

MED-ARBITRATION – PART 2: THE PERFECT COUPLE, STRANGE BEDFELLOWS OR SOMETHING IN-BETWEEN?

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The [first part](#) of this two-part article series looked at some of the issues surrounding mediation in the med-arbitration process, this part will focus on the arbitration phase.

Having raised and addressed challenges for the med-arbitration practitioner in the course of facilitating mediation as part of a stand-alone, hybrid process, we now turn our attention to the unique challenges and opportunities offered in the arbitration stage of the process. When the same facilitator is involved in both the mediation and the arbitration aspect of med-arbitration, it is essential that their shifting of roles is clear to the parties. This understanding starts well before participating in the med-arbitration and with the parties' agreement governing the process.

The Med-Arbitration Agreement

There is no comprehensive legal framework that can be referenced regarding med-arbitration. It is all based on a contract, and the applicable Arbitration Act. Most of our guidance comes from court decisions, mainly in family law cases and some of those cases set out clear guidelines of what should not be done in med-arbitration.¹

The agreement must be written so that everyone involved understands the process. It is important for the entire process to be set out in the agreement. It is critical that the parties are giving informed consent and they cannot do that if they do not understand what they are getting into.

A well-defined process set out in the written agreement will also help to significantly increase the odds that any settlement coming out of the mediation phase is complied with and enforceable. This will also ensure that



an arbitration award made in the arbitration phase resolving the dispute is less likely to be successfully appealed and more likely be enforced in court (if needed). Without a clear written agreement, there is no point in even attempting to use med-arbitration.

It goes without saying that great care must be used in designing a med-arbitration process to make sure that all parties are provided with an equal right to present their case and respond to the case(s) of others involved in the arbitration phase. Without meeting the basic requirements of natural justice, med-arbitration will not work.

Fortunately, this is relatively easy to do with the active participation of counsel and the mediator-arbitrator in the design process. While Colm Brannigan believes that med-arbitration is a process that would likely not be undertaken unless the parties are represented, or a very minimum have independent legal advice on the Med-Arbitration Agreement, Marc Bhalla believes that it can work for self-represented parties, so long as they are clear on the process and their options.²

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¹ See *Hercus v. Hercus* 2001 OJ No. 534 (OCJ) as one of earliest and still the most relevant case on procedural fairness in med-arbitration, and *Kainz v. Potter* 2006 CanLII 20532 (ONSC) as a good example of how not to conduct an arbitration in a med-arbitration.

² Marc worries that too many ADR practitioners prevent those who cannot afford legal representation from having the opportunity to gain access-to-justice and that med-arbitration is a perfect example of the type of process that can offer great efficiencies to self-represented parties to overcome the hurdles that stand in their way to conflict closure.

Nevertheless, Colm's concerns must be sufficiently considered to ensure that med-arbitration can be properly utilized for the purposes intended when parties participate without legal representation.

There is no "standard" Med-Arbitration Agreement, although the ADR Institute of Canada now offers a written comprehensive precedent agreement to provide guidance along with process rules that encourage best practices in the field.

Given the custom nature of each agreement, great care must be taken to work with clients and their representatives. Clarity and competence in drafting are essential. This is even more essential when you are considering a med-arbitration process where the same person is both the mediator and, if needed, the arbitrator.

The Transition from Mediation to Arbitration

If the Med-Arbitration Agreement can be considered the "Constitution" of the process, the most important part of any med-arbitration is the transition from the mediation phase to the arbitration phase.

A clear understanding of this aspect of the med-arbitration process, especially around the transitioning role of the process facilitator is extremely important to the success of the process. Many are concerned that the mediator may use information received during the mediation phase in the arbitration process. A well thought out and clearly written Med-Arbitration Agreement will take care of most concerns, but it is extremely important that the parties know when the process has moved from mediation to arbitration and what this really means. Without a clear line, there is a danger that the process can move into a "twilight" phase that can easily taint both the outcome of the dispute and the reputation of the process. This is especially the case if parties are left with the impression that the decision maker is relying on information beyond what is properly introduced as evidence when arriving at a decision.

Well-known Toronto arbitrator, Michael Erdle stated: "information is not evidence" and both the parties and the mediator-arbitrator must appreciate this. It is trite to say, but the arbitrator has a duty to base their award on evidence and there is often confusion by the parties over what the difference really means. With the addition of less stringent focus on the laws of evidence especially around admissibility in arbitration, you have a recipe

for disaster.

One way to safeguard against confusion, distrust or the potential of introducing reasons for parties to be encouraged to appeal the arbitration award is to consider offering through thoughtful design, a "way out" for a party, and also the mediator, if either is uncomfortable with what took place in mediation.

A well drafted and appropriately considered Med-Arbitration Agreement can ensure that parties are clear on the process they are agreeing to. Further, the Med-Arbitration Agreement can serve to offer protections for the parties and process facilitator while providing just and clear closure to the conflict.

The Future: Listening to our Client's Needs?

A properly designed and implemented med-arbitration process can lead to a fair, cost efficient and speedy resolution of disputes, whereas the time and expense of using separate mediation and arbitration processes may not be justifiable.

We must start being more innovative in matching specific dispute resolution processes to disputes instead of defaulting to what we have become familiar with. This is particularly the case when our clients express that they do not want to pick a service "off a shelf" but instead customize the dispute resolution process to deliver upon the promise of The Honourable Thomas Cromwell and Professor Frank Sander⁵ surrounding the flexibility such processes offer.

With the ADR Institute of Canada's National Rules and its Med-Arbitration Agreement now available, there may never be a better time to start, or start again, thinking outside the "single-process-fits-all box." No single dispute resolution process fits all disputes. In many disputes, mediation will be the most suitable and appropriate option. While in other disputes it will be arbitration or litigation. While med-arbitration may not be suitable for every type of dispute, it is always worth considering as a powerful and effective option.

⁵See [part 1](#)

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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. To read more about Colm, visit www.mediate.ca. To read more about Marc, visit www.marconmediation.ca. pg. 11