

# CONTRACTING FOR PROCESS

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## I

### INTRODUCTION

This article introduces the concept of contracting for process and considers when it is likely to be the best contract design. Contracting for process is in widespread use, but it often goes unnoticed. Some characteristics of contracting for process suit it particularly well to situations of uncertainty, including the radical uncertainty that results from fundamental disruptions such as COVID-19. Parties can employ this design for both contracts made or renegotiated during a crisis and for contracts made in ordinary times. The concept articulated here, however, is not confined to contexts of uncertainty or complexity; it can be used to achieve a variety of objectives and to solve a number of problems. Nor is it limited to or coterminous with relational contracting, managerial contracting, contracts for innovation, or other contracting practices and theories. Each of these can overlap with contracting for process, but not necessarily. (Picture a Venn diagram in which some areas overlap and others do not.)

This article observes and describes contracting for process as a contracting practice, distinguishes it from contract designs and contract theories that obscure contracting for process, and assesses how contracting for process is better suited to different parties, transactions, and situations, particularly in times of crisis. It is the first articulation of contracting for process as a general practice.<sup>1</sup> As used here, *contracting for process* refers to contracting for steps to be taken even though those steps are not the primary object of the contract.<sup>2</sup> Typically,

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1. Dispute resolution mechanisms, such as arbitration, and some self-enforcement devices (like chargebacks) have received extensive treatment, *see, e.g.*, Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEG. ANALYSIS 561, 566–67 (2015) (discussing interior remedies), including in papers by Bernstein and others. They are a kind of contracting for process, but this article has a broader and more general focus, articulating contracting for process as a distinct but overlapping theory and practice not limited to dispute resolution.

2. The distinction between primary and secondary objects is largely intuitive but is discussed here and further in Part II.A, *infra*.

contracting for process is an aspect of contracting, rather than a kind of contract; contracts concerned only with process will be rare.

Consider a contract for manufacturing T-shirts. Suppose the buyer and the manufacturer do not know the design, the quantity, or even whether anyone will want the T-shirts. With apparel manufacture such a high degree of uncertainty is unusual, but it can arise in a pandemic. The T-shirts are the primary object of the contract. Because the parties are not able to specify most of what is typical, and assuming they cannot specify the contingencies that will determine these terms—for example, they cannot say, “if this event occurs, then you will produce 500 shirts,” and so on—they might instead contract for a process to determine whether the T-shirts should be made and if so, the design, quantity, and timing. The process may involve market monitoring, market studies, meetings, structures and constraints for decision-making, and the like, so the parties can decide together how to proceed in light of events that they cannot specify. The processes they specify—gathering information, collaborating, making decisions—can happen regardless of the disrupted state of the world and in this sense are crisis-proof.<sup>3</sup> This is contracting for process, although it (like contracting for process in general) is not purely about process. After all, by definition, the process is not the primary object of the contract.<sup>4</sup> The process for which the parties contract is an aid to reach their main goal.<sup>5</sup>

Notably, the manufacture of T-shirts is not a contract for innovation. Nor is the process necessarily part of relational or managerial contracting. The manufacture of T-shirts may be a discrete, transactional, one-off deal. Nor even is the outcome necessarily determined by a vague standard such as “best efforts”; the process may be highly specified. Some contracts for process may be relational, managerial, or for innovation, but they need not be. A merger agreement will often be among the least relational contracts but may involve quite a lot of contracting for process. On the other end of the spectrum, a contract for the manufacture of antilock brakes may involve contracting for process; that contract, and the processes involved, will look very different from a merger agreement or a contract for T-shirts, even though all may involve contracting for process. A contract for manufacturing antilock brakes is likely to be highly

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3. In legal terms, the specified processes are not “commercially impracticable.” See U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM’N 2002).

4. For this reason, many contracts are excluded from this definition. In a contract for a GAAP audit (performed in accordance with “generally accepted accounting principles”), for example, the process is one of the *primary* objects. Similarly, many business process outsourcing (BPO) contracts are not the subject of this discussion. In those contracts, conducting the process—such as running company finance operations—is again the primary object. Although BPO contracts are not the focus here, many of these ideas can be applied to them. Other papers will have to take on that task.

5. Others may also be interested in the process of manufacturing. For instance, consumers may care about human rights or environmental impact. Although relevant, the interest of nonparties is not the main concern here and has been ably covered. See Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 529 (2004) (discussing how consumer choices are affected by the process of creating goods).

relational, long-term, and perhaps managerial in nature.<sup>6</sup>

Similarly, a contract for services will look different but may also involve contracting for process—or again, some contracting for process. Physicians do not ordinarily obligate themselves to achieve a particular result, but they do contract to use appropriate efforts, and in particular cases, those efforts will involve particular processes (or even “procedures”). This distinction between contracting for stated results and contracting for appropriate efforts is well understood and explicated in civil law theory, which has long distinguished contracts in which a party agrees to achieve the result (delivering goods, for instance) as opposed to using appropriate means, without promising the result itself. In French the former is called an *obligation de résultat*; the latter an *obligation de moyens*.<sup>7</sup> The taxonomy is unfamiliar in the common law, but the practices are common enough. The best-known examples in the common law may be contracts calling for best efforts, but there are many others, and some of those contracts and processes are highly specified.

The goal of this article is to identify and describe contracting for process; to differentiate it from other contractual designs and theories; and to consider when it will work best. The occasion for this article is the COVID-19 crisis, which will receive particular attention. Contracting for process can help resolve the tension between the reliability that a contract can provide and the flexibility that may be needed in disrupted times. But the utility of contracting for process is not limited to crises. Contracting for process is likely to grow in importance with increasing technological ability to facilitate and monitor process commitments<sup>8</sup> and increasing demand for value and values related to process (such as quality assurance and adherence to ESG values). Accordingly, this article gives some attention to broader uses of this contract design.

In summary, parties should choose contracting for process when the specification costs of an effective process are lower than the specification costs of the primary object of the contract. This is the function most important in times of crisis. More broadly, process, even when results are easily specified, can also be used to build trust and lower holdup and other opportunism risks, and thus reduce price. In addition, contracting for process can increase operational effectiveness, performance reliability, product quality, and timeliness. And processes, regardless of efficiency, may be required by company commitments or legal mandates. Contracts that call for human rights or environmental due diligence in supply chains are a prime example,<sup>9</sup> as are processes required for the

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6. These kinds of contracting are discussed below.

7. See generally Christian Larroumet & Sarah Bros, *Les Obligations, Le Contrat*, in TRAITÉ DE DROIT CIVIL TOME 3, 42 (Nicolas Molfessis ed., 9th ed. Economica 2018). A comparative analysis is planned for another paper.

8. See *infra* Part IV.C (on systems engineering).

9. David V. Snyder, Susan Maslow & Sarah Dadush, *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains*, 77 BUS. LAW. 115 (2022) (Report of the Working Group to Draft Model Clauses to Protect Human Rights in International Supply Chains, ABA Business Law Section) [hereinafter MCCs 2.0].

production of food, drugs, and the like.<sup>10</sup> Especially relevant to crises, although in a different way, are contracts that protect supply chain resilience through processes such as monitoring, updating, learning, and adjusting; modifying production location; and verifying redundancy, excess capacity, and multiple sourcing.<sup>11</sup>

The discussion begins in Part II by outlining the goals of a contract, and Part III reviews ideas in the contracts literature that might be confused or conflated with contracting for process. Even though each type of contracting has overlapping characteristics, relational contracts, long-term agreements, contracts using vague standards (including “best efforts”), contracting for innovation, and managerial contracting are all distinguished from contracting for process. Part IV considers when contracting for process might be most useful, giving special consideration to crises. After noting some questions in Part V, the article concludes in Part VI. Because the article has the twin goals of stating a newly conceptualized aspect of contracting, as well as pointing out its practical benefits, and because of the space constraints of this symposium, not all facets of the idea can be examined here. This article is a first attempt to sketch the concept and its uses.

## II

### THE FUNCTIONS OF AND CHALLENGES FOR A SUCCESSFUL CONTRACT

Contracting for process can only be evaluated with goals in mind. This article focuses on the enforcement, operational, and value-generation aspects of contracts and also accounts for the problems of uncertainty, complexity, and specification costs.

#### A. The Multiple Dimensions of Contractual Function and Further Definitional Points

Classically, the function of the contract is to tie the parties to their commitment so they can rely on it, and reliability is itself tied, in traditional thinking, to contract remedies.<sup>12</sup> Modern contract theory has expanded its understanding of remedies, which may be legal or nonlegal, economic or noneconomic.<sup>13</sup> Reliability linked to some kind of sanction might be called the

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10. See 21 C.F.R. § 110.80 (2000) (discussing food process and production controls); 21 C.F.R. § 210.2 (2009) (discussing current processing and manufacturing of drugs); 21 C.F.R. § 211 (1978) (discussing manufacturing practices for finished pharmaceuticals).

11. On network fragility, see Matthew Jennejohn, *The Transactional Dynamics of Market Fragility*, 85 LAW & CONTEMP. PROBS., no. 2, 2022, at 281.

12. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 59–60 (1936) (explaining that reliance has been and continues to be a core function of contracting). See generally L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937) (discussing reliance interests further).

13. See generally BARAK RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE (2017) (discussing religious and cultural sanctions); see also Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*,

*enforcement aspect* of a contract. A frequent challenge on this aspect is that breaches may be “observable” by the parties but may not be “verifiable” to a third party such as a court, another tribunal, or a network,<sup>14</sup> thus limiting enforceability and reliability.

Aside from enforcement, this article emphasizes an aspect noticed more in business scholarship than in legal literature: contracts in commercial relationships can serve an operational function (the *operational aspect*).<sup>15</sup> A contract sets up a business operation. A contract tells the parties what to do and when. A contract might also tell them how to do it, or some of it.<sup>16</sup> Some kinds of contracts are literally integral to operations, being “incorporated into the contract management electronic platforms used by both buyers and suppliers.”<sup>17</sup> Simpler contracts often do the same; a straightforward sale says what goods are to be delivered, how payment is to be made, what must be done to care for the goods, how and when to make claims about defects, and so on.

The operational aspect of the contract has multiple functions. It may serve a management function: the parties may be trying to manage quality, timing, cash flow, or credit. The parties may be managing trade secrets, other intellectual property, and competition issues.<sup>18</sup> The list could go on.<sup>19</sup> The contract is part of operations management and financial planning, and it will frequently be an effort to generate high value at low cost by controlling the manner and timing of contractual performance.

This raises the most important function of a contract: to generate value. Call this the *value aspect*, and notice there are two kinds of value. Typically, value comes through payment to one party and delivery of property or services to the

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21 J. LEG. STUD. 115, 140–42 (1992) (highlighting how Jewish culture and religion established sanctions for fair dealing violations); Robert E. Scott, *The Paradox of Contracting in Markets*, 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 71, 76 [hereinafter Scott, *Paradox*] (discussing sanctions like loss of business and damage to reputation for contract violations); Bernstein, *supra* note 1, at 563–64 (explaining that parties can be sanctioned through reputational harms for contract violations). *See generally* Robert E. Scott, *Conflict and Cooperation in Long Term Contracts*, 75 CAL. L. REV. 2005 (1987) (showing that reputation and sanctions are fundamental to cooperation between parties); Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281, 291–94 (2016) (illustrating loss of network benefits like being part of a trusted business community).

14. *See, e.g.*, Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1389–98 (2010) (discussing how judicial verification for breach of contract can be costly and impractical).

15. This is not to say that the managerial function has been ignored. *See, e.g.*, Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931) (discussing the managerial aspect of contracts); Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 58 (1974) (same).

16. *E.g.*, Bernstein, *supra* note 1, at 562, which will be considered more fully *infra* Part III.D.

17. Lisa Bernstein & Brad Peterson, *Managerial Contracting: A Preliminary Study*, 3, n.9 (unpublished manuscript) (on file with author).

18. *See* Matthew Jennejohn, *Creative Ordering* (2021) (working paper) (on file with the Law & Contemporary Problems Journal).

19. Consider innovation in marine insurance contracts as explained in Insureblocks, *Insurwave—A Maersk Pilot for Marine Blockchain Insurance* (June 5, 2018), <https://insureblocks.com/ep-12-insurwave-a-maersk-pilot-for-marine-blockchain-insurance/> [<https://perma.cc/BD7M-3V9C>].

other. General Motors (GM) will pay for an antilock brake system; the supplier will make the systems and receive money for them. The goods and the money in this contract might be called the *primary value* or *primary objects* of the contract. Making antilock brakes is complicated, though, and they serve a crucial safety function. The contract needs to generate not only the primary value but also secondary values. GM needs to know which suppliers and sub-suppliers are capable and reliable. That information thickens the market and allows more efficient contracting. Companies can build reputation, and the value of that reputation can be realized because market participants have access to the information.<sup>20</sup> These are *secondary values* or *secondary objects* that can be produced by successful contract design. They are secondary because their purpose is to make the production of the primary values—T-shirts or antilock brakes—more efficient. Without the primary value, the secondary values have no purpose.

Although economic value may be the most important aspect of a commercial contract, and while efficiency will be an element, other values may be legal or moral. As discussed below, many contracts provide for processes that are legally required or that have social value, regardless of whether those processes have direct efficiency value for the parties.<sup>21</sup> Drugs and food need to be made according to regulations governing safety, and the regulations are geared to processes (“good manufacturing practice”).<sup>22</sup> Supply chains may require human rights or environmental due diligence or both, whether because of legal mandates or companies’ social commitments. Model contract clauses recently published by the American Bar Association to protect workers’ human rights in international supply chains are aimed squarely at establishing a process of human rights due diligence (a promise for a process) rather than unrealistic and ineffective representations and warranties (promises for results).<sup>23</sup>

## B. The Challenges to Successful Contracting—Always and in Crisis

Uncertainty, complexity, and the cost of specifying the terms of the contract are among the chief challenges for contract design and drafting. The parties face uncertainty when they lack information necessary to specify performance. They may not know how well the T-shirts will sell and thus be uncertain about quantity.

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20. Scott, *Paradox*, *supra* note 13, at 86–87; Bob Trebilcock, *How They Did It: Supplier Trust at GM*, SUPPLY CHAIN MGT. REV. (May 5, 2017), [https://www.scmr.com/article/how\\_they\\_did\\_it\\_supplier\\_trust\\_at\\_general\\_motors](https://www.scmr.com/article/how_they_did_it_supplier_trust_at_general_motors) [<https://perma.cc/APF2-XWB2>]. See *infra* Part III.C.

21. Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility*, 2019 WIS. L. REV. 1109, 1124 (2019). See generally David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 AM. U. L. REV. 1869 (2019).

22. See 21 C.F.R. § 110.80 (2000) (discussing food process and production controls); 21 C.F.R. § 210.2 (2009) (discussing current processing and manufacturing of drugs); 21 C.F.R. § 211 (1978) (discussing manufacturing practices for finished pharmaceuticals).

23. See generally MCCs 2.0, *supra* note 9, at 125–28 (analyzing what is necessary to human rights due diligence under the United Nations Guiding Principles). For further discussion, see *infra* notes 89–92 and accompanying text.

The parties face complexity when they know the necessary information but specifying it is difficult. They may know how to make antilock brakes but specifying how to do it is an immense undertaking. Uncertainty can easily increase complexity. The production process may vary for 1,000 T-shirts versus 100,000 T-shirts.<sup>24</sup> If uncertainty or complexity are great enough, then specifying precise terms will be too costly, and the parties will avoid specification and may instead use a vague standard, like “best efforts,” or respond in some other way, perhaps relying on the courts, custom, reputation, networks, or chance.<sup>25</sup> This article discusses contracting for process as a strategy for addressing specification costs, including uncertainty and complexity;<sup>26</sup> contracting for process is an alternative when highly specified or even contingent contracts<sup>27</sup> are unattractive or impossible, as in times of crisis.

### III

#### OBSERVING AND DISTINGUISHING CONTRACTING FOR PROCESS ACROSS THEORY AND PRACTICE

For some, contracting for process will bring to mind relational contracting<sup>28</sup> or perhaps managerial contracting. Some will think of best-efforts clauses, or the costs and benefits of long-term agreements (LTAs). And it may resonate with contracting for innovation. This part discusses each of these contract designs and the corresponding contract theories and considers how they relate to the quite separate concept of contracting for process. Each of these kinds of contracts, and each of these theories, will sometimes overlap with contracting for process, but they are not at all coterminous. (Again, picture a classic Venn diagram that shows overlap but not identity.) For example, some contracts for process will be highly relational or managerial, as with integrated manufacturing; others will be highly discrete, as in a merger. The commonalities and distinctions are discussed in this part.

#### A. Relational and Long-Term Contracting

Macneil famously described a continuum between discrete (one-off or transactional) contracts, on one pole, and relational contracts, on the other pole.<sup>29</sup>

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24. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1092 (1981) (explaining that complexity and uncertainty play distinct roles yet are also linked).

25. See *infra* note 50 and accompanying text (noting that a party’s use of precise or vague terms can influence the way judges evaluate the contractual relationship).

26. Note this is not the only role of contracting for process; it has other benefits, as discussed in Part IV.

27. The model given is simplified, but real (and complex) examples are common, frequently linked to forecasting. See, e.g., Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 75–76 (2014).

28. See, e.g., IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

29. See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical*,

Relational contracting typically involves a long term,<sup>30</sup> but it need not.<sup>31</sup> Regardless of period, three issues may arise, and every one of them can be exacerbated by crisis: (1) the difficulty of specifying precise terms; (2) special problems in monitoring performance,<sup>32</sup> as well as judging that performance given that the terms are imprecise; and (3) enforcing the contract, given the first two problems, which may require self-enforcement like termination rather than litigation or arbitration.<sup>33</sup> In short, relational contracts, despite potential strengths on operational and value aspects, have enforcement problems. There is not much that courts can do with them,<sup>34</sup> given the vagueness of the terms and the doubtful verifiability of the necessary information. Plus, courts are reluctant to intervene in highly relational contracts.<sup>35</sup>

Contracting for process might provide a solution to the three related issues that lead to this problem. Sometimes, when process is emphasized, vagueness is obviated: although it may be hard to tell whether a party has employed best efforts in some cases, in many cases the party has stopped expending any effort at all, and there is no question about breach.<sup>36</sup> Further, the parties may be able to specify a process that itself will lead to, or that will provide a proxy for, the primary object of their bargain. That process may be reasonably precise and verifiable. Consider an example: the parties may contract for a process of market investigation or market testing, and the process can require that results and other information be shared. That process of market investigation and market testing will then determine, say, what style of T-shirt to produce, how many to produce, and where and when to deliver them.<sup>37</sup> Everything about the T-shirts may be unknown at the time of the contract and therefore impossible to specify. But the process need not be vague, and there may be little problem of monitoring, observability, or verifiability.

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*Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 899–900 (1978) (comparing the nuances between relational contracts and discrete transactions).

30. See *generally id.* at 882 (comparing the impact that longer-term deals have on relational contracts and discrete transactions).

31. Goetz & Scott, *supra* note 24, at 1091.

32. *Id.* at 1115.

33. *Id.* at 1116, 1131.

34. Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEG. STUD. 271, 316 (1992). Of course, counterexamples can be found, e.g., Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 75–76 & nn.97–98 (2003) (citing *Florida Power and Light Co. v. Westinghouse Elec. Co.*, 597 F.Supp. 1456 (E.D. Va. 1984), *rev'd*, 826 F.2d 239 (4th Cir. 1987)).

35. See Schwartz, *supra* note 34, at 313 (discussing how courts intentionally act passively when certain contractual factors are not met).

36. Consider the Sycamore Partners acquisition of Victoria's Secret, discussed *infra* notes 84–86 and accompanying text, or the Texaco-Getty merger involved in *Texaco v. Pennzoil*, 729 S.W.2d 768 (Tex. Ct. App. 1987) (upholding a verdict that Getty breached its contract to merge with Pennzoil when Getty accepted a better offer from Texaco).

37. This example is simplified; for real examples, see, e.g., Trebilcock, *supra* note 20 (describing GM's "Strategic Supplier Engagement"); Bernstein & Peterson, *supra* note 17, at 8, 32–38 (discussing the process of structuring managerial contracts and their implications).

Specifying the process but not the results of the contract does raise a question, even if everything is perfectly and freely verifiable. How can a court enforce the contract? It cannot award expectancy damages because the expectancy is indeterminate. The parties can liquidate damages, though, either at a level commensurate with their expectations given their uncertainty<sup>38</sup> or at a reliance level. Even without liquidation, courts can award reliance damages, and they have done so.<sup>39</sup> Aside from this, contractual self-enforcement mechanisms (termination, reputational sanctions, economic hostages, etc.)<sup>40</sup> can be brought to bear.

Aside from enforcement in court or arbitration by lawyers, and aside from self-enforcement, other third-party enforcement is both possible and well documented.<sup>41</sup> Arbitration that is not so lawyerly is widespread: members of a merchant community can enforce contracts in accordance with their norms, which may be preferable to legally oriented norms.<sup>42</sup> With respect to contracts for process, enforcement by members of the community—who know “how you do it right”—seems particularly promising. Even without an arbitral structure, informal enforcement within business networks is normal. Parties who shirk the norms of the business community will suffer reputational damage, loss of business opportunities, and other network penalties (as long as there is a sufficiently developed network). Those networks can take the form of industry associations, supply chains, or even less formal structures, with or without some coordinating function or coordinating body.<sup>43</sup>

The preceding discussion focuses on the enforcement aspect of contracting for process in a relational context, but operational and value-generation aspects are important too. To return to an earlier example, the system that GM has implemented with its suppliers illustrates both aspects. Sometimes an innovative system or subsystem is particularly important (like long battery life for the Chevy Bolt). To achieve this primary object—and other primary objects like high quality at low cost—some secondary objectives are necessary: contracting systems that build trust, collaboration, and shared cultural values that lead to better products

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38. See RESTATEMENT (SECOND) OF CONTRACTS § 33 (AM. L. INST. 1981) (stating that a contract meets the certainty requirement if its terms “provide a basis for determining the existence of a breach and for giving an appropriate remedy”); U.C.C. § 2-718 (AM. L. INST. & UNIF. L. COMM’N 2002) (limiting liquidation damages to a reasonable amount based on “the anticipated or actual harm caused by the breach”).

39. See RESTATEMENT (SECOND) OF CONTRACTS § 349 (AM. L. INST. 1981); e.g., *Copeland v. Baskin Robins U.S.A.*, 96 Cal.App.4th 1251, 1262–64 (Ct. App. 2002) (holding that reliance damages are available to a plaintiff in a contract to negotiate an agreement though actual damages from reliance must still be established).

40. Jonathan C. Lipson & Norman M. Powell, *Contracting COVID: Private Order and Public Good (Standstills)*, 76 BUS. LAW. 437, 456–57 (2021).

41. See Bernstein, *supra* note 13.

42. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1771–87 (1996).

43. Bernstein, *supra* note 13; Scott, *Paradox*, *supra* note 13.

and financial results.<sup>44</sup> To achieve these objectives, GM implemented a system in which the contracts call for significant process, as well as results. There are scoring systems, trend charts, structured meetings about scores and performance where both buyers' and suppliers' voices are heard, a "supplier council," and so on. These processes are designed with results in mind. The "process" exists to achieve "performance expectations," as a GM executive said.<sup>45</sup> But the process is engineered just as the products are, and the process can be highly specified in ways that the results may not be.<sup>46</sup>

The GM example involves relational contracting and how processes are used to solve the issues typical in such contracts. The T-shirt hypothetical is simpler but again demonstrates how contracting for process can solve problems of uncertainty, complexity, and high specification cost. It also demonstrates that contracting for process can be relational (as with GM) but need not be (as with T-shirts). Manufacturing T-shirts is generally on the discrete rather than the relational end of the continuum. Brands in the apparel sector often want agility—the ability to switch manufacturers at low cost, unlike the market for systems and subsystems of automobiles, where a relational investment can pay off. But uncertainty, complexity, and high specification costs can be generated not only by relational settings but also by exogenous factors, like the uncertainty inherent in a crisis. Contracting for process is helpful in both cases; it is not limited to relational settings. Of course, contracting for process can move a discrete transaction a step along the relational scale, but the processes need not be elaborate, long term, or expensive. The processes specified will be determined by the business motivations, and a T-shirt contract can involve process and still be relatively discrete and short term.

In other instances, parties may prefer long-term agreements (LTAs).<sup>47</sup> By nature, an LTA will raise the issues that typify relational contracts, that is, uncertainty and complexity and the consequent difficulty of specifying terms. As with relational contracts generally, a contract for process can help when the parties can specify processes that are likely to lead to the primary objects. The objectives will vary but setting out the "how-to provisions to guide and improve production" is a principal function of an LTA.<sup>48</sup> As might be expected in any relational or other long-term agreement, process can be central. The agreed process, together with the long-term commitment, allows the parties to invest in

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44. Jeffrey H. Dyer, Prashant Kale & Harbir Singh, *How to Make Strategic Alliances Work*, 42 SLOAN MGMT. REV. 37, 38 (2001).

45. Trebilcock, *supra* note 20, at 25; *see also* Scott, *Paradox*, *supra* note 13, at 87–88 (demonstrating how the governance structures involved in these contracts facilitate coordination). Systems engineering is discussed further *infra* Part IV.C.

46. *Id.*

47. *See generally* Juliet P. Kostritsky & Jessica Ice, *Why Choose LTAs? An Empirical Study of Ohio Manufacturers' Contractual Choices Through a Bargaining Lens*, 9 AM. U. BUS. L. REV. 337 (2020) (providing empirical evidence for when and why parties are more likely to utilize LTAs).

48. *Id.* at 339.

a profitable relationship that would not otherwise be possible.<sup>49</sup>

Contracting in a time of crisis shares many of the challenges of relational or long-term contracting. Uncertainty, complexity, and the difficulty or impossibility of specifying the primary objectives of the contract will often impede contracting. In such times, companies may want to invest in relationships but may be fearful of unwelcoming markets. A contract that calls for a process that will, to the degree appropriate under developing market conditions, lead to the achievement of the (not entirely knowable) primary objectives of the contract may allow contracting and appropriate levels of investment and commitment given the vagaries inherent in extraordinary times.

## B. Best Efforts and Other Similar Clauses

To many practicing lawyers, a contract built on a best-efforts clause may be the prototypical contract for process. The obvious vagueness of the standard—and the resulting difficulty of interpretation, monitoring, and enforcement—has occupied not only the literature on relational contracting but also the research on more discrete transactions, such as corporate mergers. The choice of a vague standard results from a trade-off. The parties skip the high cost of precise specification at the time of contract negotiation (*ex ante*) knowing that they may face high litigation or other enforcement cost later (*ex post*) if something goes wrong.<sup>50</sup> Regardless of the clause chosen—“best efforts,” “reasonable commercial efforts,” or “good faith”—vagueness is inescapable, despite pages of scholarly analysis.<sup>51</sup>

The parties can offer interpretive guidance,<sup>52</sup> but contracting for process may work better. Indeed, lawyers may draft contracts for process without recognizing it as a separate strategy. For example, a contract for process was structured as an interpretive guide in the agreement between Microblend LLC and Mobil Oil Co.<sup>53</sup> It defines best efforts to include:

[P]roviding demonstrations of the Products to potential customers; assisting in discharging seller’s obligation under its warranties relating to the Product; submitting, at least thirty days prior to the start of each calendar quarter, a quarterly forecast for the upcoming six months; assisting in determining the credit worthiness of any

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49. See *id.* (noting that the second function of LTAs is to secure a continuing commitment of the parties through express provisions and implicit protections).

50. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 851–56 (2006) (discussing how a contract’s particular use of precise and vague terms can guide the court’s future interpretation of both the standards and their accompanying rules).

51. E.g., Victor P. Goldberg, *In Search of Best Efforts: Reinterpreting Bloor v. Falstaff*, 44 ST. LOUIS U.L.J. 1465, 1480–85 (2000); Goetz & Scott, *supra* note 24, at 1120–23. The clauses are used not only in mergers but quite commonly in many major contracts. See Scott, *Paradox*, *supra* note 13, at 75–76 n.19 (showing that 17% of CORI database contracts contain efforts clauses). See generally *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979) (finding the defendant in breach of the contract’s “best efforts” clause).

52. Gilson, Sabel & Scott, *supra* note 27, at 58–60.

53. Scott, *Paradox*, *supra* note 13, at 76 n.22.

distributor; and otherwise assisting in the sale and marketing of the Product as the parties may from time to time agree.<sup>54</sup>

Efforts clauses have so dominated thinking that we fail to recognize process not as an aid to interpretation but as an independent obligation for which the parties can contract.

Sometimes a highly specified process with precise terms will be desirable, as in the Microblend-Mobil contract; sometimes not. A contract for process has the same flexibility as a contract for results, with precision *ex ante* as one choice and vague terms with potentially high litigation costs *ex post* another. As with a vaguely specified contract for results, a vaguely specified contract for process could run into difficulties with enforcement, whether legal (judicial or arbitral) or nonlegal (reputational, loss of business, and so on). At the end-game stage,<sup>55</sup> where parties care little about trust or their relationship, any vaguely specified contract—for results or for process—will face the same difficulty. This is not a problem peculiar to process; it is a problem of vague specification.

The contract for process is simply another strategy—or contract design—that is likely to be especially attractive in times of uncertainty. This may be particularly true in relational settings where the parties, though their experience with each other, can state their processes for decision-making, production, marketing, and the like. But it is hardly limited to relational settings. One party—an apparel brand, for instance—may be able to state the necessary processes based on its own experience. More highly specified processes will make enforcement easier, less costly, and more certain than under an unadorned efforts clause. There are also operational and value ramifications. A contract for process, if stated with reasonable precision, can offer greater operational guidance. It can also help the parties build trust. Probably the best-known examples come from the literature on innovation,<sup>56</sup> which is addressed next.

### C. Contracting for Innovation

Contracting for innovation is part of the move away from vertical integration and into outsourcing (although that term now seems outmoded). With the transition away from integrated firms, contracts have themselves moved toward an architecture of learning<sup>57</sup> and governance, both formally and pragmatically.<sup>58</sup>

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54. *Id.*

55. Bernstein, *supra* note 42, at 1796–97.

56. See generally, e.g., Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009) (arguing that “contracting for innovation” raises switching costs and deters opportunism); Gilson, Sabel & Scott, *supra* note 14.

57. See Matthew Jennejohn, *Collaboration, Innovation, and Contract Design*, 14 STAN. J.L. BUS. & FIN. 83, 140–45 (2008) (explaining this trend toward a pragmatic learning process between parties in contract).

58. See *id.* at 112–13 (discussing pragmatic coordination). See generally Susan Helper, John Paul MacDuffie & Charles Sabel, *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, 9 INDUS. & CORP. CHANGE 443 (2000) (observing this transition toward more pragmatic coordination).

These mechanisms can be built around routines and processes. Exploring possibilities, setting up prototypes, benchmarking:<sup>59</sup> all of these are process ideas, and the contracts are largely contracts for process (or “practice” or “*praxis*”).<sup>60</sup> The same is true more generally of the contracted-for methods of information sharing, like checking and evaluation or correction and improvement. Contracts for innovation seem to be a prime example of contracting for process, at least in many instances.

Depending on the contract and the context, few of these processes can be understood in traditional legal ways, and if they cannot be so understood, they cannot be enforceable in traditional legal ways. But that does not mean they are not enforceable. There may be self or network enforcement mechanisms. In addition, the processes give operational guidance and add value in terms of both the primary and secondary objectives of the contract. The leading articles describe the “braiding” of formal commitments, which may be enforceable legally, and informal commitments that may be enforceable in non-legal ways or may simply be unenforceable.<sup>61</sup> These contracts resolve problems, whether of opportunism or otherwise, by establishing in the contracts themselves processes for doing business.<sup>62</sup> The radical uncertainty of innovation—contracting to reach an unknown result—nicely parallels the more frightening uncertainty of crisis. Contracting for process can provide a solution in both cases.

#### D. Managerial Contracting

Contracting practice that takes advantage of many of the pragmatic, process-oriented methods of contracts for innovation can be seen more generally. Management functions that were performed by control mechanisms within firms must be translated into contracts as firms have disintegrated vertically and shifted to horizontal contractual arrangements.<sup>63</sup> Contract clauses on administration, coordination, information flow, and contract adjustment characterize this

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59. Charles Sabel & Jonathan Zeitlin, *Neither Modularity nor Relational: Inter-Firm Collaboration in the New Economy*, 5 ENTER. & SOC'Y 12–13 (2004) (articulating benchmarking as a contract to survey current products and processes and assess potential improvements).

60. Jennejohn, *supra* note 57, at 114.

61. Much of the literature grows from the papers by Gilson, Sabel, and Scott. *See supra* notes 14, 27, and 56. *See generally* Ronald J. Gilson, Charles Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Terms*, 88 N.Y.U. L. REV. 170 (2013) (discussing judicial treatment of contract innovation); Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981 (arguing that implementing contract innovation through formal contract procedure encourages compliance with relational norms). For a recent assessment, see generally Matthew Jennejohn, *Braided Agreements and New Frontiers for Relational Contract Theory*, 45 J. CORP. L. 885 (2020) (applying and assessing the braiding thesis through looking at U.S. defense contracting).

62. Jennejohn, *supra* note 57.

63. *Id.*

“managerial contracting.”<sup>64</sup> Notably, these provisions are procedural.<sup>65</sup> Managerial contracting is not coterminous with contracting for process, which is much broader (and can include some aspects of merger agreements, for example, which are not very managerial at all). And certainly managerial contracts are not purely contracts for process as they often include promises about results as well as process: the what as well as the how. But managerial contracting typically includes a significant amount of contracting for process.

Managerial provisions are not necessarily in the contract for the purpose of legal enforcement. Verifiability problems are obvious; in addition, buyers and suppliers, especially in established supply chains, do not want to sue each other.<sup>66</sup> Enforcement is nonlegal, through contract termination, reputational loss, loss of business, and the like.<sup>67</sup> In addition, managerial provisions address the operational and value aspects of the contract. Clauses may be directed to one aspect or another, but many will engage more than one aspect. Monitoring is a crucial function in many kinds of contracts—even a simple inspection of the goods in a single-delivery contract<sup>68</sup>—and looks to all three aspects. It is directed to detecting breach, or other trouble, and its potential correction, serving an operational function. It allows learning or “updating,” information-sharing, and value creation, as identified by pragmatist scholars.<sup>69</sup> In appropriate cases, it can lead to informal enforcement. Monitoring is specified in great detail in some managerial contracts, and it is all about process.<sup>70</sup>

The kind of contracting for process used in managerial contracting offers potential in times of crisis. Because of its coordination, information sharing, and updating functions, companies can jointly watch and probe the market: they can position themselves to set targets when they are able, thus taking advantage of developments as they occur.<sup>71</sup> This will be particularly necessary in industries where firms are no longer vertically integrated: instead of managing market uncertainty through intrafirm market study and interdepartmental control, contracts will be necessary. Without the contracts already in place, disintegrated

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64. See generally Bernstein & Peterson, *supra* note 17 (discussing managerial contracts and their potential to add value to contract relationships). See also Perillo, *supra* note 15, at 58 (discussing the managerial function of certain contract provisions in light of the statute of frauds).

65. Bernstein & Peterson, *supra* note 17, at 5–6.

66. See *id.* at 10 (“Many suppliers will be judgment proof, buyers want to avoid gaining a reputation for suing their suppliers, and quality problems or production disruptions can lead not only to monetary harm, but also to significant reputational harm to buyers that is not taken into account by the legal system.”).

67. *Id.* at 3–5.

68. See, e.g., *Chicago Prime Packers v. Northam Food Trading Co.*, 320 F.Supp.2d 702 (N.D. Ill. 2004), *aff’d*, 408 F.3d 894, 900 (7th Cir. 2005) (finding that Northam was liable for the spoiled ribs because it failed to examine the goods in as short a time as practicable upon receiving the transfer and thus could not show non-conformity).

69. Charles Sabel & William Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 54–56 (2011) (arguing for governance mechanisms that compensate for the absence of *ex ante* knowledge); Scott, *Paradox*, *supra* note 13, at 95.

70. See Bernstein & Peterson, *supra* note 17, at 27–32 (discussing managerial contract governance).

71. See *id.* at 19–23 (discussing this relational aspect of managerial contracting).

firms may be too late to move promptly when markets improve.<sup>72</sup>

In ordinary times, the managerial investment may not be worthwhile, particularly, say, in the contract for T-shirts example. On the make-or-buy spectrum—in which companies decide whether it is better to make something themselves or buy it from another company and then use or resell it—T-shirts may be far toward the buy end for a typical clothing brand. Managerial contracting, like other relational contracting, requires investment and management that characterizes a transaction moving toward the make end of the spectrum. Ordinarily, making the T-shirts is not the best option for a brand. But by definition, an extraordinary crisis is not ordinary, and managerial contracting, with all its process elements, may be the better choice, especially when the other choices are to sit out the market entirely or to return to vertical integration.

#### IV

##### THE BENEFITS OF CONTRACTING FOR PROCESS

As should be apparent now, contracting for process can be helpful when specifying an effective process is less costly than specifying the desired results. Such a situation can arise in many ways; times of crisis are especially prominent now. But there is more to it: there are benefits not linked to specification costs. Contracting for process can generate secondary value, which may be focused on increasing the capabilities of the other party—capacity building—or may generate information and trust that mitigates holdup risk or other kinds of opportunism. This function is valuable generally, and it will be especially salient in times of crisis. At a more basic level, contracting for process may simply be a more effective way to achieve the desired results, not because it is difficult to specify the results but because of the operational effectiveness of the process. This faith in process also lies behind many regulatory requirements for processes. In those instances (like drug manufacturing) the parties will contract for process as a matter of compliance. In many cases, several of these reasons will motivate contracting for process, which of course can be combined with a contract for results—specifying, in varying degrees, both the desired results and the process for achieving them. These ideas are discussed in this part.

##### A. Crisis and Other Cases of High Specification Costs

COVID-19 instigated this article, but any crisis—particularly those of great magnitude—will generate tremendous, possibly insuperable, uncertainty, as well as complexity. In a nebulous way, people and businesses still know what they want: “Watch what happens, move when it seems promising.” The problem is that stating more in a fully specified contingent contract could be prohibitively costly. This contribution suggests that sometimes the parties can more easily specify how they will investigate the developing state of the world, explore their

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72. See Lipson & Powell, *supra* note 40, at 447.

options, and decide how to realize the potential value that they identify.<sup>73</sup> This idea has been stated above in the context of relational and long-term contracts, contracts with efforts clauses, contracts for innovation, and managerial contracting, even though contracting for process is not limited to or coterminous with any of those.

The argument will not be repeated but can be summarized. The parties will choose contracting for process when the specification costs of the process are lower than the specification costs of the primary object of the contract and the expected value of the process-based contract is the same or higher. In the calculation, risk and uncertainty must be factors. Higher enforcement costs *ex post* under a vague standard, like best efforts, must be multiplied by the uncertainty of litigation but discounted by the chance that anything will ever go wrong, much less require litigation. Similarly, contracting for a more highly specified process must be discounted or multiplied based on its effectiveness in achieving the primary and secondary objects of the contract: the process may be more uncertain to reach the desired results than specifying the results themselves. (This would appear true intuitively—surely it must be better to require the results than a process for getting there?). Alternatively, the process may be more likely to reach the desired results, perhaps because the parties contract for both process and results. (Logically, it must be best to specify both, if possible, right?) But even a contract that specifies process alone may, counterintuitively, be more effective than specifying results alone. Empirically this appears true sometimes, as suggested by Bernstein and Peterson's work on managerial contracting.<sup>74</sup> And it is the only choice in contracts for innovation when the results are unknowable *ex ante*.

This calculation and analysis are idealized but state the comparative value propositions with precision. Less precisely but more understandably: sometimes it is cheaper and more effective to specify the desired results; sometimes the process for getting there, especially when the parties are not sure of the desired results or their timing, is better; and sometimes it is best to specify both the desired results and the process for getting there. Further, and notable for present purposes, the result of these calculations is likely to change in times of disruption, and contracting for process is much more likely to be the best, or only, choice aside from sitting out the market or returning to integration.

Another way to see the benefit of contracting for process is in relation to options, and sometimes contracting for process might be seen, loosely, as a complex of contingent options. More likely, a process-based contract will stand in the middle of a triangular ground defined by a fully specified and fully committed contract for results at one point, an option at the second point, and an unenforceable agreement to agree at the third point. In this kind of contracting for process, reaching the fully specified and committed contract is too costly.

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73. For an example, see the Model Standstill Agreement. *Id.* at 443 n.23.

74. See Bernstein & Peterson, *supra* note 17.

Crisis or other uncertainty or complexity precludes that choice. An unenforceable agreement to agree is unsatisfactory because when the crisis clears, the parties may find themselves without the contracting partner necessary to take advantage of the opportunity that has ripened. And the parties may not want the unilateral nature of option contracting, in which one party has the power to make the decisions—and must pay for that power through the option price. Contracting for process allows the parties to establish a process to explore, test, learn, meet, collaborate, and make decisions. There is not an enforceable contract for a particular result, and there is not a unilateral option. But the parties have committed themselves to work together to improve their chance to reach the hoped-for result. Sometimes it may be an attractive middle ground, particularly in times of crisis.

### B. Process, Trust, Holdup, Opportunism, and Price

Contracting for process is hardly limited to times of crisis or even to situations involving high specification costs. Trust built on process, information generated by processes, and other secondary values may motivate the parties, as observed in contracts for innovation, managerial contracting, and relational contracts. Building information and establishing reputation thickens markets and makes for more efficient contracting.

Similarly, contracting for process can help mitigate holdup risk, and mitigating that, or any, risk can improve pricing, which must take risk into account. This can be seen in a few ways. Appropriate processes can identify holdup risk earlier, as with robust and frequent monitoring, communication, cooperation, or collaboration.<sup>75</sup> These processes enable a party to see why a delay, a breach, or some other unwanted event occurred and thus avoid a misunderstanding about whether a party has breached through negligence, incapacity, changed circumstances, or the like, or instead is defecting, engaging in a holdup, or otherwise behaving opportunistically.<sup>76</sup> Unsurprisingly, opportunism or defection is punished heavily; ordinary good-faith breaches are typically correctable or forgivable.<sup>77</sup> This is likely true because some breaches are related to trust. The relationship will be more efficient and more productive if the parties can worry less about opportunism, and through monitoring, collaboration, and the information generated in the process, they come to trust each other. In other words, information and trust lower the risk of opportunism—and thus lower the price as well.

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75. *Id.* at 1–9; see also Robert E. Scott, *The Law and Economics of Incomplete Contracts*, 2 ANN. REV. L. & SOC. SCI. 279, 288 (2006) (explaining that evidentiary proxies can serve as one example of a monitoring system between two contracting parties).

76. Bernstein & Peterson, *supra* note 17, at 30–31.

77. Bernstein, *supra* note 1, at 584.

### C. Operational Effectiveness, Systems Engineering, Regulatory Compliance, and Responses to Vertical Disintegration

A set of potentially independent but possibly related scenarios will also make contracting for process attractive, and they may or may not involve problems of specification costs. Perhaps contracting for innovation, in which results cannot be highly specified, is most obvious. But sometimes the most effective way to make a valuable contract is to specify the processes for achieving the results even when the results can be easily specified. The parties may institute procedures for reaching the results because those procedures are efficient, productive, reliable, well established, or legally required.

Much of this is apparent in managerial contracting and LTAs<sup>78</sup> and their interaction with systems engineering, which addresses the requirements of end products and the engineering of both production processes and project management. Some manufacturing contracts are built around engineering requirements like assurance, reliability, safety, testing, evaluation, and workflow, as well as end-product requirements.<sup>79</sup> Processes like those in the automotive industry come to mind, but process can be just as important with emerging technologies. Operations are built around the basic engineering features, which may be stated with greater or lesser specificity in various documents. To what degree they are part of the contract raises interesting questions: are the system processes express terms? Or might they come into the contract through usage of trade, course of dealing or the like?<sup>80</sup> To what degree do they rely on formal, legal enforcement rather than informal, network-based norms?<sup>81</sup> Including process and systems engineering methods in contractual thinking, planning, and documentation will be critical in keeping contracts congruent with the parties' intent, even when the end results of the contract are specified. And bringing lawyers' work into the process (literally) helps lawyers in their own work as "transaction cost engineers,"<sup>82</sup> allowing them to help their clients build trust through process and thus facilitate investment at lower cost.<sup>83</sup>

This will be true particularly in vertically disintegrated industries.

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78. Bernstein & Peterson, *supra* note 17, at 7 (quoting John L. Pence & P. Saacke, *A Survey of Companies that Demand Supply Quality*, 42 ANN. QUALITY CONG. (1988)); Kostritsky & Ice, *supra* note 47, at 343-44.

79. See generally INT'L COUNCIL ON SYS. ENG'G (INCOSE), SYSTEMS ENGINEERING HANDBOOK: A GUIDE FOR SYSTEM LIFE CYCLE PROCESSES AND ACTIVITIES (4th ed. 2015) (discussing systems engineering life cycle); DEV G. RAHEJA & MICHAEL ALLOCCO, ASSURANCE TECHNOLOGIES PRINCIPLES AND PRACTICES: A PRODUCT, PROCESS, AND SYSTEM SAFETY PERSPECTIVE (2d ed. 2006) (focusing on assurance and safety technologies). Thanks to Ken Anderson et al. for help on systems engineering.

80. See generally U.C.C. §§ 1-201(b)(3), 1-303 (AM. L. INST. & UNIF. L. COMM'N 2001) (defining "agreement," "usage of trade," and "course of dealing").

81. See Jennejohn, *supra* note 18 (on file with author).

82. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253 (1984).

83. These ideas will gain new meaning as contracts move to automated platforms, and lawyers and engineers will need to code computers to generate the contracts themselves.

Management functions formerly contained in the firm must move into contracts as internal operations move to external firms. The transfer of management and operations functions is effectuated through contracts, and increased demand because of changes in industrial organization proceeds in parallel with decreases in monitoring costs through technology. Just as within a firm a department is given not only goals for what it must do but also procedures for how to reach them—and having them monitored along the way—those processes need to be translated into contracts. In short, contracting for process is a response to decisions about industrial organization—buying more, making less—and to organizational decisions and complexities within the contracting firms. On this axis, contracting for process can be expected—and is likely to grow—in managerial and relational contracting contexts, especially when technological monitoring is possible.

As emphasized earlier, however, contracting for process can be just as critical in discrete contracts, such as in transactions that are not relational or long term in nature. Mergers and acquisitions provide salient examples, and perhaps the most prominent current case arises from the COVID-19 crisis. Sycamore Partners contracted to acquire Victoria's Secret. The acquisition agreement said that the buyer could escape if there was a "material adverse effect" (MAE) on the target's condition. But there was a carve-out for pandemics—that is, an MAE caused by a pandemic is not an excuse not to close.<sup>84</sup> The agreement elsewhere said that the target must continue to operate in the "ordinary course of its business." When the pandemic hit, Victoria's Secret closed its brick-and-mortar stores. Not doing so would have been foolhardy. The buyer sued to escape the merger because the target had not continued in its ordinary course of business. Yet this claim under the ordinary course clause would seem to conflict with the risk allocation in the MAE carve-out. The Victoria's Secret's CEO asked, "What else did you want us to do?" Of course the parties might have conferred and agreed, but the buyer would hardly have wanted to. Instead, the buyer litigated. Before long, the case settled.<sup>85</sup>

Contracting for a post-signing process could resolve this and other tensions and missteps, purposeful or otherwise, in the fraught time between signing and closing. A process of notice, meeting, and decision-making might help: although it may not resolve the problem, it may reveal one of the parties as a defector, which will then be verifiable to a court—a prospect that may prod the would-be defector to a resolution. This is particularly true since it is rare to escape a merger. Nevertheless, deals can be called off if intervening events are big enough, and big

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84. Matthew Jennejohn, Julian Nyarko & Eric L. Talley, *COVID-19 as a Force Majeure in Corporate Transactions 1*, 5 (Colum. L. Sch., Working Paper, 2020), [https://scholarship.law.columbia.edu/faculty\\_scholarship/2645/](https://scholarship.law.columbia.edu/faculty_scholarship/2645/) [<https://perma.cc/G6L3-5Y62>] (explaining that even when contracts have pandemics as a carve-out, most still push the risk of the transaction onto the buyer); see also Jennejohn, *supra* note 11, at 281.

85. Guhan Subramanian & Caley Petrucci, *Deals in the Time of Pandemic*, 121 COLUM. L. REV. 1405, 1407–11 (2021).

crises are certainly current.<sup>86</sup> Smaller matters (like conditional regulatory approvals) can also scuttle deals, or raise possibilities for strategic or opportunistic moves that might be resolved by a contractually specified process toward closing—and certainly more highly specified than an unadorned obligation to use best efforts. Such processes are now familiar in mergers; more might be healthy. As has been demonstrated, parties are not averse to long, highly specified merger documents, even in the most highly reputed jurisdictions.<sup>87</sup>

Mergers and acquisitions provide good examples because the process of closing a deal under New York or Delaware law is well known. Other transactions also involve well established processes, including processes that are expected under industry custom, required by trade associations, or mandated by regulation. In these cases the parties contract for process, implicitly or explicitly, because they must. Food and drug manufacturers<sup>88</sup> are examples, but frequently the customary or regulatory mandate is not the only motivation. Often the process is customary or required because it is an effective means to the desired end.

Supply chains and non-product values—for example, environmentally sustainable manufacturing practices, human rights and safety for international workers—provide a good example of both business and regulatory reasons for contracting for process. Purely results-based approaches based on representations and warranties are now viewed as inferior.<sup>89</sup> In such contracts, suppliers warrant their adherence to various requirements—no forced labor or child labor, safe buildings, compliance with a corporate code of conduct. This can lead to the notorious “checkbox” approach, in which buyers demand that suppliers complete questionnaires about relevant practices and suppliers blithely do so as expected, with both parties knowing that the forms hardly reflect reality.<sup>90</sup> This practice, perhaps best termed fictitious contracting, is intriguing and is part of a larger phenomenon, but its examination will have to be explored elsewhere. The point for now is that the traditional method of representations and warranties does not work well, and current thinking is that a process of human rights or environmental due diligence is considerably better.<sup>91</sup> Indeed, it is now mandated

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86. See sources cited *supra* note 84.

87. Jeffrey Manns & Robert Anderson, *Contract Design, Default Rules, and Delaware Corporate Law*, 77 WASH. & LEE L. REV. 1197, 1205–06 (2020).

88. See 21 C.F.R. § 110.80 (2000) (discussing food process and production controls); 21 C.F.R. § 210.2 (2009) (discussing current processing and manufacturing of drugs); 21 C.F.R. § 211 (1978) (discussing manufacturing practices for finished pharmaceuticals).

89. David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts*, 73 BUS. LAW. 1093, 1097 ¶ 1 (2018) [hereinafter MCCs 1.0].

90. See MCCs 2.0, *supra* note 9, at 126 n. 28 (demonstrating that not much is gained when suppliers feel compelled to check boxes to facilitate a transaction).

91. *Id.* at 126–27 (explaining that moving towards due diligence facilitates more trust than representations and warranties).

by an increasing number of jurisdictions.<sup>92</sup> Contracting for due diligence is contracting for a process, and the hope is that this process-based (or process-inclusive) method of contracting will work in the sphere of sustainability and human rights as it does with more business-oriented objectives.

## V

### QUESTIONS

When contracting for process is separated from other contracting practices, its benefits become clearer. But it also raises questions. What is the best interpretive regime? What is the best process for dispute resolution? And how does contracting for a process of dispute resolution relate to contracting for a process of producing goods or services? Note that contractual provision for alternative dispute resolution is a kind of contracting for process. How should parties and courts address the reality that some highly specified contracts for process are overwhelmingly long and complicated? Such contracts can lead to ignorance and confusion, when parties do not know the contents of hundreds of pages incorporated by reference, or from manuals or websites. These are problems linked to standard terms generally. The large literatures on standard terms, contract interpretation, and dispute resolution can help, but those inquiries will have to be taken up later.

More broadly, examining how contracting for process fits within philosophical foundations of contract law should prove fertile for exploration. Theories based in practical reasoning and the philosophy of action might mesh particularly well. Some theories see law as a plan,<sup>93</sup> consonant with the nature of humans as planners.<sup>94</sup> Through this lens, contract law is also a plan, as are contracts themselves.<sup>95</sup> Although the phrase “contracts as plans” may make it sound like this theory is about contracting for process, the planning theory

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92. French Corporate Duty of Vigilance Law, Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, [Law 2017-399 of March 27, 2017 relating to the duty of care of parent companies and sponsoring undertakings], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 28, 2017, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/> [<https://perma.cc/V4D8-7CH7>]; see also Wet zorgplicht kinderarbeid [Dutch Child Labor Due Diligence Act], Wet van 24 oktober 2019, Stb., 2019, <https://zoek.officielebekendmakingen.nl/stb-2019-401.html> [<https://perma.cc/JZ7Q-L4NG>]; Bundesanzeiger Verlag (2021), [http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl121s2959.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf) [<https://perma.cc/2AGE-L39C>] (German law passed 16 July, 2021); Eur. Parl. Doc. (COM 2022/0051) [<https://perma.cc/CM6H-9P6X>].

93. SCOTT J. SHAPIRO, LEGALITY 119–29 (2011); see generally Scott J. Shapiro, *Laws, Plans, and Practical Reason*, 8 LEGAL THEORY 387 (2002) (explaining theory that laws can be viewed as “joint intentional activity” and legal conventions can be viewed as plans).

94. MICHAEL E. BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 1–4 (1999); see generally MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON (1999) (developing theory of planning based on intentions to act).

95. Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L.J. 341, 343–47; Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1472 (2004) (explaining that contracts should encourage collaboration rather than efficiency).

encompasses all contracts; indeed, most of the discussion in that literature is about contracts for results.<sup>96</sup> Still, a further examination of contracting for process through this lens should be illuminating, particularly with managerial contracts calling for “shared cooperative activities.”<sup>97</sup> That philosophical examination will also have to await another occasion.

## VI

### CONCLUSION

Contracting for process is a contract design, like many others, that is available to solve problems. Identifying it and separating it from other contracting strategies allows it to be seen with a firmer understanding. This contribution has shown that contracting for process can be vague, as with a best-efforts standard, or highly specified, as in managerial contracting and contracts for innovation. In a variety of contexts and transactions, contracting for process can solve both typical contracting problems and problems resulting from or exacerbated by a crisis. One of its uses is to allow a contractual commitment during a time of crisis-induced uncertainty. Such a commitment is all the more necessary now that firms have turned away from vertical integration. Without the benefits of integration, a firm cannot take advantage of opportunities on its own. It will need contracting partners, and it will need them just as much in times of crisis, when contracting is difficult, as otherwise. A contract can provide a legal knot, but it can choke the parties when a crisis occurs. Contracting for process can provide a legal slipknot that allows flexibility without leaving the parties entirely untethered. Then the process-based slipknot can adjust as uncertainty resolves and the parties understand better how to move forward.

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96. Bridgeman, *supra* note 95, at 393–94 (quoting Markovits, *supra* note 95, at 1457).

97. *Id.* at 399.