Alternatives
TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution: A Special Focus on Brazil

VOL. 33 NO. 11 DECEMBER 2015

International ADR

The Conflict Games: Getting Ready To Bring Mediation to the 2016 Brazil Olympics

BY AUGUSTO BARROS DE FIGUEIREDO E SILVA NETO

The Olympic Games are the biggest sports gathering in the world. They are a mega-event that depends on a complex combination of efforts, beginning with a city's nomination as a host candidate and only ending after the dissolution of the Local Organizing Committee.

During the Games, more than 40 world championships in distinct sporting competitions, both in men and women's events, are carried out simultaneously.

Afterward, when the Olympic Games conclude, the Paralympics begin, mobilizing 23 distinct sports, all in a single city. The complete list of Olympic sporting competitions is available at www.olympic.org/sports and www.paralympic.org/Sports/Summer.

The Games attract media and public opinion attention like no other event, with permanent exposure to world scrutiny for those involved in the Olympic Project. As with any event, the start date is unchangeable, so it is crucial to avoid delays or wasted resources, whether financial or labor-related, at all costs.

Disputes are, without a doubt, a great risk factor both for delivery of the Games and for a good relationship between those involved in the project. The players, in many cases, are necessary partners due to experience they have had in organizing previous Games. Avoiding disputes therefore must be an aim to be achieved by any organizing committee.

The author is Manager for Infrastructure Contracts and Head of Dispute Prevention and Resolution in the Rio 2016 Organizing Committee for the Olympic and Paralympics Games. He has a bachelor's degree in law from the Federal University of Rio de Janeiro, a masters in international private and international commerce law from the University of Paris I (Panthéon-Sorbonne), a masters in global business law at the Paris Institute of Political Studies (IEP-Science Po), and is a member of the Brazilian Arbitration Committee (CBAr).

UNDERSTANDING THE CONTRACTS

The organization of the Games is a result of a combination of efforts by the government, represented at its three levels—federal, state and municipal. The government is responsible for assuring that the promises made during the campaign for host city are carried out during the necessary time frame for the Games to take place.

The commitments include a diverse array of tasks, such as the treatment in customs of equipment to be used; the establishment of a lab for analysis in doping cases; tax exemptions; accessibility guarantees; commitments to an environmental legacy; currency exchange regulations; operational efficiency at ports and airports; energy supply; security, and many other issues.

The Organizing Committee for the Olympic Games, which in turn reports to the International Olympic Committee and the Paralympic Committee, constantly monitors the project's evolution to assure it follows previously established parameters for the competitions, the ceremonies, and the treatment of athletes and the public.

There are, however, public contracts and private contracts. In general, contracts established by Rio 2016 are private, according

(continued on page 172)

View this newsletter online at onlinelibrary.wiley.com
Alternatives DOI: 10.1002/alt

CPR News

CPR SETS DATE FOR 2016 BRAZIL MEDIATION CONGRESS

The CPR Institute has announced that it will hold its fourth Brazil Mediation Congress on May 6, 2016, in Rio de Janeiro.

The event will be a return to Rio, where the first CPR Brazil Mediation Congress was held in Spring 2013. The third Congress was held in São Paulo last April, while 2014 was held in Belo Horizonte. The Spring 2016 event will be held at the Industry Federation of the State of Rio de Janeiro, better known as Firjan.

"We're circling back to Rio where we first began," says CPR Senior Vice President Helena Tavares Erickson, who oversees the Congresses. "We're looking forward to seeing the people who were with us when we first got together, as well as welcoming new faces into the fold," she adds.

CPR will again conduct an advanced business mediator training workshop, running over three days, May 8-10. The schedule will allow travelers to the Congress to participate in the training, which will be held at the Rio office of law firm Barbosa Müssnich Aragão.

The 2016 Congress will be co-sponsored with the Brazilian Center of Mediation and Arbitration, better known as CBMA, a Brazil ADR provider that is a product of the work of three professional associations. The organization's English webpage can be found here: www.cbma.com.br/us.

Earlier this year in Rio, the CPR Institute and CBMA entered into a Mutual Recognition Agreement to promote their respective dispute resolution pledges and charters as reciprocally supportive. Full details can be found in CPR News, 33 *Alternatives* 82 (June 2015).

The 2016 Congress expects to cover practitioners' current experiences with the new Brazilian law, which can be found translated into English in full on page 163 of this issue.

Previous Congress attendees have reported back to CPR that the events were instrumental in advancing their commercial conflict resolution practices during a changing time, when the law, passed this year, was in development.

CPR also expects to conduct a corporate counsel roundtable session for the 2016 Congress, among other sessions to be announced.

(continued on page 176)

Alternatives

CPR | JOSSEY-BASS™ A Wiley Brand

Publishers:
Noah J. Hanft
International Institute for Conflict Prevention and Resolution

Matt Holt
John Wiley & Sons, Inc.

Editor:
Russ Bleemer

Jossey-Bass Editor:
Kelly Sullivan

Production Editor:
Ross Horowitz

Alternatives to the High Cost of Litigation (Print ISSN 1549-4373, Online ISSN 1549-4381) is a newsletter published 11 times a year by the International Institute for Conflict Prevention & Resolution and Wiley Periodicals, Inc., a Wiley Company, at Jossey-Bass. Jossey-Bass is a registered trademark of John Wiley & Sons, Inc.

Editorial correspondence should be addressed to Alternatives, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022; e-mail: alternatives@cpradr.org.

For reprint inquiries or to order reprints please call 201.748.8789 or e-mail reprints@wiley.com.

The annual subscription price is $200.00 for individuals in US/Can/Mex, $266 Rest of World; $431 for institutions in US, $547 Can/Mex and $647 Rest of World. Electronic only–all regions: $150 individual, $431 institutional; Print & Electronic–US: $220 individual, $518 institutional; Print & Electronic–Can/Mex: $220 individual, $657 institutional; Print & Electronic–Rest of World: $286 individual, $777 institutional. International Institute for Conflict Prevention & Resolution members receive Alternatives to the High Cost of Litigation as a benefit of membership. Members' changes in address should be sent to Membership and Administration, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022. Tel: 212.949.6490, fax: 212.949.8859; e-mail: info@cpradr.org. To order, please contact Customer Service at the address below, tel: 800.835.6770 or e-mail: cs-journals@wiley.com. POSTMASTER: Send address changes to Alternatives to the High Cost of Litigation, Jossey-Bass, One Montgomery Street, Suite 1000, San Francisco, CA 94104-4594.

Visit the Jossey-Bass Web site at www.josseybass.com. Visit the International Institute for Conflict Prevention & Resolution Web site at www.cpradr.org.

International ADR

Building a Mediation Structure in Brazil

The Case for Corporate ADR

BY MARIA FERNANDA PECORA GÉDÉON

In the past few years in Brazil, conciliation and mediation have been gaining momentum as instruments for speedy and peaceful conflict resolution, both judicially and extra-judicially. Neither mediation nor conciliation are new to the legal framework. But they have always been applied very timidly.

The National Council of Justice, or CNJ, which aims at improving the operations of the Brazilian judicial system, has had a fundamental role in stimulating mediation and conciliation by publishing Resolution 125/2010.

This resolution created the Judicial Centers for Conflict Resolution and Citizenship, also known as CEJUSC, which are tasked with performing pre-trial conciliation and mediation sessions, whose hearings are carried out by tribunal-accredited conciliators and mediators.

In 2015, conciliation and mediation received a further boost due to two new statutes:

(i) the new Civil Procedure Code (Statute 13.105 from March 16th 2015), which brought forth several mediation devices, a clear incentive for the mediation use, and
(ii) the Statute of Mediation (Statute 13.140 from June 26th 2015), which deals mainly with mediation between private parties as a way of solving disagreements. [See the accompanying article at right.]

The introduction of mediation in national law is certainly a great encouragement to the practice. In actuality, however, its use as a manner of extra-judicial conflict resolution is independent of the existence of specific legislation.

Now, the parties can always negotiate and, to that end, their willingness to talk to each other does not depend on any specific legislation, although the Civil Code establishes, for instance, some law-of-obligations regulations on good faith in negotiation.

One should not "straitjacket" mediation, given that one of its basic principles is voluntary action and trust of the parties in the process,

(continued on next page)

The author is a partner in the São Paulo office of Gouvêa Vieira Advogados, which also has offices in Rio de Janeiro and Paris. She coordinates the firm's corporate area, and is a mediator of the Conciliation, Mediation and Arbitration Chamber—CIESP/FIESP—Federation of Industries of the State of São Paulo, of the CBMA—Centro Brasileiro de Mediação e Arbitragem (Rio de Janeiro), and the Mediação Online.

The Law, Exposed

PREPARED BY ALEXANDRE P. SIMÕES & PAUL E. MASON

To help resolve a wider spectrum of disputes, Brazil enacted its first Mediation Law on June 26, to take effect in 180 days.

The law was the product of deliberation in the Brazilian Senate and lower Chamber of Deputies since 2013, when the Senate created a special commission to amend the Brazilian arbitration law.

That commission also proposed the Mediation Law, something that had been debated in the Congress in the 1990s, but was not passed at the time because of differences over whether mediation should be mandatory, as it has been in neighboring Argentina.

The law does not make all mediation efforts mandatory, but it does make an attempt at mediation mandatory if there is a mediation clause in the parties' contract.

The law authorizes both in-court and out-of-court mediation. Perhaps most important, the law authorizes Brazilian government bodies at all levels to engage in mediation and consensus-based forms of dispute resolution (*autocomposição*). This is especially important for commercial disputes because of the large role played by governmental bodies in the Brazilian economy.

Under the law, almost any type of dispute may be mediated. It focuses specifically on those disputes involving so-called disposable rights, which can be negotiated. Mediation of labor disputes is the main exception, where the Mediation Law calls for such cases to be governed by specific law—for example, handled by the separate labor court system.

A translation of the new Mediation Law appears below. It has been prepared by Brazilian mediator Alexandre Simões (biography available at http://ow.ly/UjudY), with assistance from attorney, mediator, and arbitrator Paul E. Mason, who is a member of the Panels of Distinguished Neutrals maintained by the CPR Institute, which publishes this newsletter (full bio at www.paulemason.info).

* * *

LAW NO. 13140, OF JUNE 26, 2015

Provides for mediation between private parties as a means to settle disputes and the self-resolution of disputes in the scope of public administration; amends Law No. 9469, of July 10, 1997, and Decree No. 70235, of March 6, 1972; and revokes paragraph 2 of art. 6 of Law No. 469, of July 10, 1997.

(continued on page 166)

International ADR: Gédéon

(continued from previous page)

which cannot be forced down the parties' throats. The Statute of Mediation has done the right thing in determining that no one is obligated to stay in a mediation process, although one must be present at the first meeting where there is a contractual mediation clause.

The Statute of Mediation also was correct in establishing the guiding principles of mediation, namely: (i) mediator impartiality; (ii) equality of the parties; (iii) "orality;" (iv) informality; (v) freedom of choice of the parties; (vi) search for consensus; (vii) confidentiality; and (viii) good-faith (Art. 2, §1 and §2 of Statute 13.140/15).

The Statute of Mediation also determines that any person "who is trusted by the parties and is able to carry out mediation may act as an extrajudicial mediator, irrespective of being a member or registered with any kind of council, group entity or professional association." The parties may be assisted by their attorneys or by public defenders (Arts. 9 and 10, Statute 13.140/15).

More than laws, however, it is necessary that mediation be well understood in order for it to be well applied as a pacifying and conflict-resolving tool, especially extra-judicially.

According to the Statute of Mediation, mediation is considered to be the technical activity exercised by an impartial third-party who has no decision-making power. The mediator is chosen or accepted by the parties and encourages and aids them in identifying or developing consensual solutions to their conflict (sole paragraph of Art. 1, Statute 13.140/15).

In practice, the mediator acts as a facilitator in interpersonal and intercorporate relations by using specific and multidisciplinary techniques so that the parties jointly build a solution for their conflicts.

In a preliminary phase of a conflict resolution process, it is common that the parties start negotiating without the mediation of any third party. Maybe this is enough, in most cases, to eliminate their disagreements.

But there are always those negotiations that reach an impasse over certain aspects, starting a conflict whose resolution is usually submitted to the adjudication by a third party, be it through the judicial system, or by sending the conflict to an arbitral tribunal, over which the parties have no control.

Many times, the strong and unwavering—even if mistaken—conviction of being completely in the right on the facts and the law, and the exhaustion of all means of convincing the other party of that view, is what leads a party to delegate decision-making power to a third-party.

That discards the mediation option, since it is truly believed that the judge or arbiter will validate that position.

A Hope for ADR Help

The premise: Mediation is the best bet for conflict resolution in Brazil.

The reasoning: The courts are overwhelmed. And, familiarly, just look at the arbitration costs the author details.

The mediation growth prospects: Strong, but not necessarily because of the nation's new law. The nation's political scandals and economic downturn are affecting existing business deals—re-opening contracts to negotiation and amendments.

Too late along the proceedings, that conviction starts weakening and disappointment sets in. Indeed, recourse to the courts or to the arbitral tribunal leads to unsatisfactory results to both parties in the vast majority of cases.

There is a Chinese saying that well expresses the frustration that is often felt at the end of litigation, even when a party has won: "Winning a lawsuit is getting a chicken after losing a cow."

OVERWHELMING LITIGATION

First, examine the Brazil judicial system.

It is interesting to note that the first big push for the introduction of mediation came from the agency whose goal is to improve the Brazilian judicial system's operation, the CNJ. The agency itself acknowledges that the delegation of the decision-making power over a given cause should be an exceptional measure. The view is that it is more logical that the parties first seek amicable and non-adversarial ways of solving their conflicts.

The CNJ's 2014 report points out that there were more than 95 million lawsuits in the country, which will be heard by around 17,000 judges in proceedings with an average duration of eight years until the final verdict. On average, each judge will be responsible for judging 5,687 proceedings!

In 2015, the Brazilian Magistrate Association, referred to here by its acronym AMB, launched the "justice scoreboard," a tool accessible through social networks for estimating, in real time, the number of suits entering the judicial system. A large display, commonly known as the "lawsuit-o-meter," was also installed in front of the Tribunal of Justice of the Federal District (Brasilia).

According to the lawsuit-o-meter, at this writing, there are more than 106 million proceedings currently in the judicial system, of which more than 42 million should not really be there. With the goal of weakening the "litigation culture," the AMB developed this methodology, which shows that a new lawsuit gets into the judicial system every five seconds.

You can see the AMB's "Placar da Justiça," nicknamed "processometro," here: www.amb.com.br/novo/?page_id=23202.

Arbitration as an alternative way to solve conflicts has become more effective in Brazil starting in 1996, with the enactment of the Statute of Arbitration (Statute 9.307 (Sept. 23, 1996)), removing jurisdictional power from the state by consensus. This was a great advancement because it allowed the selection of a qualified person who has the trust of the parties to decide a conflict.

But arbitration also creates some obstacles for the resolution of a dispute. The greatest one, beyond a shadow of a doubt, is cost. Regardless of the actual amounts being disputed in an arbitration or the particular Arbitration Chamber chosen to resolve the matter, the costs involved are quite high—and those costs don't count the opportunity cost, when the parties could be engaging in a productive activity instead of wearing themselves out in a litigation posture.

It is not worth it to resort to arbitration in order to solve small-case demands, inasmuch as costs involved can be much higher than the effective gains. Just as a reference, an arbitration before the Center for Arbitration and Mediation of the Brazil-Canada Chamber of Commerce, with a single arbiter, can have costs varying between Brazilian Real $125,000 to decide a BR$100,000 matter, and BR$150,000 for deciding a BR$4 million case.

In the case of a three-member tribunal, costs can vary between BR$275,000 for deciding a BR$100,000 cause of action, and BR$350,000 for a BR$4 million matter. Note that these values do not include other costs such as attorney fees, experts, or transportation, not to mention the opportunity cost.

A link to the CAM/CCBC calculator can be found at http://bit.ly/1SlMoJi.

Therefore, simply including an arbitration clause in a contract could represent a restriction on access to justice. Therefore, the parties should weigh the advantages and disadvantages before introducing an arbitration clause, with the understanding that their choice excludes the possibility of later resorting to the judicial system.

In this context, mediation becomes a rather attractive alternative to solve a fair portion of all conflicts, for several reasons. Besides offering a less traumatic result, since it is up to the parties to build their own agreement, it presents undeniable advantages as far as costs, promptness, and confidentiality, among many others.

In corporate conflicts, the parties commonly reject mediation based on the argument that they already have negotiated as much as they could, and resorting to mediation would be a great waste of time. Continued negotiation makes no sense if the other party's representatives are unable to change their minds. Parties also object because mediation is not legally binding.

But this option should not be so easily dismissed.

CLASSIC EXAMPLE

The classic mediation example involves two businessmen in fierce competition for buying an orange, in which causes the price to reach unthinkable values. Only after one of the parties has bought the orange for a price that was much higher than market value did they find out that one of them only wanted the skin, while the other only wanted the juice.

'[S]imply including an arbitration clause in a contract could represent a restriction on access to justice.' In the current context of Brazil's economy, mediation becomes an even more relevant tool, because the nation is undergoing a turbulent crisis caused by political corruption and an economic slowdown.

In effect, had the parties listened to each other, both would have profited in that they would have bought the orange for a reasonable price. That is the so-called win-win scenario.

Mediation doesn't always end in such perfect agreements such as this one. But mediation always enables the parties to perceive alternative solutions that they could not see simply due to having put themselves in impervious, and sometimes arbitrary, positions.

Mediation's great trick consists of opening a communication channel that is based on voluntariness, confidentiality, and trust, in a way in which the parties abandon their closed positions and start evaluating their real interests and needs.

This is not an easy thing. Mediation's success rests on the qualifications of the mediator who, besides inspiring the parties' confidence, must know, and properly employ, the many sophisticated facilitation techniques that enable dialogue.

In the current context of Brazil's economy, mediation becomes an even more relevant tool. The country is undergoing a turbulent crisis caused by political corruption and an economic slowdown that has sent the value of the Brazil Real into a tailspin, leading to downgrades of the nation's debt. See *Reuters*, "Standard & Poor Downgrades Brazil's Credit Rating to Junk" (Oct. 9, 2015)(available via *Huffington Post* at http://ow.ly/U5aAa). The crisis to a certain extent has been unexpected, and has made a great deal of uncertainty for the population.

This will affect contracts.

In such cases, the parties either negotiate a contract amendment, or they end up in a dispute where one of them claims the immutable and mandatory nature of contracts ("*pacta sunt servanda*") and the other will try to make a change-of-circumstances theory ("*rebus sic stantibus*") prevail, which allows the changing of an agreement in view of the unpredictable changes in the factors involved in its inception.

In a large portion of cases, a judge or an arbiter, even if gifted with Solomonic wisdom, will not be able to find a satisfactory solution at the speed that the business world demands. And the result, even if it agrees with one of the parties, might be more disadvantageous to the winner than a solution built by the parties themselves.

Mediation, on the other hand, results in replacing the clash of positions by the analysis of interests and a way of adequately combining them. To that end, the mediator might bring to the surface, with the appropriate techniques, some latent conflicts, some covert feelings, some more basic interests that the parties might not have wished to present so clearly in the negotiation phase.

The parties could also be embarrassed to clearly state their interests in front of each other, fearing that such revelations might be used against themselves. As the mediator gains the trust of both parties, he or she can have access to their true interests in order to help them reach their own agreement, or at least lessen the sticking points.

From that, a bridge emerges that enables the parties to find a solution that balances their interests, and which could even create new business opportunities.

One of the regular and virtuous results of mediation is making one side see the other's point of view, transforming conflicting relationships that are on the brink of being severed into relationships that foster new business. In short, it has the potential to produce a prosperous and lasting relationship between parties who previously litigated.

Then comes the question: "Would you rather be right, or happy?"

Mediation can be a good option for business executives and parties, generally, who prefer the path of happiness.

International ADR: Simões & Mason

(continued from page 163)

THE PRESIDENT OF BRAZIL

I hereby make it known that the National Congress enacts and I approve the following Law:

Art. 1—This Law provides for mediation as a means to settle disputes between private parties and the self-resolution of disputes in the scope of public administration.

Sole Paragraph—Mediation shall mean the technical activity exercised by an independent third party without decision making power, who, upon being chosen or accepted by the parties, assists and encourages them to identify or develop mutually agreed solutions to a dispute.

CHAPTER I
MEDIATION

Section I
Miscellaneous

Art. 2—Mediation shall be governed by the following principles:

I—independence of the mediator;
II—equality between the parties;
III—orality;
IV—informality;
V—free will of the parties
VI—search for consensus;
VII—confidentiality;
VIII—good faith.

Paragraph 1.—If there is a mediation section provided for in a contract, the parties shall attend the first mediation meeting.

Paragraph 2.—Nobody shall be required to remain at a mediation proceeding.

Art. 3—The object of mediation may be a dispute over "disposable" (transferable or waivable) rights or non-disposable, non-waivable rights which are able to be negotiated.

Paragraph 1.—The mediation may deal with the whole conflict or part thereof.

Paragraph 2.—The parties' agreement involving non-waivable but negotiable rights shall be confirmed by a court, and the testimony of the Public Prosecutor's Office shall be required.

Section II
The Mediators
Subsection I
Common Provisions

Art. 4—The mediator shall be appointed by the court or chosen by the parties.

Paragraph 1.—The mediator shall conduct the communication process between the parties, seeking the parties' understanding and agreement, as well as facilitating the settlement of conflicts.

Paragraph 2.—Mediation shall be free of charge for those in need.

Art. 5—The same legal provisions concerning a judge's impediment and disqualification shall apply to the mediator.

Sole Paragraph—The person appointed to act as mediator shall have the duty to disclose to the parties, prior to accepting such assignment, any fact or circumstance that may cause justified doubt with respect to his/her independence to mediate the conflict, and at such time he/she may be rejected by any of the parties.

Art. 6—The mediator shall be prevented, for a period of one year as from the end of the last hearing attended, from assisting, representing or defending any of the parties.

Art. 7—The mediator may neither act as an arbitrator nor as a witness in legal or arbitration proceedings concerning a dispute in which he/she has acted as a mediator.

Art. 8—The mediator and all those assisting him/her in the mediation proceeding, when exercising their duties or in furtherance thereof, shall have the same treatment as a public employee, for the purposes of the criminal law.

Subsection II
Out-of-Court Mediators

Art. 9—Any competent person who is trusted by the parties and is able to carry out mediation may act as an extrajudicial mediator, irrespective of being a member of or registered with any kind of council, group entity or association.

Art. 10—The parties may be assisted by lawyers or public defenders.

Sole Paragraph—If one of the parties appears with his/her lawyer or public defender, the mediator shall suspend the procedure, until all of them are duly assisted.

Subsection III
Judicial Mediators

Art. 11—A competent person having a college degree for at least two years from a university acknowledged by the Ministry of Education and being qualified by a mediators' graduate school or institution recognized by the National School for Graduation and Improvement of Magistrates—ENFAM or by the courts, in compliance with the minimum requirements established by the National Council of Justice together with the Ministry of Justice, may act as a judicial mediator.

Art. 12—The courts shall establish and keep updated registers for qualified mediators who are authorized to act in judicial mediations.

Paragraph 1.—The registration on the list of judicial mediators shall be requested by the interested party at the court of jurisdiction in the area he/she intends to exercise said mediation.

Paragraph 2.—The courts shall regulate the procedures for registration and de-registration of its mediators.

Art. 13—The remuneration due to judicial mediators shall be fixed by courts and paid by the parties, in compliance with the provision set forth [in] paragraph 2 of art. 4 of this Law.

Section III
The Mediation Proceeding
Subsection I
Common Provisions

Art. 14—In the beginning of the first mediation meeting, and whenever he/she deems necessary, the mediator shall warn the parties about the confidentiality rules applicable to the proceeding.

Art. 15—Upon request by the parties or the mediator, and with their consent, other mediators may be admitted to act in the same proceeding, whenever it is recommendable in view of the nature and complexity of the conflict.

Art. 16—Even if there is an arbitration or legal action in course, the parties may

submit to mediation, and in such case they shall request the judge or arbitrator to stay the proceeding for a term sufficient to settle the litigation amicably.

Paragraph 1.—The decision staying the proceeding under the terms mutually agreed upon by the parties shall be final.

Paragraph 2.—The stay proceeding shall not hinder the granting of provisional injunctions by the judge or arbitrator.

Art. 17—A mediation shall be deemed as initiated on the date scheduled for the first mediation meeting.

Sole Paragraph—The limitation period shall be suspended for the time the mediation proceeding takes place.

Art. 18—As soon as the mediation starts, the subsequent meetings attended by the parties may only be scheduled with their consent.

Art. 19—When performing his/her duty, the mediator may meet with the parties, whether collectively or separately, as well as ask the parties to provide information he/she deems necessary to enable the understanding between them.

Art. 20—The mediation proceeding shall be closed upon drawing up of its final instrument, when an agreement is reached or whenever new efforts to reach an agreement are not justified, whether by means of a statement by the mediator in that regard or by statement by any of the parties.

Sole Paragraph—If an agreement is entered into by the parties, the final mediation instrument shall become an instrument enforceable out of court and, if such agreement is ratified by a court, it shall be a judicially enforceable instrument.

Subsection II
Out-of-Court Mediation

Art. 21—The invitation to start an out-of-court mediation proceeding may be made by any communication means and it shall mention the scope proposed for the negotiation, the date and place of the first meeting.

Sole Paragraph—The invitation made by one party to another shall be deemed as refused if it is not replied to within thirty [30] days as from the date of its receipt.

Art. 22—The contractual provision on mediation shall mention at least:

I—a minimum and maximum term for holding of the first mediation meeting, as from the invitation receipt date;

II—a place of the first mediation meeting;

III—criteria to choose the mediator or mediation team;

IV—a penalty in case of non-attendance by the party invited to the first mediation meeting.

Paragraph 1.—The contractual provision may replace the specification of the items listed above with indication of a regulation, published by a reliable institution providing mediation services, which includes clear criteria to choose the mediator and the holding of the first mediation meeting.

Paragraph 2.—In the event there is no complete contractual provision, the following criteria shall be complied with for the holding of the first mediation meeting:

I—a minimum term of ten [10] business days and maximum term of three months, as from receipt of the invitation;

II—a place suitable for a meeting involving confidential information;

III—a list of five names, contact information and professional references of qualified mediators; the invited party may expressly choose any of the five mediators and, if the invited party does not make an objection, the first name in the list shall be deemed as accepted;

IV—the non-attendance by the invited party to the first mediation meeting shall cause the latter to bear fifty per cent [50%] of the loss of suit costs and fees if the same wins the subsequent arbitration or legal proceeding involving the scope of the mediation to which he/she has been invited.

Paragraph 3.—In the litigations arising from commercial or corporate agreements without a mediation provision, the out-of-court mediator shall only charge for his services if the parties decide to sign a mediation initiation instrument and willfully remain in the mediation proceeding.

Art. 23—If, as provided for in a mediation contractual provision, the parties undertake not to start an arbitration proceeding or a legal proceeding during a fixed term or until the implementation of a certain condition, the arbitrator or judge shall suspend the course of arbitration or the action for the previously agreed term or until the implementation of such condition.

Sole Paragraph—The provisions in the head paragraph hereof shall not apply to preliminary injunctions where the access to the Judiciary is necessary to avoid loss of a right.

Subsection III
Judicial Mediation

Art. 24—The courts shall create judiciary centers to amicably settle disputes, and such centers shall be responsible for holding pre-procedural and procedural conciliation and mediation sessions and hearings, and for the developing programs intended to assist, guide and encourage the self-resolution of disputes.

Sole Paragraph—The composition and organization of the center shall be defined by the respective court, in compliance with the rules issued by the National Council of Justice.

Art. 25—In a judicial mediation, the mediators shall not be subject to the previous acceptance by the parties, in compliance with the provision set forth in art. 5 of this Law.

Art. 26—The parties shall be assisted by lawyers or public defenders, except for the events set forth in Laws numbers 9099, of September 26, 1995, and 10259, of July 12, 2001.

Sole Paragraph—Assistance by the Public Defender's Office shall be ensured to those evidencing insufficiency of resources.

Art. 27—If the complaint fulfills the essential requirements and the pleading is not provisionally dismissed, the judge shall designate a mediation hearing.

Art. 28—The judicial mediation proceeding shall be concluded within sixty [60] days, counted from the first session, except when the parties, as per mutual agreement, request the extension thereof.

(continued on next page)

(continued from previous page)

Sole Paragraph—If an agreement is reached, the records shall be submitted to the judge, who shall determine the filing of the proceeding and, provided that it is requested by the parties, he shall ratify the agreement, by means of a court decision and final mediation instrument, and the same shall determine the filing of the proceeding.

Art. 29—Upon settlement of the dispute by mediation prior to defendant's summoning, final court's costs shall not be due.

Section IV
Confidentiality and its Exceptions

Art. 30—Any and all information concerning the mediation proceeding shall be confidential with respect to third parties, and said information may not be disclosed even in arbitration or legal proceeding, except if the parties expressly decide otherwise or whenever the disclosure thereof is required by the law or is necessary to comply with the agreement achieved by mediation.

Paragraph 1.—The duty of confidentially shall be applicable to the mediator, the parties, their agents, lawyers, technical advisors and other persons of his/her trust who directly or indirectly have participated in the mediation proceeding, thus, obtaining:

I—a statement, opinion, suggestion, promise or proposal made by one party to the other in search of an understanding for the dispute;

II—acknowledgment of a fact by any of the parties in the course of the mediation proceeding;

III—a statement of acceptance of the agreement proposal presented by the mediator;

IV—a document solely prepared for the purpose of the mediation proceeding.

Paragraph 2.—The evidence submitted in disagreement with the provision set forth in this article shall not be admitted at an arbitration or legal proceeding.

Paragraph 3.—The information concerning the occurrence of a public crime shall not be bound by the confidentiality rule.

Paragraph 4.—The confidentially rule does not exclude the duty of the parties mentioned in the head provision hereof to provide information to tax authorities after the final mediation instrument is completed, and the agents of said parties shall also be bound to the obligation of keeping the confidentiality of the information shared under the terms of art. 198 of Law No. 5172, of Oct. 25, 1966–National Tax Code.

Art. 31—The information provided by one party at a private session shall be deemed as confidential, and the mediator may not disclose it to the other parties, except if expressly so authorized.

CHAPTER II
SELF-RESOLUTION OF THE DISPUTE WHEN ONE PARTY IS A LEGAL ENTITY GOVERNED BY PUBLIC LAW

Section I
Common Provisions

Art. 32—The Government, the States, the Federal District and the Municipalities may create chambers to prevent and administratively settle disputes, within the scope of the respective Public Advocate General Office entities, if any, with authority to:

I—settle disputes among public administration bodies and entities;

II—evaluate the admissibility of the requests to settle disputes, by means of an agreement by the parties, in case of a dispute between an individual and a legal entity governed by public law;

III—promote, when applicable, the execution of a conduct adjustment instrument.

Paragraph 1.—The manner of formation and operation of the chambers mentioned in the head provision hereof shall be established by a regulation issued by each State.

Paragraph 2.—The submission of the dispute to the chambers mentioned in the head provision hereof is optional and shall be applicable only to the cases provided for in a regulation of the respective State.

Paragraph 3.—If an agreement is reached by the parties, it shall be written in the form of an instrument and the same shall be deemed as an instrument enforceable out of court.

Paragraph 4.—The authority of the entities mentioned in the head provision hereof shall not include disputes that may only be settled by acts or granting of rights subject to the authorization of the Legislative Branch.

Paragraph 5.—The authority of the chambers mentioned in the head provision hereof shall include the prevention and settlement of disputes involving economic-financial balance of agreements executed by the administration with individuals.

Art. 33—While said mediation chambers are not created, the disputes may be settled according to the mediation proceeding provided for in Subsection I of Section III of Chapter I of this Law.

Sole Paragraph—The Government's, the States', the Federal District's and the Municipalities' Public Advocate General Office, wherever they exist, may start, by their own motion or pursuant to a call, a collective mediation proceeding for disputes related to the provision of public services.

Art. 34—The initiation of an administrative proceeding for the amicable settlement of a dispute in the scope of public administration stays the statute of limitations.

Paragraph 1.—A proceeding shall be deemed as initiated when the body or public entity issues an admissibility judgment, making retroactive the stay of statute of limitations to the date of formalization of the request for amicable settlement of the dispute.

Paragraph 2.—In case of a tax matter, the stay of statute of limitations shall comply with the provisions set forth in Law No. 5172, of October 25, 1966–National Tax Code.

Section II
Disputes Involving the Direct Federal Public Administration,
Their Agencies and Foundations

Art. 35—Legal disputes involving the direct federal public administration, their

A look at Brazil's new, comprehensive mediation statute, which pushes parties and government agencies away from court fights and toward negotiations. It even provides a blueprint for private agreements to mediate.

agencies and foundations may be subject to compromise by adhesion, based on:

I—authorization of the Federal Advocate General, based on the consolidated court precedents of the Federal Supreme Court or higher courts; or

II—opinion issued by the Federal Advocate General, approved by the President of Brazil.

Paragraph 1.—The requirements and conditions of operation by adhesion shall be defined by a specific administrative resolution.

Paragraph 2.—When applying for adhesion, the interested party shall attach evidence of compliance with the requirements and conditions stipulated in the administrative resolution.

Paragraph 3.—The administrative resolution shall have general effects and it shall be applied to identical cases, timely qualified pursuant to an adhesion request, even if it resolves only part of the dispute.

Paragraph 4.—Said adhesion shall imply waiver by the interested party to the right upon which the action or appeal is grounded, which may be pending a decision, of administrative or legal nature, with respect to the points included in the purpose of the administrative resolution.

Paragraph 5.—If the interested party is a party to a legal proceeding filed by means of a collective action, the waiver to the right upon which the action is grounded shall be expressed by a petition addressed to the presiding judge.

Paragraph 6.—The formalization of an administrative resolution intended to the operation by adhesion shall neither imply an implicit waiver to the statute of limitations nor the interruption or stay.

Art. 36—In case of disputes involving litigation between bodies or entities governed by the public law comprising the federal public administration, the Federal Advocate General Office shall carry out an out-of-court settlement of the dispute, in compliance with the procedures set forth in an act by the Federal Advocate General.

Paragraph 1.—In the event mentioned in the head provision hereof, if an agreement concerning the legal dispute is not achieved, the Federal Advocate General shall be responsible to settle the same, with grounds on the applicable law.

Paragraph 2.—In the cases where the resolution of a dispute implies the acknowledgement of existence of Government's, its agencies' and foundations' credits enforceable against legal entities governed by federal public law, the Federal Advocate General Office may request to the Ministry of Planning, Budget and Management the budgetary adjustment for settlement of debts acknowledged as lawful.

Paragraph 3.—The out-of-court settlement of disputes shall not exclude the determination of liability of the public agent giving rise to the debt, whenever it is found out that his/her action or omission is, in theory, a disciplinarian infraction.

Paragraph 4.—In the events where the litigation matter is discussed under an action against a corrupt public employee or if a decision has been issued in this regard by the Federal Accounting Court, the conciliation mentioned in the head provision hereof shall depend upon the express agreement of the presiding judge or the Reporting Judge.

Art. 37—The States, the Federal District and the Municipalities, their agencies and public foundations, as well as public companies and federal public and private companies may submit their litigations with public administration entities or bodies to the Federal Advocate General Office, for the purposes of an out-of-court settlement of the dispute.

Art. 38—In cases where the legal dispute is related to taxes managed by the Federal Revenue Service of Brazil or to credits registered as federal debts:

I—the provisions set forth in items II and III of the head provision of art. 32 shall not apply;

II—public companies, public and private companies and their subsidiaries conducting the economic activity of production or marketing of goods or the rendering of services under the competition system may not exercise the option set forth in art. 37;

III—when the parties are those mentioned in the head provision of art. 36:

a) the submission of the dispute to the out-of court resolution of dispute by the Federal Advocate General Office implies the waiver of the right to resort to the Administrative Council of Tax Appeals;

b) the reduction or cancelation of credit shall depend upon the joint statement by the Federal Advocate General and the State Minister of Finance.

Sole Paragraph—The provisions set forth in item II and letter "a" of item III shall not exclude the authority of the Federal Advocate General Office provided for in items X and XI of art. 4 of Supplementary Law No. 73, of Feb. 10, 1993.

Art. 39—The filing of a legal action where bodies or entities governed by public law comprising the federal public administration concomitantly appear as plaintiff and defendant shall be previously authorized by the Federal Advocate General.

Art. 40—Public employees and agents participating in the process of out-of court resolution of disputes may only be made civilly, administratively and criminally liable when, by willful misconduct or fraud, they receive any undue equity advantage, allow or facilitate the reception thereof by a third party, or contribute therefor.

CHAPTER III
FINAL PROVISIONS

Art. 41—The National School of Mediation and Conciliation, within the scope of the

(continued on next page)

International ADR: Simões & Mason

(continued from previous page)

Ministry of Justice, may create a database on the good practices of mediation, as well as keep a list of mediators and mediation institutions.

Art. 42—This Law shall apply, where applicable, to other amicable forms of resolution of disputes, such as community and school mediations, as well as those carried out at out-of-court offices, provided that they are in the scope of their authority.

Sole Paragraph—Mediation in labor relations shall be governed by specific law.

Art. 43—Public administration bodies and entities may create chambers to settle disputes among private parties regarding activities governed or supervised by the same.

Art. 44—Articles 1 and 2 of Law No. 9469, of July 10, 1997 shall be in force with the following wording:

Art. 1—The Federal Advocate General, directly or by delegation, and the highest officers of federal public companies, together with the statutory officer of the area relating to the matter, may authorize the execution of agreements or operations to prevent or terminate litigations, including court litigations.

Paragraph 1.—Specialized chambers may be created, and such chambers shall be formed by public employees or registered public agents, for the purpose of analyzing and preparing proposals for settlement or compromise.

(. . .)

Paragraph 3.—A regulation shall provide for the kind of composition of the chambers mentioned in paragraph 1, which shall be formed by at least an effective member of the Federal Advocate General Office or, in case of public companies, a legal assistant or someone holding an equivalent position.

Paragraph 4.—Whenever the litigation involves amounts above those fixed in a regulation, the settlement or compromise shall, under penalty of being null and void, depend on the prior and express authorization of the Federal Advocate General Office and the Minister of State to which area of authority the matter is related, or also the President of the House of Representatives, the Federal Senate, the Federal Accounting Court, the Court or Council, or the Federal Attorney General, in case of interest of the bodies belonging to the Legislative and Judiciary Branches or the Public Prosecutor's Office, excluding the independent federal public companies, which will need only the prior and express authorization of the officers mentioned in the head provision hereof.

Paragraph 5.—In the compromise or agreement entered into directly by the party or by means of an attorney in fact to terminate or close a legal action, including the cases of administrative extension of payments demanded in court, the parties may define the liability of each one for the payment of fees due to their respective lawyers.

Art. 2—The Federal Attorney General, the General Attorney of the Central Bank of Brazil and the officers of federal public companies mentioned in the head provision of art. 1 hereof may authorize, directly or by delegation, the execution of agreements to prevent or terminate, in court or out-of court, a ligation involving amounts lower than those fixed in a regulation.

Paragraph 1.—In case of federal public companies, said delegation shall be restricted to a collegiate body formally constituted and formed by at least one statutory officer.

Paragraph 2.—The agreement mentioned in the head provision hereof may consist in the payment of the debt in monthly and consecutive installments up to the maximum limit of sixty [60].

Paragraph 3.—The amount of each monthly installment, at the time of the payment, shall be increased by interest equivalent to the reference rate issued by the Special System of Settlement and Custody–SELIC for federal notes, which shall be monthly accrued and ascertained from the month subsequent to that of consolidation up to the month before the payment plus one percent [1%] concerning the month when the payment is made.

Paragraph 4.—Whenever any installment is in default, after thirty [30] days, an execution proceeding shall be filed or followed , for the balance.

Art. 45—Decree No. 70235, of March 6, 1972, shall become effective with the inclusion of the following art. 14-A:

Art. 14-A—In case of determination and requirement of Government tax credits, the taxpayer of which is a body or entity governed by public law belonging to the federal public administration, the submission of the litigation to an out-of-court resolution of dispute by the Federal Advocate General Office shall be deemed as a claim, for the purposes of the provisions set forth in item III of art. 151 of Law No. 5172, of October 25, 1966 – National Tax Code.

Art. 46—The mediation may be made via Internet or by another communication means allowing remote transaction, provided that the parties are in agreement.

Sole Paragraph—A party residing abroad is permitted to have mediation according to the rules established in this Law.

Art. 47—This Law becomes effective after one hundred and eighty [180] days as from its official publication.

Art. 48—Paragraph 2 of art. 6 of Law No. 9469, dated July 10, 1997, is hereby revoked.

Brasília, June 26, 2015; 194th anniversary of the Independence of Brazil and 127th anniversary of the proclamation of the Republic.

Dilma Rousseff (President of the Federative Republic of Brazil)

José Eduardo Cardozo (Justice Ministry)

Joaquim Vieira Ferreira Levy (Finance Minister)

Nelson Barbosa (Planning Minister)

Luís Inácio Lucena Adams (Chief Minister of the Attorney General's Office)

* * *

This text is an unofficial translation, made on Aug. 7, 2015, by mediator/professor/attorney Alexandre P. Simões of the law firm Ragazzo, Simões, Spinelli, Lazzareschi e Montoro Advogados, in São Paulo, with the assistance of Paul E. Mason, an attorney, mediator and arbitrator based in Rio de Janeiro and Miami.

The Master Mediator

The Mediator as Arbitrager: Asymmetry in Action

BY ROBERT A. CREO

Editor's note: Alternatives *columnist Bob Creo, a Pittsburgh arbitrator and mediator, has been revisiting his catalog of CPR Institute website columns, originated a decade ago, in a Back to Basics* Alternatives *series that he has subtitled "Human Problems, Human Solutions." These updated and expanded columns, in print for the first time, began a year ago. He has revisited a wide spectrum of mediation room behaviors and practices. This month, he returns to the third column he wrote at www.cpradr.org, and brings it forward.*

* * *

Arbitraging involves the process of a person taking advantage of a difference in market prices to broker an immediate deal between a buyer and seller. Webster defines arbitraging as the purchase of securities on one market for immediate resale on another market in order to profit from a price discrepancy.

The almost-simultaneous purchase and sale of a commodity or stock means that the arbitrager holds title a minimum amount of time. The arbitrager takes advantage of asymmetrical information to serve as an honest broker to complete a transaction.

My thesis is that a skilled mediator is a kin folk of a skilled arbitrager. Arbitrators conduct symmetrical processes based upon the same information being known to everyone and conveyed in a transparent manner.

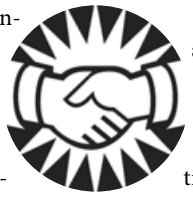
Mediators do not, and should not be confused with adjudicators.

The author is a Pittsburgh attorney-neutral who has served as an arbitrator or mediator in the United States and Canada since 1979. He conducts negotiation behavior courses that focus on neuroscience and the study of decision-making, and was recognized by Best Lawyers in America as 2014 Mediator of the Year for Pittsburgh. He is the author of "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is a member of *Alternatives*' editorial board, and of the CPR Institute's Panels of Distinguished Neutrals. His website is www.robertcreo.com.

Mediation usually is an asymmetrical process based upon multiple factors. Asymmetrical dynamics or paradigms may include, among other elements, in no particular order:

1) One party—usually the defendants—often is a repeat player in the legal system, or manages a book of business risks or disputes.

2) The dispute for the plaintiffs, especially tort and employment claimants, usually is 100% of their court docket and/or experience with the legal system.



Party v. Party v. Neutral

The inquiry: Where are mediation participants really coming from?

Processing the process: It's not just two people on opposite sides of the table. The sum total of their experiences and belief systems are at work on their negotiating positions.

Dealing with the output: Since different factors predominate at different times with different participants—simultaneously!—mediators first must be aware of their own biases and beliefs as they try to move the parties to common positions.

3) Repeat players, including counsel, benchmark against other cases; consistency, predictability, and uniformity often are the repeat players' core values.

4) Participants may have different perspectives and expectations of the processing of legal claims via the courts.

5) The defendants' proposals involve real dollars. The plaintiffs' demands involve abstract sums, goals or aspirations, and not relief in present, real time. Traditional negotiation frames recognize this by nomenclatures of "demand" and "offer."

6) One of the parties, usually claimants, may have suffered "personal trauma" that forms the basis of the claim; this may involve a personal injury, business or economic disruption or a perceived grievance involving their personal self-esteem or public reputation. The other participants' key interests may be "impersonal" and involve primarily economic impact. In short, one party may be making a personal decision with profound consequences, while others are involved in a business transaction.

7) There may be a real or perceived power imbalance among participants.

8) Participants have different risk tolerances and view risk in a unique, individualistic manner. Risk tolerance is fluid, contextual and situational.

9) Participant preparation for the mediation, and their experiences, expectations and attitudes about the process differ from each other.

10) Participants process information and make decisions with different cognitive preferences and biases. For example, see R. Lisle Baker, "Using Insights about Perception and Judgment from the Myers-Briggs Type Indicator Instrument as an Aid to Mediation," 9 *Harvard Negotiation Law Rev.* 115-186 (2004) (available at http://ow.ly/TYJMn). People may make choices in a "non-rational" or other manner inconsistent with classical economic theory that people act to maximize their own self-interest.

11) The number of participants, stakeholders and constituents on each side are uneven.

12) One or more parties may represent public interests, while others act as purely private persons. People may make decisions in a holistic manner. Participants have dif-

(continued on next page)

The Master Mediator

(continued from previous page)
ferent levels of authority and power to bring closure.

13) The law may provide additional protections or restrictions on some of the parties based upon their age, competency or other factors.

14) Confidentiality and privacy interests vary among the participants.

15) Counsel and advocates for different parties are compensated pursuant to different methods such as contingent, flat fee, salary, hourly, per diem, and incentives.

16) There almost always is diversity of culture, age, income and other demographics among the participants. This almost always extends to the mediators who may share some, but never all of the demographics with some of the participants.

17) Participants each have their own relationship to time and pacing, especially the mediator.

18) The mediator has different experience with different participants, meeting some for the first time while others are repeat players.

19) The participants have asymmetrical experiences with negotiation and mediation.

20) The mediator may have misaligned or asymmetrical goals with one or more of the participants.

21) Participants submit pre-mediation information and prepare in an asymmetrical manner.

22) Participants communicate at the mediation in an asymmetrical manner.

23) Mediators also communicate in an asymmetrical manner.

24) Mediators use different tools with different participants at different times in the process.

25) Participants have different interests.

26) There is a difference between "retributive" and "restorative" interests and goals of participants, mediators and process. Mediators tend to pressure participants toward choosing restorative interests and goals over retribution.

27) Mediators are not neutral in the sense of an intervener who stands outside the process without permanent impact on the dispute or disputants. Mediators have their own point of view and interests.

Even in a bilateral dispute, mediation is a trilateral process.

International ADR

(continued from front page)
to usual standards of service contracts. As a result, they are not subject to specific Brazil legislation such as the Lei de Licitações, Law 8.666/93, which covers bidding, for example.

The volume of contracts that come under the responsibility of the Organizing Committee is impressive. There are thousands of contracts supplying a wide variety of services such as sponsorship; temporary structures; product licensing with international consultants; ceremony contracts (opening, closing, medal awards, etc.); broadcasting; hotel room reservation; ticket sales; deals with other international Olympic committees; village construction, and hundreds of others.

It is necessary to take into consideration the diversity of profiles of the involved parties to prevent the kind of disputes that could take place, and to efficiently combine the different methods for resolving controversies into a system for dispute management appropriate for the Games' setting.

MEDIATION'S GAMES ADVANTAGES

A book created by the American Arbitration Association enumerates the advantages of using mediation in corporate settings, highlighting the convenience of blending this with other techniques to obtain more significant results. Thomas E. Carbonneau, Jeanette Jaeggi, and Sandra K. Partridge, American Arbitration Association Handbook on Mediation (JurisNet 2006).

Delivering Mega-Events

The challenge: Staging the Olympics and the Paralympics Games.

The other challenge: The Games have a history of disputes and, fortunately, a history of an infrastructure to address them.

What's new in 2016? The Brazil Games has initiated a unit that deals exclusively with dispute resolution. There are literally thousands of Games contracts spread throughout Brazil's society and economy.

The International Institute for Conflict Prevention and Resolution—the New York-based publisher of this newsletter—also cites, in several publications, the growing demand for mediation as the preferred method to resolve corporate disputes. See, e.g., "Better Solutions for Business: Commercial Mediation in the EU" (2004)(an excerpt is available at the CPR Institute's website, here: http://ow.ly/TJFiL).

In the case of the Games, the structure of the dispute prevention system uses a combination of three methods: corporate mediation, dispute boards, and arbitration. The prevention and resolution clause in contractual disputes is adjusted according to the reality of the contract, preventing an escalation of the discussion in the format most appropriate for each case.

The importance given to prior treatment of claims and the awareness of the risks they represent for the project are so significant that a specific Olympic Games dispute prevention function was created. It is also responsible for constructing internal policies applicable to the subject.

The insertion of dispute prevention clauses predicting clearly which methods will be used is crucial in order to effectively conduct the process when problems emerge. In the book, "Designing Systems and Processes for Managing Disputes," the authors cite data from studies showing that the clear mention of mediation as a stage prior to the eventual escalation of the dispute to arbitration proceedings or local courts is generally perceived as favorable by the involved parties. Nancy H. Rogers, Robert C. Bordone, Frank E.A. Sander, and Craig A. McEwen, "Designing Systems and Processes for Managing Disputes," 289 et seq. (Wolters Kluwer Law Business 2013).

The data also indicates that maintaining an option for mediation only as an alternative to

be proposed when the problem emerges isn't as effective as the step process. Id.

In the same book, the authors mention the importance of creativity in designing processes and dispute prevention systems. Id. at 131. Sometimes, it might prove more important that the professional in charge of conducting negotiations use mediation techniques in carrying out the procedure, rather than formalizing the stage as one of mediation.

An obvious exception would be when legal reasons demand it. For example, if the mediation is clearly a prior stage to arbitration, then not formally entering the mediation could lead to questions on the validity of the arbitration procedure by not having first exhausted the initial requirement.

TRUE PARTNERS

There are contracts where a party is a true partner in the project, either as a sponsor or for a history of services rendered in previous Olympic Games. In these cases, providing for negotiations at an executive level, followed by eventual arbitration, tends to be pretty efficient, since the maturity of the parties' relationship and the responsibility for the contract delivery function are natural prevention tools.

In other cases, such as contracts for construction of temporary structures, provision is made for use of dispute boards, combined with mediation and followed by arbitration.

The 2012 London Games were successful at dispute resolution both during the Games, by means of effective prevention tools. "Mediation may well be . . . the solution to guarantee the long term positive impact of these beautiful moments," wrote mediator Andrea Maia, who explained that the

> London Olympic Games may serve as an inspiration to the use of ADR in large events. In the UK, the Olympic Delivery Authority established an independent dispute avoidance panel to seek pragmatic solutions to construction disputes and avoid judicial resolution. Contractors for the ODA, the body responsible for the building of Games venues, will sign up to participate in the panel should the need arise.

Andrea Maia, "Mediation may be the solution to guarantee the long term positive impact of beautiful moments," *Kluwer Mediation Blog* (June 25, 2012)(available at http://ow.ly/TJOGN).

The London Games also were successful in dealing with disputes still open after the event. All cases were closed within less than six months after the Games ended, an admirable feat considering the particularities of the project.

The Rio 2016 Games hope to be equally successful with the results obtained by creating a specific system for the prevention and management of disputes, including an area dedicated exclusively to this topic that allows the correct structuring of internal policies and the conduct of procedures in a technical and objective manner.

The dispute resolution mechanism expects to make it possible to leave as its legacy the reduction of the country's litigious culture, valuing the search for consensual solutions, and collaborating toward a perception of memorable Games—both in and out of the sporting events.

ADR Brief

ATTEMPTING TO DEFINE THE PRACTICE, POUND CONFERENCE ORGANIZERS LAUNCH A WORLDWIDE SERIES ON ADR COMMON GROUND

Details are emerging for a series of conferences that will pay homage to a seminal 1976 event that is credited with the birth of modern court and commercial conflict resolution practices.

The wide-ranging plans to re-do the singular Pound Conference in multiple events as a 40th anniversary commemoration has produced an outline of gatherings, worldwide, that are being designed to cover alternative dispute resolution comprehensively, and encourage its use. The programs will begin in Singapore in March, and are expected to run into 2017.

The original Pound Conference itself was a reprisal, intended to follow the path blazed by a 1906 address by U.S. Supreme Court Justice Roscoe Pound at a gathering focused on access to justice.

The April 1976 sequel, 70 years later in St. Paul, Minn., gathered about 270 academics, government and court officials, and practitioners to discuss the future of the courts. Among other things, it produced a focus on nonjudicial dispute resolution.

In the world of ADR wonks, it's best known for Harvard Law Prof. Frank E. A. Sander's depiction of a "multi-door courthouse," where processes like mediation, arbitration, and others would join litigation as forums for resolving disputes, and present better access to justice than just trial work alone. [Sander has been an *Alternatives* editorial board member since the newsletter's inception in 1983.]

The organizers of the new Global Pound Conference series launched a website in October listing events in 36 cities covering 26 countries. The first will be on March 17-18 in Singapore, and the final sessions are projected for London in July 2017.

The current proposed GPC Series title is "Shaping the Future of Dispute Resolution & Improving Access to Justice."

The organizers—associated with IMI Mediation, a web-based, mediation-focused nonprofit originated in the Hague, Netherlands, which provides a mediator credentialing process—also have big plans for the events themselves, and have offered voluminous supporting materials, as well as stiff requirements, for local organizers.

Organizing officials emphasized a broad inclusiveness in an attempt to involve as many aspects of conflict resolution practice as possible. At press time, they are vigorously rewriting—with the input of conflict resolution authorities including committed and potential GPC participants worldwide—a series of common core questions that will be presented at each conference. The questions are designed to dig deep into practices, and lead to the conferences' ultimate goal, data that will chart the future of ADR and improve access to justice.

The organizers insist that they are not scripting the events, and that there is no finan-

(continued on next page)

ADR Brief

(continued from previous page)
cial requirement for local organizations to participate, despite the sponsorship demands in an extensive prospectus that they say are needed to pay for logistics, including an electronic voting apparatus. Information on support, a link to the prospectus, and the nonfinancial participation material can be found at the organizers' website, globalpoundconference.org. (A direct ink is available here: http://ow.ly/Ufycq.)

Interested parties won't necessarily need to leave their homes or offices to experience the offerings. The elaborate new GPC website has outlets for video and the materials that will be prepared for, and emerge from, the events. The plan is to selectively post the videos, but to make widely available the results of the data-gathering efforts to grow the profession.

A conference last year held by IMI provided data that serves as an organizing plan for the GPC series. The data "suggested that significant gaps may exist between what disputants expect and need and what is currently provided by advisers, provider bodies, practitioners, educators and policy makers."

The prospectus provides a highly structured process to bring the material together, with projections for half of each session coming from the core questions, which are being developed by a central organizing group executive committee. The agendas will revolve around a group of what has been expected to be about 20 "core questions and propositions" to be used at each event. The other half will be left to locals.

* * *

"We're going to try to have a consistent conversation at every event," explains Deborah Masucci, who is IMI's board chair, former chair of the American Bar Association's Section of Dispute Resolution, and who is serving the GPC organizing group executive committee ex officio on a support team. She adds, "That is why we are trying to share information across borders and trying to understand dispute resolution in similar terms."

The problem is at the root, she says, explaining, "Definitions are one of the hardest things to deal with." Masucci, a New York-based mediator and arbitrator, says one big point, echoed by others close to the process, is the different national views of mediation and conciliation—sometimes interchangeable, but sometime distinctly different local processes.

Michael McIlwrath, who is a member of the GPC organizing group executive committee as well as the IMI board that appointed it, says that the semantic differences sometimes obscure process divergences. For example, McIlwrath—global chief litigation counsel at GE Oil & Gas, an energy unit of General Electric Co.—says that he views the big definition question as the distinction between binding versus nonbinding processes. He notes that Australians, for example, want the debate to use the terms consensual and non-consensual.

Conflict Gatherings

The plan: Bring together business executives in dozens of cities to find out what they want from conflict resolution practices.

The goal: Data that not only makes ADR better but improves access to justice, everywhere.

The linchpin: How do we define ADR? And how do you define ADR?

Jeremy Lack, another GPC organizing group executive committee member, and who also serves on IMI's Independent Standards Commission, says that seemingly simple definitions have been a challenge in drafting the common questions for the events. People may be using the same terms, but they are often talking about different things depending on their locations, Lack explains.

"We have been grappling with common concepts to be discussed to determine what the end user wants out of ADR," explains Masucci, because, despite an orientation toward mediation, "maybe there is some other concept people are going to want that may impact them better. It is not necessarily mediation. We are forcing providers to think about . . . what they are doing [because it] may not meet the end users' needs."

Lack, an attorney-neutral based in Geneva, adds that the Global Pound Conference "is supposed to be representative of what users need, and [aspires to] change the way dispute resolution is conducted in the 21st Century."

* * *

Howard Herman, who is chairman of the American Bar Association's Section of Dispute Resolution, says that the international differences over conciliation and mediation have a familiar ring.

"For some people this also goes to how narrowly or broadly you are going to define a mediation process," says Herman, who is director of the ADR Program for the U.S. District Court in California's Northern District federal court, adding, "It harks back to a controversy we have seen here [in the United States on] the appropriateness of defining evaluative inputs into the process."

The DR Section is not a sponsor, but instead is listed as a GPC "Global Partner"; Herman says the section is still considering whether to host a U.S. event sometime next year.

Herman reflects the goals of the conference organizers in discussing his group's review of the core questions. So far, he says, commenting on the draft questions is the principal work that the ABA DR Section has undertaken while it is considering event organization logistics, including finding sponsors.

"There is some concern among members of the section" about the questions, Herman explains, noting that the first issue is whether the view of mediation will be sufficiently broad to encompass various U.S. practice styles.

Second, Herman notes, section members have concerns that the target audience being surveyed so far does not appear to include "non-commercial, non-repeat-player-type participants—for example, individual consumers."

Citing the broad range of inquiry, Herman says that through its comments on the draft questions, the ABA DR Section is "pressing for

ADR Brief

clarity of exactly what it is we are looking at, so that the conclusions aren't broader than what is actually looked at."

"We support the project," Herman concludes, "and want to see the project be the best it can be."

* * *

The conferences will vary from place to place, but the GPC prospectus provides a specific outline. It proposes day-long events, including four 90-minute sessions. The prospectus has an agenda for the sessions: a moderator introduction; brief panelist explanations that present the core questions to the voting audiences; the electronic voting segment, which may range beyond the core questions, and an analysis of the results; a panel discussion, and a summary.

But that's just the format. The prospectus also suggests the topic and the categories of panelists needed to pull the session off. The core questions once developed will illuminate the line of inquiry for each session:

- Session 1. Access to Justice & Dispute Resolution Systems: What do users need & expect?
  - Panelists: four representative users of various dispute resolution processes.
- Session 2. How is the market currently addressing users' needs and expectations?
  - Panelists: one or more service providers (e.g., a mediator, arbitrator, dispute resolution institution), one adviser, one user, and possibly one miscellaneous stakeholder.
- Session 3. How can dispute resolution be improved? (Overcoming obstacles and challenges.)
  - Panelists: one user, adviser, service provider, educator and/or legislator or judge.
- Session 4. Promoting better access to justice: What action items should be considered and by whom?
  - Panelists: one user, adviser, provider, educator and/or one legislator or judge

In the wake of the responses, the detailed core questions that will illustrate the session points had been taken down from the GPC website at press time for redrafting, and replaced with a survey inviting the public to comment by the end of last month (see http://ow.ly/V0fl5). The GPC prospectus—last updated on Oct. 13—says that the process will be completed by the middle of this month.

But Jeremy Lack suggests that given the strong opinions about the core questions' content and the multiple re-drafts—he conceded that it has occasionally been "such a polemic discussion"—the rewriting could go on for a while, perhaps up until the March Singapore kickoff event. Lack is presiding over monthly conference calls to discuss the issues.

Lack and Mike McIlwrath are joined on the GPC organizing group executive committee by University of Stellenbosch (South Africa) Graduate School of Business Prof. Barney Jordaan, who will head the committee that will process the GPC data; Dan Rivlin, chief executive officer of Kenes Group International, a conference producer firm based in Geneva and Tel Aviv, and sponsor representatives Alexander Oddy, a partner in the London headquarters of Herbert Smith Freehills, and temporary Singapore representative Loong Seng Onn, who is executive director of the Singapore Mediation Centre, a private nonprofit provider.

Currently, the organizing group executive committee projects that 50% of the program "will be pre-set and predetermined" based on the core voting questions.

* * *

The list of tasks for local organizers is long too, and it raised some eyebrows when it was released early this year, particularly with a command to identify local sponsors. But, Mike McIlwrath explains, the requirements were extensive for the same reasons that the questions need to be honed—to drive the project to produce data and a path for the future of ADR.

He says the GPC officials are working with local officials to adapt the events to the bigger agenda. "You have to find a way to make sure every event is sophisticated," says McIlwrath, "and you have the right people there."

Still, the latest version of the prospectus (direct link at http://ow.ly/UxEYj) notes that it's possible—perhaps in the face of the list of requirements—that not all of the 36 cities will succeed in holding a Global Pound Conference event.

But the organizers have an expansive view and are aiming high. They want to gather a wide range of interests, and Lack emphasizes the intention to include business executives, including risk managers and professionals who deal with corporate governance issues. Lack says he wants the conference to expand beyond traditional ADR conference audience that can skew toward neutrals and provider employees.

To boost corporate interest, the organizers even provided in the prospectus a "business rationale for sponsorship."

The agenda is designed to produce data, and the data is going to be turned over to "a committee of independent academics," overseen by Barney Jordaan. The organizers hope that the recommendations that are generated will be useful to governments, court systems and users in boosting ADR use, and improve access to justice in countries and across borders.

They also envision future conferences to update the data, periodically, down the road—"becom[ing] a living movement afterward and progressing the field," says Deborah Masucci. Jeremy Lack says his ideal scenario is revisiting the data every two to four years via web surveys, likely more focused on discrete issues but which "hopefully will become over time a database to get real market research" across the spectrum of conflict resolution practice.

So far, the organizers say, so good. They say they have raised more than €300,000 for the efforts. The conferences "are supposed to be self-funding and sustaining," says Deborah Masucci, and "they should create a surplus."

The big sponsors are the London-based law firm Herbert Smith Freehills, which has a prominent ADR-world presence advocating for more use (the firm summarizes its work at http://ow.ly/Uni74), and a yet-to-be-established entity funded by the government of Singapore, both of which have donated €100,000 as platinum sponsors and, as a result, have seats on the organizing group executive committee.

Other early high-level sponsors include the American Arbitration Association's International Centre for Dispute Resolution, Shell, AkzoNobel, the Beijing Arbitration Commis-

(continued on next page)

ADR Brief

(continued from previous page)
sion/Beijing International Arbitration Center, and JAMS Foundation. The prospectus lists 32 global partners, which covers nonfinancial supporters (including the CPR Institute, which publishes *Alternatives).*

A web page dedicated to the kickoff March Singapore event is available at http://singapore2016.globalpoundconference.org.

The ultimate goal, says Michael McIlwrath, reprising Deborah Masucci's view of the efforts, is a "global conversation, and we're all talking to one another," adding that he hopes the GPC series will "provoke the conversation the way the original Pound Conference did."

* * *

The CPR Institute, which publishes this newsletter, is a global partner in the Global Pound conference series. It has previously worked closely with the GPC organizing group executive committee members featured in this article, all of whom have served in a variety of committee roles at the CPR Institute over many years. Among other things, the GPC principals have provided training services and web content for and on behalf of the CPR Institute. Alternatives *editor Russ Bleemer, who wrote this article, has written an attorney profile for the IMI website, as well as added production and social networking for Michael McIlwrath's podcast,* International Dispute Negotiation, *which is available at www.cpradr.org and iTunes.*

CPR News

(continued from page 162)

Planning for the full Congress agenda is underway. Please visit www.cpradr.org for the latest updates.

CPR has been busy since the Congress earlier this year and the accompanying CBMA agreement, also in April. In mid-October, CPR signed its second Pledge Mutual Recognition Agreement in Brazil, with the Chamber of Conciliation, Mediation and Arbitration of the Center of Industries of the State of São Paulo/Federation of Industries of the State of São Paulo (CIESP/FIESP). For full details, see the CPR website here: http://ow.ly/Uybco.

CPR Vice President Olivier Andre traveled to São Paulo for the signing, and, concurrently, co-chaired and spoke on a panel at the New York State Bar Association's International Section on the growth of mediation and ADR in Brazil.

CPR's Brazil web page can be found here: http://ow.ly/UybVz.