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Agreements to engage in 'med-arb' now enforceable in Ontario

The Ontario Court of Appeal has confirmed that agreements to engage in the combined mediation/arbitration process known as 'med-arb' will be enforced. In *Marchese v Marchese* [2007] OJ No 191, the Court held that an agreement to submit to med-arb was enforceable despite a provision in the domestic arbitration statute that prohibits arbitrators from conducting any part of an arbitration as a mediation. Ontario's domestic arbitration statute is quite different in this regard from its international commercial arbitration statute, which expressly permits, with the parties' consent, the use of mediation during an arbitration to encourage settlement.

The Court reasoned that if the prohibition applied (a point it did not need to decide), it could be waived. *Marchese* makes it clear that disputing parties can expressly opt for med-arb, in which case the domestic arbitration statute prohibition against conducting any part of an arbitration as a mediation is waived.

Ontario's domestic statute provides in s 19 that 'the parties shall be treated equally and fairly' and '[e]ach party shall be given an opportunity to present a case and to respond to the other parties' cases'. The parties cannot agree to vary or exclude this provision.

Likewise, Ontario's international statute contains the fundamental mandatory provision in Article 18 that 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. Article 34 states that an award can be set aside if a party was 'unable to present his case'.

It remains an open question whether procedural fairness requirements may tie the mediator-arbitrator's hands in the mediation and impede (or preclude) private caucusing. *Marchese* did not discuss this and it is not addressed in Ontario's international statute. For the rest of this story by Barry Leon see www.mondaq.com/article.asp?article_id=59578&clk=2&login=true&print=1. ●