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Med-Arb: An Innovative Use of ADR to Meet Our Client's Needs

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In the last number of years there has been a resurgence of interest in med-arb as a process that can be used outside family law and labour disputes. Not the med-arb of the past, which many saw as a cobbled together blend of mediation and arbitration, but med-arb as an innovative stand-alone process carefully designed to the needs of the parties in a dispute. This article is brief overview of the med-arb process with a suggested model that should assist practitioners in using this dynamic process in appropriate cases.

Leading the way, the ADR Institute of Canada has created a Med-arb Rules/Guideline Working Group composed of med-arb practitioners from across Canada and will soon release its Rules and materials which provide a best practices framework to help practitioners, along with a new Chartered Med-Arb Designation.

There is currently a reluctance outside of family and labour law to embrace the concept of med-arb as a dispute resolution process. This is primarily because the two models used in most of Canada have been a single neutral as both mediator and arbitrator as one model+, or a two-neutral model, one as mediator and the second as arbitrator. While the first model has received the bulk of criticism from the legal community and in court decisions, the second model is more expensive, and replicates separate, but linked, mediation and arbitration processes.[1]

Although med-arb is often looked at as connecting two distinct processes in a hybrid model, this is not an accurate description. Med-arb is a single process composed of the following stages:

- Negotiating the Med-arb Agreement
- Mediation Phase
- Transition between Phases
- Arbitration Phase

- Award Writing

Of these stages, negotiating the med-arb agreement where the process is designed, and clearly set out is fundamental to a successful outcome. One size does not fit all and there will always be a significant amount of custom drafting involved as each dispute has its own unique attributes. It is important to remember that the med-arb agreement is also a submission to arbitration.

The transition between the mediation phase and the arbitration phase is where the process can come apart and has led to significant criticism over lack of clarity and definition as to the neutral's role at that time. The parties and counsel must understand when the transition has occurred, and what that means going forward. But this is not a problem if the transition is well thought out, and clearly expressed in the med-arb agreement.

Much of the critique around med-arb relates to the single neutral model and is focused on legitimate concerns over potential bias and denial of natural justice. There are also concerns over perceived restrictions on the effectiveness of mediation in med-arb but again, issues can be addressed in the agreement. While there is a fair amount of article literature on this topic, it really comes down to unease over the idea of the neutral performing two quite separate roles in one process.

Although not commonly used, there is a simple model that removes most if not all the common expressed concerns. That is a single neutral, opt-out model. This model, which originated in Australia, provides an "opt-out" provision before the arbitration phase begins. This "opt-out" does not relieve the parties of their obligation to continue on with the arbitration process, but it does provide a procedural safeguard that also reinforces the goal that the outcome of the med-arb process must be an enforceable arbitration award.

In using an opt-out model, a single neutral will be appointed by the parties to carry out the roles of mediator and arbitrator in the dispute. At the same time the parties will have a second person in place as an alternate arbitrator in case the opt-out is triggered. The opt-out arbitrator may be agreed upon at the beginning of the process or it may be that several names are agreed upon as potential arbitrators with the med-arbitrator selecting from that list if the parties cannot agree on a specific person at the end of the mediation phase.

The "opt-out" can be triggered by any of the parties or the med-arbitrator at the end of the mediation phase of the med-arb process. This means that if a party is unhappy with the mediator's approach to the dispute, or has an apprehension of bias and does not want the mediator becoming the arbitrator in the dispute, they can simply "opt-out" of the mediator continuing on as arbitrator, without giving any specific reasons. Similarly, the mediator can also trigger the opt-out.

If the opt-out is triggered, after the mediation phase has ended, the mediator still has a role to essentially case manage the file into the arbitration phase by ensuring that there is clarity about the issues that have been settled and those going into the arbitration phase. There will also be agreement (if not already in the Med-Arb Agreement) of the use of materials and documents from the mediation phase in the arbitration phase and times line for production of materials and a hearing date.

Med-Arb was recognized as a valid alternative dispute resolution process by the Ontario Court of Appeal in 2007.[2] More recently, the Court of Appeal again commented that the mediation/arbitration process can be more informal, efficient, faster and less adversarial than judicial proceedings.[3]

Using the "opt-out" model opens a much wider scope for the use of med-arb in a variety of subject matter disputes such as estates, employment, commercial, construction and condominium. In-house and litigation counsel should consider it for cases where there is potential for continuing relationships between disputants. Med-Arb can help maintain relationship while at the same time providing for a definite outcome and can certainly be used very effectively in cases where the cost of full blown mediation followed by arbitration or litigation is disproportionate to the amounts at stake in the dispute.With the recent amendments to the Rule of Civil Procedure regarding Simplified Procedure matters, there may never be a better time to start thinking outside the "single-process-fits-all box" where ADR is concerned. While med-arb may not be suitable for every type of dispute, it is always worth considering as a powerful and effective tool for many cases.

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[1] Hercus v. Hercus 2001 OJ No. 534 (OCJ) is one of earliest and still the most relevant case on procedural fairness in med-arb and Kainz v. Potter 2006 CanLII 20532 (ON SC), http://canlii.ca/t/1nm66 as an example on how not to conduct an arbitration in a med-arb.

[2] Marchese v. Marchese, (2007) 219 O.A.C. 257 (CA), http://canlii.ca/t/1q9jh

[3] Petersoo v. Petersoo, 2019 ONCA 624 (CanLII), http://canlii.ca/t/j1lbn

ABOUT THE AUTHORS

Colm Brannigan is a mediator and arbitrator based in the GTA and a member of the ADRIC Med-Arb Rules Working Group. Colm can be reached through www.mediate.ca.

Conor Brannigan is a mediator with the Canadian Transportation Agency in Ottawa. Conor can be reached though www.mediate.ca.