Notre Dame Law Review

Volume 47 | Issue 4 Article 12

4-1-1972

Specific Performance of Construction Contracts--Archaic Principles Preclude Necessary Reform

Gary L. Lennard

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

 Part of the Law Commons

Recommended Citation

Gary L. Lennard, *Specific Performance of Construction Contracts--Archaic Principles Preclude Necessary Reform*, 47 Notre Dame L. Rev. 1025 (1972).
Available at: http://scholarship.law.nd.edu/ndlr/vol47/iss4/12

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

SPECIFIC PERFORMANCE OF CONSTRUCTION CONTRACTS—ARCHAIC PRINCIPLES PRECLUDE NECESSARY REFORM

I. Introduction

The Court of Chancery served a very useful function in early English society[1] by providing aggrieved parties with a remedy unavailable to them under the common law.[2] Since the law courts had become so insistent upon the requirement that a party file a writ specifically designed to encompass a particular cause of action, often the questions permeating an action were so peculiar that the rigid writs were inappropriate to provide the court with jurisdiction.[3] Parties unable to secure relief under the law sought other machinery more amenable to their needs. The Chancery Court, characterized by its individualized approach, fashioned a writ appropriate to the particular circumstances and provided the aggrieved party with an equitable remedy.[4]

The formulation and adherence to definite principles by the English courts produced many deficiencies in the common law.[5] Although the courts administered "law," they failed to provide "justice" as it was envisioned by society. The community morals dictated that disputes be settled justly and fairly, but the courts viewed their role as one of providing certainty and stability to the relations between men, with little or no regard for justice.[6] The common law was simply unable to stay abreast of the changing philosophy and composition of English society.[7] Equity was "founded on a sense of justice," however, and very adept at confronting the exigencies of the diverse society.[8] Many commentators[9] have suggested that the maintenance of equity has injected a sense of fairness into the common law, while at the same time retaining the hallmark of fashioning new remedies for the ills of society:

> [E]quity is, *or should be,* a living, changing thing, forever adapting itself to new conditions; in its ultimate sense it is a supreme law, acting upon and modifying codes, statutes, and case law. The avoidance of the freezing of law into inflexible rules is one of its chief purposes.[10]

Although the administration of equity nurtured the common law development in England and America, its continued viability in a complex, industrialized nation in the twentieth century is subject to serious question. The distinct equit-

1 The Court of Chancery was founded during the fourteenth century. F. MAITLAND, EQUITY 3 (2nd ed. 1936).
2 Oleck, *Historical Nature of Equity Jurisprudence,* 20 FORD. L. REV. 23, 36 (1951).
3 F. MAITLAND, *supra* note 1, at 4.
4 *Id.* at 5.
5 Oleck, *supra* note 2, at 23.
6 Newman, *What Light Is Cast by History on the Nature of Equity in Modern Law?,* 17 HAST. L.J. 677, 681 (1966).
7 Gardner, *Anachronism of Modern Equity—Discretion of the Chancellor in the Use of a Jury,* 8 MERCER L. REV. 225 (1957).
8 Newman, *The Place and Function of Pure Equity in the Structure of Law,* 16 HAST. L.J. 401, 410 (1965).
9 *See* Newman, *supra* note 6, at 681; Oleck, *supra* note 2, at 25; Newman, *supra* note 8, at 412.
10 Oleck, *supra* note 2, at 25 (emphasis added).

able decrees, such as specific performance, certainly are necessary in a modern society, but their value as remedies has been impeded by the courts' application of the principles. The deficiencies of the common law—certainty and precedent—have completely invaded the once fair and just equity courts. A petitioner is now entitled to equitable relief only if his complaint can be fashioned in terms within the purview of an established principle.

The judiciary's reluctance to grant equitable decrees is clearly evidenced in the construction industry.[11] When building contractors fail to commence or complete construction, the owner is refused specific performance of the contract unless the circumstances surrounding the breach are within the precise limits delineated by precedent.[12] Often, the contract is rendered a nullity and deprived of its sanctity by the inability (i.e., the unwillingness) of the court to deviate from precedent.

A search necessitated by the desire of businessmen to discover an institution responsive to their needs has apparently culminated in the discovery of arbitration. In addition to the arbitrator's power to grant specific performance, arbitration is much more advantageous to the parties than litigation.[13] Notwithstanding these facts, however, it is imperative that the judiciary modernize its approach to construction contract breaches to insure that justice is not made entirely dependent upon whether the dispute is settled through arbitration or litigation.

II. Specific Performance

A. *The Historical Framework*

As a general rule, state and federal courts refuse to grant specific performance of construction contracts if damages would adequately compensate the injured party,[14] the petitioner owns or is in control of the realty upon which the construction is to ensue,[15] the decree would require extensive court supervision of the construction project,[16] or the terms of the contract are so indefinite that to grant the relief the court would be forced to substitute its judgment for that of the parties.[17] Courts do not, however, generally refuse such a decree if the

11 *See, e.g.,* Nelson v. Darling Shop of Birmingham, Inc., 275 Ala. 598, 157 So. 2d 23 (1963); Walberg v. Moudy, 164 Cal. App. 2d. 786, 331 P.2d 234 (1958); Northern Delaware Indus. Dev. Corp. v. E. W. Bliss Co., 245 A.2d 431 (Del. 1968); Levene v. Enchanted Lake Homes, Inc., 115 So. 2d 89 (Fla. App. 1959); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Bessinger v. National Tea Co., 75 Ill. App. 2d 395, 221 N.E.2d 156 (1966).

12 *See, e.g.,* Wood v. Estes, 224 Ala. 140, 139 So. 331 (1932); London Bucket Co. v. Stewart, 314 Ky. 832, 237 S.W.2d 509 (1951); Di Cataldo v. Harold Corp., 15 N.J. Super. 471, 83 A.2d 545 (1951); Savitt v. Ronclare Homes, 110 N.Y.S.2d 882 (Sup. Ct. 1951).

13 *See* text accompanying notes 84-88, *infra.*

14 *See, e.g.,* Lester's Home Furnishers Co. v. Modern Furniture Co., 1 N.J. Super. 365, 61 A.2d 743 (1948).

15 *See, e.g.,* Levene v. Enchanted Lake Homes, Inc. 115 So. 2d 89 (Fla. App. 1959); Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); McCormick v. Proprietors of Mt. Auborn, 285 Mass. 548, 189 N.E. 585 (1934).

16 *See, e.g.,* Nelson v. Darling Shop of Birmingham, Inc., 275 Ala. 598, 157 So. 2d 23 (1963); Queens Plaza Amusement v. Queens Bridge Realty Corp., 22 Misc. 2d 315, 36 N.Y.S.2d 326 (1942).

17 *See, e.g.,* Bessinger v. National Tea Co., 75 Ill. App. 2d 395, 221 N.E.2d 156 (1966); Berne v. Payson, 155 N.Y.S.2d 696 (Sup. Ct. 1956).

construction involves only a single act or operation,[18] the petitioner has contracted with a builder to purchase land and a building to be constructed in the future,[19] or the defendant has benefited by the contract and damages would inadequately compensate the injured plaintiff.[20]

In actuality, however, court reluctance to grant specific performance is not founded upon the *actual* inability to supervise the project; nor is it based upon the fact that an injured party will be *adequately* compensated by damages. In some decisions the construction calls for only minimal supervision,[21] while in others a damages award can never completely restore the injured party to the status quo.[22] Realistically, court reluctance to grant specific relief is derived from precedent and reasoning established during the very early years of the Court of Chancery.[23] Any equitable decree which could have ultimately proved unenforceable could have easily jeopardized the standing and integrity of the Chancery. Thus, the Chancellor granted decrees only when the contract dictated that a single act be performed.[24] Although the English courts have since abandoned such reasoning,[25] it remains a major factor in American decisions. There is no valid justification for continuing to adhere to such reasoning in *all* situations, except that, as one notable jurist has stated, ". . . the old notion, intrenched in textbooks and encyclopedias, dies hard."[26]

B. *Courts and the General Principles*

Although the general equity principles have become firmly established in many states,[27] not all courts have applied them with any great degree of consistency. In 1895, the Massachusetts Supreme Court, in *Jones v. Parker*,[28] granted specific performance of a contract to install a heating plant and light fixtures in the basement of a building constructed by the defendant. Although the structure was under lease to the plaintiff, he could have easily secured the services of another firm and then recovered the installation costs in a suit at law. The court, however, was unconcerned with the adequacy of damages. Since the contract terms were sufficiently definite and there were very few problems relating to the supervision of the project, specific performance was warranted.[29] The court concluded that it was not a ". . . universal rule that courts of equity never will enforce a contract which requires some building to be done.

18 *See, e.g.*, Bakersfield Country Club v. Pacific Water Co., 192 Cal. App. 2d 528, 13 Cal. Rptr. 573 (1961).
19 *See, e.g.*, Ammerman v. City Stores Co., 394 F.2d 950 (D.C. Cir. 1968); Laurel Realty Co. v. Himelfarb, 191 Md. 462, 62 A.2d 263 (1948); *contra*, Di Cataldo v. Harold Corp., 15 N.J. Super. 471, 83 A.2d 545 (1951).
20 Spoolan Realty Corp. v. Haebler, 147 Misc. 9, 262 N.Y.S. 197 (1931).
21 *See, e.g.*, Bessinger v. National Tea Co., 75 Ill. App. 2d 395, 221 N.E.2d 156 (1966); McCormick v. Proprietors of Mt. Auborn, 285 Mass. 548, 189 N.E. 585 (1934).
22 *See, e.g.*, Di Cataldo v. Harold Corp., 15 N.J. Super. 471, 83 A.2d 545 (1951).
23 Oleck, *Specific Performance of Builders Contracts*, 21 FORD. L. REV. 156 (1952); Oleck, *Specific Performance of Contracts Through Arbitration*, 6 ARB. J. (n.s.) 163, 163-64 (1951).
24 Pound, *The Progress of the Law—Equity*, 33 HARV. L. REV. 420, 434 (1920).
25 *Id.*
26 *Id.*
27 *See* text accompanying notes 14-20, *supra*.
28 163 Mass. 564, 40 N.E. 1044 (1895).
29 *Id.* at 566-67, 40 N.E. at 1045.

They have enforced such contracts from the earliest days to the present time."[30]

Although *Jones* was clearly contrary to the principle which precludes specific performance of contracts if an adequate remedy at law exists, the court was intent upon rendering justice rather than adhering to precedent. In *Bakersfield Country Club v. Pacific Water Co.*,[31] the court followed a very similar approach when it ordered the defendant to specifically perform his agreement to install water pipe lines on the plaintiff's property. The court alluded to the rule which precludes specific performance of contracts requiring continuous supervision over the project,[32] but determined that the installation of water service lines to the plaintiff's subdivision entailed "only a single operation."[33] Clearly the validity of such a declaration is subject to serious question; however, the holding is meritorious since the court refused to recognize the serious complications which could have ensued from such an undertaking. The court implicitly conveyed its recognition and understanding of the inherent limitations of the precedent under consideration.

In *City Stores Co. v. Ammerman*,[34] District Judge Gasch delivered an eloquent opinion in which he ordered the defendant to execute a lease and construct a building for the petitioner. The court determined that the defendant had granted the plaintiff a unilateral option contract[35] which entitled the plaintiff to lease space in a proposed shopping center as one of the major tenants on ". . . terms at least equal to that of any other major department store in the center."[36] The contract was definite enough to warrant performance notwithstanding the fact that the design of the building, the construction details, and the cost of the construction had not yet been agreed upon.[37] Also, the court explicitly rejected the defendant's contentions that he would suffer financially if forced to build and lease to the petitioner[38] and that the plaintiff's remedy was an action at law for damages.[39] It is apparent, however, that damages would not have adequately compensated the plaintiff since it is unlikely that he could have secured a lease with any other center without foregoing substantial profits during the interim.

It is interesting to note that the precise question presented to the *Ammerman* court for determination had never been decided before in the District of Columbia.[40] This may partially explain the court's apparent disinterestedness in established principles of equity. Judge Gasch so astutely stated:

> . . . *as a matter of law* that the mere fact that a contract, definite in material respects, contains some terms which are subject to further negotiation be-

30 *Id.* at 567, 40 N.E. at 1045.
31 192 Cal. App. 2d 528, 13 Cal. Rptr. 573 (1961).
32 *Id.* at 539, 13 Cal. Rptr. at 579.
33 *Id.* at 539, 13 Cal. Rptr. at 580.
34 266 F. Supp. 766 (D.D.C. 1967).
35 *Id.* at 771.
36 The clause is recited in the unilateral contract which was reprinted in the court's opinion. *Id.* at 770.
37 *Id.* at 775.
38 *Id.* at 779.
39 *Id.* at 776.
40 *Id.*

> tween plaintiff and defendant will not bar a decree for specific performance, *if in the court's discretion specific performance should be granted.*[41]

His reasoning is indicative of the court's acknowledgement that the degree of supervision inherent in a decree of specific performance is not completely determinative of the result. This court developed a simple test in which the plaintiff's interest in compliance with the contract is of the utmost concern: ". . . *contracts for construction of buildings and other contracts requiring extensive supervision of the court . . . should be specifically enforced unless the difficulties of supervision outweigh the importance of specific performance to the plaintiff.*"[42]

The overwhelming impact of *Ammerman,* however, was limited by two factors. The defendant was in control of the proposed site of the shopping center and the contract called for the execution of a lease in addition to the construction of a building. Both factors reinforced the district court's decision, but did not provide the foundation for it. The circuit court, however, restricted the district court's holding by basing its confirmation upon those two grounds.[43]

Not all courts, however, have approached the issue of specific performance with indifference toward the traditional indicia necessary to the promulgation of such decrees. Often, courts instinctively deny specific performance without seriously considering the merits of the dispute on an ad hoc basis. As one commentator has so characteristically stated: "But what happens when a judge sits in equity? Today there is a vast body of case law to bind him, just as though he were sitting in a court of law, and he is bound by precedent."[44] Too often reliance upon precedent obscures the court's view of its functions as a tribunal.

The Delaware Supreme Court was preoccupied with precedent to such an extent in *Northern Delaware Indus. Dev. Corp. v. E. W. Bliss Co.*,[45] that it totally misconstrued the questions raised by the litigation. Since the contractor had failed to comply with the completion schedules of the construction contract under which he had agreed to supply all labor, materials, and equipment necessary to expand the premises of a steel mill, the plaintiff sought a court order directing the contractor to requisition 300 additional workers.[46] After noting the problems inherent in supervising and enforcing such an order,[47] the court concluded that it ". . . should not . . . become committed to supervising the carrying out of a massive, complex, and unfinished construction contract. . . ."[48] An appropriate remedy, however, would not have required continued supervision because the court had been requested *only* to order the requisition of additional

41 *Id.* at 775 (emphasis added).
42 *Id.* at 776 (emphasis added).
43 Ammerman v. City Stores Company, 394 F.2d 950, 956 (D.C. Cir. 1968). The circuit court stated: "Thus, where the contractual obligation being enforced involves more than the mere construction of a building when the building is to be built on land controlled by its owner . . . specific performance becomes entirely appropriate." *Id.*
44 Gleen & Redden, *Equity: A Visit to the Founding Fathers,* 31 VA. L. REV. 753, 758 (1945).
45 245 A.2d 431 (Del. 1968).
46 The defendant was not required to employ any specific number of laborers under the terms of the contract. *Id.* at 432.
47 *Id.* at 433.
48 *Id.* at 432.

workers and not to supervise a construction project. Also, if the defendant had refused to comply with the order, civil sanctions could have been imposed. The court's implicit acknowledgement of the fact that the order would have been granted if the project had been expressly designed, nearly completed, and the construction agreement had been incorporated into a contract for the sale of land only served to pronounce its misunderstanding of the issues.[49] These factors could have affected the degree of supervision necessary, if such a question had been in issue; but, it is evident that they could have had only minimal impact upon the ability of the court to enforce its decree.

In *Di Cataldo v. Harold Corp.*,[50] the defendant had openly repudiated his agreement to construct a house on land which was to have been conveyed to the plaintiff. In addition to the court's refusal to adhere to the established rule sanctioning specific performance if the defendant is in possession of the realty,[51] it blatantly disregarded the terms of the contract. The court's declaration that the contract was too indefinite to warrant specific relief was seemingly unjustified in view of the fact that the contract had included the financial terms of the agreement, the dimensions of the realty and structure, who was to pay the taxes, insurance, and title fees, and that the purchaser was to be permitted to select the colors of paint, wall paper, and carpet.[52] Although the contract failed to indicate whether the house was to have been of brick or wood construction, the court could have easily taken a sample of other homes in the subdivision where the plaintiff's house was to be constructed to have determined the *type* of building originally agreed upon. Then the construction could have been ordered to proceed in conformity with other houses built by the defendant. The *Ammerman* court employed such a technique when it ordered the defendant to construct the plaintiff's structure in conformity with the standards delineated in the agreements of other major tenants.[53] Also, an agreement to construct a home "according to 'submitted plans and specifications' " had not prevented the Kentucky Court of Appeals from ordering the defendant to resume construction in *Billy Williams Builders & Developers Inc. v. Hillerich.*[54]

The judiciary's lack of concern for administering justice and its steadfast

49 *Id.* at 433.

50 15 N.J. Super. 471, 83 A.2d 545 (1951).

51 *See, e.g.*, Ammerman v. City Stores Co., 394 F.2d 950 (D.C. Cir. 1968); Billy Williams Builders & Dev. Inc. v. Hillerich, 446 S.W.2d 280 (Ky. 1969); 4 POMEROY, EQUITY JURISPRUDENCE § 1402 (5th ed. 1941).

52 The construction agreement was recited in Di Cataldo v. Harold Corp., 15 N.J. Super. 471, 474, 83 A.2d 545, 546 (1951). The following clauses are pertinent to the subject matter of the text:

> [S]aid premises to consist of a one-family dwelling, slab construction, radiant heat, 33' x 26' on a lot 55' x 100' + or — in accordance with plans and specifications of the seller to be filed with and approval of F.H.A. and/or V.A. and the Town of West Orange, for the price of $9,900.00 payable as follows . . . .
>
> The purchaser may exercise the privilege of selecting his or her choice of colors as offered by the seller in bathroom fixtures, wall and floor tile in bathroom, wall to wall carpet in living-dining room and choice of 75¢ grade wallpapers or one color of pastel wall paint.
>
> Advance taxes, insurance, interest on mortgage if any, title fees, F.H.A. fees and closing costs of approximately $335.00 will be paid by the purchaser . . . .
>
> This contract is the full and complete agreement between the purchaser and seller . . . . *Id.*

53 City Stores Co. v. Ammerman, 266 F. Supp. 766, 778 (D.D.C. 1967).

54 446 S.W.2d 280, 284 (Ky. 1969).

adherence to precedent was also exhibited in *Bessinger v. National Tea Co.*[55] when an Illinois court refused to grant specific performance of a lease providing for the construction of a 93,000 sq. ft. building which was to ". . . be of as good or better quality and workmanship as the commercial building recently constructed for . . . lessee as a food supermarket in Rolling Meadows, Illinois."[56] Although the determination that this clause was too uncertain to warrant specific performance[57] could have been justified under certain circumstances, it was entirely inappropriate in *Bessinger*. Not only was the supermarket to have been fashioned after the defendant's chain stores, but also the defendant's interest in owning a structurally and architecturally well-designed building was sufficient to guide his manner of construction. Also, the plaintiff pleaded that he would agree to any plans submitted to him by the contractor provided they complied with the square footage recited in the lease. The court, however, rejected these factors and adhered to its theory that by refusing an equitable remedy the need for extended supervision would be eliminated, disagreement between the parties would be avoided, and it would not be forced to supply necessary contract terms.[58]

The *E. W. Bliss, DiCataldo,* and *Bessinger* courts failed to acknowledge the theory underlying the creation of equity. Essentially, their approach placed the judiciary's interest in maintaining an orderly and tranquil judicial system before the plaintiff's interest in receiving that property for which he bargained. If equity is to resume its position as ". . . a force which gives shape to the ideal of decent and honorable conduct in the relations of man with man,"[59] courts must examine all the circumstances in each case and render decisions founded upon principles conducive to the promotion of the business world and not to the judicial system. While the passage of time has prompted the transformation of an agrarian society into that of a world industrial center, courts have continued to administer principles developed in the nineteenth century.

To achieve an adeptness in remedying the ills of a highly complex, industrialized society, courts would not have to grant specific performance in all contract disputes. Often, the denial of such a decree is warranted. If the plaintiff may *easily* complete construction by doing the work himself or by purchasing the services of another, he would suffer very little by resorting to a suit at law for damages. In *Ayers v. Baker,*[60] a Georgia court forced such a remedy upon the plaintiff by denying his request for specific performance of a contract to build a swimming pool.[61] Similarly, the *Wood v. Estes*[62] court declared that damages would adequately compensate the plaintiff for the defendant's breach of a contract to construct a street and sidewalk on the plaintiff's land.[63]

Since specific performance is founded upon the "equitable concept of relief

55 75 Ill. App. 2d 395, 221 N.E.2d 156 (1966).
56 *Id.* at 397, 221 N.E.2d at 157.
57 *Id.* at 400, 221 N.E.2d at 158.
58 *Id.* at 401, 221 N.E.2d at 159.
59 Newman, *supra* note 6, at 681.
60 216 Ga. 132, 114 S.E.2d 847 (1960).
61 *Id.* at 135, 114 S.E.2d at 850.
62 224 Ala. 140, 139 So. 331 (1932).
63 *Id.* at 144, 139 So. at 333-34.

from hardship,"[64] contracts similar to those found in *Ayers* and *Wood* do not merit equitable relief because the plaintiff has not suffered any real or apparent harm. He may have been *inconvenienced* by the need to secure the services of another to complete the construction and by the delay in completion of his project, but he has not incurred any judicially recognizable hardship. In such cases, the plaintiff will absorb the brunt of the inconveniences; but, in decisions akin to *E. W. Bliss* and *Bessinger,* it is society as a whole which must bear the burden of the hardship. In *Di Cataldo,* society was not burdened, but the decision did impose a hardship on the plaintiff which amounted to more than a mere inconvenience. The court's substitution of money damages for the particular realty inadequately compensated him for his loss.

The burden imposed upon society via the judiciary's reluctance to grant specific performance in cases which merit such a decree generally manifests itself in terms of economic consequences. The *E. W. Bliss* court's refusal to order the requisition of additional workers not only affected the local economy, but also, conceivably, the national economy. The steel laborers that were hired, or those likely to have been hired, to work in the new mills were forced to delay their starting dates, thereby causing them to forego earned income. If the mill had expended money on salaries, income capable of multiplying itself[65] would have been injected into the economy. Either local or imported goods and services would have been purchased with part of the income which would have been earned by the employees. The money which would have been expended on local goods and services would have created increased employment and generated an increased spending by other people in the local economy; however, any money which would have been expended on imports would have produced a "drain" on local income, but occasioned an injectment of "new" money into the community which produced the goods.[66] Thus, either the national or local economy,

64 Newman, *supra* note 8, at 417.

65 The income "multiplier" is comprised of the variables of personal savings, imported and exported goods, and tax disbursements. Any money which is saved, paid for taxes, or expended on imported goods causes an income "leakage" to the local community. The greater the amount of money which flows out of a community, the less there is available for the purchase of goods and services. If, however, goods produced by local manufacturers are exported to other communities, "foreign money" will flow into the local economy and increase spending on goods and services.

The rate of employment in a community is directly related to the local supply of money. If the amount of money flowing into a local economy increases, the employment rate will correspondingly increase; whereas, if the money flowing out of an economy increases, as a result of an increased spending on imported goods, the employment rate will decrease. *See* W. THOMPSON, A PREFACE TO URBAN ECONOMICS 142-47 (1968).

Although the income "multiplier" concept is not easily explained or defined, it is rather easily depicted by a very simple, extreme illustration. If an entire community, on a single day, either withdrew all money from circulation and saved it at a zero interest rate or paid all available money to the federal government for income taxes, the community would, in effect, "die" since there would no longer be any money available to pay salaries or purchase products and services. If the entire community, however, purchased goods produced in another community (imports), the effect upon the money supply would not be as noticeable because the local merchants who supplied the imports would retain their profits from the sales. Since the merchant would have to pay the producer for the cost of the goods, the greater portion of the purchase price would flow out of the local economy. If, however, a community produced all goods necessary for local consumption (thus, no imports needed) and exported some goods, the community would probably attain a 100% employment rate. Money would continue to flow into the community (which would be derived from the exported goods), but very little would flow out of the economy (tax disbursements would be one "drain" on the economy).

66 W. THOMPSON, A PREFACE TO URBAN ECONOMICS 142-47 (1968).

or both, would have benefited from the earlier employment of the steel workers. Also, "foreign money" flowing into the local economy would have heightened if the prospective employees would have increased the steel production for exportation to other areas of the nation.[67]

The local income "multiplier" would also have been affected in *Bessinger* if, and only if, the defendant had *not* granted another local entrepreneur a lease and construction agreement after he had repudiated his contract with the plaintiff. If another local merchant had executed an agreement with the defendant, the income that would have been generated by the plaintiff's business would not have been lost to the local economy, but only replaced by the income from the other owner's business. If, however, a second agreement had not been executed, the income which would have originated from the plaintiff's business would have been a total loss to the economy.

Another rationale for reversing the judicial system's present approach to specific performance is founded in its reluctance to supervise extensive construction projects. Although the courts' position merits attention, it is not unrealistic to contend that compliance with a decree could be forthcoming with little or no court supervision. Many large and diversified construction contractors stand to lose future bids if their substandard business practices are made public. A delay in performance by a contractor, unworkmanlike construction, or a repudiation of a court decree could easily jeopardize a company's future business.

III. The English Approach

Great Britain's judiciary has taken a slightly more realistic approach in determining the efficacy of a decree for specific performance than have their American counterparts. The particular circumstances surrounding each cause of action are considered in relation to the degree of the parties' interests in securing equitable relief,[68] notwithstanding the binding effect of precedent.[69] Indicative of this individualized approach is a statement by Judge Collins in *Wolverhampton v. Emmons*.[70]

> . . . I cannot altogether understand the principle upon which Courts of Equity have acted in sometimes granting orders for specific performance in these cases, and sometimes not. I think that possibly the explanation is that *the Courts have not uniformly adhered to one principle in such cases.* It looks to me as if the views of the Courts of Equity have gone through a process of development with regard to the subject.[71]

City of London v. Nash[72] explicitly depicts this amorphous policy and the volition of the equity courts to fashion a remedy appropriate to the circumstances.

67 *Id.*
68 Carpenters Estates, Ltd. v. Davies [1940] 1 All E.R. 13, 16 (1939).
69 *See, e.g.*, Price v. Corporation of Penzance, 67 Eng. Rep. 748 (1845); South Wales Ry. Co. v. Wythes, 69 Eng. Rep. 422 (1854); Storer v. Great W. Ry. Co., 63 Eng. Rep. 21 (1842); 4 POMEROY, *supra* note 51, § 1402.
70 [1901] 1 K.B. 515.
71 *Id.* at 523-24 (emphasis added).
72 27 Eng. Rep. 859 (1747).

Although the court was inclined to compel the performance of the defendant's agreement to replace several old buildings with newly constructed homes, it refrained from doing so in consideration of the defendant's interests. Since he had already constructed two homes and repaired the remaining buildings, the court declared that it was ". . . not obliged to decree a specific performance and will not, where it would be a hardship; as it would be here upon the defendant . . . after having very largely repaired the houses, to pull them down and rebuild them. . . ."[73] Although this decision was just and equitable under the circumstances, clearly damages would not have adequately compensated the plaintiff for his loss.[74] The court, however, balanced the interests of each party in securing specific performance and steadfastly refused to adhere to precedent.

Early it had become established that one of the exceptions to the rule which denies specific performance of a construction contract materialized if three requirements were encountered: the defendant acquired the land in a contract conditioned by a duty to construct a building as past consideration for the contract; the details of the construction project were sufficiently certain; and the plaintiff's interest in securing performance could not be adequately compensated by damages.[75] In *Carpenters Estates Ltd. v. Davies,*[76] the plaintiff fulfilled all the requirements, except that the contractor's obligation arose out of a contract which conveyed the land to the plaintiff. Although it is clear that specific performance would have been denied under American decisions,[77] the *Davies* court adeptly modified the established principle to entitle the plaintiff to specific relief. The justices ruled that it was not necessary for the defendant to own the land, but only that he obtain a right of possession to the property where the construction was to occur.[78] Essentially, the court evaded the strictures of previous decisions and fashioned an equitable remedy appropriate to the factual basis which gave rise to the litigation. It was determined that precedent could not bar specific relief if the plaintiff was entitled to such a remedy on the merits of the case:

> . . . I am wholly unable to see why the court should be debarred from granting relief by way of specific performance, and I am not prepared to accept the statement of ROMER, L.J., [judge who wrote the opinion which established the rule modified by *Davies*] as completely exhaustive, so as to prevent my granting specific performance *if I think it right to do so in the present case.*[79]

Not all English courts, however, when confronted with the problems inherent in granting specific performance, follow the approach taken in *Davies.* A few courts have preoccupied themselves with precedent to such a degree that

73 *Id.*
74 *Id.*
75 Wolverhampton v. Emmons, [1901] 1 K.B. 515, 522.
76 [1940] 1 All E.R. 13 (1939).
77 *See, e.g.,* Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960); Levene v. Enchanted Lake Homes, Inc., 115 So. 2d 89 (Fla. App. 1959).
78 Carpenters Estates, Ltd. v. Davies, [1940] 1 All E.R. 13, 17 (1939).
79 *Id.* at 18 (emphasis added).

their decisions resemble those of American courts.[80] However, the individualized technique of *Davies* merits attention from the American judicial system.

IV. Arbitration: A Substitute for Litigation

A. *General Principles*

The promisee of a construction contract may be forced to utilize machinery other than the judiciary to secure equitable relief if state and federal courts continue to adhere to precedent and refuse to analyze the circumstances surrounding a breach. One commentator has strongly suggested that commercial arbitration may be the solution to an aggrieved party's problems.[81] He considers arbitration ". . . as one of the most likely methods of doing justice, rather than as a mere possible secondary alternative."[82] Certainly many advantages enure to the parties to the dispute and to society as a whole when arbitration is employed.[83] It is not only more expeditious than litigation,[84] but also the hearings are conducted under the supervision of experts.[85] Arbitration is also less expensive than litigation;[86] a sense of privacy is provided for the parties;[87] and it serves as a

80 *See, e.g.*, South Wales Ry. Co. v. Wythes, 69 Eng. Rep. 422 (1854). *See also* text accompanying note 132, *infra*.

81 Oleck, *Specific Performance of Builders Contracts*, 21 FORD. L. REV. 156, 171 (1952).

82 Oleck, *Specific Performance of Contracts Through Arbitration*, 6 ARB. J. (n.s.) 163, 165 (1951).

83 *See generally* Address by Arthur J. Goldberg, American Arbitration Association Annual Meeting, Mar. 17, 1965, in *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. (n.s.) 13 (1965).

84 A study conducted by the University of Chicago Law School, with the cooperation of the American Arbitration Association, revealed that normally commercial arbitration cases are disposed of between 60 to 90 days. Notwithstanding the fact that the study covered the years 1947 through 1950, the findings are relevant today and worthy of mention. Fifty-seven percent of the 545 cases studied were disposed of within 90 days. If, however, delays necessitated by the parties' attorneys are considered, 77% were disposed of within a 90 day period. Also, often the cases were delayed because of the inability to select arbitrators acceptable to both parties. In cases where there were no delays in selecting arbitrators and the parties did not cause hearings to be postponed, 83% of the cases were disposed of in less than 90 days. Smith, *Commercial Arbitration at the American Arbitration Association*, 11 ARB. J. (n.s.) 3, 17-18 (1956). The judiciary has also acknowledged the expeditious disposition of proceedings. *E.g.*, Riley v. Pig'n Whistle Candy Co., 109 Cal. App. 2d 650, 241 P.2d 294 (1952).

85 M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 20.01 (1968). The Association's National Panel of Arbitrators comprises approximately 30,000 people. Each is nominated to the Panel on the basis of their knowledge and expertise in particular fields of study. AMERICAN ARBITRATION ASSOCIATION, FACTS ABOUT THE AMERICAN ARBITRATION ASSOCIATION ¶ 6 (1971).

86 Savings to the parties may be reflected in two ways. Unnecessary attorney's fees may be lessened by the quickness in which the dispute is settled and the party receiving a damages award may save money in the form of interest which he could have had to pay on any borrowed funds while awaiting the court's disposition of the matter. Also, a saving enures to the public since arbitration is a private dispute settlement device which costs the taxpayer nothing; if parties resort to litigation, however, the public must pay for court personnel salaries and general administration expenses. *See* Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME LAWYER 182, 189 (1965); S. LAZARUS, J. BRAY, L. CARTER, K. COLLINS, B. GIEDT, R. HOLTON, P. MATTHEWS, & G. WILLARD, RESOLVING BUSINESS DISPUTES: THE POTENTIAL OF COMMERCIAL ARBITRATION 49-51 (1965) [hereinafter cited as S. LAZARUS].

87 The publicity attending litigation may scath a business's image or shatter an individual's reputation; whereas, arbitration is a private proceeding unimpinged by any facets of publicity. Sarpy, *supra* note 86, at 189; S. LAZARUS, *supra* note 86, at 53-54.

partial remedy for the overcrowded court dockets.[88] One of the major inhibitions of arbitration at the present time, however, is that very few businessmen are acquainted with its machinery.[89]

Commercial arbitration has been implemented and promoted largely through the enactment of statutes.[90] Many states and the federal government[91] have enacted what have been termed modern arbitration laws,[92] while other states[93] have promulgated limited acts. The modern acts declare arbitration agreements valid, enforceable, and irrevocable, whether the agreement provides for the settlement of existing or subsequent disputes. Limited acts, however, provide that agreements are valid, enforceable, and irrevocable only if they pertain to the settlement of existing controversies. Agreements to settle disputes when, and if, a controversy arises are revocable by either party any time prior to the issuance of an award. Essentially, then, if a state has enacted only a limited act, the parties are not bound to arbitrate future disputes;[94] but if they voluntarily proceed to arbitration and an award is issued, the common law will order the parties to adhere to their original agreement binding themselves to abide by the award.[95] If, however, the state has promulgated a modern act, the parties may be compelled by the courts to arbitrate all disputes and accept the arbitrator's ruling.[96]

The most notable principle underlining a commercial arbitration agreement is the parties' complete discretion and control over the arbitration process.[97] Since the arbitrator hears the dispute pursuant to their agreement,[98] he is required to strictly adhere to procedural or substantive limitations imposed by the parties. Their agreement may thus effectively limit the scope of the arbitrator's review and the remedies available at his disposition.[99]

The American Arbitration Association (A.A.A.), however, has promulgated the Construction Industry Arbitration Rules, effective March 8, 1966, which

88 The case load administered by the American Arbitration Association drastically increased between 1959 and 1970. In 1959 the A.A.A. handled 3,986 cases. In 1970 it administered 21,870. Over 12,000 of those handled in 1970 were uninsured motorists' claims. The commercial cases totaled 2,658 in 1970 to only 674 in 1959. AMERICAN ARBITRATION ASSOCIATION, DISPUTE SETTLEMENT IN THE 70's 4 (1971). The New York judiciary has also recognized arbitration as a necessary factor in promoting reduced court dockets. *E.g.*, Grant v. Koppelman, 59 Misc. 2d 271, 274, 298 N.Y.S.2d 329, 332 (1969).

89 It was determined in one study that 82% of the businessmen contacted had little or no knowledge of commercial arbitration. Of the 18% indicating knowledge of the subject, a large percentage were included in the textile and construction industries. S. LAZARUS, *supra* note 86, at 42-43.

90 *See generally* Coulson, *Texas Arbitration—Modern Machinery Standing Idle*, 25 SW. L. J. 290 (1971).

91 *E.g.*, Arbitration Act, 9 U.S.C. §§ 1-14 (1971); N.Y. CIV. PRAC. §§ 7501-7514 (McKinney 1963).

92 Asken, *Resolving Construction Contract Disputes Through Arbitration*, 23 ARB. J. (n.s.) 141, 147 (1968).

93 *E.g.*, MISS. CODE ANN. §§ 279-297 (1957).

94 *See generally* Note, *Commercial Arbitration: A Need For Reform*, 36 MO. L. REV. 343 (1971).

95 Funk v. Funk, 434 P.2d 529, 531 (Ariz. App. 1968).

96 Kustom Kraft Homes v. Leivenstein, 14 Cal. App. 3d 805, 810, 92 Cal. Rptr. 650, 653-54 (1971).

97 *E.g.*, Monte v. Southern Delaware County Authority, 335 F.2d 855 (3rd Cir. 1964); Royal Globe Ins. Co. v. Spain, 36 App. Div. 632, 319 N.Y.S.2d 115 (1971).

98 Bacchus v. Farmers Ins. Group Exch., 467 P.2d 76, 77 (Ariz. App.), *vacated on other grounds*, 106 Ariz. 280, 475 P.2d 264 (1970).

99 *See, e.g.*, Freydberg Bros. v. Corey, 177 Misc. 560, 31 N.Y.S.2d 10 (1941).

have significantly restricted the necessity of the parties to delineate the arbitrator's power. To secure the advantage of these rules, the A.A.A. has suggested the incorporation of the following clause into the construction contract:

> Any controversey or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.[100]

It is not necessary for the arbitration agreement to explicitly confer the power to decree specific performance upon the arbitrator if this clause is incorporated into the agreement. Section 42 of the Construction Industry Arbitration Rules states: "The Arbitrator may grant any remedy or relief which he deems *just and equitable*. . . ."[101] The arbitrator, then, has the discretion to grant or refuse specific performance without an express grant of power from the parties to the agreement.

When disputes are to be settled through arbitration, the participants expressly accept any hazards inherent in the process. The award binds the parties even though the arbitrator may have made a mistake in fact or law[102] or may have completely disregarded traditional principles of law.[103] Arbitrators are experts in their particular fields, and are not always attorneys:

> Arbitrators as a rule are unlearned in law. They are expected to decide the matters in dispute according to those principles of equity and good conscience which, in their opinion, will do justice between the parties, untrammeled by the niceties of the law.[104]

The judiciary's refusal to subject an arbitrator's award to judicial review is founded upon its reluctance to frustrate the parties' original agreement to be bound by the award and to negate a legislature's objectives in promulgating arbitration statutes.[105] An award may be vacated only upon explicit statutory or common law grounds.[106] Generally, grounds sufficient to vacate an award arise if fraud or corruption was employed in procuring the award, the arbitrator was partial, he exceeded his power, or the award was not final and definite.[107] Courts may, however, modify an award if there is a mistake upon the face of it or if the arbitrator included subject matter in the award which was not submitted to him for determination.[108]

100 AMERICAN ARBITRATION ASSOCIATION, CONSTRUCTION INDUSTRY ARBITRATION RULES 2 (1971).
101 *Id.* § 42, at 12 (emphasis added).
102 Mars Constructors v. Tropical Enterprises, 51 Hawaii 332, 335-36, 460 P.2d 317, 319 (1969).
103 *E.g.*, Park Construction Co. v. Independent School Dist., 216 Minn. 27, 32, 11 N.W.2d 649, 652 (1943); Goodman v. Lazrus, 15 App. Div. 530, 531, 222 N.Y.S.2d 891, 893 (1961).
104 Park Construction Co. v. Independent School Dist., 216 Minn. 27, 32, 11 N.W.2d 649, 652 (1943).
105 *E.g.*, Funk v. Funk, 434 P.2d 529, 533 (Ariz. App. 1968); Mars Constructors v. Tropical Enterprises, 51 Hawaii 332, 335, 460 P.2d 317, 319 (1969).
106 *E.g.*, Kest v. Nathanson, 184 So. 2d 690 (Fla. 1966); Park Construction Co. v. Independent School Dist., 216 Minn. 27, 33, 11 N.W.2d 649, 653 (1943).
107 *E.g.*, N.Y. CIV. PRAC. § 7511 (b) (McKinney 1963).
108 *Id.* § 7511(c).

B. *Grayson-Robinson: An Obscure Steppingstone*

Grayson-Robinson Stores, Inc. v. Iris Const. Corp.[109] established the principle that a state court was compelled to confirm an arbitration award which decreed specific performance of a five million dollar construction contract, notwithstanding the fact that the substance of the decree was contrary to law. The factual situation which gave rise to the litigation[110] forced the Court of Appeals of New York into an atypical position between two strongly competing forces. It was compelled to either invalidate the parties' original agreement to submit their disputes to arbitration or confirm an award repugnant to the established law. Either mode selected would have been inconsistent with a tribunal's role of dispensing justice. If the former had been selected, the court would have expressed its reluctance to sanction a valid contract, while selection of the latter would have indicated its displeasure over the general principles which deny specific performance of construction contracts. The majority of the court, however, effectively avoided the need to select either foundation for its decision by resorting to other consequences which would have ensued from a ruling contrary to that espoused. Although the majority recognized the need to uphold the parties' intent of settling their disputes through arbitration,[111] they determined that a contrary decision would have clearly forestalled the development of arbitration as a private dispute settlement device. Since the state legislature had expressed its desire to foster the arbitration process via legislation,[112] the court was not in a position to frustrate that desire. The statutory grounds upon which the award could have been effectively vacated were minimal.

The majority thus effectively manipulated the underlying basis of *Grayson-Robinson* to avoid answering the obvious question of the continued efficacy of that principle which denies specific performance of construction contracts. They rationalized their holding upon the similarity which existed between the contract in question and other contracts which the court had specifically enforced, instead of advocating the modernization of equity principles. Writing for the majority, Mr. Chief Justice Desmond stated that ". . . there is nothing extraordinary about this ordinary building contract. Appellant is simply being required to fulfill its promises."[113] However, the construction cost of five million dollars is sufficient to indicate that it was not simply an "ordinary building contract." If the court would have taken a more detailed and individualized approach to the

109 8 N.Y.2d 133, 202 N.Y.S.2d 303, 168 N.E.2d 377 (1960). This decision has been heavily criticized in student law journals. *See, e.g.,* 3 WM. & MARY L. REV. 203 (1961); 61 COLUM. L. REV. 296 (1961); 35 ST. JOHN'S L. REV. 363 (1961); 6 VILL. L. REV. 255 (1960); 10 BUFF. L. REV. 67 (1960); *contra,* 25 ALBANY L. REV. 140 (1961).

110 Iris Construction Corp. agreed to build and lease a five million dollar structure to Grayson-Robinson for twenty-five years. Subsequent to the commencement of construction, Iris was unable to secure a mortgage to finance the construction and Grayson-Robinson refused to heed Iris' request for increased rental payments. Since Iris was forced to abandon the construction project, they submitted their dispute to arbitration in conformity with their agreement.

111 Grayson-Robinson Stores, Inc. v. Iris Const. Corp., 8 N.Y.2d 133, 138, 202 N.Y.S.2d 303, 307, 168 N.E.2d 377, 378-79 (1960).

112 N.Y. CIV. PRAC. §§ 7501-7514 (McKinney 1963).

113 Grayson-Robinson Stores, Inc. v. Iris Const. Corp., 8 N.Y.2d 133, 138, 202 N.Y.S.2d 303, 307, 168 N.E.2d 377, 379 (1960).

problems inherent in *Grayson-Robinson*, it could have provided courts with a foundation for granting such decrees without the arbitrator's preliminary assent.

New York decisions rendered both before and subsequent to *Grayson-Robinson* also occasioned the opportunity for the courts to question the antiquated theories which permeate specific performance. In each decision, however, this central question was intentionally avoided. *Staklinski v. Pyramid Electric Co.*[114] established the court's consent to bind an employer to a contract to employ an individual for eleven years, notwithstanding the fact that the employer had become dissatisfied with his performance. The court reasoned that the arbitration agreement was valid and the power to render it meaningless after the parties had bargained for such a clause was beyond the court's discretion.[115] Also, the fact that a court sitting in equity would not have ordered the employer to retain the employee in fulfillment of his contract was immaterial to the court.[116] Similarly evasive reasoning provided a basis for the court's refusal to stay arbitration proceedings in *Exercycle Corp. v. Maratta*:[117]

> [A] court is not justified in staying the arbitration even if the claim would not be enforceable at law. In point of fact, we have declined to enjoin an arbitration even where an arbitrator has been asked to do what a court of law would clearly not do.[118]

Although *Maratta* and *Staklinski* are significant contributions to the realization of a modern approach to specific performance, they have failed, just as *Grayson-Robinson* has, to provide a foundation for courts sitting in equity to assume the *direct* responsibility of modifying the present approach.[119]

Grayson-Robinson, however, was not totally devoid of any value to the promisee of a construction contract. He may now avoid litigation and be confident that his contract will be specifically enforced, provided that the construction contractor expressly agrees to grant the arbitrator such power or assents to arbitration conducted in conformity with the Construction Industry Arbitration Rules.[120] If businessmen resort to arbitration and provide the arbitrator with the requisite power, the ultimate determination of the efficacy of equitable awards lies within the discretion of the arbitrator.[121] If specific performance is awarded, courts would be compelled to confirm the award, provided, of course, that they are willing to follow New York's lead on this point. Apparently, most states would be obliged to do so.[122]

---

114 6 N.Y.2d 159, 188 N.Y.S.2d 541, 160 N.E.2d 78 (1959).
115 *Id.* at 163, 188 N.Y.S.2d at 542, 160 N.E.2d at 79.
116 *Id.* at 163-64, 188 N.Y.S.2d at 543, 160 N.E.2d at 80.
117 9 N.Y.2d 329, 214 N.Y.S.2d 353, 174 N.E.2d 463 (1961).
118 *Id.* at 337, 214 N.Y.S.2d at 358, 174 N.E.2d at 466.
119 *City Stores Co. v. Ammerman*, alluded to *Grayson-Robinson*, but it did not provide the impetus for *Ammerman*.
120 The parties could also secure specific performance if they elect to have the arbitration conducted in conformity with the American Arbitration Association Rules. Section 42 of those Rules is identical with § 42 of the Construction Industry Arbitration Rules.
121 Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 336, 214 N.Y.S.2d 353, 357-58, 174 N.E.2d 463, 466 (1961).
122 *See, e.g.*, Morris v. Zuckerman, 69 Cal. 2d 686, 72 Cal. Rptr. 880, 446 P.2d 1000 (1968); Sydnor Pump & Well Co. v. County School Bd., 182 Va. 156, 28 S.E.2d 33 (1943).

C. *The Parallels of Arbitration*

When a business entity adheres to outmoded business practices, it may be able to survive for decades, but it can never attain a viable state without remaining adept at business administration. If the adoption of new administrative techniques is frustrated, history indicates that a new entity will develop at the expense of the former. Although this situation is particularly characteristic of the business world, which thrives on competition, it is not inapplicable to governmental institutions.

Although equity administration was nurtured by innovation during its formative years, it has become stagnant since the turn of the twentieth century and is no longer a viable institution. Roscoe Pound's recognition of this defect nearly fifty-five years ago prompted him to remark that ". . . the exigencies of judicial administration of justice will sooner or later require resort to modern machinery despite all technical and historical objections."[123] He implicitly assumed, however, that the requisite machinery would develop from within the judicial system to replace the antiquated theories permeating the administration of equity. Instead, the inability of the system to cope with a changing society has forced the emergence of arbitration.

The increased use of the arbitration process by business[124] is not only evidence of the public's recognition of its many advantages vis-à-vis litigation, but also indicative of its ability to meet societal demands. It is not, however, without limitations. Some commentators have suggested that arbitrators are permitted too much discretion in formulating new "rules" without an effective check upon them by the courts.[125] It is claimed that arbitration is a device to exert control over society[126] and prompt unpredictability in the business world.[127] The argument has also been formulated that occasionally an arbitrator may be unable to remain impartial throughout the hearings.[128] The efficacy of these contentions, however, must be determined in consideration of the distrust associated with any new institution which is developed to remedy the defects of another. The colonists, too, were very distrustful of the development of equity courts in America.[129] Their distrust, however, did not prevent development, but only delayed it.

V. Conclusion

Notwithstanding the fact that arbitration may be employed as an effective device to secure specific performance of construction contracts, it is imperative that the judicial system eventually adopt an individualized approach to the ad-

123 Pound, *supra* note 24, at 436.
124 *See* note 88, *supra.*
125 Kronstein, *Arbitration Is Power,* 38 N.Y.U. L. REV. 661, 667 (1963); *The Court of Appeals, 1959 Term,* 10 BUFF. L. REV. 48, 69 (1960).
126 Kronstein, *Business Arbitration—Instrument of Private Government,* 54 YALE L.J. 36, 39 (1944).
127 Note, *Commercial Arbitration: Expanding the Judicial Role,* 52 MINN. L. REV. 1218, 1230-31 (1968).
128 Editorial, 17 ARB. J. (n.s.) 65 (1962).
129 Oleck, *supra* note 2, at 40-41.

ministration of equity. The issues permeating enforcement of a decree and supervision of the construction project remain the same whether an arbitrator's specific performance award is confirmed by the court or a court takes the initiative and issues the decree without the arbitrator's preliminary inducement.[130] In either case, the court must bear the burden of supervision and enforcement.[131] Thus, if both the judiciary and arbitration continue to adhere to their present approaches, an injured party's available remedies will be entirely dependent upon whether the dispute was settled by arbitration or litigation. Such a repugnant situation should not be permitted to exist.

One commentator has remarked that the administration of equity in England also suffers from the application of precedent. He has suggested, however, that the judiciary is incapable of solving its problems without legislative assistance:

> [T]he application of the doctrine of precedent to the Court of Chancery within the last 150 years has done much to . . . abrogate the fluid nature of the rules themselves. Equity has become as stereotyped as the common law and is no longer capable of re-adapting itself to the changing conditions without the assistance of the legislature.[132]

The inequitable administration of equity in America may also be forced to await legislative correction. *Grayson-Robinson* provided the impetus for courts to act, but they failed to do so.[133]

Gary L. Lennard

130 *See* Note, *Specific Performance: A Liberalization of Equity Standards,* 49 IOWA L. REV. 1290, 1300 (1964).
131 *See generally* Busch, *Does the Arbitrator's Function Survive His Award?* 16 ARB. J. (n.s.) 31 (1961).
132 Delany, *Equity and the Law Reform Committee,* 24 MODERN L. REV. 116, 118 (1961).
133 *See* Oleck, *Specific Performance of Contracts Through Arbitration,* 6 ARB. J. (n.s.) 163, 165-66 (1951).