AIPPI Conference (Paris, Oct. 4\textsuperscript{th} 2010)

Using ADR Hybrids to Resolve IP Disputes
(Why, when and how?)

Jeremy LACK (lack@altenburger.ch)
Attorney-at-Law & ADR Neutral
IMI, ICC, WIPO, INTA, CEDR, CMAP, IPOS, Result ACB, ABA, ASA, SCCM …
ALTENBURGER LTD. legal + tax (CH)
QUADRANT CHAMBERS (UK)
PCZLAW (USA)
ADR: Appropriate Dispute Resolution

Least Evaluative
Least Structured
Least Formal

NEGOTIATION

Consensual
Parties in control

INDEPENDENT EXPERT APPRAISAL

Conciliation

Most Evaluative
Most Structured
Most Formal

ARBITRATION

Adversarial
Third party in control

Source: J. Kalowski, JOK Consulting
Arbitration

Resolution

Source: Joanna Kalowski
... Conciliation ...

Zone of possible agreement

Resolution

Precedent

Legal doctrine

Statutes

“OBJECTIVE” Dispute Resolution

Source: Joanna Kalowski

© B. Sambeth Glasner & J. Lack 2008-10. All rights reserved.
... Mediation

Resolution

P1

M

P2

“SUBJECTIVE” Dispute Resolution

Source: Joanna Kalowski
Why consider mediation? Four specific reasons.

PAST

UNDERSTANDING & EXPLORATION

FUTURE

PROBLEM SOLVING & RESOLUTION

PRE-MEDIATION: Preliminary Conference

OPENING

Parties’ opening statements

Summarising and Agenda setting

Exploration of issues and interests

JOINT SESSIONS & PRIVATE SESSIONS ("Caucuses")

OPTION GENERATION (v. Alternatives)

NEGOTIATION(s) (joint & private sessions)

AGREEMENT/Closure

POST-MEDIATION: Enforcement of agreement

Source: Joanna Kalowski
Conflict as an Iceberg

A dispute is never about what it is about...

Although the “objective” aspects of the dispute may be apparent...

...the “subjective” aspects remain to be discovered.
IP disputes are like a piece of cheese

Perceptions = Value = 9/10 of all disputes

“The isn’t that they can’t see the solution, it is that they can’t see the problem”
Gilbert K. Chesterton
Possible Approaches to Conflict Resolution

Source: J. Kalowski
“We have to start by defining the process as part of the problem”

David Plant
ICC Paris, 2009
Diagnostics: Conflictology & Escalation (Glasl’s 9 Steps)

1. Disagreement The Problem
2. Debate + polemic The people
3. Actions, not words
4. Images and coalitions
5. Deliberate loss of face
6. Management of threat
7. Limited destructive blows
8. Fragmentation of the enemy
9. Together into the abyss

Target zone for conflict resolution?

"WIN-WIN"
"WIN-LOSE"
"LOSE-LOSE"

Inspired by: Tina Monberg
Source: F. Glasl’s “Confronting Conflict”
Two axes to consider: Procedural and Substantive

- Directive (process)
  - B. Directive Non-Evaluative
  - D. Directive Evaluative

- Facilitative (process)
  - A. Facilitative Non-Evaluative
  - C. Facilitative Evaluative

Source: Based on L. Riskin “The New Old & New New Grids”
Aligning DR Process(es) to Conflict Diagnosis(es)

1. Disagreement
   - The Problem
2. Debate + polemic
   - The people
3. Actions, not words
4. Images and coalitions
5. Deliberate loss of face
6. Management of threat
7. Limited destructive blows
8. Fragmentation of the enemy
9. Together into the abyss

Entering the images/coalition zone means the Neutral can now be used competitively.

NB: Mediation can be helpful to try and de-escalate the conflict at any stage.

Inspired by: Tina Monberg
Source: F. Glasl’s “Confronting Conflict”

13 © B. Sambeth Glasner & J. Lack 2008-10. All rights reserved. www.altenburger.ch
What type of process do the parties want & why?

- Facilitative (process)
  - Non-Evaluative (subject matter)
  - Mediation
- Directive (process)
  - Non-Evaluative (subject matter)
  - Mediation
- Directive (process)
  - Evaluative (subject matter)
  - Arbitration
- Directive (process)
  - Evaluative (subject matter)
  - Conciliation

Proposal: Start at A and work through to C or D?
# Evaluative Approach: Analysis of the Parties’ Alternatives

<table>
<thead>
<tr>
<th>BATNAs</th>
<th>Time</th>
<th>Cost</th>
<th>Outcome</th>
<th>Consequences</th>
</tr>
</thead>
<tbody>
<tr>
<td>PARTY A</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PARTY B</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WATNAs</td>
<td>Time</td>
<td>Cost</td>
<td>Outcome</td>
<td>Consequences</td>
</tr>
<tr>
<td>PARTY A</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PARTY B</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PATNAs</td>
<td>Time</td>
<td>Cost</td>
<td>Outcome</td>
<td>Consequences</td>
</tr>
<tr>
<td>PARTY A</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PARTY B</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
"Non-Evaluative" Approach: Seeking New Options

Is it possible to consider and generate win-win options that are worth more than each party’s BATNA.

Key Parameters
- Time
- Costs
- Award
- Consequences

DECISION

Non-Negotiated Agreement (Litigation)
- Best Case = Win (BATNA)
- Probable Case = Likely outcome (PATNA)
- Worst Case = Lose (WATNA)

Negotiated Agreement (Settlement)
- Generated Options (> or = BATNA)
The Limits of “Evaluative” ADR

THE LEGAL SYLLOGISM (an algorithm):

Facts (past & present) + Applicable law(s) = Outcomes («conclusions»)

“We have to rely only on the objective facts”. “We have a ‘sacred duty’ to establish the truth.”
“Facts” assume no biases or subjective perceptions

The Right Brain vs Left Brain test ... do you see the dancer turning clockwise or anti-clockwise? If clockwise, then you use more of the right side of the brain and vice versa. Most of us would see the dancer turning anti-clockwise though you can try to focus and change the direction; see if you can do it.

LEFT BRAIN FUNCTIONS
- uses logic
- detail oriented
- facts rule
- words and language
- present and past
- math and science
- can comprehend
- knowing
- acknowledges
- order/pattern perception
- knows object name
- reality based
- forms strategies
- practical
- safe

RIGHT BRAIN FUNCTIONS
- uses feeling
- "big picture" oriented
- imagination rules
- symbols and images
- present and future
- philosophy & religion
- can "get it" (i.e. meaning)
- believes
- appreciates
- spatial perception
- knows object function
- fantasy based
- presents possibilities
- impetuous
- risk taking

Can we accept both parties’ opposite perceptions?

The dancer turns CLOCKWISE
If we see her as standing on her LEFT FOOT

The dancer turns ANTI-CLOCKWISE
If we see her as standing on her RIGHT FOOT
The Limits of “Non-Evaluative” ADR

- No certainty of outcome
- Can get lost in time (and costs?)
- “Win-Win” perfection may be impossible
- Parties may not be psychologically capable
- Neutral may not be psychologically capable
- Parties may want a proposal or compromise
- Need for business certainty (e.g., immediate worldwide enforceability)
- There are times when a court order is needed

“This does not work in my culture”.
“What if we don’t settle?”
When **NOT** to mediate or rely only on mediation

**GOOD REASONS**
- A precedent is needed
- There is an abusive imbalance in power
- There is a risk of illegal collusion (e.g., a cartel)
- The neutral is dangerously unqualified
- The mediation could harm one of the parties
- Certainty of outcome is needed by a specific date

**BAD REASONS**
- “Mediation is a sign of weakness”
- “It is too soon to mediate”
- “We tried to negotiate, so a mediator won’t add anything”
- “You cannot negotiate with people who are in bad faith”

**Mediation is not a magic drug, but should be used much more!**
A Holistic & Customized Approach to Resolving Disputes

VALUES

NEEDS

Constraints

Fundamentals

Strategies

Focus

ISSUES

OUTCOMES

Options

Time

Money

Positions

Laws

Alternatives

Interests
Process Design: Towards Hybrid Vigour

**Factors**
- Parties
- Certainty of outcome
- Costs
- Time & deadlines
- Applicable law(s)
- Languages
- Skill sets
- Venue & distances
- Institutional rules
- Nationalities/cultures
- Counsel
- Neutrals (roles & no.)
- Availabilities
- Advisors & Experts
- Confidentiality
- Discovery
- Implementation
- Enforcement

**Sequential**
- Med-Arb
- Arb-Med
- Arb-Med-Con-Med-Arb
- Consent awards

**Parallel**
- Med//Arb
- Carve-outs
- Windows
- Shadow mediation
- Partnering

**Hybrid**
- MEDALOA
- Dispute Boards
- Co-“medarbiters”
- ???
Example 1: Benefits of Arb//Med with separate neutrals

- Eastern European company/EU Company Joint Venture for software. One party terminates. An arbitration is initiated. Preliminary issues: Qu. 1: Is the termination valid? (French Law of “Contrats synallagmatiques” applies). Qu 2: Is an affiliate covered by the arbitration clause?
- Tribunal issues and Interim Award (Ans. 1: Yes, termination was valid. Ans. 2: no, affiliate is not included)
- French Court orders mediation in proceedings involving affiliate
- Real interests = the future, co-ownership complications
- Could this not have been done by the same panel of neutrals?
- See the new CEDR Rules for the Facilitation of Settlement in International Arbitration and the creation of Mediation Windows (http://www.cedr.com/about_us/arbitration_commission/Rules.pdf)
- “Mediation Window” means a period of time during an arbitration that is set aside so that mediation can take place and during which there is no other procedural activity.

Example:

IP Case Termination of JV; impact on the future
An opportunity for a Mediation Window?
Example 2: Arb-Med for Valuation/Quantum Disputes

- Goal: Create a pressure cooker to reach an agreement in case negotiations reach an impasse.
- A 3-part process in one day:
  - arbitration (3 hours)
  - lunch (2 hours, parties only without the neutral), and
  - mediation (3 hours)
- The same neutral swapped hats (although it could have been done by two neutrals with 1 hat each)
  1. The neutral issued his arbitral decision (a number, no explanation) during lunch (placed it in a sealed envelope)
  2. The neutral met the parties after lunch as their mediator, and worked with them to reach a facilitated outcome (which was achieved, due to the pressure of the envelope)
- The sealed envelope was prominently displayed on the table throughout the mediation. It would have been opened after 3 hours and the parties would have been bound by the award it contained.

Example 3: MEDALOA when time is short

MEDALOA = Mediation and Last Offer Arbitration

French = « Arbitrage sur dernières offres »

- Goal: to create another pressure cooker, more psychological this time as there is no “sealed envelope” from a third party.
- Combination of mediation + arbitration, conducted over several sessions
- Involves the same neutral for both phases, who can take into account information learned in caucus (should mention this)
- The final arbitration stage is triggered by a deadline having been reached. The neutral acts as a “med-arbiter” who can only choose between two final last offers (one from each party). There can be oral argument as to which offer the neutral should choose.
- Possible variations
  - «Baseball arbitration» («final offer arbitration»)
  - «Night baseball arbitration» (neutral’s suggestion is drafted and compared to the binding offer).
How to Select the Right Neutrals: The IMI Decision Tree

http://www.imimediation.org/decision-tree.html

KEY QUESTIONS

1. Do the parties want an administered process or a self-administered mediation?
2. Do the parties want the mediator to be skilled in one or more practice areas?
3. What mediation style do the parties want?
   • Facilitative
   • Evaluative
   • Transformative
4. To what extent are the mediator’s language or cultural skills significant?
5. To what extent is the mediator’s location important?
6. Other key mediator selection issues
   • Availability
   • Costs
   • Use of Caucuses & Emotions
   • Code of Conduct
   • Mediator Profiles
   • References
   • Research/Feedback
   • Flexibility & hybrids (e.g., MEDALOA)
Olé!: Online Evaluation Form for ADR Process Analysis

WHAT'S INSIDE OLÉ!?
A form deigned by BAT with the help of the CPR Institute, CEDR, Miryana Nesic, David Shapiro, Jeremy Lack (2010)

I. Basics
1.1 Basic Facts
1.2 Positions Taken
1.3 Stakeholder Analysis
1.4 Other Considerations

II. Collaborative Analysis
2.1 Underlying Interests Analysis
2.2 Historic Costs
2.3 Future Cost Projections
2.4 Historic Strategy
2.5 Quantum Analysis
2.6 SWOT – Client
2.7 SWOT – Other Party
2.8 BATNAs
2.9 WATNAs
2.10 PATNAs
2.11 Chart Summarizing Alternatives
2.12 Conflict Resolution Options
2.13 Future Strategy

III. Preparations for Mediation
3.1 Style of Mediation
3.2 Negotiation Approach
3.3 Mediation Representation Plan
3.4 Mediator Assistance
3.5 Impediments Analysis
3.6 Information gathering
3.7 Other Considerations

IV. Implementation
4.1 Action Items
4.2 Task Allocations
4.3 Deadlines

V. Ongoing Review

VI. Performance Measurement
Metrics

VII. Feedback

http://www.imimediation.org/ole
In Conclusion: ADR Hybrids Create Greater Autonomy

- How satisfactory are national court litigation/arbitration on their own?
- How long & costly is the process, what is the certainty of “success”?
- What happens if you “win” (what is % compliance & consequences)?
- How easily can your outcome be enforced abroad?
- Could a mediative step add value?
- Can you afford to ignore ADR?

**ADR hybrids can help the parties to design something:**

- Faster
- Cheaper
- Better.