

The Arbitration Addendum

In each residential real estate transaction where the standard MAR purchase agreement¹ is used it must be determined whether disputes relating to the transaction will be decided by litigation or arbitration. Some of the questions commonly asked regarding the arbitration addendum follow:

1. Should you agree to arbitrate the claims covered by the arbitration clause?
2. Does the standard arbitration addendum cover *all* disputes that relate to the transaction?
3. Do all of the buyers, sellers, listing and selling brokers/agents need to sign the arbitration addendum for it to be effective?

1. Should you agree to arbitrate the claims covered by the arbitration clause?

There is no “correct” answer to this question. When making the decision here are some factors to consider:

| | <u>Litigation</u> | <u>Arbitration</u> |
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| Predictability of Decision | The court must follow Minnesota law. | The arbitrator is not obligated to follow Minnesota law. |
| Right to Appeal | If you lose in Court you still have the right to appeal the decision to the Court of Appeals. | If you arbitrate there generally is no effective appeal. |
| Evidence | The judge or jury generally does not go to the home to see the problem but instead looks at pictures and video tape. Witnesses must testify in person. | Arbitrations generally are conducted right in the home. Affidavits from witnesses are generally accepted. |
| Discovery | “Discovery” is available to force the other side to provide information regarding their claim and position to help you prepare your case. | In arbitration there generally is no discovery and you must guess as to what the other side is going to do at the arbitration hearing. |
| Time | You generally will wait at least one year before you have a trial (if the amount in dispute is \$7500.00 or less you can bring a conciliation court claim and your case will be heard within 60 days). That decision is readily appealable to district court though. | Your case generally will be heard within 90 days. |

¹ This information is primarily based on consideration of an American Arbitration Association proceeding.

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| Cost | Conciliation court costs are similar or less than arbitration and do not require attorneys. At the District Court level an attorney is more essential, and fees can run into the thousands. District court cases also involves additional fees and expenses. | The cost to file an arbitration claim is more expensive than conciliation court. |
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The main advantage of arbitration is the reduced time and cost. The main disadvantages of arbitration are that the arbitrator does not have to follow Minnesota law, so there is less predictability, there is no right of appeal and there are few rules to protect the rights of any of the parties in the dispute.

The main advantages of litigation are that there are numerous rules designed to protect the rights of the parties in the dispute, there is predictability of decisions because the court must follow Minnesota laws and each party has the right to appeal a decision that they feel is incorrect. The main disadvantages of litigation are the high cost and the time it takes to work through the system.

If the cost of the litigation is too high, the parties cannot afford the advantages of litigation. On the other hand, if the amount in dispute is significant then rolling the dice in arbitration just to save some time and money may be ill-advised. One compromise is to agree to arbitrate cases where the amount in issue is not enough to justify the cost and time involved in litigation.

Practice Tip: As a real estate agent or broker there is little reason for you to agree to arbitration. It is much more likely that a claim will be made against you rather than you making a claim – why make it easier for someone else to make a claim against you? Generally, you are going to do better in court where the judge has to follow the law than in front of an arbitrator who can base the decision on what they feel is fair, especially when your opponent is a consumer.

2. Does the standard arbitration addendum cover all disputes that relate to the transaction?

No. The arbitration addendum typically is viewed to cover disputes arising from the condition of the property. Some attorneys argue that title issues are also subject to arbitration, but the obvious problems with this position make it untenable. A dispute over the validity of the arbitration agreement itself is also likely to be considered a court-oriented dispute.

3. Do all of the buyers, sellers, listing and selling brokers/agents need to sign the arbitration addendum for it to be effective?

Yes, unless the standard addendum is amended, **all** of the buyers, sellers, listing and selling brokers/agents must sign the addendum for any of the parties to the purchase agreement to be forced to arbitrate their claims. In the recent Minnesota Court of Appeals case, *Keitzer v. Blake Builders, Inc.*, the Court of Appeals upheld a district court decision holding that the arbitration addendum was unenforceable because the real estate agents involved in the transaction did not sign as required. The Court of Appeals based their decision on the language of the addendum that stated that the agreement to arbitrate was “enforceable only if it is signed

by all buyers, sellers, listing and selling brokers/agents.” So even though the real estate agents were not a party to the litigation between the seller and buyer, the fact that they did not sign the arbitration agreement deprived the seller of the right to compel the buyer to arbitrate their dispute.

Practice Tip: If everyone is in agreement to arbitrate make sure that all of the buyers, sellers and agents/brokers sign the arbitration addendum. If some of the parties to the transaction want to arbitrate their claims even if the others don't want their claims to be arbitrated, the addendum has to be amended to reflect this intention. In other words, if the buyer and seller want to arbitrate any claims that they have against each other, but the real estate agents do not want to arbitrate any claim involving them, the arbitration addendum must be amended so that the real estate agents/brokers are not required to agree to arbitration in order for it to be effective between the buyer and seller.

As your clients enter into purchase agreements, be sure they give adequate informed consideration to the impact of the arbitration agreement. If you or your client are not comfortable with the options set out in the standard addendum, nothing prohibits the parties from modifying the language after due negotiation. But please be mindful of the line separating an agent's rights and obligations from the practice of law.