BRIDGING THE GAP: USE OF MED/ARB

One of the conflict resolution processes that ADR practitioners have available to them is a hybrid process known as Med/Arb. Med/arb is an acronym for mediation/arbitration. Usually when parties in conflict decide upon a model for resolution of their dispute, they often use very different starting points. For example, individuals in conflict with other individuals may decide to mediate their disputes.

Typically these may involve personal conflicts between immediate and remote family members, or neighbours. In such situations, they will sign a mediation agreement that appoints the mediator, sets out the scope of his duties, establishes whether or not the mediator is to express an opinion as to the reasonableness of any offers that are made measured against the law as it applies to the particular subject matter, and provide for the parties' shared obligation to pay the mediator's fees and expenses.

Often, commercial conflicts between businesses may result in the choice of arbitration as the preferred method of conflict resolution. And the reason for this is that businesses of sufficient size with access to legal advice, or in house counsel will most likely attempt to resolve disputes trough discussion or negotiation. Where these attempts at self-help fail, they may agree to arbitrate their disputes by entering into an arbitration agreement that contemplates the naming of one or more arbitrators to decide their disputes much in the same way that judges decide cases in our law courts.

One of the principal differences, however, is that the parties to an arbitration proceed by agreement and if they choose to amend their arbitration agreement they are free to do so as often as they please. By tailoring their arbitration agreements to their particular needs they can simplify and shorten the arbitration process allowing them to resolve their conflicts more quickly and less expensively.

There are, however, specific situations where Canadian provincial statutes make mediation or arbitration a legal requirement before resorting to our courts of law. For example, Ontario's new Condominium Act will result in more mediation and arbitration as a means of reducing the number of disputes that wind their way through the courts. Ontario's new Construction Act which replaces the 1983 Construction Lien Act will

remove the powers of the courts to adjudicate these disputes leaving resolution to certified arbitrators with at least 10 years of construction-related experience. It remains to be seen how this unfolds.

In some situations involving personal, or commercial conflicts, the parties will opt for med/arb in the hope of achieving final resolution more quickly. Where the parties opt for med/arb, they will be asked to sign an agreement that names the mediator and sets out the hope of his duties, and their shared obligation to pay the mediators fees and expenses. But in addition, the parties will agree that the mediator will express his or her opinion as to the reasonableness of any offers that are exchanged against the back drop of the applicable law in that jurisdiction.

Should mediation fail, the very same mediator will change hats and proceed to arbitrate the dispute. Assuming that the parties have pre-agreed to accept the arbitrator's award as final and not subject to appeal, the process ends.

The principal risk triggered by the use of this model is that by provincial statute, arbitrators are required to treat all parties fairly, equally, and without bias. Under provincial law any arbitrator who can be proven to have breached these statutory duties is at risk of removal by court order. And if this happens, a new arbitrator will need to be appointed assuming that the parties still wish to proceed with the arbitration. Leaving aside the financial risk to the parties, to the arbitrator, and to the arbitrator's professional reputation, the fundamental problem with this model is simply this.

Once a mediator expresses his or her view as to the reasonableness of any offers and as to the likely outcome were the dispute to be adjudicated in a court of law, it follows that the mediator, turned arbitrator has what judges describe as a 'leaning'. And this means that he or she is arguably biased which compromises his ability to treat the opposite party fairly and equally. Apart from this, provincial statutes such as the Ontario Arbitration Act specifically provide that arbitrators may not engage in mediation as part of the arbitration process. And the reason for this is that an arbitrator has a duty to act impartially.

For parties considering med/arb, the only escape is for the mediator to disqualify himself at the end of a failed mediation and insist that a fresh face take over. While doing so would eliminate the risk of any challenges to the mediator/arbitrator based on bias, partiality and unfair and unequal treatment, the appointment of a fresh face would entail added cost for the parties who would have to start all over again.

Med/arb then however attractive the concept is, carries risk for the parties and the mediator/arbitrator. The very idea of mediators changing hats part way through the process given the applicable legislation is like changing the rules part way through the game.

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