Resolving Real Estate Disputes

by Gerald M. Levy, CRE

A man who is master of himself and always acts with sang-froid has a great advantage over him who is of a lively and easily inflamed nature.... for in order to succeed in this kind of work [negotiation], one must rather listen than speak; and... phlegmatic temper, self-restraint, a faultless discretion and a patience which no trial can break down—these are the servants of success.

- François de Callières, Court of Louis XIV
On The Manner of Negotiating with Princes, 1716

Traditionally, real estate industry disputes rely on negotiation for solutions; if negotiation fails, litigation is often initiated. This survey article details generic real estate disputes that fit into this common framework. A subsequent examination of negotiation — the core method of conflict resolution — emphasizes a range of strategies, tactics, behaviors, and processes which permeate a wide range of other dispute resolution methods that are briefly described. The contested assets can be homogeneous or heterogeneous and, individually, can be divisible or indivisible. The assets may be physically embodied or only conceptual rights.

GENERIC REAL ESTATE DISPUTES

Generic disputes include, but are not limited to, the following issues:

- The land value, percentage rate of return, and/or economic land rent for a renewal period of a land lease agreement;
- The economic rent for a renewal term for office, retail, industrial, or special-purpose space when the renewal period is to be set at the "going rate";
- The appropriate remedy for lease disputes involving revenue issues, expense escalation reimbursements, and operational, occupancy, and use issues;
- The market value of land, improvements or both as provided in a

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lease agreement that grants the lessee a purchase option at an unspecified price;
- The market value of a partial interest in real estate including a mortgage or an equity position, leased fee, leasehold estate, sandwich leasehold, sub-leasehold, air rights, transferable development rights, subsurface rights, easement, and life estate and remainderman interests;
- The market value of a fractional ownership interest in a property in order to arrive at a "buyout" price under the terms of a partnership or other joint-ownership agreement;
- The market value, if any, of a future purchase option, right of refusal, right of last offer, and similar features;
- The appropriate remedy concerning a dispute about the terms and conditions of a real estate contract or partnership agreement;
- A decision in the construction phase of a real estate development concerning timing, scope of work, quality, and/or costs and the apportionment of obligations and benefits among the architect, owner, contractor, and tradesmen;
- A decision on whether or not a real estate commission has been earned and is payable;
- The appropriate remedy in a title dispute;
- The appropriate remedy in a dispute about the terms and conditions of a real estate loan or loan default;
- A decision rendered in a condominium, cooperative, or owners' association dispute;
- A decision in a tax *certiorari* dispute;
- A decision concerning just compensation in a property condemnation case;
- The equitable allocation of a portfolio of real estate assets among claimants arising from an estate settlement, divorce settlement, the unwinding of a joint-venture, or the dissolution of a business entity;
- Resolution of a dispute involving land use and zoning issues;
- The relative impact on real estate value of adverse environmental conditions;
- A decision concerning a dispute involving hotels, motel, clubs, or casinos;
- A decision in a dispute between real estate investors residing in different countries.[1]

THE NEGOTIATION PROCESS

Negotiation may resolve many of the generic disputes which have been categorized. It is an interest-based decision-making process with the participants bargaining to resolve differences of opinion concerning the apportionment of responsibilities and benefits. A great dispute resolution practitioner, Theodore W. Kheel has concluded, " It is the primary technique of conflict resolution."[2] Negotiation is a frequently employed resolution method in the economic, political, social, and personal spheres.

Any specific negotiation often begins with no rules and always with no accepted facts. The respective negotiators must reach a consensus concerning a set of rules for conducting the negotiation; otherwise, confusion and chaos are likely and the chance for a positive outcome is much diminished.

Similarly, at the commencement of the negotiation process there are no established facts or non-facts (even if in the greater world beyond the negotiation certain information is so classified). In a particular negotiation, the conversion of information to a "fact" is dependent on its assertion as such by one of the parties and whether or not the other party accepts it, implicitly concedes it, challenges it, or rejects it. This dynamic is one that is constantly experienced in negotiation. Relative degrees of power and persuasiveness determine which assertions become recognized facts.

The stages of the negotiation process can be segmented into phases. This author prefers a four-phase model:

The ***pre-negotiation phase*** consists of exploring, planning, and preparing a detailed presentation concerning the issues to be negotiated and the formulation of strategies and tactics for achieving one's goals. One should rank the relative importance of the range of identified issues. In this phase, one seeks out as much information as possible about the dispute and the composition of the other negotiating team and its viewpoints. Role-playing may be utilized to develop many of the arguments that could be used by the other party. Consequently, the persuasiveness of the presentation can be strengthened.

The ***presentation and negotiation phase*** consists of general comprehensive statements identifying positions and goals, non-negotiable issues, give-ups, and reasons. The goal is to exercise best efforts to achieve the other party's understanding of your point of view; to build trust; constructively question the opposing position; create doubt; and promote changes in points of view. Give and take has hopefully begun and continues.

The ***intense negotiation phase*** includes continual reframing of requirements, heavy bargaining,

and bidding leading to "the crunch" or "...that point in a negotiation when no decision becomes a decision. Until the crunch, the parties will most often hesitate before making any significant changes in their positions. The crunch signals that the time for decision-making has arrived with rewards for the right decision and penalties for the wrong one."[3]

The ***agreement and closing phase*** is based on all the prior activities and leads to a provisional agreement. This agreement is then embodied in a writing which must be ratified by all necessary constituencies including senior management and any third party ratifiers. When all approvals have been obtained, the transaction is closed and any post-closing implementation or monitoring is performed.

COMPETITIVE, COOPERATIVE, INTEGRATIVE, AND COMPOSITE CHOICE STRATEGIES

Competitive, cooperative, integrative, and composite choice strategies may be chosen by a party to a negotiation for the communication of views and implementation of actions that flow from a specific negotiating position.

A negotiator pursuing a ***competitive*** or ***distributive strategy*** presents a very tough and rigid position; provides little information; employs aggressive arguments variously embodying demands, ultimatums, threats, tricks, and bluffs; and offers no or few concessions. A competitive strategy assumes a zero sum game where one side's gain is the other side's loss.

In a ***cooperative strategy*** the negotiator presents his case in a constructive manner; supplies a lot of information; employs seemingly moderate, balanced, and feasible arguments; and may even offer a minor initial unilateral concession. The governing assumption is that a constructive relationship embodying respect, reliability, and trust will produce a fair and equitable solution for both parties. On a trusting basis, each side may be motivated to re-consider its own position as well as the other side's views and make reasonable adjustments to arrive at an agreement and maintain a future relationship.

In an ***integrative strategy,*** the negotiators do not assume a zero sum game and after initial presentations, may use "brainstorming" sessions to try to provide maximum benefits to both parties. In brainstorming, the existing conflict paradigm is broken down and new ways of thinking about the problem are encouraged. This results in additional options for solving the problem, including opportunities for value creation rather than each side just claiming an existing finite value. The basic guidelines of this strategy are: "1). separate the people from the problem; 2). focus on interests not positions; 3). invent options for mutual gain; and 4). insist on objective criteria."[4] The goal of an integrative strategy is a fair settlement arrived at in a friendly and efficient manner. Both parties may equitably share in a larger array of benefits beyond those initially contemplated by the parties.

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Utilizing a ***composite choice strategy*** a negotiator must decide at each step of the process whether he should employ a competitive, cooperative, or integrative approach. A composite set of choices may embody leverage and seeking advantage but also involves problem solving, creative thinking, and a convincing rationale combined with balanced judgment. As the parties feel more comfortable with each other and are more willing to modify their positions, a variant of this composite choice strategy may occur wherein the parties move together from a competitive strategy to a cooperative and/or integrative mode. The end goal is a reasonable outcome for each side.[5]

THE NEGOTIATOR'S DILEMMA AND THE NEGOTIATION DANCE

Two other concepts which are worth considering are the ***Negotiator's Dilemma*** and the ***Negotiation Dance.*** Consider: one could choose a cooperative, integrative, or composite choice strategy and energetically think about the existing issues in new ways of creating value. The other side uses a competitive strategy and just claims value. Will the party having taken the high road, necessarily lose in the negotiating process? [6]

No, but they will have to employ tactics which enable them to convince the other side that its aggressive and competitive style will not be allowed to run roughshod over their position. Among the tactics for deflecting an aggressive competitive strategy are taking a breather to maintain one's "cool"; listening, acknowledging, and agreeing, when possible, thereby reinforcing respect for emotions and opinions; but requiring substantiation, reframing views and creating doubts that an aggressive strategy will achieve a total victory in the negotiation. It is wise to leave the other party leeway for a dignified retreat and flexibility for the concessions which are likely to accompany it.[7]

The ***Negotiation Dance*** consists of the pattern of concessions by each side which attempt to close the gap in substantive positions. Negotiation tactics include presentations, offers, probings of evidence, and counter-offers, as well as more aggressive methods such as threats, ultimatums, bluffs, and tricks. Generally, tactics lacking in credibility will work against one's goal of reaching a satisfactory agreement.[8]

THE CONTEXT OF NEGOTIATION

No matter what strategy is selected, many negotiations occur in a complex context with dynamics that may only be partially revealed at the bargaining table. Besides the two or more parties negotiating, there may be other covert factors at work in sidebar conversations, internal constraints, and organizational dialogue.

Often in a sophisticated commercial negotiation, the leader of each negotiating team most also obtain cooperation, support, and agreement from his own team members. Members of the team may be characterized as "stabilizers," "destablilizers," or "quasi-mediators."[9] When a negotiation position is explained and backed up with persuasive data, stabilizers tends to "go along" with the senior team leader. Stabilizers tend to dislike conflict and are flexible "good soldiers" in their organizations.

Destabilizers are more headstrong and volatile. They can disrupt both the other side and their own team and usually believe they have all the right answers and completely distrust the other party. However, within bounds, they may serve a useful purpose in strengthening resolve and in testing reality.

It is often best if the leader of the negotiating team is neither a stabilizer nor a destabilizer but a quasi-mediator who can build a good relationship both with his/her own team and with the leader and members of the other team. He/she must also keep his/her own senior management informed, because, after all, they have the authority to ratify and close on an agreement; they should not be surprised during the negotiation process.

The senior team member must work constructively with the other side and the members of his/her own team. He/she periodically calls a recess from negotiating to caucus with his/her team before stating or agreeing to a change in position in order to think out an issue and maintain and build support among other team members. The team leader must contribute continuously to a reasonable negotiating climate with systematic creation of appropriate doubts about the cogency of the other party's views by employing constant communication, education, and persuasion. He/she often encourages mutual concessions to reach an appropriate businesslike closure. In a dispute which has public interest and visibility, the senior negotiator must perform media and public relations functions effectively.

Ironically, in order to achieve agreement, each team leader must be convinced of the validity of some of the other party's arguments. He/she must become the advocate of some opposing views; otherwise, ratification and closure are unlikely since the leader will fail to convince his/her own management to make concessions.

Before commencing any negotiation, one should formulate the best alternative to a negotiated settlement (BATNA). What are the reasonable alternatives and which is the best one of them? The best alternative is the BATNA. If the negotiated offer is better than BATNA, consider accepting it; if worse, try to obtain improvements; if one is unable to obtain enhancements, exercise BATNA.[10]

The success of a negotiation is often dependent on whether there is an effective bargaining continuum or an overlap in the "ask" and "settle" end points in each side's formulated span of acceptable negotiation results. If there is overlap, there may well be an agreement; if an overlap is not indicated, settlement is unlikely.[11]

DISPUTE RESOLUTION METHODS

If one is aware of the activities embedded in each phase of the negotiation process and is familiar with typical strategies and tactics which can be deployed in a complex and subtle negotiation

context, a professional has a foundation of knowledge for possibly choosing an alternative dispute resolution method in a specific situation. Numerous methods which can be selected are briefly described here:

Fact Finding is a neutral's determination of the basic facts of a dispute and the identification of areas of agreement and disagreement. Depending on the scope of work agreed upon by the claimants, the neutral may or may not make settlement recommendations to the parties.

Mediation is a voluntary, non-binding method of facilitated negotiation under the auspices of a neutral third party. Its features include voluntary exchange of information and presentations. The mediator meets with both parties together and, subsequently, separately. The mediator can employ "shuttle diplomacy" in trying to reach an agreement. The process may feature a non-binding settlement proposal by the mediator. The mediator's proposal may be accepted by the parties or, under the auspices of the mediator, they may reach their own settlement. An agreement, if achieved, is memorialized in writing and signed.

Fact Finding-Mediation provides for a neutral to issue a fact-finding report after using mediation skills to obtain the parties acceptance of his conclusions prior to final issuance of the written document.

Conciliation is similar to mediation, but with a stronger behavioral emphasis on restoring good business relations among the claimants.

Facilitation consists of a neutral using negotiation and mediation skills to structure a process for the mediation of complex bilateral or multilateral disputes. At times, the facilitator's efforts are most intense at the earliest stages of the process when there is an emphasis on creating process rules acceptable to all parties.

Referee is a designated person who insures compliance with agreed upon dispute resolution rules. He/she may or may not participate in the formulation of the process.

Partnering is a non-binding collaborative process that focuses on activities keyed to preventing project disputes or reducing their scope. It is frequently used in the construction industry and usually concentrates on role definition, team building,

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and organizational structure, together with improving information, communication, cooperation, and consensus. The process often takes place before a construction project begins.

Dispute Review Board (DRB) is particularly useful when there is a dynamic, fast moving situation such as the construction phase of a real estate development. Each of the two or more parties involved chooses a panel member; jointly, those chosen pick one or more neutrals. The members of the panel acquire knowledge about the particular development and are available as a group to resolve early or subsequent disagreements in the hope of providing prompt decisions and avoiding the "snow balling" affects of multiple layers of disagreement causing a bad overall result for the real estate development.

Ombudsperson is available to hear complaints and formulates a recommended way of resolving them. The ombudsperson considers "the facts" and issues and provides an advisory opinion leading to a likely settlement of the matter. This method may be particularly useful in landlord/tenant and employer/employee relations.

Fair Division applies game theory to the allocation of a portfolio of assets. There are a number of different possibilities. In "Strict Alternation" the parties take turns choosing assets with the first to choose having an advantage. "Balanced Alternation" provides for variations in the choosing pattern to balance the initial advantage of the first to choose. "Divide and Choose" calls for one claimant to divide the assets into two groups and the other party to choose which group to acquire. "Buy or Sell" calls for a party to state a price at which he will be equally willing to buy or sell a partnership asset. "Adjusted Winner" consists of each party being given the same number of points which they can

individually and privately allocate to the same array of assets; subsequently, tentative winners are identified for each asset based on the highest number of points allocated to the asset and adjustments are then made to even out the total number of points each claimant assigned to assets he/she has won. The tests of a well-executed fair division technique are proportionality, equitability, efficiency, and envy freeness. The greater the variation in the relative pricing perspectives of the claimants, the easier it is to satisfy all the claimants.[12]

Appraisal Proceeding is often a tripartite procedure. Each claimant chooses an appraiser; the two professionals so chosen, agree on a third appraiser; if they fail to agree on the selection, they may resort to an outside selection mechanism. The decision-making process is often on a "documents only" basis. Usually, the parties and their legal counsel are not present and, generally, there is no provision for depositions, discovery, or witnesses. After informal dialogue and discussion, a valuation conclusion is reached by at least two of the three appraisers. This alternative provides less liability protection than arbitration.

Arbitration is a binding process in which knowledgeable professionals, after hearing the presentations of each side, reach a decision which is binding on the parties and may be entered as a court order to ensure enforcement. The arbitrator(s) may have total or partial discretion or may be limited to a "baseball clause" confining the scope of the decision to choosing the exact price submitted by one party or the other. Arbitration often does not include discovery, depositions, a transcript, or strict adherence to the legal rules of evidence or procedure. As contrasted with litigation, arbitration often provides expeditious and inexpensive resolution of disputes by arbitrators possessing expert knowledge acting in a process that maintains confidentiality in business relationships.

Non-Binding or *Advisory Arbitration* is a contradiction in terms. This process is the same as or a constricted version of standard arbitration, except the award is not binding on the parties but may be accepted if they agree.

Mediation-Arbitration (MED-ARB) is, as the name implies, a blend of both mediation and arbitration. The parties attempt to resolve the dispute through mediation. If this phase fails to produce a settlement within a specified time period, the issue is referred to arbitration for a final and binding decision. Based on the agreement of the parties, this arbitrator may or may not be the same person who served as the mediator.

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Arbitration-Mediation (ARB-MED) consists of a first phase arbitration which concludes in an award under seal while the neutral attempts to guide the parties to a mutual agreement settling their conflict. Since the experience of the arbitration proceeding is informational and educational for both parties, the chances of a successful mediation are improved. If mediation fails, the arbitrator announces his award and the decision is final. The underlying philosophy is that an agreement by the parties is more satisfying to them than an imposed decision.

Mediation-Arbitration-Mediation (MED/ARB/MED) is a three-stage process utilizing first phase mediation which may narrow the issue. Yet, at strong signs of an impasse, a second phase arbitration process kicks in and serves as an educational discovery experience for the disputants. Subsequently, they may have the motivation to pull back and re-commence negotiations in a third phase mediation process assisted by a mediator who may have served as the arbitrator.

Case Evaluation is performed by a neutral experienced in the subject matter of the dispute. He reviews the substantive case by listening to each side's presentation and by reading appropriate documents and the posing of interrogatories. The neutral highlights the strengths and weaknesses of each position. Under his auspices, the parties may reach a resolution of the dispute. In essence this is a more abbreviated form of mini-trial procedure.

Judge/Lawyers Evaluation Panel consists of a credible judge and two lawyers specializing in litigation. Collectively they render a non-binding opinion after hearing presentations from both sides.

Input from the panel provides predictability about how the matter might be decided in litigation. Subsequently, the parties resume negotiation.

Mini-Trial is a brief and informal "trial" conducted and presided over by a neutral. The parties, working with the neutral, arrive at agreed upon procedural rules; there may be limited discovery and depositions. Each side presents its best case in abbreviated form. A senior executive from each firm is present and is empowered to reach a settlement. If the executives initially fail to agree, the neutral may offer an advisory opinion. If a final agreement is reached, it is reduced to a written document before the proceeding is concluded.

Private "Judge," generally a retired jurist, is hired to hear the presentation of both parties and to issue an advisory opinion outlining how he would have ruled in a formal court proceeding. This document often motivates the respective claimants to reach a settlement without engaging in formal litigation.

Summary Jury Trial consists of an abbreviated non-binding version of a jury trial utilizing jurors drawn from the regular pool who are made available by a judge. After hearing abbreviated presentations from both sides the jurors arrive at an advisory decision. Subsequent to the verdict, the parties and their counsel may ask the jurors questions about their perceptions of positive and negative aspects of each presentation. After that point the jurors are dismissed and the parties resume negotiation with a more realistic view of what an actual jury might decide. Subsequently, if the process fails and a trial takes place, there will be a new judge and jury.

Auctions provide a forum for claimants to bid in dollars or in the allocation of a limited universe of points. Such a process may be open outcry or by sealed bid. In a two-stage auction the bidders may modify their bidding in the second stage based on the education they have received in the first phase. Bidding patterns are classified as English (bidding in ascending order); Dutch (a bid as prices descend); or Vickrey (winning bidder acquires asset but at the second highest bidder's price, thereby encouraging higher bids by attempting to avoid "buyer's curse" or remorse).

Election or Referendum may be called for when there is a large number of parties in the same dispute. After structuring one or more recommended courses of action a vote may occur to choose the alternative to be followed. Voting may be direct, preferentially ranked, proportional, and/or cumulative depending on specific circumstances. Real estate industry conflicts which may require this process include the reorganization or liquidation of a public real estate entity and the merger or acquisition of such an entity.

Negotiated Rule Making is a governmental process inviting key parties in an industry who would be affected by a proposed regulatory rule to provide data and points of view concerning disputed industry issues prior to the issuance of a regulatory rule. The rule issued is likely to be more relevant and effective after use of such a process.

Common Text Negotiation involves a neutral who writes a draft of an agreement with identical copies submitted to each side. The drafter of the document does not ask for acceptance or rejection but only for comments and suggestions for modifications. This process may be repeated many times and progress continually made. This method avoids a partial agreement before knowing the entire structure of the agreement. Only when the neutral believes that the revised draft is the most likely outcome, does he/she look for agreement and closure.

Litigation is a formal legal process, involving the parties, their legal counsel, expert and fact witnesses, judge, and, possibly, a jury. The process almost always involves discovery and, possibly, depositions. Use of this method signifies that the parties will not make the ultimate decision in the matter. Judge or jury may decide a technical dispute outside of their knowledge base. Litigation is the most expensive, lengthy, and potentially aggravating method of resolving a dispute.

Dispute Resolution System Design is a process of evaluating an existing dispute resolution system by identifying typical conflicts, case volumes, resolution processes utilized, and the level of costs and benefits of the existing system. In designing a new system, a focus is put on interests, links to negotiation-like processes, low cost procedures, and building in prior consultation and subsequent feedback activities. Arraying dispute resolution systems on a low to high cost basis and describing the necessary resources, skills, and motivations required for each alternative, provides the basis for choosing a new dispute resolution system.[13]

Dispute Prevention Program provides a review of modes of doing business and the process

which documents transactions and suggests changes to reduce the volume of future disputes. This program is accomplished in association with legal counsel.[14]

An effective participant in any of these dispute resolution methods should exhibit a range of cognitive, behavioral, and process characteristics. An individual's basic traits should include a considerable intelligence; a self-confident and balanced ego; general business and specific industry knowledge; and a constructive focus on important issues.

Useful behavioral dynamics include patience; ability to listen; tolerance of silence; coolness; forbearance combined with firmness in the face of provocation; credibility; reliability; discretion; trustworthiness; ability to educate and persuade; and a respectful and dignified style.

Process skills include clear communication, effective note taking, cogent periodic summaries of progress, and a major contribution to the final written document.

Above all these traits, one must use power wisely: "To resort to power one need not be violent, and to speak to conscience one need not be meek. The most effective action both resorts to power and engages conscience."[15] Sadly, not all participants will be swayed by positions founded on conscience. We must obtain the best result we can in an perfect world.

CONCLUSION

Among these dispute resolution methods common threads include opposing parties; conflicting goals; differences in values and styles; varying degrees of power and control; variations in methods for picking the neutrals; process design; and the binding or non-binding nature of the results.

Which of these methods should be chosen for a specific dispute? One must first evaluate the nature and relative importance of the issues in contention and the dynamics of the individuals and entities involved. Subsequently, one should select the method which provides the highest probability of a cost-effective and timely resolution of the conflict with a minimum of disruption. Yet, it also must be recognized that in many instances, the dispute resolution method to be employed has already been chosen by the parties before any experts have had an opportunity to provide counseling.

In a classic negotiation each side retains control of the outcome. In other methods, some or all control is ceded to others. Yet, negotiation is at the foundation of all methods. If Clausewitz was right when he said that: "War is regarded as nothing but the continuation of politics by other means," then all these dispute resolution methods are just the continuation of negotiation by other means. One goal of a civil society should be to provide peaceful and sensible methods for resolving conflict.

In *Justice Without Law?*, Jerold S. Auerbach provides us with a thought-provoking perspective for considering the future of dispute resolution in America:

> Among Scandinavian fisherman and the Zapotec of Mexico, in Bavarian villages and certain African tribes, among the Sinai Bedouin and in Israeli Kibbutzim, ...the importance of enduring relations have made peace, harmony, and mediation preferable to conflict, victory, and litigation. But in the United States, a nation of competitive individuals and strangers, litigation is encouraged; here, the burden of psychological deviance falls upon those who find adversary relations to be a destructive form of human behavior.[16]

Although it is reported that only four percent of cases ever reach the courtroom with 80 percent being settled and 16 percent dismissed, why does an overwhelming number of disputes pass so easily from negotiation to litigation?[17] The use of alternative dispute resolution methods is, nonetheless and necessarily, gaining momentum in the United States.REI

NOTES & REFERENCES

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16. Jerold S. Auerbach, *Justice Without Law?: Resolving Disputes Without Lawyers*, New York, Oxford University Press, 1983, pp. 7-8.
17. As reported by Colosi, *op.cit.*, p. 2.