ADVANCING COMMERCIAL MEDIATION

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I. INTRODUCTION

In jurisdictions around the globe, private parties and courts are advancing mediation as a better alternative to litigation and arbitration. This advancement has been proceeding in fits and starts. Progress has been inconsistent not only among local and national jurisdictions, but within both local and national jurisdictions. Yet, the watershed has come.[1] Jurists around the world have recognized the benefit of court-connected mediation over civil litigation as much as businesspeople have recognized private, contract-based mediation as a preferable alternative to both litigation and arbitration.[2] Indeed, in the United States, where 99% of civil suits settle without trial, many have pronounced civil trials dead.[3] Further contributing to the decline in civil litigation in the United States is the U.S. Supreme Court's expansive jurisprudence enforcing all manner of now ubiquitous contractual mandatory

[1] Joseph Panetta & Ross J. Kartez, *Five Indicators Mediation Is at a Tipping Point*, N.Y.L.J. (Aug. 7, 2023, 9:13 AM), https://www.law.com/newyorklawjournal/2023/08/07/five-indicators-mediation-is-at-a-tipping-point/. [] ("The International Institute for Conflict Prevention & Resolution (CPR) found that 58% of surveyed companies reported using mediation to resolve disputes, up from 49% in 2017 and 42% in 2015. The survey also found that 77% of surveyed companies are using mediation clauses in their contracts, up from 69% in 2017. Sixty percent of companies reported using a standing alternative dispute resolution (ADR) program that allows for the use of mediation on an ongoing basis. Interest in mediation has increased sharply, in part, because of the delays and costs associated with traditional litigation.")

[2] *Id*.; *see also* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61, 63–66 (2012).

[3] Nofit Amir & Michal Alberstein, *From Transplant to Disintegration? A Comparative Study of the Judicial Role*, 37 OHIO ST. J. ON DISP. RESOL. 555, 560 (2022); *Table C-4 U.S. District Courts Civil Judicial Business*, UNITED STATES COURTS (Sept. 30, 2019), https://www.uscourts.gov/statistics/table/c-4/judicial-business/2019/09/30 [https://perma.cc/84KB-3QYY].

pre-dispute arbitration clauses—including not only waivers of rights to civil litigation, but waivers of rights to class arbitration.[4]

In the broader scheme of alternative dispute resolution (ADR), mediation is principally distinguished from arbitration and litigation in that mediation is not an adjudicative process, as are both arbitration and litigation.[5] That is, while mediators, arbitrators, and judges are all ideally skilled neutral third parties, mediators do not have decisionmaking authority to resolve disputes. Arbitrators and judges do. Mediators assist the parties in dispute in reaching volitional resolutions to their disputes.[6] Judges and arbitrators rule, authoritatively resolving issues in dispute whether or not the parties like the result(s).

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[4] *See* Thomas M. Madden, *Mandatory Pre-Dispute Arbitration: An Alternative Approach*, 2019 MICH. ST. L. REV. 1033, 1043-57 (2019) (providing a summary of the proliferation of arbitration clauses in the categories of employment, consumer finance, and broker-dealer contracts and summarizing the accumulating U.S. Supreme Court precedent enforcing all manner of these clauses). *See also* Andrew B. Mamo, *Putting the "Alternative" Back into ADR*, 70 WASH. U. J.L. & POL'Y 219, 221 (2022) (making an argument that mandatory ADR has become so ubiquitous such that ADR is no longer "alternative" and calling for a return to volitional ADR in the spirit of the access to justice motivation originally driving much ADR); Nayha Acharya, *Exploring the Role of Mandatory Mediation in Civil Justice*, 60 ALBERTA L. REV. 719, 736 (2023) (arguing that mandatory mediation compromises procedural rights whereas optional mediation can enhance civil justice).

[5] Nolan-Haley, *supra* note 2, at 68. *See* Madden, *supra* note 4, at 1037–41 and 1058–1079 (providing background on the proliferation of mandatory pre-dispute arbitration in the U.S. and a detailed discussion of the pros and cons of mediation primarily as an alternative to arbitration).

[6] Madden, *supra* note 4, at 1059–61 (discussing mediation generally and describing transformative, facilitative, and evaluative approaches to mediation). *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 8 (1996) (recognizing the variety of approaches to mediation); Leonard I. Riskin, *Replacing the Mediator Orientation Grids, Again: The New Grid System*, 23 ALTERNATIVES 127, 129–31 (2005) (explaining Riskin's changes to the grid system as he would make them in 2005); Leonard L. Riskin, Decisionmaking in Mediation: *The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1, 5–13 (Dec. 1, 2003) (explaining Riskin's changes to the grid system in 2003); Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873, 878–82 (2016) (analyzing the evaluative and facilitative approaches from Riskin's original grids). *See also* Robert A. Baruch Bush & Joseph P. Folger, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 44 (2005) (citing Riskin to describe the development of a diversity of views regarding what mediation can and should be).

This article examines the implementation of two versions of "mandatory" mediation.[7] It focuses on commercial court-connected mediation as a subset of mediation generally, yet much of this focus shares features and understanding with mediation connected to all forms of civil litigation. First, this article provides an initial look at the state of New York's very recent roll-out of presumptive ADR since the fall of 2019, sharing new data on the extent and success of the roll-out. Second, this article presents a detailed discussion of Italy's experience with court-connected mediation since its response to the European Union (EU) directive of 2008.[8] New York and Italy offer two of the world's most populous and prominent bars and some of the world's most litigious commerce. This look at both New York (obviously a major state in terms of population and economic clout) and Italy (a leading nation in the EU in fostering broad-based mediation, if not *the* leading nation) shows that the role of lawyers, and regulation addressing the role of lawyers in mediation, is central to the success or failure of a broad-based shift from the adjudicative process of civil litigation to volitional dispute resolution via court-connected commercial mediation. Moreover, this look at both New York and Italy leads one to believe that the role of lawyers as counsel to clients in civil commercial litigation and mediation (not simply the role of lawyers as mediators) is largely determinative of the success of court-connected mediation. In addition, these two examples lead us to believe that the role of lawyers' business clients as participants in mediation demands greater attention, education, and reform if mediation is to fully succeed in bettering dispute resolution.

Part II of this article provides a description of the roll-out of presumptive ADR in New York courts—focusing on very recent, exclusive new data on the utilization and success of court-connected commercial mediation in New York's trial level supreme courts and commercial division courts.[9] The data portrays the lack of uniformity among those courts' programs of mandatory or presumptive mediation within the State of New York and points to conclusions as to why the most successful of ADR programs is so

[7] I put "mandatory" in quotes here because mandatory mediation or mandatory ADR manifests in myriad iterations. For example, mandatory may mean (i) 3 hours of mediation required at a judge's request, (ii) an initial introductory mediation session prior to filing a civil claim, (iii) court ordered mediation required in order to proceed on a filed civil claim….Henceforth, I will leave off the quotation marks, but urge the reader to understand mandatory in the context of mediation and ADR generally to have multivarious meanings.

[8] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136/3) 8 [hereinafter Directive 2008/52/EC].

[9] *See infra* Part II.

successful.[10] Part III of this article provides a detailed account of the rather tumultuous story of mandatory mediation in Italy since the EU Directive 2008/52/EC, focusing on the 2013 reforms in Italy that directly attended to the interests of lawyers.[11] Part IV of this article draws from the New York experience, but more so from the Italian experience, to expound on the centrality of lawyers to the success or failure of civil court-connected commercial mediation programs.[12] Part V of this article critiques lawyer training for counseling (not mediating) in mediation and advocates for business client training for commercial mediation, offering prescriptive suggestions addressing the role of lawyers and business clients in commercial mediation in order to further advance successful mediation.[13] Part VI concludes with a call for further innovation in lawyer-commercial client relations in commercial mediation.

II. THE NEW YORK EXAMPLE

A. *The Federal Law Background*

National policy on mediation in the U.S. formally opened to various forms of court-connected mediation more than fifty years ago now.[14] Today, federal law authorizing court-connected mediation can be found both in Federal Rules of Civil Procedure Rule 16[15] and in provisions of the Alternative Dispute Resolution Act of 1998, codified in 28 U.S.C. § 652.[16] Each explicitly authorizes court-connected ADR, but preferences mediation as a form of dispute resolution.[17] Indeed, mediation is the preferred form of ADR connected to U.S. courts of all variety.[18]

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[10] *Id.*

[11] Directive 2008/52/EC *supra* note 8. *See infra* Part III.

[12] *See infra* Part IV.

[13] *See infra* Part V.

[14] Nancy A. Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution*, 88 FORDHAM L. REV. 2449, 2453 (2020) (providing a history of mediation connected to U.S. courts beginning in the 1970s).

[15] FED. R. CIV. P. 16(C)(2)(I) ("At any pretrial conference, the court may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule.").

[16] 28 U.S.C. § 652 ("(a)…Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration"). *See* Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391, 399 (2020).

[17] *See supra* notes 15 and 16 and accompanying text.

[18] Welsh, *supra* note 14, at 2450.