

"Mediation and Other Stuff"



Colm Brannigan

Mediate.ca
Dispute Resolution Services

April/2010

Welcome to "Mediation and Other Stuff", my monthly newsletter about alternative dispute resolution from an Ontario perspective.

If you have a topic that you would like covered, please contact me.

Colm Brannigan

Why You Should Consider Mediation for Business Disputes

Conflicts and disputes are a part of everyday business life. Although conflict is neutral, how it is dealt with is the important issue from a business perspective. There are usually opportunities to resolve business disputes in a positive way. Most disputes faced by businesses are good candidates for alternative dispute resolution and especially mediation. There are significant advantages in choosing

mediation over litigation or arbitration including:

- Control the outcome: You make the decision. The settlement, if any, will be decided by the parties, not imposed on them by a judge or arbitrator. This greatly reduces the fear that is likely to be present when the dispute is large enough to threaten the solvency of the business or its owners. It also allows for commercially reasonable settlements outside of the range which might be imposed by a judge or an arbitrator.
- Control the process: The parties select the mediator and decide which issues will be addressed, when sessions will be scheduled and how fees will be apportioned. In short, you design the process.
- Save costs: In mediation, business lawyers act in a consultative or coaching role, with the business owner or executives participating directly in the mediation and assuming the important decision-making role.
- Deal with the real issues: Parties can discuss the true problems and issues in dispute, including personalities, rather than arguing about each side's best legal points. The result is that a more business focused, sustainable solution is reached.
- Discuss technical issues: Issues which may be too complex or technical for a judge to grasp in the rushed atmosphere of a courtroom can be handled in mediation.
- Speed: Mediation can be scheduled and concluded as quickly as the parties need.
- Confidentiality: Mediation avoids public exposure of business mistakes, internal problems and trade secrets. Because of many sensitive issues, a local or national company has an important interest in preserving its reputation and goodwill. Sometimes the negative costs of going public with a dispute can be huge.
- Preserve relationships: Mediation can allow the relationship between disputing businesses to outlast the dispute. The very process of arriving at a consensus decision can be the foundation for the parties to continue to do business together. Going to court destroys relationships.
- Plan for the future: Parties can devise a plan for a future working relationship rather than limit discussion only to the dispute at hand.
- Satisfaction with the process: Mediation has an 80%+ settlement rate and participants are generally much more

satisfied with the process especially compared to other forms of dispute resolution. Satisfied clients tend to refer new clients to their lawyers.

Topic of the Month: Med-Arb

Med-Arb is one the most common of the so called "hybrid" ADR processes in which the same neutral can act first as a mediator and, if settlement cannot be reached, as an arbitrator. The use of Med-Arb as an ADR process has been approved by the courts in Ontario in *Marchese v. Marchese*,(2007), 219 O.A.C. 257 (C.A.), where the Court of Appeal for Ontario held that an agreement between parties to submit to Med-Arb was enforceable despite a provision in the province's domestic arbitration statute that prohibits arbitrators from conducting any part of an arbitration as a mediation.

Critics of this process believe that mediators may learn facts concerning a party that they would not learn during the arbitration, and that those facts could bias the neutral serving as an arbitrator.

Before entering into the process, it is vitally important that the parties understand the potential risks of agreeing to the mediator continuing as the arbitrator and that the parties acknowledge and waive any potential issues in writing.

Med-Arb can be appropriate in very specific situations involving sophisticated parties but it should not be generally used as boilerplate in a pre-dispute ADR agreement.

If you have any questions or comments, please contact me.

Colm Brannigan, M.A., LL.B., LL.M. (ADR), C.Med., IMI Cert., Med., ADRIO Cert. Arb.

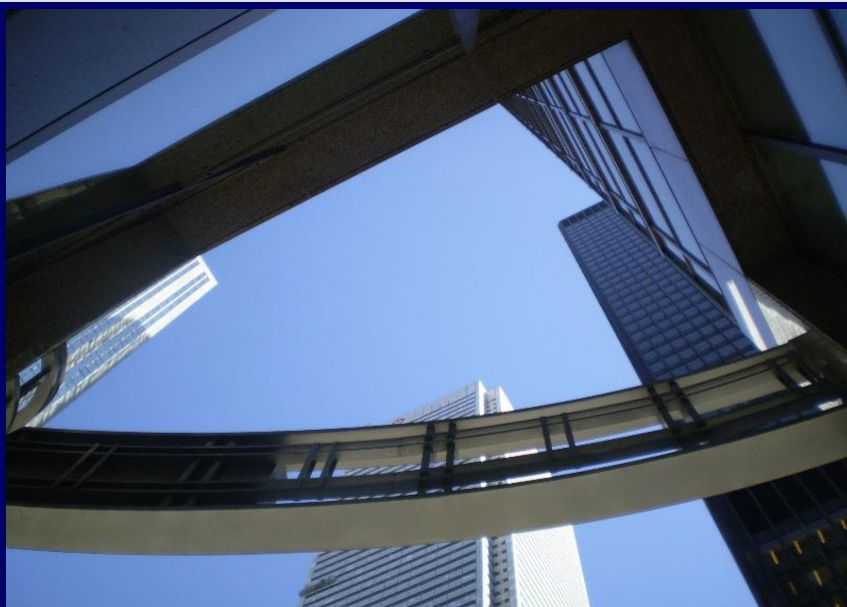
Contact Information:

Phone: 905-840-9882
Skype: colm.brannigan
E-Mail: colm@mediate.ca

Mediate Better Solutions



IMI Certified Mediator



Join Our Mailing List!

[Forward email](#)



This email was sent to colm@mediate.ca by colm@mediate.ca | [Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).
Colm Brannigan - Mediate.ca Dispute Resolution Services | 4 Burwash Court | Brampton | ON | L6Z 4M3 | Canada