

Commercial Real Estate Leases CLE Program
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ALTERNATIVE DISPUTE RESOLUTION
PROCEDURES AND PROVISIONS IN
COMMERCIAL LEASES

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- I. Alternatives
 - A. Litigation in Court
 - B. Arbitration
 - C. Mediation
 - D. Tiered negotiation as condition precedent

- II. Objectives
 - A. Fair process
 - B. Resolution
 - C. Reasonable cost
 - D. Fast resolution

III. Trade-offs

- A. Balancing process, protection, cost, and speed
- B. Ability to control ADR through contract
- C. Whose ox is being gored?
- D. Attorneys' fee shifting

IV. Tiered negotiation

- A. Strict time limits
- B. Catalyzing effective negotiations
- C. Saving time and money
- D. Obstruction

V. Mediation

- A. Non-binding, neutral-facilitated negotiation
- B. Attributes
 - 1. Fast
 - 2. Non-binding
 - 3. Confidential
 - 4. Active participation of key players
 - 5. Flexibility
- C. Mediation process
 - 1. Mediation agreement
 - 2. Written submissions

3. Participants
4. Joint session
5. Caucus sessions
6. Written settlement agreement

D. Mediation dynamics

1. Direct contact
2. Lack of filtering
3. Catharsis
4. Emotions
5. Separation
6. Log jams

E. Mediation advocacy

1. Take advantage of unique opportunities
2. Stay loose
3. Look for genuine win/win solutions
4. Interest analysis
5. Managing information
6. Focus on key issues
7. Timing

F. Conditions to successful mediation

1. Proper participants – decision makers
2. Open minds
3. Mutual or at least overlapping interests

4. Avoiding positional bargaining
5. Common assessment of risks and benefits
6. Credibility

G. Application to commercial leases

1. Tailor to leasing issues
2. Limited time and cost
3. Focus attention of principals
4. Low risk as compared with alternatives
5. Managed direct negotiation

VI. Arbitration

A. Advantages

1. Binding
2. Expertise
3. Confidentiality
4. Speed
5. Lower cost
6. Ability to choose arbitrators

B. Disadvantages

1. Lack of process
2. Lack of structure
3. No appeal
4. Overall risk

C. Cost-shifting

1. Attorneys' fees
2. Arbitration fees

D. Sole arbitrator or tribunal

1. Cost and delay of tribunal
2. Better decision-making of tribunal?
3. Provide for in agreement to arbitrate
4. Determine by rules
5. Party-appointed arbitrators
 - a. Devolve into single arbitrator
 - b. Internal advocates or genuine neutrals?
 - c. Riskier
 - d. Potential ethical challenges

E. Baseball arbitration

1. All or none
2. One side or the other
3. Limit options

F. Sponsoring organization

1. Established rules and procedures
2. Expenses
3. Role in arbitrator training, screening, selection

G. Procedures

1. Focus on the hearing
2. Discovery
 - a. Documents
 - b. Depositions
 - c. Expert reports
3. Motions
4. Testimony
 - a. Live witnesses, in person
 - b. Live witnesses, video or phone or Skype
 - c. Affidavits
 - d. Right to confront and cross-examine
 - e. Persuasiveness