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Concerns About the Med-Arb

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Thank you

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WHAT IS MED-ARB

- Med-Arb is a hybrid of mediation and arbitration
- The parties attempt mediation
- If mediation fails the dispute is then arbitrated
- The question is **WHO SHOULD BE THE ARBITRATOR.**

CONDUCT OF MED- ARB

- How is the arbitration portion conducted? - Depends on agreement (s. 3 *Arbitration Act*)
  - Cross-examinations, review of evidence, oral arguments
  - "Final offer" arbitration
- Some cases the mediator is the arbitrator - **we are not concerned when the arbitrator is a different person**
- **We have grave concerns when it's the same person**
- Date set for arbitration and process settled

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BENEFITS OF MEDIATION? (MINISTRY OF ATTORNEY GENERAL'S ANSWER)

- Over 90 percent of all lawsuits settle before getting to the trial stage. Most of these settle at mediation.
- Process is informal and completely confidential
- Parties in mediation may speak more openly than in court
- Many people find mediation a more comfortable and constructive process than a trial
- **Will this apply if your mediator becomes your arbitrator?**

DISADVANTAGES WHERE THE MEDIATOR BECOMES THE ARBITRATOR

- *Arbitration Act* - parties in an arbitration must be treated
  - equally and fairly (s. 19(1)); and
  - duty to act impartially (s. 11(1)).
- Setting aside award on certain grounds (s. 46(1))
  - Applicant was not treated equally and fairly
  - Reasonable apprehension of bias - See *McClintock v. Karam* about threshold.
- Successful mediator invites frank concessions and admissions. **Will med-arb produce those concessions/ admissions?**

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DISADVANTAGES WHERE THE MEDIATOR BECOMES THE ARBITRATOR

"**If the mediator/arbitrator must move to the arbitration phase, it cannot be expected that he or she can entirely cleanse the mind of everything learned during the mediation phase, and of every tentative conclusion considered, or even reached, during the mediation phase**. However, at a bare minimum the parties are entitled to expect that the mediator/arbitrator will be open to persuasion, and will not have reached firm views or conclusions."

- *McClintock v. Karam*, 2015 ONSC 1024 at para 70

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CONCLUSIONS

- Arbitration after mediation may give quicker less expensive resolution
  - Guarantee of finality
  - Cost-savings using the mediator as arbitrator
- But using the same neutral for mediation and arbitration creates challenges
  - Creates a risk of bias without meeting the threshold to set aside arbitration award under s. 46
  - Prevents open and frank discussions that would otherwise be present in mediation and lead to resolution

CONCLUSIONS (CONT.)

- One person being mediator/arbitrator sows seed for appeal & judicial review because s/he conducts *ex parte* discussions, hears evidence without it being tested and arguably acts outside the rules of natural justice. Can s/he
  - decide disputes in accordance with principles of law and equity (s. 31)?
  - treat parties equally and fairly (s. 19(1))?
  - give parties an opportunity respond to the other parties' case (s. 19 (2))?