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## Conflict Resolution

# Using Med-Arb in Condo Disputes

## Thinking Outside the Alternative Dispute Resolution (ADR) Box



We are in a time of ongoing change in the condominium world. With amendments to the Condominium Act, the Condominium Authority and its online Tribunal, we are finally moving towards a greater emphasis on conflict management rather than dispute resolution.

But there are still many condominium disputes that need to be resolved while this change takes place. Mediation and arbitration are still required for disputes under section 132 of the Act while court remains the option for other types of disputes.

Until recently, mediation, which is facilitated negotiation where an impartial third-party mediator helps the parties resolve disputes on their own terms, and arbitration which an impartial third-party arbitrator decides the outcome of the dispute, have been considered to be two separate and distinct processes.

It may be time to rethink this approach and look at combining both into a hybrid process, med-arb. In med-arb, the “mediator-arbitrator” first attempts to help the

disputing parties work out a settlement as a mediator, but should the mediation fail, the mediator-arbitrator then becomes an arbitrator and makes a binding decision. This is the crucial and sometimes controversial difference between separate mediation and arbitration processes, as the same person acts as mediator and, if necessary, arbitrator.

Over the last couple of years, I have acted as the mediator-arbitrator in a number of condominium and non-condominium disputes. Drawing from that experience, med-arb may have potential as an efficient, cost effective and fair dispute resolution process especially in condominium disputes.

This article also contains an example of the successful use of med-arb through a case study based on an actual condominium dispute.

One of the most difficult types of condominium disputes to resolve involves shared facilities. They are particularly contentious because they are based on legal agreements which the parties inherit

from the developer, and have had no part in their contents. There is also no alternative but to resolve the disputes in one way or another, as the parties have no way of separating from each other and as a result have an ongoing relationship. Additionally they often contain multiple areas of conflict and disputes.

Mediation seems like the ideal alternative dispute resolution process for these types of disputes because it can repair damaged relationships and set out a path forward. Unfortunately there is no guarantee of settlement through the mediation process. Because of this parties make try to avoid mediation and proceed to arbitration. Sometimes one or more aspects of the dispute can be resolved through mediation but others cannot. As a result the parties have to continue on to arbitration, which is both expensive and time-consuming.

But it is possible to combine both the mediation and arbitration processes into one fair, cost-effective and efficient process that guarantees an outcome. This is med-arb.

ILLUSTRATION BY JAMIE BENNETT

In our case study, two condominium corporations were at odds over financial and operational issues concerning the management of their shared facilities. Both parties were concerned that the legal and other costs involved in moving forward through mediation and arbitration would be disproportional to the dispute. At one stage attempts to mediate were suggested by one party but not accepted by the other. There did not seem to be a way of getting the parties to talk to each other about resolving the dispute.

The lawyers for the condominium corporations decided to look at alternatives to the usual way of resolving the dispute. Although the parties were unable to arrange an initial mediation and had moved towards arbitration, they wanted a process that would be effective in resolving this particular dispute and were open to using a hybrid approach combining the best of both worlds.

In consultation with their clients, the lawyers opted for med-arb. A date was set for a full-day mediation with the understanding that the parties and their lawyers would work together to narrow the issues before the mediation. Any issues outstanding at that time would be mediated and if needed, arbitrated.

Several conference calls took place between the lawyers and mediator-arbitrator and the process was developed to meet the specific needs of the dispute. The original number of issues was reduced by the time of the mediation hearing. During the mediation those remaining issues were further reduced. When the parties then reached an impasse over the remaining single issue, it was, as set out in the writ-

ten agreement signed before the med-arb began, to be arbitrated.

After considering this option, the parties made a final attempt to settle the single outstanding item and did so successfully. As a result, there was no need to proceed

with the arbitration. This case resolved due to the efforts of the parties and their counsel at a cost far below that of going through a traditional mediation and arbitration process.

In some cases it will be necessary to proceed with the arbitration phase of the process but in over 80% of cases that involve med-arb, the parties settle in mediation.

While uncommon in condominium disputes until recently, med-arb has been used for decades in labour and family disputes. It is not for every type

of dispute but when used properly can save condominium corporations and unit owners both money and time in resolving disputes. The med-arb process empowers the parties to maintain control. This can allow the parties to preserve the relationship and it enhances the potential for long-term commitment to the outcomes they reach in mediation. Med-arb facilitates communication between the parties by providing a collaborative non-adversarial environment for those discussions in its mediation phase.

An understanding of the med-arb process, especially around the transition from mediation into arbitration, is extremely important. Many are concerned that the mediator may use information received during the mediation phase in the arbitration process. But “information is not evidence” and the arbitrator has a duty to base his/her award on evidence.

Counsel for the condominium corporation and other parties can work with the mediator-arbitrator to make sure this transition is properly handled. The Agreement to Mediate/Arbitrate must be carefully and clearly written so that everyone involved understands the process and believes that it is fair.

To put this into a “real world” perspective, here are a sample of comments from both counsel in the shared facilities dispute, about the med-arb process used in that particular case:

*Since we clarified and/or narrowed issues during the preparatory phase, it was easier to work with my client and focus on and generate solutions. In other words, less time was spent preparing the strength of our position and more on developing mutually beneficial solutions....*

*.... (med-arb) Provides an authentic first step towards building a sense of community again since the process minimizes the focus on the adversarial process....*

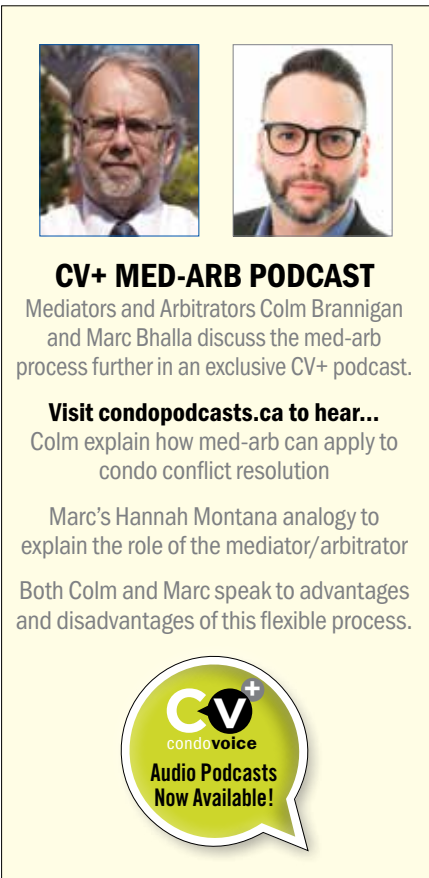
*The recovery of costs for the moving party may be limited by the amount of pre-mediation/arbitration participation. This might be mitigated by less involvement with counsel, however it is not clear to me if this will work either since counsel were involved as a result of the parties not being able to work cooperatively.*

*Not all issues may be ideal for this format. Although there were several issues on the table, the originating problem was relatively discrete and well-suited to mediation....*

*The med/arb process was extraordinarily helpful in resolving the issues between the two Corporations....*

*The med/arb process was the perfect solution for this personality-based dispute... it brought both parties to the table where they could each contemplate where they were willing to give and where they were able to take.*

*The incentive of knowing that the decision could ultimately be taken out of the parties' hands was priceless. It was quite clear that the parties were highly motivated by the fact that if they could not agree on certain*




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 Colm explain how med-arb can apply to condo conflict resolution

Marc's Hannah Montana analogy to explain the role of the mediator/arbitrator

Both Colm and Marc speak to advantages and disadvantages of this flexible process.



issues that they would be determined by an arbitrator that could rule against either of their positions entirely. Without the arbitration incentive, the parties had previously demonstrated that there was a genuine inability to sit down and meaningfully find a resolution.

At the conclusion of the med-arb, the parties arrived at an agreement on every issue but costs... each party was adamant that their view on costs was correct. However, knowing that costs would be decided by the

arbitrator allowed the parties to focus on the actual dispute.

This example shows how an innovative and efficient process can be very effective in the right case. A properly designed and implemented process can lead to a fair, cost efficient and speedy resolution of disputes that are very important to the parties, but do not justify the expense of using separate mediation and arbitration processes.

While great care must be used in designing this process to make sure that both parties feel that they have been provided with the right to hear and respond to any allegations made by the other parties, in many cases this is relatively easy to do with the active participation of counsel with the mediator-arbitrator in the design process.

I would like to thank both Joy Mathews of Rutherford and Mathews, and Luis Hernandez of Horlick Levitt Di Lella, Counsel in the case study for their comments on the process, and allowing me to use those comments in this article.

In conclusion, we must start being more innovative in thinking about matching specific dispute resolution processes to condominium disputes instead of defaulting to what we have become familiar with and going no further.

A final additional benefit of this process is, as both lawyers said:

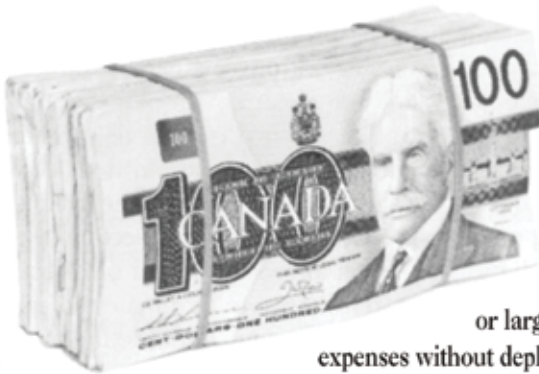
*With the right opposing counsel, positive and productive discussions are possible which benefit their respective parties...*

*... I saw great value in the cooperation that took place between Counsel as a result of the med/arb process. Once the med/arb approach was proposed, the discussions between Counsel shifted from an adversarial nature to a collegial one... Instead of focusing on why each one of our clients was correct in their positions, the med-arb process forced us to consider the reasonableness of the other's positions in a way that allowed for very frank conversations with our clients about what a meaningful resolution could look like.*

This case provides a good example of how lawyers can work as problem solvers even in an adversarial dispute. I suspect that is exactly what most, if not all condominium corporations and unit owners hope for from their legal counsel.

No single dispute resolution process, whether alternative or not, fits all disputes. While the med-arb process may not be suitable for every condominium dispute, it is worth considering as a powerful and effective option. **CV**

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