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Two Hats, or Not Two Hats?

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Working with an arbitrator who also acts as the mediator can present unique challenges but also benefits. This article considers how arbitration legislation applies to this issue and explores the pros and cons of having the same person act as both mediator and arbitrator.

Dispute resolution processes that combine mediation with arbitration are very common. However, combining the role of mediator and arbitrator in the same person is less common. There are both benefits and drawbacks to working with an arbitrator who also acts as the mediator.

What does the law say?

Generally speaking, an arbitrator can also act as a mediator with the consent of the parties.

Domestic and international legislation in Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia allows an arbitrator to act as a mediator and then resume their role as arbitrator without disqualification, if the parties consent.[1]

Similarly, according to legislation governing international arbitration in British Columbia, an arbitrator can employ mediation or conciliation procedures to encourage settlement, if the parties consent.[2] While domestic legislation is silent about this, the procedure is reflected domestically in the British Columbia International Commercial Arbitration Centre's rules on domestic commercial arbitration. These rules provide that the arbitration tribunal may, with the written agreement of the parties, conduct mediation or conciliation procedures.[3]

In Ontario, the legislation is drafted somewhat differently. In a domestic arbitration in Ontario, an arbitrator cannot conduct any part of the arbitration as a mediation or conciliation process, unless the parties agree otherwise.[4] The legislation's default rule is therefore that the same person cannot act as an arbitrator and mediator. Legislation governing international commercial arbitration in Ontario is silent on this point.[5]

While domestic legislation in Newfoundland and Labrador, and PEI is also silent on this point, in both provinces, according to legislation governing international arbitration, an arbitrator can employ mediation or conciliation procedures and then resume a role as arbitrator without disqualification, if the parties consent.[6]

Federal legislation in Canada is silent on this point.[7]

ADRIC's Rules

Under the ADR Institute of Canada (ADRIC) rules which are also used by the ADR Institute of Ontario (ADRIO), a tribunal can encourage settlement and order that the parties use mediation procedures.[8] Notably, ADRIC is launching a new designation for Mediator-Arbitrators and a new dispute resolution framework in November 2019. This is the first such designation and framework in Canada, and possibly in the world.[9]

Benefits

If an individual is allowed by the legislation to serve as both mediator and arbitrator, each party must consider whether that individual should do so.

There are important benefits of using the same neutral individual for both mediation and arbitration.

- If arbitration proves necessary, parties save time and cost because a second neutral does not have to become familiar with the facts, relevant law, and parties' positions. Having a mediator who is already familiar with the case also helps to save the cost of having counsel brief the neutral.
- A Med-Arb process may facilitate settlement. Resolution may be motivated by the threat of an arbitration that will commence immediately if the mediation fails.

Disadvantages

There are also disadvantages in having the same person act as a mediator and arbitrator in the same dispute:

- There is the risk of contamination of the arbitrator's mind because of information obtained in the without prejudice mediation. Positions taken and evidence disclosed for the purpose of mediation are done without prejudice. Using the same neutral as arbitrator who was the mediator may mean that their understanding of the case is tainted by what they learned during the without prejudice proceedings.
- The changing role of the neutral may lead parties to feel inhibited in the mediation process and disclosing and discussing their interests because of a concern that this information may later be used against them.
- An important cause for concern is that there may be a financial incentive to the neutral in proceeding to arbitration. Fewer fees are earned in a shorter mediation that resolves the matter. This concern can be addressed by creating a financial incentive for the mediator by arranging a payment of a premium if the case settles in mediation.

Practical Tips

If considering an arbitrator who will also act as the mediator: Consider and discuss the issue with opposing counsel.

- Be clear during the mediation about what information is "on and off" the record.
- When choosing the neutral individual who will act as both the arbitrator and mediator, ensure that you are selecting someone with strong skills in both areas.
- Consider financial incentives for a result achieved from mediation.
- Make clear whether the neutral is allowed to caucus with the parties separately in the mediation process, without being challenged as arbitrator if the mediation fails.

Source ADRIC

1. *Arbitration Act, R.S.A. 2000, c. A-43, s 35(1) and International Commercial Arbitration Act, RSA 2000, c I-5, s. 5; The Arbitration Act, 1992, S.S. 1992, c. A-24.1, s 36 and International Commercial Arbitration Act, SS 1988-89, c I-10.2, s.4; The Arbitration Act, CCSM A120, s. 35 and International Commercial Arbitration Act CCSM c C151, s. 5; Arbitration Act, RSNB 2014, s 35 and International Commercial Arbitration Act, RSNB 2011, c 176, s.6; Commercial Arbitration Act, S.N.S. 1999, c.5, s 38(1) and International Commercial Arbitration Act, RSNS 1989, c 234, s.6.*
2. *International Commercial Arbitration Act, RSBC 1996, c 233, s.30.*
3. *Arbitration Act, RSBC 1996, c 55; British Columbia International Commercial Arbitration Centre, "Domestic Commercial Arbitration Rules of Procedure (As amended June 1, 1998) as printed August 1998", online (pdf): British Columbia International Commercial Arbitration Centre <bcicac.com/arbitration/rules-of-procedure/domestic-commercial-arbitration-rules-of-procedure>, s. 35.*
4. *Arbitration Act, 1991, SO 1991, c. 17 ss 3 and 35.*
5. *International Commercial Arbitration Act, 2017, SO 2017, c 2, Sch 5.*
6. *International Commercial Arbitration Act, RSNL 1990, c I-15, s. 6; International Commercial Arbitration Act, RSPEI 1988, c I-5 , s. 5.*
7. *Commercial Arbitration Act, R.S.C., 1985, c. 17 (2nd Supp.).*
8. *"ADRIC Arbitration Rules", online (PDF): ADR Institute of Canada < http://adric.ca/wp–content/uploads/2017/08/2016_ARBITRATION_RULES_8_5_X_11_Aug2017.pdf>, s. 4.27.*
9. *"ADR Institute of Canada to Launch New Rules, Designation and Templates for 'Med-Arb'", online: ADR Institute of Canada < https://adric.ca/news/adr-institute-of-canada-launch-new-rules/>*