

Dispute Resolution Mules

Preventing the process from being part of the problem

Mermaids, like Sphinxes, are hybrids. Each combines distinct elements of another species to create something that is supposed to function better. I am a hybrid myself, a cocktail of Polish, Indian and English bloodlines, though opinion is sharply divided on whether the result is a functional improvement. A mule, derived from the union of a female horse and a male donkey, is more patient, sure-footed, hardy and longer-lived than the horse, and less obstinate, faster, and considerably more intelligent than the donkey. The ancient Egyptians, Romans and Greeks much preferred mules to other forms of transport.

Toyota has coined “*Hybrid Synergy Drive*” for its 21st Century mule, the Prius, a marriage of the environmental and economic benefits of a nickel-metal hydride electric motor and the power of a modern internal combustion engine, while minimizing the negatives of each. They work in tandem. It’s an inspiring concept. Does it have longer legs, into the world of dispute resolution?

Alternative Dispute Resolution or “ADR” is a strange term that could mean very different things – mediation, or arbitration. Packaging non-contentious mediation in the same box as adversarial arbitration has had an important unintended upside – it encourages the development and use of hybrid forms that drive synergy from the best features of both processes to generate holistic benefits. Over the years, the many creative professionals in the dispute resolution field have come up with some imaginative and useful options.

To understand the nature of a mule it is first necessary to understand the horse and the donkey. To value hybrid forms of ADR requires an appreciation of mediation and arbitration.

Mediation can be described succinctly. Mediation is a non-binding voluntary negotiation facilitated by a trusted neutral person. Mediation may result in a contractually-binding settlement, but only if the parties so wish. In its classic form, the mediator does not express an opinion on merits or law, and is entirely facilitative.

Arbitration is private judging. It involves the parties voluntarily submitting their dispute to a neutral person who hears the parties’ arguments and makes an award that will fully and finally bind the parties. Invariably, arbitrations are conducted in accordance

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with rules published by an arbitral body. Under the New York Convention of 1958, arbitral awards made in one country can be enforced in other countries.

An important difference between the two relates to the degree of compulsion. Once begun, the parties cannot escape an arbitration and must live with the consequences. Mediation, being an entirely voluntary attempt by the parties to resolve the matters at hand, means they can walk away from the process at any time with no adverse results.

With that description of the horse and the donkey, here are my personal top 10 dispute resolution mules that are in practical use today:

Arb-Med

The process starts as an arbitration, often on an accelerated basis. The neutral makes the award, but instead of immediately announcing it to the parties, seals it in an envelope and keeps it secret. Then the neutral (who could be the same or a different person) becomes a mediator, facilitating the parties to come to a negotiated settlement. The parties agree beforehand that if they are unable to settle (say by a certain time, or if they stop the mediation phase) then the envelope is opened and the parties are bound by that outcome.

The advantage is that the parties know they will reach an outcome, but the uncertainty of what the envelope contains motivates them to find a negotiated outcome rather than risk opening Pandora's Box. Arb-Med can be used to break deadlocks in mediations and even in negotiations (for example, where parties cannot agree on an amount of money to change hands²).

Med-Arb

Also known as Binding Mediation, the process is the reverse of Arb-Med. The neutral begins as a mediator. If the parties cannot settle all issues as a result of the mediation, the neutral becomes an arbitrator and renders an enforceable decision on those issues. There are a few main drawbacks to Med-Arb. The first is the effect it has on the integrity of the mediation – not only are parties unlikely to be as honest and truthful with a mediator who may later impose an outcome as an arbitrator. Second, for an arbitration award to be enforceable, any significant confidential information disclosed during the mediation phase must be disclosed to all parties before the arbitration proceeds. To counteract the first, parties often agree that if a settlement is not reached in the mediation phase, a different neutral will be engaged to act as arbitrator. But the confidentiality issue is a serious problem. Med-Arb lacks the psychological incentive to settle that is inherent in Arb-Med.

Non-Binding Arb-Med and Med-Arb

Instead of the arbitration resulting in a binding decision, the parties could agree that they would not be bound by the outcome of the arbitration phase. Some might argue

² See: Einstein's Lessons in Mediation <http://imimmediation.org/index.php?cID=129&cType=document>.

Więcej informacji na stronie wydawcy

<http://www.ksiegarnia.beck.pl/czasopisma-adr-arbitraz-i-mediacja-kwartalnik>