

Mandatory Mediation - Is this an Oxymoron?

Many jurisdictions have mandatory mediation schemes of one type or another. Some are by a legislative scheme as is the case in British Columbia,¹ where any party can trigger the process to begin. Other jurisdictions, particularly in various states in the U.S., have a judicial process that gives discretion to order mediation. While a “mandatory mediation” may sound counter intuitive given that our understanding is that at its core mediation is intended to be a consensual process, my experience is that it is surprising what the dynamic of having the parties commit time, personnel and resources can achieve. Often times this may be the first time the parties have been a room together, either ever or certainly since the dispute arose. Whether they think they do or not, they have a psychological investment in seeking success. As such, while they may have met involuntarily, that does not necessarily mean that a voluntary agreement cannot be reached. It must be noted of course that no jurisdiction I am aware of requires the parties to come up with an agreement, only that they participate in arguably a good faith fashion to do so. At the very least the process can be useful to narrow the issues between the parties even if a full scale resolution is not achievable.

The one question sometimes arise is how to deal with a recalcitrant party who refuses to participate in the process. Various options may be available depending on the source of the mandatory mediation process. As an example, under the legislative model used in British Columbia, the defaulting party may ultimately find that their claim is dismissed or their defence is struck if they persistently refuse to engage in the mediation and the steps leading to it. Elsewhere where a judge is responsible for ordering the mediation, failure to comply with the Court’s Order could lead to a contempt citation. While these are draconian methods, the real objective of the mediator ought to be to ascertain why the party or parties, depending on the scheme employed, are objecting to the process and attempt to override through persuasion these concerns.



Herb Silber brings a strong combination of experience, expertise and empathy to his role as arbitrator. Herb’s approach creates the positive, respectful atmosphere critical to an expedited arbitration process.



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¹ Notice to Mediate