

Med-Arb in Ontario: Enforceability of Med-Arb Agreement Confirmed by Court of Appeal

By Barry Leon and Alexandra Peterson

A 2007 Ontario appeal court decision confirmed that courts in Ontario will enforce an agreement to engage in a combined mediation/arbitration process (“med-arb”), despite natural justice and other concerns that are often raised about med-arb, particularly in common-law jurisdictions.

In *Marchese v. Marchese*,¹ the Court of Appeal for Ontario held that an agreement between parties to submit to med-arb² was enforceable despite a provision in the province’s domestic arbitration statute that prohibits arbitrators from conducting any part of an arbitration as a mediation.³

The Court reasoned that if the prohibition applied to med-arb (a point that the Court held it did not need to decide), the prohibition could be waived and the parties’ mutual decision to engage in med-arb would be considered a waiver.⁴

The decision is a welcome one for those in the dispute resolution world who believe that today’s businesses are looking for greater innovation and flexibility in the methods used to resolve commercial disputes. They consider that in many situations neither the court system nor arbitration provides the efficient and cost-effective resolution they want, and that mediation alone is not always capable of achieving a resolution. Med-arb provides another option that in the right circumstances, and conducted by a skilled mediator-arbitrator, can achieve results that neither mediation nor arbitration alone could achieve.

Med-arb is a dispute resolution process that involves two steps: a mediation in which the parties attempt to resolve their dispute themselves with the assistance of a mediator and, if necessary, a subsequent arbitration stage in which any unresolved issues are subjected to binding adjudication by the same person, at that point acting as an arbitrator. The hybrid process can have many advantages over mediation or arbitration alone. Med-arb is often less costly and more efficient than arbitration because the procedural requirements are generally not as stringent. Because it keeps the adjudicative elements limited to the issues not resolved by the parties themselves, it is especially desirable where preserving an ongoing relationship is important. At the same time, the arbitration aspect provides a final resolution to a dispute, a conclusion that is not assured in mediation. Just the looming prospect of a binding arbitral decision may encourage parties to settle their disputes themselves for fear of an adverse decision. Using the same neutral party also provides considerable savings in cost and time, because he or she will already be

familiar with the case and will not need to be briefed on the issues in dispute at the second stage.

Med-arb, however, raises concerns, in particular about natural justice and impartiality. The mediation stage of med-arb often involves private caucusing between the mediator-arbitrator and each party. Normally the right to know and have a reasonable opportunity to respond to the other side’s case is considered essential to our notions of fairness and due process in an adjudicative process. With med-arb, there is a danger that in the adjudicative stage of the proceedings, the mediator-arbitrator may consider and weigh information, obtained from one party during private caucusing in the mediation phase, to which the other party has not had a chance to respond. This information might be incomplete or even false, as well as prejudicial to the opposite party. Obviously the opposite party would not want this information to influence the arbitrator’s decision. But even if procedural and ethical rules do not permit the mediator-arbitrator to consider or weigh information obtained during private caucus in the arbitration stage of the process, the parties may not be convinced that such information could be completely discounted in the adjudication. For these reasons, med-arb has been contentious among practitioners and commentators, particularly in common-law jurisdictions.

There is also a practical concern about med-arb: it may be difficult to find someone who is capable of effectively handling the dual roles of the neutral third party in a med-arb.⁵ Med-arb requires a neutral third party who is adept at both mediation and arbitration, and who can gain the parties’ confidence and trust that he or she will provide fairness and due process in the arbitration stage.

The *Marchese* decision makes it clear that contracting parties in Ontario can expressly opt for med-arb, in which case the prohibition in the domestic arbitration statute against conducting any part of an arbitration as a mediation is waived.

The Court recognized and confirmed that med-arb is “a well recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing agreement, then proceeds to conduct an arbitration.” The fact that it is a hybrid process means, however, that the process, once agreed upon, must be followed. The Court distinguished a 2001 trial court decision, *Hercus v. Hercus*,⁶ in which the decision of a mediator-arbitrator was set aside because he had proceeded directly to arbitration, bypassing the me-

diation step entirely. In *Marchese*, the parties did not skip mediation—they had an initial meeting that indicated that mediation would be unsuccessful.

Med-arb has been considered in a couple of subsequent lower court decisions in Ontario. In a case involving child access, the parties had provided for mandatory med-arb in their agreement dealing with support, custody and access to the child. While determining that the agreement did not bar an urgent temporary child access order by the court after one of the parties unilaterally changed the access arrangements, the court (without referring to *Marchese*) made its temporary access order “pending mediation or further order by the arbitrator” and ordered the parties “forthwith to attend mandatory mediation/arbitration pursuant to the provisions of the agreement.”⁷

Ontario’s international arbitration statute, a Model Law statute, adds to the Model Law by expressly permitting the use of mediation during the arbitration proceedings for the purpose of encouraging settlement. The Act states:

For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, use mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.⁸

The use of private caucusing, as discussed above, is a fundamental concern about med-arb. Even though the Court held that parties may agree to a med-arb process, Ontario courts have not determined the extent to which the mediation stage of a med-arb may involve private caucusing. This was not discussed in the *Marchese* decision. The extent to which private caucusing may be used also is an open question when mediation is used in an arbitration under Ontario’s international arbitration statute.

In *Marchese*, the parties had agreed to submit to med-arb but there is no indication that they had sought to, or could, waive their entitlement to procedural fairness. It had become evident after only an initial meeting with the mediator-arbitrator that mediation would be unsuccessful, and the appellant then tried, unsuccessfully, to deny the existence of an agreement to arbitrate in the event of failed mediation. So there was no need for the Court to consider the use of private caucusing or its potential compromise of the mediator-arbitrator’s neutrality.

Ontario’s domestic arbitration statute expressly provides, in section 19, that in an arbitration “the par-

ties shall be treated equally and fairly” and that “[e]ach party shall be given an opportunity to present a case and to respond to the other parties’ cases.” Section 19 is one of the six provisions of the Act that the parties cannot agree to vary or exclude. Likewise, Ontario’s international arbitration statute (as noted above, a Model Law 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” and in article 34 that an award can be set aside if a party was “unable to present his case.”

It remains an open question whether these procedural fairness requirements may tie the hands of the mediator-arbitrator in the mediation phase and impede (or even preclude) the use of private caucusing, an important aspect of the mediation process.

Given the recognition by the Court of med-arb as a “well recognized legal . . . hybrid dispute resolution process,” and the fact that private caucusing is fundamental to mediation, it seems likely that an Ontario court would find that the required procedural fairness can be achieved if the mediator-arbitrator, when acting as arbitrator, takes no account of material information obtained in private caucusing about which the other party has not been informed and to which it has not had an opportunity to respond.

In Canadian courts, most commercial (and other civil) cases are tried by a judge alone (that is, without a jury). Judges are called upon regularly to exclude evidence that they have heard already and to rule on the admissibility of evidence (including alleged settlement discussions, privileged communications, and the like) that they must hear before they can rule.

However, the med-arb process presents greater challenges. Only the mediator-arbitrator (not the party that may be affected) can know what information has come to the mediator-arbitrator from a private caucus, and only the mediator-arbitrator can ensure that such information is not considered unless the opposite party is told about it and has an opportunity to respond to it. This concern is exacerbated when there is no appeal process, as often is the case, to review the mediator-arbitrator’s actions.

As a practical matter, these concerns point to the importance of any med-arb process being conducted by a mediator-arbitrator who is skilled in the process and who is accepted and trusted by the parties as a person of integrity, fairness and sound judgment.

Given that parties in Ontario are free to agree to med-arb, it is likely that courts in Ontario will enforce the result unless persuasive and cogent evidence shows that the mediator-arbitrator relied on material information obtained in a private caucus of which the opposite party was not aware and to which it had no opportunity to respond. Arbitral awards in Ontario receive a high

degree of judicial deference. Cases such as *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*⁹ have demonstrated that there is a powerful presumption in favor of an arbitral tribunal and a high bar for setting aside an arbitral award. In that case, for example, the Ontario Superior Court held that “broad deference and respect” (para. 22) should be accorded to arbitral tribunals under the Model Law and that “the grounds for refusal of enforcement should be construed narrowly” (para. 26).

It also is likely that Ontario courts will assess equality and fairness complaints arising from a med-arb in a flexible and pragmatic manner. That is, it is likely that a court will look at the whole picture to determine whether the complaining party knew the particular material information that had been provided to the mediator-arbitrator in a private caucus and had a reasonable opportunity to respond to it, rather than the court focusing on the particular manner in which the knowledge was obtained or whether the opportunity to respond was provided. The opportunity to respond would probably not need to be provided in the same manner as would be required under the court’s rules of evidence and procedure. In a med-arb process, and even in an arbitration conducted under more innovative procedures (which the Ontario domestic arbitration statute permits), what should count is substance, not form.

Marchese is important because it recognizes med-arb as a distinct process and confirms that Ontario courts will enforce parties’ agreements to utilize it.

Everywhere one goes in the world of international dispute resolution, one hears concerns, particularly from corporate counsel, about a growing lack of efficiency and cost-effectiveness in international arbitration. Arbitral institutions and arbitration organizations are looking for ways to deal with these concerns. Recent initiatives include these:

- the International Chamber of Commerce Commission on Arbitration’s *Techniques for Controlling Time and Costs in Arbitration* (ICC Publication No. 843) arising from its Task Force on Reducing Time and Costs in Arbitration;
- the International Centre for Dispute Resolution’s *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* (effective after May 2008 in all cases, unless the parties agree otherwise) that confirm that arbitrators have the authority and responsibility to manage arbitration proceedings so as to provide a simpler, less expensive and more expeditious process;
- the Centre for Effective Dispute Resolution (CEDR) constituting a Commission on Settlement in International Arbitration (composed of international

arbitrators, corporate counsel, mediators and academics, and chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler) to consider current approaches to promoting settlement in international arbitration and make recommendations on how arbitral institutions and tribunals could give parties greater assistance in finding ways to settle their disputes; and

- arbitral institutions becoming increasingly active in promoting and providing mediation for international disputes, including in the context of arbitrations.

As the users of dispute resolution services—that is, the parties and corporate counsel managing their disputes—and dispute resolution practitioners look for innovative ways to resolve commercial disputes more efficiently and cost-effectively, the recognition and acceptance of med-arb may be an important step forward.

Endnotes

1. (2007), 219 O.A.C. 257 (C.A.), MacPherson, Sharpe and Juriansz, J.J.A.
2. The clause, which was in an agreement for an alternative means of resolving a court proceeding, simply provided, “The parties shall attend for mediation/arbitration with Phil Epstein regarding all issues in the action.”
3. “The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal’s ability to decide the dispute impartially” (Arbitration Act, S.O. 1991, c. 17, § 35).
4. Section 3 of the Arbitration Act provides that “parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except” for six specified provisions, of which § 35 is not one.
5. See Claude R. Thomson, *Med-Arb—A Fresh Look*, Newsletter of the Mediation Committee of the Legal Practice Division of the International Bar Association, July 2007, vol. 3, no. 1, page 27. This excellent article more fully discusses med-arb.
6. [2001] O.T.C. 108, [2001] O.J. No. 534 (Ont. Sup. Ct. J.), Templeton J.
7. *E. (E.) v. F. (F) and G. (G.)*, 2007 ONCJ 456.
8. *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, § 3.
9. (1999), 45 O.R. (3d) 183 (Ont. Sup. Ct. J.), Lax J., *aff’d* (2000) 49 O.R. (3d) 414 (C.A.) Catzman, Abella and Rosenberg J.J.A., leave to appeal to S.C.C. dismissed, S.C.C. Bulletin of Proceedings, May 4, 2001, 821.

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