

## HOW TO...

# Make the most of med-arb

Combining mediation and arbitration can help to keep the process fast and flexible

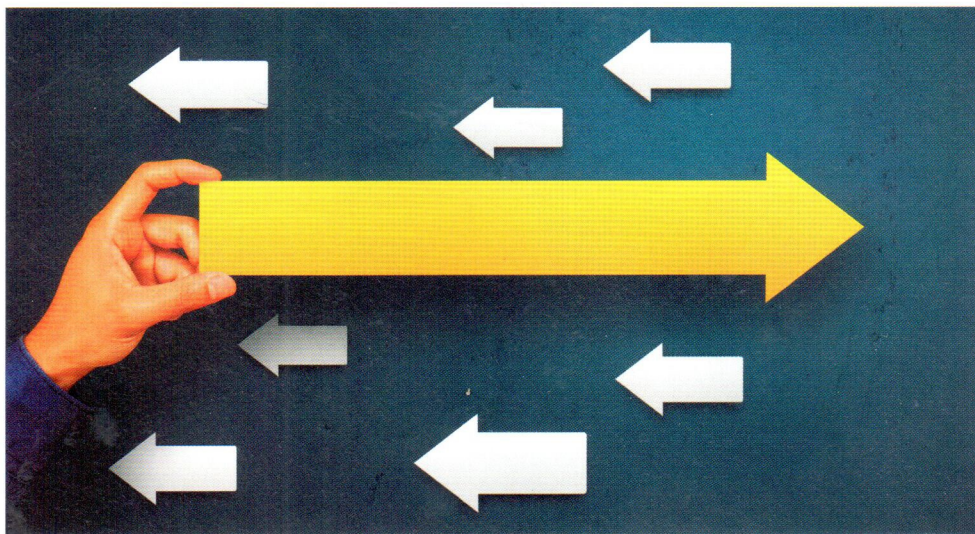
**T**he hybrid process known as med-arb – which typically involves one neutral party serving as mediator and then as arbitrator should mediation fail – is increasingly used to capture the potential advantages of ADR and to serve in place of adversarial litigation. However, there are some challenges to address if the process is to be most effective. These include: the transitional nature of the neutral role; concerns about candour, impartiality and confidentiality; and the absence of a universally accepted code of ethical conduct or procedures. Here are some ideas for overcoming these:

## PUT A SIG ON IT

To capture med-arb's advantages while addressing concerns, parties and their representatives should sign tailor-made agreements containing clear and robust provisions for the process. Among the key points to include are: time limits for the mediation and arbitration phases; whether the parties are required to make complete presentations of evidence based on strict observance of evidentiary rules or 'sufficient' cases in the arbitration phase; and which mediation communications, if any, can be considered for the arbitration award.

## DUAL ROLE DEFINED

Agree the role of the neutral party serving as the mediator-arbitrator and ensure they have the requisite training, experience and



understanding of the med-arb process and mindset. The parties must be able to trust them to conduct an effective proceeding.

## ISSUES OF ETHICS

It is crucial to confirm whether the neutral party subscribes to or is bound by a specific code of ethics or standard of conduct and is capable of properly shifting with competence and integrity from the role of mediator to that of arbitrator. In addition, signed agreements should consider whether and to what extent statutory/regulatory provisions apply to the proceeding, and whether procedural variations on the standard model should be adopted to permit greater efficiency and flexibility with more, albeit imperfect, ethical protection.

## KEEPING IT CONFIDENTIAL

Agreements should set out the level of confidentiality to be given to mediation statements. Details can include whether confidentiality

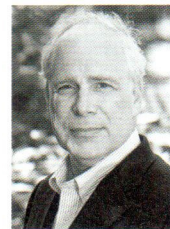
is waived regarding statements made in caucus and/or the joint mediation sessions, as well as whether private caucusing is allowed and, if so, what rules apply to the use of information obtained during it.

## ATTITUDE ADJUSTMENT

To maximise the chance of success, stakeholders should also change their attitudes and working assumptions regarding resolving disputes. This should include a more intense focus on risk analysis and creative outcomes, rather than on the legal strengths and weaknesses of each party's position and settlement amounts.

## RELATIONSHIP SAVER

While med-arb is not the correct answer in all cases, it is an extremely attractive option where the parties want to preserve a personal or professional relationship and where a speedy, cost-effective, flexible and final resolution is important. Therefore, med-arb's tremendous potential should be routinely explored by thoughtful, well-informed parties, their representatives and ADR professionals and institutions.



## ABOUT THE AUTHOR

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## LEARN MORE

The ADR Institute of Canada has drafted a cutting-edge protocol for med-arb processes, which will be implemented in 2020. For full details, visit [adric.ca](http://adric.ca)

CI Arb has produced a professional practice guideline on the use of ADR procedures in arbitration. Go to [bit.ly/AU19\\_IAPG](http://bit.ly/AU19_IAPG)

**Stakeholders should change their attitudes and working assumptions**