

ADR And The Solomonic Solution

By **Gary Birnberg** (July 16, 2018, 11:17 PM EDT)

When I tell new acquaintances that I am a mediator and arbitrator, I often am confronted with reactions that are variations on a single theme: "I don't like mediation or arbitration: They are just two different methods of splitting the baby."

Dare I respond "not so"?

Commercial mediations invariably go down one of two paths: that of the incremental resolution or that of the distributed solution.

The incremental solution comprehends crafting a win-win solution, so well-illustrated by the proverbial story of the contested orange. Each of two siblings wants the last orange in the house: the *whole* orange. Mother, professing neutrality, cuts the orange in two halves, giving one part to each, then observes one child using his half orange's rind while discarding the flesh to make a rather bland-flavored orange cake; the other using her half's flesh while discarding the rind to squeeze a half-empty glass of juice. Moral of the story: the mediator should divine not just *what* a dispute is about but *why* there is a dispute; what is each party's objective in overlapping claims. The case of the orange eschews the putatively fair yet completely unsatisfying resolution of splitting the baby in half in favor of each disputant getting *all* of what he wants.

The distributed resolution is one that is not subject to incremental analysis. A good example of this is an insurance claim in which there is no dispute over liability; only over the amount of ultimate payment. There is no peeled orange solution here. It is simply a matter of distributing positional claims.

Conversely to the case of the orange, the distributed solution implicates some notions of baby-splitting. The settlement surely will be at some numeric point between that of the bid and the ask. Yet, evidence shows that the settlement number in mediation is rarely at the midpoint between the initial bid and ask. There are several reasons why this occurs.

First is the tactical explanation. One or both of the parties might inflate or deflate its respective demand or offer, anticipating that a narrowing of the bid/ask gap will be inevitable and, thus, assuring a margin that it can bargain away without undermining its ability to achieve its desired settlement point.

A second explanation is that different needs and conditions can influence the sensibilities of each party. One simple example could be a payout that is beyond the resources available to the paying party. A



Gary Birnberg

third explanation could be psychological barriers to specific numbers: e.g., in a dispute that hovers over an even-number breaking point, one party refuses to pay beyond, for example six figures, while the other demands a minimum of a million. An additional category of such factors comprehends the universe of factors internal to each party's internal analysis, e.g. asymmetrical risk assessment, exigencies of timing, business necessity.

As the great bulk of cases that come to commercial mediation demand a distributive dynamic, partially or completely, it could be said that some form of baby-splitting is indeed an important practice in that area. Yet, the factors cited above pull the parties' center of gravity away from a symmetrical solution toward some level of asymmetrical values assessment.

Is this common distributive nature of mediation bad? I argue that it is not. Mediation empowers parties to divide the pie in a way that makes sense to them rather than leaving it for a third-party court or arbitrator to decide. In the process, mediation preserves to the parties' benefit the incremental time, stress and fees associated with the litigation and arbitral processes.

So, is mediation an exercise in baby-splitting? I argue that it is not. We cannot ignore its common distributive dynamic. However, tactical positioning, available resources, psychological considerations, and internal value and risk analysis all conspire to create a dynamic in which a Solomonically even split is neither a common nor necessarily a desirable solution.

Before going into mediation, be sure to choose your mediator carefully. Know his or her methodologies and values. Be sure that he or she will be able to nurture either a partial or an entire incremental solution to the extent possible. Yet, be equally sure that he or she can drive the process to solution to the extent that the latter is unachievable.

Conversely, criticism of baby-splitting in arbitration can be well founded. Many arbitrators fall into the trap of wanting to please both parties by reaching a compromise award, perhaps afraid of alienating one or the other by providing a decisive judgment based on reasoned application of the facts of the case to the governing law. Yet, doing so represents a serious failure to uphold professional standards.

Currently, a hotly debated topic within the world of international arbitration is whether best practice comprehends party-appointed or institution-appointed arbitrators to arbitration tribunals. Typically, tribunals are comprised of the claimant's choosing one arbitrator and the respondent another. These party-appointed arbitrators, in turn, will choose the third arbitrator, who takes on the role of the arbitral chair.

The legend goes that each of the "wing" arbitrators will defend the position of the party that appointed him or her and the chair will tip the scales in one direction or the other, creating an alliance with his or her chosen prevailing party. But, in fact, a preponderance of arbitrations conclude in unanimous rather than split decisions, indicating either full-throated abandonment of allegiance to the appointing party or some form, formal or informal, of a tacit or explicit agreement among the arbitrators that a majority decision be backed by all tribunal members.

Best practice demands that all arbitrators hew to a proper legal analysis of the case. A party-appointed arbitrator may feel a legitimate duty to assure that the interests of the party that appointed him or her be considered in deliberations with the other members of the tribunal. However, that arbitrator must also consider with equal gravity and objectivity the interests of the opposing party. At the end of the day, the goal of the arbitral panel must be to issue the *correct* result, unswayed by party loyalty and,

therefore, not subject to baby-splitting among the arbitrators.

True, one would expect the result of a professionally conducted arbitration to displease one of the parties involved. Yet, a good arbitrator will mollify the losing party's frustration by providing a well-crafted and reasoned award providing a sound legal basis for the award. Even if the frustrated party does not get what it wanted, at least it will know why it did not get it. That makes a difference.

Arbitrators are subject to the same commercial pressures as are mediators. They want the client who appoints them to be so pleased with their work that he or she will feel inclined to solicit their services on future occasions. Yet, resolution via baby-splitting ignores the dynamic that can generate an adequate solution in mediation as it undermines the very integrity of arbitration.

As with choosing mediators, attorneys must be very circumspect in choosing arbitrators, making sure not just that they will assure representation of your positions in tribunal deliberations but that they will support an award that is justified by the conjecture of the facts of the case and governing law.

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