

MED-ARB, PART 1

THE PERFECT COUPLE, STRANGE BEDFELLOWS OR SOMETHING IN BETWEEN?

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This article is part of a 2-part series. Part 2 will be published in ADR Update, Winter 2020; it will focus on the arbitration element of med-arbitration.

At a recent program on arbitration, The Honourable Thomas Cromwell asked: “Are we taking full advantage of the flexibility of the arbitration process?”¹

To fully answer this question, med-arb must be considered.

Colm Brannigan suggests that we call it “med-arbitration” as a unique innovative stand-alone process and not just a cobbled-together mash of mediation and arbitration.

Many ADR practitioners view themselves as mediators or arbitrators in any given process. This binary thinking may soon change. Mediation and arbitration may no longer be considered opposing and contradictory processes. The ADR Institute of Canada will release its med-arbitration rules in November 2019 at its National Conference, in British Columbia, along with a new, related designation.

Med-arbitration offers some unique opportunities and challenges that do not apply to stand-alone mediation or arbitration. It is essential that practitioners consider both to ensure that they are serving their clients to the best of their ability.

We cannot be so short-sighted that we consider the only benefit of med-arbitration as the convenience that it offers in terms of the time and cost. Preserving the



opportunity for parties to agree to an outcome while having them more directly face the reality of the imposition of closure on terms beyond their control encourages more to be made of the mediation opportunity. The “threat of arbitration” that exists in med-arbitration can encourage mediation to be taken more seriously, resulting in parties being better prepared to participate and enhancing the likelihood of mediation being successful.²

Yet, the question of what happens to mediation and arbitration in med-arbitration warrants careful consideration.

Process Design

Frank Sander introduced the concept of the “multi-door courthouse” over 40 years ago when he presented his paper on “The Varieties of Dispute Processing” at the Pound Conference in April 1976. However, the “promise of mediation” is often neglected in the familiarity of a routine process. We default to what we are accustomed to, but is this meeting the goals of our clients?

Looking first at mediation, it is necessary to ask some questions about med-arbitration to deliver on Professor Sander’s proposition to have “the forum fit the fuss.”

¹ The Honourable Thomas Cromwell, “The Flexibility of Arbitration and the Possibilities of User-Designed Approaches” (Keynote Address, Effective Arbitration: Strategies for Success, Toronto, 17 April 2019) [unpublished].

² Debate as to the definition of successful mediation is an interesting subject that merits debate but is not the subject of this article series.

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Is There a Role for Evaluative Mediation?

Many appreciate receiving an evaluation of their case from their mediator. Having a third party provide an assessment of positional strengths and weaknesses can help with BATNA analysis and understanding realistic possible outcomes. However, if the process facilitator is providing both mediation and arbitration services to address the conflict, is there a risk that evaluative mediation might blur their role?

The practitioner should consider perceptions that could be formed if they offer an evaluation during mediation. This might encourage parties to settle and prevent any need for the arbitration aspect of the hybrid process but there are no guarantees.

Marc Bhalla's concern about evaluative mediation in med-arbitration is that it risks putting the mediator-arbitrator in a no-win situation. If the ultimate decision is similar to the evaluation offered in mediation, the practitioner may leave themselves open to a claim of prejudgment that risks nullifying their award. If the decision is viewed as a variant from what is offered in mediation, parties may question the authenticity of the evaluation provided in mediation; this risks hurting the practitioner's reputation.

Is Death of Caucus a Real Concern?

Some believe you cannot caucus in med-arbitration. Applying the sound arbitration practice of keeping all communications with parties transparent, there is worry that bias perceptions might be formed. One on the losing end of the arbitration award—reflecting on how they could have possibly lost their case—could be inclined to point to the unknown, private communication between the winning party and mediator-arbitrator during mediation.

Caucus can be very helpful in mediation, particularly for parties assessing their settlement options. Doing away with it may risk diminishing the mediation opportunity. Colm Brannigan is not convinced that caucus does not have a role in a med-arbitration process, so long as careful consideration has been given to how it would work and such is clear to the parties.

Will Parties Use Mediation to Try to Gain Favour with the Arbitrator?

One of the most common concerns expressed about med-arbitration is how parties participating in mediation will behave if they know that their mediator could impose a decision upon them. Rather than focusing on others involved in the conflict, mediation could be used to try to win over the mediator and make a good impression for the adversarial stage to follow. Despite clarifications of capacity, there is always risk of mediation being manipulated for other purposes. This may test the skill of the practitioner.

How does med-arbitration affect mediation?

Ultimately, we believe that it extends the mediation opportunity. Challenges certainly need to be considered to maintain facilitator and process integrity and to offer parties the best available path to conflict closure.

While med-arbitration may not be suitable for every situation, forms of it have been used for decades in labour and family disputes. It can allow for preservation of relationships and enhance the potential for sustainability through commitment to outcomes reached in mediation.

Med-arbitration offers a collaborative, non-adversarial environment without the uncertainty of how the conflict will be addressed if mediation does not result in complete settlement. It preserves the opportunity for those involved in conflict to have control over the outcome of their dispute in situations where the risk of mediation failing to resolve a dispute is not an option or is undesirable.

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Colm Brannigan and Marc Bhalla serve as the co-chairs of the ADR Institute of Ontario's new med-arb section.

[Colm Brannigan](#) is a Chartered Mediator and Chartered Arbitrator and is a full-time ADR practitioner focused on mediation, med-arbitration and arbitration in condominium, commercial, construction and real-estate disputes. Colm was a member of the ADRIC Med-Arb Working Group.

[Marc Bhalla](#) is a Chartered Mediator and Qualified Arbitrator who offers ADR services both in-person and online. He believes that flexibility of process is a significant advantage of ADR over traditional processes.