



CPR

CPR Brazil Mediation and ADR Guide



CPR

International Institute for
Conflict Prevention & Resolution

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Praise for CPR Brazil Mediation and ADR Guide

"The CPR Brazil Mediation and ADR Guide is fundamental reading for lawyers in internal legal departments, with practical suggestions for reducing legal costs in case of disputes. Model escalation clauses can be adapted to the reality of any business, making the guide a tool to keep at hand."

Adelmo M. Machado

Legal Director - Brazil

Assurant

"I've been supporting CPR activities in Latin America for the past 8 years and I am very happy that CPR is launching its CPR Brazil Mediation and ADR Guide. Mediation is in its initial stages in Brazil and the launching of the guide comes in a perfect moment for the development of Mediation in our country. It is a well-crafted and practical material for practitioners and in-house counsel which contains important advice to mediation and other ADR mechanisms. The guide is structured in ten sections, beginning with a general view on methods for alternative dispute resolution, mediation clauses, describing each step of the mediation process (time and suitability, procedures, selection of a mediator, agreement for mediation, and cases study) and it ends with some useful hints about arbitration. I hope everybody enjoys the CPR Brazil Mediation and ADR Guide."

Fernando Eduardo Serec

CEO at TozziniFreire Advogados

Chair of CPR Brazil Advisory Board

TABLE OF CONTENTS

Section	Subject	Page (click to go to page)
	ABOUT CPR	4
	INTRODUCTION.....	6
1.	ADR PROCESSES: OVERVIEW	7
2.	GUIDE TO ADR CLAUSES.....	12
3.	MEDIATION: SUITABILITY AND TIMING.....	15
4.	MEDIATION: PROCESS AND PROCEDURE	18
5.	MEDIATION: FINDING A MEDIATOR	22
6.	MEDIATION: MEDIATION AGREEMENTS	24
7.	MEDIATION: PREPARING FOR A MEDIATION	26
8.	MEDIATION: FREQUENTLY ASKED QUESTIONS.....	28
9.	MEDIATION: CASE STUDIES	30
10.	ARBITRATION	31
	APPENDIX 1 INDUSTRY SECTOR-SPECIFIC RESOURCES	33
	APPENDIX 2 MEDIATION: CASE STUDIES	35
	APPENDIX 3 CPR BRAZIL ADVISORY BOARD MEMBERS AS OF APRIL 2019	48

USING MEDIATION AND OTHER ADR PROCESSES IN BRAZIL A GUIDE FOR CORPORATES AND ORGANIZATIONS

ABOUT CPR

Established in 1977 by general counsel and their law firms to find ways to lower the cost of litigation, CPR is an independent non-profit organization that helps businesses prevent and resolve commercial disputes effectively and efficiently.

Today, CPR is a collaborative organization that brings together leading corporate counsel, outside attorneys, distinguished neutrals and academics to develop and innovate cutting-edge solutions in dispute prevention and resolution.

This 360° stakeholder engagement and dialogue informs CPR's dispute resolution services — so our rules, tools and protocols are responsive to the field's most pressing concerns.

- **CPR Dispute Resolution** is an ADR provider offering quality, efficiency and integrity via innovative and practical arbitration rules, mediation and other dispute resolution services and procedures—as well as arbitrators, mediators and other neutrals, worldwide.
- The **CPR Institute**, the world's leading ADR think tank, positions CPR uniquely as a thought leader, driving a global dispute resolution culture and utilizing its powerful committee structure to develop cutting edge tools, training and resources. These efforts are powered by the collective innovation of CPR's membership—comprising top corporations and law firms, academic and public institutions, and leading mediators and arbitrators around the world.

Each element of this unique organization informs and enriches the whole, for the benefit of our members and users.

For more information, please visit www.cpradr.org.

CPR's dispute resolution services include:

- Resources for drafting pre-dispute alternative dispute resolution (ADR) clauses and custom post-dispute ADR agreements
- Rules enabling parties to conduct administered and non-administered arbitration, appellate arbitration, mediation and other forms of ADR
- Developing selection criteria for neutral selection, as well as generating lists of neutral candidates to meet parties' specific, complex needs
- Procedures for challenging arbitrators (Challenge Protocol)
- Direct appointments of arbitrators and UNCITRAL appointments
- Appointment of special arbitrator for emergency relief
- Fully administered arbitration
- Fund-holding capabilities

CPR has a panel of arbitrators and mediators in over 20 industry practice areas worldwide (for more information about the panels, visit CPR's website at <http://bit.ly/CPRNeutrals>).

For more information about the full spectrum of dispute resolution services offered by CPR, visit CPR's website at <http://bit.ly/CPRDRS>.

CPR IN BRAZIL (Brazil Initiative)

The **Brazil Initiative** is a CPR project that CPR has been actively promoting since 2011. In this period of time, CPR has taken its work to Brazil to advance and extend our best-in-class arbitration and mediation practices to a global scale. In addition, CPR has undertaken multi-level initiatives to promote commercial mediation and other methods of conflict management in Brazil.

CPR has also a CPR Brazil Advisory Board (BAB). Via the BAB, CPR seeks to be a leading independent resource in Brazil helping businesses and their legal advisers, whether in-house or external counsel, resolve and bring creative solutions to complex commercial disputes more efficiently and cost effectively, and preserve/enhance commercial relations. A list of the BAB members as of April 2019 appears at Appendix 3.

The **goals** of CPR's **Brazil Initiative** project are:

- to raise awareness and promote the use of mediation as an acceptable method for resolving business disputes;
- to develop a skilled cadre of mediators in Brazil;
- to expand CPR's Panel of Neutrals in Brazil;
- to educate the local community of in-house corporate counsel, business associations, private lawyers and judges on the benefits of Alternative Dispute Resolution methods.

Recent Work in Brazil

- CPR has conducted several conferences in Brazil:
 - **Business Mediation Congress** in Rio de Janeiro in 2013
 - **Business Mediation Congress** in Belo Horizonte in 2014
 - **Business Mediation Congress** in São Paulo in 2015
 - **Business Mediation Congress** in Rio de Janeiro in 2016
 - **Dispute Management Congress** in Curitiba in 2017
 - **VI Dispute Management Congress** in São Paulo on April 23, 2018
 - **2019 CPR Latin America Conference** will return to São Paulo on April 9, 2019
- CPR promoted a **Business Mediator Training** in São Paulo, in November 2013. A second training took place in São Paulo on April 26-28, 2015, and CPR held its 2016 workshop May 3-5 in Rio de Janeiro.
- Development of a strong collaborative **network**, including several arbitral chambers and bar associations, and strong support of the Brazilian judiciary.
- Creation and translation of key supporting **material in Portuguese**, including rules, protocols, training materials and success stories.

More information available at <https://bit.ly/2Ua2nED>.

INTRODUCTION

The CPR Brazil Advisory Board has produced this guide in furtherance of its goal to assist businesses, operating in Brazil and/or abroad, in understanding and taking full advantage of the range of "alternative dispute resolution" processes available in Brazil. This is intended to be an introductory guide to the most widely used processes, particularly mediation, and practical suggestions on how to make use of such ADR processes. It also provides links to an extensive range of additional materials and practical resources for access to more in-depth information.

This guide, which is based on the [European Mediation and ADR Guide](#), produced by the CPR European Advisory Board, does not provide legal advice on using ADR processes. Accordingly, users of this guide should consider seeking legal advice with respect to their particular circumstances.

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1. **ADR PROCESSES: OVERVIEW**

- 1.1 The term "ADR" is an umbrella term used to refer to a multitude of formal and informal procedures outside of traditional (courtroom) dispute resolution mechanisms. In Brazil and in many other jurisdictions, arbitration is regarded as falling within the range of processes that come within the term ADR. Nothing of substance turns on variations in this approach to nomenclature.
- 1.2 ADR processes are used widely in order to resolve disputes more efficiently, confidentially and at a generally lower cost than litigation. They can also help parties find practical, commercial solutions to disputes, allowing them to maintain on-going business relationships.
- 1.3 There are a multitude of options available to parties wishing to engage in ADR. Not all processes will be appropriate for all parties or all disputes. The first step in identifying the most appropriate process is to understand what options are available and to determine which option, or options, respond(s) best to the parties' needs and circumstances. This analysis will need to take into account the extent to which the parties have selected through the terms of any relevant contract one or more dispute resolution processes and how such processes are to be conducted. A comparative table giving a high-level overview of some of the most common processes can be found below on page 10.
- 1.4 One key distinction to note is between processes which are adjudicative, in that they result in a binding decision issued by a third-party neutral in an adversarial context (such as arbitration and expert determination), and those which are non-adjudicative, in that they foster amicable resolution of the parties' disagreement, with the assistance or not of a third-party neutral, conducted in a non-adversarial context (such as mediation, conciliation and negotiation).
- 1.5 One procedural aspect worth noting is that ADR may either be organised by the parties themselves (self-administered), or the parties may pay a fee to an ADR institution that will arrange the process (administered). Examples of self-administered processes are a mediation or arbitration set up on an *ad hoc* basis by the parties contacting a neutral third-party mediator or arbitrator directly. However, mediation and very commonly arbitration can be arranged with the assistance of an ADR institution.
- 1.6 In deciding which ADR process is most appropriate, parties might consider the following:
 - 1.6.1 the nature of the dispute: whether the issues in dispute are legal, technical, or relate only to quantum;
 - 1.6.2 the extent to which the process is capable of exploring and creating settlement options to meet underlying interests (economic, reputational, personal, emotional) in addition to or instead of the parties' legal rights and obligations;
 - 1.6.3 whether the parties want a facilitative process to assist them in reaching a commercial settlement, or an evaluative process to assess the factual and legal merits of their positions;
 - 1.6.4 whether a neutral third party is required to provide a decision which the parties are compelled to follow and/or which will have precedential value of importance to a party;
 - 1.6.5 the qualifications and experience of any neutral whom they wish to participate;
 - 1.6.6 how much control the parties want over the process and the amount of procedural support necessary;
 - 1.6.7 the timeframe within which the process is to be conducted;
 - 1.6.8 how much they are willing to spend on the administrative elements of the process; and
 - 1.6.9 the ability to enforce, if necessary, the outcome.

Court-Annexed Mediation

- 1.7 It is important to mention that in addition to the practice of private mediation, Brazil has also expanded its practice of court-annexed mediation.
- 1.8 According to data from the National Council of Justice (CNJ), Brazil has about 93 million cases before its national courts. In addition to this alarming number of pending claims, the legal system suffers from an exorbitant operating deficit.
- 1.9 In view of this scenario, the National Council of Justice introduced public policy initiatives to institute and promote non-adjudicative conflict resolution methods in Brazil.
- 1.10 Through Resolution 125 of 2010, and its amendments, the National Council of Justice has been implementing in all Brazilian states, Permanent Bodies of Consensual Conflict Resolution Methods (*Núcleos Permanentes de Métodos Consensuais de Soluções de Conflitos* – NUPEMECs) and Judicial Centers for Conflict Resolution and Citizenship (*Centros Judiciários de Solução de Conflitos e Cidadania* – CEJUSCs), where conciliation and mediation hearings are held.
- 1.11 Article 334 of the Brazilian Civil Procedure Code states that, if the initial complaint meets certain essential requirements and is not subject to early dismissal *in limine*, the judge shall order a conciliation or mediation session. The parties must attend the mediation or conciliation hearing. Article 334 also provides that the unjustified failure to attend the conciliation or mediation session by one of the parties shall be punishable by a fine. Exceptionally, this session may not be held if the parties expressly manifest their lack of interest in mediating or conciliating.
- 1.12 The possibility of having a court-annexed mediation does not preclude the parties from using private mediation. Often, private mediation is used even before the parties resort to litigation. Also, in contrast to private mediation, generally in court-annexed mediation the parties do not select their mediator and there is less time flexibility available to the mediation sessions.

Further resources

- 1.13 CPR's ADR Primer (<https://bit.ly/2EFfZ0Q>) provides an extensive list of ADR processes along with brief accompanying definitions. This document also provides further discussion of the differences between "administered", "self-administered" and "assisted" ADR methods.
- 1.14 The *CPR Corporate Counsel Manual for Cross-Border Dispute Resolution* – From CPR's Arbitration Committee, is an indispensable new resource providing guidance on drafting and planning for any common form of alternative dispute resolution in international business transactions, including tips on managing specific situations in-house counsel may encounter in international business disputes. To order the Manual, visit <http://bit.ly/2umr2K6>.
- 1.15 The *CPR Mediation Best Practices Guide for In House Counsel: Make Mediation Work for You* – Inspiration for the Guide grew out of conversations among the in-house counsel community over issues too frequently encountered with mediation: How to get recalcitrant parties to the mediation table? What is the best way to communicate to counsel that you will play an active role in the session? What to do when a mediator is not doing their job? And what happens after a mediation when it doesn't settle? The Guide – accessible for free to CPR Members – answers all these questions and includes insider tips from in-house counsel throughout. <http://bit.ly/MakeMediationWork>.
- 1.16 *CPR's Mediator's Deskbook* is a practical guide for mediators that contains practice tips, checklists and forms, and commentary on issues vital to successful mediation. <https://bit.ly/2l65CGG>.
- 1.17 International law firm and CPR member Herbert Smith Freehills LLP has produced a series of client guides covering a range of ADR-related topics. The guide - "Common ADR Processes - An Overview" (<http://bit.ly/HSFADRoverview>) discusses the advantages and disadvantages of several ADR methods including mediation, med/arb and arb/med (hybrid processes involving mediation and arbitration), early neutral evaluation, expert determination and adjudication.

- 1.18 CPR has produced an ADR Suitability Guide (<https://bit.ly/2tS6617>) (Portuguese version available at <https://bit.ly/2UqqETO>) to help legal practitioners determine whether or not a particular dispute is suitable for different types of ADR. This document contains a "Mediation Analysis Screen", which consists of a questionnaire for the parties followed by information on how to interpret their responses, in order to assess a dispute's suitability for mediation. The document additionally contains a comparative matrix of other non-binding ADR processes and a brief table comparing litigation against arbitration.
- 1.19 A checklist of factors to consider when determining whether a dispute is suitable or ready for mediation is set out in Section 3 below.
- 1.20 For further information on CPR's administered arbitration rules, see CPR's website at <http://bit.ly/AdministeredArbitration>.
- For information about CPR's administered arbitration rules for international disputes, see CPR's website at <http://bit.ly/IntAdministeredArbitration>.
- For information on CPR's non-administered arbitration rules, see CPR's website at <http://bit.ly/nonadministeredarbitration>.
- For more information about CPR's mediation services, see CPR's website at <http://bit.ly/CPRMediation>.
- For further information on CPR's international mediation procedure, see CPR's website at <https://bit.ly/2mAc762>.

OVERVIEW OF ADR PROCESSES		Speed	Cost	Enforcement	Finality	Impact on relations
Mediation	Structured settlement discussions with flexible procedural rules facilitated by a neutral third party with no decision-making power. Helping parties to identify the genuine issues that divide them and their underlying interests is a key part of the mediator's role.	Typically, a few weeks of preparation, followed by a one or two day mediation (private mediation). In case of court-annexed mediation, the mediation session generally takes around 2 hour, but can vary depending on several factors and each case.	Due to its short duration, mediation is much cheaper than arbitration or litigation, costs are usually split equally.	If settlement is reached, the parties will enter into a binding settlement agreement. Mediated settlements in Brazil are capable of enforcement following the Brazilian Mediation Act and the Brazilian Civil Procedure Code. In practice, disputes under such contracts are rare. The Singapore Convention (signing ceremony on August 2019) will serve as an international regime for the enforcement of mediated settlement agreements.	If no settlement is reached, litigation or further ADR will typically follow - discussions are usually subject to without prejudice privilege in later or concurrent proceedings.	Mediation provides an opportunity to discuss and mend commercial relations.
Arbitration	Typically, a formal trial-based process subject to procedural rules, usually presided over by one or three arbitrators who make a decision that is binding. Differs from litigation as the parties have more control over the procedure, flexibility and the process is generally private and confidential.	The whole process typically takes one to two years with hearings lasting from a day or two up to several weeks (and subject to delays, e.g. if the tribunal's jurisdiction is challenged).	Costs can be similar to litigation and are higher the longer it takes; sometimes, the unsuccessful party pays costs.	Awards may need to be converted into court judgments, plus court permission is often required before enforcement, but enforcing awards in foreign jurisdictions is often easier than a court judgment if the state is one of the 159 (as of now) parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The "New York Convention"), which provides for the reciprocal enforcement of awards.	Arbitral awards can only rarely be appealed where there is no such right in the dispute resolution clause, since the grounds for setting aside arbitral awards are limited, e.g. where the jurisdiction of the tribunal is challenged, or serious irregularity is asserted.	The legal and adversarial nature of the process does not assist commercial reconciliation.
Early neutral evaluation (ENE)	Neutral third party with expertise in the subject matter provides a non-binding evaluation of the dispute.	Depending on the complexity of the case, an evaluation could be made in one to three months.	The costs of an ENE are typically low, in line with mediation, as it is a summary process usually conducted without disclosure or evidence.	This is a non-binding process - the evaluation is not enforceable but may bring parties closer to settlement by helping them to assess the strength of their positions.	Litigation or further ADR will follow ENE as it will not resolve the matter – the evaluation is usually subject to without prejudice privilege in later or concurrent proceedings.	This may bring parties closer to settlement or alternatively polarise their positions, it is unlikely to mend a relationship.

OVERVIEW OF ADR PROCESSES		Speed	Cost	Enforcement	Finality	Impact on relations
Expert determination	Neutral third party with expertise in the subject matter makes a final binding decision following written (or sometimes oral) submissions by the parties, the procedure is usually less formal than arbitration.	Depending on the scope and complexity of the issues, the whole process could take six to 12 months.	Costs typically higher than mediation but lower than arbitration, due to shorter duration, curtailed disclosure and evidence.	The decision is usually stated to be binding under the applicable dispute resolution clause, as such it will usually be enforceable in the courts except where the expert has not complied with instructions.	Though there are sometimes cases where courts are prepared to intervene, in most cases the expert's decision will be accepted as final, making it a potentially swift and cost-effective method of ADR.	The speed of the decision means, if it is accepted, that the commercial relationship can often be preserved.
Conciliation	The Brazilian National Council of Justice defines conciliation as a procedure involving settlement discussions facilitated by a neutral third party, who has more freedom to express opinions and give suggestions. It is recommended for conflicts where there is no lasting relationship between those involved and generally it is a more law-focused proceeding.	Typically, a few weeks of preparation, followed by a short conciliation session (average of 30 min to 1 hour).	In the case of judicial conciliation (prevalent practice in Brazil) there are no extra costs – only the regular litigation costs. If it is a private conciliation, the cost is similar to that of a mediation.	If settlement is reached, the parties will enter into a binding settlement agreement.	If no settlement is reached, litigation or further ADR will typically follow.	Conciliation provides an opportunity for the parties to enter into an agreement.
Dispute Boards	A process where a committee composed of one or more independent professionals periodically accompanies the performance of a contract. Common in the area of civil engineering.	A conflict that arises during the contract is usually settled by the Dispute Board within 90 days.	Costs typically higher than mediation but lower than arbitration, due to shorter duration, curtailed disclosure and evidence.	Dispute Adjudication Boards (DRB) issue binding decisions; Dispute Review Boards (DRB) only issue recommendations and the Combined Dispute Boards (CBD) may issue binding decisions and issue recommendations.	Though there are sometimes cases where courts are prepared to intervene, in most cases the board's decision will be accepted as final, making it a potentially swift and cost-effective method of ADR.	Since Dispute Boards generally resolve and manage conflicts promptly, this mechanism prevents disagreements between parties from escalating and increases the chances of preserving the parties' relationship.

2. GUIDE TO ADR CLAUSES

- 2.1 Parties may make the decision to use ADR either before a dispute arises (at the outset of their commercial relations) or once it has already arisen. In the former case, it is common practice to incorporate a provision in the relevant contract to use ADR in the event of a dispute (an ADR clause). However, even if the parties do not include an ADR clause in their contract, they are free to use one or more ADR processes once a dispute has arisen, often in parallel with any formal contractually-specified dispute resolution process. Of course, once a dispute has arisen, it may be somewhat more difficult to agree on the appropriate ADR process(es) to be used and such discussions will need to be framed by any legal or procedural requirements of the jurisdiction in which the dispute is to be resolved.
- 2.2 Having a dispute resolution process involving ADR in place from the outset can potentially achieve significant time and cost savings later on. On the other hand, a mandatory obligation to use ADR (e.g. mediation) before the parties litigate in a selected national court (or arbitrate) will not always be effective in practice if the particular dispute that arises is not sufficiently developed or one party is reluctant.
- 2.3 When selecting an ADR clause, one size does not fit all and parties should adopt an approach that is suitable to each particular contract.
- 2.4 In many industry sectors, contracting parties are able to draw on dispute resolution clauses (including ADR clauses) that have been developed to reflect the needs of those sectors. By way of example, the oil and gas, construction, commodities trading and maritime sectors have all developed contracting structures and dispute resolution rules to limit the scope for conflicts to arise and to resolve them through rules and procedures suitable for the industry in question. See Appendix 1 for a summary of some of these rules and resources by industry sector, including industry sector-specific resources prepared by CPR.
- 2.5 There are broadly two types of ADR clauses: mandatory and non-mandatory. There are also escalation clauses, which are a subset of mandatory clauses.

Mandatory clauses

- 2.6 Mandatory clauses put an obligation on the parties to use ADR to resolve a dispute between the parties, as for instance using a non-adjudicative process (usually mediation) prior to arbitration or litigation being commenced, or impose a mandatory binding ADR process, such as arbitration or expert determination. They are particularly effective where parties wish to ensure that an ADR process is always attempted or used. The risk is that they will also compel parties to use the process even where one of them does not consider it appropriate and a dispute might arise regarding whether the clause was complied with. It should be noted that whether a clause of this nature is truly mandatory and effective will depend upon the system of national law governing the clause. Of course, if both parties agree, it is possible to change or dispense with a clause-mandated ADR process.

For example:

- Agreement to Mediate – Pre-Dispute Clause

“The parties shall attempt to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the [then current] CPR International Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.”

- Administered Arbitration Agreements - Pre-Dispute Clause

“Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration of International Disputes by [a sole arbitrator] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators] [three arbitrators to be appointed in accordance with the screened

appointment procedure provided in Rule 5.4] [three arbitrators, none of whom shall be designated by either party]. Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The seat of the arbitration shall be (city, country). The language of the arbitration shall be (language)."

Escalation clauses

- 2.7 Escalation clauses set out "multi-step" procedures, for example requiring parties to first negotiate directly, failing which to attempt mediation, before resorting to arbitration or litigation. These are widely used in a range of commercial contracts across all industry sectors, but are particularly common (and effective) where parties enter into long term contractual relationships where they wish to afford themselves every opportunity to resolve conflict informally before a formal dispute resolution process such as arbitration is invoked.

For example:

- 2.8 **"Negotiation Between Executives (A)** *The parties shall attempt to resolve any dispute arising out of or relating to this [Agreement][Contract] promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. To initiate a negotiation, a party shall give the other party written notice of any dispute not resolved in the normal course of business. Within [30] days after delivery of the notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.*

Mediation (B) *If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within [20] days,] the parties shall endeavour to settle the dispute by mediation under the International Institute for Conflict Prevention & Resolution ("CPR") International Mediation Procedure [currently in effect OR in effect on the date of this Agreement], [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the [45] days.] Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.*

Arbitration (C) *Any dispute arising out of or relating to this [Agreement] [Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within [45] days after initiation of the mediation procedure] [within [30] days after appointment of a mediator], shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration of International Disputes [currently in effect OR in effect on the date of this Agreement], by [a sole arbitrator] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR] [three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators] [three arbitrators to be appointed in accordance with the screened appointment procedure provided in Rule 5.4] [three arbitrators, none of whom shall be designated by either party]; [provided, however, that if one party fails to participate in either the negotiation or mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above.] Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The seat of the arbitration shall be (city, country). The language of the arbitration shall be (language)."*

Non-mandatory clauses

- 2.9 Non-mandatory clauses are clauses which only require parties to consider using ADR before arbitration or litigation - the option of ADR is raised, but flexibility to reject it is preserved should it be inappropriate in a given case. While non-mandatory clauses are sometimes criticized as ineffective because they do not compel the parties to the contract to use a particular process, they can be helpful to parties who wish to preserve maximum flexibility in their dispute resolution options – the inclusion of a non-mandatory clause enables either party to propose (for example) mediation without fear of the proposal being taken as a lack

of confidence in their case, because the use of mediation is already acknowledged by both parties as an available dispute resolution process through the terms of their contract.

CPR does not favour non-mandatory clauses because they can be the subject of litigation as to whether they have been complied with, i.e. whether the parties have considered using ADR or not. In some circumstances contracting parties may nevertheless choose to use a non-mandatory clause given the flexibility it confers.

ADR CLAUSES: KEY CONSIDERATIONS

Scope	Which dispute(s) will the clause cover?
Time period	The clause may set a maximum timeframe within which ADR should be commenced or concluded, including the timeframe for specific actions or steps to be taken.
Initiating the procedure	How will the process formally be commenced?
Selection of neutral, expert, etc.	How will the third party be chosen, will an ADR institution be used?
Language, location and governing law	Where will the process take place and in what language? It may be appropriate in longer clauses to include an express choice of law for the dispute resolution clause itself.
Attendees	This is relevant in mediation or negotiations - parties will want attendees on both sides to have the requisite authority to settle the dispute.
Confidentiality	Parties will generally want the process to be confidential and, if it is a non-binding process, to be carried out under without prejudice privilege (where that head of legal professional privilege is recognised).
Costs	Who will be responsible for the costs of the process, both in terms of funding the neutral and/or institution and ultimate responsibility for, for example, legal costs?
Interim Measures	The parties should consider whether will be a need to seek interim measures before the procedure provided for in the ADR Clause.

Further resources

- 2.10 CPR produces a range of model ADR clauses, including mediation, several types of arbitration, mini-trial and other sector-specific clauses, all of which can be accessed at <http://bit.ly/CPRModelClauses>. These can be used as a guide when drafting ADR clauses in commercial contracts, though it goes without saying that careful thought should be given to their suitability in any given scenario and whether any variations are appropriate.
- 2.11 Key considerations to bear in mind when drafting ADR clauses, including when making use of model clauses, are listed in CPR's drafting issues checklist (<https://bit.ly/2XMIyn5>).
- 2.12 *The CPR Corporate Counsel Manual for Cross-Border Dispute Resolution* provides guidance on drafting and planning for any common form of alternative dispute resolution in international business transactions, including tips on managing specific situations in-house counsel may encounter in international business disputes. To order the Manual, visit <http://bit.ly/2umr2K6>.
- 2.13 CPR further produces a practice-oriented guide to common alternative dispute resolution processes, "Drafting Dispute Resolution Clauses" (see <https://bit.ly/2IYlw6Z>), which is geared towards transactional and business lawyers. This guide provides accessible and sophisticated information on pre-dispute clause drafting along with example clauses and is available for purchase.
- 2.14 The International Mediation Institute (IMI) has pulled together numerous example mediation clauses which are freely available on the internet from various ADR providers. These are accessible here (<http://bit.ly/IMISampleClauses>), together with several pieces of practical guidance on drafting such clauses.

3. MEDIATION: SUITABILITY AND TIMING

- 3.1 Mediation is one of the most popular forms of ADR and as a process is readily applicable in different jurisdictions and in cross-border disputes. It is particularly effective where there is an on-going commercial relationship between the parties but can assist parties in virtually all disputes, except where one of the parties requires an outcome or remedy which only a court or an arbitral tribunal can provide (such as an injunction).
- 3.2 Mediation will be worthwhile in the vast majority of disputes. Often, it is a matter of determining *when*, rather than *if*, mediation will best assist parties in reaching or coming closer to settlement. Even where mediation does not result in a settlement being reached (perhaps because it is attempted early in the life of the dispute), mediation can assist parties by enabling them to identify and focus on the key issues between them and identify their respective underlying interests. Parties may negotiate or mediate more than once in the life of a dispute on the journey to reaching an acceptable resolution.
- 3.3 The questions set out below are intended as an informal checklist for parties to refer to in assessing the suitability of a particular dispute for mediation at any given stage. The checklist is not exhaustive, but only indicative. It is not necessary to answer all of these questions; usually answering just one or a few of these questions can identify whether there will be a worthwhile basis for mediation to be used.
- 3.4 The decision of whether to mediate is also closely linked to the decision over when to mediate in the dispute cycle. In summary the earlier the process is carried out, the greater the opportunity to save legal and business costs and avoid escalation of a dispute. However, this always needs to be balanced with an assessment of whether the parties are ready to settle their dispute in the sense of the issues being sufficiently defined and sufficient information being available to allow a sufficient analysis of the risks of proceeding with or escalating the dispute.
- 3.5 This section includes resources to assist both in identifying disputes suitable for mediation and in considering when to mediate (this can be more than once in a larger dispute).

CHECKLIST

- Does instinct tell you that settlement is likely, even if not until a later stage in proceedings?
Where the probability of eventual settlement is high, mediation often speeds up the settlement process, saving cost, time and potentially the business relationship.
- How important is the goal of maintaining an on-going business relationship?
If this is a key aim of both parties, mediation is likely to be worth pursuing.
- How much control do the parties want to be able to exercise over the dispute resolution process?
Mediation is a flexible process that allows parties to have more control over procedure than arbitration or litigation.
- Is the case likely to be disposed of summarily, or does one of the parties require interim relief, a particular court financial reward or penalty?
Certain types of relief available in court will not be available via mediation so where these are required mediation may not be appropriate.
- Is a formal disclosure/discovery process likely to be required?
Parties to mediation can agree to exchange information, though a full disclosure/discovery exercise is not undertaken. Where the parties believe the case requires full formal disclosure/discovery, it may be that the parties can attempt mediation before or in parallel with this exercise in order to narrow the issues on which documents are required to be produced and thereby save time and costs.
- Does the dispute only relate to quantum or a specific technical issue?
Parties may also consider using another ADR type if this is the case.

- Do the estimated monetary costs of litigation or arbitration mean that attempting mediation is worthwhile?

In the overwhelming majority of cases, the answer to this question will be affirmative.

- Is there a need for a speedy resolution of the dispute?

Besides being generally desirable, speedy resolution of a dispute will be necessary where the parties wish to continue or resume a trading or other commercial relationship. Mediation can be convened and conducted quickly, if necessary in a matter of days, although in commercial disputes a mediation will usually be arranged with a few weeks' notice to enable the parties to prepare properly.

- Is there a need for privacy?

Mediation is usually a confidential process.

- Is public vindication a goal of either party?

The mediation process itself is confidential, however, it is possible (and common) for parties to agree that one element of a mediated settlement is a public statement in an agreed format: perhaps an apology, or just a statement to acknowledge/inform third parties (investors in the market for example) that a dispute has been brought to an end.

- How certain are the parties that they will prevail in court or in arbitration?

If the parties are clear on the legal merits, it should be possible for mediation to assist them in negotiating a settlement more quickly than the outcome in litigation or arbitration. If the facts or law remains in dispute, the mediation process can provide an opportunity for parties to test their understanding and assessment of the position in a secure environment with the mediator privately and in confidence. This enables a realistic risk assessment to be undertaken which itself is likely to assist in the process of reaching agreement.

- How receptive is leadership at the respective organisations to the idea of mediation?

Companies with a "culture" that encourages ADR and that have had experience with it before are much more likely to be receptive to mediation and enter into it prepared to settle. Most business personnel who participate in mediation find the process effective.

- What is the current status of the parties' relationship?

While conflict, distrust and tension may make the mediator's job more difficult, even high levels of such emotions do not present insurmountable barriers to a successful mediation. Often it is the ability of the mediation process to allow emotional and personal factors that are present in many commercial disputes to be acknowledged that allows mediation to assist the parties in resolving their disputes. Neither litigation nor arbitration can acknowledge the role that these human interests play, and frequently the adversarial nature of either process polarises views rather than bringing the parties closer together.

- Is there a disparity between the parties in terms of financial resources and business sophistication?

Mediations with great power disparities will require careful handling by the mediator to avoid any risk of unfairness. However, mediation can provide a secure forum for parties of disparate size or resources to engage in an environment that encourages the resolution of the dispute. Some large corporates may in rare circumstances be willing to fund the mediation process simply to encourage a smaller counterparty to engage where conventional negotiation or other settlement efforts have been unsuccessful.

- Are the opposing counsel's styles compatible?

The attitudes of external counsel can impact the likelihood of a successful mediation. However, it is incumbent on the parties and their in-house counsel (where present) to set the tone. In some jurisdictions where mediation is not well known or used extensively, external counsel may themselves lack relevant understanding or experience and so that may be an obstacle to be addressed through information/education.

- Would mediation help the parties by helping them clarify the issues in dispute and understanding one another's real drivers or underlying interests?

Helping parties to identify the genuine issues that divide them and their underlying goals is a key part of the mediator's role and increases the chances of the parties reaching a settlement.

- Would mediation give the parties a chance to explain their views, reduce hostility, or even apologise?

Mediation is a more cooperative, less adversarial process than litigation or arbitration – if parties are given the chance to vent their anger or explain their position, it may be that mediation can help alleviate those tensions. Very many disputes arise or are exacerbated by misunderstandings which can often be resolved more efficiently in mediation than through litigation or arbitration.

Further resources

- 3.6 The questions set out in the checklist above, as well as other questions not listed, are discussed further in CPR's ADR Suitability Guide (<https://bit.ly/2tS66l7>). This guide provides a full mediation analysis screen which can be used to assess the suitability of particular disputes for mediation.

WHEN TO MEDIATE IN THE DISPUTE CYCLE

- 3.7 Although there is sometimes discussion about the 'right' time to mediate a dispute, in reality mediation can be undertaken effectively at a number of stages in the lifecycle of most disputes. It is necessary that the parties understand the different dynamics at play in the dispute at different stages and tailor their expectations, preparation and negotiation strategy accordingly.
- 3.8 It is obvious that the earlier the parties are able to mediate in the dispute cycle, the greater the extent of savings of legal costs and management time and the preservation of (or limitation of damage to) commercial relationships. However, the earlier a mediation takes place in the dispute cycle, the less information the parties may have available to help them assess the dispute. Generally, decision-makers prefer to be well informed before taking a decision to compromise a dispute and so there is an inevitable tension between seizing the opportunity to settle at the earliest appropriate stage while having enough information to take an appropriately robust decision (so as to be accountable to management, shareholders etc.). There will be a range of internal and external factors that affect the decision of a company about when to mediate which include the forum in which the dispute is to be resolved, the system of law governing the disputed issues, and the circumstances and underlying interests of the parties.
- 3.9 Herbert Smith Freehills LLP ADR client guide - "When to Mediate in a Dispute" (<http://bit.ly/HSFwhenmediate>) - discusses some of the factors to consider when determining which stage is the most appropriate to attempt mediation on a particular dispute. This resource is drafted from a common law perspective with English civil procedure as the reference point, but the series of questions that are asked can be readily modified to reflect procedure in the courts of a civil law jurisdiction or arbitration. Whatever the forum for the formal resolution of the dispute, the challenge for each party is to test whether advancing the case through the next procedural steps will move them closer to the point where they can take an appropriately informed decision whether to resolve the matter by agreement in negotiation or mediation, or to continue to a formal resolution of the dispute by a court or arbitral tribunal.

4. MEDIATION: PROCESS AND PROCEDURE

Overview

- 4.1 Mediation is facilitated negotiation, the aim of which is to resolve a dispute on terms mutually acceptable to the parties. The parties jointly select a neutral third party to act as mediator. The mediator's role is to explore the interests of the parties, to discover which of those interests are shared, to alert the parties to a resolution that might further those interests and to assist them in reaching that resolution by agreement.
- 4.2 Mediation provides a number of benefits over direct negotiation between the parties. In direct negotiation, parties are often reluctant to acknowledge weaknesses in their case and make concessions out of a concern that this will undermine their bargaining power. This leads to parties adopting entrenched positions and refusing to acknowledge that there might be alternative ways of assessing the dispute.
- 4.3 Mediators act as diplomats, seeking to engage the trust of both parties and encouraging them to share their real concerns and interests with the mediator in confidence. This allows realistic assessments of the risks to be carried out and alternative solutions to the dispute to be discussed and explored with the mediator privately and safely. The process helps parties engage with each other in a more pragmatic and constructive way. Mediation also provides a flexible timetable and structure that may be harder to achieve in a conventional negotiation.

Key features

- 4.4 Mediation is a **voluntary process**. Although in some jurisdictions mediation is strongly recommended by the courts or even made compulsory, parties can never be forced to reach agreement via mediation. The role of the mediator is to assist the parties in reaching an agreement, but this is not always possible.
- 4.5 Mediation is **private and confidential**. Nothing said in the course of the mediation can be discussed outside of the mediation or revealed to any third party. Additionally, everything said in the private sessions held between the mediator and one party in the absence of the other will also be confidential vis-à-vis the other party. These conditions are usually set out in the mediation agreement. Of course, that which is said cannot be "unsaid" and information which is imparted in the course of the mediation cannot be "unknown". This is the same as with any settlement negotiation. Be aware that some systems of national law governing mediation agreements take different approaches to the confidentiality of the mediation process.
- 4.6 In addition, in Brazil, because mediation is a confidential process, information exchanged during mediation cannot be used by the parties in parallel or subsequent judicial or arbitral proceedings nor disclosed to non-parties to the mediation, apart from rare exceptions, as for instance, the possibility of disclosure of information related to a crime. Also, mediators are protected from being called as a witness in an arbitration or judicial proceeding.
- 4.7 The mediator has **no power to make orders**, compel a certain course of action, enforce a settlement or issue a judgment or award. The results of the mediation will only be binding if parties enter into a settlement agreement at the end of the process. This contract will be enforceable via the dispute resolution mechanism set out within it. Enforcing the settlement agreement will typically be much easier than litigating/arbitrating the original dispute (because the action often concerns only a debt – the settlement amount) but in practice it is rare that parties to a settlement agreement entered into consensually at a mediation do not observe its terms.

Evaluative or facilitative process?

- 4.8 The mediator is independent and neutral and does not usually act in a decision-making capacity unless the parties so request (which is rare).
- 4.9 Mediators can nevertheless approach their role in different ways. A mediator may act only to enable negotiation, manage the process and avoid expressing views on the merits of the dispute or the approach of either party. This is referred to as facilitative mediation. Facilitative

mediation is the most common model of mediation used internationally. A facilitative mediator may nevertheless address the merits of the dispute, often by asking the parties questions (almost always in private) to encourage a realistic appraisal of the strengths and weaknesses of their position.

- 4.10 A mediator may also approach the role with a willingness to express an opinion on the merits of parties' respective positions or give a (non-binding) view on what a settlement could or should look like. Such mediators are often categorised as "evaluative".
- 4.11 In reality, there exists a spectrum of styles reflecting the mediator's personal approach, the wishes of the parties and in some cases expectations based on prevailing practice within a particular jurisdiction. Skilled mediators are also able to adjust their style and approach to suit the parties and the dispute, including adopting facilitative and evaluative approaches flexibly.

Procedure and rules

- 4.12 Mediation may be arranged by the parties on an entirely *ad hoc* basis or by the incorporation of the rules and procedure of an ADR institution. CPR (along with other ADR institutions) produces mediation rules, links to which can be found below.
- 4.13 Parties may agree to submit to such rules either by the terms of an ADR clause in a contract or by entering into a mediation agreement. Alternatively, parties may decide to apply custom procedural rules (for example drafted by in-house or external counsel), the terms of which will be set out in a mediation agreement (see section 6 below for further information on mediation agreements).
- 4.14 While the procedure is flexible and will vary depending on the rules adopted or terms agreed, a typical process is as set out below.

Step 1	Appoint a mediator
	This can be done either by direct joint instruction of the mediator on agreement of the parties, or by enlisting the services of an ADR or mediation service provider who can suggest or appoint a suitably qualified and trained candidate. For more information on how to select a mediator, see section 5 below.
Step 2	Logistics: date, venue and representation
	The next step is to set the date, time and place for the mediation. It is essential that appropriate decision makers with authority are able to attend from each party so that if agreement is reached a settlement agreement can be entered into on the day. Parties will also need to decide whether or not they want their respective lawyers to attend. Lawyers do attend in the great majority of cases and tend to be involved in the preparation process as well. This is not mandatory, however, and some corporations with experienced in-house counsel who are familiar with the process may be happy to attend mediations without external counsel support.

Step 3	Mediation statements and documents
	<p>Parties usually provide the mediator with a core bundle of documents (agreed, if possible) to read prior to the mediation. They also exchange (or submit only to the mediator, as agreed) brief written statements setting out their respective approaches to seek to persuade each other and educate the mediator. Mediation written statements, also referred to as position papers, are not court documents. They should be accessible to the business decision makers who are usually not lawyers.</p>
Step 4	Preparation
	<p>The parties need to prepare carefully for the mediation to give the process the best chance of reaching a successful settlement. This should include an assessment of the legal merits and evidence, carrying out a risk assessment for the dispute, understanding the economics of any litigation or arbitration that is contemplated or is under way as well as preparing a negotiating plan. It is usually helpful to give some thought in advance to what an acceptable settlement could look like. See further discussion at section 7 below.</p>
Step 5	The day itself
	<p>Firstly, the mediator explains the ground rules for the mediation such as confidentiality, a “without prejudice” privilege where applicable and how the mediation will progress with the agreement of the parties.</p> <p>Then, a typical mediation would begin in the morning with an opening joint session at which the parties give short oral statements. These supplement the written statements exchanged in advance.</p> <p>The parties may continue to negotiate in a joint session but commonly, at the mediator's suggestion, will separate to different rooms for a series of private sessions during which the mediator discusses the case privately. The mediator engages in shuttle diplomacy, spending time alternately with each party.</p> <p>The mediator may bring the parties (or selected representatives from each party) back together for further joint meetings throughout the day(s) of the mediation if helpful to advance the negotiation.</p> <p>Discussions in a mediation often develop through three stages. First, a period of exploration during which the mediator asks questions of each party to understand their interests and tests their assessment of their position in the dispute. Secondly, a process of bargaining whereby the mediator encourages the parties to make offers and counter-offers in the negotiation, either to each other in face to face joint meetings or being carried by the mediator from one party in private session to the other. Thirdly, a process of concluding agreement ensuring that the terms of a settlement are clear, capable of performance and reflected in a written settlement agreement.</p> <p>It should be noted that there is typically some variation in the structure of the mediation day(s) according to the mediation location, local practice, mediator style, and other factors. The process described above is a typical structure for a mediation, although in certain jurisdictions the mediator may encourage the parties to spend a greater part of the mediation day in joint meetings and less time in private or caucus sessions. Either approach can be effective, but it is advisable for parties to understand the mediator's usual approach and to make clear their wishes and expectations for the mediation process.</p>

Further resources

- 4.15 CPR has produced an International Mediation Procedure (<http://bit.ly/2ozJLO9> and available in Portuguese at <https://bit.ly/2U6nRTD>) which can be used for Brazilian mediations. CPR also provides a Mediation Procedure (<http://bit.ly/CPRMediationProcedure>), specifically developed for mediations in the US.
- 4.16 Herbert Smith Freehills' ADR client guide – "An introduction to mediation – what it is and how it works" (<http://bit.ly/HSFMediationIntro>)- provides a general introduction to key features of mediation and information on what to expect on the day itself. This guide also provides a template "mediation timeline", setting out the key procedural stages which take place before, during and after the date(s) of the mediation and looks in more detail at the procedure on the day of mediation itself.
- 4.17 Several other ADR institutions also provide procedural rules which can be used where either the parties have already agreed to apply such rules under a dispute resolution clause or are agreeing to mediate at the point of dispute. See, for example:
 - 4.17.1 Câmara de Mediação e Arbitragem Empresarial – Brasil (CAMARB): <http://camarb.com.br/regulamento-de-mediacao-empresarial-2018/>
 - 4.17.2 Câmara de Conciliação, Mediação e Arbitragem CIESP/FIESP: <http://www.camaradearbitragemsp.com.br/pt/mediacao/regulamento.html>
 - 4.17.3 Conselho Nacional das Instituições de Mediação e Arbitragem (CONIMA) http://www.conima.org.br/regula_modmed
 - 4.17.4 Câmara de Mediação e Arbitragem da Associação Comercial do Paraná (ARBITAC): http://arbitac.com.br/wp-content/uploads/regulamento_mediao.pdf
 - 4.17.5 Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá (CAM-CCBC): <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/resolucao-de-disputas/mediacao/regulamento-1998-2015/>
 - 4.17.6 Centro Brasileiro de Mediação e Arbitragem (CBMA): http://cbma.com.br/regulamento_3_ingles

5. MEDIATION: FINDING A MEDIATOR

Locating a mediator

- 5.1 A mediator can be appointed in one of two ways. Either the parties can agree on the candidate and instruct that person directly, or they can enlist the services of an ADR or mediation service provider that can suggest or appoint a suitably qualified and trained candidate, usually in return for a fee.

Selecting a mediator

- 5.2 In Brazil, there is no strict requirements for providing services as a private mediator. A private mediator can be anyone that the parties trust. In order to provide services as a court-certified mediator in a court-annexed mediation in Brazil, one needs to have graduated at least two years prior from an undergraduate institution and go through a certification training provided by institutions recognized by the National School for Education of Magistrates (*Escola Nacional de Formação e Aperfeiçoamento de Magistrados*) or by the judiciary. The requirements for providing services as a mediator vary across individual jurisdictions around the world. In Europe; for example, certain jurisdictions have no formal or legal requirements at all (for example, the UK) whereas others require that mediators undergo formal training, certification and continuing education training (for example, the Netherlands).
- 5.3 Although it is always advisable to use a mediator that has been trained and accredited by a reputable ADR institution, such accreditation is not in itself any guarantee of quality or experience, nor does it say anything about the personal style and attributes of a particular mediator. It is therefore essential to seek information on the performance of a mediator which may be obtained from a number of sources including the inclusion of the neutral on a list or panel of recommended neutrals maintained by an ADR institution, discussions with that ADR institution, discussions with external counsel or with peers and a review of on-line mediator feedback websites. In some cases, particularly major cases, it might be useful for the parties to interview mediator candidates during the selection process.
- 5.4 Mediators each have their own personal styles and it will be important to choose someone who will be able to work well with and get the most out of the parties' representatives on the day of mediation. Where the dispute is particularly large or complex and if multiple parties are involved, the parties can consider using a team of co-mediators to share the work between them.
- 5.5 The majority of commercial mediators are lawyers by background who have been trained as mediators. However, parties may alternatively wish to select a non-lawyer, for their other skills, such as specialist industry sector expertise. Whatever the mediator's background, key attributes will be patience, an ability to listen, energy and determination.
- 5.6 A common question concerns the importance of subject matter expertise for the mediator. The more specialized the subject matter and type of dispute, the more limited the pool of potential candidates to act as mediator. In practice it is desirable for the mediator to have a working knowledge of the subject matter – for example, intellectual property, insurance, energy, products liability – so that the mediator can engage efficiently with the issues, but it is rarely essential to have deep subject matter expertise. It is usually equally important that the mediator be appropriately skilled in managing the process.

Further resources

- 5.7 For parties wishing to agree upon and engage a mediator directly, CPR maintains an extensive and detailed neutrals database (CPR's Panel of Distinguished Neutrals), which can be searched by CPR Members to identify neutrals whose experience, credentials, language ability and geographic location meet the requirements of the parties. The detailed biographies of these neutrals, who are thoroughly vetted for their ADR proceeding and commercial dispute experience, can be displayed online. Non-CPR Members can obtain biographies of CPR credentialed neutrals with pre-determined qualifications by contacting

CPR. CPR can also assist the parties to a dispute in selecting a mediator. For additional information about CPR's Dispute Resolution Services, see <http://bit.ly/CPRDRS>.

- 5.8 Alternatively, CPR can assist parties in the selection of an arbitrator or a mediator when the parties so provide in their contract or at the parties' request after the dispute has arisen. In that case, CPR will work with the parties to select a neutral who is fully qualified to resolve the dispute and who has been screened for conflicts and availability. See CPR's Neutral Selection Services (<http://bit.ly/CPRSelection>) for further details.

The CPR's Due Diligence Evaluation Tool (DET) is a document of potential questions designed to facilitate a more informed evaluation of potential arbitrator and mediator candidates. See <http://bit.ly/CPRDET>.

- 5.9 Herbert Smith Freehills' ADR client guide - "Selecting your mediator and drafting the mediation agreement" (<http://bit.ly/HSFMediatorSelection>) - also sets out factors and criteria to take into consideration when selecting a suitable mediator.

6. **MEDIATION: MEDIATION AGREEMENTS**

- 6.1 The mediation agreement is entered into between the parties either on the day of the mediation or shortly in advance. It sets out the procedural framework governing how the mediation will run and includes other key obligations, such as confidentiality obligations. These documents address a standard list of topics, albeit the precise form may differ from one jurisdiction to another, regardless of the size and type of commercial dispute. As noted above, the agreement will either set out all terms in one document or may incorporate the procedural rules of an ADR institution by reference.
- 6.2 It is good practice to sign the mediation agreement as early as is practicable after the parties agree upon a mediator, so that pre-mediation activity can also be structured in accordance with the terms agreed. Frequently, however, the agreement is not signed until the first day of the mediation.
- 6.3 Key terms typically covered in the mediation agreement are discussed below.

<i>The dispute</i>	It is important to be clear about what issues and disputes are intended to be resolved (if possible) at the mediation. This will be straightforward where the matter is in litigation or arbitration where the issue in dispute will be framed by reference to the proceedings. Where no proceedings are under way, or where the parties wish to attempt to resolve other or related disputes, careful drafting will be required so that both parties approach the mediation with common expectations as to what will or will not be discussed (which of course affects preparation).
<i>Location, time and date</i>	Parties will need to set the time and location and may also wish to specify a time-limit for negotiations. The overriding concern should be to identify a location and facilities for the mediation that are convenient, comfortable and properly equipped to meet the parties' requirements.
<i>Confidentiality</i>	Everything said in the mediation should be confidential and on a "without prejudice" basis (where that type of privilege is recognised). Consider whether it is appropriate or even possible to keep the fact of the mediation a secret.
<i>Settlement Authority</i>	There is usually a term that those present will have the authority to bind the parties they represent. Typically, the agreement includes a provision that no settlement is agreed or legally binding until the parties have entered into a written settlement agreement.
<i>Mediator</i>	It is typical to provide that the mediator and any appointing authority will not have any liability toward the parties in connection with the mediation. There should also be a term that no party will seek to require the mediator to give evidence in connection with the proceedings or any satellite litigation.
<i>Costs</i>	Parties will need to agree who will pay the costs upfront (in terms of funding the mediator's costs and the venue for the mediation if a neutral venue is preferred), and who will ultimately be liable for them, including parties' costs of preparation, venue fees, and mediator fees, in litigation or arbitration.

<i>Governing law and jurisdiction</i>	The mediation agreement should include an express choice of law clause and a clause identifying the forum for the resolution of any disputes arising out of the mediation process (which are rare). It is helpful to select a law and court with an established body of jurisprudence to support the critical elements of the mediation process (for example, confidentiality, the "without prejudice" nature of the negotiations and, if desired, the procedural ability to convert mediation settlement agreements into enforceable judgments).
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Further resources

- 6.4 CPR has produced a Model Agreement for Parties and Mediator which can be found at the end of the CPR Mediation Procedure at <https://bit.ly/2lrkKwb>.
- 6.5 Herbert Smith Freehills' ADR client guide - "Selecting your mediator and drafting the mediation agreement" (<http://bit.ly/HSFMediatorSelection>) - explains further issues to consider when drafting a mediation agreement.

7. MEDIATION: PREPARING FOR A MEDIATION

7.1 Prior to attending the mediation day, the parties will need to prepare to give themselves the best opportunity to settle the dispute. This will include preparing the business decision makers, developing a strategy for the mediation and gathering information necessary for the day itself including information of the costs of the dispute to date and going forward if a settlement is not reached. The objective is for both parties, through proper thought and planning with their legal advisers, to remove as many obstacles to a settlement as can reasonably be anticipated.

7.2 Below is a checklist of issues and questions that a corporation (usually the in-house lawyer) might wish to consider in advance of a mediation.

CHECKLIST

<i>Procedure</i>
<ul style="list-style-type: none"> • Will there be decision-making authority present at the table and who will those people be? • If not, how are decisions to be made and authority obtained (for example from individuals contactable by telephone)? • Will there be broad equality of decision makers in terms of their status in the respective organisations? • Are third parties interested in the outcome (insurers, others providing financial support to one or more parties) and if so, are they appropriately engaged/informed to allow the mediation to proceed efficiently? • Is the mediation venue suitable in terms of facilities to accommodate the parties, provide food, drinks and necessary business services for the duration of the mediation? (A neutral venue is often desirable but is not essential if one or other of the parties or their legal advisers can host the mediation). • How are the costs of the mediation to be borne? These will include the parties' own legal costs of preparing for and attending the mediation and the parties' respective shares of the mediator's fees (and any venue fees). • In the event of an unsuccessful mediation, are the costs of the process to be treated as costs of the relevant proceedings (litigation or arbitration) or to be borne by the parties in any event?

<i>Negotiations</i>
<ul style="list-style-type: none"> • Apart from the merits of the case, are there any other issues that should be considered and discussed? • Is there anything that should not be discussed? • What information or documents will the parties need to reach a resolution? For example, are there technical issues that require some specific input for the mediation but outside a court or arbitration timetable? Is there any way to simplify complex information using pictures, charts, diagrams or other non-verbal tools? • Have the business decision makers been briefed to familiarise them with the process and prepared to play a role (ideally an active role) in the negotiation?

Settlement

- How will quantum be addressed? The natural focus of the parties before a mediation is often on issues of legal liability, but the resolution will usually require at least some information on quantum, frequently before the parties have addressed the issue in detail in litigation or arbitration. Consider whether a risk analysis tool such as a SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis would therefore assist.
- Apart from the money in dispute are there any other matters that might be included in the settlement (such as apologies, public statements, confidentiality undertakings, future joint ventures/relations)?
- What are the best and worst alternatives to settling the case?
- What is the value of the relevant business relationship and are there any opportunities for further business?
- What will be the cost and other consequences of non-settlement via mediation?
- Will there be any economic or reputational issues in the event that a settlement is not achieved?
- What will be the level of initial offers and how will those relate to the issues in dispute?
- What are the merits of making the first offer?
- What are the anticipated counter-offers?
- What is the range of potential settlements that are likely to be offered?
- What are the commercial bargaining positions of the parties?

Further resources

- 7.3 CPR's Mediation Procedure contains in its "Commentary" section useful information to prepare for mediation. See: <https://bit.ly/2lrkKwb>.
- 7.4 Herbert Smith Freehills' ADR client guide - "[Preparing for Mediation](#)" - discusses many of the issues considered above, and additionally looks at other areas that will need to be addressed in preparation for the mediation, such as understanding the style and approach of the mediator, undertaking a risk assessment, defining a negotiation strategy and preparing the written submissions and opening statements.

8. MEDIATION: FREQUENTLY ASKED QUESTIONS

8.1 Will suggesting mediation be taken as a sign of weakness?

It is a common concern of corporations that are unfamiliar with ADR processes that proposing mediation may be construed by their opponent as a sign of weakness because the objective of the process is to reach a settlement. Corporations that are experienced mediation users meet this concern by explaining to counterparties that they regard mediation as an effective dispute resolution tool which provides an opportunity to resolve disputes at lower cost, more quickly and with the best chance of preserving business relationships (where relevant).

It may also help if the corporation has a formal or informal policy to use ADR and in particular mediation when appropriate. This could include a public commitment such as signing CPR's Corporate Policy Statement on Alternatives to Litigation ©, CPR's 21st Century Pledge © or the ADR Pledge of another institution. For more details about the pledges and their signatories, see <http://bit.ly/CPRPledges>.

Of course, the inclusion of an ADR clause in the contract substantially removes this concern because the parties have already agreed that an ADR process, usually mediation, is either a mandatory step or at least an available step in the event of a dispute.

Sharing positive experiences of mediation can also allay concerns. See section 9 and Appendix 2 of this guide for case studies of successful mediation stories.

8.2 Will mediation increase costs?

It is inevitable that appointing a mediator, preparing for and attending a mediation will require legal and other costs. However, those costs are usually quite modest as compared with the costs of any litigation or arbitration that is under way or contemplated. If the mediation leads to a settlement, it is likely much greater costs will be saved; even if it does not, it is likely that the dispute will proceed more efficiently in litigation or arbitration with the parties focusing on the relevant issues.

8.3 How likely is mediation to end in a binding settlement agreement?

Quite likely. The BAB's experience of mediation when used in commercial disputes is that approximately 70% of disputes settle on the day(s) of the mediation. A material proportion of those that do not settle on the day nevertheless settle in the weeks or months that follow. This is usually assisted by the work that was done at the mediation to focus on the issues, assess the matter critically and realistically and to build relationships between disputing parties.

8.4 Can confidentiality be preserved with respect to the matters discussed?

Yes, the process is confidential, and this is recognised in the Brazilian Mediation Act. In regard to international cases, the extent to which a national court may have the power in litigation to look behind the confidentiality of the process will depend on the law governing the mediation and the law and procedure of the national court in which any related or satellite litigation takes place; however, generally, confidentiality is considered a key feature of mediation.

8.5 Is mediation a viable option where the counterparty is reluctant to engage?

Mediation is a voluntary process in that the parties cannot be forced to reach an agreement, even if they are encouraged or obliged to participate in it by the law or procedure of a national court. If one party is reluctant to engage, it is often due to a lack of understanding of the process and what it can achieve. However, an initial reluctance to engage and participate can often be overcome by a good mediator who can instil trust in the process. See the Mediation Success Stories of the BAB at Appendix 2, which describe a range of commercial disputes across industry sectors that can be used as real illustrations of the process in action.

8.6 Is it possible to mediate a dispute where the counterparty has committed fraud?

Yes. As long as the parties have sufficient trust to engage in the negotiation with each other, fraud cases can be mediated effectively and successfully. Of course, the process cannot provide parties with interim remedies such as injunctions to freeze assets which are matters

for a national court with jurisdiction.

8.7 Is it possible to mediate a large or complex claim?

Definitely! Mediation has been used to resolve some of the largest and most complex commercial disputes. The preparation for and approach to the mediation should be commensurate with the size and complexity of the case: if the matter is very large, consider using co-mediators to share the work and allow the process to proceed more quickly.

8.8 How does mediation work where there are multiple parties involved?

The process works in the same way except that the mediator needs to afford the multiple parties the appropriate opportunity to participate in joint sessions and private meetings. The more complex the dynamics and range of interested parties in the mediation, the more structure and communication is required from the mediator or co-mediators.

8.9 Can you mediate where there are language, cultural or religious differences?

The mediation process is flexible and can assist parties from very different backgrounds. The characteristics of the mediator such as background, language skills and training are important to allow parties to communicate with each other – and the mediator – effectively. Parties can consider appointing co-mediators where a mix of skills or experience is likely to assist with a resolution of the dispute (and the dispute is of sufficient size to justify the additional costs).

8.10 Is it necessary for external counsel to attend mediation?

It is not necessary for external counsel to attend the mediation but it is usual that they do. Some corporations with experienced in-house counsel attend mediations without external counsel.

8.11 Where can you get user-generated feedback on mediators?

CPR can assist with gathering feedback on neutrals on its lists. Many corporations seek guidance from external counsel on mediator performance. Feedback digests for some mediators are available on the IMI website (<https://www.imimmediation.org/>).

9. MEDIATION: CASE STUDIES

- 9.1 The experience of the members of CPR's Brazil Advisory Board (BAB) is that it can assist organizations that are considering using mediation to understand how others have used mediation in resolving disputes in similar jurisdictions, industry sectors or circumstances. However, since mediations are confidential, it can be difficult to share information of this nature publicly.
- 9.2 The BAB has gathered a number of case studies reflecting the experience of the members and their organizations, as well as of their colleagues who act as mediators, outside and in-house counsel, and businesspeople, with successful mediations. Each case study, in which the names of the parties have been made anonymous, includes an explanation of the dispute and how mediation assisted in reaching a resolution.
- 9.3 The case studies are included at Appendix 2 to this guide. They include case studies of disputes in the following subjects:
1. M&A
 - 1.1. Business Transfer
 - 1.2. Private Equity
 - 1.3. Failed Acquisition
 2. Mining
 3. Employment and Use of Technology in Mediation
 4. Agribusiness
 5. Partnership
 6. Public Contract
 7. Real Estate
 8. Public Nuisance
 9. Family Business/Inheritance
 - 9.1. Family Business
 - 9.2. Inheritance and Family Business
 - 9.3. Inheritance
 10. Professional Liability
 - 10.1. Medical Malpractice
 - 10.2. Attorney Fees

10. ARBITRATION

- 10.1 Arbitration is a private adjudicative dispute resolution process that is based on a contractual agreement to submit the relevant dispute to arbitration. It usually results in a binding award given by the arbitrator or arbitral panel (although it may in rare cases be non-binding if the parties so agree). The arbitrator acts as an independent, impartial and neutral third party and the entire process is governed by the arbitration agreement signed by the parties and the rules of the arbitral institution (if any) agreed by the parties. Arbitral awards can rarely be appealed unless permitted by the arbitration agreement (and on limited grounds in some jurisdictions). For example, CPR has an optional appellate procedure which can be incorporated into arbitration clauses (see <http://bit.ly/CPRAppealArbitration>). Arbitral awards can generally be set aside (annulled) by courts of the state of the seat of arbitration on certain, very limited grounds, relating essentially to due process concerns.
- 10.2 Arbitration is characterised by party autonomy. It therefore allows much more freedom to contracting parties regarding the procedure for resolving their dispute than would be the case if the matter was litigated in national courts. Arbitration offers parties flexibility in being able to choose their own arbitrator or arbitral tribunal, in particular by specifying the qualifications and experience of any arbitrator to be appointed.
- 10.3 Arbitration is generally considered to be a confidential process both as to the arbitration itself and the documents created in connection with the arbitration, although local law and practice and the rules of the relevant arbitral institution may vary in this regard.
- 10.4 Binding arbitration awards are widely enforceable through the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which requires the courts of contracting states to recognise and enforce awards made in other states subject to certain limited exceptions, generally comparable to those permitting annulment by courts of the state of the seat of arbitration.
- 10.5 For a comparison of the arbitration process with other methods of ADR, refer to the table in section 1.

Model arbitration clauses, the selection of procedural rules and appointment of arbitrators

Any arbitration is based on an arbitration agreement which can be an independent agreement entered into after the dispute has arisen or, more commonly, through the clauses of an existing contract entered into before the dispute has arisen. CPR provides a repository of model clauses suitable for different kinds of arbitration which can be accessed here: <http://bit.ly/CPRArbitrationClauses>.

- 10.6 While arbitrations can be conducted in an *ad hoc* manner where the parties are responsible for agreeing on their own rules of procedure, the parties can also choose from among various international arbitral institutions and their model rules to provide a procedural framework for the conduct of the arbitration. CPR has produced procedural rules suited for different situations.
- 10.7 For information about CPR's Administered Arbitration Rules for International Disputes, see CPR's website at: <http://bit.ly/IntAdministeredArbitration>.
- 10.8 For information on CPR's Non-administered Arbitration Rules for International Disputes, see CPR's website at <https://bit.ly/2FNUoF7>.

Settlement in arbitration

- 10.9 Arbitration and mediation are often used to complement one another as part of a sequential dispute escalation process (typically mediation first, then arbitration). These processes may also be used in parallel. The extent to which an arbitral tribunal will raise the subject of settlement with the parties to the arbitration (whether through mediation or otherwise) varies depending upon the characteristics of the tribunal, the procedural rules under which the arbitration is being conducted, and the laws and practices relevant to the proceeding, the

parties and the arbitral tribunal. CPR's rules encourage both the tribunal and CPR to raise mediation with the parties.

Further resources

- 10.10 There is an enormous quantity of material available to assist parties considering using arbitration.
- 10.11 CPR's Arbitration Committee has produced a number of protocols and guidelines to increase the efficiency of arbitration, such as:
 - 10.11.1 The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (see <http://bit.ly/CPRDisclosureProtocol>),
 - 10.11.2 The CPR Protocol on Determination of Damages in Arbitration (see <http://bit.ly/CPRDamagesProtocol>),
 - 10.11.3 The CPR Guidelines on Early Disposition of Issues in Arbitration (see <http://bit.ly/CPRDispositionGuidelines>),
 - 10.11.4 The CPR Guidelines for Arbitrators Conducting Complex Arbitrations (see <http://bit.ly/CPRArbitrationGuidelines>).
- 10.12 Herbert Smith Freehills' ADR client guide – "Use of mediation with arbitration" (<http://bit.ly/HSFMedArb>) - provides an overview of the practical aspects of using mediation with arbitration.

APPENDIX 1

INDUSTRY SECTOR-SPECIFIC RESOURCES

CONSTRUCTION

The CPR Construction Advisory Committee has produced three briefings: i) *A Management Best Practice*; ii) *Realistic Allocation of Risks: The First Step in Dispute Prevention*; and iii) *Dispute Review Boards (DRBs): A Management Best Practice*.

Construction disputes are commonly subject to typical multi-tiered ADR processes as reflected in the widely adopted FIDIC Red Book (Construction Contract 2nd ed. (2017)), Conditions of Contract for Construction, for Building and Engineering Works Designed by the Employer, published by the International Federation of Consulting Engineers (“FIDIC”) that provides that disputes first be referred to:

- a) A Dispute Resolution Board (“DRB”) often structured to provide decisions on an interim basis (recommendations);
- b) A Dispute Adjudication Board (“DAB”) that issues binding decisions.

COMMODITIES AND MARITIME

There also exist dispute resolution rules tailored for specific sectors of the economy:

In the field of commodities, a widely used set of dispute resolution rules is the National Grain and Feed Arbitration Rules (2009).

In the field of maritime and salvage, there exist various sets of rules including:

- a) The Procedure Rules of the Arbitration and Mediation Chamber of the Brazilian Center for Maritime Arbitration (CBAM)
- b) The Arbitration Rules of the Maritime Arbitration Chamber of Rio de Janeiro (CAMRJ)
- c) The London Maritime Arbitration Association Terms (2012);
- d) The German Maritime Arbitration Association Rules (2013) and
- e) The Society of Maritime Arbitration Rules (2013).

FRANCHISE DISPUTES

The *CPR’s Franchise Mediation Program: A CPR Procedure for Resolution of Franchise Disputes* that was developed in 1994 in collaboration with the International Franchise Association, the Asian American Hotel Owners Association, and the American Association of Franchisees and Dealers. It provides for a negotiation phase followed by a mediation phase. It has been used by many leading franchisors, franchisees and franchisee associations. See <http://bit.ly/CPRFranchise>.

INTELLECTUAL PROPERTY & TECHNOLOGY

The CPR Patent Task Force has published a Protocol in 2012: “Report of the CPR Patent Mediation Task Force: Effective Practices Protocol.” The protocol provides recommendations for the mediation of patent disputes. See <https://bit.ly/2TwJEDS>.

See CPR’s Patent Arbitration and Mediation Model Clauses here: <https://bit.ly/2STHg4y>.

CPR has produced a Master Guide on Patent Mediation. More information available at <https://www.cpradr.org/news-publications/store/master-guide-to-patent-mediation>.

CPR has developed Rules for Non-Administered Arbitration of Patent and Trade Secret Disputes. See <https://bit.ly/30YEIgz>.

CPR has also drafted Fast Track Mediation and Arbitration Rules of Procedures, which are particularly adapted to IT disputes. See <http://bit.ly/CPRFastTrack>.

The CPR Committee on Information Technology Conflict Management has produced the book “Avoiding and Resolving Information Technology Disputes”. See <https://bit.ly/2EJ70g6>.

INSURANCE & REINSURANCE

CPR has drafted Mediation Principles for Insurer-Insured Disputes, designed to encourage parties to engage in mediation when faced with the prospect of coverage or other insurance-related litigation. See <http://bit.ly/CPRInsurance>.

The CPR International Reinsurance Industry Protocol was drafted by representatives of leading companies and law firms in the London and American insurance markets and is offered as a statement of “best practices” to encourage the early and efficient resolution of disputes between Reinsurers and the Reinsured. See <http://bit.ly/CPRReinsuranceProtocol>.

OIL & GAS

Model form contracts of LOGIC (Leading Oil and Gas Industry Competitiveness), include a stepped dispute resolution provision that provides:

- a) First that the dispute be referred to company representatives who shall seek to reach agreement;
- b) Then, if no such agreement is reached, the dispute is referred to two named individuals as identified in the agreement;
- c) Thereafter, if no agreement is reached, the matter shall be referred to the managing directors of each company; and
- d) Failing the agreement of the managing directors, the parties may settle the dispute by a form of alternative dispute resolution agreed by them.

APPENDIX 2

MEDIATION: CASE STUDIES

As discussed in section 9 of this guide, CPR's Brazil Advisory Board (BAB) has gathered a number of case studies reflecting the experience of its members and their organizations, as well as the experience of their colleagues who act as mediators, outside and in-house counsel, and businesspeople, with successful mediations. Each case study, in which the names of the parties have been made anonymous, includes an explanation of the dispute and how mediation assisted in reaching a resolution.

1. M&A

1.1. Business Transfer

Two of the law firm's clients entered into a business transfer transaction. The parties set the parameters for the transitional period of the transfer: Seller would continue to accept purchase orders from customers until Buyer could set up the "newco" with necessary licenses and authorizations to operate the business. Buyer would deliver the products to customers. Customers would pay to Seller. During such transitional period, Seller would pass on to Buyer any payments/funds received from customers.

A dispute arose over the amounts received from customers. Seller's understanding was that all receivables had been passed on to Buyer. Buyer's understanding, in turn, was that receivables passed on by Seller to Buyer did not match the amount listed in the purchase orders. Since both parties were clients of the same law firm and both parties were seeking assistance from this firm, counsel suggested mediation and offered the mediation to be conducted by one of the law firm's attorneys who happened to be a capable mediator.

The mediation was very useful in many ways. First, both parties trusted the mediator, as the firm was equally interested in keeping both clients. Second, there were no significant costs involved. Both parties attended mediation sessions with their in-house counsel. Mediation sessions took place in a conference room at the law firm. Third, parties' representatives could finally meet face to face, which had not happened in a long time (only phone calls and e-mails). After communication was re-established and the parties had been given access to the same level of information within the same internal procedures, the parties found out that the difference between the amounts received by Seller and the amounts passed on to Buyer was actually due to a double payment of applicable taxes (one payment by customer and one payment by Buyer).

This led to a very successful mediated solution (win-win process), as parties collaborated to recover unduly paid taxes and communication between the parties improved such that no further misunderstanding was reported through the conclusion of the business transfer.

1.2. Private Equity

An US private-equity investor ("A") entered into a Share Purchase Agreement (SPA) with a Colombian start-up tech company ("B"), pursuant to which, the Parties agreed that A would acquire in part the shares held by the Sellers in B, as well as make an investment in new shares issued by B, which would result in a total investment of USD 50 million with A being entitled to participate with 49% of the voting shares of B. During the closing period, there was a massive drop in B's sales and the resulting operation. A claimed that such fact was probably known by the Seller at the time of the execution of the Agreement, and Seller had failed to proper and timely release it to A.

In view of the parties' entrenched positions, the mediator and the parties agreed on a procedural timetable. According to that, each party would be given the opportunity to orally present their views on the facts and events that had occurred during the contractual negotiation, execution and performance phases. After each of the presentations, the opposing party was given the floor to ask

questions or request any factual clarifications. No arguments or opinions were allowed. The parties also agreed that all documents or other material produced for or brought into existence for the mediation would be subject to a negotiation privilege and together with evidence of meetings and other oral proceedings in the mediation would be inadmissible as evidence and not be disclosable in any litigation or arbitration connected with the dispute so long as and to the extent that such privilege applied. Both parties were represented by their litigation counsel.

Both parties relied on mediator's background and experience in M&A and private-equity disputes in the relevant jurisdiction. During the caucuses, the mediator played the Devil's advocate role, showing the weaknesses of each party's legal standpoint. This was critical to reduce both parties' expectations of the outcome of a litigation or arbitration, raising their interest in negotiating. Albeit the offers demonstrated that a settlement could be reached, there was still a gap. In view of the hurdles, the parties agreed that the mediator would present a mediator's proposal to the parties. Such proposal should be a single undertaking (every item of the negotiation should be part of a whole and indivisible package and could not be agreed separately). After 2 (two) weeks, 5 (five) meetings, and many caucuses, the mediator's proposal was accepted by both parties and a settlement was reached.

1.3. Failed Acquisition

This dispute arose from a failed acquisition by a major U.S.-based oil company of a majority interest held by a Brazilian mining company in a Brazilian oil company.

After the buyer's due diligence was done, it discovered potential environmental and tax liabilities of the target Brazilian oil company which had not been disclosed in the due diligence phase. After direct negotiations failed to produce a settlement, the buyer launched an international arbitration under their contractual dispute resolution clause. However, the parties agreed to attempt mediation first.

The mediation was held in Rio de Janeiro at a neutral site - the offices of the Brazilian law firm with which the mediator was affiliated. The language was English alternating with Portuguese, as at least one of the participants did not speak English well.

Several challenges arose in the mediation. One was a possible imbalance between the parties in that one side brought a single lawyer and a business client, while the other side brought four lawyers. But since all were knowledgeable and sophisticated in the business, it was less of a real imbalance than a perceived one. The mediator kept the mediation on track by not allowing the session to derail into a legal mini trial, even though each party submitted extensive documentation to prove or disprove the existence of the asserted liabilities.

Another challenge was a certain mistrust built up by the perception that seller was hiding the liabilities from the buyer. At the mediation session, lawyers for the seller took the position that the liabilities were legally non-existent so therefore had not been listed as such. While the buyer disagreed with that assessment, the exchange of views at the mediation helped clear the air and dispel mistrust.

Because the issues over the existence of tax and environmental liabilities were not resolved at the session and because the amounts at stake were not *mega*, the mediator suggested resolving the case using a single arbitrator instead of the three-arbitrator tribunal provided for in the parties' arbitration clause. This suggestion was designed to save the parties time and money. The parties' counsel accepted this suggestion and modified their clause accordingly. The case did go to a highly respected single arbitrator who decided the matter in far less time and at far lower cost than a three-member tribunal would have done. The mediation was worthwhile in that it helped produce a faster and more cost-effective decision for the parties.

2. Mining

A mining company and an engineering and construction conglomerate had entered into a joint venture focused on developing a mining plant. A dispute arose when the agreement between the two companies was terminated by one of them and a contractual interpretation conflict over

compensation calculation criteria arose. There was no divergence on the fact that the compensation was due, but rather on the basis of its calculation which would impact the payment amount. While the mining company argued that the calculation of the compensation should be based on the schedule for physical execution of the plant, the contractor asserted that the calculation should instead be based on the financial development plan of the works. Both parties had unsuccessfully attempted to negotiate directly and reach a solution over the matter before resolving to submit it to a mediator to facilitate resolution.

Mediation was chosen from among five options selected by common agreement between the parties. As the very first step, both companies were asked to simultaneously send their written arguments to the mediator, copying each other over e-mails. Following that exchange, six meetings were held in the offices of the parties' external lawyers. The mediation process took two months to complete. Such amount of time was exclusively due to difficulties in settling suitable dates and times for all of the numerous representatives from different areas of both companies – such as executives from engineering, finance and operations. In the mediator's experience, two months was not too long of a period to deal with such complex interests.

The key ingredient to reaching a final resolution was acknowledging both sides' perspectives and expectations for future business relations, potential contracts, and common interests. Both parties wanted to prevent this conflict from presenting an obstacle to future cooperation on industrial and infrastructural projects as well as possible joint ventures or partnerships. Creating understanding and trust was crucial. The two companies agreed on having the physical execution schedule serve as basis for compensation calculation combined with the commitment for additional remuneration in future common contracts and projects. In a survey, the parties declared as feedback that they were "very likely to use the mediator again" and recognized "the importance of his skills and abilities in leading them to a mutually acceptable resolution".

3. Employment and Use of Technology in Mediation

The client was a former top executive at a leading power company in Brazil. The majority shareholder was a multinational energy company. When leaving his post, the client was offered a severance package with several components, one of which was a payout based on a percentage of project finance funding he attracted and had brought in during a certain time period. A dispute arose as to the amount of such project finance funds.

The client's executive severance agreement with the company contained an institutional med – arb clause, that is mediation followed by arbitration if necessary. Holding an in-person mediation proved to be problematic because of scheduling conflicts on both sides as well as possible issues with obtaining visas.

Therefore, an unprecedented three-way videoconference mediation was suggested. At that time (2006), videoconferencing was just beginning to spread, primarily among large corporate users. The equipment was very expensive, costing over one hundred thousand U.S. dollars and transmissions were sometimes fuzzy. A special videoconference room in São Paulo was rented to accommodate the meeting. The technical platform used in the room needed to be pre-tested to ensure compatibility with the two other sites in the U.S. used for the three-way mediation and adjusted accordingly.

The logistics involved were quite unlike today when most of us can simply subscribe to videoconferencing services such as Zoom, Webex, Blue Jeans or Skype for a free, slimmed-down service, as long as the internet quality and speed are sufficient at our locale. Videoconferencing has become a lot faster, cheaper and more reliable with the spread of high-speed internet and use of personal computers at home or at the office rather than centralized dedicated video equipment.

The mediation itself went well, with good image and audio quality. As with videoconferences today, perception by one party and the mediator of the body language of the other party was limited to the neck up. This of course provides a less complete negotiation/mediation experience than in-person sessions but is much better than telephone or email.

The dispute became primarily one of positional bargaining since the underlying interests of both parties were opposed (money moving from one party's pocket to the other party's). After some hard bargaining back and forth by video, the parties were able to reach agreement and settle the dispute.

This was a creative and pioneering step to help extend the frontiers of mediation beyond national borders and gained recognition as such at the Triple Colloquium held in New York later that year. Videoconferencing made this mediation possible and saved the parties considerable time and cost.

4. Agribusiness

This dispute arose in the agribusiness sector between a very large multinational produce distributor/reseller with famous brand name and a midsize to large Central American family farm. Issues arose over pricing and other conditions for purchase and shipment of large quantities of produce. The multinational had recently been sold to a large Brazilian agribusiness company which inherited various problems with the multinational seller/distributor's balance sheets, business practices, etc.

The Brazilian distributor wanted to reduce their costs as much as possible across the board. They insisted on a typical multinational HR-style policy of supposedly treating all their produce suppliers in the area in the same way. This was taken as a personal insult by the local family producer who insisted that the distributor had instead been changing their commercial conditions for purchase and shipment of their produce constantly and always to the producer's detriment, in breach of their agreement.

The parties' contractual dispute resolution clause contained a Med – Arb provision, *i.e.*, mediation first, followed by arbitration if necessary. The mediation was held at a neutral site -institutional offices in Miami where both parties had representatives nearby. Each side brought three representatives.

The challenges here involved sharply different commercial and cultural negotiating styles between the multinational distributor and the Central American producer, including dealing with highly charged emotions. The representatives were from Brazil, Central America, Portugal and the U.S. Another challenge was mediating issues involving core family values going beyond underlying commercial interests on one side versus standardized multinational practices on the other. Even with these challenges, the mediation session helped the parties communicate their differences face-to-face, especially since the distributor had been acquired by its Brazilian owners only recently.

As the case developed, what looked like a single dispute between the parties revealed itself as a dry run for a series of disputes lurking in the background involving the same distributor and various other produce plantations in the country, over which this producer had influence.

It became apparent that all these issues required more time to be resolved, so the mediation was adjourned to give the parties time to mull over what took place in the mediation session and negotiate from there. One of several lessons from this mediation is to set parties' expectations for follow-up sessions in case things are not resolved in their first mediation encounter.

5. Partnership

This case involved a 50/50 joint-venture agreement between a British and a Brazilian company, henceforth Brit Co. and BR Co., regarding specific Sciences services. Business was good and growing. Brit Co. had expertise and worldwide resources and capabilities regarding specific and sophisticated services, and BR Co. had a profound knowledge of the local market and a background of success and professionalism in running different fronts in the field. Cultural differences between the parties were always an issue. Although there were some bumps in the road, the parties had been able so far to deal with a number of strategic corporate decisions with some degree of flexibility.

The dispute arose when BR Co. decided to acquire a small local company. They considered the business a great opportunity and were keen to acquire what they considered to be very valuable asset for a very low price. The joint venture required that both shareholders be in agreement for the

acquisition. Despite all the efforts from BR Co. representatives to persuade their partners, Brit Co. representatives were adamant that they didn't want to move forward with the acquisition. Brit Co. viewed the situation of disagreement as a natural course of business and were still pleased with the venture. BR Co., on the other hand, viewed this event as the tip of an iceberg of a long-strained relationship. They held a long list of complaints regarding issues of governance, decision making processes, communication, vision of future and so forth. Having difficulties in getting the ears of their partners to discuss those matters, BR Co. sent Brit Co. a strong letter. The letter pointed out many different issues that they actually considered as breaches of the joint-venture agreement, that they felt they had put up with for a long a time. They called for mediation. Brit Co.'s representatives were perplexed but accepted the invitation for mediation.

The mediation was conducted in Brazil, by a Brazilian mediator trusted by both parties and their legal teams. The mediator had a couple of initial private meetings with each side, with the use of videoconference to reach the representatives of Brit. Co. Following this, the agenda of issues was structured and the parties met in person for a 3-day intense in-person mediation.

When the mediation started, the level of distrust between the parties was very high and it seemed like the path of the mediation would be to create a process to "part with grace". Brit Co. considered the claims in the letter to be frivolous and that, in fact, there was no real conflict between the parties. BR Co., in their view, was temperamental about the acquisition issue. BR Co., on the other hand, was really fed up with the *modus operandi* of the joint-venture, by which they felt they would find themselves often on the weak position of doing all the hard work and having to persuade stubborn partners, who did not understand a thing about the Brazilian market. After a few private sessions with both sides, it became clear for the mediator that the real problem was not the issue of the deadlock of the acquisition, but the potential deadlock of the whole joint-venture, due to the way parties had been interacting.

Although the level of distrust and scepticism was very high, it came out that all options were on the table: to part, buy or sell, to fix the problem and stay together and so forth. But they were at a deadlock, and nobody wanted to give. With that in mind, the parties and the mediator decided to shape the process to start with a "stay together approach". If this would fail, the "part with grace" discussion would be had. With the help of the mediator the agenda was structured to first discuss their perspectives on the future of the business. At first, it seemed they were far apart on this issue. It appeared to Brit Co. that BR Co. was losing focus, by acquiring a company that would deviate from the scope of the joint venture. It appeared to BR Co. that Brit Co. was too conservative and not interested in growing business in Brazil. In reality, both parties were interested in growing and in agreement that focus was key for the success of the business. Issues of strategy were also discussed and the parties proved to be fully aligned in their vision of the business. Then a long and difficult list of governance issues was covered by the agenda. In fact, there had been some past corporate decisions that needed some fixing, some governance rules that were never applied, some communication issues and decision-making procedures that needed to be reviewed and so forth.

By covering the agenda, parties found a way to come to very intelligent terms regarding all of the governance issues. The problems were difficult, but the parties and lawyers were really fast track and high-end professionals. Knowing there was a high level of information asymmetries, the mediator orchestrated the parties to discuss the relevant issues, in the right order and with the right timing. It was playing out perfectly so far. But despite the good progress, the parties continued to be sceptical about a final settlement and the time came to face the elephant in the room: the acquisition issue. It was wise to leave it for last, to create momentum, a higher level of positive energy and some perspective of a good future to then tackle it.

BR Co. had made some firm commitments to acquire the new business and was facing a tight spot. Brit Co. did not consider this to be their problem. They had the right to say no. BR Co. should not, under the agreement, have taken any action to acquire a company without consent. To make matters worse, there was an issue regarding an "approval" of the acquisition at a shareholders meeting, followed by a subsequent "take back" letter. The mediator realized that the problem was more form than substance. Brit Co. representatives were delivering a very blunt "no" to the issue. They felt they

had the right to. But maybe they could be more persuasive about their position and show a little bit more empathy and warmth towards their partners.

At a caucus, the mediator coached the principal of Brit Co., a very senior and remarkably talented CEO, to deliver a classic “positive no” for the acquisition issue, instead of the blunt and direct no. To refresh the reader’s memory, in a nut-shell, the “positive no” entails a “sandwich”: (i) a “yes to yourself”, which means a frank and logical explanation of your reasons to say no; (ii) the “no” that flows naturally from your explanation; (iii) ending on a “positive note”, offering what can be offered in the context. The senior CEO noted that he did not actually believe that the problem was simply form but agreed to try the approach.

He delivered the most perfect “positive no” the mediator had ever witnessed. In the closing part of the “positive no”, he asked about the ways by which Brit Co. could help BR Co. to get out of the tight spot they were in regarding the promise of acquisition and showed genuine willingness to help. Like magic, this immediately unlocked the other side. They again negotiated wisely and agreed on the acquisition by the joint-venture of the assets that interested their business and found options for other companies from BR Co.’s business group to absorb the staff and resources that deviated from the joint-venture’s focus. The case was settled and both parties reported a high level of satisfaction.

If the parties had not used mediation, they would certainly be stuck by now in an arbitration process about deadlock clauses and claims for breach of contract. Booming business opportunities would have been lost. Another point that should be noted in this case was that the way by which the mediation process was shaped and the agenda was built proved to be critical for the success of the settlement strategy. The mediation operated as a logical syllogism, that helped parties that were once in a deadlock, distrustful and sceptical, build to the conclusion that they should stay together. The mediation also served to fix some of the communication problems that were unnecessarily pushing the partners apart. The parties’ collective intelligence served to fix all the other issues.

6. Public Contract

The initial matter in dispute was the administrative contract between a public company and a group of service companies that had participated in a public bidding. This group won the bidding and was in charge of expanding the facilities of the public company. The parties faced adversity, difficulties and unforeseen situations during the performance of their contract.

It is worth noting that the contract had a med-arb clause and the public company along with its legal department, which had expertise on the matter, proposed mediation, before accepting arbitration, which had already been requested by the group of companies. The group of companies, which did not grasp the advantages of mediation, intended to arrive at a speedy resolution of the dispute, which is why it requested arbitration.

In order for mediation to be effective, the time of preparation was critical, because it was then that extensive clarifications about the Mediation itself were conveyed to both parties separately. The mediator was contacted at his office by one of the persons responsible for the public company contract with the purpose of knowing how the mediator would undertake the process of referring to mediation. At that time, it was noted that this was the first experience of the public company with mediation and that this option seemed more appropriate to them due to the respect they had for the group of companies it had hired, given that some of the group’s service providers had responded satisfactorily to previous contracts. With regard to the group of companies, the mediator adopted the same approach and provided ample clarification regarding the mediation process, and how the mediator would handle the process. The mediator did so over a period of almost two hours in the group’s headquarters with the presence of the person in charge of the contract and representatives of the companies (a total of 9 people).

From the preparation period until the effective implementation of the mediation, 3 months elapsed, because the schedule of 11 people plus the mediator had to be accommodated, given that the mediator reinforced from the beginning the importance of the presence and active participation of all to effectively develop a different and productive dialogue.

Once the process started, the issues mentioned in the preparatory meetings were naturally emphasized at the first meeting with respect to the difficulty of paying the expenses incurred by the group of companies in carrying out the construction works and the many refusals to discussing any requests for the payment of these expenses. As in all mediation processes, dialogue at the outset began with antagonistic views from the participants, some of whom already knew one another not only through the contract at hand but also from previous contracts. At the same time, other unforeseen issues were raised, such as: liability for unanticipated and completed works, as well as clarifications regarding the difficulty of completing other works that were further required to carry out the contract.

This opportunity fostered an environment favorable for dialogue, and it was decided that both sides would raise all outstanding issues, in addition to those already included in the agenda, which they would bring to the next meeting scheduled for two weeks thereafter. It was determined that twenty issues regarding the contract needed to be discussed, on a sort of step-by-step basis. This scenario encouraged a change in perspective from some of the parties, and progressively created a more favorable environment for exchanging information and allowing mutual clarification. This also allowed the inclusion of other people, departments and technicians, as well as representatives of internal committees of both sides, in the mediation. This environment encouraged participants to open worksheets and set up mini-committees to discuss aspects, not only economic or legal, but also to develop studies with common criteria, which were agreed during the mediation, to assist in the discussion of all twenty issues.

The change in atmosphere from distrust to a greater mutual respect among all was noticeable, although some difficulties arose from both sides regarding the technicians' opinions in respect of the requests formulated by the members of the group of companies and vice-versa. This positive atmosphere was maintained at all other meetings, during a total of 18 plenary meetings and 9 separate meetings or mini-committee meetings lasting a year and a half. Progress was made upon revision of the parties' respective monetary claims. Prior rejections, on the other hand, were gradually being overturned, which allowed for the parties' understandings to be embedded in a broader agreement, which was eventually given effect notwithstanding of the fear of possible future scrutiny from the external control bodies to which public entities are subject.

At no time did the mediator use evaluative instruments; he permanently stimulated an innovative and different dialogue among all the participants. The satisfaction of all without exception was reinforced with respect to their autonomy, as well as the recognition in particular of their differences, which were always respected. This outcome was made possible through cooperation, informality and responsible decision-making that were constantly developed.

7. Real Estate

The dispute involved, on the one hand, a construction company responsible for the construction and launch of a real estate project and, on the other, a client, doctor, who acquired two apartment units of the project to realize the dream of his family.

The conflict arose after a 6 month-delay in the delivery of the units, and the client suspended the final payments. There was a pre-mediation meeting, between the owner of the company and the client and their respective lawyers, to attempt to achieve an agreement, but the meeting ended almost in physical aggression among them and agitated discussion among the lawyers.

A relatively simple matter that became too tense, all because of the way this meeting unfolded. The company claimed that the delay was due to the client's lack of approval of the projects and the problems with payment. The doctor attributed the fault 100% to the incompetence of the designers of the construction company, who did not deliver the projects in compliance and in accordance with the agreed terms.

The construction company was determined to rescind the contract, not to hand over the apartments and force the client to seek judicial relief to recover the amount paid for the units, regardless of the

litigation risks. Given the belligerent relationship between the parties, the company said it would do anything to postpone the restitution of money as a measure of retaliation for the belligerent and disrespectful conduct of the client.

On the other hand, the buyer claimed full restitution of the amount he had paid, plus a daily penalty, damages for breach of contract, interest, monetary compensation and moral and material damages.

Mediation was requested by one of the parties and lasted only three meetings of approximately three hours each, until the agreement was signed. The parties and their respective lawyers were present.

Mediation played a key role in identifying the true interests of the parties and in fully separating the material and relational aspects involved in the conflict. Before mediation, it was not possible to go past the rigid positions of the two parties, both of whom were completely disengaged from reality and from the contractual clauses that governed the relation between them.

In the first session of mediation, given the tension in the room, the mediator made the parties and their lawyers commit to a smooth progress of the work. He made a chart split into two columns - relational and material - and had the parties agree that anything arising in mediation concerning the relational aspect would be noted in the respective column but would remain on standby until the material aspect was fully resolved. Everyone agreed.

With this strategy, the mediator very quickly came to the true interests of the parties. The buyer wanted the dream apartment; the construction company wanted to deliver the client's project and have it as a resident in the property.

It was concluded that the delays, notwithstanding who was to blame, would have caused additional costs to the client of 15 thousand Reais, in a contract of millions of Reais.

Upon discovering this situation, both parties quickly came to the conclusion that any judicial fight would cost much more, and, in the end, no one would have their interest taken care of. That is, everyone would lose.

With this, it was proposed that the damage should be shared between the parties and that the construction company would put its best designers to serve the client and finish the work to his satisfaction.

In just three meetings in mediation, a lot of money was saved and at least 10 years of legal proceedings avoided; not to mention that the real interests of the parties were met, leaving aside their personal differences.

8. Public Nuisance

The case involved a company that built an event venue (venue for wedding parties, birthdays, wedding anniversaries and other events) in a posh neighborhood of São Paulo on land that belonged to one of its partners (where a car wash building had been demolished and a beautiful building was built over most of the land, comprising a basement and two stories).

After the house was inaugurated, the neighbors started complaining about the loud noise emanating from the house when bands performed or when electronic music was played. The neighbors made complaints to the City Hall and the venue was put under notice that it had emitted decibels in excess of the level legally permissible after 10 p.m. on more than one occasion.

The mediation involved the partners of the venue, a representative of the neighboring buildings, the company responsible for building the property, and the company that had been hired for soundproofing.

At the request of all participants in the mediation, the testimony of a Professor that held a doctorate degree in acoustics was heard. The Professor analyzed the venue's acoustics and civil engineering

and provided specific criticism. The suggested required repairs were prorated among the partners of the venue, the engineering company and the company specialized in acoustics projects. During the repairs, the event venue did not host parties with live or electronic music, which greatly pleased the neighbors.

The opinion of the expert hired with the agreement of all involved and his discussions with the parties and their lawyers was key for everyone to identify the problem and to stop discussing individual responsibilities, but instead search for a joint and shared solution. At the same time, the process made the neighbors feel heard and valued during the mediation. With the dispute settled, many of the neighbors started to book the venue for their own celebrations and the venue is still in operation without ever again having received any further legal notice.

9. Family Business/Inheritance

9.1. Family Business

This is a case involving a traditional fourth-generation business family (almost 100 years old) controlled in equal parts by six distinct branches and until 2012, led by the older brother. After the death of the eldest son, some issues started to generate frequent tensions: growth strategy and handling of the business, hiring/adding and remuneration of relatives, deadlock on utilization of companies' land and properties, investment policies and distribution of dividends, among others.

The mediator was approached by one of the branches of the family interested in inviting the other shareholders and family members to participate in a mediation. After individual pre-mediation meetings, which were critical to overcoming the initial skepticism toward the process, terms for mediation were signed by all those involved in the matter. Family lawyers followed the mediation as observers without direct involvement.

Over a period of five months, six joint meetings and some further individual meetings (caucuses adapted to the characteristics of the family and the number of participants), it was possible to list and prioritize the relevant issues, capture the various visions of those involved, identify common interests and points of agreement, develop options and finally validate criteria for decision making.

A fundamental principle in multilateral negotiations known as the "single undertaking" principle, according to which nothing is agreed until everything is resolved, governed the interactions between the partners. In this sense, the mediation was very similar to the process of consensus building, and several techniques were used: successive approximations; reality check of proposals; scenario analysis; always - worth noting - very carefully to make sure everyone understood the scope and consequence of the stipulated arrangements.

As a result of the mediation, a Memorandum of Understanding (MoU) was drafted by the mediator and approved by the family, which later served as the basis for the lawyers to prepare contractual instruments that would detail the agreements signed during the mediation¹. In terms of the benefits perceived by the clients, it is worth mentioning:

- Distribution and investment of existing assets according to different family profiles and preferences
- Maintenance of family relationships by affinity and not only by the corporate bond
- Greater focus on business management due to concentration of shareholdings and/or voting rights
- Greater predictability in the succession process, with positive repercussions on the organizational climate, company performance and retention of key employees/collaborators.

¹ In some jurisdictions this would not be allowed.

9.2. Inheritance and Family Business

Husband and Wife had three children – a Son and two Daughters. Some time ago Husband died without leaving a will. At the time he owned the following assets, all held in a “total community property” legal regime with his wife:

- a piece of land by the BR national highway - for this reason it was very saleable and liquid, valued at the equivalent in *reais* of US \$500.000;
- a piece of land by the beltway around their major city - for this reason very saleable and liquid, valued at US \$800.000, where the family business (see below) was located;
- 20 lots of land in the El Dorado neighborhood, with total value of US \$200.000;
- the family house, valued at US \$400.000;
- a farm equipment/machinery business of undetermined value; and
- A piece of land where the farm machinery business warehouse is located, valued at US \$800.000.

The initial family meetings only served to radicalize respective positions and increase the level of conflict. The Son tried to take advantage of his privileged position as eldest child and son, to become the estate’s administrator, to control the family business and gain the emotional support of his mother who was also the surviving intestate spouse. In view of the male-dominated culture (*machismo*) prevailing and his status as her only son with a life-long illness which was manageable with her help, she had always emotionally favored him over the Daughters.

The Daughters as the other heirs took a defensive position due to their lack of knowledge about the true value of the assets, the business and the contentious position of Wife in favor of her son.

One of the Daughters asked for help from her husband, who intervened by contracting professionals to help with valuation and other advice which decision was supported by her sister.

The biggest point of contention was that Son wanted to keep for himself the family business, the land by the BR highway, and the city beltway which were the most valuable assets. There was no clarity as to which assets were to go to mother, which to him, or which to the Daughters.

The applicable Brazilian law/rules of intestate succession (where decedent leaves no will) provide that:

- Before anything else, 50% of all assets held in a “total community property” regime go to the surviving spouse;
- After that, remaining assets are divided according to rules of Brazilian intestate succession: each of the three heirs gets one-third of the assets remaining in the decedent’s estate, after taxes, costs, creditors.
- The heirs are free to alter this statutory scheme by mutual agreement to be approved by the court.

Agreement did not look viable. Meetings were unproductive and emotionally draining. The lawyer hired for the estate was dismissed while the Daughters hired their own attorney to represent them. The Son was dismissed as estate administrator and replaced by the judge with a court-appointed administrator.

The Daughters requested a valuation of the farm machinery business using an expert report which the court approved, putting the Son in check and in shock. He had worked many years to help build the business, the income of which was used to support the family's well-to-do lifestyle which was enjoyed by the Daughters who did not know anything about the business.

The business is a privately held family business with the following basic characteristics:

- It is a Limited company (*limitada*) with shares of restricted private ownership called "quotas". Husband held 99 quotas and Wife one quota (Brazilian company law requires at least two quota-holders). Quotas are not publicly traded. Right of first refusal to sell outside the family always goes to the other quota-holders.
- Last year's stated revenue for the business were the equivalent in *reais* of three million US dollars in gross revenues and three hundred thousand US dollars net profits. The business had five employees, not including the Son who has acted as General Manager for the last ten years and had a stated compensation for this role of sixty thousand US dollars per year.

Momentum having tilted back towards the Daughters, the Son and his mother hired a new lawyer to represent them.

After some ten years in fruitless negotiations and court proceedings, the mother suggested mediation, which suggestion was supported by the estate administrator (*inventariante*).

In the beginning, the mediation session, and shuttling in between sessions were very difficult. The members of the family could barely talk to each other and would not remain in the same room. Only after many pre mediations sessions, the introduction and opening session where the mediator could explain the purpose and the principles of the process, were the parties able to develop confidence in the mediator.

Many techniques were used to develop this mediation. Private meetings were useful to disclose the parties' real interests, hidden necessities and personal conditions that would reflect each party's choices of assets: money, real estate or the farm machinery company (parties 1, 2, 3 and 4 below):

- 1 - was recently divorced and in very bad financial condition so she really wanted to transfer as much as possible the assets in money;
- 2 – a married heir with a very stable family social and economic situation preferred the most valuable real estate;
- 3 – The male heir wanted to keep the company. In the beginning he tried to undervalue the business to compensate for the division of other assets. Luckily the two sisters had no ability or interest in running the company although it was "the goose that laid golden eggs" (*galinha dos ovos de ouro*).
- 4 – The mother completely supported the Son's decisions, reinforcing his position.

Balance of power was the biggest issue during the whole mediation process in its stages, moments, steps, phases, etc.

Naturally, venting and mutual complaints were allowed in a very subjective way as part of the mediator's toolkit. Observing and supporting the parties without applying any pre ruled issue or concept helped the parties to go forward with their goals.

Many suggestions came up during the presentations in the brainstorming sessions, based on objective criteria suggested by the mediator such as private and judicial appraisals of assets, and by farm business experts, etc.

The final division was based on the interests of the heirs and principles of compensation based on objective valuation of the assets, at the same time respecting the requirements of the law of succession.

The objective of this mediation was achieved – to divide the family assets equitably and in accordance with the respective interests of each of the parties. After the passing of time, relationships between the family members improved as well.

9.3. Inheritance

The case involved members (siblings and cousins) of a large family of European origin regarding the inheritance of a deceased aunt and especially the amount of the estate she would have received before the death of her husband (uncle of the nephews). The couple, which owned real estate, farms, a quarry, a radio company and financial investments, had no children and left no will.

The family was divided into three groups that were represented by practitioners among the best lawyers in Brazil. In the first mediation session, one of the attorneys said she would not let her clients sign an agreement, while another stated that the family faced a real curse when it came to dividing assets, given that the matter had been debated in court for over 14 years then. The mediation continued without stay from judicial proceedings by several local courts, since the assets were located in several cities and in several states of the country.

At the end of 6 sessions, and determined to lift the curse, the parties and the mediator came up with a quite convenient formula for aggregating pieces of the estate (no group would have to share anything with the others) and dividing the shares, with a focus on the group that was the most skeptical about the mediation. Also, we were able to make each group understand the others' BATNA (best alternative to a negotiated agreement). Consequently, we reached an excellent agreement that put an end to the issue and settled all related lawsuits, which were embedded in a mediation settlement.

The participation of the parties' lawyers was critical to the success achieved, as the attitude of everyone changed throughout the mediation such that we reached a very transparent and collaborative form of representation.

10. Professional Liability

10.1. Medical Malpractice

The Mediation and Arbitration Chamber received a mediation request sent by a physician, plastic surgeon, partner of a renowned Plastic Surgery Clinic.

The request for mediation asked for the attendance of a patient who had undergone breast implants. The breast implants were rejected by the patient, who then threatened to sue the physician in court for damages, which according to the patient was caused by the surgeon.

The patient had already commissioned an expert report to serve as evidence in a future judicial proceeding and was reluctant to accept a mediation procedure. After convincing her to attend a pre-mediation meeting, in which she was shown the advantages of being able to reach a quick agreement for repairing the aesthetic damages she had suffered, she (the patient) agreed to submit her case to mediation. However, she imposed a "sine qua non" condition: that the doctor, plastic surgeon, who did the surgery, would not attend the mediation sessions.

Thus, the mediation session was held without the presence of the plastic surgeon, who was represented by his lawyer, and in less than 1 hour a satisfactory agreement for both parties was reached.

10.2. Attorney Fees

A well-regarded lawyer represented the heirs and the executor of estate of a deceased person who had amassed valuable assets. In the course of a probate proceeding, the lawyer was dismissed by the executor.

The issue was the payment of attorney's fees for the services rendered in the course of the probate proceeding which was to be calculated based on the value of the property being distributed and would be paid to the lawyer at the end of the probate proceeding.

The lawyer sought an agreement on his legal fees for the period he had worked.

The mediation lasted months, until finally an agreement was reached that allowed the lawyer to receive a remuneration for the services rendered and at the same time continue to represent other heirs in the probate proceeding.

These last two cases demonstrate that there are situations in which the client does not want, for various personal reasons, to assume a role in the mediation, and as a consequence, the lawyer starts to play this role, contrary to the application of the above theory, which recommends the involvement of the party (the client) in the mediation procedure.

Although in theory it is recommended that the client be involved in the mediation process, in some instances the lawyer must undertake full representation of the client in order to achieve effectiveness and success in the mediation.

APPENDIX 3

CPR BRAZIL ADVISORY BOARD MEMBERS AS OF APRIL 2019

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