

THE COUNSELORS OF REAL ESTATE

CRE

REAL ESTATE
DISPUTE
RESOLUTION
PROGRAM

Protocol

Describing a Range of Methods
for Resolving Disputes

ABOUT THE COUNSELORS OF REAL ESTATE

The Counselors of Real Estate, established in 1953, is an international group of high profile professionals, including members of prominent real estate, financial, legal and accounting firms as well as leaders of government and academia, who provide expert, objective advice on complex real property situations and land-related matters.

Membership is selective and extended by invitation only. The organization's CRE Designation (Counselor of Real Estate) is awarded to all members in recognition of superior problem-solving ability in various areas of specialization, such as dispute resolution, litigation support, real estate analysis, asset management, strategic planning, valuation, feasibility studies, acquisitions/dispositions, debt/equity placement and real estate law. Counselors also serve as project managers, identifying and linking a variety of specialists analyzing a problem and/or executing its solution.

CREs achieve results, acting as key players in major transactions and/or real estate decisions. The majority of Fortune 500 companies retain CREs for advice on real estate holdings and investments. CREs also serve public and private property owners, developers, investors, attorneys, accountants, financial institutions, nonprofit and religious organizations, educational institutions and health care facilities.

CRE

THE COUNSELORS OF REAL ESTATE

430 North Michigan Avenue
Chicago, Illinois 60611-4089
Phone: 312/329-8427
Fax: 312/329-8881
Email: info@cre.org
Web: www.cre.org

WHAT IS A COUNSELOR OF REAL ESTATE?

A Counselor of Real Estate is a real estate professional whose primary business is providing expert advisory services to clients. Compensation is generally structured on an hourly, daily or fixed fee basis although other payment terms are sometimes arranged in high value impact assignments. Any possibility of actual or perceived conflict of interest is resolved before acceptance of an assignment. A Counselor always places the interests of the client first and foremost in any advice provided, regardless of the method of compensation. CREs have acquired a broad range of experience in the real estate field and generally possess technical competency in more than one real estate discipline.

Serving as sole practitioners, CEOs or other senior executives of consulting firms or leaders of the real estate departments of major corporations, CREs are committed to creating real estate solutions of economic value to clients. CREs assess the real estate situation by gathering the facts behind the issue, thoroughly analyzing the collected data, and recommending the key course of action that best fits the client's objectives.

The extensive CRE network stays a step ahead of the ever-changing real estate industry by reflecting the professional diversity of all providers of counseling services. CREs honor the confidentiality and fiduciary responsibility of the client-counselor relationship and adhere to a strict Code of Ethics and stringent Standards of Professional Practice.

Approximately 1,100 real estate practitioners throughout the world carry the CRE designation, denoting the highest recognition in the real estate industry. With CRE members averaging 20 years of distinguished industry experience, individuals, institutions, corporations or government entities should consider engaging a CRE to resolve their real estate disputes.

January 2007

PROTOCOL

Describing a Range of Methods for Resolving Disputes

A PROTOCOL DEFINED

Historically, the word **Protocol** refers to arrangements for formal modes of behavior between the representatives of sovereign states. It has also been used as an alternative to the word treaty, as in treaty of peace.

A dispute resolution protocol can describe alternative modes of behavior embodied in various dispute resolution processes that can be employed to resolve a conflict. Depending on their objectives and the desirability of maintaining relationships, the parties can select a framework of basic themes in each dispute resolution process and some optional features that can be customized for the resolution of a particular dispute.

The CRE Real Estate Dispute Resolution Program Protocol describes a range of flexible and rational frameworks involving dispute resolution choices that may be customized and serve as “road maps” for the resolution of complex real estate disputes in a fair and knowledgeable manner.

The Protocol does not itself constitute a set of Rules to govern the resolution of disputes but rather is an educational and explanatory text describing a range of processes that may be utilized by the parties. The specific Rules for major dispute resolution processes are contained in the CRE Real Estate Dispute Resolution Program Rules. If there is an inconsistency between the Protocol and the Rules on any particular issue, it is the Rules which will govern in a specific dispute resolution proceeding.

A major feature of the CRE Real Estate Dispute Resolution Program consists of identifying to the parties and/or their counsel CREs qualified to resolve real estate disputes based on their real estate expertise, training and experience in dispute resolution. Such professionals can facilitate an agreement through mediation or act as an impartial arbitrator who is given the authority to render an award adjudicating a specific dispute. The CRE Real Estate Dispute Resolution Program also gives the parties the choice of a number of other recognized dispute resolution methods.

The CRE Real Estate Dispute Resolution Program maintains a proprietary database of senior real estate dispute resolution professionals, holding the CRE designation, who are well qualified to resolve a wide range of real estate related disputes.

THE CRE REAL ESTATE DISPUTE RESOLUTION PROGRAM PROTOCOL (the “Protocol”)

Rather than provide a rigid, unitary set of rules for resolving a wide range of divergent and complex real estate disputes, the Protocol and the accompanying CRE Real Estate Dispute Resolution Program Rules (the “Rules”) afford the parties a variety of widely accepted dispute resolution methods that can be selected and possibly customized to meet the needs of the disputants in particular circumstances.

Depending on the nature of a particular dispute (e.g., the property type involved, the technical issues to be decided, the specific expertise required and the priorities of the parties), the CRE Real Estate Dispute Resolution Program will provide a customized list of CRE neutrals qualified to serve as resolution facilitators or impartial decision makers.

The choice of specific neutral(s) is the prerogative of the parties unless the parties cannot agree on the choice of such persons and thereby cede that prerogative to the CRE Real Estate Dispute Resolution Program.

Once the neutral(s) is appointed within the framework of the Rules, neutral(s) may decide any outstanding unresolved issues relating to procedure or administrative process for a particular dispute resolution case.

ADMINISTRATION OF CRE REAL ESTATE DISPUTE RESOLUTION PROGRAM SERVICES

In arbitration a case administrator designated by the CRE Real Estate Dispute Resolution Program will act to secure the services of the chosen neutral(s) after selection by the parties, submitting disclosure and oath forms to the neutrals for execution, and arranging the date, time and place of a telephonic preliminary conference and the locale of hearing sessions. Thereafter, the case administrator will provide other administrative services such as scheduling additional sessions and distributing documents unless specific provisions have been approved for the direct exchange of documents. When an arbitration award is ready, it will be transmitted to respective counsel or to the parties.

Deposits for the fees of neutrals and filing and administrative fees will be required before the commencement of the hearings. Such deposits may require replenishment in lengthy or complex cases.

The case administrator will not oversee on-site administration of the actual hearings. This function is the responsibility of the selected CRE neutrals.

In mediation, direct communication between the neutral(s) and the parties and counsel is permissible; in arbitration and appraisal proceedings, no *ex parte* communications are permitted unless the parties have permitted and the program has approved direct exchange of documents only. Generally, in both arbitrations and appraisal proceedings, all communications between the parties or their counsel on the one hand and chosen CRE neutrals on the other will be transmitted through the case administrator instead of directly to or by the neutrals themselves.

In a typical mediation, the case administrator designated by the CRE Real Estate Dispute Resolution Program assists the parties in selecting a mediator, and in working out dates and a location for the mediation. Thereafter, the mediator usually talks with both sides privately in advance of the mediation to learn about the case, to obtain documents for review, and to secure the parties' approval of the procedures to be followed.

In brief, arbitration is typically the most administratively intensive dispute resolution process; and mediation, the least.

A BROAD ARRAY OF DISPUTES IN THE REAL ESTATE INDUSTRY

The CRE Real Estate Dispute Resolution Program Rules may be used to resolve disputes arising from any type of real estate asset or land use.

Disputes may involve real estate assets held in fee simple or those held as “partial interests,” such as leased fees or leasehold estates. Other real estate partial interest disputes might address a mortgage or equity position, a “sandwich” lease, sublease, or an operating leasehold. Air rights, transferable development rights (TDRs), riparian rights, subsurface rights, estates for life, remainderman rights, reversionary interests and property easements may be part of a case as well as renewal and purchase options and rights of first refusal or negotiation of first or last offer.

Contextual disputes can include the re-setting of rents for ground lease renewal periods, establishing a new economic renewal rent for the renewal term of a space lease, resolution of a landlord-tenant dispute involving property tax or operating expense reimbursements, or conflicts involving operating procedures or occupancy and use controversies among other issues. A tenant or another third party may possess a purchase option at a specific future point in time but at an unstated price to be related to a market value level. Resolution of all can be sought through the CRE Real Estate Dispute Resolution Program.

Disputes may also arise from a fractional ownership interest (such as a general or limited partnership interest) or from the need to arrive at a buyout price under the terms of a joint-ownership agreement or a public or private real estate syndication.

Controversies relating to the terms and conditions of a real estate or property management contract, a loan, a title policy or an asset management agreement may be addressed through dispute resolution as well as issues associated with property condemnation, tax *certiorari*, land use, zoning disputes and environmental problems. A dispute may involve equitable allocation of a portfolio of real estate assets necessitated by an estate or divorce settlement or dissolution of a joint venture or business enterprise.

The possibilities are of course endless in today's litigious society, and a principal aim of dispute resolution under the auspices of the CRE Real Estate Dispute Resolution Program is to resolve the inevitable disputes while minimizing the time, expense and acrimony that too often accompany litigation.

CHOICE OF A SPECIFIC DISPUTE RESOLUTION PROCESS

A number of dispute resolution processes will be briefly described and certain of these processes are featured in this Protocol and in the Rules, with other dispute resolution alternatives available upon request.

Negotiation and litigation (included here for definitional and comparative purposes only) frame the opposite end points for all dispute resolution processes. The start is always a failed negotiation where the parties have not been able to resolve their dispute, and the end, if the dispute resolution process selected is unsuccessful, is litigation.

Negotiation

Negotiation is an interest-based decision-making process. Participants bargain to resolve differences of opinion concerning the apportionment of responsibilities and benefits. Negotiation is the most frequently employed dispute resolution method in the professional, business and personal realms, and is the "mother of all methods." Currently, the two major schools of negotiation thought are designated as integrative ("win, win") and distributive ("win, lose"). In negotiation, the parties maintain full control of the process and any agreement reached requires the consent of all parties to the transaction. When negotiation fails, parties increasingly turn to dispute resolution to avoid the risk, expense, time and emotional stress of the courtroom.

Litigation

At the other end of the spectrum from negotiation is litigation, a legal proceeding involving the parties, their legal counsel, fact and expert witnesses, a judge, sometimes a jury and, often, discovery, affidavits, declarations, depositions, interrogatories and similar features. In litigation, the parties themselves do not decide the matter or choose the decision maker(s). Rather, a judge or jury decides the issue even though it often involves a complex technical dispute outside the experience and expertise of many of them. Litigation is the most expensive and emotionally draining method to resolve disputes and its avoidance increasingly is the aim of a range of other dispute resolution methods.

METHODS FEATURED IN THE CRE REAL ESTATE DISPUTE RESOLUTION PROGRAM

Mediation

Mediation is a voluntary non-binding confidential method of assisted negotiation under the auspices of a neutral third party. Its features include voluntary exchange of information and presentations. The mediator meets with both or multiple parties, usually in a joint session at the beginning and at the end of the formal process and, in the interim, in caucuses with each side separately. The mediator may employ “shuttle diplomacy” in trying to assist the parties in reaching an agreement. An agreement, if achieved, is usually confirmed in writing and signed by all parties to the dispute – where practicable in the form of a final agreement, or where that is not possible in the form of a signed term sheet that is as comprehensive as circumstances permit.

The mediation style spectrum ranges from the purely facilitative (where the mediator is only a neutral facilitator and does not provide opinions helping the parties reach agreement) to the strongly evaluative (where the mediator gives his judgment about the dispute to the parties) and may even be transformative (usually where continuing relationships are involved and the process creates a range of new innovative possibilities) or a composite of two or more of these styles. Mediation may provide the best chance for maintaining a relationship between the parties after a successful conclusion of the process.

Arbitration

Arbitration is a binding process in which knowledgeable professionals (one or three) serve as neutral third party arbitrators. After hearing presentations from each side, the arbitrators reach a decision which is binding on the parties and may be entered as a court order to ensure enforcement. Arbitration may or may not include legal counsel, discovery or a transcript. Usually, formal hearing sessions are conducted by the arbitrators, but strict adherence to the legal rules of evidence or civil procedure is not customarily required. As contrasted with litigation, arbitration is a confidential process which provides expeditious and comparatively inexpensive resolution of disputes by experienced arbitrators knowledgeable about the issues in controversy.

If the parties agree, limitations can be placed on the discretion of the arbitration panel in its formulation of the final award by devices such as “final offer” or “baseball” arbitration; “night baseball” arbitration or “bounded” arbitration that will be described in the subsequent document embodying the Rules. If the parties agree, the powers of the arbitration panel can be expanded by means of *Ex Aequo Et Bono* (“According to What Is Just and Good”) Arbitration. These limitations on arbitral discretion or, alternatively, the expansion of arbitral discretion, are described in detail in the Rules.

Mediation/Arbitration (Med/Arb)

Mediation/Arbitration is a two-phase process. First, a mediation process occurs. If the parties, with the aid of a neutral mediator, succeed in achieving a resolution of their dispute, there is no second phase arbitration process. If the mediation is unsuccessful, the parties together select a new neutral or panel of three neutrals (all as the parties wish) who hears the evidence and renders a binding arbitration decision resolving the dispute. In the alternative the parties may agree to permit the first phase mediator to serve as the second phase arbitrator or arbitration panel chair.

Appraisal Proceeding

An appraisal proceeding may be conducted by one or three neutrals selected from the CRE Real Estate Dispute Resolution Program Panel who have appropriate appraisal or related experience. In many cases it is a tripartite panel where each party selects an appraiser (in a dispute resolution context) who may or may not be on the CRE Real Estate Dispute Resolution Program Panel and the two chosen professionals agree on a third professional who is from the CRE Panel. If the first two chosen professionals fail to agree on this selection, the CRE Real Estate Dispute Resolution Program will select the third professional.

The decision making process may be on a “documents only” basis without a formal hearing. In such an instance, the parties and their legal counsel are not present and there is no provision for transcripts, discovery or witnesses. After informal dialogue and discussion among the appraisers (in a dispute resolution context) a decision is reached by at least two of the three neutrals. In a frequent variant of this procedure, there may be hearing sessions and other features common in arbitration.

Mediation/Appraisal Proceeding (Med/App)

A Mediation/Appraisal Proceeding (Med/App) is identical in design to Mediation/Arbitration (Med/Arb) except that an appraisal proceeding, not an arbitration proceeding, follows the mediation.

OTHER DISPUTE RESOLUTION METHODS

Arbitration/Mediation (Arb/Med) is roughly the reverse of Mediation/Arbitration (Med/Arb) in that an arbitration is the first phase process but the panel’s award is sealed until the parties subsequently try to reach an agreement through mediation under the auspices of a neutral who was not involved in the arbitration; if the parties fail to reach an agreement within a specified time period, the previously sealed award is unsealed and it becomes the official award in the matter in dispute. If the parties do reach agreement through mediation, the panel’s sealed award is not opened and is destroyed.

Conflict Review Board is a panel of experts that may be called on short notice to resolve conflicts between already identified parties who have ongoing interaction with each other. At the time the Conflict Review Board is established, the panel of neutrals is oriented by each of the parties on the issues and dealings of the parties up to that point. The authority of such board whether binding or advisory is described in the agreement between the parties.

Mediation/Arbitration2 (Med/Arb2) If in a first phase mediation some issues are agreed upon and some issues remain unresolved, all the parties may agree to allow the mediator to resolve the remaining outstanding issues unilaterally; if all the parties do not concur in this instruction, a second phase arbitration occurs either with another neutral, a three neutral panel, or the first phase mediator acting as second phase arbitrator or arbitration panel chair, based on the agreement of the parties.

OPTIONAL DIAGNOSTIC METHODS

Prior to embarking on any of the above processes, the parties to a particular dispute may agree to participate in one of the following optional diagnostic methods possibly leading to an early settlement of their dispute, avoiding a more expensive process in dollars, time and, possibly, aggravation. In this fashion the parties still retain joint control of the outcome.

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.

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 submissions and by posing questions. Subsequently, the neutral highlights the strengths and weaknesses of each position. If the parties then agree to continue working with the neutral, the parties may reach a voluntary resolution of the dispute.

STANDARD CRE REAL ESTATE DISPUTE RESOLUTION CLAUSES

Parties who wish to have the CRE REAL ESTATE DISPUTE RESOLUTION PROGRAM RULES govern any future dispute that occurs between them subsequent to the execution of a particular real estate agreement may include one of the two appropriately modified clauses in a legal agreement concerning real estate:

To select Mediation, Arbitration or an Appraisal Proceeding use the following appropriately modified clause:

Any controversy, claim or dispute arising out of or relating to this agreement or the breach, termination or validity thereof, shall be resolved in accordance with the Rules of the CRE Real Estate Dispute Resolution Program of The Counselors of Real Estate, as it may be amended from time to time, by means of _____ (insert mediation, arbitration or appraisal proceeding), and if not mediation, [specify one or three arbitrators for an arbitration or one or three appraisers (in a dispute resolution context) for an appraisal proceeding]. The neutrals shall be selected from the panels of mediators and arbitrators maintained by The Counselors (in the case of an appraisal dispute the neutral shall be a member of the Panel of Arbitrators and also have appropriate experience and credentials in the appraisal field). The dispute resolution process, including neutral selection, is to be governed and administered by a representative of The Counselors and judgment upon any award rendered or agreement reached may be entered by any court having jurisdiction thereof. By executing an agreement containing this clause each party thereto agrees to be bound by the CRE Real Estate Dispute Resolution Program Rules.

To select Mediation-Arbitration (Med/Arb) use the following appropriately modified clause:

The parties shall endeavor to resolve any dispute arising out of or relating to this agreement by mediation pursuant to the Rules of the CRE Real Estate Dispute Resolution Program of The Counselors of Real Estate. Unless the parties agree otherwise, the mediator will be selected from The Counselors' panel of mediators. Any controversy or claim arising out of or relating to this agreement or the breach, termination or validity thereof that remains unresolved 45 days

after the appointment of the mediator, shall be settled by one or three arbitrators (strike one of these alternatives) which may or may not (strike one of these alternatives) include the mediator, in accordance with the CRE Real Estate Dispute Resolution Program. Judgment upon the agreement reached or the award rendered may be entered by any court having jurisdiction thereof. By executing an agreement containing this clause each party thereto agrees to be bound by the CRE Real Estate Dispute Resolution Program Rules.

The above cited clauses can be easily modified by the parties to allow them to agree to utilize another dispute resolution process provided for in the CRE Real Estate Dispute Resolution Program.

The parties and their counsel are reminded that the Protocol's purpose is to be a definitional and comparative text describing and explaining an array of dispute resolution processes and diagnostic methods that may be chosen by the parties to aid in the resolution of a specific dispute. The Rules contained in a separate document provide the actual structure of dispute resolution in a particular case within the framework of the method(s) chosen by the parties. The Rules are the paramount and definitive document in any individual dispute resolution process.



THE COUNSELORS OF REAL ESTATE

430 North Michigan Avenue Chicago, Illinois 60611-4089
Phone: 312/329-8427 Fax: 312/329-8881 Email: info@cre.org Web: www.cre.org

CRE

THE COUNSELORS OF REAL ESTATE

430 North Michigan Avenue Chicago, Illinois 60611-4089

Phone: 312/329-8427 Fax: 312/329-8881 Email: info@cre.org Web: www.cre.org