Mediate, Arbitrate or Court? Which way do you go?

Condominium Mediation and Arbitration

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By

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INTRODUCTION

The ability to deal with and resolve conflict is of fundamental importance to anyone involved with Condominiums whether unit owner, board member or manager. Conflict is neither good nor bad and provides tremendous opportunities in the condominium community. We can choose our response to conflict. Many people's first response is to avoid it but that does not deal with the problem.

The basic options available in dealing with condominium disagreements, apart from ignoring them, are negotiation, mediation, arbitration and litigation. Condominiums are communities and people have no option but to learn to live together. Dealing successfully with disputes contributes to the overall community.

Mediation, which is a form of Alternative Dispute Resolution (ADR), is especially appropriate for condominium disputes as common interests exist and the disputes are often about the parties' relationship as well as other issues.

Under section 132 of the *Condominium Act, 1998* any disagreement between the condominium corporation and unit owner regarding declaration, by-laws or rules are to be submitted to mediation and arbitration for resolution. My short paper only deals with mediation and arbitration which are both considered ADR processes.

The other presenters on this panel will look at this section of the Act and others from the quite different perspective of counsel to the corporation or unit owner.

What is Mediation?

Mediation is based in the tradition of business negotiation, psychology and communication. The essence of mediation is the commonsense idea that intervention by an experienced, independent and trusted person can often help parties settle their dispute by negotiating in a collaborative rather than adversarial way.

There are many definitions of mediation but essentially, mediation is a process with defined stages that is used in situations where there is a disagreement between one or more parties. It is a collaborative problem solving approach which empowers the parties to make their own decisions with the help of the mediator who is a neutral and impartial third party with no vested interest in the outcome.

Mediation has at least three distinct phases, a beginning where the issues are identified, a middle where the interests underlying the parties' positions are identified, and an end where options for a solution are explored and eventually agreed upon.

It is most important to note that the mediator does not have the answer, the parties do, with the mediator's help. The mediator cannot impose a solution.

Because of this, it is important to come to mediation with an honest desire to reach a settlement that is fair to the parties and workable in practice.

Participants in mediation must be prepared to be flexible in moving away from their initial positions to seek solutions which meet as many of their mutual interests as possible.

In some circumstances, the mediator may end the process, if he or she believes that mediation is not appropriate or useful for the parties to continue and in such cases, the mediator issues a notice under section 132(6)(b) that the mediation has failed. Mediation is usually a voluntary process but in condominium disputes, mediation is required as part of the mandated procedure under the *Condominium Act*.

Some say that "mandatory" mediation, by taking away this voluntary element, is not a good idea as voluntary participation is one of the key components of the mediation process, but studies have shown that once parties are at the table, mediation, whether mandated or voluntary is highly successful.

Mediation is the most commonly used ADR option. Based on a mail and phone survey of 528 of the largest U.S. corporations:

- 88% have used mediation;
- 81% said that mediation provides "a more satisfactory process" than litigation;
- 90% view mediation as an effective cost-saving measure;
- 82% said that the main reason to use mediation is that it allows the parties to resolve disputes themselves.

Another study of 449 cases administered by four major providers of ADR services showed that mediation was capable of settling 78% of cases, regardless of whether the parties had been sent to mediation by a court or had selected the process voluntarily. Mediation also cost far less than arbitration, took less time, and was judged a more satisfactory process than arbitration.

The *Condominium Act* requires each party to pay the mediator's fees and expenses. Usually both parties will pay 50% of the fees if there is a resolution. It is not uncommon for a mediator to require one or the other party to pay 100% of the mediator's fees if they did not attend a scheduled mediation, or behaved in a way that defeated the purpose of the mediation.

Benefits of Mediation

The benefits of mediation as a dispute resolution process in condominium and other disputes include:

- Choice of mediator;
- Flexible and informality;
- Confidentiality;
- Help with communication;
- Avoiding a "win-lose" approach;
- The parties reach their own settlement which can help preserve relationships and community values. This is an often overlooked but extremely important benefit of mediation in condominium disputes as the parties will usually continue to live beside each other;
- Faster and usually less expensive than litigation.

Especially on condominium disputes, one of the most important benefits of mediation is the parties keeping the power to create a resolution outside the power of what a court or arbitrator could order.

Although mediation is a far less expensive process than litigation, it does have significant costs. For the condominium and the unit owner, there are the costs of

legal advice and the mediator's fees. These fees vary depending upon the experience of the mediator and the length of the mediation.

Given the unique nature of condominium disputes, it makes sense to choose a mediator with experience in the field.

As noted above mediation is a private process so it is difficult to know what actually takes place in a mediation session. While not condominium mediation, the following link will take you to examples of "real", not role played mediations in which the participants have given permission for the mediation to be videoed:

http://www.courts.state.md.us/macro/video/resolutionarypeople.wmv

This may help you put mediation in context.

Arbitration

Arbitration is another private dispute resolution process. Arbitration is different than mediation as it is an adjudicative dispute resolution procedure in which the arbitrator, issues an award which is equivalent to a judgment from a court.

In a condominium dispute, arbitration is the process required under the *Act* where mediation has failed. Arbitration is a legal process governed in Ontario by the *Arbitration Act, 1991*, and in the case of condominium arbitration it is also governed by the *Condominium Act, 1998*. Condominium arbitration is not significantly different than any other type of arbitration.

Unlike participants in mediation who design their own settlement with the help of the mediator, participants in arbitration give control of the outcome to the arbitrator. The chief advantage of arbitration compared to mediation is that the parties can be certain that their dispute will be dealt with which is something that cannot be guaranteed by the mediation process.

The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator who then makes an award.

The parties are usually represented by counsel, although unit owners often do not have legal representation in condominium disputes. This is unfortunate as the result of the arbitration process has significant legal consequences to the parties.

Compared to court, arbitration can usually be completed more quickly. It is generally less formal than court but it is also far harder to overturn an arbitrator's award so it is extremely important to be prepared for the hearing.

Selecting the Arbitrator

Unlike a court where you have no choice but to accept the judge assigned to your case, in arbitration, the parties select the arbitrator. This important decision is usually handled by the lawyers for the condominium and the unit owner.

If the parties cannot agree on the arbitrator, unless there is a bylaw setting out a selection process, the condominium must apply to Superior Court for the appointment of the arbitrator under the Arbitration Act.

All arbitrators, regardless of how they are selected, must be carefully screened to assess their education, experience, and personal qualifications.

Disputants must remember that arbitrators' decisions are generally not open to review by the court.

Dispute resolution organizations such as the ADR Institute of Ontario (www.adrontario.ca) can provide information about potential arbitrators who are members of that organization.

It is important to prepare thoroughly for the arbitration hearing. To this end the lawyers will prepare their client's cases. This can be an expensive process, but preparation is crucial to success.

The Arbitration Hearing

The arbitration hearing can be held in a number of different places including the arbitrator's or counsel's office, or other facility.

The parties need to decide whether to have a transcript of the hearing made by a court reporter. Of course this is a significant cost to the parties and since appeals of arbitration awards are rarely successful, it is probably best not to have a transcript unless the arbitration hearing is very lengthy or the issues are very complex.

Arbitrators tend to conduct the hearing in an informal manner, but do not confuse the lack of formality with a lack of seriousness.

The rules of evidence used in court apply in arbitrations but arbitrators also tend to admit evidence that would not be permitted in a court proceeding. As in a regular court trial, the parties take turns presenting evidence and rebutting the evidence of the other side.

The "burden of proof", which is the standard which a party has to meet in order to prove its allegations and win its case, is, in arbitration as in civil litigation, the "balance of probabilities".

Because of this, each side must keep in mind that the evidence it provides must be sufficient to convince the arbitrator of its position. Of course, their lawyers will have explained all of this to his or her witnesses in the preparation stage.

After all the evidence is presented, the parties or their lawyers usually present closing statements. This is not always required but most lawyers will do so as it is a good opportunity to pull all their facts together and make a final appeal.

The arbitrator then considers the evidence and law and issues a written award. In a typical case, this is done within 30 days of the closing of the hearing.

Once you have an arbitration award it is binding on the parties. If one party will not comply with the award, the other party will have to enforce it by going to court under the *Arbitration Act, 1991* and ask for a court order reflecting the award. So it is possible to go through arbitration and still end up in a court hearing. This is one of the major potential flaws with the arbitration process in condominium dispute resolution.

Appealing the Arbitrator's Award

It is very difficult to appeal an arbitrator's decision which makes it in many ways more "final" than a court decision. In most cases, there are only very narrow grounds for appeal. In effect, parties to condominium arbitration are required to give up their ability to appeal in return for what should be a speedier less expensive, private process.

The Cost of Arbitration

The parties to the arbitration have significant legal costs in preparing and presenting their case in arbitration. The parties also pay for the arbitrator's fees. The cost of arbitration will definitely be much higher than those of mediation and can be quite high if the dispute is lengthy and complex.

If costs are awarded in favour of the condominium corporation against a unit owner, they may, in many cases, especially where there is a rule or by-law dealing with the costs of enforcement, be collected in the same manner as common expenses.

Because of the potential cost of arbitration parties should make their best efforts to resolve their dispute through mediation before it becomes necessary to arbitrate.

Conclusion

In conclusion, mediation and arbitration are useful tools for dispute resolution. Mediation provides flexibility and should be the number one choice for condominiums whether or not it is required under the Condominium Act. Only mediation holds out the possibility of repairing the relationships that are so important in a community.

This is not to say that arbitration and litigation do not have their places. Some disputes require the authority of an Award or Judgment in order to bring about compliance.

If there is one clear lesson from this presentation, it is the importance of seeking legal advice from an experienced condominium lawyer as soon as possible after the dispute arises. The choice of dispute resolution process is extremely important and should only be made after receiving legal advice about the pros and cons of the various options.

CASE EXAMPLES:

Mediation:

Long term dispute (20 years plus) between unit owner and board plus board members. Mediation resulted in a written agreement over outstanding issues including how to deal with problems in the future. Because the parties participated in their agreement, they are more likely to keep it.

Hoarding and repair problem. Mediation resulted in the condominium board helping the unit owner find assisted living, repairing the unit and selling it. This innovative community based result benefitting everyone involved. A far more satisfactory result than could have been achieved through arbitration or litigation.

Unit repair problem over long term (7 years) where litigation had been commenced and both condominium and unit owner had spent a great deal of money. One day mediation resulted in solution where condominium agreed to purchase the unit from the owner to repair and later sell. A court could not have ordered this.

Arbitration:

Cost sharing dispute between two condominiums over common facilities. Mediation failed and in order to save costs counsel agreed on a less expensive no formal hearing type of arbitration.

Dispute over whether a dog was nuisance or not. The owner was extremely uncooperative in the dispute. Resulted in order for permanent removal of the dog and that the owner had to pay costs of approximately $50,000.00 against the dog owner.

Cost sharing dispute over shared facilities. A one day hearing with significant accounting evidence from both sides led leading to a mutually satisfactory settlement.