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Battleground selection for resolving real estate disputes - by Christopher Kenney

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As any party to a lawsuit soon learns, it is expensive to fight. Real estate development, with the confluence of property rights, contract rights, and tort risks, is fertile ground for disputes to arise. In some cases, prompt, reasonable settlement is the best business decision. It reduces expense, eliminates delay and preserves relationships. In other cases, principle, profit or an unreasonable adversary make battle inevitable.

If you're going to fight, dictate upfront where the battle will take place. You can provide in your contract whether any disputes arising out of it will go to litigation, binding arbitration, and/or mediation. Here is a brief summary of each option and how each differs from the others:

A. Litigation

This is the default process for adjudication of disputes in the Commonwealth. The litigation process is governed by rules of procedure and evidence. In most cases, litigants have a right to trial by jury. This is can be good or bad, depending on the subject matter of the dispute. For example, a basic contract dispute or personal injury matter can be suitable for a jury who will comprehend themes of fairness, enforce promises and determine reasonable expectations. Conversely, if you're fighting about a complicated engineering dispute the subject matter might be lost on a jury of laypeople. That type of dispute could be better adjudicated by a judge or private arbitrator with construction industry experience.

The losing party at trial can appeal to a three judge appellate panel who determine whether the trial judge committed legal errors that warrant reversal of the verdict or at least a "do-over" at trial. This additional protection of rights can save the day, or drain your wallet, depending on how long and expensive the litigation and appellate processes are in your case.

B. Binding arbitration

Parties have the right to arbitrate their disputes only if both sides have agreed to do so. If you want to avoid the relative length and expense of litigation and appeals, include a binding arbitration

provision in your contract. That provision constitutes an enforceable waiver of the right to jury trial. Courts will dismiss lawsuits and force litigants to arbitration if their contract requires them to adjudicate their dispute there.

Arbitration is generally faster and less expensive than litigation. It is, however, a weaker safeguard of your goal to get the right decision. For example, there is only limited “discovery” available in the arbitration process. Consequently, you probably will not have the opportunity to learn as much about your adversary’s case in arbitration as you would in litigation, which has a robust “discovery” process built into the rules of civil procedure. Moreover, the rules of evidence are applied much less stringently in arbitration. This creates the risk that hearsay and other generally unreliable evidence will be considered by the decision-maker as the basis for the outcome. Last, but most importantly, there is almost no redress from an arbitration decision, even if the arbitrator was undeniably wrong on the facts or the law.

C. Mediation

Mediation can be used in conjunction with litigation or arbitration. Mediation is a private, confidential, voluntary, and non-binding settlement negotiation overseen by an experienced, neutral, third-party mediator. The parties jointly select and pay for the mediator’s time. At the mediation hearing, each side provides a general overview of its respective position to the mediator in a collective opening session. The mediator then separates the parties and does “shuttle diplomacy” going back-and-forth between their separate rooms to poke and prod each party toward mutual compromise by privately reviewing some of the downside risks each party faces by going to trial. If the case results in a settlement, an agreement is signed and is enforced as a settlement contract. That eliminates the need for an arbitration hearing or a court trial. On the other hand, if mediation is unsuccessful, the parties return to the status quo ante on their litigation track or arbitration track with all rights reserved. The documents and discussions that were shared as part of the mediation process remain confidential and are inadmissible in any future proceedings.

Conclusion

The length, cost, and likely outcome of real estate disputes are influenced greatly by the forum the parties select to resolve their disputes. There is no “one size fits all” forum; rather, parties should select the forum best suited to the size, scope, complexity and cost of each respective dispute. That initial input most often dictates the ultimate outcome.

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