

August 2011



CONTACT US:
146, Avenue Louise
B-1050 Brussels
Belgium
Fax: +32 2 646 24 31
Tel: +32 2 643 33 01
Email:
administration@arbitration-adr.org

Inside this month's issue:

<i>AIA Upcoming Events</i>	1
<i>German courts rule on preliminary enforceability of foreign arbitral</i>	2
<i>Interview with Mr. Dan Naranjo</i>	3
<i>Impartiality of arbitrators and arbitrability of corporate disputes – Russian courts' view</i>	4
<i>Book Review - EU and US Antitrust Arbitration</i>	6
<i>AIA Recommends to attend</i>	7

AIA Upcoming Events



LAST CALL

The Association for International Arbitration is proud to invite you to its upcoming Training Program

European Mediation Training For Practitioners of Justice

LOCATION: HUB University, Stormstraat 2 Rue d'Assaut, 1000, Brussels

DATE: September 5-17, 2011

TWO PLACES ARE STILL AVAILABLE!

Check the program, lecturers and application form at

www.emtpj.eu

The European Mediation Training for Practitioners of Justice 2011

To follow one mediation course and become accredited as a mediator in civil and commercial matters in 16 mediation centers worldwide! Is that possible? Yes, it is!

Follow the EMTPJ course, organized by the Association for International Arbitration (AIA) and sponsored by the EU Commission, next September in Brussels and become recognized as a mediator inside and outside Europe. EMTPJ counts on support of mediation centers in Hong Kong, Egypt and Russia, among others.

The EMTPJ program is unique not only because of the above! What might be even more significant is that the program brings together attendees from all over the world. It is this multinational and multicultural environment that fosters exchange of different perspectives and experiences and gives possibility to create a truly international mediation landscape.

EMTPJ is a two-week training program on cross-border civil and commercial mediation. This year the course will take place from September 5th to the 17th in Brussels, Belgium. It will be a 100 hour training program including the assessment day. Training will cover the following essential areas: the stages in the mediation process, analytical study of conflict resolution, theory and practice of EU and mediation acts, theory and practice of negotiation in mediation, international and cross – border mediation, the role of experts and counsel in civil and commercial mediation, theory and practice of contract law in Europe, interventions in specific situations and EU ethics on mediation.

German courts rule on preliminary enforceability of foreign arbitral awards

by Carsten Grau & Vanessa Blechs Schmidt

1. A foreign arbitral award may be declared preliminarily enforceable in Germany (i. e. without prior service of the application to the debtor), if the debtor holds only such assets in Germany which may easily be transferred out of the country during the *exequatur* proceedings. This applies in particular to bank account balances.

2. The OLG which is competent for the *exequatur* proceedings shall also be competent to order preliminary enforcement measures.

A recent decision of the OLG (High Court) in Frankfurt (*OLG Frankfurt am Main, 26 SchH 12/09, orders dated 23.11.2009, 08.12.2009*) has clarified the requirements for the beneficiary of a foreign arbitral award to obtain an order for preliminary enforcement of the award against the assets of the losing party in Germany. The preliminary enforcement order, which can be obtained without notice to the debtor, allows the amount of the arbitral award to be secured while the main enforcement proceedings take place.

In casu, a French and a Swiss company had entered into a contract relating to the marketing and support of a software product. In the contract, the parties agreed that disputes would be resolved by arbitration in Sweden under the rules of the Stockholm Chamber of Commerce. A dispute arose and the Swiss company commenced arbitration proceedings against the French company in Sweden. In the final arbitral award, the tribunal ruled against the Swiss company by denying its claims in their entirety, while also ordering it to pay a considerable amount to the French company. In order to obtain the payment under the award, the French company needed to have the arbitral award declared enforceable in Germany and Switzerland, which were the countries where the Swiss company held its assets. *Exequatur* proceedings were started in both countries. In particular, the French company attempted to obtain an order for preliminary enforcement against the Swiss company's German assets.

Unlike other jurisdictions, German law allows assets in Germany to be preliminarily secured in the course of *exequatur* proceedings under a foreign arbitral award without prior service of the award and without allowing the debtor a prior hearing, see Article 1063 para. 3 of the German Civil Procedure Code. This provision gives a presiding judge in the competent high court (OLG) the discretion, upon an

application by the beneficiary of an award, to order that enforcement of the amount owing under the award be permitted for the purpose of securing the amount of the award prior to the debtor being served with the main application to obtain a certificate of enforceability. In order to obtain such an order of preliminary enforceability of the arbitral award, the beneficiary of the award needs to establish in court that, otherwise, there is a risk that it will not be possible to enforce the award.

Having examined the case No. 26 SchH 12/09, OLG Frankfurt decided on 23 November 2009, that the proof to establish such risk is sufficient if the beneficiary of the award, or creditor, can show that the debtor only has assets located in Germany that could easily be relocated out of the jurisdiction, in particular bank account balances or outstanding customer claims. OLG Frankfurt ruled that the creditor is not under an obligation to have already searched the entire country for other assets (in particular real estate) and to provide proof of such a search in court. Instead, the court considered it sufficient for the managing director of the creditor (who in this case had known the debtor's managing director for several years) to render an affidavit that "to the best of the creditor's knowledge" no other immovable assets of the debtor were located in Germany.

On the basis of a preliminary certificate of enforceability, the creditor may apply for securing measures, in particular the freezing of bank account balances. Further, while generally a different court than the OLG would have jurisdiction to hear the subsequent application for securing measures, the OLG Frankfurt has ruled twice (in 2001, case no. 2 SchH 2/01 and in 2009, case no. 26 SchH 12/09) that the OLG in charge of the *exequatur* proceedings shall also be competent to issue the freezing order. This way, it is much quicker for the creditor to obtain the freezing order.

In practice, enforcement of a foreign arbitral award will only be successful if tangible assets of the debtor remain available in the jurisdiction while the arbitral award is being declared enforceable in - sometimes lengthy - *exequatur* proceedings. If the assets of the debtor are dissipated or transferred elsewhere during the enforcement proceedings, the beneficiary of the award will be left with nothing to enforce the award against. This means that the opportunity for successful parties who are enforcing arbitral awards in Germany to obtain an order of preliminary enforceability has proven to be an effective tool to ensure the availability of assets. It provides the creditor with the benefit of surprise



since the debtor is not alerted in advance by service of the main application and - hence - has no chance to relocate tangible assets away from Germany.

This almost unique procedural authority of the German courts to grant a preliminary enforceability order for foreign arbitral awards allows the creditor to preliminarily secure the available assets of the debtor and makes Germany a forum of first choice for effective enforcement of foreign arbitral awards.

Interview with Mr. Dan Naranjo

by Mary Ladd

Mr. Naranjo is a man who has been successful as a lawyer, judge, arbitrator, mediator, father and grandfather. He has been a practicing attorney for over 30 years. Mr. Naranjo was the president of the San Antonio Bar Association, co-founder and Chairman of the Board of the San Antonio Bar Foundation, and appointed as a US Magistrate Judge from 1981-1989 in the Western District of Texas. When he left the bench, his reputation for being fair, objective, and maintaining his neutrality was well established in the community. Lawyers sought him out, asking him to mediate or arbitrate cases even before he had received any mediation training. He recognized the opportunity he had to broaden his area of expertise, and took initiative by going to Seattle, Washington for an intensive 40 hour training session with the United States Mediation and Arbitration Association. He then returned to San Antonio where he began supplementing his law practice with mediation. Now, his work in mediation has gone from being supplementary to being the bulk of his practice. He is a member of The Texas Academy of Distinguished Neutrals which is a membership that can only be attained through invitation, after meeting strict criteria. He is a member of the AAA Commercial, Employment and Mediation Panels, and has mediated and arbitrated commercial and employment disputes with high value claims. He helped arbitrate disputes concerning the US participation in the Olympic Games and he was placed on the AAA's sports panel. He served on the Board of Directors of the San Antonio Sports Federation, which was responsible for bringing the NCAA 1998 Final Four in San Antonio. He is also an adjunct Professor of Law at St. Mary's University School of Law where he has been teaching Alternative Dispute Resolution since 1998.

Mr. Naranjo was enthusiastic to learn about the AIA and energetically and thoughtfully answered my questions. It was a relief to realize that he is a lawyer who knows the significance and value of passing on knowledge and lessons learned from experience.

I began the interview by asking how he had seen mediation and arbitration change and progress in the US. He explained that in general, "mediation has expanded so much in the US. Texas along with Florida, Ohio, and California are the outstanding neutral's leaders in the US in Alternative Dispute Resolution. They [the states] have taken leadership because of the neutrals in those states. It seems like California, Florida, Ohio, and Texas academics and practitioners have really taken a lead role in furthering the whole ADR movement, and it takes that kind of aggressive leadership."

Personally, Mr. Naranjo has had over 20 successful years of experience as an arbitrator and has mediated and arbitrated numerous commercial and employment disputes. Along with being on the panel of the AAA and the International Center for Conflict Prevention & Resolution in New York City, he is also on the panel of the US postal service. He has seen that family law cases have become very important in the ADR field and commercial disputes and labor management are also very popular cases to be mediated. He focuses on arbitrating and mediating commercial and employment cases because those have always been the most interesting to him, and it was simply a natural progression stemming from the work he was already doing as a lawyer before he began working in ADR.

I asked Mr. Naranjo if he had done any international mediation or arbitration. He told me of the times he had done training sessions with the US state department, when he was invited to Mexico to lecture on mediation at the law schools and bar associations in Querterero and Mexico City. He is also a representative for his alma matter, the University of Texas Law School, which began a training program for Panamanians who are seeking to make Panama the center of ADR in Central America.

I also asked him what was most rewarding about his experience as an arbitrator and mediator. He replied, "you are really helping people resolve very complex issues. In essence, as a neutral you really are a peacemaker, and it is very gratifying to be able to help resolve either commercial disputes, [or] labor and employment disputes. [As an arbitrator] you are central to getting to the very essence of the

dispute and making a fair, responsible resolution."

I can hear the sincerity in his voice when he speaks about the rewarding aspects of his career, and I can see the passion for the work he does, in his eyes, but even with his successes and rewarding experiences, Mr. Naranjo is wise to recognize the challenges that come with the job. When speaking of maintaining neutrality, he said, "It is a challenge on occasion because you might become emotionally involved with a dispute itself, or you feel sympathy. You have to rise above that to maintain your neutrality. It is not always easy because as a human being, you develop sensitivities to the human predicament and become sympathetic to the plight. It is important for a neutral to maintain that neutrality so that the parties are satisfied with the process and know that you have maintained neutrality. The process breaks down if there is a perception of any bias."

Mr. Naranjo has put in the time and energy to develop as a respectable mediator and arbitrator, and so I listen attentively as he encourages me to "build up a reputation in a community where you practice, of objectivity, neutrality, and fairness, because the decisions you make may not be popular." Then he stresses "however, if the process that you used in arriving at the decision, if it is apparently fair, objective, neutral, then the parties and their council will be appreciative of the process and the result."

The light bulb of enlightenment has been switched on. Yes, of course, it is about the process and being consistently fair and neutral so that people have faith in the process and the arbitrators. Without the solid foundation of a trustworthy process, arbitration as a practice would have little legitimacy.

Mr. Naranjo continued, "If you treat people, parties, lawyers, with respect, fairness, and through your work, you give sound legal reasoning for the result that you reached, [then] that makes the process accepted by the parties and their lawyers. It is so much about the process of impartiality, fairness, and in doing that, you are really furthering the arbitration/ mediation cause by the way you conduct yourself or the proceeding. Follow the rules. Hopefully you will receive a fair result, [and] respect for the decision. [It] is so important that the persons involved respect the neutral AND the process."

I steered the conversation in a slightly different direction, and asked what kinds of characteristics or strengths one needs to be a successful mediator or arbitrator. He said,

"having a strong subject matter expertise in commercial litigation, in labor, employment, in whatever area [that] is helpful to the neutral, because that denotes a strong foundation in that [particular] area of dispute. I'll tell you what has been of assistance to me. I was a former US Magistrate Judge, and have handled a great many complex disputes in the federal system. That experience has assisted my development in federal litigation. I think it gives lawyers and parties some indication of the experience level of the neutral. To acquire experience, you must develop a subject matter expertise in a subject matter you like, and then I would suggest that persons wanting to get in the field volunteer at local alternative dispute resolution centers. You want to get experience. It is a way of building up a rapport in the community in which you are practicing law." Mr. Naranjo also strongly recommended that American students and practitioners become members of their local bar associations, as well as the American Bar Association.

I have discovered that you can tell a lot about a person according to what they consider their greatest achievement to be. Mr. Naranjo is obviously accomplished in his career, but he did not hesitate to say that, "my biggest achievement in life is producing a beautiful daughter, Cecilia, who in turn has completed the circle and provided me with two gorgeous grandsons. Being a magistrate judge is a pretty big thing, and I have always been proud of that appointment, but when you are the father of an outstanding daughter who produces two beautiful grandsons, that is pretty hard to beat."

Mr. Naranjo can be reached at his office in San Antonio by phone at (210) 344-9823 or by e-mail at dnaranjo@texas.net. You can also book an appointment through his personal page, www.texasneutrals.org/dan-naranjo.

Impartiality of arbitrators and arbitrability of corporate disputes – **Russian courts' view**

by Dilyara Nigmatullina
(also published at www.cisarbitration.com)

On June 21, 2011, the City of Moscow Commercial Court (the "City Court") annulled an award of the International Commercial Arbitration Court at the RF Chamber of Com-

merce and Industry (the "ICAC") rendered on March 31, 2011, whereby Novolipetsk Steel JSC ("NLMK") was to pay 9.5 billion roubles (approximately 237 million euro) to Nikolai Maksimov ("Maksimov").

The conflict between the parties dates back to 2007 when Maksimov, at that time the sole owner of the Maxi Group holding company, sold 50 percent of the company plus one share to NLMK. NLMK is one of the largest steel producers in Russia. Its principal owner is Vladimir Lisin, who holds 84.6% of NLMK shares. The terms of the share purchase agreement, as well as its implementation, gave rise to multiple disputes. Starting in 2008, Russian courts on the regional, as well as federal level, have rendered a range of decisions relating to different aspects of the dispute. Moreover, a number of criminal cases have been initiated by the parties against each other.

In addition, the parties recently completed an arbitration concerning their various grievances before the ICAC. The award was entered in Maksimov's favor, and NLMK turned to the City Court, petitioning that the composition of the arbitral tribunal and the arbitral procedure contravened the agreement of the parties.

NLMK argued that the members of the tribunal failed to disclose certain relevant circumstances that gave justifiable doubts as to their impartiality or independence. In particular, in the course of the arbitral proceedings, Maksimov submitted a legal opinion from Ural State Law Academy ("USLA"), signed by a professor at the business law department, who is simultaneously the rector of USLA. At the same time, Belykh, a member of the tribunal, headed the USLA business law department and would have been the legal expert's colleague. Another legal opinion submitted by Maksimov to the arbitrators was prepared at the Institute of Private Law (Yekaterinburg), by Professors Alekseev and Stepanov, who also teach at USLA together with Belykh. Moreover, yet another legal opinion presented by Maksimov to the ICAC tribunal was provided by Professor Shulzhenko from the Institute of State and Law (the "ISL") of the Russian Academy of Sciences. A different member of the arbitral tribunal, Zykin, works at the ISL. None of the above-mentioned facts had been disclosed during the proceedings.

The City Court rejected as groundless Maksimov's waiver objection raised under article 4 of the Law on International Commercial Arbitration (the "Law on Arbitration"), because in the opinion of the court, there was no casual connection between the waiver of right to object and the arbitrators' breach of their duties.

Nonetheless, it seems that the City Court failed to take notice of one fact. Both the Law on Arbitration and the ICAC

Rules in articles 13(2) and 18(1) respectively, set for a party intending to challenge an arbitrator, a time-limit of 15 days after being notified of the composition of the arbitral tribunal, or having become aware of circumstances that can serve as a basis for challenge. Within the indicated time-limit, both the Law on Arbitration and the ICAC Rules require the challenging party to communicate in writing its rationale for the challenge to the arbitral tribunal. Presumably the rationale here is challenges should be made "in real time," and not just at the end of a proceeding when one party is dissatisfied with the result of the arbitration or expects that the end result will be adverse. The final sentence of article 18(1) of the ICAC Rules specifically provides that unless a party makes a challenge within the requisite period of time, the right to challenge shall be deemed to have been waived.

NLMK challenged the arbitrators on March 24, 2011, several months after the submission of the referenced legal opinions. Although the City Court did not specifically refer to the time limits set forth in the Law on Arbitration or the ICAC Rules, it nonetheless found that information regarding occupation and position of the members of the tribunal and the authors of legal opinions was available on the official websites of the Russian Academy of Sciences and USLA. Consequently, NLMK, acting with minimum diligence, could and should have become aware of alleged circumstances serving as a reason for challenge far sooner than March 2011. Failure of NLMK to challenge arbitrators before it was clear what the inevitable outcome would be (on March 24, 2011, NLMK challenged arbitrators and on March 31, 2011, the award was entered) resulted in a waiver of the right to challenge.

Ignoring article 18(1) of the ICAC Rules, the City Court found that the facts referred to by NLMK violated the Law on Arbitration because they showed that the composition of the arbitral tribunal and the arbitral procedure contravened the agreement of the parties, which constituted the basis for setting aside the award.

Additionally, the City Court found that the subject-matter of the dispute was not capable of settlement by arbitration and consequently the award contravened the public policy of the Russian Federation. In view of the City Court, though a dispute between the parties arose out of a share purchase agreement, it still dealt with the transfer of share ownership and consequently belonged to the domain of corporate disputes which falls within the special jurisdiction of state commercial courts by virtue of article 33 and 225.1 of the Commercial Procedure Code of the Russian Federation



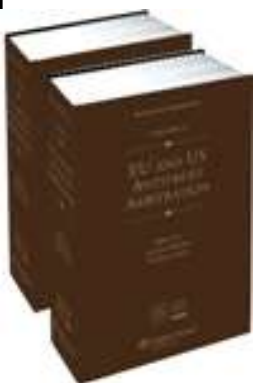
(the "Commercial Procedure Code"). Nonetheless, the City Court's legal conclusions are suspect: the referenced Commercial Procedure Code provisions only establish the jurisdictional rules for dividing certain categories of disputes between different branches of Russian state courts: courts of general jurisdiction and commercial courts. Nothing in these rules expressly provides that the legislature intended to make such disputes non-arbitrable.

NLMK also argued that the ICAC award was contrary to the public policy. In this respect, the City Court found that the arbitral tribunal breached mandatory provisions of Russian law in calculating the purchase price of shares. Because the award contravened a fundamental principle of Russian law, it was in conflict with the public policy of the Russian Federation and was void. Despite the reluctance of the domestic court to uphold the validity of the ICAC award, a different approach has been taken by the District Court of Amsterdam where Maksimov applied to enforce the award. Having examined the matter, the foreign court ordered interim measures in respect of NLMK's share in a joint enterprise with Duferco-Steel Invest & Finance (Luxemburg).

Maksimov also applied for the Constitutional Court of the Russian Federation (the "Constitutional Court") to assess the constitutionality of the provisions of the Commercial Procedure Code relied upon by the City Court in finding the corporate nature of the matter rendered the dispute at hand non-arbitrable. On July 19, 2011, the Constitutional Court accepted this petition. According to experts, it will take no less than 4 months for the Constitutional Court to render its decision in this matter.

Book Review - EU and US Antitrust Arbitration

by Ewa Kurlanda and Jing Yang



The book "EU and US Antitrust Arbitration" provides its reader with extensive background and specialist insights on the interface between arbitration and both EU and US antitrust law and practices. This book is therefore strongly recommended to all antitrust and ADR practitioners.

At its core, antitrust law wishes to prevent and react to certain barriers in the market, most notably to certain joint actions or concerted practices between competitors or to unfair practices applied by enterprises that hold a certain position on the market. In such way, consumers should

benefit of a free market economy. Practice demonstrates that ordinary court intervention or arbitration procedures are frequently used to find proper relief.

When comparing to ordinary court litigation, arbitration has proven to give the added benefit of neutrality, independent judgment and confidentiality – the latter being especially important in the delicate context of the disclosure of commercially sensitive information. Another advantage of arbitration in the realm of antitrust law is that of the expertise of the arbitrator within the field, a feature not always present in state courts.

This book is written by specialists from the forefront of antitrust practitioners and international arbitrators. The authors applied authoritative analysis of practice and procedures to integrate relevant EU and US laws and practices and their respective impacts on dispute resolution within the sphere of antitrust law, and related issues.

Comprising two comprehensive volumes sectioned into five parts, each of them drafted as stand-alone sections, this work provides coverage to consider over one hundred specialized topics. It updates the reader with numerous recent arbitration awards and references to important judicial decisions, academic and professional commentary, regulations and opinions, and both federal and state legislation.

The first chapters are devoted to general topics of antitrust arbitration both in the EU and the US. The issues discussed at the outset include arbitrability of antitrust law from the perspective of the respective jurisdictions, as well the arbitrator's perspective and the user's perspective. Issues regarding the question of the burden and standard of proof in international arbitration and their application in antitrust matters outside of arbitration are also evaluated. The work then goes on to examine the practicalities of the arbitration process, such as the use of economic evidence, the role of experts in antitrust arbitration, etc.

The following chapters present post-modernist thought from a common as well as continental law perspective, changing views on the obligation of applying antitrust law, the review practice of arbitral awards, the points of view of the different Competition Authorities, challenges within the context of state aid and merger control practices, specificities of matters in the communications and pharmaceutical sector, in-depth analysis of key cases and their effects, antitrust arbitration under the ICC Rules, EU merger clearance decisions over the period of 1992 – 2009, useful indexes, etc.

The book can be purchased at www.kluwerlaw.com. AIA Members receive a 10% discount.



AIA Recommends to attend

VISION MEDIATION. What's the outlook?

7th congress integrated mediation

This conference will be the platform where EVERYONE has their speaker's corner. We will examine facts, exchange experiences and introduce new and unknown methods to use in mediation.

Admittance: 1st of October 2011 from 9 a.m.
Place: Landgericht Berlin (higher regional court), Littenstraße 12 – 17, 10179 Berlin-Mitte (close to Alexanderplatz)

Costs: In total (lump sum) 220 € (Members 185 €)
Early bookers will discount 10%. When booking is concluded until 31st of August the tuition is 200 €. Booking on a daily base is possible. The fee is a lump sum including food, beverages, handouts including a DVD.

Details: Please find more details here: <http://www.in-mediation.eu/en/vision>

Application: Send your application to Integrierte Mediation e.V., Code: IM conference 2011, Im Mühlberg 39, D-57610 Altenkirchen, e-mail: office@in-mediation.eu or phone: +49 2681 986257

Operator: Integrierte Mediation e.V. and the Landgericht Berlin

The subjects to be discussed are perspectives of mediation and the profiles of mediators.

At least four different themes will be in focus:

⇒ Mediation and Justice.

Discussions concerning court annexed mediation. Should the justice system be competitive with mediation or a proponent of mediation or both? What is your answer?

⇒ Mediation and Experience.

Mediation has many different faces. Compare and contrast our experiences to discover a common vision.

⇒ Mediation and Healthcare.

Is mediation effective in resolving institutional problems? Staff problems? Staff and patient problems? Legislation and drug distribution problems?

⇒ Mediation and Emotions.

Is mediation an effective means of expressing the emotional factors involved in conflict? Should mediation be therapeutic or a substitute for therapy?

The II International Congress on Mediation, Lisbon, 20 to 22 October 2011

CAPP – Centre of Administration and Public Policies from School of Social and Political Sciences (ISCSP), Technical University of Lisbon and Office for Alternative Dispute Resolution (GRAL), Ministry of Justice, are organizing the II International Congress on Mediation, taking place on ISCSP grounds, in Lisbon, 20 to 22 October 2011.

The Congress theme will be centred on Restorative Justice, bringing together national and foreign speakers of recognized merit and experience.

We are now witnessing great development and consolidation of Restorative Justice in Europe and worldwide. In Portugal, the rules of mediation in criminal procedure, introduced in the Portuguese legal system in 2007, led to the creation, in 2008, of the Penal Mediation System, specifically dedicated to the mediation of adults, which has recently concluded its experimental two-year period. On the other hand, the Ministry of Justice has been preparing a new system of Juvenile Mediation. Thus, now is the time to convene a forum for reflection. We hope that the II International Congress on Mediation will be a place to share and debate the theory of principles, concept design and future paths for Restorative Justice. In order to achieve these goals, the Congress will have plenary sessions that will rely on the participation of foreign guests of recognized standing and experience in different areas of Restorative Justice, as well as distinguished national guests. Aiming at sharing knowledge in the area of restorative practices, the Congress will have workshops in which it will be possible to see the work developed by Portuguese mediators in the Penal Mediation System. It will also promote contact with experiences from other countries and continents, particularly regarding adult and juvenile mediation, mediation in prison context, mediation in schools and other restorative practices.

We invite you to participate in this event and we inform you that you can find all the updated information about the Congress at

<http://www.gral.mj.pt/home/noticia/id/504>.