Arbitrating Real Estate Industry Disputes

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Abstract: Arbitration is an important tool to consider for resolution of real estate industry disputes, both on the residential and commercial sides. The reality of ongoing business relationships among the parties, the ability to choose an arbitrator experienced and knowledgeable in real estate matters, and the ability to streamline and customize the process to fit the particular issues involved all provide significant benefits to the disputing parties. This article describes the nature of several areas of real estate disputes, the advantages of using arbitration to resolve them, and suggests provisions for arbitration clauses to include in the governing contractual documents.

Introduction

The real estate industry and real estate law contain many peculiarities that are industry-specific and which do not apply to other businesses. Accordingly, when addressing dispute resolution in real estate, finding both a forum and an arbiter/decider familiar with the ins-and-outs of real estate business and law will accomplish several beneficial goals. Arbitration permits the disputing properties to do both, while proceeding in litigation does not.

While there are a wide-variety of real estate industry disputes, some of the advantages of arbitration are specifically applicable to most, with some being more applicable than others. For instance, the ability to tailor the process to the individual dispute is very important in all real estate disputes. In real estate disputes, the expertise of the neutral with the particular part of the industry involved is very important for timely and expeditious resolution. The more technical the dispute, legally, factually or both, the more efficient arbitration will prove to be.

Types of Disputes

Examples of some of the various types of real estate disputes where arbitration is effective are as follows:

1) Easement Agreements: (Parking easements, right-of-way easements, etc.). Easement agreements can be very detailed and complicated matters. The advantages of arbitration in resolving disputes arising under them are that a quick, private, efficient process can be provided to try issues before an expert that may be too complicated or specialized for lay persons or even judges to comprehend, much less to effectively address and resolve. Further, in several parts of the country, courts will very often send these cases to special masters for decision, so including arbitration as a contractual remedy will definitely serve to speed up the dispute resolution process. The disadvantage, of course, is that the parties have to incur the expense of an arbitrator, but an efficient arbitration process can be cost effective.
2) Broker/Client Disputes: The advantages are the experience of an arbitrator who has handled cases involving real estate brokers and their clients, especially if large dollar amounts are involved. Often. these cases involve specialized questions, such as procuring cause, that are better addressed by a real estate industry specialist. An arbitration clause will also keep these disputes out of the courthouse and especially away from juries, who may be misled by the facts, or put off by the amounts of money in controversy.
3) Title Disputes: These can be very complex legally, and often involve title insurance issues that make them even more complicated. Again, they can be better sorted out by real estate expert arbitrators than by judges or juries, and they will also often be sent to special masters by courts if they arise in the litigation context.
4) Leases and Work Letters: Landlords may be reluctant to enter into arbitration agreements because of the loss of statutory summary dispossessory remedies. This may be addressed by bifurcating the issues of possession/dispossession from liability for damages under the lease. For long-term commercial leases in which possession may not be an issue, the arbitration process often works well for many of the reasons previously set forth. When a lease contains an option to purchase, a major issue is often the ability to fix the fair-market value or future purchase price of the property. A clause designating a neutral arbitrator/appraiser, or even just an arbitration provider organization to appoint one according to its rules, and empowering the neutral to make that decision could relieve the anxiety of both the landlord and the tenant as to determination of a fair future price. This technique can also be used to enforce the terms of an escalation clause, resolve tenant buildout disputes, establish future rentals, etc. Tenant buildout disputes also often involve technical and complicated construction related issues that can be best be decided by an arbitrator, as can conflicts over common maintenance area charges involving issues of tenant reimbursement, and disputes over the exercise of renewal or purchase options, which could otherwise have a severe impact on the ability of the landlord to sell or lease the property to others.
5) Financial Institutions and Lenders: Many financial and lending institutions include arbitration provisions in their loan documents. While this is not an advantage in creditor-oriented states where summary judgment can easily be obtained, such provisions do discourage intrusive and abusive discovery associated with counterclaims involving lender liability. One problem is the

potential impact of arbitration provisions on foreclosure proceedings in security deed instruments which might obviate the right to judicial sales in such situations.

6) Environmental disputes: Disputes concerning land use, natural resource management and public land use, water resources, energy, air quality and solid and hazardous waste toxic substances issues often involve very technical factual and legal issues that are best resolved by private arbitrators.
7) Residential Real Estate Disputes: In these times of rising home prices—whether fueled by high-tech in San Francisco, entertainment in Los Angeles, equities or banking in New York or Boston—many residential real estate disputes have come to resemble commercial cases, in terms of both the time and money expended to obtain a resolution, and the effect of the result on the parties. With hundreds of thousands or even millions of dollars at stake, the process can look and feel a lot like big-dollar commercial litigation . . . except that the parties bearing the cost burden are not businesses but families and individuals, and the outcome hits them where they live.

Discussed below are a range of such cases, their possible paths into arbitration, and the benefits of this course.

Home Purchase-and-Sale Transactions

Disputes arising out of the purchase and sale of residential properties come to arbitration primarily for the time- and cost-savings it affords. The path to arbitration is typically a mandatory arbitration clause contained in the realtor-association contract form used to document the transaction. Unfortunately, these embedded clauses often lack a designated arbitration provider, or even a choice of providers any of which a claimant can choose. When this happens the clause is not "self-executing," and absent some agreement of the parties after the dispute has arisen, one of them must at least start the process in the courthouse with a proceeding to appoint an arbitrator, or to designate a provider to administer the case and appoint an arbitrator from its panel. Also, because contracts for the purchase-and-sale of homes, and contracts between such parties and their brokers, could be considered consumer contracts and/or adhesive, care should be taken to avoid including provisions that might be deemed unconscionable or overreaching.

Of course, these cases can also come to arbitration without any such clause in the contract, by way of voluntary agreements reached after the dispute arises. This can sometimes be accomplished by a telephone conference between counsel. It can also happen at the end of an otherwise unsuccessful mediation; parties who have not been able to agree on settlement terms can sometimes agree on a mutually beneficial alternative to litigation for obtaining a decision in their case. Such an agreement can include either the identity of the arbitrator to be appointed, or simply the arbitration provider to be used; or a list of three arbitrators can be provided by the mediator, from which each party is allowed to strike one after looking over their resumés. Some arbitrators can and will self-administer such "ad hoc" arbitrations if the parties agree that an administering organization is not necessary.

These cases typically involve alleged misrepresentations or non-disclosures in the documentation or other process attendant to the sale. For this reason, agents who broker these sales are often

brought into the dispute by buyers or sellers, who allege they relied on the professionals to point out inaccuracies or weaknesses in the disclosure forms. These brokers or agents may or may not be compelled to arbitrate depending on the forms used, the boxes checked and the signatures obtained. But even if not compelled to arbitrate, they can usually be compelled to testify under subpoena at the arbitration, and many prefer obtaining an arbitral decision of their liability to being sued in court. *See Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co., Inc.,* 129 Cal. App. 4th 759, 761 (2005) (granting non-signatory broker's petition to compel arbitration of claims against it).

Once an arbitrator is appointed, these cases usually involve weighing the competing testimony of buyer, seller and the agent or agents who represented each. As such, while familiarity of the arbitrator with the applicable statutes and forms is helpful, familiarity with fraud and non-disclosure cases is equally important.

Condominiums and other Common Interest Developments

Disputes regarding condominium and other common-interest developments also come to arbitration, almost always by way of clauses in the Conditions, Covenants and Restrictions (CC&Rs) governing condominium associations and owners, or in the Tenancy-In-Common (TIC) agreements governing multi-unit buildings that have not (or not yet) been converted to condominiums. These developments and buildings are governed by rules applicable to all parcels or units, covering various issues that affect some or all owners—e.g., trash location and collection, carpet-coverage and other sound dampening standards, music and noise levels and abatement during certain hours, setbacks are to be maintained and how decisions are to be made during the construction and maintenance project.

Many of these arbitrations concern a transient or non-recurring problem that has arisen as a dispute between some or all the owners, and can be decided by an arbitrator after a hearing, perhaps after some document exchange. But some disputes arise in a setting that will benefit from an arbitrator making some decisions at one point in time, and staying involved for some time thereafter to make others. One example is a construction project, particularly in the common areas or largely affecting them. Disputes between the owners or co-owners can send conflicting signals to contractors onsite, who can react by walking away from the job because the owners have effectively breached the construction contract by not being able to make decisions. Experienced arbitrators know how to issue interim or partial awards in such cases, while retaining jurisdiction to make other decisions and see the project through to completion. They can get to know the property and the parties who own it. They have telephone numbers and email boxes, and can be reached straightaway when something comes up—it doesn't take 15 or 30 days to get on their calendars. None of this is necessary when owners are getting along; but it can be essential when owners are not cooperating and the roof or other parts of the building languish in a state of partial completion.

Neighbor-to-Neighbor Disputes

Many of the same issues arise in ordinary neighbor-to-neighbor settings—encroaching trees, fences or walls; blocked views; diverted runoff or drainage; pets with too much attitude.

Anything commonly referred to as a nuisance might arguably be a nuisance (or other violation) under the law. Typically, without CC&Rs or TIC agreements, no embedded clauses move these cases automatically into arbitration. But they can still come to arbitration by post-dispute agreements to arbitrate, shepherded by counsel interested in minimizing costs and delay for their clients.

Familiarity with state laws and local ordinances will be especially helpful in these cases when the parties are unrepresented. But with million dollar homes this rarely happens, and members of this specialist bar often appear as counsel.

The Arbitration Clause

The arbitration clause dealing with real estate disputes must be carefully prepared and tailored to the situation involved. Often step provisions are utilized that require negotiation, mediation and then arbitration under the rules of the desired provider organization. Such provisions should include: The methodology for delivery notice to the opposing party; any desired limitations on the mediator's and arbitrator's authority and jurisdiction; the method of choosing both (including any desired specific qualifications for the neutral); the number of arbitrators (single or panel of three); and the provider organization to be used, if any.

Parties should also consider appropriate limitations on the process to accomplish an efficient and timely (but complete) resolution of any dispute. This could include expedited procedures for selection of neutrals; the amount of discovery to be allowed, if any; time limits for pertinent dates; allocation of costs and expenses; any rights of consolidation or joinder of other parties; the timing, type and form of any award; plus any appeal rights that the parties agree to retain. In more specialized and technical disputes, the neutral may be empowered to bring in at the parties' expense neutral third party professionals such as engineers, architects or other consultants to aid in the resolution of the dispute.

While it is not necessarily recommended that such detailed provisions be utilized in all cases, the parties should consider designing the dispute resolution process and the arbitration provision to fit the types of disputes that they anticipate might arise under the relationship involved.

Conclusion

Because of the often sophisticated and technical legal and factual issues involved, real estate disputes are particularly appropriate for arbitration. The drafters of real estate documents should pay particular attention to the inclusion of arbitration provisions. Doing so will expedite hearing, provide expertise in the forum, and ensure that real estate disputes are resolved in an equitable and fair manner.