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Memoranda of understanding, letters of intent and contracts: An analysis of speech acts

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Abstract. The aim of this paper is to explore the differences in the use of modals to create illocutionary acts considering three legal genres, the Memorandum of Understanding (MoU), the Letter of Intent (LoI) and the contract. On the one hand, the Memorandum of Understanding (MoU) is an agreement that has hardly been investigated in the existing literature and it is used to establish cooperation in research and in academic/cultural activities between universities. On the other hand, the Letter of Intent is a genre generally used in corporate communication that precedes the MoU in the development of joint research nets. The MoU can be considered as a specific type of contract, thus our research questions are: what are the most significant differences in modal realization among the MoU the LoI and corporate contracts? Are illocutionary acts genres-bound? In particular, the study sets out to explore the use of speech acts. Therefore, it focuses on regulative patterns considering the rhetorical functions of directive and commissive acts (Trosborg 1995) in this legal genre. The analysis is based on a corpus of MoUs signed by Anglophone universities (UK – US – AUS). The results obtained are then compared to those of two comparable corpora of contracts and of Letters of Intent (LoI) in order to show differences and similarities in the patterns observed. From a methodological point of view, the study integrates corpus linguistics and discourse analytical perspectives in the investigation of textual data, relying on both qualitative and quantitative analysis. A combination of computational analysis and manual tagging is employed to select all the relevant regulative speech acts in the corpus. Results show that the MoU is a “hybrid genre” (Bhatia 2004), an instance of “interdiscursive colonisation” (Bhatia 2011: 106) in which the directive component of the contract is combined with the commissive one of the Letter of Intent.

Keywords. Letter of intent, memorandum of understanding, contract, regulative speech acts.

1. Introduction

Legal discourse has been studied from various perspectives in the past years. Several studies have investigated in particular its distinctive lexical features, such as technical terms, archaic expressions, etc., and on its syntactic complexity (see, e.g. Mellinkoff 1963; Danet 1985; Goodrich 1990; Russel and Locke 1992; Gibbons 1994, 2003; Tiersma 1999; Garzone and Salvi 2003; Cornu 2005).

Moreover, scholarly interest has focused on the language used in specific communicative events in legal fields such as police interviews (Coulthard 1996; Gibbons 2003), statutes (Bhatia 1993; Gibbons 2003), witness statements and examinations (Cotterill 2003; Heffer 2005), etc. Furthermore, the emergence of a genre-analytic perspective in the 1990s has significantly affected research in languages for specific purposes (LSP) with major repercussions also on the study. However, the existing literature has focused prevalently on prescriptive/normative documents that are characterized by general applicability (see Gotti and Dossena eds. 2001), while limited attention has been given to the analysis of contracts (Trosborg 1995, 1997, 2000; Blom and Trosborg 1992; Frade 2005; Anesa 2006; Bondi and Diani 2010). As Trosborg (1995) points out, contractual communication is unique since the intentions of the parties are expressed onto print with the help of an intermediary learned in the law. Contracts are “operative documents” (Tiersma 1999) in which the relationship between the parties is symmetrical, as both parties have something of interest to the other party (promise / consideration). They create or modify legal relationships between parties.

Moreover, with the exception of few studies, the issues of pragmatics and the use of speech acts in written legal discourse have hardly been considered (Kurzon 1986; Trosborg 1995, 1997; Diani 2001; Cavalieri *forth.*) especially with regard to contracts.

The aim of my paper is thus to further the study of speech acts in written legal discourse dealing in particular with a type of legal document that has received little attention by previous research, the Letter of Intent (LoI), contributing to the existing literature on legal genres. The analysis is focused on modals for socio-pragmatic occurrence and pragmalinguistic realization of potential speech acts basing on the theories on regulative speech acts by Searle (1976) and on legal speech acts by Trosborg (1995).

More specifically, the data will be examined to identify categories of regulative patterns considering both their quantitative presence in the corpus of LoIs and their rhetorical functions. Finally, the results obtained will be compared to those of two reference corpora of Memoranda of Understanding (MoU) (instance of non-corporate agreement) and contracts (corporate agreement) respectively (Cavalieri *forth.*) in order to explore similarities and differences in categories topology and quantitative presence of speech acts.

2. Materials and methods

The analysis will be based on three small corpora, a main corpus of Letters of Intent (LoICorp) and two comparable corpora of Memoranda of Understanding (MoUCorp) contracts (ContrCorp) respectively. The LoICorp is composed of 40 Letters of Intent signed between English-speaking Departments and Universities from the United Kingdom, the United States and Australia, and non-native English-speaking Departments Universities to start the process of creating international nets of research exchanges, and it amounts to 25,129 tokens altogether. For what concerns the two comparable corpora, on the one hand, the MoUCorp consists of 40 Memoranda of Understanding (54,960 tokens) signed by Departments and Universities. On the other hand, the ContrCorp is comprised of 40 contracts (50,664 tokens) of Private Law including Employment Agreements, Land Agreements, Lease Agreements. All the documents included in the three corpora were selected as full texts and were then transformed into the *txt.* format to be easily analysed by corpus linguistic tools (e.g. Wordsmith Tools).

Before moving on to the methodology used for the analysis, a description of the Letter of Intent in the legal context is needed in order to understand the type of document thoroughly. The LoI is a legal document signed between institutions (in our case universities, departments etc.) outlining a bilateral or multilateral agreement before its finalization. LoIs resemble written contracts, but are usually not binding. Many LoIs, however, contain binding provisions such as non-disclosure agreements or a covenant to negotiate in good faith. LoIs signed between universities are preliminary documents to create a network for research cooperation with other institutions, or to begin student and researcher exchanges with international partners. A Letter of Intent differs from a Memorandum of Understanding for one main reason concerning the condition for their validity; an LoI, in fact, outlines the intent of one party toward another with regard to an agreement and may only be signed by the party expressing that intent, whereas an MoU must be signed by all parties to be valid.

As for methodologies, the study relied on an integration of corpus and discourse analysis using both quantitative and qualitative methods to analyse the three corpora (LoICorp, MoUCorp and ContrCorp). More specifically, four main steps were followed. Firstly, all the occurrences of regulative acts were isolated and extracted from the two wordlists of the corpora by means of a computer-assisted analysis performed with Wordsmith Tools version 5.0 (Scott 2008). The speech acts individuated were then analysed considering their pragmalinguistic realization of directives and commissives by which the parties are committed.

Secondly, the selected items were concordanced and all concordances were submitted to manual tagging in order to isolate only relevant speech acts and to specify potentially ambiguous items.

Thirdly, a framework to classify the regulative speech acts and their rhetorical functions was identified following and, at the same time, implementing the model proposed by Trosborg (1995).

Finally, the results obtained by the three corpora were compared and similarities and differences discussed.

In the next section a definition and a model for classification of the regulative speech acts investigated is provided.

3. The classification of regulative speech acts

In his classification, Searle (1976) outlined two major categories of regulative acts: directives, an obligation issued by one party over the other, and commissives, an obligation issued by a party committing him/herself. Due to its legal nature, a contract is “a legally binding agreement imposing [both] rights (*directives*) and obligations (*commissives*) on the parties [...]” (Redmond 1979: 19).

For what concerns the first category, directive speech acts are illocutionary acts by means of which the addresser tries to influence the behavior of the addressee. According to Havertake (1984), directives are *impositive speech acts* defined as follows:

[...] speech acts performed by the speaker to influence the intentional behavior of the hearer in order to get the latter to perform, primarily for the benefit of the speaker, the action directly specified or indirectly suggested by the proposition (p. 107)

As a consequence, a directive is a “face-threatening act“ (Brown and Levinson 1987: 62) as it attempts to exercise power or direct control over the intentional behavior of the addressee. According to the theory of Brown and Levinson (1987), the imposition of directives can be expressed at various degrees going from explicit directive force (“on record”; e.g. imperatives, unhedged performative utterances, the modals *shall*, *must*) arriving to directives issued by making recourse to politeness strategies, i.e. mitigating devices (“off record”; e.g. the modals *can/could* or *will/would* [concerning the ability/willingness of the addressee], *may* [permission], suggestory formulae, statement of wishes/desires/needs of the speaker).

Moving on to the second category, commissive speech acts are ‘convivial acts’ (Leech 1983: 104) which commit the speaker to a certain course of action (Austin 1962: 156). The speaker’s commitment is usually expressed through performatives such as *promise*, *vow*, *pledge*, *covenant*, *contract*, *guarantee*, *swear*, etc., and through the modal will functioning as an implicit performative.

Table 1 shows the classification of regulative speech acts with their linguistic realizations in contracts proposed by Trosborg (1995), which provided a framework for the analysis of regulative speech acts in MoUs.

DIRECTIVES	1. CONSTITUTIVES	Lexical main verb Be-constructed Shall
	2. PERMISSION/RIGHTS	Lexical main verb May Can
	Assignment of benefit/liability Negated assignment of benefit/liability ¹	
	3. OBLIGATION	Are to/ Must/ Shall / Lexical main verb/ Will
COMMISSIVES	4. PROHIBITION	May/Can + neg. Shall + neg. Will + neg.
	5. PROMISES	Promise/ Acknowledge/ Warrant/ Covenant/ Undertake/ Accept etc.

Table 1: Regulative speech acts framework.

4. Results

This section is sub-divided into two main parts. In the first section, the results of the analysis of regulative speech acts in the LoICorp are presented. In the second section, emphasis is laid on the similarities and differences retrieved comparing the results obtained by the investigation of the three corpora.

4.1. Regulative speech acts in the LoICorp

After a first quantitative analysis (wordlist) of the LoICorp, we observed that the total number of regulative speech acts amounted to 465 items.

As a second step, the LoICorp was analysed focusing on the occurrence of directive acts, thus dealing with the sub-categories *constitutives*, *rights*, and *obligations/prohibitions*. Our results highlight a predominance of *obligations* (57.2%) and the most frequent realization of this sub-category is through the use of the modal *will* (40.0% out of the total 57.2%), followed by the modal *shall* with a percentage of 12.5%. The modal *must* and the construction *be + to* (no instances found in the corpus) are the less present covering a percentage of only 2.4%. An explanation for this distribution could be probably sought in the legal nature of the Letter of Intent. In fact, the LoI is a document settled only to express the intent/willingness to converge in a common line of action, to demonstrate a preliminary understanding between the parties. Table 2 shows the distribution of *obligations* in the LoICorp with some instances extracted by the manual tagging of the corpus:

OBLIGATIONS			% per category	% tot
Prohibition	May + neg	2 (0.4)	2.3	
	Can + neg	1 (0.2)		
	Shall + neg	3 (0.5)		
	Will + neg	5 (1.1)		
	ex. Any information gathered in the performance of subsequent Agreement will not be disclosed ... (loi_us_4)			
Obligation	Is/are to	/	54.9	57.2
	Must	11 (2.4)		
	ex. Exchange students must abide by the laws of the host country affecting foreign nationals ... (loi_us_8)			
	Shall	58 (12.5)		
ex. Exchange students shall follow an academic programme developed in consultation with the student's home institution. (loi_uk_6)				
Will	186 (40.0)			
ex. AU will be consulted thoroughly before any such decisions are taken (mou_us_21)				

Table 2: Regulative acts in the LoICorp – obligations

The two classes *constitutives* and *rights* are almost equally present in the corpus with a percentage of 18.1% and 20.0% respectively. Examples in Table 3 show that *constitutives* in LoIs are mainly realized through the construction *be + copula* (11.0% out of 18.1%). As it is possible to observe in the examples provided in Table 3, the main function of *constitutives* is to establish the terms and conditions relating to date, implementation, etc. of a subsequent MoU following the LoI. No instances of constructions with *lexical main verb* and no *predictions* were found in the corpus.

CONSTITUTIVE			% per category	% tot
Statements	Lexical main verb (include/ mean/ apply/exclude, etc.)	/	18.1	
	Be-constructed ex. The Director is responsible for ensuring the implementation of the stated objectives of the ATN. (loi_ aus_3)	51 (11.0)		
	Shall/will ex. This LoI shall be followed by a MoU before...(loi_uk_5)	33 (7.1)		
Predictions	Shall	/	/	18.1
	Will	/		

Table 3: Regulative acts in the LoICorp - constitutives

As far as *rights* are concerned, in the LoI both institutions involved (Universities, Departments, etc.) could grant permission to students and researchers of the other institution. Statements of permission amount to 20.0% of the total number of strategies and they are generally expressed through the modal *may/can* or through lexical verbs such as *permit, allow, give permission/ allowance*, etc. Table 4 provides examples for the sub-category rights:

RIGHTS			% per category	% tot
Permission	Lexical (permit*/allow*/give* permission, allowance etc.) ex. The University of Sidney allows members of the University of Rome “La Sapienza” to collaborate on Australia-wide and international issues and initiatives, while retaining the flexibility to adapt to their individual circumstances. (loi_ aus_4)	12 (2.6)	17.2	
	May/Can ex. Aston University may determine the period of staying of the researcher (loi_uk_7)	58 (11.4) 15 (3.2)		
	Assignment of benefit	BOTH PARTIES ... have full right, power, and authority to execute the LoI on the date signed. (loi_ us_2)	5 (1.1)	
Negated assignment of benefit	neither institution shall enforce criteria for the exchange of faculty or students which would violate ...(loi_uk_3)	8 (1.7)		
Liability	/	/		
Negated limitation of liability	/	/	2.8	20.0

Table 4: Regulative acts in the LoICorp - permissions

Moving on to commissive speech acts, as shown by the LoICorp, they are mainly in the form of promises by which a party commits him/herself before the law. The most frequent items found in the data are the performative verbs *promise, acknowledge, warrant, covenant undertake, accept* (4.7%).

4.2. Regulative speech acts in the MoUCorp and in the ContrCorp

4.2.1. Regulative speech acts in the MoUCorp

Observing the wordlist of the MoUCorp, we highlighted a presence of 1799 regulative speech acts.

The instances of directive acts were then analysed considering the sub-categories *constitutives*, *rights*, and *obligations/prohibitions*. As it is for the LoICorp, the results show a predominance of *obligations* (63.3%) mainly realized through modal *will* (48.5% out of the total 63.3%) as a first instance, and by the modal *shall* with a percentage of 10.4% as a second instance. The modal *must* and the construction *be + to* (no instances found in the corpus) are far less present in the corpus with a percentage of only 2.6%. The MoU and the LoI have the same legal nature. Indeed, the MoU as well represents a type of agreement only outlining the interest of the parties to converge in common research and teaching activities, showing intents and preliminary understanding between the parties. Table 5 shows the presence of *obligations* in the MoUCorp providing also some examples extracted by the concordances:

OBLIGATIONS			% per category	% tot
Prohibition	May + neg	6 (0.3)	2.8	
	Can + neg	/		
	Shall + neg	12 (0.7)		
	Will + neg	32 (1.8)		
	ex. Any research information will not be disclosed ... (mou_us_4)			
Obligation	Is/are to	/	60.5	63.3
	Must	48 (2.6)		
	ex. Administrative staff must respect the laws of the host country .(mou_us_8)			
	Shall	118 (6.6)		
	ex. Exchange students shall abide by the rules of hosting institution. (mou_uk_6)	50 (2.8)		
Will	873 (48.5)			
ex. AU will be informed before any such decisions are taken (mou_us_21)				

Table 5: Regulative acts in the MoUCorp - obligations

As far as the categories *constitutives* and *rights* even in the MoUCorp they are almost equally present with a percentage of 17.6% and 16.7% respectively. As shown by the examples provided in Table 6, *constitutives* in the form of statements serve the purpose of establishing the terms of the MoU and spelling out conditions relating to date, implementation of the agreement, etc. The instances found in the MoUCorp typically involve a lexical verbs (162 instances out of 234 - 10.6%) such as *include*, *mean*, *apply*, *exclude*, etc. and the construction *be + copula* (70 instances out of 234 - 4.6%).

CONSTITUTIVE			% per category	% tot
Statements	Lexical main verb (include/ mean/ apply/exclude, etc.) ex. This Memorandum of Understanding applies to a partnership established between (the School of XXXX), Aston University and (Partner Institution) (mou_uk_5)	162 (10.6)	12.8	
	Be-constructed ex. The Director is responsible for any change in the implementation of the present MoU. (mou_aus_4)	70 (4.6)		
	Shall/will ex. This Memorandum of Understanding <i>shall enter</i> into force at the date of the last signature of all the parties and shall, subject to the provisions of Clause 13, continue in force until 31 August 2007. (mou_uk_7)	2 (0.1)		
Predictions	Shall Will	90 (4.8) /	4.8	17.6

Table 6: Regulative acts in the MoUCorp - constitutives

When dealing with the category *rights*, it is possible to observe that statements of permission amount to 13.6% of the total number of items of the other sub-categories. Similarly to the LoI, *permissions* are generally expressed through the use of the modals *may* and *can* or through the use of lexical verbs such as *permit*, *allow*, *give permission/allowance*. Table 7 provides examples for the sub-category *rights*:

OBLIGATIONS			% per category	% tot
Permission	Lexical (permit*/allow*/give* permission, allowance etc.) ex. The ATN's structure allows members to collaborate on Australia-wide and international issues and initiatives, while retaining the flexibility to adapt to their individual circumstances. (mou_aus_4)	14 (0.8)	13.6	
	May/Can ex. Durham University may determine the period of staying of the researcher (mou_uk_7)	183 (10.2)		
		39 (2.6)		
Assignment of benefit	BOTH PARTIES ... have full right, power, and authority to execute this Agreement on the date signed. (mou_us_4)	17 (0.9)		
Negated assignment of benefit	neither institution shall impose criteria for the exchange of faculty or students which would violate ...(mou_us_8)	12 (0.7)		
Liability	/	/		
Negated limitation of liability	Neither party shall have any liability to the other for any failure to perform any A obligations under this Agreement (mou_us_10)	27 (1.5)	3.1	16.7

Table 7: Regulative acts in the MoUCorp - permissions

The last category *commissives* are mainly in the form of promises and the most frequent items found in the data are the performative verbs *promise, acknowledge, warrant, covenant undertake, accept* (2.4%).

4.2.2. Regulative speech acts in the ContrCorp

The analysis of the wordlists of the ContrCorp highlighted a presence of 5897 items of regulative speech acts in the data. Observing closely to the occurrences, a predominance of *directives* is absolutely evident (96.6%). As it was for the MoUCorp, the most frequent sub-category of directives was *obligations* with the 67.9%. In order to express obligation in contracts, the modal *shall* is the most frequent item (42.4%). *Shall* is used to express the illocutionary force of an order.

Even when dealing with the sub-category of *prohibition*, the negative version of the modal *shall* is used almost exclusively (5.4% out of 6.2% of the strategies observed). Table 8 shows results and examples for the category *obligation*:

OBLIGATIONS			% per category	% tot
Prohibition	May + neg	50 (0.8)	6.2	
	Can + neg	2 (0.03)		
	Shall + neg ex. The Developer or the Lessor shall not have any civil, criminal, labor or any other type of liability (la_6)	316 (5.4)		
	Will + neg	/		
Obligation	Is/are to	53 (0.9)	61.7	67.9
	Must ex. the other party must receive a copy of the respective testimony.(la_8)	152 (2.6)		
	Shall ex. Landlord and Landlord's agents shall have the right at all reasonable times during the term of this Agreement (la_8)	2500 (42.4)		
	Lexical main verb	260 (4.4)		
	Will	670 (11.4)		

Table 8: Regulative acts in the ContrCorp - obligations

As regards to rights, in contracts there is a symmetrical relation between the two parties, either of which is able to grant permission to the other party. As shown by Table 9, the modal *may* is the almost exclusively used item in the ContrCorp to express permissions.

RIGHTS			% per category	% tot
Permission	Lexical (permit*/allow*/give* permission, allowance etc.)	201 (3.4)	15.6	
	May ex. The Hirer may determine the hiring at any time by giving one month's previous notice [...] (LA_3)	704 (11.9)		
	Can	19 (0.3)		
Assignment of benefit	The rights and obligations of the Company under this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Company (EA_7)	190 (3.2)		
Negated assignment of benefit	The duty to disclose contained in this clause shall not impose on either party any obligation (LA_8)	20 (0.3)		
Limitation of liability	Landlord may dispose of all such personal property...Landlord is hereby relieved of all liability for doing so (la_6)	53 (0.9)		
Negated limitation of liability	Landlord or its agents shall have no liability ...	18 (0.3)	4.7	20.3

Table 9: Regulative acts in the ContrCorp - rights

Constitutive rules have the same role in contracts than in MoUs. In fact, constitutives are used to determine terms (for example, concerning liability) and conditions concerning price, date, amount, etc. Moreover, they give definitions of terms and expressions in the contract or supply information concerning application of these terms. Typical examples found in the ContrCorp are *mean, apply, include, exclude*, etc. (3.6% out of 7.1% of the strategies observed), or constructions with *be + copula* (2.4% out of the 7.1% of the strategies observed). Table 10 summarizes the data giving examples for the category:

CONSTITUTIVES			% per category	% tot
Statements	Lexical main verb (include/ mean/ apply/exclude, etc.) ex. "Accident" includes exposure resulting from a mishap to a conveyance ... (EA_6)	211 (3.6)	7.1	
	Be-constructed ex. Buyer is responsible for all costs of any 'quiet title or other action ... (LA_7)	139 (2.4)		
	Shall/will ex. Any notice shall be deemed to be duly served 48 hours after posting ... (LA_5)	62 (1.1)		
Predictions	Shall Will	77 (1.3) /	1.3	8.4

Table 10: Regulative acts in the ContrCorp - constitutives

As far as commissive acts are concerned, the most frequent items observed in the ContrCorp were the performatives *warrant* and *acknowledge*, whereas the less frequent were *promise* and *covenant*. This category represents only the 3.4% of the total amount of regulative speech acts.

5. Discussing the findings

Comparing the data, a first observation can be made in terms of type of regulative speech acts found in the two corpora. As demonstrated by the analysis, LoIs, MoUs and contracts present the same topology of regulatives, however the occurrence of regulative speech acts in LoIs and MoUs is far less frequent than in contracts (465 items out of 25129 tokens in LoIs vs. 1799 items in MoUs out of 50664 tokens and 5897 items out of 54960 tokens in contracts)

In the second place, it was noted that the category of *directive*, and in particular the sub-category of *obligations*, dominated (LoICorp 57.2%; MoUCorp 63.3%; ContrCorp 67.9%) in the three corpora. However, the most frequent items differ in the three corpora. On the one hand, the modal *shall* is the most used item in contracts (42.4%), on the other hand, the modal *will* resulted to be the most frequent indicator of obligation in LoIs (40.0%) and MoUs (48.5%). The explanation for the less frequent occurrence of regulative acts and for the massive use of the modal *will* is probably to be sought in the legal nature of the Letter of Intent and Memorandum of Understanding, which are a type of documents only highlighting an expression of the willingness to converge in a common line of action, to show intents and preliminary understanding between the parties.

The explanation above is applicable even to *prohibitions* that are far more frequent in contracts (6.2%) than in LoIs (2.3%) and in MoUs (2.8%).

In contrast, the category of *constitutives* is more used in LoIs and MoUs (LoICorp 18.1% and MouCorp 16.7% vs. ContrCorp 8.4%) and this fact can be probably be explained by the institutional role played by these types of documents in which all terms and conditions are settled preliminarily.

6. Notes

¹ The sub-category Assignment of Benefit/Liability involves a dual function: it distributes a right to whomever is entitled to it and a latent duty on the party not entitled to it – irrespective of which party makes the utterance. Negated Assignment of Benefit/Liability is a pragma-semantically related version of this sub-category, in which case the right assigned is some kind of debt reduction, restriction as to commitment etc. (e.g. neither party shall be liable for...) (Trosborg 1995: 39).

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