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## A unique alternative to court resolution of high-exposure, complex disputes

By Neal R. Marder,  
Ali R. Rabbani and  
Shelly A. Kim

In the age of skyrocketing costs of litigation, companies are increasingly looking for alternative methods to resolve disputes short of trial. High exposure, complex disputes can quickly become large, unwieldy cases requiring dozens of witnesses, multiple experts, tens of thousands of documents, and years to litigate. Given the potential costs and the uncertainties of predicting state and federal court juries, it makes sense that many companies are choosing to put their resources towards resolving their complex disputes outside of the courts prior to the filing of a complaint. For instance, companies may include a pre-litigation dispute resolution provision in their contracts in hopes of resolving issues without the need for costly litigation. One option for these companies to consider is a unique alternative dispute resolution process that includes a non-binding arbitration before mediation because it can give the parties a clear picture of what their potential liability and exposure would be following discovery and trial, but in a much more streamlined and cost-efficient process.

Historically, parties have

sought either mediation or arbitration as “traditional” methods of alternative dispute resolution. But both come with their drawbacks. For example, if the parties cannot reach an agreement in mediation, the deal collapses and the case proceeds to trial. As for arbitration, an impartial arbitrator’s authority to impose a decision might be attractive to parties seeking finality to their dispute outside of the courts. But the lack of a formal appeals process can present too much risk for parties that face substantial risk of an unfavorable result.

In recent years, parties have increasingly taken advantage of two hybrid options in the search for an alternative dispute resolution process that is “just right.” One option is “med-arb,” which begins with the parties first attempting to negotiate a settlement of their dispute with the assistance of a mediator. If the parties are unable to settle, the parties then move on to arbitration, where the mediator assumes the role of an arbitrator to render a binding decision. However, a potential pitfall of the “med-arb” model is that the mediator’s potential to ultimately make a binding decision about the dispute can influence the parties to be disingenuous or hesitant about sharing confidential information with the

mediator. While parties can avoid this possibility by hiring a separate neutral evaluator for the mediation and arbitration phases, this would involve additional time and costs to get the arbitrator up to speed.

The second and lesser-known hybrid is “arb-med,” which, as the name suggests, is the reverse of “med-arb.” In “arb-med,” a neutral evaluator functions initially as an arbitrator and renders a binding decision that is not initially disclosed to the parties. The arbitrator then transitions into a mediator to help the parties resolve the dispute on their own. If the parties are unsuccessful in mediation, the neutral evaluator will issue the previously determined binding award. Thus, a potential downside of the “arb-med” model is that the parties may end up with a result based on the evaluator’s prior determination that is far off from the range in which they were last negotiating when the mediation fell through.

We recently explored a third hybrid, combining certain elements of “med-arb” and “arb-med” without the risk of a binding award. In this particular case, the underlying contract included a pre-litigation alternative dispute resolution provision that required the parties to exchange claims and other information prior to filing

a lawsuit. At the outset, the parties agreed to initially engage in a three-day non-binding arbitration before a well-respected neutral evaluator who specialized in the complex subject matter. Each party was allotted one day to present their case in any form they chose, including by questioning witnesses and experts. The parties also agreed that there would be no cross-examination of witnesses during the arbitration. The third day was allotted for rebuttals, during which the arbitrator could ask both sides and their witnesses questions about key areas of the dispute. Upon the conclusion of the three-day arbitration, the neutral evaluator provided a non-binding written evaluation addressing issues of liability and potential risks each side would face if the dispute proceeded to litigation. After the parties had time to assess their own risks based on the written evaluation, the parties met to negotiate a resolution with the help of the same neutral evaluator who presided over the arbitration. At the end of the mediation, the parties ultimately reached a favorable settlement.

The benefits of this unique resolution process include the following:

- The parties can present their case before a neutral evaluator without worrying about being

bound to a non-appealable final decision.

- The parties can tailor the process to their needs. For example, the parties can choose the scope of discovery, location, the neutral evaluator, and other important procedural rules, such as whether to allow cross-examination of witnesses.

- The process is potentially less expensive than litigation. This is particularly appealing where the dispute involves highly complex issues, requiring numerous witnesses and experts, and will be before a jury if the dispute is litigated.

- The disputes are resolved in an expedited timeframe.

- The parties engage in streamlined discovery, as opposed to seeking overbroad requests only to winnow them down through tedious meet and confer efforts and discovery motions.

- Once the parties enter into mediation, both sides are already aware of the universe of information before the mediator and they have had time to truly assess the risks they would face at trial.

- Even if the case is not resolved, the information exchanged during the process will help streamline discovery in litigation.

- The entire process can begin and end with complete confidentiality, as nothing is publicly filed.

Of course, as with any alternative dispute resolution process, there are also potential risks that companies should consider prior to crafting the pre-litigation resolution procedure that will best suit their needs. Potential risks include the following.

- Arbitrators may not apply

the rules of evidence, which may allow a party to “get away with” more than it could in court.

- Parties are giving up the right to a jury trial. Where a party’s case has themes that will better resonate with a jury than with an arbitrator, the party should consider whether the benefits of a jury trial outweigh the benefits of an out-of-court process.

- Parties that desire finality

should consider a binding process.

For the reasons discussed above, companies should consider including pre-litigation dispute resolution provisions in their contracts that allow for the parties to craft their own preferred method of dispute resolution that is not confined to just binding arbitration or mediation. The hybrid options discussed above may turn out to be “just right.” ■

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**Neal R. Marder** is a partner at Akin Gump Strauss Hauer & Feld LLP. Neal is a seasoned trial lawyer with a diverse civil litigation practice. He works with in-house counsel, senior management and boards of directors for companies, oftentimes facing high-profile, bet-the-company business disputes.



**Ali R. Rabbani** is a senior counsel at Akin Gump Strauss Hauer & Feld LLP. Ali represents clients in complex commercial litigation, with an emphasis on consumer fraud and securities class action defense, corporate governance and shareholder disputes, intellectual property matters and bankruptcy litigation.



**Shelly A. Kim** is an associate at Akin Gump Strauss Hauer & Feld LLP. Shelly advises clients in numerous industries, including communications and retail, on complex commercial litigation, with an emphasis on class action defense.

