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Understanding Justice

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was a two-year (2014–2016) multi-partner project examining aspects of spoken language interpreting in mediation and civil justice in the European Union.

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Editor: Brooke Townsley

Understanding Justice

an enquiry into
interpreting in civil
justice and mediation

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Programme of the European Union



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Foreword

Brooke Townsley

1. The Understanding Justice Project

Since the first DG Justice-funded projects of the late 1990s and the early years of the new millennium, interpreting and translation in criminal justice have received significant attention from academics and practitioners in a range of EU-funded projects. In total, 20 EU-funded projects examining aspects of spoken and sign language interpreting and written translation in criminal proceedings are listed by the European Legal Interpreters and Translators Association (EULITA), (itself an EU-funded initiative).¹ A common feature of these projects is their emphasis on the establishment of professional standards for interpreting and translation in criminal justice proceedings. Civil proceedings, however, are an equally important area of legal activity in the European area of justice, and as Vanden Bosch and van der Vlis point out in chapter one of this volume, in a genuine European area of justice, language difference should be no more a barrier to justice in civil procedures than it is in criminal law. For this reason, language difference and the methodologies used to manage language difference in civil law require the same attention as accorded them in criminal justice.

With this in mind, the Understanding Justice project came together in 2014 to address the subject of interpreting in civil justice and in mediation as an alternative to court-based civil proceedings. Between 2014 and 2016, the 14-person project group examined a range of aspects of interpreting in civil justice and mediation, including legislation regarding rights to interpreting and translation in civil justice, civil justice and mediation interpreting competences, self-assessment for interpreters, the dynamics of mediation conducted through interpreters or bilingual mediators, the ethics of mediation interpreting and the use of interpreters in mediation in different parts of the EU.

The results are presented in this report. In 'Legal Underpinnings for Legal Interpreting & Translation (LIT) in Civil Proceedings and Mediation (ADR)', (part one, chapter one) Vanden Bosch and van der Vlis undertake a detailed examination of international conventions and the EU *Acquis Communautaire* with a view to establishing how and to what extent parties to civil disputes in the EU can benefit from the same legislative safeguards enjoyed by defendants in criminal proceedings.

In 'Legal Interpreting Competences in Civil Justice and Mediation' (part one, chapter two), starting with the interpreting competences required of legal interpreters in criminal justice, Hertog examines the specific competences required for interpreting in civil justice proceedings. He then turns to the case of interpreting in mediation, a form of Alternative Dispute Resolution (ADR) of increasing significance in civil dispute resolution, and sets out the specific interpreting competences required by this setting. The phenomenon of bilingual mediation and its efficacy for the management of language difference also receives attention in this chapter.

Part Two extends the examination of interpreting in mediation. In 'Methodology' (part two, chapter one) Sandrelli outlines the methodology employed in the design of an online questionnaire circulated among mediation practitioners and organisations in six EU states (Belgium, England and Wales, Italy, Poland, Romania and Spain). Data collected in these states are then presented in the 'Country Reports' (chapters two to seven) allowing for a comparison of practice in the management of language difference in mediation. Ethical issues arising in mediation using interpreters are addressed by Monacelli in part two, chapter eight while in part two, chapter nine 'Videoconferencing as a Tool for Bilingual Mediation' Braun draws on work on the use of video conferencing in criminal justice undertaken by the AVIDICUS projects to examine the possibilities offered by the use of video conferencing as a tool in interpreted mediations.

The use of self-assessment methodologies for interpreters to acquire the additional competences required for interpreting in mediation is presented by Maxwell-Hyslop (part three, chapter one), who introduces the concept of structured self-assessment as a part of Continuing Professional Development (CPD) and provides guidelines on how to use self-assessment exercises. The chapter links to the online self-assessment tool provided on the Understanding Justice website, available at <http://understandingjusticeproject.com/assessment/>. The report closes with concluding observations and some recommendations for mediators considering working through an interpreter.

In addressing the matter of language difference and the use of interpreters in mediation, the Understanding Justice project represents in some ways a step into the unknown. Just as the goals of mediation (the achievement of a dispute resolution based on coming to a mutual agreement) differ from a court-based adjudication, so the communicative dynamics are different enough to present a profound challenge to the interpreter. The exact nature of this challenge, however, has not received systematic attention and remains largely unrecognised. There is no clear understanding on the part of either mediators or interpreters of what it means to interpret in mediation, how this should be managed or how an interpreter can be

used to best effect. This leads to *ad hoc* arrangements made anew for each interpreted mediation and to sub-optimal experiences of using an interpreter. It has also encouraged a focus on bilingual mediation in preference to third party interpreting. The use of a dual-role bilingual mediator, however, also raises significant questions for the mediation process, a point picked up by many of the contributors to this volume.

The Understanding Justice project has taken initial steps towards illuminating these issues. As a project taking first steps in a previously under-explored realm, it raises more questions than it can conclusively answer. We believe, however, that the raising of questions and the suggestion of provisional answers is a key stage in the development of coherent and long-lasting understanding and it is in this spirit that the efforts of the Understanding Justice project group are presented.

2. Endnotes

1 EULITA [online] [accessed 11/6/ 2016] <http://www.eulita.eu>

Part 1

Legal Underpinnings for Legal Interpreters & Translators (LIT) in Civil Proceedings and Mediation (ADR)

Yolanda Vanden Bosch and Evert van der Vlis

1. Introduction

1.1. In General

Language in legal proceedings is critical. In all legal domains, immigration law, administrative, civil and criminal law all persons need to understand the legal proceedings and legal language, in order to participate as a party in the procedure. However, the level of understanding of legal language is very low for many citizens.¹

The population of migrants all over the European Union is growing constantly and recently there has been a new flow of refugees to Europe.² All these will be confronted directly with the language of legal proceedings and specific legal language (terminology), a form of language which often seems incomprehensible even for the native speaker, whether litigant, suspect or victim.³ This is clearly a practical disadvantage. Dialogue and discussion in all legal matters will also become more complex because of its increasingly multilingual character. In this complex, multilingual and multicultural environment, only high-quality legal translating and interpreting will be a guarantee of a fair trial for those who do not speak the language of the proceedings.

International and national legislation, and also recently the European Union, have raised awareness of human rights and more specifically the problem of language barriers in criminal procedures. Different international instruments already refer explicitly to language and communication problems in criminal procedures and protect the other language-speaking suspects, victims and witnesses in criminal hearings and pre-trial procedures and special attention is given to children's rights and language problems. The same level of attention has not, however, been paid to language barriers in civil law, which governs relations between citizens, private and government bodies, associations, companies, their goods and their rights. Within the European Union and worldwide, however, there has been an increase in cross-border disputes, as well as in family, liability and commercial cases, with the

concomitant rise in parties using different languages. Just as in Criminal law, in a genuine European area of justice, language should not be a barrier in civil procedures or alternative dispute resolution (hereafter ADR).

There are also different pathways for a litigant to find a solution in a civil dispute (civil, commercial, or social). There is the traditional dispute resolution pathway of court proceedings but an alternative of growing significance in civil disputing is the pathway of alternative dispute resolution (ADR), such as negotiation, conciliation, facilitation, mediation, and arbitration and complaint committees. Mediation, as a form of ADR, is even used in criminal matters, such as child abduction, because victims often start civil procedures to claim compensation for damages caused by crimes. Mediation is used to handle the civil aspects of the crime.

In 2014, the Understanding Justice project set out to examine the phenomenon of interpreting in civil justice, including ADR. In this chapter, we review the legal foundations for interpreting in these types of proceedings, starting with international legislation and looking for those rules that offer protection to persons without the ability to speak the language of civil procedure or ADR, including mediation.

1.2. The Understanding Justice Project

In the modern multicultural societies of Europe, solicitors, company lawyers, magistrates and judicial officers are confronted more and more often with the problems of language minority litigants, in all legal domains: criminal, civil, commercial, social and administrative. Furthermore, although there are no exact statistics available on the number of “cross-border” divorces and cases of disputed parental responsibility within the European Union, it is safe to say that a considerable number of citizens are affected. As an example, approximately 15 per cent of divorces in Germany each year (approximately 30,000 couples) concern couples of different nationalities. In addition, hundreds of children are victims of abduction within the European Union each year. Since 1 March 2005, the Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003) has been in force, a regional instrument that is binding on all Member States of the European Union. In 2008, out of a global total of 1,961 return applications, 985 were received by Brussels II a States (50%). 706 of these were made by fellow Brussels II a States and so the Brussels II a Regulation applied to 36% of applications globally in 2008 and 72% of applications received by Brussels II a States.⁴

For a statistical analysis of applications made in 2008 under The Hague Child Abduction Convention, Parts I-III see the website of The Hague Conference on

Private International law (HCCH).⁵ In the Netherlands, the number of family law cases referred by court to mediation has increased again, after a decline from 2010, to more than 2,300 cases in 2014.⁶

Evidently, different languages and cultures add new dimensions that need to be taken into account when considering the methodology of civil court proceedings and ADR. Language and cultural barriers, linked to diversity, may affect the result of the litigation. This highlights more and more the requirement for the assistance of an interpreter. However, whereas several international conventions - and in the last few years EU-legislation - have focussed on the right to interpretation and translation in criminal cases,⁷ legislation providing foundations for the right to interpretation and translation in the much higher number of civil justice proceedings and in ADR does not exist in the EU *acquis* in the same way. However, equality of arms has to be not only a criminal, but also a civil law concern.

1.3. Civil Judicial Proceedings

In all 47 Member States of the Council of Europe⁸, the number of non-criminal cases before court is much higher than the number of criminal cases. In Belgium, for example, in 2010, 690,000 cases were heard before civil and commercial courts, and there were 3,117 mediations (including family, civil and commercial and social matters).⁹ In 2012, 782,164 civil and commercial litigation cases (first instance courts) were listed,¹⁰ as against 41, 114 incoming criminal cases only (Table 9.15).

Many kinds of non-criminal disputes have to be resolved, depending on the court system and the legal area (civil, commercial, social, administrative proceedings). Lawyers who speak the language of the court can nearly always represent litigants but if the lawyer does not speak the language of his client or if they share no common language, language problems are present at the very first stage. There can also be language problems before the court, as litigants (native or non-native) can choose to defend themselves before court without a lawyer (if allowed). If the civil procedure is not a written procedure or if a personal appearance of the parties is required before court, with or without the lawyer, when witness hearings are organised for a person who does not speak the court's language, or in cross-border disputes in civil and commercial matters, language will be a serious barrier to the fair conduct of the proceedings and interpretation will be required. The interpreter, moreover, is confronted with a wide range of legal terms, and sometimes with highly emotional confrontations between parties, as in divorces, child abduction cases, or environment, media or labour cases etc, all of which require a high degree of professionalism and competence to manage.

1.4. ADR

A much smaller number of cases¹¹, but steadily growing¹², can be found under the ADR umbrella, varying from country to country, and legal area: negotiation, conciliation (see also Uncitral)¹³, mediation (see also EU)¹⁴, arbitration, Ombudsman services and neighbourhood mediation in cities all come into this category. In all these cases there is also the need for contact between the parties and their lawyers to prepare the case and provide assistance during ADR proceedings. The European Union actively promotes methods of alternative dispute resolution (“ADR”), such as mediation, and the Mediation Directive 2008/52/EG of the European parliament and the Commission Report of 21 May 2008 on certain aspects of mediation in civil and commercial matters were due to be implemented by May 2011.¹⁵

In mediation, the parties (with or without a lawyer) to a dispute attempt on a voluntary basis to reach a settlement of their dispute between themselves, with the assistance of a mediator. The parties negotiate with each other and try to find solutions that are acceptable to all parties in the conflict. The mediator (an impartial person) facilitates communication between the parties, guides the conversations and monitors the process in an efficient and equitable manner with each party searching for a solution that is acceptable to all. He takes no decision, however, leaving this to the parties themselves. Often in mediation, the parties work with a bilingual mediator, two bilingual mediators, or through an interpreter.

In conciliation, the conciliator (an impartial person) assists the parties (with or without a lawyer) during the negotiations and gives advice. He makes direct proposals, and in contrast to the mediator he plays a more direct role in the resolution of the dispute. In arbitration, however, a judgment is made by a non-governmental judge chosen by the parties (with or without lawyers). In all these situations, however, language plays a crucial role.

2. Equality of Arms and Fair Trial in Civil Proceedings

In principle, access to justice and language is a matter for domestic law and normally the language of the country will be the language of the court. A multilingual country such as Belgium has specific rules for the language(s) of the court and, when needed, interpretation and/or translation will be necessary.¹⁶ The cornerstone of legal proceedings in any system, moreover, is the right to a fair trial for everyone. This includes the right to participate fully in adversarial proceedings. Therefore, equality of arms must be ensured for every party to a dispute, even when he does not speak the language of the legal proceedings.

However, unlike in criminal cases, the costs for interpretation or translation in civil cases will be mostly borne by the parties, not the State. In certain circumstances, however, as in some cases that are eligible for legal aid, there will be the right to a free interpreter/translator. In order to distinguish the existence of rights to interpreting and translation in civil procedures, a key part of equality of arms for all parties, it is important, therefore, to look at the legal framework, and international and national legislation on the right to interpretation and translation in legal proceedings.

2.1. United Nations

International underpinnings for the right to interpretation and translation in legal proceedings are part of the founding Charter of the United Nations, a universal international organisation founded in 1945, currently with 193 Member States. The founding Charter referred to the promotion and protection of human rights as one of the key purposes of the United Nations. In the Universal Declaration of Human Rights (1948), the UN worked out a broad range of legal instruments on the protection of human rights worldwide, as follows.

2.1.i. The United Nations Charter¹⁷

According to article 13, the General Assembly of the United Nations Organization shall initiate studies and make recommendations for the purpose of:

- a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; and
- b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, *language*, or religion (emphasis added).

The Charter requires the Organization to “promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, *language*, or religion” (art. 55/c, emphasis added).

2.1.ii. The Universal Declaration of Human Rights (UDHR)

The 1948 Universal Declaration of Human Rights (UDHR)¹⁸ was a milestone document in the history of human rights, although it was not a legally binding text for the Member States. Article 2 of the Declaration of Human Rights repeats the principles of the UN Charter, in the same language, declaring that everyone

is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (emphasis added).

Article 10 mentions that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.

2.1.iii. The International Covenant on Civil and Political Rights (ICCPR)

These rights expounded in the Universal Declaration were further worked out in the International Covenant on Civil and Political Rights (ICCPR)¹⁹, and regionally in the European Convention on Human Rights (see *infra*). According to article 14.1 ICCPR, all persons shall be equal before the courts and tribunals. More specifically, in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, the ICCPR stated that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial judge. Also, in the determination of any criminal charge against him, the ICCPR states that everyone shall be entitled to the following minimum guarantees, in full equality: '(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court' (art. 14.3. (f)).

Although the right to an interpreter is specifically mentioned in criminal cases, the Covenant demands a fair trial for all persons and that everyone shall be equal before the law. This means that the party must be able to communicate and to be understood in pre-trial and court proceedings, and that communication must be possible with his lawyer. Therefore, interpretation shall be necessary in pre-trial and court proceedings.

Art. 26 ICCPR states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to the Optional Protocol to the International Covenant on Civil and Political Right,²⁰ an action against a State Party is possible from individuals subject to its jurisdiction who claim to be a victim of a violation by that State Party of any of the rights set forth in the Covenant. This means that such an action is also possible on grounds of language equality.

2.1.iv. The UN Human Rights Committee (UNHRC)

The UN Human Rights Committee²¹ states the principle of equality between parties also applies to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. In exceptional cases, it might also require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined. It describes the rights to a fair trial and the assistance of a lawyer and interpreter and to the translation of written documents. Also mentioned is the right to have adequate time and facilities for the preparation of a defence and the right to communicate with counsel of their own choosing. Communication with counsel can only be assured, however, if a free interpreter is provided during the pre-trial and trial phase.

The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court is provided for by article 14, paragraph 3 (f), which enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.

2.1.v. Convention on the Rights of the Child (CRC)

In criminal cases, according to article 40.1 of the Convention on the Rights of the Child (CRC)²², the States Parties recognise the rights of every child alleged as, accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society.

Art. 40 par.2/vi mentions the right to the free assistance of an interpreter if the child cannot understand or speak the language used. For children these rights are explicitly mentioned in this UN-Convention.

Art. 12 par. 2 of the Convention on the Rights of the Child (CRC) states that children have the right to be heard in all judicial and administrative procedures that can be realised with a representative such as a lawyer. Of course, such children must have the possibility to communicate with their representative, or to answer questions directly. If necessary, they must therefore have the right to a competent interpreter

for this communication as well as in court.

The Convention further stipulates in art. 9.1 CRC that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. According to art. 9.2 CRC in any of those proceedings, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

States Parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child (art. 12.1 CRC). For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (art. 12.2 CRC).

Art. 20 CRC states that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State (para.1). States Parties shall in accordance with their national laws ensure alternative care for such a child (para.2) and such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and *linguistic background* (para.3)²³ (emphasis added).

To fulfil those rights, there should of course also be the right to an interpreter, if necessary.

2.1.vi. International Convention on the Elimination of All Forms of Racial Discrimination (CERD)²⁴

The CERD states that in compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: the right to equal treatment before

the tribunals and all other organs administering justice (art. 5). This covers criminal and civil proceedings, and all ADR procedures linked to a court proceeding.

2.1.vii. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

In criminal matters the UNODC, the United Office on Drugs and Crime, worked out Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.²⁵ Principle 6 states that States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status. Cfr guideline 2, 42 (d) states that information on the rights of a person suspected of or charged with a criminal offence in a criminal justice process and on the availability of legal aid, should be provided in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity. Further guidelines describe the right to information in their language (3c, 4e, 5g). This may include, but is not limited to, requiring judges and prosecutors to explain their rights to them in clear and plain language. Especially regarding children, guideline 10e mentions that information on legal rights must be given in a manner appropriate for the child's age and maturity, in a language that the child can understand and in a manner that is gender- and culture-sensitive. Provision of information to parents, guardians or caregivers should be in addition to, and not an alternative, to communicating information to the child.

Just as in criminal matters, where suspects receive information and consultation in their own language, victims, (who always have the right to lodge a civil demand for compensation) should have the same rights as a minimum.

2.1.viii. Human Rights Committee, Special Rapporteur on Extreme Poverty and Human Rights

The United Nations gives special attention to persons living in poverty. Art. 14, par. 1 ICCPR guarantees in general terms the right to equality before courts and tribunals. The Human Rights Committee states that this right not only applies to the courts and tribunals addressed in art.14, 2 but must also be respected whenever domestic law entrusts a judicial body with a judicial task.²⁶

Magdalena Sepúlveda Carmona (Special Rapporteur on extreme poverty and human rights) analyses the obstacles preventing poor people's access to justice, which is a fundamental right in itself and essential for the protection and promotion of all other civil, cultural, economic, political and social rights.²⁷ Her report underlines in para. 10 that the principle of equality and non-discrimination obliges States to take measures to ensure that all individuals are entitled to equal access to

judicial and adjudicatory mechanisms without distinction, including on the basis of language. All parties in judicial or legal proceedings are to be treated without any discrimination. The principle of equality and non-discrimination extends to preventing discrimination on the basis of social and economic status, as implied in the phrase “other status”.²⁸

The report states that certain groups, which suffer from structural discrimination and exclusion and that are disproportionately represented among the poor, particularly ethnic and racial minorities, migrants and indigenous peoples, encounter additional barriers to accessing justice (para.18). Simply making information available is not sufficient (para.27). Furthermore, it is stated that information may only be available in written format, thus creating obstacles for those with low levels of literacy and persons with disabilities, or may only be published online or in commercial newspapers, or only in one official language. By making information available, States must take into account, in addition, the difficulty created by linguistic barriers, along with social, economic and structural barriers. Information on access to justice is still only available in the official languages.²⁹

The report also refers to ‘Differences in language and culture’, in section ‘E/ Structural problems of judicial processes’. Without the resources to retain private legal assistance, and with restricted access to legal aid (see above), persons living in poverty are frequently forced to navigate the judicial system alone. In doing so, they encounter, in addition to the barriers listed above, a complex labyrinth of laws, traditions and interactions, with copious paperwork, the use of legal jargon and mainstream languages, and restrictive time limits, all of which can deter the poor from seeking justice under formal systems and impede fair outcomes (para. 70).

Requirements that demand a high level of evidentiary proof before civil claims can have a disproportionate impact on the poor, who are hampered by their lack of financial resources, time and understanding of the law and of legal processes. Collating evidence, obtaining expert opinions and preparing forms in the correct language can be an almost impossible process without the assistance of a competent legal representative (para.73).

When this competence does not include knowledge of the language spoken by the client, it is evident that free interpretation and translation should also be provided.

Furthermore, para. 75 stipulates that while many people find it difficult to understand legal or judicial terminology, the complexities increase for many persons living in poverty in multilingual and multi-ethnic societies where legal proceedings are often conducted in a language that they do not understand. Despite States’ obligations to

ensure that individuals facing a criminal charge have access to a free interpreter (International Covenant on Civil and Political Rights, art. 14.3 (f)), the report notes in para. 77 that this service is often limited, unavailable or reserved for those who speak a foreign language, rather than a minority language or local dialect, and is rarely provided in civil cases. It further states in para. 77 that the issue of language disproportionately disadvantages women, who are not only less likely to speak the predominant language and require an interpreter, but who are also vulnerable to abuse or exploitation by interpreters, whose cultural prejudices may inform their translation.

The report concludes that States should take positive measures to raise the capacity of poor and disadvantaged groups to ensure that they have full understanding of their rights and the means through which they can enforce them (para. 96). They should actively disseminate legal and judicial information, for example about laws, legal decisions and policy decisions, without charge and in multiple formats and languages. Regarding differences in language and culture, the report concluded that States should ensure that, in linguistically diverse societies, court processes operate in languages used by the poorest communities where necessary and can adapt to intercultural communication, and should provide free interpreters in civil and criminal cases for those who require but cannot afford them (para. 96).

2.1.ix. The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking

The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking³⁰ notice that States should make effective provisions for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support sufficient to meet their immediate needs.³¹ States should ensure that entitlement to such information, assistance and immediate support is not discretionary but is available as a right for all persons who have been identified as trafficked. Guideline 6, protection and support for trafficked persons (para. 5), states that States should provide trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand. States and, where applicable, intergovernmental and non-governmental organisations, should also consider ensuring that victims of trafficking have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible. These remedies may be criminal, civil or administrative in nature. They must provide information as well as legal and other assistance to enable trafficked persons to access remedies. The procedures for obtaining remedies should be clearly explained in a language that the trafficked person understands (Guidelines 9, access to remedies). Trafficked persons seeking to access remedies should be provided with

necessary assistance to this end, including social assistance, free and qualified legal aid and representation, and, where necessary, qualified interpreters, regardless of their immigration status (guideline 9/iii).

2.2. Council of Europe (COE)

The Council of Europe (1949), consisting of 47 Member States including the 28 EU Member States, has been, since 1953, the leading human rights organisation in Europe. The Member States have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law, with its own control organism regarding implementation, the European Court of Human Rights. The Council of Europe promotes human rights through international conventions.

2.2.i. The European Convention on Human Rights (ECHR)³²

Article 6 of the ECHR guarantees the right to a fair trial. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (art. 6.1 ECHR). The right to a fair trial is guaranteed in both civil and criminal proceedings. The right to legal aid is vital to guarantee the right to a fair trial. In civil cases the European Court of Human Rights noted the importance of the right to legal aid where the absence of legal support would make any equality of arms illusory or it would effectively deprive an applicant of access to the proceedings as such.³³ Where the ECHR does not explicitly provide for the right to free legal assistance for civil cases, legal aid for indigent litigants has to be possible in some circumstances, e.g. *Airey v Ireland*.³⁴ States are required to guarantee to every individual an “effective right” of access to the court in determination of his or her “civil rights and obligations.”³⁵ The possibility of appearing in person in the proceedings would not satisfy the requirements of the Convention if it cannot be reasonably expected that the person will be able to effectively represent her/himself. Of course, a non-native speaker with the right to legal aid must also have the possibility to communicate with his lawyer and in the court proceedings, in criminal as in civil settings. The right to legal aid will also include the right to free assistance of an interpreter. Without such a right, there is no guarantee of fair trial and equality.

A fair trial will only be guaranteed for a non-native speaker when he can understand the legal proceedings and can communicate within them.

Article 6, para. 2 prescribes in more detail the minimum rights for everyone charged with a criminal offence, i.e. to be informed promptly, in a language, which he understands, and in detail, of the nature and cause of the accusation against him, and to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Whereas minimum rights for criminal procedures are an obligation, in civil and administrative cases, the obligation is more general, but it still exists. Article 14 contains a prohibition of discrimination on any grounds, such as language, among others. It is clear therefore that the right to a fair trial has to be guaranteed even in civil proceedings, without discrimination on language grounds. If necessary interpretation or translating should therefore be guaranteed.

As the rights mentioned in art.6 §3 are 'a choice' of elements of a fair trial, it is not surprising that the Court during an assessment under Article 6 § 1 also applies the elements, *mutatis mutandis*, step by step to civil matters³⁶ even if they are originally intended for criminal trials.³⁷

The organisation of an efficient court interpretation system is part of a fair and high quality court system. The ECtHR has already dealt in different cases with discussions about the assistance of an interpreter in criminal cases (right to an interpreter, place and timing, restrictions, free/costs, quality).³⁸ In *Kamasinski v. Austria*,³⁹ the ECtHR stated that in view of the need for the right guaranteed by art. 6.3.e to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.

The Court stated that the assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.⁴⁰ In *Baytar v. Turkey*, the Court observed that the judge apparently failed to verify the language skills of the interpreter, who was simply a member of the applicant's family waiting in the corridor.⁴¹ In *Cuscani* the Court stated that it is true that the conduct of the defence is essentially a matter between the defendant and his counsel, whether the counsel is appointed under a legal aid scheme as in the applicant's case or is privately financed. However, the ultimate guardian of the fairness of the proceedings was the trial judge, who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant.⁴² It further observes that the domestic courts have already taken the view that, in circumstances such as those in the instant case, judges are required to treat an

accused's interest with "scrupulous care".

In civil cases, judges are also required to act in the interest of the parties before them, and as ultimate guardian to decide whether interpretation is needed when a non-native party comes before court. Equality of arms must be realised in civil cases as well.

2.2.ii. Resolution (76) 5 on Legal Aid in Civil, Commercial and Administrative Matters⁴³

This resolution recommends that governments of Member States accord, under the same conditions as to nationals, legal aid in civil, commercial and administrative matters, irrespective of the nature of the tribunal exercising jurisdiction, and this to natural persons being nationals of any Member State and to all other natural persons who have their habitual residence in the territory of the state where the proceedings take place.

Also important are two Resolutions of the Committee of Ministers of the Council of Europe. Resolution (78) 8 (art. 3)⁴⁴ states that legal aid should be provided for all the costs necessarily incurred by the assisted person defending his legal right, including the translation costs. Recommendation N° R(81)⁴⁵ on measures facilitating access to justice, applying to civil, commercial, administrative, social and fiscal matters requires that the Member States should pay particular attention to the problems of interpretation and translation and ensure that persons in an economically weak position are not disadvantaged in relation to access to the court or in the course of any proceedings by their inability to speak or understand the language of the court.

2.2.iii. The European Agreement on the Transmission of Applications for Legal Aid (1977)⁴⁶

This agreement concerns the right to legal aid. Every person who has his habitual residence in the territory of one of the Contracting Parties and who wishes to apply for legal aid in civil, commercial or administrative matters in the territory of another Contracting Party may submit his application in the State where he is habitually resident (art. 1). The Explanatory Memorandum of the European Agreement of the Transmission of Applications for Legal Aid (1977)⁴⁷ concerns applications for legal aid in civil, commercial or administrative matters made by persons who are habitually resident in another state, and mentions that a failure to understand the language used by the court is a serious obstacle to access justice and that the state should therefore take measures to remedy this situation. Provision should be made not only for assistance by interpreters during the hearings but also for information to be given to the person concerned with how to obtain translations of documents. It would also be helpful to prepare foreign-language translations of documents giving procedural information.

The preamble of the Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid⁴⁸ underlines that it is desirable to improve the efficiency of the operation of the Agreement and to supplement it in certain aspects, in particular as regards questions relating to mutual assistance between central authorities and to the communications between lawyers and applicants for legal aid. The preamble refers to Resolution (76) 5 on legal aid in civil, commercial and administrative matters.⁴⁹ Further underlined is the need for applicants for legal aid to be able to communicate with their lawyers, not only in courts but also before commencing judicial proceedings. Of course, in such cases, it is possible that interpretation is necessary. Art. 3 specifically concerns communication between lawyers and applicants. The requested Party shall ensure that lawyers appointed to represent such applicants communicate with these applicants in a language readily understood by them, or ensure that costs for translation and/or interpretation of the communications between lawyers and applicants are covered (art.3§1). Where it is not practicable to apply this first paragraph, the requested Party shall provide appropriate means to ensure the effective communication between lawyers and applicants (art.3§2).

2.2.iv. Recommendation No R (84) 4 of the Committee of Ministers of the Council of Europe on parental responsibilities⁵⁰

The Recommendation underlines that any decision of the competent authority concerning the attribution of parental responsibilities or the way in which these responsibilities are exercised should be based primarily on the interests of the child. However, equality between parents should also be respected and no discrimination should be made, in particular on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (principle 2). The child should be consulted if their degree of maturity with regard to the decision so permits (principle 3). An identical principle is found in Recommendation No R (87) 6 on foster families (principle 7) and Resolution (77) 33 of the Committee of Ministers of the Council of Europe on the placement of children (encourage the participation of children in the management of their placement and give them the opportunity to discuss their situation progressively as they mature in understanding). This means that the assistance of an interpreter will be necessary, if needed, for the consultation to take place.

2.2.v. The Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice and the Explanatory Memorandum⁵¹

These guidelines are the Council of Europe's direct response to Resolution No. 2 on child-friendly justice adopted at the 28th Conference of European Ministers of Justice.⁵² They propose solutions to assist Member States in establishing judicial systems responding to the specific needs of children, with a view to ensuring children's effective and adequate access to and treatment in justice, in any sphere – civil, administrative or criminal.

The guidelines state that the rights of children shall be secured without discrimination on any grounds such as sex, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background or status of their parents (CH III/D.1). Guideline 2 on information and advice reaffirms the right of the child to receive the information and advice in understandable language, adapted to the child's age, maturity and abilities.⁵³

Chapter IV stresses the importance of child-friendly justice before, during and after judicial proceedings, and its importance for all judicial proceedings. A general element of child-friendly justice is the provision of information and advice. There is the obligation to provide information on all charges against the child, promptly and directly, both to the child and to the parents, and on the rights the child shall enjoy in such cases and about prosecutorial decisions.⁵⁴ When a judgment is delivered, the motivation for that judgement ought to be provided in a way that the child can fully understand.⁵⁵ The Explanatory Memorandum further states that the information may have to be translated into a language the child understands (a foreign language, Braille or other) as is the case for adults, and the formal legal terminology will have to be explained so that the child can fully understand its meaning. The information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender- and culture-sensitive (Guideline IV.A.2).

The Guidelines request the establishment of a common assessment framework for professionals working with or for children (such as lawyers, psychologists, physicians, police, immigration officials, social workers and mediators) in proceedings or interventions that involve or affect children to provide any necessary support to those taking decisions, enabling them to best serve children's interests in a given case (Guideline 17). According to the Explanatory Memorandum, however, only a few of them have knowledge of children's rights and procedural matters in this context.⁵⁶ On the other hand, not mentioned is the need for special training for the interpreters working with children.

For all this information, if necessary, the assistance of an interpreter should be provided. Legal interpretation and translation have to be included in the assessment frameworks.⁵⁷

2.2.vi. European Convention on the Exercise of Children's Rights

The scope of this convention⁵⁸ is family proceedings, in particular those involving the exercise of parental responsibilities, such as residence and access to children. Chapter II concerns procedural measures to promote the exercise of children's rights. Under 'A/ Procedural rights of a child', article 3 mentions the right of the child to be informed and to express his or her views in proceedings. A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the right to receive all relevant information, to be consulted and express his or her views, and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision. Further, article 14 states that where internal law provides for legal aid or advice for the representation of children in proceedings before a judicial authority affecting them, such provisions shall apply in relation to the matters covered by Articles 4 (Right to apply for the appointment of a special representative) and 9 (Appointment of a representative).

This also means that interpreting has to be provided if the child speaks another language than the language of the proceedings.

2.3. The Hague Conference on Private International Law (HCCH)

The Hague Conference on Private International Law⁵⁹, a global inter-governmental organisation for cross-border co-operation in civil and commercial matters produced a total of 40 conventions.

According to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,⁶⁰ a Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature (art.14). Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2 (art. 14, para. 2)

2.4. The European Union (EU)

The European Union, first a purely economic union, evolved into a political union with more and more emphasis given to human rights. The core values of the EU are human dignity, freedom, democracy, equality, the rule of law and respect for human rights. In 1999, the European Council held a special meeting in Tampere on the creation of an area of freedom, security and justice in the European Union and in 2009, the Charter of Fundamental Rights was adopted. Since then the European Union has worked towards the creation of a genuine European Area of Justice, with attention to better access to justice, minimum standards, a union wide fight against crime and new procedural legislation in cross-border cases.

In March 2014, the European Commission presented a framework to safeguard the rule of law in the European Union.⁶¹ The European Council of 26-27 June 2014 approved strategic guidelines for legislative and operational planning for the coming years within the areas of freedom, security and justice (AFSJ). These guidelines, which took effect on January 1, 2015, are the successor to the Tampere, The Hague and Stockholm programmes. The EU Justice Agenda for 2020 — Strengthening Trust, Mobility and Growth within the Union, emphasises that all human beings have fundamental rights and freedoms regardless of language.⁶²

2.4.i. Charter of Fundamental Rights of the European Union

According to article 20 of the Charter,⁶³ everyone is equal before the law. Specific attention is given to language problems for citizens in the Union, and to solutions such as the creation of multilingual model documents. In criminal matters the promotion of efficient access to translation and interpretation and the quality of these services are a European priority. It is an integral part of the right of the defence. However, there is also a need for interpretation and translation in civil cases and in mediation. For EU citizens, everyone is considered equal before the law. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited (art. 21/1). The right to a fair trial and the right of defence is also enshrined in art. 47 and 48. The European Commission, moreover, aims to ensure that the rights stipulated in the ECHR are not theoretical or illusory but rather practical and effective.

2.4.ii. The Stockholm Programme – Roadmap

On 29 November 2000, the Council adopted, in accordance with the Tampere Conclusions, a programme of measures to implement the principle of mutual recognition of decisions in criminal matters.⁶⁴ In 2009, a resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings was adopted.⁶⁵ The first step was Directive 2010/64/EU on the right to interpretation and translation⁶⁶, for experience has shown that, although all the Member States are party to the ECHR, that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States, nor of the right to interpretation and translation. A survey of different EU countries also showed that there were (and still are) many differences in accreditation, registers, code, training and quality of interpretation and translation.⁶⁷ Free and adequate linguistic assistance should be ensured, allowing suspected and accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings. The Directive explicitly underlined that Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications (art. 2.2, recitals 19 & 20). Screening, training, qualifications, knowledge of legal concepts, and a proper attitude on the part of interpreters and translators are absolute requirements. Subsequent Directives also refer to these standards of interpretation and translation. The Directive 2012/13/EU on the right to information of suspects or accused persons, in criminal proceedings⁶⁸, for example, mentions them in art. 3.1. d & recital 25.

The EU Directive 2012/29 established minimum standards on the rights to support and the protection of victims of crime, replacing the Council Framework Decision 2001/220/JHA.⁶⁹ The preamble underlines that the EU has set itself the objective of maintaining and developing an area of freedom, security and justice, the cornerstone of which is the mutual recognition of judicial decisions in civil and criminal matters (recital 1). Restorative justice services, including, for example, victim offender mediation, family group conferencing and sentencing circles, can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation (recital 43). Article 7 specially concerns the right to interpretation and translation (see also recital 34, 35, 36). Unlike 2010/64/EU Directive, the Victims' Directive does not require Member States to allow victims to challenge the quality of translation/interpretation. Recital 34 states as well that it is equally important to ensure that victims are treated in a respectful manner and that they are able to access their rights. Interpretation should therefore be made available, free of charge, during questioning of the victim and in

order to enable them to participate actively in court hearings, in accordance with the role of the victim in the relevant criminal justice system. Victims are parties in a criminal procedure, but they join these proceedings for their civil interests. Civil parties should always have the same rights as suspects.

The Guidelines (25)⁷⁰ also invite the Member States to introduce an official registration/accreditation system (albeit not obligatory) for certified interpreters and translators at national level. Such a system would be a basis for developing a network of translators and interpreters with appropriate coverage to provide services as and when required (for example, to build on the work of EULITA).⁷¹

In April 2016, the Directive on procedural safeguards for children suspected or accused in criminal proceedings was adopted.⁷² The Explanatory Memorandum⁷³ explicitly mentions that article 4, 'Right to information of children', should be implemented in accordance with the standards set out in Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. In March 2016, the European Parliament adopted a legislative resolution on the proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings.⁷⁴ This emphasises that there can be no discrimination on the ground of the language of the child.⁷⁵

The European Commission is working on a Directive on the right to provisional legal aid for suspects or accused persons⁷⁶. Of course, the right to legal aid can only be guaranteed when there is respect for the right to interpretation and translation.⁷⁷

2.4.iii. European Union – Civil Matters

Along with criminal procedures, the European Union has also worked for many years on judicial cooperation in civil matters. A wide range of regulations have been put in place concerning cross-border disputes regarding family matters and successions, divorce and legal separation, children, property effects of marriage and registered partnerships, successions and wills, civil status documents, civil and commercial matters, company law and corporate governance.⁷⁸

In the area of civil procedural law, the main policy objective is that borders between countries in the European Union should not constitute an obstacle either to the settlement of civil law matters or to initiating court proceedings, or to the enforcement of decisions in civil matters. The EU has recognised in this respect the need for better access to justice for all individuals and companies and that non-native speakers will be confronted with translation and interpretation problems.

The European e-Justice Strategy is another tool for simplifying judicial cooperation in civil matters and addresses the development of the use of information and communication technology in the administration of justice.⁷⁹ It also gives attention to innovative translation tools such as automated translation, dynamic online forms and a European database of legal translators and interpreters.

European e-Justice, the use of information and communication technologies in the area of justice at EU level, serves to improve citizens' access to justice, to facilitate procedures within the EU and to make the resolution of disputes or the punishment of criminal behaviour more effective. These topics are important for judges in civil proceedings as well and at the same time as for mediators. The E-Justice portal also includes data on legal interpreters and translators⁸⁰ and these data are also available for mediators. The e-Justice Portal will further incorporate the website of the European Judicial Network (EJN) on civil and commercial matters and the European Judicial Atlas on civil and commercial matters.

In 1999, the Tampere European Council formulated the aim of the creation of a 'genuine European area of Justice', based on the principle that individuals and companies should not be prevented or discouraged from exercising their rights by incompatibilities between or complexities of judicial and administrative systems in the Member States (B.28). The Council also increased convergence in the field of civil law (B.VII). Where the EU directives before were fixed until this time specifically on criminal matters, the Stockholm Programme (2009) also mentioned the civil law (B. VII & 3.1.2). Indeed, cooperation in civil law facilitates the everyday life of citizens and law enforcement cooperation provides for enhanced security.

The aim of the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters⁸¹ is to improve, simplify and accelerate cooperation between Member States as regards the taking of evidence in legal proceedings in civil and commercial matters. Article 55 concerns cooperation on cases specific to parental responsibility, and also refers explicitly to mediation.

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 is also known as the Brussels IIa or sometimes Brussels II bis (1).⁸² They contain a requirement to facilitate communications (art. 55c). There is a need to facilitate communications between courts, in particular for the purposes of the application of paragraphs 6 and 7 of Articles 11 and 15 (art. 55c). Communication is indeed a key moment in working out a good solution for a problem. If both judges speak and/or understand a common

language, they should not hesitate to contact each other directly by telephone or e-mail. Other forms of modern technology may be useful, such as conference calls. If there are language problems, the judges may rely, so far as resources allow, on interpreters. The central authorities will also be able to assist the judges.⁸³

Article 15 does not cover the mechanisms of translation. Judges should try to find a pragmatic solution that corresponds to the needs and circumstances of each case. Subject to the procedural law of the State addressed, translation may not be necessary if the case is transferred to a judge who understands the language of the case. The central authorities may also be able to assist in providing informal translations.⁸⁴

Judge Francisco Javier Forcada Miranda of the Court of Family Affairs No 6 of Saragossa, Spain and Member of the International Hague Network of Judges⁸⁵ states that the use of video-conferencing makes matters considerably easier, if interpreters are available. As regards oral communications, he mentions that the draft uses the idea that oral communications are also encouraged; when two judges do not speak the same language, one or both, should have available a neutral professional interpreter able to interpret in both directions.

In the EU Directive 2003/8/EG⁸⁶ on legal aid in cross border civil and commercial problems, article 3.2 asks for an adequate form of legal aid. According to art. 7 legal aid includes interpreting as translation costs. First line legal aid costs and interpretation and translation costs are included. In the Commission report to the Parliament of 23 February 2012⁸⁷ in subdivision 2 on p.4 this point of view is confirmed. It is an undisputed principle of legal aid that Member States have to support legal aid costs for those who cannot afford it (subdivision 3.2.1). Legal aid is also to be granted in mediation (Recital 21).

Further, in 2007 the Specific Programme Civil Justice was developed as part of the General Programme Fundamental Rights and Justice.⁸⁸ Target groups in the programme are inter alia, legal practitioners, national authorities and the citizens of the Union in general. For the purposes of this Decision, 'legal practitioners' shall mean judges, prosecutors, advocates, solicitors, notaries, academic and scientific personnel, ministry officials, court officers, bailiffs, court interpreters and other professionals associated with the judiciary in the area of civil law (art. 6). Mediators are not explicitly mentioned here.

The Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations has the objective of guaranteeing effective access to justice for parties involved in a dispute covered by the Regulation. Art. 45

describes the content of legal aid. It safeguards the assistance necessary to enable parties to know and assert their rights and to ensure that their applications, lodged through the Central Authorities or directly with the competent authorities, are effectively dealt with. It shall also cover as necessary interpretation (art. 45/e). 51 2.

3. Equality of Arms and Fair Trial in Alternative Dispute Resolution

Along with judicial proceedings, national States and international organisations are giving more attention to alternative dispute resolutions (ADR). ADR solutions appear as separated moments inside or beside the judicial criminal and civil proceedings. There is a wide range of ways to solve disputes in a non-judicial way, and ADR is continuously growing and developing in all the national States in Europe.

ADR is governed in principle by the same fundamental concerns about equality and fairness of the proceedings as elaborated in the human rights documents by the UN, COE, and the EU and language barriers that impact on these concerns are present in ADR just as they are in judicial proceedings. For this reason, some states, such as Belgium and the Netherlands also grant legal aid to ADR and, if necessary, coverage within that legal aid of the right to the assistance of an interpreter.

In what follows, we examine the legislative underpinnings for interpreting and translation in ADR.

3.1. Arbitration

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration (1985), amended in 2006.⁸⁹ Under this law, the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal (Art. 22/1). The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal (Article 22/2). Article 18 specifies the equal treatment of parties. The parties shall be treated with equality and each party shall be given a full opportunity to present his case. Equality for parties will be only be possible if they can express themselves correctly. In the event that there are parties speaking another language, interpretation will be needed. The Explanatory Memorandum (36) states that, in addition to the general

provisions of article 19, other provisions in the Model Law recognise party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. An example of particular practical importance in international cases is article 22 on the language to be used in the proceedings.

According to the UNCITRAL Arbitration Rules, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration⁹⁰, the proposal to arbitrate contains suggestions as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon (art. 3.3. g). Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings (art. 19.1). The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal (art. 19.2). According to the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010), institutions may offer to make available or arrange for interpretation services (art. 23, c, vii).

3.2. Conciliation

The UNCITRAL Conciliation Rules⁹¹ do not refer to the matter of language. However, article 19 concerns the communication between the conciliator and parties. The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately (19.1). Central to good communication is the language used, so eventually the assistance of a qualified interpreter may be necessary.

3.3. Mediation

Mediation is a way of resolving disputes without the need to go to court. A mediator, an independent neutral third party, will help both parties to come to a resolution of their dispute and an agreement. Parties will discover for themselves solutions to the questions dividing them. International organisations and national States promote mediation as an alternative to traditional court-based dispute resolutions.⁹² Key principles for the mediator are impartiality, neutrality and confidentiality. Mediators

will not take sides in any dispute and they are not advisers. Usually they will recommend that legal advice is sought alongside the mediation process. According to the European Code for mediators⁹³, mediators must be independent and impartial. The mediator must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express regarding the rule of law and the need for a prompt settlement of the dispute (3.1). The mediator must guarantee the fairness of the process (3.2). He must ensure that all parties have adequate opportunities to be involved in the process. He must take all appropriate measures to ensure that any agreement is reached by parties in full knowledge and with informed consent, and that all parties understand the terms of the agreement (3.3).

Mediation exists in civil, administrative and criminal matters. This mediation process may be initiated by the parties, or suggested or ordered by a court. In judicial mediation, the judge or the prosecutor intervene in the process. They advise on, decide on or/and approve the procedure. According to a CEPEJ report, 41 States or entities provide for a system of judicial mediation.⁹⁴ There is mediation in civil and commercial cases, family law cases (ex. divorce), administrative cases, employment dismissals and in criminal cases. Table 6.4 of the report gives an overview of the number of accredited mediators in absolute values between 2006 and 2012. According the report accreditation may be granted by the courts, a national authority or an NGO. Out of 41 states or entities, however, no more than 24 were able to indicate a number of court accredited mediators, which limits the analysis and comparability of data. In the Netherlands the Dutch Mediation Institute (NMI), an independent institute aims to raise awareness of mediation, improve the standard of the services available, and manages a national register of mediators, which includes only qualified mediators.⁹⁵ Further, there are registers of accredited mediators in Belgium⁹⁶, Italy⁹⁷, England and Wales⁹⁸, Poland⁹⁹, Romania¹⁰⁰ and Spain.¹⁰¹ There are also specific codes of ethics for mediators¹⁰², and also the European Code of Conduct for Mediators, which sets out a number of principles to which individual mediators can voluntarily decide to commit. It is applicable to all kinds of mediation in civil and commercial matters.

3.3.1. Council of Europe

The European Union actively promotes methods of alternative dispute resolution (ADR), such as mediation.¹⁰³ The COE observed the development in the use of mediation in the Member States, in criminal matters as well as in civil matters, as an alternative to traditional proceedings and the Committee of Ministers developed the following Recommendations concerning mediation: Recommendation (98) 1 on family mediation¹⁰⁴, Recommendation (2002)10 on mediation in civil matters¹⁰⁵

and Recommendation No. R (99) 19 concerning mediation in penal matters of 15 September 1999. The demands of victims in criminal matters also concern civil rights of remuneration and compensation and can be introduced in a penal as well as in a civil procedure. Therefore, they are included in this chapter. Furthermore, there is Recommendation Rec (2001) 9 on alternatives to litigation between administrative authorities and private parties.

Recommendation (98) 1 on family mediation particularly concerns the area of divorce and custody of children. For the purposes of this Recommendation, “mediation” refers to a dispute resolution process whereby parties negotiate the issues in dispute in order to reach an agreement with the assistance of one or more mediators. The idea is to find a more acceptable solution for the parties and the children and to provide better protection of the welfare of the children. It recommends that governments facilitate mediation in civil matters whenever appropriate. As the mediator has to be impartial and preserve the equality of the parties’ bargaining positions (III, i-iii), it will be necessary for him to communicate and understand both parties equally. When both parties speak another language this can lead to a problem. This creates the need for either a bilingual mediator, two mediators, one of whom is bilingual, or a third-party interpreter.

According to Recommendation (2002)10 on mediation in civil matters,¹⁰⁶ States are free to organise and set up mediation in civil matters in the most appropriate way, either through the public or the private sector. Mediators should act independently and impartially and should ensure that the principle of equality of arms is respected during the mediation process (Principle IV/12). While it is not explicitly mentioned in the text, this means that the mediator should take into account the possibility of language problems. If necessary, interpretation must be provided to guarantee the equality of arms.

Recommendation No. R (99) 19¹⁰⁷ concerning mediation in penal matters aims to enhance the active participation of the victim and the offender in criminal proceedings (preamble). The Recommendation recognises the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain an apology and reparation. It is also considered important to encourage the offenders’ sense of responsibility and offer them practical opportunities to make amends, which may further their reintegration and rehabilitation. The Appendix to Recommendation No. R (99) 19 concerning mediation in penal matters states, regarding the legal basis in Chapter III, that the fundamental procedural safeguards should be applied to mediation. In particular, the text explicitly mentions that the parties should have the right to legal assistance and, where necessary, to translation/interpretation.

Within the COE, the European Commission for the Efficiency of Justice (CEPEJ) worked to enable a better implementation of the Recommendations of the Committee of Ministers concerning mediation. The Working Group on Mediation (CEPEJ-GT-MED)²⁸¹⁰⁸ was set up to gauge the impact in Member States of the relevant recommendations of the Committee of Ministers, Recommendation Rec(98)1 on family mediation, Recommendation Rec(2002)10 on mediation in civil matters, Recommendation Rec(99)19 concerning mediation in penal matters and Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties. According to the CEPEJ Guidelines¹⁰⁹, for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, measures should be taken to ensure that the parties are able to understand the process of enforcement in which they are involved, and, where possible, have the option of participating in the proceedings without the need for legal representation (Guideline 15). To this effect, the enforcement processes and legislation should be rendered as clear and comprehensible as possible (i.e. by creating plain-language versions of legislation, enforcement handbooks, by reducing the time of contact time the parties need to have with the court both in person and via correspondence, etc.). The Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement states that all of the stakeholders that are likely to be involved in enforcement processes (police, experts, translators, interpreters, local authorities, risk insurers, child care experts, etc.) should have sufficient legal status to help the enforcement agent and should be available, in case their help is necessary, for the enforcement of a judgement (Guideline 16). This means that knowledge of the law is necessary, and that qualified translators and interpreters are required.

According to article 3 of the European Convention on the Exercise of Children's Rights of 25 January 1996, the child has the right to be informed and to express his/her views in proceedings. The child must receive all relevant information in order to prevent or resolve disputes or to avoid proceedings before a judicial authority. Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties (article 13). Where internal law provides for legal aid or advice for the representation of children in proceedings before a judicial authority affecting them, such provisions shall apply in relation to the matters covered by Articles 4 and 9 (art.14). This Convention shall not restrict the application of any other international instrument which deals with specific issues arising in the context of the protection of children and families, and to which a Party to this Convention is, or becomes, a Party (art.15). The combination of these articles guarantees that interpretation needs to be available, if necessary, to fulfil these rights; however, there is no specific reference to interpretation as such in the Convention.

3.3.2. HCCH

Regarding mediation, the HCCH produced a Guide to Good Practice under The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (or ‘The 1980 Hague Child Abduction Convention’).¹¹⁰ The Guide promotes good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children, which fall within the scope of the Convention. The more recent of the modern Hague Family Conventions explicitly mention the use of mediation, conciliation and similar methods.

The Guide states that parties must have the possibility to communicate directly in their preferred language during mediation, although there may be cases where this is not feasible. Chapter 2.5 concerns ‘language difficulties’ and notes that a further challenge to mediation in international family disputes arises when the parties to the dispute speak different mother tongues. Where the parties have different native languages, they may, at least temporarily, each prefer to speak their own language. This may be the case even if one of the parties masters the other’s language or is comfortable using a language other than his / her mother tongue in the everyday context of their relationship. In the emotionally stressful circumstances of discussing their dispute, the parties may simply prefer to speak their mother tongue, and this might give them the feeling of being on an equal footing (Guideline 74). On the other hand, parties with different mother tongues may well feel comfortable speaking a third language in mediation, i.e., the mother tongue of neither of the parties, or one party may be willing to speak the other’s language. In any case, the mediator has to be aware of the additional risk of misunderstandings because of language difficulties (Guideline 75). The wishes of the parties regarding the language(s) must be respected as much as possible. Ideally, the mediator(s) themselves should be able to understand and speak those languages.

Co-mediation allows for the involvement of mediators with the same mother tongues as the parties and fluent in, or having a good command of, the other relevant language (so-called ‘bilingual’ co-mediation). Co-mediation may also include one mediator speaking only the mother tongue of one party and the other being fluent in the two relevant languages. Here, however, the mediator speaking the two languages will partly play an interpreting role (Guideline 76). Offering the parties the possibility to communicate in their preferred language during mediation is clearly the first choice; however, there may be cases where this is not feasible. Communication in the preferred language might be facilitated by interpretation. Where interpretation is considered an option, the interpreter has to be chosen with care and needs to be well prepared and aware of the highly sensitive nature of the conversation, and of the emotional atmosphere of the mediation, so as not to add a further risk of

misunderstanding and jeopardise an amicable resolution. Furthermore, safeguards concerning the confidentiality of mediation communications must include the interpreter(s) (Guideline 77).

Different countries provide legal aid for mediation, for example in England and Wales, Sweden and Switzerland,¹¹¹ the Netherlands and Belgium.¹¹² Legal aid for the applicant covers legal costs, translations, interpreters.¹¹³

Other conventions also refer to mediation. The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children¹¹⁴ states that the Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to facilitate the communications and offer the assistance, and to facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies (art.31 a and b). Also mediation is referred to in art.31 of The Hague Convention of 13 January 2000 on the International Protection of Adults¹¹⁵, and art. 6(2) d), 34(2) i) of The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.¹¹⁶

The Wrocław Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues is the result of a meeting of German and Polish mediators.¹¹⁷ It points out basic principles for resolving binational disputes over parents and children's issues through mediation. Particular attention is given to mediation proceedings that conform to the framework of international agreements and conventions such as The Hague Child Abduction Convention and the Brussels IIa Regulation. According to the Declaration, the mediation should be conducted as a bi-national co-mediation (recommendation 1). The mediators should have the same national origin as each party in the mediation (recommendation 2), so that mediators reflect the different cultural backgrounds of the parents. One mediator should be female and the other should be male, as the two mediators should represent the genders of both the mother and father (recommendation 3). One mediator should have a psychological/pedagogical professional background and the other should have a legal background (recommendation 4).

Regarding the mediation costs, the Feasibility Study on Cross Border Mediation in Family Matters, Responses to the Questionnaire¹¹⁸ mentions under 'Cost associated with mediation', that, before the mediation proper begins properly, parties must be informed about the fees and costs associated with the mediation, including the interpreter's fee. (5.1).

3.3.3 The European Union

As already mentioned, the European Union actively promotes methods of alternative dispute resolution (“ADR”), such as mediation and the E-justice portal contains a lot of information on mediation in the EU, the Member States and cross-border family mediation.¹¹⁹ According to Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters¹²⁰, the central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. They shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end (art.55/e).

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000¹²¹ refers also in article 55 (e) to mediation. Central authorities will do what is necessary to facilitate mediation.

Recital 21 of EU Directive 2003/8/EG¹²² on legal aid in cross border civil and commercial problems states that legal aid needs to be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court. Article 7 of this directive concerns the costs related to the cross-border nature of the dispute, and mentions that legal aid also covers interpretation (art. 7a).

The Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations obliges the Central Authorities to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes.¹²³

Directive 2008/52.EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters was adopted on 21 May 2008, to be implemented by the Member States by May 2011.¹²⁴ The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings (art.

1.1). This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations, which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). The provisions of this Directive should only apply to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions to internal mediation processes (Recital 8). Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions if such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems as far as these deal with aspects that are not covered by this Directive (Recital 14). The preamble refers to the rights of access (recitals 2, 3, 5, 14). The application field is cross-border disputes in civil and commercial matters. A 'mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation (art. 3). Member States are obliged to encourage the training of mediators and to ensure high quality mediation (art.4). This training must ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties (art. 4.2 and recital 16). The Directive seeks to promote fundamental rights, and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union¹²⁵ (Preamble 27).

The EU encourages each Member State to encourage the training of mediators and to ensure a high quality of mediation.¹²⁶ The European Commission implemented a financing decision for the framework of the Programme Civil Justice¹²⁷, to fund projects pertaining to among others, training for judges, central authorities and practitioners in the area of family mediation referred to in Regulation (EC) No 2201/2003 concerning divorce and parental custody matters (Brussels IIa Regulation 6 and in the area of mediation in civil matters (Directive 2008/52), and promotion and training for practitioners related to mediation techniques, with a view to developing mediation in cross-border cases.

The E-justice website also makes reference to language difficulties and modern means of communication in mediation.¹²⁸ It notes that it is an important advantage for the mediator to speak the language of both parties, or at least the common language (if the couple has one). In cases of bi-cultural co-mediation, it might be sufficient for a mediator to speak the language of one party and understand the other if no other solution can be found. The point of finding a mediator who speaks the

language of the parties is not just that of limiting costs because interpretation is not required, however; there is also the psychological aspect and the need for the parties to understand what they are agreeing to. It is also underlined that the mediator should be sensitive to the cultural background of the parties and should be aware of cultural diversity. The use of modern means of communication (telephone, (online) videoconferencing, webcams, etc.) can also be useful in organising the mediation. Not explicitly mentioned, however, is the possible assistance of an interpreter. The interpreter can be physically present, or can give assistance via videoconferencing.¹²⁹ The guidelines on the website conclude that whatever language is used for mediation, it is important that everybody involved understands the language and the terminology used by the mediator(s).

4. Conclusions

In comparison with criminal cases, the number of civil cases is very large and the number of Alternative Dispute Resolutions, (including mediation in civil matters) as a way to avoid court procedures is growing throughout the EU.

In legal disputes, the international community pays particular attention to communication and the participation of all parties, without discrimination, and in particular without language discrimination. Specific regulations were drawn up for criminal and civil matters, and for ADR and mediation. It is crucial to understand each other in all types of legal discussions, as without this understanding, equal participation in the procedure is not possible. Respect for the rule of equality is a further condition for a fair trial and effective participation in all jurisdictions are covered in UN, COE and EU rules. Equality of arms is a condition for a fair trial not only in criminal cases, however, but also in civil proceedings and mediation. This is even more the case when parties speak different languages outside the courtroom and judges are not present to monitor respect for the fundamental rights of the parties.

The ECtHR notes that the judge is the ultimate guardian of the fairness of a court procedure and this includes attention to language. By analogy, in mediation, the mediator has to be the ultimate guardian of fairness in the procedure. It is his task and legal obligation to ensure that there is equality in communication for all parties and to make effective participation for all possible.

To this end, the mediator himself may speak more than one language and practice as a bi-lingual mediator, or alternatively work with a bilingual co-mediator. Nevertheless, the question arises whether it is possible for a bilingual mediator, whether working

alone or with a co-mediator, to monitor and manage language difference when both mediating and interpreting. The question also arises of whether the mediator is truly sufficiently competent in both the languages and their legal registers. Today, in different States there are already official registers of accredited mediators who have followed training courses in mediation. These domestic registers sometimes mention the language(s) in which the mediators work. However, at the EU-level, there is no information on the level of language proficiency, training, and/ or screening, or specialisation of the mediator. Each kind of mediation (family, civil, commercial, social) requires, however, a specialised language competence. Mediation parties should therefore only accept a bilingual mediator who is selected on the basis of language knowledge of both general and legal discourse in both languages, as a guarantee of the quality of communication with and between the parties.

The observable and actual neutrality of the mediator is also essential in mediation. However, even with sufficient language skills, a bilingual mediator risks giving the impression of support for the party whose first language corresponds with the first language of the mediator. It might seem in this case that confidentiality and neutrality are being compromised. Furthermore, a party not fully informed or understanding the mediation and the mediated conclusion, perhaps because of a language problem with a mediator, can claim partiality and disrespect of neutrality and contest the validity of the conclusion of the mediation before the civil courts. The use of bilingual mediators should therefore only be undertaken bearing these questions in mind.

In criminal and civil cases and in ADR/mediation procedures professional third-party legal interpreting and translation provided by an independent interpreter or translator is the best path to effective participation. It allows the legal actors or mediators to fully concentrate on the procedure, without concerning themselves with language and interpreting at the same time. Using qualified and accredited interpreters from an official register should be obligatory, as already explicitly stated in respect of criminal matters in EU Directive 2010/64. A fair trial in civil procedures and in ADR/mediation requires the same guarantees.

In civil court procedures and in mediation, cooperation with accredited interpreters from official registers improves the likelihood of effective communication with and participation of all parties in the exchange, as well as protecting the impartiality and neutrality of the mediator. This is only possible, however, if interpreters are aware of the specific features of working in mediation and if mediators know how to work with interpreters.¹³⁰ This presupposes some investment of time and revenue in training, for both mediators and interpreters. Even when this appears to raise the costs of mediation, these costs should be borne, as failing to do so creates risks to the

human rights of parties. As F. Tulkens, former judge at the ECtHR, stated, human rights have to be applied even in times of crises and of limited financial means.¹³¹

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6. Endnotes

1 In Belgium for example, 72% of the respondents on the Belgium Justice barometer declared that the legal language was unclear (http://www.belgium.be/nl/binaries/Barometer-justitie_N_2010_tcm117-114018.pdf, p.25-28).

2 http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics; http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf.

3 Internationally, there is the ‘plain-language movement’ to campaign to make legal documents clear. See Mellinkoff, D. (1963); <http://www.clarity-international.net/>; Gibbons, J.(2014), Put, G. (2015).

4 The protection of children’s rights within the EU under the ‘New Brussels Regulation’, ref. MEMO/05/70-01/03/2005.

5 http://www.hcch.net/index_en.php?act=publications.details&pid=5421&dtid=32

6 ter VOERT, M. (2015).

7 ECHR, art. 5 and 6; Directive 2010/64/EU on the right to interpreting and translation in criminal cases; the Directive 2012/29/EU on the Rights of Victims of Crime.

8 On average, at the European level in 2012, the first instance courts were able to resolve more or less the same number of cases as the number of new incoming cases: around 2500 cases per 100,000 inhabitants; http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf, p.202.

9 http://www.bmediation.eu/images/stories/News/barometer_bemiddeling_2012.pdf.

10 CEPEJ, Report on ‘European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice’ Table 9.1.

11 In Belgium, in all domains the number of mediation increased between 2012 and 2013. In 2012 as in 2013, international mediations were about 4% of the mediations. For civil and commercial cases, and social cases international mediations comprise above 8%, for family cases just 3% (bemiddelingsbarometer 2014, p. 7); http://www.vandaag.be/binnenland/105617_bemiddeling-is-nog-geen-alternatief-voor-rechtszaken.html; http://www.bmediation.eu/images/stories/News/barometer_mediation_2014_v1.0_nl.pdf; For a report on Alternative Dispute Resolution (ADR) in COE: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf.

12 http://www.coe.int/T/dghl/cooperation/cepej/evaluation/2012/Synthese_

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13 <https://www.uncitral.org/>

14 See also the study commissioned by European Parliament in 2014 on ‘rebooting’ the 2008 Mediation Directive; [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>

16 <http://www.culturalpolicies.net/web/belgium.php?aid=519>

17 26 June 1945, San Francisco, came into force on 24 October 1945. <http://www.un.org/en/charter-united-nations/>

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21 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

22 Convention on the Rights of the Child, resolution 44/25 of 20 November 1989 (entry into force 2 September 1990), <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

23 Meyers, Diana T. (2014).

24 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

25 United Nations, 2013, https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf

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27 United Nations, General Assembly, A/67/278, 9 August 2012.

28 Human Rights Committee, General Comment No. 32, para. 9, and Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 35. Economic and social status is explicitly included as a ground of discrimination in the American Convention on Human Rights (art. 1).

29 In Belgium, for example, there is now information on legal aid on the website of the Antwerp Bar (Dutch speaking part of Belgium), in the following languages: Dutch, French, English, German, Spanish, Italian, Polish, and Arabic (<http://www.balieantwerpen.be/>) The website of the Association of Flemish Bars (working for the whole Dutch speaking part mentions the choice of lawyers, speaking Dutch, French, English, German, Spanish, Italian, Russian, Arabic, Turkish, Berbers, Chinese, Portuguese, Serbian, Croatian, Hindi, Polish, Urdu, Hebrew, Swedish, Bulgarian and Greek (<http://www.advocaat.be/zoekadvocaat.aspx>).

30 United Nations, Office of the High Commissioner for Human Rights, Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1); <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

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32 http://www.echr.coe.int/Documents/Convention_ENG.pdf.

33 Open Society Justice Initiative, European Court of Human Rights Jurisprudence on the Right to Legal Aid.

34 *Airey v Ireland* - Series A, No 31 (1979-80) 3 EHRR 592.

35 ECHR, Article 6.1.

36 Logghe, F. (1996); Cohen (1989).

37 *Comm., Broers v België*, rapport 6 April 1992, *R.T.D.H.*, 1993, p.595, note Lambert. P.

38 *Diallo v. Sweden* (Dec.), 5 January 2010, § 83, 25; *Salduz v. Turkey*, 27 November 2008, §54-55,82,84;

Baytar v Turkey, 14 October 2014, §83-84; *Kamasinski v. Austria*, 19 December 1989, §74. See also Vanden Bosch, Y. (2014).

39 *Kamasinski v Austria*, 19 December 1989, §74.

40 *Diallo v Sweden*, 05/01/2010, § 25.

41 *Baytar v Turkey*, 14 October 2014, §57 & 9.

42 *Cuscani v UK*, 24 September 2002, §39.

43 Adopted by the Committee of Ministers on 18 February 1976; [http://euromed-justiceii.eu/files/repository/20090128124611_res\(76\)5e.pdf](http://euromed-justiceii.eu/files/repository/20090128124611_res(76)5e.pdf).

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45 Recommendation N° R(81)7 of the Committee of Ministers to Member States on measures facilitating access to justice, 14 May 1981; <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168050e7e4>.

46 CETS No.092, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=8&NT=092>

47 <http://conventions.coe.int/Treaty/EN/Reports/Html/179.htm>.

48 Moscow, 4 October 2001, European Treaty Series - No. 179; <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680080624>.

49 COE 1976. Council of Europe. Committee of Ministers.

50 Adopted by the Committee of Ministers on 28 February 1984, <http://www.coe.int/t/dghl/standardsetting/family/Rec.84.4.%20E.pdf>

51 Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) Guidelines and Explanatory memorandum - version edited 31 May 2011; http://www.coe.int/t/dghl/standardsetting/childjustice/Source/GuidelinesChildFriendlyJustice_EN.pdf; http://srsg.violenceagainstchildren.org/sites/default/files/children_corner/guidelineschildfriendlyjustice_en.pdf;

52 Lanzarote, 25-26 October 2007, [http://www.coe.int/t/dghl/standardsetting/minjust/mju28/MJU-28\(2007\)Resol2E.pdf](http://www.coe.int/t/dghl/standardsetting/minjust/mju28/MJU-28(2007)Resol2E.pdf)

53 Explanatory memorandum, IV.A.53.

54 Explanatory memorandum, IV.A.55.

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56 Explanatory Memorandum, 67.

57 See Van der Mussele, E. (2015).

58 25.1.1996; <http://conventions.coe.int/Treaty/EN/Treaties/Html/160.htm>

59 http://www.hcch.net/index_en.php?act=text.display&tid=1; The Hague Conference currently has 80 Members: 79 States and 1 Regional Economic Integration Organization.

60 18 March 1970, <http://www.hcch.net/upload/conventions/txt20en.pdf>.

61 Compliance with the rule of law is a prerequisite for the protection of all fundamental values listed in Article 2 TEU, and for upholding all rights and obligations deriving from the Treaties and from international law SPEECH/12/596). President Barroso (2012) (SPEECH/12/596) recalled that a Political Union also means that the rule of law, as a founding value of the EU, must be strengthened, announcing an initiative to this end.

62 COM (2 014) 144 final, 2014/C 271/06, OJ, 19.8.2014.

63 2012/C 326/02, OJ, C 326/391.

64 On 29 November 2000, OJ, C12, 15 January 2001, p.10-22.

65 Resolution of the council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal OJ, C 295/1, 4 December 2009, p.1. See also Van der Vlis, E. (2012).

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67 Hertog, E. & Van Gucht, J. (2008).

68 Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings, 22 May 2012, OJ, 1/6/2012, L 142/1, see recital 25.

69 25 October 2012, OJ, L 315/57; see also Groenhuijsen, M.S and Pemberton, A. (2007).

70 DG Justice Guidance Document related to the transposition and implementation of Directive EU 2012/29, p23; http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf;

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73 Recital 5, Explanatory Memorandum 3&20.

74 COM (2013)0822 – C7-0428/2013 – 2013/0408(COD) (Ordinary legislative procedure: first reading).

75 Preamble 65.

76 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013PC0824>.

77 *OJ*, L 280, 26 October 2010, p.1-7.

78 For an overview of legislation in civil matters see: http://ec.europa.eu/justice/civil/law/index_en.htm; there are, for example, the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; *OJ* L 174, 27.6.2001, p.1; Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, *OJ* L 26, 31.1.2003, pp. 41–47; Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* L 343, 29.12.2010, pp. 10–16; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), *OJ*, L 351/1-32; Regulation (EU) no 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, *OJ* L 181, 29.6.2013, pp. 4–12; and on mediation, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ* L 136, 24.5.2008, pp. 3–8.

79 COM (2008)329 final.

80 https://e-justice.europa.eu/content_find_a_legal_translator_or_an_interpreter-116-en.do

81 *OJ* L 174, 27.6.2001, p. 1.

82 OJ/L 338/1-29, 23.12.2003.

83 European Commission, Regulation Practice Guide for the application of the Brussels IIa Regulation, 39, http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf

84 Ibidem, 40.

85 'Using best means of communications available in a multilingual context (Draft principles n°8 and 9)', in *The Judges' Newsletter on International Child Protection*, vol. XV / Autumn 2009 - Special Focus, Theme 3, http://www.hcch.net/index_en.php?act=text.display&tid=62

86 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ, L 26.

87 COM (2012) 71 final.

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89 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html

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91 Resolution 35/52, 4 December 1980, Conciliation Rules of the United Nations Commission on International Trade Law, <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>.

92 On mediation, see also *Mediation in civil and administrative matters*: Brenninkmeijer, A.F.M. (2005); Folberg, J., Milne, A., Salem, P., (2004); <http://wodc.nl/onderzoeksdatabase/99.164c-literatuuronderzoek-naar-mediation.aspx>.

93 http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

94 CEPEJ, Report on 'European judicial systems – Edition 2014 (2012 data): Efficiency and quality of justice', p148.

95 <https://mediatorsfederatienederland.nl/>.

96 <http://www.fbc-cfm.be/nl/inhoud/lijt-erkende-bemiddelaars> in 2013: accredited mediators in family cases 710, in civil and commercial cases 533 and in social cases 155 (Federale Bemiddelingscommissie).

97 <http://www.giustizia.it/>

98 <http://www.civilmediation.org/>

99 <http://ms.gov.pl/pl/dzialalnosc/mediacje>; adr_rada@ms.gov.pl.

100 <http://www.cmediere.ro/>

101 <http://fsima.es/>

102 Belgium - <http://www.fbc-cfm.be/nl/inhoud/deontologische-code-0>;
The Netherlands - https://mfregister.nl/content/uploads/sites/3/2014/02/Gedragsregels_voor_de_MfN-registermediator.pdf; Poland - http://ms.gov.pl/Data/Files/_public/mediacje/adr1/kodeksetyczny.pdf;

103 https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do.

104 Committee of Ministers to Member States on family mediation adopted on 21 January 1998; [http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec\(98\)1%20E.pdf](http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec(98)1%20E.pdf)

105 Adopted by the Committee of Ministers on 18 September 2002: <https://wcd.coe.int/ViewDoc.jsp?id=306401>

106 http://www.partners-serbia.org/en/wp-content/uploads/2013/05/CoE-Rec-R200210-on-mediation-in-civil-matters_EN.pdf

107 Recommendation N° R (99) 19 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999.

108 https://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pdf;

109 Guidelines for a better implementation of the existing Council of Europe's Recommendation on enforcement, adopted by the CEPEJ at its 14th plenary meeting, (Strasbourg, 9 – 10 December 2009), 17 December 2009, CEPEJ(2009)11REV2; <https://wcd.coe.int/ViewDoc.jsp?p=&id=1565277&direct=true>

110 http://ec.europa.eu/justice/civil/files/mediation_en.pdf

111 Jonker, M. (2015).

112 Vanden Bosch, Y. (2014).

113 Explanatory Memorandum to the Civil Legal Aid (Financial resources and payment for services), (Amendment) Regulations 2014, 2014 No. 812, 7.4.

114 <http://www.hcch.net/upload/conventions/txt34en.pdf>

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116 <https://assets.hcch.net/docs/14e71887-0090-47a3-9c49-d438eb601b47.pdf>

117 Wrocław, October 8, 2007, <http://missingchildreneurope.eu/Portals/1/wroclaw-declaration.pdf>

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119 https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do?init=true.

120 *OJ* L 174, 27.6.2001, p. 1.

121 *OJ*, 23.12.2003, L 338/1

122 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, *OJ*, L 26.

123 Art. 51/2c, *OJ*, 10.1.2009, L.7/1

124 *OJ*, 24.05.2008, L 136/3; see also European parliament (2014), Directorate general for internal policies policy department C: Citizens' Rights and constitutional Affairs Legal Affairs, 'Rebooting' the mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU.

125 *O.J.*, 2012/C 326/02

126 https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do; Hopt, K.J., Steffek, F. (2013).

127 C (2011) 9468 Commission implementing decision of 21.12.2011 concerning the adoption of a financing decision for 2012 in the framework of the Programme "Civil Justice" C (2011) 9468; 22.11.2012 C (201).

128 https://e-justice.europa.eu/content_particularities_of_crossborder_mediation-384-en.do.

129 See also EU projects Avidicus, <http://www.videoconference-interpreting.net/> & https://e-justice.europa.eu/content_videoconferencing-69-en.do; Braun, S. & Taylor, J.L. (eds.)(2012).

130 Corsellis, A., Clemens, A. & Vanden Bosch, Y. (2011).

131 Tulkens, F., cited in Leestmans, D. (2013).

Legal Interpreting Competences in Civil Justice and Mediation

Erik Hertog

1. EU Legislation on Legal Interpreting

We take as our starting point Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.¹ This Directive, the first on interpretation and translation, can be seen as the strengthened and much needed implementation of some of the principles enshrined in Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms² and Articles 47 and 48 in the Charter of Fundamental Freedoms of the EU.³ It was also the first measure in an intended package of safeguards to ensure the right to a fair trial and the right of defence throughout the European area of justice. The Directive stipulates that interpreting be provided at all stages of a criminal procedure, including lawyer consultations or police interviews, and that the interpreting be of a quality that guarantees the fairness of the proceedings. Member States are required by the Directive to put concrete procedures or mechanisms in place to ensure this quality, such as the possibility to challenge a decision finding that there is no need for interpretation, the possibility to complain if the quality of the interpretation is not sufficient, that interpreters be drawn from a register of qualified interpreters and that legal professionals receive training in working across languages.

Since 2010, two more measures of this package of procedural safeguards in criminal proceedings have been issued: Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings⁴ and Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.⁵ With regard to interpretation (and translation), these Directives are linked in the mind-set of the EU Commission. For example, in Recital 25 of the Directive on the right to information it says that ‘Member States should ensure that, when providing information in accordance with this Directive, suspects or accused persons are provided, where necessary, with translations or interpretation into a language that they understand, in accordance with the standards set out in Directive 2010/64/EU’.⁶

Similarly, Recital 34 (but also 35 and 36) of a related Directive, i.e. Directive 2012/29/EU establishing minimum standards on the rights, support and protection

of victims of crime and replacing Council Framework Decision 2001/220/JHA also clearly draws on the 2010 Directive:⁷

(34) Justice cannot be effectively achieved unless victims can properly explain the circumstances of the crime and provide their evidence in a manner understandable to the competent authorities. It is equally important to ensure that victims are treated in a respectful manner and that they are able to access their rights. Interpretation should therefore be made available, free of charge, during questioning of the victim and in order to enable them to participate actively in court hearings, in accordance with the role of the victim in the relevant criminal justice system.

And the specific, detailed Article 7 (Right to interpretation and translation) in this Victims Directive reiterates that

Member States shall ensure that victims who do not understand or speak the language of the criminal proceedings concerned are provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal proceedings, free of charge, at least during any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings.

Imminent Directives (measures) - on legal aid⁸, on safeguards for children⁹ and on the presumption of innocence¹⁰ - will no doubt further strengthen the reliance on and the importance of the 2010 Directive on interpretation and translation.

At the same time, civil justice is also characterised by an increase in cross-border or at least multilingual disputes, ranging from private family matters to major international, commercial disputes. The multicultural society makes itself felt as much, if not more, in the civil justice courts as in the criminal courts, whether before a justice of the peace or in an administrative or commercial procedure. The EU civil justice programme actively promotes judicial cooperation in civil and commercial matters such as in insolvencies or family conflicts as well as in the area of judicial training, with a view to fostering a common legal and judicial culture and effective access to justice.¹¹

As a matter of fact, a considerable number of legislative instruments regarding civil justice have been put in place at the European level over the last decade. A few examples of interesting Regulations must suffice: Council Regulation (EU) No 1259/2010¹², relates to issues such as the existence, validity or recognition of a

marriage; the annulment of a marriage; the property consequences of the marriage; parental responsibility and maintenance obligations as well as issues of trusts or successions. We have Regulation No 1215/2012¹³ and Regulation (EU) no 606/2013 on mutual recognition of protection measures in civil matters;¹⁴ the 2003 Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes¹⁵; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order¹⁶ and, of course, the Directive which is the focus of this project, Directive 2008/52/EC the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.¹⁷

Increasing free movement of EU citizens as well as international migration cannot but have an effect on, among others, the education or health provisions of the Member States, as it will on the criminal and civil justice systems and indeed on personal (e.g. mixed marriages) or community relations (e.g. neighbour disputes).¹⁸

However, different from the significant development in criminal proceedings, the civil justice programme has to date paid little attention to the provision and quality of interpreting in civil proceedings. Nevertheless, the fact that there are more civil than criminal cases, that every Member State has become increasingly multilingual, that EU citizens move, work, marry, study across borders and hence may find themselves quarrelling and arguing across tables, fences and borders, would seem to warrant closer attention to the need for interpreting in civil justice. To begin tackling the issue, it seemed worthwhile to focus on one particular kind of civil justice procedure, i.e. mediation. Mediation, or alternative dispute resolution, comes in very diverse shapes and forms but the focus in this project is on straightforward mediation, of the kind between neighbours, spouses, parents and schools, patients and hospitals, etc. not on complex commercial-financial arbitration between multinational companies, who would bring their own highly qualified interpreters anyway, if need be, or simply conduct the arbitration in English. Within the field of straightforward mediation things are different: trying to mediate and resolve a dispute between other-language speaking parents, perhaps newly arrived, and a school board, is an altogether different kind of challenge. Now there is one area in civil justice where the language (and interpreting) challenge has received some considerable attention and that is the field of cross-border family disputes. This is obviously a sensitive, delicate matter requiring highly trained and fine-tuned mediation skills. But it is the established practice of often having to do so in a multilingual situation, between languages, which has challenged the partners in this project to reflect and investigate what this entails for the legal interpreter (LI) accepting an assignment in cross-border or multilingual mediation. The assumption in this project is that mediation is a very specific legal procedure therefore requiring

specific, additional skills on top of those mastered by a trained, qualified legal interpreter – as interpreting for a child victim or child perpetrator would be in a juvenile court.

2. Legal Interpreting

Over the past 15 years some 20 projects have been carried out under the auspices of the EU Commission Directorate-General Justice, Liberty and Security to develop standards, strategies and materials to provide interpreting and translation in the legal services that meet the quality standards required by the 2010 Directive. Notably the projects *Aequitas* (on standards and training), *Building Mutual Trust 1* (on training materials), *Qualitas* (on competences and testing) and the report of the Reflection Forum on Multilingualism and Interpreter Training have described and defined the competences required of the LI in criminal proceedings.¹⁹ These competences – knowledge components and good practice skills – are generic and should be mastered by the LI whether working in criminal or in civil proceedings. The position and conviction of the partners in this project is that in order to work in mediation – a specific legal domain - the interpreter needs to have mastered the competences of the LI and use them as the basis for the acquisition of the additional specific competences required in mediation.

It may be worth pointing out here that in the past decade the term Legal Interpreter/ Interpreting has gained wide currency over earlier, more specific or narrower terms such as court interpreter or sworn interpreter. The term is more inclusive and includes – in the letter and spirit of the Directives - interpreting in all proceedings, all settings and at all stages of legal procedures, from a search warrant or arrest, police or investigative judges' interviews, legal aid, lawyer-client or victims' meetings, through all interim hearings until the decision in court and post-trial situations such as prison or probation. Moreover, the practice of legal interpreting shows that today it stretches far beyond criminal law settings only. Interpreting is needed in immigration hearings, during depositions when personal statements such as a witness report or expert testimony documents need to be interpreted, in mediation and conflict resolution settings, in juvenile and custody hearings or in civil and commercial law disputes. As Bancroft et al. have pointed out

Many legal services and processes take place outside the courtroom. Consider these representative examples: Immigration services, Discrimination complaints, Employee arbitration, Divorce and custody mediations, Interpreting for law enforcement, Sight translation of legal forms for any service (Bancroft et al, 2013:96).

One of the concerns of these authors is that, focusing so much on criminal procedures, insufficient attention has been paid to the vast and diverse field of legal interpreting and that hence ‘the lack of specialized training for non-courtroom legal interpreting has become a critical concern in providing effective and appropriate legal interpreting’ (ibid: 97-98).

Therefore, before turning to interpreting in civil procedures and more specifically in mediation, let us recap the main competences required of the LI. The professional profile of the LI comprises a number of competences which can be broadly subdivided into pre-requisite and specific competences. The first category describes the general competences LIs are expected to possess prior to beginning an LI training course and which are the foundations to build a legal interpreting training course on. The second category describes competences that are specific to the professional LI.²⁰

2.1. Pre-requisite Competences

2.1.i General language competence

Proficient language knowledge and skills in both the language of the legal system and the foreign language. The Common European Framework of Reference for Languages: Learning, Teaching, Assessment provides a yardstick here. It is expected that the highest levels (C1 and C2) are required of LIs.²¹ Such general language competence would include the following skills.

2.1.ii Performance Criteria for Listening Skills

LIs are able to understand any communication, except the most specialised, in the two languages without serious listening comprehension errors, recognise and understand idioms, registers and a variety of expressions, identify and understand the significance of varying levels of formality as required by the occasion, understand the range of language strategies used by any speaker, understand regional accents and possibly dialects which a native speaker of the language would be expected to understand, understand speech produced under stress, identify and understand the significance of changes in the perception of the subject matter, the direction of the argument and the position taken up by the participants, recognise underlying feelings and attitudes of others even when they communicate these indirectly or with subtlety or through non-verbal communication. These skills have to be underpinned by a knowledge of grammar and syntax in identifying precise meaning and a constant awareness of changes in the language and usage as well as a readiness to update one’s own knowledge accordingly.

2.1.iii Performance Criteria for Speaking Skills

LIs master a full command of grammar and syntax and are thus able to speak the two languages without serious errors, use with confidence a range of idioms, registers and a variety of expressions as required by a particular occasion, speak with a fluency and without an accent that may be difficult to understand, adapt to varying levels of formality as required by the occasion, adapt their own use of spoken language so as to respond to changes in the subject matter, the direction of the argument and the positions taken up by the participants. They are able to transfer the communicative strategies, intentions and emotions of speakers.

2.1.iv Performance Criteria for Reading Skills

LIs are able to define the genre of the text - the kind of text - and are able to understand its structure, key points and purpose. They can identify differences and similarities between opposing positions and arguments in the text and possible ambiguities. They are alert to the level of formality of the text, including contextual and cultural allusions.

2.1.v Performance Criteria for Writing Skills

LIs need to be able to express meaning correctly, clearly and without ambiguity and use language, including idioms, register and nuances to communicate information in ways that are appropriate to the topic, the context and the intended purpose, taking account of possible contextual and cultural requirements.

2.1.vi. Interpersonal Skills and Attitudes

LIs often work in stressed and anxious circumstances, in difficult settings, thus requiring strongly founded communication and interpersonal skills. Drawing a psychological personality profile of an LI is a hazardous undertaking but some of the following traits would probably be characteristic of the professional, qualified LI: intellectual curiosity, assertiveness, analytical skills, accuracy, flexibility, decisiveness, perseverance, empathy, interest in language and cultures and, of course, an interest in interpreting and in legal issues.

2.1.vii Knowledge of the Relevant Countries and Cultures

LIs deal with a great cultural and linguistic diversity of people, hence a thorough knowledge of both the country of the legal system and of the other language speaker is essential. This competence includes knowledge of geography, regions and cities;

population, demographics, migration and ethnic groups; political institutions, parties, groupings and current affairs; the social, welfare and health sectors; education and religion; media and information sources; a broad history timeline; and cultural issues, including traditions and customs.

2.2. Specific Competences

2.2.i Legal Language

LIs are proficient in the language and discourse of the legal system. They have knowledge of the linguistic characteristics of legal language, of the registers most commonly used in legal contexts, from formulaic language to slang, from jargon to group-bound variants. They can follow legal arguments, understand legal concepts and master terminology in sufficient depth to be able to transfer messages correctly, fully and adequately into the target language. LIs can identify and master the characteristics, conventions and formats of the different main types of oral genres such as interrogation, testimony or sentencing.

2.2.ii Knowledge of Legal Systems

LIs know the overall structure of the legal systems of their working languages and of the relationships between the legal services within them, e.g. the hierarchies and types of criminal and civil courts and tribunals. They know the legal professions in both systems, i.e. the different legal actors (police, judges, prosecutors, clerks, lawyers, etc.) and the role of experts working in the legal system. They know the aims and organisational structure of services, e.g. the police, probation and prison services as well as e.g. victim support services. LIs also know the common procedures within each legal service, for example, the sequence of speakers in hearings in courts and tribunals, the steps taken in criminal investigations or the circumstances and character of consultations with lawyers. They are familiar with the main settings in which legal interpreting is required (e.g. asylum hearings, police procedures, trials and other court proceedings) and this knowledge is underpinned by a sufficient, reliable knowledge of the relevant aspects of criminal and civil law enabling them to carry out their assignments, complemented, when necessary, with knowledge of additional specific legal domains such as juvenile courts.

2.2.iii Knowledge of Resources and Information Retrieval

LIs are able to quickly access any necessary relevant sources (human, electronic, paper-based) and have a clear understanding of the channels through which such legal information is available and how they are structured and systemised, especially

online, including both national legal online sources and EU and international online legal sources. They can access information available through educational institutions and services offered by professional associations. LIs can identify what they are unsure of, build upon their existing background knowledge before and, if necessary, during an assignment and know where to find the required information quickly. They can keep a personal accessible record of useful, non-confidential information, and keep up-to-date between assignments.

2.2.iv Interpreting and Oral Sight Translation Skills

LIs master the various modes of interpreting (short dialogue, consecutive, simultaneous/chuchotage and sight translation) and the appropriate supportive strategies (such as memory, note-taking, stress management, etc.). They possess the necessary interactional skills, e.g. formal introductions, asking for repetition or clarification, turn management, etc. They can interpret accurately into both languages, including factual information, concepts and opinions, adding or omitting nothing, using, as required, standard or formal language, jargon or informal language and the correct legal terminology. They can render levels of linguistic sophistication or bluntness and reflect the speakers' attitudes and emotions, including, as far as possible, non-verbal communication. They are able to speak in both languages with confidence, fluency and without an accent which could hamper understanding. They are able to suggest action if the flow of communication between the parties breaks down and alert the parties to any important missed social and cultural inferences without acting as a culture broker.

Having been given reasonable preparation time the LI is able to convey the meaning of a written source text in the other language completely and faithfully without adding or withholding anything. They can produce a sight translation which is fluent, clearly audible, presented at a pace acceptable for spoken language and without an accent that might hinder understanding. They are able to render the language register and tone of the document and alert to any important inference that might lead to misunderstanding. Given the growing use of video-link interpreting, LIs will also increasingly be required to master the specific competences for these assignments.

2.2.v Professional Code of Conduct and Guidelines to Good Practice

Knowledge of the code of ethics and integrated awareness of the code in one's professional performance are essential for the LI. This ensures that the interests of all parties are served in an impartial and confidential way and it inspires trust in the professional role of the LI. Moreover, the LIs know that a breach of the code makes them liable to disciplinary procedures and possibly criminal charges. LIs

know the code(s) that apply in the national/regional legal system, the code(s) of the national/regional professional association and the relevant EU code(s). They are able to fully integrate the ethical principles of the code(s), such as maintaining confidentiality and impartiality. They can judge whether they have adequate skills and knowledge to accept an assignment or how to decline or recuse themselves if they feel it is necessary to do so. They are aware of potential conflicts of interest. They understand that Continuous Professional Development, including self-monitoring of performance, further enhances ethical professional practice.

Moreover, LIs are aware of good practice working arrangements, e.g. how to prepare, whom to inform if attempts have been made to corrupt or put pressure on them; how to deal appropriately with any comments or allegations about the quality of interpreting or of their professional practice; how to deal with health and safety issues, diary and financial management, etc.

3. Mediation in Interpreting

Before turning to mediation as a legal process, it is first necessary to resolve a potential terminological confusion. In the Interpreting Studies literature, mediation is used to refer to a range of strategies aimed at the facilitation of exchanges between various parties, notably other language speakers and public service providers or organisations. The prototypical example is the (inter-)cultural mediator working in public hospitals who will guide and accompany the other-language speaking patient through the system, inform the family or relatives, provide relevant cultural information to staff, help to fill out forms and, when required, will also interpret. The mediator interprets but extends his or her role to the active or even proactive removal of linguistic and cultural barriers in the communication situation in order to anticipate or resolve possible misunderstandings, a position referred to as linguistic mediation. It is obvious that this style of interpreting goes beyond mere interpreting as trained and restrictively defined in professional conference or public services (community) interpreting – i.e. the accurate and complete rendering of a message into the other language without adding, omitting or changing the content, form or intent of the message. On this level of linguistic mediation, the mediator while interpreting will gloss, specify and explain terms or phrases which are culture-bound in either language. Also culturally loaded communication styles (forms of address, registers, politeness norms, gazes etc.) will be bridged in order to reduce the cultural distance in terms of pragmatic effect and affect.

However, the remit of the mediator usually stretches even wider and can move on from linguistic mediation to active cooperation between the cultures of the two

parties, including fostering access to culturally appropriate services for the other-language users as well as assisting organisations in the process of doing so.²²

Bancroft et al. (op cit: 110) define the term as follows:

‘Mediation: A term used in community interpreting in the U.S. and around the world to refer to any act or utterance by the interpreter that briefly suspends the interpreted session or takes place outside it and is intended to remove linguistic, cultural, or systemic barriers to communication, service delivery, and equal access to services.’²³

Consequently, (inter-)cultural mediators need to be competent in linguistic mediation but also in culturally competent communication (i.e. the ability to recognise the cultural codes of those involved in communicative relations). Some authors such as Verrept, in his description of the mediator in health services, would expect them to be competent in culture brokerage as well, i.e. to be able to explain the culture of the hospital and of the staff to the patient (and the world of the patient to the staff); to guide the relations between the other-language users – often vulnerable groups - and the services; to provide information, practical assistance and, if necessary, emotional support; and ultimately, (and closer to the meaning of the legal process which is the focus of this project – hence the confusion that needs to be avoided at all costs), able to assist in conflict mediation between individual patients or communities on the one hand and the service providers on the other, to monitor problems and, if necessary, advocate strategies towards a (re-)solution.²⁴

It is obvious that this is where the crux of the problem lies, in the role description and role expectation of the mediator who as part of an assignment interprets – but constantly runs the risk here of extending the interpreting into linguistic mediation - and who, secondly, has to perform a number of other tasks which are expected of him or her and which surround the interpreting. As a result, the edges between interpreting and mediating become blurred, for the interpreter as well as for the service provider and other-language client. Even in the most consensual and constructive contexts - in the social services finding housing for a refugee or in health care providing treatment to a patient - the inherently active stance of the mediator and the latitude taken, tend to move far beyond the established professional practice of interpreting properly speaking and the traditional tenets of the codes of conduct and national standards.²⁵ The risk of usurping the professional expertise of the service provider or the voice of the client by the interpreter-mediator is never far away.

This is not the place to go into a lengthy discussion of the evolving views on the role of the interpreter, whether to take a more prescriptive and normative stance or allow

more pragmatic latitude, whether to adopt a teleological outcome-oriented position or at the far end of the continuum expect the interpreter(-mediator) to empower the other-language client by explicitly advocating the concerns and interests of the weaker and disadvantaged party in the communication situation. But it will come as no surprise that in the Interpreting Studies literature there is some concern about the blurred boundary definitions and roles of the mediator and interpreter and about the potentially ensuing confusion. This is why Pöchhacker warns that:

Characterising interpreting as mediation carries a considerable risk of ambiguity and misunderstanding and may play a role in the very practical difficulties that appear to hamper the professionalisation of community interpreting in many countries. It is therefore suggested to distinguish as clearly as possible between the professional function of cross-cultural mediation (in the contractual, conciliatory sense) and that of interpreting in community-based settings, considering that there is ample scope for the professionalisation of either.²⁶

What is clear is that mediation in interpreting (and in Interpreting Studies) is associated with public services or community interpreting and entails a completely different interpreting practice and ethical stance from interpreting in mediation as a legal process, to which we will now turn.

4. Interpreting in Mediation

4.1. Introduction

‘Mediation is a form of intervention in which a non-aligned third party, the mediator, assists parties in dispute to negotiate over the issues that divide them.’²⁷ Apart from very specific forms of mediation such as adjudication or commercial arbitration – much more characterised by formal procedures, rules, extensive advance written documentation and a presiding authority - mediation is also being increasingly used in civil disputes, often as a voluntary stand-alone process and sometimes on a compulsory basis as part of a court linked or ordered procedure. It is quite common to resort to mediation, for example, in national and cross-border family disputes (including divorce, matrimonial disputes, child abduction or custody), in disputes relating to elderly people²⁸, to resolve disputes in churches, in the workplace, in schools (bullying, parent teacher disputes, etc.) in health care (medical negligence claims in particular), and even in such unexpected contexts as environmental disputes or youth mediation (e.g. gangs). The reasons for the increase and strongly encouraged use of mediation are clear: they relieve overburdened court rolls and mediation is confidential, efficient, speedy and less costly. Additionally, it may have

the enormous advantage of solving the root causes of a conflict rather than its legalistic side only.

Given the inherent multilingualism of modern societies, which inevitably and for quite some time now has been prominently manifest in the legal services, notably in criminal proceedings, it is clear that one will be confronted with the same phenomenon in civil matters, including mediation. Now most mediation obviously takes place in a monolingual setting, most often in the language of the legal system, the dominant (official) language(s) of the country. But even here, in a monolingual situation, the multilingualism of our societies will force itself in by the back door. When two Turkish speaking neighbours in Belgium have a conflict and it comes to a mediation process as a strategy to try and resolve the dispute, the first option will be to turn to a Turkish speaking mediator, and no interpreter will be needed. This is common practice in all EU Member States. As Vanden Bosch pointed out in a previous chapter, in Belgium the register of mediators available on the website of the Federal Mediation Commission lists 24 languages in which mediation can be offered.²⁹ The practice has obvious advantages – time, cost, cultural rapport, ease of communication process, etc. - however, we immediately run into a problem here that will crop up again and again throughout the following discussion: there is no language test for these mediators. They themselves indicate in which language they feel proficient enough to work.

But, of course, there will be numerous occasions when mediation is needed between parties speaking different languages. We assume that the parties and mediator(s) will not all switch to a shared though not necessarily adequately mastered third language, nor that one party will reluctantly agree to speak the other party's language to remove the language barrier.³⁰ These are options that entail major disadvantages and risks, as one needs to express one's emotions, expectations and nuances in a foreign language, which in the latter case even involves a real power imbalance. If one of these options is taken – and one most fervently hopes not - then the mediator will have to be very, very much aware of potential misunderstandings and in the latter case, the risk of unfairness to the needs of one party.

Turning now to situations in which the parties do decide to speak their own different languages, there are three ways to mediate across these languages: bilingual mediation, the bilingual mediator(s) as interpreter(s) and the use of interpreters.

Bilingual Mediation

In bilingual mediation people communicate with each other, each using their own language.³¹ Although parties may have spoken the other party's language in the past,

and certainly understand it, each party now decides to speak their own language. Both languages are understood by all, but for reasons of accuracy and nuance, emotions and stress, or simply equality of arms, one decides to express oneself in the language in which one feels at ease and through which one attempts to assert one's own identity and voice in the conflict. In such a situation one needs one or two bilingual mediators, proficient in both languages so that the whole mediation process can be conducted in the languages of the parties. The mediators do not have to interpret, nor is there a need for an interpreter. The bilingual mediation process proceeds as if it were monolingual.

This is a common option in cross-border mediation but not exclusively so, as it may also happen in national mediation e.g. when the other language speaker and the public service provider each speak their mother tongue and understand the language of the other party, with the mediator proficient in both.

The practice of bilingual mediation is best documented in cross-border, international family mediation cases or in disputes involving partners from the same state but of different nationalities or different religious or ethnic communities. The complexity and sensitivity of these disputes – sometimes acrimonious divorce, child custody battles, child abduction – has stimulated the practice of co-mediating these cases with a tandem team of two specialised bi-cultural and bilingual mediators, each from a different state of origin and preferably from a different but complementary background (e.g. with legal and socio-psychological expertise) and of a different gender.³² The Wroclaw Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues (Wroclaw, 6-8 October 2007) sums it up as follows:

1. The mediation should be conducted as a bi-national co-mediation.
2. The mediators should have the same national origin as each party in the mediation.(...) In this way mediators reflect the different cultural backgrounds of the parents.
3. One mediator should be female and the other should be male. (...)
4. One mediator should have a psychological/pedagogical professional background and the other should have a legal background. (...)³³

A pre-eminent association that mediates along these principles is MiKK, the German association *Mediation bei internationalen Kindschaftskonflikten*, which has a large database of trained, qualified German and foreign mediators working worldwide in dozens of languages, an excellent informative website and a solid body of research based on a great deal of valuable experience.³⁴ Similar organisations are e.g. Reunite

in the United Kingdom³⁵ or IKO, the Centrum Internationale Kinderontvoeringen in the Netherlands.³⁶ There is also an EU Network of International Family Mediators.³⁷ This practice of co-mediation in international family disputes is supported by the EU Parliament³⁸ and The Hague Permanent Bureau recommendations.³⁹

Their conclusion is that the ideal is a combination of all these parameters: two mediators from different nationalities, of different gender and with different complementary competences. Of course, it is understood that it is not these prerequisites as such which will make the mediation process successful, but in combination with the competences and experience of the mediators they will be of invaluable help in these kinds of disputes in understanding the parties' culture, values and expectations and their verbal as well as non-verbal communication. The feeling is that this modus operandi will be more conducive to building a basis of confidence and trust, create a constructive atmosphere and thus increase the likelihood of reaching an understanding. As Paul and Walker (2007: 590) put it:

Two mediators of different sex are required in order to take full advantage of co-mediation and to give both parents the opportunity to feel properly understood by a woman or man during the mediation proceedings. A further prerequisite for the composition of the mediation team is differing professions. Owing to the highly escalated conflict potential of such proceedings, one mediator should have a so-called psycho-social or educational profession, including a high degree of relevant experience. At the same time, such proceedings are closely embedded in a legal framework so that profound legal knowledge is indispensable when external legal counsel is involved. Last but not least, the pair of mediators should reflect both parents' cultural background.⁴⁰

4.2. Bilingual Mediators as Interpreters

In a different scenario, each party decides to speak their own language, for the same reasons as in bilingual mediation but in this case the language of one party is not understood (or sufficiently understood) by the other party. In these situations, and in case of one mediator, a bilingual mediator who will also interpret between the parties is required. In the case of two mediators, they may both be bilingual and able to interact with both parties but interpreting will still be needed for the other party anyway, and if one mediator is proficient in one language only, then the second mediator, as a bilingual, will need to interpret for both the other mediator and between the parties.

The fact is that in the extensive literature on bilingual mediation, the language issue - the degree of proficiency in both languages - is rather taken for granted. One

would expect that, given the highly sophisticated language skills that are required in mediation, this competence would merit great and in depth attention. In their seminal chapter on family mediation in an international context, Kiesewetter and Paul (2014: 43) refer only to the desirability wherever possible of: ‘fluency in the language of the parent from the other country so that the mediation can be conducted wholly or partly in the languages of both parties’ as criteria for selection of the two co-mediators. ‘Wherever possible’, ‘fluency’, ‘wholly or partly’: the statement raises questions rather than providing a firm standard or operational training goal, while the last qualification – ‘wholly or partly’ – seems to open the door for a mixed form of mediation: bilingual if possible, interpreted when unavoidable (or does the infernal practice of the third language – shared by all participants but nobody’s first language, often imposed, turned to or reluctantly agreed to for practical reasons but handicapping everybody - raise its ugly head here?). Other publications shed no more light on the proficiency question. The EU Parliament text on The Role of the Mediator for International Parental Child Abduction expects *each mediator to be fluent in both languages of the parties* (italics mine); The Hague Guide to Good Practice under The Hague Child Abduction Convention, Part V – Mediation (HCCH: (2012:32) states:

Co-mediation allows for the involvement of mediators with the same mother tongues as the parties and fluent in, or having a good command of, the other relevant language (so-called ‘bilingual’ co-mediation). Co-mediation may also include one mediator speaking only the mother tongue of one party and the other being fluent in the two relevant languages. Here, however, the mediator speaking the two languages will *partly play an interpreting role* (italics mine).

Another statement in a comment on a Franco-German Family Mediation project (Alles, 2009: 3), does not offer much concrete information either:

One of the skills required of family mediators involved in this project was an excellent command of the language of the other country. (...) Accordingly, both mediators needed to be at ease in both languages, not only to have a precise and clear understanding of what was said by the parties, but also *to be able to conduct the mediation process in both languages* (again, italics mine).

The fact that the language proficiency competence is so ill-defined and all too vaguely described is a major problem both in bilingual mediation, as we saw above, and also when the mediator has to interpret, although it seems little realised. These legal professionals, social workers, educationalists, psychologists, etc. may bring excellent mediating competences to the task but the question remains about who

tests their language proficiency, how and at what level. The other problem, however, of the mediator(s) also having to interpret, gives rise to even greater concern. In the same chapter on family mediation in an international context, Kiesewetter and Paul (op cit:51-52) are aware of the problem.

Having to translate the dialogue while mediating increases the cognitive load and requires considerable additional effort on the part of the mediator. This leaves less time for reflection and for focusing on the dynamics of the mediation during pauses in the conversation. (...) Mediators deliberately work with a different type of language than that articulated by the parents. When mediators simultaneously assume the role of interpreter as well as the mediator, it may affect their ability to reframe and reformulate with a changed connotation. If parents feel desperate and hurl bitter accusations at each other, as a mediator one might not necessarily want to translate this, but rather articulate the underlying wishes and needs they express directly.

Mary Carroll, a co-author in the same book, shares the concerns about cognitive overload - managing the thought and communication processes of mediation simultaneously with the interpreting task - but also warns of perceived preferential treatment of the interpreted party:

The dual role of interpreter-mediator can cause confusion and uncertainty for the conflict parties and compromise the perception of the mediator's neutrality as the interpreter-mediator devotes more time to one party than the other. Therefore, a clear distinction between the roles of the impartial interpreter on the one hand and the impartial yet process-oriented mediator on the other is required for all parties in mediation (Carroll, 2014: 129-130).

Finally, a much more fundamental criticism of the dual role of bilingual mediators is voiced by Bernal (2011: 557, 559, 561, 580-581). He argues that:

A lack of interpretation experience, combined with the effects of interpreter fatigue, hampers the effectiveness of serving in such a capacity. The presence of these factors eventually leads to a substandard performance in the collective dual-role, as well as the individual mediator and interpreter roles. (...) In fact, performing dual-roles also questions the neutrality and confidentiality of the individual in both the dual-role of an interpreter-mediator, as well as in the individual roles of an interpreter and a mediator. (...) But when both roles and their accompanying ethical standards are combined, therein lies an ethical problem with neutrality. First, the interpreter is not to communicate with the parties or their relatives outside of the interpreter role. A mediator's main role is to facilitate communication between the parties, which requires

communication outside of the role of an interpreter. When it is perceived an interpreter communicates with individuals outside of the strict scope of interpreting, there can be serious questions raised regarding his impartiality. (...)

As a bilingual attempting to be an interpreter, he is completely unfamiliar with the complexity of the languages and their cultures, as well as the inner workings, methods, and techniques of interpretation. He also does not understand the full effects of interpreter fatigue. The added cognitive requirement of interpreting, along with the interpreter fatigue, would in turn affect the quality of his mediation skills. The opposite is also true. If he focuses solely on achieving a mutually agreeable settlement, the parties will never be able to successfully communicate, therefore preventing that very settlement from ever taking place. (...) Two individual professionals, fulfilling two individual roles, must be used in order to guarantee a fair, efficient, and successful mediation for the parties.

A strongly worded position, but it has the advantage of forcing us to reflect on the implications of the mediator also having to interpret the process. While it is true that even a monolingual mediation is always an exercise in interpretation, this is not the same as having to interpret between languages in a bilingual mediation. It is understandable and correct that the mediation competences are deemed preeminent and essential in the mediation process, but making the language proficiency and interpreting skills wholly subservient to them, in a process wherein language and communication are so crucial, is downright dangerous. If mediators, for practical reasons (time, efficiency, cost, etc.) or more fundamental reasons (reluctance to have a third party present, distrust of the interpreter's competence or ethics, etc.) decide to mediate and also interpret, they should not only possess a very high level of language proficiency in both languages but also a deep understanding of what interpreting really is, i.e. the full, accurate, complete rendering of a message in content, form and intent. When mediators also have to interpret, they run the risk of getting distracted and fatigued more easily. They may miss out on subtleties, nuances and connotations if they do not have superb language competences. They may run the risk of creating an unwanted alliance with one party in a perceived preferential treatment. Moreover – and this is where the role confusion comes in and where this kind of interpreting begins to resemble the mediating we mentioned in Section 3 - as mediators they may opt for interpretations of the verbal message that serve the mediating purpose but do not render justice to the voice of the speaker. Ultimately, to rob a party of its full voice –which it would have in a monolingual or mutually bilingual situation - by drowning it in the mediation process may well, as Bernal suggests, border on the unethical. Strongly worded perhaps, but food for thought, definitely.

4.3. Interpreting in Mediation

The role tension when being both mediator and interpreter is a challenging one, untenable for some, even unethical for others. Kiesewetter and Paul (op cit: 52) acknowledge the problem and come to the conclusion - even in cross-border family mediation, that: 'As a general rule therefore, when interpreting is required it is preferable to employ a professional interpreter whenever possible.'

Nevertheless, there remains a great deal of suspicion of interpreters in mediation, who seem to be viewed as a necessary evil. The feeling is they may interfere with the role of the mediator; they are thought to be insufficiently skilled in the process as such and in the communication and linguistic strategies of the mediator, and there is a widespread ignorance and even distrust of the ethical codes they have to abide by. Mediation seems to be trusted in the hands of mediators only, and interpreters are a last, desperate resort.⁴¹ A Dutch report on the evaluation of a pilot mediation project in international child abduction cases – with four cases out of 30 using the services of an interpreter – recommended that the use of an interpreter be limited as much as possible. The mediator needs to find out whether the parents can not, after all, manage a common language and if not, and an interpreter is to be used, they are to be instructed to 'interpret as literally as possible' and 'to adopt a detached role' in order 'to avoid noise and interpretation' in the interpreter's rendering (Bakker et al. 2010: 54).⁴²

If an interpreter is needed after all (because of the specific language combination or a bilingual mediator-interpreter is not available), one would do well to take some extra precautions:

Where interpretation is considered an option, the interpreter has to be chosen with care and needs to be well prepared and aware of the highly sensitive nature of the conversation, and of the emotional atmosphere of the mediation, so as not to add a further risk of misunderstanding and jeopardise an amicable resolution. Furthermore, safeguards concerning confidentiality of mediation communications must be extended to include the interpreter(s) (HCCH op cit: 32).

Now, one need not be too desperate. This is possible, as interpreting has been fully integrated for decades now in virtually all domains of the legal services, though most prominently in criminal justice matters. However, in contrast with the achievements in interpreting in criminal justice matters and the procedural and quality-ensuring EU Directives in place, scant attention has been paid to interpreting in civil matters, let alone in mediation. Nevertheless, it does happen, as the following instance shows. Feedback from six mediators on a 2006 questionnaire conducted by the Reunite

International Child Abduction Centre revealed that the services of an interpreter were required in some mediation cases but that the use of an interpreter did not hinder the mediation process and did not affect the ability to reach a Memorandum of Understanding within the allocated timeframe (Reunite, 2006: 48-53).⁴³

Because the current state of affairs on interpreting in mediation offers little solid in-depth evidence, it cannot come as a surprise that, when the issue is confronted, it is from a wholly practical point of view. Marian Roberts, for instance, does recognise the role of the 'translator' (sic) as one of the possible 'third persons' (besides lawyers, support persons, social workers, etc.) in mediation and describes their function as 'to ensure, on behalf of one or more of the parties, accessibility to and effective participation in the mediation process. (Roberts, 2014: 178-179). While admitting that their status, role and function is 'central in consideration of cross-cultural aspects of mediation' her A-Z of Mediation restricts itself to offering useful but general advice to accommodate the 'complicating, yet often beneficial, additional presence of a third person' (ibid:178). This means e.g. the promulgation of guidelines and procedures to ensure the integrity of the process; checking seating arrangements and length, time and cost implications as well; the management of power and gender imbalances and possibly conflicting ethical professional imperatives, as necessary.

Similar advice is offered to mediators using the services of an interpreter by Boule and Nesic (2010:270-271). They insist on the use of professional interpreters, with a clear role definition, fully briefed, in an appropriate seating position, mastering the various modes of interpreting and having signed a confidentiality undertaking before the session commences.

More extensive recommendations – because written for mediators but at least with the practice of interpreting in mind – are made by Carroll (2014: 135-137): the interpreter should be a trained and qualified professional, abide by professional ethics, know how to deal with misunderstandings and conflict; the interpreter should be briefed, the respective roles and seating arrangement discussed; and the interpreter should know the overall management of the process (including potential imbalance in time allocation in favour of the interpreted party, the risk of alliances being formed, etc.).

In conclusion, from this brief survey of the three ways to mediate between languages, it has become clear that more comparative research is needed on the pitfalls and successes, the advantages and disadvantages of each method and particularly so on the use of interpreters in mediation. Participating in observation sessions, role plays, ethnographic analysis, interviews and questionnaires could all shed more light on interpreting in the mediation process and would be to the mutual benefit of

both mediators and LIs. Given the current state of affairs, however, we believe that more useful insights can be derived from the mediation process itself and from the mediators' competences as they are described in the literature. It is these two factors, we think, that will help us to better define the competences of the LI in mediation.

5. Specific Interpreting Competences in Mediation

Our goal in this section is to describe the specific, additional competences required of the LI in mediation. We will first look at the mediation process itself as it impacts on interpreting; and then at the competences of the mediators that need to be mirrored in a complementary way by the LIs rendering mediators' interventions and communication and linguistic strategies into the other language.

5.1. The Mediation Process

The following case seems a fairly typical example of a mediation process.

This case concerned a dispute between an Italian father and a Slovakian mother over custody and access rights in respect of their two children, aged 5 and 7, who were born in Italy and taken to Slovakia by their mother. After the applications by the parties and the legal background to the case had been assessed, the Mediator organised discussions between the parents with a view to formally opening a mediation procedure.

The process of negotiation consisted of the following stages:

- a telephone conferencing session between the father, who was in Strasbourg with his lawyer, and the mother and her lawyer, who were at the Italian Embassy in Slovakia with the Consul and an interpreter;
- presentation of the parties and formal opening of the proceedings;
- discussion of the draft mediation agreement drawn up in the preceding months and negotiation of key points of the mediation agreement;
- finalisation of the mediation agreement (after an eight-hour session);
- signing of the mediation agreement and formal conclusion of the procedure;
- fundamental issues covered in the mediation agreement: right of custody, rights of access and maintenance (Euromed, 2011: 18-19).

There is obviously not one overall mediation process model that fits all circumstances or all parties. The institutional and legal context, the complexity of the issues on the table, the personal concerns at stake, possible cultural factors and experiential preferences of the mediator, will all affect the method chosen. Generally, however, it seems possible to identify broad stages in the process, where each stage will automatically tap into some of the interpreter's basic skills (listening, note taking, chuchotage, consecutive, oral translation, etc.).⁴⁴

A pre-mediation or intake session, sometimes in the form of an advance questionnaire, often an interview with both parties separately, is sometimes conducted over the telephone or via video-link. Its purpose is to provide information about the mediation process, explain the procedures and the role of the mediators, including the importance of confidentiality. This interview also helps to identify the issues for mediation and the suitability of the mediation instrument. On the basis of informed and voluntary consent an agreement may then be reached with both parties. However, mediation may also be court ordered or be part of a court linked procedure, in which case the process starts on a compulsory basis and time will be needed to establish this working basis of trust in the process.

The duration of mediation obviously varies, depending on the number and complexity of the issues and the degree of hostility, as well as on the particular, personal conditions. The Utrecht pilot report mentions three sessions of three hours (over two days). The Reunite report mentions: 'Subject to some variation the usual arrangement is three mediation sessions scheduled over two consecutive days, each session lasts up to three hours.'(Reunite, op cit: 9-11).⁴⁵ The first session will reiterate aspects which have been raised during the intake - procedures, the ground rules of the mediation. The main issues are then explored, letting each party present their information, assert their feelings and expectations and allowing the mediator to define and delineate the process. Often the mediator will opt to go into so-called 'caucus sessions', where mediators will take some time with each party separately. This is also the time for interim lawyer-party consultation, if applicable. (In the case of child abduction or custody cases, there may be separate sessions with the child or children concerned, often conducted by another mediator, with a report sent to the main mediator(s) and destroyed after the mediation, unless, by mutual agreement, submitted in later court proceedings).

The second and third sessions will then follow on day two, alternating if necessary between joint and caucus meetings. The positions – the issues and the emotions involved –will be further examined and, in a succession of overlapping stages, altered and steered towards a mutually acceptable settlement. Throughout this process, the mediator acts as a catalyst, a coordinating collaborator, an objective,

non-judgmental facilitator steering the process from conflict to resolution. The mediator informs, elucidates, clarifies and analyses the feasibility of the steps to the desired objectives. As Roberts (op cit: 110-12) points out, the process is propelled by the basic contradiction between the parties' antagonism and the simultaneous need for joint action to arrive at a mutually acceptable decision. In a cyclical as well as developmental process, and by means of a negotiation logic and psychological strategy, the mediator will try to steer the sessions from hostility to settlement. Such an outcome will usually take the form of a Memorandum of Understanding which will have to be agreed on and signed by both parties (and if present and necessary by their lawyers). Mediation can lead to either a full or partial agreement on the issues.⁴⁶

For completeness sake, it must be mentioned that mediation can also be conducted by telephone or video conference or online, the latter being used, for example, in e-commerce disputes. Where the parties are geographically distant, or there is great urgency, or where there is concern over the safety of one party or of children, it may be preferable to conduct either all or part of the mediation via these means of communication. This type of mediation may have time and cost advantages, as well as greater flexibility and accessibility (allowing for a wider range of parties to be involved). Boulle and Nestic, however, alert mediators to a number of potential disadvantages, such as the lack of rapport and immediacy, the difficulty to assess non-verbal communication or emotional content, the fact that it is easier to get distracted than in face to face sessions. There is less scope for the parties to learn and develop conflict management skills, apart from the fact that technology is not always secure and reliable and some people might find dealing with these issues via telephone or video intimidating or unsettling. They suggest mediators would do well to follow a number of additional guidelines, which as matter of fact would underpin the quality of interpreting in these situations as well: check the connections beforehand, have a briefing before the conference link up, identify who is physically present at either side, give participants time to settle into the medium, listen carefully and check understanding, keep statements within reasonable length, remind everyone that only one person should speak at a time, etc. A really fundamental concern is confidentiality, i.e. to ensure that what is being said and agreed online will remain private (Boulle and Nestic op cit: 240-248; Roberts (op cit: 126-128).⁴⁷

5.2. Competences Required of the Mediator

Apart from the competences listed below, mediators will first of all need to possess a certain aptitude and personal qualities that will make them apt for and successful at mediation. They will need patience, persistence, energy, flexibility, sensitivity,

problem-solving creativity, empathy, reasonableness, and no doubt a few more personality traits, all radiated through a non-judgmental presence of authority. From the brief discussion above of the mediation process, however, it is clear that the competences required of the mediators are, first and foremost, strongly knowledge based.

Mediators need the following knowledge based competences:

- knowledge of the relevant national (and in cross- border cases) international mediation instruments
- knowledge of the law of mediation, and of the enforceability regulations of mediated agreements between different jurisdictions
- knowledge of the nature of conflict, including the dynamics of power and violence
- knowledge of the appropriateness or inappropriateness of mediation by managing the pre-mediation preparation, screening and intake of both parties
- knowledge of the principles and phases of the mediation process, including the writing of memoranda of understanding
- knowledge of the roles, functions and liability of mediators as well as the roles and functions of accompanying third persons such as lawyers and other professionals, including the interpreter
- knowledge of the communication strategies used in mediation, such as monitoring interaction, positioning, etc.
- knowledge of the linguistic strategies used in mediation, such as reframing, questioning, summarising, etc.
- knowledge of the specific issues involved in bilingual, cross-cultural mediation, such as gender, ethnicity, etc.
- knowledge of the relevant mediation and subject matter resources and the networks of other professionals.

While firmly aware of one's position as an interpreter in the mediation process and in order to be able to deliver a professional, competent service, the LI, too, will need to master in some practical but efficient way the same knowledge based competences: knowledge of the legal mediation instruments and the mediation process, an understanding of the role of the mediators and of third persons, the essentials of the nature of conflict and the specific issues involved in bilingual, cross-cultural

mediation. And they will need to know the specific mediation and subject matter terminology (e.g. in cases of health, youth gangs, family, education mediation, etc.).

A second set of competences is more specifically related to the ability to apply the communication and linguistic strategies needed in mediation.⁴⁸ Polarisation and argumentativeness are to be avoided and instead respectful communication – or reducing conflict communication – is stimulated. Mediators will encourage both conflicting partners alike to articulate their interests, their needs, wishes and fears and to stimulate a disposition towards a fair and feasible joint solution. The process is meant to grant a high level of voice and participation to each of the parties and all interventions and incentives are aimed at reducing tensions and at restoring or improving communication between the parties.⁴⁹

These are some of the communication skills mediators need:

- active and effective listening skills, being able to concentrate on everything expressed by a speaker (the information, the emotional content, the accompanying body language)
- observation skills, keeping an eye on people's feelings and reactions, on their body language and vocal tones, which can be confusing, incongruent with or supportive of what is being said
- positive non-verbal communication skills, such as supportive gestures and phrases, indicating understanding or support, showing physical as well as psychological rapport with a party
- the skill to separate issues into aspects that are amenable to solutions from those that are not yet
- the skill to identify the dominant feelings of each party, to remind parties of the progress that has been made, and to establish a platform for the next session
- the skill to grasp the pragmatic intention as well as the illocutionary force and perlocutionary effect of an utterance
- at the appropriate phase in the process, the skill to force the parties to make the mediator(s) the addressee(s), rather than speaking to each other, making the communication situation less threatening
- managing turn-taking skills, allowing each disputant to tell their story, making the other wait and listen, avoiding overlapping and competition for speech
- managing appropriate positioning and seating of parties and third persons

at the appropriate stage in the process, thus carefully monitoring proxemics during the process

- the skill to manage the stress and high emotional tension of the sessions

Some of the main linguistic strategies mediators need to master are:

- questioning skills, making appropriate use of different types of questions, depending on context and circumstances in the course of the mediation process⁵⁰
- simplifying skills, putting difficult arguments or complex issues into simple, clear language
- summarising skills, e.g. to provide clarification and focus on important aspects of the issue
- the skill to select one argument for full consideration and move away from another, to develop new arguments and to explore a possible solution, rather than a verbatim playback
- the skill to reiterate and stress what has not been understood or 'heard', e.g. a concession, an apology, an offer
- reframing skills, of issues and positions 'in a manner that ensures both maximum receptivity and vigilance to desired objectives' (Roberts op cit:111) but also of 'inappropriate language of the parties to words and phrases which are positive instead of negative, constructive instead of destructive, and problem-solving rather than problem-reinforcing' in order to provide a different frame of reference and think differently about things (Boulle and Nestic op cit:143); in this sense, every mediation, even a monolingual one, becomes an exercise in translation
- the skill to suppress essential features of everyday talk by mitigating arguments and facilitate regeneration of non-argumentative talk⁵¹
- the skill to defuse confrontation, decoupling accusations and denials by altering or extending what one party has said in a subtle but potentially significant way, thus avoiding face-threatening communication
- the skill to formulate accusations as problems, not people, focusing on the issue rather than the person, talking about what rather than who.

Because interpreting is a matter of knowing how (rather than knowing what), for the LIs in mediation it is crucial that they understand the communication and linguistic strategies of the mediator but above all are able to render faithfully and accurately

all parties' interventions into the other language. Given the complexity of this long, but by no means exhaustive, list of mediation skills, it is clear that the LIs need not only to be trained and fully qualified but will also need a very high proficiency in both languages, an attentive ear to linguistic strategies and a watchful eye for paralinguistic communication features.

All of the above competences need to be solidly grounded in an ethical competence. As a matter of fact, the EU Mediation Directive (Article 7) and the Council of Europe Recommendation No R (98) 1 on family mediation make confidentiality the cornerstone of the mediator's ethical awareness.⁵² They need to ensure that no information will go beyond the walls of the meeting rooms or will be disclosed in any other way. Other documents such as the European Code of Conduct for Mediators or individual association or national codes elaborate the principles of the Directive into fully elaborated ethical rules and regulations.⁵³ The main ethical principles that are repeatedly stressed are the following, all of which are essential to ensure the parties' trust in the process (Roberts op cit: 40-41,65-66,76-77,112,134-35,165-69).

- Confidentiality
- Independence and Impartiality
- Fairness and equity
- Objectivity and even-handedness
- Avoidance of any conflict of interest
- Respect for each party's views, for their perceptions, emotions, their values and expectations
- Professional competence and responsibility
- Accept no other rewards than the agreed fees

LIs, when qualified and registered, abide by their professional code of conduct which essentially covers the same issues as those of the mediators. See, for example, the Grotius code for legal interpreting, drawn up as part of Aequitas, an EU Commission DG Justice project on legal interpreting in criminal justice. Another standard example is the EULITA code of ethics.⁵⁴

From the above it is also clear that mediation sessions can be intensely stressful and not only because of the complexity of the issues. Certain topics – a divorce case involving domestic abuse or child abduction - will be inherently difficult and

incredibly taxing. In an atmosphere of anxiety, mistrust or despair, parties may be insecure and vulnerable or downright rude and cruel. Emotions may run high and may run the gamut from hostility, distrust, anger and suspicion to understanding, acceptance and reconciliation. All participants – including the interpreter - are together in this process, for a number of hours, over a number of days, and there is an obvious risk of empathy, or even sympathy – whether on the basis of the issue, gender, ethnicity, language or whatever – with one of the parties. While the code is there, so is the pressure of this often trying process, which is why LIs in mediation need to cultivate and maintain an exceptionally strong ethical awareness. If ever the principles of the LI code of conduct are paramount, it is in mediation.

5.3. Competences of the LI in Mediation

On the basis of this brief description of the mediation process and the competences of the mediators, it is now possible to draw up the following list of competences required of the LI when engaged in interpreting in mediation.

- Knowledge of the relevant international and national legal mediation instruments
- Knowledge of the mediation process
- Knowledge of the role of the mediators as well as the roles of third persons, such as lawyers and other professionals involved in the mediation process
- Knowledge of specific mediation and subject matter terminology
- Knowledge of the nature of conflict, including the dynamics of power and violence
- Knowledge specific to bilingual, bi-national and bi-cultural mediation
- Knowledge of the communication strategies used in mediation
- Knowledge of the linguistic strategies used in mediation
- The skill to transfer all parties' communicative and linguistic interventions accurately, in content, form and intent into the other language, mastering all interpreting modes
- The skill to observe and assess the impact of non-verbal communication and paralinguistic features in the mediation process and to render their effect

- The skill to position oneself appropriately in the different meetings in the course of the mediation process, often in the case of crowded sessions triggering complex dynamics
- The skill to manage the stress and the high emotional tension in many mediation sessions
- Skill to access relevant mediation resources
- Overriding concern with ethics, guaranteeing among other things confidentiality and impartiality, while at the same time being involved in a constructive supportive process

6. Conclusion

Mediation is a legal process, with standard procedures, conducted in many instances in the presence of lawyers. If successful, it can lead to a binding conclusion; if unsuccessful, it usually leads to a continuation of the dispute before the courts. It is essential that any interpreting in mediation be provided by qualified, i.e. trained, certified and accredited legal interpreters who possess and can exercise the whole range of legal interpreting competences. However, as the above has shown, both the procedures and the strategies used in mediation are very specific and very challenging. For these reasons, legal interpreters working in mediation require the additional specific competences described above. We recommend, therefore, that learning and training strategies be developed to meet the specifics of interpreting in mediation across languages.⁵⁵

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8. Endnotes

1 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/01.

2 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

3 Charter of Fundamental Freedoms of the European Union [2012] OJ 1 326/02.

4 Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings [2012] OJ L 142/01.

5 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [2013] OJ L 294/1.

6 See also recitals 9, 11, 23 in the Access to a Lawyer Directive.

7 Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

8 Commission of the European Communities, Proposal for a directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 Final: See Recital 4

9 Commission of the European Communities, Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 Final. This Directive too lays down in Article 4, 20 that 'This Directive should be implemented in accordance with the standards set out in Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings'.

10 Commission of the European Communities, Proposal for a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 Final.

11 For a survey of legislation in civil matters see: http://ec.europa.eu/justice/civil/law/index_en.htm (accessed 15/10/2015).

12 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ2 343/01.

13 Mutual recognition of protection measures in civil matters [2012] OJ 2 351/01.

14 Mutual recognition of protection measures in civil matters [2013] OJ 2 181/04.

15 Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[2003] OJ 2 26/01.

16 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [2011] OJ 2 338/02.

17 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008]OJ L 136/03.

This Directive should be read in conjunction with Council of Europe Recommendation No. R (98)1 on family mediation ([http://www.coe.int/t/dghl/standardsetting/family/7th%20Conference_en_files/Rec\(98\)1%20E.pdf](http://www.coe.int/t/dghl/standardsetting/family/7th%20Conference_en_files/Rec(98)1%20E.pdf) accessed 15/10/2015) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/01; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF> (accessed 15/10/2015).

In its Resolution of September 2011 on the *Directive on mediation in the Member States, its impact on mediation and its take-up by the courts* (<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0361&language=EN>; accessed 15/10/2015) the European Parliament stressed that ‘parties who are willing to work toward resolving their case are more likely to work with one another than against one another; believes that therefore these parties are often more open to consideration of the other party’s position and work on the underlying issues of the dispute; considers that this often has the added benefit of preserving the relationship the parties had before the dispute, which is of particular importance in family matters involving children’. In its Resolution of October 2011 on alternative dispute resolution in civil, commercial and family matters (<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0449>; accessed 15/10/2015) the Parliament drew attention to the work of the European Parliament Mediator for International Parental Child Abduction and emphasised ‘the crucial role of types of ADR (Alternative Dispute Resolution) in family disputes, where it may reduce psychological harm, can help the parties to start talking again and thereby, in particular, help ensure the protection of children’. See also *The European Parliament Mediator for International Parental Child Abduction Handbook* (2011). Strasbourg: European Parliament, 13.

An interesting new development is suggested in the Online Dispute Resolution for Low Value Civil Claims report. See <http://www.judiciary.gov.uk/reviews/online-dispute-resolution> (accessed 15/10/2015)

18 This has been one of the issues identified in the 2014 Rebooting the Mediation Directive: the limited impact of its implementation and proposing measures to increase the number of mediations in the EU. European Parliament, Directorate General for Internal Policies, Legal and Parliamentary Affairs. http://www.europarl.europa.eu/RegData/etudes/etudes/ join/ 2014/ 493042/ IPOL -JURI_ ET%282014%29493042_ EN.pdf (accessed 15/10/2015).

19 For a survey of these projects see Hertog (2015a). The reports or links of the individual projects websites can be most easily accessed via the EULITA website <http://eulita.eu/european-projects> (accessed 15/10/2015).

20 This section compiles earlier work done by Edda Ostarhild (for *Aequitas*), Ann Corsellis (for *Aequitas*, *Building Mutual Trust 1* and *Qualitas*), Brooke Townsley (for *Building Mutual Trust 1* and *Qualitas*), Cynthia Giambruno (for *Building Mutual Trust 1* and *Qualitas*) and Erik Hertog (for *Aequitas*, *Building Mutual Trust 1*, *Qualitas* and the *Reflection Forum report*).

21 CEFR (2001) at http://www.coe.int/t/dg4/linguistic/Cadre1_en.asp (accessed 15/10/2015).

22 Pym (2002).

23 Bancroft et al. (2013). See also Baraldi et al. (2015: forthcoming).

24 Verrept (2008). In another article (2013) co-authored with Hanneke Bot, the authors focus on different forms of interpreting and intercultural mediation in mental healthcare and suggest the alternative term and model of 'interactive interpreting'.

25 See e.g. *Code of Professional Conduct of the National Register of Public Service Interpreters* at <http://www.nrpsi.org.uk/pdf/CodeofConduct07.pdf> or the *Canadian National Standard Guide for Community Interpreting Services* on http://multi-languages.com/materials/National_Standard_Guide_for_Community_Interpreting_Services.pdf (both accessed 15/10/2015).

26 Pöchhacker (2008: 9). See also Katan (2013), Rudvin and Tomassini (2008) and Mesa (2000).

27 Roberts (2014: 104).

28 Roberts (2014: 60): 'it is estimated that one-fourth of the caseload of *community mediation* services involves older people'.

29 This is the list at the time of writing: Arabic, Bulgarian, Chinese (Mandarin), Czech, Dutch, French, English, German, Greek, Hindi, Hungarian, Italian, Japanese, Lebanese, Luxembourg, Persian, Polish, Portuguese, Romanian, Russian, Slovak, Spanish, Turkish, Swedish. <http://5033.fedimbo.belgium.be/nl/zoeken-naar-een->

bemiddelaar (accessed 7/10/2015).

30 This might happen at the instigation of the mediator – for whatever reasons but often to avoid interpreting – or of the parties who might not trust an interpreter from their own community to be confidential or impartial.

31 The practice is also known as *intercomprehension*, a term also used by Carroll (2014) in her chapter on bridging the linguistic gap in cross-border family mediation. It has also become somewhat of an EU buzzword. See <http://eu-intercomprehension.eu/description.html> , http://languagemagazine.com/?page_id=11125 and <https://en.wikipedia.org/wiki/Intercomprehension> (both accessed 15/10/2015).

32 This type of family mediation must be seen, not only but also pre-eminently in the context of the 1980 Hague Child Abduction Convention (http://www.hcch.net/index_en.php?act=conventions.text&cid=24) and the 1996 Hague Child Protection Convention (http://www.hcch.net/index_en.php?act=conventions.text&cid=70) (both accessed 15/10/2015).

33 <http://www.mikk-ev.de/english/codex-and-declarations/wroclaw-declaration/> (accessed 15/10/2015).

34 <http://www.mikk-ev.de/english/englisch/> (accessed 15/10/2015).

35 <http://www.reunite.org> (accessed 15/10/2015).

36 <http://www.kinderontvoering.org> (accessed 15/10/2015).

37 <http://www.crossbordermediator.eu> (accessed 15/10/2015).

38 *The Role of the Mediator for International Parental Child Abduction* <http://www.europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html> (accessed 15/10/2015).

39 *Revised draft Guide to Good Practice under the Hague Child Abduction Convention, Part V - Mediation* (2012). http://www.hcch.net/upload/guide28mediation_en.pdf (accessed 15/10/2015).

40 On reflection there may be some practical problems that immediately spring to mind – such mediations are more difficult to arrange, more expensive and the mediators need to have similar training and working styles, otherwise different dynamics may hinder the process. More importantly, as *The Hague Permanent Bureau recommendations* points out, this method may detract from the effectiveness of the process as each party may identify with *their* mediator to seek counsel or support. Therefore, it is imperative that the process is balanced by a strong and continuous emphasis on the role of the mediator as completely impartial and objective.

41 See the following comment: ‘Whether mediation proceeds with one mediator from each State or one or two mediators from the same State, it is important that the language used in mediation is clearly understood by all concerned. The parents in many Hague Convention applications have a shared language. However, even where this is the case, it has been suggested that the ability to communicate in a mother tongue or preferred language can assist mediation. Where issues are particularly emotional or a parent wants to be sure to be understood he or she might prefer to speak in his or her own language. While many mediation projects favour using a mediator from each State it is of course necessary that the mediators can also communicate with each other. So they must have at least one shared language. Ideally it may be beneficial to have bilingual mediators so that one mediator is not also working as a translator. In bi-national projects where the two languages are known bilingual mediators may be sought. In broader initiatives professional translators could be used, although this would add to the expense of the mediation’ (Vigers, 2006: 16). http://hchc.e-vision.nl/upload/wop/abd_pd05e2006.pdf: 16-17 (accessed 15/10/2015).

42 ‘Om het risico op ruis en eigen interpretatie door een tolk te voorkomen, wordt het gebruik van een tolk zoveel mogelijk beperkt. De ouders moeten aangeven welke taal zij gemeenschappelijk spreken. Wanneer blijkt dat een tolk nodig is, dient deze instructies te krijgen dat het gaat om een zo letterlijk mogelijke vertaling en een terughoudende opstelling’.

43 However, the role confusion seems to reign strongly even in the heads of these expert mediators: ‘In one case the interpreter was extremely helpful (almost a third mediator)’ (ibidem: 49).

44 See Roberts (2014: 104-110 and 116-119). Roberts also quotes P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective*. New York: Academic Press, who identifies the following stages: searching for an arena; defining the agenda; exploring the field; narrowing differences; bargaining and ritualizing the outcome. See also <http://www.adrcenter.com/international/cms/video-on-mediation-22-languages/> (accessed 15/10/2015).

45 This section is also based on the *Reunite International Child Abduction Centre* report (2006: 9-11) and Bakker et al. (2010).

46 See the *Reunite International Child Abduction Centre* report for examples of Memoranda (2006: Appendix 2, p.101-104). For a description of the mediation process in family mediation, see Kiesewetter and Paul (2014: 46-47).

47 We would like to draw attention here to the recommendations of the *Avidicus* projects on the use of videoconference or remote interpreting in criminal justice. As part of their deliverables they have published recommendations for best practices for LIs as well as legal professionals. See <http://www.videoconference-interpreting.net/>.

See also https://e-justice.europa.eu/content_particularities_of_crossborder_mediation-384-en.do (both accessed 15/10/2015).

48 This section is indebted to the following documents: Roberts (op cit:161-4); Boulle and Nestic (op cit:143-161); *Rechtwijzer 2.0 Online Problem-Solving Dispute Resolution for Divorce. Evidence base* (s.d.); the *Guide to Good Practice under the Hague Child Abduction Convention, Part V - Mediation* (2012), and the *Advanced Mediation Skills Course Book* (UNESCO, 2000).

49 See also the interesting chapter by Conley and O'Barr (2005).

50 Boulle and Nestic (2010: 155-157) identify 12 categories of questions with their intended objectives: open, focused, closed, clarifying, reflective/empathic, probing, leading, cross-examining, hypothetical, disarming/distracting, rhetorical and suggestive. See also van de Griendt and Schutte (2011).

51 Apparently, some mediators feel inflammatory language should not be interpreted as such in order to keep the mediation atmosphere positive. At www.mediate.com (accessed 15/10/2015) it is suggested that the interpreter should be instructed to provide a 'literal' interpretation and to maintain a reserved attitude. 'Decide and tell the interpreter whether you prefer verbatim or diplomatic interpretation.' It begs the question why inflammatory language should be allowed to be heard in a monolingual mediation, and to be glossed over in interpreted mediation. Once again, the comment betrays above all ignorance of the professional and ethical role of the LI.

52 See note 14 and 17 above.

53 See the *European Code of Conduct for Mediators* of 2 July 2004 http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf. For an example of a national code (Belgium): <http://5033.fedimbo.belgium.be/nl/inhoud/deontologische-code-0>

For an association code, see the *Code of Conduct* drawn up by the UK Family Mediation Council: <http://www.familymediationcouncil.org.uk/us/code-practice/> or the *Ethical guidelines for mediators* of the Australian Law Council: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/EthicalGuidelinesforMediators.pdf> (all accessed 15/10/2015)

54 See Corsellis and Fernández (2001). See also <http://eulita.eu/code-ethics> (accessed 15/10/2015).

55 *Advanced Mediation Skills Course Book* (2000) Paris: Unesco.

Part 2

Methodology: Questionnaire Design and Distribution

Annalisa Sandrelli

With the free movement of workers, goods and services within the EU and the significant influx of migrants from non-EU countries, it seems likely that, once mediation becomes a well-known way to settle civil disputes, there will be more and more cases involving parties who speak different languages. The Understanding Justice project therefore used an online questionnaire to find out how the Member States are bridging the language gap now. The aim of the questionnaire was to collect information on the incidence of mediation involving two or more languages in the Member States of project partners since the adoption of Directive 2008 (52/EC).

As was highlighted in Chapter Two, the starting point of the Understanding Justice project was to take stock of the body of work on interpreting and translation in criminal justice, with the aim of identifying the core competencies that LITs acquire through training and professional experience in criminal justice and then highlighting the specific competencies needed to work in mediation. Therefore, the logical step to take in designing the questionnaire to be used in the Understanding Justice project was a review of questionnaires used in previous EU-funded projects on legal translation and interpreting, namely *CO-Minor-IN/QUEST* (JUST/JPEN/AG/2961), *ImPLI – Improving Police and Legal Interpreting* (JUST/2010/JPEN/AG/1562), and *AGIS II – Status Quaestionis. Questionnaire on the Provision of Legal Interpreting and Translation in the EU* (JLS/2006/AGIS/052).¹ The structure and content of these tools were carefully studied, in order to identify common questions that would need to be included in our questionnaire, and then develop the mediation-specific questions relevant to our project. In the Warsaw meeting of the project (November 2014) the partners discussed the general aims of the questionnaire and identified the core aspects that would be covered in it. It was decided that two versions of the questionnaire would be developed, one aimed at mediation organisations and the other at individual mediators. A first version of both was jointly drafted in English by Annalisa Sandrelli and Claudia Monacelli (UNINT, Rome) between December 2014 and January 2015 and was then shared with all the project partners on an online platform for feedback on both content and structure (February-March 2015). Skype conferencing sessions were also organised with selected project partners to discuss specific issues related to the wording

1 Information on all the EU-funded projects on legal translation and interpreting can be found at <http://eulita.eu/european-projects>.

of questions, the sequencing and, of course, the content. A final version of both questionnaires was sent to all project partners for translation into their respective languages at the end of April 2015. After a few minor adjustments to the translations, the questionnaire was piloted with selected mediators in May-June 2015. Feedback from these trial-runs was incorporated into all the language versions, which were then uploaded to a dedicated page (<http://www.understandingjusticeproject.com/survey.html>). The questionnaire went live at the end of July 2015 and closed at the beginning of October 2015.

The questionnaire for mediation organisations opens with a biographical section on the respondent (role in the organisation and language skills), followed by a section which aims at collecting information on the types of mediation provided by the organisation (voluntary, mandatory or both), volume of work, success rate and settings (face-to-face, telephone, videoconference). Then the topic of mediations involving more than one language is introduced and questions are asked to find out how frequent they are, in which domains of civil law they occur and how the organisation deals with such situations. The following section focuses on the use of bilingual mediators to bridge the language gap, and the final section on the use of interpreters: in both cases, the questionnaire collects information on training and qualifications, best practice guidelines, and so on. The questionnaire aimed at individual mediators is very similar, but asks specific questions on bilingual mediation and working through an interpreter. The results of the questionnaire inform each of the Country Reports below. It must be stressed that no claim to statistical significance is made, nor to full comparability of data across the Member States, for a number of reasons. Firstly, the methods adopted for questionnaire distribution varied in the Member States. In most countries the questionnaire was circulated through contacts with local mediation and interpreting organisations; in Italy it was sent by the Statistics Department of the Ministry of Justice to all the mediation organisations on the national register (incidentally, Italy is the only EU country to produce quarterly reports on mediation cases with statistically reliable data). As a result, the response rate varied widely in different countries. Secondly, mediation is not used in the same domains in every country, so it was difficult to indicate the type of disputes in sufficiently general terms, avoiding culture-bound elements or references to national legal traditions. Thirdly, although much care was taken in the translations of the questionnaires, some minor adjustments had to be made to each version to ensure comprehension and relevance to the national situation. Despite these limitations, the country reports provide valuable and previously unavailable data on bilingual mediation and the use of interpreters in mediation.

Both versions of the questionnaire are shown in the next pages.

Questionnaire for organisations

The survey takes approximately ten minutes to complete, if all questions are answered. It will not time-out automatically. The survey closes on 2nd October 2015.

1. Which country do you practice mediation in?	
(a) Country:	
2. What is the name of your organisation?	
3. What is your role in the organisation?	
director	<input type="radio"/>
administrator	<input type="radio"/>
mediator	<input type="radio"/>
Other (Please specify)	<input type="radio"/>
4. If you are also a practising mediator, what is the language you use in professional practice?	
5. Do you speak any other languages?	
	Yes <input type="radio"/>
	No <input type="radio"/>
Please list and indicate your level of proficiency (according to the Common European Framework of Reference for Languages, http://www.coe.int/t/dg4/linguistic/cadre1_en.asp)	
6. Language	
(a) Language 1	
(b) Language 2	
(c) Language 3	

7. Level of proficiency	A1 (beginner)	A2 (beginner)	B1 (inter mediate)	B2 (inter mediate)	C1 (advanced)	C2 (advanced)
Language 1	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Language 2	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Language 3	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Next, we would like to ask about the number and type of mediations that your organisation undertakes. (If exact figures are not available, please provide an estimate).

8. What types of mediation does your organisation provide?

voluntary (the parties choose Mediation without being obliged to do so)	<input type="radio"/>
court-ordered (mandatory, the parties are obliged to attempt Mediation)	<input type="radio"/>
both	<input type="radio"/>

9. Please indicate how many of each type are provided per annum:

voluntary

court-ordered (mandatory)

10. How many of these mediations are successful (i.e. the dispute is resolved without going to court)? Please give a figure (per annum) for each type:

voluntary

court-ordered (mandatory)

11. How many of these mediations take place with the parties assisted by their lawyers? Please give a figure (per annum) for each type:

voluntary

court-ordered (mandatory)

12. Are all mediations carried out face-to-face?

Yes

No

If 'no,' which of the following alternatives are employed? Please tick all that apply and indicate a figure per annum. [Answer this question only if answer to Q#12 is No]

13. Used?	Yes	No
Mediation by telephone	<input type="radio"/>	<input type="radio"/>
Mediation by video-conference	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>
14. Per annum		
(a) Mediation by telephone		
(b) Mediation by video-conference		
(c) Other		

Next, we would like to ask about mediations undertaken by your organisation in which one or more of the parties and the mediator do not share a common language (mediations involving more than one language).

16. Do you carry out mediations involving more than one language?	
Yes	<input type="radio"/>
No	<input type="radio"/>

Branching Instructions

IF ANSWER TO (QUESTION# 16 is (Yes)) THEN GO TO QUESTION# 17

IF ANSWER TO (QUESTION# 16 is (No)) THEN STOP, YOU HAVE FINISHED THIS SURVEY.

IF QUESTION# 16 is not answered THEN GO TO QUESTION# 17

17. Please indicate the frequency of mediations involving more than one language:	
daily	<input type="radio"/>
weekly	<input type="radio"/>
monthly	<input type="radio"/>
less often	<input type="radio"/>

18. Which types of mediation most often involve more than one language?	
voluntary	<input type="radio"/>
court-ordered	<input type="radio"/>

19. Please indicate the number of mediations per annum for each type involving more than one language:	
voluntary	
court-ordered (mandatory)	

20. In which types of dispute is more than one language most often used?	
Family (e.g. divorce, custody of children, child abduction)	<input type="checkbox"/>
Non-family civil (e.g. neighbour disputes, torts, personal injury)	<input type="checkbox"/>
Commercial (e.g. business and commercial contracts, banking, insurance)	<input type="checkbox"/>
Employment and labour (e.g. employer-employee)	<input type="checkbox"/>
Administrative (e.g. public policy, , environmental policy)	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>

21. Please indicate the number of cases for each type per annum:	
Family	
Non-family civil	
Commercial	

Employment and labour
Administrative
Other

22. Which of the approaches shown below are used by your organisation when the mediator and one or more of the parties do not share a common language?

a bilingual mediator is used	<input type="radio"/>
an interpreter is used	<input type="radio"/>
two mediators are used, one of whom is bilingual	<input type="radio"/>
any of the above, depending on circumstances.	<input type="radio"/>
Other (Please specify)	<input type="radio"/>

Branching Instructions

IF ANSWER TO (QUESTION# 22 is (any of the above, depending on circumstances.)) THEN GO TO QUESTION# 1

IF ANSWER TO (QUESTION# 22 is (a bilingual mediator is used OR two mediators are used, one of whom is bilingual)) THEN GO TO QUESTION# 23

IF ANSWER TO (QUESTION# 22 is (an interpreter is used)) THEN GO TO QUESTION# 28

IF ANSWER TO (QUESTION# 22 is (Other (Please specify))) THEN GO TO QUESTION# 1

IF QUESTION# 22 is not answered THEN GO TO QUESTION# 23

Next, we would like to ask about your use of bilingual mediators.

23. Does your organisation use bilingual mediators in mediations involving more than one language?

Yes	<input type="radio"/>
No	<input type="radio"/>

24. If yes, in how many cases? [Answer this question only if answer to Q#23 is Yes]	
Per annum	
25. Are bilingual mediators required to have formal language qualifications in their second or third languages?	
Yes	<input type="radio"/>
No	<input type="radio"/>
26. If yes, what level of qualifications is required? Please tick all that apply: [Answer this question only if answer to Q#25 is Yes]	
equivalent to CEFR A1/A2	<input type="checkbox"/>
equivalent to CEFR B1/B2	<input type="checkbox"/>
equivalent to CEFR C1/C2	<input type="checkbox"/>
27. Does your organisation provide best practice guidelines for bilingual mediators?	
yes	<input type="radio"/>
no	<input type="radio"/>
Other (Please specify)	<input type="radio"/>
Next, we would like to ask about your use of interpreters.	
28. Does your organisation use interpreters in mediations involving more than one language?	
yes	<input type="radio"/>
no	<input type="radio"/>

Branching Instructions

IF ANSWER TO (QUESTION# 28 is (yes OR no)) THEN GO TO QUESTION# 29

IF QUESTION# 28 is not answered THEN GO TO QUESTION# 29

29. If yes, in how many cases?

Per annum

30. If interpreters are used, are they required to have completed formal training in interpreting?

Yes

No

31. What minimum level of qualification is required? Please tick all that apply: [Answer this question only if answer to Q#30 is Yes]

Basic/introductory

Undergraduate (BA degree or equivalent)

Postgraduate (MA or equivalent)

32. If interpreters are used, are they required to have completed formal training in mediation?

Yes

No

33. What minimum level of qualification is required? Please tick all that apply: [Answer this question only if answer to Q#32 is Yes]

Undergraduate (BA degree or equivalent)

Postgraduate (MA or equivalent)

Professional or in-service qualification

34. If interpreters are used in court-ordered mediation cases, from where are they selected?

list of freelancers held by the court

list of freelancers held by the mediation organisation

list of freelancers held by an external translation agency

Other (Please specify)

35. If interpreters are used in voluntary mediation cases, from where are they selected?	
list of freelancers held by the court	<input type="checkbox"/>
list of freelancers held by the mediation organisation	<input type="checkbox"/>
list of freelancers held by an external translation agency	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>
36. In court-ordered mediation, who pays for the interpreter?	
the state	<input type="checkbox"/>
the party who requests an interpreter	<input type="checkbox"/>
both parties, who share the cost	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>
37. In voluntary mediation, who pays for the interpreter?	
the state	<input type="checkbox"/>
the party who requests an interpreter	<input type="checkbox"/>
both parties, who share the cost	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>
38. Is a briefing session held with the interpreter before the first mediation session?	
yes	<input type="radio"/>
no	<input type="radio"/>
39. If yes, who participates? [Answer this question only if answer to Q#38 is yes]	
the interpreter and the mediator	<input type="radio"/>
the interpreter, the mediator and both parties	<input type="radio"/>
the interpreter, the mediator and the Other Language speaking party	<input type="radio"/>
Other (Please specify)	<input type="radio"/>

40. Does your organisation provide interpreters with best practice guidelines?	
yes	<input type="radio"/>
no	<input type="radio"/>
41. Does your organisation instruct the interpreter on how they should interpret in a mediation session?	
yes	<input type="radio"/>
no	<input type="radio"/>
42. If 'yes', which mode of interpreting does your organisation prefer? Please tick all that apply: [Answer this question only if answer to Q#41 is yes]	
the interpreter listens and takes notes until one party has finished speaking and then interprets (consecutive with notes)	<input type="checkbox"/>
the interpreter listens until one party has finished speaking and then interprets, but does not take notes (consecutive without notes)	<input type="checkbox"/>
the interpreter whispers a simultaneous interpretation to one party as the other party is speaking (simultaneous)	<input type="checkbox"/>
43. Is a de-briefing session held with the interpreter at the end of an interpreted mediation session?	
yes	<input type="radio"/>
no	<input type="radio"/>
I don't know	<input type="radio"/>
44. If 'yes', in what form? (please specify): [Answer this question only if answer to Q#43 is yes]	
45. Is there anything else you would like to comment on the subject of mediation that we have not mentioned in this questionnaire?	

6. What types of mediation do you provide?	
voluntary (the parties choose mediation without being obliged to do so)	<input type="radio"/>
court-ordered (mandatory, the parties are obliged to attempt mediation)	<input type="radio"/>
both	<input type="radio"/>

7. Please indicate how many of each type are provided per annum:
voluntary
court-ordered (mandatory)

8. How many of these mediations are successful (i.e. the dispute is resolved without going to court)? Please give a figure (per annum) for each type:
voluntary
court-ordered (mandatory)

9. How many of these mediations take place with the parties assisted by their lawyers? Please give a figure (per annum) for each type:
voluntary
court-ordered (mandatory)

10. Are all mediations carried out face-to-face?	
Yes	<input type="radio"/>
No	<input type="radio"/>

If 'no', which of the following alternatives are employed? Please tick all that apply and indicate a figure per annum. [Answer this question only if answer to Q#10 is No]

11. Used?	Yes	No
Mediation by telephone	<input type="radio"/>	<input type="radio"/>
Mediation by video-conference	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>

12. Per annum
(a) Mediation by telephone
(b) Mediation by video-conference
(c) Other

13. Please specify your "Other" alternative of Mediation: [Answer this question only if answer to Q#11(c) is Yes]

Next, we would like to ask about mediations in which one or more of the parties and you, the mediator, do not share a common language (mediations involving more than one language).

14. Do you carry out mediations involving more than one language?	
Yes	<input type="radio"/>
No	<input type="radio"/>

Branching Instructions

IF ANSWER TO (QUESTION# 14 is (Yes)) THEN GO TO QUESTION# 15

IF ANSWER TO (QUESTION# 14 is (No)) THEN STOP, YOU HAVE FINISHED THIS SURVEY.

IF QUESTION# 14 is not answered THEN GO TO QUESTION# 15

15. Please indicate the frequency of mediations involving more than one language	
daily	<input type="radio"/>
weekly	<input type="radio"/>
monthly	<input type="radio"/>
less often	<input type="radio"/>

16. Which types of mediation most often involve more than one language?	
voluntary	<input type="radio"/>
court-ordered	<input type="radio"/>

17. Please indicate the number of mediations per annum for each type involving more than one language:	
voluntary	
court-ordered (mandatory)	

18. In which types of dispute is more than one language most often used?	
Family (e.g. divorce, custody of children, child abduction)	<input type="checkbox"/>
Non-family civil (e.g. neighbour disputes, torts, personal injury)	<input type="checkbox"/>
Commercial (e.g. business and commercial contracts, banking, insurance)	<input type="checkbox"/>
Employment and labour (e.g. employer-employee)	<input type="checkbox"/>
Administrative (e.g. public policy, , environmental policy)	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>

19. Please indicate the number of cases for each type per annum:	
Family	
Non-family civil	
Commercial	
Employment and labour	
Administrative	
Other	

20. Which of the approaches shown below do you use when you and one or more of the parties do not share a common language?	
a bilingual co- mediator is used	<input type="radio"/>
an interpreter is used	<input type="radio"/>
either a bilingual mediator or an interpreter, depending on circumstances	<input type="radio"/>
Other (Please specify)	<input type="radio"/>

Branching Instructions

IF ANSWER TO (QUESTION# 20 is (either a bilingual mediator or an interpreter, depending on circumstances)) THEN GO TO QUESTION# 1

IF ANSWER TO (QUESTION# 20 is (a bilingual co- mediator is used)) THEN GO TO QUESTION# 21

IF ANSWER TO (QUESTION# 20 is (an interpreter is used)) THEN GO TO QUESTION# 24

IF ANSWER TO (QUESTION# 20 is (Other (Please specify))) THEN GO TO QUESTION# 1

IF QUESTION# 20 is not answered THEN GO TO QUESTION# 21

Next, we would like to ask about bilingual mediation.

21. Do you offer bilingual mediation, where you both mediate and interpret as required?

Yes

No

22. Do you have formal language qualifications in your second or third languages?

Yes

No

**23. If yes, what level of qualifications? Please tick all that apply:
[Answer this question only if answer to Q#22 is Yes]**

equivalent to CEFR A1/A2

equivalent to CEFR B1/B2

equivalent to CEFR C1/C2

Next, we would like to ask about your experience of using of interpreters in mediation.

24. Do you mediate using an interpreter in mediations involving more than one language?

yes

no

Branching Instructions

IF ANSWER TO (QUESTION# 24 is (yes)) THEN GO TO QUESTION# 25

IF ANSWER TO (QUESTION# 24 is (no)) THEN GO TO QUESTION# 41

IF QUESTION# 24 is not answered THEN GO TO QUESTION# 25

25. If yes, in how many cases?	
Per annum	
26. Are interpreters required to have completed formal training in interpreting?	
Yes	<input type="radio"/>
No	<input type="radio"/>
27. What minimum level of qualification is required? Please tick all that apply: [Answer this question only if answer to Q#26 is Yes]	
Basic/introductory	<input type="checkbox"/>
Undergraduate (BA degree or equivalent)	<input type="checkbox"/>
Postgraduate (MA or equivalent)	<input type="checkbox"/>
28. Are interpreters required to have completed formal training in mediation?	
Yes	<input type="radio"/>
No	<input type="radio"/>
29. What minimum level of qualification is required? Please tick all that apply: [Answer this question only if answer to Q#28 is Yes]	
Undergraduate (BA degree or equivalent)	<input type="checkbox"/>
Postgraduate (MA or equivalent)	<input type="checkbox"/>
Professional or in-service qualification	<input type="checkbox"/>
30. If you use interpreters in court-ordered mediation cases, from where are they selected?	
list of freelancers held by the court	<input type="checkbox"/>
list of freelancers held by the mediation organisation	<input type="checkbox"/>
list of freelancers held by an external translation agency	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>

31. If you use interpreters in voluntary mediation cases, from where are they selected?	
list of freelancers held by the court	<input type="checkbox"/>
list of freelancers held by the mediation organisation	<input type="checkbox"/>
list of freelancers held by an external translation agency	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>

32. In court-ordered mediation, who pays for the interpreter?	
the state	<input type="checkbox"/>
the party who requests an interpreter	<input type="checkbox"/>
both parties, who share the cost	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>

33. In voluntary mediation, who pays for the interpreter?	
the state	<input type="checkbox"/>
the party who requests an interpreter	<input type="checkbox"/>
both parties, who share the cost	<input type="checkbox"/>
Other (Please specify)	<input type="checkbox"/>

34. Do you hold a briefing session held with the interpreter before the first mediation session?	
yes	<input type="radio"/>
no	<input type="radio"/>

35. If yes, who participates? [Answer this question only if answer to Q#34 is yes]	
the interpreter and the mediator	<input type="radio"/>
the interpreter, the mediator and both parties	<input type="radio"/>
the interpreter, the mediator and the Other Language speaking party	<input type="radio"/>
Other (Please specify)	<input type="radio"/>

36. Do you provide interpreters with best practice guidelines?	
yes	<input type="radio"/>
no	<input type="radio"/>
37. Do you instruct the interpreter on how they should interpret in a mediation session?	
yes	<input type="radio"/>
no	<input type="radio"/>
38. If 'yes,' which mode of interpreting do you prefer? Please tick all that apply: [Answer this question only if answer to Q#37 is yes]	
the interpreter listens and takes notes until one party has finished speaking and then interprets (consecutive with notes)	<input type="checkbox"/>
the interpreter listens until one party has finished speaking and then interprets, but does not take notes (consecutive without notes)	<input type="checkbox"/>
the interpreter whispers a simultaneous interpretation to one party as the other party is speaking (simultaneous)	<input type="checkbox"/>
39. Do you hold a de-briefing session with the interpreter at the end of an interpreted mediation session?	
yes	<input type="radio"/>
no	<input type="radio"/>
I don't know	<input type="radio"/>
40. If 'yes,' in what form? (please specify): [Answer this question only if answer to Q#39 is yes]	
41. Is there anything else you would like to comment on the subject of mediation that we have not mentioned in this questionnaire?	
42. Would you be prepared to be interviewed about your experience of mediations involving more than one language?	
yes	<input type="radio"/>
no	<input type="radio"/>

Country Report: Belgium

Yolanda Vanden Bosch

1. The Belgian Context

Belgium is a linguistically diverse country. The law recognises French, Dutch and German as official languages and contains rules for the use of these languages. In 2012, nearly 125,000 foreigners emigrated to Belgium, predominantly into the most important cities.¹ In Flanders, more than 180 nationalities are resident, with the city of Antwerp alone having citizens from 169 countries.²

The term 'mediation' ('bemiddeling') has many meanings in daily usage and there are many forms of 'mediation' that are not regulated by law. Alternative dispute resolution is also available via Ombudsmen, on a voluntary basis for government companies, business organisations, hospitals, and in tax matters. In criminal matters victim/offender mediation is a possibility before or after the court procedure.³

A distinction can be made between voluntary mediation (volontaire/vrijwillig - outside the scope of legal proceedings) and judicial mediation (judiciaire/gerechtelijke)- as part of a lawsuit).

In the legal context, however, mediation ('bemiddeling') refers to a specific opportunity to resolve a dispute without resorting to a court-imposed solution. The Act of 19 February 2001 implemented specific regulations for the court-ordered settlement of family cases, still on a voluntary basis.⁴ In 2005, the Act of 21 February⁵ generalised mediation as a tool for conflict resolution, in the entirely new part VII of the Belgian Civil Procedure Code.⁶ Mediation is now a structured procedure, framed by strict legal guarantees, and an equivalent to court proceedings for conflict resolution in family disputes, civil, commercial and social cases. Furthermore, the Act of 5 April 2011 mentions the specific use of mediation in divorce matters⁷ and mediation has a central place in the new Family & Juvenile Courts.⁸ There is no distinction, moreover, between internal and international cases (such as EU cross-border mediation). According to the Mediation-Barometer 2012⁹, 3.81% of the mediations between January 2010 and June 2012 were international; 60% of those were dealt with by a dozen mediators.

While mediation is still in its infancy in Belgium, it is growing in importance.¹⁰ An IPOS survey in 2008 showed that the number of mediation proceedings in divorce cases was relatively low (in Flanders alone, less than 10% of divorce parties requested mediation).¹¹ In 2010, however, there were 3,117 mediations nationwide, of which 1,166 were in civil and commercial matters, 1,282 in family matters and 477 in social disputes. The total number of mediations increased again in 2011 (3,228 cases) and during the first six months alone of 2012 there were 2,171 cases. However, by comparison, the competent courts (justices of the peace, courts of first instance, commercial courts, court of appeal) handled 690,000 cases in 2010.¹²

In 2012, about 50% of mediators responded to the 'Mediation-Barometer' survey organised by a private organization on mediation, bMediation¹³ with the support of the Federal Mediation Commission.¹⁴ From this survey, it appears that the profession of mediator in Belgium is still a secondary activity and that practitioners are mainly female.¹⁵

Data collected by the 2014 'Mediation-barometer' indicates that mediation remains relatively unknown and continues to develop rather slowly.¹⁶ The study showed that family mediation, neighbour disputes over structures or property, and disputes between shareholders in civil and commercial matters are the most important sectors. Furthermore, mediation was used in conflicts about consumer disputes, work relations, trade and distribution, services for businesses, intellectual property, industry, information and communication technologies, construction and property, civil liability, finance and insurance, and others.¹⁷ This is a very broad spectrum, with implications for language and communication, especially when non-native speakers are involved. Furthermore, the number of mediators and mediations seemed to be growing in 2012 and in 2013, mostly in civil and commercial cases. According the CEPEJ 2014 report on European judicial systems¹⁸, there were 1,082, 1,099 and 1,134 accredited mediators in 2008, 2010 and 2012 respectively. In 2014, there were 1,222 accredited mediators.¹⁹ and 1,511 accreditations were given. A significant group has more than one accreditation (for ex. in civil and commercial, as well as family, and in social mediation).

The CEPEJ report 2014 indicated that judicial mediation in Belgium is used in civil and commercial cases, family law cases (ex.divorce), employment dismissals and criminal cases. In the 'Justice Barometer' 2014, 92% of those who answered questions support mediation as a way to resolve conflicts.²⁰

Mediation is strictly confidential²¹ and the mediator must respect the code of conduct of the Federal Mediation Commission (hereafter abbreviated as the 'FMC', as regulated by Decision of 18 October 2007, available in Dutch and French).²² The

code is based on the European Code for Mediators. Particular attention is paid in the code to the qualifications of the mediator, their ethics, independence and impartiality, and to respect for confidentiality and professional secrecy.

Within the framework of the Belgian Act, anybody can act as a mediator (for example, a lawyer, psychologist, doctor, social assistant, architect, etc).²³ There are both accredited and non-accredited mediators. Mediation is not a protected profession, and anyone who wishes to is free to call himself mediator. However, only an accredited mediator can ask for homologation of the agreement before court, is subject to the code of ethics for mediators and measurable quality criteria, guarantees independent and impartial mediation and can be paid via legal aid. The Act appoints the FMC as the central body that monitors the development and quality of mediation.²⁴ It doesn't itself conduct mediations, but it accredits mediators who have followed and successfully completed a special training in mediation provided by a recognised institute.²⁵ Only a mediation agreement reached under the guidance of an accredited mediator will be eligible for approval by a court and the approval of a mediation agreement gives it the same executable force as a court judgment.

The Act also mentions accreditation criteria and training requirements for mediators and minimum requirements for accreditation, some positive (competencies required by the nature of the dispute, education or experience, independence and impartiality) and some negative (no criminal record incompatible with the performance of the position of accredited mediator and no disciplinary sanction from another profession). It is possible to become accredited as a mediator for family, civil, commercial and social cases and for each category there are specific training programmes. The FMC regulates mediator training providers, but the training itself is provided by the private sector.²⁶ A training programme typically comprises a common core of 60 hours, divided into (at least) 25 hours of theoretical training and (at least) 25 hours of practical training. The training covers theory (the general principles of mediation (ethics/philosophy), the study of the various types of ADR, the applicable body of law, the sociological and psychological aspects of mediation, mediation processes and practical exercises. In addition to this common core, there are programmes specific to each type of mediation, also comprising theoretical and practical training.

The FMC regulates the profession and keeps an up-to-date list of accredited mediators, which can be consulted on their website.²⁷ In 2012, there were 1,207 mediators on the register. According to the profiles of the interviewees in the Mediation-Barometer 2012, 88.5% were accredited, and some had accreditation for more than one domain; of these, 54.9% were for civil and commercial cases, 17.4% for social cases, and 56% for family cases.²⁸

Mediation in Belgium is not free of charge. The mediator's fees are agreed between the private mediator and the parties and determined in the mediation protocol. Generally, fees are equally divided between parties and are not regulated by law.

As in civil proceedings, it is possible for a party to obtain legal aid to pay a mediator's fees, if that party's income is modest and provided that the mediator is accredited.²⁹ This is possible in both voluntary and in court-ordered mediation. The assistance of an interpreter for the mediation can also be funded by legal aid. Legal aid is available for all forms of mediation but only fee-based remunerations and the cost of an accredited mediator are reimbursed.³⁰ The CEPEJ Report 2014³¹ mentioned Belgium as one of the 18 Member States that indicate explicitly that legal aid is available for activities outside the judicial field, in order to avoid judicial procedures or to facilitate access to law.

2. Mediation and Language Difference

The FMC states that in international mediation, in addition to the difficulties associated with jurisdiction, linguistic problems are to be expected. The list of accredited mediators on the website of the FMC is available in Dutch and French,³² and indicates in which language the mediators can work. Currently, the register mentions 24 languages: Arabic, Bulgarian, Chinese (Mandarin), Czech, Dutch, French, English, German, Greek, Hindi, Hungarian, Italian, Japanese, Lebanese, Luxembourgish, Persian, Polish, Portuguese, Romanian, Russian, Slovak, Spanish, Swedish and Turkish. However, there is no language test for these mediators, who self-certify in which languages they can work.

Neither the 2012 nor the 2014 Mediation-Barometer surveys contained questions about communication and language problems, the use of bilingual mediators, two co-mediators with a different language, or the use of a third-party interpreter. When the parties do not speak the same language, however, the mediator is obliged to decide if he really can mediate between these parties with complete independence and impartiality; independence and impartiality are explicitly referred to in the code of conduct (art. 4 & 5). The language problem may affect independence or impartiality. Therefore, the mediator may decide not to mediate himself in view of the language problem or, given his language skills, he may decide to act as bilingual mediator. In either case, he must guarantee his impartiality and independence to both parties. Alternatively, he may work together with another language speaking mediator and ask for an interpreter.

Where appropriate, or if an appearance of lack of independence and impartiality exists, the mediator is obliged, both prior to and during the mediation, to notify parties of any elements that may be deemed to compromise his independence or impartiality and either withdraw from the mediation or obtain a written agreement from the parties for the continuation of the mediation (art. 6). The mediator must also assess whether he can accept the assignment and whether his appointment will be based on the free choice of all parties (art. 15). Documents connected with the mediation should be written in one of the three national languages of Belgium, or a certified translation produced.

3. Survey Results

The Understanding Justice questionnaire was sent to 1,354 mediators and organisations on the FMC register. Some of them, such as the Flemish Bar Association³³ and Bemiddeling VZW³⁴ also brought the survey to the attention of their members and some personal interviews were also carried out. The overall response to the survey was, however, limited.

According to the questionnaire results, most mediators work in only one language (Dutch or French) in their professional practice, although they all mentioned that they speak at least one additional language. Some carry out mediations in several languages (e.g. French and English, French and Italian, or Dutch, English and German). Most respondents reported their level of proficiency in their first and second languages as level C1 and C2, and for their third language as C1, B2 or C2.

In the event that an interpreter is used in the mediation, the respondents indicated that they select interpreters via a social language service (e.g. Brucella's Accueil asbl) or from lists of interpreters held by the courts. There is no national register of legal interpreters in Belgium.³⁵ In court-ordered and in voluntary mediation, if the case is eligible for legal aid; interpretation is paid for by the state.

The questionnaire and interviews provided little information on the overall incidence of language difference in mediation in Belgium. Mediators reported that they usually worked with parties in a common language, and the majority reported that they would only work in their own language. In some cases, however, when the mediator and one or more of the parties did not share a common language, the mediator would work bilingually, sometimes with help from a lawyer if present at the mediation. One respondent mentioned that he and the parties could usually resort to English as a third common language if required, while another noted that he translated in both directions. A further respondent reported that he wouldn't accept

cases where there was a language difference, but would refer them to a bilingual mediator, or work collaboratively with a mediator competent in the other language. It appears from the FMC register and the bMediation Mediation-Barometer that a large percentage of mediators are bi- or trilingual. In these instances, the mediator will rephrase in the other language for the benefit of the other-language speaking party. bMediation also noted that statistics on mediation are not made public and that the incidence of language difference in mediation was poorly documented in Belgium.

Most mediators reported that mediations are carried out face-to-face. Only one respondent answered that he worked via telephone or videoconference.

In the earlier Mediation-Barometers of 2012 and 2014 there were no questions on the matter of language difference in mediation. In an interview by telephone with the Belgian Institute of Notaries, they confirmed that the matter of language difference in mediation was very interesting, but that until that time it had not seemed to be a problem or a matter deserving of attention from notary-mediators.

4. Use of Interpreters or Bilingual Mediators and Co-mediators

Both bilingual mediators and third-party interpreters are used in Belgium as practical solutions to the challenge of language difference in mediation.

The costs and fees of the mediator in the context of a judicial or voluntary mediation in legal aid situations, led by a FMC-accredited mediator, are met by the state. So is the cost of interpreters in civil mediations, if the foreigner does not understand the language of justice, when he is entitled to legal aid (art. 692 Code of Civil Procedure).

According to the FMC Code of Ethics, a mediator must be satisfied that each party understands the impact of the proposed solutions (art. 20). Moreover, there should not be a manifest imbalance between the parties, and it is the responsibility of the mediator to ensure this. All these require the mediator to have the capacity to communicate with both parties, in their own language or via an interpreter. The mediator must also ensure that any significant written documents are produced and that the parties can understand them.

Andries (2008)³⁶ notes that in cross-border mediation, communication problems will be greater when parties have different mother tongues. Although an ideal mediation takes place in a language in which both parties are strong, this is not always possible in an international mediation. Therefore, according to Andries, it is

advisable to agree in advance on the language(s) in which the mediation procedure will be carried out, for example, by explicitly choosing one language or another. However, a common language is not a requirement for the validity of the mediation agreement.

First, the language in which the contract is to be drawn up must be chosen. Second, the language of the seat of the mediation shall be declared. Finally, the absence of an explicit choice of language can be taken as the implicit expression of agreement that each party may use their own language during the mediation. Parties who do not speak each other's language, however, are forced to rely on interpreters and translators. This significantly increases the cost of the mediation. Andries (2008)³⁷ notes that the language issue must appear on a mediation checklist and that parties should consider whether agreements on the language of the mediation process are desirable. It should also be mentioned in the agreement that parties must appoint an interpreter/translator at their own cost.

Language barriers are also an important element in cross-border family conflicts. The Child Focus and the Cross-Border Family Mediators Network reported that they train their mediators on how to mediate with the assistance of interpreters, but also, for example, how to mediate when only one party in the mediation is able to speak in his native language. The mediator must always maintain a balance between the parties in these difficult situations. An interviewee also referred to the recommendations worked out by MiKK³⁸ for mediators in bilingual cross-border family mediations. Their advice is that mediators should consult the parties and assess, prior to the start of the mediation, how the language barrier can best be overcome. Possible options are that one of the co-mediators interprets in addition to mediating, the use of an interpreter, or relying on 'intercomprehension'.³⁹

Online or Telephone/Video Linked Mediation

There is no legislation regarding online mediation in Belgium.

Traest (2014)⁴⁰ states that personal contact between the parties and the mediator (face-to-face mediation) is considered to be very important for the success of mediation and that online mediation lacks this kind of face-to-face contact. He also underlines that, during the mediation, non-verbal communication is a factor of the utmost importance. He concludes that this disadvantage can be overcome to a certain extent by using video-conferencing programmes or Skype. According to the survey results and personal interviews, however, telephone and video-linked mediations are rare in Belgium. Only one questionnaire respondent mentioned working via telephone.

Belgium is notable, however, for the existence of 'Belmed', an online platform of the Belgian Government that the Federal Public Service Economy puts at the disposal of consumers and companies.⁴¹ Belmed is a contraction of 'Bel' for 'Belgian' and 'Med' for 'Mediation'. It grants access to an online platform to lodge a mediation request and to find a solution to a dispute. It can be used to settle commercial disputes out of court via the Internet with the help of an independent mediator and is available on the website in Dutch, French, German and English.

5. References

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6. Endnotes

- 1 On January 1, 2013 in a total population of 11,099,554, there are 1,195,122 immigrants (of which 894,138 are from Europe and 805,319 from the EU-27 countries. (RR-ADSEI -) http://unia.be/files/legacy/statistisch_en_demografisch_verslag.pdf).
- 2 By comparison, there are 193 countries in the United Nations.
- 3 On mediation in Belgium, see Traest, M. (2013: 45).
- 4 *Moniteur Belge (MB)*, 03-04-2001, 11218.
- 5 *MB*, 22-03-2005, 12272.
- 6 Art. 1724-1737 Code judiciaire – Gerechtelijk Wetboek; the Act also repealed the former art. 734bis-734 sexies (family matters) of this Code.
- 7 *MB*, 16 June 2011.
- 8 Act of 30 July 2013, *MB*, 27 September 2013, 6842.
- 9 This survey by bMediation for 2012, and that for 2014 only concerns mediations unregulated by the Mediation Act of 2005.
- 10 See also Lesseliers, V. (2009), 277-278; Hemelsoen, R. (2012), 15.
- 11 <http://www.scheidingsonderzoek.ugent.be/pers.pdf>; <http://www.scheidingsonderzoek.ugent.be/fs4.pdf>; <http://www.gva.be/cnt/aid878380/bemiddeling-bij-echtscheiding-flopt>.
- 12 http://www.beci.be/nl/press_corner/hotnews/hotnews_van_de_leden_van_beci/bmediation/.
- 13 <http://www.bmediation.eu/index.php/en>.
- 14 http://www.bmediation.eu/images/stories/News/barometre_de_la_mediation_2012.pdf.
- 15 De Beir, T. (2014), 48.
- 16 Mediation/Bemiddelingsbarometer 2014:1.
- 17 http://www.bmediation.eu/images/stories/News/barometer_mediation_2014_v1.0_nl.pdf:12.

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18 Report on 'European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice', http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf:151.

19 De Beir, T. (2014), 49.

20 http://www.hrj.be/sites/5023.b.fedimbo.belgium.be/files/press_publications/justitiebarometer_2014.pdf.

21 Art 458 Criminal Code is applicable.

22 <http://5033.fedimbo.belgium.be/sites/5033.fedimbo.belgium.be/files/explorer/Gedragcode.pdf>.

23 Since 1st January, 2014, more non-lawyers seem to have been registering as mediators. In family matters, there were 385 lawyers (313 advocates and 72 notaries) and 385 non-lawyers; in civil and commercial matters 334 lawyers (305 advocates and 29 notaries) and 243 non-lawyers and in social affairs 62 lawyers (all advocates) and 102 non-lawyers. De Beir, T. (2014),51.

24 <http://www.fbc-cfm.be/fr>.

25 Art.1726,par. 1 & art. 1727 of the Judicial Code http://5033.fedimbo.belgium.be/sites/5033.fedimbo.belgium.be/files/explorer/Criteria_voor_erkenning_van_bemiddelaars.pdf.

26 There are 12 Dutch and 17 French training institutes at the time of writing (2016) (<http://www.fbc-cfm.be/nl/inhoud/erkende-vormingsinstanties>)

27 <http://www.fbc-cfm.be/nl/inhoud/lijt-erkende-bemiddelaars>.

28 http://www.bmediation.eu/images/stories/News/barometer_bemiddeling_2012.pdf

29 Art. 665/5° Code of Civil Procedure.

30 Art. 665/5, 671 & 696 Code of Civil Procedure.

31 Report on 'European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice', p.70.

32 In accordance with art. 1727 § 6, 7° Code of Civil Procedure; <http://5033.fedimbo.belgium.be/nl/zoeken-naar-een-bemiddelaar>.

33 <http://www.ordeexpress.be/artikel/95/1166/tolken-bij-bemiddeling-vul-de-enquete-in>

34 <http://www.bemiddelingvzw.be/>

35 Implementation of the EU-Directive/2010/64 on legal interpreters and translators (LIT) resulted in the Act of 2014, December 19 (LIT register). As yet, the Act is still awaiting implementation.

36 Andries, K. (2008).

37 Andries, K. (2008), 5.

38 Carroll, M. (2014) <http://www.mikk-ev.de/english/list-of-mediators/>.

39 Carroll, M. (2014). For ‘intercomprehension’ in the European Union context, see <http://bookshop.europa.eu/nl/intercomprehension-pbHC3012594/>; <http://eu-intercomprehension.eu/description.html> , http://languagemagazine.com/?page_id=11125

40 Traest, M. (2014), 44.

41 http://economie.fgov.be/en/disputes/consumer_disputes/Belmed/what_is_it/#.Vs8MdvnhC70

Country Report: England & Wales

John Hammond

1. Introduction

Mediation, as the most commonly used of the different methods of Alternative Dispute Resolution (ADR), emerged in England and Wales from the middle of the twentieth century, but in different ways and at different times, according to the domain of conflict in which its usefulness was identified.

We shall now outline the status of mediation in each of its principal domains and then touch upon what we have been told about the use of more than one language in mediation, as revealed from responses to the project questionnaire.

Readers will need to be aware that the United Kingdom is not a single legal jurisdiction. This brief report does not attempt to address the position of mediation in Scotland or in Northern Ireland.

2. Civil and Commercial Mediation

In the context of civil and commercial cases, mediation as a form of ADR started to be used in the early 1990s in personal injury and clinical negligence cases. ADR received a significant boost by its prominent inclusion in the overarching objectives of the new Civil Procedure Rules (CPR) in 1999. The CPR introduced a codified system of rules to govern the civil courts. It embodied active case management by the judiciary and put forward a new approach to civil justice which encouraged parties to consider court proceedings only as a last resort. The court will enquire at the very first case management conference whether ADR could be employed and judges have the power when awarding costs to penalise a party unreasonably refusing to mediate. In 2013 case management was expanded to include costs management, with each party required to exchange a cost budget, thus providing further focus for ADR to be considered as an attractive option.

In parallel with the aforementioned civil procedural innovations, a number of court and other mediation schemes have been developed in recent years. One example is the Small Claims Mediation Service established by Her Majesty's Courts and Tribunals Service (HMCTS), which is a free service attached to all county courts for defended small claims cases, including personal injury claims, with a value below prescribed amounts, for a limited period by telephone. For higher value claims, a fixed-fee time-limited mediation provider can be sourced via the Civil Mediation Online Directory.

In the wake of the heightened profile of mediation in England and Wales in the 1990s, the Civil Mediation Council (CMC) was established in 2003 to represent the interests of mediation providers and mediators and to promote generally the merits of civil and commercial mediation. Currently, the CMC has a membership of some 70 provider organisations and some 400 individual mediators. It is important to note that only the organisations are accredited members, provided they comply with the requirements of the Provider Accreditation Scheme. Each provider must ensure that the mediators on its panel are properly trained, supervised, insured and are fulfilling CPD and practice requirements. The provider must adopt the obligations in the EU Model Code of Conduct for Mediation, as a minimum.

In its recent report on its survey of commercial mediator attitudes and experience, the Centre for Effective Dispute Resolution (CEDR) estimates that the total value of cases mediated each year in the UK is approximately £10.5 billion, with the total value of mediated cases over the last 15 years approaching £85 billion. Additionally, “by achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year [2016] will save businesses around £2.8 billion a year in wasted management time, damaged relationships, lost productivity and legal fees” (CEDR, 2016).

3. Family Mediation

According to the latest reports from the Office of National Statistics:

- There were 114,720 divorces in England and Wales in 2013, a decrease of 2.9% since 2012, when there were 118,140 divorces.
- In 2013, there were 9.8 men divorcing per thousand married males and 9.8 women divorcing per thousand married females. A decrease of 27% for men and 26% for women compared with 2003.
- The number of divorces in 2013 was highest among men and women aged 40 to 44.
- For those married in 1968, 20% of marriages had ended in divorce by the 15th wedding anniversary, whereas for those married in 1998, almost a third of marriages (32%) had ended by the end of the same period.
- Over 120,000 families with dependent children (under 16, or 16-18 in full-time education and not married) separated in 2013.
- In 2010-11, one third of all children aged 16 and under were not living with both of their birth parents.

Family mediation is used by couples who are either at the point of separation, or already separated or getting divorced to settle issues that might include parenting plans, financial matters, child support and maintenance or any other problem particular to their personal circumstances. Mediation is increasingly used in cases of child abduction and other family disputes with an international dimension, e.g. relocation. It will not be an appropriate way forward in all cases, e.g. in instances of domestic abuse, or when there is a large disparity of power between the parties. Mediation is also available to other family members, such as grandparents, who may be having difficulties over contact arrangements, or step-parents who would like to support their new partner.

In family cases, the general approach is that the courts should be used as a matter of last resort and mediation has been established as an ADR method since the introduction of the Family Law Act 1996. It is now a requirement to consider mediation and attend a Mediation Information and Assessment Meeting (MIAM) before bringing a family law matter to court and this has increased the use of family mediation as an approach to reduce the scope or intensity of dispute and conflict within the family.

Family mediations tend to be undertaken by specialist ADR providers, the main ones being the six members of the Family Mediation Council (established in 2007):

- the National Family Mediation (NFM), established in 1982, which has the largest number of affiliated providers in England and Wales, asserts its providers deliver around 30,000 mediations per year, with full agreement being achieved in 83% of NFM cases;
- the Family Mediators Association (FMA), established in 1988, is a membership organisation representing over 400 family mediators;
- Resolution (which is the Solicitors' Family Law Association), comprising 6,500 members who are family lawyers or other professionals in England and Wales;
- the ADR Group, which manages 500 commercial mediation appointments each year (with a greater than 80% success rate);
- the College of Mediators, set up in 1996 as the UK College of Family Mediators, but has since widened its remit to include all domains of mediation, currently has 250 practising members;
- The Law Society.

Family mediators need to fully understand the law on child maintenance, on benefits, tax, pensions, wills and property, in order to be able to appreciate that what is proposed is legal and workable. Disputes involving family matters can also evoke intense emotional expressions and reactions, more so perhaps than in other domains of conflict resolution.

Perhaps for these reasons, together with the aspect of public funding, family mediation is more highly regulated than most other forms of mediation. Family mediators must be qualified and accredited by one of the six organisations above and abide by the Council's Code of Practice. To become approved by any of the bodies, a family mediator now needs to have a mentor, known as a Personal Practice Consultant (PPC) (see <http://www.familymediationcouncil.org.uk>). The Council is responsible for setting and maintaining the professional standards for family mediators and for devising and implementing training standards with which all family mediators must comply.

4. Workplace and Employment Mediation

Workplace conflict costs each economy dearly, measured in terms of the millions of working days lost annually, and the UK is certainly no exception. Mediation in the workplace and in employment matters is considered cost and resource effective, resulting in a very high proportion of disputes being resolved. As such there is a very strong business case for mediation, which is recognised by both government and employer organisations.

“Workplace Mediation” is a term used when there is an ongoing working relationship at the time of the commencement of the mediation, whereas “Employment Mediation” refers to mediation conducted when the employee has left employment, or is in the process of parting from the employer. Mediation is particularly well-suited to the former, as it is more likely to retain a continuing working relationship between the employee and employer. It is of course possible that a mediation may begin in the context of a workplace matter, but then conclude in terms closer to an employment mediation.

Workplace Mediation is an expanding area of business for ADR providers. The Civil Mediation Council maintains a register of mediation providers (organisations, not individuals), some of whom are also accredited as civil and commercial mediation providers. At the time of writing, 12 organisations are listed (cf. 38 in 2013). Some organisations also run training programmes in workplace mediation. Workplace mediators may be internal, i.e. another employee acting as a mediator, as opposed

to being sourced from an external provider. More often than not, parties are not represented, unless circumstances require it, e.g. in cases of intimidation or bullying. The HR department, or manager responsible for HR matters, will usually manage the process and for reasons of confidentiality the mediation and any pre-meetings may be held off-site.

In relation to employment claims (examples of which are unfair dismissal, redundancy), mediation and conciliation schemes have been offered by ACAS (the Advisory, Conciliation and Arbitration Service) since 1984. ACAS mediation and conciliation schemes are regulated by statute, unlike most other mediation processes in the UK, which are regulated by the contract made between the parties. The terms “mediation” and “conciliation” are often used interchangeably, although in the past a conciliator may have been more active in suggesting proposals to the parties, more in the role of an evaluative mediator rather than a facilitative mediator. For purposes of the ACAS schemes, the only difference lies in the fact that ACAS state on their website that conciliation is the term used if the employee is making a specific complaint against their employer and where there is a potential or actual claim to the Employment Tribunal, rather than more general employment matters. Conciliation is voluntary and often carried out over the telephone.

While workplace and employment mediators work within their own specialised fields of expertise and procedures, there is much in common with the skills and strategies used in civil and commercial mediation. Both fall under the purview of the Civil Mediation Council, which so far has not formulated a single Code of Good Practice for workplace mediators, but recommends that all registered organisations adopt one which meets or exceeds the European Code of Conduct for Mediators.

5. Community Mediation

There are a large number of community mediation schemes in every area of the UK. They can be used to mediate a wide range of matters, including neighbourhood disputes, disputes about noise, litter, nuisance claims, parking, pets, some landlord and tenant disputes, and small debt claims.

Community mediation schemes are typically free-of-charge to the parties, engage mediators (often co-mediators) who are volunteers (but who have received some training), rarely involve legal representation and may vary according to the custom and practice of the local community mediation provider. They are usually funded by community trusts or the local authority. Many have charitable status and are usually run by volunteers. Some finance their operations, at least partly, by selling their services to users.

Community mediators currently operate outside the terms of reference of the Civil Mediation Council. The College of Mediators has recently set standards for community mediators and, to date, over 100 community mediators have met those standards. Some organisations have created their own training courses, but most provide guidance and some form of continuing development to their mediators.

While community life is becoming more complex, arguably more confrontational and some behaviour anti-social, the greatest challenge to mediation expanding as a positive force in this field will be a lack of secure and consistent public funding.

6. Language Context – Project Questionnaire on the Use of Languages in Mediation

The project team produced an online questionnaire to gauge the incidence of language barriers in mediation in the UK and the modes of addressing these barriers, including interpreting and bilingual mediation. This barrier would naturally arise when the two parties and/or the mediator do not share a common language. One version of the questionnaire was designed to be completed by an appropriate person within the institution or organisation providing a mediation service and a different version was intended to be completed by individual mediators. We alerted the major mediation providers of its existence and asked them to propagate its availability to its members or anyone appropriate accessing their websites. It was available between July and September 2015. Only 6 institutions responded, the largest being National Family Mediation and ACAS. 61 individual mediators responded to the call for information. The responses are reported as follows.

6.1. Institutional Responses

According to its website, National Family Mediation (NFM), through its network of affiliated members, delivers 30,000 mediations per year, in over 500 locations across England and Wales. It states that agreement is achieved in 83% of its cases. The vast majority of mediations are voluntary, as opposed to court-ordered. In roughly one quarter of each type the parties are assisted by lawyers. All mediations are carried out face-to-face. In the response to our project questionnaire, it would seem that a tiny percentage of their mediations involve the use or need for more than one language: only 12 mediations in the last year. In the majority of such instances, the parties speak their own language and an interpreter is used, as opposed to choosing a bi-lingual mediator, which is less common. Interpreters engaged in NFM mediations are sourced from external agencies, with costs shared by both parties,

unless the mediation is funded by legal aid. While they would only use a qualified interpreter, he or she is not required to have any particular background or experience in mediations. The mediator will brief the interpreter prior to the mediation as to how to deal with the multi-lingual dimension in the conduct of the mediation.

A respondent in East Lancashire (SMILE Mediation) reported it conducted some 200 mediations annually, all voluntary, with roughly an 85% success rate. All of their mediations were conducted face-to-face and all without lawyers assisting. Of the 200 mediations, only 4 needed to use more than one language, so 2%. All fell in the category of non-family civil subject-matter (e.g. neighbour disputes, personal injury, nuisance). Parties would speak their own languages and an interpreter would be engaged. The provider selects an interpreter from a list of freelancers and he or she is not required to have had any specific training in mediation, but the mediator would hold a briefing meeting with the interpreter before the first mediation session. The organisation provides the interpreter with best practice guidelines. Some mediations are conducted with two co-mediators.

One smaller provider (Anderson Mediation) offering mediations mainly in family disputes submitted a response to the questionnaire. Two thirds of their mediations were voluntary and one third were court-ordered. Both enjoyed a very high success rate. In half of each category the parties were accompanied by lawyers. Of the 30 or so mediations they conducted annually, none involved the use of more than one language.

In the field of employment disputes, the Advisory, Conciliation and Arbitration Service (ACAS) responded that they arrange 80,000 conciliations or mediations per annum, all of which are voluntary. They estimate that some 50,400 of the total are successful, in the sense that the dispute is resolved without going to court. Perhaps unsurprisingly given this volume, they estimate that 78,250 are carried out over the telephone. These will all be conciliation sessions, as they state that all ACAS mediations are conducted face-to-face. Approximately 1,000 cases (conciliation or mediation) annually will involve more than one language. When an interpreter is required for a conciliation session they participate by a three-way conference call. ACAS did not indicate which languages were most commonly required. Most often the parties speak their own language and an interpreter is engaged. There was no information provided as to whether bilingual mediators were ever used, but it seems not, as they report that interpreters are used in all cases. The interpreters were sourced by means of an "Interpreter Contract" and are paid by the state, rather than the parties. Although they do not require an interpreter to have received any formal training in mediation as a process, it is their practice for the interpreter to attend a briefing meeting with the mediator prior to the first mediation session and they are

instructed how they should interpret in the mediation session. ACAS prefers the consecutive mode, having first made notes or by relying on memory. It is not their practice to arrange a debrief with the interpreter after the conciliation or mediation process.

6.2. Individual Responses

61 individual mediators responded to our invitation to submit information on their own competence in languages other than English and their own experience of the impact of more than one language on the conduct of mediation. While all 61 said they used English as the language in their professional practice, 35 said they did not speak any other language, while 26 said they did. 15 spoke one additional language, 6 spoke two additional languages and 5 spoke three additional languages. Of all languages (whether as a first, second or third) listed, French was by far and away the most common, four times more so than any of German, Italian and Spanish. The mediators were asked to self-assess their proficiency according to the CEFR. Including all languages listed, the modal average level was B1.

When asked about their own practice, 34 of the 61 said they conducted voluntary mediations only, 26 said they provided both and one, court-ordered only. For those undertaking both types, the number of court-ordered represented a small fraction. Success rates reported were high and the degree of representation by lawyers varied somewhat. 52 of the 61 said that all their mediations were conducted face-to-face. In the case of the remaining nine, “shuttle mediation” was the most frequent response, with little use of mediation by telephone or video conferencing.

With reference to mediations conducted in more than one language, 32 of the 61 said this did not form part of their practice and 29 said it did, albeit not so often. Such mediations were overwhelmingly voluntary rather than court-ordered. The 29 respondents felt that more than one language is used most commonly in family disputes, then non-family civil (e.g. neighbourhood disputes, torts, personal injury), and then much less frequently in commercial disputes.

When asked which approach they used when they themselves or one or more of the parties do not share a common language, 25 of the 29 replied that an interpreter is used. One said that a bilingual mediator is used and two said that either a bilingual mediator or an interpreter is engaged, depending on the circumstances. Presumably those three individuals would withdraw in favour of a bilingual mediator, as no respondent replied to offering bilingual mediation themselves. No respondent who had earlier said that they speak another language themselves claimed to have any

formal qualification in that language. In terms of frequency of mediations involving more than one language, two of the 29 said they mediated in 10 such cases annually, the rest mediated only six or fewer such cases over a year. To the question as to whether interpreters were required to have completed formal training in interpretation, 17 replied yes and eight said no. Nine thought undergraduate level was the minimum qualification required; six thought basic/introductory was the minimum level required. All said that interpreters were not required to have completed formal training in mediation. The most common method of sourcing an interpreter was selecting from a list of freelancers held by the mediation organisation.

On the question as to whether they hold a briefing session with the interpreter before the first mediation session, 21 of the 29 mediators said yes; four said no. Asked if they provided the interpreter with best practice guidelines, 14 said yes and 10 said no. 21 said that they did indeed instruct an interpreter on how they should interpret during the mediation; five said they did not. The vast majority of these 21 said they preferred the mode of consecutive interpreting without note-taking (relying on memory), three preferred consecutive with taking notes and two preferred simultaneous interpreting (the interpreter whispering a simultaneous interpretation to one party as the other party is speaking). At the end of the mediated session, 17 said they held a debriefing session with the interpreter; eight said they did not.

7. Concluding Observations

The general consensus is that ADR in general and mediation in particular are now firmly embedded in the range of options available for the resolution of civil disputes. Most commentators would add that there is much to be done in raising awareness of mediation so that more litigants or potential litigants are encouraged to explore that avenue.

ADR is beneficial to society as a whole and not only to the litigants, as it permits limited judicial resources to be applied only to the cases truly requiring formal adjudication in a court of law. Very senior judges have remarked extra-judicially on the complementary contribution of ADR to civil justice, while at the same time warning it should never be seen as displacing the constitutional right to have one's dispute heard in an appropriate court of the land. It should be remembered that judges formulate and develop the law in deciding the cases before them, so it is essential that matters of important legal principle or policy are considered, adjudicated and recorded by the judiciary in a public forum for the benefit of all. The evolution of case law should not be stunted. The challenge is achieving resolution of disputes in the most appropriate forum given all the circumstances. ADR can only be positive in adding to the mechanisms available.

It is generally felt that there needs to be more, but not too much, regulation of the practice of mediation. Accreditation and training varies across the different specialist areas: civil, family, workplace and community. While there are common standards of good practice, a professional regulatory body would address the current lack of accountability for mediators. As professionals performing a service requiring considerable skill, it follows that they should be properly trained and supervised under a common code of practice. While many mediators are legally qualified, there is a trend towards greater professional diversity, with new entrants reflecting new applications of mediation, e.g. workplace, tax, medical and education.

As far as we are aware, there has been no formal collection of data in the UK concerning the use of more than one language in the conduct of mediation. This project invited reports of experience from both institutions and individual mediators. While it would be imprudent to draw too many conclusions from such limited data, the following observations could be made:

1. Overall, a low incidence of mediations with a language barrier was reported by the respondents in the UK.
2. Where interpreters are used, there was no apparent consistency of policy in their management by the mediation provider or the mediator.
3. Where facility in more than one language was needed, there was a clear preference to engage an interpreter rather than appointing a bilingual mediator. Although almost half of the mediators assessed themselves as having some competence in additional languages, it would seem they had a healthy respect for the professional level required of interpreters, rather than offering themselves as the language intermediary (assuming the language in question was one they had knowledge of).
4. It was noteworthy that where an individual mediator spoke an additional language, for these respondents it was a “traditional foreign language” here in the UK, i.e. the European languages of French, German, Italian, Spanish, etc. This might support findings in other, wider surveys, that there is a serious concern about the lack of ethnic diversity among mediation practitioners. One would expect most linguistic diversity in community and family mediation and it may be that mediators in these fields were under-represented in our data.

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Country Report: Italy

Annalisa Sandrelli

1. Legislative Framework

Before the 2008 EU Directive (52/EC), mediation had been used in Italy for dispute resolution in certain financial matters and in all corporate matters (Legislative Decree 5/2003; Law 533/1973), but was not used by the general public as an ADR method (De Palo *et al.* 2014). Family mediation also began to appear in the 1990s in connection with divorce proceedings, but business mediation remained a niche area until the first decade of the 21st century. It was entirely voluntary and used relatively infrequently: about 20,000 cases per year, a significant figure in comparison with other EU countries, but a tiny fraction of the millions of cases in civil courts. Moreover, only 40% of mediation requests actually went beyond the first meeting (Giudice, 2014). In the period between 2005 and 2010 incentives were introduced to try and make mediation more popular and boost numbers (D'Urso, 2016). Italy can be considered a 'laboratory' as regards mediation, since over the past five years its governments have experimented with a range of legal options to raise the profile of this ADR method and make it more accessible to citizens. A brief overview of the main steps and legal instruments is provided below (Camera dei Deputati, 2014; De Santis, 2014; De Luca, 2014; De Palo *et al.* 2014; D'Urso, 2016; Giudice, 2013; Iafrate *et al.* 2014; Pompei 2014).

Firstly, it must be pointed out that when the 2008 Directive was transposed into national law, Italy was the only Member State to choose an opt-out model, while the other 27 countries adopted the opt-in model (D'Urso, 2016). In other words, in all of the other EU countries the parties involved in a controversy must sign an agreement to initiate a mediation process, whereas in Italy they must sign an agreement not to start a mediation process. This is because Legislative Decree 28 (adopted on 4 March 2010) introduced mandatory mediation in a number of domains. Thus, mediation became a compulsory step that parties involved in a dispute had to take. The law established that if no settlement could be reached, then parties were allowed to initiate legal proceedings in a civil court. Mandatory mediation was an attempt to reduce the pressure on the Italian civil courts that were swamped with millions of cases.¹ Initially, the provision had a positive effect, in that the number of mediation cases increased steadily, up to 154,000 in 2012.

However, the new law met with stiff opposition from lawyers, who went on strike and brought the law before the Constitutional Court. In 2012 the latter ruled that the provision imposing mandatory mediation in the Decree (namely, article 5, paragraph 1 and article 16, paragraph 1) was unconstitutional and was an undue obstacle to citizens' free access to justice. As a result, mediation went back to being a voluntary ADR method, and the number of mediation processes dropped significantly: in the first three quarters of 2013 the average was only 1,700 new cases per month, with a total of 41,604 mediation processes overall (one sixth of the previous year). The Italian government decided to intervene once again. Legislative Decree 69/21 June 2013 (*Decreto del Fare*), converted into Law 98/ 9 August 2013, reinstated mandatory mediation in a number of domains (tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, medical and sanitary malpractice, defamation by the press of other means of advertising, contracts, insurance and banking, and finance) on an experimental basis, for an initial period of four years. There are, however, a number of significant changes:

- there are four types of mediation: voluntary, mandatory, court-ordered (judicial referral) and provided by contract;
- in mandatory mediation, only the initial mediation meeting is compulsory. There are sanctions for not showing up at the initial meeting. However, if the parties do not reach an agreement, they do not have to pay anything and can go to court;
- where mediation is mandatory, parties must be assisted by their lawyers. In other circumstances (voluntary mediation), the parties are allowed to have counsel but it is not legally required;
- if an agreement is reached and signed by the mediator, the parties and their lawyers, it is immediately enforceable. There are also tax incentives for the parties: settlement is tax-free up to a value of 50,000 euros, and the parties are also entitled to tax credit on the mediation fee;
- all qualified lawyers are automatically mediators, but they must attend a dedicated training programme.

The situation will have to be re-assessed in 2017 at the end of the experimental period. Therefore, the Statistics Department of the Ministry of Justice has been monitoring the situation very closely, by collecting data on all the mediation processes taking place in Italy (see Italian links below). The Ministry of Justice keeps a register of accredited mediation centres (public or private mediation bodies cannot offer mediation services if they are not on the register) and a list of all the accredited mediators in the country. The Ministry also publishes quarterly reports

on mediation in Italy on a dedicated website (see Italian links below).

The latest available statistics concern the year 2015, when about 200,000 new mediation cases were recorded. Even more significantly, there has been a significant drop in the number of new court cases in areas covered by the mediation law, which means that mediation is gradually gaining ground and beginning to ease the pressure on the courts. As regards the types of disputes in which mediation is used, in 2015 the majority of cases involved banking (23.5%), property (13.7%), lease (12%) and condominium management disputes (11.9%), all of them areas covered by mandatory mediation. Non-mandatory mediations accounted for 10.9% of cases.

As regards the outcome of all these mediation processes, it must be highlighted that in 52.7% of cases the party invited to the mediation did not accept it and the dispute had to be settled in court. However, the percentage of cases in which the two parties actually meet for the preliminary meeting (in which mediators explain what the mediation process entails) has been increasing steadily in the last few years and currently stands at 44.9%. According to the 2015 data, settlement was reached in 23% of cases, but, if only the mediations that went beyond the first meeting are taken into account, the success rate goes up to 43.5%. Predictably, the most frequent type of mediation is compulsory mediation (81.6%), followed by voluntary mediation (8.3%), mediation by judicial referral (9.7%) and, in a negligible percentage, mediation provided by the terms of a contract.

Mediation may only be initiated in the province (district) where civil proceedings will take place in case mediation is unsuccessful ('natural judge' principle). This provision is aimed at preventing the party initiating mediation from appointing a mediator in a remote location, in an attempt to discourage the other party from participating.

The geographical breakdown of mediation activities reveals that it is more frequent in the North-West (27%), followed by the South (24%), central Italy (22%), the North-East (17%) and islands (11%). The charge for initiating a mediation process is only 45 euro + VAT and is payable by the claimant. If the other party decides to participate in the mediation, the costs are shared between the two parties. The overall fee (*indennità di mediazione*) depends on the value of the dispute. In 2015 the average economic value of mediations was just under 140,000 euros per dispute and the average duration of the mediation process was 103 days (in successful mediation cases) as opposed to the 902 days necessary in court.

In order to qualify as a mediator, a Bachelor degree in any discipline (or equivalent three years of study) is a pre-requisite. Additionally, a dedicated 50-hour training course in mediation at an accredited training centre must be completed. Newly-

qualified mediators are also required to take part in at least 20 mediation cases as trainee mediators over the following two years. Nationally registered lawyers are, by law, mediators, but they can only practise as mediators if they have had the appropriate training and if they are part of a mediation organisation.

2. Survey Data

The survey was sent to all the mediation organisations on the national register (currently 723) by the Statistics Department of the Ministry of Justice in its quarterly mailing. This email message (sent on 21 July 2015) explained to the mediation organisations what the Understanding Justice project was and why information was being collected on mediation in Europe. The message contained the link to the two online questionnaires in Italian. In order to encourage participation, phone calls to the 20 largest mediation centres in Italy were made a few days afterwards. Overall, 79 respondents completed the questionnaires, including 63 organisations and 16 individuals. The response rate was not very high (8.7% of all registered organisations replied), probably on account of the time of the year (the end of July and August coincide with the summer break for most Italian businesses). However, as the list of respondents included some of the largest mediation organisations in Italy, the questionnaires can be considered at least indicative of trends. The main results are summarised and analysed below.

2.1. Mediation Organisations

There were 63 respondent organisations in all. In most cases the respondents were either the directors of the mediation organisation (29%) or administrative staff (24%), with the exception of four respondents (6% of the total) who were mediators themselves. 85% of respondents stated that they spoke a foreign language, mostly at intermediate level and mostly English (37 out of 63 respondents). However, roughly two thirds of the sample (41 respondents) stated that they only practised as mediators using the Italian language; two respondents reported they also used English in mediations.

The overwhelming majority of organisations (over 90%) reported they offer both voluntary and mandatory mediations, but that the bulk of the work is made up of the latter. The majority of cases involve disputes of a commercial nature. About 55% of respondent organisations (34) reported that they carry out all mediations face-to-face; a large number of organisations declined to explain which alternatives to face-to-face mediation they employ, but those who did answer the question primarily use video conferences (35%) or telephone mediation (19%).

Only 21 organisations (35% of the sample) carry out mediation using more than one language: of these, 19 less frequently than once a month, two on a monthly basis and only one on a daily basis; the average is about 20 cases per annum. In these cases, either a bilingual mediator is used (reported by 10 organisations) or two mediators are used, one of whom is bilingual (three respondents): significantly, only one organisation reported using interpreters. Those organisations that use bilingual mediators also explained that in most cases (13 responses, i.e. 21%) the latter are not required to have formal language qualifications in their second or third language; however, six organisations stated they do require them to have language qualifications, and three of them specified they require a C1/C2 level (one said they require A1/A2, one indicated B1/B2). Moreover, 12 organisations provide bilingual mediators with best practice guidelines.

Although only one organisation reported using interpreters in mediations involving more than one language when they were asked about the approach they take to bridging the language gap (in the first section of the questionnaire; see paragraph above), in their replies to Q28², 11 organisations declared they used interpreters, albeit in a very low number of cases (1.75 per annum on average); this discrepancy may have been caused by comprehension problems or inaccurate filling out of the questionnaire, but what clearly emerges is that the use of interpreters is the exception rather than the norm. The organisations who stated they use interpreters also provided some information on their training: three stated they are required to have completed formal training in interpreting and four require training in mediation.

When interpreters are recruited, they are selected from a list held by the mediation organisation itself (11 responses). The cost of the interpreter is shared by both parties in most cases, both in court-ordered and in voluntary mediation. A briefing session before the first mediation session seems to be relatively common (10 positive answers) and the preferred mode of interpreting seems to be consecutive interpreting with notes (six positive answers).

Overall, the use of interpreters in mediation sessions is infrequent in our sample, the preferred option being the use of a bilingual mediator. When interpreters are used, however, there is some awareness of the fact that they need guidance prior to the first mediation session.

2.2. Individual Mediators

There were 16 individual respondents overall. All of them (100%) practise mediation in Italian and one of them reported using Italian and German. All of them (100%) speak another language as well as Italian, generally English or French.

Almost all of them (94%) work in both voluntary and mandatory mediations, but the latter type are more frequent. The vast majority of cases involve disputes of a commercial nature. About 56% of mediators only work in face-to-face mediations; those who reported working in other settings did not provide many details (one reported using the telephone and four mentioned videoconferencing).

Only 25% of respondents stated that they conduct mediations using more than one language, but not very frequently (less than once a month). Three respondents reported working through an interpreter (but indicated only one case per annum) and another two stated they work as bilingual mediators, if the foreign language involved is a language they know. No formal training in interpreting or in mediation is required of the interpreters (once again, only one response).

To sum up, according to our small sample of both mediation organisations and individual mediators, the use of interpreters in mediation appears to be extremely rare in Italy. One of the possible reasons is a lack of familiarity with the world of interpreting among mediation professionals (there seems to be little awareness of interpreter training and specific competencies). Another complicating factor is the fact that the obligation to be assisted by a lawyer in mandatory mediation (which makes up the bulk of all mediation cases in Italy) often means that the parties do not actually attend the mediation sessions, and send their lawyers instead. It could be hypothesised that lawyers and mediators have sufficient language skills to use English as a *lingua franca*, especially in commercial and business disputes, which form the majority of cases in Italy. If mandatory mediation is expanded to cover other areas of civil law, the number of cases involving foreign languages (not necessarily English) will increase considerably and so will the need for bilingual mediators and interpreters. A clearer picture will emerge after the end of the experimental period, when the Italian government decides how to move forward with mediation.

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Italian links

Mediation in Member States – Italy: https://e-justice.europa.eu/content_mediation_in_member_states-64-it-en.do?member=1

Mediation Department of the Ministry of Justice: <https://mediazione.giustizia.it/>

Register of accredited mediation organisations: https://www.giustizia.it/giustizia/it/mg_3_4_15.wp?tab=d

DG Statistics of the Ministry of Justice: https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Studi%20analisi%20e%20ricerche.aspx

Italian legislation

Legislative Decree 4 March 28/2010 (National Implementing Measure of the EU Mediation Directive): <http://www.altalex.com/index.php?idnot=55668>

Ministerial Decree 180/2010 (implementing the above Legislative Decree): <http://www.altalex.com/index.php?idnot=12320>

Constitutional Court ruling 272, 12 December 2012: <http://www.altalex.com/index.php?idnot=60417>

Decree Law 69/21 June 2013 (Decreto del Fare): <http://www.altalex.com/index.php?idnot=63478>

Law 98/9 August 2013 (converting the above Decree Law into law): <http://www.altalex.com/index.php?idnot=64162>

4. Endnotes

1 According to the latest available figures, there are currently about 4.5 million cases in the Italian civil courts, including a backlog of cases whose duration exceeds 3 years (Bartolomeo, 2016).

2 ‘Does your organisation use interpreters in mediations involving more than one language?’

Country Report: Poland

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1. Mediation in Poland: The Legal Background

Mediation in Poland was introduced between 1991 and 2005, depending on the branch of law. The earliest domain was collective labour law disputes (1991), followed by restorative justice in criminal matters (1997, effective as of 1 September 1998) and cases involving juvenile criminal offenders (2001), and judicial control over administrative decisions (2002). Current legal regulations in criminal procedure are binding as of 2003. In civil law, including commercial, family, employment, and other private law matters, mediation was introduced in July 2005 by amending the Code of Civil Procedure and some other acts. In 2010 important changes were introduced into the civil procedure. Thus, Poland implemented the requirements set out in EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, and the scope of Polish civil law in mediation is much broader than that of the EU Directive covering not only mediation proceedings, but also agreements to mediate and settlement agreements, selection of a mediator, and confidentiality principles (cf. Pieckowski 2012: 10-14).

Cross-border mediation in international child abduction was made available in Poland in November 1992 after Poland had ratified The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Additionally, Poland signed a bilateral agreement with Germany's Ministry of Justice in 2011 on co-operation in cross-border mediations in family matters, such as parental responsibility, contact with child and child abduction.¹

In 2005 the Social Council on Alternative Dispute and Conflict Resolution ('the ADR Council') was set up as an advisory body to the Minister of Justice to work out recommendations for the national ADR system, develop the unified model of mediation institutions in Poland, and promote high-standard mediation proceedings, among other tasks.

The Polish civil law (art. 183(1)-183(15) of the Code of Civil Procedure) provides for two types of mediation:

- conventional or contractual mediation based on an agreement to mediate, i.e. private or out-of-court mediation, and
- mediation in court proceedings (court-ordered mediation).²

All mediations in civil matters are voluntary in Poland, including court-ordered mediations, as the parties have to agree to mediation (opt-in model) and may refuse to participate in it. If the parties do not choose a mediator, the court is entitled to appoint one from a list of permanent mediators maintained by regional courts. A new law effective as of 1 January 2016 enumerates for the first time special requirements for permanent mediators, such as education, training and practical skills in conducting mediations (cf. Ordinance of the Minister of Justice of 20 January 2016; Journal of Laws Dz.U. 2016, item 122).

In family cases additional requirements apply to mediators concerning their education (psychology, teacher training, sociology or law) and experience (practical skills in conducting mediation in family cases). Mediation settlements are enforceable.

As of January 2016 some important changes have been made in mediation as an amending law of 10 September 2015 was passed on enhancing amicable methods of dispute resolution in civil cases. The litigating parties are now obliged to state in their claim whether they attempted the ADR methods of settling their dispute amicably and, if not, provide reasons why. Also the court has more possibilities to introduce mediation at any stage of the case, and more than once, and is obliged by law to inform the parties about mediation, or organise information meetings about mediations. The parties will now also have the choice to select a mediator, whose access to case files (and parties' contact details) is now made by law more immediate and less unrestricted. The costs of mediation are now included in the costs of court proceedings which will enable the underprivileged to be exempted from mediation costs. The new law provides for other financial incentives to promote mediation rather than litigation. Finally, the communication between judges and mediators will now be facilitated by a co-ordinating judge – leader in mediation in every regional court. The above changes in the law on mediation prepared by the Ministry of Economy and based on expert recommendations aim at improving the organisation of mediation and its procedure, raising its standards and reducing the costs of disputes for both individuals and the state.

2. The Cultural, Social and Linguistic Context of Mediation in Poland

In the opinion of one of the top Polish arbitrators, Piotr Nowaczyk, Poland's cultural and historical context may not be very conducive to mediation since due to past historical events Poles tend to be less trustful and treat disputes "as a battle, a duel". However, mediation could be a remedy for the shortcomings of the judiciary system (Nowaczyk, 2014), especially given the considerable length of court proceedings in Poland related to commercial matters (540 days) compared to mediation — 42 days.³

Mediation has a special role to play in the Eastern European countries of the post-Soviet bloc where the communist state strongly controlled many spheres of life, including conflict resolution. Mediation 'reprivatises' the area of conflict resolution and involves a shift from the paternalistic role of the state and law to the private sphere with more active roles of the parties in conflict resolution (cf. Morek, 2012: 3). Thus, mediation promotes civic society and changes social patterns of how disputes are solved. Overall, it may contribute to the transformation of legal culture in Poland.

As regards the linguistic context, Poland is predominantly a monolingual country with a low number of residing foreign nationals and ethnic minorities. According to the 2011 census, fewer than 0.9% of residents use a language other than Polish at home, excluding dialects of an ethnolect status — Silesian and Kashubian. The foreign languages most frequently spoken at home are: English, German, Belarussian, Ukrainian, Russian, Norwegian, French and Italian.⁴ According to the data held by the Polish Office for Foreigners, as of 1 July 2015, there were 193,747 foreigners who held legally valid documents to reside in Poland (permanent residents, asylees, refugees, etc.) — this number corresponds to only 0.5% of the Polish population. The largest group of foreign nationals came from Ukraine (about ¼), Germany, Russia, Belarus, Vietnam, Italy, France, China, Bulgaria, the United Kingdom, Spain, Armenia and Turkey.⁵ Even though these figures grew dynamically in the last few years, the number of foreign nationals with legally valid documents in Poland is low. By comparison the number of foreign citizens in the UK is estimated at 5 million in 2014, while following the recent migration of the last five years, the so-called foreign-born population is estimated at 8.3 million (Rienzo and Vargas-Silva, 2015). Thus, the linguistic diversity of Poland is low and translates into a much lower need for bilingual mediation than in other more linguistically-diverse countries.

3. Official Statistics on Mediation in Civil Matters in Poland

The Polish Ministry of Justice maintains statistics for court-ordered mediation only. According to these data, the litigating parties were referred to mediation by Polish courts in the following number of cases in 2015:

- Mediation in civil matters (including contract law, property law, torts, payment claims) — 4,123 cases were sent to mediation by courts, of which the settlement was reached and the court proceedings were discontinued in 8% of cases;
- Mediation in commercial matters (including company law) — 5,744 court-ordered mediations with the settlement rate of 13%⁶;
- Mediation in family matters — 1,932 cases in 2015 with the settlement rate of 44%;
- Mediation in employment matters — 512 cases in 2015 with the settlement rate of 23%.

The rate of success in civil matters referred to mediation is very low. The highest rate of success is observed in family matters.

Table 1 juxtaposes court-ordered mediation in civil matters in 2006, a year after it was introduced, and in 2015, evidencing an exponential 6-fold increase over the period of 10 years in the number of cases being referred to mediation.

Table 1. Court-ordered mediation in Poland in 2006 and 2015

	Court-ordered mediations	Settlement approved by the court	Rate of success
2006			
Civil cases	1448	93	6%
Commercial cases	256	51	19%
Family cases	270	127	47%
Employment cases	33	5	15%
	2007	276	14%
2015			
Civil cases	4123	321	8%
Commercial cases	5744	640	13%
Family cases	1932	856	44%
Employment cases	512	120	23%
	12311	2037	16%

Source: Based on the data of the Polish Ministry of Justice <https://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/>.

However, despite the growth, the number of cases referred to mediation, that is 12,311 in 2015, is still very low, especially when considering the total annual number of court cases in the corresponding fields in that year: 9 million civil cases, 1.7m commercial cases, 1.4m family cases and 0.1m employment cases.⁷ This means that only 0.1% of cases in civil matters were referred by courts to mediation. The statistics confirm that the take-up of mediation in Poland is still very low despite awareness-raising campaigns targeted at judges, legal practitioners and the general public. Recent research (interviews with legal experts) attributes it, on the one hand, to the low awareness of the general public of mediation and, on the other hand, to low interest among lawyers who rarely inform their clients of the possibility of mediation (Pękala 2015: 220-223). The situation should change in 2016 thanks to a new enactment streamlining mediation procedures and imposing mediation-promoting solutions.

No official statistics are maintained for out-of-court mediation, which is conducted on the basis of agreements to mediate, except for out-of-court settlement agreements submitted to courts for approval. The option of approval is used scarcely, with a very low figure of 108 settlements in civil, commercial and employment matters submitted for approval in 2015.⁸ However, this does not reflect the growing popularity of out-of-court mediation in the private sector, especially in commercial matters, brought about by the introduction of court-referred mediation (Peters & Gmurzyńska, 2008: 124).

There are no statistical data on mediation involving more than one language in Poland. The only available statistics on cases which *may* involve language issues concern cross-border mediations in family matters under The Hague Convention. Such cross-border court-referred mediations relate to the return of a child and rights of access and they are extremely rare with two mediations in 2015, five in 2014, two in 2013, and two in 2012 (of which 81% were unsuccessful).⁹ This may change in the near future due to the growing number of multicultural families (cf. Zagórska 2013: 103) and one of the EU's highest rates of emigration.¹⁰

4. The Survey on Mediation and Languages in Poland

The data obtained from the survey show that mediations in civil matters involving more than one language are rare and that there is a low awareness of language issues in mediation.

The Polish part of the survey was distributed from 31 August 2015 to 02 October 2015 to mediation organisations and individual mediators via email. The mailing

list was compiled on the basis of public registers of mediation organisations and individual mediators kept by regional courts in major Polish cities (Warsaw, Kraków, Poznań, Wrocław, Katowice, Łódź, Gdańsk) and through directories of mediators available on various mediation-related websites. The questionnaire was sent to 69 mediation organisations and 1,157 individual mediators and was filled in by six mediation organisations and 37 individual mediators. In addition, we received emails from three organisations and eight individual mediators, saying that they did not fill in the survey because they did not have any experience with mediations involving a language other than Polish. A relatively low response rate to the survey may be attributed to the uncommon occurrence of bilingual mediation in Poland. The survey was supplemented with a literature review, a survey of mediation websites on the Internet and in-depth telephone and face-to-face interviews with mediators.

5. Mediation Organisations

Only four mediation organisations reported that they carried out mediations involving more than one language. In the case of 75% of the respondents such mediations took place less often than once a month, ranging from two to five mediations per annum. Only one organisation, which is the largest one among the respondents, conducts bilingual mediations more often than once a month, with 30 court-referred mediations and 15 contractual (private) mediations involving more than one language per annum (which constituted 1.2% and 1.8%, respectively, of all mediations conducted by it during the year). Bilingual mediations are conducted mainly in family and commercial matters and occasionally in employment and administrative matters. In the case of mediations involving more than one language all organisations use bilingual mediators who are not required to have formal qualifications in their second or third languages and who are provided with best practice guidelines by only two organisations.

Interpreters are used rarely by organisations and are not required to have formal training in mediation. Interpreters are either taken from the register held by the Ministry of Justice or the party who speaks a foreign language is responsible for arranging their own interpreter. Depending on the type of mediation, interpreting costs are covered by the state, by the party who requests an interpreter or are shared by both the parties. All the respondents replied that they held a briefing session with the interpreter engaged for the mediation; however, it seems that there is no clear pattern of who attends a session — the interpreter and the mediator may be accompanied by the party who requested an interpreter or by both parties. The preferred mode of interpreting seems to be consecutive mode with notes.

6. Individual Mediators

The survey of individual mediators shows that, in general, mediators have a good command of at least one foreign language, although it should be borne in mind that the survey was filled in mainly by those mediators who took part in bilingual mediation. 94% of the respondents speak another language, predominantly English, in some cases Russian, German, and occasionally French, Spanish and Italian. The proficiency in Language 1 is assessed at the advanced level (C1 and C2) in over 50% of cases.

Mediations involving more than one language were conducted by 22 mediators, of which only two mediators do so on a monthly basis while others do so less than once a month. Mediations involving more than one language are more common in contractual mediation (65%) and they tend to apply to commercial and family matters, and very occasionally to civil, administrative and employment matters (collective labour disputes were also mentioned). The most frequent solution to the problem of language difference is to use a bilingual mediator, in some cases supported by bilingual co-mediators and/or bilingual lawyers. The majority of the mediators who responded to the survey (65%) offer bilingual mediation where they both mediate and interpret but only 40% of them have formal language qualifications in their second language (mainly C1/C2).

39% of the respondents mediate using an interpreter (or a sworn interpreter); however, it happens very rarely — on average twice per annum. In most cases interpreters are required to have completed formal training in interpreting at the postgraduate level but, again, they are not required to have completed formal training in mediation. Interpreters are usually selected by the parties themselves or are agreed upon mutually by the parties; they are also sourced from the register of court interpreters held by the Ministry of Justice or a list of freelancers maintained by mediation organisations. Interpreters are paid mostly by the party who requested them or jointly by both parties. More than half of the mediators hold a briefing session with interpreters and instruct them on how they should interpret in a mediation session; however, they rarely provide interpreters with best practice guidelines. The preferred arrangement for the briefing session is the interpreter, the mediator and the other language speaking party. Mediations are interpreted in various modes: the consecutive mode with/without notes and the simultaneous mode. More than half of the mediators hold a de-briefing session with an interpreter at the end of a session; this is attended by all the parties to check the understanding of the settlement reached and to discuss further arrangements, such as a written translation of the settlement agreement.

Open-ended comments, interviews and other data confirm that, in the case of mediations involving more than one language, there is a clear preference among mediators for mediating by themselves or for using bilingual co-mediators rather than interpreters: it is optimal when the mediator and the parties use the same language. This is possibly due to the fact that bilingual mediation is relatively rare and Polish mediators deal mainly with popular European languages which they can easily cover from among their number. It applies in particular to mediations in commercial matters where English is ‘a common ground’ and where parties are often assisted by bilingual lawyers. Bilingual mediation in English may be a choice even if English is not a native language to either of the parties (e.g. a Polish and a Dutch party). Following the Wrocław Declaration on Mediation of Bi-national Disputes over Parents’ and Children’s Issues (2007), it is recommended that mediations in family matters are conducted by two bi-cultural mediators who come from the same country as the parents in dispute.¹¹ Some mediation organisations advertise themselves on their homepage as having a network of bilingual mediators who know foreign languages and/or list their mediators with explicit reference to the foreign languages they speak.

Interpreters are sometimes used as a ‘security’ even if the mediator and the parties are able to communicate in the same language. Mediators, in particular those who are able to mediate by themselves, are strongly against the use of interpreters in mediations, i.e. *it should be the last resort only when it is absolutely necessary*. The major concern seems to be that an interpreter may fail to understand the purpose and specificity of the mediation process and may fail to convey certain nuances of meaning, including nonverbal elements and the cultural context. It has also been raised that interpreting increases the cost of mediation and makes communication less effective. This issue is also discussed in the literature on cross-border family mediations:

“even though it may be indispensable, the presence of an interpreter may cause significant obstacles to information flow and errors in the transfer of ... intentions. (...) the need to use a third party to express oneself may cause unnecessary stress or an emotional block” (Zagórska 2013: 112).

On the other hand, it has also been implied that it is advisable to have an official interpreter in court-ordered mediations to ensure that there are no doubts as to the mediator’s impartiality and neutrality.

7. The Interpreter's 'Invisibility' in Mediation

Language issues and arrangements for managing language difference are hardly ever discussed in the professional literature addressed to mediators or nor do they appear in mediation rules published by mediation organisations. Language issues have not been mentioned in the Wrocław Declaration, either. The awareness of mediation is also low among Polish interpreters — very few interpreters advertise interpreting in mediation within the range of services they offer (this may also be due to the low demand for this type of service). There are no dedicated training materials or publicity materials on mediation specifically for interpreters.

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Zagórska, K. (2013) 'Mediacje transgraniczne w sprawach rodzinnych' in M. Tabernacka (ed.) *Mediacje ponad podziałami*. Wrocław: Uniwersytet Wrocławski, 103-115.

9. Endnotes

1 For cross-border mediation in the Polish legal system, see Rękas (2014: 83-95).

2 Mediation scheme in court civil case in: Kaźmierczak & Kaźmierczak (2015: 150).

3 2010 data, p. 47, http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf.

4 <http://mniejszosci.narodowe.mac.gov.pl/mne/mniejszosci/wyniki-narodowego-spis>.

5 Mid-year statistics on proceedings concerning foreigners 2015 <http://udsc.gov.pl/wp-content/uploads/2014/12/Dane-liczbowe-dotycz%C4%85ce-post%C4%99powa%C5%84-prowadzonych-wobec-cudzoziemc%C3%B3w-w-pierwszej-po%C5%82owie-2015-roku2.xlsx>

6 Also compare interesting research based on the Warsaw Regional Court files in commercial mediation between 2013 and 2015 conducted by the Centre for Dispute and Conflict Resolution at the Faculty of Law and Administration, University of Warsaw. Available from <http://mediacje.wpia.uw.edu.pl/files/2016/02/Badanie-mediacji-gospodarczych.pdf>.

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8 <https://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/>.

9 <https://ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/>.

10 http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

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Country Report: Romania

Teodora Ghiviriga

1. Mediation in Romania: The Legal Background

Mediation as it is currently practiced in Romania was officially introduced in 2006 and is regulated by Law 192/2006 as a well-defined procedure in alternative dispute resolution. This law institutionalizing mediation was one of the important themes of the justice reform strategy in the process of Romania's accession to the European Union; Government Emergency Ordinance 13/2010 integrates the objectives of EU Directive 52/2008 into Romanian legislation.

In this document, mediation is defined as a method of out-of-court settlement with the help of a specialised neutral third party acting as a mediator, taking into consideration both parties' viewpoints and helping them to arrive at a voluntary resolution of their dispute, agreed to by both parties. The procedure results in a document (the settlement agreement) that, in the case of real estate transfer and related cases, will be subject to verification, completion or adjustment if necessary and eventual authentication by a court of law or notary public. In all other cases, the settlement agreement is accepted if authenticated by a notary or the court will issue an enforceable decision based on its content. If complete agreement is reached by the parties, the case can be closed; if partial agreement is reached, the court may consider the solution identified during mediation.

The parties are present in person at the mediation and can have legal advice during all stages of the mediation process. In the parties' absence, a lawyer or another person can represent them, if they possess a power of attorney. In those criminal cases that can be subject to mediation (e.g. minor cases of assault, trespassing, sexual harassment), the information meeting on mediation can be held separately with each party, thus avoiding a face-to-face encounter between the victim and the perpetrator.

Several other laws offer incentives when mediation is used as a form of alternative dispute resolution: between 2006, when Law 192/2006 was passed, and 2012, when Law 115/2012 entered into force, the payment of the judicial 'stamp duty' (a tax levied by the Romanian Government on certain contracts and legal documents, the payment of which is evidenced by the stamping of the relevant documents) was waived if the litigation was solved through mediation. Starting in 2012, this applied only to cases not involving the transfer of real estate, and mainly to commercial

cases. This was modified in 2013, when under Government Emergency Ordinance 80/2013, a judicial stamp duty (see above) became payable for any mediation agreement concluded in court, irrespective of whether it is initiated before or after the matter is brought to court. The individuals are exempted 50% of the stamp duty (see above) if the case is closed as a result of the parties' agreement .

Mediation is entirely voluntary in Romania. However, in order to promote mediation among the population, Law 115/2012 stipulated that the parties to a case should participate (free of charge) in a compulsory information meeting on mediation and its advantages in certain matters stipulated in article 13 of the law. When the law was first promulgated, this meeting could only be organised by a trained mediator; a later enactment (Law 214/2013) stipulated that the information about mediation could be provided by any legal practitioner (lawyers, notaries, prosecutors, judges) with no qualifications in mediation required. According to Law 214/2013, mediation was a voluntary process, and only the meeting informing the parties of the possibility of mediation was compulsory. Prior to court procedures, the mediator would issue a document by which parties could prove that they had attended the compulsory mediation information meeting.

In 2014, however, the article in Law 2014/2013 stipulating a compulsory information meeting on the benefits of mediation was declared to be contrary to the provisions of the Romanian Constitution. Subsequent to this change, the mediation information meeting is no longer compulsory or free of charge and there is no penalty for not attending.

Not all types of disputes are subject to mediation. In general, mediation in Romania can be used in certain criminal cases (minor crimes such as assault, bodily injury, trespassing, some types of domestic theft, breach of trust, property damage, breach of quiet enjoyment, failure to fulfil marital or parental obligations, sexual harassment and a few others), business related civil cases, family law, property related cases, employment litigation, consumer law and professional negligence cases.

The most recent addition to the legislation on mediation in Romania is Order 38/2015 (SAL – SOL). This integrates the provisions of Directive 2013/11/UE of the European Parliament and of the Council regarding out-of-court settlements in conflicts between consumers and traders. In Romania, the SAL instrument is a function of the Consumer Protection Office, aimed at solving consumer problems with a product or a service bought in another EU Member State.

The main documents regulating mediation in Romania are:

- Law 192/2006 regarding Mediation and Organization of the Profession of

Mediator, amended and completed by law 370/2009, GO 13/2010 for the transposition of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Law 202/2010 on measures to expedite dispute settlement¹

- Law 115/2012 amending and completing Law 192/2006 regarding mediation and organisation of the profession of mediator²
- Law 192/2006 regarding mediation and the profession of mediator, amended and completed by law 370/2009, GO 13/2010, Law 202/2010, Law 115/2012, Law 76/2012, GEO 90/2012, GEO 4/2013, GEO 80/2013, Law 255/2013 and the Decision of the Constitutional Court of Romania 266/ 2014³
- Decision of the CCR 266/07.05.2014 regarding the constitutionality of the compulsory information meeting on the benefits of mediation⁴
- The Code of Professional Ethics and Deontology for Mediators⁵
- The Occupational Standards of Mediators⁶
- Regulations of the Organisation and Functioning of the Mediation Council⁷

Mediation is one of the most recent liberal professions in Romania. Under Law 192/2006, individuals can become trained mediators if they have legal competence and are medically able to perform, have not committed crimes that affect the honour and dignity of the profession, have graduated from higher education and have completed a training course for mediators provided by an organisation agreed by the Mediation Council; they must also have at least three years' length of service. No legal studies are necessary for trained mediators. However, in the early years following the introduction of mediation in Romania in 2006 more than half of mediators had a legal background, with Business Administration as the next most frequent higher education background. Currently, few professionals in the field specialise in a particular area of the law, although there is a trend towards specialisation (e.g. in professional negligence, divorce settlements, leasing, etc.), especially in the large cities.

There is no restriction as to who can be a mediator. However, professionals in certain legal areas cannot practice other public or private functions, including mediation, e.g. judges, bailiffs, public prosecutors. A member of the legal profession such as a lawyer cannot perform as both a mediator and as legal counsel for the same client; if lawyers also offer mediation services, they cannot represent in court a client for whom they have acted as a mediator. They must choose whether to represent the client as a lawyer or to act as a mediator.

Continuing Professional Development is mandatory for mediation professionals, and renewal of their licence to practise is subject to the mediator acquiring 20 points per annum. Professional mediation activity is regulated and monitored by a national body, the Mediation Council. A licence to practise can be suspended or terminated voluntarily by the mediators themselves, or when they no longer meet any of the conditions prescribed by the law. Disciplinary sanctions for professional misconduct can range from a reprimand to removal of licence to practise. The profession has its own code of professional ethics and deontology and its own occupational standards.

Following authorisation as mediators, professionals are registered on the general list of mediators held by the Council of Mediation (<http://www.cmediere.ro/mediatori/>). Romanian mediators can be listed on this site even if their practise is not conducted on Romanian territory. Currently almost 7,000 active mediators with the right to practise are on the national list found on the website of the Council of Mediation (updated 27.04.2015), with around 1,000 others whose licence to practise has been suspended. However, there are cases where professionals registered as active mediators on the national list may not have yet mediated any cases. According to a survey covering the year 2014 (IRES, 2015), 12% of professionals had not mediated any case, while most mediators reported between one to five cases; the average was 12 cases. The regional distribution of mediators varies widely, as does the range and the number of cases. Some counties have less than 50 mediators on the list, compared to the capital city Bucharest, where more than 1,500 mediators are registered. Successful mediation cases are also unevenly distributed, with lower figures in some counties than others, with the majority of successful cases in Bucharest.

The actual extent and success of the activity of mediation in Romania is difficult to estimate, as there are no comprehensive statistics. However, some figures have been released: according to data supplied by the President of the High Council of the Judiciary, in 2014 only 1,800 cases out of the 2 million on the court lists were successfully concluded through mediation. It appears that, despite efforts to promote mediation as a method of civil dispute resolution, the process is still insufficiently known or trusted in Romania, by both individuals and the members of the legal profession. On the one hand, individuals are reluctant to go to mediation, partly due to lack of information on the advantages of mediation over litigation and partly on account of what has been termed 'the belligerent character of the population' (Stoica & Spiridon, 2014). On the other hand, legal professionals themselves are reluctant to use mediation, claiming that sometimes mediators use the process in cases not stipulated by law or disagreeing with the form in which some agreements are issued.

Figures released in February 2015 from a survey by The Romanian Institute for Evaluation and Strategy (IRES, 2015) conducted in 2014 indicated that the most

frequent cases in mediation were divorce cases (around 50%), and commercial cases (15%), while the rest were minor criminal cases (e.g. road accidents, injuries, verbal abuse), employment litigation cases and cases involving associations of collective housing unit owners or tenants' associations.

2. Mediation and Language Difference

Nothing is stipulated specifically regarding the language in which mediation is conducted in Romania. It is assumed that Romanian, as the official language of the country, will be used, as it is the language spoken by the majority of the population. Existing ethnic minorities in Romania also have a good command of it. Under article 68 of Law 192/2006, parties in the mediation of criminal cases are guaranteed legal representation and, if necessary, the services of an interpreter. With free movement of persons and increased geographical and occupational mobility, the necessity of operating in languages other than Romanian has become apparent, so many professionals in Romania offer mediation in languages other than the official one, as indicated by the national list of mediators.

Where this possibility exists, the most frequent offers are English and/or French, which are extensively taught in primary and secondary education and tested at B1 level at the end of the secondary cycle (the baccalaureate exam). A comparatively smaller number of mediators, possibly bilinguals from mixed families or mixed-language communities, offer services in the languages of minorities resident in Romania (Hungarian, German, particularly in the western part of the country; Russian and Turkish, particularly but not exclusively in the east and south respectively) or languages that may have been acquired during residence abroad or in a working or family environment, not as the result of formal education (Italian, Spanish, Hebrew, Arabic). Some professionals advertise that they provide mediation in as many as four languages and some offices employing several mediators offer mediation in various languages and/or the assistance of an interpreter. There is no regulation, however, as to the level of proficiency for each language spoken by the mediator and the level is usually self-assessed. In some cases, the mediator also has a background in foreign languages and/or is a sworn translator/ interpreter.

3. The Questionnaire on Mediation and Languages in Romania

Only a small number of responses were received (14) to the questionnaire distributed to individuals and mediation organisations in Romania and, in these

cases, only some of the questions were answered. Moreover, only individual mediators responded.

According to the data collected, the languages spoken by mediators vary from Romanian only to two languages (Romanian/English or Romanian/Hungarian) and, in one case, five languages. However, the respondents reported that they did not conduct mediation in all the languages they speak. Answers regarding the level of language proficiency in each were in some cases contradictory, suggesting that the respondents may not have had a good grasp of the Common European Framework of Reference for Languages (CEFR). Respondents reported that the languages used in mediation are: Romanian (14), English (4), French (2), Hungarian (1), Italian (1). One respondent also mentioned having provided mediation in Turkish. In some cases, English is used as a relay language for parties speaking Romanian and other languages.

The data regarding the number of cases mediated per mediator, per annum, varied from one case to 70. The number of cases in which the parties spoke more than one language also varied, from one case to 10, while others reported only two or three such mediations per year; some reported they had had no such cases at all. A respondent in a telephone interview referred to the existence of mediators who conduct all their activity in English, but no data showing the frequency of this phenomenon is available. This all suggests that, while mediation involving parties that speak more than one language does occur in Romania, the incidence is relatively low. This result is in keeping with the linguistic profile of Romania as a country with a Romanian speaking majority with small pockets of ethnic minorities and as yet occasional contacts with foreigners.

The answer to the question referring to the chosen methods of handling multilingual communication in mediation indicated that the mediators' solution of choice would be to use an interpreter (eight respondents); this, however, is not entirely relevant since some of the respondents do not offer mediation in a foreign language or, if they do, they have not yet mediated in such cases. Many indicated a reluctance to use interpreters, however, reporting concerns with confidentiality, the danger of complicating the process, the additional administrative burden, the possibility that the presence of the interpreter might interfere with the rapport between the mediator and the parties, and the potential distortion resulting from the transfer of information from one language to another. Regarding the selection criteria for an interpreter in the event of a multilingual mediation, emphasis was placed on the qualification of the interpreter (MA or at least BA-level education), not on the language professional having any formal training in mediation.

Potential interpreters for multilingual mediation are drawn either from existing lists of sworn translators/interpreters held by the local courts of law or from agencies and professional associations. Only two respondents reported that they would resort to recommendations from friends or relatives or choose based on a previous collaboration. Since interpreting in multilingual mediation is still a relatively infrequent occurrence in Romania, there are no lists of freelancer interpreters held by mediation organisations. Reportedly, the preferred mode of interpretation used in mediation is consecutive with notes, with an almost equal incidence of chuchotage. Some respondents also mentioned the use of sight translation if the mediation process required it. Briefing and de-briefing is offered to interpreters and they are provided with best practice guidelines; in the de-briefing meeting, any language issues that arose are addressed or the progress of the mediation is analysed and suggestions for improvement made.

While the questionnaire was only intended to provide an indication of practice, the answers are comparable to those in the survey conducted by The Romanian Institute for Evaluation and Strategy (IRES, 2015) in 2014, in terms of the areas of law where mediation is used. Thus, the questionnaire indicated that mediation is used extensively in family disputes (108), and less so in commercial (19) or other civil (10) cases. Most cases are conducted in the presence of the parties, with a very low figure for mediation conducted by telephone (1) or videoconferencing (1). Two of the 26 respondents interviewed by telephone or email mentioned the use of videoconferencing for mediation when parties cannot travel on account of health issues or residence in another country. However, it was reported that both mediators and parties prefer face-to-face mediation and consider it more effective.

4. Methods Adopted by Mediators to Address Language Difference in Mediation

So far, no steps have been taken to address the challenge of language barriers in mediation, nor any guidelines issued. As is apparent from the answers to the questionnaire, mediators respond to each situation on an *ad hoc* basis, using their own common sense, professionalism and level of expertise. Direct conversations with mediators indicate a preference for a dual-role mediator, acting as a language facilitator as well as mediator. Mediators are reluctant to use interpreters for reasons of confidentiality, lack of confidence in the ability of the interpreter to adapt to the style and pace of the mediator, and concern about their ability to adequately render delicate shades of meaning that could affect the outcome of the process.

5. Online or Telephone/Video Linked Mediation

In addition to face-to-face mediation, some offices and mediators have recently started to offer online and telephone or video linked mediation. Given that the Romanian market is increasingly open to international economic actors, cases where the physical presence of parties in meetings is impossible and which therefore require the use of telephone or video mediation are becoming more frequent. Such services are advertised in parallel with “traditional” mediation. However, they require special skills and, as a consequence, the first training materials in Romanian for online mediation have started to appear on the Internet. Applications such as Skype and video conferencing software such as GoToMeeting are used. However, as yet there is no evidence of extensive use of such modes in mediation in Romania.⁸

The recent Order on the Introduction of the SOL (SAL) Instrument, (the European platform for alternative dispute resolution in cases of consumer protection), may have an impact on the use of other modes than traditional face-to-face mediation. At the time of writing, (March 2016), no Romanian organisation is registered on this platform. However, given easier access to the internet and to specialised software, as well as increased population mobility, it is expected that mediators will strive to adapt and will more frequently resort to such instruments in the future.

6. References

- IRES. (2015) *Percepțiile și așteptările mediatorilor față de alegerile pentru Consiliul de Mediere – 2015* [Online] Available at: <http://www.ires.com.ro/articol/293/percep-iile-%C8%99i-a%C8%99teptarile-mediatorilor-fa%C8%9Ba-de-alegerile-pentru--consiliul-de-mediere-%E2%80%93-2015> [Accessed 10/2/2016].
- Stoica, M., Spiridon, C. (2014) ‘La loc comanda. Români nu mai sunt obligați să meargă la mediator.’ in *Adevărul* [Online] Available at: http://adevarul.ro/news/eveniment/la-loc-comanda-romanii-nu-mai-obligati-mearga-mediator-1_5370fde80d133766a897509f/index.html [Accessed 16/2/ 2016].

7. Endnotes

1 Legea nr. 192/2006 privind medierea și organizarea profesiei de mediator, modificată și completată prin Legea 370/2009, GO 13/2010 pentru transpunerea Directivei 2006/123/CE a Parlamentului European și a Consiliului din 12 decembrie 2006 privind serviciile în cadrul pieței interne și prin Legea nr. 202/2010 privind unele măsuri pentru accelerarea soluționării proceselor

2 Legea 115 /2012 pentru modificarea și completarea Legii nr. 192/2006 privind medierea și organizarea profesiei de mediator

3 Legea nr. 192/2006 privind medierea și organizarea profesiei de mediator, modificată și completată prin: Legea 370/2009, OG 13/2010, Legea nr. 202/2010, Legea nr.115/2012, Legea 76/2012, OUG 90/2012, OUG 4/2013, OUG 80/2013, Legea 255/2013, Decizia CCR nr.266/2014

4 Decizia Curții Constituționale nr. 266/07.05.2014 referitoare la excepția de neconstituționalitate a obligativității informării cu privire la beneficiile medierii

5 Codul de etică și deontologie al mediatorilor autorizați

6 Standardul ocupațional al mediatorului

7 <http://www.mediere.org.ro>

8 The examples mentioned here come from Bucharest (the capital) and Cluj.

Country Report: Spain

Cynthia Giambruno

1. Legal Foundations

In Spain, mediation has come to be seen as a vital part of the judicial process and one component of an arsenal of alternative dispute resolution (ADR) tools. In recent years, legislative steps have been taken in the area of civil and commercial mediation. Legislation passed in 2012 (*Ley 5/2012 de 6 de julio, de mediación en asuntos civiles y mercantiles*¹/Act 5/2012 of July 6, on mediation in civil and commercial matters) recognises the advantages of mediation as being able to ‘provide practical, effective and cost-effective solutions for certain conflicts between parties’. As stated in this legislation ‘mediation is based on the intervention of a neutral professional who makes it possible for the parties to a conflict to find their own solution in a fair process which allows the underlying relationships to be protected and control over the outcome of the conflict to be maintained’ (Preamble, I).

The law is comprised of five sections, each with a specific focus. Title I establishes the law’s scope of application, both nationally and internationally, and enumerates four basic principles of mediation:

- it is voluntary
- all parties to a mediation are considered equal and mediators remain impartial
- mediators remain neutral as regards the agreements reached
- the contents of the mediation are considered confidential and will not be revealed, even in a court proceeding except under very specific conditions.

Title II states that mediation is expected to be carried out in good faith and with the mutual respect of the parties, who must be willing to collaborate with and support the mediator. Titles III and IV regulate the qualifications of mediators and their obligation to follow the European Code of Conduct for Mediators, and establishes a simple, flexible procedure for mediation that allows the parties to freely determine how the sessions will be structured while ensuring the validity of any agreement that may be reached. Finally, Title V establishes the procedure for enforcing an agreement in accordance with the pertinent provisions of Spanish law, including when the agreement is to be executed outside of Spain. This law is applicable to

civil and commercial mediation, including cross-border disputes, provided that one of the parties is legally domiciled in Spain and the mediation is carried out within national boundaries or is expected to have effects in Spain. It is not applicable to criminal, labour, consumer or government affairs cases.

This foundational law on mediation was further developed in 2013 in Royal Decree 980/2013, dated December 13, which develops certain aspects of the law in civil and commercial mediation. (In Spanish at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-13647) In this decree, four main areas are addressed:

- quality and training
- the creation of a register of mediators and mediation institutions
- civil liability
- the development of a simplified electronic mediation option for certain cases.

Additionally, a stipulation was included that requires mediation institutions to provide an annual report of their activities including the number and type of requests received, the number of electronic mediations carried out, the percentage of cases that are interrupted before resolution, the average duration of mediation, the number of agreements achieved, and the degree of satisfaction of the parties with the mediation as regards both the process itself and the resolution of the dispute. There is also a specific requirement for providing information on cooperation with other ADR entities to facilitate handling of cross-border disputes.

Finally, a Ministry of Justice Order in 2014 (Orden JUS/746/2014, May 7) specifically addresses the issue of the creation of the register. It provides further details on the information and documentation that is required for inclusion and outlines the protection of personal information in accordance with the Spanish legislation in effect.

As stated above, mediation is becoming a recognised alternative to lawsuits and adversarial legal actions. This is partly due to the fact that there are currently over 9 million law suits filed in Spain each year, with the resulting overload and clogging of the judicial system. This has led to the exploration of alternative means of dispute resolution including mediation, conciliation and arbitration. There has been a concerted effort on the part of the Ministry of Justice and the General Council of the Judiciary (*Consejo General de Poder Judicial*) to work with regional governments and professional regulatory bodies, such as bar associations and chambers of commerce, to raise awareness about mediation among the public in general and among legal professionals as a means to increase the number of cases that can be handled through these alternative means. For example, mediation in labour disputes

is quite common, given that Act 36/2011 establishes a general rule that mediation or conciliation must be attempted prior to bringing a case to court. In criminal law, mediation is prohibited in cases of gender violence, but is stipulated for juveniles aged 14-18 as a means of re-education. It is in the area of family law that mediation is most widely used, with more well-developed regulations and structures. At least 13 of the 17 autonomous communities (regional governments) have specific legislation on family mediation, many of which predate the 2012 law on mediation in civil and commercial matters.

Mediation can take place independent of judicial proceedings (voluntary mediation) or can be complementary to them. It is worth mentioning that mediation in Spain is not obligatory; in other words, it is not court-ordered, but rather court initiated. If a dispute reaches the litigation stage, the parties are informed by the judge that mediation is an option and they are “invited” to consider this alternative. Parties are allowed to request a stay of proceedings while the mediation process takes place and are entitled to a free information session so that they can assess the appropriateness of mediation for their particular case. Mediation is also contemplated and regulated in the 2013 Bankruptcy Act (*Ley Concursal*), which was modified in 2015 to facilitate access by individuals and small and medium-sized businesses as a means by which a restructuring of their debts and the “second chance” concept could be implemented. There is a special category on the Ministry of Justice Register for bankruptcy mediators.

The cost of mediation depends upon the type of mediation and specific circumstances of the case. The 2015 law on mediation states that the cost of extra-judicial or voluntary mediation will be shared equally by the parties unless a specific agreement stating otherwise is reached. As regards court-initiated cases, in the area of labour, family and criminal mediation, there are free services offered through the courts, and in some cases there is also public financing of mediation if parties contract a mediator on their own initiative.

2. The Ministry of Justice Register of Mediators and Mediation Institutions

A register of mediators and mediation institutions has been created by the Ministry of Justice and is available to citizens as a resource that can be used to find an appropriately qualified professional for specific types of grievances.² The register is a computerised data bank which is structured in three sections: Mediators (natural persons), bankruptcy mediators (natural or legal persons) and mediation institutions (legal persons).

Mediators must have a university degree or equivalent, have completed specific training in mediation offered by duly accredited institutions, and obtain civil liability insurance. Mediation institutions can be public or private entities, Spanish or international firms, and public law corporations that promote mediation and facilitate access to mediation services, although they do not provide those services directly. These institutions must maintain a high level of transparency and clearly delineate between mediation and other forms of alternative dispute resolution.

The register is easily accessed on line, and users choose the type of mediation they are seeking from four categories (general, family, civil and commercial) and the geographical location they prefer (province, national or international).

3. Mediation Statistics

Statistics on voluntary mediation are difficult to find, even though the legislation on mediation requires mediation institutions to prepare an annual report on their activities, which should be available for consultation on their webpages. The data that are available are on judicial mediation, and while these data do not show the whole picture, they do provide a general overview of the acceptance of this alternative to legal recourse when disputes arise.

The Spanish General Council of the Judiciary (*Consejo General de Poder Judicial*) provides an annual report on court-initiated mediation. As mentioned above, mediation in Spain is not court-ordered, but rather court initiated, with parties to a dispute being invited to consider mediation as an alternative to a lawsuit and given information as to its costs and benefits. The most recent report available on this type of mediation is for the year 2014. The report includes comparative data for two years (2013 and 2014) on family, criminal, and civil mediation. In 2014, there were 10,864 judicial referrals to mediation but only 3,741 actual mediations. Of these, 2,144 (57.3%) resulted in an agreement being reached, while 1,597 (42.7%) did not. The largest number of mediation referrals came from family courts (56% of the total), but the type of mediation that was most successful was criminal mediation, with 67.3% of the cases achieving an agreement. In family mediation, that number was 43.4%, and in civil disputes the success rate was 32%. Almost 600 courts referred cases to mediation. A comparative analysis of the use of mediation as a means to resolve disputes shows that in recent years increments in use have been small but steady. As regards tendencies, the tables below show the actual number of mediations and the success rates for 2013/2014.

Family Mediation

YEARLY DATA FOR 2013	
Total number of referrals made	5,116
Total number of mediations carried out	1,162
Total number of successful mediations (agreement reached)	568 48.8%
Total number of unsuccessful mediations (no agreement reached)	594 51.11%
YEARLY DATA FOR 2014	
Total number of referrals made	6,101
Total number of mediations carried out	1,379
Total number of successful mediations (agreement reached)	598 43.36%
Total number of unsuccessful mediations (no agreement reached)	781 56.6%

Civil Mediation

YEARLY DATA FOR 2013	
Total number of referrals made	721
Total number of mediations carried out	91
Total number of successful mediations (agreement reached)	31 34.06%
Total number of unsuccessful mediations (no agreement reached)	60 65.93%
YEARLY DATA FOR 2014	
Total number of referrals made	549
Total number of mediations carried out	119
Total number of successful mediations (agreement reached)	37 31.09%

Total number of unsuccessful mediations (no agreement reached)	82 68.90%
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Criminal Mediation

YEARLY DATA FOR 2013	
Total number of referrals made	3,984
Total number of mediations completed	3,759
Total number of mediations initiated	1,836
Total number of successful mediations (agreement reached)	1,403 76.41%
Total number of unsuccessful mediations (no agreement reached)	433 23.58%
YEARLY DATA FOR 2014	
Total number of referrals made	4,214
Total number of mediations completed (pending from previous years)	4,349
Total number of mediations carried out	2,243
Total number of successful mediations (agreement reached)	1,509 67.27%
Total number of unsuccessful mediations (no agreement reached)	734 32.72%

2014 Annual Report of the CGPJ on judicial mediation

These data show that mediation in family cases continues to grow, while mediation in civil cases is not yet consolidated. The number of courts referring cases to family mediation has remained steady, but in civil cases, that number has actually decreased. Success rates are still somewhat low, with mediation resulting in agreements only about one-third of the time in civil cases and just under half in family cases. Although not regulated by Act 5/2012, it is in criminal law that we see

the highest rate of agreements reached: some 67% in 2014. These agreements are important because they deal with damages for victims.

4. Survey Results

The Understanding Justice Project focuses on issues related to linguistic and cultural diversity in mediation and civil justice. There is no question that the number of mediations that involve individuals who do not share a language will increase, and that special consideration must be given to these situations. In order to address the specific needs of individuals involved in dual language mediation sessions, the services of a bilingual mediator, co-mediators with different language skills, or professional interpreters will be required. A survey was developed to ascertain the current state of affairs and the degree of awareness of mediators and mediation institutions in a number of EU Member States regarding these options. In Spain, the survey was submitted to some 200 individual mediators and mediation institutions during the months of June and July, 2015. Respondents had until the end of September to participate. A total of 24 responses were received, 17 from individuals and 7 from institutions. Consultations were also held with 3 mediators. The only conclusion that can be reached when analysing the responses to the survey questions is that there is very low level of awareness of the issues related to mediation when more than one language is involved. The number of questions that were left unanswered was surprisingly high, indicating that the respondents were either unaware of or uninterested in the issue at hand. However, if we exclude the “no response” answers and analyse the responses that were given, some interesting data emerge.

5. Mediation Organizations and Institutions

Only seven mediation organisations participated in the survey, and none of these provided any statistical information on how many mediations their organisations arrange per annum. Some information was offered as regards face-to-face compared to other types of mediations. Four of the seven said that all of their mediations were face to face, while three reported using other means, such as video-conferencing or electronic mediation, as alternatives. None of the respondents reported using telephone interpreting.

As regards mediations involving more than one language, four of the seven reported that they did carry out these types of mediation, but with a very low frequency. Three of the four said that the type of mediation which most often involves more than one language is voluntary rather than court initiated, and most cases are family or non-

family civil disputes. In response to the question on the approach most frequently used to manage cases in which the mediator and at least one of the parties do not share a common language, two organisations said that bilingual mediators are used and two said that they choose between using a bilingual mediator, an interpreter or two mediators, one of whom is bilingual. Three of the respondents stated that their organisations use bilingual mediators, one said they did not, and three did not respond to that question. It was also reported that when bilingual mediators are used, they are required to have some type of language qualification, usually at the B1 or B2 level or above. It is interesting to note that none of the organisations reported providing best practice guidelines for bilingual mediators. More interesting yet was the fact that none of the seven organisations reported resorting to interpreters in these cases. When asked if they used interpreters when there was more than one language involved, four said no and three simply did not answer.

6. Individual Mediators

The most interesting data provided by the individual mediators had to do with how they handled cases in which more than one language was involved. All but three reported having at least a B1 level of proficiency in a second language, with eight and two reporting proficiency in two and three languages respectively. Furthermore, 65% reported using these languages in mediations. Of these, approximately 6% reported participating in mediations involving more than one language on a daily basis, and 17% said at least once a month. However, the highest percentage, 41%, answered that they were involved in this type of mediation less than once a month.

When asked what type of dispute involved more than one language, 29.5% answered family issues, 23.5% non-family civil, 35.3% commercial, 11.8% employment and labour and 17.6% marked “other”, but without specifying what these other types might be. It is important to note that respondents could mark more than one option for this question.

When asked what approach was used in mediations in which the parties did not share the same language, 23.5% stated that they called an interpreter, while 29.4% indicated they used either a bilingual mediator or an interpreter, depending upon circumstances. Almost one quarter of the respondents reported serving as both mediator and interpreter in some mediations. When asked more directly if they mediate using an interpreter when more than one language is involved, 41% said yes and 23.5% said no (35% did not respond to this question). 65% did not answer when asked what mode of interpreting they preferred. Most did not know if interpreters were required to have formal training in interpreting, with only 17.6% responding

affirmatively to this question. Furthermore, 82% stated that they did not know what the minimum level of qualification (formal training) was. The same is true as regards the issue of interpreters having training in mediation. The most common response to questions related to this issue was simply no response whatsoever. Only 17.6% of the respondents marked 'yes' when asked if interpreters were required to have completed formal training in mediation.

As regards the procurement of interpreting services, when asked how interpreters are selected when there is a court-initiated mediation, of the approximately 40% of respondents who answered, 6% stated that they were freelancers contracted by the courts, 11.7% said the interpreters were supplied by translation agencies, and 23.5% marked "other", but without providing any further information. Fully 65% of the respondents did not answer this question, showing a significant level of disinterest or lack of awareness. Numbers were quite similar for voluntary mediation, with most respondents not knowing how interpreters are contracted.

Finally, when asked if they held a briefing session with the interpreter before the mediation, 36% said yes and 6% said no. The remaining 42% did not answer this question. Additionally, 35% reported that they provided some kind of instructions to the interpreter before a mediation, and 17.65% said they give interpreters best practice guidelines. However, only 11.7% held a debriefing session with the interpreter after the mediation.

7. Conclusions

While it is true that there is great interest in Spain in promoting mediation as an alternative to litigation, and in spite of the fact that Spain has a high degree of linguistic diversity, including 4 co-official languages within its borders, little thought has been given to how to handle mediation cases which involve individuals who do not share the same language. While this may seem quite surprising, it appears that this is true in many other EU Member States as well. The question is then why there is such a low level of awareness about this issue when it seems quite obvious that many cases are likely to arise. Not knowing how to appropriately approach these situations, whether with an interpreter, a bilingual mediator, or both, will inevitably lead to more and more difficulties as mediation becomes increasingly popular and a more commonly-used alternative to court proceedings. However, it is important to point out that when mediators were asked about this issue, they seemed genuinely interested and this bodes well for steps to be taken to improve the situation in the future.

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9. Endnotes

1 Developed in *Real Decreto 980/2013 de 13 de diciembre*. Published in the *Boletín Oficial del Estado* on December 27 of the same year.

2 For further information choose the English language tab on the Ministry of Justice webpage and then click on “Register of Intermediaries and Intermediation Institutions”. <http://www.mjusticia.gob.es/cs/Satellite/Portal/en/servicios-ciudadano/tramites-gestiones-personales/registro-mediadores>. [Accessed 5/7/2016]

Ethical Issues Emerging in Civil Mediation Cases Using Interpreters

Claudia Monacelli

1. Introduction

This chapter examines ethical issues that have emerged in our study of interpreting in mediation, both in relation to when co-mediators act as interpreters in civil mediation sessions and when interpreters are employed.

First of all, in mediation, this requirement introduces an entirely new layer of communicative complexity to an already complex interaction. In what follows, we examine some of the professional-ethical conflicts that may arise when a party chooses to communicate in mediation in their own language.

In order to understand the dynamics at play among all parties present in a mediation conducted in more than one language, we first describe how civil mediation sessions develop in terms of the objectives set and the agenda behind each phase of the mediation session (§1). Subsequently, a co-mediation model currently in use in cross-border mediation is presented (§2) in order to fully grasp the complexity of the information flow in this context and understand the difficulties that arise when mediators act as interpreters. Video clips from the simulated bi-cultural and bi-lingual mediation sessions used in the Understanding Justice project and ethical arising are then explored (§4). The chapter concludes with a discussion of the findings and the matter of ethical code conflicts (§5).

2. The Phases of Civil Mediation

Roberts (2013, 2015) outlines five distinct phases of the mediation process as set out in Table 1 below.

Development	Objective	Agenda
Phase 1	Establishing the arena	First contact and reception Facilitating communication
Phase 2	Clarifying the issues	Agreeing and defining the agenda Facilitating communication
Phase 3	Exploring the issues	Managing differences in the early stage Managing high conflict Facilitating communication
Phase 4	Developing options	Facilitating communication Further information exchange and learning
Phase 5	Securing agreement	Concluding the session

Table 1. The mediation process (adapted from Roberts 2013)

Phase 1, the commencement and introductory phase, typically clarifies procedure and the roles of the participants, addresses the issue of who has decision-making roles and the issue of confidentiality. Information is gathered and investigated in Phase 2, where the subject matter is distinguished, issues are clarified and an agenda is agreed upon. Phase 3 covers areas in which it is expected that conflict will arise and where the differences between the parties present are most extreme. Often sessions in this phase exhibit highly escalated conflict dynamics, lack of trust, feelings of anger and betrayal and a sense of pressure to make far-reaching decisions at short notice; there is also a high level of insecurity. Even so, this is a fact-finding phase where establishing and defining differences are fundamental in order for mediators to determine a movement forward in reaching an agreement by exploring options and developing solutions in Phase 4. Here, mediators facilitate discussions and give evaluative feedback, which ultimately leads, in Phase 5, to securing – and finalising – an agreement among parties via a process of bargaining. Roberts (*ibid.*) stresses that the transitions from one stage to another are the most delicate moments for mediators.

The confidential, voluntary process outlined in Table 1, where parties negotiate a mutually acceptable agreement in the presence of impartial mediators, although flexible, is highly structured. The process becomes more complex, however, when there are parties from more than one cultural background, as in the case of cross-border mediation. This ‘messiness’ of reality (Gulliver 1988) is further compounded when the need for language assistance arises. The example offered by the Co-Mediation Model addressed in the next section illustrates the compounded difficulty arising when more than one culture (and language) is present in the mediation session.

3. The Bi-lingual Co-mediation Model

The Wroclaw Declaration of October 2007¹ regarding the mediation of bi-national disputes over parents’ and children’s issues, pays particular attention to making mediation proceedings conform to the framework of international agreements and conventions, such as The Hague Child Abduction Convention² and the Brussels IIa Regulation.³ A defining feature of such mediations is their cross-border, inter-cultural and possibly inter-lingual nature. Mediations in such disputes, according to the Wroclaw Declaration, should be conducted as a bi-national co-mediations, where the two mediators have the same national origins as the two disputing parties respectively.

The following model (Table 2), presented at the Understanding Justice ‘Mediation and Interpreting’ Project Symposium, sets out the criteria for such co-mediations:

Bi-cultural	Reflecting the cultural background of the parties
Bi-lingual	Reflecting the language(s) of the parties, whenever possible
Bi-professional	Co-mediators: one with a legal background, one from the humanities
(Bi-)gender	Reflecting the gender of the parents

Table 2. Co-Mediation Model (adapted from Carroll 2016)

According to this model, mediators should have the same national origin as each party in the mediation, so that mediators reflect the different cultural backgrounds of the parents. One mediator should be female and the other should be male, so that the genders of both parents are represented by the two mediators. One mediator should have a psychological/pedagogical professional background and the other

should have a legal background. In cases where more than one language is used, either at least one bi-lingual mediator will be present, or there will be an interpreter.

In sessions where co-mediators act as interpreters, there is a need to clearly distinguish between when a mediator is speaking as a mediator and when as an interpreter. This situation also creates a distinct role conflict, however, as bi-lingual mediators in this case attempt to act both as interpreters between two parties and as the distinct mediators required by the model for each party in conflict. What is more, the need for impartiality and/or neutrality on the part of the mediator puts them in the delicate position – when acting as an interpreter – of questioning whether they are in fact attending more to one party than the other and, if so, whether they need to compensate for this in some way in their mediation. The question also arises of whether the mediator-acting-as-interpreter should provide a close rendition of the original or whether s/he should interpret what was said as a reframed rendition, in the interests of progressing the mediation or mitigating conflict and confrontation. These all raise a number of ethical questions.

As noted above, the position of a mediator-acting-as-interpreter calls into question their impartiality and neutrality, either as a mediator or as an interpreter. In the case when third-party interpreters are in place of bi-lingual mediators, a major issue arises of what is expected of the interpreter because what mediators ask of interpreters cuts across what professional codes of ethics prescriptively tell interpreters to do.

The following section analyses simulated mediation sessions in order to point out some of the normative constraints imposed by the dynamics of the mediation context.

4. Simulated Civil Mediation Sessions

Our discussion is based on twelve short extracts from two simulated bi-lingual mediations (Spanish/English and Romanian/English), all of which are available on the Understanding Justice website. Table 3 provides details of these excerpts and indicates where in the excerpts the points discussed can be found:

Clip	Time	Languages	Roles and Actions
1	1:03	English	Robyn (Mediator) establishes the arena, determines the information flow and interpreting modality
2	1:22	Spanish	Gemma (Co-mediator) explains expectations to interpreter

3	1:44	Spanish	Franco (Mediator) explains mediation phases to interpreter
4	1:34	English/ Romanian	Elizabeth (Co-mediator) explains mediation rules and expectations to interpreter and parties
5	1:05	English	Robyn (Mediator) facilitates communication in the phase clarifying the issues by asking Jim (Grandfather) to intervene
6	0:15	English	Jim (Grandfather) explains he understands turn-taking management
7	1:41	English/ Spanish	Franco (Mediator) establishes the arena, first contacts are made; Gemma (Co-mediator) explains interpreting dynamics
8	1:49	English/ Spanish	Franco (Mediator) explores issues with Veronica (Neighbour) and Brooke (Neighbour)
9	1:32	English/ Spanish	Gemma (Co-mediator) explores issues with Brooke (Neighbour); Interpreter working in consecutive mode using note-taking
10	2:34	English/ Romanian	Robyn (Mediator) explores issues with Julia (Daughter-in-law) and Jim (Grandfather); Interpreter working in consecutive mode, no note-taking
11	2:33	English/ Romanian	Robyn (Mediator) manages high conflict and facilitates communication
12	1:55	English/Ro- manian	Robyn (Mediator) develops options, facilitates communication, gathers further information exchange and learning

Table 3 Video clips examined in case study

In both simulated mediation sessions there are five people involved: a mediator, a co-mediator, one interpreter, two conflicting parties. However, in all twelve video clips no action (agency) is ever taken by the interpreter, i.e. the interpreter never takes the initiative in mediation sessions. And – as will be seen below – the interpreter is subject to a number of constraining expectations, as outlined by the mediators in these sessions.

The roles of all parties are defined in the very first phase of each mediation process by the mediator(s), who play a dominant role throughout the process and act as gatekeepers in the information flow throughout. In video clip one, for example, the mediator unequivocally tells the interpreter to wait until the speaker stops speaking before she interprets, saying, 'we expect only one person to speak at one time' (video clip 1: [00:45]). He also specifies the turn-taking time frame, stating that 'we will speak for maybe 30 seconds or a minute, then stop' (ibid: [00:30]). The co-mediator also clarifies the turn-taking process, saying 'we would just give you a couple of sentences, two or three sentences, and then we would stop talking'(ibid: [00:50]), specifying that 'a lot can be said in a minute' (ibid: [00:39]), thus indicating that turns will probably be limited to about 30 seconds.

The absence of agency on the part of the interpreter is therefore highlighted by the controlling role of the mediators; even decisions on turns of speech and length of utterance, usually to some degree the preserve of the professional interpreter, are taken over by the mediators.

This theme is continued in video clip two, where one mediator, in the pre-mediation discussion with the interpreter, mentions that she understands that he (the interpreter) has experience as a court interpreter but explains that the interpreting requirements for mediation purposes are 'much more flexible than in the courtroom than what you are used to in a legal setting' (ibid: [00:26]). However, she also tells the interpreter that he is to refrain from adding any personal interpretation of what is said (a professional norm for a qualified interpreter that hardly needs reiterating) and requests him to interpret literally, since they (the mediators) have to 'apply certain techniques to 'clean' the language' (ibid: [00:49]); they do this because they 'like to have the control over the communication' (ibid: [00:57]). The mediators then go on to mention that the interpreter should point out to them any cultural issue that they 'may not notice but you (the interpreter) do' (ibid: [01:13]), and he should tell them 'in all confidence' (ibid: [01:18]). Throughout, the expectations of the interpreter on the part of the mediators are explicitly stated in the introduction, albeit in contradictory forms: the interpreter is required not to add any personal interpretation and to interpret. At the same time, he is to adopt the role of informant in the event of perceiving 'cultural issues' and to report on these to the mediators in confidence.

In video clip three, a professional code conflict arises, where the mediator's directions to the interpreter appear to require a fundamental breach of the interpreter's ethical norms. Here the mediator, while explaining Phases 1 and 2 (as outlined in Table 1) to the interpreter in detail, specifically informs the interpreter to tell him 'if at any time any of the parties is disrespectful and insults each other'; the interpreter

should, in this case, 'please look at us before interpreting, so that we can tell you not to translate' (ibid: 00:40) (emphasis added). Here, the mediator is directing the interpreter to deliver an edited rendition of what was said by the other party, when required to by the mediators. A fundamental tenet of professional interpreting practice is that interpreters should interpret everything that is said without adding or omitting anything.

In this video clip the mediator offers some insight into the thinking behind this instruction on the mediation professional's side, when he states that, while 'I don't want to put that responsibility on the interpreter', the interpreter needs to be aware 'that insults here are considered an element of conflict escalation' (ibid: [01:00]) that has to be controlled by mediators. The interpreter is therefore told to inform the mediator(s) of any disrespectful forms of address and offered a work-around to avoid repeating the inflammatory terms: 'It would be better if you consult with us, or if you say 'the gentleman here has just insulted the other' (ibid: [01:34]).

Awareness of the possible perceived imbalances that the introduction of an interpreter may introduce into the mediation are shown by the mediators in video clip seven. Here both mediators make a point of explaining to the Spanish-speaking party that, while the interpreter interprets simultaneously into English while she is talking, that he will also switch over to interpreting simultaneously into Spanish for her when the English-speaking party speaks. The mediators appear to be at pains to ensure that the Spanish party, (incidentally, also the party in the mediation who shares the first language of the mediators and of the 'seat' of the mediation), does not regard the interpreting provided to the English-speaking party as preferential treatment. Voicing an apparent non sequitur, however, one co-mediator notes that 'many times you will notice it is shorter, because we try to condense the information... but you will get a literal translation' (ibid: [01:30]). The mediators also announce that 'we will all have to adapt to these dynamics' (emphasis added) (ibid: [01:17]). Linguistically, this use of the first person plural pronoun appears to include the speaker. Pragmatically, however, it in fact excludes the speaker from the decision-making process since this 'suggestion' is evidently binding on all parties to the interaction ('we will have to').

The gatekeeping role of the mediators is further illustrated in video clip 11, where the mediator intervenes forcefully, cutting off the English party by raising his voice, as soon as he perceives that he may be about to escalate conflict. He also cuts off the interpretation. Having headed-off the escalation, the mediator then nods to the interpreter to continue. Once again, the directive and controlling role of the mediators and the interpreter's lack of agency is tacitly reinforced.

5. Ethical Issues Arising When Interpreters are Used in Mediation

We turn now to the ethical issues raised by the gate-keeping functions of the mediator and how this interacts with the normative ethical code of a professional interpreter.

Ethics refers to “human behaviour and human action. Ethical considerations may precede and cause human action; they may also be applied as a yardstick against which behaviour is measured” (Kalina 2015: 65). Therefore, we can take ethics to refer either to the attitude that guides an individual’s action or to the effect that this action has on others. In essence, all ethically based questions concern a construct of agency (human action); in contexts where interpreters are used, professional interpreting ethics concern the interpreter’s agency. Agency also lies at the core of power in legal settings. For example, the ability for a party in conflict to use his/her native language puts them in a position of ‘equality of arms’ vis-à-vis the opposing party’s ability to communicate.

We start off with a marked difference – in relation to other triadic encounters where interpreters are present – of how the information flow is determined, i.e. in civil mediation the mediators explicitly decide what interpreting modality is to be used in the session (video clip one: [00:01]). In video clip two the interpreter is even asked to tell mediators ‘in all confidence’ (ibid: [01:19]) of any cultural conflicts that may arise, thus extending the interpreter’s role to one of confidant vis-à-vis the mediators. Kalina states (2015: 66) that “an ethical solution to a problem is one for which the individual concerned can assume full responsibility”. The controlling role of the mediator, instructing the interpreter HOW to interpret, WHEN to interpret and when NOT to interpret, alongside the requirement made of interpreters to take on confidant or consultant roles with the mediators, does not allow interpreters to assume full professional responsibility for their actions.

There also seem to be ambiguous and sometimes conflicting expectations of the interpreter’s role on the part of the mediator (video clip three). The mediator at first requests that the interpreter indicate to them any possible conflict throughout the process, but then says ‘I don’t want to put that responsibility on you’ (ibid: [00:58]). The mediator in this case also suggests that, in the event that a party uses offensive language, the interpreter use third person reference to inform them, before interpreting it. Once again, the mediator is, albeit unwittingly, instructing the interpreter to practice in a way that cuts across some fundamental normative professional roles i.e. the interpreter should interpret all that is said as closely as

possible in form to the way it was said, including adopting the 1st person identity of the speaker. Ambiguity in terms of expectations also appears in video clip seven, when the co-mediator mentions to the Spanish party that the different language versions may be longer or shorter, but that the interpretation will nonetheless be literal. This is, of course, a contradiction in terms: a summary or condensed rendition can't also be a literal and full rendition at the same time.

6. Managing Ethical Code Conflicts

In some settings, such as court and medical interpreting, codes of practice are established by providers, i.e. the authorities that are responsible for the functioning of the service. In civil mediation, too, this seems to be the case. However, in no other interpreting contexts are interpreters required to withhold or omit information for specific reasons, as is the case in civil mediation, where mediators are *de facto* the gatekeepers of the communication flow.

The interpreter occupies a secondary, and often subordinate, role in civil mediation encounters, raising further ethical issues. Whereas in cases in which bi-lingual mediators act as interpreters, possibly empowering the other language client by 'advocating' the concerns and interests of the weaker and disadvantaged party in the communication situation, interpreters in the same capacity are not accorded such latitude. This in turn raises questions of whether the choice to manage language difference in mediation by employing a bi-lingual mediator acting as an interpreter or by introducing a third-party interpreter, fundamentally changes the way that a party participates in a mediation.

Undoubtedly both bi-lingual mediators and interpreters face numerous challenges in this respect. These can be summarised but as, but are not limited to:

- Maintaining neutrality
- Observance of both interpreters' and mediation's sometimes conflicting ethical principles
- Coping with escalated conflict
- Countering the imbalance in time allocation between parties to retain impartiality
- Supporting impartiality through body language and symmetrical seating
- Avoiding the appearance of allegiance according to language/background

As noted at the outset of this chapter, in legal settings, mastery of language means power. The existing codes of ethics for interpreters and mediators respectively do not, however, account for the asymmetries created when the two activities of interpreting and mediation are combined. This suggests that, at the very least, a systematic consideration of the ethical conflicts created when language difference calls for the use of bi-lingual mediators or third-party interpreters in mediation is required. Perhaps even an adapted new code of conduct/ethics – one observant of the particular nature of the interpreter’s role in this setting – is called for in order to clarify the specific constraints interpreters deal with in civil mediation sessions. We hope this chapter serves as one step towards the illumination and eventual resolution of this question.

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- 3 http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf

Videoconferencing as a Tool for Bilingual Mediation¹

Sabine Braun

1. Introduction

According to the European Directive on mediation in civil and commercial matters², mediation is a structured process in which “two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator”. According to this definition, the essence of the mediation process is that those involved in a dispute appoint an impartial third party to help them resolve the dispute and arrive at an outcome that is acceptable for both/all parties. Although mediation may be suggested or ordered by a court or prescribed by law, it is essentially a voluntary process, and the purpose of mediation entails that the conflict parties ultimately have a shared goal, i.e. that of resolving the dispute, even if this may not be obvious to the parties at the beginning of the process, or it may slip into the background during individual stages of the process. To achieve the ultimate goal of dispute resolution, the mediation process focuses on improving the communication and building consensus between the parties. It involves exploration, de-escalation, improvement of interpersonal relationships, and ultimately the development of sustainable options (Carroll, 2016). Mediation is in stark contrast with litigation, which is “combative” and “blame-oriented” (Uluc, 2015).

The definition suggests that mediation constitutes a communicative genre, i.e. that it is a purpose-driven communicative event whose structure and stages are shaped by that purpose. Various stages of the mediation process have been described. Roberts (2008: 151-157), for example, identifies four stages. The first stage, establishing the arena, includes initial contacts with and between the parties and involves defining the decision-making authorities, i.e. the parties, particularly as this may vary across cultures. Roberts points out, for example, that in some cultures women do not have decision-making powers. If an interpreter is present, this stage also involves defining the interpreter’s role. The next stage in Roberts’ model, clarifying the issues, is a stage that is necessary because the parties often bring a range of issues to mediation. According to Roberts, the important point at this stage is to identify the issues that are negotiable as well as agreeing an agenda for the mediation process. The stage of exploring the issues is the stage at which the dispute is likely to be most clearly

expressed, i.e. where the parties may lose sight of their ultimate shared goal and where the role of the mediator is crucial to ensure that differences can be expressed but are appropriately managed. The stage of developing options begins when dispute starts to turn into information exchange and learning. This is followed by the stage of securing agreement, which concludes the process.

Moore (2014) has a similar model, although he distinguishes between the preparation stage and the actual mediation session. Moreover, with reference to Goffman's (1969) communication model, he identifies characteristic actions or 'moves' for each stage, as in his view,

moving through the stages of mediation and accomplishing the goals and tasks in each one involves the parties initiating and completing various activities or 'moves' to resolve differences and to bring the conflict to termination" (Moore 2014: 183).

He also emphasises that each move involves decision-making and the assessment of possible actions, and that the role of the mediator is to help the parties select positive moves/actions. According to him,

some common mediator activities and moves include opening communications between or among disputing parties, improving their working relationships, defining a mutually acceptable discussion and problem solving process, enhancing information exchange, clarifying needs and interests, encouraging mutual understanding, generating potential options for agreement, helping parties to evaluate possible solutions that they have developed, and facilitating reaching mutually acceptable understandings and agreements. [...] Successful achievement of stages, goals, and tasks by engaging in appropriate activities helps both disputants and the intermediary create an environment that supports attitudinal, behavioural, and substantive changes, and ultimately resolution. (Moore 2014: 184)

The framing of mediation as a communication genre, along the lines of Moore's considerations, also reveals further challenges for bilingual/cross-cultural mediation. The characteristics of communication genres, i.e. their overall structure and individual moves, have been shown to be culture-specific (Bahtia, 1993). This means that apart from having to overcome linguistic and cultural barriers (including differences in relevant legislation and conventions), bilingual/cross-cultural mediation also introduces the possibility that the conflict parties' genre expectations differ, adding another layer of complexity.

Regardless of this, there is a growing demand for mediation in many countries, including bilingual/cross-cultural mediation, partly because some types of mediation are now prescribed by law (e.g. family mediation in divorce cases in England and Germany), and partly because mediation is seen not only as a fast and cost-effective alternative to litigation but also as a more sustainable option, as the parties are actively involved in the decision-making process. The increasing popularity of mediation as a form of alternative dispute resolution has also led to the search for ways of conducting mediation in other than the traditional face-to-face setting. The use of communication technologies has been considered especially to increase access to mediation, e.g. when geographical distance between the parties is an issue, and to accelerate the arrangement of a mediation session in situations where time constraints are imposed on mediation by law.

The exploration and use of communication technologies to facilitate mediation and other forms of dispute resolution has led to the development of Online Dispute Resolution (ODR). According to Uluc (2015), ODR is, however, a rather ambiguous term. In a narrow sense, as Uluc (2015) points out, ODR refers to the often highly automated dispute resolution services that are available through the Internet to handle disputes that have arisen online (most commonly through e-commerce). On the other hand, ODR is a cover term for dispute resolution through electronic means regardless of whether the dispute arose online or in a traditional setting. In this wider sense ODR covers different forms of dispute resolution including negotiation, mediation and arbitration, and it is used to resolve disputes in e-commerce, between organisations, for family mediation and other purposes (Carneiro *et al.* 2014).

Katsh and Rifkin (2001), who were among the first authors to discuss the use of technological tools in dispute resolution, suggested that technology will adopt the role of a 'fourth party' in mediation. In a more differentiated view, Moore (2014) points out that the function of the technological tools applied in ODR can range from information aides (e.g. in the form of expert systems to search for information), to facilitating asynchronous communication (e-mail, web-based messaging) and synchronous communication between the parties (telephone, videoconference). In recent attempts to systematise current ODR practices it has been suggested that ODR is becoming a modality of dispute resolution in its own right (Poblet *et al.*, 2010). One reason for this view is that some of the constraints imposed by the various communication technologies require mediators to develop alternative strategies for working with the conflict parties, for example when communicating through the written word (Moore 2014: 79). However, Carneiro *et al.* (2014: 29) warn that the use of technological tools in dispute resolution first and foremost raises a number of new questions and needs to be analysed carefully.

It would be beyond the scope of this chapter to examine in depth the great variety of communication tools for ODR that have emerged in the past two decades. In the area of mediation, which traditionally relies heavily on face-to-face encounters (except for some forms of shuttle mediation), videoconferencing seems to be the most applicable technology to complement or replace face-to-face mediation sessions. Videoconferencing enables users to communicate in real-time, seeing and hearing each other. Due to the increasing popularity of videoconferencing, both in the professional and private world, mediation organisations have begun to exploit videoconferencing tools. Examples include the Virtual Mediation Lab (<http://www.virtualmediationlab.com>), which features simulations of monolingual and bilingual mediations; the guidance from the UK's National Family mediation Service (<http://www.nationalfamilymediationservice.co.uk>), which mentions videoconference-supported mediation as an alternative to face-to-face mediation to provide the parties with more flexibility; and a number of mediation service providers such as Mediation1st (<http://www.mediation-1st.co.uk/?p=mediation.by.video.conference>), whose website highlights scenarios in which face-to-face mediation may be difficult, including in cross-border cases.

However, although there is a range of valid reasons for exploring the potential of videoconferencing technologies for mediation, research has shown that videoconference communication differs from face-to-face communication. In bilingual mediation, which is the focus of this chapter, the intricacies of bilingual, cross-cultural and, where relevant, interpreter-mediated communication add further complexity, so that videoconferencing in these settings requires especially careful consideration. The present chapter will begin by outlining the main findings from research into monolingual videoconference communication³ (section 2) and bilingual, interpreter-mediated videoconference communication (section 3). Particular attention will be paid to the findings from research in other areas of legal communication. Subsequently, section 4 will explore to what extent these findings are applicable to the mediation setting and outline basic, research-led principles for videoconferencing as a tool for bilingual mediation. Section 5 will conclude the chapter with a synopsis of the main current challenges for videoconference-supported bilingual mediation and an outlook towards the future.

2. Videoconference Communication: Research Findings, Challenges and Opportunities

Videoconferencing is often equated to, or seen as easily replacing, face-to-face communication. The use of videoconferencing in mediation is no exception to this. Mediation1st, for example, claims with reference to videoconference-

supported mediation that “apart from the fact that the mediation takes place by videoconference, everything else is just the same as in a face to face mediation” (<http://www.mediation-1st.co.uk/?p=mediation.by.video.conference>). Some scholars working in the field of ODR have argued along similar lines. According to Manevy (2002), videoconferencing replaces face-to-face communication by “powerful screen to screen communication”. Nwadem (2015) believes that videoconference-supported encounters are “almost the same” as a face-to-face encounter, as participants can see each other, although he concedes that videoconferencing “requires mediators to adapt their communication skills from face to face interaction to screen to screen interaction” (Nwadem 2015). Such discussions normally highlight the (potential) benefits of videoconferencing especially for cross-border contexts where it can be difficult to gather all parties in one place, but there is little consideration of the potential challenges of videoconferencing and of the specific challenges arising from the combination of communicating through technological tools and overcoming linguistic and cultural differences. However, whilst videoconference is a richer medium than many other distance communication tools, as it allows for synchronous interaction and enables the participants to see each other, research into its use in other legal settings, especially in criminal and immigration proceedings, has highlighted a number of difficulties and has generated mixed results about its appropriateness as a tool for legal communication. Section 2.1 will review the findings from this research. Section 2.2 will then consider communicative aspects of videoconferencing and discuss possible reasons for the mixed research findings from legal videoconferencing. This will serve as a basis for discussing the appropriateness of videoconferencing in mediation settings in section 4.

2.1. Videoconferencing in Legal Settings

Videoconferencing has been one of the top priorities of the Multiannual European e-Justice Action Plans 2008-2013 and 2014-2018. Both versions highlight the potential of videoconferencing for improving judicial efficiency and access to justice, and thus for strengthening the rights of European citizens. In line with this, an increasing range of European legal instruments allows for the use of videoconferencing technology in legal proceedings, e.g. for the hearing of remote witnesses (Art. 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters) and the use of remotely located interpreters (Art. 2 of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings). However, research into the use of videoconferencing in legal proceedings has often been sceptical and has warned of unwanted consequences. For example, Haas (2006) highlights interaction problems created by problems with eye contact, identification and interpretation of body language, poor sound quality

as well as problems with interpreter-mediated communication in videoconferences. Testimony via video link has been shown to be less credible than live testimony (Harvard Law Review 2009). Similarly, Federman claims that videoconferencing multiplies the complexity of legal communication and that “the mediation effects created through videoconferencing introduce the significant possibility of inconsistency, inaccuracy, and altered judgment” (2006: 450). As an example of such effects, Benforado (2010) discusses bias through camera positioning. At the same time a study conducted for BID UK (2008) finds that detainees feel isolated in video links between detention centres and courts. In view of such research findings, the Harvard Law Review warns that VC use may result in a system “in which individuals gain speedier entrance [to an immigration court] but fewer receive the opportunity to be heard in a meaningful manner” (2009: 1193). Poulin (2004) believes that decisions regarding the use of videoconferencing in criminal proceedings may be biased or influenced by cost savings and that defendants’ needs and interests are not sufficiently addressed. Taking this point further, Sossin and Yetnikoff (2007: 248) argue that “questions of financial resources and structures” cannot be separated “from the question of fairness and reasonableness” of judicial decision-making.

The London Probation Trust conducted a videoconferencing pilot in 2006 to evaluate the use of videoconferencing for court report interviews. The findings were mixed (London Probation Trust 2007). While offenders generally reported being able to see and hear clearly, the majority of offender managers felt that the quality of the video links was inadequate. Additionally, offender managers suggested that videoconferencing was unsuitable for conducting interviews with offenders who do not speak English as a first language.

Whilst technological innovation has improved the quality of videoconference equipment and connections, especially through the use of broadband Internet, some authors have argued that this is not a guarantee for successful videoconference communication and have focused on improving the environment in which videoconferencing takes place. Work on legal videoconferencing undertaken in Australia and the Netherlands, for example, has been concerned with the conditions under which videoconference technology may be used in court and the technical set-ups that are appropriate (Rowden *et al.* 2013, van Rotterdam and van den Hoogen 2012). This work has taken into account the specifics of legal communication and has emphasised the importance of the audio-visual environment as a whole (including the geographical distribution of the participants, their position in relation to the equipment, lighting, acoustics, visibility and other factors).

Apart from that, several case studies highlight and exemplify positive aspects of videoconference use in legal settings. A point repeatedly made is that the use of video

links improve access to legal services and justice, as shown, for example, by Cohl and Thomson (2008) with reference to rural communities in Canada. Positive views and reports also extend to the use of videoconferencing with or by offenders: in England and Wales, for example, the Youth Justice Board has used video links for nearly a decade to facilitate the resettlement of young offenders (e.g. use for interviews) and to support contact of young offenders with their families.⁴ In the US, Bartlett (2000) and Bobbitt *et al.* (2011) refer to videoconferencing pilots in Pennsylvania and Florida respectively, allowing prisoners to communicate with their families. Tong and Farrington (2008) describe the use of videoconferencing in Utah for delivering educational programmes to prisoners which are aimed at reducing re-offending. In such settings, videoconferencing is seen much more as a tool to help overcome barriers to communication than in studies of videoconferencing in court settings. In Europe, videoconferencing and other digital tools are also increasingly considered in prison education programmes (Knight 2015).

Outside the legal sphere, videoconferencing is conceptualised as a community building tool, an aid to facilitating communication, supporting education and improving professional cooperation. It could thus be argued that, as long as videoconferencing is a means of supporting specific, additional communication needs, rather than replacing face-to-face contact, such as in the examples outlined above, then it can provide added value to complex and diverse communication processes.

However, even in settings where videoconferencing technology is effectively the sole or principal means of establishing communication, e.g. in remote therapy settings and forensic healthcare, there is some evidence that it can still be successful. Sullivan *et al.* (2008: 23) present evidence which they believe supports the use of videoconferencing in forensic mental healthcare in Australia ‘despite a number of practical, legal, and clinical issues that may reduce its effectiveness compared with face-to-face assessments’. They emphasise the opportunities that videoconferencing provides for linking medical specialists to patients in prisons and clinics and believe that VC is useful even for activities such as patient assessment and treatment.

The question then seems to be which factors contribute to videoconference communication being – or being perceived as – more or less successful. Arguably, the answer is linked to parameters of communication, such as the distinct purpose of a communicative event and the communication genre. The following section briefly looks at this, before outlining some of the general challenges for videoconference communication.

2.2. Communicative Aspects of Videoconferencing

The previous section has shown that in the legal context alone, the communicative purposes that can be found in applications of videoconferencing are very diverse and include assessing and judging a person, information gathering as well as collaboration and making social contact. This means that videoconferencing is used in the legal context to cover highly critical communicative events in which parties have conflicting goals as well as events with shared goals, which are normally easier to manage. These differences can at least partially account for the different evaluations that videoconference communication has received in different legal settings. Further differences may arise from the level of complexity of the videoconferencing set-up. In its simplest form, a video link can be set-up between two sites, but multi-point videoconferences with several sites have also become common. In addition, differences in the perception of videoconferences arise depending on whether it is compared and contrasted with face-to-face communication or with other tools for distance communication.

Before the use of videoconferencing was researched specifically in relation to legal settings, videoconferencing had become the subject of research as a tool for distance communication more broadly. In a seminal work in this field, Short *et al.* (1976) discussed the efficiency of distance communication tools to support different communication purposes or genres. This discussion was linked to the ability of different media to transmit interpersonal verbal and non-verbal cues. Short *et al.* postulated that the absence of such cues leads to a reduced 'social presence' between participants. Since Short *et al.* also believed that social presence is more important for achieving social tasks such as conflict resolution and negotiation than intellectual tasks such as decision-making, it has often been assumed that videoconferencing is more suited for the latter. However, conclusive evidence is not available (see Ferran and Watts 2008), and many communication genres that are relevant in legal settings have not been investigated systematically in terms of whether the medium of videoconference supports them efficiently. This does not invalidate an approach that uses the communication genre as a guide for assessing the usefulness of videoconferencing, but it suggests that the specifics of videoconferencing need to be considered in greater detail.

As a point of departure, two important prerequisites of communication can be singled out. One is the ability to share 'common ground' in communication, i.e. a mutual understanding of the knowledge and the premises from which the participants start (Clark 1996). If this is not given, any discussion, debate, argument, information exchange or decision-making is difficult, and it is hard to establish whether there is understanding, agreement, disagreement etc. among the participants. The other

prerequisite is the ability to develop a ‘rapport’ between the participants, i.e. the ability to coordinate and synchronise the interaction, to indicate the stance someone takes to what is being talked about, or to gauge whether understanding has been achieved and agreement (or otherwise) reached. This is normally achieved through a range of often ‘small’ interpersonal verbal, vocal and embodied clues (Gumperz 1982). Together the availability of common ground and rapport can be conceptualised as ‘contextualisation’, which has been highlighted to be of crucial importance in conflict resolution (Carneiro *et al.* 2014; Katsh 2006).

Both prerequisites are not easy to achieve in videoconferences, irrespective of the communication purpose, and for a variety of reasons, which are mostly related to ‘social presence’. This concept was originally defined by Short *et al.* (1976: 65) as the “degree of salience of the other person in a mediated communication and the consequent salience of their interpersonal interactions” or the feeling of being “there” (Bull and Rumsey, 1988). More recent definitions have focused on “sense of togetherness” (Hauber *et al.* 2005), i.e. on “the ability of the users to perceive each other” (Fägersten, 2010: 178).

When compared to face-to-face communication, one of the obvious differences is that participants in videoconferences are in different physical and social environments at their respective sites. They only have a partial and two-dimensional view of the remote site, i.e. they see the two-dimensional image of the remote participants and the remote environment that is captured by the camera and presented on the screen. Due to the two-dimensional nature of a video screen, there is also no peripheral vision or awareness (Heath and Luff, 1991). The physical separation of the interlocutors and the extract-like view of each other’s environments lead to the fragmentation of the communicative environment (Luff and Heath, 2003), which disrupts the sense of togetherness because eye contact, gaze direction, body movement, small gestures and other embodied clues that are important for creating a sense of presence are difficult to reproduce in videoconferences (Heath and Luff, *op cit*). The fragmentation makes it difficult to gauge the atmosphere or communicative situation at the remote site and creates a latent uncertainty about what ‘the other side’ does. In other words, the technical channels (audio, video) used in videoconferencing are less effective in transmitting contextualisation clues, leading to greater insensitivity towards each other’s communicative behaviour in videoconferences (*ibid*). All of this has an impact on the ability to contextualise the communicative event and on the salience of the other participants and their actions.

The observed consequences include, for instance, unnatural ways of speaking, a tendency to speak louder, over-elaborate and be less coherent as well as fatigue, omission of key information and avoidance of ‘difficult’ or complex topics (Braun,

2004). Interlocutors have also been found to spend a considerable amount of time on explicitly co-ordinating the communication. O'Malley *et al.* (1996) argue that a 'greater processing overhead' is required in videoconferences, making the communication potentially less efficient. Ferran and Watts (2008) furthermore argue that videoconference communication increases the participants' cognitive load because coordinating the communication and identifying who is speaking (when there is more than one person per site), creating (the illusion of) eye-contact and other tasks – all to be carried out while processing what the speaker is saying – take up cognitive resources. Ferran and Watts observe that the high cognitive load entails new information-processing strategies in VCs which differ from other forms of communication. Visual cues such as the likeability of a person, for example, are shown to become more important than the content of what is said.

When videoconference communication is compared to other tools for distance communication, a more positive perception of videoconferencing normally emerges. There is a strong belief that social presence increases with the number and range of communicative cues a communication tool enables (Yoo and Alavi, 2001), meaning that videoconferencing as a multimodal (or media-rich) form of distance communication is seen as supporting a comparatively high degree of social presence. However, whilst it is true that by providing synchronous access to verbal and non-verbal clues, videoconferencing overcomes some of the obvious drawbacks of other forms of distance communication, Kash and Rifkin (2001) believe that online interaction cannot provide the same richness of face-to-face encounters. Due to its extract-like nature and the fragmentation, videoconference communication is, for example, more likely to lead to ambiguity or misunderstanding than face-to-face communication and may therefore not be conducive to building mutual trust.

Fägersten (2010: 188) furthermore points out that the many communication modes playing a part in videoconferencing environments "can also have the effect of emphasising the aspect of mediation, serving as subtle – or, in the event of malfunction, obvious – reminders of the lack of shared physical space". Whilst Fägersten assumes that those engaging in videoconference communication will adapt, other research has shown that adaptation has limitations (Braun, 2004).

In a similar line of argument, Nardi and Whittaker (2002) claim that the creation of 'convivial' media ecologies remains challenging. Although videoconferencing technologies have improved and are certainly a more viable alternative to face-to-face communication than it was when Heath and Luff (1991) put forward their thoughts about the effectiveness of the technical channels, Nardi and Whittaker's assessment still applies, not least because – as Fägersten (2010) also notes – technological glitches, pixilation of images, split-seconds of sound cutting out, which are still part

and parcel of many videoconferences, are strong reminders that videoconference communication is not the same as face-to-face interaction. An additional point raised by Goodman (2003) is that online communication has generally been shown to be less effective between strangers.

Given the challenges of videoconference communication as outlined above, a practical conclusion in many legal settings has been to limit its use to communication of a short duration and between a small number of participants. Although these prerequisites are not necessarily met in the mediation process, there remains the dilemma that face-to-face communication is difficult to set up in cross-border mediation situations, making the use of videoconferencing, as arguably currently the richest medium for distance communication, a desirable alternative. However, the current limitations of videoconferencing have to be borne in mind when this technology is applied to mediation settings, especially when the difficulties in achieving common ground in videoconferencing are further exacerbated by the intricacies of cross-cultural communication, which will be addressed in the next section.

3. Videoconferencing and Interpreter-Mediated Communication

In addition to the factors outlined in the previous section, the involvement of an interpreter in a videoconference creates additional, specific challenges. The feasibility of interpreting in a videoconference depends on a number of factors, including especially:

- The location of the interpreter in relation to the other participants, i.e. whether the interpreter is integrated into a video link between two (or more) sides, or whether the video link is used to gain access to an interpreter
- The purpose, complexity and duration of the communication, i.e. whether the video link is used for a short exchange between a small number of participants or for a lengthy court trial or similar, involving various layers of communication
- The mode of interpreting required, i.e. consecutive interpreting, whereby speakers say a few sentences and then pause for the interpreter to deliver his/her rendition, or simultaneous interpreting, whereby the interpretation is delivered while the speaker is speaking, either by whispering or from an interpreting booth.

Several studies have focused on the use of videoconferencing in simultaneous conference interpreting in international institutions such as the EU and the UN. These institutions mainly have a need for 'remote interpreting', whereby the

interpreters work from a different location, e.g. due to a shortfall of interpreting booths in meeting rooms. Although these settings are very different from the requirements for interpreting in criminal proceedings including cross-border resettlement contexts, some of the findings are noteworthy. All of these studies have, for example, highlighted the importance of sound and image quality and lip synchronisation as a prerequisite for good interpreting quality (e.g. Mouzourakis, 2006; Causo, 2012).

A growing demand for 'remote interpreting' is also noticeable in healthcare settings. Video-mediated remote interpreting is gradually replacing the previously wide-spread use of telephone-mediated remote interpreting in many healthcare settings. A number of surveys on user satisfaction have been conducted. However, empirical studies of interpreter performance, quality and interaction are largely absent. The findings from the survey-based studies of remote interpreting in medical encounters using video link are also difficult to compare because of a great variance in the conditions under which they were conducted. In a review of these studies, Azarmina and Wallace (2005: 144) conclude, perhaps somewhat optimistically, that 'the findings of the selected studies suggest that remote interpretation is at least as acceptable as physically present interpretation to patients, doctors and (to a lesser extent) interpreters themselves'. In spite of the lack of any formal assessment of the interpreters' performance in the studies referred to, the authors conclude that 'remote interpretation appears to be associated with levels of accuracy at least as good as those found in physically present interpretation' (*ibid.*). They do, however, note that interpreters generally preferred face-to-face interpreting and that they had a preference for video remote interpreting to remote interpreting by telephone. This is corroborated by more recent studies comparing the three methods of delivery. Of the over 200 patients, 24 healthcare providers and seven interpreters surveyed by Locatis *et al.* (2010), the majority of both providers and interpreters showed the same preferences with regard to the three methods. Patients found no difference between the three modes, but were only subjected to one mode each. The 52 interpreters responding to a survey conducted by Price *et al.* (2012) in a clinical setting found all three methods satisfactory for conveying information, but they preferred face-to-face interpreting to video and telephone interpreting for interpersonal aspects of communication. This led Price *et al.* to highlight the connection between communication genre and appropriateness of videoconferencing.

In contrast to the requirements in healthcare settings, the growing use of videoconferencing in legal settings has led to more diverse requirements for interpreting. On the one hand, interpreters are nowadays often integrated in video links between courts and remotely located witnesses or defendants. On the other hand, courts, police and immigration authorities have begun to access remotely located interpreters using video links.

A comprehensive feasibility study of videoconference interpreting in immigration proceedings was conducted by Ellis (2004). In the examined setting, the immigration judge, the refugee protection officer and the interpreter were together in the immigration office, whilst the refugee and his/her lawyer were in another city. The findings are based on interviews with, and questionnaire responses from, immigration lawyers and judges, refugee protection officers, and interpreters. The lawyers were mostly sceptical about the suitability of video links, whilst the other three groups were generally more positive. One of the major problems reported was that the interpreter was not co-located with the refugee, leading to a weaker personal rapport between the interpreter and the refugee, difficulties with the coordination of the communication, and the impossibility of using whispered interpreting. Judges felt that consecutive interpreting was disruptive, especially when they delivered their final submissions. The hearings by video link also tended to be longer and were considered to be more fatiguing than comparable face-to-face hearings. The interpreters were concerned that body language and emotions were not transmitted efficiently and that this might undermine the refugee's credibility. The interpreters also felt that videoconference communication involved more repetition and overlapping speech, which was difficult to resolve and impeded accurate interpretation.

A study of immigration bail hearings by video link conducted by two British charities—Bail for Immigration Detainees (BID) and the British Refugee Council—(BID 2008) came to similar conclusions. The bail applicants, who were separated from the interpreter and all other participants, felt that they had difficulty following what happened in the courtroom and that only the questions directed towards them and their answers were interpreted; they had problems seeing and hearing the other exchanges in the courtroom.

The General Directors' Immigration Services Conference (GDISC), an informal network for European collaboration on immigration issues, created an 'Interpreters' pool project' in 2007, which was a Europe-wide initiative to supply interpreters for asylum interviews by way of relay interpreting to overcome problems with interpreter availability, especially for rare languages (GDISC 2007). The interpreter who speaks the immigration case worker's language was co-located with the case worker and the applicant. The second interpreter, who speaks the language of the applicant, was located in another country. The project ended in 2012, but it is an example of how the uses of videoconference technology have evolved to go beyond the two basic distinctions between remote and teleconference interpreting.

The most comprehensive study to date relating to videoconference-based interpreting in criminal proceedings was conducted by the European AVIDICUS

projects. AVIDICUS 1 (2008-11) assessed the viability and quality of video-mediated interpreting in criminal proceedings (Braun and Taylor 2012a) in two relevant configurations: a) in criminal proceedings which involve a video link, e.g. the hearing of a remote witness, with an interpreter being located at either side of the video link (“videoconference interpreting”), and b) in proceedings which use a video link to access a remotely located interpreter (“video remote interpreting”). The focus was on consecutive interpreting as the most common mode of interpreting in criminal proceedings.

A series of experimental studies comparing onsite and video-mediated interpreting revealed a significantly higher number of interpreting problems and a faster decline of interpreting performance over time in video links, suggesting greater difficulties for interpreters and a faster onset of fatigue, and ultimately a higher cognitive load for the interpreters. This was corroborated by qualitative analyses, which show that videoconference-based interpreting magnifies known problems of (legal) interpreting to a certain extent. In particular, the following issues were noted for the interpreters (Braun 2013, 2016; Braun and Taylor 2012d; Balogh and Hertog 2012; Miler-Casino and Rybinska 2012):

- Listening and comprehension problems
- Difficulties with communication management
- Problems with rapport-building with the other interlocutors
- Traditional interpreting strategies, such as visual signals, are less effective, e.g. in allowing the interpreter to take the floor and interpret
- Other strategies, such as oral intervention to take the floor or resolve a problem, tend to feel more disruptive.

Crucially, the AVIDICUS findings suggest that whilst basic practical problems with videoconference-based interpreting may be resolved quickly through initial training and familiarisation, the combined complexities of technological mediation (through videoconference) and linguistic-cultural mediation (through an interpreter) also create deeper-rooted behavioural and communication problems which may change the dynamic of legal communication (see Braun and Taylor 2012a for a summary of the AVIDICUS findings). Interestingly, Napier (2012) conducted a similar study for sign-language interpreting during the same period and came to very similar results, and presented similar recommendations to those generated in AVIDICUS 1 (Braun 2012).

To follow up on the potential impact of training and equipment and on the potentially

changing communicative dynamics in videoconference-based interpreting, the AVIDICUS 2 project (2011-13) was designed to address two strands of research (Braun *et al.* 2013a). The first strand replicated the AVIDICUS 1 studies, involving the same interpreters but providing them with short-term training in videoconference-based interpreting before they participated again. Moreover, better equipment was used. The findings of this research create a complex picture, making it impossible to say without reservation that training, familiarisation and the use of better equipment resulted in a clear performance improvement. The second strand of research focused on the analysis of the communicative dynamic in real-life court hearings that used videoconferencing and interpreting and revealed differences in the dynamics of the communication between traditional and video-mediated settings. Videoconference interpreting in court seems to entail a reduction in the quality of the intersubjective relations between the participants and a greater fragmentation of the discourse. The findings raised the broader question of whether videoconference-based, interpreter-mediated proceedings work best when they replicate as closely as possible the traditional face-to-face settings, e.g. by transferring known communication strategies and the spatial organisation of face-to-face settings to the videoconference settings, or whether justice is better served when design solutions start from the main requirements for all legal communication—i.e. fairness and efficiency of justice. The research indicated that a replication of all aspects of face-to-face interpreting may not be the most effective solution for video-mediated proceedings and that further research needs to provide more detail on the factors that make videoconference solutions effective for bilingual communication.

The questions relating to the effectiveness of bilingual videoconference communication in legal settings were addressed in AVIDICUS 3, which turned to the design and implementation of bilingual videoconferencing solutions. The main aim was to carry out a comprehensive assessment of the videoconferencing solutions currently used and/or planned in legal institutions across Europe in order to ascertain whether these solutions are fit for the purposes of conducting bilingual proceedings and integrating an interpreter. This involved fieldwork in a number of European countries and interviews with representatives of different stakeholder groups to elicit information about such aspects as the configurations of bilingual videoconferencing that are required at present and in the foreseeable future; common patterns of physical and geographical distribution of the participants; types of equipment and transmission; room layout and positioning of the participants in relation to the videoconferencing equipment and to each other; mode(s) of interpreting; and videoconferencing literacy of the participants.

The overarching finding of this research is that the complexity of interpreter-mediated videoconferencing is generally underestimated by those responsible for

implementing videoconferencing facilities in legal contexts and that these facilities therefore tend not to allow sufficiently for integrating interpreters into bilingual videoconference communication in legal settings. Fowler (2013), who investigated court-prison video links, similarly notes problems with the interpreters' positioning in the courtroom, access to the microphone, as well as visibility of the video image. She argues that these problems, together with the absence of a protocol, lead to frequent disruptions, requests for repetition and misunderstanding.

However, as pointed out earlier in this chapter, if used appropriately videoconferencing tools have the potential to enable communication that would otherwise be difficult to arrange, especially when geographical distances have to be overcome and time and resources are limited. It is with this proviso that videoconferencing can support mediation including bilingual mediation situations, which tend to be the settings that involve geographical distance. The following section will outline initial considerations for videoconference-supported bilingual mediation.

4. Videoconferencing as a Tool for Bilingual Mediation

The previous sections have focussed on monolingual and interpreter-mediated videoconference communication with specific regard for legal settings. The use of interpreters is the standard option in formal bilingual legal settings, especially in criminal proceedings and immigration proceedings which involve a minority-language speaker. When it comes to bilingual mediation settings, however, things are less clear cut. Bilingual mediation can involve an interpreter, but the tendency to use bilingual mediators instead has led to a range of mixed-language mediation procedures. This means that in addition to exploring the options for the use of videoconferencing in mediation settings with an interpreter other options such as bilingual communication without an interpreter also need to be considered in terms of how they can be supported by videoconferencing tools. For example, MIKK's co-mediation model for cross-border family mediation involves two mediators, each representing at least one of the languages and cultures involved whilst also sharing a common language (Carroll, 2016). This model can lead to a myriad of configurations (ibid.). In the potentially simplest case, both mediators and both parties speak the same language, either as mother tongue or second/foreign language. In other cases, the parties and the mediators use a foreign language as *lingua franca*, especially English. A noteworthy point is, however, that in all situations of non-native language use on the part of the dispute parties, it is possible that problems arise when parties try to express emotions. Another possible configuration is therefore intercomprehension whereby everyone speaks their own language, but all other participants understand this language. It is also possible that one mediator speaks both parties' languages, whilst the other

mediator only speaks one of the languages. In this case, the bilingual mediator is likely to double up as an interpreter, although this is challenging as it requires a clear distinction between speaking as the mediator and as the interpreter. In other cases, when the mediators have a language in common with only one party, an interpreter is required to facilitate communication with the other party.

All of these configurations become potentially more complex when a video link is involved. Whilst some of the common problems in videoconference communication involving interpreters were outlined in section 3 above, it should also be noted that research in the European DUTT Project, which focused on the use of videoconferencing in probation and prison settings, has found that the use of a non-native language or *lingua franca* can magnify the problems of videoconference communication described in section 2 above (Braun and Taylor, 2013).

It would be difficult to consider the implications that the use of videoconferencing would have on each possible configuration of bilingual mediation in detail. However, as a starting point for a more in-depth discussion of the emerging demand for videoconference-supported bilingual mediation, it is possible to formulate a number of basic principles which are derived from what is known about videoconference communication (with and without an interpreter). These principles will be outlined in the following sections.

4.1. Participant Distribution

Given that videoconferencing entails the physical separation of the participants, one of the most important questions in videoconference communication is how the participants are distributed geographically, i.e. who shares and does not share the same location. As outlined in section 2 above, the impact of the physical separation, especially the potential lack of social presence, has been one of the main concerns in research on videoconferencing and distance communication as such. In videoconference-supported mediation settings, the distribution of participants is closely linked to perception of equality. To illustrate this, a likely scenario of videoconference-supported mediation would be that the mediator(s) is (are) located in a metropolitan area, and that one of the parties lives in that area and initiates the mediation, while the other party is in a different location, for example, abroad. In this scenario, a two-way video link could be set up with the mediator(s) and party 1 in the same location and party 2 in their own location. However, given the fragmentation of the communication environment in videoconferences and its consequences (see section 2), this set-up is likely to create an imbalance and may put the remote party at a disadvantage or at least create that impression. To avoid

this, it seems more appropriate to use multi-point videoconferences in mediation, i.e. a three-way link, with the mediator(s) and the parties each in a separate location, even if one party lives close to the mediator's location. If there are two mediators and they are in different places, a four-way link would be necessary.

The inclusion of an interpreter in videoconference-supported mediation settings introduces a further layer of complexity regarding participant distribution. The important point here is not only to avoid a situation whereby one party is at a (perceived or real) disadvantage, but also to ensure that the interpreter's impartiality is not undermined by his/her location. Carroll (2011) contends that seating arrangements in mediation with interpreters can be based on the experience of interpreter-mediated therapeutic settings, which suggests that a seating arrangement ensuring equal physical distance between all participants works best. In videoconferences involving an interpreter, this may be best reproduced by a multi-point video link in which the interpreter works from a separate site. In addition to facilitating impartiality, working from a separate location would also enable the interpreter to exercise control over his/her equipment, e.g. the volume of the sound, according to his/her own needs.

However, in more formal legal settings, the brief discussion in section 3 makes it clear that there is no 'best' place for the interpreter. Different participants have different preferences. In hearings of remote witnesses or defendants, for example, many interpreters feel that they would like to be co-located with the minority-language speaker, whilst judges prefer the interpreter to be in court. In bilingual mediation settings, where the linguistic configuration is more complex, as outlined above, it is important to avoid strong asymmetries in participant distribution, and to work out and agree a participant distribution that is acceptable to both parties and/or to explain the rationale for the chosen distribution to the parties.

Moreover, it needs to be noted that multi-point videoconferences come with their own challenges, especially in terms of co-ordinating the communication. In bilingual mediation settings, where parties are likely to understand at least some of what the others say (see above), it may be difficult for a remotely located interpreter to make him/herself heard. If a qualified interpreter is available locally, a more practical option may therefore be for the interpreter to be co-located with the mediator(s). Another question arising in multi-point videoconferences is how the images from the participating sites should be displayed. This will be discussed in section 4.2 below.

Another important dimension of creating appropriate distance and a perception of equality in videoconference communication is the spatial organisation at each site, i.e. the seating arrangement and positioning in relation to the cameras and the screens. This will be discussed in section 4.5 below.

4.2. Image

As explained earlier, face-to-face communication relies heavily on non-verbal, embodied clues such as mimic, gesture, gaze and posture. These cues are important resources for gauging the participants' reactions and responses to what is being said. They also indicate stance towards one's own utterances, help resolve ambiguities, and create common ground and rapport. Visual perception of each other strengthens the feeling of social presence and togetherness. As a basic principle of videoconferencing, every participant should therefore be able to see the other participants and be visible to the others. Moreover, the mutual visibility should be transparent, i.e. no-one should be left guessing as to whether s/he is visible to the others.⁵

Furthermore, in videoconferences with interpreters it is particularly important that the interpreter is able to intervene and deliver the interpretation or request clarification at relevant points. Many interpreters use visual signs, e.g. raise their hand, to indicate that they would like the speaker to pause. In video links, this is crucial because verbal intervention has been found to be more disruptive than in face-to-face communication (Braun and Taylor, 2012a).

One of the major challenges of videoconference communication is, however, that the communicative environment is fragmented and, as explained in section 2.2, that the technical channels impose some constraints on how participants can be shown and how embodied resources are transmitted and perceived. An important question arising is therefore how the participants are displayed to each other, especially in multi-point videoconferences, which appear to be the type of videoconference that best encompasses the needs of mediation.

Different videoconferencing systems offer different solutions for displaying participants on screen. A common option is to show the site of the current speaker in a large window and the other participants in small windows. The current speaker then normally sees the previous speaker in the large window. This leads to a dynamic display of images/speakers, which may appear to be useful for interactive communication. However, the dynamics are microphone-driven, which can lead to situations whereby a participant who is not speaking but making some noise (e.g. paper rattling) briefly appears on the screen. This can be disruptive, as it draws attention to the communication technology. It may also be confusing for participants who are not familiar with the way multi-point videoconferences work and who have no explanation for why this might happen. The only way of preventing this from happening is that those who are not speaking mute their microphones. Disruption may also arise when a participant is trying to take the floor and begins to speak. The configuration also makes it difficult to gauge everyone's reaction to what is being said.

Another option is 'continuous presence' whereby each site is displayed in an individual window (normally of equal size). This option is more static, which may draw less attention to the videoconference setting as such. It also enables participants to see the others' reactions to what is being said. Continued presence in static windows seems to be a more suitable choice for highly interactive videoconferences including videoconference-supported mediation settings.

A further important way to mitigate the challenges that come with the extract-like nature of videoconferencing is to use the option of seeing one's own image, i.e. the image that is captured by the camera and sent to the other site(s). The own image will not only reassure participants that they are visible for the others (mutual visibility); it also enables the participants to control how they are seen by the others and provides a useful means of controlling whether visual signals, e.g. raising one's hand to gain the floor, are visible and effective. In addition, although real eye contact is difficult to achieve in a videoconference, access to one's own image will enable the participants to create the illusion of eye contact, which is an important element of creating trust and thus crucial in mediation, both for the primary participants and, if present, the interpreter.

The considerations regarding the visual perception of each other are closely linked to the quality of the video image. Given that it is essential for the participants to recognise gestures, facial expressions and lip movement, the image quality needs to be of a high standard. In addition, the image quality needs to be stable, i.e. the communication should not be disrupted by a sudden drop in the image quality or split-second pixilation of parts of the image as a result of bandwidth problems or error frames in the image transmission, as this may lead to communication problems and will draw attention to the fragmented environment.

4.3. Sound

The sound quality of the equipment used is crucial for professional communication and even more so for an interpreter. Some interpreters feel that the sound quality of a videoconferencing system is even more important than its image quality. In a comprehensive understanding of interpreter-mediated communication, such a weighting may be unsustainable, but clearly sound is one of the most important elements of communication for the interpreter. Sound quality has a strictly technical dimension, i.e. the audio transmission capacity of the equipment used, but it is also influenced by a number of environmental factors. Both will be outlined in this section. The points made here also apply to communication in a non-native language, which is common in bilingual mediation.

With regards to the technical dimension, one of the problems is that the sound transmission in older videoconference equipment is limited to a frequency of 7.5kHz because of the audio compression algorithms used (e.g. G.722), whilst the audible human frequency is approx. 20kHz. In more recent equipment, better sound quality (approaching 20kHz) can be achieved through better compression algorithms but in the AVIDICUS studies, which were conducted using such equipment, listening comprehension problems and ensuing mis-hearings were nevertheless among the most serious problems. Difficulties arose especially when there were short periods of sound cutting out (often less than a second, but leading to the inaudibility of a sound or a syllable). In cloud-based videoconferencing systems such as Skype, the sound quality is known to be notoriously variable.

Causo (2012) also points out that the sound may be affected by unsuitable peripheral equipment, i.e. simple microphones and loudspeakers, unsuitable positioning of the equipment, and the absence of noise cancellation, which may lead to inferior, variable and sometimes 'tinny' sound, sound reverberations and other disturbances. This is likely to magnify the technologically imposed constraints on sound transmission quality. While it may well be possible to control these variables in the professional office environment of a mediation organisation, controlling the parties' set-up is likely to be much more difficult. Testing the video link with each party prior to setting up the mediation session is therefore crucial.

As a related issue, interlocutors may – in the course of the communication – also change their position in relation to the microphone, raise or lower their voices, or change their voice modulation. All of this needs to be taken into account in the set-up of a videoconference to minimise the risk of miscomprehension and distortion of the communicative message. This points to the importance of agreeing ground rules as well as signs indicating a technical problem.

Another point is that mediation involves a high degree of interaction. This requires turn-taking and sometimes entails overlapping speech, which also often leads to sound disturbances in videoconferencing. It seems that the artificial sound source in a videoconference does not accommodate overlapping speech in the same way as natural speech does. Again, it will be important to establish ground rules at the beginning of the videoconference, although the conflict parties in a mediation session may find it difficult to observe such rules, especially in the exploration stage (see section 1), where differences between the parties' views are likely to emerge, entailing emotionally loaded communication. This has implications for the co-ordination or moderation of the mediation session on the part of the mediator.

The impact of any sound quality problems is likely to be compounded in situations

where the participants do not have a frontal or near-frontal view of the others to see their lip movements and facial expressions or when speakers do not enunciate clearly, speak with a strong accent, or have difficulty speaking, all of which is particularly relevant in the context of bilingual mediation. Hence an appropriate view and a high-quality image, as well as high-quality sound, are vital. Equally important, image and sound need to be synchronised. Any discrepancy between sound and image will require additional processing effort to 'piece' sound and image together. This is particularly important for an interpreter, given that interpreting is a cognitively highly demanding activity where interpreters often work at the limit of their cognitive processing capacity. However, it is also particularly important in situations of non-native language use as in bilingual mediation without an interpreter.

4.4. Mode (Method) of Interpreting

When an interpreter is involved in a video link, consecutive interpreting is normally used in bilingual videoconferences in similar settings, i.e. legal and medical settings. This mode allows more easily than simultaneous interpreting for clarifications and interventions that may be necessary to ensure that the interpretation is accurate. Whispered interpreting (*chuchotage*), which is traditionally used in court proceedings to interpret from the court's official language into the language of the minority-language speaker, is possible in videoconferences when the interpreter is co-located with the person who requires the interpretation. However, two points need to be considered here with regard to mediation settings. First, a limited number of tests with whispered interpreting in videoconferences in the AVIDICUS projects suggests that whispered interpreting in a videoconference setting has its own dynamics. For example, the sound of whispering or speaking with a low voice is amplified when it is fed back through the microphone to the other side. Participants feel that this is disruptive. The alternative is to mute the microphone at the site where the whispered interpretation is delivered, but the silence that is then perceived at the other sides can be unnatural and lead to confusion. Second, the linguistic asymmetry of many mediation situations may make whispered interpreting less practicable. As was established above, mediation settings will normally require multi-point videoconferences. As soon as participants in more than one location need an interpretation of what is being said, whispered interpreting is not possible.

In the long run, it is possible that technical solutions for simultaneous interpreting of dialogue situations like those in mediation will become available, but such solutions are likely to be technically complex due to the required additional sound channels, i.e. they are likely to require a purpose-built videoconferencing system. Equally

important, the use of simultaneous interpreting would raise new questions regarding the viability of the simultaneous mode in the semi-formal dialogic communication that is characteristic of mediation. In an initial, experimental exploration of multi-point videoconferences with simultaneous interpreting, Braun (2004, 2007) found that the interpretation is often delivered as a mix of simultaneous and consecutive interpreting, due to the interpreter's time lag, and that this can lead to confusion over who is speaking. In a setting where some participants may understand more than one of the languages used, there would be the added problem that those who understand what is being said are tempted to reply without waiting until the interpreter has rendered the previous utterance, which is likely to be disruptive.

4.5. Seating Arrangements and Spatial Organisation

The considerations in section 2.2 made it clear that videoconferencing leads to a fragmentation of the communicative space. The spatial organisation of participants therefore has two dimensions, i.e. the interlocutors' geographical distribution, which was discussed in section 4.1 above, and the seating arrangements that the interlocutors make at each participating site. The seating arrangements at each site are also closely linked to the importance of non-verbal embodied clues and the constraints that videoconference communication imposes on their transmission, as outlined in section 2.2.

To mitigate these constraints, it will be useful if seating arrangements in relation to the camera and the screen allow participants to have a clear frontal or near-frontal view of each other. In videoconferences with more than one participant per site, participants often simply sit next to each other focussing on the screen. However, this makes interaction between participants at the same site difficult. At the same time, the seating arrangements should not create a situation in which the interlocutors have to turn sharply away from each other in order to look into the camera or at the screen. A slightly angled or half-circle seating position is advisable.

Where it is the case that participants with different roles are co-located (e.g. the mediator and a party, or the mediator and an interpreter), their seating arrangement should not give the impression that these participants speak 'with one voice'. A clear physical distance is required here. To facilitate the perception of equality (see section 4.1), participants at the different sites should also have a similar distance to the camera to ensure they appear in a similar size on the screen.

4.6. Communicative Dynamics and Communication Management

As was pointed out earlier, geographical distance as the overarching condition of videoconferences seems to affect all aspects of communication, including the dynamics of the communication and its management. The overall management of the communication in mediation is closely linked to the stages of mediation (see section 1 above). Questions arise with regard to preparation and briefing, but also over the opening procedure in a videoconference, introductions, the question of how to manage breakout sessions and other aspects. What is required here is a set of guidelines and mutual acceptance of these to ensure relevant activities and moves in the VC, e.g. the mediator's moves are fully understood by the parties.

In terms of communicative dynamics, one important dimension of this is the actual co-ordination (or synchronisation) of the talk, e.g. managing overlap, minimising competing talk and interruptions that are perceived as disruptive. As outlined earlier, the distance between the parties makes this more difficult. Moreover, in mediation settings, the emotional nature of the communication can contribute to further difficulties with overlapping speech.

In addition, transmission delays, however slight, let participants' reactions to each other appear hesitant. Research into the specifics of turn-taking has shown that hesitant response behaviour is normally interpreted as an inability to produce an appropriate reply or as disagreement (Pomerantz 1984). The transmission delay in videoconferences can therefore lead to uncertainty and produce the wrong signal. At the same time, attempts to resolve 'deadlock' situations created by long pauses frequently result in overlapping speech, e.g. when an interlocutor starts to restate his/her utterance just as a response from the remote site arrives (see also Braun, 2007). This means that the transmission delay makes it more difficult for participants to intervene without too much disruption. This problem is exacerbated in interpreter-mediated communication. When interlocutors speak fast and/or are agitated, or when they are not used to working with, and pausing for, an interpreter, the transmission delay in videoconferences adds to the problems that interpreters experience with intervening in videoconferences.

Furthermore, Carroll (2011) highlights the sensitivity of the participation framework in mediation. Based on findings from interpreting in psychotherapy settings she argues that the interpreter's style and personality play a crucial role in sensitive communication settings such as psychotherapy and mediation. The impact of technological mediation on this is still little understood, but bearing in mind that videoconference communication has generally been shown to entail a lower sensitivity of the participants towards each other's communicative cues (see section 2.2), there are likely to be implications.

4.7. Conclusions

This chapter has outlined some of the specifics and challenges of videoconference communication with a view to its use in settings of bilingual mediation. The implications arising from this discussion can be divided into different areas and can be summarised as follows:

Choice of videoconferencing tools:

The selection of a videoconferencing tool and the required equipment (screen, microphone, speakers) as well as sufficient bandwidth are, of course, an important prerequisite for successful videoconferencing in any setting. As was pointed out in this chapter, the highest possible sound quality is advisable to minimise communication problems. However, mediation settings are very likely to involve the use of cloud-based videoconferencing tools from private homes, meaning that there is no guarantee for high quality, even more so when it involves a cross-border connection. Choice of equipment is therefore by far not the only factor to be considered in relation to videoconferencing in the mediation context.

One important aspect is the development of communication procedures, e.g. for the opening phase, where ground rules need to be set, explanations given and procedures agreed. This phase will need to include guidance on the use of videoconference as a tool during the mediation process, ranging from the practicalities of turn management to signals for indicating discomfort with the videoconference session or guidance for the event of a technical breakdown. It is also possible that the other stages of mediation and/or the moves within these stages (see section 1) need to be adjusted to suit the specifics of videoconference-supported mediation.

A crucial prerequisite in this regard is awareness of the specifics and ensuing difficulties of videoconference communication on the part of the mediator and interpreter, as is the development of adapted communication strategies to overcome them. Research into videoconference communication since the 1990s has shown that adaptation can be a complex process. The subtle differences in the distribution of communication strategies, especially problem-resolution strategies, between face-to-face and videoconference-based communication that have been identified in research and outlined in section 2 suggest that the latter is still more challenging for most people than the former. This is particularly apparent in videoconference participants' use of inefficient set-up (camera positioning, lighting etc.) and inefficient strategies to resolve communication problems, which is currently compounded by the fact that videoconferencing is still fairly new for many people, especially multi-point videoconferencing. At the same time, successful examples of

strategy deployment and adaptive behaviour have been identified, suggesting that training can lead to improvement (Braun, 2007, Braun *et al.* 2103a).

Training and familiarisation is required and would be possible to arrange for mediators and interpreters. An effective type of training can be joint training sessions involving mediators and professional interpreters. Although there are clearly different issues to be tackled for each group, ultimately they should come together in training, as indeed they will in practice. This is corroborated by the outcomes of various training sessions (for each group and joint sessions) held in the AVIDICUS project for legal practitioners and interpreters (Braun *et al.* 2013b). The experience with videoconference training in the AVIDICUS projects also suggests that such training may be most efficient when it focuses on a detailed analysis of problematic instances and reflection on how these can be resolved, i.e. what strategies are available to repair or, better, pre-empt communication problems in video links.

However, it would be more difficult to train the parties. This highlights once again the importance of developing communication procedures for videoconference-based mediation, and of explaining and agreeing such procedures at the beginning of a mediation session. There is, however, a risk that the parties do not manage to abide by set ground rules. When as much is at stake for participants as in mediation settings, it is bound to be difficult for the disputing parties to focus on the matter of their dispute as well as remembering communication rules for the videoconference. Mediators (and interpreters) need to bear this in mind and need to be prepared to manage non-observance of the ground rules of videoconference communication.

Another important aspect in this regard is mutual trust. The findings from several projects focusing on legal communication, legal interpreting and videoconferencing in the legal context (Building Mutual Trust, Building Mutual Trust 2, the AVIDICUS projects) make it clear that training and familiarisation cannot resolve all problems. Remaining problems can only be overcome in an atmosphere of openness and mutual trust between the parties, which, in turn, is only possible when the potential challenges of the videoconference setting are clear to all. For interpreters, it will be important that they can be confident that their requests for clarification, for example, are not attributed to a lack of competence.

This leads to another important point as far as mediation involving interpreters is concerned, i.e. *interpreting quality*. The quality of interpreting also depends on the quality of the interpreter. Given the current situation in Europe, where there is still insufficient provision of training and education in legal interpreting and where current trends of outsourcing as a way of cost-saving have led to a decline

in the interpreters' overall working conditions, there is a high risk of a shortage of qualified interpreters who are able to cope with the challenges of videoconference communication and those of the mediation setting.

Similarly, the introduction of video-mediated interpreting also raises important issues for the working environment of mediators (Moore, 2014) and interpreters (Braun and Taylor, 2012). Given the cognitively demanding nature of both mediation and interpreting, the strain emanating from longer videoconference sessions should not be under-estimated. Practice will have to show how potential problems with fatigue (lack of concentration) can be addressed.

Although this chapter has raised a number of questions in relation to the use of videoconferencing in bilingual mediation, the potential benefits of appropriate solutions for videoconferencing in (bilingual) mediation settings, especially in cross-border contexts, should not be dismissed. The 'de-materialisation' of mediation through videoconferencing may help to promote mediation as a form of alternative dispute resolution. The main argument here is that, before videoconference-supported mediation is used on a larger scale, it would be advisable to gain a more comprehensive understanding of the problematic aspects outlined in this chapter. Further research in this area needs to capitalise on what is known about videoconference communication but it will need to focus more specifically on multi-point videoconference settings, and combine this with research into the specifics of mediation as a communication genre. The stages of the mediation process will be a useful starting point for such research, as the mapping of potential difficulties of videoconference communication and relevant communication strategies onto the various stages will highlight where problems may be most critical and where adaptation is most important.

With regard to involving interpreters in videoconference-based mediation, it will also be useful to investigate the different modes of interpreting further and to explore technical solutions that can accommodate the most effective way of delivering interpreting services in this setting.

The range of questions arising in relation to the appropriateness of the videoconferencing in bilingual mediation (with or without interpreter) is indicative of the more comprehensive question of whether videoconference-supported mediation will work best when it replicates as closely as possible the traditional face-to-face setting or whether the purpose of mediation is better served when the development of solutions starts from the main requirements of mediation in all its stages and when, as suggested by Poblet *et al.* (2010) videoconference-supported mediation is indeed regarded as a form of dispute resolution in its own right.

5. References

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6. Endnotes

1 I would like to thank Mary Carroll, Managing Director of MiKK e.V., for fruitful discussions during the preparation of this chapter.

2 Directive on mediation in civil and commercial matters [2008] OJ 2 136/3.

3 This is often referred to as 'video-mediated communication', but here, to avoid terminological confusion around the term 'mediation', the term 'videoconference communication' will be used.

4 <http://dera.ioe.ac.uk/9768/1/Transforming%20Youth%20Justice.pdf>

5 Exceptions include hearings of vulnerable witnesses and situations in which an interpreter wishes to remain anonymous.

Self-Assessment and Continuing Professional Development (CPD)

Hilary Maxwell-Hyslop

1. Chapter Outline

This chapter, together with the activities on the website, aims to help interpreters who want to prepare for assignments in the civil justice domain but whose access to any taught courses or workshops is either limited or non-existent. For the purposes of this project, we have assumed that interpreters wishing to work in civil justice are already qualified to operate in a criminal justice setting. The website materials themselves are self-study, designed to be worked on alone as part of the professional interpreter's CPD. The chapter also provides an introduction to understanding how effective self-assessment can aid productive engagement with the activities.

The activities provide a systematic way of preparing for a new interpreting domain through:

- identifying the additional competencies needed
- assessing to what extent these have been mastered
- creating a plan of how to acquire any additional competencies needed
- recording, reviewing and reflecting on the chosen study programme.

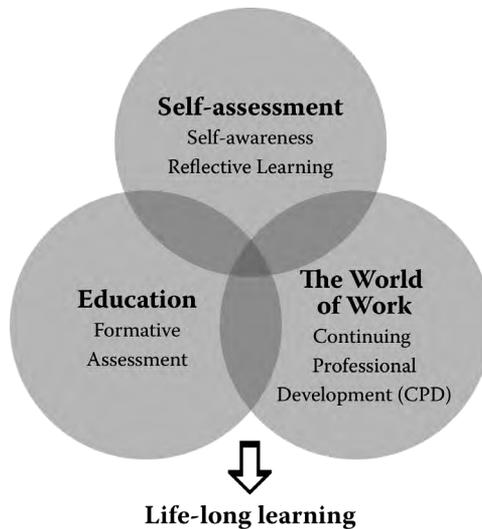
These materials focus on mediation, which is of growing importance in civil disputing arrangements throughout the European area. However, whereas there has been a considerable amount of attention given to the role of the interpreter in a courtroom session, less attention has been paid to the role of the interpreter in mediation. Interpreting in this area of civil justice not only draws on the professional legal interpreter's existing competencies but also requires mastery of additional context-specific knowledge and skills. It is essential, therefore, that an interpreter understands the mediation process.

2. What is Self-Assessment?

Self-assessment is part of human behaviour. For example, you write an email complaining about a faulty computer. You read it critically and decide that the tone you adopted is unnecessarily aggressive. You tone it down. In this process you have

judged your draft against a gut feeling of what an appropriate letter of complaint should look like and adjusted it accordingly. So, you not only saw that it was wrong, you had to work out why it was wrong in order to decide how to correct it.

Self-assessment can be defined as ‘the assessment or evaluation of oneself or one’s actions, attitudes, or performance’.¹



Self-assessment (or self-evaluation) in education has received considerable attention and is seen as part of what has been termed Self-Regulated Learning, that is, the whole process of taking responsibility for one’s own learning. This is done in stages, from the first step of self-observation and self-recording of target behaviour through to goal setting, self-assessment, self-assessment intervention and finally self-instruction intervention, where the learner is able to complete a set task autonomously (Monacelli 2009). It is recognised that this degree of learner involvement in the assessment of his or her own work needs instruction, and some educational systems prepare students for this, using activities such as peer-assessment and students grading their own work. This is sometimes then followed by students actually contributing to their formative and, on occasion, summative assessment. Taras (2010) has identified four different models of self-assessment in use in Higher Education, categorising them as stronger or weaker models, depending on the degree of autonomy given to the student. Thus a weaker model would have students self-marking using a model answer with criteria to compare to their own work – a valuable introduction to the assessment process, whereas the strongest model, the Learning Contract Design (LCD) model, is one of the very few

examples where the responsibility for graded assessment is handed to the students, and contributes to their final grades. Somewhere between the two, the standard model has students providing feedback and grading their own work before handing it back to the tutor. The tutor's final assessment with feedback is then made on both the piece of work and the accompanying student self-assessment. Taras' own model moves towards an integrated student-tutor approach, where the final grade is the assimilation of peer, student and tutor feedback.

All these models rely on transparency and clear understanding of the process to be effective. The tutor has a dual role in self-assessment: to introduce the notion of self-assessment, to provide feedback on the students' engagement with it, and then to be part of the implementation of the model adopted. Trust is very important, with clear parameters set for any self-assessment activity, together with user-friendly assessment tools. No one is willing to give an accurate assessment of their own work unless they know exactly how this information will be used.

Questions about the accuracy of self-assessment have been raised, with research showing that learners tend both to over-assess and under-assess the quality of their work, depending on different factors. Some learners might overestimate their skills or knowledge of a particular area; others will find it easy to say what they find difficult but are less able to identify or articulate what they feel they are able to do. This, according to Black and Wiliam (2001), does not present a problem as such. What they do see as a challenge, however, is that learners can only assess themselves when they are sufficiently clear about the targets for their learning.

Recognising what has worked, and why, enables you to try to repeat it, just as recognising what has not worked enables you try to put it right and/or learn for the future. Both are equally important. Effective self-assessment, therefore, relies on good reflective skills. In 'The Reflective Practitioner', Schön (1983) discusses the importance of the 'reflective practitioner' and how reflective practice can impact on the relationship between a professional, his clients and society at large. Schön describes the idea of the professional sharing his uncertainties in a reflective contract with the client:

He [the professional] gives up the rewards of unquestioned authority, the freedom to practice without challenge to his competence, the comfort of relative invulnerability, the gratifications of deference. The new satisfactions open to him are largely those of discovery – about the meaning of his advice to clients, about his knowledge-in-practice, and about himself. When a practitioner becomes a researcher into his own practice, he engages in a continuing process of self-education (1983: 299).

Schön acknowledges that there are serious constraints on the applicability of this approach, but his exploration of the nature and role of the professional is still discussed today.

3. Self-Assessment, Continuing Professional Development (CPD) and Life-long Learning

Whether or not you were introduced to self-assessment during your education, the skill is an important tool for engagement in effective life-long learning. Boud (1995:13) argues that

it is important for all learners to develop the ability to be realistic judges of their own performance and to effectively monitor their own learning. Learning can only be effectively undertaken when the learner monitors what is known, what remains to be known and what is needed to bridge the gap between the two.

In order for professionals to be able to work on their own effectively, they need to have good self-assessment skills so they can identify exactly where they need to focus their efforts. The skill of self-assessment is also an important feature of professional expertise. In 'The Nature of Expertise', Chi et al (1988) reported that experts in different fields all shared strong self-monitoring skills:

Experts seem to be more aware than novices of when they make errors, why they fail to comprehend, and when they need to check their solutions.

It is now recognised that initial qualifications indicate the minimum level of competence a professional needs to operate safely in his or her field; they are the beginning of professional development, not the end. After initial qualifications have been achieved, however, CPD is the mechanism that has developed to formalise the necessary updating of knowledge and skills by professionals throughout their working career. One frequently used definition of CPD has been adopted by the Royal College of Veterinary Surgeons:

[CPD is] the systematic maintenance, improvement and broadening of knowledge and skills and the development of personal qualities necessary for the execution of professional and technical duties throughout the member's working life (RCVS, 2016).

Life-long learning and CPD are interrelated, but Lindsay (2014) suggests an extra dimension in life-long learning that is not present in CPD alone:

Whilst CPD is concerned with maintaining and developing competence, the further aspect within lifelong learning described here emphasises **the need for individuals to engage so that they continually learn and evolve in response to the changing environment** (2014:34-35 emphasis added).

Formalised CPD is a relatively recent phenomenon. It was previously assumed that professionals would do whatever was necessary to keep their professional skills up to date and they were the best judges of what that was (Friedman et al, 2009:13). Now it is expected that professionals will undertake CPD on a more formal basis, whether via membership organisations which might offer guidance and relevant activities, and/or regulatory bodies, who might impose sanctions in the case of failure to undertake a CPD programme, perhaps by withholding or withdrawing registration.

Some CPD programmes focus on ‘inputs’, the hours a practitioner spends over a year on CPD activities. Some focus more on ‘outputs’, using what has been called a ‘reflect-act-impact cycle’ (Lindsay, 2014:7). You reflect on your learning needs, act in response to those needs, and assess how effective your learning activities have been in meeting these needs. In the latter model, it is not the hours that you spend that is significant but the completion of tasks, activities or areas of study you have set yourself. In the European Union, some CPD programmes for interpreters and translators are compulsory (e.g. in Poland or the Netherlands), while others are voluntary. Programmes might include skills updates, e.g. note taking techniques, or knowledge-based output, or discussion of the ethical issues which inform a Code of Conduct.

All CPD programmes by their very nature place a great deal of emphasis on professionals taking responsibility for their own development. Thus self-assessment is an integral part of CPD – in terms of individual professionals setting their own objectives, reflecting on practice, assessing how much a particular activity has met their learning needs or identifying what they still need to do. To do this productively, there needs to be an awareness of the CPD choices available and some means of monitoring their effectiveness. Discussing evaluation in education, Eraut (1984:37) points out that we cannot answer the question “Are we doing what is best?” if we are not aware of the options. It is also important to understand the process as well as the outcome. Eisner (1976 and 1985) discusses the role of the educational ‘connoisseur’, a term often associated with the arts or food and drink – a person who is informed about and appreciates the intrinsic qualities of their specialism and who is able to discriminate the subtleties among, for example, different schools of painting or vintages of wine. He states that educational connoisseurship can inform educational criticism. This is not criticism in a negative sense. Eisner likens it to criticism of literature, film and the arts, commenting

Simply knowing the final score of the game after it is over is not very useful. What we need is a vivid rendering of how that game is being played (Eisner, 1985:131).

With the changing nature of work and a longer working life for some, either by choice or necessity, CPD is important to enable a professional's career to remain as 'resilient' as possible (Lindsay 2014:93). It must, however, be evident that you have undertaken CPD. Record keeping of CPD activity is important, for several reasons. It does not just satisfy the requirements of an employer or membership organisation, it also demonstrates that you have taken responsibility for the maintenance of existing professional skills and the acquisition of new ones.

Whether a particular activity counts as valid CPD will vary between organisations. Lindsay (*ibid*:151) mentions eleven activities when reviewing CPD in the professions, though there are more:

- accessing the Internet for information
- attending courses, conferences and seminars
- being shown by others how to do certain activities and tasks
- doing your job on a regular basis
- interacting with experts
- participating in workshops with peers
- reading magazines, newspapers and journals
- reading technical material
- reflecting on your performance
- studying online learning modules
- watching and listening to others while they carry out their work

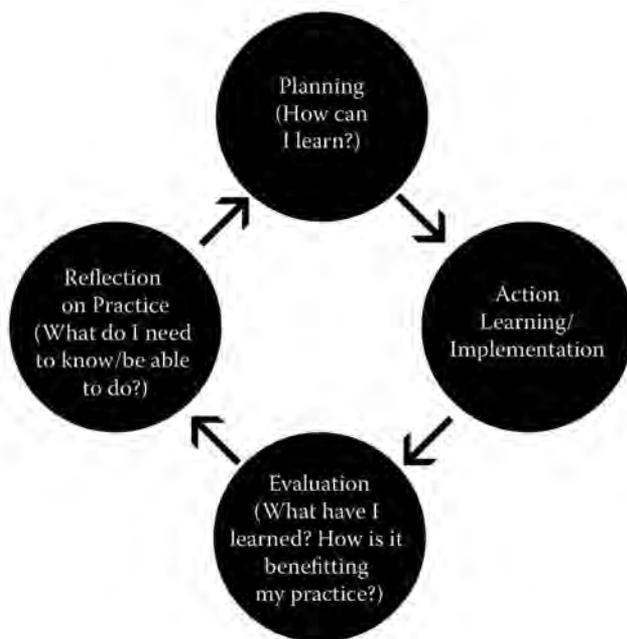
You will note that not all of these activities require you to be a member of an organisation or professional body. However, membership of an active professional interpreting organisation can also be hugely beneficial in terms of career development. Not only will it enable you to keep up to date with issues of professional interest, including information and advice on training opportunities, but it also enables you to make contact with other interpreters, providing valuable opportunities for networking and discussion.

4. How to Use These Materials for Self-Assessment and CPD

As mentioned earlier, CPD in the professions is usually monitored in some way – even if the monitoring is only done on a sampling basis where, for example, a professional body may ask for proof of CPD activity from a certain number of members each year. On the other hand, you may be a member of a national organisation that organises CPD, or have access to an informal network of friends and colleagues with whom you can discuss the progress you are making with your self-study. Interpreters, however, are often isolated in their work, with little access to the professional organisations and formal CPD that characterise other professions, such as Medicine or the Law. Therefore, when designing these materials, we have assumed that you do not have access to external monitoring and feedback, so these materials can be used by interpreters working entirely on their own (although you can also use them in collaboration with others).

Working alone and setting your own goals and deadlines, however, does present its own challenges. Although you are not presenting your work for assessment by another person (a teacher, an exam marker or external assessor), it is still important not only to record what you have watched, read or researched, but also to note down how useful it was, what you have learned and what questions still remain. These written records are sometimes known as learning diaries or journals. A learning diary or journal is the central, physical record of your self-assessment and CPD and you should consider keeping one as you work through these materials.

Self-assessment and taking responsibility for designing and recording your own CPD does have benefits, however, that being given a ‘ready-made’ CPD programme may not. Working on your own will lead you towards a more output-focused approach and develop your sense of ownership of your work and your career development. It is a good idea to review your programme of CPD at intervals to try and evaluate how it is helping your professional development in different ways, for example, dealing with the unexpected. It is also the case that the benefits you gain from an effective CPD programme impact not only on yourself but on the end-users of your services.



Example of a CPD cycle (RPSGB)

Friedman (2012:15) uses the diagram above (adapted from the Royal Pharmaceutical Society of Great Britain (RPSGB) to express CPD as a cycle. It is a continuing process, with each step informing the next, but the evaluation stage is key. It will inform your reflection on practice, which in turn guides your planning.

In the exercises we have put on the website, we start with the Reflection on Practice step, which will help you create your plan.

5. Learning Styles

One thing you may not have thought of since your formal education is the matter of learning styles. There is a great deal of literature on this subject. You may not want to go into it in detail, but understanding how best you learn can help you organise your study more effectively. If you are aware of your own learning style, you can identify your own preferences.

Walsall Children and Young People's Partnership (no date:11) provides a useful table showing different learning styles:

LEARNING STYLES

<p>Day to day Learning</p> <ul style="list-style-type: none"> • connect new information/skills with personal experience and real-life problems/situations • prefer co-operative methods of learning e.g. seminar groups, brainstorming, learning through project work etc. <p>Hands-on Learning</p> <ul style="list-style-type: none"> • be interested in how things work and want to 'get in and try it' • prefer experiential methods of learning e.g. through hands-on tasks, on the job learning etc. 	<p>Listening Learning</p> <ul style="list-style-type: none"> • want to acquire knowledge to deepen understanding of concepts/processes • prefer to learn from what 'the experts' have to say e.g. lectures, conferences, further qualifications etc. <p>Teach Yourself Learning</p> <ul style="list-style-type: none"> • rely on self-directed discovery and want to teach yourself • prefer independent study and training which involves simulations, role-play etc.
<p>NB: Many people will find that they have a mixed learning style which involves two or more of the above. This situation provides a wide variety of possible methods for effective CPD.</p>	

Pritchard (2008, cited in Tipton and Furmanek 2016:26) points out that learning preferences can change over time. So awareness is important, as the more you understand how best you absorb and retain new information, the more effective your self-study will be. It will also enable you to assess your own progress knowing that you are doing everything possible to maximise your learning potential.

According to Boud (1995):

Self-assessment thus encompasses a larger territory than might at first be apparent. It is as much concerned with planning learning and the questioning of existing learner practices as it is with recording achievements or checking understanding.(1995: 20)

6. Website Materials

The interactive materials on the website are designed to introduce you to interpreting in mediation and to show how it differs from other types of legal interpreting. There is also a focus on self-assessment to help you work on your own as effectively and productively as possible. These materials can be found on the Understanding Justice website at: <http://www.understandingproject.com/assessment/>.

The materials include:

- exercises to help improve your reflection on your own performance as an interpreter
- video clips to highlight different learning points relevant to interpreting in mediation with comments from an interpreter
- a list of the competencies (knowledge and skills) required for interpreting in mediation
- an exercise for self-assessment of your mastery of these competencies
- video clips to highlight different competencies in practice, including comments from interpreters and mediators
- templates for the construction of an Action Plan, record keeping and other CPD activities.

All these exercises are designed for self-study and can form part of your on-going CPD programme. However, if you are able to work with a colleague, the exercises can be used to generate useful discussion.

7. Conclusion

Interpreting in mediation is a challenging activity that requires additional competencies to those already mastered by legal interpreters. To be successful in this activity, it is important to understand as much as possible about the process of mediation in general, as well as to have the particular knowledge and skills required. Preparation for this work can be undertaken by individual interpreters, as part of their CPD. However, to get the maximum benefit from this CPD, it is important to study systematically, following the cycle of Planning-Action -Evaluation-Reflection, and recording progress as you learn.

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9. Endnotes

1 <http://www.oxforddictionaries.com/definition/english/self-assessment>

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Conclusion

Brooke Townsley

1. Interpreting in Civil Justice

The Understanding Justice project was motivated by the perception that, despite civil cases outnumbering criminal cases throughout the European area the matter of language difference in civil law has not received the same attention as that given to language in criminal law. The right to a fair trial with equality of arms between parties is, however, a fundamental component of fair civil proceedings in any judicial system and this equality of arms can only be assured for parties who do not speak the language of the court by the provision of legal interpretation and written translation of documents where required. It is clear from the analysis presented in this volume by Vanden Bosch and van der Vlis that there is a significant body of legislation underpinning the provision of similar rights to language assistance for parties in civil proceedings. Attention must therefore be given to ensuring the provision of legal interpretation and translation in civil proceedings on the same basis as in criminal proceedings.

As the analysis of interpreting competencies for civil justice in chapter two indicates, the competencies for an interpreter working in civil proceedings are, at core, the same as those required in criminal proceedings. It follows, therefore, that civil court administrators tasked with the provision of interpreting and translation can benefit from the same arrangements put in place for criminal justice. I refer in particular to the requirements of the 2010 Directive on the right to interpretation and translation in criminal proceedings¹, including the establishment by EU Member States of national registers of suitably qualified interpreters and translators for use by domestic judicial systems. These registers can provide the experienced and qualified interpreters and translators civil justice requires to make equality of arms and fair proceedings a reality for those who do not speak the language of the court. By harnessing the body of work completed on interpreting and translation in criminal justice in this way, a rapid impact can be achieved on the provision of the same in civil justice.

2. Mediation

Traditional court proceedings as a method for resolving civil disputes are not the only route to a resolution available for disputing parties, however. A glance at

attempts to promote the use of mediation in the EU as an alternative to court-based judicial proceedings (see the Green Paper on alternative dispute resolution in civil and commercial law²; the 2008 Directive on certain aspects of mediation in civil and commercial matters³; the 2014 study 'Rebooting the Mediation Directive'⁴) indicates the growing importance accorded to mediation as a means of dispute resolution. Mediated solutions to civil disputes offer a number of benefits for the parties and for the judicial system. A successful mediation leads to a negotiated solution agreed by the parties, rather than one imposed by an external adjudicator, which can represent a more positive outcome for all concerned, with ownership of the resolution on both sides. Every successful mediation leading to a negotiated resolution of a dispute also means one less case to go through the civil courts, thus relieving pressure on already over-crowded court lists and reducing delay. Finally, successful mediation can reduce costs both for individuals and for court systems.

3. Language Difference in Mediation

As the growth of movement of goods and people between EU states and into and out of the EU itself increases the incidence of cross border civil proceedings, a similar increase can be expected in cross-border disputes going to mediation. Parties in these mediations cannot, however, be assumed to share a common language with the mediator(s) or each other and the challenge of language difference exists here just as it does in court-based proceedings. The country reports compiled by project members in their respective EU Member States indicate that language difference in mediation is far from rare and that ad hoc arrangements are being used by mediators to confront the difficulties this presents. These range from mediators using their own language skills to mediate across languages, through the use of bilingual and bi-cultural co-mediators, to the use of independent third party interpreters. Awareness of the potential complexities of working across language and of the impact of the method chosen for managing language difference, however, is low, with responses to a survey carried out by the project and interviews with mediators indicating limited insight into either. This presents a barrier to mediators making informed choices regarding methodologies for working across languages, and leads to sub-optimal arrangements. If the benefits of mediation outlined above are to be extended more widely in multi-lingual contexts, a clearer understanding of the role and impact of third-party interpreting in mediation on the part of mediators is required.

4. Bilingual Mediation

Research undertaken by project members among professional mediators and mediation organisations uncovered a reluctance to use third-party interpreters, and

a preference for bilingual mediation based on the mediator's own bilingualism or the use of a bilingual co-mediator (the UK being the exception). A recurrent concern on the part of mediators was a possible loss of control of the carefully calibrated communicative processes in mediation, or of other obstacles to their management of the mediation if an interpreter was used. Overall, the emerging picture was that mediators tended to perceive interpreting as a negative obstacle in mediation, to be avoided if at all possible.

The attraction of bilingual mediation in cases of language difference is clear. Just as a defence lawyer or prosecutor in court carefully measures their use of language, their linguistic behaviour and choice of term or phrase, so a mediator relies on being able to reflect messages, reframe statements, invite responses or deescalate conflict in favour of more constructive interaction, all through the means of language. It is understandable that the prospect of placing this in the hands of an unknown third party, whose renditions into another language, moreover, cannot be monitored, seems unattractive. The use of a bilingual co-mediator who can undertake the role of mediator and interpreter where necessary, appears to allow mediators to retain control of the mediation dynamics so crucial to their practice. In this dual role, a co-mediator will undertake both to respond as a mediator to utterances of a party in a second or 'other' language and also to act as an impartial interpreter of those utterances. As Hertog outlines in chapter two, however, this option is problematic. Examination of the cognitive and linguistic skills demanded of a dual-role mediator/interpreter, the possible impacts on the perceived dynamics of the interaction from the point of view of the parties and the seemingly insoluble clash of professional roles between mediator and interpreter, one bound to progress the mediation process, the other bound to reproduce faithfully whatever is voiced by the speakers irrespective of its impact, all raise questions about the viability of this apparent solution.

The option of a mediator conducting a mediation entirely in a second language may appear to circumvent these difficulties and to be a common-sense solution. Mediators who responded to the project surveys often reported having bi or trilingual skills and being able to mediate using those skills if necessary. These language skills, however, were usually not externally certified or accredited. This raises questions about the actual levels of second and third language competence reported by mediators and the validity of their confidence that language barriers can be overcome on the basis of bilingualism.

5. Interpreters in Mediation

Thus, we are returned to the possibility of using of third-party interpreters in mediation where language difference is an issue. The question arising, therefore,

is whether third-party interpreting in mediation can be made a more reliable and attractive option.

A look at the development over time of interpreting in criminal justice goes some way towards answering this question. The presence of the interpreter in the court room during hearings or in the lawyer's office at client-representative meetings is now common place in judicial activities across Europe, but this was not always the case. As the pressures of migration, an increase in cross-border cases and the resulting incidence of language difference became more acute in the closing decades of the last century and the early decades of the new, the criminal justice system had to learn how to accommodate language difference in its proceedings and how to work with, and through, interpreters. Interpreters, for their part, have had to learn to work within that system in full understanding of judicial functions and systemic requirements. Driven by the demands of legislation and the requirement for fair trial procedures, this process has led to recognition on the part of the legal professions that ad hoc solutions to language difference (untrained bilingual assistants, the use of family members, lawyers or police officers relying on some grasp of a second language) are not a workable solution. It is now accepted that judicial systems need trained interpreters with professional understanding of their role.

The findings of the Understanding Justice project suggest that the mediation profession is in a similar position to the one described above for the criminal justice system some years ago. It is beginning to recognise the impact of language difference but has yet to formulate a common, coherent set of responses. Like their colleagues in criminal justice of some decades ago, professional mediators are unsure how to employ interpreting as an effective tool to help meet the challenges of language difference. It is clear, however, that language difference in mediation is likely to increase in future while finding bilingual mediators across the range of languages mediators are going to encounter is unlikely to be possible. This points towards the inevitability of an increased role for independent third party interpreters in mediation. Using interpreters in mediation can, however, be made as functional and successful a solution to language difference as it has long been in criminal and civil court proceedings. There are no inherent reasons why mediators cannot mediate successfully through an interpreter given sufficient mutual insight into the processes involved.

In what follows I will add some final recommendations to those already made by the authors of the preceding chapters.

6. Recommendations

1. Only use professional interpreters

On the face of it, this may seem an unnecessary point; after all, who would choose to use an amateur in place of a professional, in any field? To choose competent professional interpreters, however, requires recognition by mediators of what competence and professionalism in interpreting consists of.

Some questions that mediators should reflect on when planning work with an interpreter are:

- Do I know what a competent, professional interpreter is?
- What should I expect them to be able to do?
- How can I gauge whether my interpreter is fully competent?

Answers to these questions are offered below:

Competent interpreters will be:

- i. Qualified in interpreting, at undergraduate or post-graduate level (equivalent to). This means they will hold and be able to evidence an accredited qualification in interpreting from a recognised education or training provider.
- ii. Able to use a range of interpreting modes (long and short consecutive interpreting and whispered simultaneous interpreting), depending on the situation. Trained interpreters bring a range of interpreting skills to any interpreting task. Depending on the task, they are able to choose the appropriate mode of interpreting and switch between modes as required.

They will be able to explain these to you and discuss how you want the mediation to progress and the best modes of interpreting to use at each stage.

- iii. Able to reflect in their interpretation both the content and tone of what you or the other language speaker say. Crucially, they will not modify in any way what you say or what any party says to you. They will reflect fully the exact message which is produced by a speaker, irrespective of its tone or content. They will largely interpret using the first person.
- iv. Registered on a professional register of qualified and vetted interpreters

To find and engage interpreters, consult a professional register. The domain with the highest number of established registers of professional

interpreters is the law. You can find information on registers of professional legal interpreters from your domestic judiciary or from the European Legal Interpreters and Translators Association (EULITA) (www.eulita.eu/). Outside of the judicial system, information on interpreting registers and professional associations can be obtained by contacting the European Network of Public Service Interpreters (ENPSIT) (www.enpsit.eu).

2. Decide on the minimum levels of qualification and experience you will accept and check the bona fides of interpreters you propose to work with

Data collected by the project indicated that mediators are often unclear about the professional status and background of the interpreters they worked with. Many reported sourcing interpreters from commercial agencies, who were assumed to have taken responsibility for ensuring the suitability of the interpreter provided. Mediators should always check the background and qualifications of an interpreter, whether engaged directly or via an agency.

If engaging interpreters via an agency, check with the agency the qualifications and background of the interpreter they propose to send and ask for evidence. There are also professional organisations of interpreters in most countries who can supply contact details for qualified professionals (see ii above) free of charge.

Other mediators report using interpreters from local court lists. This can provide some level of assurance of the skills of the interpreter, as a local or national judicial system may have put in place measures to ensure the quality of interpreters. However, as Hertog identifies in this volume, there are further specialised competencies required of legal interpreters to work successfully in mediation, which work exclusively in criminal or civil justice court rooms will not provide. The selection of interpreters for mediation from court lists, therefore, is not enough in itself to ensure effective working through an interpreter, although it is clearly a first step. Mediators must still make careful preparations for working with an interpreter chosen from a court list, based on insight into the dynamics of the interpreting process.

3. Consider joint CPD training for mediators and interpreters

A small investment of time and limited funds in inter-professional training can have a disproportionately large positive impact on practice relative to its size. The key feature of such training, however, has to be that both mediators and interpreters participate. Both sides need to benefit from hands-on experience of how the other works and a chance to establish common working practices.

A workshop day drawing together professional interpreters and mediators to examine mutual professional requirements and how to work together could also be the foundation for establishing a network of mediation interpreting specialists.

4. Evaluate carefully the use of dual-role bilingual mediators

What may appear to be an elegant and cost effective solution from the point of view of mediation raises significant questions about its impact from the point of view of language difference. Although it has a clear part to play in the management of language difference, it should only be deployed in full awareness of its possible unintended consequences. The same care should be taken when planning to mediate entirely in a second language. Mediators' language skills should be measured and accredited to the same degree as their mediation skills. If competence in a second or third language is not objectively measured at approximately C1/C2 on the Common European Framework of Reference for Languages (CEFR) then it is unlikely to be sufficient for use in mediation.

Mediators and mediation organisations who bear these and other recommendations made in this report in mind should experience a rapid, qualitative shift for the better in their experience of working with interpreters, thus allowing third-party interpreting to become a preferred choice for mediators working across language and culture.

7. Endnotes

1 DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1 art.5.1, 5.2

2 Green Paper on alternative dispute resolution in civil and commercial law [2002] Com (2002) 196

3 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3

4 De Palo et al (2014) *Rebooting the Mediation Directive*. Brussels: European Parliament

5 This is, I believe, a function of the nature of language work. The advocate or doctor who invests years of study and sums of money to acquire a body of knowledge and professional skills may unconsciously assume that an interpreter, who is using at least one language that s/he has acquired from birth, cannot therefore be performing a particularly complex or demanding task. As a result, they did not, at first, recognise the need for certified competence, nor the range of tools that such a competent interpreter can put at their disposal. It was only through a process of mutual exposure to each other's practices over time, and the growth of a recognisable profession of legal interpreting, that mutual insight into competencies has developed.

