



# Smart Strategies Help Resolve Real Estate Conflicts

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## *Alternative Dispute Resolution in Real Estate Deals*

As attorneys we have a duty to advise the client as to various forms of dispute resolution when a matter is likely to involve litigation. Any unresolved real estate business deal traditionally is resolved by the parties resorting to a lawsuit, unless it is settled. The majority of lawsuits over failed real estate deals or projects settle before trial. The problem is that this happens only after large amounts of money and time have been spent on litigation.

Over the last decade there has been great interest in finding alternative ways to resolve disputes other than the court system. The use of alternative dispute resolution (ADR) processes, such as non-binding mediation and binding arbitration, have become popular both in the legal and business fields, to avoid unnecessary expenses. This includes the use of contracts involving real estate deals and commercial projects. While ADR is not always the best option, parties to a transaction should consider whether to place an ADR clause in a real estate contract or agree to commit to some form of ADR.

## **Disadvantages of Litigation in Real Estate**

There are several disadvantages to litigating real estate disputes. Generally lawsuits are expensive and time-consuming with a possibility of settlement usually after the parties have incurred the majority of costs. A company must consider the hard costs of litigation to include attorney's fees and expenses. These are costs which may not be recoverable under state laws, unless there is a specific provision in the contract that allows it. Once a lawsuit is filed, counterclaims may be filed and the company loses control of the costs. One example is when management and key employees must now take time to respond to litigation, which disrupts normal business



operations. Also, depending on court dockets, lawsuits can take years to get to trial and can continue on a right to appeal.

Furthermore, litigation over real estate deals can damage the reputation of a company, cost jobs and even help their competitors, all while providing unpredictable results. For instance, all court filings are public records and may subject the company to publication in a newspaper, magazine, or the social media. These public records and transcripts of testimony at trial, in turn, are open to any competitor seeking insider information as an advantage. There is no way to predict what a judge or jury may decide in a complicated real estate dispute. If there are complicated facts or expert testimony, the jury and judge may not have sufficient time to understand well, thus possibly rendering an unfair judgment.

### **Alternative Dispute Resolution Techniques and Advantages Mediation:**

On the other hand, there are many benefits to non-binding mediation, which is the reason it is the fastest growing method of dispute resolution. In mediation the parties hire a neutral third party mediator to help negotiate a business settlement. The mediation is confidential and not open to the public and statistics show that most disputes submitted to mediation end in settlement. In fact, a mediation can be scheduled in a matter of weeks, and normally does not take more than one business day to complete. Mediation does not require court approval and can happen before or after a lawsuit is filed.

The mediator chosen does not make or impose a decision, unlike arbitration or a judge in a trial. Rather, mediation is nonbinding and therefore the parties do not give up any rights by participating in mediation. In fact, the sole purpose of mediation is to attempt to negotiate a settlement. This is accomplished by communicating and encouraging offers and counteroffers between the parties. In sum, mediation can offer practical business solutions that are not available in litigation. Mediation clauses can be placed in all types of real estate contracts and deals: development deals, commercial leases, and brokers buy-sell and construction contracts.

### **Arbitration:**

The other ADR process available is binding arbitration. Arbitration is the referral of



the dispute to an impartial third person chosen by the parties, usually a retired judge, lawyer, or a knowledgeable expert, who agree in advance to abide by the arbitrator's award issued after an evidentiary hearing. Generally, both parties have a right to be heard at the hearing but are subject to legal considerations and rules of procedure as followed by the courts. The decision to place an arbitration clause in a contract, or to agree to arbitrate a claim after a dispute has arisen, is a business decision for the company.

There are pros and cons to binding arbitration in real estate contracts. First, arbitration employs a third party with extensive experience and knowledge in real estate. This eliminates the need to educate a judge or jury in the nuances of real estate, unlike a trial. Arbitration can be set up in a matter of months, not years, so it is faster than a trial. However, it is binding and almost impossible to appeal an arbitration award. Further, the costs and expenses of arbitration are significantly less than litigation because it limits attorney's fees associated with scores of unnecessary depositions for discovery. Also, unlike the public court system, arbitration is private and confidential.

## Conclusion

In conclusion, a business should be aware of the availability of ADR in the event a legal claim arises and should always seek the advice of their lawyer as to whether or not it wants to place ADR clauses in its contracts. Using ADR provisions, in particular agreeing to binding arbitration of disputes in real estate deals, should not be considered alone. Mediation and binding arbitration can be useful to economically and efficiently resolve disputes. In many cases, going through an expensive, delayed trial process is not in the best interests of any business. If the dispute can be resolved through ADR, lawyers can assure that clients will have proceedings that will be, more confidential, faster, and more cost efficient than litigation.

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