9].

[249] *See* FALSI AMICI E TRAPPOLE LINGUISTICHE (Silvia Ferreri ed., 2010). The EU has published a booklet collecting the most alarming cases of false friends between Anglo-American and Latin languages that could cause misunderstandings in European legislation. *See* European Commission, *False Friends (From French into English),* INFORMATION PROVIDERS GUIDE: THE EU INTERNET HANDBOOK, http://ec.europa.eu/ipg/content/tips/words-style/false_friends_en.htm [https://perma.cc/8KGL-FUVQ] (last visited Oct. 18, 2018); *see also* European Commission, *EU Jargon in English and Some Possible Alternatives,* INFORMATION PROVIDERS GUIDE: THE EU INTERNET HANDBOOK, http://ec.europa.eu/ipg/content/tips/words-style/jargon-alternatives_en.htm [https://perma.cc/EHD3-55DD] (last visited Sept. 21, 2018).

a developed and recognized legal regime is misplaced and doomed to fail. Cordero-Moss notes that often the reason for some transplantation is simply the "prestige" of the law being transplanted, such as transplantation or borrowing from English financial law or American corporation or tort law.[250]

The avoidance of context—historical development of the legal term, concept, or rule within the legal tradition of the other country and the need to properly fit the borrowed term or rule into a given section of a statute, the statute as a whole, and the regulatory apparatus as a whole—results in the transplanted term or concept having little if any substance to guide the courts in the borrowing country. In the end, such superficial transplantation is likely to sow much confusion in the legal community and chaos in the law. If the purpose for the use of English terminology is to provide an aura of modernization or to make the transplanting country's laws look advanced or cutting edge, then such stylism is empty of both purpose and substance and should be rejected out of hand. This article concludes that such superficial transplantation or terminological borrowing is unnecessary and dangerous in the development of law.

When a legislature or regulatory body decides that a transplant or borrowing of a foreign concept is needed, then they must also provide proper guidance to aid in the interpretation and application of the new concept. In order to increase the chances of a successful transplantation, the following best practices should be followed. First, lawmakers should acknowledge that transplanting requires a deep understanding of the law being transplanted. Second, lawmakers should make sure the law being transplanted is a proper fit for the existing law of the transplanting country. Third, lawmakers must provide proper guidance in the new law, such as detailed definitions and cross-referencing. Moreover, in order to ensure that the transplanted or borrowed law concepts or words fit into the overall context of the existing law, lawmakers should carefully study the similarities and differences between the borrowing country's law and the law of the borrower country.[251] Such a study may dictate a

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[250] Cordero-Moss, *supra* note 45, at 24.

[251] *See generally* Cordero-Moss, *supra* note 45. The failed attempted transplant of the common law trust into Russian law is an example. The Russian government recognized the need to incorporate the trust into Russian law, but, it was a transplant in name only. The recognition of the trust was based not on an in-depth understanding of the concept or its function. The core element of the common law trust is the bifurication of property interests into formal ownership by the trustee and a beneficial interest allocated to the beneficiary. Instead, Russian law continued to recognize only the formal ownership of the trustee, meaning that basis of the relationship was purely

modification in the law being transplanted and the level of guidance needed to be incorporated into the newly enacted law to guide legal practitioners and judges to proper interpretation of the new concept.

Whether the prestige of transplanting a more developed or more recognized law from another jurisdiction is good or bad is less important than how it is done. The existence of the three factors listed above is most predictive of whether the transplant will be successful. Unfortunately, in the area of language borrowing or superficial transplantation these factors are rarely found.

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a contractual one between the donor and the trustee, leaving the beneficiary party without the remedies provided in the common law trust. Thus, the core element of the trust was left out of the Russian enactment making the trust in Russia to be narrow in scope, and ultimately unnecessary. Cordero-Moss notes that the pledge concept already in Russian law could have been used to the same effect. *Id.* at 31, 33.