Condominium Authority of Ontario

Core Components of a Mediation and Arbitration By-Law

Disclaimer

In keeping with the CAO's mission to empower condo communities with information, education, and dispute resolution services, this document provides key insights into the important components of a mediation and arbitration by-law. These by-laws are important for providing additional procedural guidance on how parties communicate and participate in mediation and arbitration, and addressing areas where the current legislation allows flexibility. This helps provide clarity and consistency and encourages efficient dispute resolution by avoiding costly court proceedings.

This document aims to support condo corporations in Ontario with establishing clear, consistent, and transparent procedures for addressing disputes that must be submitted to mandatory mediation and arbitration under section 132 of the *Condominium Act, 1998*. While combined mediation-arbitration (med-arb) processes exist, this document focuses on mediation and arbitration as separate processes.

The CAO recognizes that each condo community is unique and may already have provisions within its existing by-laws on mediation and/or arbitration procedures. As such, your condo board should consult with their legal counsel to ensure that the appropriate protocol set out in the Condo Act is followed for passing and implementing any new or revised by-laws.

The CAO welcomes any feedback to further refine and improve this document. Please complete the feedback survey.

Recitals

The recitals frame what the by-law is aiming to achieve and the authority. It is important to consider who would be involved in potential disputes and governed by the by-law. For example, if a shared facilities dispute involves your condo and another condo, challenges may arise if the by-law only governs your condo.

Some condos may establish a mediation and arbitration by-law to cover disputes that arise out of the listed sections of the Condo Act and also under dispute resolution clauses in contracts and voluntary processes.

If your condo already has a mediation and arbitration by-law or provisions within general operating by-laws that speak to these processes, it is important to include language in a new by-law repealing those prior provisions to avoid potentially conflicting or unduly complex by-law provisions.

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General Provisions

The general section of a mediation and arbitration by-law sets out key foundational provisions that apply throughout the by-law, including, but not limited to, definitions, confidentiality, severability, and delivery of notices and documents.

Confidentiality

One foundational aspect of mediation and arbitration is confidentiality. Mediated settlement agreements often have confidentiality requirements. It can be worthwhile for a mediation and arbitration by-law to also capture intended confidentiality.

> *Confidentiality provisions are often best left to be flexible. For example, sharing aspects of a mediation with a third-party non-participant can be helpful. The by-law should not prevent this if participants agree.*

Severability

Severability clauses are an important component of mediation and arbitration by-laws. They ensure that if any provision is found to be invalid or unenforceable by a court or tribunal, the rest of the by-law continues to be in effect.

Notices and Delivery

Notices and their delivery are an important aspect of mediation and arbitration, as they ensure all parties are properly informed and provided with an opportunity to participate. It can be helpful to consider how notices and delivery will apply in a variety of scenarios, including with respect to non-resident owners, when parties already communicate by email, and in the event of a postal delivery interruption.

> *Condo by-laws may refer to section 47 of the Condo Act for notice delivery which helps set a clear standard.*

Good Faith Participation Requirements

It can be helpful to include a good faith participation requirement for each process in the by-law, where applicable, including pre-mediation negotiation, mediation, and arbitration. Good faith participation means parties make an honest effort to work together to genuinely address the dispute and find an amicable resolution by attending pre-scheduled sessions, cooperating throughout the process, and avoiding unnecessary delays. While it can practically sometimes be difficult to prove a lack of good faith, the sentiment captures the spirit of collaboration.

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Pre-Mediation Negotiation

Most mediation and arbitration by-laws require parties to first try to work together and resolve a matter themselves before bringing in a third-party neutral mediator or arbitrator. Requiring this in a by-law can be helpful as these negotiations allow the parties to build trust, identify areas of agreement, and potentially reach a resolution without the need for third-party involvement.

Templates

As mediation and arbitration process forms are not prescribed, including them in a by-law can help guide the process. Without this, there is a risk of missing the opportunity for mediation by not knowing how to initiate it.

Some condo by-laws include forms as attachments which can be difficult to adjust in the future. As a best practice, the optional templates on the CAO's website can be referenced to account for any changes. The CAO provides detailed instructions on how to complete the optional templates.

Including clear timelines of when to use any templates are important as well. Timelines must consider any existing requirements under the Condo Act.

For example, as a best practice, 30 days for the responding party to respond to a Notice of Submission to Mediation provides enough time to acknowledge the notice and for parties to begin discussions to select a mediator and schedule the mediation while still complying with section 132 (1) (b) of the Condo Act.

Additionally, as a best practice, parties should be given 7 days to respond to a Notice of Submission to Arbitration as this is in accordance with the Arbitration Act and allows parties enough time to review the proposed arbitrators and work toward agreement. The shorter timeline is appropriate, as parties are typically more aware by this stage of the process and can reasonably be expected to respond with less time.

Selection

Including guidance in a by-law on the mediator and arbitrator selection process can help parties avoid delay as the Condo Act does not prescribe a process. Most mediation and arbitration by-laws require parties to first try to use their best efforts to come to a unanimous agreement on a mediator or arbitrator. This typically involves the

If parties cannot agree on a mediator, some condo by-laws may treat mediation as failed or require the appointment of mediator representatives, or use of a third-party organization to appoint a mediator. Using representatives or a third-party organization allows neutral individuals to select an appropriate practitioner. By-laws that refer to specific organizations should include alternative options if the organization no longer exists or offers the service.

initiating and responding parties submitting the names of prospective practitioners to the other party.

It could be helpful to include a mechanism if parties are unable to agree on a mediator or arbitrator to help ensure the process moves forward and/or an appropriate practitioner is selected. In the spirit of early resolution, this can help prevent the need to go to court for the appointment of an arbitrator, saving time and costs.

Additionally, including clear requirements to provide timely notice and a copy of the by-law to the selected mediator or arbitrator helps avoid unnecessary delays and ensures they have the information needed to begin guiding the process in accordance with the relevant provisions.

If parties are unable to agree on an arbitrator, some condo by-laws may require the appointment of arbitrator representatives or use of a third-party organization to appoint an arbitrator. If one party does not engage in the selection process, some condo by-laws allow the other party to move forward with one of their proposed arbitrators.

Some condo by-laws may use random selection processes if parties are unable to agree. This can be difficult if the process is not clearly defined and raise concerns of procedural unfairness, especially in arbitration, if a party ends up with an arbitrator they did not want.

Appointment

As the appointment process for mediators and arbitrators is not prescribed, including guidance surrounding the procedural aspects can help parties avoid delay while providing clarity.

Most mediation and arbitration by-laws provide clear criteria for when a mediator or arbitrator's involvement becomes official, and it is typical for there to be defined processes for both engagement and conclusion. The process can differ slightly between mediation and arbitration. For example, under the Arbitration Act, appointments can also take place through the court, which by-laws should consider. A clear and formal appointment process is especially important in arbitration, as parties may attempt to withdraw if they feel it is not going in their favour.

To formally appoint a mediator, some condo by-laws may require parties to sign the mediation agreement and pay a retainer. Some mediators may require this as well.

To formally appoint an arbitrator, some condo by-laws may require parties to confirm the arbitrator's authority in writing (i.e., the scope of issues the arbitrator will make a decision on, cost awards) and pay a retainer.

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Qualifications

Agreeing on a mediator or arbitrator can sometimes be one of the most challenging steps. As mediation and arbitration are unregulated professions in Ontario and across Canada, including clear qualification criteria can assist parties during the selection process and ensure that the mediators and arbitrators selected are impartial, independent, and competent.

Condo by-laws may include qualification criteria such as requiring impartiality, specific designations (e.g., Qualified Mediator (Q.Med), Chartered Mediator (C.Med), Qualified Arbitrator (Q.Arb), Chartered Arbitrator (C.Arb)), familiarity with Ontario's condo sector (e.g., recent completion of CAO's Director Training), experience with condo-related disputes, and a practice in Ontario.

Most mediation and arbitration by-laws provide a list of qualifications that the appointed mediator and arbitrator must meet to qualify to mediate or arbitrate a dispute. These criteria can be unique to meet a condo community's specific needs, though it is important to not be too narrow and include flexibility to account for changes over time. For example, a by-law requiring a mediator to be part of a certain organization that ceases to exist can create difficulties and exclude qualified candidates.

Replacement

It can be helpful to include guidance on how parties should proceed if a mediator or arbitrator is unable to continue in their capacity for any reason as the Condo Act does not prescribe a process.

If a mediator cannot continue, some condo by-laws may deem the mediation as failed unless parties agree to appoint a replacement, requiring any previously held hearings to be rescheduled.

This guidance on replacing a mediator or arbitrator can help ensure a smooth transition and avoid any unnecessary delays.

If an arbitrator is unable to continue, some condo by-laws require the replacement of the arbitrator in the same manner as the original appointment.

The process for both can differ slightly though to provide the mediation process with some more flexibility if the parties wish to continue to arbitration and not seek a replacement for the mediator.

Some condo by-laws involve an outgoing mediator or arbitrator in finding a replacement. This can raise practical issues if there are concerns of bias or they are unable to assist due to health reasons or unforeseen circumstances.

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Representation

Recognizing the right to legal representation in the mediation and arbitration process is important and promotes procedural fairness.

Providing the mediator with discretion to manage who attends and participates can help ensure the mediation process remains focused, fair, and efficient.

Most mediation and arbitration by-laws recognize this right, while some may introduce flexibility to mediation by granting the mediator authority to limit attendance and participation of others at sessions.

Payment of Mediator's Fees and Expenses

Including guidance on how a mediator's fees and expenses will be shared is helpful as the Condo Act only requires that the mediation settlement or notice stating that the mediation has failed specify each party's share, but it does not prescribe how the costs must be divided. Many mediators do not view it as their role to allocate costs, as mediators do not impose outcomes on parties.

As a best practice, parties should equally share the mediator's fees and expenses unless they agree otherwise. Equal sharing promotes fairness and encourages good faith participation, while still allowing flexibility as different arrangements can be made.

Submissions

Some condo by-laws include provisions setting out the volume of written materials, such as a Mediation Brief. These provisions are not always helpful, as the extent of materials that is appropriate often depends on the nature of the specific dispute. It may be best to leave these types of details to the mediator or arbitrator to establish on a case-by-case basis.

Conclusion

Including guidance on how mediation and arbitration conclude can help all parties understand their obligations. It is also important for the mediator or arbitrator to confirm their duties have been completed and formally end their involvement to avoid uncertainty.

For mediation, under the Condo Act, a mediator is required to make a written record of whether a settlement was reached or not. The CAO's Mediation Report template can be used to do so.

For arbitration, an arbitrator's duty can be discharged upon issuing a final and binding award.