

A Med-arb Variant: Binding Mediation— an Oxymoron? Yes but Doable

By Eugene S. Ginsberg

The last issue of this publication carried a series of articles on the pluses and minuses of med-arb combinations. As noted by some of the commentators, sometimes the format of traditional mediation does not suit the parties' needs. An example illustrates how a flexible approach to dispute resolution is important. Disputing parties requested "binding" mediation through the Alternative Dispute Resolution Tribunal program of the Nassau County Bar Association ("Association").

The Association has a Mediation program and an Arbitration program. They both follow their respective traditional usage. Mediation is a process whereby the goal is for the parties to voluntarily agree upon a result. The Mediator helps them to do so but does not have the power to impose a decision upon them. In arbitration the neutral or impartial arbitrator makes a decision and the award is enforceable in court. In mediation, the parties are each able to tell the mediator things that are not disclosed to the other party. If a mediation is not successful, both parties may pursue other venues, including arbitration, to obtain a decision.

In this situation the parties wanted to proceed in the less formal mediation style, but in the event there was no agreement did not want to pursue a resolution in another venue. They probably chose a program of the Association because of its minimal cost. They, therefore, were willing to authorize the mediator to utilize any information disclosed in a private caucus and were willing to waive confidentiality to have a determination made by the mediator. To have the determination enforceable the mediator became an arbitrator and the determination was issued as an "Award."

Binding mediation is an oxymoron. However, converting the binding aspect into an award made what the parties desired doable. It was necessary to modify the mediation agreement to make it binding. They agreed

that the impartial mediator would have "full authority to make binding decisions on any issues that are not voluntarily agreed to, or otherwise resolved." They acknowledged their "desire that all disputes between them be agreed to or finally determined by the Mediation." They also agreed that "any information disclosed to the Mediator in joint or private caucus sessions may be used by the Mediator in making his final and binding determination." They expressly waived "any right or privilege that such information is confidential." They authorized the mediator to make a final and binding determination and granted him "the authority to act as an arbitrator and issue such determination in the form of a final and binding Award" and that the Award "shall be enforceable under CPLR § 750C, *et seq.*, in a Nassau County Court having jurisdiction." The arbitration opinion referenced the jurisdiction and the award resolved the issues between the parties.

This was the first time since the Tribunal Panels were established, ten years ago, by the Association that such request was received. The ADR Tribunal program accepted the challenge and accomplished the purpose desired by the disputants.

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