

THE ARBITRATION PENUMBRA: ARBITRATION LAW AND THE RAPIDLY CHANGING LANDSCAPE OF DISPUTE RESOLUTION

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INTRODUCTION

Arbitration law is implicitly founded on a procedural model involving binding adjudication of disputes by a private tribunal pursuant to an agreement.¹ Today, however, this “classic” model of arbitration is but one—albeit highly important—alternative among a growing number of process templates for resolving domestic and international disputes.² These include mediation³ and many forms of third-party evaluation or nonbinding adjudication,⁴ multi-step processes or integrated conflict management programs,⁵ and hybrids such

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¹ See *infra* text accompanying notes 74-79.

² See generally Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1 (2004); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831.

³ “[M]ediation is, by definition, a procedure by which the parties negotiate a resolution to their dispute with the assistance of a third party mediator. If the parties do not reach an agreement, the mediation process is at an end; no resolution may be imposed on the parties.” Bowden v. Weickert, No. S-02-017, 2003 WL 21419175, at *5 (Ohio Ct. App. June 20, 2003) (quoting Oliver Design Group v. Westside Deutscher Frauen-Verein, No. 81120, 2002 WL 31839158, at *2 (Ohio Ct. App. Dec. 19, 2002)); see also James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006) (surveying cases discussing dramatic growth of mediation-related litigation, including cases involving contractual agreements to mediate and mediated settlement agreements).

⁴ See CATHERINE CRONIN-HARRIS, BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT: ADR SYSTEMS DESIGN 170 (1997) (including nonbinding neutral evaluation in the scope of arbitration); see, e.g., Harrison v. Nissan Motor Corp., 111 F.3d 343 (3d Cir. 1997) (recognizing informal dispute resolution procedure under automobile lemon law, resulting in a nonbinding decision that may be enforced against the manufacturer if the customer accepts it). Nonbinding arbitration procedures are required under some uninsured motorist statutes. See, e.g., Patterson v. Allstate Ins. Co., 884 So. 2d 178 (Fla. Dist. Ct. App. 2004). The same is true of some mandatory fee arbitration statutes. See, e.g., Ervin, Cohen & Jessup, LLP v. Kassel, 54 Cal. Rptr. 3d 685, 685 (Ct. App. 2007). It is also employed in some federal and state court ADR programs. See, e.g., Furia v. Zicarelli, 935 So. 2d 103, 103 (Fla. Dist. Ct. App. 2006).

⁵ See *infra* text accompanying notes 9-11, 242-73.

as “med-arb” and “arb-med.”⁶ Some are consensual approaches;⁷ others are mandated as part of a government regulatory scheme.⁸

With the proliferation of dispute resolution alternatives have come questions about the legal enforceability of contractual agreements to submit disputes to a process, the implications of a failure to comply with such agreements, or the consequences of an agreement or decision reached through a process. There are also important collateral issues involving the powers and duties of third party arbitrators, mediators, and other “interveners” or “neutrals,” including their obligations to disclose information regarding potential conflicts of interest, their ability to direct the production of testimony or documents and make other procedural decisions, and the extent of their immunity from legal process. Finally, there are issues about the confidentiality of information communicated during the process, its admissibility as evidence in other legal or administrative proceedings, and its safeguarding from the prying eyes of third parties.

Additional complexities attend the widespread and growing use of multi-step dispute resolution processes in contracts of all kinds.⁹ Such procedures commonly consign arbitration to a secondary or tertiary role in a spectrum or sequence of approaches to resolve conflict. The primary emphasis is on negotiation or mediation in order to promote party control of solutions, address interests as well as rights, and permit less formal, less costly, and more efficient dispute resolution.¹⁰ Sometimes, however, the obligation to engage in negotiation or mediation raises enforcement issues that involve arbitration law.¹¹

Moreover, as lawyers garner experience with these processes and the ranks of self-described professional neutrals asserting multi-faceted expertise swell, some are experimenting with “switching hats” to play different neutral roles in connection with a dispute.¹² Although the practice goes against conventional wisdom in Anglo-American cultures,¹³ many neutrals have engaged

⁶ See *infra* text accompanying notes 13-15.

⁷ See generally Stipanowich, *supra* note 2.

⁸ See, e.g., Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 (2000); CAL. CIV. CODE § 1793.22 (West 2007) (California Lemon Law).

⁹ See *infra* notes 242-73 and accompanying text.

¹⁰ See, e.g., Mary Rowe, *Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?*, in *WORKPLACE DISPUTE RESOLUTION* 79, 90 (Sandra E. Gleason ed., 1997) (discussing functions performed by various elements of integrated systems for resolving issues in the workplace).

¹¹ See *infra* notes 247-73 and accompanying text.

¹² See *Neutrals Deployed Several Kinds of ADR to Solve IBM-Fujitsu Copyright Dispute*, *ALTERNATIVES TO HIGH COST LITIG.*, Jan. 1987, at 187 (describing shifting roles of two “neutrals” in complex intellectual property disputes as arbitrators, mediators, system designers, and special masters supervising an ongoing program of dispute resolution); see also JAY FOLBERG, DWIGHT GOLANN, LISA KLOPPENBERG & THOMAS STIPANOWICH, *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW*, 643-48 (2005).

¹³ Hugh F. Landerkin, *Conflict Management: Are Skills and Theories Enough? The Qualities of a Third Party Conflict Intervener*, *ADRIC Conference: ADR Energy* (Nov. 17, 2006), <http://www.adrcanada.ca/documents/3pconflictintervener.pdf>.

in “med-arb”¹⁴ or “arb-med.”¹⁵ These arrangements can give rise to legal issues, often implicating the law of arbitration.¹⁶

Parties seeking judicial resolution of these issues with respect to a dispute resolution agreement often invoke the Federal Arbitration Act or state arbitration statutes, with conflicting, often unpredictable results.¹⁷ Indeed, a survey of the evolving judicial decisions on legal questions surrounding “appropriate dispute resolution (ADR)” reveals a landscape that remains “fundamentally aimless, meandering, and above all, confusing.”¹⁸ There is a need for clearer, more carefully reasoned, and more reliable approaches to legal issues surrounding dispute resolution processes.¹⁹

The body of judicially-declared law addressing these emerging forms of appropriate dispute resolution and the interface between arbitration and other processes—much of which has developed within the “penumbra” of federal and state arbitration statutes—raises important questions about the underlying policies, scope, and contours of arbitration law. This article will briefly survey some of the “cases of trouble”²⁰ that make up the evolving arbitration law “penumbra.” Part I will explore the functions and potential impact of arbitration statutes on the enforcement of dispute resolution provisions, and the lack of clarity surrounding the definition of “arbitration” and its consequences.²¹

¹⁴ See, e.g., *Coughlan v. Coughlan*, No. A03-206, 2003 WL 22136814 (Minn. Ct. App. Sept. 16, 2003) (med-arb arrangement established by parenting plan agreed to by parents); *Local 85 of the Amalgamated Transit Union v. Port Auth.*, 840 A.2d 506, 508 (Pa. Commw. Ct. 2004) (neutral to hold arbitration hearings, mediate, and if necessary render an arbitration award on the basis of last best offers on issues related to negotiation of collective bargaining agreement); see also *Dep’t of the Navy v. Local 22, IFPTE*, 97 F.S.I.P. 100, 1997 WL 665055 (1997) (Carrillo, Arb.); *Stipanowich*, *supra* note 2, at 853-55, 869-70, 887 (discussing med-arb and related legal and practical issues).

In a related vein, mediators sometimes encourage parties to a mediated agreement to include an arbitration clause in the agreement; the mediators themselves are sometimes designated as arbitrators in the clause. E.g., *Fair v. Bakhtiari*, 147 P.3d 653, 654-55 (Cal. 2006); *Morgan Phillips, Inc. v. JAMS/Endispute*, 44 Cal. Rptr. 3d 782 (Ct. App. 2006).

¹⁵ E.g., *Soc’y of Lloyd’s v. Moore*, No. 1:06-CV-286, 2006 WL 3167735, at *1 (S.D. Ohio Nov. 1, 2006); see Michael Leathes et al., *Einstein’s Lessons in Mediation*, MANAGING INTEL. PROP., July-Aug. 2006, at 23, available at <http://www.managingip.com/Article.aspx?ArticleID=1254352> (subscription required). Med-arb has been integrated in some institutional provisions and even in court rules. See, e.g., *Clark v. Alfa Ins. Co.*, No. Civ.A. 00-AR-3296-S, 2001 WL 34394281, at *4 (N.D. Ala. Feb. 7, 2001) (citing N.D. Ala. Loc. R. 16.1 with Med/Arb and other options).

¹⁶ See FOLBERG, GOLANN, KLOPPENBERG & STIPANOWICH, *supra* note 12, at 646 (citing *Township of Aberdeen v. Patrolmen’s Benevolent Ass’n*, Local 163, 669 A.2d 291 (N.J. Super. Ct. App. Div. 1996) (holding that a med-arb neutral cannot apply information obtained from mediation to the arbitral setting)).

¹⁷ See *infra* text accompanying notes 80-82, 86-117, 247-73; see also *Stipanowich*, *supra* note 2, at 860-66.

¹⁸ IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 172 (1992).

¹⁹ See generally Schmitz, *supra* note 2, at 1-2 (criticizing judicial tendencies to either rely on arbitration law or deny enforcement to ADR agreements and calling for courts to develop approaches to enforcement of ADR agreements under the law of contract).

²⁰ The phrase is borrowed from K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 28 (1941) (noting recurring issues that indicate the legal system’s problems and future direction).

²¹ See *infra* notes 25-85 and accompanying text.

Part II will touch upon the diverse approaches taken by courts in determining whether various “ADR” processes fall within the purview of arbitration law and will explore the implications of expansive application of arbitration law in such contexts.²² Part III will examine issues raised by the expanding use of agreements for multi-step dispute resolution, including the legal implications of a party’s refusal or failure to comply with an agreement to negotiate or mediate prior to arbitration.²³ Part IV will briefly consider various ways of advancing a more rational legal framework for the evolving spectrum of diverse dispute resolution mechanisms, with due consideration of the tension between the need for appropriate legal structures and the importance of promoting party autonomy and flexibility in problem solving outside the legal system.²⁴

I. ARBITRATION LAW: ITS FUNCTIONS, IMPACT, AND SCOPE

A. *The Legal Framework*

1. *Functions of the FAA, State Arbitration Laws*

In the United States, arbitration law consists of the Federal Arbitration Act (“FAA”) and corresponding state statutes, the great majority of which are based closely on the Uniform Arbitration Act (“UAA”) in its original 1955 form²⁵ or its revised version published in 2000 (“Revised UAA,” or “RUAA”).²⁶ Federal and state legislation is extensively fleshed out by judicial decisions; in the case of the FAA, jurisprudence has had a dramatic impact on the scope and substance of the statutes.²⁷

Arbitration law is aimed at regulating the interface between the private forum of arbitration and the courts, with primary emphasis on the judicial enforcement of agreements to arbitrate and of resulting arbitration awards.²⁸ Arbitration law promotes the autonomy of parties by enforcing their agreements to arbitrate; in the case of the FAA this enforcement principle is very strong and very broad,²⁹ and the Supreme Court has decreed that it trumps contrary state enactments.³⁰ Arbitration law also serves channeling, eviden-

²² See *infra* notes 86-241 and accompanying text.

²³ See *infra* notes 242-73 and accompanying text.

²⁴ See *infra* notes 274-346 and accompanying text.

²⁵ UNIF. ARBITRATION ACT § 1 (1956); see also *The RUAA Moves Toward National Passage*, DISP. RESOL. J., May-July 2002, at 5 (UAA ultimately adopted by 49 states).

²⁶ RUAA, UNIF. ARBITRATION ACT (revised 2000); see also Association for Conflict Resolution, ACR Legislative and Public Policy (LPP) Committee Proposal on the Revised Uniform Arbitration Act (Dec. 2005), http://acrnnet.org/pdfs/RUAA_Proposal_for_ACR_Member_Review_Comment_12-2005.pdf (RUAA adopted by at least eight states).

²⁷ See generally I IAN R. MACNEIL, RICHARD E. SPIEDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT (1994).

²⁸ See FOLBERG, GOLANN, KLOPPENBERG & STIPANOWICH, *supra* note 12, at 518.

²⁹ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 n.27 (1983) (“[T]he policy of the Arbitration Act requires a liberal reading of arbitration agreements”); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (holding that the scope of arbitrable issues should be decided in favor of arbitration).

³⁰ See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that state regulation specifically limiting arbitration was preempted by the FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that FAA applies to any case “affecting”

tiary, and cautionary functions³¹ by judicially enforcing only those agreements evidenced by a writing or record,³² and against which no valid defense can be asserted.³³ Finally, it establishes supplementary or default terms for different aspects of arbitration processes;³⁴ in the case of the RUAA and some other arbitration statutes, moreover, the law establishes certain principles or procedural elements that cannot be waived or modified by agreement.³⁵

2. Potential Impact of Applying the FAA and State Arbitration Laws

The conclusion that a dispute resolution procedure is covered by the FAA carries with it a number of specific consequences of legal import.³⁶ It triggers the operation of a judicial framework to ensure the specific performance of the agreement to arbitrate and/or suspend litigation of the same disputes³⁷—a framework that ensures “special protection” for arbitration under federal law and prohibits states from adopting anti-arbitration rules for contracts within the scope of the FAA.³⁸ It provides for prompt interlocutory review of judicial decisions denying orders to compel arbitration pursuant to contractual provisions.³⁹ It facilitates arbitration processes through mechanisms for judicial appointment of arbitrators if the designated method fails,⁴⁰ and for judicial enforcement of arbitral summonses (subpoenas).⁴¹ It establishes mechanisms for confirmation, modification, or vacatur of arbitrators’ decisions or awards,⁴² with standards for review that are “extremely deferential” to those decisions.⁴³ Those standards do, however, incorporate notions of a “fundamentally fair” adjudicative process,⁴⁴ including the opportunity to present material evidence before a decision maker who has made a timely disclosure of circumstances that might call his or her impartiality into question.⁴⁵ Arbitrators are deemed

interstate commerce); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that FAA applies in both federal and state courts).

³¹ Cf. LON L. FULLER & ROBERT BRAUCHER, *BASIC CONTRACT LAW* 557-58 (2d ed. 1964).

³² Federal Arbitration Act, 9 U.S.C. § 2 (2000).

³³ See *id.*

³⁴ See, e.g., *id.* § 5 (providing for court-appointed arbitrator if established selection mechanisms fail).

³⁵ RUAA, UNIFORM ARBITRATION ACT § 4 (revised 2000) (prohibiting modification of provisional remedies, issuance of subpoenas and depositions, jurisdiction, etc.).

³⁶ See Schmitz, *supra* note 2, at 5-14 (summarizing effects of FAA and UAA enforcement schemes). As discussed below, some courts, in order to find certain kinds of dispute resolution processes are within the purview of the FAA, necessarily find one or more provisions of the FAA inapposite. This is problematic. See *infra* text accompanying notes 108-10, 116-18, 134-231.

³⁷ 2 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, §§ 15.1.3.1-2.

³⁸ *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 799 (7th Cir. 2005).

³⁹ FAA, 9 U.S.C. § 16(a) (2000); see *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 5 (1st Cir. 2004).

⁴⁰ 9 U.S.C. § 5.

⁴¹ *Id.* § 7.

⁴² *Id.* §§ 9-10.

⁴³ See *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003).

⁴⁴ 1 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, §§ 2.6.2-2.7; see also FOLBERG, GOLANN, KLOPPENBERG & STIPANOWICH, *supra* note 12, at 568-69.

⁴⁵ 3 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 28.1.1.

immune from judicial process within the scope of their arbitral role⁴⁶ and will not be called upon to testify in court proceedings save in special circumstances.⁴⁷

The 1955 version of the UAA is very similar in form and function. However, more recent revisions to that uniform law have produced a much lengthier, more detailed and more prescriptive statutory framework for arbitration (RUAA), including a number of provisions setting forth default procedural elements—some of which are non-waivable by parties. Much the same may be said of the California Arbitration Act,⁴⁸ which among other things contains very specific disclosure requirements and other ethical standards for arbitrators.⁴⁹

3. *Arbitration's Consensual Foundations and Inherent Flexibility*

Arbitration law is about enforcing consensual arrangements for private dispute resolution, with a central tenet being effectuation of the intent of the parties as expressed in their agreement.⁵⁰ Within the ambit of the FAA and the more prescriptive framework of some state arbitration statutes, therefore, parties are afforded considerable flexibility to structure processes as they see fit. One leading scholar suggests that although arbitration is at once an “exercise of private ordering” and “an exercise in adjudication—resulting in an award that the force of the state makes obligatory on the litigants in much the same way as [a court] judgment,” the fulfillment of the parties’ intent as defined by their arbitration agreement is the dominant theme that both characterizes and distinguishes American arbitration.⁵¹

The principle of freedom to choose among procedural options suffuses nearly all aspects of arbitration, and the wide arbitration spectrum includes a considerably rich and diverse array of procedures. Arbitration law contemplates legal enforcement within broad bounds of agreements about the nature and scope of arbitration, including the precise breadth of the arbitrator’s jurisdiction/authority, the selection of the tribunal, the character of the hearing, and pre- and post-hearing procedure.⁵²

Additional flexibility inheres in the ability of parties to agree to modify or unilaterally waive elements of an agreed-upon process, even to the extent of foregoing participation in a hearing.⁵³ Moreover, it is commonly understood that parties may agree to have an arbitrator enter the arbitral equivalent of a consent order—an award based on terms of settlement crafted by the parties.⁵⁴

⁴⁶ *See id.* §§ 31.3.1.1-.2.

⁴⁷ *Id.* § 31.3.1.6.

⁴⁸ California Arbitration Act, CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 2007).

⁴⁹ *Id.* §§ 1297.121-.125 (prohibiting personal bias, conflict of interest, etc.).

⁵⁰ 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 3.2.1.1.

⁵¹ Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 451 (2005).

⁵² 3 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 27.2.

⁵³ *Id.* § 32.4.2.1.

⁵⁴ *See* China International Economic and Trade Arbitration Commission (“CIETAC”) Arbitration Rules art. 40, § 1 (2005), available at <http://www.cietac.org.cn/English/rules/rules.htm> (providing for an arbitration award based on settlement terms reached in mediation).

All that said, in present practice consensual process choices (as well as statutorily mandated dispute resolution programs) extend well beyond the ambit of an adjudication resulting in a binding award, regularly challenging courts to define what is and what is not within the contemplation of arbitration law. Does arbitration law control if, for example, the agreement contemplates that the “intervener” is intended to play the part of a mediator rather than an adjudicative role,⁵⁵ or that the intervener’s decision is not enforceable in a court of law?⁵⁶ What if the parties agree that there will be no hearing, but that the intervener may make a binding determination on his or her own investigation?⁵⁷ Each of these scenarios has provoked conflicting responses by courts.

A Tenth Circuit panel went so far as to say that “[p]arties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA, but may choose from a broad range of procedures and tailor arbitration to suit their peculiar circumstances.”⁵⁸ This however, begs the essential question—what, for the purposes of arbitration law, is “arbitration”?

B. What is “Arbitration”?

In 1925, Congress enacted the FAA to encourage judicial enforcement of contractual arbitration provisions—or, in the words of the pivotal FAA section 2, “contract[s] . . . to settle [disputes] by arbitration,”⁵⁹ offsetting the historic “hostility of American courts” to their enforcement.⁶⁰ In recent years, the Supreme Court and other federal and state courts have repeatedly pronounced strong federal policies supporting arbitration.⁶¹ As the Second Circuit recently observed, “it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we ‘have often and emphatically applied.’”⁶² These policies are pragmatically reinforced by commensurate restrictions on the role of courts in the management and disposition of arbitrable issues.⁶³

Where the FAA holds sway to effectuate agreements to arbitrate, these principles are sufficiently potent to trump policies supporting resort to otherwise popular process alternatives such as court-connected mediation.⁶⁴ Con-

⁵⁵ See *infra* text accompanying notes 139-79.

⁵⁶ See *infra* text accompanying notes 180-231.

⁵⁷ See *infra* text accompanying notes 232-241.

⁵⁸ *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 690 (10th Cir. 2004).

⁵⁹ Federal Arbitration Act, 9 U.S.C. § 2 (2000).

⁶⁰ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

⁶¹ *Id.* at 131-32; *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁶² *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir. 2006) (quoting *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995)).

⁶³ 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 8.6; see also FOLBERG, GOLANN, KLOPPENBERG & STIPANOWICH, *supra* note 12, at 526.

⁶⁴ See generally *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539, 542-43 (Tex. App. 2006) (overturning an order postponing enforcement of an agreement to arbitrate pending the conclusion of court-ordered mediation). Despite arguments that strong state policies supported the encouragement of settlement through mediation, the appeals panel unanimously concluded that deferring action on the motion to compel arbitration interfered with the parties’ expectations that their dispute would be addressed expeditiously through arbitration, and would cause the parties additional delay and expense. *Id.* While mediation might occur, the

versely, a determination that a particular dispute resolution procedure is not “arbitration” means that a number of questions, including the ability of courts to require participation in the process, to facilitate its implementation, or to enforce its results, must be decided on other legal bases.⁶⁵ These may be determinations of first impression, as may be questions about the confidentiality of related communications, the immunity of the third party interveners or “neutrals” from legal process and their obligation to make disclosures about potential conflicts of interest.⁶⁶ “When one of these powers or duties is important,” in the words of Judge Easterbrook, “the choice between ‘arbitration’ and other forms of private dispute resolution matters.”⁶⁷ Some courts, moreover, have concluded that if a procedure is not “arbitration,” there is no basis for judicial enforcement.⁶⁸

Given the legal consequences of the conclusion that a dispute resolution process is or is not “arbitration,” one might logically expect the FAA to define that term or otherwise delineate the purview of the FAA. Yet nowhere in the FAA is there an explicit definition of the term “arbitration.”⁶⁹ The legislative history of the FAA provides no more illumination, at least directly.⁷⁰

The same is true of the UAA, the highly influential template for state arbitration statutes and close “cousin” to the FAA, which was revised by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 2000.⁷¹ The omission by NCCUSL drafters is particularly curious in light of their inclusion of a glossary of terms in the Revised Uniform Act; they did, however, offer relevant clues by defining “arbitrator” as “an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.”⁷²

Given the silence of the FAA and UAA regarding the definition of arbitration, coupled with the fact that federal and state statutes establish no formal

panel rejoined, it would have to be conducted within the rubric of “proceedings directed by an arbitrator.” *Id.* at 543.

⁶⁵ *See* Dluhos v. Strasberg, 321 F.3d 365, 370 (3d Cir. 2003) (“If, however, a dispute-resolution mechanism does not constitute arbitration under the FAA, then a district court has no jurisdiction to review the result absent an independent jurisdictional hook.”).

⁶⁶ *See, e.g., id.*

⁶⁷ *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 799 (7th Cir. 2005).

⁶⁸ *See* *Felkner v. Dean Witter Reynolds, Inc.*, 800 F.2d 1466, 1470 (9th Cir. 1986) (holding that court would not enforce arbitration agreement that did not meet definition of arbitration); *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 345 (Minn. Ct. App. 2007) (holding that appraisal was not arbitration, and only a court action could determine an insurer’s liability). *But see Omni Tech Corp.*, 432 F.3d at 799 (fact that final, binding accounting procedure is not “arbitration” does not mean it is not judicially enforceable).

⁶⁹ 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 2.3.1.1.

⁷⁰ *Id.*

⁷¹ RUAA, UNIF. ARBITRATION ACT, prefatory note (revised 2000). As of this writing, the Revised Uniform Arbitration Act had been passed by twelve states.

⁷² *Id.* § 1(2). The UNCITRAL Model Law on International Commercial Arbitration also contains no true definition of the term “arbitration.” UNCITRAL Model Law on International Commercial Arbitration art. 2(a) (amended 2006) Article 2(a) offers only a self-referring definition, explaining that under the Model Law “‘arbitration’ means any arbitration whether or not administered by a permanent arbitral institution.” *See id.*

requirement that arbitration agreements be explicitly identified as such,⁷³ it is incumbent upon courts to reach their own conclusions regarding the scope of application of arbitration law. There are certainly strong clues in the overall form and content of the statutes. Viewed in full, both the FAA and the UAA appear to contemplate a process in which disputes are submitted to a hearing before a third party, who renders a binding decision that fully and finally addresses the disputes presented.⁷⁴ Moreover, standards for vacatur of arbitral decisions, or awards, envision some form of hearing before an impartial tribunal,⁷⁵ as do provisions authorizing the issuance of summonses or subpoenas.⁷⁶ From these indicators, reinforced by long custom and practice,⁷⁷ some courts have identified at least four “signifying elements” of procedures that, when framed in an agreement, fall within the scope of arbitration law: (a) a process to settle disputes between parties; (b) a neutral third party; (c) an opportunity for the parties to be heard; and (d) a final, binding decision, or award, by the

⁷³ See *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 192 (1910); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004) (“Whether the accounting remedy is ‘arbitration’ under the federal statute . . . does not depend on the nomenclature used in the agreement.”); *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985). See generally 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 2.3.1.1, and authorities cited therein.

⁷⁴ See Schmitz, *supra* note 2, at 7. At least superficially, the language of the FAA raises a question about whether or not “arbitration” may include nonbinding as well as binding awards. FAA section 9 providing for judicial enforcement of awards states:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

Federal Arbitration Act, 9 U.S.C. § 9 (2000) (emphasis added). The italicized phrase with its conditional “if” might be interpreted as giving parties to agreements under the FAA an option to provide for court enforcement of the award, failing which the judicial enforcement provisions of the act would not apply.

However, there is no indication in the legislative history of the FAA that it was designed to deal with anything but binding arbitration. Indeed, according to Professors Macneil, Speidel, and Stipanowich, “it was precisely the fear of nonbinding awards that led to the need expressed in the House Report . . . ‘to make the contracting party live up to his agreement.’” See 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 9.8.1, at 9:57 (citing MACNEIL, *supra* note 18, at chs. 7-9).

⁷⁵ 9 U.S.C. § 10 (a)(2) (award may be vacated in case of partiality or corruption).

⁷⁶ *Id.* § 7 (describing process of summoning witnesses to testify before arbitrators).

⁷⁷ Professor Soia Mentschikoff identified four “essential aspects” of arbitration: an agreement by parties to arbitrate; a dispute resolution process outside the courts; a decision by a third party arbitrator; and recognition of that decision as final and binding in accordance with the parties’ prior agreement. Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 699 (1952).

third party after the hearing.⁷⁸ These elements denote what we will refer to as “classic” arbitration for the purposes of comparison.⁷⁹

Some federal and state courts, however, have applied arbitration law to agreed procedures that in one way or another fail to conform to the “classic” model, including processes in which there is no legally enforceable final award⁸⁰ or no hearing.⁸¹ These determinations are often made without explanation or on the basis of questionable, vague, and/or unreliable tests.⁸²

Given what has been characterized as the irresistible “gravitational force” of arbitration law—a body of well-established precedent according legitimacy, strong protection, and expedited enforcement to arrangements for resolving conflict—it is no wonder that many courts have swept aside “definitional niceties” and used arbitration law as a convenient (if often ill-fitting) hook for enforcement of other kinds of dispute resolution agreements.⁸³ Indeed, at least one thoughtful scholar forcefully argues that the strong policies supporting party autonomy require courts to apply arbitration law very liberally, affording breathing room for the evolution of various forms of private ordering.⁸⁴ There are, however, countervailing arguments supporting a more restrained application of arbitration law and the promotion of appropriate alternative grounds for the enforcement of nonbinding arbitration, mediation, and other alternatives to “classic” arbitration.⁸⁵

⁷⁸ See, e.g., *Fit Tech*, 374 F.3d at 7. A California appellate decision explained:

Arbitration has been defined as “[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.” The characteristics of an arbitration agreement are: “(1) a third party decision maker; (2) a mechanism for ensuring neutrality with respect to the rendering of the decision; (3) a decision maker who is chosen by the parties; (4) an opportunity for both parties to be heard, and (5) a binding decision.”

Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 850 n.2 (Ct. App. 2006) (citation omitted) (quoting *Cheng-Canindin v. Renaissance Hotel Ass’n*, 57 Cal. Rptr. 2d 867, 872 (Ct. App. 1996)); see also *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175, at *5 (Ohio Ct. App. June 20, 2003) (quoting *Ohio Council 8 v. Ohio Dep’t of Mental Retardation & Developmental Disabilities*, 459 N.E.2d 220, 222 (Ohio 1984) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1966))); 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 2.1.2; Mentschikoff, *supra* note 77; see also Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 125 (2002) (observing that “most have read the [arbitration] acts to apply to consensual proceedings that ‘settle’ or end disputes through final and binding third party determinations”).

⁷⁹ *Fit Tech*, 374 F.3d at 7 (referring to “classic arbitration” elements).

⁸⁰ See *infra* note 135 and accompanying text.

⁸¹ See *infra* notes 106, 111, 115 and accompanying text.

⁸² See *infra* notes 106, 111, 115 and accompanying text.

⁸³ See Rau, *supra* note 51, at 467.

⁸⁴ See *id.* at 466-508.

⁸⁵ See *infra* notes 134-241.

II. JUDICIAL DIVERGENCE ON THE APPLICATION OF ARBITRATION LAW TO DISPUTE RESOLUTION AGREEMENTS

A. *The Scope of Arbitration Law: A Variety of Approaches*

Courts have taken dramatically different approaches in assessing the applicability of arbitration law to various conflict resolution processes.⁸⁶ While some have concluded that only “classic” arbitration is within the scope of the statute, others have applied arbitration law to agreements for “nonbinding arbitration,” appraisal,⁸⁷ or other nonbinding third-party decision-making processes⁸⁸ and even to mediation.⁸⁹

Under the FAA, divergence begins with the question of whether the definition of arbitration is a matter of federal or state law.⁹⁰ In determining whether a contract requires arbitration, the Supreme Court has decreed, “[C]ourts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”⁹¹ This has led a number of courts to look to state law in order to determine whether the FAA applies to a dispute resolution agreement.⁹² Other decisions have rejected this approach, however, citing the absence of plain evidence that Congress intended state law to define “arbitration”⁹³ and the declared national policy supporting the broad enforceability of

⁸⁶ There is a good deal of authority for the proposition that the application of the FAA does not depend on precise nomenclature and that arbitration law may be applicable to agreements contemplating processes not expressly labeled “arbitration.” See *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004). See generally 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, §§ 2.3.1-2, and authorities cited therein.

⁸⁷ See *infra* notes 192-97 and accompanying text.

⁸⁸ See *infra* notes 180-91 and accompanying text.

⁸⁹ See *infra* notes 100, 110, 140 and accompanying text.

⁹⁰ See 1 MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 27, § 2.3.1.2.

⁹¹ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

⁹² See, e.g., *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat’l Ass’n*, 218 F.3d 1085, 1090-91 (9th Cir. 2000) (holding that state law governed review of appraisal decision); *Hartford Lloyd’s Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062-63 (5th Cir. 1990) (defining arbitration per Texas and other state laws); *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (defining “arbitration” by reference to state law).

⁹³ A Tenth Circuit panel reasoned:

In the absence of clear evidence that Congress intended state law to define “arbitration,” we must assume that federal law provides the definition. The meaning that the law attaches to the term “arbitration” establishes the scope and force of the FAA. Unless Congress plainly intended the various states’ laws to define “arbitration,” and to therefore regulate the FAA’s application within their borders, we will look to federal law for the definition. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S. Ct. 1597, 104 L.Ed.2d 29 (1989) (“We start . . . with the general assumption that in the absence of a plain indication to the contrary, Congress when it enacts a statute is not making the application of the federal act dependent on state law.”) (internal citations omitted). . . .

Neither the language nor the legislative history of the FAA demonstrate that Congress plainly intended state law to define the FAA’s central term. Not only does the FAA lack a plain indication that state law should govern, it is silent as to what law defines “arbitration.” . . .

. . . .

Congress did not plainly intend arbitration to mean different things in different states. Rather, it sought a uniform federal policy favoring agreements to arbitrate. Accordingly, we will apply federal law standards to determine whether . . . appraisal constituted arbitration.

agreements to arbitrate under the FAA requiring a single national definition of “arbitration.”⁹⁴

Putting aside the question of controlling law, there is the central problem of finding a suitable, functional test for application of arbitration law. A survey of pertinent case law reveals fundamental conflict among judicial approaches.

*Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*⁹⁵ is illustrative of precedents that base decisions about whether a process falls within the ambit of arbitration law on its conformance to the “classic” or traditional model of arbitration, based in turn on the “intuited” intent of statutory drafters.⁹⁶ The First Circuit decision concerned an agreement to have Price Waterhouse accountants make a final determination of disputes regarding the calculation of the corporate earnings of fitness centers. The court drew attention to the language of finality in the agreement as well as the presence of “other common incidents of arbitration of a contractual dispute” including “an independent adjudicator,” standards for decision-making (in the form of terms governing the pay-out), and “an opportunity for each side to present its case.”⁹⁷

Some other decisions apply arbitration law to various dispute resolution processes without explanation. In *Dow Corning Corp. v. Safety National Casualty Corp.*,⁹⁸ an Eighth Circuit panel determined that the FAA was applicable to arbitration procedures culminating in what it concluded must be a nonbinding decision;⁹⁹ it reached this conclusion without pertinent consideration of the nature and purpose of the FAA or any other supporting justification. In *Cecala v. Moore*,¹⁰⁰ a federal district court enforced a “mediation” agreement under the Illinois Uniform Arbitration Act, using the terms “arbitration” and “media-

Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc., 390 F.3d 684, 688-89 (10th Cir. 2004).

⁹⁴ See *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 & n.3 (1st Cir. 2004) (pointing out analogous examples of core terms at the heart of various federal statutory schemes being defined as a matter of federal law). As stated in *Salt Lake Tribune*: “Were we to hold that state law guides our determination, we would empower states to define arbitration as they choose, thus limiting the FAA’s utility. This we decline to do. Congress passed the FAA to ensure that state law would not undermine arbitration agreements.”

Salt Lake Tribune, 390 F.3d at 689.

⁹⁵ *Fit Tech*, 374 F.3d 1.

⁹⁶ See *id.* The decision reasoned that the applicability of the FAA to an “accounting remedy” should be based on “how closely the specified procedure resembles classic arbitration and whether treating the procedure as arbitration serves the intuited purposes of Congress.” *Id.* at 7.

⁹⁷ *Id.* The court noted that although the “accounting remedy” did not cover all of the disputes between the parties, including operational issues affecting the pay-out, there was no requirement that arbitration provide comprehensive relief. *Id.* (citing *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 4 (1st Cir. 2000); *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 831-33 (2d Cir. 1988)).

⁹⁸ *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003).

⁹⁹ *Id.* at 747; see also *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986 (Ind. Ct. App. 2005) (concluding “arbitration” agreement was enforceable under Indiana law without concluding whether the arbitral decision would or would not be binding). Cf. *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208-09 (9th Cir. 1998).

¹⁰⁰ *Cecala v. Moore*, 982 F. Supp. 609 (N.D. Ill. 1997).

tion” interchangeably; the court appeared to be oblivious to the differences between the processes.

A middle (and muddy) ground is occupied by other precedents, most notably the much-cited federal district court decision in *AMF Inc. v. Brunswick Corp.* and its progeny.¹⁰¹ *AMF* centers upon the language of FAA section 2 providing that the arbitration statute governs “contracts . . . to settle [disputes] by arbitration.”¹⁰² For the purposes of applying the FAA, the court reasoned, the key issue was “whether ‘a controversy’ would be ‘settled’ by the process set forth in the agreement” as required by section 2.¹⁰³ This, the court concluded, did not mandate the rendition of a legally enforceable award. Although the subject agreement to submit disputes regarding advertised claims to the National Advertising Division (“NAD”) provided for the NAD to make a determination that was not legally binding, the court concluded that the parties’ controversy would nevertheless be “settled” by the NAD procedure because there would be a determination as to whether data supported the advertised claims—“even though the parties [might] want to continue related disputes in another forum.”¹⁰⁴ Given the history of corporate adherence to decisions issued by NAD tribunals, moreover, it was “highly likely” that a NAD determination would either end the challenge to the advertisement or result in a modification of the advertising copy.¹⁰⁵ In a further departure from the “classic” arbitration model, the court ruled that the FAA applied despite the fact that NAD procedures did not involve an adversary hearing, but were based on *ex parte* communications.¹⁰⁶

AMF has had considerable influence on judicial opinions, including federal appellate decisions addressing enforcement of nonbinding arbitration provisions.¹⁰⁷ This is regrettable since the *AMF* rationale lends itself to subjective

¹⁰¹ *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985).

¹⁰² Federal Arbitration Act, 9 U.S.C. § 2 (2000).

¹⁰³ *AMF*, 621 F. Supp. at 459.

¹⁰⁴ *Id.* at 461.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ In *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), the Ninth Circuit favorably cited *AMF* in the course of directing the enforcement of a nonbinding arbitration provision in a restaurant franchise development agreement. *Id.* at 1208-09. The court, however, dispensed with any consideration of the likelihood that the nonbinding determination would finally resolve any of the issues and in this sense went a significant step beyond *AMF*. See *id.* at 1209. In *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001), *AMF* and *Wolsey* were favorably cited by the Fourth Circuit in support of its determination that an arbitration agreement was enforceable under the FAA despite the fact that it was not binding on the United States Government. *Id.* at 321-23. In *Brennan v. King*, 139 F.3d 258 (1st Cir. 1998), the court distinguished the facts of *AMF* in the course of declining to apply the FAA to an “arbitration” provision in a university tenure application procedure, concluding that “[b]ecause the contract at issue here imposes strict constraints on the scope of the arbitrator’s authority and severely limits the effect of the arbitral decision, there is little ground for a “reasonable . . . expectation” that the procedure will resolve the dispute.” *Id.* at 266 n.7 (quoting *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 350 (3d Cir. 1997)).

In *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640 (Neb. 1996), the court also cited *AMF* in support of its conclusion that the Federal Arbitration Act covers nonbinding arbitration agreements. *Id.* at 645. The Alabama Supreme Court made no distinction between binding and nonbinding arbitration in *Morrison Restaurants v. Homestead Village of Fair-*

and time-consuming inquiries into whether a particular process is “reasonably likely” to resolve a dispute, thus invoking arbitration law. The resulting difficulty is exemplified by *Harrison v. Nissan Motor Corp.*,¹⁰⁸ a case in which the trial court was treated to a lawyerly debate over the extent to which a manufacturer’s informal dispute resolution mechanisms actually avoided resort to court.¹⁰⁹ It does not require a great stretch of the imagination to imagine courts being asked to apply arbitration law to a mediation proceeding under the *AMF* standard because the designated mediator (or mediation provider organization) boasts a high rate of success in closing cases! Indeed, even without resort to such arguments, the rationale promoted by *AMF* has underpinned judicial enforcement of agreements to mediate under arbitration law.¹¹⁰

Other decisions also appear to have departed from the “classic arbitration” approach, raising the possibility that processes not based on an adversary hearing are within the scope of arbitration law.¹¹¹ Consider the Tenth Circuit’s decision in *Salt Lake Tribune Publishing Co. v. Management Planning, Inc.*¹¹² While the court observed that “[u]nder federal law, we must determine if the process at issue sufficiently resembles classic arbitration to fall within the purview of the FAA,” it focused solely on what it termed the “central [element of] any conception of classic arbitration[:] . . . the disputants empowered a third party to render a decision settling their dispute.”¹¹³ In accompanying dicta the court observed that “[p]arties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA, but may choose from a broad range of procedures and tailor arbitration to suit their peculiar

hope Ltd., 710 So. 2d 905 (Ala. 1998). The court invoked the principle “a party may waive its right to arbitrate a dispute if it substantially invokes the litigation process and thereby substantially prejudices the party opposing arbitration” to strike down a clause in a food service contract calling for mediation of disputes, followed by nonbinding arbitration if mediation failed to resolve disputes. *Id.* at 907 (internal quotations omitted).

¹⁰⁸ *Harrison*, 111 F.3d 343.

¹⁰⁹ *Id.* at 350.

¹¹⁰ In *CB Richard Ellis, Inc. v. American Environmental Waste Management*, No. 98-CV-4183 (JG), 1998 U.S. Dist. LEXIS 20064 (E.D.N.Y. Dec. 4, 1998), the court also rigorously applied the FAA to enforce a mediation agreement, citing policies and precedents supporting the broad enforceability of arbitration agreements and standards for interpretation. The court endorsed the parties’ position that the FAA governed judicial analysis of the mediation provision, reasoning that because the clause “manifests the parties’ intent to provide an alternative method to ‘settle’ controversies arising under [their agreement, it] fits within the [FAA’s] definition of arbitration.” *Id.* at *4 (citing *AMF*, 621 F. Supp. 456). This rationale would extend the purview of the FAA to virtually any ADR process. *Accord Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891 (M.D. Tenn. 2003).

¹¹¹ See *AMF*, 621 F. Supp. 456.

¹¹² *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684 (10th Cir. 2004).

¹¹³ *Id.* at 689 (citing *Harrison*, F.3d at 350). The court was emphatic that it “must nonetheless scrutinize the process . . . to ascertain whether the third party’s decision does in fact resolve the dispute.” *Id.* at 690. It cited *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988), for the principle that “what is important is [whether] the parties clearly intended to submit some disputes to their chosen instrument for the *definitive settlement* of grievances under the Agreement.” *Salt Lake Tribune*, 390 F.3d at 690. The court cites 1 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 2.3.1.1. *Salt Lake Tribune*, 390 F.3d at 690 (“Process is arbitration under the FAA where ‘the decision of the dispute resolver shall be both final and binding, subject only to the limited judicial review spelled out in the FAA.’”).

circumstances.”¹¹⁴ Although the Tenth Circuit’s vague insistence that arbitration need not involve “quasi-judicial proceedings” may or may not constitute an outright rejection of the requirement of the adversary hearings that are an element of “classic” arbitration, other courts have clearly held that an agreement to conduct hearings is not a prerequisite to the application of arbitration law.¹¹⁵

In addition to revealing considerable judicial confusion, not to mention sloppiness,¹¹⁶ many of the decisions applying arbitration law to mediation and nonbinding arbitration processes raise important questions. Given that arbitration law provides a convenient procedural “hook” for the bare enforcement of other kinds of dispute resolution provisions, one may ask, what of the applicability of other aspects of arbitration law? As discussed above, arbitration law not only establishes a procedure for requiring people to participate in a process, but also establishes a multi-faceted implementing legal framework.¹¹⁷ Of necessity, courts that summarily enforce other kinds of ADR agreements under arbitration law must use federal and state statutes selectively since at least some (and perhaps many) sections of the statute may be inapposite. Assuming this is permissible, are courts up to the challenge? And are there not more suitable alternatives?

B. Exploding the Box: The Case for Expansive, Flexible Application of Arbitration Law

Professor Alan Rau has advanced creative arguments in support of the notion that arbitration law should serve as a fount of “living law” of dispute resolution and evolve expansively to serve a wide range of public and private intervention processes.¹¹⁸ He contends that American arbitration law represents a duality¹¹⁹ in which, in contrast to judicial approaches in other systems,¹²⁰ the notion of a legally enforceable adjudication mechanism in place of the public forum is of much less significance than the principle of party autonomy in private ordering.¹²¹ This consummate emphasis on the ability of parties to structure private dispute resolution processes in virtually any way they choose has resulted in enforcement of agreements that circumvent most if not all elements we have termed “classic arbitration”¹²² and present conceptual difficulties for those seeking to assert firm boundaries for arbitration law.

Limiting the application of arbitration law to circumstances in which an adversary hearing is conducted, or where a legally binding award is rendered, he argues, creates a “straitjacket” that unduly restricts the flexibility already

¹¹⁴ *Salt Lake Tribune*, 390 F.3d at 690.

¹¹⁵ See, e.g., *Schofield v. Int’l Dev. Group Co.*, No. SA-05-CA-1110-RF, 2006 WL 504058, at *2 (W.D. Tex. Feb. 2, 2006) (citing definition of “arbitration” in *Black’s Law Dictionary*); *AMF*, 621 F. Supp. 456.

¹¹⁶ See generally Rau, *supra* note 51.

¹¹⁷ See *supra* text accompanying notes 25-49.

¹¹⁸ See generally Rau, *supra* note 51, at 466-508.

¹¹⁹ Nathan Isaacs may have been the first to comment upon the dual character of arbitration. Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929 (1927).

¹²⁰ See generally, Rau, *supra* note 51.

¹²¹ See *id.*

¹²² See *supra* text accompanying notes 77-79.

inhering in parties under arbitration law.¹²³ In order for arbitration to have sufficient breathing space to serve the wide ranging needs of contracting parties, courts should be prepared to transcend any traditional boundaries.¹²⁴ In addition, he suggests, arbitration law is not an all-or-nothing unitary construct, but rather a smorgasbord that parties and courts may selectively apply to the extent circumstances warrant.¹²⁵ He proposes that courts be permitted to use the act as a source of enlightened statute-based commercial law,¹²⁶ “lett[ing it] out” as necessary to address present realities.¹²⁷

On this basis, Professor Rau proposes to explode any conceptual “box” for arbitration and apply arbitration law to forms of nonbinding arbitration and third party decision-making, and even mediation—whether consensual or statutorily mandated. He eschews virtually every definitional boundary for arbitration, save the need (apparently) for a third party intervener in some role.¹²⁸ (He merely offers a list of scenarios that he says are clearly beyond the scope of arbitration law.¹²⁹)

Rau contends that harnessing the “core” aspects of arbitration law, including sections authorizing courts to stay related litigation and compel arbitration and to appoint arbitrators (neutrals)¹³⁰ to enforce various mediation agreements and other ADR provisions, would give authors of mediation and nonbinding decision-making processes the benefit of the “streamlined procedures” and “expedited judicial action” to enforce their agreements.¹³¹ Other aspects of arbitration law, including provisions for confirmation and vacatur, might or might not be applicable depending on the circumstances. In the case of vacatur standards, for example, it would be up to the courts to “assure the conclusive

¹²³ Rau, *supra* note 51, at 501. “To look for the ‘ideal type’ of a particular process is to miss the obvious point that the needs of contracting parties, and the creativity of draftsmen, are infinite in their variety—as are the types of dispute resolution mechanisms that they may devise.” *Id.* at 504.

¹²⁴ *Id.*

¹²⁵ *Id.* Lending weight to Professor Rau’s position are decisions in which courts acknowledge the possibility that an arbitration agreement may be enforced even though the final award may not be enforceable in a court of law. *See, e.g., Dow Corning Corp. v. Safety Nat’l Cas. Corp.*, 335 F.3d 742, 745 (8th Cir. 2003) (distinguishing “[m]andatory arbitration prior to resort to a court” from “mandatory arbitration precluding resort to a court”); *Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3d Cir. 1996); *Okla. City Assocs. v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 795 (10th Cir. 1991). As Professor Schmitz explains, “If the parties do not agree that judgment may be entered on an award, the FAA does not apply to the enforcement of the award. [But] [i]f the FAA applies to the proceeding, the parties may enjoy other benefits of the broad remedial scheme of the Act” Schmitz, *supra* note 78, at 147. Professor Macneil, however, strongly disputes this notion and insists that the FAA should be read to permit judicial enforcement of awards in the absence of an entry of judgment clause. He insists that the language and legislative history of the Act support this conclusion. In any event, he insists, awards rendered in the absence of an entry of judgment clause should be enforceable in an “ordinary [common law] action on the award.” 4 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 38.2.2.

¹²⁶ *See* Rau, *supra* note 51, at 469-70.

¹²⁷ *Id.* at 503.

¹²⁸ *Id.* at 460-61.

¹²⁹ *See generally* Rau, *supra* note 51.

¹³⁰ *Id.* at 500.

¹³¹ *Id.* Rau suggests that to deny them this opportunity “seems both ungenerous and unnecessary.” *Id.*

nature of an award only to the extent this is what the parties were trying to accomplish.”¹³² He is apparently confident that courts will be able to navigate their way to nuanced, tailored applications of federal or state arbitration statutes that are appropriate to the procedures at hand.¹³³

C. Arguments for Greater Restraint

There is no question that parties have created an extraordinarily rich spectrum of dispute resolution processes, many of which are “one-off” from classic arbitration. Moreover, parties routinely modify or waive procedural elements (by, for example, foregoing the opportunity to present evidence in an adversary hearing¹³⁴ or limiting the “finality” of an award¹³⁵). Although in recent years there have been a spate of judicial or legislative efforts to set limits on this flexibility by, for example, establishing mandatory and non-waivable rules for arbitration¹³⁶ or forbidding certain kinds of agreements such as contractually expanded standards for judicial review and vacatur of award,¹³⁷ the principle of contractual autonomy and flexibility is a strong argument for a liberal interpretation of what constitutes “arbitration.”¹³⁸

There are, however, a number of compelling arguments for not applying arbitration law indiscriminately to other forms of ADR agreements, including the lack of functional compatibility between these processes and the language and structure of the arbitration statutes, related transaction costs, and the availability (or possibility) of more suitable alternatives. We will first consider mediation, and then turn to nonbinding arbitration and other forms of nonbinding third-party decision-making.

1. Mediation and the Law of Arbitration

As we have seen, some courts have enforced agreements to mediate (under which a third party facilitates negotiations between the parties in order to pro-

¹³² *Id.* at 501 (emphasis omitted).

¹³³ *Id.*

¹³⁴ See *supra* text accompanying note 53.

¹³⁵ See *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790, 793-94 (5th Cir. 2002) (holding that parties’ contractual modification of default standard of review for arbitration awards allowed for de novo review of pure questions of law); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995) (holding that when parties’ contract stated that errors of law in arbitration decision shall be subject to appeal, de novo review of issues of law was embodied in the arbitration award).

¹³⁶ See *supra* text accompanying notes 35, 49.

¹³⁷ See, e.g., *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 789 n.3 (8th Cir. 2003) (“[W]e again express skepticism as to whether parties can contract for heightened judicial review of arbitration awards, which would seemingly amend the FAA, crown arbitrators mini-district courts, force federal trial courts to sit as appellate courts, and completely transform the nature of arbitration and judicial review.”); *Chi. Typographical Union No. 16 v. Chi. Sun-Times Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (holding that the parties cannot contract for judicial review of an arbitration award); *Oakland-Alameda County Coliseum Auth. v. CC Partners*, 124 Cal. Rptr. 2d 363, 370 (Ct. App. 2002) (holding that parties to an arbitration agreement cannot contractually expand the scope of judicial review beyond that provided by statute).

¹³⁸ See *supra* text accompanying notes 50-54.

mote resolution of dispute)¹³⁹ under federal or state arbitration law, either without explanation¹⁴⁰ or under broad interpretations of the scope of the relevant statute.¹⁴¹ Such actions, however, defy even the most strained interpretation of the nature and purposes of arbitration law. There is absolutely no evidence that agreements to mediate were within the contemplation of the drafters, and there is recent evidence to the contrary in the form of discrete uniform law initiatives on arbitration and mediation.¹⁴² Moreover, no prudent practitioner purporting to advise clients on the drafting of dispute resolution clauses would assume that a mediation provision would be governed by arbitration law.¹⁴³

Let us consider the fundamental difference between an agreement to mediate and an agreement to arbitrate. Parties pen an arbitration clause with the expectation that their efforts to resolve the subject controversies will be wholly (or almost wholly) outside the court system, and expect that resorting to court, if required, will be limited to seeking some form of judicial facilitation for the agreement or a resulting award; in the absence of voluntary compliance the law provides a straightforward and expeditious means of getting to the anticipated private forum and enforcing the bargained-for result. In the case of an agreement to mediate, the parties are conveying their intent to sit down at a table and informally explore opportunities for consensual resolution; it is doubtful that the legal enforceability of the provision is prominent in their minds—the emphasis is on voluntary participation.¹⁴⁴

¹³⁹ See *supra* notes 100, 110.

¹⁴⁰ See *Cecala v. Moore*, 982 F. Supp. 609, 612 (N.D. Ill. 1997) (applying Illinois Uniform Arbitration Act); *Design Benefit Plans, Inc. v. Enright*, 940 F. Supp. 200 (N.D. Ill. 1996) (enforcing contract provision requiring mediation, then arbitration, under Federal Arbitration Act).

¹⁴¹ See *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891 (M.D. Tenn. 2003); *Ellis v. Am. Env'tl. Waste Mgmt.*, No. 98-CV-4183 (JG), 1998 U.S. Dist LEXIS 20064 (E.D.N.Y. Dec. 4, 1998) (applying Federal Arbitration Act).

In *Coburn v. Grabowski*, No. CV 960134935, 1997 Conn. Super. LEXIS 1478 (Conn. Super. Ct. May 29, 1997), a Connecticut court reasoned that in the absence of cases involving the effect of mediation clauses, it was reasonable to look to the law of arbitration for guidance in considering the enforceability of a mediation provision in a real estate contract. The court observed that “[a]lthough the mediation process differs from the arbitration process, they are both accepted methods utilized for dispute resolution . . . [and] the types of clauses found in contracts invoking their use are generally similar.” *Id.* at *3. Although this approach is similar to the way courts use the Uniform Commercial Code by analogy to fill gaps in non-U.C.C. commercial and contract law, the U.C.C. expressly envisages this approach while arbitration statutes do not. U.C.C. § 1-102 (1998).

¹⁴² The effort by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) to modify the Uniform Arbitration Act occurred simultaneously with the drafting of the Uniform Mediation Act by a separate committee under NCCUSL auspices. See RUAA, UNIF. ARBITRATION ACT (revised 2000); see also UNIF. MEDIATION ACT (2001).

NCCUSL’s Scope and Program Committee rejected a proposal to include provisions in the Uniform Arbitration Act to provide for summary enforcement of agreements to mediate. Schmitz, *supra* note 2, at 12.

¹⁴³ One of the few exceptions is the referral to arbitration of an issue respecting the impact of a failure to mediate in a multi-step dispute resolution provision. See *infra* text accompanying notes 242-48.

¹⁴⁴ Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 787 (2005) (summarizing common critiques of court-ordered mediation); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-*

In almost every way, the “enforcement” of an agreement to mediate under the FAA or corresponding arbitration law makes no sense because the processes are fundamentally incompatible in nature and purpose. The specific enforcement of an agreement to mediate typically consists of an order to participate in a negotiation presided over by a mediator.¹⁴⁵ The obligation may result in attendance at no more than a single meeting,¹⁴⁶ and pending litigation may be suspended only briefly. In contrast to binding arbitration, “there is no wholesale substitution of private process for public, only the contingency that a negotiated settlement will end some or all of the litigation.”¹⁴⁷ Mediation, unlike binding arbitration, is truly conducted “in the shadow of the courthouse.”¹⁴⁸

The process implicitly defined by the FAA and state arbitration statutes and fleshed out by courts is a private adjudicative framework that is in virtually all respects an analog of the public justice system.¹⁴⁹ The parties have consigned the resolution of their dispute to the good offices of the arbitrator for full and final resolution; the arbitrator as judge and jury has plenary authority over all aspects of the proceedings, subject only to the parties’ agreement and the demands of fundamental fairness. The law empowers arbitrators to issue subpoenas for documents and witnesses,¹⁵⁰ direct hearing schedules, control the flow of evidence,¹⁵¹ and decide all submitted issues. As in court, *ex parte* discussions generally must be avoided in the interest of fairness.¹⁵²

In contrast, mediation is intended to promote self-determination by engaging the parties in facilitated communications that may lead to a negotiated settlement.¹⁵³ As facilitators, mediators are habitually accorded none of the quasi-judicial powers of arbitrators, and in the absence of novel arrangements it would be anomalous for a mediator to issue subpoenas or make legally enforceable rulings. Mediators’ power lies in their ability to listen, to promote communication, and to persuade.¹⁵⁴ The opportunity to communicate in confidence with the parties, *ex parte*, is often critical to their success.

Connected Mediation: The Inevitable Price of Institutionalization?, 6 HARV. NEGOT. L. REV. 1 (2001).

¹⁴⁵ See *Monroe v. Corpus Christi Indep. Sch. Dist.*, 236 F.R.D. 320 (S.D. Tex. 2006); *Valley Coal Co. v. Int’l Union, United Mine Workers of Am.*, 586 A.2d 436 (Pa. Super. Ct. 1991).

¹⁴⁶ See, e.g., *Envntl. Contractors, LLC v. Moon*, 983 P.2d 390 (Mont. 1999) (finding that dismissal of appeal was not warranted where party satisfied appellate mediation participation requirements by being available by telephone and having his attorney physically present at a single mediation meeting).

¹⁴⁷ Stipanowich, *supra* note 2, at 862.

¹⁴⁸ Exceptions must be made for mediations conducted pursuant to multi-step dispute resolution provisions in which disputes that are not resolved through mediation are submitted to arbitration. Some related issues are discussed in Part III. See *infra* text accompanying notes 242-73.

¹⁴⁹ FOLBERG, GOLANN, KLOPPENBERG & STIPANOWICH, *supra* note 12, at 453.

¹⁵⁰ See 3 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 34.2.1.

¹⁵¹ *Id.* § 34.2.

¹⁵² *Id.* § 32.4.1.2.

¹⁵³ Welsh, *supra* note 144, at 4.

¹⁵⁴ See *id.*

The immunity of arbitrators from liability within their arbitral role is well established under U.S. law,¹⁵⁵ as reflected in the latest revisions to the UAA.¹⁵⁶ Arbitral immunity is based on the notion that arbitrators, like judges, require protection from liability and legal process in order to ensure their impartiality and shield them from undue influence in making decisions.¹⁵⁷ It also reflects strong public policies against judicial intrusion into the arbitration process and in favor of the finality of arbitration awards.¹⁵⁸ However, the immunity of mediators is another (and more controversial) matter;¹⁵⁹ arbitral immunity furnishes no obvious predicate,¹⁶⁰ with the possible exceptions of mediators with close connections to courts¹⁶¹ or mediators who render formal advisory opinions or evaluations.¹⁶² Although some statutes have offered similar protections to court-appointed mediators,¹⁶³ the drafters of the Uniform Mediation Act (“UMA”) declined the opportunity to include a provision for mediator immunity.¹⁶⁴

A comparison of the recent uniform statutes points to another salient difference in mediation and arbitration—the nature and scope of confidentiality.¹⁶⁵ The centrality of confidentiality in mediation is reflected in the UMA, which is devoted almost entirely to the scope of legal privileges for protection of communications in mediation in order to facilitate full and forthright discourse between disputants and mediators.¹⁶⁶ Despite its vaunted “privacy,”¹⁶⁷

¹⁵⁵ See generally 3 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 31.3.

¹⁵⁶ RUAA, UNIF. ARBITRATION ACT § 14 (revised 2000). Internationally, practices vary. See Stipanowich, *supra* note 2, at 878-79.

¹⁵⁷ See 3 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, §§ 31.3.1.1-.2.

¹⁵⁸ *Id.*

¹⁵⁹ See SARAH R. COLE, NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* § 11.3 (2d ed. 2006); Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629 (1997).

¹⁶⁰ See Stipanowich, *supra* note 2, at 863.

¹⁶¹ See, e.g., *Wagshal v. Foster*, 28 F.3d 1249, 1252-54 (D.C. Cir. 1994) (holding that absolute quasi-judicial immunity extends to mediators and case evaluators in court program); *In re Sergeant Farms, Inc.*, 224 B.R. 842 (Bankr. M.D. Fla. 1998) (holding that absolute quasi-judicial immunity applies to mediator appointed in bankruptcy case).

¹⁶² See *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (holding that a court-appointed mediator or neutral case evaluator performing tasks within the scope of his official duties was entitled to absolute immunity from damages in a suit brought by a disappointed litigant); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 903 (Ct. App. 1990) (granting absolute immunity to neutral third persons who are engaged as case evaluators or arbitrators when acting in their official capacities).

¹⁶³ E.g., FLA. STAT. § 44.107 (2007) (“[A court-appointed] mediator shall have judicial immunity in the same manner and to the same extent as a judge.”).

¹⁶⁴ See generally UNIF. MEDIATION ACT (2001); see also UNIF. MEDIATION ACT § 4(b) (Draft 1999), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/med499.pdf> (“This Draft takes no position on the general issue of immunity for mediators.”).

¹⁶⁵ See generally Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255 (2006).

¹⁶⁶ See generally UNIF. MEDIATION ACT. See, e.g., *Fair v. Bakhtiari*, 147 P.3d 653, 656-57 (Cal. 2006) (“[T]he mediation confidentiality provisions of the Evidence Code were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings.”).

¹⁶⁷ Reuben, *supra* note 165, at 1259-61.

however, in the absence of special agreements or arbitral orders, arbitration proceedings do not offer a similar evidentiary shield.¹⁶⁸

Finally, arbitration statutes establish a framework for judicial confirmation, vacatur, modification, and enforcement of arbitrators' decisions or awards. The statutory framework clearly contemplates a judgment rendered through adversary adjudication, not a settlement agreement achieved through facilitated negotiation.¹⁶⁹ Moreover, the law anticipates that the arbitral award will produce a full and final resolution of all matters submitted and—if the parties have so provided, the enforcement of the final award by a court of law;¹⁷⁰ in contrast, there is no guarantee that mediation will resolve any disputes, only a possibility; in many cases, moreover, mediated settlements resolve some but not all of the issues.¹⁷¹

Thus, the law of arbitration is in nearly every respect an illogical foundation for enforcement of mediation agreements.¹⁷² Although a desperate lawyer or ill-informed court may use arbitration law as a convenient hook for ordering parties to mediation, it means forcing a square peg into a round hole.

2. Other Grounds for Enforcement of Mediation Provisions

That said, there are several other bases upon which courts may enforce agreements to mediate. In some jurisdictions, for example, statutes now provide a specific rubric for enforcement of mediation agreements.¹⁷³ Even in the absence of legislation, courts may view the enforcement of a private agreement to mediate as incidental to their authority to unilaterally order parties to participate in mediation¹⁷⁴—authority now established by many rules of court,¹⁷⁵ the

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* text accompanying notes 42-45, 74; see generally Federal Arbitration Act, 9 U.S.C. §§ 2-16 (2000).

¹⁷⁰ See 9 U.S.C. § 9 (providing for awards based on arbitral proceedings).

¹⁷¹ *Seasoned Lawyers Offer Mediation Insights*, ALTERNATIVES TO HIGH COST LITIG., Jan. 1994, at 55 (“If one party does not want to solve the problem, mediation will fail.”).

¹⁷² See, e.g., *Lindsay v. Lewandowski*, 43 Cal. Rptr. 3d 846, 850 (Ct. App. 2006) (noting that applying arbitration rules to mediation could create confusion); *Cafarelli v. Colon-Col-lazo*, No. CV055000279S, 2006 WL 1828608 (Conn. Super. Ct. June 20, 2006) (holding that absence of mediation, unlike arbitration, did not deprive the court of jurisdiction).

¹⁷³ See, e.g., *Gassner v. Bechtel Constr.*, 702 So. 2d 548, 552 (Fla. Dist. Ct. App. 1997) (discussing FLA. STAT. § 440.211 (1995), which contemplates a range of possible “alternative dispute resolution system[s] to supplement, modify or replace” statutory procedures); see also California International Arbitration and Conciliation Act, CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West 2007); Texas Alternative Dispute Resolution Procedures Act, TEX. CIV. PRAC. & REM. CODE ANN. § 154.001-154.073 (Vernon 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 154.021; UNCITRAL Model Law on International Commercial Conciliation (2002).

¹⁷⁴ See ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 66 (1996) (noting that most federal mediation programs authorize judges to order parties to mediation even without their consent).

¹⁷⁵ See *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 1098 (Fla. Dist. Ct. App. 2001) (noting that mediation is mandatory as ordered by the court); *Fuchs v. Martin*, 845 N.E.2d 1038 (Ind. 2006) (holding that court-mandated mediation was not an improper restriction of court access).

existence of a contractual agreement to mediate should significantly augment the judicial prerogative.¹⁷⁶

Similarly, mediated agreements may be specifically enforced as contracts or pursuant to special statutes.¹⁷⁷ Where, as is increasingly the case, a contractual dispute resolution agreement calls for mediation followed by arbitration, it is possible that a court will grant a motion to stay litigation under arbitration law.¹⁷⁸

However, these and a variety of other legal issues surrounding mediation are still being fleshed out by courts in various jurisdictions.¹⁷⁹

3. *Treatment of Nonbinding Arbitration and Variants*

Although agreements to mediate present a stark contrast to arbitration, many other agreements for “ADR” (or procedures such as the ICANN Uniform Dispute Resolution Policy¹⁸⁰) fall somewhere in between. For example, some nonbinding arbitration procedures may be similar in all respects to binding arbitration, save for a legally binding award.¹⁸¹ The problem with applying arbitration law to such arrangements is that at least some elements of arbitration law will be inapposite; the applicability of other aspects of arbitration law will be matters for argument.

a. *A Broad Spectrum of Nonbinding Decisional Processes*

This rich spectrum of procedures lying “between” classic mediation and classic arbitration includes those in which third parties are called upon to produce a decision that is not final and legally binding. Examples include “non-binding arbitration,” exemplified by the National Advertising Division’s procedure for resolving disputes over commercial advertising,¹⁸² “early neutral

¹⁷⁶ Ann T. Pfau & Daniel M. Weitz, *Court-Annexed ADR on the Rise*, N.Y. L.J., Apr. 12, 1999, at 10.

¹⁷⁷ See, e.g., California International Arbitration and Conciliation Act, CAL. CIV. PROC. CODE, § 1297.11 (provides for enforcement of conciliation agreements); TEX. CIV. PRAC. & REM. CODE ANN. § 154.021.

¹⁷⁸ See, e.g., *Woodlands Christian Acad. v. Logan*, No. 09-97-348 CV, 1998 Tex. App. LEXIS 3185, at *8-9 (Tex. App. May 21, 1998) (citing arbitration precedents in enforcement of multi-step procedure involving mediation, then binding arbitration of disputes under employment agreement).

¹⁷⁹ See Coben & Thompson, *supra* note 3, at 45-47 (noting that information is limited in regard to mediation due to privacy concerns).

¹⁸⁰ See *infra* note 217 and accompanying text; see also Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998) (authorizing individual registrars to issue domain names in the generic top level domain names, and the administration of country code top domains is delegated by ICANN); Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 149 n.16 (2001).

¹⁸¹ See, e.g., *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998) (involving nonbinding arbitration procedure under AAA Arbitration Rules, including some procedures for pre-hearing discovery).

¹⁸² See also CAL. BUS. & PROF. CODE § 6200 (West 2007) (California Mandatory Arbitration Act, providing for nonbinding arbitration process for resolution of attorney-client fee disputes); *In re Federated Dep’t Stores, Inc.*, 328 F.3d 829 (6th Cir. 2003) (procedure adopted by bankruptcy court required claimants who had personal injury litigation against

evaluation” in the form that evolved in various court programs,¹⁸³ some dispute resolution board or dispute review board (“DRB”) procedures used in infrastructure projects,¹⁸⁴ and the dispute resolution procedure under the Internet Corporation for Assigned Names and Numbers’ (“ICANN”) Uniform Domain Name Dispute Resolution Policy (“UDRP”).¹⁸⁵ Although process options differ in detail, most tend to be aimed at a “short and sharp” evaluation or decision by a third party.¹⁸⁶ As in mediation, the intent is not to supplant legal process unless the parties themselves agree to do so. It is not legal compulsion but the authority of the decision maker or other factors that compels resolution of the dispute.¹⁸⁷

Under some procedures, third party decisions may become binding in the absence of an appeal.¹⁸⁸ In other circumstances, notably under the procedures of standard state lemon laws and the Magnuson-Moss Warranty Act, a third party decision may be enforced at the election of one party.¹⁸⁹ Other arrangements provide that an arbitration award is binding if below a certain amount, and nonbinding if above.¹⁹⁰ Under other agreements decisions may not be enforceable in a court of law¹⁹¹ but may be admissible in later legal or administrative proceedings.

Some rubrics of decision-making such as “appraisal” comprehend a wide range of procedures.¹⁹² Some appraisals are intended to be binding deci-

Chapter 11 debtor to submit claims to nonbinding arbitration prior to bringing claims to court).

¹⁸³ Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 280 n.1 (1986).

¹⁸⁴ See Thomas J. Stipanowich, ‘Real Time’ Strategies for Relational Conflict, I.B.A. MEDIATION NEWSL., July 2007, at 6, 8-9.

¹⁸⁵ See *infra* note 325 and accompanying text.

¹⁸⁶ See *infra* note 325 and accompanying text.

¹⁸⁷ See *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 463 (E.D.N.Y. 1985) (noting that remedy at law would not address the parties’ concerns; submission to nonbinding authority was authorized).

¹⁸⁸ *City of Lincoln v. Soukup*, 340 N.W.2d 420 (Neb. 1983) (noting that decisions of municipal personnel board shall be final and binding upon the appointing authority, specifically that an “order by the personnel board, like the order of any intermediate court or administrative agency, is final and binding unless appealed”).

¹⁸⁹ See Harold Greenberg, *The Indiana Motor Vehicle Protection Act of 1988: The Real Thing for Sweetening the Lemon or Merely a Weak Artificial Sweetener?*, 22 IND. L. REV. 57, 60-66 (1988).

¹⁹⁰ Such an agreement, which has been employed in insurance policies as a device to deny trial if the arbitration award does not meet the minimum liability amount of the policy, has been struck down by most courts that have considered the issue. See, e.g., *Fireman’s Fund Ins. Co. v. Bugailiskis*, 662 N.E.2d 555, 557 (Ill. Ct. App. 1996) (citing decisions); *Davidson v. Robertson Orchards, Inc.*, No. H-99-020, 2000 WL 376407, at *2-3 (Ohio Ct. App. Apr. 14, 2000).

¹⁹¹ See, e.g., *PVI, Inc. v. Ratiopharm GMBH*, 135 F.3d 1252 (8th Cir. 1998) (refusing to enforce award under FAA where the parties failed to provide specifically for judicial enforcement in the agreement).

¹⁹² When it comes to the application of arbitration law, contractual arrangements for appraisal are a continuing source of controversy. Some courts have distinguished “appraisal” from “arbitration” on the basis that appraisals tend to focus solely on a question of valuation. See, e.g., *Hartford Lloyd’s Ins. Co. v. Teachworth*, 898 F.2d 1058, 1063 (5th Cir. 1990); *Rastelli Bros., Inc. v. Neth. Ins. Co.*, 68 F. Supp. 2d 440 (D.N.J. 1999). Broadly

sions,¹⁹³ while others are merely advisory.¹⁹⁴ Some appraisers are appointed (and may be affiliated with) a single party, others jointly.¹⁹⁵ Some appraisals are made in the wake of an adversary hearing, while others depend primarily or solely on the appraiser's own inquiry and expert judgment.¹⁹⁶ The latter approach is also characteristic of other third party expert decision-making processes, including the roles traditionally played by design professionals on construction projects.¹⁹⁷

b. Considerations Regarding the Application of Arbitration Law to Processes Involving Nonbinding Decisions

As we have seen, courts sometimes apply arbitration law to one or another of the foregoing non-mediation options;¹⁹⁸ such cases tend to present closer questions than does mediation due to their greater similarity to classic arbitration. Judicial application of arbitration law to such arrangements still raises concerns, however, on functional as well as historical levels.

(1) History, Language, and Structure of the FAA

According to Ian Macneil, a committed student of the history and evolution of federal arbitration law, "The FAA is designed to deal with agreements

speaking, however, the enforceability of arbitration agreements has never hinged on the comprehensiveness of their scope, but on the intent of the parties: While some arbitrators have authority to resolve virtually any kind of dispute relating to a contract, others' authority is narrowly circumscribed. See 2 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 20.2. ¹⁹³ Appraisers are often explicitly designated "arbitrators." See, e.g., *Blutt v. Integrated Health Servs., Inc.*, No. 96 CIV.3612 LLS., 1996 WL 389292 (S.D.N.Y. July 11, 1996). See generally Melvin D. Kraft, *Arbitration of Real Estate Valuation Disputes: Strategies in Preparing and Proving the Case*, *ARB. J.*, Sept. 1987, at 15. The presence or absence of such a label, however, is not necessarily dispositive of the question of whether arbitration law should apply. See *supra* text accompanying note 73.

¹⁹⁴ Compare *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1st Cir. 2004) (holding that accountant dispute resolution remedy is arbitration), and *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 830-31 (2d Cir. 1988), with *Salt Lake Tribune Pub. Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684 (10th Cir. 2004) (holding that appraisal agreement was not arbitration because it will provide parties with a data point but not a binding decision).

¹⁹⁵ Herbert Dodell, *Using the Appraisal Process to Resolve Insurance Disputes*, *L.A. LAWYER*, July-Aug. 2002, at 15 (noting that appraisers may be chosen separately and jointly in appraisal process).

¹⁹⁶ See, e.g., *Bratanov v. Riemenschneider*, 439 N.E.2d 434 (Ohio Ct. App. 1980) (holding that adversary appraisal should allow defendant to have a pre-hearing independent appraisal).

¹⁹⁷ See *Stipanowich*, *supra* note 2, at 846-47.

¹⁹⁸ See, e.g., *In re Federated Dep't Stores, Inc.*, 328 F.3d 829, 831 (6th Cir. 2003); *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003); *United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1207-09 (9th Cir. 1998); *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985); *Homes of Legend, Inc. v. McCollough*, 776 So.2d 741 (Ala. 2000); *Krut v. Whitecap Hous. Group, LLC*, 602 S.E.2d 201, 207 (Ga. Ct. App. 2004) (FAA); *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640 (Neb. 1996). *Contra Fit Tech*, 374 F.3d 1; *Dluhos v. Strasberg*, 321 F.3d 365, 371 (3d Cir. 2003); *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242 (Ohio 1992) (applying Ohio law); *Godfrey v. Hartford Cas. Ins. Co.*, 16 P.3d 617 (Wash. 2001) (applying Washington Arbitration Act).

to engage in binding arbitration . . . [and not] nonbinding arbitration.”¹⁹⁹ Indeed, “[i]ts entire history is free of any suggestion of such intention, and it was precisely the fear of nonbinding awards that led to the need expressed in the House Report . . . ‘to make the contracting party live up to [its] agreement.’”²⁰⁰

A possible “loophole” for those seeking to apply the FAA to nonbinding arbitration exists in FAA § 9, which provides:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States District Court in and for the district within which such award was made.²⁰¹

The first sentence of FAA section 9 may be read as simply enabling parties to select the court in which they wish to enter their judgment, but another, very plausible interpretation of the plain language is that statutory confirmation of an award is only available if the parties have included an entry of judgment clause.²⁰² The latter reading would support the concept that nonbinding arbitration agreements would also be enforceable (to a point) under the FAA. A number of arguments have been advanced against such a reading, however;²⁰³ the most compelling of these is a historical one. At the time the FAA was enacted it was common to enforce arbitration awards through ordinary contract actions; the expedited confirmation procedure set forth in the FAA provided an alternative route to judicial enforcement.²⁰⁴ It may be that Congress intended the expedited statutory procedure to apply only in the presence of an entry of judgment provision and to otherwise leave parties to their traditional common law remedy for the enforcement of binding arbitration awards; the purpose of FAA section 9 was to reserve the statutory confirmation process for those situations in which parties used the “magic” entry-of-judgment language in their binding arbitration agreement, while other binding arbitration awards would need to be enforced via the common law route.²⁰⁵ In the absence of any other evidence to the contrary, this historical evidence undercuts the argument that FAA section 9 provides a loophole for agreements specifically contemplating a nonbinding award.

(2) *Functional Comparison*

A process culminating in a nonbinding decision is in most cases aimed at encouraging settlement, with the decision serving as an objective spur to con-

¹⁹⁹ 1 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 9.8.1, at 9:55-9:57.

²⁰⁰ *Id.* at 9:57. *Cf.* Schmitz, *supra* note 2, at 9-14, 26-46 (discussing arbitral “finality” and the relevant history of judicial attitudes toward arbitration and the legislative history of federal and state arbitration statutes).

²⁰¹ Federal Arbitration Act, 9 U.S.C. § 9 (2000).

²⁰² 4 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 38.2.2.

²⁰³ *See id.* §§ 38.2.2.1-.3; *see also* Schmitz, *supra* note 78.

²⁰⁴ 4 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 38.2.2.2, at 38:22-38:23.

²⁰⁵ *Id.* at 38:23-38:24.

sensus.²⁰⁶ Such processes are in this sense more akin to mediation, in which the intervener aims to empower parties to find their own solution, often by imparting a dose of reality and objectivity, rather than binding arbitration, in which responsibility for a decision on the merits as well as procedural questions is consigned to a third party. There is, moreover, no legal guarantee of a resolution—only varying levels of expectation and hopefulness. For this reason, some courts have found nonbinding arbitration processes to “frustrate the public policy goal of arbitration in many cases since it adds costs and delay when an award is rejected [through trial de novo].”²⁰⁷ Such concerns also underlie the *AMF* rationale that arbitration law should only enforce nonbinding arbitration agreements that are reasonably likely to settle the dispute(s).²⁰⁸

For a court to confirm a “nonbinding” award under arbitration law would be a seemingly useless exercise and contravene the parties’ agreement; under the FAA confirmation would also violate the precept that federal judgments must be binding in order to “satisfy the constitutional requirement of a justiciable case or controversy.”²⁰⁹ But can the same be said of other elements of arbitration law? Even without a binding decision, such a process may furnish a very real “day in court,” and coercing participation offers the possibility of conserving judicial resources, especially if the process appears likely to resolve the dispute finally.²¹⁰ As exemplified by the process sponsored by the National Advertising Division,²¹¹ even a nonbinding decision might trigger coercive efforts by third parties (such as members of a commercial peer group or trade association) or establish a compelling framework for negotiation.

It is thus conceivable that some or all of the due process concerns that underlie standards for judicial vacatur of award under arbitration law—a fair opportunity to be heard, absence of ex parte communications, the disclosure of potential conflicts of interest by the third party decision maker, and the absence of other forms of misconduct—are also of legitimate concern to those agreeing to processes for nonbinding “advisory” decisions. Therefore, judicial decisions fleshing out concepts of “fundamental fairness” under arbitration law may be

²⁰⁶ Nonbinding arbitration is the submission of a dispute to an arbitrator with the understanding at the outset that the result will be purely advisory, and the result will be treated by the parties as a recommendation for settlement. If the parties do settle as a result of nonbinding arbitration, the court does not confirm the arbitration award; rather, it enforces the settlement contract, the terms of which may be different from the arbitrator’s award.

Godfrey v. Hartford Cas. Ins. Co., 993 P.2d 281, 285-86 (Wash. Ct. App. 2000) (Becker, J., dissenting on other grounds) (citation omitted), *rev’d on other grounds*, 16 P.3d 617 (Wash. 2001); see *Advanced Bodycare Solutions LLC v. Thione Int’l, Inc.*, No. 06-81128-CIV-Hurley, 2007 WL 1246024, at *6 (S.D. Fla. Apr. 30, 2007) (nonbinding arbitration provision “merely provides a forum for the parties to pursue pre-suit settlement negotiations”).

²⁰⁷ *Fireman’s Fund Ins. Co. v. Bugailiskis*, 662 N.E.2d 555, 558 (Ill. App. Ct. 1996).

²⁰⁸ *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985).

²⁰⁹ 1 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 9.8.1, at 9:57 (quoting *AMF*, 621 F. Supp. at 460).

²¹⁰ See *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1251 (Ohio 1992) (Wright, J., concurring) (reasoning that courts should be able to compel nonbinding arbitration and stay litigation).

²¹¹ See *supra* text accompanying notes 101-06 (discussing *AMF*).

helpful guidelines in nonbinding decision-making. This is especially so if the advisory decision is admissible in later legal or administrative proceedings.²¹²

Depending on the circumstances, it may also be possible to advance coherent arguments in support of judicial appointment of a third party intervener to render a nonbinding decision, just as they would a “binding arbitrator” under a traditional arbitration agreement. Likewise, there may be justifications for judicial enforcement of a subpoena issued by the third party, or even to accord those who make decisions, though merely “advisory,” quasi-judicial immunity in order to protect the process from the taint of coercion, as in binding arbitration.²¹³

But if such conclusions are possible with respect to non-mediation non-binding dispute resolution processes, they are far from inevitable. Nonbinding procedures are often extremely abbreviated—essentially nothing more than the shortest expedient route to an outside opinion. The whole idea is to get the latter without the risk of being legally bound; conversely, the absence of legal consequences makes it possible to abide highly attenuated procedures.²¹⁴ Thus, evidence may be greatly limited and ex parte communications and other “irregularities” may be tolerated; some aspects of neutral authority, such as the authority to issue subpoenas, may be at variance with the likely intentions of the parties. In short, application of arbitration law in order to enforce an agreement may open up a bigger can of worms on other points of law and might conceivably undermine the intent of parties to nonbinding processes.²¹⁵

Dluhos v. Strasberg,²¹⁶ a decision involving procedures under the 1999 Internet Corporation for Assigned Names and Numbers’ (“ICANN”) Uniform Domain Name Dispute Resolution Policy (“UDRP”),²¹⁷ is illustrative of the incompatibility of some nonbinding procedures with arbitration law.²¹⁸ In that decision, the Third Circuit reversed a district court decision confirming an award rendered by a tribunal under the UDRP²¹⁹ on the ground that the

²¹² Such concerns appear to have motivated the Eighth Circuit to conclude that the FAA authorized a non-merits judicial review of a nonbinding arbitration award on grounds of “evident partiality” in *Dow Corning Corp. v. Safety National Casualty Corp.*, 335 F.3d 742 (8th Cir. 2003).

²¹³ See *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962). But see *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684 (10th Cir. 2004) (since process did not constitute “arbitration,” appraiser was not entitled to immunity).

²¹⁴ Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, DISP. RESOL. J., Aug. 1998, at 8, 14.

²¹⁵ See *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968) (holding that an arbitrator has a duty to disclose to the parties any of his dealings that “might create an impression of possible bias”); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338-41 (11th Cir. 2002) (panel concluded that the parties to a nonbinding arbitration agreement intended to make disclosures in accordance with *Commonwealth Coatings*).

²¹⁶ *Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir. 2003).

²¹⁷ ICANN, Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

²¹⁸ For present purposes we do not treat what must be another important issue—the apparent inapplicability of the FAA, which is aimed at facilitating agreements to arbitrate, to non-consensual procedure established by statute.

²¹⁹ After plaintiff *Dluhos* registered the domain name www.leestrasberg.com, interests representing the estate of actor and acting coach Lee Strasberg filed a complaint with provider

UDRP's unique contractual arrangement, which does not prevent any party from filing suit before, during, or after the dispute resolution proceedings, renders the FAA's provisions for limited, post-award judicial action inapplicable.²²⁰ Moreover, because a trademark holder or a holder's representative need not use the UDRP procedure before going to court, FAA provisions for judicial compulsion to arbitrate prior to judicial review and judicial stays of litigation pending completion of arbitration are inapposite. The UDRP proceedings were never intended to supplant court proceedings, unlike "methods . . . covered by the FAA," but merely to afford an additional forum for dispute resolution with an explicit right of appeal to the courts.²²¹ The court remanded the case for de novo review of the tribunal's award under the Anticybersquatting Consumer Protection Act.²²²

Even where arbitration law is arguably a more suitable template for judicial treatment of a particular nonbinding decision-making procedure, courts should still be required to proceed carefully when asked to apply a particular principle of arbitration law (such as subpoena power or arbitral immunity) to nonbinding decision-making. Given the amount of litigation surrounding nonbinding arbitration provisions and the conflicting judicial responses, however, it is far from clear that courts are up to the challenge of "tailoring" the application of arbitration law to one-off situations as proposed by Professor Rau.²²³

c. Alternative Bases for Enforcement

As a number of courts have observed, nonbinding ADR agreements may also be enforceable under general principles of contract.²²⁴ In *AMF*, the court made the case for equitable enforcement of a provision to submit disputes over advertised claims to the National Advertising Division for advisory nonbinding resolution.²²⁵ In agreeing to use the NAD procedure in lieu of litigating, the

National Arbitration Forum under the terms of the ICANN UDRP procedure, alleging that the name was "identical or confusingly similar to" an estate-owned trademark. Dluhos filed a letter of limited appearance before NAF to contest jurisdiction and announced an intent to file suit in federal court challenging the constitutionality of the process, which he did. Proceeding without Dluhos' participation, the NAF panel issued an award directing that the domain name registered by Dluhos be transferred to the Strasberg estate. After Dluhos filed an amended, broad-based complaint in federal court, all the defendants filed motions to dismiss for failure to state a claim. The court granted the defendants' motions, and proceeded to review NAF's decision under the grounds provided in FAA section 10(a) and the "manifest disregard" standard. The court confirmed NAF's decision as an arbitration award. *Dluhos*, 321 F.3d at 367-69.

²²⁰ The UDRP contemplates the possibility of judicial intervention since either party may at any time "submit[] the dispute to a court of competent jurisdiction for independent resolution." *Id.* at 371.

²²¹ *Id.*

²²² The decision pays significant lip service to Judge Weinstein's *AMF* decision. *Id.* at 370 (The FAA applies to a dispute resolution mechanism if "viewed in light of the reasonable commercial expectations the dispute will be settled by this arbitration.") (quoting *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 461 (E.D.N.Y. 1985)); see also 15 U.S.C. § 1125(d) (2000).

²²³ See *supra* text accompanying note 133.

²²⁴ See, e.g., *Rastelli Bros., Inc. v. Neth. Ins. Co.*, 68 F. Supp. 2d 440 (D.N.J. 1999); *AMF*, 621 F. Supp. at 461.

²²⁵ *AMF*, 621 F. Supp. 456.

parties had “evinced a clear intent . . . to require confidential submission to the NAD of disputes”; both had bargained for and received benefits from the stipulation, including “[s]peed, informality and modest cost,” and the “particular experience and skill of the NAD as a resolver of disputes.”²²⁶ Equitable relief was appropriate because the legal remedy—the very litigation the parties sought to avoid by bargain—

would be inadequate since it could only approximate the skilled, speedy and inexpensive efforts available by way of specific performance. A law suit would deny AMF the practical specialized experience that the parties agreed to have available for an examination of data-based comparative advertising. A court decision and an NAD decision would have different effects on the parties’ reputations within [their] industry.²²⁷

In today’s environment, moreover, nonbinding third-party decision-making procedures (whether consensual or statute-based) are increasingly employed in statutory schemes as well as private contract, thus reflecting favorable public policy.²²⁸

As previously discussed, however, the courts are far from unanimous on grounds for enforcement of nonbinding decision-making agreements. There are jurisdictions in which nonbinding arbitration is not judicially recognized²²⁹ and others in which the issue remains in doubt.²³⁰ In particular, widespread litigation has failed to produce clarity with respect to the treatment of various forms of appraisal or of procedures for the arbitration of claims against uninsured motorists with trial de novo where awards exceed a certain amount.²³¹

4. *Decisional Processes Without Adversary Hearings*

The application of arbitration law to some forms of appraisal and other processes in which third parties make decisions without first receiving evidence and/or arguments in some kind of adversary hearing have also proven problem-

²²⁶ *Id.* at 462.

²²⁷ *Id.* at 463.

²²⁸ See *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1251 (Ohio 1992) (Wright, J., concurring) (“[T]he promotion of nonbinding arbitration as one of a panoply of alternative dispute resolution procedures is presently favored public policy in our state.”).

²²⁹ See, e.g., *Godfrey v. Hartford Cas. Ins. Co.*, 16 P.3d 617 (Wash. 2001). Washington arbitration law “does not contemplate nonbinding arbitration.” *Id.* at 621; see also *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797 (7th Cir. 2005) (reversing district court denying enforcement to a dispute resolution clause). The *Omni* court specified that an independent accountant would act as an expert and not as an arbitrator, observing that the district court “assumed that it may ignore any form of alternative dispute resolution other than ‘arbitration.’” *Id.* at 799; see also *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684 (10th Cir. 2004) (appraisal process was not “arbitration” because it did not provide a binding decision, appraiser therefore denied immunity).

²³⁰ See, e.g., *Schaefer*, 590 N.E.2d 1242 (two conflicting plurality opinions; court declared de novo provisions unenforceable under arbitration law). Compare *Davidson v. Robertson Orchards, Inc.*, No. H-99-020, 2000 WL 376407 (Ohio Ct. App. Apr. 14, 2000) (holding that arbitration clause not binding when finality was contingent on outcome), with *McGuffey v. LensCrafters, Inc.*, No. CA2005-03-069, 2006 WL 156697 (Ohio Ct. App. Jan. 23, 2006) (holding that trial court should not have ordered binding arbitration).

²³¹ See *Schmitz*, *supra* note 78, at 167-74; see also *Parker v. Am. Family Ins. Co.*, 734 N.E.2d 83 (Ill. App. Ct. 2000).

atic for courts.²³² Some courts have concluded that if an appraisal procedure contemplates no opportunity for the parties to be “heard” by the appraiser in some fashion, it is not arbitration.²³³ Other courts, however, have treated appraisal as arbitration despite the absence of any form of hearing.²³⁴

Procedures that do not contemplate hearings certainly appear to fall outside the ambit of FAA section 10 and similar state provisions to the extent they hinge on the concept of a fundamentally fair hearing²³⁵ before the third party decision maker.²³⁶ Other elements of the FAA, however, are arguably relevant, including some grounds for vacatur (evident partiality, arbitral misconduct, or exceeding one’s powers),²³⁷ but there remain questions of judicial efficiency.²³⁸

Again, moreover, there may be ready alternatives to the law of arbitration for enforcement of some such procedures. In *Omni Tech Corp. v. MPC Solutions Sales, LLC*,²³⁹ the Seventh Circuit overturned a district court order denying a buyer’s motion to stay an action pending resolution of a dispute by a firm of accountants in accordance with a contractually specified procedure, even though the contract provided that the accountants would act “as experts and not as arbitrators.”²⁴⁰ Writing for the court, Judge Easterbrook questioned why the district court assumed it could “ignore any form of alternative dispute resolution other than ‘arbitration’ . . . [since m]any contracts have venue of forum-selection clauses . . . [that] do not call for ‘arbitration’ but are routinely enforced, even when they send the dispute for resolution outside the court’s jurisdiction.”²⁴¹

²³² See *supra* text accompanying notes 111-15.

²³³ 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 1432-44B (1962). On the contrary, see 1 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 2.3.2, but note that the same treatise identifies an “adjudicatory process” as sine qua non in 1 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 2.1.2, and treats the requirement of a fundamentally fair hearing in 3 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 32.4.

²³⁴ See, e.g., *Hirt v. Hervey*, 578 P.2d 624, 627 (Ariz. Ct. App. 1978).

²³⁵ See 3 MACNEIL, SPIEDEL & STIPANOWICH, *supra* note 27, § 32.3.1, and cases cited therein.

²³⁶ At the same time “almost all procedural rights” under arbitration statutes may be “waived by word or action.” *Id.* § 32.4.1.1, at 32:35. Under New York arbitration law, nearly any statutory requirement respecting arbitration hearings “may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection.” N.Y. C.P.L.R. 7506(f) (McKinney 2007).

²³⁷ Moreover, courts have enforced awards even though parties have unilaterally waived their right to present evidence. See *supra* text accompanying note 53.

²³⁸ Cf. *supra* text accompanying notes 215-23.

²³⁹ *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797 (7th Cir. 2005).

²⁴⁰ *Id.* at 799. The statement that the firm of accountants would act as an expert and not as an arbitrator means that it will resolve the dispute as accountants do—by examining the corporate books and applying normal accounting principles plus any special definitions the parties have adopted—rather than by entertaining arguments from lawyers and listening to testimony.

²⁴¹ *Id.* (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Publicis Commc’n v. True N. Commc’ns Inc.*, 132 F.3d 363 (7th Cir. 1997); *Omron Healthcare, Inc. v. Mac-laren Exps. Ltd.*, 28 F.3d 600 (7th Cir. 1994)). The statement that the firm of accountants would act as an expert and not as an arbitrator means that it will resolve the dispute as accountants do—by examining the corporate books and applying normal accounting princi-

III. MULTI-STEP PROCESSES AND “INTERFACE” ISSUES

Many different kinds of contracts presently include provisions contemplating multi-step processes for dispute resolution.²⁴² Such provisions often call for parties to resolve disputes through negotiation and/or mediation before turn-

ples plus any special definitions the parties have adopted—rather than by entertaining arguments from lawyers and listening to testimony.

Nevertheless, the language was not merely “hortatory” and must be honored; Easterbrook concluded: “[T]he judge is no more entitled to ignore it than he could ignore the contract’s detailed definition of ‘net working capital.’” *Id.*

(The court did not reach the question of whether, if the definition of “arbitration” for the purposes of the FAA is federal whether every provision for a “final and binding” decision should be called an agreement to arbitrate.)

²⁴² See, e.g., *Davis v. O’Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) (employment contract); *Tittle v. Enron Corp.*, 463 F.3d 410 (5th Cir. 2006) (fiduciary liability insurance policies); *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044 (10th Cir. 2006) (software licensing agreement); *Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861 (6th Cir. 2006) (construction subcontract); *Schoenduve Corp. v. Lucent Techs., Inc.*, 442 F.3d 727 (9th Cir. 2006); *Am. Gen. Life and Accident Ins. Co. v. Wood*, 429 F.3d 83 (4th Cir. 2005) (stepped employment system); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (stepped employment system); *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278 (2d Cir. 2005) (third party collateral deposit agreements); *Summit Contractors, Inc. v. Legacy Corner, LLC*, 147 F. App’x 798 (10th Cir. 2005) (construction contract); *Prescott v. Northlake Christian Sch.*, 141 F. App’x 263 (5th Cir. 2005) (employment contract between principal and Christian school); *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005) (stepped employment system); *Parsons Energy & Chems. Group, Inc. v. Williams Union Boiler*, 128 F. App’x 920 (3d Cir. 2005) (construction contract); *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003) (digital storage services contract); *Hawkins v. Aid Ass’n for Lutherans*, 338 F.3d 801 (7th Cir. 2003) (fraternal benefit society contract); *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (construction contract); *Kemiron Atl., Inc. v. Aguakem Int’l, Inc.*, 290 F.3d 1287 (11th Cir. 2002) (distributorship contract); *Hightower v. GMRI, Inc.*, 272 F.3d 239 (4th Cir. 2001) (stepped employment system); *Texaco Exploration and Prod. Co. v. AmClyde Engineered Prods. Co.*, 243 F.3d 906 (5th Cir. 2001) (construction contract); *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369 (6th Cir. 1999) (contract for security services); *Keymer v. Mgmt. Recruiters Int’l, Inc.*, 169 F.3d 501 (8th Cir. 1999) (manager’s employment agreement); *Drayton Grain Processors v. NE Foods, Inc.*, No. 3:06-cv-37, 2007 WL 983825 (D.N.D. Mar. 30, 2007) (LLC agreement); *Stones River Elec., Inc. v. Chevron Energy Solutions Co.*, No. 5:06CV-115-R, 2007 WL 433083 (W.D. Ky. Feb. 2, 2007) (electrical installation contract); *CACI Premier Tech., Inc. v. Faraci*, 464 F. Supp. 2d 527 (E.D. Va. 2006) (employment contract); *ZARS, Inc. v. LTS Lohmann Therapy Sys. Corp.*, No. 2:05-CV-198 TC, 2006 WL 2992719 (D. Utah Oct. 18, 2006) (product development contract); *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891 (M.D. Tenn. 2003) (stepped employment system); *SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059 (N.D. Cal. 2002) (contract for purchase and sale of land); *Bono v. David*, 54 Cal. Rptr. 3d 837 (Ct. App. 2007) (real property development contract); *Auchter Co. v. Zagloul*, 949 So. 2d 1189 (Fla. Dist. Ct. App. 2007) (construction contract); *Pheng Invs., Inc. v. Rodriguez*, 196 S.W.3d 322 (Tex. App. 2006) (real estate purchase contract).

There are also contractual provisions that refer to mediation and arbitration in the alternative. See *In re The IT Group, Inc.*, 359 B.R. 97 (Bankr. D. Del. 2006); *Covenant Health Rehab. of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007). This practice may result in confusion and unpredictable results in court. See, e.g., *Ex parte Indus. Techs., Inc.*, 707 So. 2d 234 (Ala. 1997).

ing to binding arbitration.²⁴³ These tiered “filtering systems” are grounded on the notion that disputes are best resolved by relatively informal, flexible, efficient, and inexpensive means, and that binding adjudication through arbitration or litigation should be reserved as a final step in the event all else fails.²⁴⁴ At the same time, however, multi-step dispute resolution agreements present new issues for counselors and courts²⁴⁵ (as do scenarios involving interplay between the statutory nonbinding arbitration system and consensual binding arbitration).²⁴⁶

When a party to a multi-step process fails or refuses to participate in contractually-mandated negotiation or mediation, a court may be asked to enforce the agreement to negotiate or to mediate. If the contract also includes an agreement to arbitrate, there will likely be questions regarding the enforceability of that agreement.²⁴⁷ A party seeking to enforce the arbitration agreement may also argue that issues surrounding the enforceability of earlier “steps” (such as negotiation or mediation) should be decided not by a court, but by the arbitrator(s).²⁴⁸ Such scenarios have spawned a growing body of federal and state court decisions under arbitration statutes. Judicial response varies dramatically, with some courts establishing positions that appear inconsistent with policies supporting the broad enforcement of arbitration agreements and other courts arguably reaching too far in the opposite direction.

A troubling example of the latter is *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*²⁴⁹ In that decision the Eleventh Circuit affirmed a district court order denying a motion to enforce an arbitration provision and stay a suit

²⁴³ CPR COMM’N ON THE FUTURE OF ARBITRATION, *Arbitration and the ADR Landscape*, in *COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS* ch. 1 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

²⁴⁴ See *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634 (7th Cir. 2002) (party’s failure to follow contractual requirements of good faith negotiations and timely notice was not waiver of right to compel arbitration). The purpose of technical requirements is “to encourage successful negotiations so that neither litigation nor arbitration will be necessary, not to prefer the courts to an arbitrator if informal discussions break down.” *Id.* at 638-39.

²⁴⁵ See *Prescott*, 141 F. App’x at 267-69 (5th Cir. 2005) (multi-step process raises special interpretational issues).

²⁴⁶ See, e.g., *Ervin, Cohen & Jessup, LLP v. Kassel*, 54 Cal. Rptr. 3d 685 (Ct. App. 2007) (client waiver of right to nonbinding arbitration under California Mandatory Fee Arbitration Act meant that law firm could require arbitration of disputes under contractual binding arbitration agreement).

²⁴⁷ See Michael Pryles, *Multi-Tiered Dispute Resolution Clauses*, 18 J. INT’L ARB. 159 (2001) (discussing the question in the context of international arbitration and the New York Convention); see also *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.*, [1993] A.C. 334 (H.L.) (Eng.) (enforcing a dispute resolution agreement that required resort to a panel of experts prior to ICC arbitration under the inherent jurisdiction of the court and the English Arbitration Act).

²⁴⁸ *In re R & R Pers. Specialists of Tyler, Inc.*, 146 S.W.3d 699, 704-05 (Tex. App. 2004). *But see* *Tekmen & Co. v. S. Builders, Inc.*, No. Civ.A.04C03007RFS, 2005 WL 1249035 (Del. Super. Ct. May 25, 2005).

²⁴⁹ *Kemiron Atl., Inc. v. Aguakem Int’l, Inc.*, 290 F.3d 1287 (11th Cir. 2002); see also *In re Pisces Foods, L.L.C.*, No. 03-06-00274-CV, 2007 WL 1518076, at *1, 4 (Tex. App. May 24, 2007) (where multi-step agreement provided that “[i]f you have a work-related problem that involves a legally protected right that could not be settled through Steps 1, 2, or 3 of the Program, you may request arbitration,” effect of failure to comply with preliminary steps was matter for judicial determination).

where neither party requested mediation, a preliminary step in the parties' dispute resolution agreement. Kemiron had sued Aguakem for breach of contract for the sale of chemicals; it also pled unjust enrichment and sought a declaratory judgment. The contract contained a dispute resolution clause that provided "the parties shall be free to [engage in] . . . the prompt and effective adjustment of any . . . differences . . . under friendly and courteous circumstances."²⁵⁰ Failing settlement in this fashion, the agreement provided that "the matter shall be mediated within fifteen (15) days after receipt of notice . . ." Finally, the contract provided that "[i]n the event the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice . . ."²⁵¹

Aguakem's motion to stay Kemiron's suit pending arbitration pursuant to the FAA was denied by the district court on the basis that there was no duty to arbitrate until the parties had first mediated their dispute, followed by a notice by a party of the intention to arbitrate. Reviewing the district court's determination de novo, the Eleventh Circuit panel also concluded that the agreement to arbitrate was "conditioned by the plain language" of the provision requiring mediation before arbitration.²⁵²

Kemiron's interpretation of the multi-step dispute resolution provision might appear rational on its face, but it seems inconsistent with the strong FAA policy supporting broad enforceability of arbitration agreements and ignores repeated Supreme Court directives respecting the relative spheres of courts and arbitrators with regard to arbitrability determinations. In *John Wiley & Sons, Inc. v. Livingston*,²⁵³ the Court made clear that arbitration law charges courts with the responsibility to determine whether there is a valid arbitration agreement and whether a particular issue is within the scope of that agreement,²⁵⁴ in which case it falls to the arbitrator(s) to address all subsequent issues, procedural and substantive, leading to a final award on the merits, including questions about compliance with procedures for properly invoking and maintaining a claim.²⁵⁵

Since the Court's pronouncement of respective spheres of authority in *John Wiley*, the principles espoused in that decision have been repeatedly and forcefully restated.²⁵⁶ Moreover, the Court has repeatedly emphasized the limitations on the judicial role in enforcing arbitration agreements while underlining the far-reaching authority of arbitrators under broad-form arbitration clauses.²⁵⁷ In *Howsam v. Dean Witter Reynolds, Inc.*,²⁵⁸ the Court made it

²⁵⁰ *Kemiron*, 290 F.3d at 1289.

²⁵¹ *Id.* (emphasis omitted).

²⁵² *Id.* at 1291.

²⁵³ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

²⁵⁴ *Id.* at 547.

²⁵⁵ *Id.* at 557-58.

²⁵⁶ See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

²⁵⁷ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ."). For a typical "broad-form" clause, see *Collins & Aikman Products Co. v. Building Systems, Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) ("The clause . . . submitting to arbitration '[a]ny claim or controversy arising out of or relating to th[e] agreement,' is the paradigm

plain that judicial questions of arbitrability were of “limited scope . . . applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter,” but not to “‘procedural’ questions which grow out of the dispute and bear on its final disposition²⁵⁹ . . . [as well as] ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’”²⁶⁰ The Court went on to explain that limiting the judicial role to such “narrow circumstance[s] . . . avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.”²⁶¹ On this basis, the Court concluded that a contractual time limit on the eligibility of disputes for arbitration was to be resolved by arbitrators and not the court.²⁶² The functional dichotomy between courts and arbitrator was subsequently applied with extreme vigor by the plurality in *Green Tree Financial Corp v. Bazzle* in support of the conclusion that the question of whether “classwide” arbitration involving many contracts between a company and numerous different consumers was appropriate was for the arbitrator and not the court under a broad-form clause.²⁶³

The multi-step ADR agreement in *Kemiron* contained no specific language supporting the conclusion that a party’s failure to participate in mediation was a matter for the court and not arbitrators. This is not, arguably, one of that narrow category of situations in which parties would have expected a court to address the procedural issues. Under the circumstances, the court should have referred the issue of enforcement of the mediation agreement to the arbitrators.²⁶⁴ The ironic result of the decision is that the parties ended up in court, which seems far indeed from the spirit of their original agreement.

of a broad clause.” (quoting *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 251 (2d Cir. 1991)).

²⁵⁸ *Howsam*, 537 U.S. 79.

²⁵⁹ *Id.* at 83-84 (quoting *Livingston*, 376 U.S. at 557).

²⁶⁰ *Id.* (quoting *Moses H. Cone*, 460 U.S. at 24-25).

²⁶¹ *Id.*

²⁶² *Id.* at 85. The Court favorably cited the Revised Uniform Arbitration Act of 2000, which states that an “arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled.” *Id.* “[W]hether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.” *Id.* (second emphasis added).

²⁶³ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). In *Bazzle*, the Supreme Court vacated and remanded South Carolina court decisions affirming awards of damages to two classes of plaintiffs in class action arbitrations involving numerous claims against Green Tree Financial Corporation for violations of the Consumer Protection Code. *Id.* at 447. The South Carolina Supreme Court held that the contracts were silent with respect to class arbitration, authorized class arbitration, and concluded that the arbitration had properly taken place. *Id.* at 450. Three justices joined Justice Breyer in concluding that under the broad-form arbitration provisions in the consumer contracts at issue, the unresolved question of whether the parties intended to engage in classwide arbitration was for the arbitrator, not the court. *Id.* at 451. Justice Stevens concurred in the result on the basis that the South Carolina decision was correct. *Id.* at 454-55 (Stevens, J., concurring).

²⁶⁴ Thus, for example, in *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634 (7th Cir. 2002), a court ruled that a party’s failure to follow contractually mandated requirements to enter into good-faith negotiations and provide timely notice did not undermine the enforceability of the arbitration agreement. The court explained that the purpose of the preliminary step was “to encourage successful negotiations so that neither litigation nor arbitration will be necessary, not to prefer the courts to an arbitrator if informal discussions break down.” *Id.* at 639.

Consider, by way of contrast, a recent federal court decision that con- signed to arbitration the validity of a mediated settlement agreement that, among other things, purported to vitiate the arbitration provision in the parties' contract.²⁶⁵ Because the arbitration clause covered "any controversy or claim arising out of or relating to this contract," the court held that the question of the validity of the settlement agreement was itself arbitrable since it had its "origin or genesis" in the contract.²⁶⁶

Of course, when it comes to divining the respective responsibilities of courts and arbitrators on matters of arbitrability, the intent of the parties controls.²⁶⁷ Therefore, in the event the parties have clearly stated their intention that courts and not arbitrators will address issues surrounding negotiation, mediator, or other preliminaries to arbitration in a multi-step agreement, then that intention should be honored. On this basis, some courts have concluded that contractual provisions that specifically make mediation a "condition precedent" to arbitration create justiciable arbitrability issues if a party refuses or fails to mediate. Such was the case in *HIM Portland, LLC v. DeVito Builders, Inc.*,²⁶⁸ addressing an agreement that provided that disputes shall "be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party."²⁶⁹

Under dicta in *Howsam* supporting a narrow view of arbitrability, how- ever, even "conditions precedent" are normally expected to fall within the pur- view of arbitrators and not courts²⁷⁰—a conclusion that reinforces policies supporting arbitration but may be troublesome to scholars of contract.²⁷¹ The issue is further complicated by the fact that most arbitration rules provide arbi- trators with virtually plenary authority regarding jurisdictional and enforcement issues. *Contec Corp. v. Remote Solution Co.*²⁷² follows the strong majority rule that when parties to an arbitration agreement "explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation

²⁶⁵ *Prime Vision Health, Inc. v. Ind. Eye Clinic, P.C.*, No. IP 00-0096 C-B/S, 2000 U.S. Dist. LEXIS 9893 (S.D. Ind. July 13, 2000).

²⁶⁶ *Id.* at *10-11.

²⁶⁷ See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

²⁶⁸ *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003).

²⁶⁹ *Id.* at 42 (emphasis omitted). The contract further specified that "mediation shall proceed in advance of arbitration" and that "[c]laims, disputes, and other matters . . . that are not resolved by mediation . . . shall be decided by arbitration." *Id.* at 42-43 (emphasis omitted). Cf. *White v. Kampner*, 641 A.2d 1381, 1385 (Conn. 1994). Similarly, in *Cafarelli v. Colon-Collazo*, No. CV055000279S, 2006 WL 1828608 (Conn. Super. Ct. June 20, 2006), a Connecticut court held that the dispute about whether steps in a multi-step dispute resolution clause had been satisfied was an issue for an arbitrator due to the "all-embracing" language in the contract. *Id.* at *2. "[L]anguage such as disputes . . . arising out of or related to . . . creates almost limitless jurisdiction." *Id.* at *3. Accordingly, the dispute about whether "mediation as a condition precedent to arbitration" has been satisfied was to be determined by an arbitrator. *Id.* at *2 (emphasis omitted).

²⁷⁰ See *Howsam*, 537 U.S. at 85.

²⁷¹ See generally Thomas J. Stipanowich, *Of "Procedural Arbitrability": The Effect of Noncompliance with Contract Claims Procedures*, 40 S.C. L. REV. 847 (1989).

²⁷² *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205 (2d Cir. 2005).

serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."²⁷³

IV. ADDRESSING THE LEGAL FRAMEWORK

A. *The Need for Clear and Meaningful Approaches—and Caution*

After a generation of growing emphasis on informal methods of conflict resolution in contractual relationships and statutory programs, the surrounding legal landscape remains “aimless, meandering, and . . . confusing.”²⁷⁴ The “penumbra” of arbitration law—a body of judicial decisions involving application of the FAA or state arbitration law to processes that are to one degree or another different from “classic” arbitration, or to the interface between arbitration and earlier stages in multi-step dispute resolution processes—reflects the failure of courts to articulate clear and well-reasoned approaches to the new generation of dispute resolution tools as well as the challenges confronting drafters of consensual and statutory dispute resolution procedures.

The application of arbitration law normally entails a variety of legal consequences affecting not only the enforcement of a dispute resolution agreement and the outcome of the process, but also the nature of the process (including the handling of confidentiality issues), and the powers, rights, and obligations of the third party intervener(s).²⁷⁵ While it makes sense to afford arbitration law sufficient “breathing space” to accommodate a wide range of party choice, the application of these same legal principles to mediation and nonbinding arbitration is either illogical or of limited utility. To undertake a case-by-case analysis of parties' intent and understanding and relevant policy considerations in order to determine whether or not some aspect of the FAA or state arbitration law controls “impose[s] a significant burden on . . . courts to create a body of law

²⁷³ *Id.* at 208; *see* *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005); *Jacobs v. USA Track & Field*, 374 F.3d 85 (2d Cir. 2004); *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115 (2d Cir. 2003); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989); *Dream Theater, Inc. v. Dream Theater*, 21 Cal. Rptr. 3d 322 (Ct. App. 2004); *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006). However, a small minority of jurisdictions have reached contrary conclusions in the absence of clear evidence of intent to submit arbitrability issues to the arbitrator. *See* *McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192 (8th Cir. 1997); *Medtronic, Inc. v. ETEX Corp.*, No. Civ.04-1355 ADM/AJB, 2004 WL 768945 (D. Minn. Apr. 12, 2004). In *Medtronic*, ETEX argued that an arbitrator ought to decide the issue of arbitrability because “the parties adopted the rules of the CPR Institute for Dispute Resolution, which include a rule that the arbitral tribunal shall have the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part.” *Id.* at *2. The court was not persuaded, finding that “the references in the [arbitration agreement] cited by ETEX do not state the parties adopted or incorporated the entire set of rules.” *Id.* The court made this conclusion despite the fact that the agreement read, “the CPR Institute may appoint an arbitrator if the parties fail to agree, and . . . the arbitrator shall establish other procedural rules in accordance with the then in effect CPR Institute for Dispute Resolution Rules.” *Id.* The court found that “these references do not constitute clear evidence of an intent to submit the issue of arbitrability to the arbitral forum.” *Id.*

²⁷⁴ *See supra* text accompanying note 18.

²⁷⁵ *See supra* text accompanying notes 28-47.

on what can and cannot be done, injecting more complexity and litigation into a process aimed at less.”²⁷⁶ As we have seen, the burden generally outweighs whatever benefits may be achieved by viewing ADR processes through the lens of arbitration law.

While it may be appropriate for courts addressing other procedures to draw upon arbitration law by analogy, this approach also provides limited guidance in the context of procedures with different goals. Should litigation be stayed and a nonbinding, settlement-oriented process compelled? Should a mediator or third party decision maker be accorded immunity? Should courts enforce subpoenas issued by the third party intervener? Questions such as these require thoughtful consideration of the parties’ intent and relevant public policy considerations that may be very different from those underlying an agreement for binding arbitration.

Although some courts have availed themselves of the opportunity to employ the law of contract, including legal and equitable remedies, in support of ADR processes, others have not.²⁷⁷ This judicial intransigence may result from vestiges of the ancient “ouster of jurisdiction” doctrine,²⁷⁸ modern mistrust or misperceptions about ADR,²⁷⁹ perceived limitations on equitable relief,²⁸⁰ or simple judicial ignorance. In any case, it is clear that courts need guidance for the legal effectuation of dispute resolution procedures,²⁸¹ as well as issues on the interface between processes.²⁸²

Because we are talking about consensual or statutory processes aimed at reducing reliance on court processes and promoting more efficient, timely, cost-effective, and flexible solutions, litigation-producing uncertainty in the surrounding legal framework is particularly troublesome, not to say ironic. Judicial treatment of related legal issues should be as straightforward and as attenuated as possible—a principle understood by the drafters of the FAA and the original UAA.²⁸³ These legal structures were designed to minimize the role of courts. In enforcing arbitration agreements or resulting awards—the “front

²⁷⁶ *Lindsay v. Lewandowski*, 43 Cal. Rptr. 3d 846, 850 (Ct. App. 2006) (emphasis omitted). In the case of the FAA, moreover, its broad extension to other forms of ADR raises the questionable specter of a fully federalized realm of dispute resolution. See *supra* text accompanying note 30.

²⁷⁷ See *supra* notes 68, 213 and accompanying text.

²⁷⁸ See *supra* notes 68, 213 and accompanying text (extensively treating the history and implications of the “ouster of jurisdiction” doctrine).

²⁷⁹ See 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, 184-89.

²⁸⁰ See Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575, 583-87 (1988) (discussing courts’ refusal to specially enforce nonbinding dispute resolution agreements based on principle that “equity will not enforce a ‘vain order’” and other similar principles).

²⁸¹ See Schmitz, *supra* note 2, at 46-53.

²⁸² See *supra* notes 242-73 and accompanying text.

²⁸³ *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 448 (Tenn. 1996) (“[T]he purpose of the Federal and Uniform Arbitration Act is the same: to . . . [bypass] the courts.”); Francis J. Pavetti, *Why the States Should Enact the Revised Uniform Arbitration Act*, 3 PEPP. DISP. RESOL. L.J. 443, 445 (2003) (“[T]he RUAA drafters made a conscious effort throughout the drafting process to avoid court involvement wherever possible . . .”). But see *infra* text accompanying notes 309-11.

and back end” of arbitration—where judicial facilitation is most likely to be needed, court involvement was nevertheless severely confined. In between, the court role is significantly more limited. If the policy of minimal judicial involvement pervades the law surrounding binding arbitration, it should be of even greater importance in the case of mediation, nonbinding arbitration, and other approaches intended to promote party self-determination through informal and flexible private mechanisms.

Caution and moderation must also be the bywords of those seeking clearer and more rational approaches to judicial treatment of consensual and other schemes for “appropriate dispute resolution.” The very notion of a “law of ADR,” however well-intended, strikes some as oxymoronic.²⁸⁴ When it comes to ADR, the implementing law is not an end in itself, but only a means to be prudently employed within the narrow bounds of necessity. Legal reformers must take care that in attempting to solve a perceived problem around the edges of ADR they don’t undermine the very flexibility and autonomy they seek to facilitate.²⁸⁵ In evaluating options for the effectuation of ADR processes, a balance must be struck between the need for judicial help to encourage and promote creative solutions and the need to minimize the judicial burden and the broader transaction costs of facilitating out-of-court alternatives.

B. *Statutory Reform and Its Pitfalls*

1. *Superficial Benefits of Expansive Statutes*

On a superficial level, statutory reform (as, for example, in the form of a uniform dispute resolution statute that complements the Uniform Arbitration Act and the Uniform Mediation Act) appears to offer a straightforward way of addressing the “cases of trouble” surrounding the enforcement of ADR procedures. A legislative structure providing a framework for addressing the “major arteries” of consensual conflict resolution, including mediation and nonbinding third-party decision-making procedures, seemingly could provide grounding for clearer and more systematic judicial management of out-of-court dispute resolution procedures by avoiding unnecessary transaction costs associated with lit-

²⁸⁴ See Coben & Thompson, *supra* note 3. As Charles Pou has observed, “[T]here is an obvious tension in the very idea of ‘ADR laws,’ all of which are, in a sense, trying to legislate flexibility. Some see this irony as inherently ridiculous, and believe it best to say nothing by statute—thus avoiding slippery slopes and any need to interpret.” Charles Pou, Jr., *Things That ADR Legislation Can and Cannot Do Well*, DISP. RESOL. MAG., Summer 2001, at 7, 8. Ironically, one of the incentives cited by those touting the use of mediation in international disputes is the increasing legalization of arbitration. See Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT’L & COMP. L. REV. 637 (1995) (noting growing use of litigation practices in international arbitration).

Like it or not, however, we live in an era reflecting the “ADRization of litigation” as well as the “litigization of ADR.” Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 404 (2005).

²⁸⁵ See Robert M. Jones, *Florida’s Experience with Dispute Resolution Legislation: Too Much of a Good Thing?*, 1, 2 (2000), <http://consensus.fsu.edu/ADR/PDFS/FloridaADR.pdf> (observing that advocates of ADR legislation tend to “overstate the problem and oversell the solution”; decrying “[o]ne size fits all” approach taken by some ADR legislation; ignoring contextual needs and variations among processes).

igation.²⁸⁶ It could articulate and reinforce the policies supporting legal enforcement of ADR provisions that do not entail a binding award, eradicate the misplaced reliance on arbitration law that has clouded recent jurisprudence, and provide courts a level of comfort regarding the use of specific performance with respect to mediation and nonbinding arbitration provisions. The law might also serve a “channeling” function by establishing certain formalities as requisites for summary enforcement, as well as default provisions to serve as a “safety net” for agreements. Drafters of contracts considering the use of such procedures could face reduced transaction costs and risks.

The process of developing the law could permit important and overdue dialogue among practitioners and commentators along the rapidly eroding professional boundaries between arbitration, mediation, and other processes. It could also serve as a model for the national evolution of mediation and other nonbinding procedures.

Some examples of statutory frameworks currently exist within the realm of international commercial mediation, suggesting at least a partial scope (and a starting point for discussion) for a statutory enactment covering forms of nonbinding dispute resolution as well as “interface” issues. These include the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Conciliation²⁸⁷ and counterparts legislated in several U.S. states, exemplified by the California International Arbitration and Conciliation Act.²⁸⁸ These enactments address a wide array of points of law surrounding conciliation (mediation), including (1) public policies supporting the use of conciliation;²⁸⁹ (2) standards for the scope of legal enforcement, including the requirement of a record;²⁹⁰ (3) the definition of the “commence[ment]” of the process;²⁹¹ (4) confidentiality;²⁹² (5) minimum requirements regarding the appointment of conciliators (mediators), including disclosure requirements;²⁹³ (6) choice of representatives;²⁹⁴ (7) agreements to stay judicial or arbitral proceedings, and the roles of courts or arbitrators;²⁹⁵ (8) suspension of limitation periods and the roles of courts or arbitrators; (9) service of process and the immunity of participants;²⁹⁶ (10) the immunity of con-

²⁸⁶ Cf. Pou, *supra* note 284, at 9 (effective ADR legislation could “reflect an appropriate general balance between prescription and flexibility in employing these processes, protecting sensitive communications, acquiring neutrals services and assuring judicial oversight”).

²⁸⁷ UNCITRAL Model Law on International Commercial Conciliation (2002); see Pieter Sanders, *UNCITRAL’s Model Law on International Commercial Conciliation*, 23 *ARB. INT’L* 105 (2007) (critiquing and proposing changes to the UNCITRAL Model Law); Erik van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation—A Critical Appraisal*, 21 *J. INT’L ARB.* 1 (2004) (heavily critiquing the UNCITRAL Model Law).

²⁸⁸ CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West 2007).

²⁸⁹ § 1297.341; see, e.g., UNCITRAL Model Law on International Commercial Conciliation.

²⁹⁰ UNCITRAL Model Law on International Commercial Conciliation art. 1.

²⁹¹ § 1297.211.

²⁹² § 1297.371.

²⁹³ § 1297.121.

²⁹⁴ § 1297.351.

²⁹⁵ § 1297.381.

²⁹⁶ § 1297.431.

ciliators;²⁹⁷ (11) conciliator's evaluations;²⁹⁸ (12) the role of conciliators in preparing draft conciliation settlements;²⁹⁹ (13) the admissibility of communications or evidence used in conciliation in later arbitration or litigation, and nondisclosure;³⁰⁰ and (14) the enforcement of a conciliated settlement agreement.³⁰¹ A number of these standards address the interface between mediation/conciliation and arbitration in the context of multi-step procedures, as do provisions governing (15) conciliators acting as arbitrators;³⁰² (16) arbitrators acting as conciliators;³⁰³ (17) arbitral awards on agreed terms;³⁰⁴ and (18) the impact of a conciliated settlement agreement and the procedure for converting it to an arbitration award.³⁰⁵

2. Problems and pitfalls

It is no accident, however, that no federal or state statute attempts to address ADR processes comprehensively. The sheer range of ADR procedures, the diverse goals of parties, and differing public policy considerations raise daunting barriers to would-be drafters. It is not simply for historical reasons that existing statutes tend to focus on more limited process taxonomies or "families," such as arbitration (the FAA or the UAA)³⁰⁶ or mediation (the UMA),³⁰⁷ and why the latter is extremely limited in scope. No effort has been made on either the federal or state level to regulate the entire broad and diverse range of nonbinding arbitration and other nonbinding third-party decision-making processes.³⁰⁸

Promulgating legislation requires considerable care, and the challenges increase dramatically with the scope of regulation. A statute purporting to cover even an entire family of procedures such as binding arbitration is of such breadth as to raise formidable tensions between providing meaningful support for private agreements and over-regulating. As an object lesson, those seeking to improve the legal framework of ADR should consider the reform of the UAA, undertaken in the late 1990s.³⁰⁹ That initiative produced a revision more than double the length of its minimalist predecessor, transforming a barebones legal interface to facilitate arbitration agreements into a forthright regulator of due process in arbitration proceedings.³¹⁰ The development of the RUAA

²⁹⁷ § 1297.432.

²⁹⁸ UNCITRAL Model Law on International Commercial Conciliation art. 6 (2002).

²⁹⁹ CAL. CIV. PROC. CODE § 1297.361; § 1297.362 (no party required to accept draft agreement proposed by conciliator).

³⁰⁰ § 1297.371.

³⁰¹ § 1297.401.

³⁰² § 1297.351; UNCITRAL Model Law on International Commercial Conciliation art. 12.

³⁰³ CAL. CIV. PROC. CODE § 1297.301.

³⁰⁴ §§ 1297.303-.304.

³⁰⁵ § 1297.401.

³⁰⁶ See *supra* text accompanying notes 25-26.

³⁰⁷ See *supra* note 142 and accompanying text.

³⁰⁸ See *supra* text accompanying notes 182-97.

³⁰⁹ See *supra* note 26.

³¹⁰ See *supra* note 26. Many (though by no means all) of the statutory reforms reflect legitimate, deep-felt due process concerns about the expanding use and potential abuse of private, binding arbitration under boilerplate provisions in standardized adhesion contracts involving employees, consumers, and others. Their application is, however, made general

exemplifies the difficulties of relying too heavily on statutory reform, especially when the statute is intended to be of broad application.³¹¹ The RUAA and recent modifications to the California Arbitration Act³¹² illustrate the pitfalls of crafting a “one-size-fits-all” statute that governs dispute resolution provisions in consumer and employment contracts, which may be contracts of adhesion,³¹³ as well as commercial agreements.³¹⁴

By way of contrast, the drafters of the UMA declined the opportunity to address many of the current legal issues surrounding mediation,³¹⁵ instead tak-

by the terms of the uniform statute. It is too early to assess the overall impact of the RUAA, but it is reasonable to assume that it may reinforce current trends in the direction of making arbitration more “legalistic”; for example, the author has heard anecdotal evidence that the RUAA’s textual treatment of discovery, while not intending to mandate its use, may have led some lawyers to conclude that discovery is required in commercial arbitration regardless of the specific provisions in the parties’ agreement.

³¹¹ See Jones, *supra* note 285.

³¹² CAL. CIV. PROC. CODE § 1281.85 (West 2007); CAL. CT. R., ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION (2002); JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA RULES OF COURT (2007). These provisions were aimed primarily at consumer and employment arbitration but also establish stringent requirements for disclosure of potential conflicts of interest by arbitrators in commercial cases. See Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. Rev. 119 (2003) (critically appraising the statutory “ethics standards”). Among other things, arbitrators are required to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitration would be able to be impartial. CAL. CIV. PROC. CODE § 1297.121. The statute permits parties to disqualify the arbitrators based on such disclosures within fifteen days after receiving the disclosure statement. § 1281.91(b)(1). First of all, the disclosures arbitrators are required to make are not limited to those that might be considered material, and even non-material disclosures trigger an automatic right on the parties to disqualify the arbitrator. They create the potential for cynical manipulation of the arbitration process and dramatically increased transaction costs. By way of illustration, consider the situation in which, months or years into the arbitration of a complex commercial case, a party who fears it will be on the losing end of the arbitrator’s award hires new counsel or identifies a witness having some relationship to the arbitrator for the purpose of creating a requirement for the arbitrator to make a supplemental disclosure under the statute. The arbitrator’s disclosure triggers an automatic right to disqualify without regard to materiality. Should the arbitrator fail to make a disclosure within the scope of the statute, an “aggrieved” party may move to vacate the award, again without regard to the materiality of the non-disclosure.

To many business clients the statute’s disclosure requirements, and the ability of parties to disqualify arbitrators based on disclosures, are superfluous in light of administrative mechanisms for handling arbitrator disclosures and challenges. Moreover, given the potential risks and higher transaction costs described above, at least some commercial parties would prefer to incorporate contract terms waiving the statute and its “protections.” This may not be possible, however. A recent court decision interpreted the California statute as requiring commercial parties to comply with the disclosure requirements of the statute, which it interpreted as trumping the institutional disclosure and challenge procedures incorporated in the arbitration provision of the parties’ contract. *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142 (Ct. App. 2004).

³¹³ See generally Stipanowich, *supra* note 2, at 888-90.

³¹⁴ *Id.*

³¹⁵ Paul Bennett Marrow, *Coming to New York? An Unconscionable Mediation Agreement*, N.Y. ST. B. J. July-Aug. 2006, at 40, 41 (“[I]t is a mistake to assume that the UMA is far-reaching. Unfortunately, in its present form, it is shallow and leaves many issues for determination by the courts.”); Andrea K. Schneider, *Which Means to an End Under the Uniform Mediation Act?*, 85 MARQ. L. REV. 1, 2 (2001) (“The goals of the UMA are quite simple. . . .

ing a narrowly cabined approach to the task of establishing uniform standards for courts. The resulting uniform legislation is confined primarily to confidentiality issues, and even that treatment is limited to legal enforcement of mediation privileges and related exceptions.³¹⁶ For a variety of reasons,³¹⁷ no effort was made to provide guidance for more general enforcement of agreements to mediate or of mediated settlement agreements.

As noted above, the primary examples of more all-embracing statutory regulation have been confined to the international realm, with an emphasis on the use of mediation provisions in international commercial contracts.³¹⁸ Even in the international sphere, some question the value of regulation since, with the exception of Canada, Australia, the United Kingdom, and some other common law countries, commercial mediation/conciliation practice outside the United States has yet to develop on a broad scale.³¹⁹ A leading international expert on mediation insists that among other things such regulation is premature,³²⁰ and others have levied sharp criticisms at many elements of the UNCITRAL Model Law.³²¹ On a broader plane, there is as yet no evidence that the failure to develop a suitable legal framework for conflict resolution is undermining the United States' position as a forum of choice in an increasingly competitive global dispute resolution market.

Additionally, there is always the concern that the rough-and-tumble, often unpredictable process of legislating will produce a solution that is as bad as or worse than the problem that it purports to solve. Although NCCUSL's approach to the promulgation of uniform laws is in a number of respects superior to other legislative processes,³²² it remains a "political" process that is subject to pressures from special interest groups.³²³ Moreover, NCCUSL enactments are not "law" until they have been adopted by state legislatures, and herein lies the potential for further mischief: At this point, non-uniform enactments may undermine central purposes of the statute.³²⁴

From a cost-risk-benefit perspective, the best approach may be efforts addressing specific regulatory schemes incorporating dispute resolution pro-

As outlined by the Prefatory Note to the UMA and Hughes, the UMA tries to meet the following three obligations: (1) the reasonable expectations of parties regarding confidentiality, (2) the integrity of the mediation process, and (3) the policy that parties have the ultimate decision-making authority or self-determination." (footnotes omitted).

³¹⁶ UNIF. MEDIATION ACT, prefatory note (2001) (discussing the purpose of the UMA: "[T]he law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met.").

³¹⁷ See Schmitz, *supra* note 2, at 12-14.

³¹⁸ See *supra* text accompanying notes 287-305.

³¹⁹ NANCY NELSON ET AL., COMMERCIAL MEDIATION IN EUROPE: BETTER SOLUTIONS FOR BUSINESS (2004).

³²⁰ "The field is too young for rules . . . there is not even a common agreement on models of mediation." Interview with Karl Mackie, Executive Director, Centre for Effective Dispute Resolution (CeDR), in London, Eng. (May 10, 2007).

³²¹ See generally Sanders, *supra* note 287; van Ginkel, *supra* note 287.

³²² Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 547-51.

³²³ *Id.* at 554.

³²⁴ *Id.* at 554-55.

grams³²⁵ and other statutes incorporating dispute resolution procedures. Drafters should have before them a checklist of key legal issues to consider and possibly address in the statute, including mechanisms for judicial enforcement of dispute resolution procedures such as stays of related litigation and orders to compel, and related provisions for venue; judicial authority to appoint neutrals where the parties fail to do so; standards for judicial confirmation, vacatur or modification of awards (if any) and related venue provisions; legal immunity of interveners; and the interaction of the statute with the FAA or other arbitration statutes.³²⁶

Meanwhile, although parties and counsel should be encouraged to explore new and creative avenues for constructive resolution of conflict, those who opt for consensual process templates other than classic arbitration (or other processes that fall within well-defined procedural regimes) have a responsibility to anticipate the possibility that their process will raise novel questions of law, including enforcement of participation in the process, review or effectuation of the outcome, the protection of related communications, and the powers, rights, and obligations of third party interveners. Some and perhaps all of these issues should be specifically addressed in the parties' agreement.

C. A Restatement of Dispute Resolution?

The American Law Institute is currently considering the development of a *Restatement of International Commercial Arbitration*,³²⁷ an initiative acknowledging the growing importance of arbitration in the resolution of cross-border commercial disputes and the need to establish clearer guidelines regarding sur-

³²⁵ An existing example would be a specific regulatory structure incorporating a dispute resolution mechanism that is associated with domain name registration. See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998) (authorizing individual registrars to issue domain names in the generic top level domain names, and the administration of country code top domains is delegated by ICANN); see also Helfer & Dinwoodie, *supra* note 180, at 149 n.16. The full text of the UDRP and supplementary materials are available from ICANN, Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), <http://www.icann.org/dndr/udrp/policy.htm>.

³²⁶ Another possibility would be to amend the FAA and UAA to define "arbitration" for the purpose of the statutes. One relatively tight "classic" formulation would be as follows:

For the purposes of this Act, "arbitration" means "[a] process of dispute resolution in which an impartial third party renders a final, binding decision (award) after a hearing at which both parties have an opportunity to be heard."

For the sake of completeness one might also include a definition of "arbitration agreement":

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

UNCITRAL Model Law on International Commercial Arbitration art. 7(1) (amended 2006). However, this is probably not necessary given the clear references to agreements to arbitrate in various sections of the FAA.

³²⁷ See email from Harry Kyriakodis, Librarian, American Law Institute to Donald Buffalo, Pepperdine University School of Law (August 6, 2007) (indicating that the ALI is considering an International Commercial Arbitration Project, although no formal prospectus has been drafted for the Council to consider).

rounding legal issues.³²⁸ That initiative suggests the possibility of a similar approach to address the need for a clearer and more coherent legal framework for the broader landscape of dispute resolution in the United States.³²⁹

A decade ago, Carrie Menkel-Meadow advanced a thoughtful if ultimately unfruitful proposal to amend the *Restatement of the Law Governing Lawyers* to address the roles of lawyers engaged in ADR.³³⁰ Although my emphasis here is somewhat different, I am persuaded that the *Restatement* may be a particularly useful approach to “clarify[ing] the law and . . . provid[ing] a text that courts and other legal bodies deciding contested cases can employ . . . [as well as] ‘serv[ing] as an educational and reference tool’ for lawyers . . . and others.”³³¹ I endorse Professor Menkel-Meadow’s suggestion that we explore ways in which the *Restatement* may be made responsive to current dispute resolution practice and propose an informal effort to develop a possible *Restatement* structure. Without rejecting Professor Menkel-Meadow’s recommendations for revisions to the *Restatement of the Law Governing Lawyers*, I propose the consideration of a freestanding *Restatement of Dispute Resolution* aimed at consensual dispute resolution procedures, along the lines of the FAA or UAA, and perhaps addressing statute-based and court-connected procedures as well.³³² Although page limitations preclude a detailed proposal here, I envision a standard encompassing key legal principles associated with different forms of contract-based dispute resolution under a series of sections devoted to mediation, binding arbitration,³³³ and other procedures for nonbinding third-party decision-making.³³⁴ To the extent possible, each section would

³²⁸ Email from Jack Coe, Professor of Law, Pepperdine University Law School, to the author (July 31, 2007) (on file with the author) (transmitting concept paper for project).

³²⁹ An alternative would be to expand the new ALI initiative to address other consensual conflict resolution approaches, including mediation and nonbinding arbitration, in international transactions.

³³⁰ See generally Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631 (1997).

³³¹ *Id.* at 632 n.4 (quoting Nancy Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541 (1997)).

³³² Inclusion of court-connected or statute-based dispute resolution procedures would probably introduce significant complications but should be considered. The UNCITRAL Model Law on Conciliation addressed not only conciliation based on parties’ agreement but also noncontractual mediation. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (Vernon 2001) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 152.001 (Vernon 2007)); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (Vernon 2007) (including non-contractual mediation).

³³³ Because binding arbitration is now regulated by federal and state statutes, *Restatement* drafters have previously elected not to address it in detail. See Stephen K. Huber, *Arbitration and Contracts: What Are the Law Schools Teaching?*, 21 J. AM. ARB. 209, 254 (2003) (noting that the *Restatement of Contracts*, Chapter 8, Unenforceability on Grounds of Public Policy, “states that rules are not included for fields in which legislation is preeminent, such as arbitration”). On the other hand, the inclusion of binding arbitration in a *Restatement* would facilitate an integrated, comprehensive treatment of consensual dispute resolution procedures, including issues involving the “interface” between arbitration and other processes, and permit considered reflection on the growing body of relevant law, including laws relating to arbitration provisions in adhesion contracts.

³³⁴ As suggested above, taxonomic approaches to nonbinding third party decision-making procedures are rendered difficult by the sheer diversity of approaches. See *supra* text

follow a similar structure, beginning with a treatment of relevant policies. Common topics would include grounds for and scope of enforcement, judicial appointment of interveners, immunity of interveners, confidentiality, the legal effect of awards or other “results” of procedures, and grounds for judicial review or vacatur, if any. Sections would, of course, vary dramatically in detail due to the significant variance among processes.³³⁵

A well-drafted *Restatement of Dispute Resolution* might serve as an integrated “shadow framework” of legal principles supporting and regulating the use of out-of-court conflict resolution alternatives including binding arbitration, mediation, nonbinding arbitration, and other nonbinding third-party decision-making processes. Because it would be promulgated outside the vast “crazy quilt” of present federal and state legislation and decisional law, the need to harmonize with current law would in many cases be of less importance than identifying and promoting the most effective legal principles. Its power to influence courts and legislators while giving confidence to contract drafters would lie in its strong provenance, its unique breadth, and the power of an integrated and thoughtful approach to the range of legal issues surrounding dispute resolution processes.³³⁶

The *Restatement* would permit close analysis of the operation of key forms of nonbinding conflict resolution including mediation, nonbinding arbitration, appraisals, decisions by design professionals on construction projects, and other processes. The document would provide clear guidance for courts on the policies supporting judicial enforcement of nonbinding processes and the scope of such action.

Compared to legislative processes, the *Restatement* offers a relatively careful, conservative process involving the efforts of experienced scholars, judges, and practitioners. While the process certainly envisions considerable give and take with respect to the issues, there is less likelihood of the final outcome representing last-minute lobbying by special interest groups.³³⁷ At the same time, its provenance could underline its relative importance and influence in the field.

Even if confined to consensual agreements for dispute resolution, a *Restatement* would involve a degree of synthesis never before attempted (or even seriously contemplated) in the field of dispute resolution.³³⁸ At a time

accompanying notes 182-97. This should not, however, discourage an attempt at identifying and treating general process categories.

³³⁵ For example, possible elements of a section on mediation are suggested by provisions of the UNCITRAL Model Law on Conciliation and the California International Arbitration and Conciliation Act. See *supra* text accompanying notes 287-305.

³³⁶ Indeed, an initiative of this kind would provide a forum for addressing many of the topics covered in this Symposium, not just the “penumbra” issues raised in this article.

³³⁷ See Menkel-Meadow, *supra* note 330, at 632 (though critical, characterizing a particular *Restatement* process as “a noble effort” and “a heroic gathering” of pertinent case law and other standards in an effort to address “difficult and often contentious issues”). But see Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 26-27 (1993) (raising concerns that the ALI in addressing the law of lawyering may be yielding to professional self-protectionism by members of the bar).

³³⁸ Such synthesis is also rare in scholarship. One very ambitious exception was Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000) (proposing a “unitary” understanding of

when there is considerable experience with a wide array of approaches to the out-of-court resolution of disputes, including complex multi-step procedures, and when professional practice among lawyers and neutral interveners is embracing multiple processes, the field is sufficiently mature to conduct a thoughtful dialogue and debate on policy and principles transcending traditional process boundaries. To date, most standards for dispute resolution have focused on specific processes, with little or no reference to or consideration of other procedures.³³⁹ Thus, for example, the Uniform Arbitration Act was revised without a consideration of mediation and nonbinding arbitration procedures, and the Uniform Mediation Act was only marginally affected by arbitration law.³⁴⁰ The development of a *Restatement* would engage experts from diverse backgrounds in a wide-ranging discussion of policies and principles associated with different forms of dispute resolution. Topics such as the immunity of third-party interveners may be explored and addressed comprehensively, with careful re-examination of the policies supporting immunity for those serving in arbitral and other “quasi-judicial” roles versus those acting in more purely facilitative capacities.³⁴¹ There would be an opportunity for the discrete treatment of special considerations associated with adhesion contracts without the concerns about federal preemption that limited discussion and debate during the development of the RUAA,³⁴² as well as more careful consideration of the interrelationships between intervener independence and impartiality, disclosure of potential conflicts of interest, and judicial enforcement.³⁴³ “Interface” issues involving multi-step processes could also be addressed, along with issues of arbitral finality and other topics addressed³⁴⁴ in this Symposium.

The promulgation of yet another set of standards for out-of-court dispute resolution, especially one so broad-based, will strike some as a superfluous or even foolhardy effort.³⁴⁵ Advocates for out-of-court processes, especially mediation and other nonbinding processes, may argue that an emphasis on legalities totally misses the point or threatens the vitality of our experimenta-

public civil dispute resolution, including private ADR proceedings, prompted by constitutional concerns).

³³⁹ See CAL. CT. R., ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION (2002); CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002).

³⁴⁰ See UNIF. MEDIATION ACT art. 9 (2001) (establishing requirements for mediator disclosure, reflecting similar provisions in the RUAA).

³⁴¹ See *supra* text accompanying notes 155-64.

³⁴² See Stipanowich, *supra* note 2, at 894.

³⁴³ See *id.* at 873-74 (discussing concerns with decision-making by third parties aligned with or employed by a single party).

³⁴⁴ See *supra* text accompanying notes 242-73.

³⁴⁵ See Steven H. Goldberg, “Wait a Minute. This Is Where I Came In.” *A Trial Lawyer’s Search for Alternative Dispute Resolution*, 1997 BYU L. REV. 653, 655 (noting with concern the increasing emphasis on what Professor Menkel-Meadow describes as “The Law of ADR” and querying whether a *Restatement of the Law of ADR* can be far behind); see also Geoffrey C. Hazard, Jr., *Non-Silences of Professor Hazard on “The Silences of the Restatement”*: *A Response to Professor Menkel-Meadow*, 10 GEO. J. LEGAL ETHICS 671 (1997) (expressing serious reservations regarding Professor Menkel-Meadow’s suggestion regarding proposed changes to the *Restatement of the Law Governing Lawyers* to include non-adversary models).

tion with consensual processes;³⁴⁶ commercial arbitration proponents may fear that a new and comprehensive standard (even with discrete treatment of binding arbitration) may undermine long-accepted traditional principles such as arbitral immunity. One cannot say with great confidence that such concerns are misplaced or that the costs of such a standard will clearly outweigh the benefits. For this reason, the concept and potential scope of a *Restatement of Dispute Resolution* should be carefully vetted prior to the presentation of a proposal to the American Law Institute. A multi-disciplinary group of thoughtful scholars, jurists, practitioners, and advocates of key “stakeholder” groups (such as businesses, employees, and consumers) should be brought together to consider the possibilities and concerns associated with this approach. Even if the effort demonstrates the futility of developing a *Restatement*, it is likely to engender important debate “across boundaries” and may produce new ideas or even areas of consensus on relevant principles or policies; one possible product would be an authoritative new treatise or reference source on consensual dispute resolution.

CONCLUSION

The widening “penumbra” of arbitration law manifests various issues with which courts have struggled on the interface between the justice system and the diverse realms of out-of-court dispute resolution. Uncertainties regarding the boundaries of arbitration law and options for the legal treatment of other dispute resolution processes have resulted in conflicting judicial precedents and commensurate gray areas for drafters. Although arbitration law needs a degree of “breathing space” to accommodate party choices, it is an inappropriate or very limited template for mediation and other nonbinding dispute resolution processes. Although some courts have embraced ready alternatives in contract law, including equitable approaches to enforcement, there remains a great need for meaningful and authoritative guidance in this arena. In this regard, statutory reform presents significant challenges and dangers. Careful consideration should be given to the possible development of a *Restatement of Dispute Resolution*; even if a *Restatement* approach is ultimately rejected, a well-structured multi-disciplinary discussion may produce important new guidance for the field.

³⁴⁶ See *supra* text accompanying notes 283-85.