A wide variety of alternate dispute resolution procedures present themselves to commercial and business litigators. In addition to mediation and arbitration, we may choose among multi-step or phased procedures; hybrids, such as “med arb” and “arb med”; nonbinding arbitration; or, conversely, binding mediation. This increasing variety has been accompanied by increasing litigation over the meaning and implications of agreements to engage in these processes. Ironically, our desire to reduce reliance on inefficient and time-consuming judicial processes and exert more control over dispute resolution may instead mire us in expensive and uncertain litigation. Because ADR procedures are predominantly creatures of contract, however, careful drafting can help avoid some of the pitfalls. This article identifies issues to keep in mind when drafting a pre-or post-dispute agreement for nontraditional ADR.

Negotiate Carefully and Draft Precisely
Ambiguous clauses and imperfectly incorporated model provisions often signal a failure to have achieved a meeting of the minds. Careful negotiation and precise drafting can decrease the chances of a detour to the courthouse on the way to ADR.

An agreement that the matter “shall be referred to a neutral alternative dispute resolution forum for hearing and decision with the costs for such mediation or arbitration to be shared equally by the parties” did not communicate whether the parties intended mediation, arbitration, a two-step process, or whether they wanted to leave their options open. The court charged with deciding concluded, first, that the parties intended to arbitrate, not mediate, and, second, that the arbitration was meant to be binding. Even if this is what the parties did intend, time and money were lost by involving the court. A well-drafted ADR agreement will be specific about the procedure selected, particularly if it is something other than classic arbitration or mediation. There remains judicial reluctance to conclude that arbitration will be nonbinding or that mediation ever can be binding.

If the parties intend to benefit from the procedural rules and enforcement mechanisms associated with the Federal Arbitration Act (FAA) or its state counterparts, they should use the word “arbitration” in the agreement. While the cases recite that this is unnecessary, it will decrease the chances of costly and time-consuming motion practice. The agreement should also identify precisely which components are mandatory. A multi-step provision stating that the parties “shall” mediate, after which they “may” submit the dispute to binding arbitration, is typically read as completely mandatory, but why depend upon the court to bail out the draftsperson?

Consistency also avoids unnecessary confusion. An agreement to “settle the dispute by arbitration under the Construction Industry Mediation Rules of the American Arbitration Association” prompted a reviewing court to send the question whether the parties intended to arbitrate to a jury trial—surely the last place the parties intended to go. Moreover, consistency between the ADR clause and the rest of the contract is equally important. A clear and unambiguous agreement for binding arbitration can be derailed by a waiver of jury trial provision; a warranty provision incorporating by reference FTC regulations prohibiting binding arbitration; or a mediation provision elsewhere in the contract. When an unambiguous ADR provision is part of a larger contract, ensure that its clarity is not clouded by contradictory provisions.

Identify the Role the Neutral(s) Will Play
The number of neutrals and the role that each will play must be clearly delineated. If the parties intend to mediate and then move on to arbitration, they must state whether the same neutral will preside over both phases. They may wish to leave the door open to use of a single neutral, but not mandate it, with a provision that the mediator may serve as arbitrator if all parties agree at the close of the mediation phase, or they may wish to create a presumption but leave an “out,” with a provision that, unless otherwise agreed, the mediator will also serve as arbitrator.
The agreement should also clearly delineate what each neutral’s authority will be at each point in the process. For instance, parties who instruct a neutral to render a binding decision could be charging the neutral to deciding the merits of the based on evidence admitted at a hearing or determining an equitable compromise of the parties’ claims (which in turn could be based upon the parties’ last, best settlement offers or upon the neutral’s assessment of interests and positions expressed during ex parte sessions). Articulation of the scope of the neutral’s authority could protect against a challenge to the award on the grounds that the neutral exceeded his or her authority, and evidence that the parties did, indeed, agree to bestow authority on the neutral could forestall later claims that the procedure was unfair.

For instance, the parties may agree to a procedure that allows a single neutral to switch hats during the ADR proceeding. This upends certain assumptions about the conduct of mediation, including confidentiality and mediator neutrality, and about the arbitration process, including evidentiary standards and transparency in decision-making. The agreement, therefore, needs to demonstrate that the parties understand the implications of the procedure they have selected and waive any objections to it. Arbitration awards rendered by neutrals who have previously mediated the same dispute have been vacated in the absence of sufficient evidence of such an agreement and waiver.

Consider and Address Confidentiality Issues
A defining characteristic of classic mediation is confidentiality. Parties expect that information disclosed to the mediator during ex parte caucuses will not be shared and that the substance of their negotiations will not be disclosed to third parties. Confidentiality can be imposed by state statutes, federal and state evidentiary privileges, or the parties’ own agreement.

Because the neutral cannot forget what he or she heard as a mediator after putting on the arbitrator hat, a hybrid proceeding may give rise to a claim that the parties waived confidentiality simply by moving from mediation to arbitration (i.e., that the arbitrator now knows what the parties communicated to the mediator in confidence). An award rendered in a “med arb” proceeding was vacated on the grounds that the neutral’s use of the parties’ settlement positions to fashion an award violated the confidentiality of the mediation process. Absent an explicit waiver of confidentiality by the parties, this court ruled, the neutral was not authorized to use this information as grounds for an award. In another case, a third party, seeking documents generated in a “med arb” proceeding, similarly claimed that, by participating in a hybrid process, the parties had waived their mediation privilege. The court rejected the argument, finding no evidence in the parties’ agreement or conduct to support such a broad waiver.

Parties to a multi-step or hybrid ADR presumably wish to shield all aspects of their participation from outside eyes but do not intend a confidentiality rule strict enough to derail their own proceedings. Careful consideration of the implications of applicable state rules and of the language of the parties’ own contract provisions will enable the parties to agree upon contract language distinguishing between confidentiality within the confines of their process and privilege with respect to third parties and collateral proceedings.

In Society of Lloyds v. Moore, the ADR agreement explicitly provided that during the mediation that followed arbitration, the neutral might, without revealing his verdict, discuss his perceptions of each party’s case. In an action to vacate the neutral’s award, which was disclosed after mediation failed, the losing party sought to introduce an email from the neutral, sent during the mediation phase, to prove that the arbitral award had been based on considerations outside the scope of the ADR agreement. The court rejected the argument that the parties had waived the confidentiality of their communications with the neutral by agreeing to an “arb med” procedure.

Consider Enforcement Mechanisms
The FAA and state arbitration statutes provide a clear and efficient mechanism for enforcing an agreement to participate in mandatory, binding arbitration, while efforts to enforce agreements to mediate or engage in multi-step or hybrid ADR under the FAA yield inconsistent results. Agreements for mediation have only rarely been enforced under the FAA, and, while some courts have enforced agreements for “med arb” or phased procedures, others have declined to do so, even when the procedure culminates in a binding decision.

Reference to an appropriate enforcement mechanism is an important part of a dispute resolution clause for anything other than mandatory, binding arbitration. Courts that have declined to enforce “med arb” or phased agreements under the FAA have treated them as two discrete procedures, one of which (mediation) is a condition precedent to the second (arbitration). Courts that have enforced “med arb”
agreements under the FAA have viewed the agreement as calling for a single proceeding, ordering the parties to “mediate and then arbitrate.” Careful drafting may, therefore, increase the likelihood of enforcement under the FAA if that is the parties’ goal. On the other hand, if only nonbinding ADR is contemplated or the agreed-upon mediation procedure is not unitary, drafting efforts should focus on making the dispute resolution clause enforceable on its own terms, without reference to arbitration. Courts are increasingly receptive to enforcing ADR agreements under traditional contract law principles, and some states have enacted statutes providing enforcement mechanisms for mediation agreements. The dispute resolution clause should recite that it is enforceable, either in an agreed-upon court or in any court of competent jurisdiction. Parties can be encouraged to abide by their undertaking to participate by providing for an award of attorney fees to a party that prevails in enforcing the agreement.

Address Post-resolution Issues

Finally, an ADR provision will benefit from consideration of post-resolution issues, including the documentation, review, and enforcement of what could be either a negotiated or adjudicated resolution. There should be provision for the preparation of a binding and written settlement agreement in the event the matter is resolved during mediation, with the provision that it is enforceable in a court of competent jurisdiction. If the settlement is reached during a multi-step or phased procedure, disputes over the settlement agreement may be arbitrable if the arbitration clause is broad; consideration should be given to whether this is desirable.

The agreement should recite that an award is subject to review and confirmation pursuant to FAA Sections 10 and 11, or applicable state law. It may be helpful to agree which court or courts will have jurisdiction of confirmation proceedings.

Parties may wish to exert more control over the final resolution than is afforded by the FAA by adopting a heightened standard of review. (This may be attractive in a legally complex case or one in which the neutral has been afforded broad access to information, admissible and inadmissible, through participation in a hybrid procedure.) The United States Supreme Court has recently ruled that the narrow grounds for review provided in FAA Sections 10 and 11 are the exclusive grounds for review under the FAA. The states have reached varying conclusions in applying state arbitration.
acts, leaving some latitude for heightened judicial review under state arbitration law, and private dispute resolution firms are filling a perceived need by offering private arbitration appeal procedures, in which the parties can agree to “substantial evidence” review or de novo review of legal rulings. If the parties agree to more searching appellate review, they will need to provide for a reasoned award and a stenographic record of the proceedings and offer clear guidance about what substantive and evidentiary law applies.

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2. Nonbinding arbitration typically involves the same procedural steps as binding arbitration—discovery, briefing, a hearing, and a reasoned award—but the result, by agreement, is not immediately binding on the parties. The parties may, if they wish, agree that it will become binding if certain conditions are met, e.g., the failure of either party to initiate litigation or binding arbitration within a set period of time, or it may remain complete advisory. See generally Bennett, NON-BINDING ARBITRATION: AN INTRODUCTION, DISP. RESOL. J. (vol. 61, no. 2) (May–June 2006).

3. “Binding mediation” is often used to refer to a process in which, if a mediation is unsuccessful, the mediator is authorized to render a binding decision without proceeding to a further adjudicatory phase, either by deciding upon an award within the mediated bracket or by taking into account expressions by the parties of their interests during the mediation. See, e.g., COOLEY, supra n. 3, 263–64.


7. See, e.g., Lindsay v. Lewandowski, 139 Cal. App. 4th 1618, 1624, 43 Cal. Rptr. 3d 846, 850 (2006) (“There are significant problems with the concept of ‘binding mediation’”).

8. See, e.g., Schoefeld v. International Dev’t Group, 2006 WL 504058, *2 (W.D. Tex. 2006) (“No particular words are needed to create a valid arbitration agreement”).


10. Ex parte Mountain Heating & Cooling, Inc., 867 So.2d 1112, 1116 (Ala. 2003). See also Oliver Design Group, 2002 WL 31839158, *2 (agreement made “binding mediation” the final step of a multi-step ADR procedure but then provided that the AAA’s construction industry mediation rules—which do not provide for binding mediation—would apply; court concluded that the parties intended binding arbitration).

11. Id. at 1116–17.


14. See infra note 19.

15. See, e.g., Peterson v. Peterson, 2002 WL 518841 (2002). In a form of binding mediation, the parties agreed that a neutral would mediate and, if no agreement were reached, make a “recommendation” that the parties agreed to accept and present to the court for entry of judgment. A reviewing court found that the parties had voluntarily waived their rights to any civil process beyond what this procedure afforded them.

16. See Bowden v. Weickert, supra note 19. This issue has also arisen in the context of “arb med.”


19. See, e.g., Kemiron Atlantic, Inc. v. Agukem Int’l Inc., 290 F.3d 1287 (11th Cir. 2002). State courts have reached a similar conclusion. See, e.g., In re Pisces Foods LLC, 228 S.W.3d 349 (Tex. App. 2007).

20. See, e.g., CAL. CIV. PROC. CODE § 1291.11; TEX. CIV. PRAC. & REM. CODE § 154.021.


