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CONFRONTING ADR AGREEMENTS' CONTRACT/ NO-CONTRACT CONUNDRUM WITH GOOD FAITH

Amy J. Schmitz*

INTRODUCTION

Should there be legal recourse for bargaining gone bad? Professor Charles Knapp explored this question in his influential article, *Enforcing the Contract to Bargain*, and courts have continued to struggle with it, despite public policy that supports cooperative processes.¹ Enforcement of “contracts to bargain” or to pursue other cooperative processes creates a conundrum by calling courts to confront intricate difficulties in filling gaps and fashioning remedies for breach.² Moreover, these difficulties are now threatening the efficacy and vitality of agreements to participate in mediation and other nonbinding alternative dispute resolution processes, which I refer to as “ADR agreements” to distinguish them from contracts requiring binding arbitration.³

* Associate Professor, University of Colorado School of Law. I thank Charles Knapp and my fellow participants, Kristin M. Madison, Alan Schwartz, and Omri Ben-Shahar, on the *Revisiting a Classic: Charles Knapp's Enforcing the Contract to Bargain* panel at the American Association of Law Schools Contracts Conference “Exploring the Boundaries of Contract Law,” in Montreal, Canada (June 17, 2005). I also thank Nestor Davidson and Mark Lowenstein for their comments, and David Blower and Kathryn Bostwick for their research assistance, as well as Melissa Pingsley, Matthew Perry, and Andra Zeppelin for their assistance with final citation verification.

1. See generally Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 680–86 (1969).

2. See WEBSTER'S THIRD NEW INT'L DICTIONARY 497 (1986) (defining “conundrum” as “a puzzle or problem that is . . . intricate and difficult of solution”).

3. “ADR,” or Alternative Dispute Resolution, generally refers to any nonlitigation dispute resolution process, which some define to include binding arbitration under the Federal Arbitration Act (FAA) and Uniform Arbitration Act (UAA). See, e.g., Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (discussing terminology confusion). I use the term “ADR agreements” here, however, to concisely refer to contracts requiring parties to submit disputes to nonbinding alternative dispute resolution processes outside the scope of the FAA and UAA, such as negotiation and mediation. See Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124–32 (2002) (distinguishing final arbitration under the FAA from nonbinding processes).

Professor Knapp's conception of a "contract to bargain" is a useful framework for exploring the enforcement of ADR agreements because it captures "middle position" situations. In these situations, parties stand at the crossroads between "yes-contract" and "no-contract" by incorporating flexibility and leaving gaps in the terms of their deals. As Professor Knapp has explained, they signify their "willingness to be regarded as 'committed' to the entire proposed exchange" by negotiating and reaching agreement on some terms of the deal, but nonetheless delaying agreement on other important terms.⁴ Similarly, parties to ADR agreements commit to an underlying exchange but promise to pursue a cooperative process to resolve any disputes that arise during performance. In both cases, parties expect to cooperate but usually do not specify what that cooperation entails.

Although public policy ostensibly supports ADR, courts have failed to adequately analyze and enforce ADR agreements. Instead of considering the middle-position nature of these agreements, courts jump to the same formalist yes-contract/no-contract conclusions they have imposed on other contracts to bargain. They either assume ADR agreements fall in the no-contract column under traditional, formalist conceptions of so-called "agreements-to-agree," or they mistreat non-binding dispute resolution processes as binding arbitration under the Federal Arbitration Act (FAA)⁵ or the Uniform Arbitration Act (UAA).⁶ Even if the results are acceptable in some cases, problems arise when courts misapply statutes and formalist doctrines to over- or under-enforce ADR agreements.⁷ Courts may cut off the parties' contractually preserved access to judicial recourse by using the FAA to jump to the yes-contract conclusion that a binding contract exists. Moreover, the failure of courts and legislators to openly confront the yes-contract/no-contract conundrum of ADR agreements has left parties without adequate contracting guidance.

In a previous article, I critiqued the improper treatment of nonbinding ADR as binding arbitration under the FAA and UAA and invited courts to refresh common-law contractual analysis of ADR agree-

4. Knapp, *supra* note 1, at 685.

5. 9 U.S.C. §§ 1-16 (2000). The FAA governs only written agreements to submit disputes to final and binding arbitration. See *Dluhos v. Strasberg*, 321 F.3d 365, 366-69 (3d Cir. 2003) (holding nonbinding private resolution procedure is not arbitration governed by the FAA).

6. UNIF. ARBITRATION ACT §§ 1-33, 7 U.L.A. 1, 9-94 (2000) (parroting the FAA and representing state law in nearly every jurisdiction).

7. See, e.g., *Inland Group of Cos., Inc. v. Providence Wash. Ins. Co.*, 985 P.2d 674, 678-80 & n.1 (Idaho 1999) (assuming in a footnote that the state's UAA applied to an insurance policy's appraisal provision, and using the Act's pro-arbitration law and procedures).

ments.⁸ I suggested that courts should enforce ADR agreements flexibly where parties' participation in an ADR process will foster fair settlement or provide other collateral benefits that outweigh the burdens of compelled participation in the process.⁹ For example, it may be appropriate for a court to use the common law to order corporate buyers and sellers to negotiate price adjustments under an ADR agreement in an installment sales contract. In contrast, a court might refuse to order an employee to mediate sexual harassment claims against an intimidating or abusive employer.

This Article goes a step further by confronting the tensions and complications courts face when they actually apply such common-law analysis to enforce ADR agreements. The Article shows how Professor Knapp's conception of a contract to bargain captures the middle-position nature of ADR agreements and explains why they are ill-suited for formalist "one-size-fits-all" enforcement.¹⁰ This is because formalist rules ignore the human context of ADR agreements.¹¹ They undervalue "relational realities" and often fail to adequately redress the parties' harms.¹² Furthermore, rigid enforcement rules create arbitrary and unfair outcomes; these outcomes ultimately cause the rules to become inefficient and less legitimate. A court applying rigid rules, for example, would treat the above-referenced installment sales and harassment claimants the same—regardless of how the parties' relations evolved after they agreed to their original contracts. Although this seems to foster contract law's efficiency goals, such quick yes-contract conclusions may cause parties to suffer emotional harm

8. See generally Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curbing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1 (2004).

9. *Id.* at 62–74.

10. See Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1201–03 (1998) (describing the "postmodern," post-Reagan period as "nudg[ing] contract back toward a kind of formalism that had seemed obsolescent only a decade or so ago"); see also Harvey L. Temkin, *When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions*, 55 FORDHAM L. REV. 125, 127 n.12 (1986) (observing how an "all-or-nothing" approach may be attractive because it "allows a man to know where he stands" but that such a rule may be overly harsh).

11. I refer to "human" contexts to highlight contextualized relational and seemingly irrational factors that impact contracting in real life. This builds on modern contextual analysis. See, e.g., Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 78–79 (1981) (highlighting contextualized contract analysis).

12. I use "relational realities" to refer to a broad range of human factors that impact contracting, including not only course of performance, course of dealing, and usage of trade, but also emotional, reputational, and practical factors of a given relationship. This borrows from Professor Ian Macneil's "relational contracts," and his observation that classical doctrine embraces a confined "presentation" by viewing exchange as bound by present events, namely offer and acceptance at the time of contract. See Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 589–93 (1974) (critiquing "presentation" in classical law).

or reach one-sided settlements, while narrow no-contract conclusions render ADR agreements meaningless.

This Article invites courts to go beyond formalist yes-contract/no-contract conclusions to craft appropriate remedies for enforcing ADR agreements. The Article proposes that courts should separately decide (1) whether there is a valid ADR agreement, and (2) how to overcome obstacles to determine breach and craft remedies for redressing breach. Although this seems to be what courts already do when they decide contract cases, the reality is that courts collapse these questions into one yes-contract/no-contract conclusion to escape the difficulties of defining ADR duties and determining proper remedies. The proposed approach allows for more relational and contextual analysis by asking courts to ease formalist rules that have traditionally limited enforcement of contracts requiring cooperation. The Article also seeks to spark consideration of remedial tools that courts have not adequately utilized in enforcing these agreements in the past.

Part II discusses the yes-contract/no-contract conundrum of contracts to bargain, and how this conundrum has impacted the analysis of ADR agreements.¹³ Part III highlights some of the problems with this yes-contract/no-contract conundrum.¹⁴ Part IV discusses the first step of my proposed analysis of ADR agreements, and explains my suggested approach for determining validity of ADR agreements and defining parties' duties to comply with these agreements in good faith.¹⁵ Finally, Part V focuses on the second step of the proposed analysis and addresses how courts may overcome evidentiary hurdles of determining breach and suggests some tools that courts may employ to remedy breach.¹⁶ The Article concludes by inviting consideration of this proposed analysis as a starting point for further exploration into the means for addressing the yes-contract/no-contract conundrum that is threatening the efficacy of ADR agreements and other contracts to bargain.

II. ADR AGREEMENTS' CHARACTERIZATION AS CONTRACTS TO BARGAIN

Professor Knapp crafted the action-oriented term "contracts to bargain" in order to stress the bargaining process that agreements with

13. See *infra* notes 17–83 and accompanying text.

14. See *infra* notes 84–156 and accompanying text.

15. See *infra* notes 157–222 and accompanying text.

16. See *infra* notes 223–290 and accompanying text.

open terms often require.¹⁷ ADR agreements also require such bargaining, which causes courts to struggle with their enforcement. Commentators frown on the “best efforts” standards these agreements often demand because they assume such vague standards foster inefficiency.¹⁸ Moreover, courts are reluctant to order parties to conform their bargaining behavior to moral or ethical norms of conduct.¹⁹ Instead, courts have avoided these enforcement issues by collapsing validity and remedy issues into an all-or-nothing yes-contract/no-contract analysis of these contracts to bargain or to engage in ADR.

A. *The Yes-Contract/No-Contract Conundrum of Contracts to Bargain*

Formalist contract law rigidly enforces only those bargained-for exchanges that are marked by offer, acceptance, and consideration. This rigid regime prefers clear terms that a court can enforce without having to fill gaps or monitor ongoing conduct. Formalist contract law thus concludes that “the so-called contract to make a contract is not a contract at all” because it leaves terms open to parties’ later negotiation.²⁰ This approach assumes a bright line exists between yes-contract and no-contract: either the parties have concluded a final contract or they have no contract because they contemplate further negotiations.²¹ If the parties expect to negotiate open terms, they remain free to walk away at any time and for any reason.²²

The types of contracts caught in this yes-contract/no-contract conundrum have traditionally been categorized as “agreements to agree” or “formal contracts contemplated.”²³ Courts have been reluctant to enforce agreements to agree because they leave terms open, although the parties have agreed to most terms and manifest a com-

17. Knapp, *supra* note 1, at 685 n.41 (explaining use of verb form “to bargain” in lieu of noun form such as “bargain contract”).

18. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *YALE L.J.* 814, 817–18, 831–32 (2006) (discussing contract scholars’ assertions that parties avoid vague “best efforts” or “commercial reasonableness” standards due to concerns regarding uncertainty costs).

19. Knapp, *supra* note 1, at 678–79 (noting also how common contract law does not necessarily conform to parties’ “private moral code”).

20. *Id.* at 674 (internal quotation marks omitted) (quoting 1 *ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS* § 29 (rev. ed. 1963)).

21. *Id.* at 673–86 (explaining the theoretical divide between yes-contract/no-contract under common law).

22. *Id.* at 675–76 (adding how legal realism softens this rigidity by considering moral or ethical duties to continue negotiations, but concluding that courts still apply the yes-contract/no-contract regime).

23. *Id.* at 676.

mitment to reach agreement on the open terms.²⁴ Similarly, courts may refuse to enforce formal contracts contemplated despite the parties' agreement on the terms of a deal because they contemplate that the parties will conclude a formal, written contract. Even the somewhat liberalized enforcement of agreements to agree under the Uniform Commercial Code (UCC) assumes the dichotomous yes-contract/no-contract regime that "does not exhaust the catalog of possible intentions."²⁵

Professor Knapp introduced contracts to bargain as middle-position cases in this catalog because they involve contracts in which the parties have reached agreement to such a degree that they are committed to a proposed exchange.²⁶ The parties, therefore, expect that the other may not walk away from the contemplated exchange unless they cannot reach final agreement after "good faith bargaining."²⁷ Knapp proposed that promissory estoppel and the UCC should provide the bases for courts to enforce these contracts to bargain in order to effectuate the parties' expectations and promote other important bargaining policies.²⁸

Promissory estoppel may justify compensation for detrimental reliance induced by a party's manifest commitment to an uncompleted bargain.²⁹ In some contract to bargain cases, this may allow a party to recover losses suffered in reliance on promises to follow through with a deal. This equitable remedy, however, does not cover all contracts to bargain because it hinges on whether the plaintiff can prove it suffered sufficient damage due to reasonable reliance on the defendant's firm offer to bargain.³⁰ This is particularly difficult where it appears that the parties did not expect to be bound to the contemplated bargain until after they had agreed on open terms.³¹ Furthermore, some courts have declined to find the requisite reasonable reliance because

24. *Id.* at 676-77.

25. Knapp, *supra* note 1, at 678.

26. *Id.* at 685-86.

27. *Id.*

28. *Id.* at 686.

29. *Id.* at 686-88 (explaining the application of RESTATEMENT (SECOND) OF CONTRACTS § 90 (1965)).

30. See *Barnes & Robinson Co. v. OneSource Facility Servs., Inc.*, No. M2004-01003-COA-R3-CV, 2006 WL 163218, at *3-7 (Tenn. Ct. App. Jan. 23, 2006) (refusing to find a duty to negotiate in good faith absent an express duty and narrowly applying promissory estoppel to require clear economic loss due to reasonable detrimental reliance).

31. See Knapp, *supra* note 1, at 688-89 (emphasizing how contracts to bargain do not fit the promissory estoppel paradigm because the parties to these contracts have not set all contract terms, and are not necessarily duped into relying on the other's definite and clear promissory offer).

they deem it unreasonable to detrimentally rely on a promise to negotiate.³²

Professor Knapp therefore proposed that UCC § 2-204(3) should provide another possible basis for enforcing contracts to bargain.³³ Section 2-204(3) allows for enforcement of agreements “[e]ven though one or more terms are left open” where the parties’ intent to conclude a contract is clear and there is “a reasonably certain basis for giving an appropriate remedy.”³⁴ Knapp suggested that this provision allows for some “lack of definiteness.”³⁵ He urged that courts could use this provision to enforce contracts to bargain depending on (1) whether the parties “intend[ed] to make a contract,” and (2) whether there is “a reasonably certain basis for giving an appropriate remedy.”³⁶ Knapp explained that by considering context and business practices in a given case, courts could provide a remedy to effectuate the parties’ intent, promote reasonable commercial behavior, and foster the UCC’s continued relevancy.³⁷

This analysis left open the question of what constitutes sufficient intent to bargain, and what “bad faith” behavior qualifies as a breach of the duty to bargain.³⁸ In addition, UCC § 2-305, which regulates contracts with open price terms, generally deems failure to agree on price as a deal-breaker where the parties have not indicated a clear intent to be bound if a price is not set.³⁹ Many commentators and courts have construed this provision to qualify UCC § 2-403’s allowance for indefiniteness and to condone a “seemingly universal” rejection of agreements to agree.⁴⁰ Contracts to bargain have therefore fallen into a yes-contract/no-contract conundrum because courts ei-

32. *Barnes*, 2006 WL 163218, at *5–7 (refusing to apply promissory estoppel liberally in finding no duty to negotiate in good faith).

33. Knapp, *supra* note 1, at 692.

34. U.C.C. § 2-204(3) (2002).

35. Knapp, *supra* note 1, at 692.

36. *Id.* at 692–93.

37. *Id.* at 694–95.

38. *Id.* at 698–99, 720–22 (acknowledging these murky issues and explaining how courts may approach resolving them).

39. U.C.C. § 2-305.

40. Knapp, *supra* note 1, at 693–97, 726–27 (acknowledging that “reasonable price” enforcement under UCC § 2-305 may be improper in contract to bargain cases where there has been “[a] genuine breakdown in negotiations,” but proposing that UCC § 2-305 should not preclude enforcement of a contract to bargain unless the parties have not reached agreement on price after “bargaining in good faith”).

ther refuse to enforce them as empty agreements to agree or imply “reasonable” terms in order to enforce final deals.⁴¹

Courts have found it difficult to fashion middle-position remedies that enforce contracts to bargain. Because contracts to bargain merely require that parties seek to conclude a deal, it is usually improper for a court to award expectation damages.⁴² Furthermore, parties are usually unable to prove damages with reasonable certainty in contract to bargain cases where the parties have left terms open.⁴³ In addition, courts generally refuse to order parties to negotiate due to “the inevitable lapse of time and the likely estrangement of the parties.”⁴⁴

Nonetheless, contract law should more readily enforce these contracts to bargain in order to “tip the scales against bad faith” and promote parties’ compliance with their commitments.⁴⁵ As Professor Knapp argued, such enforcement would at least shed light on reality.⁴⁶ He concluded that “the ‘contract to make a contract’ has been as firmly fixed in the affairs of men as the moon in its track, and yet, because of a seemingly unavoidable logical contradiction, has been as remote from our legal system as the moon seemed to Professor Corbin[’s classical law].”⁴⁷

B. Bipolar Enforcement of ADR Agreements

ADR Agreements are contracts to bargain because they call upon parties to bargain with the hope of producing a final settlement agreement, although they do not require the parties to actually reach an agreement.⁴⁸ During ADR processes, a third party may facilitate settlement between the parties or provide an evaluation of their respective cases, which the parties remain free to accept or reject.⁴⁹ This

41. Nonetheless, there are some courts that may take a “middle position” by ordering damages due to reliance on the contemplated deal. *See id.* at 723–24 (highlighting difficulty of determining breach and remedies for breach of “good faith” duties to bargain).

42. *See id.* (highlighting this “harder” question of appropriate remedy, and proposing factors bearing on its analysis).

43. *See id.*

44. *Id.* at 725.

45. *Id.* at 726–27.

46. Knapp, *supra* note 1, at 726–27.

47. *Id.* at 728.

48. Again, I use “ADR Agreements” to refer to nonbinding dispute resolution to distinguish these agreements from binding arbitration agreements under the FAA and UAA, which require parties to abide by a third party determination.

49. *See, e.g.*, Better Business Bureau (BBB), BBB Auto Line, <http://www.dr.bbb.org/autoline> (last visited Aug. 29, 2006) (providing information regarding the BBB’s program for resolving consumers’ Lemon Law warranty disputes against car manufacturers through conditionally binding arbitration, which produces awards consumers may accept or reject, and detailing the proce-

indeterminacy creates tough enforcement and remedy difficulties. For example, how should a court enforce an employee's contractual duty to mediate sexual harassment claims?⁵⁰ Many courts have avoided these questions by either denying enforcement of such ADR agreements or treating nonbinding processes like arbitration in order to force parties to settle or accept a third party's decision on their claims.⁵¹ Courts also have dodged the enforcement and remedy difficulties of ADR agreements by assuming they are unenforceable under formalist common-law principles that bar enforcement of "agreements to agree."⁵² Courts' yes-contract/no-contract assumptions have therefore bred confusing and "splintered" contract law that threatens the utility and efficiency of ADR.⁵³

1. *Mistreatment of ADR Agreements as Arbitration*

Binding arbitration is not the same as a nonbinding ADR process. Arbitration agreements under the FAA and UAA are governed by a rigid pro-enforcement scheme that is not suited for ADR agreements.⁵⁴ ADR agreements are beyond the scope of the FAA and

dures and rules for that arbitration program); *see also* *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349 (3d Cir. 1997) (refusing to apply the FAA to the BBB's Auto Line conditionally binding arbitration procedure).

50. *See, e.g.*, Schmitz, *supra* note 8, at 1–2.

51. *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 861 (citing examples of courts using arbitration statutes to enforce nonbinding dispute resolution processes).

52. *See id.* at 831–35 (warning against application of arbitration laws to dispute resolution "willy-nilly without discussion").

53. Charles L. Knapp, *An Offer You Can't Revoke*, 2004 WIS. L. REV. 309, 316–17 (highlighting how even after the flood of law-and-economics analysis crested, modern contract law failed "to pull itself together").

54. *See* *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1142–45 (5th Cir. 1985) (emphasizing that courts must broadly construe arbitration agreements and compel arbitration, unless an opponent rebuts the enforcement presumption with strong evidence that the dispute is not covered by an agreement); *Ohio Council 8, Am. Fed'n of State, County & Mun. Employees v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 459 N.E.2d 220, 222–23 (Ohio 1984) (*per curiam*) (refusing to apply arbitration law to a nonbinding dispute resolution procedure, and emphasizing that arbitration and mediation "are not functionally equivalent"); Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265, 277 (2002) ("Mediation can be distinguished from binding arbitration in that the parties are the decision-makers and the mediator has no decision-making authority."); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 SYRACUSE J. INT'L L. & COM. 1, 31 (1997) (contrasting extraordinary enforcement scheme applicable to arbitration and contract-law remedies applicable to other nonarbitration procedures); *see also* *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 192–99 (1910) (finding that appraisal was not arbitration, and therefore "the strict rules relating to arbitration and awards do not apply"); *Collins v. Collins*, 53 Eng. Rep. 916, 919 (1858) (finding that Act of Parliament governing enforcement of arbitration did not apply to appraisal,

UAA because they do not require the parties to abide by a third party's resolution of their dispute.⁵⁵ Nonetheless, some courts have effectively rewritten ADR agreements and forced parties to reach final settlements by glossing over language that requires nonbinding ADR and mandating that the parties arbitrate under the FAA or UAA.

The approach ignores parties' chosen contract terms and subjects ADR agreements to a statutory scheme ill-suited for agreements that do not require parties to waive trial rights and abide by a third party's determination of their dispute. The FAA and UAA mandate that courts automatically order specific performance of valid agreements to arbitrate, without balancing equities and exercising discretion as a court would otherwise do before ordering coercive remedies under common law.⁵⁶ In addition, the FAA/UAA scheme prescribes strict enforcement procedures that include streamlined motion practice, liberal venue provisions, immediate appeal from orders adverse to arbitration, arbitral immunity, limited review of awards, and treatment of awards as judgments.⁵⁷ Therefore, although courts may look to the Acts for guidance in enforcing ADR agreements, they should be careful not to misapply these Acts in ways that contradict legislative principles and contract-law equities.⁵⁸

For example, in *AMF Inc. v. Brunswick Corp.*,⁵⁹ the court decided the FAA required the parties to submit their advertising dispute to a nonbinding advisory tribunal—essentially equating evaluative mediation with binding arbitration governed by the FAA.⁶⁰ The court

and therefore remedies for breach of an appraisal agreement under common law would apply); Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN. L. REV. 819, 820 (1962) (emphasizing that the sections of the FAA "are integrally related and are not a series of independent provisions").

55. This was the focus of a prior article, and therefore I will not belabor the point here. See Schmitz, *supra* note 8, at 1–7 (emphasizing inapplicability of FAA or UAA to nonbinding ADR agreements); see also *Lynn v. Gen. Elec. Co.*, No. 03-2662-GTV-DJW, 2005 WL 701270, at *7–8 (D. Kan. Jan. 20, 2005) (finding FAA and UAA did not apply to agreement to mediate).

56. See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931–32 (10th Cir. 2001) (emphasizing FAA's special statutory scheme). Under contract law, courts will exercise discretion to specifically enforce a contract only when ordering damages would be inadequate, and coercive relief is appropriate in light of all facts and circumstances, as well as the public interest. RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. c (1981); see also U.C.C. § 2-716(1) (2002) (providing that courts may order specific performance of a sale of goods "where the goods are unique or in other proper circumstances").

57. See *infra* note 87 and accompanying text (discussing the FAA's broad remedial scheme).

58. See *infra* notes 223–238 and accompanying text (proposing flexible and process-oriented application of common-law remedies to enforcement of ADR agreements).

59. 621 F. Supp. 456 (E.D.N.Y. 1985).

60. *Id.* at 459–60 (defining arbitration loosely to include any submission of a dispute to a third party); see also *United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001) (citing *AMF*,

hinged its decision on the FAA, only intimating that the agreement was likely enforceable under New York contract law.⁶¹ In addition, the court's use of the FAA suggested that the court would treat the arbitrator's decision as final and subject it to very limited review under the Act.⁶² Courts have also assumed that the FAA and UAA apply to arbitration procedures that are nonbinding because they are subject to trial de novo.⁶³ In many cases, courts ignore the parties' contracts and require the parties to accept the arbitrators' determinations as final and subject to only limited judicial review under the statute.⁶⁴ This thwarts contractual intent and neglects contract law, which requires courts to weigh equities before ordering specific performance of contract duties.

Meanwhile, other courts treat nonbinding processes as arbitration in order to deny enforcement based on antiquated ouster and revoca-

621 F. Supp. at 461) (finding nonbinding dispute resolution agreements enforceable under the FAA); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998) (same).

61. *AMF*, 621 F. Supp. at 459 (citing George W. Taylor, *Preface* to EDWIN E. WITTE, *HISTORICAL SURVEY OF LABOR ARBITRATION* vi (1952)). Application of the FAA presumably preempted antiquated state law precluding enforcement of arbitration or ADR agreements. See *Southland Corp. v. Keating*, 465 U.S. 1, 10–16 (1984) (holding FAA preempts state law inhibiting arbitration).

62. *AMF*, 621 F. Supp. at 461–62.

63. See, e.g., *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1244–51 (Ohio 1992) (assuming that the only form of arbitration is binding arbitration subject to the FAA/UAA remedial scheme); see also Jennifer L. Shaw, Note, *The Tie That Binds: Arbitration in Ohio After Schaefer v. Allstate Ins. Co.*, 22 CAP. U. L. REV. 779, 779–81, 795–97 (1993) (discussing the *Schaefer* court's failure to consider the utility and enforceability of trial de novo procedures).

64. *Field v. Liberty Mut. Ins. Co.*, 769 F. Supp. 1135, 1140–42 (D. Haw. 1991) (treating trial de novo like binding arbitration, and thus striking the provision and requiring limited judicial review under Hawaii's arbitration statute); *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923–27 (Ct. App. 1996) (voiding trial de novo provision in physician's contract with his patient); *Goulart v. Crum & Forster Pers. Ins. Co.*, 271 Cal. Rptr. 627, 627–28 (Ct. App. 1990) (holding insurance code arbitration provision prevented either party from seeking trial de novo); *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 346–49 (Colo. 1998) (en banc) (holding that insurance agreement allowing either party to request trial de novo if the award exceeded \$25,000 was against public policy); *Zook v. Allstate Ins. Co.*, 503 A.2d 24, 25–27 (Pa. Super. Ct. 1986) (finding trial de novo provision ambiguous and thus unenforceable, especially because "a court of competent jurisdiction is only empowered to disturb the arbitration award if there is evidence of fraud, misconduct, corruption or some other irregularity which caused the rendition of an unjust, inequitable or unconscionable award"); *Slaiman v. Allstate Ins. Co.*, 617 A.2d 873, 873 (R.I. 1992) (holding trial de novo provision violates public policy); *Godfrey v. Hartford Cas. Ins. Co.*, 16 P.3d 617, 621–23 (Wash. 2001) (en banc) (holding trial de novo provision unenforceable because parties "cannot submit a dispute to arbitration only to see if it goes well for their position before invoking the courts' jurisdiction"; further explaining that it would ignore the trial de novo provision because arbitration law "does not contemplate nonbinding arbitration" and courts will not "condone what amounts to a waste of judicial resources"); *Petersen v. United Servs. Auto. Ass'n*, 955 P.2d 852, 854–56 (Wash. Ct. App. 1998) (voiding trial de novo provision because "[t]he purpose of arbitration is to avoid the courts to resolve a dispute").

bility doctrines.⁶⁵ These doctrines preclude enforcement of arbitration contracts based on courts' traditional "jealousy" of arbitration.⁶⁶ The revocability doctrine stated that arbitration agreements were freely revocable by any disputant, while the ouster doctrine declared that courts would not enforce arbitration that sought to "oust the courts of jurisdiction" or displace judicial power to resolve disputes.⁶⁷ Although it seems pro-ADR policy would eclipse these doctrines, some courts have continued to honor or otherwise incorporate ouster and revocability principles into their narrow perception that they lack power to order participation in contractual ADR processes not governed by statute.⁶⁸

2. *Misperception that ADR Agreements Are Empty "Agreements-to-Agree"*

While some courts have bound parties to ADR agreements to final settlements based on misapplication of arbitration law, others have neutralized these agreements under rigid formalist rules preventing

65. See Schmitz, *supra* note 8, at 27–42 (discussing evolution and application of traditional judicial doctrines precluding the specific enforcement of agreements requiring participation in private dispute resolution processes).

66. See CLARENCE F. BIRDSEYE, *ENCYCLOPEDIA OF GENERAL BUSINESS AND LEGAL FORMS* 205 (1924) (emphasizing common-law courts' jealousy and opposition to arbitration, despite their enforcement of other contracts); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 238–39 (1929) (stating reasons courts did not enforce arbitration agreements).

67. See Hulvey, *supra* note 66, at 239–41 (discussing doctrine refusing to compel performance of an agreement "intended to oust the courts of their jurisdiction").

68. See *HIM Portland, L.L.C. v. Devito Builders, Inc.*, 211 F. Supp. 2d 230, 233 n.5 (D. Me. 2002) (finding parties' failure to trigger an arbitration requirement by seeking mediation under the contract precluded application of the FAA, and thus allowing the parties to litigate "because the Court cannot order the parties to mediate"); see also Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575, 583–87 (1988) (critiquing courts' refusal to specifically enforce nonbinding dispute resolution agreements based on common-law principles that "equity will not enforce a 'vain order,' or require litigants to do something that would be ineffectual or futile," and breach of such agreements causes no harm because when "one party is determined not to settle, the other party is not harmed by the refusal to engage in ADR"); Tim K. Klintworth, *The Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact-Finding*, 1995 J. DISP. RESOL. 181, 188, 194 (explaining that one reason modern courts have been reluctant to enforce nonarbitral dispute resolution agreements without statutory backing is because they view these agreements as "tak[ing] away some of the courts [sic] power," and further emphasizing that "many courts have worried that alternative dispute resolution processes are robbing them of their power and jurisdiction to deal with cases that they would normally have a right to govern"); cf. Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258, 1259–61 (1933) (emphasizing that courts' blanket refusal to specifically enforce executory arbitration agreements was based on flawed judicial doctrine reflecting courts' hostility to private dispute resolution, but that courts continued to blindly apply the doctrine even when they admitted its complete "lack of logic").

enforcement of “agreements to agree.” Despite the merger of law and equity, courts have continued to assume that they lack the power to specifically enforce agreements to engage in private dispute resolution.⁶⁹ They presume that ADR procedures are too uncertain or futile to be worthy of judicial compulsion.⁷⁰

One would expect that this anti-enforcement attitude disappeared with the rise of ADR’s popularity.⁷¹ In reality, however, trends promoting contract formalism and autonomy have pushed courts to become increasingly reluctant to enforce what they deem ambiguous agreements to agree.⁷² Emphasizing the presumed efficiency of clear enforcement rules, they focus merely on whether a contract has sufficiently “definite” standards.⁷³ They also undervalue the process and relational values of ADR by assuming ADR agreements are unenforceable simply because a court cannot force the parties to settle their disputes.⁷⁴ In this way, courts generally take a dichotomous ap-

69. Alfred Hayes, *Specific Performance of Contracts for Arbitration or Valuation*, 1 CORNELL L.Q. 225, 225 (1916).

70. See *Pillow v. Pillow’s Heirs*, 22 Tenn. (3 Hum.) 644, 646 (1842) (holding that an agreement requiring land be appraised by three named persons could not be specifically enforced because the court had no power to “make a new contract” by selecting substitute appraisers and refused to compel the commissioners named in the contract to appraise the property); *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 22–24 (Del. Ch. 1992) (finding parties had no duty to negotiate in good faith pursuant to their contract because any such obligation would provide only “the first step of a more comprehensive procedural scheme” eventually leading to binding dispute resolution, and assuming without adequate explanation that ordering negotiation would necessarily stir litigation and “possible contempt decree”).

71. See ALAN SCOTT RAU ET AL., *ARBITRATION* 59 (2d ed. 2002) (noting the “pro-arbitration” policies in many states). Some states have also created offices to encourage mediation. See, e.g., ARK. CODE ANN. §§ 16-7-101 to -104 (West 1995); HAW. REV. STAT. ANN. §§ 613-1 to -4 (West 1989); KAN. STAT. ANN. §§ 5-501 to -516 (West 1996); N.J. STAT. ANN. § 52:27E-73 (West 1994).

72. See RAU ET AL., *supra* note 71, at 1860 (noting courts’ increased regulation of freedom from contract).

73. See Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1860–62 (2004) (discussing courts’ reluctance to enforce agreements to negotiate).

74. See, e.g., *Jilley Film Enters., Inc. v. Home Box Office, Inc.*, 593 F. Supp. 515, 520–21 (S.D.N.Y. 1984) (finding an agreement to negotiate is not enforceable because it is even more vague than an agreement to agree); *Griffin v. Griffin*, 699 P.2d 407, 409–10 (Colo. 1985) (en banc) (premising analysis of an agreement requiring parents to negotiate and jointly select their child’s school on the assumption “the parties merely ‘agreed to agree,’” and “such agreements are unenforceable because the court has no power to force the parties to reach agreement and cannot grant a remedy”); *Dave Greytak*, 622 A.2d at 22–24 (finding contract did not provide for specific performance of a duty to negotiate, and emphasizing that the court will not order such relief because it lacks power to force parties to reach an agreement); *Coldmatic Refrigeration of Can., Ltd. v. Hess*, 572 S.E.2d 6, 7–9 (Ga. Ct. App. 2002) (finding no breach or fraud claims could be predicated on agreement to sell stock because it left important terms to be negotiated in the future, and thus “was nothing more than agreement to agree”); see also 1 SAMUEL WILLISTON & WALTER H.E. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* § 45 (3d ed. 1957) (stating generally agreements to negotiate are not enforceable).

proach to such agreements by either filling gaps to enforce a final agreement or finding that there is no contract at all.⁷⁵

In addition, courts are reluctant to enforce ADR agreements that call for good-faith negotiations without setting clear parameters for what good faith means. In *Jilcy Film Enterprises, Inc. v. Home Box Office, Inc.*,⁷⁶ the court refused to enforce an agreement to negotiate because it did not state sufficiently specific and objective guidelines for the process.⁷⁷ The contract required that Jilcy and HBO “negotiate exclusively in good faith” regarding HBO’s “distribution, exhibition or other exploitation” of a documentary of the filming of *The Terry Fox Story*.⁷⁸ The court dismissed Jilcy’s claim that HBO breached the contract because such good-faith standards were too uncertain to enforce.⁷⁹

The specificity of participation standards under an ADR agreement is important in determining the proper remedies for enforcing that agreement, but a lack of specificity should not necessarily preclude a court from finding a valid contract.⁸⁰ Furthermore, the difficulty of defining good-faith negotiations should not bar enforcement of parties’ clear intent.⁸¹ The *Jilcy* court may have been too quick to dismiss the claim without first considering whether the parties made an enforceable commitment to bargain.

This yes-contract/no-contract approach ignores the wide spectrum of deals parties actually create, and it rewards a party’s refusal to honor an agreement that incorporates flexibility.⁸² I proposed in a

75. See Ben-Shahar, *supra* note 73, at 1862–64 (explaining definiteness requirement).

76. 593 F. Supp. 515 (S.D.N.Y. 1984).

77. See *id.* at 520–21 (quoting and discussing *Pinnacle Books, Inc. v. Harlequin Enters., Ltd.*, 519 F. Supp. 118, 122 (S.D.N.Y. 1981) and *Mocca Lounge, Inc. v. Misak*, 462 N.Y.S.2d 704, 706 (App. Div. 1983)).

78. *Id.* at 516–21 & n.1. The parties executed the negotiation agreement on July 21, 1982, and had ongoing discussions regarding production and licensing for the documentary until January 19, 1983, when an HBO employee called and told Jilcy’s attorney that there would be no deal. *Id.* at 517–18. Jilcy claimed, however, that the parties had reached an oral agreement on January 7, that was embodied in the Production and License Agreement HBO sent to another counsel for Jilcy on January 18. *Id.*

79. *Id.* at 520–21 (questioning and seemingly denouncing its earlier decision in *Thompson v. Liquichimica of Am., Inc.*, 481 F. Supp. 365 (S.D.N.Y. 1979)); see also *Griffin*, 699 P.2d at 409–10 (assuming an agreement requiring parents to negotiate to choose their child’s school was an unenforceable “agree[ment] to agree”).

80. See Schmitz, *supra* note 8, at 60–62 (discussing factors courts should consider in determining proper enforcement of ADR agreements).

81. Ben-Shahar, *supra* note 73, at 1860–61 (noting this ambiguity but suggesting a no-retraction approach for resolving it).

82. See Knapp, *supra* note 1, at 673–84 (discussing common law’s rigid all-or-nothing approach). See generally RANDY E. BARNETT, *PERSPECTIVES ON CONTRACT LAW* (3d ed. 2005) (describing the traditional refusal to enforce preliminary agreements as “all-or-nothing”).

previous article that courts abandon their presumptive refusal to enforce “agreements to agree.”⁸³ I now explore how courts should use their enforcement tools to enforce ADR agreements in ways that promote compliance with commitments to pursue ADR without jeopardizing efficiency or party autonomy.

III. PROBLEMS OF BIPOLAR ENFORCEMENT OF ADR AGREEMENTS

Contract law should not cast ADR agreements into the bipolar, yes-contract/no-contract abyss. This approach harms the utility of ADR, muddies contract law, and belittles parties’ desires to tailor ADR provisions to their transactions.⁸⁴ Furthermore, it results in the over- and under-enforcement of ADR agreements, and harms the efficiency of ADR. ADR agreements deserve a more nuanced contract analysis that acknowledges the messiness of real-world contracting and does not force these agreements into the classical yes-contract/no-contract “tennis game model.”⁸⁵

A. *Over- or Under-Enforcement of ADR Agreements*

Courts’ bipolar treatment of ADR agreements sometimes leads to over- or under-enforcement of these contracts. Courts that apply the FAA and UAA to summarily enforce ADR agreements may over-enforce these contracts by ordering parties to participate in ADR despite facts and equities suggesting such specific enforcement would be improper under common law. Courts that cling to old common-law doctrines, however, may under-enforce these agreements by voiding them without proper analysis. In both cases, courts fail to tackle common-law contract and remedy analyses and do not provide clear and coherent enforcement standards.⁸⁶ Moreover, they neglect to effectuate the parties’ intent. As with other contracts to bargain, ADR agreements are not promises to conclude settlement contracts, nor are

83. Schmitz, *supra* note 8, at 3–5.

84. See Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 118–31 (2002) (emphasizing expansion of mediation due, in part, to growing criticism regarding fairness and judicialization of binding arbitration under the FAA, and challenging mediation proponents to protect mediation as “a product that succeeds, or fails, on its own”).

85. See Knapp, *supra* note 53, at 321 (describing the classical approach’s narrow focus on offer-and-acceptance as a tennis game: “[T]he offeror serves one over the net; the offeree returns it; if that stroke was a counteroffer, then the offeror hits it back again, and this continues until the ‘game’ is over”).

86. See Stipanowich, *supra* note 52, at 868–69 (noting courts’ “mixed reactions” to agreements to negotiate or mediate and further discussing the varied analyses courts apply to their enforceability).

they merely agreements to agree. They are middle-position agreements that manifest the parties' commitment to engage in ADR in hopes of reaching final settlements.

1. *Over-Enforcement Problems*

a. *Intrusion on Contractual Liberty*

Although a court's misapplication of the FAA or UAA may lead to a proper result in some cases, this is not always true. As explained above, misapplication of the Acts may lead to over-application of strict statutory enforcement remedies and procedures.⁸⁷ For example, a court's application of the FAA to a nonbinding determination may allow the court to apply the Act's limited review to the determination instead of de novo review.⁸⁸ This subjects parties to remedies that drafters of the recently revised UAA refused to extend to agreements to mediate.⁸⁹

Moreover, courts intrude on parties' autonomy and contractual liberty when they equate nonbinding ADR with arbitration. This ignores the parties' agreement and allows courts to automatically order parties to engage in ADR without considering the context of the parties' deal.⁹⁰ This may also allow courts to ignore parties' preservation of freedom from contract by effectively forcing them to reach a settlement.⁹¹ Indeed, ADR agreements are distinguishable from arbitration agreements under the FAA or UAA because they preserve parties' rights to refuse final settlement terms and to seek judicial recourse if they are ultimately unable to settle their disputes through ADR.

b. *Coercion of Harmful Relations*

Over-enforcement of ADR agreements based on quick yes-contract analysis is also problematic when it results in coercive ADR that fuels

87. See *id.* at 863 (stating concern with courts' misapplication of arbitration statutes to non-binding ADR); see also *Harrison v. Nissan Motor Corp.* in U.S.A., 111 F.3d 343, 345-52 (3d Cir. 1997) (refusing to apply FAA interlocutory appeal provisions to nonbinding arbitration).

88. See *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 746-52 (8th Cir. 2003) (applying FAA § 10 review to a nonbinding third-party determination).

89. See Schmitz, *supra* note 8, at 7-8 (noting UAA drafters' decision).

90. Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 74-80 (stating arguments against good-faith participation requirements in mandatory mediation).

91. See Schmitz, *supra* note 8, at 58-59 (discussing courts' reliance on no-contract assumptions regarding so-called "agreements to agree"). See generally BARNETT, *supra* note 82 (noting courts' reluctance to enforce contracts that are contingent on the parties' further negotiations of final terms).

harmful relations. When courts fail to consider the realities of the parties' relationship and the broad range of remedies they have for enforcing ADR agreements, they fail to consider how participation in an ADR process may harm disadvantaged parties. For example, a court should not aid a party's use of an ADR process to tax the other party's resources. Ordering participation in ADR may also be problematic where it would exacerbate parties' already strained relations.⁹² Some relations may be so volatile that ordering participation in a mediation conference could incite physical violence or cause a party to suffer emotional trauma. Some harassment claimants are so fearful of an alleged harasser that they may develop illness from the stress of having to sit through discussions in an informal conference room with this individual.

In addition, forced participation in ADR could perpetuate disproportionate exchange in uneven bargaining contexts. The pressure of a closed conference room may exacerbate bargaining imbalances, making it easier for parties to take advantage of those with less power, experience, or resources. Furthermore, the blanket enforcement of ADR agreements may invite strategic threats to require participation in ADR to coerce parties into accepting one-sided settlement terms.⁹³

c. Promotion of Futile Processes

The blanket enforcement of ADR agreements may also foster inefficiency by forcing parties to complete futile processes. Clear enforcement rules generally increase efficiency by providing certainty and promoting private dispute resolution. It is inefficient, however, to force parties to "go through the motions" of an ADR process when the parties are adamantly opposed to participation. This may even push parties away from the bargaining table.

Some commentators therefore argue that it is inappropriate for courts to mandate nonconsensual mediation where "token compliance" is likely to foster "cynicism and resentment" of the ADR pro-

92. See Schmitz, *supra* note 8, at 1–2 (discussing Vicky's hypothetical case); see also Stipanowich, *supra* note 52, at 863, 868–69 (warning against application of arbitration statutes to mediation and other nonbinding ADR, and discussing difficulties of ordering participation in such processes that generally require parties' cooperation).

93. See Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 46–71 (1999) (discussing why and when a party may seek an injunction or specific performance to gain bargaining advantage although performance of the contract would be inefficient).

cess.⁹⁴ Disingenuous participation in ADR fosters inefficiency by adding superficial layers to the litigation process and lowering parties' "sense of procedural fairness" and faith in the justice system.⁹⁵

It also may be unwise for a court to order participation in ADR where judicial intervention could upset organic dispute resolution. This may be especially true for those within close-knit communities.⁹⁶ In these contexts, organic, reputation-based repercussions may result in more durable solutions. Professor Bernstein, for example, found in her study of the cotton industry that the communal nature of the industry fostered a private legal system that parties generally followed without resorting to formal dispute resolution processes due to fear of "reputation-based nonlegal sanctions."⁹⁷ Judicial intervention in this organic process could cause parties to assume more defensive, litigious attitudes and prevent future cooperation.

2. *Under-Enforcement Problems*

a. Rendering ADR Clauses Useless

Although participation in ADR can be unproductive, inefficient, and even unpleasant in some cases, this does not mean courts should never enforce ADR agreements. ADR agreements are an important category in the range of contracting options and should not be cast into the no-contract bin as empty "agreements to agree." This condones noncompliance with ADR commitments and saps the power from ADR clauses. Parties will not invest time and resources negotiating or drafting ADR clauses if these clauses have little or no force. Why carefully plan for flexible resolution of likely disputes by crafting an ADR clause if a party may subsequently ignore it?

Some commentators argue that ADR's voluntary nature makes it theoretically inconsistent to force compliance with an ADR agreement, and that ADR is productive only if parties voluntarily submit to the process.⁹⁸ Other commentators add that there is no need for courts to intervene to enforce ADR agreements because reputational

94. See Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 44–47, 51 (2005) (questioning mandated mediation from the perspective of democratic theory).

95. See Izumi & La Rue, *supra* note 90, at 74–75 (noting criticisms of mandatory mediation).

96. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–87 (2001) (discussing the cotton industry's Private Legal System (PLS)).

97. See *id.* (explaining the cotton industry's enforcement of the PLS through informal means that foster cooperative behavior).

98. See Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1600 (2005) (emphasizing the "central irony" of mandatory ADR in light of ADR's voluntary nature).

pressures and commercial ethics are better catalysts for encouraging parties' compliance with the process.⁹⁹

Although these are valid considerations, it is important to acknowledge that pre-dispute ADR agreements often play an important role in encouraging cooperative dispute resolution. Parties who accept pre-dispute ADR agreements often refuse to even negotiate such agreements after disputes arise.¹⁰⁰ Once conflict erupts, parties become entrenched in their positions. Contracting partners become defensive and lose incentive to cooperate with one another. They may refuse to agree to anything their opponent suggests in an attempt to signal strength. These parties may fear that agreement reveals vulnerability, and they assume ADR disproportionately benefits the party that requests it.

If parties have included an ADR clause in their pre-dispute contract, however, they are more likely to participate in the prescribed ADR process even if they would not have condoned it after their disputes developed.¹⁰¹ Furthermore, if they believe their agreement is enforceable, they can "blame" their compliance on the agreement. They can only rely on that contract promise, however, if it has some force. Thus, ADR agreements should mean *something*.

In addition, it is sometimes the lawyers—not the disputing parties—who resist participation in an ADR process.¹⁰² If ADR agreements are easily avoidable, then lawyers may emphasize this to their clients and dissuade them from participating in the process. Some lawyers may even encourage litigation in order to gather statutory attorney's fees, especially in class actions.

99. See Knapp, *supra* note 1, at 678 (noting "moral stricture of rather general acceptance" and calling for compliance with promises).

100. See Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMP. RTS. & EMP. POL'Y J. 221, 248–49 (1997) (explaining how parties become entrenched in their defensive positions, and are not likely to sign arbitration agreements after disputes arise); Daniel J. Guttman, *For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation*, 12 OHIO ST. J. ON DISP. RESOL. 175, 185–88 (1996) (noting how divorcing parties are unlikely to voluntarily agree to ADR after disputes arise, but instead act on emotion and resort to traditional adversarial processes in an effort to harm one another); see also Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 234–38, 283–84 (2005) (discussing importance of emotion in decisionmaking, and emotion's epistemological function in negotiating and lawyering in general).

101. Guttman, *supra* note 100, at 185–88.

102. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–49 (1982) (discussing lawyers' economic interests and fear of losing control as factors creating their reluctance to mediate).

b. Ignoring the Virtues of Promoting ADR

Why should the law promote participation in ADR? Modern Supreme Court FAA jurisprudence has exclaimed the virtues of arbitration and ADR as means for efficiently, flexibly, and peacefully resolving disputes, and other courts have echoed such praises.¹⁰³ ADR allows for greater flexibility than litigation or binding arbitration because parties may control their dispute resolution processes and outcomes.¹⁰⁴ Parties also may benefit from having a third party with specialized or technical training facilitate their dispute resolution process.¹⁰⁵

ADR is also generally private, thereby allowing parties to resolve disputes off the public record and outside a public forum. Privacy allows the parties to “save face” by resolving their conflicts quietly without the embarrassment of public defeat.¹⁰⁶ Such privacy often benefits not only corporate parties but also employees and consumers who wish to escape public trial. In addition, parties to private ADR proceedings may be able to better protect business and other confidences, regardless of whether the confidences would qualify for special protection under judicial procedures.¹⁰⁷

Proponents of ADR also emphasize that it may foster efficiency by permitting parties to better control the business costs of conflict. Furthermore, ADR helps lighten courts’ caseloads because parties who engage in ADR usually end their disputes without litigation, either

103. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Supreme Court has reaffirmed strict enforcement of arbitration agreements in recent decisions. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000) (finding that the “liberal federal policy favoring arbitration agreements” supported enforcement of an arbitration agreement although the agreement was silent with respect to arbitration costs and fees (quoting *Moses*, 460 U.S. at 24); see also *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 528 (7th Cir. 1996) (Posner, J.) (noting “Congress’s emphatically expressed support for facilitating arbitration in order to effectuate private ordering and lighten the caseload of the federal courts”).

104. See Reuben, *supra* note 94, at 44–47 (explaining how mediating parties remain free to litigate, and any settlement depends on the parties’ additional consent, and also noting how mediation’s consensual process and autonomy value make it more democratic).

105. This has been popular in technical areas like patent disputes. See Christine Lepera, *What the Business Lawyer Needs to Know About ADR: New Areas in ADR*, 578 PRACTISING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 709 (1998) (describing increased use of arbitration to resolve disputes involving intellectual property rights, online technology, and entertainment issues); Camille A. Laturno, Comment, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization’s New Arbitration Rules*, 9 TRANSNAT’L LAW. 357, 369–71 (1996) (discussing the evolution of arbitration in intellectual property disputes, and emphasizing that arbitration is particularly appropriate for resolution of such disputes because they involve specialized and technical issues).

106. Amy J. Schmitz, *Untangling the Privacy Paradox*, 54 U. KAN. L. REV. (forthcoming 2006) (explaining benefits of arbitral privacy).

107. See *id.* (discussing privacy in arbitration).

through the ADR process or during post-process settlement discussions. Parties often report greater satisfaction with such settlements than with binding judgments or arbitration awards because ADR allows parties to claim ownership of the processes and outcomes.¹⁰⁸

Evidence suggests that even disputants who resist ADR still benefit from participation in the process.¹⁰⁹ Studies of court-mandated mediation have indicated that parties generally view mediation processes as fair and efficient, unless mediators are overly evaluative or coercive in forcing settlement.¹¹⁰ Regardless of whether parties are initially resistant to ADR, they report satisfaction with the process because it gives them an opportunity to be heard that they likely would not get through the regular litigation process.¹¹¹ This may also produce more peaceful and durable solutions because parties who feel they are “heard” are more likely to abide by the agreements they ultimately reach.

ADR may be beneficial even where it does not end the parties’ dispute.¹¹² Participation in ADR may provide collateral benefits because it is generally less adversarial than litigation and arbitration and may prevent the escalation of conflict.¹¹³ This is especially true in informal mediations that allow parties to air their concerns in nonthreatening atmospheres.¹¹⁴ Mediators may meet with parties individually to give them equal opportunities to discuss their positions, or may moderate more open and transparent group discussions.¹¹⁵ In addition, mediators may temper hostilities and foster civility. Although all

108. Tom R. Tyler et al., *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 *GROUP PROCESSES & INTER-GROUP REL.* 99, 116 (1999) (stating that mandatory participation in arbitration or mediation is often psychologically satisfying to participants). See generally Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 *WILLAMETTE L. REV.* 565 (1997) (citing studies that showed parties were generally equally satisfied with court-ordered and voluntary arbitration).

109. Frank E.A. Sander, *The Future of ADR*, 2000 *J. DISP. RESOL.* 3, 8–9 (noting that parties benefit from the process even when they do not settle).

110. Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 *NEV. L.J.* 399, 425–27 (2004) (reporting results of study).

111. *Id.* at 410–11 (reporting goals of court-connected mediation programs).

112. See Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 *OHIO ST. J. ON DISP. RESOL.* 831, 836 (1998) (discussing relational benefits of mediation, even where required by law).

113. See Reuben, *supra* note 94, at 27 (emphasizing how dispute resolution may contribute to productive and pleasant workplace culture by channeling tensions of conflict into a “constructive direction as an agent of appropriate change”).

114. See *id.* at 44–47.

115. *Id.* (noting how caucuses, or individual meetings with the parties, are “the antithesis of transparency” and thus may harm the democratic character of the process).

mediators are not equally effective, many are cognizant of power imbalances and sufficiently savvy to protect parties from abuse.¹¹⁶

c. Negative Impact on Bargaining Ethics

Classical contract law boasts a rigid “no-fault” regime that focuses only on whether parties have complied with the clear terms of their contracts.¹¹⁷ Unlike tort and criminal law, contract law claims to reject consideration of “good” or “bad” behavior or the relevance of “willful” breach.¹¹⁸ Contract law generally disregards questions of motive, allows for efficient breach, and avoids problems of subjective inquiry and proof.¹¹⁹ It also has produced a caveat emptor approach to bargaining and negotiations, which it justifies on the assumption that contracts result from free choice.¹²⁰ This formalist law frowns on any special duties of kindness or good faith during negotiations, unless the parties have a fiduciary relationship or violate another contract defense.¹²¹

116. See Jordi Agustí-Panareda, *Power Imbalances in Mediation: Questioning Some Common Assumptions*, May–June DISP. RESOL. J. 24, 29–31 (2004) (explaining how the voluntary nature, empowerment function, and nonadversarial approach in mediation may protect mediating parties from coerced settlements); Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 76 (explaining how mediators may screen for and employ techniques to deal with power imbalances); Sander, *supra* note 109, at 7–8 (noting that most mediators are reputable, and will not coerce settlements, but acknowledging that there may be a need for greater public oversight of mediators to promote fairness).

117. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975); see also Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 776–79 (1985) (highlighting contract law’s rejection of any “social organization that seeks to impose a particular vision of the good above all others”).

118. 5A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1123 (1964) (further stating that concerns for willfulness indicate “childlike faith in the existence of a plain and obvious line between the good and the bad, between unfortunate virtue and unforgivable sin”).

119. 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.17a (3d ed. 2004) (explaining bases for contract law’s avowed disregard of willfulness).

120. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 743 (1979) (explaining how classical law used will theory to justify presumed enforcement of contracts); Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1516–19 (2003) (emphasizing centrality of free will in contract theory); Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 75–78, 107–20 (1993) (discussing how caveat emptor has prevailed in American contract law, but proposing that this should be tempered by a precontractual duty to negotiate in good faith under modern contract law).

121. See Epstein, *supra* note 117, at 293, 295–301 (emphasizing how fraud, duress, undue influence, and incompetence do not call courts to assess the fairness or reasonableness of substantive contract terms, but expressing concern with minimizing the cost associated with application of incompetence defense).

This formalist view has been revived and reinforced by law and economics scholars.¹²² Many of these scholars insist that contracts should be enforced as written, and that courts should resist “the tug to a more paternalistic conception of the judicial role in enforcing contracts.”¹²³ They suggest that this formalist regime promotes the parties’ long-term interests and efficient distribution of resources for the public at large.¹²⁴ They therefore reject any inquiry regarding the moral justifications for enforcing contracts based on apparent “consent” at the time of contract.¹²⁵

Although efficiency and certainty are important considerations, justice and good faith remain central to contract equations.¹²⁶ Aristotelian notions of “rectificatory,” or corrective, justice in contractual dealings survive in courts’ assessments of bargaining conduct.¹²⁷ Furthermore, we share universal standards of fairness, divinely and secularly formulated, by virtue of our “common humanity.”¹²⁸ Hobbes echoed that reason and public order dictated “natural” or “moral”

122. See Brian Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, 19 QUINNIPIAC L. REV. 715, 715–20 (2000) (“The virtuous prefer good, villains prefer bad, and rational actors in economics prefer themselves.” (quoting Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. REV. 903, 903–04 (1998))).

123. *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 524 (7th Cir. 1986).

124. Bix, *supra* note 122, at 717 (noting how works of Professor Epstein and other law-and-economics theorists suggest that presumed enforcement of so-called adhesion contracts may be in “the long-term interests of those who sign” them).

125. See *id.* at 720–21 (emphasizing that few scholars “dig[] down deep as one might into the moral question: why, or under what circumstances, should ‘consent’ justify state enforcement of agreements?”). To be sure, it would be inefficient for every court to consider “deep questions of moral justifications of consent” in every case. *Id.* at 720. Furthermore, any critique of presumed enforcement must be careful to consider whether a better approach will have better or worse long-term effects. *Id.* at 720–21; see also Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 744–51 (1982) (discussing “the bargain principle,” which assumes courts should not question the substantive fairness or adequacy of consideration for contracts).

126. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 787 (2002) (noting how fairness matters despite scholars’ disclaimers of its relevance and assumptions that “economic Darwinism” allows those with power to use that power to obtain more).

127. HENRY MATHER, *CONTRACT LAW AND MORALITY* 45–47 (1999) (emphasizing how “Aristotelian rectificatory justice is linked to morality in a very direct and pervasive way,” and explaining how this theory of justice bases remedy on “whether the defendant’s conduct was morally wrongful” although it seeks to limit the remedy to restoring the status quo ante).

128. See Charles L. Barzun, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1058–71, 1079–88 (2004) (discussing legal science of inductive discovery of “moral” truths, derived from natural experience and common sense, and emphasizing how natural assumptions of fairness and equality limited the caveat emptor norm in American courts); Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 861–62, 868–69 (1999) (noting how Cicero believed obligations should promote civic virtue, and Hegelians rejected strict individualism to the detriment of communal values).

precepts for humankind's peaceful survival,¹²⁹ which included the obligation to perform private contracts.¹³⁰ Bargaining ethics are therefore woven into our social and legal culture.¹³¹ They resonate in contract doctrines such as unconscionability¹³² and in duties under the *Restatement (Second) of Contracts* and the UCC to perform contracts in good faith.¹³³ The duty of good faith and fair dealing thus applies to parties' performance of contract duties.¹³⁴

Accordingly, contract law should require parties to keep their ADR promises and follow through with commitments to cooperate in good faith.¹³⁵ Of course, the meaning of "good faith" in a given context is problematic. This is not, however, a sufficient reason to cast it aside.¹³⁶ The enforcement of good-faith compliance with ADR agreements serves societal interests by reinforcing parties' confidence in their contracts¹³⁷ and promoting promise-keeping and good-faith bargaining.¹³⁸ Private law is not nearly as amoral as it claims to be.¹³⁹

129. Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 IOWA L. REV. 713, 718 (1992) (explaining how Hobbes viewed submission to a sovereign and "natural laws" as necessary to quell humankind's "natural condition" of war).

130. *Id.* at 719. In Hobbes's view, individuals have a duty to justly perform their contracts regardless of the sovereign's demands. *Id.*

131. See Palmieri, *supra* note 120, at 72–74 (highlighting good faith and fair dealing as "a fundamental commandment of social behavior").

132. See *id.* at 72–77 (emphasizing that ethics and morality have always been part of our conceptions of contracting and have formed foundations for duties of good faith that prevail in civil law and survive in modern contract law). Despite the current return to formalism and economic preoccupation, concern for fairness has thankfully survived. See Knapp, *supra* note 126, at 790–98 (discussing fairness of mandatory arbitration and very real concerns regarding stolen access to the courts).

133. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (stating that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"); U.C.C. § 1-203 (2002) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

134. *Prof'l Serv. Indus., Inc. v. Kimbrell*, 834 F. Supp. 1305, 1310 (D. Kan. 1993); see also *Travelers Indem. Co. of Ill. v. CDL Hotels U.S.A., Inc.*, 322 F. Supp. 2d 482, 494 (S.D.N.Y. 2004) (emphasizing how the duty of good faith applies to performance of contract duties but does not extend to future negotiations).

135. Charles L. Knapp, *The Promise of the Future—and Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. 932, 950–52 (1984) (highlighting the importance of promoting socially desirable outcomes through contract law, regardless of efficiency); see also Palmieri, *supra* note 120, at 75–77, 105–08, 199–201 (noting doctrines protecting bargaining morality and proposing duty to negotiate in good faith).

136. See *infra* notes 223–235 and accompanying text (discussing tensions involved with enforcing ADR agreements).

137. See Izumi & La Rue, *supra* note 90, at 71–73 (noting arguments favoring mandatory mediation).

138. See Knapp, *supra* note 135, at 951 (emphasizing that "promise-keeping in general is not merely praiseworthy behavior, but an absolutely necessary glue for holding society together").

139. See James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1, 22–23 (2002) (drawing on work of the "Late Scholastics" in discussing moral foundations of contract

Moreover, requiring good-faith participation in ADR pursuant to contract promises in fact comports with both modern efficiency and classical contract principles.

B. Inefficiency of Uncertain and Confused Analysis of ADR Agreements

1. Absence of Guidelines for Courts and Practitioners

There remains a thorny question: "To enforce or not to enforce?" Courts have exacerbated the uncertainties of finding answers by dodging the question under the guise of a yes-contract/no-contract regime, and legislators and policymakers have similarly declined to confront enforcement of ADR agreements.

Recently, the National Council of Commissioners on Uniform State Laws (NCCUSL) had an opportunity to clarify enforcement rules for mediation as it revised the UAA and crafted the Uniform Mediation Act (UMA). NCCUSL failed to take advantage of this opportunity, however, by declining to mandate summary enforcement or to set other enforcement standards for promises to participate in mediation.¹⁴⁰ Revisors of the UAA and drafters of the UMA determined that the summary enforcement scheme of the UAA is ill-suited for mediation, and assumed that the common law adequately addresses enforcement of ADR agreements.¹⁴¹ In addition, they indicated that the UAA should not extend to mediation because it would eliminate legal-process protections that apply in other contract cases.¹⁴²

Policymakers have also avoided setting standards for fair bargaining.¹⁴³ The UMA drafters declined to prescribe how courts or mediators should police the behavior of ADR participants. Similarly, the proposed Revised Model Standards of Conduct for Mediators promulgated by a committee of the American Bar Association (ABA), American Arbitration Association (AAA), and Association

law, and concluding that we must escape the "circle of modern ideas" to understand economics and law).

140. See UNIF. MEDIATION ACT (UMA) § 5(i) (Annual Meeting Draft, July 23–30, 1999) (noting that the National Council of Commissioners on Uniform State Laws (NCCUSL) recently considered and rejected expansion of the UAA to mandate specific enforcement of agreements to mediate). In addition, drafters of the UMA did not prescribe enforcement legislation regarding enforcement of agreements to mediate because they assumed that common contract law provides for enforcement analysis. See generally UNIF. MEDIATION ACT (2001), reprinted in 22 N. ILL. U. L. REV. 165 (2002) (providing final draft without summary enforcement provisions) [hereinafter UMA].

141. See Schmitz, *supra* note 8, at 12–14 (discussing NCCUSL's decision not to prescribe summary enforcement for agreements to mediate).

142. *Id.*

143. See Izumi & La Rue, *supra* note 90, at 71–76.

for Conflict Resolution, do not prescribe rules for enforcing ADR agreements.¹⁴⁴ Instead, the proposed standards reinforce the voluntary nature of mediation, while also stressing a mediator's duty to promote "diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants."¹⁴⁵

Courts and policymakers have failed to clarify, or even confront, thorny questions regarding the enforcement of ADR agreements and have left parties with little guidance as to the enforceability of their ADR agreements. Understandably, courts and commentators disagree about whether, when, and how to enforce ADR agreements. They should rethink their yes-contract/no-contract regime, however, in order to protect bargaining integrity and the efficacy of ADR agreements.¹⁴⁶

2. *Increased Litigation over ADR*

While courts and commentators avoid difficult questions regarding enforcement of ADR agreements, parties continue to sue one another over their ADR promises.¹⁴⁷ Without clear guidance, parties are often uncertain about the enforceability of their ADR agreements. They therefore waste their time and resources, as well as those of the courts, fighting about how they will resolve their fights.¹⁴⁸

In *Marland v. Safeway, Inc.*,¹⁴⁹ for example, the parties spent significant resources litigating disputes arising out of a postsettlement contract containing an ADR clause, which was intended to save them the headaches of further litigation.¹⁵⁰ The first disputes erupted in 1993, when Marland sued Safeway on claims relating to its contract to sell

144. See generally MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitration Ass'n, Am. Bar Ass'n & Ass'n for Conflict Resolution 2005), available at <http://moritzlaw.osu.edu/programs/adr/msoc/pdf/standards-090805.pdf> [hereinafter MEDIATOR STANDARDS].

145. *Id.* Standards I, VI.

146. See Temkin, *supra* note 10, at 132, 160–61 (emphasizing ambiguities of courts' "all-or-nothing" enforcement of duties to negotiate, and concluding that there was "no judicially recognized theory of an appropriate remedy" for enforcing duties to negotiate in good faith).

147. See, e.g., *HIM Portland, L.L.C. v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (exemplifying lengthy litigation regarding a contract to mediate before seeking arbitration).

148. See *id.* (debating the duty to mediate all the way to the First Circuit Court of Appeals, where the court dismissed the motion to compel arbitration because the parties failed to mediate as a condition precedent to arbitration); see also *Vestar Dev. II, L.L.C. v. Gen. Dynamics Corp.*, 249 F.3d 958, 959–62 (9th Cir. 2001) (emphasizing the "unsettled nature" of the enforceability of an agreement to negotiate in good faith, and therefore opting to finally end the parties' years of litigating a breach of duty to negotiate claim based on the claimant's failure to prove damages).

149. 65 Fed. App'x 442 (4th Cir. 2003).

150. *Id.* at 444–48.

cleaning products to Safeway. The parties settled these disputes prior to trial and signed a new three-year sales contract that included a clause requiring them to pursue ADR in good faith to settle any future disputes.¹⁵¹ Despite this clause, the disputes continued and Marland sued Safeway on various claims, including breach of the ADR agreement.¹⁵² The parties then wasted three more years litigating these claims, which federal courts ultimately rejected.¹⁵³

The litigation produced nothing more than mixed messages regarding the viability of claims for breach of ADR agreements. The district court found that no claim existed for breach of the duty to mediate, but the appellate court stated, "Marland may at one time have had an action for specific performance to compel mediation."¹⁵⁴ The court affirmed summary judgment for Safeway on Marland's breach of the ADR agreement claim, however, because Marland failed to prove that the damages were foreseeable to Safeway at the time the parties signed their second contract.¹⁵⁵ The court therefore seemed to indicate that Marland's only remedy for breach of the ADR agreement would have been to obtain an order compelling mediation.¹⁵⁶ The court's use of the word "may," however, left the parties wondering whether it would have actually condoned specific enforcement of the mediation agreement.

IV. RECOGNIZING VALID ADR AGREEMENTS AND DUTIES TO PERFORM THEM IN GOOD FAITH

Courts should no longer collapse questions regarding validity and enforcement of ADR agreements into one yes-contract/no-contract conclusion as they have done with respect to other contracts to bargain. Instead, they should separately determine (1) whether a valid ADR agreement exists and (2) how to enforce that agreement, all the while giving due regard to the flexible middle-position character of these agreements. With respect to step one, this Article merely proposes that courts promote the certainty and efficacy of ADR agreements by confirming the validity of such agreements when they are supported by offer, acceptance, and consideration. The Article also acknowledges the imprecise nature of these agreements, however, by inviting courts to ease their current formalist analysis of ADR agree-

151. *Id.* at 444-45.

152. *Id.* at 445-49.

153. *Id.* at 445-49 & n.3 (reporting that these claims were first filed on July 28, 2000).

154. *Id.* at 448-49.

155. *Marland*, 65 Fed. App'x at 448-49.

156. *See id.*

ments and use duties of good faith to fill the agreements' understandable gaps. Furthermore, the second step of the approach calls on courts to consider context and post-contract relations in deciding when breaches have occurred and what remedies are available for enforcing valid ADR agreements.

A. *Presence of Contractual Ingredients at Contract Formation*

Parties to pre-dispute ADR agreements include these agreements in their overall deals, often not expecting they will encounter disputes. They may offer, accept, and provide consideration for an ADR clause in their deals as means for avoiding the time and expense of litigating future disputes. In such cases, formalist contract rules would dictate that courts enforce these exchanges of promises, provided they survive traditional contract defenses.¹⁵⁷ This is especially true in light of public policy promoting ADR as means for easing the burden on the courts.¹⁵⁸ As one court noted with respect to agreements to negotiate, “[a] contract, after all, is ‘an agreement to do or not to do a certain thing.’”¹⁵⁹

Nonetheless, courts have narrowed their applications of offer, acceptance, and consideration standards to ADR agreements, thereby avoiding the more intricate difficulties of crafting proper enforcement remedies. They often assume ADR agreements are too indefinite or are otherwise unenforceable “agreements to agree.”¹⁶⁰ Courts should broaden their analysis to recognize that ADR agreements are different from “agreements to agree” in that they do not require that parties reach an agreement in order to have meaning.¹⁶¹ Enforcement of an ADR agreement should focus on process—not result. Contract law, which holds parties to their promises, should apply to commitments to engage in ADR processes.¹⁶² Indeed, ADR agreements indi-

157. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* §§ 2.5, 2.11, 4.2, 9.1 (4th ed. 1998) (explaining basics of offer, acceptance, and consideration, but also providing that an agreement may be void or voidable “because it is contaminated by duress, undue influence, misrepresentation, mistake, or unconscionability”); *see also id.* at §§ 9.2, 9.9, 9.10, 9.13, 9.25, 9.37, 9.38 (setting forth bases and elements of these defenses).

158. *See, e.g.*, *Pearson v. Dist. Court*, 924 P.2d 512, 515–16 (Colo. 1996) (en banc) (finding courts have power to order parties to mediate in the interest of “just, speedy, and economic resolution of disputes”).

159. *Copeland v. Baskin Robbins U.S.A.*, 117 Cal. Rptr. 2d 875, 880 (Ct. App. 2002) (quoting CAL. CIV. CODE § 1549 (West 1982)).

160. *See id.* (finding same with respect to contracts to negotiate); *see also supra* notes 69–83 and accompanying text (discussing how ADR agreements, like other contracts to bargain, are not agreements to agree).

161. *Copeland*, 117 Cal. Rptr. 2d at 880–81.

162. This distinction has led some courts to be less resistant to enforcing contracts to negotiate terms of a deal. *Id.* at 882 (gathering citations).

cate a firm commitment to participate in an ADR process and are not merely agreements to agree that require compliance with a contemplated but uncompleted contract.¹⁶³

A California Court of Appeals explained the difference between unenforceable agreements to agree and enforceable ADR agreements in *Copeland v. Baskin Robbins, U.S.A.*¹⁶⁴ In that case, Baskin Robbins and Copeland signed a statement agreeing to many terms regarding a co-packing arrangement under which Copeland would purchase Baskin Robbins's ice cream manufacturing plant, and Baskin Robbins would in turn agree to purchase ice cream from Copeland.¹⁶⁵ The parties continued negotiations but never finalized key terms such as price because Baskin Robbins suddenly broke off discussions due to "strategic decisions" it had made about its business.¹⁶⁶ The court found that Copeland could have a claim for breach of their agreement to negotiate because it was not merely an agreement to agree that evidenced the parties' intent to remain uncommitted until they formalized their agreement.¹⁶⁷

ADR agreements are distinguishable from agreements to agree because they require the parties to *do something*—to engage in ADR. In *Gillenardo v. Connor Broadcasting Delaware Co.*,¹⁶⁸ for example, the court found the parties' contractual duties to negotiate "to be real, not illusory," where the plaintiff had offered to negotiate in good faith to buy the defendant's radio stations, and the defendant had accepted that offer by executing a letter of intent to work diligently to finalize a sales agreement.¹⁶⁹ This did not mean, however, that the defendant was obligated to actually finalize the sales contract. It was not an agreement to sell.¹⁷⁰

The first step in my proposed analysis therefore comports with traditional contract rules. It reinforces that courts should consider offer, acceptance, and consideration in assessing the validity of ADR agreements. Nonetheless, the proposal asks courts to ease the formalism of their traditional analysis and to find ADR agreements enforceable even if they do not delineate clear standards for compliance. In other words, courts should not unduly focus on the specificity of terms as a means for avoiding intricate difficulties of determining enforce-

163. *Id.*

164. *Id.* at 880.

165. *Id.* at 876–78.

166. *Id.* at 878–79.

167. *Copeland*, 117 Cal. Rptr. 2d at 881–82.

168. No. C.A. 98C-06-015 WLW, 2002 WL 991110, at *1 (Del. Super. Ct. Apr. 30, 2002).

169. *Id.* at *6–8.

170. *Id.*

ment remedies. Admittedly, ADR agreements are murky because they preserve parties' freedom to control the ADR process and reject any settlement of their disputes. Courts should nonetheless recognize the validity of ADR agreements marked by offer, acceptance, and consideration in order to protect their relevance and efficacy.

B. Recognition of Good-Faith Duties to Fill Gaps in ADR Agreements

In recognizing the validity of ADR agreements, courts should also appreciate the duty to perform these agreements in good faith and use this duty to fill the agreements' understandable gaps. Despite the fact that courts and legislators have espoused support for ADR, they have declined to delineate standards for compliance with ADR agreements.¹⁷¹ At the same time, formalist trends have disempowered duties of good faith that contract law has traditionally required for the performance of all contracts.¹⁷² Contract law implies such duties in recognition of the reality that "[c]ontracts are always more than the contract document."¹⁷³ Furthermore, implying duties of good faith effectuates the parties' reasonable expectations¹⁷⁴ and fills the gaps inevitably left open in ADR agreements.¹⁷⁵

171. See, e.g., COLO. REV. STAT. §§ 13-22-502 to 22-507 (1989) (Colorado International Dispute Resolution Act exemplifying law encouraging use of mediation and conciliation but failing to provide standards or guidelines for participation in these processes); see also *Vestar Dev. II, L.L.C. v. Gen. Dynamics Corp.*, 249 F.3d 958, 959-62 (9th Cir. 2001) (highlighting the unclear law regarding the existence and enforceability of agreement to negotiate in good faith); *supra* notes 140-146 and accompanying text (discussing UMA drafters' and other policymakers' avoidance of mediation definition and enforcement issues).

172. See, e.g., Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 227-33 (2005) (advocating the demise of the implied covenant of good faith in some contracts). But see RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (recognizing duties of good-faith performance); Palmieri, *supra* note 120, at 88-99 (discussing basic contract law requiring good-faith performance of contract duties).

173. D. Gordon Smith, *Independent Legal Significance, Good Faith, and the Interpretation of Venture Capital Contracts*, 40 WILLAMETTE L. REV. 825, 844-45 (2004) (quoting Stewart Macaulay, *The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 45 (2003)) (explaining that the implied duty of good-faith attempts to effectuate what the parties would have contracted for had they thought to negotiate the issue).

174. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmts. a & c (1981) (recognizing duty of good faith, but noting it generally does not apply to the formation of a contract); *Copeland v. Baskin Robbins U.S.A.*, 117 Cal. Rptr. 2d 875, 883 (Ct. App. 2002) (rejecting Baskin Robbins's argument that requiring good faith in an agreement to negotiate would discourage parties from even beginning negotiations due to fear that liability would attach).

175. See Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEG. L. REV. 69, 79-84, 100-01 (2005) (explaining how the definition of mediation itself depends on context, although some seek to define it prescriptively in hopes of protecting "moral integrity" of the process); Vanessa Sims, *Good Faith in Contract Law: Of Triggers and Concentric Circles*, 16

1. *Currently Disempowered Duties of Good Faith*

Courts and commentators debate the legitimacy of good-faith duties and whether good faith requires subjective honesty or objectively reasonable behavior.¹⁷⁶ They also disagree about whether duties of good faith should apply to protect reasonable expectations regarding participation in ADR processes.¹⁷⁷ Formalist trends, however, have opposed implied duties of good faith on the ground that such duties allow courts too much latitude in defining good faith, akin to Justice Stewart's "I know it when I see it" approach to obscenity.¹⁷⁸ Accordingly, most courts and commentators have rejected proactive attempts to delineate standards to participate in ADR in good faith.

Nonetheless, Professor Kimberlee Kovach has delineated a list of good-faith participation standards which includes compliance with any contract, judicial, or statutory terms, attendance at dispute resolution sessions with full authority to settle, preparation for such sessions, and meaningful participation in the sessions.¹⁷⁹ This list also requires parties to refrain from misleading disputants, defying mediators' directives, or abandoning the process before the mediator declares an impasse or otherwise excuses the parties.¹⁸⁰ Meanwhile, Susan Oberman has proposed a looser definition of good faith aimed at protecting autonomy in ADR and the wide range of models and values dispute resolution may serve.¹⁸¹ She defines good faith as requiring that parties mediate with "intention and authority to negotiate," and that they "provide necessary documentation or information."¹⁸²

KING'S C. L.J. 293, 293-95, 302-07 (2005) (discussing controversy regarding good faith in English contract law, and finding that the standard must be contextual and practical).

176. See Roger L. Carter, *Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 368-78 (discussing conflicting views of the meaning of good-faith participation in mediation).

177. See Roy Kreitner, *Frameworks of Cooperation: Competing, Conflicting, and Joined Interests in Contract and Its Surroundings*, 6 THEORETICAL INQUIRIES L. 59, 87-93 (2005) (discussing how conflict of interest theory narrows any contractual duties of good faith).

178. See Dobbins, *supra* note 172, at 227-33 (critiquing implied duties of good faith in certain contexts); Kreitner, *supra* note 177, at 87-93.

179. Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 615-16 (1997).

180. *Id.* at 600-22.

181. See Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Resolving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 776-86, 795-98 (2005) (discussing spectrum of mediation models and basic elements of self-determination in mediation).

182. *Id.* at 798. By requiring that parties indicate commitment in this way, Oberman's definition also seems to comport with courts' definition of the duty to collectively negotiate labor disputes in good faith in a manner aimed "to resolve differences and reach a common understanding." *Bon Homme County Comm'n v. Am. Fed'n of State, County, & Mun. Employees*,

Some courts also have indicated a willingness to recognize a good-faith duty to refrain from interfering with others' "reasonable expectations" regarding performance of their ADR agreements.¹⁸³ These courts recognize that good faith should preclude parties from harming each other's rights to enjoy the "fruits of the contract."¹⁸⁴ One court, for example, affirmed a jury finding of bad-faith breach of an agreement to negotiate where the defendant provided "disingenuous" excuses or reasons for breaking off negotiations.¹⁸⁵ The court explained that parties must refrain from "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract."¹⁸⁶

Imposing *any* level of compliance with duties to pursue ADR in good faith is controversial because it is arguably inconsistent with ADR's consensual nature.¹⁸⁷ Most courts and commentators have therefore criticized "reasonable expectations" definitions of the implied duty of good faith.¹⁸⁸ They worry that imposing proactive good-faith duties may effectively force the parties to settle their disputes or offer certain settlement amounts. In *Indiana v. Carter*,¹⁸⁹ for example, the court rejected a finding that the state failed to act in good faith by offering only a \$3,000 settlement amount during mediation of a tort claim.¹⁹⁰ The court therefore reversed an order against the state to pay sanctions and costs, and emphasized that the \$3,000 offer did not represent the kind of bad faith required for a court to impinge on parties' autonomy in ADR.¹⁹¹ The court also explained that settlement is not the only goal of ADR; it may also be useful in facilitating

Local 1743A, 699 N.W.2d 441, 444–48 (S.D. 2005) (imposing such a duty to collectively negotiate under South Dakota law).

183. See Dobbins, *supra* note 172, at 252 (discussing various definitions and debate among and within jurisdictions).

184. *Id.*

185. Gillenardo v. Connor Broad. Del. Co., No. C.A. 98C-06-015 WLW, 2002 WL 991110, at *8–9 (Del. Super. Ct. Apr. 30, 2002).

186. *Id.* at *8.

187. See Reuben, *supra* note 94, at 50–51 (noting disagreement with proposals that mediation may be unilaterally imposed). There are valid criticisms of court-mandated ADR with respect to possible coerced settlement and inefficiency of token compliance with unilaterally imposed programs. *Id.* With respect to enforcement of ADR agreements, however, the parties have consented to engage in the ADR process. Accordingly, it seems courts should enforce these consensual promises, although they must do so carefully and without effectively forcing settlement. Of course, this leads to difficult inquiries regarding levels and types of proof, as well as remedies, for breach of ADR duties.

188. See Dobbins, *supra* note 172, at 255–59 (critiquing definitions of good faith).

189. 658 N.E.2d 618 (Ind. Ct. App. 1995).

190. *Id.* at 620–22.

191. *Id.* at 623–24.

the exchange of information, reducing misunderstandings, and clarifying priorities.¹⁹²

Similarly, the court in *Avril v. Civilmar*¹⁹³ emphasized that courts should not order sanctions against a party for offering small settlement amounts.¹⁹⁴ In that case, the court reversed the trial court's sanctions order against a defendant for failure to mediate in good faith based on the defendant's refusal to offer more than \$1,000 as a final settlement of plaintiff's car collision case.¹⁹⁵ The court explained that sanctions are proper only against a party that shows actual bad faith by not attending the mediation or by refusing to comply with an agreement term.¹⁹⁶

In this way, most courts define good faith to preclude only clear and objective bad-faith breach under what some refer to as "excluder analysis."¹⁹⁷ In *Office Environments, Inc. v. Lake States Insurance Co.*,¹⁹⁸ for example, the court affirmed dismissal with prejudice of a plaintiff's claim as a proper sanction for the plaintiff's failure to comply with the court's mediation order pursuant to local rules.¹⁹⁹ The plaintiff derailed the process in bad faith by causing the mediator to cancel the mediation after the plaintiff neglected to pay the mediator's retainer fee and contributed to over five years of delays by rescheduling the mediation three times.²⁰⁰ Furthermore, the court refused to consider the plaintiff's last-minute objections to the mediation order and fee, which the plaintiff finally raised after the court dismissed the case.²⁰¹

Mediation practitioners and commentators also have been unwilling to announce clear criteria for good-faith participation in ADR. They discussed the difficulties of defining good faith at the American Journal of Trial Advocacy's 2004 Symposium on Issues Affecting the Pro-

192. *Id.*

193. 605 So. 2d 988 (Fla. Dist. Ct. App. 1992).

194. *Id.* at 989-90.

195. *Id.* at 989-92.

196. *Id.*; see also *Wholesale Tape & Supply Co. v. Icode, Inc.*, No. 1:04-CV-266, 2005 WL 3535148, at *8-10 (E.D. Tenn. Dec. 22, 2005) (explaining that "good faith imposes 'an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of the law'" in rejecting an argument that the defendant failed to act in good faith by refusing to pay plaintiff the refund it requested (quoting *Lane v. John Deere Co.*, 767 S.W.2d 138, 140 (Tenn. 1989))).

197. Dobbins, *supra* note 172, at 271-73 (explaining Professor Summers's "excluder analysis").

198. 833 N.E.2d 489 (Ind. Ct. App. 2005).

199. *Id.* at 494-96.

200. *Id.*

201. *Id.* at 495-96 (noting that defendant wasted time and resources preparing for the scheduled mediation sessions that plaintiff cancelled on short notice).

essional Mediator.²⁰² Jack Cooley, chair of the ABA Dispute Resolution Section, offered the most extensive discussion of good faith. He explained that the hurdles of defining and enforcing good-faith participation in court-ordered mediation led the ABA to conclude that parties should be sanctioned only for objectively bad-faith conduct, such as failing to attend mediation.²⁰³ This has also prompted the ABA to reject adoption of rules requiring that parties attend mediation with settlement authority or that they make a settlement offer during a mediation.²⁰⁴ In addition, other commentators have rejected any attempts to impose more subjective standards of good faith.²⁰⁵

Although most see good faith as a “good thing” in theory, there is no generally accepted definition of good faith, let alone a duty to participate in ADR in good faith.²⁰⁶ The most we can glean from the cases is a tenuous “excluder analysis” that relies on a circular definition of good faith: good faith means no bad faith. But the meaning of “bad faith” inevitably depends on how parties expect each other to behave in “good faith.” An excluder analysis also is different from a more proactive “reasonable expectations” definition of good faith with respect to burdens of proof and definition. An excluder analysis places the burden on the party asserting breach to show that the other behaved in a manner blatantly hostile to the ADR agreement. A more proactive definition requires the parties to comply with good-faith standards determined in light of parties’ reasonable expectations. This means parties asserting breach bear a heavier burden of proof under the excluder analysis, while courts bear a heavier burden seeking to define good-faith standards under a reasonable expectations analysis. Furthermore, courts have narrowed the application of the excluder analysis by rarely finding bad faith and by seeking avenues for avoiding the difficulties of contextually analyzing parties’ ADR agreements.

202. William W. Huss, et al., *The Legal Foundation—Defining the Legislative Format*, 28 AM. J. TRIAL ADVOC. 19, 19–28 (2004).

203. *Id.* at 38–39.

204. *Id.*

205. See Carter, *supra* note 176, at 379 (explaining the “moderate approach” some commentators suggest for prescribing enforcement of objective good faith such as “compliance with procedural rules and orders, completion and exchange of pre-mediation forms, and physical presence at the mediation,” while rejecting subjective rules “more closely linked to a party’s intent”).

206. See Dobbins, *supra* note 172, at 252–55 (discussing various definitions and debate among and within jurisdictions).

2. *A Proposed Approach for Reinvigorating Duties of Good Faith to Fill Gaps in ADR Agreements*

The prevailing excluder analysis of good faith typifies the strategy of avoidance that courts employ in analyzing contracts to bargain. If courts were to honestly confront the meaning of good faith, they would have to consider context in determining the parties' reasonable expectations. Instead, courts use the excluder approach to cast aside claims of breach of ADR agreements and to avoid even attempting to give meaning to promises to participate in ADR. Although this may conserve judicial resources, it undervalues parties' promises to pursue cooperative processes and hinders the efficiency of ADR agreements by leaving parties without contracting guidance. Parties are left wondering whether it is worthwhile to even include ADR agreements in their contracts, let alone take them seriously when disputes arise.

Accordingly, contextual good-faith duties to cooperate that may be improper in arm's length pre-contract negotiations, may nonetheless be appropriate and necessary to enforce ADR agreements.²⁰⁷ Courts should not avoid setting good-faith standards by defining good faith as merely excluding blatant bad faith. Instead, they should provide real contracting guidance and recognize that contextual good-faith standards may be necessary in some cases in order to properly enforce parties' ADR promises and promote the efficacy and efficiency of ADR.²⁰⁸

Courts should use express contract terms as the starting point for determining what good faith requires under an ADR agreement to give effect to procedures parties delineate in their contracts. This focus on contract terms should also promote contract compliance and efficiency, and may prompt parties to more carefully construct their ADR agreements. Courts must look beyond ADR agreement terms, however, because parties to ADR agreements rarely delineate clear ADR procedures or participation standards in their contracts. Courts should require, at a minimum, that parties initiate the ADR process and cooperate in that process until it legitimately becomes futile or counterproductive. This should also require that parties offer each

207. See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 *IND. L.J.* 591, 604–06 (2001) (discussing mediator and participant misconduct, especially prevalent in uneven bargaining contexts).

208. See Carter, *supra* note 176, at 393 n.187 (noting some courts' and commentators' advocacy of more subjective standards as necessary to promote cooperative ADR and protect the integrity of an ADR process).

other a real opportunity to air their claims and participate in the process.²⁰⁹

In order to ensure a “real opportunity” to be heard, parties cannot derail the process or take opportunistic advantage of gaps they have intentionally left in the ADR agreement.²¹⁰ Applying Professor Ben-Shahar’s “no-retraction” principle, a retracting party should not be able to walk away from a commitment to participate cooperatively in an ADR process without liability.²¹¹ However, courts should fill gaps parties have left in their ADR agreements with terms most favorable to the retracting party.²¹² This gives would-be retractors incentive to pursue the process, unafraid that they will become subject to onerous obligations by initiating ADR discussions.²¹³ It also prevents parties from being forced to settle or offer certain settlement amounts, and should allow parties to withdraw from a truly unproductive or unsatisfying ADR process without having to provide “proper reason” or specific justification.²¹⁴

In addition, although the claimant would bear the ultimate burden of proving the alleged retractor breached the ADR agreement, a retractor seeking to fill gaps in the agreement with its favored terms would have to show that those terms are reasonable in light of the parties’ relationship. This is appropriate because that party will usually have both the incentive and the information to prove the reasonableness of its reading of the contract. This, in turn, may ease the court’s burden in filling gaps, thereby lowering costs and improving

209. See Philip J. Harter, *A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadow’s Essay on Deliberative Democracy*, 5 NEV. L.J. 379, 385–87 (2004) (explaining that those affected by a decisionmaking process should have the opportunity to participate in that process); Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 395–96 (2005) (discussing the role of authentic participation in court-connected ADR).

210. See generally Omri Ben-Shahar, “*Agreeing to Disagree*”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389 (explaining how different gap fillers should apply in different circumstances and how parties intentionally leave some contract terms incomplete).

211. See Ben-Shahar, *supra* note 73, at 1830–40, 1844–62 (explaining the principle as a unifying approach and applying it to supplement terms in unclear agreements).

212. See *id.* at 1844–71 (applying the no-retraction principle to duties to negotiate in good faith).

213. See *id.* (further explaining incentives). One may argue that this principle would spark a race to be the first retractor. This seems unlikely, however, because the retractor would still be ordered to mediate and may be liable for attorney’s fees and costs of involving the courts in the process.

214. See Iain Thain, *Almost Contract: (ii) Agreements to Agree*, NEW ZEALAND L.J. 162, 163–64 (2005) (explaining New Zealand courts’ approaches to agreements to negotiate and limits on enforcement).

efficiency of resolving disputes.²¹⁵ That said, the likely effects of burden allocation are dependent on context.²¹⁶

In many cases, this may cause a court to find that the parties' ADR agreement required them to disclose information during an ADR process that they would not otherwise have had a duty to reveal. Although courts have become increasingly averse to requiring pre-contract duties of disclosure in arm's-length transactions, they have indicated a willingness to find disclosure duties where parties share a special relationship or have unequal access to information.²¹⁷ This is especially true where a party casually acquired the relevant information or has misrepresented the information in some way.²¹⁸ Disclosure duties are appropriate in ADR because parties to these agreements are not contracting strangers, and they have arguably formed quasi-fiduciary relationships by the time disputes develop and they must perform their ADR duties.²¹⁹ Furthermore, performance of ADR agreements should mean parties may not disingenuously neglect to disclose information in uneven bargaining contexts.

Indeed, candid and honest communications are essential to fruitful ADR processes. That is why laws generally protect the confidentiality of mediation in much the same manner as they protect the confidentiality of other settlement discussions.²²⁰ Although parties need not reveal "all their cards" during an ADR process, they should provide information the mediator reasonably believes to be necessary to facilitate fruitful discussions. An ADR process would be futile and counterproductive if parties were to show up at an ADR session unprepared and unwilling to honestly present the facts underlying their claims. Such passive-aggressive conduct creates an atmosphere of dis-

215. See Scott & Triantis, *supra* note 18, at 856–60 (explaining how allocation of burdens and standards of proof can increase efficiency of back-end enforcement of vague contract terms).

216. See *id.* at 860–64 (emphasizing difficulty of predicting allocation and efficiency of allocating burdens in practice).

217. Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1796–97, 1852–68 (2005) (discussing disclosure duties in common law of contracts and reporting findings from an empirical study of cases reported from 1789 to 2002).

218. *Id.* at 1852–68 (reporting findings from study, but not looking specifically at whether courts find disclosure duties in performing contracts to participate in ADR).

219. See Dobbins, *supra* note 172, at 240–41 (explaining importance of context in defining the implied duty of good faith, and acknowledging legitimate application of such duty where there is disparate bargaining power or "sufficient impact on the community," despite significant criticisms of the duty).

220. See UNIF. MEDIATION ACT, *Prefatory Note* (2001), reprinted in 22 N. ILL. U. L. REV. 165, 165–78; see also *infra* notes 223–235 and accompanying text (discussing confidentiality in mediation).

trust and leads other parties to assume defensive postures that prevent settlement discussions from moving forward.

Of course, any good-faith standard is driven by context and subject to reasonable disagreement. Good faith should require more with respect to performance of ADR agreements than it does in pre-contractual negotiations.²²¹ Parties to an ADR agreement have committed themselves to an essential term—the promise to pursue the stated ADR process—and courts should use standards of good faith to fill gaps in that process.²²² Furthermore, courts should base such standards on parties' reasonable expectations, giving greater weight to the likely expectations of the retracting party in order to promote voluntary compliance with an ADR agreement.

V. TACKLING DIFFICULTIES OF DETERMINING BREACH AND CRAFTING REMEDIES

Once a court finds a valid ADR agreement, the court must consider how it should enforce that agreement. Proof and remedy issues should not preclude courts from finding breach of an ADR agreement. Instead, courts should use available tools to provide remedies for breach, and enforce parties' commitments to engage in ADR in order to foster contract compliance and cooperative dispute resolution. Although this proposal may seem simplistic to some, the reality is that many courts have not followed this approach due to difficulties of assessing breach claims and crafting middle-ground remedies for enforcing ADR duties. This Article therefore explores how courts may overcome evidentiary hurdles to determine whether parties have breached ADR duties and what remedies courts should apply to address a party's breach. Moreover, the Article hopes to spark further exploration of when and how courts should tackle ADR enforcement tasks.

221. See *Barnes & Robinson Co. v. OneSource Facility Servs., Inc.*, No. M2004-01003-COA-R3-CV, 2006 WL 163218, at *3–5 (Tenn. Ct. App. Jan. 23, 2006) (finding no enforceable duty to negotiate in good faith in the case at issue, but citing other courts' enforcement of such preliminary agreements indicating commitment on essential terms of the contemplated final contract).

222. See *Surface Materials Sales, Inc. v. Surface Prot. Indus. Int'l*, 368 F. Supp. 2d 836, 840–42 (N.D. Ohio 2005) (finding action for breach of contract to negotiate appropriate where “unessential term[s] left to future agreement cannot be determined judicially and would otherwise be left unperformed”).

A. *Overcoming Evidentiary Hurdles to Prove Breach of ADR Duties*

Even when courts can determine what conduct constitutes breach of an ADR agreement, it is difficult for parties to prove breach in court due to confidentiality agreements and evidentiary or privilege rules that may preclude courts from considering mediator testimony or other evidence pertaining to negotiations in an ADR process.²²³ Parties to ADR processes often sign confidentiality agreements before they begin a process, never expecting that the other party will act in bad faith or otherwise breach its ADR duties. Moreover, even when parties do not expressly contract for confidentiality, statutes or court rules may prevent parties from later admitting ADR communications in court to prove another party's breach of the ADR agreement.

Candor and open discussion are necessary in ADR processes to foster fruitful and honest settlement discussions. This is why nonbinding ADR processes are more confidential than litigation or binding arbitration.²²⁴ Policymakers posit that without confidentiality protections, parties to nonbinding processes may hold back information due to fear that disclosure will prejudice them in litigation if the process fails or provide fuel for coerced and one-sided settlements.²²⁵ Nonetheless, commentators and policymakers continue to debate the impact of evidentiary exclusions on our notions of democratic transparency and on duties to participate in ADR in good faith.²²⁶

The drafters of the UMA sought to create confidentiality rules for mediation communications that navigate the fine line between promoting candor and preventing the bad-faith failure to participate in mediation.²²⁷ The UMA therefore prescribes a mediator privilege

223. See FED. R. EVID. 408 (protecting against admission of negotiations aimed toward settlement of the case); Jerry P. Roscoe, *What Did I Promise? The Path from Confidentiality to Conspiracy*, JUST RESOLS. (Am. Bar Ass'n Sec. of Disp. Resol.), Apr. 2005, at 6–7 (explaining the ambiguous confidentiality rules applicable to mediation discussions and conduct).

224. See, e.g., PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 326–31, 353 (2d ed. 2005) (explaining confidentiality rules applicable to conciliation under the international model law, and the absence of such rules regarding arbitration); see also Princeton Ins. Co. v. Vergano, 883 A.2d 44, 61–67 (Del. Ch. 2005) (emphasizing role of confidentiality in fostering settlement through mediation, and finding confidentiality considerations barred testimony of a mediator regarding parties' representations during the mediation).

225. See UMA §§ 1–16 (2001), reprinted in 22 N. ILL. UNIV. L. REV. 165, 179–247 (2002) (stating rules for confidentiality, mediator privileges, and disclosures); Elizabeth Strong, *The Uniform Mediation Act, An Opportunity to Enhance Confidentiality in Business Mediation*, 7 ADR CURRENTS, June–Aug. 2002, at 5, 6 (discussing confidentiality focus of UMA).

226. See Izumi & La Rue, *supra* note 90, at 71–76.

227. See Nancy F. Lesser, *How Much Confidentiality Does the UMA Provide?*, NAT'L L.J., Apr. 11, 2005, at S2 (highlighting the confidentiality rules suggested by the UMA, but noting

protecting the *mediator* from being compelled to disclose written, oral, and nonverbal statements made during the mediation or made for the purpose of conducting the mediation.²²⁸ The UMA does not, however, prevent the *parties* from disclosing mediation communications. Instead, it leaves the participants to agree to confidentiality rules before they engage in mediation.²²⁹ Furthermore, the UMA does not preclude disclosure of information that is discovered outside of the mediation process.²³⁰ In addition, parties may pierce a mediator's privilege to prove professional misconduct or in other situations where the need for obtaining evidence substantially outweighs the interest in confidentiality.²³¹

The Revised Model Standards of Conduct for Mediators, jointly proposed by the ABA and AAA, go a step further by requiring mediators to foster "honesty and candor" among participants and to maintain the confidentiality of "all information" obtained in the mediation or protected under an agreement of the parties.²³² Similarly, the AAA Mediation Procedures protect confidentiality of the communications made during the mediation process.²³³ These procedures generally do not, however, bar the disclosure of underlying information simply because it was at issue in a mediation.²³⁴ Furthermore, some state statutes and mediation rules further limit the enforcement and application of confidentiality protections to allow disclosure where necessary in light of public policy and other social goals.²³⁵

Confidentiality norms and rules generally focus on protecting communications made during ADR processes, where protection will pro-

limitations of UMA's confidentiality protections). As of Lesser's article, only four states had adopted the UMA, but many others were considering the Act's adoption. *Id.*

228. *Id.*

229. UMA §§ 4–8, *reprinted in* 22 N. ILL. L. REV. 165, 197–229 (2002); *see also* Lesser, *supra* note 227, at 82–84 (stressing that the onus is on parties to draft confidentiality agreements).

230. *See* UMA § 4, *reprinted in* 22 N. ILL. L. REV. 165, 197–205 (2002) (providing a privilege against admissibility of mediation communications but stating that this privilege does not protect evidence or information discovered outside of the mediation).

231. *See* UMA §§ 5–6, *reprinted in* 22 N. ILL. L. REV. 165, 206–23 (2002) (setting forth preclusions and exceptions to privilege).

232. MEDIATOR STANDARDS, *supra* note 144, Standard V (allowing a mediator to report "whether the parties appeared at a scheduled mediation and whether or not the parties reached a resolution").

233. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (July 2003) (requiring confidentiality with respect to mediation disclosures).

234. *Doe 1 v. Superior Court*, 34 Cal. Rptr. 3d 248, 251–52 (Ct. App. 2005) (concluding that California law precluded disclosure of materials the Archbishop prepared for mediation, but did not bar the Church from revealing the underlying information contained in the materials).

235. *See* Ronald J. Hedges, *Mediation Developments & Trends*, SK042 ALI-ABA 1485, 1521–31 (2005) (citing various state statutes and court rules limiting enforcement or effect of confidentiality agreements in litigation and settlement processes).

mote candid participation in an ADR process. They are not meant to provide means for parties to pervert ADR processes. For this reason, these rules generally leave escape hatches that allow for disclosure of ADR communications where disclosure is necessary to prove another party's breach of an ADR agreement. Indeed, it would thwart justice to allow parties to use policy-based confidentiality rules to hide their failures to pursue ADR in good faith.

Accordingly, courts and policymakers should clarify when parties may disclose ADR communications where it is necessary to prove a breach of the duty to participate in an ADR process. Parties should be permitted to use such safety hatches, however, only when they are unable to get the necessary proof elsewhere. Every attempt should be made to protect the confidentiality of ADR communications so that the integrity and efficacy of ADR processes are preserved. These hurdles, however, should not prevent courts from gathering the necessary evidence to determine whether a party has breached an ADR agreement.

B. Choosing and Using Judicial Enforcement Tools

Once a court decides that a party has breached an ADR agreement, the court should openly confront the practical and theoretical difficulties of providing a remedy for the breach. This is not an easy task. It is generally difficult for a court to calculate damages due to "lost opportunity" or reliance damages due to another's failure to properly engage in ADR. In addition, courts face hurdles in seeking to craft specific enforcement or injunctive remedies that may effectively force parties to settle. These difficulties, however, are not insurmountable, and courts have other remedial tools—such as sanctions—that may be appropriate in some cases.

1. Damages

Compensatory damages are the preferred remedy for breach of contract because damages generally compensate parties for losses, promote contract compliance and certainty in economic transactions, and require little judicial supervision or administration.²³⁶ Contract law favors the expectation measure of damages over restitution or reliance measures because the expectation measure seeks to place parties in positions they would have attained if the contract had been

236. See MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 4–6 (4th ed. 2001) (explaining the expectation damages rule as "easily the most important single idea in the whole contracts field").

performed.²³⁷ It is generally difficult for a court to use these measures to enforce ADR agreements, however, because a court cannot base damages on a speculative settlement that the parties may or may not have reached, and parties' reliance or restitution damages may also be speculative or nominal.²³⁸ Courts may nonetheless use these measures, as well as sanctions or liquidated damages, to provide proper relief in some cases.

a. Expectation Damages

Expectation damages seek to provide contracting parties with the benefit of their bargain.²³⁹ The benefit of the bargain under an ADR agreement generally is the opportunity to pursue the ADR process the agreement prescribes. The benefit is not certain settlement or assurance that the process would have saved the parties from litigation costs. The parties cannot even claim that their ADR bargain would have facilitated efficient exchange of information. Instead, the parties may merely claim that they lost the benefit of the opportunity to participate in ADR.

This leaves courts with little to use in attempting to measure expectation damages for breach of an ADR agreement. How does a court place an economic value on the lost opportunity to engage in ADR? Theoretically, there may be a way to determine a number based on the probability of settlement, a likely settlement amount, the estimated savings from avoiding litigation, and so forth. The problem is that these are all speculative valuations. Such murky measures of damages generally defy contract rules requiring that claimants prove damages with reasonable certainty.²⁴⁰

b. Reliance and Restitution Damages

In contrast to the expectation measure's forward focus, reliance and restitution measures look backward to pre-contract conditions. Reliance damages compensate parties for losses suffered in reliance on the breached contract, while restitution damages seek to disgorge breaching parties of benefits unfairly retained, or to otherwise place the parties where they would have been if there had been no contract.²⁴¹

237. 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1002 (1964).

238. 3 FARNSWORTH, *supra* note 119, § 12.8 (describing reliance damages and commenting that "the injured party cannot recover damages for loss beyond the amount proved with reasonable certainty"); *id.* § 12.19 (describing restitution).

239. CHIRELSTEIN, *supra* note 236, at 4-6.

240. 3 FARNSWORTH, *supra* note 119, § 12.8.

241. *See* CHIRELSTEIN, *supra* note 236, at 200-11 (explaining the reliance and restitution measures).

Although expectation damages have prevailed as the classical measure for compensating loss, reliance and restitution measures have gained acceptance for their ability to provide remedies where expectation damages are speculative or inappropriate.²⁴² The reliance measure seeks to provide “justice” by allowing parties to recoup what they lost in reasonable reliance on a breached promise.²⁴³ Restitution damages, on the other hand, seek to compensate parties for any benefit they conferred on the breaching parties.²⁴⁴

Courts may use reliance or restitution damages to remedy breach of uncompleted contracts because these measures are generally easier to determine than expectation damages in such cases.²⁴⁵ For example, a court may order a party who fails to comply with an ADR agreement to compensate the harmed party for any attorney’s fees and costs that party wasted in preparing for the thwarted ADR process. The court may also reimburse the injured party for the expense of having to bring an action to enforce the retracting party’s breach of an ADR promise.

Such damages may not be appropriate, however, where they are so nominal that they will not adequately remedy the breach or will frustrate the public policy encouraging parties to at least “come to the table” and participate in ADR.²⁴⁶ If a party’s liability for breach of an ADR agreement does not even dent its wallet, then the remedy serves no real purpose and wastes everyone’s time and resources. In such cases, reliance or restitution damages may not adequately or efficiently compensate a party for the lost opportunity to participate in ADR.

Nonetheless, in some cases, restitution or reliance damages provide tools the courts may use to compensate an injured party for lost opportunity to comply with an ADR agreement.²⁴⁷ The *Copeland* court

242. See RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981) (noting different measures of damages, including reliance and restitution); *Copeland v. Baskin Robbins*, 117 Cal. Rptr. 2d 875, 880 (Ct. App. 2002) (finding reliance, instead of expectation, damages would be appropriate for breach of an agreement to negotiate).

243. Knapp, *supra* note 10, at 1264–74 (discussing justice concerns underlying promissory estoppel and protection of the reliance interest).

244. 3 FARNSWORTH, *supra* note 119, § 12.8.

245. Knapp, *supra* note 10, at 1198–1200 (explaining modern development of reliance protection).

246. See *Office Env’ts, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489, 493 (Ind. Ct. App. 2005) (finding that limiting sanctions for failure to participate in court-ordered mediation to costs or attorney’s fees would “frustrate the [court’s] goal” of encouraging ADR).

247. See *Copeland*, 117 Cal. Rptr. 2d at 880–84 (struggling with unclear caselaw regarding the breach of a contract to negotiate, but concluding that if one can prove such breach, then the appropriate damages remedy must be based on the injured party’s reliance on the agreement to negotiate).

emphasized this point in finding that “the appropriate remedy for breach of a contract to negotiate is not damages for the injured party’s lost expectations under the prospective contract but damages caused by the injured party’s reliance on the agreement to negotiate.”²⁴⁸ This also comports with contract law condoning compensatory damages but denouncing punitive remedies. Moreover, assessing restitution or reliance damages at least signals to the parties that their ADR agreements are not entirely meaningless. This, in turn, may promote the use of and compliance with ADR agreements.

c. Nominal Damages

Courts may resort to ordering nominal damages where a plaintiff has proven breach but is unable to prove the amount of loss with reasonable certainty.²⁴⁹ Nominal damages are not compensatory; they are small sums that courts assess based on custom or court rule in the relevant jurisdiction—generally without regard to actual harm caused by the breach.²⁵⁰

In some jurisdictions, courts couple nominal damages with a judgment for the costs of the action.²⁵¹ Some question courts’ use of nominal damages to shift costs, while others reject nominal damages awards to parties who cannot prove any loss. In addition, many agree that courts should exercise caution in ordering nominal damages, let alone measuring them by court costs.²⁵²

With respect to enforcing ADR agreements, a court may order the breaching party to pay nominal damages where the injured party cannot prove actual losses due to the breach. Such minimal liability may not provide sufficient incentive to participate in ADR. Nonetheless, an award of nominal damages and costs would signal to the breaching party, and to other contractors, that their ADR promises are not empty. Moreover, nominal damages may be the only appropriate remedy where the injured parties’ expectation, reliance, or restitution interests are impossible to measure, and it would be improper for the court to order the parties’ participation in the ADR process.

d. Liquidated Damages

A monetary remedy that should not go unmentioned is liquidated damages. Contracting parties may agree that the breaching party

248. *Id.* at 884.

249. 5 CORBIN, *supra* note 237, § 1001.

250. *Id.*

251. *Id.*

252. *Id.*

must pay the other party a specific sum or amount based on objectively determined factors. They do so in order to increase the certainty of compliance and enforcement, and to decrease the costs of requiring a court to calculate damages based on expectation, reliance, or restitution measures. Liquidated-damages provisions also may decrease uncertainty of vague contract terms by constraining how a court will enforce these terms.²⁵³ Furthermore, courts are generally eager to enforce these provisions where damages are difficult to determine and the liquidated amount under the contract appears to have been a reasonable estimate of likely damages at the time of contracting.

Despite the potential efficiency benefits of liquidated-damages provisions, however, it appears that parties have not employed them to reduce the uncertainty of enforcing their ADR agreements. Searches of caselaw reveal little to no discussion of liquidated damages awarded for breach of an ADR agreement.²⁵⁴ This is likely because parties rarely include them in their ADR agreements, and simply comply with contracts that do contain them.

Parties generally incorporate ADR agreements in their contracts at a time when they are focused on other key components of their contracts and not expecting disputes to develop. These parties usually expect ADR provisions to fend off litigation, not to spark legal fights about participation in a process. For example, parties negotiating a sales contract are likely to focus their bargaining resources on setting price and delivery terms favorable to their needs, and are unlikely to invest resources negotiating the specifics of an ADR clause. Instead, parties to ADR provisions expect that these provisions will prevent litigation and minimize any dispute resolution costs. They likely view consideration of liquidated damages a waste of time and resources.

Accordingly, it is not surprising that many parties do not include such liquidated-damages provisions in their ADR agreements. With respect to pre-dispute agreements, it is often inefficient for parties to invest front-end transaction resources negotiating these provisions. Furthermore, it is generally impractical to expect parties to add post-

253. See Scott & Triantis, *supra* note 18, at 835–46, 855–56, 878–79 (discussing efficiency of vague terms, and explaining how liquidated damages provisions may constrain a court’s “choice of proxies” in enforcing such terms).

254. March 15, 2006 searches on Westlaw of all federal and state cases using “(contract /3 negot!) /30 (liquid! w/3 damag!)” and “(contract /3 mediat!) and (liquid! w/3 damag!)” yielded no cases involving enforcement of liquidated damages provisions in ADR agreements. Similar searches on Lexis on the same date located only one case tangentially involving such enforcement, *International CableTel Inc. v. Le Groupe Videotron Ltee*, 978 F. Supp. 483 (S.D.N.Y. 1997), which is discussed below.

dispute liquidated-damages provisions to their ADR agreements before initiating ADR. Although such provisions may ease a court's burden in measuring losses due to breach of vague ADR terms, disputing parties generally focus on resolving all of their claims, not merely setting damages for peripheral ADR provisions. Therefore, any so-called liquidated-damages provision would in fact be a settlement agreement.

That is not to say parties should never link the breach of an ADR clause with a liquidated-damages provision. Some parties may be wise to include such a provision to clarify enforcement of an ADR clause and signal their commitment to their chosen ADR process. For example, parties negotiating a deal involving intellectual property may use a liquidated-damages provision to solidify their commitment to resolve their disputes in a confidential ADR process to better assure that their proprietary information will avoid trial's public eye. Similarly, parties to an ongoing supply contract for a construction project may allocate liquidated damages for breach of an ADR clause as a means for ensuring that parties will follow through with an ADR process instead of disrupting performance with litigation that would thwart timely completion of a project and subject contractors to additional liability. In addition, parties may want to include a liquidated-damages provision in an ADR agreement merely because they distrust the others' commitment to an ADR process.

At the same time, courts should broaden their view of liquidated-damages provisions in underlying contracts to consider how a provision may apply to remedy a breach of an ADR clause in the contract. A court may construe a general liquidated-damages provision linked to breach of "any claims" to require a party to pay that sum not only for breach of the underlying contract, but also for breach of the ADR clause.

In *International CableTel Inc. v. LeGroupe Videotron Ltee*,²⁵⁵ for example, the court noted that a provision specifying a \$10,000,000 payment as damages for settling "any claims" would have barred all claims by CableTel against the defendant, including CableTel's claims that the defendant fraudulently failed to negotiate exclusively with CableTel as their contract required.²⁵⁶ CableTel argued that its fraud claim was collateral to the contract and therefore it could recover extracontractual tort damages against the defendants. The court disagreed, however, emphasizing that liquidated-damages provisions

255. 978 F. Supp. 483 (S.D.N.Y. 1997).

256. *Id.* at 486-90.

should be read broadly to cover all claims to enhance “the predictability that is essential to contracting.”²⁵⁷

Liquidated damages provisions therefore may create an avenue for more predictable and efficient enforcement of ADR agreements. Courts should generally enforce these provisions, provided they do not state unreasonable amounts or otherwise appear to penalize breach. This is appropriate because ADR agreements present the sort of indeterminate damages problems that liquidated-damages provisions seek to address. Nonetheless, it may not always be worthwhile or efficient for parties to negotiate these provisions in their contracts, and parties to ADR agreements may believe that no amount of damages would be adequate because they adamantly want the opportunity to seek settlement through an ADR process.

2. *Specific Enforcement and Injunctive Remedies*

The tools that best effectuate the intent of the parties to an ADR agreement will often be equitable remedies such as specific performance and injunctive relief. Specific performance is an appropriate remedy for a breach of contract where damages would not adequately compensate loss, the court will not be overburdened with enforcing its order, and such relief is otherwise appropriate in light of the facts of the particular case.²⁵⁸ Stated more simply, courts should apply this remedy when the benefits of ordering specific relief outweigh the detriments that would result from the order.²⁵⁹ Such relief is appropriate when it will promote justice, and courts need not reserve it for rare cases.²⁶⁰

Courts have traditionally limited the use of specific performance to cases involving real estate or other unique property.²⁶¹ They based this limit on the traditional “inadequacy of damages” or “irreparable harm” requirement for justifying use of these equitable remedies.²⁶²

257. *Id.* at 489–90.

258. *See* 5A CORBIN, *supra* note 118, §§ 1139, 1171 (discussing courts’ application of specific performance remedies in light of adequacy of damages and difficulty of enforcement).

259. *Id.* § 1136 (questioning any limitation on equitable remedies to cases where damages would be inadequate in light of the unification of law and equity courts, and courts’ duty to grant relief that will best compensate an injured party).

260. *Id.*

261. *See id.* §§ 1142–43 (stating the traditional rule); *see also* JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 16.1–16.2 (3d ed. 1998) (explaining courts’ prospecific enforcement attitude in ordering remedies for breach of contracts for sale of real property, and sale of unique goods under the UCC).

262. DAN B. DOBBS, *LAW OF REMEDIES* § 2.1(1) (2d ed. 1993); JAMES M. FISHER, *UNDERSTANDING REMEDIES* 149 (2001). *But see* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990) (arguing that the irreparable injury rule should not, and

Nonetheless, modern courts have eased this traditional reluctance to order specific remedies.²⁶³ They recognize that the *Restatement (Second) of Contracts* and the UCC support a more liberal application of equitable remedies.²⁶⁴ Furthermore, courts have become more open to ordering parties to negotiate or mediate in good faith in light of public policy supporting private dispute resolution.²⁶⁵ This is especially true where it appears negotiation or mediation would produce a settlement or benefit long-term or interdependent relations.²⁶⁶

Accordingly, courts may use specific enforcement to order participation in a private resolution process when the benefits of participation outweigh the detriment caused by ordering participation in the process.²⁶⁷ Courts may also use more passive injunctive remedies to prevent parties from litigating claims in defiance of their ADR agreements. For example, a court may stay or dismiss litigation until the parties comply with an ADR process that the parties' agreement requires as an express or implied condition precedent to seeking judicial

does not, exist in any substantial way). Some courts have continued to apply the "irreparable harm" limit despite the merger of law and equity courts. *DOBBS, supra* note 262, at 51 (also discussing limits on equitable powers). See generally JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA* (4th ed. 1918) (discussing continued "Equity Jurisprudence" after the merger of law and equity).

263. See Gene R. Sheve, *The Premature Burial of the Irreparable Injury Rule*, 70 *TEX. L. REV.* 1063 (1992) (book review) (noting expansion of specific performance, but finding that the irreparable harm rule survives); see also *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275 (2d Cir. 1985) (emphasizing "irreparable harm" as "the single most important prerequisite for the issuance of a preliminary injunction").

264. See Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style"*, 17 *NEW ENG. L. REV.* 321, 344-45 (1982) (discussing more liberal application of equitable remedies); Alan Schwartz, *The Case for Specific Performance*, 89 *YALE L.J.* 271, 275-79 (1979) (proposing that "the compensation goal implies that specific performance should be routinely available").

265. See *Fluor Enters., Inc. v. Solutia Inc.*, 147 F. Supp. 2d 648, 650-51 (S.D. Tex. 2001) (compelling mediation as proscribed in the parties' contract); *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985) (finding it had power to order participation in nonbinding arbitration under both the FAA and the court's equitable power); *Marshall v. U.S. Home Corp.*, No. 20573, 2002 WL 274457, at *1-2 (Ohio Ct. App. Feb. 27, 2002) (staying proceeding to enforce mediation and arbitration provisions); see also *Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 750 n.10 (E.D. Va. 2001) (stating the *AMF* court relied on its "inherent equitable powers" to stay litigation); *PERILLO, supra* note 261, § 2.8(b) (noting modern courts' willingness to enforce a contractual duty to negotiate in good faith).

266. See *Katz, supra* note 68, at 575-77, 584-95 (advocating specific enforcement of dispute resolution agreements where participation in the process may benefit the parties' relationship); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-classical, and Relational Contract Law*, 72 *Nw. U. L. REV.* 854, 879, 891-901 (1978) (discussing suitability of dispute resolution mechanisms to ongoing relations); Sid L. Moller, *Birth of Contract: Arbitration in the Non-Union Workplace*, 50 *S.C. L. REV.* 183, 204-11 (1998) (proposing that private dispute resolution processes are suited to employment because it is a relational and interdependent activity).

267. See *Schmitz, supra* note 8, at 63-66.

relief.²⁶⁸ A court also may stay litigation pending parties' compliance with an ADR agreement if expressly allowed by statute or by analogy to a statutory or other policy-based requirement to exhaust administrative remedies before filing suit.²⁶⁹

Courts may also stay litigation to foster a related ADR process based on the court's power to "control the disposition of the causes on its docket."²⁷⁰ Courts may justify their use of this power by analogizing to courts' use of this power to stay litigation related to but not covered by an arbitration agreement governed by the FAA.²⁷¹

Courts have stayed litigation, for example, where the arbitration and court proceedings involve common issues, those issues will be finally determined in the arbitration, and staying litigation pending the process will not cause undue hardship to the parties.²⁷² This was the case in *Cosmotek Mumessillik Ve Ticaret Ltd. Sirkketi v. Cosmotek U.S.A., Inc.*²⁷³ In that case, the court used its inherent power to stay a foreign distributor's action against the manufacturer pending arbitration of the distributor's related disputes under its contract with a United States distributor, even though the manufacturer was not bound by the contract containing the arbitration clause. The stay was intended to encourage the disputants to join in cooperative resolution of the product defect claims.²⁷⁴

268. See *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (holding mediation was a condition precedent to arbitration under the parties' agreement, and therefore the arbitration provision had not been activated and the FAA did not apply); *Bill Call Ford, Inc. v. Ford Motor Co.*, 830 F. Supp. 1045, 1053 (N.D. Ohio 1993) (dismissing franchisee's claim for failure to seek mediation as a condition precedent to litigating under the parties' agreement); RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."); 3A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 628 (1960) (discussing conditions precedent); Schmitz, *supra* note 8, at 66–71 (discussing use of exhaustion and condition analysis).

269. See Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 PEPP. DISP. RESOL. L.J. 161, 162–76 (2005) (discussing the United Kingdom's Civil Procedure Rule mandating that courts actively manage their caseloads and encourage ADR, and allowing them to use that power to stay litigation while parties pursue ADR processes); see also Schmitz, *supra* note 8, at 66–71 (discussing enforcement by analogy to statutes requiring disputants to pursue an administrative or other resolution process prior to filing litigation on their claims).

270. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

271. See *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964) (indicating a stay may be appropriate where issues involved are subject to arbitration).

272. *Am. Shipping Line v. Massan Shipping Indus., Inc.*, 885 F. Supp. 499, 502 (S.D.N.Y. 1995); see also *Sierra Rutile, Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991) (stating same rules).

273. 942 F. Supp. 757, 760–61 (D. Conn. 1996).

274. *Id.* The court seemed to question the prudence of the distributor's opposition to the stay, and advocated "faster resolution" through the arbitration "if counsel are conscientious." *Id.*

In addition, courts often have power to order parties to engage in ADR processes prescribed by statutes or judicial rules, even when the parties have not signed an ADR agreement.²⁷⁵ Courts disagree, however, on whether they have inherent power to order parties to engage in ADR.²⁷⁶ Some courts conclude that they may use their inherent power to manage their dockets as justification for ordering nonbinding ADR, while others hold that their inherent powers do not extend this far.²⁷⁷ Meanwhile, some commentators propose that legislatures should clarify judicial rules to grant courts such power in order to effectively manage judicial affairs and litigant conduct.²⁷⁸

Specific performance and injunctive relief may not always be equally appropriate.²⁷⁹ In some cases, injunctive relief may be more appropriate than specific performance because it is considered less coercive and may require less judicial oversight.²⁸⁰ Injunctions often strike a better balance between the important interests in efficiency, freedom of contract, and fairness.²⁸¹ Nonetheless, bad faith may justify strict specific performance and judicial supervision of that performance in some cases. This could promote commercial morality and efficiency by causing the parties to negotiate whatever result would create the optimal distribution of resources for all involved.²⁸²

However, the court sought to insure against prejudice to the distributor by requiring periodic updates regarding the arbitration to verify "that the early hearing and decision which are the hallmark of arbitration are in fact afforded to [the distributorship]." *Id.* Furthermore, the distributor remained free to seek to vacate the stay if a risk of prejudice from delay became apparent. *Id.*

275. Amy M. Pugh & Richard A. Bales, *The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution*, 42 DUQ. L. REV. 1, 14 (2003) (discussing various rules and statutes allowing courts to order ADR).

276. *Id.* at 14–19 (discussing split of authority on this issue); see also *Sierra*, 937 F.2d at 750 (finding that a court has inherent power to stay an action related to a pending arbitration "in which issues involved in the case may be determined," but declining to stay claims that would not be affected by the arbitration (quoting *Nederlandse*, 339 F.2d at 440)).

277. See Pugh & Bales, *supra* note 275, at 14–19 (explaining courts' positions).

278. *Id.* at 23–26.

279. See *Beverly Glen Music, Inc. v. Warner Comm'cs, Inc.*, 224 Cal. Rptr. 260 (Ct. App. 1986) (noting that courts may order injunctive relief in cases where it would be improper for the court to order specific performance, such as personal services contracts); EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 1.2.2 (1989) (noting distinctions between specific performance and injunctions).

280. See Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1375–76 (1982) (providing hypothetical case in which injunctive relief may be more appropriate than the more coercive specific enforcement remedy); see also *Richards v. Foulk*, 345 So. 2d 402 (Fla. Dist. Ct. App. 1977) (staying litigation pending statutorily required mediation).

281. Yorio, *supra* note 280, at 1376–77, 1397–1404.

282. See *id.* at 1407–11 (noting how "morality and efficiency do not necessarily part company" in most cases involving a deliberate breach); see also Ben-Shahar, *supra* note 73, at 1839, 1851–52 (proposing a no-retraction regime precluding parties from retracting freely from their

3. *Sanctions and Evidentiary Exclusions*

Some courts have imposed sanctions on parties who defy their duties to participate in ADR. Sanctions come in different forms. Courts may order parties to pay set penalties, attorney's fees, and other costs of wasted preparations for an ADR process. They also may strike pleadings, exclude evidence, or even dismiss a case, due to a party's failure to participate in ADR in good faith.²⁸³

Courts usually have the power to order sanctions under legislative directives or court rules, and may go so far as to dismiss with prejudice where there is clear evidence of bad faith.²⁸⁴ They will not resort to dismissal, however, where other enforcement devices are available.²⁸⁵ Courts are more likely to stay litigation or order the costs or attorney's fees as sanctions.²⁸⁶ They also may fashion remedies suited to address a party's particular bad-faith conduct. In one case, for example, the court found that it was appropriate for the trial court to bar evidence a party failed to properly present in a court-ordered mediation.²⁸⁷

Courts are also reluctant to punish parties with sanctions where the parties' attorneys caused the failure to participate in an ADR process. In *Wetherholt v. Mercado Mexico Cafe*,²⁸⁸ for example, the court found that a client should not suffer for the sins of its attorney.²⁸⁹ The court therefore found it improper to dismiss the case or strike pleadings because the plaintiff's first attorney failed to answer discovery requests, and did not attend or even notify the plaintiff of a court-

representations and defending against the argument that this is inefficient by explaining that parties are not bound to inefficient contracts because they remain free to negotiate a more efficient alternative).

283. See *Office Env'ts, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489, 490–93 (Ind. Ct. App. 2005) (affirming dismissal of case for failure to mediate pursuant to court order).

284. *Id.* at 493–96.

285. See *Brock v. Kaiser Found. Hosp.*, 13 Cal. Rptr. 2d 678 (Ct. App. 1992) (finding a court should not dismiss a plaintiff's claim for failure to comply with a contractual duty to arbitrate where the court could use a statute or equitable powers to order the parties to participate in the arbitration and criticizing *Boutwell v. Kaiser Found. Health Plan*, 254 Cal. Rptr. 173 (Ct. App. 1988) which found that dismissal was appropriate where the plaintiff failed to pursue contractual arbitration for five years).

286. See *Harlan v. Dep't of Transp.*, 33 Cal. Rptr. 3d 192, 913–15 (Ct. App. 2005) (affirming award of fees paid to attorney to prepare for negotiations as an appropriate remedy for breach of an agreement to negotiate in good faith); *Luxenberg v. Marshall*, 985 S.W.2d 136, 141–42 (Tex. App. 1992) (finding sanctions appropriate against a party who failed to participate in court-ordered mediation).

287. See *Fisher v. Herrera*, 367 So. 2d 204, 206–07 (Fla. 1978).

288. 844 S.W.2d 806 (Tex. App. 1992).

289. *Id.* at 808.

ordered mediation or the subsequent hearing to determine sanctions.²⁹⁰

VI. CONCLUSION

Why is it so difficult to enforce what public policy deems so "good"? Pro-ADR rhetoric is in vogue, but few courts are willing to put rhetoric into action by effectively enforcing agreements to participate in ADR. This is understandable in light of the difficulties of defining good-faith participation in ADR, determining breach of ADR duties, and devising proper remedies for such breach. There is a fine line between promoting ADR and forcing settlement.

Courts should nonetheless confront these difficulties instead of hiding behind yes-contract/no-contract conclusions. ADR agreements have become an important category of contracts to bargain that deserves proper analysis and enforcement. It is time for courts to carefully and separately consider (1) whether there is a valid ADR agreement and (2) how to enforce that agreement using duties of good faith and creative contract remedies. Courts should ease formalist fear of flexible and contextual contract enforcement in order to tackle these tasks. Although this may seem contrary to efficiency-focused contract law, such enforcement of ADR agreements is important to preserve their efficacy and integrity.

290. *Id.*