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Should You Initial the Arbitration Clause?

By Andrew J. Wiegel

Most real estate purchase and sale contracts have a paragraph regarding arbitration of disputes. You can elect to arbitrate any disputes which might arise by initialing the blanks beneath it. Do you want to agree to arbitrate if there is a dispute, or is going to court better?

Arbitration is a process for resolving disputes which is an alternative to litigation in court. It is one type of Alternative Dispute Resolution (ADR). Rather than filing a lawsuit, going to court and having the matter heard by a judge or jury, the disputing parties arrange for the services of a private arbitrator through the American Arbitration Association, Judicial Arbitration and Mediation and Service or a similar dispute resolution service. The arbitrator may be a retired judge, a lawyer, or even a non lawyer.

Instead of a trial, arbitration is an informal hearing which takes place in a conference room with the arbitrator, the parties and their lawyers. Witnesses may testify, documents may be submitted and the arbitrator renders a decision following the hearing. There is no jury of your peers. The procedural protection against statements by people not present being considered is not the same as the protection of the court process.

The paperwork required to initiate arbitration is simpler than that required for a lawsuit and there are fewer opportunities for legal skirmishing before the hearing. This can result in a less expensive process. But that is not always the case. Arbitration is more expensive in one respect. You have to pay the arbitrator an hourly fee. While there are fees associated with court trials, they are less.

One of the advantages of arbitration is flexibility and predictability and scheduling. The arbitrator and parties agree on the schedule for hearings, and the hearings take place as scheduled. By contrast, in court proceedings, the dates are set by the court and hearings can be continued if the court calendar is too full. Court proceedings inevitably involve a considerable amount of waiting time which can also be expensive.

One disadvantage of arbitration is the lack of any right to appeal. The arbitration process lacks a procedural safeguard against erroneous determinations. In court, if a judge makes a mistake, the parties can appeal the decision to the Court of Appeal for review. In arbitration, the

arbitrator's decision is final and cannot be appealed.

If you agree to an arbitration provision, the provision will determine the details of the arbitration procedure including whether or not you will have the right to question your opponent before the arbitration hearing by deposition or written interrogatory. This is called the "Right of Discovery." Make sure it's in your arbitration clause if you anticipate that the other party will have greater access to information in the event of a dispute.

If the contract has a provision for the award of attorneys' fees, attorneys' fees can be awarded to the prevailing party in arbitration, along with the costs of the arbitration itself.

A special problem can arise if there is a dispute after the buyer and seller have agreed to arbitrate, but the real estate brokers have not agreed to arbitrate. The standard forms do not require the brokers and agents to arbitrate even if the buyer and seller agree to do so. This can result in an aggrieved buyer having to proceed with an arbitration against the seller and also a separate lawsuit against the real estate brokers, potentially doubling the cost of resolving the dispute. Sometimes there is an arbitration clause which has been initialed between the seller and the listing broker in the listing agreement, but a buyer's agent could still refuse to arbitrate in the event of dispute. If the buyer and seller are going to agree to arbitrate, they should insist that the brokers also agree to arbitrate if a dispute arises from the transaction.

The final decision on whether or not to initial an arbitration provision depends upon your view of the advantages and disadvantages of arbitration. There is no "right" answer. You need to consider what will be important to you if a dispute arises.

Andrew J. Wiegel is a partner at Wiegel & Fried, LLP. The information contained in this article is not intended to be exhaustive - instead it is provided to inform the real estate community of some important features of California law. The information in this article is general in nature; consult with an attorney for legal advice on any particular matter. © Copyright 2004, Wiegel & Fried, LLP.