

## Become Arbitration Savvy

Every time you are presented with a contract, the arbitration provision should be given careful attention so you will understand the nature of the dispute resolution method mandated by the contract.

Some of the documents that contain arbitration provisions, or do not, are summarized herein so the nature of such provisions are more familiar before the contracts are executed. Many of the documents are California Association of Realtor forms, as indicated by the reference to "C.A.R. Form."

California Residential Property Agreement (C.A.R. Form RPA-CA). In this standard offer to purchase real property, agreeing to arbitration is an option, and its provisions must be specifically agreed to by initialing by both parties. It provides that any dispute or claim in law or equity arising between the parties out of the agreement or any resulting transaction, shall be decided by neutral, binding arbitration. The parties have a right to discovery. It does not specify the arbitration provider, but it requires the arbitrator to be a retired judge or justice, or an attorney with at least 5 years of residential real estate law experience, unless the parties agree to a different arbitrator.

An unlawful detainer action or actions in small claims, probate, or bankruptcy courts, are an exception to the provision. Filing a lawsuit to preserve a statute of limitations, or to enable the recording of a notice of pendency of action (lis pendens), such as a complaint by a buyer for specific performance of the RPA-CA, are also exceptions to both the mediation and arbitration provisions.

Many other contracts in the real estate field require arbitration, and it is often not an option, unless it is stricken from the contract by mutual agreement.

The Southland Regional Association of Realtors (SRAR) provides a procedure for making arbitration requests, and the current filing fee is \$500. The hourly fee for the arbitrator is additional to the filing fee. The statute of limitation imposed by the SRAR is 180 days after the close of escrow, and it encourages the parties to first attempt to resolve the dispute by mediation.

California Exclusive Listing Agreement (C.A.R. Form RLA). Arbitration is not included, and mediation is required to be attempted and accepted, or the right to recover attorney's fees may be barred. It only provides an ADVISORY, that if the parties agree to resolve their disputes by arbitration, they can document their agreement by attaching and signing a separate Arbitration Agreement. (C.A.R. Form ARB)

Buyer Representation Agreement - Exclusive (C.A.R. Form BRE). The provisions for mediation and advisory regarding arbitration are the same as the RLA.

Residential Lease or Month-to-Month Rental Agreement (C.A.R. Form LR). Requires that mediation is attempted and accepted to preserve right to recover attorney's fees, except for an unlawful detainer action. No reference to arbitration.

Commercial Lease Agreement (C.A.R. Form CL). After mediation is attempted or fails to resolve the dispute, arbitration is an option, similar to the RPA-CA.

California Arbitration Agreement (C.A.R. Form ARB). Provides that any dispute or claim in law or equity arising, or having arisen, between the parties out of the Purchase Agreement, Listing Agreement, Buyer Representation Agreement, or Other agreement, or any resulting transaction, that is not settled through mediation, shall be decided by neutral, binding arbitration. The arbitrator shall be a retired judge or justice, or attorney with at least 5 years of transactional law experience, unless the parties agree otherwise. No reference to who pays the arbitration fees.

Home Warranty Contracts. The arbitration provision for one company confirms that the entry into the contract constitutes an agreement that all disputes involving the company, or that arise out of actions that the company took, or did not take, "shall be arbitrated", as long as the claim is in excess of the applicable small claims court jurisdictional amount, which is \$10,000 or less in California.

The provision confirms the buyer is:

- a. giving up the right to a jury trial,
- b. giving up the right to participate in any class action (a legal action by multiple parties in a similar position),
- c. giving up the right to a private attorney general action,
- d. giving up the right to participate in any other representative or consolidated action, and
- e. giving up the right to participate in any class arbitration or consolidated arbitration proceeding.

Unless a claim is filed in small claims court, the home warranty contract requires final and binding arbitration held in the county of the covered property (or other location mutually agreed upon by the parties). The arbitration must be conducted by the American Arbitration Association (AAA) under its rules for consumer disputes. The company will pay the initial filing fee if the customer cannot afford to pay the fee, or will reimburse the customer, unless the arbitrator determines the claim is frivolous. The contract requires the parties to agree that the contract and arbitration provision is governed by the Federal Arbitration Act.

A similar home warranty contract by a different company, confirms that any arbitration must take place on an "individual basis", and the parties agree that they are waiving any right to a jury trial. It provides that the parties agree that the arbitrator lacks the power to consider claims for injunctive or declaratory relief, or to grant relief affecting anyone other than the individual claimant. It provides that the arbitration is governed by the Commercial Arbitration Rules and the

Supplementary Procedures for Consumer Related Disputes of the AAA. It applies to all disputes and claims between the parties, including claims that arose prior to the purchase of the contract. The company will pay all AAA filing, administrative and arbitrator fees for any arbitration it initiates, and for any arbitration initiated for which the value of the claims is \$75,000 or less, unless the arbitrator determines the claims are brought in "bad faith or for an improper purpose", in which case the AAA rules govern the payment of AAA fees.

A similar home warranty contract by a third company states that any arbitration must be conducted in the city nearest to the property covered by the contract having an AAA regional office. Each party shall bear its own costs and expenses and equal share of the administrative and arbitrator's fees of arbitration.

#### LESSONS:

1. Determine whether arbitration is optional or mandatory, and if optional, consider not agreeing to arbitration to preserve right to file Superior Court action.
2. Arbitration results in waiver of jury trial, appeal, and injunctive relief.
3. Arbitration may be required with a specified provider, such as the AAA, and its rules and the Federal Arbitration Act may govern the proceeding.
4. Arbitration fees and costs may be paid by one of the parties, such as a home warranty company, or may be shared by the parties, subject to the arbitrator's findings in the action.
5. Arbitration is often not required for small court claims for \$10,000 or less, or for unlawful detainer, in order to preserve a statute of limitations or to record a notice of pendency of action.