Med-Arb – The Third Alternative

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Perspectives on alternative dispute resolution for ADR parties and their lawyers

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Perspectives sur la résolution des différends pour les parties et leurs avocats

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Med-Arb, which has a long history of use in labour and family law disputes, is finally receiving the attention it deserves in Canada as an innovative, well-designed stand-alone process and not just a cobbled together mash-up of mediation and arbitration. One of the major critiques of med-arb has been a significant unease over one neutral acting as both mediator and arbitrator in the same dispute. The alternative of using two separate neutrals significantly increases costs. In this article, an alternative model is presented using one neutral as med-arbitrator but providing an opt-out provision at the end of the mediation phase.

In the last number of years there has been a resurgence of interest in the use of med-arb as a stand-alone process that can be used in a variety of disputes. There have been recent articles in ADR Perspectives[i] and an ADRIC Med-Arb Rule Working Group has drafted Rules, a precedent agreement and criteria for a Chartered Med-Arb designation. The Rules were discussed with ADR Practitioners at the ADRIC Conference in Victoria and should be released shortly.

Although many agree that the utility of Med-Arb as a well thought out and designed process combining the flexibility of mediation with the guarantee of an outcome in arbitration should encourage its wider use, there has, for many years been significant criticism of med-arb especially around the idea that one person can both mediate and arbitrate in the same dispute. This concern goes to the equality and fairness requirements of natural justice found in Arbitration Acts throughout Canada.

As a result of such concerns, the use of med-arb, has generally been restricted to certain restricted areas such as family law and labour disputes. Two distinct models have developed. The one-neutral model, which is more common and has been heavily criticized over process concerns, including the transition from mediation to arbitration, and the two-neutral model which, although meeting the natural justice concerns by having a separate mediator and a separate arbitrator in med-arb, is expensive, takes more time to resolution as it essentially duplicates separate mediation and arbitration processes instead of using med-arb as an integrated model.

But there is a third option which can provide a way to use the potential of med-arb while at the same time making sure that the process is fair to the parties, although it is virtually unknown and unused in Canada until quite recently. 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, one person 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 an 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. In other situations, the opt-out arbitrator may be a party to the Med-Arb Agreement with the arbitration dates already agreed upon and set out in the agreement.

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, preferably in writing signed by the parties or their representatives. 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. Once appointed, the arbitrator may wish to incorporate the parties' agreements on process into Procedural Order No. 1.

Using this opt-out approach provides procedural safeguards while at the same time allowing for innovation in design of the med-arb process to produce optimal outcomes for the parties.

In any Med-Arb process, the key to success is a carefully drafted and well thought out Med-Arb Agreement and ADRIC will be providing a precedent agreement that will allow parties to choose the model of med-arb that they see as being most appropriate for their specific dispute.

It is unlikely that the "opt-out" will be triggered very frequently in actual practice. In 20 non-family med-arbs conducted by the authors in the last couple of years, 15 have settled in the mediation phase, three have proceeded onto arbitration with the med-arbitrator but on a much-limited number of issues. Only two cases have utilized the "opt-out" alternative. In one case a party opted out and in the other the mediator opted out because he felt he might have pushed the parties too hard towards a resolution in the mediation phase.

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, 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. While med-arb might not be considered for "bet the business" type of dispute, it can 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.

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[i] Two Hats, or Not Two Hats? By Lauren Tomasich, Eric Morgan & Sarah Firestone Vol.6 No.4 December 2019/décembre 2019 http://adric.ca/adr-perspectives/two-hats-or-not-two-hats/

Med-Arbs – Practical Considerations for Getting the Best of Both by David Farmer and Steven Kley Vol.5 No.2 May 2018/mai 2018 http://adric.ca/adr-perspectives/med-arbs-practical-considerations-for-getting-the-best-of-both/