



OBSERVATIONS ON CONTRACTUAL SPEECH ACTS

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The purpose of this study was to investigate the communicative connotations associated with the expression of the parties' rights and obligations in contracts written in English. A related pragmatic aim was to observe the verbs or verb phrases conventionally used to introduce contractual provisions. Towards the above ends, a speech act analysis of 3 licence agreements, 3 proprietary information agreements and 3 sale agreements was carried out. Three types of contracts were included in the study to see whether variation could be associated with the type of contract. The premise was that contractual provisions expressed as assertive, commissive and declarative speech acts represent a more neutral and less authoritative communicative style than those expressed as directives. The findings suggest that directives are the prevalent speech act type in contracts which imply an evenly balanced power status between the parties. In 88% of the cases directives are expressed using a *shall* + *infinitive* construction. Sale agreements showed a higher incidence of commissive speech acts than the other two types of contracts. This was explained by reference to the equal position of the parties in the latter type of contractual situation. Two agreements with distinct imbalance of power between the parties showed patterns of speech act incidence which differed from those of the evenly balanced contracts. This suggests that variation in the communicative style of contracts may reflect differences in the relationship between the parties to the contract. As this relationship varies from one type of contract to another, it is possible that the communicative style of the contract text is determined by the type of contract.

Keywords: contract English, communicative style, speech act, illocutionary point, contract phraseology

1 INTRODUCTION

It is commonly known that the major function of a contract is to state the rights and obligations that the parties are going to assume in relation to the contractual transaction they are about to perform. In theory, however, such rights and obligations may be articulated in a variety of ways depending on whose voice is heard in the text and whose perspective is prevalent. Thus, an obligation can be expressed as a party's consent to perform a particular action or as a duty imposed on a party by the other one. In other words, the language used might, instead of assuming authoritative tones, evoke the 'meeting of the minds', which is the underpinning principle in a contractual situation. The corresponding

scale for rights could range from rights granted by one party to another to choices available for the latter.

This study set out to investigate which communicative tone is prevalent in the contracts drafted in English, whether it varies from one type of contract to another, and how possible variation can be explained. Speech act analysis was chosen as a method of identifying various communicative connotations in contractual provisions.

An attempt to find research based information to set up a course of contract English for law students revealed that although legal language has been a target for active linguistic research, the language of contracts seems to have remained on the fringe of such interest. This finding inspired the present writer to undertake small-scale studies of relevant aspects of contract language. The motivation for the current study arose from two previous studies conducted by the present writer. The first (Sallinen 2002) provided an outline of the distinctive text structural, sentence structural and lexical features of contract English, while the second (Sallinen 2003) focused on differences in the language of common law contracts and those specifically drafted for international use. A need was then felt to focus on the interactive aspect of contract English. Previously, Trosborg (1994) has investigated the prevalence of the various speech act types in English contracts. Trosborg (1994) approaches the study of contractual speech acts from the perspective of a legal translator and raises the question whether the translator should adhere to the original communicative functions, i.e. the speech act types of the source text. Trosborg's (1994) findings concerning the incidence of the speech act types are relevant to this study and will be discussed in connection with the present results. An essential difference between this study and Trosborg's (1994) lies in the fact that Trosborg does not distinguish between different types of contracts in her analysis of contractual speech acts. In this study, on the contrary, speech acts were assumed to carry various communicative connotations and an attempt was made to find out if the communicative tone of the contractual provisions varied depending on the type of the contract.

In the study of the other genres of legal language, speech act analysis has, according to Gibbons (1999), been one of the focal methods and been applied to the analysis of language crimes such as *threat* and *broken promise* (Gibbons 1999). Kurzon (1986) has investigated the speech act of *enactment*, i.e. the phrases used to give a text the force of law. Salmi – Tolonen (2003) defines persuasion in the court room context as a strategy which seeks to establish a perlocutionary effect through an illocutionary force.

Besides the primarily theoretical interest in the communicative connotations of contractual provisions, the present study had a more pragmatic purpose. It aimed at identifying the verbs/verb phrases conventionally used to construct the main clauses of contractual provisions. Such knowledge constitutes a part of the core information to

be provided on a course of Contract English which aims at initiating the students in the reading and drafting of contracts.

2 DATA

To find out about the communicative connotations of contractual texts a speech act analysis of the provisions of 9 contracts was carried out. The data consisted of three types of contracts including 3 licence agreements, 3 proprietary information agreements, and 3 sale agreements. Table 1 below identifies the data and the sources used.

Table 1. The data and the sources used

| Reference/code used | Title of contract | Source |
|--|--|---|
| License Agreement 1 (LA1) | Games Licence Agreement | private |
| License Agreement 2 (LA2) | Massachusetts Institute of Technology and Akamai Technologies, INC. Exclusive Patent And Non-Exclusive Copyright License Agreement | http://contracts.findlaw.com/agreements/akamai/mit.lic.1998.10.26.html |
| License Agreement 3 (LA3) | Nokia Open Source License (NOKOS License) Version 1.0a | http://www.opensource.org/licenses/nokia.php |
| Proprietary Information Agreement 1 (PIA1) | Mutual Non-Disclosure Agreement | private |
| Proprietary Information Agreement 2 (PIA2) | Agreement with Respect to the Exchange of Proprietary Data | http://www.procopio.com/pdfs/sample3.pdf |
| Proprietary Information Agreement 3 (PIA3) | Proprietary Information and Inventions Agreement for Independent Contractors | http://www.procopio.com/pdfs/sample4.pdf |
| Sale Agreement 1 (SA1) | Agreement for the Sale and Purchase of a Business, A147 Aug 2002 | www.contractstore.com |
| Sale Agreement 2 (SA2) | Sale Agreement (Business) | www.jurifax.com/extracts/1416Econ.pdf |
| Sale Agreement 3 (SA3) | Agreement for Sale of Real Estate, FORM 09a 1994 | Alpha Publications of America, INC |

The analysis focused on the actual contractual provisions ignoring the initial statement of the parties, the description of the contractual

transaction, definitions, warranties and representations, and the final execution clause. To describe the content structure of a contract and to identify the focus of the present analysis, contracts were viewed as sequences of four moves (see Sallinen 2002) in the following way:

Contractual Macro Moves

- **Move 1:** Parties and the date
- **Move 2:** Circumstances, the contractual transaction/object of the contract, and the parties' wish to be involved
- **Move 3:** Definitions/interpretations, contract-specific provisions (including the parties' rights and obligations), representations and warranties, boilerplate provisions
- **Move 4:** Execution by signatures

The focus of the present study was on *the contract-specific provisions* of Move 3. Move 3 constitutes the bulk of the contractual document and articulates the terms of the contract. Among the contractual terms two types can be distinguished. The major part of the terms relate to the transaction in question defining the rights and obligations of the parties. In the above four-move model, the latter are called *contract-specific provisions*. The rest of the contractual terms are labelled *boilerplates* which are standard provisions regulating such aspects of the contractual circumstances as for instance attorneys' fees and the governing law. Because boilerplates are written into a standard format (Wall and Whalen 2001), they cannot be expected to reflect the tone of the communication that takes place between the parties. Besides the contractual terms, move 3 frequently incorporates definitions of the concepts to be used, and the 'representations and warranties' made by either or both parties to confirm that there are no legal obstacles to the transaction in question. Both definitions, and representations and warranties are introduced using standard grammatical and lexical formulas such as *X means Y*, and *A Party represents and warrants that ...*. Thus contract-specific provisions remain the only part of the contractual document where contracts may differ from one another in terms of their communicative style, if such differences relevantly exist. The materials used for the present study included 420 contract-specific provisions. Moreover, a speech act analysis of the related 97 boilerplate provisions was also carried out to enable a comparison between the language of contract specific provisions, which may have been affected by the mutual position of the parties, and the language of the standard provisions, which assumably cannot be so affected.

3 METHOD: SPEECH ACT ANALYSIS

Speech act analysis was used as the method of investigating the communicative tone of the types of the contracts included in the study. The notion of speech act as used in this study is based on Searle and

Vanderveken's (1985) theory, according to which every propositional act when uttered carries an illocutionary force. Thus the meaning of an elementary sentence consists of its propositional meaning and its *illocutionary force*. The illocutionary force is determined by the *illocutionary point or purpose* of the utterance, the degree of strength of the illocutionary point, its mode of achievement, certain conditions relating to the propositional content and preparatory presuppositions of the utterance, and the sincerity of the psychological state in which the utterance is made (Searle and Vanderveken 1985).

The illocutionary point is, however, the primary determinant that qualifies the meaning of a propositional act. The other determinants explain variation in speech acts such as *order* and *request* which share an illocutionary point but differ, for example, with respect to the degree of strength of the illocutionary point. Searle and Vanderveken (1985:37) distinguish five illocutionary points and main categories of speech acts as follows:

| Name of the speech act | Purpose/ point of the illocution |
|-------------------------------|--|
| Assertive | to say how things are |
| Commissive | to commit the speaker to doing something |
| Directive | to try to get other people do things |
| Declarative | to change the world by saying so |
| Expressive | to express feelings and attitudes |

For a more in depth analysis of the above illocutionary points, Searle and Vanderveken (1985:92-96) introduce the notion of *direction of fit*, which means the way in which the propositional content of an utterance relates to the world of that utterance. Searle and Vanderveken (1985:92-96) define four directions of fit and relate them to the above illocutionary points in the following way:

Direction of fit: a determinant of illocutionary point

- 1) The word-to-world direction of fit: the assertive illocutionary point
- 2) The world-to-word direction of fit: the commissive illocutionary point (speaker-based orientation); the directive illocutionary point (hearer-based orientation)
- 3) The double direction of fit: the declarative illocutionary point.
- 4) The null or empty direction of fit: the expressive illocutionary point

3.1 APPLICATION OF SPEECH ACT THEORY TO THE PRESENT STUDY

For the purposes of this study it was adequate to identify contractual speech acts by reference to the illocutionary point they carry instead of conducting a more subtle analysis which would include all the determinants of illocutionary forces. In practice this meant that the 419 contract specific provisions and 97 boilerplate provisions included in this study were identified as speech acts with one of the above five

illocutionary points, i.e. as *assertives*, *commissives*, *directives*, *declaratives*, or *expressives*. From the start, expressives were an unlikely category because of the impersonality of the contractual genre. The category was later dropped from the discussion as irrelevant.

The present analysis focused on the main clause of each provision. In compound sentences with two or more coordinated main clauses, all main clauses were identified as separate speech acts. What Searle and Vanderveken (1985:5) call conditional speech acts, i.e., speech acts which become effective, if a particular condition is fulfilled, are frequent in contract texts. Such conditionality was, however, ignored in this study, because it was not relevant to the research question of the study.

The criteria for the identification of the illocutionary points of contractual provisions included the context of the utterance, its direction of fit, and *illocutionary force indicating devices* (Searle and Vanderveken 1985:2) such as the person of the subject (first, second, third), the predicate verb/verb phrase (whether an illocutionary or performative verb, use of auxiliaries), tense, and mood.

Contractual provisions are frequently expressed as indirect speech acts (Schiffrin 1994:59) consisting of a speech act based on an illocutionary or performative verb and a subordinate speech act. The illocutionary or performative verb of such indirect speech act seems to relate to the contractual framework in general while the propositional content of the subordinate proposition is inherent to the respective transaction. In this study such speech acts were identified according to the illocutionary or performative verb, e.g.

- (1) The First Party recognizes that the Second Party may disclose information to its subcontractors ... (Proprietary Information Agreement 1)

The subordinate clause above conveys a directive speech act but the provision as a whole is presently categorized as a declarative according to the verb *recognize*, which is understood to carry in this context a slight performative meaning. This varies from Searle's (1969) analysis of a sentence such as *I hope you'll write a letter of recommendation for me* as a directive on the basis of the underlying (grammatically subordinate) act. In this study, however, the focus of interest is on how the literal or 'surface' speech act may modify the communicative tone of the contract. It can be expected that in the majority of contractual sentences the underlying deep-structural speech act is a directive because the parties aim at making each other behave in a desired way.

A further observation about contractual provisions as speech acts was that when the subject of a sentence is a third person noun denoting the parties or either party, the sentence can be interpreted as containing also a first person speech act. This is because both parties have signed the contract and therefore the content of the provisions apply to the parties as first person obligations, commitments or assurances (See Example 4 in Section 3.2).

Trosborg (1994) uses only three categories to describe contractual speech acts, i.e. 'constitutive rules', directives and commissives. Her criteria for including contractual provisions in the speech act categories will be commented on in Section 3.2.

3.2 CONTRACTUAL PROVISIONS AS SPEECH ACTS

Because the language of contracts largely consists of standard phraseology and 'ways of saying' (Tiersma 1999:59-61), consistent approaches to frequently used phrasing were sought. Labelling contractual provisions as various types of speech acts was, however, no easy task. This was because, as also Verschueren (1985) points out, speech acts tend to be multi-faceted and reflect aspects of several types of speech acts. Yet, subject to the above source of ambiguity, the illocutionary point and accordingly the speech act type of the most frequent set phrases were determined as indicated below in Sections 3.2.1-3.2.4.

3.2.1 ASSERTIVES

In the context of contracts, clauses articulated as statements carry the underlying function of an order /directive because the signatures of the parties at the end of the agreement signal their determination to make the world match the words of such statements. Yet, for the purposes of the present study such clauses are identified as assertives when no surface-level illocutionary force indicating device suggests otherwise, e.g.

- (2) No license or conveyance of any rights to either party is granted or implied by the disclosure of Proprietary Data by Discloser except as provided herein. (Proprietary Information Agreement 2)

Because assertives seem to be more frequently used to say how things must be than what the parties must do, they are a neutral category from the point of view of the research questions of this study.

Among the few assertives which provide for the behaviour of the parties are statements of the parties' rights such as *a party is entitled to*, and *a party has the right to (do)*. The set phrase *the party understands that* is categorized as an assertive. *Understand* is not an illocutionary verb proper, because it does not state what the speaker does with words. In a contractual context it is, however, used syntactically like an illocutionary verb.

- (3) '... and The Second Party *understands that* this Sale of Real Property is made subject to the following Lien(s) of Record, to wit ... (Sale Agreement 3)

Trosborg (1994) refers to contractual statements as ‘constitutive rules’ and admits as above that ‘they may still serve the purpose of regulating behaviour’ (Trosborg 1994:313).

3.2.2 COMMISSIVES

By Searle’s (1985:37) definition ‘in utterances with the commissive point the speaker commits himself to carrying out the course of action represented by the propositional content’. The definition implies that commissive speech acts are always in the first person singular or plural. In this study it is claimed that in the contractual context third person predications such as in Example (5) correspond to first person commissives because the signatures executing the contract indicate that each party has made a promise for its own part to carry out its contractual obligation. The parties call themselves by third person names in the contractual setting but the provisions are transformable into first person commissives as shown below:

- (4) 1) The Second Party *agrees to pay* to the First Party ... (Sale Agreement 3) = I, the undersigned Second Party, agree to pay ...
- 2) Company *agrees that* it will not ... (License Agreement 2) = We, the undersigned Party, agree that we shall not ...

Commissives in this context are typically introduced with *agree* or using the future tense with *will*:

- (5) 1) Each party *agrees to provide* written notice to the other party promptly after becoming aware of any infringements of the patent rights or copyrights. (License Agreement 2)
- 2) Company *will pay* the Licensor the fees described ... (License Agreement 1)

3.2.3 DIRECTIVES

According to Searle and Vanderveken (1985:37), the illocutionary point of directives is ‘to try to get other people to do things’. As directives are presently categorized also sentences which state the way the world is desired to be, i.e., the imperative is directed at states of affairs instead of people.

- (6) All the rights set forth in this Agreement shall be cumulative and not alternative. (Sale Agreement 2)

Orders of this kind can always be transcribed into orders to be fulfilled by a human subject. For example, the above contractual provision is actually equivalent to *the Parties shall deem all the rights set forth in this Agreement as cumulative and not alternative*, which means that both

parties order the other party to behave in that way. In addition, predications such as *You hereby agree ...*, *You agree to work with the Company ...*, *You assume the cost of ...* were interpreted in their context as second person imperatives.

3.2.4 DECLARATIVES

In this study phrases such as *the parties/each party agree(s) that X* (with the subject of the that clause being other than *parties/the party*), *a party acknowledges that*, *a party recognizes that*, and *a term means X* were identified as distinctive signals of declaratives:

- (7) 1) The parties *recognize and agree that* nothing contained in this Agreement shall be construed as granting any property rights by licence or otherwise to any confidential information of the other party ... (Proprietary Information Agreement 1)
- 2) Company, sublicensees and end-users *acknowledge that* title to the copyrights shall remain with X and that ... (License Agreement 2)
- 3) The Company *recognizes that* X may disclose Information to its subcontractors but only to the extent that such subcontractor has a need to know for the purpose of carrying out the purpose ... (Proprietary Information Agreement 1)

The main criterion for the classification of the above type of provisions as declaratives is the world-to-word direction of fit that coexists in such utterances with the word-to-world type of fit, i.e., once a provision is said to be recognized, acknowledged or agreed upon by a party/parties in the contractual context it becomes recognized, acknowledged or agreed between the parties. On the other hand, the above three utterances also convey an assertive message by stating how things are, i.e. the fact that *the parties recognize and agree*, *company, sublicensees and end-user acknowledge*, and *the company recognizes*. On the same grounds, definitions of the type represented by Example (8) are regarded as declaratives. Since the statement of the proposition the term to be defined carries the meaning assigned to it:

- (8) ‘Discloser’ means the party disclosing data, some of which may be Proprietary Data.’ (Proprietary Information Agreement 1)

Trosborg, who does not recognize the category of declaratives, classifies provisions with *acknowledge* as the verb of the main clause as commissives. This solution suggests that the subject is thought to commit himself/herself to acknowledging a state of affairs.

3.3 PREMISES OF THE STUDY

The underlying assumption in the present study is that contractual provisions with the assertive, commissive, or declarative illocutionary point carry a more neutral or less authoritative communicative tone than directives or tend to emphasize the ‘meeting of the minds’, and the bilateral or multilateral nature of the contractual situation. Thus it is assumed that in Example (9) below the modified phrasings a¹), a²), and a³) of provision a) carry a less authoritative communicative tone than the original provision. Similarly, the modified phrasing b¹) is regarded as neutral in comparison to the original provision b), which stresses the ‘meeting of the minds’ between the parties:

- (9) a) The Receiving Party shall adhere to any relevant export control laws ... (Proprietary Information Agreement 1)
- a¹) The Receiving Party agrees to adhere to any relevant export control laws ...
 - a²) The Receiving Party will adhere to any relevant export control laws ...
 - a³) The Parties agree that any relevant export control laws shall be adhered to
- b) The parties agree that this Sale of Real Property is made subject to the following Lien(s) of Record: ... (Sale Agreement 3)
- b¹) This Sale of Real Property is made subject to the following Lien(s) of Record : ...

The incidence of the above four illocutionary points was surveyed and compared among the contract-specific provisions of the three types of contracts chosen for the study. In addition, a speech act analysis of the boilerplate provisions of the respective contracts was carried out to obtain comparison data from a contractual context which was not affected by the mutual position of the parties. Boilerplates are not expected to reflect the relationship of the parties because they are standard provisions with fixed phraseology.

4 FINDINGS

To investigate the communicative style of contracts drafted in English the incidence of assertive, commissive, directive and declarative speech acts was calculated among the contract specific provisions of each contract of the three contract types included in the study (see Tables 2, 3 and 4 in Sections 4.1-4.3). This was the basic statistical analysis which served as a starting point for 4 other surveys. For further study of the data, a distinction was made between contractual transactions which suggested an even balance of power between the parties and those with one party in a stronger power position. When relevant, contracts will be called from now on *evenly balanced contracts (EBCs)* or *unevenly*

balanced contracts (UBCs), respectively. In the current data Nokia's Open Source Agreement (Licence Agreement 3) and the Proprietary Information and Inventions Agreement for Independent Contractors (Proprietary Information Agreement 3) represent the latter category. The further surveys of the data included 1) a study of the distribution of the various speech act types in the whole EBC data (Table 5), 2) a comparison of the distribution of the speech act types among the contract specific and boilerplate provisions across the whole data (Table 6), 3) a comparison of the distribution of the speech act types among the contract specific provisions of the three contract types (Table 7), and 4) a comparison of the phrasings used to express the directive speech act in the Nokia Open Source Agreement and the other 8 agreements of the current data (Table 8). The results of the statistical analyses will be provided in this section accompanied with a brief account of the observations that are of interest to the present study. A more thorough discussion on the wider meaning of the observations will take place in the discussion section (Section 5). In sections 4.1-4.3, each contract included in the data is also described in terms of the features that are assumed to have an influence on the analysis.

4.1 INCIDENCE OF SPEECH ACT TYPES AMONG THE CONTRACT-SPECIFIC PROVISIONS OF LICENCE AGREEMENTS

Licence Agreement 1 is an agreement between two small IT companies. The second licence agreement, which is made between Massachusetts Institute of Technology, a research and educational institute, and Akamai Technologies, Inc., a Delaware corporation, deals with large-scale technology transfer. The third licence agreement is Nokia's Open Source Agreement, in which the company grants a royalty-free licence to a source code to anybody who complies with the provisions of the agreement. In the latter agreement the position of the contracting parties differs from that of an evenly balanced contract in that the terms of the contract have been drafted by the licensing party, and they are not negotiable between the parties. The following distribution of speech acts was found in this material:

Table 2. Incidence of assertive, commissive, directive and declarative speech acts among the contract- specific provisions (CSPs) of licence agreements (LAs)

| CSPs | Assertives Incidence/% | Commissives Incidence/% | Directives Incidence/% | Declaratives Incidence/% | Total Incidence/% |
|--------------|---------------------------|----------------------------|---------------------------|-----------------------------|----------------------|
| LA1 | 2/17→11.8% | 4/17→23.4% | 9/17 →53% | 2/17→11.8% | 17→ 100% |
| LA2 | 10/151→6.6% | 9/151→6% | 119/151 →78.8% | 13/151→8.6% | 151→ 100% |
| LA3 (UBC) | 21/66→31.8% | 0/66→0% | 42/66 →63.6% | 3/66→4.6% | 66→ 100% |

Table 2 yields three major observations. First, the directive speech act is the dominant type in each of the above 3 licence agreements. Second, LA1, an agreement between two small companies, seems to be more ‘commissive’ than LA2, which is a large-scale contract. According to the premises of this study, the above observation may be suggestive of a closer contact between the parties. The third observation concerns the lack of commissives and a greater number of assertives in LA3 than in the other two licence agreements. LA3 represents a contractual situation with an uneven balance of power. The lack of commissives in the contract may reflect the sovereign position of the open source licensor.

4.2 INCIDENCE OF SPEECH ACT TYPES AMONG THE CONTRACT-SPECIFIC PROVISIONS OF PROPRIETARY INFORMATION AGREEMENTS

The first proprietary information agreement was made between two small IT companies. The second and third agreements are commercially available contract schemes. The latter involves a contractual setting between a corporation and an independent contractor, which implies an uneven power status between the parties. Table 3 below shows the distribution of the various speech acts in the three proprietary information agreements.

Table 3. Incidence of assertive, commissive, directive and declarative speech acts among the contract-specific provisions (CSPs) of proprietary information agreements (PIAs)

| CSPs | Assertives Incidence/% | Commissives Incidence/% | Directives Incidence/% | Declaratives Incidence/% | Total Incidence/% |
|---------------|---------------------------|----------------------------|---------------------------|-----------------------------|----------------------|
| PIA1 | 1/17→5.9% | 0/17→0% | 15/17→88.2% | 1/17→5.9% | 17→100% |
| PIA2 | 5/27→18.5% | 1/27→3.7% | 20/27→74.1% | 1/27→3.7% | 27→100% |
| PIA3 (UBC) | 13/51→25.5% | 23/51→45.1% | 8/51→15.7% | 7/51→13.7% | 51→100% |

In Table 3 attention is drawn again to the high percentages of directives in PIA1 and PIA2 and to the lack or low level of commissives in these agreements. These findings gain greater significance when a comparison is made with the other types of contracts (see Table 7, Section 4.4). PIA3, on the contrary shows a vastly different pattern with few directives and a high incidence of commissives. This pattern will be discussed in Section 5 by reference to PIA3 as an unevenly balanced contract.

4.3 INCIDENCE OF SPEECH ACT TYPES AMONG THE CONTRACT-SPECIFIC PROVISIONS OF SALE AGREEMENTS

All the sale agreements included in the study are commercial contract schemes. The first two are for the sale of a business while the third is for the sale of real estate. Table 4 below represents the incidence of the various speech acts in this contract type.

Table 4. Incidence of assertive, commissive, directive and declarative speech acts among the contract-specific provisions (CSPs) of sale agreements (SAs)

| CSPs | Assertives Incidence/% | Commissives Incidence/% | Directives Incidence/% | Declaratives Incidence/% | Total Incidence/ % |
|------|---------------------------|----------------------------|---------------------------|-----------------------------|--------------------------|
| SA1 | 5/49→10.2% | 10/49→20.4% | 34/49→69.4% | 0/49→0% | 49→ 100% |
| SA2 | 7/23→30.4% | 3/23→13.1% | 11/23→47.8% | 2/23→8.7% | 23→ 100% |
| SA3 | 3/19→15.8% | 5/19→26.3% | 9/19→47.4% | 2/19→10.5% | 19→ 100% |

Table 4 further confirms directives as the dominant speech act among evenly balanced CSPs. SA2 and SA3, however, show the lowest

incidence of directives in the EBCs of this data. There also seems to be a tendency towards a higher average percentage of assertive and commissive speech acts than in the other contract types.

4.4 DISTRIBUTION OF THE SPEECH ACT TYPES AMONG THE CONTRACT SPECIFIC PROVISIONS OF THE WHOLE EBC DATA

Table 5 below shows that in the current data directives are the dominant speech act type among the evenly balanced contracts. The rate varies between 47.4%-88.2% (see Tables 2-4).

Table 5. The distribution of speech act types among the contract-specific provisions (CSPs) of evenly balanced contracts (EBCs)

| CSPs | Assertives Incidence/% | Commissives Incidence/% | Directives Incidence/% | Declaratives Incidence/% | Total Incidence/% |
|------|---------------------------|----------------------------|---------------------------|-----------------------------|----------------------|
| EBCs | 33/303→10.9% | 32/303→10.6% | 217/303→71.6% | 21/303→6.9% | 303→100% |

4.5 A COMPARISON OF SPEECH ACT DISTRIBUTION AMONG THE CONTRACT SPECIFIC AND BOILERPLATE PROVISIONS IN THE WHOLE DATA

As Table 6 below indicates boilerplate provisions show a lower incidence of commissive and declarative speech acts than the contract specific ones. They seem to be primarily articulated by using directives and assertives.

Table 6. Speech act distribution among contract-specific and boilerplate provisions (BPP) in the whole data

| | Assertives | Commissives | Directives | Declaratives | Total |
|-----|------------|--------------|---------------|--------------|----------|
| CSP | 67/419→16% | 55/419→13.1% | 266/419→63.5% | 31/419→7.4% | 419→100% |
| BPP | 28/97→29% | 1/97→1% | 64/97→66% | 4/97→4% | 97→100% |

4.6 A COMPARISON OF SPEECH ACT DISTRIBUTION AMONG THE CONTRACT SPECIFIC PROVISIONS OF EVENLY BALANCED LICENCE AGREEMENT, PROPRIETARY INFORMATION AGREEMENTS AND SALE AGREEMENTS

A notable observation in Table 7 below is that the sale agreements of this data seem to be more ‘commissive’ than the other contract types. Proprietary information agreements, on the contrary, are the lowest in

commissives and the highest in directives. Moreover, licence agreements seem to have more declaratives than the other two types of contracts. This is obviously due to the fact that each of them included one or more declarative ‘licence granting’ provisions.

Table 7. Speech act distribution among the contract specific provisions (CSPs) of evenly balanced licence agreements, proprietary information agreements and sale agreements

| CSPs | Assertives Incidence/% | Commissives Incidence/% | Directives Incidence/% | Declaratives Incidence/% | Total Incidence/% |
|------|---------------------------|----------------------------|---------------------------|-----------------------------|----------------------|
| Las | 12/168→7.2% | 13/168→7.7% | 128/168→76.2% | 15/168→8.9% | 168→100% |
| PIAs | 6/44→13.6% | 1/44→2.3% | 35/44→79.5% | 2/44→4.6% | 44→100% |
| SAs | 15/91→16.5% | 18/91→19.8% | 54/91→59.3% | 4/91→4.4% | 91→100% |

4.7 A COMPARISON OF THE PHRASING OF DIRECTIVES IN THE NOKIA OPEN SOURCE AGREEMENT (NOSA) AND THE OTHER 8 AGREEMENTS OF THE DATA

To conduct a comparison of the ways in which directives were phrased in the Nokia Open Source Agreement as opposed to the remaining agreements of the data was found to be relevant because the Nokia agreement, as an unevenly balanced agreement, seemed to deviate from the patterns of directives distinctive of the other 8 agreements. Table 8 shows that while in the other agreements *shall+infinitive* seems to be the dominant way of expressing directives, the Nokia Open Source Agreement shows a higher incidence of directives with *must+infinitive*, which pattern is not found elsewhere in the data. Similarly, imperatives, which are nonexistent in the other agreements, occasionally occur in NOSA (7.1%). Moreover, as Table 8 shows, NOSA uses *may+infinitive* more frequently than the other agreements. Implications of the above findings will be discussed in Section 5 below.

Table 8. Phrasing of directives: A comparison between the Nokia Open Source Agreement (OSA) and the other 8 agreements of the data

| Phrasing of directives | Shall+ infinitive | May+ infinitive | Must+ infinitive | Imperative | Other | Total |
|------------------------|-------------------|-----------------|------------------|---------------|----------------|--------------|
| 8 agreements | 198/225→ 88% | 21/225→ 9.3% | 0→ 0% | 0→ 0% | 6/225→ 2.7% | 225→ 100% |
| NOSA | 10/42→ 23.8% | 13/42→ 31% | 16/42→ 38.1% | 3/42→ 7.1% | 0→ 0% | 42→ 100% |

4.8 CONVENTIONAL MAIN VERBS/VERB PHRASES IN CONTRACTUAL PROVISIONS

Besides finding out about variation in the communicative style of contracts, this study also set out to identify the verbs or verb phrases conventionally used to articulate the main clauses of contract specific provisions. The feasibility of this task is based on the fact that contract language is strictly regulated by genre rules and operates on a number of set phrases and structures (Mattila 2002:456-459). The following observations were made:

Directives: *Shall + infinitive* was used in 77.9% (208/267) of the directives of this data while *may+infinitive* occurred in 12.7% (34/267) of them. Table 8 shows the corresponding figures, when only evenly balanced contracts are included in the survey. Nokia’s Open Source Agreement was the only contract in this data to express directives with *must+infinitive*. Trosborg (1994:312), who in her study of contractual speech acts includes in the directive category statements of *obligations, prohibitions, and rights*, also pointed out that obligations and prohibitions are ‘almost exclusively’ expressed by using *shall +infinitive*.

Commissives: The structure *A Party/The Parties agree(s) that it/they will (do)...* and *A Party/The Parties agree(s) to (do) ...* was used in 56.7% (29/51) of commissives, while the rest of them (22/51→43.3%) showed a pattern with the future tense, i.e. *A Party/The Parties will (do)*. The verb *to agree* introduces a commissive speech act when its subject is the same as that of the following infinitive or that clause. *To consent* is then a synonym to the verb.

Declaratives: Contractual provisions with the pattern *The Parties agree that X* (e.g. ‘that any dispute arising ... shall be settled ...’) were identified as declaratives. The verb *agree* is understood to introduce a declarative speech act when it is followed by a *that* -clause which has a subject other than that of the verb *agree*. The incidence of the above type was 29% (9/31) of the declaratives. A 9.7% (3/31) occurrence was found for both the phrase *A Party/Parties recognize(s) that ...* and *A Party/Parties acknowledge(s) that* The rest of

the declaratives (16/31→51.6%) represented the formula *The Party/The Parties/I hereby grant(s)/assign(s)/waive(s)/etc.*

Assertives: Among assertives the range of phrasal variation is so much wider that incidences of set phrases could not be identified on the basis of data of this size. However, recurrent assertive phrases such as *A Party/Parties understand(s) that ...*, *A Party represents that ...*, *A Party/Parties affirm(s) that/declare(s) that /is (are) entitled to /has/have the right to ...* were observed in this material.

5 DISCUSSION

The main purpose of this study was to investigate the communicative styles used to articulate the rights and obligations of the parties in contracts drafted in English. Three different types of contracts were included in the study to see whether there was variation in the communicative style between the types. The communicative style of the core part of the contract was assumed to be reflected in the types of speech acts chosen to convey the contractual message. Below, the results presented in Tables 1-8 above will be discussed. An attempt is also made to explain the phenomena observed.

The major finding made based on the current data was that directive seems to be the prevalent type of speech act in the conventional evenly balanced contracts. Over 70% of the contract specific provisions of the evenly balanced contracts included in this study were expressed as directive speech acts (see Table 5). The rate of directives varied between 47% – 88 % in individual contracts. Trosborg, who included statements of obligations, prohibitions and rights in the category of directives found a 63.9% prevalence of the directive speech act. Thus directives can (especially in the *shall+infinitive* format), on the basis of their frequency, be regarded as the ‘unmarked’ type of contractual speech acts which reflects the position of authority that each party is entitled to assume in the contractual situation.

A major premise of this study was that commissives and declaratives as contractual speech acts may serve a hedging communicative function. The finding that boilerplate provisions are low in the above two speech acts supports indirectly such premise. The phrasing of boilerplate provisions is not likely to be affected by the parties’ mutual relationship because they are standard, fixed-form provisions (Wall and Whalen 2001). Thus, as Table 6 in Section 4.4 shows, assertives and directives are the prevalent speech act types among boilerplate provisions. Assertives are a neutral category with respect to the relationship of the parties. Trosborg (1994) appropriately calls contractual assertives ‘constitutional rules’, which regulate the contractual setting rather than the rights and obligations of the parties. Similarly, directives can (especially in the *shall+infinitive* format), on the basis of their frequency, be regarded as the ‘unmarked’ type of contractual speech acts. It may be claimed that because boilerplates are neutral in terms of the parties’ mutual relationship, they carry ‘unmarked’ language. Thus the higher

incidence of commissives and declaratives among the contract-specific provisions may justify the claim that those speech acts serve a hedging function. At the rate at which commissives occur, obligations imposed on a party are communicated as commitments or promises by the party. Declaratives serve a hedging function most frequently in the phrasing ‘the parties agree that X...’, which highlights the meeting of equal minds (see Section 4.6).

A comparison of the evenly balanced licence agreements, proprietary information agreements and sale agreements indicated that commissive speech acts were most frequent in sale agreements (Table 7 in Section 4.5). This finding is tentative because the data consisted of only 9 contracts, but if similar results can be obtained from a more comprehensive study, the observation may serve as an instruction for the parties drafting contracts in English or modifying standard contract schemes. It may be explained by reference to the hedging communicative function of the commissive speech act. The relationship between a seller and a buyer is a one-time relationship in which an equal status is assumed between the parties. According to a sale agreement the seller loses his title to the object of the sale as soon as the purchase price is paid. On the other hand, according to licence agreements and proprietary information agreements the licensor and the discloser of proprietary information remain owners of the licensed property or disclosed information notwithstanding the licensing or disclosing procedure. The latter situation may imply subtle differences in the mutual balance of power with respect to the object of the contract. This may eventually be reflected as more authoritative tones in the language of the contractual provisions. There may, however, be also deviations from this line of thought: for example Proprietary Information Agreement 1 (Table 2) has been drafted in a very amicable tone.

Licence Agreement 3 (Nokia’s Open Source Agreement) and Proprietary Information Agreement 3 (Proprietary Information and Inventions Agreement for Independent Contractors) provide examples of imbalanced contractual situations, in which one of the parties is clearly the drafter of the contract who dictates the terms. Thus there is an element of unilaterality in both of the above agreements. The position of authority held by one of the parties is, however, manifested as different drafting practices in the above two types of agreement.

Open source agreements show a very high degree of imbalance in the mutual position of the parties. The licensing party which provides for the free use of its source code is restricted only by its own benefit; it is in the interest of the licensor to have the source code developed by outside users and to attract users the terms of the licence must be reasonable. The sovereign position of the licensor is reflected in the communicative style of the contractual provisions in that, as shown in Table 2, Section 4.1, there are no hedging commissive or declarative elements. The 4.6% incidence of the declarative speech act seen in Table 1 is due to the occurrence of the obligatory licensing phrase ‘Nokia/ a Contributor

hereby grants ...'. Moreover, as can be seen in Table 8, Section 4.6 below, the phrasing of the directive speech act showed a 38 % incidence of *must+infinitive* and a 7 % incidence of the imperative mood, both of which devices seem to indicate a stronger directive force than *shall+infinitive* which was the prevalent way to express the directive illocutionary force in the other agreements. The high incidence of *may+infinitive* may also be explained by reference to the authoritative position of the licensing party; *may* implies that the rights of the licensed party are regarded as permissions granted by the licensing party.

In Proprietary Information Agreement 3, on the contrary, the bulk of the contract-specific provisions are commissive or declarative speech acts (see Table3, Section 4.2). Directives, which are the prevalent speech-act type in the other agreements contained in this study, constitute only 15% of the provisions of this agreement. The contract is made between a company hiring an independent contractor and the contractor. Thus the relationship between the parties is in some respect similar to that of an employer and employee, with the balance of power gravitating towards the former. It is most likely that the company has had a dictating role in the drafting of the agreement. Yet the contract is written in the first person singular and consists mostly of promises and expressions of consent by the independent contractor. The hedged tone which is achieved by the means discussed above and which highlights the contractors willingness to accept the terms included in the contract, may serve the purpose of promoting an amicable business relationship between the parties by alleviating the implications of the imbalanced power relation.

In sum, the findings of the present study indicate that the contractual document is dominated by the directive illocutionary purpose; the parties are strongly determined to make the world fit the word. Yet, commissive, assertive and declarative speech acts provide alternative ways to attain the underlying goal of the parties to make each other behave in the desired way. The findings suggested that there may be variation in the communicative style of a contract text depending on the type of the contract. This finding is tentative because only three types of contracts were included in the study and there were only three contracts representing each type. The results obtained from the study of the two contracts with elements of unilaterality and an uneven balance of power provided some support for the assumption that the ultimate reason for the variation in the communicative style of contracts could arise from the mutual position of the parties.

The notion of speech act is like a chameleon. When looked at from one perspective it reflects one illocutionary purpose while from another it may suggest a different meaning. Therefore, it is a risky notion for a unit of analysis. In spite of this feebleness and obscurity, the notion of speech act was adopted for this study because it provided a means for understanding the interactive side of the meaning of contractual provisions. Still another problem in this study relates to the description of

the speech act phenomena as percentages from a data consisting of several contracts. Percentages drawn from a data consisting of several contracts as units of analysis may provide a distorted picture of the units included when no standard deviations are calculated. Yet the present data was expected to be reasonably transparent to the reader, because the units of analysis are few enough for the reader to keep record of the deviation between the individual units.

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