

WHEN MED-ARB GOES BAD

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In recent years, mediation-arbitration (or “med-arb” as it has come to be known) has become the preferred choice for many family law lawyers and their clients. Med-arb received a significant boost when it was recognized and endorsed by the Ontario Court of Appeal in *Marchese*. Its success rate (the vast majority of cases settle in the mediation phase) has made it more popular in many circles than its cousins (traditional mediation, collaborative law or litigation). While the advantages of med-arb (accessibility and adaptability, lower cost, predictability, privacy, good results, and speed) have been well-documented, less attention has been paid to those cases that are not suitable for med-arb and what the mediator/arbitrator should do when a case goes bad.

Cases Not Suitable for Med-Arb

Experience has taught us that the following cases are likely not appropriate for med-arb:

- Domestic violence or power imbalance that cannot be remedied by the presence of counsel;
- Difficulty in obtaining financial disclosure;
- A need to bind third parties;
- Party(ies) can't afford the cost of a third professional;
- Party(ies) won't respect court orders or arbitral awards;
- One party is represented by competent counsel and the other is not;
- An unhappy party is likely to abandon the process or use the arbitrator's fees as leverage;
- Case requires the arbitrator to determine a novel point of law.

Take Precautions

Wise arbitrators will take precautions at the outset before accepting cases that demonstrate any of these danger signs. They will disclose any prior relationships with any of the parties or counsel that might possibly create a reasonable apprehension of bias. They will ensure that they use well-drafted arbitration agreements that include clauses that permit them to resign at any time, to terminate the mediation phase at their discretion, to determine the procedure for the arbitration, to retain an expert at the parties' expense, to accept retainer payments from one party on behalf of another party who has failed to pay, and to make awards for interim fees and disbursements. They will also insist on adequate retainers to ensure that they can complete their mandates (hear a motion, finish the hearing, write the award, etc.).

Terminating the Arbitration

Section 43(3) of the *Arbitration Act* provides that an arbitrator shall make an order terminating the arbitration if the arbitrator finds that continuation of the arbitration has become impossible. An arbitrator may resort to this provision if domestic violence or power imbalance, absence of competent counsel, or other causes prevent the arbitrator from ensuring that the parties have been treated fairly and equally or if the conduct of a party (failure to respect awards, replenish retainers, etc.) prevents the arbitrator from properly discharging his or her statutory duties.

Resignation of the Arbitrator

Section 14(1) of the *Arbitration Act* provides that an arbitrator may resign. While the statute is silent on the need for reasons, section 14(2) (“an arbitrator’s resignation...does not imply acceptance of the validity of any reason advanced for challenging or removing him or her”) implies that the arbitrator need not give reasons for his or her resignation.

An arbitrator's resignation raises a number of issues. First, how is a new arbitrator determined? Section 16(1) of the *Arbitration Act* provides that a replacement arbitrator shall be appointed when an arbitrator's mandate terminates. However, section 16(5) provides that section 16(1) does not apply if the arbitration agreement provides that the arbitration is to be conducted only by a named arbitrator. The arbitration agreement can avoid this problem by providing for appointment of a replacement either by agreement or court order. Second, what happens to the old arbitrator's awards? Do they become void upon his or her resignation? Once again, the problem can be solved by providing in the arbitration agreement that any interim awards made will continue in full force and effect until amended by either a replacement arbitrator or the court.

One Size Does Not Fit All

While med-arb continues to grow in popularity, it is important to remember that "one size does not always fit all". Counsel should be realistic about the prospect of a successful mediation-arbitration. Parties who have generated high conflict litigation will likely generate high conflict mediation-arbitration. Such cases might best stay in the court system, leaving med-arb for those parties who are most likely to benefit from that process. Arbitrators should also be cautious when accepting cases and realistic in their assessments of what can be achieved. By identifying the "bad cases" early, arbitrators can save themselves and their clients much grief down the road.

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