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CONTENTS

Articles

For Business Dispute Solutions, Process Matters
David C. Albalah and Jesse D. Steele 385

Negotiating Implementation of a Peace Agreement: Lessons Learned From Five Years at the Negotiating Table
Amos N. Guiora 411

Alternative Dispute Resolution in Real Estate Matters: The New York Experience
Gerald Lebovits and Lucero Ramirez Hidalgo 437

Mediation Starts From the First Phone Call—Practice Pointers and Helpful Hints for Lawyers Going to Mediation
Robin Gise, Jed Melnick, Vivien Shelanski, and John Wilkinson 463

Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program
Dorcas Quek 479

Recommendations Regarding Establishment of a Mediation Clinic
Cynthia A. Savage 511

Notes

Enhancing the Effectiveness of Mediation in Korean-American Family Disputes: Cultural Sensitivity Training for Mediators and Co-Mediation Teams
Giyang An 557

Gentrification \jen-trə-fə-kā-shən\ and Mediation: Where a Single Pronunciation and Differing Perceptions Converge
Tiffany Ansley 585

Child Custody: Don't Worry, a Bet Din Can Get it Right
Jeffrey Haberman 613

Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims
Jessica Mullery 643

The Federal Arbitration Act After *Alafabco*: A Case Analysis
Benjamin D. Tievsky 675

Transcending Cultural Nationalist and Internationalist Tendencies: The Case for Mutually Beneficial Repatriation Agreements
Joshua S. Wolkoff 709

ALTERNATIVE DISPUTE RESOLUTION IN REAL ESTATE MATTERS: THE NEW YORK EXPERIENCE*

Gerald Lebovits† and Lucero Ramirez Hidalgo‡

I. Introduction

New York continues to experience an ever-increasing number of real estate disputes. In 2009, the New York State courts' caseload was approximately 4.7 million, the highest tally in the state's history.[1] Contributing to the caseload was a 17% increase in statewide home foreclosure filings in 2009, part of an 84% increase in filings over the previous four years.[2]

The increasing number of cases, in New York and all across the country, has led to a growing trend toward resolving disputes using alternative dispute resolution ("ADR"). States across the nation are enacting laws that require parties to attempt mediation before litigating over foreclosures. The 2008 New York State budget included twenty-five million dollars to provide services to homeowners who entered into a subprime or unconventional mortgage.[3] Administered through the New York State Housing Trust Fund Corporation, the program has awarded sixty-four grants through February 2009. The grants include foreclosure-prevention,

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1 William Glaberson, *The Recession Begins Flooding into the Courts*, N.Y. Times, Dec. 27, 2009, at A1, *available at* http://www.nytimes.com/2009/12/28/nyregion/28caseload.html.

2 *Id.*

3 Division of Housing & Community Renewal, Subprime Foreclosure Prevention Services Program, http://www.dhcr.state.ny.us/programs/ForeclosurePrevention/ (last visited Jan. 15, 2010).

counseling, and mediation services in New York's sixty-two counties.[4]

ADR is a technique to settle disputes outside a courtroom. There are a number of ways to use ADR in real estate cases. Anyone who has leased or purchased real estate can appreciate the potential for disputes and understand the need for parties to be protected against costly and time-consuming litigation. Real estate cases include residential and commercial landlord-and-tenant disputes, conflicts between cooperative boards and shareholders, and problems involving construction, leasing, subleasing, sales, broker-client relationships, broker-agent relationships, appraisals, foreclosures, property-management issues, real estate partnerships and other associations. When a dispute arises, commercial and not-for-profit ADR institutions can administer real estate related mediations and arbitrations on a regular and quick basis. The court system relies on those institutions to oversee court-ordered and court-promoted ADR. Some states, like New York, offer court-administered ADR if the dispute is appropriate, the parties agree (or, in some cases, whether or not the parties agree), and volunteer mediators and arbitrators are available. In New York, court-promoted ADR includes pilot programs like the New York City Civil Court mediation programs and the Supreme Court mortgage-foreclosure program.

This article is intended to provide an overview of the available ADR options in New York for individuals and those in the real estate industry and the advantages and disadvantages as compared to litigation. The first section examines the different forms of ADR available to the real estate consumer. The second notes the general advantages and disadvantages of these ADR processes. The third looks at the particular advantages of ADR in real estate cases. The fourth presents an overview of different ADR programs promoted in New York to resolve real estate disputes.

With no end in sight for the housing crisis and the overburdened courts' dockets, ADR provides an efficient, cost-effective method, not only to relieve the courts' dockets, but also to promote compromise between, and bring peace to, the parties.

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[4] *Id.*

II. Different ADR Options in Real Estate Disputes

A. Negotiation, Mediation, and Arbitration

There are many different variations of ADR, but the most common ones are negotiation, mediation, and arbitration. Distinctive characteristics define them and make them more or less appropriate to resolve particular disputes. In deciding which, if any, method to use, the parties should take into account the time and cost-savings, the need for confidentiality, and the interest in having a binding judgment at the end of the process.

1. Negotiation

Negotiation is a nonbinding proceeding in which two or more participants attempt to reach a joint decision on matters of common concern when they are in actual or potential disagreement or conflict. Negotiation tends to be an informal process that does not require a third-party neutral. The parties in dispute attempt to reach an agreement using their negotiating skills and leverage.[5]

Parties negotiate all kinds of differences before, during, and after a relationship exists between them. Parties will often negotiate directly, but it is common, especially in commercial settings, to involve counsel. If negotiations fail, the parties generally resort to another ADR proceeding or to litigation.

Contractual provisions can provide for negotiation before either party might commence any other ADR or litigation. The provisions are designed to avoid costly disputes if a settlement can be reached amicably. Sometimes, a dispute can cool off if one party takes the time to listen to the other to find a satisfactory solution. Negotiation can reduce the hostility between the parties as they seek to find common ground, often resulting in an agreement amenable to both sides. The advantage of negotiation over other ADR techniques is that parties that negotiate can eliminate the cost associated with a third-party neutral (if any) and overcome adversarial bias.

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[5] *See* Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 Harv. Negot. L. Rev. 231, 263 (2005) (noting that negotiation is "a process of iterated communication" to "reach a joint decision").

2. Mediation

Mediation has been referred to as "facilitated negotiation."[6] It is a nonbinding proceeding in which the parties attempt a consensual resolution with a neutral third party's help. Mediation is a more informal proceeding than litigation and arbitration because of its non-adjudicatory, consensual trait. Mediation can occur at any stage at which the dispute remains unresolved, including before a lawsuit is filed or before arbitration.[7]

Although facilitative mediation is the most common form of mediation, other methods are available. One is evaluative mediation, which is similar to a settlement conference before a judge. In this method, a neutral evaluates the merits of the case and provides an opinion about what a case is worth.[8] A lesser-known method is transformative mediation, which focuses on empowering the parties as opposed to settlement or problem solving.[9] As one author explained, "[t]ransformative mediation views the most important aspect of mediation as its potential to transform the people who are in the very midst of the conflict."[10]

Depending on the rules of the mediation, the neutral might or might not be able to suggest possible solutions to the problem. The neutral nevertheless promotes communication between the parties to help them reach an agreement.[11] The neutral's intention is to assist the parties to reach a creative solution that satisfies all the parties involved, rather than to impose a decision.[12] The parties need not follow the mediator's suggestions; they should reach a solution that satisfies them.

Mediation often takes place in a neutral venue like an office conference room, a less formal and intimidating location than a courtroom. Two or more office rooms are normally required. The

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6 Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996).

7 Arthur Mazirow, *Alternative Dispute Resolution in Real Estate Transactions,* 460 PLI - REAL ESTATE L. & PRAC. 857, 868 (2000).

8 Leona Beane, *Mediation*, N.Y. LAWYER'S DESKBOOK § 26-5 (2d ed. Supp. 2009–2010).

9 *Id.*

10 Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker & Won-Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution*, 14 HARV. NEGOT. L. REV. 1, 22–23 (2009).

11 John D. Feerick, *Towards Uniform Conduct of Standards for Mediators*, 38 S. TEX. L. REV. 455, 458 (1997) (explaining that mediators are not judges or advocates, but rather facilitators, helping "parties communicate with each other and reach common ground").

12 *See* James J. Alfini, *Mediation as a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators,* 49 S. TEX. L. REV. 829, 831 (2008) (positing that "party self-determination" is the guiding principle of mediation).

mediator starts the process with both parties in the same room and will often separate them in different rooms to have private conversations—or caucuses—with each of them. The mediator will go back and forth between the parties bringing offers and counteroffers.[13]

Mediations can last one or a few sessions, depending on the complexity of the issues, the mediator's skills, the parties' bargaining positions, and the parties' willingness to agree. If successful, mediation is efficient. When parties do not reach an agreement on all the issues involved, mediation can still have a positive effect; it can create a more forthcoming attitude, narrow the issues, disclose some underlying interests, and set the stage for future settlement.[14]

To be effective, mediation requires a disposition toward settlement from all the parties involved. Without a genuine intention to reach an agreement, mediation will fail. Mediation is not advisable when a violent party is involved, when one side is unreasonable, when one side has a decidedly superior legal position, or when the parties are so antagonistic that concessions between them are not viable.

3. Arbitration

Arbitration is a binding adjudication of the parties' claims and defenses by a neutral arbitrator or group of arbitrators. The arbitrators' ruling or award is ultimately binding on the parties just as if it were rendered by a court as a final judgment.[15] To enforce an arbitral award, the prevailing party requires a court order recognizing and enforcing the award. As arbitration has become more popular, nationally and internationally, recognizing and enforcing awards has become easier and faster. An arbitral award differs from a court decision in that appeals are unavailable and collateral attacks are allowed only on narrow grounds, such as fraud or duress, because an agreement to arbitrate is analogous to a contract.[16]

Courts will not enforce an arbitration agreement that violates public policy. Public policy exceptions can be invoked to exclude

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[13] David L. Erickson & Peter Geoffrey Bowen, *Two Alternatives to Litigation: An Introduction to Arbitration and Mediation*, 60 DISP. RESOL. J. 42, 47 (2006).

[14] Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. 5, 5–8 (1989).

[15] N.Y. C.P.L.R. 7501 (Consol. 2010); Adam Fisher, *Helping Those Who Are Helping Us: Sarbanes-Oxley Whistleblower Protection and its Interplay with Arbitration,* 8 CARDOZO J. CONFLICT RESOL. 305, 329 (2006).

[16] N.Y. C.P.L.R. 7511 (Consol. 2010).

arbitration.[17] An unconscionable lease, for example, may not be enforced, and thus arbitration will not occur. Failure to comply with the agreement can preclude a party from enforcing the agreement. Actions arbitrated are also subject to a statute of limitations. However, if the statute is raised to the arbitrator, applying the statute is within the arbitrator's sole discretion, because the arbitrator need not apply substantive law.[18]

The parties may pursue different variations of arbitration. The first variation is "baseball" or "final-offer" arbitration. In this process, each party submits a proposed monetary award to the arbitrator, who chooses one of the proposed awards based on the merits of the presented case. The arbitrator does not modify the prevailing party's proposed award. This technique limits the arbitrator's discretion and encourages the parties to propose reasonable awards.[19]

The second is "night baseball" arbitration. As with baseball arbitration, the parties propose monetary awards to the arbitrator, but in night baseball the arbitrator does not know the contents of the proposed awards. Rather, the arbitrator issues a separate monetary award, and the proposed award that is closest to the amount in the arbitrator's decision becomes binding on the parties.[20]

A third is "high-low" arbitration. Before the arbitration hearing, and without informing the arbitrator, the parties establish a bounded range of awards. If the arbitrator's award falls within that range, then the arbitrator's award becomes binding on the parties. If the arbitrator's award is outside the range, then the parties will be bound to whichever of their proposals is closest to the arbitrator's award.[21]

Arbitration is intended to be more efficient than litigation because phases such as discovery, which may take months and sometimes years in litigation, are usually limited—and sometimes nonexistent—in arbitration. Because arbitrators are private individuals with fewer cases than the average judge's docket, arbitrations are generally heard quicker and can progress at a faster pace

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17 Joseph DiBenedetto & Elyse Pepper, *Arbitration*, N.Y. LAWYER'S DESKBOOK §§ 4-5 to 4-9 (2d ed. Supp. 2009–2010).

18 *Id.*

19 Dan Weitz, Lisa M. Courtney, Howard Sherman & Gerald Lebovits, Mediation Techniques for Effective Conferencing in Housing Court: Tips from the Bench & Beyond 3 (Mar. 8, 2006) (unpublished outline for the New York State Judicial Institute, used in a mediation seminar for court attorneys in Housing Court).

20 *Id.* at 3.

21 *Id.*

than litigation. The unavailability of appeals and the mere limited possibility of collateral attack tend to help the parties resolve cases in a shorter period.

Arbitration can be a flexible vehicle of dispute resolution. At the initial stages, the arbitrators and the parties together decide the procedural calendar and agree on ground rules. Parties are able to adapt arbitration to their own needs and the requirements of the particular case.

Arbitration also offers the parties a level playing field to resolve their disputes. Whether the parties are nationals of different countries, a government entity and an investor, two companies of unequal bargaining power, or represented or unrepresented adversaries, arbitration provides an ad hoc, impartial forum.

Additionally, arbitration gives the parties an opportunity to decide for themselves the rules of procedure, the applicable substantive law, and even who will arbitrate. When cases are fact-intensive and technical, parties can benefit from choosing specialists. The ability to choose a specialist avoids having to educate a judge or jury. Parties can rely on these arbitrators to render specialized decisions.

B. Commercial vs. Court-administered/Court-ordered/Court-promoted ADR

The principles of voluntariness and party control over process are traditionally considered essential to effective ADR.[22] To reduce progressively overflowing dockets, however, courts have begun to offer, and in some instances, mandate ADR.

1. Contractually Binding ADR

ADR is usually a creature of contract.[23] For the most part, parties agree to ADR, if they ever do so, at the initial stages of their relationship, when they are more likely to reach agreements to solve future problems. Once conflicts arise, agreements can still be achieved if both parties believe that their differences would be

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[22] Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution,* 75 FORDHAM L. REV. 2685, 2686 (2007).

[23] Ilya Enkishev, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61, 64 (2004) (explaining that waiving the right to resort to judicial relief is a part of the idea that arbitration is based on contract principles).

better resolved through ADR than in court. An ongoing relationship between the parties can improve chances of an agreement later.

Many contracts contain boilerplate ADR clauses that are typical but not necessarily ideal. When negotiating a contract, parties that invest efforts in deciding the best dispute resolution clause can avoid future headaches. In that respect, consulting an ADR institution might be beneficial. Institutions have boilerplate clauses, but they can also offer advice if the specifics of the relationship are fleshed out. Thinking of the kinds of disputes that might arise from the contract, the need for preliminary measures, and the possible time constraints can generate an adequate and cost-effective ADR clause.[24]

Default mechanisms help avoid unwanted delay. It is advisable to establish time limits to attempt resolution through negotiation or mediation before going to arbitration or litigation. Provisions to qualify arbitrators should be construed to make the clause viable. Providing for a bilingual Japanese and German speaking construction-law specialist to resolve a dispute under New York law might render the clause impracticable. However, defining the scope of the disputes to be resolved through ADR creates certainty: some disputes that require relief might be better off resolved in litigation. Crafting an ADR proceeding particular to the parties' interests is valuable.

2. Court-ordered Binding ADR

In the real estate context, several courts in the United States and particularly in New York State have the authority to send parties to binding ADR. Mediation is the most widespread court-ordered ADR in real estate disputes.

Commercial division civil courts, in their discretion, can refer appropriate cases to mediation at an early stage if the parties are likely to settle. The parties are required to attend a mediation session and attempt to mediate. If no agreement is reached, the parties have a right to litigate their case before the court. If the parties

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[24] *See* Michael F. Donner, *Litigation 101: Thinking Through the Use of Boilerplate Provisions*, 1978 A.B.A. Sec. Prob. & Prop. 19, 21 (arguing that failing to formulate ADR clauses to suit the parties' specific needs can result in unanticipated litigation).

enter into an agreement, the law treats the agreement as a contract.[25]

3. Court-administered Voluntary ADR

Various civil courts in New York State, especially the New York City Civil Court, offer voluntary small claims mediation and arbitration. The court encourages the parties to arbitrate or mediate their disputes.[26] When the parties appear in the Civil Court's Small Claims Part on their small claims case, which often involves real estate issues in the broad sense like security deposits and roommate travails up to $5,000, the court offers them an opportunity to arbitrate. When both parties agree on arbitration, they are assigned an arbitrator. In one session, the arbitrator hears the parties' argument, weighs the evidence, and renders a final award. The main advantage to the parties is the efficiency of the action for the claimant and the defendant. The award is not subject to collateral attack except on narrow grounds and there is no opportunity to appeal. However, the proceeding is less formal and stressful and the decision is based on substantive law.[27] The arbitrator's decision is designed to be as well-reasoned as a judge's decision.

Small claims arbitrators are trained volunteer lawyers with more than five years practice in New York; New York City alone has more than 2,600 small claims arbitrators who decide thousands of cases a year.[28] When parties file a small claim, they might not realize they will have to wait some time for a judge trial, present the evidence to a judge, and endure possible motion practice and appeals, all for a claim under $5,000 dollars. Small claims arbitration offers litigants an advantageous alternative to judge trials. Court-administered ADR also benefits the court system. It enables the court to focus on the other cases on its docket.

Small claims ADR is particularly appropriate for breach of contract claims of small amounts and for landlord-tenant, cooperative, and condominium disputes in which the claimant does not

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[25] Commercial Division, Supreme Court, New York County, Rules of the Alternative Dispute Resolution Program (2008), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment1.pdf [hereinafter Rules of the ADR Program].

[26] New York City Civil Court Small Claims Part, http://www.nycourts.gov/courts/nyc/smallclaims/index.shtml (last visited Jan. 15, 2010).

[27] Gerald Lebovits, Small Claims Courts Offer Prompt Adjudication Based on Substantive Law, N.Y. St. B.J. Dec. 1998, at 6.

[28] New York City Civil Court Small Claims Part: Small Claims Arbitrator Volunteers, http://www.courts.state.ny.us/courts/nyc/smallclaims/sc_volunteeropps.shtml (last visited Jan. 15, 2010).

seek a possessory judgment in which a tenant or proprietary lessee can be evicted.

Arbitrations are simple, inexpensive, and expedited proceedings. About six weeks from the moment a small claim is filed, the case appears in court, and the parties—if both consent—may select arbitration.

Once a small claims case is filed, the parties can agree to be referred to mediation. Community Dispute Resolution Centers ("CDRC") in every county, under contract with the court, provide a forum to mediate small claims cases. Mediators can aid the parties to draft agreements that a court can so order if the parties sign it. If mediation is unsuccessful, the parties can still go to a small claims judge or arbitrator.

4. Court-promoted ADR

Courts promote ADR as a way to resolve disagreements efficiently and effectively. They will generally consent to adjourn or stay an action or proceeding when the parties request ADR. CDRCs are available to parties in every New York County that offers ADR. In New York City, Resolution Centers are found in every borough. These centers offer a free or low cost alternative to litigation, saving both parties time and money and diverting cases from the court system. ADR is available before or after filing a case in court. Courts offer several ADR options to parties that intend to file a claim in civil court.[29]

5. Institutionalized vs. Ad Hoc

ADR proceedings can be administered by an institution or by the parties themselves. There are advantages and disadvantages to both options, and preference should depend on the particularities of the case.

Institutionalized proceedings create a presumption of legitimacy because the institution is neutral.[30] It insulates the neutrals from fee negotiations, challenges to their commitment, and admin-

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[29] For information on ADR services promoted by New York courts, see the New York State Unified Court System's Alternative Dispute Resolution homepage at http://www.courts.state.ny.us/ip/adr/adrlinks.shtml.

[30] *See generally* 28 U.S.C. § 653 (1998) (authorizing federal district courts to create procedures for the selection and use of neutrals in ADR); 4 AM. JUR. 2D *Alternative Dispute Resolution* § 6 (2009).

istrative discussion between the parties.[31] Institutions have fixed procedural rules and default mechanisms to avoid setbacks. They generally provide the venue for meetings and hearings. Institutions charge a fee proportional to the amount in dispute.

Ad hoc ADR allows parties the maximum degree of freedom to design their proceeding. Sophisticated ADR consumers will find it convenient to choose this variant. This variant is also recommended when both parties fully trust a particular third-party neutral to design and administer the process and to decide the case. To avoid problems, the ADR clause should have default mechanisms to deal with appointing the neutral and to resolve challenges to that appointment. Institutions offer these services even when the rest of the proceeding will not be held under its auspices.

Both ad hoc and institutionalized proceedings are confidential:[32] the only difference is that an ad hoc award complied with voluntarily will be seen only by the parties and the arbitrator. In an institutionalized proceeding, the institution's case managers will also have access to the file and the award.

III. Advantages and Disadvantages of ADR Generally

A. Advantages of ADR Generally

ADR can offer many advantages to litigation. Parties who choose ADR can control the proceeding because ADR is a creature of contract, especially in regard to choosing the procedural rules and default mechanisms. In litigation, parties exert control to a significantly lower extent; they are beholden to court rules and the jurisdiction's substantive law. Parties that design an ADR clause can choose the method, the venue, the applicable rules of procedure and substance, the way to select the neutral, and the neutral's qualifications. They can agree on most details of the pro-

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[31] *See* Wayne D. Brazil, *Comparing Structures for the ADR Delivery by Courts: Critical Values and Concerns*, 14 Ohio St. J. on Disp. Resol. 715, 751 (1999) (discussing the legitimacy of court supported ADR programs and neutrals).

[32] *See generally* Ellen E. Deason. *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. Kan. L. Rev. 1387, 1387 (2006) (noting that courts that offer mediation programs routinely adopt rules protecting the confidentiality of the process); 2 Am. Jur. 2d *Administrative Law* § 383 (2009) (discussing dispute resolution under the Administrative Dispute Resolution Act).

cess as long as they respect basic rules of fairness to make the outcome enforceable.

Parties that select a neutral can choose one with particular expertise, experience, and background. Choosing the neutral carefully might be the most important aspect of ADR.[33] In ADR, the parties can make sure that the neutral will have the time to participate in the process at the parties' pace. The parties can also choose how involved the neutral will be in the process and which issues the neutral will focus on in discussions.

Different cases require different resolution mechanisms. ADR can be adapted to suit various types of cases and disputing parties' needs. Neutrals can suggest creative solutions to meet the parties' requirements for the proceedings.

Institutions have rosters of neutrals with a wide range of expertise. Even when the institution is not selected to administer the proceeding, this initial assistance might be crucial to an expeditious offset.

Any doubts about the neutral's impartiality can be addressed from the offset and throughout the proceeding. Parties are well advised to review carefully the neutral's disclosure statement to ensure trust.[34]

ADR is generally less time consuming than litigation. Negotiation can be the speediest ADR mechanism. Setting a time limit for negotiations can improve certainty and efficiency. This also applies to mediation when combined with arbitration or before litigation. A dispute resolved faster is less expensive. Attorney fees go down, dispute costs stop, and the parties can use their resources more efficiently. ADR is usually faster and consequently cheaper than a courtroom proceeding.

ADR is also confidential. The file and the award are not a public record, as it is in litigation. When parties value confidentiality, ADR can be the answer.

It is significant that when the parties' agreement is reached by negotiation or mediation, the parties tend to comply with their obligations—much more so than when a court imposes a decision.

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[33] Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. Rev. 1768, 1809–11 (2001).

[34] Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Setting*, 27 Fla. St. U. L. Rev. 153, 164–66 (1999) (noting that ADR neutrals are bound by a code of ethics that requires disclosure statements).

B. Disadvantages of ADR Generally

As with any proceeding, ADR has drawbacks. If court-ordered or required by contract, ADR can restrict access to the courts. Some women's rights organizations have articulated this concern; they consider arbitration clauses as a condition of employment to be oppressive.[35] Mandatory-arbitration clauses prevent plaintiffs from litigating. The denial of access to the courts can result in lower compensatory awards, less negative publicity for the defendant, and a lack of precedent.[36]

This is especially true because arbitrators need not comply with substantive law,[37] may not award punitive damages unless the arbitration agreement allows for punitive damages,[38] may not hold parties in contempt,[39] and must render decisions that are unappealable and subject to review only in limited cases.[40] ADR can also be used to obtain improper discovery. These worries dissipate, however, when the choice to participate in ADR is voluntary.

There is a concern that if one of the parties cannot afford an attorney, as is often the case for tenants and small landlords in landlord-tenant disputes, the unrepresented party will be at a disadvantage and opt to settle in ADR. Unrepresented litigants can experience coercion when they negotiate with a lawyer rather than litigate before a neutral judge sensitive to the rights and needs of unrepresented litigants.

Another disadvantage of choosing ADR over litigation is that arbitration can result in one party's giving up a key term to find a middle ground, a term the party would have received in litigation. In that respect, litigation can be considered beneficial, but if the type of ADR and neutral are chosen well, then the parties will more likely resolve their disputes in accordance with their needs.

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35 Press Release from Kim Gandy, President, National Organization for Women, Mandatory Arbitration Threatens Civil Rights (May 1, 2002), *available at* http://www.now.org/press/05-02/05-01.html.

36 *Id.*

37 Matthew Savare, *Clauses in Conflict: Can an Arbitration Provision Eviscerate a Choice-of-Law Clause?*, 35 SETON HALL L. REV. 597, 598 (2005).

38 Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role In Punishment and Federal Preemption of State Law,* 63 FORDHAM L. REV. 529, 536 (1994). The New York rule is enunciated in *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 354, 353 N.E.2d 793 (1976).

39 Lawrence N. Gray, *Judiciary and Penal Law Contempt in New York: A Critical Analysis*, 3 J.L. & POL'Y 81, 84–86 (1994) (noting that parties may be held in contempt only in open court).

40 N.Y. C.P.L.R. 7511 (Consol. 2010).

One essential way to choose a neutral well suited to both the parties and the method of ADR is to ensure that the neutral's expertise matches the issues in dispute. A failure to choose a neutral with a good grasp of the law might lead to an illegal, unenforceable agreement that costs all the parties time, money, and heartache. Furthermore, an inefficient neutral can cause the parties to become more contentious than they were at the start of the resolution process. The inexperienced neutral can waste time and effort by allowing the parties to dwell on feelings unrelated to the specific problem they are trying to resolve.

There are always pros and cons to any proceeding. Although ADR has some downsides, it can be advantageous to both the parties in dispute and the court system, especially in charged, complicated cases like real estate matters.

IV. Particular Advantages of ADR in Specific Real Estate Relationships

Particular advantages of ADR arise in some real estate relationships. In the New York City Housing Court, for example, both attorneys and judges conduct mediations all day, every day, often with great success. In some New York County Housing Court resolution parts, at which cases are heard until they are referred for trial, if necessary, the judges and court attorneys are assisted by facilitators from the New York City Department of Housing Preservation and Development ("D.H.P.D."). These D.H.P.D. facilitators mediate proceedings to the extent that they make sure, before a judge allocutes a stipulation, that unrepresented litigants agree in the stipulation to pay only the rent they owe; that they become familiar with agency programs, such as New York State Department Social Services programs, that might assist eligible litigants with their rent; and that their repair issues are contained in the stipulation, along with access and completion dates.

Under ADR, the parties can avoid the high cost of litigation and the time-intensive preparations necessary for trial. Additionally, in ADR, the parties can reach a settlement that, if the proceeding had been litigated, would have resulted in a decision that strictly favors one party over the other.

With ADR, the parties can address issues that would not only come before the court but also those outside a judge's purview. For instance, the parties can litigate over rent, but they cannot ask

the court to preserve goodwill between landlord and tenant; the proceedings are fraught with emotion because the tenant's home might be at stake; and for the landlord, at stake can be a problem tenant and a large sum of arrears due. Occupancy conflicts do not always give way to an easy resolution in cases involving condominiums or cooperative boards; the tenants are also the owners, respectively in fee simple or as cooperative shareholders holding proprietary leases. ADR can resolve the parties' material and non-material issues.

A. Construction

1. Arbitration

The construction industry is an important arbitration consumer. Construction cases are some of the most complex the ADR world faces. In international construction cases, parties frequently include an arbitration provision under the rules of the International Chamber of Commerce ("ICC") or similar administrative tribunal. For building projects in the United States, the AIA Standard form Contract (AIA Document A 201 (2007)) is the most popular. The form contract is the product of many years' discussion and review by construction-industry components and provides a legal framework for construction projects. The form contract includes an ADR section. The contract provides for the parties to select an initial decision maker, often the project's architect, to mediate the claim informally. If this fails, then the parties may move to a formal mediation, and then binding arbitration, in accordance with the Construction Industry Rules of the American Arbitration Association ("AAA"), unless the parties otherwise agree.[41]

Binding arbitration in construction cases applies in New York only under General Business Law §§ 756-758, the Construction Contract Prompt Payment Law:

> to expedite [under the rules of the American Arbitration Association] payment of all monies owed to those who perform con-

[41] *See* AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT COMMENTARY: A201—2007 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION § 15.4, at 58, *available at* http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aias076835.pdf (last visited Jan. 15, 2010) (noting that the AIA 2007 form contract differs from previous form contracts in that arbitration is not mandatory and that parties must go through non-binding ADR before accessing arbitration, thus signaling a recognition by the industry of the benefits of cooling-off periods and more cost-efficient ADR).

> tracting services on private construction projects where the size of contract between the owner and the general contractor exceeds $150,000, [in which] violations of the statute may be submitted to binding arbitration at the request of an 'aggrieved party.'[42]

Construction cases often involve several parties, sometimes from different jurisdictions, in dispute. Arbitration allows parties to choose neutral rules of procedure and substance. It also allows creative design to accommodate the parties' particularities. A panel of arbitrators from different legal traditions is often a solution to a balanced proceeding. Although American parties might be accustomed to extended discovery, parties from civil law jurisdictions are not. Arbitration usually involves limited discovery; discovery can be expanded or constricted in the clause itself. Choosing the place of arbitration in a pro-arbitration jurisdiction where the parties have assets can provide an expedited recognition and enforcement process.

Construction disputes commonly involve technical issues that, if tried in court, would require serious efforts to educate the judge and jury. In arbitration, parties can choose industry specialists as neutrals. They can have experience as arbitrators, experts, or both. The proceeding can include cost-effective site inspections and analysis of data by the arbitrators themselves. Parties often have different bargaining power; multinationals, for example, commonly do business with family companies or individuals. Arbitration can level the playing field by giving both parties equal opportunities to design the arbitration proceeding and be involved in the panel's appointment.

Construction projects usually involve a continuous relationship. Arbitration has proved to be an effective mechanism to resolve commercial disputes and allow parties to engage in further business dealings. Outside a courtroom, parties often feel less antagonistic and allow opportunities for discussion and venting so that the parties can settle amicably. Time is always of the essence. Large construction projects must move forward. Expenses rise by

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[42] Robert J. MacPherson & Neal M. Eiseman, Outside Counsel, *Mandatory Arbitration in Construction Payment Disputes*, N.Y. L.J., Apr. 20, 2010, at 4, col. 3 (questioning the constitutionality of the Prompt Payment Law, adopted "[w]ith little fanfare" in September 2009, noting that "it is just a matter of time before a disgruntled owner, contractor or subcontractor forced into an arbitration challenges the constitutionality of the [law's] mandatory arbitration provisions . . . .").

the hour. Arbitration with no appeal is usually a shorter proceeding than litigation.

Arbitration provides an advantage for subcontractors if the scope of the arbitration clause includes disputes that might arise during performance and after construction is completed. Subcontractors can continue to do business with the private contractor.[43]

2. Mediation

Some construction contracts provide for negotiation or mediation before arbitration or litigation. Negotiations are usually held regardless of a specific contractual provision. Even though construction cases often involve only money-related controversies, a skilled mediator might be able to explore the parties' different, underlying interests, if the parties commit to and collaborate with the process.

Parties are well advised to consider time and costs important enough to make real efforts to settle the dispute sooner rather than later. Negotiating or mediating can result in an early settlement. If a decision is reached, a memorandum of agreement should summarize the agreement even when the formal drafting of the contract is left to the parties' counsel.[44]

B. Housing

Landlord-tenant disputes have particularities that make them frequent mediation consumers. By definition, the landlord-tenant relationship is contentious. Negotiation and mediation can provide a method to vent discussion, resolve problems, and avoid alienating the relationship by costly, damaging, emotion-laden litigation.

In residential landlord-tenant cases, ADR can result in a consent judgment by stipulation, if allocuted by the court, that binds tenants to pay their rent but which sets up a payment plan in accordance with their financial status and assures that the landlord effect repairs. If a nonpayment dispute were tried before a judge, with the landlord receiving a final judgment declaring that the tenant would have to pay in five days or be evicted, the landlord would probably have spent more money on attorney fees than it could

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[43] Overton A. Currie & Ronald G. Robey, *Winning Strategies in Construction Negotiations, Arbitration and Litigation*, 308 PLI - Real Estate L. & Prac. 911, 941 (1988).

[44] *Id.* at 938.

recover from a judgment-proof respondent.[45] Mediation can be an ideal forum to achieve settlements without allowing the dispute to escalate into an adjudicative process.

With the financial crisis, or near crisis, facing New York today, the state has seen a dramatic increase in eviction filings. ADR cannot only alleviate court dockets, but also offer an expeditious resolution of landlord-tenant cases.

C. Foreclosure

Mortgage foreclosure filings have reached record levels. When mortgagor and mortgagee find common ground, which concededly will not happen often, ADR is a natural alternative to litigation to resolve foreclosure cases. Defaults occur in a large percentage of foreclosure cases. Sometimes payment defaults are voluntary; other payment defaults are caused by homeowners' inability to reach a settlement and avoid foreclosure when they are unrepresented or unaware of available options.

Mediation can explore solutions that satisfy both parties and avoid foreclosure. Avoiding foreclosure saves homes and saves lending institutions from taking over a building that might sell for less than the value of the mortgage. Lengthy proceedings result in non-compliance and waste time and money. ADR can save resources and distress to homeowners, financial institutions, and the court system.

D. Other Contractual Disputes (Agency, Partnership, Sales, Appraisals)

Commercial contractual disputes among components of the real estate industry lend themselves naturally to ADR. Agency, partnership, and cooperative and condominium disputes involve a continuing relationship. Parties benefit from getting through disputes effectively. When commitment and cooperation with the proceeding is achieved, ADR is cost-effective.

Real estate contracts, like most commercial contracts, often contain ambiguous terms subject to interpretation. Real estate contracts might contain specially technical or uncertain terms.

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[45] N.Y. Real Prop. Acts. § 732(2) (Consol. 2010).

ADR can be an option in many of these cases. A variant of the main three ADR mechanisms like expert evaluations, mini-trials, or mediation followed by arbitration are common in real estate breach of contract disputes.

V. Programs Offered in New York State for Real Estate Disputes

Major commercial arbitration institutions administer real estate cases. Their fees are proportional to the amount in dispute. For cases with lower amounts in dispute, several New York programs offer court promoted, court administered, or voluntary ADR. The list below is not exhaustive, but it represents the different options available to the industry:

- Community Dispute Resolution Centers;
- New York City Bar Association's Mediation Program for Co-Op/Condo Disputes;
- Residential Mortgage Foreclosure Program;
- Safe Horizon Program;
- Resolution Assistance Program ("RAP");
- New York State Supreme Court Commercial Division ADR Program;
- The New York State Dispute Resolution Association, Inc. ("NYSDRA");
- New York City area law school mediation clinics.

A. Community Dispute Resolution Centers ("CDRC")

Every county in New York State has a CDRC that provides ADR for free or for a minimal charge to New York residents. Most cases are mediations. The Centers are operated by non-profit organizations that work with the New York State Unified Court System. The centers receive referrals from courts and other institutions. They specialize in landlord-tenant disputes, small claims, and neighbor disturbances, among others.[46]

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[46] Community Dispute Resolution Centers: Frequently Asked Questions, http://www.nycourts.gov/ip/adr/faq.shtml#How%20Does (last visited Jan. 15, 2010).

B. New York City Bar Association's Mediation Program for Co-Op/Condo Disputes

The City Bar has established a mediation program for residential disputes in which attorneys familiar with cooperatives and condominiums serve as mediators.[47] This program is particularly appropriate for disputes between owners, sponsors, managing agents, and boards of directors "without drag-down, drawn-out court hearings."[48]

The program offers a mediation forum for a $100 administration fee per party and mediator fees from $125 to $400 an hour, usually shared by the parties.

Once all parties agree to attempt a mediated settlement and the administration fee is paid, the program provides a list of five trained mediators with their biographies and hourly fees. The parties select two mediators from the list. The program finds the one who is available the soonest.

The mediator then contacts the parties to arrange a first mediation session. A settlement the parties sign is enforceable in court. If no settlement is reached, the parties can proceed to arbitration or litigation.

C. Residential Mortgage Foreclosure Program

On December 15, 2009, New York Governor David A. Paterson signed into law the Mortgage Foreclosure Law. Designed to assist homeowners and tenants at risk of losing their homes in foreclosed properties, the law requires mandatory settlement conferences. Effective April 2010, the law provides that when the court receives a request for judicial intervention in connection with a foreclosure action, it must send the request to the defendant or refer the defendant to housing counseling agencies, which can assist in mediation. The law forbids the lender or servicer from charging the borrower any fees, including the cost of an attorney, associated with the settlement conference. When New York implemented the mandatory settlement conferences, the State of New

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[47] Council of New York Cooperatives & Condominiums, Mediation (2007) http://www.cnyc.com/code/archive/legal/archive-mediation-A07.htm (last visited Jan. 15, 2010).

[48] Press Release, N.Y. City Bar Ass'n, Co-op and Condo Mediation Project: A New Public Service for Resolving Disputes (Oct. 11, 2006), *available at* http://www.abcny.org/PressRoom/PressRelease/2006_1019.htm.

York Banking Department noted that the law is a "reflection of the fact that many current foreclosures have as much to do with the economic downturn and job losses as with the subprime mortgage crisis."[49]

The mediation program draws from a June 2008 pilot program launched in Queens County to promote early court intervention in residential mortgage foreclosures. Its purpose is to encourage assisted negotiations with case managers at an early stage to promote settlements. For lenders, simply realizing that a workout cannot be achieved may help expedite the action. Developing a case management plan during the initial conference can prove efficient as well. When homeowners appear and raise defenses, early court intervention and continuing case management can ensure that the case does not languish. If foreclosure cannot be avoided, the discussions can prove beneficial in streamlining subsequent proceedings.

Case managers also answer procedural foreclosure questions, aid with conference forms, and provide legal and housing counseling services before the conference date. The court assigns judicial hearing officers and court attorney referees to preside over the early conference parts, and a judge is available in case a judge's decision or order is required.[50]

Specialized judges and staff have been working to promote efficiency through this program. The goal, not yet realized, is to decongest the system of the steep increase in foreclosure filings, lengthy proceedings, and a high default rate.

D. Safe Horizon Mediation Program

Safe Horizon is a non-profit organization that provides free mediation services in Brooklyn and Manhattan. It collaborates with the New York City Civil Court by training mediators to handle small claims, Housing Court, and pro se Civil Court mediations. Their training consists of a basic mediation course followed by a specialized course.[51]

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[49] State of N.Y. Banking Dep't.,–NYSBD–Help for Homeowner Facing Foreclosure, http://www.banking.state.ny.us/hetpmfl.htm (last visited Jan. 15, 2010).

[50] N.Y. St. Unified Ct. Sys., Residential Mortgage Foreclosures: Promoting Early Court Intervention (2008), *available at* http://207.29.128.60/whatsnew/pdf/ResidentialForeclosure6-08.pdf.

[51] Safe Horizon: Mediation Training Institute, *available at* http://www.safehorizon.org/page.php?nav=snb&page=mediation_training (last visited Jan. 15, 2010) (discussing the training prospective applicants will receive at the Safe Horizon Mediation Program).

The basic course consists of forty hours of basic mediation training, followed by twelve weeks of an apprenticeship with a mentor. The apprenticeship consists of a progressive method for training mediators. After being adequately instructed, trainees are encouraged to introduce the mediation with an opening statement, take a more active role during the mediation, and conduct the mediations by themselves with a mentor present. Mentors are skilled general mediators. The course ends with an evaluation of the video recording of the trainee's first mediation.

Once mediators take the basic course, they can turn to specialized mediation training. It introduces the terminology employed in Civil Court, including housing proceedings, together with a second apprenticeship with a specialized mediator. This course also ends with an evaluation of the mediator's first specialized mediation.

Once Safe Horizon has trained a mediator and the Civil Court approves the mediator, the court provides a mini-apprenticeship to complete the training. At this point, mediators can participate in the Civil Court's encouraged small claims, housing, and pro se Civil Court mediations.[52]

If the parties reach a settlement, the mediator drafts the agreement. The court will then allocute the settlement stipulation with the parties, who will execute the agreement before the judge.

E. Resolution Assistance Program ("RAP")

New York City Housing Court operates a program to assist self-represented landlords and tenants to prepare for Housing Court appearances and settlements and to provide support in hallway negotiations. The program recruits, trains, and supervises law student and college volunteers, who cannot provide legal assistance or participate during settlement discussions or conferences.[53]

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[52] *See generally*, N.Y. St. Unified Ct. Sys., N.Y. City Civil Ct., http://www.nycourts.gov/courts/nyc/civil/index.shtml (last visited Jan. 18, 2010) (encouraging small claims mediations to hear pro se civil cases that involve money up to $5,000; Housing Court mediations to hear pro se housing cases with unlimited amounts in dispute; and pro se Civil Court mediations in actions involving claims from $5,001 to $25,000 dollars).

[53] N.Y. St. Unified Ct. Sys., The Resolution Assistance Program, http://www.nycourts.gov/courts/nyc/housing/rap.shtml (last visited Jan. 15, 2010).

F. New York State Supreme Court Commercial Division ADR Program

Once a case is filed in the Supreme Court's Commercial Division, the court may in its discretion refer parties to ADR to resolve their dispute.[54] The parties may agree on the type of ADR they wish to pursue, the private institution they want to administer the proceeding, and the ADR rules that will govern. If the matter has not been entirely resolved within a forty-five day window, but the parties and the neutral believe that it would help if the ADR process were to continue, the process may go forward for an additional thirty days. The ADR proceedings must be completed within seventy-five days unless a justice specifically authorizes a continuation.[55] The parties can also voluntarily request a referral to the program or attempt a private means of ADR once a case is filed in the Commercial Division.

Under the program's mediation rules, parties must attend at least a four-hour mediation session within thirty days of the mediator's appointment. A clerk oversees the program. The clerk will appoint a mediator from a roster of candidates.[56] Specialized mediators are available and assigned to cases in which technical issues are involved, as in construction disputes.

The initial session of the program, or multiple sessions totaling no more than four hours, is not charged to the parties. If an agreement is not reached, any party may request that the case be returned to court. The mediator will report the outcome within seven days of completion of the mediation. If the parties wish to continue their attempt to settle, they may do so under the program by paying the mediator an hourly fee of $300.

If no resolution is obtained through mediation under the program, the parties can agree to binding arbitration under the ADR program or to private arbitration. Arbitration under the program consists of a forty-five day proceeding from the selection of the arbitration panel. Unless otherwise agreed, the case is decided by a sole arbitrator. An award in writing will ensue within seven days of its conclusion. The parties must pay a $300 fee per hour to each

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[54] RULES OF THE ADR PROGRAM, *supra* note 25 (ADR Program Rule 1 provides that justices of the Commercial Division, the administrative judge of the Supreme Court, Civil Branch, New York County, and the other justices of the Supreme Court, New York County, upon the administrative judge's authorization, may refer cases to the program.).

[55] *Id.* at 5 (Rule 8(i)).

[56] *Id.* at 2 (Rule 4(a)).

arbitrator for the time spent on the case to prepare for hearings, to conduct hearings, and to write the award.[57]

If the parties are referred a first time to the ADR program but they do not reach a complete settlement, the case is referred back to court. At a later stage of the court proceeding, the court may send the parties again to mediate if it believes that at the new stage the parties are likely to settle. On this second occasion, the parties pay mediator fees at $350 per hour, from the start.[58]

G. The New York State Dispute Resolution Association, Inc. ("NYSDRA")

NYSDRA is a private non-profit organization that has a joint mediation program with the New York State Division of Housing and Community Renewal ("DHCR").[59] The Manufactured Homes Program provides mediation services for disputes between park owners and tenants. Many manufactured home residents and park owners experience classic landlord-tenant problems, together with the unique problem that these residents own their home but not the land on which it is situated.

H. New York City Area Law School Mediation Clinics

A number of law schools in New York have mediation clinics that offer to resolve real estate disputes, free of charge, in community dispute resolution centers, the Small Claims Part, and Civil Court. The mediation clinics are staffed with trained law students, who work under the advisement of law professors. The schools that have mediation clinics are Benjamin N. Cardozo School of Law,[60] Columbia Law School,[61] New York University Law

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57 *Id.* at 3 (Rule 5(c)).

58 *Id.* at 2 (Rule 5(b)).

59 The Division of Housing and Community Renewal is responsible for supervising, maintaining, and developing much New York State low-income and moderate-income housing. *See* Division of Housing and Community Renewal, Agency Description, http://www.dhcr.state.ny.us/AboutUs/AgencyDescription.htm.

60 Benjamin N. Cardozo School of Law Mediation Clinic, http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10402 (last visited Jan. 15, 2010).

61 Columbia Law School Mediation Clinic, http://www.law.columbia.edu/focusareas/clinics/mediation (last visited Jan. 15, 2010).

School,[62] New York Law School,[63] Brooklyn Law School,[64] Hofstra University School of Law,[65] University of Buffalo Law School,[66] City University of New York School of Law,[67] and Fordham University Law School.[68]

In addition to these clinics, St. John's University School of Law has an Immigrant Tenant Advocacy Clinic, in which law students, under the advisement of attorneys, work in conjunction with the Immigrant Tenancy Advocacy Project to provide legal services to tenants affected by substandard housing conditions in Brooklyn and Queens.[69] Pace University Law School has a Land Use Law Center that encourages the use of ADR between developers and environmentalists on issues pertaining to the preservation of land.[70]

VI. Conclusion

ADR mechanisms in real estate disputes offer an effective alternative to litigation. Knowing the options is the first step. Then it is up to the parties to identify the best procedure for their case. A good assessment can improve the odds of resolving the dispute sooner, cheaper, and better. Approaching ADR proceedings in good faith is essential. Choosing an appropriate neutral in mediation and arbitration is crucial. New York offers a number of options well suited to different disputes.

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62 New York University Law School Mediation Clinic, http://www.law.nyu.edu/academics/clinics/semester/mediation/index.htm (last visited Jan. 15, 2010).

63 New York Law School Mediation Clinic, http://www.nyls.edu/academics/catalog_and_schedule/alpha_list/mediation_clinic (last visited Jan. 15, 2010).

64 Brooklyn Law School Mediation Clinic, http://www.brooklaw.edu/Academics/Curriculum/Directory/Course.aspx?id=L_222 (last visited Jan. 15, 2010).

65 Hofstra University School of Law Mediation Clinic, http://law.hofstra.edu/Academics/Clinics/clinic_descriptions.html (last visited Jan. 15, 2010).

66 University of Buffalo Law School Mediation Clinic, http://law.buffalo.edu/Academic_Programs_And_Research/default.asp?firstlevel=1&secondlevel=1&filename=MediationClinic (last visited Jan. 15, 2010).

67 City University of New York School of Law Mediation Clinic, http://www.cuny.edu/law/clinics/clinicalofferings/Mediation.html (last visited Jan. 15, 2010).

68 Fordham University Law School Mediation Clinic, *available at* http://flslive.lawnet.fordham.edu/clinical-legal-education/5426.htm (Jan. 15, 2010).

69 St. John's University School of Law Immigrant Tenancy Advocacy Clinic, http://www.stjohns.edu/academics/graduate/law/academics/clinical/immigrant_tenant_advocacy_clinic.stj (last visited Jan. 15, 2010).

70 Pace University Law School Land Use Center, *available at* http://www.pace.edu/page.cfm?doc_id=31259 (last visited Jan. 15, 2010).