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Dispute Resolution Clauses in Leases:
“Judge and Jury Need Not Apply”*

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I. Introduction.

This paper will address the non-judicial dispute resolution provisions commonly found in today’s commercial real estate leases. Since the landlord/tenant relationship differs in certain respects from other real estate contractual relationships, this paper will highlight the special dispute resolution needs and objectives of lease parties. After a brief review of the authority and resources available to facilitate the dispute resolution process, this paper will review the types of disputes most commonly settled non-judicially and give examples of the lease clauses and procedures that commonly govern that process.

II. What Are Landlords And Tenants Looking For?

Dissatisfaction with judicial resolution of disputes is common today. This is especially true among parties whose relationship is established under more “technical” contracts accumulating many specialized clauses to deal with a great many contingencies. The legal and factual underpinnings of the relationship between a commercial landlord and its tenants create some very particular tensions. These tensions in certain limited areas of commercial leases have driven the development of a variety of alternative dispute resolution approaches.

There has not been a widespread embrace of arbitration in commercial leases, due in large part to the imbalance in the bargaining power of the parties. While not as pronounced as in the residential area, commercial tenants, except for the very largest and creditworthy, generally do not have the ability to force a landlord to give up the benefits that are provided to landlords under the judicial system. Landlords generally benefit from many of the aspects of judicial decision-making that motivate others to seek alternative dispute resolution methods.

In most landlord-tenant disputes, the passage of time is on the landlord’s side. While commercial contracts are generally creatures of mutuality, a lease still creates an estate in property. From that fact comes the strongest surviving property aspect of a lease, the

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independence of the covenants in a lease. Every landlord has a huge advantage in any dispute since it can continue to collect rent, the basic economic benefit of its bargain, even if the landlord has failed in its contractual obligations to provide services. If the tenant withholds rent, the landlord can terminate the leasehold estate for non-payment, with limited defenses available to the tenant. Plus, the law has long given landlords expedited procedures to evict a tenant, which in most cases means the interruption of a tenant's business. The tenant is highly motivated to pay everything demanded by the landlord or suffer such an interruption. This advantage is an edge that most landlords are not willing to forgo.

Because of the disparity in bargaining position, tenants are eager to seek the protection of an independent "voice of reason" on issues where intransigence by the landlord, combined with the time pressure imposed by the tenant's need to continue its business operations without interruption or unpredictable cost, could force the tenant to accept an unreasonable resolution to a disputed issue. The best example of this is the determination of market rental rates for the tenant's exercise of options for future extensions and expansions, as discussed below.

While most of the desire for alternative dispute resolution comes from the tenant's side of the table, there are also some decisions that a landlord would like to reach more promptly and quietly. While a landlord's remedies are powerful, there are situations where the threat of eviction is disproportionate to the matter at hand. A good example of this is a dispute over pass-throughs of taxes and operating expenses in an office lease, or of common-area charges in a retail lease, as discussed below.

The major factors that push landlords and tenants to adopt non-judicial dispute-resolution methods can be summarized as follows:

- A. an informed decision by a real estate professional who has experience with commercial lease issues (and understands and appreciates the nuances of custom and usage) which will be a closer match to the parties' mutual expectations and the economic alternatives available in the marketplace;
- B. a prompt decision to avoid the "ripple" impact of delay and uncertainty of result on the rest of the tenant's (and landlord's) business (such as sale or financing for the landlord and renewal and expansion decisions for the tenant); and
- C. a less expensive decision by eliminating the extended discovery, motion, pre-trial and appeal process that adds so much to the cost of litigation.

III. What Makes Lease Disputes Different?

A modern lease intertwines, to a surprising extent, the financial affairs of two parties who are in very different businesses. Unlike many contracts, the flow of payments between the parties is not completely fixed by the contract. Because leases involve commitments of 10 to 15 years, landlords will look to protect the "net" return on their investment against tax and operating cost increases over that period. The result is the introduction of

“pass-throughs” of taxes and operating expenses (or escalations in those costs over a base amount) in office leases or of common area expenses in retail leases.

The existence of these variable items creates a natural tension, since one party selects the scope and suppliers of the services and the other has to pay for them. To control this process, tenants often negotiate a lengthy list of “excluded” expenses that the landlord is not allowed to pass through. Compliance with this list must be monitored during the term of the lease to verify that only the permitted items have been passed through. While these complex provisions protect tenants from abuse, they also cry out for expert, third party verification.

The fundamental fact that a lease is a long-term relationship adds another dimension to many disputes. In ground leases and other long-term leases, the fundamental value of the building or center will change over time, as will the market for that type of property as a whole. As a result, the parties need a way to “mark-to-market” their economics during the term. This requires a pre-agreed mechanism for making those adjustments to rental rates and settling the inevitable disputes over those adjustments in the future without renegotiation by the parties. The same future value issue arises when a tenant has invested money in constructing improvements on the leased premises and a portion of the improvements are taken in a condemnation. On what basis is the resulting award to be shared?

A long-term lease also amplifies the results of any dispute. More is at stake for each party than the current dollars in dispute. The results of a seemingly small interpretation of a lease clause will have a “snowball” effect over a long term. The issue might even be further magnified since when the landlord goes to sell the building or center, the price it can obtain is largely just a multiple of the property’s rental revenues. Finally, animosities built up over the course of a bitter and drawn-out dispute will inevitably affect the many accommodations, amendments and modifications that landlords and tenants must make over the term of the lease to maintain a good relationship. This accumulation of acrimony of course also decreases the landlord’s chances to persuade the tenant to renew its lease at the end of the term.

IV. What Lease Issues Are Most Often Disputed?

Perhaps the most common dispute involves the calculation of tax and operating expense pass-throughs and common area maintenance charges. The amounts at issue are relatively small compared to the aggregate economic lease obligations. However, the clauses themselves, and their application in various factual situations, are not easily interpreted by, or even explained to, a judge or a jury. As a result, many larger commercial leases provide for the selection of an independent accountant to resolve this type of dispute.

Tenants need assurances that their operations can continue at a given location. A tenant may need more space during its lease term to house an expanding staff if its business is growing. The tenant understands that it can’t simply ask for the right to cancel the existing lease obligation and move to larger quarters in another building. To address these

points, leases often contain options exercisable by the tenant to expand into additional space. Since it doesn't want to be exploited by the landlord as a "captive" tenant and find that its landlord is asking an over-market rent for that extra space that is critical to its business, the tenant asks the question of how that rate will be fairly determined, leading to a dispute resolution clause.

The same opportunity for exploitation arises at the expiration of a lease term. A tenant negotiates the maximum term that a landlord will initially accept at a pre-agreed rental rate, with the protection of an option to stay in the space at "then-current market rent." After that initial term expires the tenant will typically have a large economic stake in staying in its space, either to realize the value of an established customer base in a retail location or, in an office setting, to avoid both the disruption of moving its operations and the cost of fitting out new space.

Many landlords believe that they know their project and their markets best and reserve in their form leases the discretion to determine then-current market rents, perhaps adding a "good faith" standard. Most larger tenants see this as a way for the landlord to deny them the true value of their option and will only be satisfied by having an independent third party determine the market rent.

A similar situation occurs when the parties must determine current market value of the building or site. This may be needed to determine the purchase price for a purchase option given to the tenant or for periodic rental adjustments in long-term ground or master leases. If a condemnation occurs, the relative values of the landlord's and tenant's interests in the improvements and the site must be determined. In most of these leases, unlike shorter term occupancy leases, the tenant has invested a considerable amount in construction and cannot agree to just cancel the lease or forgo its purchase option and forfeit its investment. In these situations, the parties regularly accept the need for a third-party determination and an appraisal process is often incorporated into the lease.

Completion of a landlord's construction obligations in a newly constructed building or shopping center (or of initial tenant improvements in any lease where the landlord undertakes to deliver space in "turn-key" condition) will be the trigger for the tenant's rent payment obligation, so determining the exact completion date can be critical. These disputes tend to arise at very pressure-filled moments, often when the closing of permanent financing or a take-out purchase is at hand. Like any construction delay situation, there will be a need to assess timely performance of many inter-dependent obligations along the "critical path" to completion and their contribution to the total delay. Timely resolution of these disputes is crucial. Experts are called for since a thorough understanding of the construction process is needed to even start to assess accurately the respective responsibilities for any delay.

There are other lease disputes that arise often and would seem to be amenable to resolution by arbitration, such as:

- A. The acceptability of subtenants or assignees proposed by the tenant;

- B. The tenant's remedies (or lack of remedies) on any untenability of its space due to the failure or interruption of services; and
- C. The tenant's obligation to remove alterations made during the term and restore its premises at the expiration of the lease term.

Each of these situations involves time pressures, demands expertise in the interpretation of lease provisions, and would benefit from a knowledge of the general custom and usage in landlord/tenant circles to assess the "reasonableness" of a given situation.

V. What Are The Most Common Dispute Resolution Methods In Leases?

Perhaps the most common alternative dispute resolution device is the designation of an "independent public accountant" to resolve disputes over the correctness of pass-through expenses, as to both the amount and type of expense. See Exhibit A for a sample provision. A corollary benefit to a landlord is that this type of resolution can be kept private, one of the benefits of arbitration. See Chapter 6 in *Commercial Arbitration at Its Best; Successful Strategies for Business Users*, edited by Thomas J. Stipanowich and Peter H. Kaskell, American Bar Association, Section of Business Law, Section of Dispute Resolution and CPR Institute for Dispute Resolution (2001), which is a useful compendium of arbitration rules and rationales. This will minimize adverse publicity about the landlord and avoid alerting other tenants in the building or project to join in a group challenge to the practices or charges at issue. Note also that the sample clause attached as Exhibit A requires the tenant to obtain a confidentiality agreement from its pass-through auditor to address the same issue. Some landlords will go further and preclude the tenant from hiring any pass-through auditor which works on a contingency fee basis. The landlord fears that such an auditor will be incentivized to overstate the claims against the landlord in hopes of winning a larger settlement, thereby polarizing the situation.

The "arbitration" of current market rent for tenant options to expand the premises or extend the term is also common in larger leases. See Exhibit B for a sample provision. Because rent is the heart of the relationship these clauses should always be carefully addressed. Rather than letting the arbitrators use their own, perhaps differing, concepts of market rent, some parties will carefully define the factors that the arbitrators must include in their determination. These can include both the universe of other leases to be compared and the adjustments which are to be made to the stated rents under those leases to reflect differing terms, pass-throughs and tenant concessions, so that an "apples-to-apples" comparison is achieved.

One of the keys to this type of clause is reaching agreement on the qualifications of the decision-makers. Note that Exhibit B selects the decision-makers from experienced leasing brokers. Unfortunately, being an expert usually means having handled many similar transactions, but that also means the expert has probably previously worked with the landlord or is at least a candidate to do so in future transactions. This fear often drives tenants to resist the appointment of a leasing broker as an arbitrator despite the fact that leasing brokers undoubtedly have the most information about the market. Landlords

often resist the tenant's most common alternative, an appraiser, out of a fear that appraisers are accustomed to valuing buildings, not leases, and are trained to make decisions on past comparable transactions, which by definition will lag current market conditions.

As discussed in more detail below, a dispute over market rental rates is the one that most lends itself to "last offer" or "baseball" arbitration since the arbitrator is not ruling on the "correct" interpretation of a clause or fashioning a solution to an open-ended dispute. Baseball arbitration works best when the objective is to select a narrow, but not exact, range of amounts from a wide-ranging survey of comparable transactions in a marketplace.

Another common use of a third-party decision-maker often occurs when the lease has an initial term well in excess of typical space lease terms of 5 to 15 years. These are usually ground or pad leases where the tenant is making a major investment by constructing a building on the site and doesn't have the luxury of moving out if there is a battle over future market rents. This also means that the tenant has a compensable interest in any condemnation awards. These landlords are generally not willing to fix a rental rate based on today's value and don't want a pre-agreed formula tied to increases in the consumer price index or another generic inflation indicator. The landlord anticipates that the value of its site will rise steadily over that lengthy period and will demand that its rent be reset from time to time to keep its return commensurate with the rising value of its asset.

The issue is usually framed as the application from time to time of a certain percentage return to the landlord, usually pre-agreed at the beginning of the term, to the updated value of the landlord's asset. These resets are usually scheduled for every ten or fifteen years to match the length of the fixed rental commitment to the fixed rent period found in occupancy leases. In this context, the parties are forced to find a pre-agreed mechanism to establish the future rents and continue their landlord/tenant relationship. See Exhibit C for an example of this type of clause. This type of provision almost always calls for appraisers to act as the decision-makers.

The referral of disputes over completion of improvements to construction experts is less common, but can be very valuable in certain situations. See Exhibit D for a sample provision. The key in this situation is speed, so the time frames are most compressed in this area. Since the act of moving into a space and starting to pay rent is in reality the last good leverage point for a tenant, and since the landlord has pressure from investors and lenders to get cash flow from the premises started, this is one of the few areas where landlords will be pushing the arbitration concept.

Pre-agreed resolution mechanisms are rarely seen for the other issues--landlord's approval of assignees or subtenants, tenant's remedies for untenability due interruption of services and removal and restoration obligations. In fact, landlords often seek to limit tenants to only injunctive relief on the subject of assignment and subletting approvals. These matters perhaps do not require the same level of third party fact-finding as the other, more commonly addressed, disputes despite the critical nature of the decisions. This is especially true for disputes over assignment and subletting approvals.

Here the tenant may lose the prospect and incur significant damages if the landlord is acting improperly. Some tenants with tremendous leverage can and do obtain broader arbitration rights, but these instances are very rare. See Exhibit E for a sample of a generic provision.

VI. What Are The Sources For Rules Of Procedures For These Decision Makers?

Contractual language usually governs selection of the arbitrator(s) and the basic decision-making process. The qualification and appointment process for the arbitrators should be spelled out in the lease. Will there be one arbitrator or three? What is the “tie-breaker” if the parties fail to agree on the appointment? Parties often feel safer with three arbitrators, with the parties each choosing one and then directing those two appointees to pick the third. As a backup, if there is a problem in selection parties often designate one of the arbitration associations to select the arbitrator and sidestep that dispute. It is also possible to leave the full arbitrator selection process to the arbitration associations, which have selection procedures established in their rules.

There are several alternatives to the ultimate decision-making. The arbitration association rules generally state that the arbitrator, or a majority of the arbitrators if there are more than one, will decide the issue. Majority rule is almost always the result when a panel of three is assembled, although sometimes the third arbitrator is the sole decision-maker. The second alternative in Exhibit B calls for two arbitrators and bases the result on the average of the two appraisers’ valuations so long as they are within 20% of each other.

However, this averaging approach highlights one of the hesitations that landlords and tenants have about arbitration. Both sides fear that they will lose money unfairly due to the natural tendency of arbitrators to “split the difference” in an attempt to please both sides. Once parties realize they are headed for a “split the difference” arbitration, their offers will harden and stay further apart as they seek to move the inevitable final average amount toward their side of the table.

To address this concern, “last offer” or “baseball” arbitration is the growing choice for disputes over current market rates or property values. By forcing the parties to make their best offers before the arbitration commences, and then authorizing the arbitrator(s) only to select one of the two “last offers,” the parties prevent the arbitrators from taking an easy way out of the situation. See Exhibit B for a detailed baseball arbitration procedure. Note that the second alternative in Exhibit D also illustrates a modified baseball approach, where a third arbitrator is selected to choose the final amount from the two values determined by the parties’ appointees if they differ by more than the 20% threshold for averaging.

Despite the general antipathy to splitting-the-difference approaches, several of the attached baseball arbitration clauses do include a limited pre-arbitration averaging concept. This will apply if the parties’ last offers are within a certain percentage of each other. So long as this percentage is low, the averaging helps the parties achieve a quicker end to the dispute without further jousting.

The actual details regarding the management and oversight of the arbitration process is often implemented by the incorporation by reference of the rules promulgated by a professional arbitration organization. The organization most commonly selected is the American Arbitration Association (“AAA”), but there are other organizations which offer similar services. See the AAA website, www.adr.com, for copies of their rules.

While the AAA’s Commercial Arbitration Rules are the generic rules most commonly referenced there is another more specific set of AAA rules that can be used for lease disputes. In 2003 the AAA promulgated a set of “Real Estate Industry Arbitration Rules (7/1/03).” The introduction to these rules indicates that they are intended specifically to address real estate disputes including disputes over “economic rent for a renewal term ... at the ‘going rate’” and “lease disputes involving revenue issues, expense-escalation reimbursements and operational and occupancy and use issues.” The AAA also has “Construction Industry Arbitration Rules,” which are specifically aimed at construction disputes.

Specific procedures for decisions that need to be made quickly are set out in the AAA’s “Expedited Procedures” contained in Rules E-1 to E-10 of the Commercial Arbitration Rules and in Rules 56-60 of the Real Estate Industry Arbitration Rules. These provide timesaving shortcuts, such as telephonic notices of the appointment of arbitrators and of the date set for the hearing. A maximum limit of seven days is set for selection of the arbitrators, and only seven days advance notice of the hearing date is required. The hearing itself must be held within 30 days of the appointment of the arbitrators. The hearing is generally limited to one day and a decision is due within 14 days after the hearing.

VII. What Are The Sources Of Authority For Enforcing The Decisions Of These Appointed Decision Makers?

Most lease arbitrations will be governed by the arbitration act enacted in the state where the leased premises are located, based on the law most typically selected to govern the lease. These acts are generally modeled on the Uniform Arbitration Act and validate the leasing parties’ agreement to arbitrate. “[A] provision in a written contract to submit to the arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable,” Section 1, Uniform Arbitration Act, National Conference of Commissioners of Uniform State Law, 1955, as amended in 1956. The Act goes on to stay any judicial proceedings involving the dispute while arbitration is pending, give the arbitrators authority to run the arbitration and set limited circumstances (such as fraud or “evident partiality”) in which an arbitration award can be vacated by a court.

There are many cases involving arbitration, usually focused on the arbitrability of a particular dispute or whether the arbitrators have been “fair and impartial.” For a good example of the “parade of horrors” that can arise with the appointment of arbitrators in a lease arbitration over a rent resetting clause, see *Gadd v. Kelley*, 66 Haw. 431, 667 P.2d 251 (1983), in which the Supreme Court of Hawaii was faced with a party’s firing of its previously appointed arbitrator as soon as it learned of a tentative adverse decision.

VIII. What Can Be Done To Avoid Arbitration?

The existence of an arbitration clause is certainly a good way to minimize disputes. Unarguably, the greatest benefit of an arbitration provision is the impact the very existence of that clause has on the attitude and approach of the parties to the arbitrable issue. Not surprisingly, parties will bargain more freely and reach a compromise more quickly when a prompt and effective resolution through arbitration is available. The loss of control and the risk of suffering a prompt and adverse decision as a result of taking an unreasonable position fosters compromise.

Mediation is growing in popularity in other real estate settings. See “Alternate Dispute Resolution for Real Estate Disputes: Is ADR Really Faster, Better and Cheaper?” by Michael F. Donner and Dennis L. Greenwald, *Probate & Property*, American Bar Association, Real Property, Probate and Trust Law Section, May/June 2006, for a good practical overview of the pros and cons of this trend. Mediation can provide more flexible solutions in terms of adjustments to the on-going relationship and future concessions to a present problem. The mediator can have one-on-one confidential discussions with each party which provides for more candor and less polarization. Since mediation is non-binding it may not, however, sufficiently motivate the parties to reach a settlement until they are faced finally with a loss of control over the outcome.

Why is mediation not seen much in leases? Most likely this is due to the more narrow range of issues on which landlords and tenants want third-party input. There, the contributions of a mediator in framing issues and possible solutions are less helpful than in a more free-form dispute. As discussed above, since the dispute arises in the context of a long-term relationship, there will always be related issues which the parties may be reluctant to address in mediation. Because of that on-going relationship, landlords and tenants may also simply believe that they do have good lines of communication and that adding a non-binding phase of discussions will do nothing but add further time to a process they want resolved quickly.

Note that the clauses contained in both Exhibit D and Exhibit E include a requirement that before arbitration can be initiated, each party must refer the dispute to a designated senior executive and arrange for a discussion of the dispute by those senior executives. This quasi-mediation process is often used to make certain that settlement is not being prevented solely by a clash of personalities or by accumulated “bad will” between operational managers who have been involved with the dispute from its inception. Often these individuals may have an interest in justifying or defending their prior positions that runs counter to their respective employers’ best interests. This is an especially good approach when both landlord and tenant are institutions with multiple levels of decision-making. Sometimes the senior executives will bring a broader view of the costs and benefits of the dispute, along with greater authority to structure and approve a mutually satisfactory settlement.

EXHIBIT A

CONFIRMATION OF PASS-THROUGHS

1. Each Landlord's Statement shall be subject to Tenant's right to audit such Landlord's Statement using Tenant's own employees or any other reputable firm which regularly provides such services. If Tenant desires to audit any Landlord's Statement a notice to Landlord to such effect must be given no later than three (3) months after the date such Landlord's Statement is delivered to Tenant, or such Landlord's Statement shall be deemed conclusive and binding on Tenant and shall not be subject to audit by Tenant thereafter. Tenant shall pay for any such audit, provided, that if any audit discloses any error of five percent (5%) or more with respect to either the amount of Operating Expenses or of Taxes set forth in such Landlord's Statement, Landlord shall reimburse Tenant promptly thereafter for the reasonable costs incurred by Tenant in connection with such audit. Upon at least ten (10) days notice, Landlord shall make available for examination or copying by the person or persons conducting such audit all books and records relevant to the Operating Expenses and Taxes for the Landlord's Statement in question either at the Building or at Landlord's principal place of business in the United States of America, as selected by Landlord. Any person or persons conducting an audit on behalf of Tenant (each an "Auditor") shall execute and deliver to Landlord a confidentiality agreement in form and substance reasonably acceptable to Landlord to hold any information derived from its review of the books and records of the Building and the results of such audit in confidence, provided that such Auditor may disclose such audit or any information obtained in connection therewith to Tenant or Landlord and such other parties as may be reasonably necessary to resolve any potential dispute with respect to Operating Expenses or Taxes.

2. If an audit results in a determination that Tenant has overpaid any amounts on account of Operating Expenses or Taxes, Landlord may dispute the results of the audit and, if the parties are unable to reach agreement within thirty (30) days thereafter, Landlord and Tenant shall jointly select an independent certified public accountant to act as a single impartial arbitrator within an additional thirty (30) days thereafter. The fees of such arbitrator are to be either shared equally by Landlord and Tenant or paid in full by Landlord if such arbitrator confirms an overcharge to Tenant of five percent (5%) or more with respect to either the amount of Operating Expenses or of Taxes set forth in the Landlord's Statement in question. If Landlord and Tenant are unable to agree upon an independent certified public accountant who is amenable to serving as an arbitrator within such additional 30 day period, at the request of either party, the American Arbitration Association (or any successor entity thereto) (the "AAA") shall designate an independent certified public accountant to serve as the arbitrator.

3. The amount of such Operating Expenses and/or Taxes with respect to the Landlord's Statement in question shall be the amount determined by the arbitrator, provided that such amount shall be no higher than the amount set forth in the disputed Landlord's Statement or less than the amount determined by Tenant's audit.

EXHIBIT B

DETERMINATION OF CURRENT MARKET RENTAL RATE

1. In the event of the failure of the parties to agree as to Current Market Rate by the last day of any period provided for in this Lease (or if no period is provided within thirty (30) days after the need for such agreement becomes known), such dispute shall be determined by arbitration as herein provided in Subsections 2 through 5 of this Section.

2. Landlord and Tenant, within seven (7) days after expiration of such period (time being of the essence), shall each simultaneously submit to the other at a location mutually agreeable to Landlord and Tenant (provided that if no such location is mutually agreeable, then in the office in the Building of the Building manager), in a sealed envelope, its good faith estimate of the Current Market Rate (collectively, the "Estimates"). If the higher of such Estimates is not more than one hundred five percent (105%) of the lower of such Estimates, Current Market Rate shall be the average of the two Estimates. If either party fails to submit an Estimate, Current Market Rate shall equal the Estimate submitted by the other Party.

3. If both parties fail to submit an Estimate or if the Current Market Rate is not resolved by the exchange of Estimates (i.e., if the higher of such Estimates is more than one hundred five percent (105%) of the lower of such Estimates), or if there are other disputed issues in connection therewith, Landlord and Tenant, within seven (7) days after the exchange of the Estimates (or the latest date on which such exchange of Estimates should have occurred), shall each select an arbitrator to determine which of the two Estimates most closely reflects the Current Market Rate for the subject space for the subject term and determine any other disputed issues in connection therewith. Each arbitrator selected pursuant to this Article shall be an independent third party and shall have at least ten (10) years experience in the business of acting as a real estate broker dealing with buildings located in the comparable market area and comparable to the Building. Upon selection, Landlord's and Tenant's arbitrators shall work together in good faith to agree upon which of the two Estimates most closely reflects the Current Market Rate for the space and/or term in question and determine any other disputed issues in connection therewith. The Estimate chosen by such arbitrators shall be binding on both Landlord and Tenant as the Current Market Rate for the space and/or term in question. If either Landlord or Tenant fails to appoint an arbitrator within the seven (7) day period referred to above, the arbitrator appointed by the other party shall be the sole arbitrator for the purposes hereof.

4. If the two arbitrators cannot agree upon which of the two Estimates most closely reflects the Current Market Rate, or if they cannot resolve any other disputed issues in connection therewith within twenty (20) days after their appointment, within ten (10) days after the expiration of such twenty (20) day period, the two (2) arbitrators shall select a third arbitrator meeting the aforementioned criteria (or, if such two arbitrators are unable to select a third arbitrator within such period, the parties agree that upon application of either party or arbitrator, the AAA shall designate such third arbitrator in accordance with the then applicable rules, regulations or procedures of the AAA). As soon as practicable after the third arbitrator has been selected as provided for above, but in any case within fourteen (14) days thereafter, such third arbitrator shall select which of the two Estimates most closely reflects the Current Market Rate

and such Estimate shall be binding on both Landlord and Tenant as the Current Market Rate for the space and/or term in question, and such third arbitrator shall determine any other disputed issues in connection therewith. If the third arbitrator believes that expert advice would materially assist in reaching a determination, such arbitrator may retain one or more qualified persons to provide such expert advice. The parties shall share equally in the costs of the third arbitrator and of any experts retained by the third arbitrator. Any fees of any arbitrator, counsel or experts engaged directly by Landlord or Tenant shall be borne by the party retaining such arbitrator, counsel or expert.

5. Each arbitrator determining Current Market Rate shall be bound by the provisions of this Lease and shall not have the power to add to, subtract from, or otherwise modify such provisions. Landlord and Tenant agree to sign all documents and to do all other things necessary to submit any such matter to such arbitrators and further agree to, and hereby do, waive any and all rights they or either of them may at any time have to revoke their agreement hereunder to submit the determination of Current Market Rate to such arbitrators and to abide by the decision rendered by such arbitrators.

EXHIBIT C

LAND VALUE DETERMINATION

ALTERNATIVE NO. 1 -- BASEBALL APPROACH

Land Value. As of any date on which Annual Base Rent will be readjusted pursuant to Section 3(a) hereof, the “*Land Value*” shall mean the fair market value of the Leased Premises as of the applicable date shown in the chart in Section 3(a) (the “*Valuation Effective Date*”) if the Land were vacant land unencumbered by this Lease and available for development of a project of the maximum size then permitted by law and being offered for sale by a willing seller under no compulsion to sell. In the event of the failure of the parties to agree as to the Land Value by a date six (6) months prior to the applicable Valuation Effective Date, such dispute shall be determined by arbitration as provided below.

Arbitration. If the parties fail to agree on (i) Land Value under Section 3(c), (ii) the equitable adjustment of Rent after condemnation under Section 18(c) hereof, or (iii) the apportionment of an undivided condemnation award under Section 18(e) hereof (each a “Arbitrated Amount”) such dispute shall be determined by arbitration promptly after either party’s issuance of a written demand for arbitration under this Section.

Estimates. Landlord and Tenant, within ten (10) days after the effective date of a demand for arbitration given by either party (time being of the essence), shall each simultaneously submit to the other its good faith estimate of the Arbitrated Amount (collectively, the “*Estimates*”). If the higher of such Estimates is not more than one hundred five percent (105%) of the lower of such Estimates, the Arbitrated Amount shall be the average of the two Estimates. If either party fails to submit an Estimate, the Arbitrated Amount shall equal the Estimate submitted by the other party.

Selection of Appraisers. If both parties fail to submit an Estimate or if the Arbitrated Amount is not resolved by the exchange of Estimates (i.e., if the higher of such Estimates is more than one hundred five percent (105%) of the lower of such Estimates), Landlord and Tenant, within ten (10) days after the exchange of the Estimates (or the latest date on which such exchange of Estimates should have occurred), shall each select an appraiser to determine which of the two Estimates most closely reflects the Arbitrated Amount. Each appraiser selected pursuant to this Section shall be an MAI Appraiser (as hereinafter defined) and shall have had at least five (5) years experience within the previous ten (10) years as a real estate appraiser working in the market or submarket that includes the Leased Premises, with working knowledge of current commercial real estate values and practices. For purposes of this Lease, an “*MAI Appraiser*” means an individual who holds an MAI designation conferred by, and is an independent member of, the American Appraisal Institute (or its successor organization, or in the event there is no successor organization, the organization and designation most similar) and who is independent of Landlord and Tenant. Upon selection, Landlord's and Tenant's appraisers shall work together in good faith to agree upon which of the two Estimates most closely reflects the Arbitrated Amount. The Estimate chosen by such appraisers shall be binding on both Landlord

and Tenant as the Arbitrated Amount applicable to such matter. If either Landlord or Tenant fails to appoint an appraiser within the ten (10) day period referred to above, the appraiser appointed by the other party shall be the sole appraiser for the purposes hereof.

Third Appraiser. If the two appraisers cannot agree upon which of the two Estimates most closely reflects the correct Arbitrated Amount within twenty (20) days after their appointment, within ten (10) days after the expiration of such twenty (20) day period, the two (2) appraisers shall select a third appraiser meeting the aforementioned criteria (or, if such two appraisers are unable to select a third appraiser within such period, the parties agree that upon application of either party or appraiser, the American Arbitration Association (the "AAA") shall designate such third appraiser in accordance with the then applicable rules, regulations or procedures of the AAA). As soon as practicable after the third appraiser has been selected as provided for above, but in any case within fourteen (14) days thereafter, such third appraiser shall select which of the two Estimates most closely reflects the Arbitrated Amount and such Estimate shall be binding on both Landlord and Tenant as the Arbitrated Amount for such matter. If the third appraiser believes that expert advice would materially assist in reaching a determination, such appraiser may retain one or more qualified persons to provide such expert advice. The parties shall share equally in the costs of the third appraiser and of any experts retained by the third appraiser. Any fees of any appraiser, counsel or experts engaged directly by Landlord or Tenant shall be borne by the party retaining such appraiser, counsel or expert.

Arbitration Rules. Each appraiser determining an Arbitrated Amount shall be bound by the provisions of this Lease and shall not have the power to add to, subtract from, or otherwise modify such provisions. Landlord and Tenant agree to sign all documents and to do all other things necessary to submit any such matter to such appraisers and further agree to, and hereby do, waive any and all rights they or either of them may at any time have to revoke their agreement hereunder to submit the determination of any such Arbitrated Amount to such appraisers and to abide by the decision rendered by such appraisers.

ALTERNATIVE NO. 2 --AVERAGING WITH FALLBACK BASEBALL APPROACH

Purchase Option. Upon the expiration or sooner termination of the Lease (including extension/option periods when and if exercised), Lessee shall have the option of purchasing the building and land containing the Premises as legally described on Schedule 1 attached hereto (the "Fee Area") for a purchase price equal to the fair market value of the Premises. The fair market value of the Fee Area shall be determined by an appraiser selected by the Lessor and Lessee. If the Lessor and Lessee are unable to agree on one appraiser, the appraised value of the Fee Area shall be determined as follows: the Lessor and Lessee shall each select an appraiser. If the higher of the two appraisals does not exceed the lower by more than twenty percent (20%), then the two appraisals shall be averaged, and such average shall be binding on all parties in interest.

If the two appraisals do differ by more than twenty percent (20%), then the two appraisers shall select a third appraiser, or if they are unable, a third appraiser shall be appointed by a judge of the highest state court located in the county in which the Premises are located. Such appraiser shall appraise the Fee Area (the "Independent Appraisal"). The Independent Appraisal, together with that appraisal made on behalf of one of the parties which is closest in

amount to the Independent Appraisal shall be averaged, and the value so determined shall thereupon be binding on all parties in interest. If the Independent Appraisal differs by the same amount from each of the other two appraisals, the value set forth in the Independent Appraisal shall thereupon be binding on all parties in interest. The cost and fees of the appointment of such third appraiser shall be borne equally by the Lessor and the Lessee. All appraisers shall at the time of appointment be knowledgeable and experienced in appraising real estate and should be registered as an MAI appraiser or such similar certification or qualification.

The parties and their assigns and successors in interest agree that they will proceed as expeditiously as possible in determining the appraised value of the Fee Area. The appraisal procedure shall, if at all possible, be completed within sixty (60) days after the expiration date or sooner termination. If either party fails to appoint a qualified appraiser within thirty (30) days after requested to do so by the other party, such failure shall constitute a waiver by the party of its right to appoint an appraiser, and the determination of the valuation shall be binding on all parties in interest.

The final appraisal determination, so long as made as herein defined, shall be binding and conclusive on the parties hereto, and such appraisers shall not incur any liability for such determinations made in good faith. All determinations shall be supported, in writing, by the underlying data, and shall set forth the reasoning and computations relied on and used by such appraisers.

EXHIBIT D

RESOLUTION OF CONSTRUCTION DISPUTES

If Landlord and Tenant have a dispute with respect to matters relating to the Work or Landlord’s achievement of Turnover Condition, the dispute shall initially be submitted by either party to the Landlord and Tenant for resolution. The initial representatives of the parties shall be as follows, until a party gives written notice to the other parties that it is replacing its representative:

Landlord Representative: _____

Tenant Representative: _____

The Landlord and Tenant Representatives shall meet one or more times to attempt to resolve such dispute within the five (5) business day period following the date that such dispute is submitted to them. If, after such meeting(s), the parties have been unable to resolve such dispute, then such dispute shall be resolved as set forth below.

“Construction Arbitration” shall mean a procedure for resolving disputes during construction of the Shell and Core Work regarding achievement by Landlord of Turnover Condition with respect to the Premises, whereby, if Landlord and Tenant are unable to reach agreement regarding such matters after submission to Landlord’s Representative and Tenant’s Representative, either party may elect by notice to the other (an “Arbitration Notice”) to submit such matter to be decided by an independent third party mutually satisfactory to Landlord and Tenant who shall either be an Architect Arbitrator or a Construction Company Officer arbitrator (as defined herein) or an arbitrator selected by the AAA. The party electing such arbitration shall propose in its notice to the other party an Arbitrator meeting the foregoing criteria, and the other party shall within five (5) days after receipt of such Arbitration Notice notify the electing party in writing of its acceptance of such Arbitrator as so designated by the electing party, or if the other party is not prepared to accept the Arbitrator designated by the electing party, then such other party may request that the office of the AAA in the city in which the Building is located appoint an Arbitrator for purposes of conducting such construction arbitration. The one Arbitrator mutually satisfactory to Landlord and Tenant, or the Arbitrator designated by the AAA (if Landlord and Tenant fail to agree on the selection of one Arbitrator), shall within five (5) days after engagement meet with the representatives of Landlord and Tenant for the purpose of gaining information with respect to the nature of the dispute between Landlord and Tenant, and shall decide such dispute without delay and as promptly as reasonably possible under the circumstances. The decision of such Arbitrator shall be final and binding on both Landlord and Tenant and shall not be subject to further review. Both parties shall share equally the costs of the Arbitrator. These procedures shall also apply to resolving disputes during the construction of Tenant’s Work and to such other matters with respect to which “Construction Arbitration” is specified as the dispute resolution mechanism pursuant to the provisions of this Lease (including, without limitation, the Workletter). “Construction Arbitration” shall be conducted pursuant to any Expedited Procedures provisions of the Construction Industry Arbitration Rules of the AAA (as modified by the terms and conditions of this definition).

Any such arbitration shall be conducted in the city in which the Building is located, and administered by the AAA. The arbitrators shall be bound by the provisions of this Lease and shall not have the power to add to, subtract from, or otherwise modify such provisions. Landlord and Tenant agree to sign all documents and to do all other things necessary to submit any such matter to arbitration and further agree to, and hereby do, waive any and all rights they or either of them may at any time have to revoke their agreement hereunder to submit to arbitration and to abide by the decision rendered thereunder.

EXHIBIT E

GENERAL ARBITRATION

All disputes between the parties specifically referencing this Section (so long as such reference is applicable) shall be resolved in accordance with this Section except (i) Landlord shall have all of its rights and remedies at law or in equity in the event of a default by Tenant which is not properly contested by Tenant hereunder, (ii) Landlord shall have the right to obtain possession of the Premises by any lawful means following a valid termination of this Lease, and (iii) any arbitration decision under this Section shall be enforceable in accordance with applicable law in any court of proper jurisdiction. Furthermore, if Landlord disputes Tenant's right to abate, offset, or deduct any amount of Rent pursuant to Tenant's express rights under this Lease and if Landlord gives written notice to Tenant of such dispute on or before the date ten (10) business days after Landlord receives written notice from Tenant that Tenant intends to exercise such right to abate, offset, or deduct, then such dispute shall be resolved in an arbitration proceeding pursuant to this Section prior to any abatement of disputed amounts by Tenant.

Either party may give written notice of the dispute requesting resolution under this Section and submit a reasonably detailed written statement of the position and reasons therefor with such notice. The other party will, within ten (10) days of receiving such written statement, submit to the party initiating the dispute resolution its own detailed written statement of the position and reasons therefor. Tenant and Landlord shall each designate a senior executive by written notice to the other and such senior executives shall meet at the earliest mutually acceptable time and place, but in any case within (30) days and attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days of the date of the response statement, then either party may initiate arbitration of such controversy by written notice to the other (the "Arbitration Notice"). The arbitration shall be held before a single arbitrator. The parties shall endeavor to agree upon and name the arbitrator within the fifteen (15) day period following the Arbitration Notice. If the parties fail timely to name the arbitrator, then unless the parties agree in writing to another procedure for designating the arbitrator, either party may by written notice given to the other and to the office of the American Arbitration Association in the city where the Building is located request that the arbitrator be promptly chosen by such office of the American Arbitration Association. In any event, the arbitrator shall be either a person with at least fifteen (15) years of personal experience as a partner, member or other principal of one or more major law firms with an office in the city where the Building is located (which for this purpose shall mean a law firm having at least ___ attorneys) who has a principal specialty in real estate practice, or a retired judge who has served for at least fifteen (15) years on a court hearing civil controversies in the city where the Building is located; provided that the arbitrator shall not have had any business relationship with either party or Affiliates of either party for at least the then most recent ten (10) years, all as determined by the person or persons designating such arbitrator. The arbitrator shall commence the arbitration hearing within ten (10) days after appointment, shall complete the arbitration hearing within thirty (30) days after the date the arbitration hearing commenced, and shall render a written arbitration decision within forty (40) days after the arbitration hearing commenced, which time periods may be extended by written agreement of the parties or by the arbitrator for good cause. The arbitration shall be conducted in accordance with then existing, expedited procedures under the commercial arbitration rules of the American Arbitration Association; however, to the extent any provisions of this paragraph are inconsistent

with such procedures, the provisions of this paragraph shall govern. The arbitration shall only be administered by the American Arbitration Association if it chooses the arbitrator; otherwise it shall be administered by the arbitrator. The decision of the arbitrator shall be final and binding upon the parties and judgment upon the decision rendered by the arbitrator may be entered in any court having jurisdiction thereof. The parties shall equally share and pay the costs of the arbitrator.

Notwithstanding the foregoing or anything herein to the contrary, the dispute resolution provisions of this Section shall not apply to a dispute, claim or controversy in which: (i) a party, having given the other party at least 10 days' notice of the other party's alleged breach, in good faith seeks immediate equitable relief from a court of competent jurisdiction to enable the instituting party to prevent irreparable harm (alleged to arise from the alleged breach) pending agreed resolution or a grant of arbitral relief; or (ii) any claim by one party against the other party arises out of the subject matter of any court litigation or proceeding commenced by any third party against one party in which the other party is an indispensable party or third party defendant; or (iii) any claim is asserted with respect to which a third party, which is not bound and will not, upon request of a party, agree to arbitrate, is an indispensable or necessary party.