

# HOW TO ... GAIN THE GREATEST ADVANTAGE FROM MED-ARB

## CONTRIBUTION FROM ADRIO PRESIDENT

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Mediation and arbitration can be effectively combined using an increasingly popular variable hybrid alternative/appropriate dispute resolution (ADR) process known as “med-arb” to help resolve disputes.

Med-arb has long been accepted and is increasingly used internationally in labour, family and commercial disputes to capture the potential advantages of ADR - and its use as a flexible, innovative and multi-purpose tool in resolving disputes efficiently, fairly and expeditiously - over traditional adversarial litigation.<sup>1</sup>

### The Process

In its “pure form” med-arb typically involves one neutral person who initially serves as a mediator, assisting the parties to reach a mutually acceptable resolution and, if mediation fails, the same neutral then functions as an arbitrator, rendering a final and binding decision/award on all unresolved issues.<sup>2</sup>

### The Advantages

The main advantages of med-arb over a mediation followed by an arbitration in which different neutrals function as mediator and arbitrator are said to include<sup>3</sup>:

- ✓ Flexibility
- ✓ Efficiency
- ✓ Improved chances of settlement
- ✓ Greater party satisfaction
- ✓ Finality<sup>4</sup>

### The Concerns

Concerns most frequently raised when the same neutral serves as both mediator and arbitrator include the following:<sup>5</sup>

- ✓ Difficulties with the transition
- ✓ Candour will be curbed
- ✓ Confidentiality in jeopardy
- ✓ Impartiality is at risk
- ✓ Reasonable apprehension of bias
- ✓ Due process and natural justice is violated

*This article continues on the next page.*

<sup>1</sup>Brannigan, Colm. (2019, June 6). Med-Arb as a Well-Designed Stand-Alone Process Workshop.

<sup>2</sup>Dizgun, Leslie. (2017). Med-Arb: Crossing the Line; Huberman, Marvin J. (Ed.). (2017). A Practitioner’s Guide in Commercial Arbitration. Toronto, ON: Irwin Law Inc. 379-388; Goldberg, Stephen B., Sander, Frank E. A., Rogers, Nancy H. (1992). Dispute Resolution: Negotiation, Mediation, and Other Processes, (2ed). Boston, MA: Little, Brown & Company. 226-230; (2009). Alternative Dispute Resolution. Halsbury’s Laws of Canada First Edition. Markham, ON: LexisNexis. 414-415.

<sup>3</sup>Blankenship, John T. (2006). Med-Arb: A Template for Adaptive ADR. Tennessee Bar Journal, 42(11), 28-41; Boyle, Kari D. (2013, March 4). Med-Arb: From the Mediator Perspective. Slaw: Canada’s Online Legal Magazine. Retrieved from [www.slaw.ca/2013/03/04/med-arb-from-the-mediator-perspective](http://www.slaw.ca/2013/03/04/med-arb-from-the-mediator-perspective); Elliott, David C. (1995). Med-Arb: Fraught with Danger or Ripe with Opportunity? Alberta Law Review, 34(1), 163-179; Hoffman, David A. (2018, January). Making the Case for Med-Arb. ACResolution Magazine. Retrieved from [http://www.acresolution-digital.org/acresolutionmag/January\\_2018/pg=20#pg20](http://www.acresolution-digital.org/acresolutionmag/January_2018/pg=20#pg20)

<sup>4</sup>Sandar, Frank E.A., & Goldberg, Stephen B. (1994). Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure. Negotiation Journal, 10(1), 49-68.

<sup>5</sup>Akazaki, Riichiro. (2015, August 30). Overcoming Bias: Mediation-Arbitration in Canadian Civil Litigation. Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2653461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653461); Fullerton, Richard. (2009). The Ethics of Mediation-Arbitration. The Colorado Lawyer, 38(5), 31-39. Retrieved from [http://holmeskirby.com/index\\_bestanden/FULLERTON\\_Richard\\_The%20ethics%20of%20mediation-arbitration.pdf](http://holmeskirby.com/index_bestanden/FULLERTON_Richard_The%20ethics%20of%20mediation-arbitration.pdf), cited by Blankenship, supra note 3, 15 -21; Boyle, supra note 3, 1-2; Elliott, supra note 3, 166-168; Pappas, Brian A. (2013). Med-Arb: The Best of Both Worlds May Be Too Good to Be True, A Response to Weisman. Dispute Resolution Magazine, 19(3), 42; Pappas, Brian A. (2015). Med-Arb and the Legalization of Alternative Dispute Resolution. Harvard Negotiation Law Review, 20(157), 157-203. Retrieved from <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1569&context=facpubs>.

- ✓ Host of ethical dilemmas - critics of same-neutral med-arb claim that this process creates a “myriad of ethical dilemmas,”<sup>6</sup> including restrictions on central principles of mediation: self-determination, impartiality and confidentiality; changing the mediation dynamic; impinging on creative problem-solving; and using pressure and strong-arm tactics from which parties cannot walk away to achieve agreements in the mediation phase. Same-neutral med-arb does not have a universally accepted code of ethical conduct or procedures.
- ✓ *Med-Arb is not yet fully and unconditionally supported* - there is no professional/institutional dispute resolution organization that unconditionally endorses the practice of same-neutral med-arb.<sup>7</sup>

### Making Med-Arb Work

To capture the advantages of same-neutral med-arb while addressing its concerns, ADR professionals, institutions, parties and their representatives should consider the following points.<sup>8</sup>

#### Full Disclosure/Informed Consent/ Procedural Fairness

- ✓ Full/explicit disclosure, informed consent and procedural fairness should be set out in signed agreements by parties and their representatives with clear and robust provisions addressing the parties’ desire to engage in a carefully tailor-made med-arb process that suits them best, detailing:
  - the level of confidentiality to be given to mediation statements;
  - which mediation communications, if any, can be considered for the arbitration award;
  - whether confidentiality is waived regarding statements made in caucus and/or the joint mediation sessions;
  - whether the parties are required to make complete presentations of evidence based on strict observance of evidentiary rules or “sufficient” cases in the arbitration phase;
- the role of the neutral serving as the mediator-arbitrator;
- time limits for the mediation and arbitration phases;
- whether private caucusing is allowed and, if so, what rules apply to the use of information obtained during private caucusing;
- whether due process and natural justice issues have been sufficiently canvassed and determinations made as to how to effectively deal with them;
- whether the neutral has the requisite training, experience and understanding of the med-arb process/mindset and the trust of the parties and their representatives in the neutral to conduct an effective same-neutral med-arb proceeding;
- whether the neutral subscribes to or is bound by a specific code of ethics/standard of conduct and is capable of properly shifting with competence and integrity from the role of mediator to that of arbitrator;
- whether and to what extent statutory/regulatory provisions apply to the med-arb proceeding; and
- whether procedural variations to the standard same-neutral med-arb model should be adopted, so as to permit greater efficiency and flexibility with more, albeit imperfect, ethical protection.

*The articles continues on the next page.*

<sup>6</sup>Anderson, Van A. (2003). Alternative Dispute Resolution and Professional Responsibility in South Carolina: A Changing Landscape. South Carolina Law Review 55, 191, 195-196, cited by Blankenship, supra note 3, 19, endnote xciii.

<sup>7</sup>Fullerton, supra note 5; Fullerton, supra note 5, endnote 35; (2010, July 1). An ADR Primer. International Institute for Conflict Prevention and Resolution. Retrieved from <https://www.cpradr.org/news-publications/articles/2010-07-01-an-adr-primer>, cited by Fullerton, supra note 5, endnote 37.

<sup>8</sup>Sussman, Edna. (2009). Developing an Effective Med-Arb/Arb-Med Process. New York Dispute Resolution Lawyer, 2(1), 71-74; Telford, Megan Elizabeth. (2000). Med-Arb: A Viable Dispute Resolution Alternative. Queen’s University IRC Press Current Issues Series. Retrieved from <http://irc.queensu.ca/sites/default/files/articles/med-arb-a-viable-dispute-resolution-alternative.pdf>; Van Soye, Scott C. (2012) Another Arrow in the Quiver: Med-Arb May Be Right for Your Business Dispute. ADR Times, II(1), 18-21. Retrieved from [https://www.mediate.com/mediator/attachments/14154/med\\_arb\\_article.doc](https://www.mediate.com/mediator/attachments/14154/med_arb_article.doc).

## Changes in Attitudes and Working Assumptions

- ✓ To maximize the chances of success in med-arb, and minimize its risks, stakeholders should:
  - increase their knowledge of and commitment to ADR and its goals, values, principles and challenges;
  - change their attitudes and working assumptions regarding resolving disputes promptly and fairly;
  - focus more intensely on risk analysis and creative outcomes rather than on the legal strengths and weaknesses of each party's positions and settlement amounts, with a better understanding of the cost, availability and the requisite qualifications of appropriate ADR, particularly med-arb, providers.

## Conclusion

Same-neutral med-arb's full potential has yet to be realized. With inventiveness and imagination, further med-arb innovations and hybrid techniques and concepts will emerge.

It is noteworthy and encouraging that the ADR Institute of Canada (ADRIC) has now drafted a cutting-edge protocol/framework for med-arb processes which will be implemented in 2020, and is presently creating a designation for med-arb practitioners, believed to be a first in the world.<sup>9</sup>

As a valuable ADR tool, med-arb offers efficiency, flexibility, variety, practicality and finality - which, if carefully designed and appropriately used by fully informed and consenting parties and a duly qualified and trusted med-arbiter, promises to continue to be an effective and multi-purpose method for the resolution of disputes.

<sup>9</sup>Raymer, Elizabeth. (2019, July 5). New framework for Med-Arb to be launched in November. Retrieved from <https://www.canadianlawyer.com/legalfeeds/author/elizabeth-raymer/new-framework-for-med-arb-to-be-launched-in-november-17511/>.

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