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## **ADR**

# **Resolving Landlord and Tenant Disputes The Alternatives to Going to Court**

In business, disputes will invariably arise. Commercial lease agreements are no exception. So how are these disputes resolved? When negotiation fails, the traditional process is to go to court. This can be expensive, stressful, time consuming and often unpredictable. The adversarial nature of the litigation process can also damage ongoing business relationships.

The alternative to the “negotiate or litigate” dichotomy is “ADR” – Alternative Dispute Resolution. The most popular ADR techniques include mediation, neutral case evaluation and arbitration. When an impasse is reached in negotiation, more and more business people are turning to ADR instead of litigation. ADR allows the parties to control the process, manage the costs and craft a resolution that fits their needs.

### **Mediation**

Perhaps the most prominent form of ADR is mediation. In this process a neutral third party, trained in dispute resolution, helps the parties resolve their disagreement. The mediator has no authority to impose a solution; the resolution must be agreed to by all parties. The mediator is a neutral facilitator who helps the parties find common ground and encourages resolution. There are as many mediation techniques as there are mediators. The variations include everything from the basic, (e.g. acting as an intermediary transmitting the parties’ offers and counter-offers until an agreement is reached), to the

more esoteric (e.g. use of the “circle process” in which all disputes are resolved through consensus). Whatever technique is used, the goal is always the same, i.e. to resolve the dispute without going to court.

Mediation is undertaken on a “without prejudice” basis, to encourage parties to negotiate in a free and frank manner, as they are not bound by any position taken or concession made during the mediation process. Unlike court decisions, the outcome of mediation is private and does not set a precedent. The parties often agree that the settlement reached will remain confidential. Finally, as a co-operative process, mediation may preserve relationships that might otherwise be strained by the adversarial nature of litigation.

### **Neutral Case Evaluation**

Neutral case evaluation is another ADR technique that is useful in helping the parties resolve their dispute. This is particularly so where there is a contentious legal issue such as the interpretation of lease terms. The technique involves both parties agreeing on an individual, often a senior lawyer who is a recognized expert in the field or a retired judge, who is directed to provide a non-binding, neutral evaluation. This “evaluation” is essentially an impartial legal opinion that the parties use to form the basis for settling the dispute.

The parties can combine different ADR techniques; no particular technique requires the exclusion of another. For example, the parties may agree before a mediation to a neutral case evaluation that will form the basis on which the parties will mediate. Conversely, following an unsuccessful mediation the parties might ask the mediator, who by the end of the mediation will be familiar with all of the facts and issues, to provide a neutral evaluation. ADR techniques are flexible and innovation is encouraged.

## Arbitration

While mediation and neutral case evaluation are non-binding (unless an agreement is reached), arbitration is binding. An arbitrator acts like a judge, making a decision that is final and binding. The key difference between arbitration and going to court, is that the parties control the arbitration process. The parties select the arbitrator, determine how formal or informal the procedure will be and determine when and where the hearing will be held.

To commence an arbitration, the parties require an arbitration agreement. In the context of a commercial lease the arbitration agreement is often a provision contained in the lease that requires the parties to arbitrate a lease dispute. It is worth noting that courts will halt court proceedings and order the parties to arbitrate where the agreement contains a provision stating that they will arbitrate the issue in question. Despite the absence of such a clause, the parties may mutually agree to submit the dispute to arbitration.

When selecting an arbitrator, parties to a commercial lease dispute are able to appoint an individual with expertise in commercial leasing matters. An arbitrator who not only understands the law, but also the business issues that underlie a commercial leasing transaction, is more likely to arrive at an informed and commercially reasonable decision. By contrast, in a court setting, one does not have the option to “shop” for a judge.

Like mediation, the decision of the arbitrator is private. Also, the decision of the arbitrator is only binding on the parties to that particular dispute; it does not set a legal precedent. Arbitration can take less time, since the parties control the process and are not subject to the scheduling difficulties experienced by courts. However, the benefits of arbitration are dependent on the parties, who must be committed to resolving the dispute. Some arbitrations have been known to go on at great length and expense.

ADR is not suitable in all cases. Sometimes there is no choice but to go to court - particularly where the other party is uncooperative or intent on evading the issue. However, in a commercial leasing dispute, the parties should consider ADR. The landlord and tenant may wish to preserve their business relationship even though a genuine dispute has arisen between them. In those circumstances, ADR may provide a less adversarial process for resolving the dispute.



Our secret for closing files lies as much in what is taken out as in what is put in. By eliminating exorbitant expenses and excess time, by shortening the process through practical application of our knowledge, and by efficiently working to implement the best course of action, we keep our clients' needs foremost in our minds. There is beauty in simplicity. We avoid clutter and invest in results.

Often a deal will change complexion in mid-stage. At this critical juncture, you will find us responsive, flexible and able to adjust to the changing situation very quickly and creatively. We turn a problem into an opportunity. That is because we are business minded lawyers who move deals forward. The energy our lawyers invest in the deal is palpable; it makes our clients' experience of the law invigorating.

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