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Building a Safe Place for Mediation In Arbitration Proceedings

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Just as New York state courts have announced a presumptive mediation model for civil cases to begin in the fall (Dan M. Clark, "New York Courts to Begin Presumptive Mediation for Civil Cases Later This Year," N.Y.L.J., May 16,2019), it is a critical time for the arbitration community to consider a blueprint for increasing the use of mediation so that settlement rates in arbitration can be competitive with litigation. In the course of an arbitration there should be strategically timed mandatory "check ins" with ADR case administrators built into procedural orders to test whether prospects for mediation may improve as cases progress. Case administrators may act as important screeners to allow the parties a safe zone to raise their openness to mediate at various stages, at the inception of the matter, after key disclosures or depositions and at an interim conference call before the arbitration hearing. Moreover, arbitrators should not rule out the possibility that there still may be an opportunity to settle after the close of the hearing but before the arbitration award is issued—counsel's optimistic view of the case may change even this late in the game. Establishing a mechanism in the order allows a case administrator to assume a role similar to court administrators in New York's mandatory court mediation programs and may lead to similar settlement rates. In fact, the results may even be better because many attorneys feel that courts too often order parties to mediation too soon before there is sufficient information exchange and before litigants are emotionally ready to consider settlement on reasonable terms. Richard Weil, Mediation in a Litigation Culture, The Surprising Growth of Mediation in New York, Dispute

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Resolution Magazine (Summer 2011).

The American Arbitration Association (AAA) offers parties a track for mediation, subject to opt out, which takes place concurrently and "shall not serve to delay the arbitration." AAA Rule 9. Over 65% of AAA commercial cases and nearly 85% of employment cases settle. FINRA's statistics closely resemble the AAA statistics with 66% percent settlement rate (53% by direct negotiations of the parties and an additional 13% percent settled with the assistance of a mediator). Statistics are not publicly available at JAMS and CPR statistics are hard to quantify because many cases are non-administered, yet it is likely that settlement rates might mirror these trends. The New York State Unified Court System Report of Civil Case Activity have for over a decade issued reports that show that in New York state courts only 3% of cases are tried and in the Southern and Eastern District courts fewer than 2% of cases go to trial. Mediation: Through the Eyes of New York Litigators, Report of the Mediation Committee of the New York State Bar Association Dispute Resolution Section and the Alternative Dispute Resolution Committee of the New York City Bar Association (Feb. 17, 2011) (NYSBA Report). These statistics reveal a significant *"arbitration deficit"* and some practitioners have noted that the deficit is even more pronounced in the international context. Justin William and James Glayshear, The Settlement Deficit in Arbitration, Global Arbitration Review (September 2018). A recent report by the International Centre for Dispute Resolution (ICDR) which examined ICDR cases from January 2015 to December 2017 reveals that 72% of arbitrations settled prior to an award being rendered and 39% were resolved prior to tribunal fees being incurred. See www.icdr.org, Arbitration Report; Time and Cost: Considering the Impact of Settling International Arbitrations.

For a decade, JAMS International Rules have provided for a "Mediator in Reserve" policy whereby one week after Respondent's receipt of the Request for Arbitration, a suggested list of mediators is sent to the parties who are encouraged to select a mediator from the list. The mediator selected (the Mediator in Reserve) is available to "assist in settlement negotiations if at any time in the course of the arbitration proceedings the parties all agree to enlist the mediator's assistance. There is no charge to the parties for the appointment of the Mediator-in-Reserve, and the parties do not incur fees unless and until they choose to utilize the mediator's services. Under the policy, the Mediator-in-Reserve will not be informed of the parties' selection until and unless the parties decide to request the mediator's services. The policy further provides 'that the parties will not be bound to use the Mediator-in-Reserve and may, at any time, mutually select another mediator to assist in their settlement discussions." The arbitrator in the proceeding has no knowledge of the identity of the Mediator in-Reserve, or whether the parties may have engaged those services.

> In the course of an arbitration there should be **strategically timed mandatory "check ins" with ADR case administrators** built into procedural orders to test whether prospects for mediation may improve as cases progress.

CPR announced a set of new rules both for domestic arbitrations and international matters effective March 1 2019, highlighting new initiatives including: (1) a signature screened process for selection of party appointed arbitrators; (2) a new protocol to assess cyber risks; and (3) new rules to supplement the parties and the tribunal's ability to suggest mediation at any time with a provision authorizing CPR to reach out to the parties during the arbitration to invite mediation.

The CPR 2019 Rules and JAMS Mediator in Reserve Policy are great initiatives but they may not go far enough in encouraging mediation. Why? The screened process of appointments which CPR pioneered in selection of arbitrators might have some utility in the context of improving settlement rates in mediations. In short, when it comes to mediation and "breaking the ice," screens can be helpful. One of the biggest hurdles to engaging in settlement discussions is that no one wants to be the first to raise the prospect of mediation. ADR administrators can fill the void

by reaching out independently with each party at various set intervals and ask "are you open to the use of mediation?" Neither side needs to know the other sides' response. If only one side responds affirmatively or if both respond "no" then there is no agreement to proceed with a mediated path or with a mediator in reserve- and there is no need to reveal the responses of either side. If both respond affirmatively, the case proceeds to mediation. Therefore, each side knows that it may respond "yes," secure in the knowledge that its compromise will never be disclosed unless there is a deal. The case administrator acts as an important conduit and safety zone to test the parties' readiness or receptivity. According to a New York State Bar Association report seeking the answer to why mediation is underutilized found that there was resistance from lawyers and clients and concerns about the process and s*everal lawyers expressed a concern that suggesting mediation would be seen as a sign of weakness*. Others indicated "I don't see suggesting mediation as of sign of weakness, although if I am in court, I will try to get the judge or magistrate to suggest it to both sides." Mandatory mediation programs in the courts eliminate this psychological fear factor of appearing weak by eliminating the requirement that one party raise the suggestion to mediate. Even when mediation does not yield a settlement on the spot, it offers space to assess the strengths and weaknesses of each side's position, narrows and clarifies issues, offers an impartial assessment of the case, encourages adversaries to consider the others' needs and interests and, quite often, begins a process that leads later to settlement. Having structured mandatory mediation intervals built into a procedural order allows the case administrator to shepherd parties to structured mediation module.

I posed the question in a blog to other ADR practitioners, "Should arbitrators build into a preliminary hearing order (and raise at preliminary conferences) various 'check ins' with the case administrator to take the temperature of parties' willingness to mediate?" The responses were encouraging and positive. Some noted that it may be particularly useful in family business breakup arbitrations where significant emotional issues impact the participants. Others opined that the best intervals for a formalized call would be after dispositive motions and at the final prehearing conference call. Another suggested using this practice to check in with the parties more regularly, maybe every two months to see if mediation would be welcome. Each case probably requires a tailored approach based upon an arbitrator's sense of whether more frequent check ins might suit a particular matter. Two weeks later another question was posted: "What might the legal profession do (or not do) to increase party satisfaction with mediation … whether or not parties reach a settlement?" One of the comments noted: "Parties want to know if an arbitrator has the authority to order mediation. There is nothing in the AAA rules that allow for this. So, I believe AAA should empower arbitrators with the authority to not just encourage mediation but to be able to order [it]. A simple, clear rule on this would be great." Adoption of an official rule may not be necessary if arbitrators incorporate into best practices procedural orders that allow for safety zones for mediation and if ADR provider organizations encourage the use of such templates.

Its time to remedy the "arbitration deficit" in settlement rates and have the statistics resemble court settlement rates. Modelling a procedural order to function like a mandatory court mediation program subject to opt out might be an important first step and ADR provider organizations, case administrators and arbitrators all play an important role in the success of these efforts.