

Calling in the specialists

In the second of a series of articles on negotiating and drafting contracts on an international level, **Sergey Frank** focuses on the involvement of specialists

Negotiations are difficult. They often require special know-how to help resolve certain issues.

Examples are complicated tax issues in any kind of M&A activities requiring tax experts and chartered accountants, or the obtaining of licences and permits from international or state authorities.

The European Commission antitrust authorities in Brussels, for example, approve mergers require the advice and help of attorneys specialising in anti-trust matters. Many arrangements for cooperation in the technical field, such as the exchange or licensing of technical know-how and patents, necessitate the advice of patent lawyers. The list of specialists may become very long.

One question is essential: how should one put the know-how of such specialists to use within negotiations, taking into account that this involvement will most likely be rather expensive? It seems to be rather advisable primarily to define their actual role in the negotiating process prior to their involvement.

Problems that should be considered include:

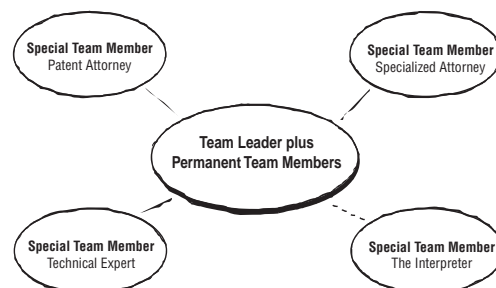
Who is a specialist?

Usually, specialists within the international negotiating process are not involved in the total communication development to the extent that the permanent team members are. They are

either involved in specific issues, such as the patent or tax attorney. If they are involved on a permanent basis, it is not as negotiating team members, but in auxiliary roles helping to advance the flow of the communication process, for example in the role of an interpreter. Other specialists may be involved because of their professional expertise as patent attorneys, anti-trust lawyers or tax experts, or because of their neutrality, for example in the case of an arbitrator or ombudsman, or objectivity, ie if both parties agree on a specialist to resolve certain questions in discussion.

The involvement of a specialist should take the following considerations into account:

The specialist involved has of course to be an expert in his field. But this is not enough; he should also have profound business knowledge and experience, because otherwise you will spend your time with highly sophisticated specialists talking about academic issues which, for one reason or the other, may be not relevant for the discussed project. Moreover, and due to cost reasons, specialists should be involved in a restricted way and not take part in the whole negotiating process. This does not apply for the interpreter about whom we are going to talk later in detail. Another consideration may be to separate the negotiations if the specific issue which requires the involvement of specialists can be clearly separated from the remaining issues. This separation of the



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negotiating process should be decided and implemented by the leader of the negotiating team. His other obligations include, inter-alia, the selection of his team members, the selection of the interpreter, if any, or of any specialists involved in the negotiating process.

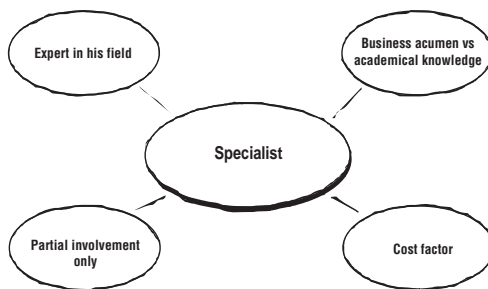
Interpreters in international negotiations

Most international negotiations deal with very complex matters. They become even more difficult because people from different countries and different cultures come together. Quite often, they have to involve one or more interpreters because both parties do not have a language in common to conduct the negotiation.

No tactic or strategy exists which guarantees the best possible result in each individual case. However, there are some ideas and behaviour patterns which can be used to get better results from negotiations faster and more effectively. Apart from cultural differences, which result in different negotiation patterns, one has especially to consider the problem of communication.

The language used in negotiations

In most international negotiations, both sides usually speak English, a language which has developed along different historical and cultural lines in Britain and the United States. The result is that certain terms have different



meanings in the two countries. For example, “net sales” in the US is defined as “turnover” in the UK. The entire list of such differences is long.

This difference in terminology becomes an even greater problem if one or both parties' mother tongue is no English. In such cases misunderstandings may arise, sometimes leading to almost insurmountable obstacles. For example, there is no way to translate a negative English answer such as, "We are not giving any guarantees!" into Japanese. The latter derives from a culture where a straightforward negation, as used in all Western languages, is not only unknown but would be regarded as a sign of impoliteness and result in loss of face: Instead of a direct negation the Japanese have approximately 16 ways to avoid a direct "no".

Definitions

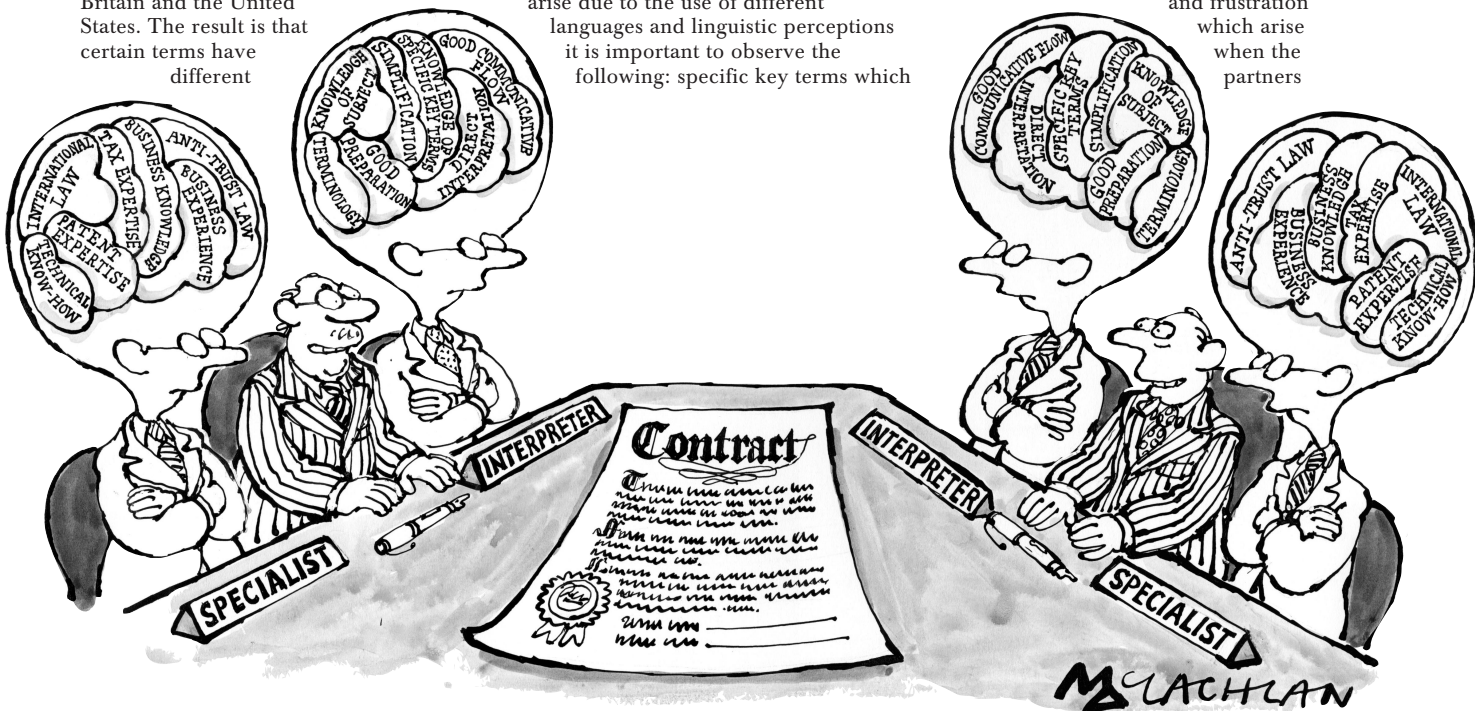
To solve the problem effectively or at least reduce the misunderstandings which arise due to the use of different languages and linguistic perceptions it is important to observe the following: specific key terms which

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are likely to play an important part in the negotiation including, but not limited to profit, subsidiary or affiliated company, and licence fee should be exactly defined in advance and presented to the interpreter as well as to the other party.

The term "profit" may mean in this context pre-tax profit but also after-tax profit. In addition, the tax systems of the two countries involved might not be identical. With the help of a definition list of this kind, problems that are connected with the defined terms become clear and concrete. Possible misunderstandings, especially for the interpreter, could be limited and mutual comprehension is made easier. Both parties know in that case what they are talking about and are able to convey their messages correctly to the interpreter.

Furthermore, the list can be used again and again during the negotiation to commit the partner to definitions already specified and agreed. Do not forget that each hour invested in mutually defining key terms may save days of discussions and frustration which arise when the partners



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start to disagree about misleading key terms. They usually do not disagree over key terms as such but over minor details which then eventually play a major role. Therefore it is worth being as detailed as possible in the definition of key terms and the basic concept of the transaction.

Practical recommendations regarding the interpreter

Who is the interpreter?

The classical role of the interpreter is translating from one language into another, preferably with specific know-how in technical, legal or commercial terms. Here, the interpreter is just a tool in the international communication process. He does not possess any other means to influence the negotiation process beyond his translating activities. As an exception and sometimes to be preferred is the role of the local agent who, as a liaison officer, prepares the whole negotiation, is involved in the negotiation process in part or in total as a general team member and simultaneously does the translation. The last possibility is a bilingual member of the negotiating team who takes active part in the negotiation but is also involved in the translation work.

However an interpreter is used it is very important to define clearly his role and involvement at the beginning. This makes clear to the other side whether the interpreter is a pure interpreter or a member of the negotiating team.

The quality of the communication depends on the number of interpreters involved. In a nutshell, one basic rule is "less is better". One should, wherever possible, communicate without them. Frequently, however, this will be impossible. Then, one has to reduce the complexity of the subject matter and enhance the flow of communication.

There are certain rules which may help to improve the negotiation process. For example, the subject matter could be made clearer and more easily understood for the interpreter and,

indirectly, for the parties involved.

- Be prepared in advance to provide an interpreter whom you know, who has your confidence and who is familiar not only with the languages involved but also the specific subject matter.
- It should be clear that circumstances other than the business in hand must be taken into account. This applies to all international negotiations where the atmosphere in which it is conducted is of crucial importance. Maintain a pleasant attitude and use breaks every hour to give the interpreter a rest.
- Business practice is not identical the world over. It varies considerably from continent to continent and from country to country. This applies also to the individual role of the interpreter. If you negotiate in a country not your home find out what the specific practices are there when an interviewer is involved.
- Brief the interpreter in advance. Give him the agenda if available. The basic rule is: "The more specific his preparation, the better his performance."
- Speak loudly, clearly and slowly. Avoid superfluous and little-known concepts or slang words. Avoid double negatives. Explain major ideas in two or three different ways. The point may be lost if discussed only once.
- Particularly applicable to interpreters is the fact that the human brain and individual perception are not able to follow long conversations without neglecting or forgetting details. Therefore, do not talk for more than one or two minutes. This gives the interpreter a chance to speak.
- A concept is easier to understand if it is presented in writing rather than just verbal form. Let the interpreter make notes and ask questions. Write out the main points and results discussed during the negotiation.
- Consider potential verbal misunderstandings. For example, 1 billion in the United States is 1 milliard in West Germany or France. Let the interpreter clarify such points, though only with your assistance.

The specialist has of course to be an expert. But this is not enough; he should also have profound business

knowledge and experience, otherwise you will spend time talking about academic issues which may not be relevant

- After a part or total agreement has been reached confirm in writing what has been agreed.

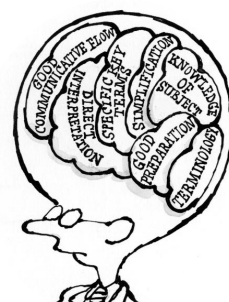
Summary

The job of an interpreter within an international negotiation is usually complex and difficult. This person has constantly to make sure that both parties understand and express what has been said by each side. He also has to understand each statement's underlying implications if there are any. To help him achieve this one should try to make the subject matter of the negotiation as clear as possible. In addition, two factors enhance the interpreter's performance: a positive climate and enough time for him to understand and communicate the information conveyed. Otherwise, both parties run the risk of having misunderstandings which may result in a considerable loss of time and, sometimes, even in the failure of the whole negotiation.

Even a little training brings about a considerable improvement in the negotiating competence of a lawyer acting on an international level. And effective negotiating pays off because there is scarcely a situation where so much can be achieved in so short a time as in a negotiation. ■

The first article in this series, on contractual, communication and drafting considerations, appeared in the European Lawyer of October 2000.

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Who is the interpreter?

