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Arbitrating disputes in the real estate industry: Is arbitration the best course of action for you?

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The current economy has created more than the usual number of disputes, especially concerning payment issues in contracts. These disputes can include anything from disputes with consultants concerning their services and fees to disputes with contractors and architects. They can also involve partnership and other types of business disputes. Many of the contracts involved in such disputes contain arbitration provisions. This means that any disputes arising from the contract must be arbitrated. Arbitration is selected by the parties for dispute resolution for a number of reasons. First, it is private. The records are not open to the public for viewing, as they are in court proceedings. This can be attractive if you are arguing about private business matters or trade secrets. Also, there is the perception that arbitration is faster and less expensive than going to court.

When someone is thinking about arbitrating a dispute, it presumes that there is a contract signed by the parties with an arbitration clause in it. I never assume that there is a signed contract. Almost every time I ask clients for a copy of their contract, they send me an unsigned copy and say "Don't worry. We have a signed one. We just can't find it." Other times, they give me a contract only signed by one party. Having an unsigned contract with an arbitration clause in it does not satisfy this requirement.

Furthermore, the dispute must be one that is arbitrable under the arbitration provision in the signed contract between the parties. In other words, let's say that one party thinks he is entitled to a bonus, based on conversations which occurred between the parties, but this is not something that was ever drafted into the contract between them. Perhaps there is some email discussing the topic or there were just verbal discussions. They may have a signed written contract calling for arbitration of disputes under the contract, but this issue may not fall under the arbitration provision in the contract. This can be a tricky subject, because one party may start an arbitration over such a subject and the other party may try to block it. The issue of arbitrability may be handled by the organization overseeing the arbitration, such as the American Arbitration Association (AAA), or it may require going to court.

There may also be leases where there is a provision requiring arbitration. This type of arbitration may proceed very differently. The kind that I have been talking about is through the AAA. They hear construction contract disputes under their construction industry rules. They may also hear a wide variety of commercial disputes under their commercial rules. There can also be arbitration proceedings which are handled by an arbitrator selected by mutual agreement of the parties. The arbitrator may be someone who is well-known and respected by all in the business community. This person can be difficult to decide on, since it requires the parties to "agree" on many different things, when the whole reason they are arbitrating to begin with is that they cannot agree on things.

When it comes to the issue of arbitrability, some might say, "Well, I will just start an arbitration

proceeding and see what happens." The only problem with that is that the other party may then be forced to go to court to try to stay or stop the arbitration, so that the issue can be litigated in court. This is when the notion of arbitration being an economical method of dispute resolution goes out the window. The hearing process on such a motion can be extensive, costly and time consuming. It involves appearing in court one or more times and filing briefs. Depending on the particular case, either the court case will be stayed and the parties will proceed with their arbitration or vice versa. You can also have a situation where an issue is arbitrated, such as breach of a construction contract and after it is decided, it goes back to court for the court to handle the foreclosure of mechanic's lien issues.

Some people mistakenly think of arbitration as a group of people sitting around a table and "talking it out." In fact, it has become an extremely formal and expensive process. It is a lot like going to court, but a little looser. The claimant pays a filing fee when commencing the proceedings, based on a sliding scale and the amount in dispute. If there is a counterclaim, the respondent also has to pay a filing fee based on the amount of that party's counterclaim. Next, the parties share equally in the expense of using the AAA venue for the hearings and the expense of the arbitrator's time. The parties may estimate that the hearings will take four days. All of those fees are paid up front, before the hearings begin. This may involve thousands and thousands of dollars of fees being paid before any hearings begin.

Any attorney who arbitrates has to be familiar with these kinds of proceedings and be the kind of person who can think on her feet and deal with surprises. There is usually little discovery before the hearings begin. This makes it more likely that issues will come up in the course of the hearings which require the exchange of more information. A good litigator will be able to handle such things and be equally effective whether the dispute is in court or in arbitration.

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