

SAMPLE ARBITRATION LANGUAGE¹

Janice Mac Avoy
Fried, Frank, Harris, Shriver & Jacobson LLP

Joshua Stein
Joshua Stein PLLC

For reference and possible use in transactions, we offer four samples of possible arbitration language. The first two samples are primarily intended for ground leases with possible rent resets based on Land Value. The third sample sets out a simpler process for other disputes, typically of lesser magnitude, e.g., reasonableness of withholding consent. The fourth sample is specific to arbitration where the parties cannot agree on the final form of documents for a transaction. We encourage anyone using this language to: (a) review all four options and use whatever provisions they think will work best for their particular situation; and (b) make sure all capitalized terms have been appropriately defined taking into account the overall document.

1. LAND VALUE ARBITRATION (OPTION 1)

1.1. *Definition.* “Land Value” means, on each Land Value Reset Date, the fair market value² of the Land at that Land Value Reset Date, determined under this Article.

1.2. *Agreement and Arbitration.*³ The parties shall try to agree on Land Value at least ___ months before each Land Value Reset Date. If they do not agree by that date, then either shall Notify the other of the impasse. Each party shall within 10 Business Days after the effective date of that Notice designate an Arbitrator, who need not be Disinterested. All appointed Arbitrators shall be MAI appraisers with at least 10 years’ experience appraising properties within the market in which the property is located. Those two party-appointed Arbitrators shall within 10 Business Days designate a third Arbitrator, who must be Disinterested. If the two party-appointed Appraisers cannot agree on the appointment of a Disinterested Arbitrator, they shall apply to the AAA or any successor organization for the appointment of a Disinterested Arbitrator, but the AAA arbitration rules and procedures will be not be used and instead, the arbitration rules and procedures set forth in this Lease shall govern. The Arbitrators shall hold

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² We omit possible details about the definition of Land Value, as this program relates to arbitration, not the nuances of Land Value

³ Alternatively, the parties can agree to the appointment of Appraisers for an appraisal proceeding. In an appraisal proceeding, the parties are not entitled to an arbitration hearing, and do not have the right to present witnesses or evidence or be represented by counsel, all of which they are entitled to in an arbitration. A Land Value determination by Appraisers will work about the same as the arbitration procedures described in text, substituting appraisers for arbitrators.

hearings within [90 days] of the appointment of the Disinterested Arbitrator. All three Arbitrators must agree in writing to determine Land Value in good faith in accordance with this Article. The Disinterested Arbitrator shall select the Final Fair Market Value Determination of either Landlord or Tenant that the Disinterested Arbitrator believes is closest to Fair Market Value, and may not select any other amount as the Fair Market Value. The parties shall confirm that selected Fair Market Value in writing.

1.4. *Failure to Designate.* If either party fails to timely designate an Arbitrator, and does not cure that failure within 10 Business Days after Notice from the other party, which Notice states in capital text “**FAILURE TO TIMELY DESIGNATE AN ARBITRATOR SHALL RESULT IN FORFEITURE OF THE RIGHT TO NAME AN ARBITRATOR AND AN ARBITRATOR SHALL BE APPOINTED ON YOUR BEHALF,**” then the one designated Arbitrator shall appoint the Arbitrator for the other party.

1.5. *Delegation.* Landlord and Tenant may each, by Notice to the other, delegate to one Mortgagee all its rights under this paragraph. That delegation shall: (i) bind the recipient of the delegation Notice; and (ii) remain effective until the designated Mortgagee has either satisfied and discharged its Mortgage of record or given Notice terminating the delegation.

1.6. *Disinterested.* “Disinterested” means collectively, (i) having no economic interest, direct or indirect, in the Land, the Improvements, or any property or business owned in whole or in part by Landlord or Tenant; (ii) not being a partner of, or employed by the same firm as, any nominee selected by Landlord or Tenant; (iii) not being an officer, director, employee, partner, manager, member, shareholder, or other similarly positioned individual of Landlord, Tenant, or any Affiliate of either at the time in question or any time within the previous five years; (iv) not having been an agent or adviser of Landlord, Tenant, or an Affiliate of either in those five years; and (v) not being related, within six degrees of consanguinity, to anyone listed in clauses (i) through (iv).⁴

2. LAND VALUE ARBITRATION (OPTION 2)

Experienced litigators tend to prefer JAMS arbitration over AAA arbitration except for valuation disputes, where AAA typically has a better roster of appraisers. The AAA rules are, however, often regarded as cumbersome and the administration process can be extremely slow.

Here is an example of arbitration procedures for a fair market value determination:

2.1. *Initial Meeting.* Within 30 days after the appointment of the third arbitrator, the three arbitrators will meet (the “Initial Meeting”) and set a hearing date for the arbitration. The hearing shall not exceed five days and shall be scheduled to be held within [90/120] days after

⁴ This sets a rather high standard, perhaps an unrealistic one, if Landlord or Tenant is a major player or even a somewhat active player.

the meeting of the three arbitrators. At the Initial Meeting, Landlord and Tenant shall each submit a Fair Market Value determination (each, a “Final Determination”). If either party shall fail so to submit a Final Determination, then the other party’s Final Determination shall be selected as the Fair Market Value.

2.2. *Arbitration Procedures.* There shall be no discovery in the arbitration. [For space leases: However, on reasonable notice to the other party, Tenant may inspect any portion of the Building relevant to its claims, and Landlord may inspect any portion of the space occupied by Tenant on the floors in issue.] The Disinterested Arbitrator shall establish a schedule prior to the scheduled hearing for the parties to exchange opening written expert reports and opening written pre-hearing statements, rebuttal written expert reports and rebuttal written pre-hearing statements, exchange of written witness lists, including a brief statement as to the subject matter to be covered in the witnesses’ testimony, and to exchange all documents that they intend to offer at the hearing. Other than rebuttal witnesses, only the witnesses listed on the witness lists shall be allowed to testify at the hearings. Each party may present live witnesses and offer exhibits, and all witnesses shall be subject to cross-examination. The Arbitrators shall conduct the five day hearing so as to provide each party with sufficient time to present its case, both on direct and on rebuttal, and permit each party appropriate time for cross examination; provided, that the arbitrators shall not extend the hearing beyond five days. Each party may, during its direct case, present evidence in support of its position and in opposition to the position of the opposing party.

2.3. *Decision.* Following the conclusion of the hearings, the three Arbitrators shall meet and within 10 Business Days following the conclusion of the hearings, the Disinterested Arbitrator shall make a determination of the Fair Market Value by selecting either the amount set forth in Landlord’s Final Determination or the amount set forth in Tenant’s Final Determination, whichever the third arbitrator determines is closest to Fair Market Value of the Land, and may not select any other amount as the Fair Market Rent, provided that in no event shall the rent be less than the Annual Rent. The Disinterested Arbitrator need not issue a “reasoned award” or any explanation of his or her determination. The fees and expenses of any arbitration pursuant to this Section shall be borne by the parties equally, but each party shall bear the expense of its own arbitrator, attorneys and experts and the additional expenses of presenting its own proof. The arbitrators shall not have the power to add to, modify or change any of the provisions of this Lease. After a determination has been made of the Fair Market Value, the parties shall execute and deliver an instrument setting forth the rent based on the Fair Market Value, but the failure to so execute and deliver any such instrument shall not effect the determination of the rent based on Fair Market Value.

3. GENERAL ARBITRATION LANGUAGE (NOT SPECIFIC TO FAIR MARKET VALUE)

3.1. *Use of Arbitration.* Only where this Lease states that any disagreement or impasse shall be resolved through Arbitration (an “Arbitrable Matter”), that Arbitrable Matter, including the scope of any Arbitrable Matter and whether an asserted Arbitrable Matter in fact qualifies as such, shall be determined by arbitration in New York City before one arbitrator (“Arbitration”). The Arbitration shall be administered by JAMS Alternative Dispute Resolution Services in the City of New York (with any successor organization, “JAMS”) under its Streamlined Arbitration

Rules & Procedures, effective July 1, 2014, as amended. [JAMS Rule 28 (baseball arbitration) shall apply

3.2. *Procedural Matters.* In any Arbitration: (a) the arbitrator shall have no right to award damages on account of any unreasonable or allegedly unreasonable withholding of any consent where that withholding is an Arbitrable Matter; and (b) the decision and award of the arbitrator shall be final and conclusive on the parties. The parties consent to entry of judgment based on that award. The party whose position the Arbitrator rejected shall pay all costs and fees, including reasonable attorneys' fees, of both parties in the Arbitration unless the Arbitrator finds that neither party prevailed.⁵ The Arbitration shall be confidential. The parties shall preserve its confidentiality. Except as this Lease states, the Arbitrator shall establish the Arbitration rules of procedure. If any party fails to appear at a duly scheduled and noticed hearing, the arbitrator is hereby expressly authorized to enter an award for the appearing party. This Arbitration clause shall not preclude anyone from seeking provisional remedies in aid of Arbitration from a court. If JAMS (and any successor organization) no longer exists, then Landlord shall reasonably designate a replacement.

4. ARBITRATION FOR DISPUTES ON FORM OF DOCUMENTS

4.1. *Efforts to Agree.* Landlord and Tenant shall use commercially reasonable efforts to agree on a final form of the Documents, on or before [DATE] (the "**Arbitration Date**").

4.2. *Submission of Dispute.* If the final form of the Documents is not agreed to by both parties on or prior to the Arbitration Date, either party shall submit a dispute relating to the documentation that has not been finalized to final and binding arbitration in New York, New York administered by JAMS in accordance with JAMS Streamlined Arbitration Rules and Procedures in effect at that time (or, if JAMS is no longer in existence, then administered by National Arbitration and Mediation ("**NAM**"), in accordance with NAM's Comprehensive Dispute Resolution Rules and Procedures; and if NAM is no longer in existence, then administered by any successor or substantially similar dispute resolution organization). A single arbitrator will be selected pursuant to such rules and procedures (the "**JAMS Arbitrator**").

4.3. *Arbitration Procedure.* The parties agree that: (1) the unsuccessful party in such arbitration will pay to the successful party all reasonable attorneys' fees and disbursements incurred by the successful party in connection with such arbitration, and will pay any fees and disbursements due to JAMS (or the organization administering the arbitration) and the JAMS Arbitrator and, to the extent the "successful" party cannot be clearly identified, each party will bear its own costs and expenses and the parties will pay their equal share of any fees and disbursements due to JAMS (or the organization administering the arbitration) and the JAMS Arbitrator; (2) arbitration pursuant to this Section is intended to be the sole and exclusive method of arbitration to be utilized by the parties and the sole and exclusive dispute resolution method to

⁵ Clients often have strong views on attorneys' fees clauses.

be utilized by the parties concerning any dispute regarding the final form of the Documents; (3) the JAMS Arbitrator shall have no right to award damages; (4) Landlord and Tenant shall submit to such binding arbitration only the terms and conditions of the relevant documents as to which there is a dispute (the “**Disputed Terms**”) and all terms and conditions of the relevant documents not submitted to arbitration (the “**Undisputed Terms**”) shall be deemed to be irrevocably agreed upon by Landlord and Tenant, (5) the JAMS Arbitrator shall follow the [provisions of the Term Sheet [or other document governing the purpose of the disputed documents]⁶, and (6) any decision or award rendered in such arbitration, whether or not such decision or award has been confirmed, shall be final and binding upon Landlord and Tenant and shall constitute an “award” by the JAMS Arbitrator within the meaning of the applicable arbitration rules and Laws. Each party shall submit to the JAMS arbitrator, with respect to each Disputed Term, the language proposed by such party for the Disputed Term (the “Proposed Term”). The JAMS Arbitrator shall determine the Disputed Terms on an issue by issue basis, and shall order, with respect to each Disputed Term, that the parties enter into the Proposed Term submitted by either Landlord or Tenant as to that specific issue, and shall not modify the Proposed Term submitted by the prevailing party as to such issues.

4.4. *Limitations.* The JAMS Arbitrator will be bound by the provisions of this Lease and will not have the power to add to, subtract from or otherwise modify such provisions or any of the Undisputed Terms. The JAMS Arbitrator will consider only the specific Disputed Terms submitted to him/her for resolution, and will be directed to make a determination as to the “successful” party or a specific determination that there is no prevailing party. If any party fails to appear at a duly scheduled and noticed hearing, the JAMS Arbitrator is hereby expressly authorized to enter judgment for the appearing party. The JAMS Arbitrator need not issue a “reasoned award” or provide an explanation of his/her decision. Landlord and Tenant shall each have the right to appear and be represented by counsel before the JAMS Arbitrator and to submit such data and memoranda in support of their respective positions in the matter in dispute as may be reasonably necessary or appropriate under the circumstances. Neither party shall have ex parte communications with any arbitrator selected under this Section [__] following his or her selection and pending completion of the arbitration hereunder.

4.5. *Arbitrator Standards.* Any JAMS Arbitrator acting under this Section [__] shall (1) be experienced in the field to which the dispute relates, (2) have been actively engaged in such field for a period of at least 10 years before the date of his or her appointment as a JAMS Arbitrator hereunder, (3) be sworn fairly and impartially to perform his or her respective duties as a JAMS Arbitrator hereunder, (4) not be an employee or past employee of Landlord or Tenant or of any other person, partnership, corporation or other form of business or legal association or entity that controls, is controlled by or is under common control with Landlord or Tenant and (5) never have represented or been retained for any reason whatsoever by Landlord or Tenant or any

⁶ If no such document exists, the Lease should state the standards the Arbitrator should apply in choosing between the parties’ submissions.

other person, partnership, corporation or other form of business or legal association or entity that controls, is controlled by or is under common control with Landlord or Tenant.

4.6. *Cooperation.* Landlord and Tenant agree to sign all documents and to do all other things necessary to submit any such matter to arbitration and further agree to, and hereby do, waive any and all rights they or either of them may at any time have to revoke their agreement to submit to arbitration and to abide by the decision rendered.