ALTERNATIVES FOR RESOLVING BUSINESS TRANSACTION DISPUTES

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INTRODUCTION

The congestion plaguing both federal and state courts has focused public attention on the efficiency of our judicial system. Awareness of the existing burden on the judiciary, coupled with projections of increasingly frequent resort to litigation, has disturbed the public, distressed the legal profession, and threatened to diminish the quality of justice dispensed by our courts. The problem is, of course, an old one, recalling what Shakespeare had to say about our profession—"The first thing we do, let's kill all the lawyers." Legal theorists, commentators, and the public have criticized the present system while disagreeing as to how the situation should be remedied. Advocates of court reform, however,

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1 See Note, The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts, 94 HARR. L. REV. 1592, 1592 (1981). The judiciary's burgeoning caseload has been traced to delays in the burdensome pretrial process. E. JOHNSON, A PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING OF CIVIL DISPUTES 2 (1978). Other causes, however, such as the increase in the number of complex multiparty cases litigated, also have contributed to the problem. See Janofsky, The "Big Case"—A "Big Burden" on our Courts, 1980 UTAH L. REV. 719, 719; see also Cooke, The Highways and Byways of Dispute Resolution, 55 ST. JOHN'S L. REV. 611, 611-12 (1981).


3 W. SHAKESPEARE, II Henry VI, IV.

4 See, e.g., E. GRISWOLD, THE SUPREME COURT'S CASE LOAD: CIVIL RIGHTS AND OTHER PROBLEMS 3-5 (1974); Bell, Crisis in the Courts: Proposals for Change, 31 VAND. L. REV. 3, 4-5 (1978); Janofsky, Reducing Court Costs and Delay, 71 ILL. B.J. 94, 94-95 (1982). The inefficient use of time and money under the present system has been attributed to the acts of attorneys, judges, and insurance companies, as well as to the court system and society in general. See Williams, Court Delays and the High Cost of Civil Litigation: Causes, Alternatives, Solutions, 71 ILL. B.J. 84, 85-86 (1982).

A number of simplified and expeditious procedures designed to preserve the essentials of fair and effective process are being evaluated as possible reform measures. Janofsky, supra, at 95-96. For example, one commentator's recommendations include mediation, in-
most likely would agree with Chief Justice Burger's urgings that greater use be made of alternatives to conventional litigation.⁵

It is suggested that greater use of alternatives to the traditional court system would unburden the judiciary, streamline the judicial process, and ultimately preserve the quality of the judicial system. Furthermore, employment of a nonconventional forum may serve the needs of individuals involved in a business dispute more effectively than litigation, since the formal courtroom atmosphere often hinders dispute resolution.⁶ Therefore, increased awareness of the accessibility of alternative modes of dispute set-

creased use of the telephone for motion disposition and various other pretrial procedures, use of videotape for evidence depositions, and stricter adherence to trial dates. Williams, supra, at 86-91. Another has noted that the application of management science concepts such as queuing theory also might be effective in reducing judicial time consumption. See Nagel, Predicting and Reducing Court-Case Time Through Simple Logic, 60 N.C.L. Rev. 103, 123-45 (1981).

Evaluation of the court congestion problem has led to the suggestion that the federal court caseload be decreased by eliminating historical grounds for federal jurisdiction that no longer serve any useful purpose. See Bell, supra, at 9. For example, the burden of the United States Supreme Court could be lightened by decreasing the instances of direct review by the Court of district court decisions. See E. Griswold, supra, at 6. A more radical proposal advocates alteration of the three-tier federal court system by collapsing the circuit courts into a single United States Court of Appeals with regional panels consisting of three judges each. Id. at 14-15. Issues of national implication would be assigned to a national panel of the United States Court of Appeals. Id. at 15. Legislation also is pending to ease the Supreme Court's caseload by creating a temporary Intercircuit Tribunal of the United States Courts of Appeals. S. 645, 98th Cong., 1st Sess. §§ 601-607 (1983); H.R. 1970, 98th Cong., 1st Sess. (1983); see Hellman, Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?, 67 Judicature 29, 29 (1983).

In addition, some of the recently adopted amendments to the Federal Rules of Civil Procedure were designed to combat the productivity crisis in the federal courts. See Marcus, Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure, 66 Judicature 363, 364 (1983).

⁵ See Burger, supra note 2, at 276. Chief Justice Burger's proposed solution concentrates on arbitration as an alternative to traditional litigation, especially in large, complex commercial disputes. Id. at 276-77. The Chief Justice also advocates a system in which judicial review of an award would be discouraged, citing the procedure existing in Michigan. Id. at 277. As a step toward a more arbitration-oriented system, Chief Justice Burger advocates alteration of the American Bar Association's Special Committee on Alternative Means of Dispute Resolution or, alternatively, establishment of a new commission including distinguished representatives of the bar and the business community as members. Id. In addition, Chief Justice Burger urges greater utilization of the administrative process, as exemplified by the worker's compensation boards, to resolve disputes. Id. at 275. The Chief Justice also suggests examining the judicial systems of other countries that employ specialized court systems or that limit the jury selection process to a few minutes, and evaluating such techniques for possible American use. Burger Keynotes Current Problems in Administration of Justice, N.J.L.J., Jan. 13, 1983, at 1, col. 4.

⁶ See Burger, supra note 2, at 275.
tlement and sufficient familiarity with the nature and elements of
the mode best suited to the situation at hand will promote not only
the interests of disputants, but those of our society as well.

This Article will focus on the resolution of conflicts in the
commercial transactions arena. The court system should not be a
subject that concerns the lawyer only at the public interest level.
Important as that is, there are other considerations at the "law-in-
action" level—the place where the lawyer is concerned with negoti-
ating a contract—which should stimulate thought as to what hap-
pens to the contractual relationship if the parties have a dispute.
This Article will propose that the negotiating lawyer consider both
inherent and potential conflicts which may arise in a particular
transaction and that attention be given by the lawyer to the suita-
ble forums for dispute resolution should a controversy arise. The
Article then will discuss various dispute resolution techniques in
relation to different types of business disputes, and suggest viable
and appropriate nonconventional forums for the types of conflict
discussed.

ANALYZING THE COMMERCIAL TRANSACTION

An examination of the nature and characteristics of the basic
kinds of disputes that can arise in business transactions is a neces-
sary prelude to an analysis of the available modes of resolution. In
business disputes, the controversial issues commonly spring from
differing expectations between the parties concerning the desired
outcome of the transaction or series of transactions in question.
Such differences in expectations may occur over the interpretation
of contractual terms, the sufficiency of the contractually required
performance, or both interpretation and performance combined.
Each of these three possibilities merits a brief explanation.

Since words lack the rigor of mathematical formulas, it virtu-
ally is impossible to eliminate vagueness and ambiguity from writ-
ten communication in every instance. Interpretation disputes
therefore often arise over the meaning of the words employed in a
contract. The controversy is not whether a certain act or whether
certain conduct took place, which if it did would concededly be
embraced within the contract, but rather how shall a situation that
has arisen or that periodically may arise under an ongoing contract
be treated. For example, under a typical rent escalation clause, the
tenant agrees to pay a portion of subsequent increases in operating
expenses for the building in which leased premises are situated.⁷ Such clauses typically describe these increases in elusive language, fostering different interpretations of the clause by each party.⁸ “First refusal” clauses, which grant the tenant the opportunity to purchase the property if the landlord receives an offer to purchase from a third party,⁹ also are fertile ground for interpretation disputes, since the word “offer” may be defined differently in various contexts.¹⁰ It may, for instance, refer to a firm offer in the legal sense, or merely to a proposal to negotiate with the intention of endeavoring to make a firm deal. The resolution of such a controversy thus lies in defining contract terms in a manner which reflects the understanding of the parties.

On the other hand, the controversy may not have its emphasis on the agreement itself, but rather on the performance under the agreement. Such a controversy may arise over the question of

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¹⁰ See 1 S. WILLISTON, WILLISTON ON CONTRACTS § 27 (3d ed. 1957). For a proposal to constitute a legal offer, the offeror must either make the offeree a promise for a specific consideration or state the consideration that he will give for a certain promise. Id. § 23. In the context of sales transactions, the offeror must show at least a present intention to promise to sell at a specified price. Thomas J. Sheehan Co. v. Crane Co., 418 F.2d 642, 645 (8th Cir. 1969). In Sheehan, an oral quotation indicated only a future intention to sell, and therefore was considered merely an invitation to make an offer. Id. The quotation lacked the definiteness required for an offer, since it failed to specify the time of acceptance, quantity, payment terms, and time of performance. Id.; see United States v. Braunstein, 75 F. Supp. 137, 139 (S.D.N.Y. 1947), appeal dismissed, 168 F.2d 749 (2d Cir. 1948). One court has stated that “[a] mere expression of intention or general willingness to do something,” conditioned on an event or in exchange for something to be received, does not constitute an offer. Beverage Distribrs., Inc. v. Olympia Brewing Co., 440 F.2d 21, 29 (9th Cir.), cert. denied, 403 U.S. 906 (1971).
whether a real estate broker has earned his commission under the terms of the brokerage contract. For example, if the broker produces a customer with whom the broker’s principal refuses to deal, the broker must be able to prove that his performance satisfied the broker’s engagement under the contract with the principal in order to support the claim for a commission.\(^{11}\) In order to establish his performance of the broker’s engagement, the broker will have to show that the customer and the principal were in substantial agreement as to essential terms of bargain, that the broker was the procuring cause of bringing about agreement on those terms, and that the customer had sufficient financial capability to comply with those terms.\(^{12}\) Settlement of the dispute between broker and principal thus will focus on the quality of the broker’s performance.

Many controversies feature disagreement over both contract interpretation and performance. Such disputes can arise in many settings, and are typical of the construction contract. Since a construction contract requires the integration of architectural specifications with the formal legal contract,\(^{13}\) determining the terms of

\(^{11}\) The generally stated rule for determining whether a broker has earned a broker’s commission is whether the broker has produced a buyer ‘ready, willing, and able’ to buy at the price and terms stated by the seller in the listing agreement. Christo v. Ramada Inns, Inc., 609 F.2d 1058, 1061 (3d Cir. 1979) (quoting Simon v. H.K. Porter Co., 407 Pa. 359, 362, 180 A.2d 227, 229 (1962)); Fleming Realty & Ins., Inc. v. Evans, 199 Neb. 440, 442, 259 N.W.2d 604, 606 (1977); E. Farnsworth & W. Young, Cases and Materials on Contracts 309 (3d ed. 1980); Goldstein, When Does a Real Estate Broker Earn his Commission?, 27 Prac. Law. 43 (1981).

\(^{12}\) See Van Riper v. Agabian, 57 App. Div. 2d 923, 923, 395 N.Y.S.2d 59, 60 (2d Dep’t 1977). The requirement of financial capability is satisfied if the prospective buyer has the means of paying the downpayment and the deferred payments, when due, as required under the proposed contract of sale. Fleming Realty & Ins., Inc. v. Evans, 199 Neb. 440, 442, 259 N.W.2d 604, 606 (1977). A mere plan to raise the requisite funds is insufficient. See, e.g., Nelson v. Bolton, 72 Ill. App. 3d 519, 526, 391 N.E.2d 182, 186 (1979) (upholding denial of real estate broker’s commission when financial ability of purchaser rested on third persons not bound to furnish the funds); Globerman v. Lederer, 281 App. Div. 39, 42, 117 N.Y.S.2d 549, 551 (1st Dep’t 1952) (must show details from which jury can infer financial ability). The buyer’s credit rating also must be examined. See, e.g., Allied Realty, Inc. v. Boyer, 302 N.W.2d 774, 777 (N.D. 1981). Nor is financial capacity conclusively established by examination of the income-producing capabilities of the property to be purchased. Id. at 778. See generally Goldstein, Proof of Financial Ability of the Purchaser in Real Estate Brokerage Actions, N.Y.L.J., Apr. 26, 1954, at 4, col. 1.

\(^{13}\) See I. Werbin, Legal Guide for Contractors, Architects, and Engineers 16-19 (1961). A construction contract may well consist of a basic agreement, architectural plans, project specifications, and general conditions to which all transactions comprising the project are to conform. See id. at 14-17. The resolution of inconsistencies between the contract documents may be accomplished by including clauses governing interpretation of the contract in the contract itself. See J. Sweet, Legal Aspects of Architecture, Engineering
the agreement may not be an easy task. Performance is an issue as well, since there may be questions as to whether the completed structure is in substantial conformity with the contract as an integrated agreement of all the elements of the bargain.\textsuperscript{14} Disputes such as these must be resolved by dividing them into their component problems and resolving each problem separately. The contract's terms must be defined before attempting to ascertain how closely they have been met.

The above classification—which may be called a functional view of the litigatory process relative to a business controversy—is not intended to be a rigorous one. Rather, it is offered as an approximate guide in assessing the quality of the controversy, since it may be an aid in making a judgment as to where one should go to resolve differences, though not necessarily a determinative factor.

An inquiry into the nature of a dispute also must involve considering the needs and expectations of the parties and the nature of their relationship. An individual with a small amount at stake in a dispute, for example, is likely to seek a more expedient and less expensive resolution technique than litigation. Conversely, a party with a large financial stake in a transaction may be more willing to resort to litigation to protect his investment. For example, a manufacturer of automobiles whose supplier has breached the supplier's contract to provide steel may be able to acquire steel from an alternate source, continue production, and await the ultimate settlement of the contract dispute at trial. The amount of time in which a dispute can be settled also may be determinative in forum selection.

\textsuperscript{14} The doctrine of substantial performance is applied to ascertain whether a party has satisfied all contract conditions. J. Calamari & J. Perillo, The Law of Contracts 410 (2d ed. 1977). Another method of resolving contract inconsistencies is to assign the power of deciding which document controls to the architect. See id.
The business relationship of the contracting parties is another important consideration in selecting a forum. Thus, if the parties based their contract on principles of custom and usage in the trade, a method of conflict resolution not bound by strict rules of judicial interpretation and principles of precedent is more likely to effectuate their expectations and produce a result consistent with the contract's underlying rationale. If the parties have drafted their agreement in reliance upon traditional legal principles, however, use of an alternative forum may not lead to a result that conforms to the expectations of the parties.

The time framework of the parties' business relationship also will affect their choice of forum. If the likelihood exists that the parties will be involved in future or recurring transactions with each other, a forum less likely to disrupt a continuing relationship between the parties should be employed in lieu of litigation. These examples illustrate why knowledge of the parties' needs must be coupled with an understanding of how the various means of dispute resolution can be utilized to meet those needs before an intelligent choice of forum can be made. Accordingly, an inquiry into the characteristics of each forum is necessary.

**Modes of Resolution**

Formal litigation—the "fight" theory of conflict resolution—is, of course, an available form of redress for all types of conflicts. Litigation, however, necessarily involves pleadings, discovery, hearings and other costly time-consuming procedures. As a result, litigants often become frustrated and acquiesce in unsatisfactory compromises. In order to avoid such frustration and to prevent injustices, Chief Justice Burger has urged disputants to resort to alternative modes of conflict resolution in lieu of the litigation process whenever such alternatives are more efficient in resolving controversies without any sacrifice of a just result. In our system of justice, benchmarks for permissible conduct come from the decisional process of our judicial machinery. Judicial resolution of con-

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15 See Burger, supra note 2, at 275. Physicians have observed that the stress of participating in a lawsuit can cause "litigation neuroses" in litigants, lawyers, and lay and expert witnesses. Id. Thus, even a satisfactory dispute resolution is diminished in value as a result of the emotional and financial drain on litigants. Id. at 274. Business entities suffer an analogous drain from litigation, since involvement in a lawsuit diverts the money and manpower of a company away from business pursuits, thus threatening productivity. Id. at 275.

16 Id. at 276; see supra note 5.
flicts is not functionally obsolete. The challenge is to improve the efficiency of the judicial system, as is the intent of the Chief Justice, by employing other methods of conflict resolution, such as arbitration, appraisal, simplified statutory procedures, rent-a-judge programs and mediation. Since the characteristics of these alternatives must be understood in order to determine when their use might be advantageous, a brief examination of each is in order.

Arbitration

Arbitration is a non-judicial proceeding in which disputing parties submit their conflict to an impartial person or group of persons for a final and binding resolution instead of to a judicial tribunal, and must be invoked by voluntary agreement of the parties. If one of the parties refuses to honor a contract provision requiring disputes to be arbitrated, the provision can be enforced by court order; if one of the parties is unwilling to abide by the

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17 See infra notes 22-33 and accompanying text.
18 See infra notes 34-47 and accompanying text.
19 See infra notes 48-62 and accompanying text.
20 See infra notes 63-76 and accompanying text.
21 See infra notes 77-80 and accompanying text.
22 Although recorded instances of dispute resolution by means of arbitration can be found in the Bible, see 1 Kings 3:16-28, and fifth century Athens, see The Rhetorical Aristotle 77-78 (D. Appleton ed. 1932), modern arbitration has its roots in Roman law, Jaret, Judicial Review of Arbitration: The Judicial Attitude, 45 Cornell L.Q. 519, 519 (1960).
24 See, e.g., F. Kellor, supra note 22, at 26.
25 See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400 (1967) (court shall order parties to proceed with arbitration unless it is determined that controversy centers around the agreement to arbitrate); see 9 U.S.C. § 4 (1976) (before granting order to proceed with arbitration, court must find “that the making of the agreement for arbitration or the failure to comply therewith is not in issue”). While compliance with express conditions precedent to arbitration ordinarily is a question “for the court, not the arbitrator,” Opan Realty Corp. v. Pedrone, 36 N.Y.2d 943, 944, 335 N.E.2d 854, 855, 373 N.Y.S.2d 549, 550 (1975), nevertheless the determination of the existence of such express
arbitrator's award, the award similarly may be enforced.\textsuperscript{25} It therefore is important that the negotiating lawyer—as much as the litigator—be fully familiar with the ramifications of including an arbitration clause in the agreement that is being negotiated.\textsuperscript{26} In sum, conditions precedent has been left to the arbitrators as a question of contract interpretation, see Pearl St. Dev. Corp. v. Conduit & Found. Corp., 41 N.Y.2d 167, 171, 389 N.E.2d 693, 695, 391 N.Y.S.2d 98, 100 (1976); see also Goldstein, The Power of Arbitrators in Commercial Arbitration, 26 FraC. Law. 68, 72-73 (1980); cf. United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 363, 380 N.E.2d 253, 255, 408 N.Y.S.2d 424, 427 (1978) (contractual limitation on time of filing for arbitration is question for arbitrator, since limitation is not an "express" condition precedent).

\textsuperscript{25} At common law, the prevailing rule was that arbitration agreements were revocable at will by either party at any time before the award was rendered. See, e.g., Standard Magnesium Corp. v. Fuchs, 251 F.2d 455, 457 (10th Cir. 1957). Today, courts in many jurisdictions have the power to sanction enforcement of arbitration agreements by reason of statutory enactment. See Lippman, Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives, 24 Me. L. Rev. 215, 217 (1972); see also Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (arbitration clause enforced in light of uncertainty of applicable law); Warren Bros. Co. v. Cardi Corp., 471 F.2d 1304, 1307 (1st Cir. 1973) (public contracts bonding statute will not bar enforcement of arbitration clause).

\textsuperscript{26} Pennsylvania has a compulsory arbitration system that has drawn widespread attention for its provisions designed to reduce court congestion. In reality, the Pennsylvania system is "compulsory mediation," since there can be a trial de novo so that the finality of the ordinary consensual arbitration does not prevail. It is of interest, however, to note briefly the substance of the Pennsylvania system, which requires arbitration of all claims in which the amount in controversy is insufficient to establish state court jurisdiction. See Pa. R. Civ. P. 1301-1314; see also Reynolds, Compulsory Arbitration in Montgomery County, 19 Shingle 77 (1956); Rosenberg & Schubin, Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania, 74 Harv. L. Rev. 448, 448-49 (1961); Recent Decision, Arbitration—Compulsory Arbitration in Pennsylvania—Arbitration Act—De Novo Appeals, 16 Duq. L. Rev. 443, 451-52 (1977). The Pennsylvania system was designed not only to free the courts to handle larger cases and perform other judicial functions, but also to satisfy the need for prompt resolution of small claims cases. In re Smith, 381 Pa. 223, 229, 112 A.2d 625, 629, appeal dismissed, 350 U.S. 858 (1956). Under this system, each common pleas court may determine whether arbitration shall be permitted within its jurisdiction, what kinds of cases shall be arbitrated, and the jurisdictional amount to be fixed pursuant to section 7361(b) of the Judicial Code. Pa. R. Civ. P. 1301 note; see 42 Pa. Cons. Stat. Ann. § 7381(b) (Purdon 1982). Three-judge panels are appointed from a list of available arbitrators. Pa. R. Civ. P. 1302(b). Local rules govern the procedure for fixing the date, time, and place of the hearing, but a minimum of 30 days written notice to the parties is required in all localities. Id. 1303(a). Once the Board is convened for a hearing, the arbitrators make an award unless the court orders a continuance, even if one party is absent or is unprepared. Id. 1303(b). Generally, the rules of evidence are followed during the arbitration hearing. Id. 1305. Awards shall dispose of all claims for relief and shall be made promptly upon termination of the hearing. Id. 1306. Appeals take the form of a request for a jury trial de novo. Id. 1311(a). If no appeal is taken within 30 days of the entry of the award on the docket, the prothonotary will enter judgment on the award. Id. 1307(c). However, if the record and the award disclose an obvious and unambiguous mistake, the court still may modify the award. Id. 1307(d). Of the other states, only Arizona has enacted a statute similar to the Pennsylvania Compulsory Arbitration Act. See Ariz. Rev. Stat. Ann. § 12-133 (1982). New York, however, has empowered the chief administrator of its court system to establish a similar
it is a consensual arrangement when we think of the employment of arbitration in business transactions, and the focus of our attention should be in that direction.27

Arbitration offers the advantages of privacy, convenience and a reduction of formality. Flexibility is another important advantage of arbitration. Though an arbitrator acts as judge of both the law and the facts,28 he is not bound by the principle of *stare decisis* in making an award.29 Nor is he precluded by tenets of substantive law from ordering certain forms of relief.30 For example, although a court may be reluctant to enforce a restrictive covenant in an employment contract on public policy grounds, an arbitrator, not bound by such considerations, is likely to order adherence to this award.31 Indeed, the conventional equity rule, that equity will not

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27 See, e.g., Lippman, supra note 25, at 218.
28 See id. at 217. Though the arbitrator must evaluate legal and factual questions, the purpose of arbitration is to render an award that is fair and just, not to make findings of fact and conclusions of law. In re Curtis, 64 Conn. 501, 512-13, 30 A. 769, 770-71 (1894); McKnight v. McCullough, 21 Iowa 111, 114 (1866); Mangum v. Mangum, 151 N.C. 270, 271-72, 65 S.E. 1004, 1004-05 (1909). While distinctions between law and fact issues have little relevance to the arbitration process, see W. Sturges, Commercial Arbitrations and Awards 654-55 (1930), arbitration has been conceded to be “a legitimate and conclusive method” of resolving such issues, 27 St. John’s L. Rev. 350, 351 (1953); see also In re Sprinzen, 46 N.Y.2d 623, 629, 389 N.E.2d 456, 458, 415 N.Y.S.2d 974, 976-77 (1979) (arbitrator’s findings of fact and law will generally be upheld).
30 Justice Rehnquist has suggested that as a result of the emphasis placed on written judicial opinions, a judge subconsciously may place scholarship above the need for a speedy trial. Rehnquist, A Jurist’s View of Arbitration, 32 Ark. J. 1, 6 (1977). He therefore views as an advantage the fact that arbitration “need not produce a body of decisional law” to guide the future conduct of lawyers and litigators. Id. at 5.
make a decree requiring continual supervision, has been held not to apply to an award in arbitration that requires continual performance.\textsuperscript{32} An arbitrator thus has more discretion than does a court to tailor the remedy to fit the needs of the parties, according to the equities of the situation. Invoking arbitration also can increase the range of potential solutions for a dispute. Since an arbitrator's decision is final, a court will vacate it only if the award is "completely irrational" or the arbitrator has otherwise exceeded his authority.\textsuperscript{33} It thus is possible for a court, by enforcing an arbitrator's award, to provide a kind of remedy it could not otherwise have granted under conventional practice.

Arbitration often may prove to be the most appropriate mode of resolution for all three kinds of contract disputes. For instance, when a conflict arises over the interpretation of a contract based on principles of trade custom and usage, an arbitrator, free to ignore conventional judicial principles, may ascribe a meaning to the controverted terms that is more consistent with the parties' intentions than an interpretation that a court could make. Arbitration also offers an appropriate forum for the resolution of the differences revealed during the course of performance. An example of such a situation is a construction contract, where an interruption of performance caused by a disagreement could have disastrous


\textsuperscript{33} See, e.g., N.Y. Civ. PRAC. LAW § 7511(b) (McKinney 1980). The Civil Practice Law allows a court to vacate an award if it finds that a party's rights were prejudiced by: (1) "corruption, fraud or misconduct," (2) partiality, (3) an arbitrator who exceeded his authority, or (4) failure to follow proper procedure. Id. Broad discretion has long been a feature of arbitration. See, e.g., Taylor v. Fitz Coal Co., 618 S.W.2d 432, 433 (Ky. 1981) (absent "gross mistake of law or fact" amounting to fraud or partiality, courts may not set aside arbitration awards); see San Martine Compania De Navigacion, S.A. v. Saguenay Terminal Ltd., 293 F.2d 796, 800-01 (9th Cir. 1961); Spring Cotton Mills v. Buster Boy Suit Co., 300 N.Y. 586, 586-87, 89 N.E.2d 877, 878 (1949) (arbitration award is a complete and binding determination not to be disturbed merely because one party defaulted); see also Morgan v. Mather, 30 Eng. Rep. 500, 502 (1792) (arbitration award to be set aside only if contrary to law, or if corruptions, injustice or admitted mistake occurs). One reason for permitting such latitude is that the parties to an arbitration have by prior agreement consented to accept the arbitrator's award as final and binding. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 183 (3d ed. 1973). However, since the arbitrator is selected by the parties, he is held to stringent standards of impartiality. Lippman, supra note 25, at 218 n.23; see Commonwealth Coatings Corp. v. Continental Casualty Co., 335 U.S. 145, 149 (1968).
consequences. Arbitration best serves the parties' needs in such a case by providing a forum for the parties to resolve their differences while continuing the work, or by enabling parties to assert a claim and preserve the right to arbitrate until a time after the job is completed. In addition, arbitration may prove to be a more appropriate forum than the courtroom to resolve technical or scientific questions related to either contract interpretation or performance. By selecting arbitrators experienced in the technical areas involved, the parties can greatly expedite the attainment of a mutually acceptable end to their controversy.

Appraisal

Occasions arise for the need to appraise the value of a property interest. Thus, for the purpose of revising rental under a long-term lease, it is not uncommon for the lease to require periodic review of the rental reserved. If the parties are unable to agree on a rent revision by bargain, the lease may provide that in such a circumstance the differences are to be resolved by appraisal, with each side appointing an appraiser. The rent is determined by a percentage of the land value established by the appraisal. If the

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46 See Marceron v. Chevy Chase Servs., Inc., 258 F.2d 155, 159 (D.C. Cir. 1958) (rental to be determined by computing 8% of a certain fraction of appraised land value); Hung Wo Ching, 50 Hawaii at 564, 445 P.2d at 371 (rental is 6% of appraised value for each rental period); 873 Third Ave. Corp. v. Madison Assocs., 56 App. Div. 2d 748, 748, 391 N.Y.S.2d 1007, 1007 (1st Dep't 1977) (Murphy, J., dissenting) (lease provided for rental at 6% of the appraised value of the land per year). For a discussion of what is considered in making an appraisal, see Abelmann, How to Estimate Highest and Best Use, in J. BABCOCK, VALUATION
two appraisers are unable to agree, there is a provision for the selection of a third appraiser, and the agreed value of any two becomes the value used for the purpose of fixing the rent.

The general rule is that appraisal cannot be compelled where a party refuses to engage in it pursuant to the terms of the contract. In such an event, the value determination to be made by the appraisers would be made instead by the court. In California and New York, however, there is a statutory sanction employed to enforce agreements to submit to appraisal. The hostility toward enforcing agreements for appraisal absent a statutory sanction probably is a remnant of the hostility, which existed before modern practice, to specifically enforcing agreements to submit to arbitration.

Under New York law, an appraisal award is not enforceable in the same manner as a conventional arbitration award. The sub-

of Real Estate 6 (1958).


40 See Hecht, supra note 34, at 683-85.


stantive determination of the appraisers is open to judicial review, unlike the limited procedural objections permissible on a review of an arbitration award. The reason for the distinction has been that in appraisal, unlike arbitration, there is no oath taken by the appraisers, no hearing, and no requirement that the determination be based on submitted evidence.

The employment of the appraisal procedure as a method of conflict resolution would suggest that the parties, having been unable to resolve their differences consensually, now look to the appraisers to give finality to the resolution of the difference. If that is the rationale for the invocation of the clause, then the way to avoid the uncertainties inherent in appraisal would be to use conventional arbitration, with its circumscribed area of judicial review of an award—review limited primarily to procedural deficiencies—provided the arbitrators have not produced a "completely irrational" result.

N.E.2d 574, 577 (1954). The reason most often offered by the courts for the difference in approach is that arbitration entails the submission of the whole controversy, while appraisal extends only to the specific question of cash value. In re Delmar Box Co., 309 N.Y. 60, 63, 127 N.E.2d 808, 811 (1955).


Statutory Simplified Procedure

Some states have enacted legislation to provide methods which permit disputants to resolve their conflicts in a faster, more informal manner by circumventing traditional courtroom procedure.\(^{48}\) New York, for instance, has enacted the “Simplified Procedure for Court Determination of Disputes” (SPCDD),\(^ {49}\) to provide such an alternative to ordinary litigation.\(^ {50}\) Though specifically

\(^{48}\) The excessive amount of money and time required of parties to the judicial process has provoked the creation of new judicial procedures for civil cases. In 1978, an experimental “Pilot Project in Economical Litigation” (ELP) was adopted by two municipal and two superior courts in California. See Note, California’s Pilot Project in Economical Litigation, 53 S. Cal. L. Rev. 1497, 1498 (1980). The program was designed to provide a more simple, less expensive judicial system for the resolution of small-claim civil cases by simplifying pleadings, motions, discovery, and trials. Epstein, Reducing Litigation Costs for Small Cases, 20 Judges’ J., Spring 1981, at 9, 10; Note, supra, at 1499. Speedy adjudication was promoted by encouraging trial within 50 days of filing the pretrial memorandum in municipal cases and within 120 days of filing in superior court cases. See Epstein, supra, at 64-65. Though public ignorance of the program has impeded the full utilization of simplified procedures, the program was reported to be successful in decreasing the time and cost of a typical case. Id. at 65. In July 1983, a modified version of the ELP, which applied new rules of civil procedure statewide in municipal courts, went into effect. See Cal. Civ. Proc. Code §§ 90-100 (West Supp. 1983). While continuing curbs on motions and pleadings, the revised system liberalized discovery techniques to a limited extent. DeBenedictis, Rules Restricting Civil Procedures Takes Effect Friday, L.A. Daily J., June 27, 1983, at 1, col. 6. Kentucky has adopted a program that limits the discovery period and fixes a trial date 30 days after the pretrial conference. Janofsky, supra note 4, at 95. Some courts are using phone-in motion conferences and videophone arguments to promote judicial economy and efficiency. Epstein, supra, at 66; Hanson, Mahoney, Nejelski & Shuart, Lady Justice—Only a Phone Call Away, 20 Judges’ J., Spring 1981, at 40; Janofsky, supra note 4, at 96; Pike, Cure Fails: Civil Cases Drag On, Nat’l L.J., Feb. 9, 1981, at 21, col. 4.


\(^{50}\) The specified purpose of the SPCDD is “to promote the speedy hearing of [disputes authorized for settlement under SPCDD] and to provide for such actions a procedure that is as simple and informal as circumstances will permit.” N.Y. Civ. Prac. Law § 3035(a) (McKinney 1974); see Fifth Ann. Rep. N.Y. Jud. Conference 97 (1960); D. Siegel, Handbook on New York Practice § 609, at 874 (1978); J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 3031.01 (1980).
designed for use in the sphere of commercial transactions, the procedure may be invoked in any dispute if included as a contract provision to submit present or future controversies to resolution under the SPCDD.

The SPCDD proceeding itself is a hybrid of arbitration and formal litigation. The SPCDD proceeds on the basis of a jointly filed statement of claim that sets forth the claims and defenses of the parties. If the parties are unable to agree on a statement of claim, the court may settle the issues on motion. Formal plead-

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61 At the time New York adopted the SPCDD, the use of arbitration in the commercial sector was increasing. In fact, the motivation behind implementation of the SPCDD was to encourage the business community to select the courts for settlement of their disputes. See Fifth Ann. Rep. N.Y. Jud. Conference 1957; see Fifth Ann. Rep. N.Y. Jud. Conference 99-100 (1960); D. Siegel, supra note 50, § 609, at 874; Weinstein, Trends in Civil Practice, 62 Colum. L. Rev. 1431, 1433-34 (1962). Foreign countries, such as Great Britain, France, and Germany, have established commercial courts, which utilize simplified procedures and are maintained by judges with a commercial law background, to lure tradesmen back to the use of litigation. See, e.g., Ferguson, The Adjudication of Commercial Disputes and the Legal System in Modern England, 7 Brit. J. L. & Soc'y 141, 146 (1980); see de Seife, A Plea for the Creation of Commercial Courts, 17 New Eng. L. Rev. 437, 438 n.7 (1982). While the caseloads of some of these courts have increased, arbitration is still a favored form of adjudication among merchants. See, e.g., Ferguson, supra, at 145-46 (arbitration is most popular method for resolving commercial disputes in Great Britain).


65 N.Y. Civ. Prac. R. 3034(1) (McKinney 1974). A judicial settlement of the parties' dispute over the statement of claim is similar to an order compelling arbitration under sec-
ings are dispensed with, as are traditional rules of evidence and procedure, unless the court directs otherwise. There is no right to a jury trial, and pretrial discovery can be obtained only through court order. Unlike arbitration proceedings, SPCDD pro-

tion 7503(a) of the New York Civil Practice Law, by which the court will require arbitration, absent a substantial question regarding whether a valid agreement to arbitrate was made. N.Y. Civ. Prac. Law § 7503(a) (McKinney 1980); 28 Brooklyn L. Rev. 133, 134 (1961).

66 N.Y. Civ. Prac. Law § 3031 (McKinney 1974). The SPCDD permits an action to be commenced or continued on the basis of a statement of the parties' claims and defenses, which is either signed and acknowledged by the parties or signed by their counsel. Id. California's Economic Litigation Project (ELP), in contrast, merely limits pleadings to the complaint, answer, cross-complaint, and answer to the cross-complaint. Note, supra note 48, at 1509. The primary function of the pleadings under the ELP was to give notice of the claim. Id. at 1510. Limiting the pleadings to a brief outline of the claim, with legal arguments to be developed at trial, would save both time and expense without sacrificing the development of a litigant's case, particularly if the case is small. See Jewel, Do The Small Claims Courts Portend an Informal Trial Procedure?, 49 Cal. St. B.J. 458, 494 (1974). But cf. Epstein, supra note 48, at 12 (lawyers reported by judges to be slow in changing style of pleadings under ELP).


68 N.Y. Civ. Prac. R. 3036(1) (McKinney 1974). At least one commentator has suggested that allowing a judge summarily to curtail the applicability of simplified procedure rules may be one of the reasons for the SPCDD's unpopularity. D. Siegel, supra note 50, § 609, at 875. It is submitted, however, that allowing the judge to maintain control over procedure is beneficial. For example, such control enables him to permit discovery in a particular case if it seems necessary for a just resolution. See DeBenedictis, supra note 48, at 16, col. 1 (new California civil procedure laws permit judges to sanction additional discovery when "vitally necessary to a litigant's case").

69 N.Y. Civ. Prac. Law §§ 3031, 3033(1) (McKinney 1974). There is a right to a jury trial when the submission of the dispute to the court under the SPCDD, the making of the contract, or the failure to comply with either submission or contract is at issue. N.Y. Civ. Prac. R. 3034 (McKinney 1974). Parties originally intended to have the right to trial by jury under the SPCDD. See Fifth Ann. Rep. N.Y. Jud. Conference 101 (1960). This was a result of the legislature's view of SPCDD as combining the advantages of arbitration with the procedural safeguards of litigation. See id. One advantage of bench trials that is shared by arbitration is the liberalizing of the rules of evidence. See id.; Janofsky, supra note 4, at 95. Non-jury trials, like arbitration hearings, also are regarded as less expensive than jury trials and less burdened by delay. See de Seife, supra note 51, at 453. But see Hawkins, The Case for Trial by Jury in Complex Civil Litigation, 7 Litigation, Fall 1980, at 15, 16 (quicker adjudication via bench trial does not outweigh vital role of jury).

60 N.Y. Civ. Prac. R. 3036(5) (McKinney 1974). The function of discovery rules is to
ceedings are bound by formal rules of substantive law and are subject to judicial review. The SPCDD therefore offers the speed and informality of an arbitration proceeding while assuring that traditional rules of substantive law will guide the tribunal in deciding the issues.

Statutory simplified procedure appropriately might be employed in a performance controversy involving a contract term which had been incorporated by the parties into the agreement in recognition of traditional judicial principles. Although the SPCDD has been used infrequently, its existence should be noted by the practitioner, since there may be circumstances in which the SPCDD would be the more favored means of conflict resolution for

prevent a litigant from unexpectedly encountering surprise evidence at trial. See Hickman v. Taylor, 329 U.S. 495, 501 (1947); 4 J. Moore & J. Lucas, Moore's Federal Practice ¶ 26.02[2] (2d ed. 1983); Note, supra note 48, at 1500. However, extensive deposition procedures are viewed as leading to delay and greater cost in litigation. See generally 4 J. Moore & J. Lucas, supra, ¶ 26.02[3]; DeBenedictis, supra note 48, at 1, col. 6. Under the California ELP, discovery was limited to inspection, copying and medical examinations for municipal court cases, and motions were required before depositions were permitted. Epstein, supra note 48, at 15. More liberal discovery was permitted in superior court cases. Id. A reduction of 2½ discovery events per case was reported, with no significant effect on the outcome of the lawsuit. McDermott, Equal Justice at Reduced Rates, 20 Judges' J., Spring 1981, at 16, 18-19. The Kentucky program of simplified procedure also limits the number of interrogatories, and grants the right to take depositions of third-party witnesses only if such depositions are to be introduced at trial. Janofsky, supra note 4, at 95; see also Hufstedler, The Future of Civil Litigation, 1980 Utah L. Rev. 753, 761 & n.17 (states such as Maryland, Massachusetts, and Minnesota have reported favorable results from limiting number of interrogatories).


See D. Siegel, supra note 50, § 609, at 874; Weinstein, supra note 51, at 1434 (SPCDD will not significantly reduce the number of controversies decided by arbitration). There are, however, aspects to the SPCDD that might induce a party to invoke it instead of arbitration. Under the SPCDD, the judge is empowered to set the number of witnesses to be heard. N.Y. Civ. Prac. R. 3034(5) (McKinney 1979). Thus, a judge can obtain the testimony of qualified experts to decide technical issues. Jaffe, Simplified Procedure for Determination of Disputes Compared with Arbitration and Ordinary Litigation, N.Y.L.J., Dec. 14, 1961, at 4, col. 1. A judge also is more likely than an arbitrator to be impartial. Id. Although arbitrators usually are more qualified in a specialized field, the development of judges versed in the intricacies of various types of litigation—tort, commercial, or matrimonial—would be attractive to those seeking a specialist to resolve a dispute. Cf. de Seife, supra note 51, at 449-52 (suggesting combination of arbitration with a commercial court system).
the client.

Rent-A-Judge

The rent-a-judge system, a new method of dispute resolution, has been widely employed by disputing parties in California,63 and more recently in the East,64 to avoid the litigation process. This method of conflict resolution, like arbitration, requires the parties to agree to accept a private settlement of their differences.65 Pursuant to such an agreement, the parties petition the court for an order submitting their dispute to a referee.66 They then hire a refe-

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65 E.g., CAL. CIV. PROC. CODE § 638 (West 1976 & Supp. 1983); see Christensen, supra note 63, at 81; Rent-a-Judge, TIME, Apr. 20, 1981, at 51.

66 E.g., CAL. CIV. PROC. CODE § 638 (West 1976 & Supp. 1983). The trial judge has discretion in granting petitions for referencing, and such decisions will not be disturbed on appeal absent an abuse of discretion. See, e.g., Reed v. Reed, 118 Cal. App. 2d 399, 257 P.2d 1002, 1002-03 (1953). References may be either general or special. A general reference is a mandate "to try any or all of the issues in an action or proceeding, whether of fact or of law,
ree,\textsuperscript{67} who typically is a former judge,\textsuperscript{68} to hear the dispute.\textsuperscript{69} This hearing proceeds at a time and place convenient to the referee, the parties, and their witnesses.\textsuperscript{70} The referee then files a report with the trial court, and the report, by statute, has the effect of the findings of the trial court upon which judgment may be entered.\textsuperscript{71}

and to report a finding and judgment thereon,” \textit{Cal. Code Civ. Proc.} § 638(1) (West 1976 & Supp. 1983), and a special reference is used “to ascertain a fact necessary to enable the court to determine an action or proceeding,” \textit{id.} § 638(2). In California, a reference may be obtained up to the eve of trial. Note, \textit{supra} note 1, at 1597. Along with the petition, the attorney must stipulate the individual chosen as referee, the compensation to be paid if the jurisdiction allows private payment, the amount of discovery to be performed, and the parties’ willingness to be bound by the decision. \textit{Id.} at 1597 n.22.


\textsuperscript{70} \textit{E.g.}, Christensen, \textit{supra} note 63, at 81-83; Note, \textit{supra} note 1, at 1598; \textit{Rent-a-Judge, Time}, Apr. 20, 1981, at 51.

The system thus provides the benefits of arbitration with the additional advantage that experienced adjudicators can be secured. In addition, the privacy offered by the rent-a-judge system may be appealing to the parties. If a lawsuit would prove embarrassing to an individual party on a personal or professional level, the rent-a-judge system remains a viable forum because it is a private proceeding. Although it has been criticized as being violative of due process, equal protection and the first amendment, and although some commentators fear that it may create an inherently biased private judiciary, the rent-a-judge system still constitutes

72 Christensen, supra note 63, at 84; Hill, supra note 63, at 15, col 3; Note, supra note 1, at 1599-1600.
73 See Note, supra note 1, at 1606-08. Several different due process arguments can be made against a reference system involving private payment. The argument that the poor are denied due process because they do not have effective access to the reference system is meaningful only if they are incapable of receiving any kind of a constitutionally fair hearing through the ordinary judicial system. Id. at 1606-07. The argument is weakened further by the Supreme Court's refusal to recognize an absolute right to a civil hearing. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 378 (1971). A more viable argument would be that reference allows the rich to purchase at will a better quality of adjudication than the poor. Note, supra note 1, at 1601. This type of problem is eliminated, of course, by state payment of referees. Id. at 1608.
74 See Christensen, supra note 63, at 91-93; Note, supra note 1, at 1601-06. The equal protection argument against the private referee system is based on the proposition that establishment of such a system divides the class of all litigants into two groups: those who can afford a referee and those who cannot. Note, supra note 1, at 1601. The latter group cannot benefit from the advantages of reference over traditional litigation and thus is at a disadvantage. Id. at 1601-02. Such a classification does not merit strict scrutiny, however, since the Supreme Court repeatedly has held that wealth alone is not a suspect classification. See, e.g., Harris v. McRae, 448 U.S. 297, 321-26 (1980). It is possible, however, to argue that consensual reference violates equal protection by showing that this classification is not significantly related to an important governmental interest. Note, supra note 1, at 1603. Though the Court has never applied such midlevel scrutiny to a classification based on financial status, it has suggested that poverty, in combination with other factors, might justify such scrutiny. Id. at 1604; see Maher v. Roe, 432 U.S. 464, 471 (1977).
75 See Note, supra note 1, at 1608-10. An argument that private reference violates the first amendment necessarily assumes that all Americans have the right to review civil trials. See Christensen, supra note 64, at 93. The public, however, has never been held to possess a constitutional right to attend civil trials. Note, supra note 1, at 1609. Compare Note, Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings, 91 Harv. L. Rev. 1899, 1921-23 (1978) (arguing for a public right to view civil trials despite the dearth of supporting case law) with Note, All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records, 52 Temp. L.Q. 311, 311 (1979) (noting that the "requirement of public civil trials," though not constitutionally mandated, is as old as the requirement of public criminal trials).
76 See Note, supra note 1, at 1607-08. It has been argued that when referees are privately paid, they tend to favor those litigants who are more likely to bring them future business. Id.; see Shrewsbury v. Poteet, 202 S.E.2d 628, 631 (W. Va. 1974). As a result, these "steady customers" would receive more favorable verdicts over time than parties less famil-
a viable alternative to traditional judicial proceedings.

Mediation

Mediation is a nonjudicial mode of conflict resolution in which a neutral third party employs nonadversarial techniques in order to reconcile the conflicting positions held by the parties. It is the least formal method of dispute settlement, since a mediator is not subject to the constraints of either contract or statute and thus has broad powers to encourage settlement. It is also, as a general rule, more rapid and less expensive than other forms of conflict resolution. Mediation, however, differs from other methods of dispute resolution in that the result of the mediation process is not enforceable by court sanction. Its effectiveness in resolving controversies is therefore maximized when it is employed by the parties as a first attempt to settle their differences, that is, before they have submitted the dispute to a more formal forum such as an arbitration proceeding. If they are able to reach an agreement after mediation, further proceedings will be unnecessary. Even if the parties are unable to effectuate a settlement at this stage, however, the mediation procedure will have clarified the issues that must be resolved, expediting subsequent proceedings. The procedure is familiar with the reference system. Note, supra note 1, at 1608.

77 K. BRAUN, LABOR DISPUTES AND THEIR SETTLEMENT 53-55 (1955); W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 25-40 (1971). The term mediation, though normally used interchangeably with the word conciliation, implies a larger amount of active intervention in the dispute. INTERNATIONAL LABOUR OFFICE, GENEVA, CONCILIATION IN INDUSTRIAL DISPUTES 1 n.1 (1973); W. MAGGIOLO, TECHNIQUES OF MEDIATION IN LABOR DISPUTES 10 (1971). A conciliator merely brings the parties together in a non-adversarial setting to solve their dispute themselves, whereas a mediator participates in the parties' negotiations, making suggestions when appropriate. W. MAGGIOLO, supra, at 10; W. SIMKIN, supra, at 25-26.


80 See W. SIMKIN, supra note 77, at 27-29. Whereas an arbitrator may render a binding decision, a mediator does not have such authority. Id. at 28. The sole purpose of a mediator's intervention is to facilitate and encourage an expeditious settlement actually forged by the parties themselves. See K. BRAUN, supra note 77, at 35-36; W. MAGGIOLO, supra note 77, at 57.
effective because a mediator does not decide a dispute but rather helps the parties reach their own resolution, thus fostering the continuance of the relationship between the parties, who generally must continue to work together.

**Conclusion**

Parties are opting for unconventional forums to resolve their conflicts with increasing frequency as a result of mounting congestion in the court system. Use of such alternative forums may benefit not only the litigants by facilitating the resolution of their dispute, but also may help reduce bulging court dockets. Since the task of choosing the most appropriate forum for issue resolution falls to the negotiating lawyer, he should have some familiarity with the nature and components of alternative modes of dispute resolution. To best perform his function, the lawyer must analyze potential conflicts in light of the alternative modes of conflict resolution available and select the forum that will best protect the client's interests. The above observations are offered as guidelines which should be pondered in selecting a forum for the resolution of a business dispute. Used effectively by practitioners, they may improve the quality of justice available to those who turn to our judicial system.