

Early Resolution Strategies for Real Estate Disputes

The Dirt Report

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Ever-increasing pressures to resolve disputes quickly and efficiently make it critical to give early consideration to strategies to maximize means for prompt resolution of disputes by settlement or adjudication. By making an early and comprehensive factual investigation and preliminary legal analysis, and considering various alternative mechanisms for dispute resolution outside traditional litigation, the real estate litigator will maximize the opportunity for early resolution and client satisfaction.

This article takes note of some of the considerations and strategies that may be employed when a dispute looms or has reached the litigation stage.

Trends in Handling Mechanisms for Resolution of Real Estate Disputes

Pressures on the Handling of Disputes

The prevailing adverse market conditions are a key driver in many of today's real estate disputes. Acquisition, lease and development transactions that may have succeeded in a stronger market have sometimes been derailed due to pressures brought on by market conditions, including more demanding return-on-investment requirements, more conservative underwriting and lack of available capital. Unfulfilled expectations often lead to disputes. At the same time, the commercial real estate industry is more mindful than ever about legal spending and the need for efficiency in the litigation process. Finally, the availability and responsiveness of the courts (in California, for example) to adjudicate disputes has been dramatically affected in recent years as public funding has become more scarce. This has resulted in increased caseloads and reduced staff and hours in the courts.

As a consequence of these conditions, clients are apt to consider dispute resolution solutions short of active litigation and trial. This may include employing traditional settlement mechanisms such as

settlement conferences and mediation earlier, or more creative adjudicatory dispute resolution methods, including not only arbitration but private trial and reference (referee) procedures. Of course, unless there is a contractual or legal mandate to employ these procedures, they will be available only when opposing parties to the dispute can reach agreement to employ them. Moreover, while active consideration is given to alternatives, many parties ultimately decide they are better off remaining in a courtroom setting.

Choosing the Right Procedures for Resolving Real Estate Disputes

When a real estate dispute arises and appears headed to litigation, it is always worthwhile to give consideration to alternatives to the court system. There are several, though these alternatives have frailties and risks, and may not be suitable to a given case or client. Of course, some disputes can be resolved by early settlement processes including mediation, and it is not uncommon for contracts to contain a pre-suit mediation clause requiring the parties to make an effort to resolve any dispute before proceeding to the courts. In the event pre-litigation settlement is not feasible, the best known alternative to the courts is arbitration, but there are alternatives to arbitration and hybrid approaches. All of these approaches can be written into agreements at the transaction stage or agreed when a dispute arises.

Arbitration

Whether arbitration is agreed at the time of original contracting or at the time the dispute arises, arbitration is a contractually created and governed mechanism, designed to promote efficiency, speed to result and finality. Arbitration can also provide a private forum for dispute resolution, often important for the protection of sensitive information or reputation. Generally, arbitrators have broad powers in support of these goals, unless those powers are contractually circumscribed. In particular circumstances, arbitration can readily fulfill all these goals.

Resulting from the policy of arbitral finality, parties have little recourse from an award made by an arbitrator except in narrow circumstances; indeed, the courts have generally found that parties who have elected arbitration have bargained for finality at the expense of being assured of recourse even

in the event of arbitrator error. Ironically, despite the rule of finality, many arbitration results are attacked in court, with aggrieved parties seeking to bring themselves within one of the narrow exceptions to the rule of finality. Though these attacks may be more often than not futile, it does put the parties into the court system they originally sought to avoid. Arbitration can be surprisingly costly (limits on discovery are often counter-balanced by costs of the arbitration agency and arbitrator) and time consuming, and particularly so if a three-arbitrator panel will be used. The better known arbitrators can have very full calendars, which often leads to delay. Often, arbitration does not turn out to meet the goals of speed, efficiency, cost management and privacy. Whether arbitration is considered at the contracting or dispute stage, counsel should be prepared to identify the pros and cons of arbitration to clients, based on practical experience with arbitration in their locale, the nature of the business relationships at stake, the magnitude of the dispute and sensitivity of information that may be disclosed during the dispute.

There are special problems with arbitration in the real estate context, where some remedies may only be obtainable in court and gray areas exist as to others. To the extent a party requires a provisional or interim remedy such as to record a *lis pendens*, or to obtain an injunction or pre-judgment attachment order, arbitration may not afford a forum for enforceable relief, leaving the parties to take at least this portion of their dispute into the courts. There can also be problems with arbitration in the lease context, such as where quick relief in an unlawful detainer proceeding is sought; query whether the unlawful detainer action is referable to arbitration. Finally, in the judicial foreclosure context, a judgment of foreclosure is required to be obtained in court (at least in California) but determination of fair market value for purposes of a deficiency judgment may be arbitrable. Although an application to a court for provisional or other extraordinary relief does not generally destroy the right to arbitrate, it does leave the parties in the peculiar status of having ongoing court proceedings at a time arbitration is sought to be employed, and leaves the intent of the parties to stay out of court unfulfilled.

In view of the questions over arbitrable finality and efficiency generally and the special problems with arbitration that accrue in the real estate context, many practitioners and clients will decide that arbitration is not suitable. There are alternatives.

Judicial Reference

In California, a "referee" can be appointed to handle a case through trial. Cal. Code Civ. Proc. § 638. The parties file a stipulated petition to the presiding judge of the court and the court refers the matter to an agreed referee. The reference is a public procedure, with a public filing, but proceedings are generally held outside the courthouse. The referee and parties can tailor discovery and hearing procedures by agreement. The referee prepares a statement of decision, upon which a judgment is entered, which has the same force and effect as any other judgment and is appealable. References are increasingly being reviewed as an improvement upon arbitration; the parties are able to fashion their own procedure and largely stay out of the traditional courtroom, but have redress if a judgment is entered that is viewed as improper.

Private Judge Trial

Under the California Constitution, parties are entitled by stipulation to have the court appoint a judge, who is sworn to handle a specific matter, and who has all the powers of a sitting judge for that matter. Cal Constitution Article IV, § 21; Rules of Court § 2-830. A private judge trial is much like a reference in the sense that the parties will handle procedures outside the courthouse and will obtain a judgment, subject to appeal, rather than an arbitration award.

Litigation

There is plenty of evidence to argue that arbitration has not always been the panacea that it was earlier thought to be. For those parties interested in alternatives to traditional litigation, where the parties can tailor their adjudicatory procedure, judicial reference and private judge trial procedures allow efficiency of pretrial preparation and discovery scheduling, potentially afford a quicker result and provide protection to the parties in terms of appeal should the referee or appointed judge be felt to have misstepped.

Despite the various alternative dispute resolution procedures that exist, in recent years many clients are no longer interested in pursuing these options. Rather, some clients, who are concerned about

the seemingly unfettered (almost) discretion of an arbitrator and the greater than expected cost of alternative dispute resolution mechanisms, seem to be returning to civil litigation as a preferred method to resolve their disputes.

Initial Steps in Resolving a Real Estate Dispute

Whenever an attorney takes on a new real estate dispute, it is important to conduct an early investigation to find out as much as possible about the facts behind the dispute. This will include review of contracts, collecting relevant documents and speaking to key witnesses. Basically, counsel needs to understand what happened early to make preliminary recommendations to the client about how to achieve a desirable resolution – whether it be through litigation or one of the identified alternative dispute resolution mechanisms. Indeed, the chosen dispute resolution strategy may depend on the claims made and defenses that are available or upon specific business interests of the client. For instance, the business interests of the client may dictate pushing hard to try to resolve the case as early as possible, where, for example, the client is seeking to maintain a business relationship with the opponent or has other core business interests that demand full attention. Alternatively, the client may want to handle the dispute aggressively, where the client feels strongly about its legal position, is concerned that passivity in asserting legal rights may adversely affect other similar situations or believes the opposing side is unreasonable in its view of the matter. Consequently, it is important to consider the client's dispute resolution goals, while armed with early factual and analytical work-up, to allow the best matching of those goals with the client's legal position.

One of the client's initial roles in assisting development of a real estate dispute resolution strategy is to supply the material facts of the case by making available needed files and witnesses. Secondly, the client needs to be intimately involved in the strategic decision-making process regarding case approach once the facts are developed. In other words, the client must be an integral part of the dispute resolution team.

Initially, it is important to obtain all the file materials (hard copy and electronic) that are germane to the transaction, including the contract and transaction documents, communications between the

parties and any pertinent third parties or government agencies, and internal evaluations of transactions, notes and memoranda. Although the portion of a contract that will be important to a dispute is case dependent, there are certain contract terms that should always be reviewed immediately, including any attorneys' fees clause (or absence of same); venue/choice of law clause; arbitration or reference clause and mandatory mediation clause. Review of the correspondence, email and other file materials will provide context and information regarding contemporaneous conduct.

One of the most important aspects of developing a dispute resolution strategy in a real estate case is interviewing all of the key personnel affiliated with the client. In many cases, key witnesses may have moved to other companies; therefore, interviews will be needed of both relevant current personnel and ex-employees if they can be found and if they will cooperate. It is recommended that anybody who is a potential material witness at the outset be interviewed; being comprehensive in that area provides the best immediate overview of the facts, including any pitfalls, and how key witnesses may appear from a credibility standpoint. Thus, often, key third parties will be interviewed as well. Some lawyers may strategically decide to talk to certain key personnel at the outset of litigation and then delay communication with other witnesses to a later time. Based on early interviews, a decision can be made regarding which witnesses are most important to the client's case, which witnesses need more attention from a preparation standpoint, and what adverse facts exist.

Conclusion

When faced with a new or looming real estate dispute, early consideration should be given by counsel to alternatives that may be available to traditional litigation. Alternatives run the gamut from early settlement negotiation and mediation to a menu of adjudicatory options ranging from arbitration to reference to private trial. In some, but not all, cases, this menu of options may provide opportunity for early and more efficient resolution, and in other cases, traditional litigation is still likely to be preferred. In either event, to assure timely consideration of the options and the best early advice to clients regarding those options and case handling, early comprehensive investigation is recommended.

Takeaways

- Conduct an early investigation including collecting relevant documents and interview of key witnesses and review of legal principles. This will assist with strategic recommendations to the client.
- Understand the client's dispute resolution goals.
- Look at the full menu of dispute resolution options in light of the early review and investigation to determine best handling.
- Where considering alternative dispute resolution approaches, evaluate a hybrid approach.

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