ENFORCEMENT REMEDIES: ARBITRATION AND MEDIATION - WHERE DO THEY FIT?

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By Deborah M. Howes, B.A., LL.B., A.C.C.I., F.C.C.I., C. Arb., C. Med.

When a condominium corporation, board or an owner seeks to enforce rights or entitlements or obligations in the condominium, conflict usually results. In any conflict, you can walk away, negotiate, facilitate, mediate, conciliate, arbitrate or litigate. The time, energy, expense, privacy and formality attached to the process may prompt someone consider one option over another. Mediation and arbitration are two effective enforcement techniques. While this paper discusses both, the focus of the paper is on mediation, the less apparent enforcement technique.

What is Mediation?

Mediation is a structured discussion process where an independent third party assists the disputing parties to reach a resolution that works for them. A mediator is the impartial person who helps the parties negotiate a settlement that is satisfactory to them.

Mediation generally is successful in resolving disputes quickly and at less cost than other processes. It is very flexible in both time and location. It ensures privacy. At the same time, it has little risk, because the parties are not bound to anything and do not give up their rights to use any other process unless they reach a satisfactory resolution during the mediation. There is no settlement unless all the disputing parties agree. As a result, mediation is useful in enhancing community and in improving or preserving relationships.

What is Arbitration?

Arbitration is a hearing process where an independent party listens to the parties and makes a final and binding decision. An arbitrator is an independent, impartial person who hears the cases of each disputing party and makes a final decision on the matter in dispute.

Arbitration is successful in providing a binding decision for disputing parties. The process ensures that e ach party has the opportunity to present their case and provide all the relevant information and argument to the arbitrator. It is flexible in time and location. Arbitration is a private process. It is generally faster and less costly than litigation.

Mediation and Arbitration under the Various Provincial Condominium Acts

Some provincial legislation recognizes arbitration and mediation of condominium disputes under the provincial condominium Act and Regulation. Excerpts of the legislation are set out in Append ix A. From those excerpts one can see that some province s mandate arbitration and mediation, where others require the parties to agree to its use.

Mediation in Condominium

One aspect of condominium is community. The business and property aspects of condominium require directors and owners to ac t within set guidelines, to shoulder significant responsibility and to preserve and enhance property. In many cases, these aspects of condominium directly conflict with the community aspects of condominium - shared spaces and people interactions. Community involves people and that will also create conflict.

Mediation is a very effective and efficient tool for resolving conflicts in condominium communities. It can be used on any topic - neighbor or director disputes, noise, bylaw or rule enforcement, property issues, contract disputes, maintenance and repair issues or money matters.

Often enforcement issues focus on a narrow subject - breach of a rule or bylaw or non-payment of a condominium levy, fee, contribution or fine. Yet, if one looks behind the narrow enforcement issue one often dis covers that other matters or reasons lie behind the dispute. Mediation enables the corporation and the owners to get behind the narrow dispute and resolve the real or underlying conflicts, resulting in a resolution of the enforcement dispute and better community understanding and relationships. An agreement that two neighbors participate in crafting is always better than an arbitrator's award or judge's ruling imposed on you. An agreement builds better communities because it means both sides are winners.

Some would argue that court procedures are certain and can be completed in a few days. Mediation can occur immediately or close to the dispute arising - even before the legal paperwork begins. All you need is the will of the parties and a mediator of your choosing. Mediation has a high rate of success in almost all places that use it (70% or better). A court judgment is a certain and final decision on the dispute, but the parties have no say in the content of the decision and have no guarantee going in of what the outcome will look like. Parties cannot select their judge or the time of their hearing in court, but they can choose their mediator and the time and place of the mediation. This can minimize time, cost and the stress related to the process.

Mediation is a private process - you agree on who else has to know and what they need to know. Court procedures are open to the public, both in the hearing and in the final decision. Privacy can be an important aspect of getting business done while preserving the nature of the community.

Successful mediations involve open and honest, respectful communication between the parties. Mediation is also an off-the-record discussion between the parties. This communication allows the parties to better understand each other and to be creative in the ways that they can resolve the dispute. At the same time, it enables them to abide by the legislation and their governing documents. Mediators will require that parties agree not to use the mediator's notes as exhibits or call the mediator as a witness in an arbitration or court proceeding if the mediation does not resolve all the dispute.

Parties can participate in mediation on their own or with their representatives or legal advisors. Mediators do not provide representation for any party or legal advice or judgement on the content of the settlement reached by the parties. A mediation can recess for someone to consult an advisor or lawyer or an expert. Parties can bring documents and experts into the process to assist them as required.

As with a court proceeding, there is a cost to mediation. The parties usually y agree to share the responsibility to pay the fees and expenses of the mediator, but can make other arrangements. In a court proceeding, the parties do not directly pay for the judge's fees or salary, but do pay court fees in the process. Each party would pay for their own representative or legal advisor in each process, if they choose to use one. These costs are usually lower in mediation than in court proceedings because mediation generally requires less total time to prepare and present. Parties may realize sig nificant savings if they become familiar with mediation and begin to attend mediations on their own. When directors are considering how to best advance the financial interests of their condominium community, mediation becomes a viable alternative to consider.

When the parties reach a resolution in mediation, the settlement is enforceable in the same way as any other contract between two parties.

How Do You Choose A Mediator?

The Act or bylaws may mandate mediation, but they do not identify mediators or tell us how to select one or where to look. This can often be the most troubling aspect of using mediation that people encounter. It often means you have to reach agreement with the very person that you are seeking enforcement against or the person with whom you are in the midst o f a dispute .

You should s elect a mediator with the same care and attention that you would give to selecting any other professional or contractor. Some of the considerations include:

• the mediator's training in mediation,
• knowledge about condominium ,
• experience as a mediator and in what areas of mediation,
• memberships in related professional organizations (dispute resolution and condominium)
• the mediator's fee s and expenses,
• how he or she wants to be paid (is a depos it required?),
• willingness and ability of the mediator to mediate,
• any conflicts of interest the mediator may have,
• availability to begin and complete the mediation,
• flexibility of the mediator on time and location,
• willingness of the mediator to abide by a Code of Ethics for mediators
• the content of the mediator's Agreement or Contract to Mediate that the parties and mediator will sign.

There are a number of different ways that parties can select a mediator or mediators. Some require advance preparation, so consider them early.

• agreeing on a mediator's name at the time of the dispute

In order to agree on a mediator's name, one of the parties or both have to propose a name or names to the other party. This can be done by each putting together a list of three or five mediators names and exchanging the lists. If one name appears on both lists, that person is the mediator. If the names do not match, the parties can agree to a name on either list or can exchange new lists. Information about mediators and their backgrounds can be obtained from organizations like CCI or from professional conflict resolution organizations,

such as the ADR Institute of Canada Inc. or the Arbitration and Mediation Institute of Ontario. Other sources can include the Better Business Bureau, government departments, CMHC, telephone directories and websites.

• agreeing to have a professional organization or independent body or person name the mediator

The parties can agree at the time to have a named organization or person (ACMO, CCI, AMIO, ADR Institute of Canada Inc., the auditor, etc.) name a mediator for the parties. This will enable the parties to identify the nature of the dispute and any qualifications they m ay seek in a mediator while not having to agree with each other on the name of the mediator.

• agreeing on a process for selecting a mediator which results in a single mediator being selected

Parties can agree on a process for selecting a mediator - such as that indicated in the first bullet above. In Alberta, CCI is working with other industry participants to create an industry roster and a process which will be posted on the website. Parties will be able to rank mediators on the roster and then total up the points resulting from their rankings. The mediator with the highest number of points will be their “ag reed” mediator.

Alternatively, the process might include one party sending the other a list of agreeable mediators. If the responding party does not agree or provide an alternate list within a set time (5 days or so), the other party gets to select the mediator from the original list.

• including in the bylaw s or rules o f a process for selecting a mediator which results in a single mediator being selected

By including the process in the condominium by laws or rules, it removes the need to dis cuss the process at the time of the dispute. This option enables each condominium community to create a process that works for their community and removes the possibility of an additional dispute at the time enforcement arises.

• including the names of mediators on a rotating roster in the bylaws or rules

Naming a roster of mediators and arbitrators in a contract (bylaws or rules) is a very common practice in business and labor relations. It requires the condominium community to review the roster from time to time. It means the board has to contact the mediators to ensure they are willing to serve on the roster and that in return they agree to make themselves available on shorter notice to assist resolve condominium disputes.

• agreeing at a general meeting (by proper resolution or motion) to name a roster of mediators for the coming year (much like appointing an auditor)

This option would require the same preparation as including names on a roster in the bylaws or rules, but would enable the corporation to change the names of the mediators more easily and frequently. Again the mediators can be asked to agree to respond more quickly to requests for their services for that corporation.

Why Use a Mediation Agreement?

A mediation agreement is a contract between the mediator and the disputing parties. Most mediators require the parties to sign a mediation agreement. This agreement clarifies certain roles and responsibilities in the

mediation process. It provides a measure of security for the mediator, who is not part of the dispute. It helps pre vent other disputes that could arise during the mediation process.

Provincial legislation may require a mediator to include certain items in the mediation agreement. Most mediation agreements include clauses to deal with the following matters:

• names and contact information for the parties and mediator
• nature of the dispute
• agreement of the parties to use mediation and this mediator
• confidentiality of the process and information
• off-the-record nature of the discuss ions
• open and honest nature of the discussion and sharing of information, including documents
• fees and expenses of the mediator and how they are to be paid
• location and time of the mediation or range of time it is to be completed within
• role of and obligation of the mediator to remain impartial and treat the parties equally and fairly
• opportunity for the mediator to meet with the parties jointly or individually
• what will happen to the mediator's notes
• parties cannot call the mediator as a witness or compel production of the mediator's notes or records for other arbitration or court proceedings
• authority to negotiate and settle the matter and any limits on authority
• parties' rights and obligations concerning representation and legal and professional advice
• whether the settlement will be in writing and if so, who will prepare it
• ability of the mediator and parties to use experts in the mediation process and how they will be paid, if used
• indemnification of the mediator by the parties.

How Can You Prepare for Mediation?

Your mediator will work with both parties to acquaint you with the mediation process and what to expect. Many mediators also provide verbal or written information to the parties to help them prepare for the mediation.

A typical information sheet or letter from a mediator might look like:

The following steps will assist you in preparing for your session with the mediator and the other party.

(a) The mediation session is informal. It is a structured discussion between the parties, with the help of the mediator. Our sessions normally occur with everyone in the same room at the same time.

As your mediator, I will generally begin the session by making sure that High Clouds Incorporated everyone is comfortable and that everyone is willing to attempt to reach a settlement. At the beginning I will talk with the parties about things like:
• my role as mediator and any concerns or questions
• whether each party has the authority to settle
• what concerns the parties have about confidentiality and the nonbinding nature of the discussions and, if so, any limits on the confidentiality or the binding nature of the discussions
• the time frame for the discussions, breaks, etc.
• what will happen if I decide I need to meet with you separately ,

• ways to encourage collaborative discussions, such as listening and displaying courtesy while the other is talking.

I then work with you to identify the items in dispute so that we can form an agenda of things you want to attempt to resolve. If there is more than one item, we will determine which item to discuss first.

We will proceed to discuss each item separately so that each party can explain their views and what matters to them about the item. I generally ask each party questions during this part of the mediation, so that I can help the other party better understand. After you have finished discus sing the topic, I then help you identify and explore ways to resolve the item.

Before we leave the mediation session, we review all the work done, either to set a continuation date (if the parties have not yet reached a settlement on all items) or to ensure that everyone understands and agrees with the term s of the settlement.

(2) Parties can bring their own lawyers or representatives with them to the mediation. If you do not, it is important that you understand your rights and entitlements before you get to the session. As the mediator, I do not give legal advice to either of you or make any judgments about your settlement.

(3) The goal of the mediation session is to increase the understanding between you and, if possible, attempt to reach a settlement of some or all of the items in dispute. Whether a settlement is reached, and the content of the settlement, is completely in yours and the other party's hands; I do not force a settlement or suggest what should be in the settlement.

(4) Mediation is a highly successful way of helping parties resolve dispute s. However, if you do not reach a settlement, you still maintain your right to use other steps or processes (such as arbitration or court action) to deal with the matter.

(5) If you reach a settlement of the dispute, you ca n take it to a lawyer to draft into a contract, if necessary. Any settlement reached has the same status as if you had contracted with the other party.

(6) Please dress comfortably, but respectfully of the other persons you will be meeting. Bring with you any papers, notes or documents you want to use in the mediation session. Bring a cop y of your condominium By -laws and the Condominium Property Act and Regulation.

(7) In order to prepare for the mediation session, spend a little time thinking about and answering the following questions:
a) What is the dispute about? If there is more than one item in dispute, list them all.
b) Do you have the authority to settle this dispute? What limits are on your authority or who else would have to be involved?
c) What concerns do you have around confidentiality of the discussions we will have?
d) What information do you have about each item that you can share with the other party?
e) What information might the other person have about each item?
f) Why is this matter in dispute?
g) What is important to you about this?
h) What do you think is important to the other person?

i) What would you like to see as a resolution?
j) How do you think that resolution would work for the other party?
k) Is there something that could satisfy both of you? What might it look like?
l) What is the worst thing that could happen if you did not resolve this dispute?
m) What would it be like for you if you could resolve this dispute?

8. As your mediator, I always work to remain impartial and independent. Therefore, I always prefer to have discussions with all the parties together or, if I discuss something with one of you, I will also call the other party. I adhere to the AAMS Code of Ethics for Mediators which is attached.

9. If you have any questions or concerns, please feel free to call me at_____ or make note of them and we will discuss them at the beginning of the mediation session.

Skills of a Mediator that A Manager or Director May Also Have

We have said that mediation can improve communities. Mediation is about negotiating, with another person present to help those who are negotiating. Communities will also be improved when the participants in the community begin to use their skills to negotiate resolutions to disputes before enforcement is required. What skills does a mediator have and use that make their efforts with the parties successful? Do managers and directors have those same skills? Can they acquire those skills? The answer to the latter two questions is yes.

Mediators are patient and willing listeners. They observe body language, listen to the words spoken and watch for patterns in behaviour and speech. They are intensely curious and are always asking questions - seeking to better understand all the parties, each with their own distinct views and motivations. At the same time, mediators know that people like to know and hear that they have been heard. Mediators validate the disputing parties comments and emotions and help them rephrase negatives into positives.

Mediators know they have to let people deal with the past to get by it, but they also realize that the dispute is about the present and the settlement is about the future.

Mediators look behind the stated positions to the reasons people take their positions. They know that by understanding the reasons they can become more creative in the options for resolution.

Mediators are non-judgmental, knowing that each party has distinct motivators that drive that party. They also know that parties will reach resolutions that work for them, not necessarily what would be the norm or what would work or has worked for others.

Mediators know that by allowing people, in a managed, respectful and safe environment, to express their emotions, people ca n get pas t their emotions and deal with disputes in a calm and logical fashion. They understand that personality clashes and harsh words are often related to hurt feelings. They are skilled in separating people issues from the content of the dispute.

Mediators model the kind of respectful, courteous, curious behaviour they ask the parties to adopt. They closely guard their impartiality and their responsibility to treat both disputing parties fairly and equally.

Many of us possess some or all of these skills. Often, when we are in conflict, we forget to use them as well as we could. Many colleges, organizations or private trainers offer training courses to enable people to learn and better understand the mediation process and to develop the skills needed to become a successful mediator or negotiator.

Conclusion

The next time you loo k at enforcement remedies, consider mediation or arbitration. If the legislation requires you to use mediation or arbitration, welcome the opportunity and work towards the resolution that works for you.

Deborah M. Howes is a Chartered Arbitrator and Chartered Mediator and president of High Clouds Incorporated, an Edmonton based company focusing on seminar s and dispute resolution services in condominium, labour relations, real estate, commercial and administrative justice communities. She is a Fellow of the Canadian Condominium Institute and National Vice President of CCI for 2001-2002.