

# ADR Solutions for Legal Professionals: Which is best for your Ontario civil/estate dispute\*?

An at-a-glance guide to features and benefits of mediation, arbitration and med-arb.

What is.....	<b>MEDIATION</b>	<b>ARBITRATION</b>	<b>MEDIATION- ARBITRATION ("MED-ARB")</b>
<b>Is it voluntary?</b>	Yes, unless required by a contract between the parties that governs their dispute ("governing contract"), the <i>Rules of Civil Procedure</i> (i.e., Rs. 24.1 & 75.1), a statute, a court Practice Direction, or a court order.	Yes, unless required by a governing contract, a statute, or a court order made on consent.	Yes, unless required by a governing contract, or a consent court order.
<b>Can you choose when, in the life of the dispute, to hold it?</b>	<p>Yes, except: If mediation is required by a governing contract, it usually must be held before a court proceeding (litigation), or an arbitration commences.</p> <p>If mediation is mandatory in a proceeding governed by R. 24.1 or 75.1 of the Rules of Civil Procedure, then see R. 24.1.09 &amp; 75.1.05, as well as local Practice Directions (including Consolidated Practice Direction for Civil Actions Applications, Motions and Procedural Matters in the Toronto Region, part III, 57 - 61) as for timing.</p>	<p>Yes, except: If arbitration is required by a governing contract, the parties agree not to commence or continue litigation. Also, arbitration provisions in contracts often spell out when and how the arbitration process may commence. Also, see "mediation" in the left column.</p>	<p>Yes, subject to the terms of the med-arb agreement and/or any governing contract requiring med-arb.</p>

<p><b>Which is least costly?</b></p>	<p>Mediation is usually the least costly of the three processes. If it results in a full and final settlement, then the need for (continued) litigation or arbitration is eliminated.</p>	<p>Arbitration almost always costs more than mediation. The bigger question is whether it costs more than litigation. Arbitration can be far less expensive provided it is not treated as “private litigation” (you don’t simply play by the same rules as litigation with the exception of choosing the “judge”). Arbitration can also be less costly if the parties agree that they cannot appeal the award.</p>	<p>See “mediation” and “arbitration”.</p> <p>A med-arb not resulting in a full settlement at mediation requires arbitration. However, med-arb can provide the “best bang for the buck” since:</p> <ol style="list-style-type: none"> <li>1. Many report higher settlement rates at mediation; and</li> <li>2. Most med-arb agreements provide that the parties will not appeal the arbitrator’s award.</li> </ol>
<p><b>Which is faster?</b></p>	<p>Mediation—especially if it is held early in the life of a dispute—has the potential to be the fastest way to resolve a dispute if the parties agree to a settlement of all issues.</p>	<p>As with cost, arbitration presents an opportunity for savings of time if parties agree to an expedited process and do not “play by litigation rules” and they agree to no appeal.</p>	<p>See the comments in the “mediation” and “arbitration” columns.</p> <p>Considerations as to cost also apply to time with necessary modifications.</p>
<p><b>Is it conducive to virtual/remote participation?</b></p>	<p>Yes.</p>	<p>Yes.</p>	<p>Yes.</p>
<p><b>Is it appropriate where there are self-represented parties?</b></p>	<p>Yes.</p>	<p>Yes.</p>	<p>No. †</p>
<p><b>Are appeals to a court possible?</b></p>	<p>n/a</p>	<p>Yes, but see s. 45 of the <i>Arbitration Act, 1991</i> which permits appeals of an arbitral award to a court on question of law only and with leave. The parties may agree to opt-out of this appeal right, or to add additional rights of appeal.</p>	<p>See comments in “arbitration” column.</p> <p>But many, if not most, mediator-arbitrators (the author included) will not conduct med-arbs if the parties have not contracted out of their appeal rights.</p>

<p><b>How to select your neutral?</b></p>	<ol style="list-style-type: none"> <li>1. Training as a mediator.</li> <li>2. May or may not be a lawyer (or former lawyer). It depends.</li> <li>3. Subject matter expertise.</li> <li>4. Style and traits best suited for your particular case i.e., evaluative, interests-based (non-evaluative), or someone with both styles.</li> <li>5. Cost and availability.</li> <li>6. Diversity considerations.</li> <li>7. Word of mouth.</li> </ol>	<ol style="list-style-type: none"> <li>1. Training as an arbitrator.</li> <li>2. A lawyer (or former lawyer) and/or someone with subject matter expertise.</li> <li>3. Cost and availability.</li> <li>4. Diversity considerations.</li> <li>5. Organizational technical and administrative skills.</li> <li>6. Potential conflicts.</li> <li>7. Word of mouth.</li> <li>8. Research-all of above.</li> </ol>	<ol style="list-style-type: none"> <li>1. See “mediator”.</li> <li>2. See “arbitrator”.</li> <li>3. Training in conducting med-arbs (highly recommended).</li> </ol>
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\* “Civil disputes” includes employment law, business disputes (including shareholder remedies, family businesses, construction law, partnership issues), commercial tenancies, debt and mortgage enforcement, personal injury and insurance matters (not including motor vehicle accidents), real estate and neighbour disputes (excluding condominiums), and professional negligence. Civil disputes do not include, among other things, family law, labour (unionized workplaces) disputes, condominium disputes, residential tenancies, Federal Court matters, tribunal matters with some exceptions, and criminal law. “Estate disputes” includes trusts and [Substitute Decisions Act](#) matters.

†The author’s view. Others may disagree. The main reason is that, without the involvement of counsel for all sides of a dispute, the fact that the mediator becomes the decision maker (arbitrator) can prove problematic where there is a self-represented party. Of course, this is not always the case. As well, the potential for problems may or may not be alleviated by either party having the right, after the mediation, to “opt-out” of the mediator going on to serve as arbitrator - with a different arbitrator being quickly appointed.