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IN THE SPOTLIGHT

Getting a Lease Signed in 20 Days

A Capital Markets Approach

By Anthony Casareale

In today's uncertain economy, time can be the worst enemy for a landlord trying to get a lease signed.

What can a landlord do to get that critical lease signed as soon as possible so that a competing landlord or global event does not cause this prospective tenant to reconsider? Today, more than ever, landlords need to manage critical lease transactions, if not all lease transactions, in the same way they manage capital markets transactions. If a landlord applies principles utilized in capital market transactions, a lease should be "closed" in under 20 days.

Do Not Spend Too Much Time on a Letter of Intent, Get a Lease Draft Out

If the parties and their brokers have exchanged more than two drafts of letters of intent or term sheet without reaching full agreement on all matters, the landlord should consider having a lease prepared by its counsel and distributed. So long as the initial space and term are agreed to, as well as base rent and escalations, why exchange more drafts and endure more conference calls on a letter of intent? That time and energy should be focused on the lease itself.

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Alternative Dispute Resolution As a Problem-Solving Device

By Walter Goldsmith

The past decade has featured massive growth in lawsuits, including those involving real estate. Sometimes these lawsuits have been unavoidable, arising from insolvencies or foreclosures. Often, however, they have resulted from disagreements between property owners and tenants or contractors. The time and money spent on these disputes has caused a needless and crippling drain on the resources of the parties.

Practitioners have observed escalating disillusion of clients with litigation as the primary vehicle for dispute resolution. Sources of dissatisfaction have included, among other things, the length, complexity, expense and general rancor involved. This has been especially true during the recent dramatic and continuing downturn in the economy. Nor are such complaints new. More than 80 years ago, for example, Judge Learned Hand expressed similar views:

> The price we pay for unrestrained advocacy, the atmosphere of contention over trifles, and the unwillingness to concede what ought to be conceded, and to proceed to things which matter. Courts have fallen out of repute; many of you avoid them whenever you can, and rightly. About trials hang a suspicion of trickery and a sense of result depending upon cajolery or worse. I wish I could say it was all unmerited. After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.

"The Deficiencies of Trials to Reach the Heart of the Matter," address to the Association of the Bar of the of the City of New York, 1921.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) — principally arbitration and mediation — has for some time been successfully used in a wide variety of commercial disputes. In addition to such areas as labor/management relations, with which it has been traditionally associated, ADR has been used in such diverse areas

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as medical malpractice, accounting and professional services disputes, claims regarding health care and securities, matrimonial matters, employment discrimination, sexual harassment and, recently, in disposing of creditor claims in bankruptcies. ADR has also long been used in resolution of real estate disputes, including those relating to real estate valuation, commercial leases — notably leases for retail space — and construction issues. The widely used American Institute of Architects (AIA) construction agreement contains a provision calling for arbitration of disputes among the parties, and requiring mediation before an arbitration can be initiated.

ADR has enjoyed a warm reception and high success rates in most of these areas. A notable former exception was the securities industry, in which claimants complained that arbitrations, especially, were controlled, and the outcome skewed, by the industry. Fortunately, the securities industry, now governed by a regulatory body known as the Financial Industry Regulatory Authority ("FINRA"), has a highly effective mediation facility that can be used as an alternative to arbitration. Despite extensive use in business and professional settings, arbitration and mediation have been underutilized in commercial real estate disputes. The arbitration and mediation processes are described below.

The Role of an Arbitrator

Most practitioners have at least passing familiarity with arbitration and mediation as dispute resolution devices. However, they differ widely. Arbitration is an adjudicative process. The role of an arbitrator, not unlike that of a judge, is to hear and determine, with the determination binding and ultimately enforceable in much the same manner as a judgment. A major advantage of the process is to allow the parties to choose the arbitrator(s) after receiving information regarding their credentials and background. As a result, panel members can be obtained who are objective and expert in the area of the dispute. This option, not available to litigants, fosters expedited dispositions without the need to educate the arbitrator regarding the legal and practical context in which the dispute has arisen. Unlike litigation, in the arbitration process, documents and records are kept confidential, except with the consent of the parties. Communications with the arbitrator can be made only with the other party(ies) present or through the American Arbitration Association or other supervising entity, if any.

Further savings in time and cost are effected by: 1) the power of the arbitrator to impose a hearing schedule that will not be changed without good cause; 2) the relative informality of arbitration proceedings; 3) suspension of many of the formalistic rules of evidence; and 4) truncation of extensive discovery, frequently unavoidable in litigations. For example, a well-known, publicized case administered by the American Arbitration Association under its Large Complex Case Program involved the valuation of a prime Park Avenue, NY, building. A three-member panel was selected, consisting of a commercial real estate owner, an expert in appraisal and valuation techniques, and this author as the real estate lawyer. The case was heard, and a nine-figure award rendered, in less than six months. It can be expected, and the parties agreed, that litigation of this matter, including motions and appeals, would have taken many years.

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Cooperative Surety Can Help Salvage a Defaulted Project

By Kenneth M. Block and John-Patrick Curran

Picture this scenario: You are the owner/developer of an office building that is approximately 50% complete and you are operating under a tight time schedule to complete the project and deliver possession to several tenants. Your general contractor informs you that, due to economic distress, the last requisition funded by your lender was used to pay subcontractors on a different project. You also are informed that the general contractor plans to close its business and that several subcontractors are preparing to file liens. The project is grinding to a halt.

By working with the general contractor's payment and performance bonds surety, the project can be resurrected and placed on a sound path to completion. This article provides a helpful guide to the practical operation of payment and performance bonds in the context of an undisputed contractor default.

The Performance Bond

Under the terms of the most commonly used form of performance bond (AIA Document A312-1984) the surety is, in effect, the guarantor of the contractor's performance, conditioned only upon the owner's fulfillment of its payment obligation under the construction contract. The trigger for the surety's obligation is a default by the contractor. However, prior to the declaration of a contractor default, the owner must comply with provisions of the performance bond requiring the owner to notify the surety and the contractor that it is considering declaring a "Contractor Default" and to request a conference with the contractor and the surety "to discuss methods of performing the Construction Contract" (AIA Document A312, paragraph 3.1).

This so-called 3.1 conference must be held not later than 15 days after the receipt of the owner's notice by the contractor and surety. Regardless of the outcome of the conference, the owner may thereafter declare a default, but no earlier than 20 days after the request for the 3.1 conference has been given. The owner must also agree to pay the balance of the contract price to the surety in the event a contractor default is declared.

Four Options

If the surety is satisfied that a contractor default exists and is prepared to assume responsibility for the completion of the construction contract, it has four options under the bond: 1) arrange for the contractor, with the consent of the owner, to complete the construction contract; 2) undertake to perform and complete the construction contract through its agents or independent contractors; 3) obtain bids or negotiated proposals from contractors acceptable to the owner for new contracts to complete the project and pay to the owner damages incurred as a result of the contractor default in excess of the balance of the contract price; or 4) determine the total amount for which it may be liable to the owner and tender payment thereof in full satisfaction of its obligations. (Generally speaking, the surety will select one of the foregoing options only where the contractor's default is undisputed. In the absence of an undisputed default, the surety will invariably side with the contractor and deny liability under the bond, leaving the owner with two defendants—albeit with one presumably possessing assets — should litigation ensue.)

Returning to our scenario, promptly after the owner learned of the contractor's misapplication of the loan proceeds (a diversion of trust funds), it notified the surety and contractor that the owner intended to declare a contractor default and requested a 3.1 conference. At the conference, the surety, accompanied by an outside claims consultant (but without the contractor, which by then was functionally bankrupt) met with the owner to discuss the circumstances of the contractor's default and to consider which of the four options under paragraph 4 of the performance bond would be most appropriate.

Given the concession by the contractor that monies were diverted and that it had discontinued operations, the surety authorized the owner to begin a search for a replacement contractor. The surety also agreed to arrange for its consultant to contact each subcontractor to determine amounts due and owing as well as balances to complete the work. Further, the surety requested access to the site for the purposes of determining the quality and progress of construction to assist it in making a determination as to which of the remaining options under paragraph 4 of the bond it would follow.

The 3.1 conference then concluded with an agreement that the contractor would be formally terminated and that a replacement contractor would be retained to complete the project. Whether the new construction contract would be with the surety or with the owner or whether a tender payment would be made by the surety was left open for further discussion.

Subcontractor Negotiations

A determination had also been made at the 3.1 conference that it would be most economical to complete the project utilizing substantially all of the existing subcontractors, and the surety undertook to negotiate ratification agreements with each subcontractor. The ratification agreements would recite the original subcontractor amounts, the approved change orders, the value of work completed as of the termination of the general contractor, the amount of retainage, the amount due, and the remaining contract balance.

By reason of the payment bond, the surety would also agree to pay

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Cooperative Surety

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the subcontractors the amounts currently due (which had been diverted by the contractor). For their part, the subcontractors would ratify their existing subcontracts and agree to honor all guaranties and warranties and to be bound to the surety or a successor contractor to complete the subcontract work. Where agreements could not be reached with subcontractors and disputes as to amounts due led to the filing of liens the surety undertook to discharge those liens through bonding.

New Contractor

The challenge facing the owner and the surety was determining a fixed price for the completion of construction. The owner required a fixed price to satisfy its lender that the project could be completed within the construction loan amount and the surety required a fixed price to determine its ultimate exposure under the performance bond.

A construction manager was then mutually selected by the owner and surety to secure the site and investigate existing conditions, with compensation on the basis of a monthly fee. At first, the construction manager was only willing to complete the project as an agent of the owner without risk, contending that it did not have preexisting relationships with the subcontractors and it was concerned that latent defects might result in unknown costs.

However, because of the need for a fixed price, both the owner and surety encouraged the construction manager to engage in whatever investigation and testing was necessary to satisfy itself as to the quality of the work and the scope and cost to complete. The construction manager also interviewed each subcontractor to satisfy itself that a new working relationship could be established, and confirmed that the subcontract balances were sufficient to complete the work. The construction manager also performed a detailed scheduling analysis to determine the time to complete the project and its cost of supervisory personnel.

At the conclusion of the construction manager's due diligence, a guaranteed maximum price was established, providing for a substantial contingency for the benefit of the construction manager in the event the ultimate project cost exceeded its estimate. Protections were also added to the construction management agreement relating to latent defects arising from the work of the defaulted contractor.

Finally, based on the ratification agreements, the subcontracts were assigned to the new construction manager, which took over full responsibility for the completion of the project at a fixed price acceptable to the owner, the owner's lender, and the surety.

Owner's Agreement

During the several months between the contractor's default and the conclusion of an agreement with the new construction manager, the owner engaged in continuing negotiation with the surety as to the surety's full liability under the performance bond which, in this case, had a penal sum of 50% of the original contract sum. (Often, in order to save premium cost, performance bonds are issued for less than the full amount of the contract sum. In our scenario it was believed that a penal sum equivalent to 50% of the contract sum would adequately protect the owner against a contractor default. As matters developed, that belief was accurate.)

It quickly became apparent that the surety wished to follow the fourth option under the performance bond by tendering payment to the owner of a negotiated amount representing the surety's potential liability to the owner under the bond, which could include: 1) the costs to correct defective work and complete the construction contract; 2) any additional legal, design professional and delay costs resulting from the contractor's default; and 3) liquidated or actual damages caused by delayed performance or nonperformance of the contract. Under our scenario, the cost to complete the project greatly exceeded the remaining contract balance; the owner had incurred legal, architectural, project management and engineering costs directly related to the contractor's default; and the owner anticipated incurring additional costs to carry the construction loan (including the payment of real estates taxes) until the project was completed.

After extensive negotiations, the parties reached an agreement as to the amount of the surety's tender. The tender agreement with the surety also covered the assignment of the ratification agreements, the handling of latent defects (for which the surety would remain liable), and potential claims of subcontractors with whom ratification agreements could not be reached.

Having successfully negotiated a fixed price agreement with a new construction manager and a tender agreement with the surety which allowed the owner to recoup a substantial portion of its damages resulting from the contractor's default, the owner was able to obtain approval from its construction lender and loan proceeds began to flow, facilitating the resumption of construction.

Conclusion

This scenario illustrates the steps that can be taken with a cooperative surety in salvaging a project following a contractor's undisputed default. In such a circumstance, it is in the interest of the surety to assist the owner in mitigating its damages by bringing the surety's full resources to bear and working with the subcontractors and a replacement contractor to contain the cost to complete the project. Unlike a scenario where a contractor's default is in question, acrimony and litigation were avoided with a successful outcome to both owner and surety.

In the Spotlight

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Review Your '2005 Lease Form'

Often, a lease draft is prepared by counsel from the landlord's standard form without much thought or input from the landlord. In today's competitive marketplace, the landlord must focus on the initial lease draft. The landlord must not only be sure that the agreed-to terms are accurately reflected, but it must also give consideration to more "balanced" lease provisions that are reflective of a renters' market.

This approach should short-circuit the "heavy mark-up" that tenant's counsel typically provides. Simple concessions in the first draft that would be, and in the past have been, agreed to in a final comparable lease will cut days — and perhaps weeks — off the negotiation process without adversely affecting the ability of the landlord to finance or sell the building.

Since the current downturn in the commercial real estate market may be with us for a while, it may be a good time to revisit your standard lease form and consider how many of those tough provisions that you inserted earlier this decade are really necessary.

The Capital Markets Transaction Approach

The 'Kick-Off' Call

Now, the capital markets approach. Landlords should initiate a "kick-off" call with all parties on the day that the initial draft is distributed. The landlord or its counsel should take the lead on the "kick-off' call and maintain an upbeat and positive tone. The landlord should use terminology utilized in capital market transactions — talk about "closing," a checklist, etc. The "closing date" should be set by the landlord in this call no more than 20 days thereafter. It will be difficult for anyone on the call to object to the notion of getting the deal done as soon as possible.

The 'Closing' Schedule

The landlord can then ask the tenant, its broker and counsel when written comments to the initial lease draft can be expected. That date should typically be in five to seven days. Anything longer should be challenged on the call. The landlord should then establish a closing schedule for negotiations based on that input.

The landlord should have its counsel review the initial lease comments with tenant's counsel in an effort to eliminate as many points of disagreement as possible. Thereafter, there should be no significant lawyer negotiations without the principals involved. Also, where possible, the landlord needs to be flexible and concede on matters in order to keep the momentum in a negotiation

Use a Closing Checklist

In advance of the "kick-off" call, the landlord, its broker and counsel should create a closing checklist. No landlord could imagine closing an acquisition and/or financing transaction without a checklist. Initially, the closing checklist can remind the parties that a letter of credit, insurance certificate and the like are needed. The landlord should also have its counsel update the closing checklist to list all unresolved lease comments. The checklist should be sufficiently detailed so that the parties do not necessarily have to refer back to the lease during discussions.

The checklist is an indispensible visual aid. It focuses the parties on three pages, and not the lengthy lease document. Using a checklist allows the parties to monitor the progress of negotiations as items are checked off.

In the end, a landlord needs to create the same sense of urgency in closing a lease deal as pervades a $100 million acquisition closing. The landlord's team must press their counterparty on the tenant's team in a coordinated way, keeping the focus on closing, which means resolving open issues and disagreements every day.

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Limited Grounds for Appeal

Because of extremely limited grounds for appeal, arbitration awards are seldom challenged and very rarely overturned. The virtual waiver by the parties of their rights to appeal adds to the efficiency of the arbitration process. It also serves as a spur to arriving at a settlement before the award is rendered. Appeal rights will not be readily relinquished, however, unless the parties have implicit confidence in the neutrality and qualifications of the arbitrator, and the orderly administration of the case.

Mediation is a process in which a neutral assists the parties in reaching an agreement. The mediator has no power to issue an award or to impose a resolution. The role of the mediator is to create and maintain a climate that maximizes the possibility of settlement. Of course, the person(s) empowered to make final decisions for the respective parties must be present. Mediators may initially act as "agents of reality." Especially at the beginning of the process, the mediator is likely to point out, separately and repeatedly to each party, the apparent weaknesses in its case, the uncertainties of success in an adversarial proceeding and the unpleasant and expensive litigation alternative that may lie ahead in the event that the mediation is unsuccessful. Like arbitration, mediation proceedings are confidential except when consented to by the parties. In addition, the mediator may not disclose to any party information given by another party unless specifically authorized to do so.

A Skillful Art

Mediation is a skillful art. The mediator's role may be more or less active, depending on the dynamics of the process and what is needed to help move the parties toward settlement. In some cases, once having helped to set the process in motion, mediators may adopt a less active

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"maintenance" role, allowing the dialogue between the parties to continue, while seeking to head off an impasse that could result in derailment. Even in this less active role, the mediator may be needed when snags develop. For example, the mediator must act when a party is represented by a team rather than by an individual, and some members of the team disagree with a proposed solution acceptable to other members.

On the other hand, the mediator may take a very active role, like the conductor of an orchestra, in which he/she helps each side to fashion successive proposals as the parties move closer together. Mediators must use all tools at their disposal — creativity in proposing solutions, use of interpersonal dynamics, and knowledge of the subject matter to try to develop "win-win" solutions to disputes between parties. The mediator can also serve as a "cover" to make proposals necessary for settlement that the parties may have considered privately but are unwilling to introduce for tactical or political reasons.

Mediation is hard, concentrated work. Preceding the mediation, the parties must submit pre-mediation statements summarizing their positions. These will be read and absorbed by the mediator. If there are questions or suggestions, the mediator may speak jointly or *ex parte* to any party(ies) and/or their counsel. The mediator must have refined and sophisticated knowledge of the subject area and a thorough understanding of the dispute and the positions of the parties before the mediation begins. He/she must be convinced that the mediation will succeed and communicate that conviction to the parties.

'Empowerment'

In a relatively recent development, there has arisen a new concept of transformative mediation, which emphasizes "empowerment" of the parties to express their needs and feelings, and "recognition" of those of the other party. The parties are encouraged to define their own needs and objectives while understanding those of the other side. Transformative mediation is seen by proponents as a way of reaching the roots of conflicts between the parties instead of focusing on solutions to immediate problems. They believe that the "problem-solving" approach involves suppression of

Transformative mediation has been especially effective in areas where the emphasis is on the relationship of the parties ...

feelings and long-term needs in order to reach a short-term solution. Transformative mediators are, as a result, seen as less directive than problem solving mediators, with the transformative approach using a broader context for moving the mediation ahead. Transformative mediators may consider the mediation a success, even though no solution has been reached, if improved understanding and communication between the parties has been achieved.

Transformative mediation has been especially effective in areas where the emphasis is on the relationship of the parties, as in matrimonial situations, and conflicts involving families, neighbors and co-workers. Problem solving mediation is generally more effective in business disputes. Of course, the transformative and problem solving approaches must be used where appropriate to forward the needs and objectives of the clients, the parties in the dispute. It is up to the mediator to understand the needs of the parties — spoken and unspoken — quickly, and to help them move towards their respective objectives. When this has occurred, the parties will respond and will be willing to trust the mediator. Among the clues used by mediators are the body language, facial expressions, speech patterns of the parties, and interactions with counsel. The mediator must "surround" him/herself in the cross-currents between the parties and counsel so as to become a part of the process.

Even in problem-solving mediation, there may be a significant emotional component as, for example, conflicts between originators of businesses and "sweat equity" partners. These feelings need not be suppressed by the mediator as diversions to a solution. On the contrary, the mediator must pay attention to those feelings, and may actually be able to use them as components in a solution. These considerations are especially important where there will be a continuing relationship between the parties. At the conclusion of a successful mediation, the participants should feel a sense of satisfaction, even camaraderie, in collaborating to "untie" a knot in their relationship.

Being Directive

By the same token, transformative mediations may be "directive" in helping the parties to accomplish their goals. Transformative mediators must be alert to indications that are useful in empowering the parties to express their needs and feelings and to recognize those of the other party(ies). The mediator sees these opportunities and encourages the parties to pursue them.

At the end of the mediation process the mediator, like the catalyst in a high school chemistry experiment, is scarcely in evidence. By allowing the parties to arrive at their own understanding, the mediator has maximized the possibilities for a favorable outcome. As authors of the resolution, the parties have made an investment in its successful implementation.

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When Tenants Do The Work, Protect Your Asset

By Ira Fierstein

With more and more landlords delivering raw space to tenants, or otherwise providing that the premises are to be delivered in "as-is" condition, tenants are performing work that was customarily performed by landlords. Consequently, tenants are demanding larger construction allowances, and added care must be taken when representing landlords in these situations, to ensure that tenants' work is completed lien-free and that construction reimbursements are not paid prematurely.

Safeguards

Lease forms prepared by landlords have historically included safeguards that provide protection to landlords when tenants are permitted or required to complete improvements to the premises. In addition to specifying tenant design criteria that must be satisfied, the lease typically requires conformity with laws, approval of plans and specifications by the landlord, and delivery of adequate insurance by the tenant's contractor, which insurance should name the landlord and the landlord's mortgagee as additional named insured parties. But as construction allowances skyrocket and more and more states are permitting subcontractors to place a lien on properties, even though they may have previously delivered lien waivers, these customary protections may be inadequate.

Before the Tenant Begins Work

Prior to allowing a tenant to commence any work, and in addition to requiring the procurement of all necessary permits and the delivery to landlord of evidence thereof, a landlord must receive adequate assurances that its tenant has the financial ability to complete the job once started (this assumes the landlord is not funding the construction allowance until the work is completed or is not funding 100% of the costs). Where permitted in the jurisdiction, the landlord should insist on the execution of "no-lien" contracts and requiring the posting of notices of landlord "non-responsibility" confirming the no-lien nature of the contract on the premises. Although often resisted by tenants who are required to pay for such protection, a surety company performance bond provides an avenue to protect a landlord if a tenant abandons the project once it is started. In addition, personal guaranties by individuals of substance who are connected to the tenant and who have the wherewithal to pay for construction costs may further protect a landlord from loss from mechanic's, materialmen's or other liens. If none of these solutions are available, or are viewed as inadequate, the landlord should require a letter of credit from the tenant to secure the tenant's construction obligations, or require the establishment of a construction escrow with safeguards prior to the release of funds.

Contractors and Subcontractors

Today, more than ever before, contractors are receiving payments for tenant improvements, either directly from the landlord, or from the tenant, but then not paying their subcontractors (even where the subcontractors have delivered lien waivers). *See* article by Block and Curran, *Infra*, page 3. It is, therefore, imperative that the landlord protect itself against such contractor misconduct via the lease documentation. The lease should recite that the tenant's construction contract must require the completion of the tenant's work in accordance with approved plans and specifications and must be in the form of the current edition of Document A101 or A107 of the American Institute of Architects. In addition, the landlord should insist that the contractor furnish a payment and performance bond in the form of AIA Document A311 equal to at least double the cost of the tenant's work. The bond should name the landlord as an additional beneficiary. Until the bond is delivered to and accepted by the landlord, the tenant and its contractors should not be permitted to commence any work at the premises.

Cost Overruns

To protect against cost overruns, the landlord should insist that any construction contract withhold a portion of the payment to the contractor until the work is completed and all requisite parties have signed off on the final construction. Typically, a 10% holdback is acceptable to all parties.

Many of the foregoing additional safeguards are being mandated or encouraged by the landlord's lender. Because they are fearful of foreclosing or taking back a deed on property that has unfinished tenant construction or potential or existing mechanics liens in place, lenders are unwilling to approve leases without performing their own financial investigation of a tenant or requiring: 1) an assignment of any tenant letter of credit or bond; or 2) written approval rights in any construction escrows.

Depending on the respective financial strengths or weaknesses of the landlord and the tenant, a strong national tenant may have the leverage to resist some of those requirements, especially where the construction allowance is significant. In such instances where the tenant has great coverage or bargaining power, it may demand that the landlord either deliver a letter of credit to the tenant, or establish a construction escrow to

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Tenants

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deposit the amount of any construction allowance. If this cannot be avoided, the landlord should make sure its money is funded last out of the escrow (after the tenant deposits the balance needed to complete the work, as shown by a continuously updated budget, signed construction contract, and owner's and contractor's sworn statement), and the landlord should also control the release of funds from escrow.

CONFIRMATION

Prior to the payment of any construction allowance, the landlord should confirm that the work was completed in a satisfactory manner, which should be confirmed by the landlord's own architect. In addition to receiving sworn statements and final lien waivers from the general contractor, the landlord should require these from all subcontractors and material suppliers as well. Depending on the jurisdiction, it may be insufficient to rely on subcontractors' lien waivers given before payment to the subcontractors. Some jurisdictions, such as Illinois, allow subcontractors to file liens against property, in certain circumstances, even though they previously signed final lien waivers. Unless the landlord receives adequate verification that all subcontractors and material suppliers have been paid in full, the landlord should reserve the right to pay the general contractor, subcontractors and material suppliers directly (or at least the right to issue joint checks payable to the tenant and such parties or jointly to the contractor and such other parties — where the landlord is paying the contractor directly), together with the right to withhold or deduct said amounts from the construction allowance (if given to tenant), or the amount the landlord is paying directly to the contractor (if it relates to work required of the landlord or paid directly by the landlord).

Prior to the payment of any construction allowance, the landlord should confirm that the work was completed in a satisfactory manner, which should be confirmed by the landlord's own architect.

Finally, if the lease terminates for any reason prior to its stated expiration (whether or not attributable to a tenant default), the lease should require the tenant to reimburse the landlord for the unamortized amount of the construction allowance, based on a straight line amortization, which reimbursement obligation should expressly survive the termination of the lease. Of course, the best solution is for the landlord not to offer any cash allowance at all, but to provide an abatement of fixed rent amortized over the initial term of the lease equal to what the construction allowance would have been. Should the lease terminate early, the landlord would not "fund" the balance of the allowance.

CONCLUSION

If the landlord is careful and follows the above suggestions, and refuses to give in to the tenant's demands for construction allowances without adequate protection, the landlord will be successful in covering its asset.

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ADR

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RESOLVING COMMERCIAL REAL ESTATE DISPUTES

Mediation, currently underused, can be very helpful in resolving commercial real estate disputes. Frequently arising issues, such as those involving real estate tax and rent escalations, common area charges, use of space, cost of utilities, service disruptions, casualty insurance issues, restrictive covenants, availability and maintenance of parking facilities, including proper lighting, condemnation and construction issues are often sources of litigations, which continue for many years.

Predictably, very few mediated settlement agreements fall apart once the mediation has concluded. Partly for this reason, mediation is especially useful in situations where the parties will have an ongoing relationship, as opposed to those where the dispute involves a "one-shot deal." It can be expected that a history of non-adversarial dispute resolution will strengthen the business relationship of the parties and enhance their ability to dispose of future disagreements successfully.

CONCLUSION

Counsel in a wide range of specialties are faced with a litigation-weary marketplace, hungry for speedy and inexpensive dispute resolution procedures. With steadily emerging demands of clients on all levels for cost-effective service, lawyers dare not fail to respond. The availability of ADR continues as a valuable tool, useful to potential adversaries and counsel seeking to avoid the rigors and expense of litigation. This is certainly true as to disputes where retail and commercial leasing are involved. These are areas in which ADR procedures have powerful potential for productive use. Hopefully, ADR is a resource that will be recognized and used by potential litigants.

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