

I. Introduction

Following a relationship breakdown, the parties involved have many options as to how they will determine the legal issues that result from their terminated union.

Currently, there are increases in the number of parties that are utilizing alternative dispute resolution processes (ADR), as opposed to litigation. Among these common ADR processes are mediation, arbitration, and the combination of the two methods, mediation/arbitration (med/arb).

Med/arb is a hybrid dispute resolution process that involves two steps. The first step is mediation, in which the parties attempt to resolve the dispute themselves with the assistance of a neutral mediator. If necessary, the second step is an arbitration stage in which the same neutral person, at that point acting as an arbitrator, determines any unresolved issues in a binding adjudication¹.

It is not disputed that med/arb is satisfying the needs of many parties who engage in the process. However, having the same person conduct the two stages disregards many of the necessary elements needed for an independent mediation and arbitration, which essentially jeopardizes the effectiveness of both processes.

The purpose of this paper is to highlight that the fundamental elements of the independent mediation and arbitration processes are violated when the same neutral person, who was acting as the mediator then becomes the arbitrator during the med/arb process. These elements include mediator facilitation, mediator impartiality, creating a safe and trusting environment, participant voluntariness, self-determination of the agreement, and fair and equal treatment of the parties.

¹ Barry Leon & Alexander Peterson, "Med-arb: Ontario's Appeal Court brings more effective dispute resolution one step closer" (2007) 29 IBA Legal Practice Division Mediation Committee Newsletter.

It is advised that parties consider attempting mediation separately, prior to a possible adjudicative decision, instead of a combined med/arb process. Dividing these processes will result in clients attaining a more valuable mediation and arbitration.

II. The Mediation Process

a) Introduction

There has been much debate as to how mediation should be conducted. Specifically, issues have been raised as to how facilitative or evaluative mediation and mediators should be during the process. Although the debate is significant, it is beyond the scope of this paper. This paper will focus on mediation as a facilitative process.

b) Definitions

Mediation is a process in which an impartial person, the mediator, helps disputing parties to reach a voluntary, mutually acceptable resolution of the issues in their dispute². This is accomplished by assisting and encouraging parties in the dispute to communicate and negotiate in good faith with each other, identify and convey their interests to one another, assess risks, talk about possible settlement options, and to allow parties to freely resolve their dispute³. Essentially, mediation is a facilitated negotiation between the two parties in the relationship breakdown⁴.

III. The Arbitration Process

a) Introduction

² *Model code of conduct for mediators*, Canadian Bar Association – Ontario ADR Section. 1998.

³ Tom Bastedo, “Mediation Paper Revised with Draft Watermark” (2008).

⁴ *Supra* note 2.

As with mediation, arbitration proceedings can have various meanings. The arbitration process that will be discussed in this paper is a voluntary, binding process.

b) Definitions

Arbitration is a process that resolves disputes outside the courts. The parties involved refer their dispute to a neutral person, the arbitrator, by whose decision they agree to be bound. The arbitrator reviews the case and imposes a decision that is legally binding for both sides⁵.

IV. The Mediation/Arbitration Process

a) Introduction

The med/arb process has become more recognized and widely accepted since *Marchase v. Marchase*⁶, where the Ontario Court of Appeal held that an agreement between parties that submitted to med/arb was legally enforceable. This is despite the provision in the province's domestic arbitration statute that prohibits arbitrators from conducting any part of an arbitration as a mediation⁷. The court reasoned that even if the prohibition applied to med/arb, it could be waived by a mutual decision of the parties to engage in the process⁸.

b) Positives and Negatives of the Process

⁵ *Supra* note 3.

⁶ (2007), 219 OAC 257 (CA).

⁷ *Supra* note 1.

⁸ *Supra* note 1.

Med/arb may seem advantageous to many parties given that it has the possibility of being less costly and more efficient. These advantages are mainly due to the fact that another arbitrator is not needed to be briefed about the situation after a failed mediation⁹. However by combining mediation and arbitration as one process, instead of conducting a separate mediation and arbitration with a different neutral person, the mediation and arbitration components are both being compromised. Thus, it has the potential to be unsuccessful in part by causing the parties to become even more adversarial and to raise the negative emotions that are already being experienced by the parties.

IV. Elements of Mediation Violated by Med/Arb

a) The Dual Roles of the Neutral Third Party

i) Introduction

The roles of mediator and arbitrator have very different assumptions and expectations¹⁰, given that the role of a mediator requires facilitation and the role of an arbitrator requires evaluation. This contrast can cause confusion and problems for both the parties and the neutral person.

A mediator's facilitative tasks are to ask questions to help participants understand each other, help parties articulate their own proposals, help parties exchange proposals, and help parties evaluate proposals¹¹. Also, they educate the parties about their underlying interests, predict the impact on interests when not settled, provide

⁹ *Supra* note 1.

¹⁰ *Supra* note 2.

¹¹ *Ibid.*

opportunities to give recognition to the other party, and help parties define the scope of the problems¹².

While an evaluative arbitrator's role is to listen to both parties' arguments, weigh the information, and make a binding decision based on the findings of fact and law.

ii) The Neutral's Difficulty Balancing the Roles

In a med/arb process, the neutral person begins in a facilitative role and if the mediation stage fails, the neutral must switch roles and become evaluative. The question then arises: can the neutral person divert their focus to another task? It is argued that potentially changing roles from facilitative to evaluative will diminish the neutral's capacity to achieve their primary goal, which is coming to a satisfying agreement during the mediation stage¹³. The neutral may be distracted by their prospective dual role and end up performing neither role to the fullest. If the neutral is not effectively providing the mediation service, they are doing harm to their clients, who have requested the process because they feel it may be suitable for their personal situation.

Furthermore, med-arb requires a neutral third party who is adept in both mediation and arbitration. It may be difficult to find someone who is capable of effectively handling the dual roles¹⁴. If the neutral is not skilled in both areas, they are less likely to be successful during the process and could cause harm to their clients.

When the process is mixed and the neutral has multiple roles, he or she is bound by more than one code of ethics and is charged with separate goals and tasks¹⁵.

¹² *Ibid.*

¹³ *Supra* note 3.

¹⁴ *Supra* note 1.

¹⁵ *Supra* note 3.

Therefore, the process also raises concerns about natural justice and impartiality¹⁶, which is discussed in detail in following sections of this paper.

iii) The Client's Difficulty Balancing the Roles

In addition to the mediator/arbitrator having difficulty in balancing their roles, the parties also struggle with the neutral's dual roles.

Many clients will not know how to behave and what information to disclose when the neutral is acting as the mediator. Since that same mediator may become the evaluator if the first stage fails, the parties may not participate in the mediation process to the fullest for the fear of revealing something that will later be brought against them. The parties will likely want show the mediator positive personality traits and give information that would be favourable to their position. Also, the parties may not make offers of compromise because they may be concerned that it will weaken the evaluator's perception of their case.

The med/arb process may lead clients to feel that they are forced to be in a competitive mind-set from the beginning, seeking to capture the neutral's favor and win the case. This mind-set creates a destructive environment for mediation. An atmosphere of respectful collaboration is necessary for creative problem-solving and successful mediation¹⁷.

It is likely that when the parties are confused about the dual role of the neutral, they will not be as open to mediation as they would be if the process were independent of arbitration.

¹⁶ *Supra* note 1.

¹⁷ *Supra* note 3.

b) Impartiality and Non- Judgment by the Neutral Third Party

i) Impartiality

Impartiality of the neutral person means behaving and also seen as behaving unbiased toward either party to the dispute, toward their interests, and toward the options they present for settlement¹⁸. To be impartial, the mediator must be above suspicion that they have done or might do anything that would jeopardize their unbiased reputation with the disputants¹⁹. These are high standards that must be achieved by the mediator during the first stage of mediation.

To achieve impartiality in mediating or evaluating a dispute, the neutral must pay precisely equal attention to the concerns of each party. Often each party will tell convincing and self-righteous stories to the neutral person that reveal the other spouse to be uncooperative, immature, and the perpetrator of the relationship breakdown. The neutral must make every effort to resist such tactics and remain impartial throughout the entire process for it to have an opportunity to be successful²⁰.

It is also not uncommon for the neutral person to receive calls from therapists or even lawyers of the parties. The mediator/arbitrator then has an even more complex problem: he or she must deal not only with impartiality for the feuding couple but also with the outside persons, by not giving too much weight to one side over the other²¹.

¹⁸ *Supra* note 2.

¹⁹ Alison Taylor "Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process" (1997) 14 *Mediation Quarterly*. 215.

²⁰ Donald T. Saposnek, "Mediating Child Custody Disputes" Revised Edition. San Francisco, CA: Jossey-Bass Inc., 1998.

²¹ *Supra* note 18.

Finally, the neutral's objectivity may be influenced if the parties continually try to manipulate the mediator instead of negotiating in good faith²². Manipulation may occur frequently in the caucuses the mediator has with the parties. It will be further discussed that in *Marchese* there was no consideration of the use of private caucusing or its potential compromise of the mediator-arbitrator's neutrality²³. It is uncertain whether the courts will have any future input into the potential for violated impartiality in the mediation caucuses during the med/arb process.

ii) Non-judgment

In addition to impartiality, it is very important that the mediator/arbitrator maintain a nonjudgmental attitude towards both parties. Each spouse may frequently attempt to convey negative things about the other spouse, implicitly and explicitly, trying to sway the neutral's sympathies. The neutral person must not succumb to this tactic by the parties. If the mediator/arbitrator does become even slightly overtly critical of one of the spouses, the non-judgmental attitude necessary for a successful resolution will be lost²⁴.

c) Creating a Trusting and Safe environment for the Parties

i) The importance of a trusting and safe environment

²² *Supra* note 19.

²³ *Supra* note 1.

²⁴ *Supra* note 18.

It is critical for the mediator to create a trusting and safe environment for the parties during the mediation process. This allows the disputants to feel comfortable enough to disclose pertinent information to the mediator and the other party, thus potentially reaching a successful agreement. The mediator must also allow each party equal protection and give the maximum opportunity to save face in the midst of the threats and accusations that are frequently thrown about throughout the mediation process. Thus, the mediator must work to minimize any judgments and criticisms revealed to create this safe and trusting environment²⁵.

A safe and trusting environment becomes difficult to achieve when the neutral person is balancing the dual role of mediator and adjudicator. It is difficult for the parties to feel safe to reveal information and engage in the process if they know the mediator could use any disclosed information to their detriment during arbitration.

ii) Caucuses in building a trusting and safe environment

The use of a caucus between the mediator and one party, to the exclusion of the other party, is of importance in contributing towards building a trusting and safe environment. In a caucus, a party can disclose information to the mediator that he or she does not feel comfortable sharing with the other party. The party usually feels safe telling this information because the mediator has no involvement in the outcome of the dispute. But, as previously discussed, parties may not want to divulge this information in a med/arb process because the neutral person does potentially have the power to decide the result.

²⁵ *Ibid.*

If caucuses were non-existent or if the parties did not feel comfortable being candid with the mediator in a caucus, there is a higher chance for an impasse during the mediation. This could potentially end the process prematurely when it possibly could have been a success, if the party was able to be more open²⁶. In addition, if the mediator has less information at his or her disposal, then the parties may also be less likely to reach an agreement²⁷.

Therefore, it is more challenging for a mediator/arbitrator to create a trusting and safe environment when conducting a med/arb process, than in independent mediations. Without this trusting atmosphere, the parties suffer and the mediation process is compromised.

d) Voluntary Participation in Mediation

i) Introduction

A main component of mediation, by all definitions, is that it is a voluntary process for parties to engage in. This essentially means that parties can leave mediation at any time if they feel it is not working for them, if they are unhappy with any part of the process, or if they are dissatisfied with the neutral person.

ii) Indirect removal of voluntariness in med/arb

²⁶ *Supra* note 3.

²⁷ *Supra* note 19.

However, if parties agree to enter into a med/arb process, the element of voluntariness is indirectly removed. Although the parties are still able to call an end to the mediation portion of the process, it leads them directly into the arbitration phase. This means that parties really do not seem to have much of an option to exit the process at all.

Additionally, the parties cannot leave the arbitration when they agree to the med/arb process²⁸. They are bound to remain in the arbitration, with the same neutral person, and the decision reached is legally enforceable.

It seems obvious that parties may want to consider the two processes independently, considering that if they are conducted separately and a party wants to withdraw from mediation for whatever reason, they can reassess the situation without being forced into arbitration.

e) Empowerment and Self-determination of the Parties

i) Introduction

Another main component of mediation is empowerment and self-determination. Empowerment and self-determination is the right of parties in mediation to make their own voluntary, non-coerced decisions regarding the possible resolution of any issue in dispute. It is a fundamental principle of mediation, which mediators are required to respect and encourage²⁹.

ii) Threats to self-determination

²⁸ *Supra* note 19.

²⁹ *Supra* note 2.

The greatest threat to self-determination in mediation is caused by the behaviour of the neutral person intending to direct some or all of the outcomes³⁰. The outcome of a med/arb process is arbitration, if mediation fails. This is an indirect way of the mediator actually being the decider of the outcome. This may be a common reality since it was previously discussed that a failed mediation could be more likely to occur because of the looming arbitration.

Arbitration has many elements resembling court proceedings and may not adequately consider the future and subjective needs and interests of the parties, which makes it impossible to include as part of mediation³¹. Therefore, by missing out on the valuable experience of a true mediation, the participants are suffering in that they are possibly having a solution imposed on them when an agreement could have been reached successfully.

Whether the neutral person decides the outcome directly or indirectly, it is a major violation of one of the main elements of mediation.

f) Equal and Fair Treatment of the Parties

i) Requirements for equal and fair treatment

Finally, a fundamental element of arbitration that is threatened in a med/arb process is equal or unfair treatment of parties. Ontario's Domestic Arbitration Statute expressly provides, in section 19, that in an arbitration, "the parties shall be treated equally and fairly" and that "each party shall be given an opportunity to present a case

³⁰ *Supra* note 1.

³¹ Renate Denorfer & Jeremy Lack, "The Interaction Between Arbitration and Mediation: Vision vs. Reality" (2007) 1 *Dispute Resolution International*, 1.

and to respond to the other parties' cases. Section 19 is one of the six provisions of the Act that parties cannot agree to vary or exclude³².

Similarly, Ontario's International Arbitration Statute contains a fundamental, mandatory provision in Article 18 that states "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case" and in Article 34 that an award can be set aside if a party was "unable to present his case"³³.

ii) Caucuses and equality

It has been established that the mediation stage of the med-arb process often involves private caucusing between the mediator-arbitrator and each party. Normally the right to know and have a reasonable opportunity to respond to the other side's case is considered essential to our notions of fairness and due process in an adjudicative process³⁴. However, caucuses present a danger because in the adjudicative stage of the proceedings, the mediator-arbitrator may consider and weigh information, obtained during caucusing, to which the other party has not had a chance to respond. This information might be incomplete or even false, and prejudicial to the opposite party³⁵. It is violating the requirement to treat parties fairly and equally if the opposed party does not address information used in making a decision.

Even if by procedural and ethical rules the arbitrator is not permitted to consider or weigh information obtained during private caucus, the parties may not be convinced

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

that such information could be completely discounted³⁶. Thus, even if the parties are in fact treated fairly and equally, there may be a perception that equality is not occurring.

The arbitrator may be improperly influenced by the settlement discussions that occurred during the mediation and perhaps use these discussions on which to base a decision. On the other hand, the arbitrator may impede the discussions by his or her presence. The arbitrator's questions and suggestions while acting as a mediator may create improper pressure to settle³⁷. The greater the mediator's direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer as a result of the mediator's biases³⁸.

The Ontario Court of Appeal has held that parties may agree to a med-arb process. However, as previously mentioned, it remains an open question whether these procedural fairness requirements may tie the hands of the mediator-arbitrator in the mediation phase and impede, or even preclude, the use of private caucusing, which is an important aspect of the mediation process³⁹. This was not discussed in the *Marchese* decision and also remains an open question under Ontario's International Arbitration Statute⁴⁰.

Nevertheless, given the recognition by the Court of med-arb as a "well recognized legal hybrid process, and the fact that private caucusing is fundamental to mediation, it is likely that an Ontario court would find that the required procedural fairness can be achieved if the mediator-arbitrator, when acting as arbitrator, takes no account of material

³⁶ *Ibid.*

³⁷ *Supra* note 2.

³⁸ *Supra* note 3.

³⁹ *Supra* note 1.

⁴⁰ *Ibid.*

information obtained in private caucusing about which the other party has not been informed and to which it has not had an opportunity to respond⁴¹.

Possession of this sort of information by a trained mediator should not interfere with that person's role as an arbitrator, but this really can never be guaranteed⁴².

iii) Screening and equality

Finally, someone besides the arbitrator in an arbitration process usually does screening. However, in med/arb, the mediator-arbitrator is not precluded from conducting the screening⁴³. This brings to light another issue about fair and equal treatment of the parties during the process. Similar to caucuses, during screening, the neutral person may be discovering information unavailable to the other party. However, if the two processes were completed independent of one another, screening requirements would not be an area for concern.

V. Conclusion

Although mediation and arbitration are both very useful and successful alternative dispute resolution processes used in Family Law, the combination of the two processes may not result in an optimal process.

This paper discussed that fundamental elements of mediation and arbitration are violated when they are completed as one process, with the same neutral person facilitating and then potentially adjudicating.

It is recommended that to avoid violating the main elements of mediation and arbitration, a mediation be attempted first independently. If the mediation fails, the

⁴¹ *Ibid.*

⁴² *Supra* note 2.

⁴³ Richard W. Shields, "*Family Arbitration in Ontario*".

parties have the option to consider arbitration, with the same or a different neutral third party. Nevertheless, clients should be educated on the advantages and disadvantages of mediation, arbitration, and med/arb to ensure they are choosing the most appropriate process for their personal needs.