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Colm Brannigan's ADR Notes

Welcome to the late summer/early fall edition of my newsletter.

One of the most interesting developments in alternative dispute resolution (ADR) is the increasing use of technology in conjunction with, or in place of traditional ADR methods. The advent of online tribunals such as the Civil Resolution Tribunal in British Columbia and the Condominium Authority Tribunal in Ontario has brought legitimacy to the concept and may bring rapid development of ODR in other tribunals and by private practitioners.

I recently wrote an article, "Online Dispute Resolution: It's Time To Rethink The Future, While We Still Can" in the Ontario Bar Association ADR Section's newsletter which asks dispute resolution professionals to look at ODR as an additional tool in our toolbox that should not be ignored.

Med-Arb is a relatively new phenomenon in Ontario outside of labour and family law disputes. It has also been one of the most controversial processes in the dispute resolution field but that does not mean we should not reconsider its use in a wider range of disputes.

In keeping with the Med-Arb theme of my last newsletter I have also explored the use of Med-Arb in a short article "Using Med-Arb in Condo Disputes" which is in the fall 2018 edition of CondoVoice. In the article, which is based on a case study of a condominium dispute, I have described Med-Arb briefly, but more importantly counsel involved in the dispute have also commented on the process.

Their comments show the value in tailoring dispute resolution to the dispute instead of just going with the "usual" approach, and in this case they decided that Med-Arb made sense. I am very interested in any comments on this article and although the article should be online shortly, if you would like a copy before then, please email me and I'll send it to you.

After looking at the use of Med-Arb in various types of disputes, I have come to the conclusion that it is not only under-utilized, but it is also not well understood as a process that can provide a fair and cost-effective method of alternative dispute resolution in the appropriate case.

Up to now we have looked at Med-Arb as a hybrid process where we joined together traditional mediation and arbitration. It is probably time we started to look at it as a standalone process that uses one person in both roles and includes the best aspects of both the mediation and arbitration processes, and might more properly be called med-arbitration to reflect that fact.

This "new" process makes sense for disputes where the cost of a traditional approach to separate mediation and arbitration or litigation does not make sense due to the disproportionate costs involved. Many condominium, construction and small business disputes fall into those categories.

In this newsletter I have reviewed some of the advantages and perceived challenges of the med-arbitration process and over the next few months I plan to write several articles about med-arbitration and also offer a med-arbitration training course by next spring.

I have also included a comment from a court case addressing when a court should interfere in mediation-arbitration. While this case is from a family law dispute, the principles apply in almost all areas of disputes.

As always, I welcome your feedback and please feel free to forward my newsletter to any of your colleagues.

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Some Advantages and Challenges of Med-Arbitration

While there is a growing body of case law in Ontario and British Columbia on med-arbitration most case law focuses on worst case scenarios, rather than best practices which is what we need to develop in this area.

It appears that the first "modern" case sanctioning med-arbitration seems to be from 2003 in Ohio. In Bowden v. Weickert the court stated that as arbitration is a creature of statute and contract, a binding agreement to combine mediation with arbitration is enforceable if the parties waived

mediation confidentiality, consented to the mediator/arbitrator dual role and established the process for submitting evidence.

In Ontario, the Court of Appeal in Marchese v. Marchese, 2007 ONCA 34 (CanLII), recognized mediation-arbitration as a legitimate process stating:

[4] We do not agree with the submission that there is any ambiguity in the words "mediation/arbitration" or that those words mean "mediation or arbitration." Mediation/ arbitration is a well recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing agreement, then proceeds to conduct an arbitration. We note that it was appellant's solicitor who suggested this process, naming a well known practitioner who regularly conducts mediation/arbitrations and who has written papers on the topic explaining precisely what that process entails. The motion judge did not err in rejecting the contention that there was no agreement to arbitrate.

[6] In our view, a mediation/arbitration agreement may be reconciled with the arbitration Act, s. 35 which prevents an arbitrator from "conducting any part of the arbitration as a mediation." If s. 35 applies (a point we need not decide) it can be waived and the agreement to engage in "mediation/arbitration" in this case amounted to a waiver.

Much like any process, the devil is in the details and most legal scholars and practitioners have focused on the negative without looking at the many ways in which a med-arbitration process can be used fairly and efficiently.

There are significant advantages to med-arbitration in the appropriate case. These include efficiency, finality, cost savings and likely, given that anecdotally there is a similar settlement rate of approximately 75-80% in med-arbitration as in mediation as a stand-alone process, there is likely a productive impact on negotiation and mediation from knowing that the matter will be arbitrated if the mediation phase fails.

Among the challenges to med-arbitration are ethical and process concerns, effectiveness of the mediation process in bringing about a more integrative solution and role boundaries of the med-arbitrator.

While I do not want to minimize the process challenges, they can be overcome by a collaborative approach between counsel and the med-arbitrator in designing the process to fit the specific dispute.

There is no doubt that we will have to develop principles around the competence of those acting as med-arbitrator, the issue of informed consent, clarity of both the mediation and arbitration phases of the process and, perhaps most importantly the documentation of the process by way of written contract.

In a later newsletter I will address some of the above advantages and challenges in more detail, but I wanted to leave this topic with providing some degree of confidence that counsel and neutrals who engage in this process will find that courts will, if the process is properly designed to meet the challenges, uphold the process and its use.

Below is a case law example that support this approach, and when combined with the increasing level of deference provided by our courts to arbitral decisions, should give counsel a degree of comfort in participating what is an innovative and effective option in alternative dispute resolution.

Will a Court Interfere With Mediation-Arbitration?

In McAlister v. Gallant, 2012 ONCJ 565 (CanLII), at p. 68 the court stated,

The intervention of the Ontario Court of Justice in the face of private mediation/arbitration agreements should be limited to its statutory jurisdiction under sections 6 and 7 of the Act. The court should be loath to interfere in the mediation/arbitration process where the process has begun and there is a mechanism in place to make decisions ... in a timely manner. It is difficult to imagine a circumstance where it will be appropriate for a judge of the interior Court of Justice to substitute its own decision for an award that has just been made by an arbitrator.... Here the parties reached an agreement that the best interests of the child will be determined through the mediation/arbitration process - an agreement that they bargained in good faith. If the father feels that the process or the award is flawed, he has a statutory pathway to follow for court intervention. He has not, for the most part followed that pathway. The party should be held to their bargain.

If our courts do not feel it necessary to intervene in mediation-arbitration in family law, then as long as the process is fair and meets the requirement of natural justice, it is safe to assume that parties who enter into a med-arbitration process by choice will be safe from court intervention based on the process. The certainty of the med-arbitration process takes away one of the criticisms of mediation alone which is that it may not lead to an outcome. By designing the process to incorporate the best aspects of mediation and arbitration parties can benefit in circumstances where they might not do so by using mediation and arbitration as individual processes.

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If I can be of help in providing information about mediation, arbitration, med-arbitration or training, please contact me.

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