

## Introduction

Most real estate transactions proceed fairly smoothly; minor disputes between the parties usually can be worked out with a little negotiation and compromise. However, buyers and sellers sometimes find themselves confronted with disputes that they are unable to resolve by themselves.

Various alternatives exist for resolving disputes. One such method is arbitration. Many real estate contracts, including those published by C.A.R., give the parties the option of agreeing, up front, to arbitrate disputes that might arise between them. This memorandum provides a brief overview of some of the issues parties to real estate transactions may confront when deciding whether or not to use arbitration as a method for resolving those disputes.

### Q1. What is arbitration?

A1. Arbitration is the term used to describe a form of dispute resolution that occurs outside of the court system. Basically, in arbitration the parties submit arguments and evidence to a neutral person, known as an arbitrator, who then renders a decision (which is called an "award").

### Q2. What types of disputes can be resolved by arbitration?

A2. Arbitration may be used to decide most types of claims, including actions for breach of contract, misrepresentation and fraud. The arbitration agreement in C.A.R. contracts, however, excludes certain matters from arbitration, including matters within the jurisdiction of a small claims, probate, or bankruptcy court.

### Q3. How does arbitration work?

A3. Since the selection of arbitration to resolve disputes is essentially a contractual agreement between two or more parties, in theory arbitration can be structured and conducted in any lawful manner that the parties agree to.

A typical arbitration, however, starts with the parties to the arbitration agreement selecting an arbitration provider for their dispute. In some cases, this may mean contacting a private arbitration service or using an individual arbitrator with whom the parties are already familiar. Once the arbitration provider is selected, a hearing is scheduled. The hearing will be similar to a court trial, with the parties able to submit evidence, call and cross-examine witnesses, and make arguments to the arbitrator. In preparation for the hearing, the arbitration clause may give the parties the right to conduct discovery (i.e., take depositions of witnesses, gather written evidence and documents, etc.). Also, in many arbitrations, the parties will be required to submit formal written statements to the arbitrator in advance of the hearing stating their positions on the dispute.

After the hearing is concluded, the arbitrator dismisses the parties and considers the evidence. The arbitrator may take several days before rendering an award. Once the award is rendered, it is delivered to the parties.

### Q4. How does arbitration compare to litigation?

A4. In many ways, arbitration is similar to litigation. For example, the parties may be represented by attorneys, the arbitrator has decision-making powers much like a judge or jury, and the award issued by the arbitrator can be binding upon the parties.

Despite the similarities, there are significant differences. For example, arbitration is not governed by the formal rules of evidence and procedure that are used in court trials. For this reason, arbitration hearings often take less time, and can be less costly, than court trials.

### Q5. Who can be an arbitrator?

A5. California law does not require licensing or certification for arbitrators. Therefore, any person can be an arbitrator. The arbitration agreement in C.A.R. contracts provides that the arbitrator shall be a retired judge or an attorney with at least five years of real estate experience.

### Q6. How much does arbitration cost and who pays for it?

A6. The cost of arbitration will depend on a variety of factors. An arbitration service may charge an initial filing fee plus an administrative fee based on the amount in dispute. There will also be a charge for the services of the arbitrator, usually an hourly fee for time spent in hearings and reviewing documents. Other costs associated with arbitration can include attorney fees, discovery costs and witness fees.

In many cases, the filing fees and arbitrator fees are divided equally between the parties. A party who incurs other costs (such as attorney fees, discovery costs and witness fees) typically pays for those costs. C.A.R. purchase contracts generally require the losing party to pay the winning party's attorney fees and costs.

### Q7. Where do I locate arbitrators and arbitration services?

A7. Arbitrators and arbitration services can be located by looking in the local telephone directory (e.g., under "Arbitration," "Mediation," or "Dispute Resolution"), by contacting government agencies such as the California Department of Consumer Affairs, or by asking an attorney or a local bar association (association for attorneys) for referrals. In addition, many arbitration providers maintain Internet websites.

Q8. What are some of the advantages of arbitration?

A8. Compared to litigation, arbitration can take less time from the start of the process until conclusion. The progress of court cases may take much longer. If a trial decision is appealed, that process can take another year or more. On the other hand, the entire arbitration process from start to finish can be completed in as little as a few months. This helps make many arbitrations less expensive than litigation (although that will not always be the case).

Arbitration is also private and confidential. For parties whose dispute involves a sensitive matter or who don't otherwise want their dispute known to the general public, arbitration offers a significant advantage.

Arbitration also allows the parties to choose a knowledgeable and informed person to decide their dispute. For example, if the dispute involves real estate, the parties can select an arbitrator who is already an expert in real estate matters. Of course, if the parties fail to exercise diligence in selecting a qualified arbitrator, this quickly becomes a disadvantage.

Q9. What are some of the disadvantages of arbitration?

A9. The parties to an arbitration do not have the right to appeal the decision of an arbitrator. Although this often shortens the time needed to bring the dispute to resolution, it also leaves the losing party with no way to obtain a different decision. The law does provide for very limited review of arbitration decisions where the arbitrator is biased, commits fraud, or violates other basic principles of fairness, but such a review rarely deals with the merits (substance) of the case. Furthermore, an agreement to arbitrate typically binds only a limited number of parties. (For example, the arbitration clause in C.A.R. purchase contracts only binds the buyers and sellers under the contract.) If the complaining party has disputes with other persons who may have contributed to the dispute (e.g., property inspectors, pest control operators, real estate brokers, etc.), unless those persons separately agree to arbitrate, the complaining party might have to bring a subsequent action in court to get full relief.

Finally, although arbitration is often less costly than court action, it might not be as inexpensive as one expects. The filing fees, the payment for the services of the arbitrator, and attorney fees may be quite significant, depending on the arbitration service selected, the amount of time needed for the hearing, and other factors.

Q10. Do I have to decide on arbitration at the time that my real estate purchase contract is signed?

A10. No. You can always agree to arbitrate disputes after they arise. However, at that point, depending on the dispute, the other party may not agree to arbitrate. If not, litigation may be your only option for resolving disputes.

Q11. Bottom line: should I choose arbitration for resolving disputes?

A11. Like any important decision affecting your legal rights, you need to think carefully before deciding on arbitration. By agreeing to arbitration, you waive certain rights (e.g., the right to appeal the decision or to have a dispute decided by a jury). Waiving these rights may be acceptable to you in light of the benefits associated with arbitration, but the choice is yours to make. If you need assistance in making your decision, there are many information sources available to assist you. In addition, your attorney can provide you with guidance in evaluating the pros and cons of arbitration.

The information contained herein is believed accurate as of May 23, 2022. It is intended to provide general answers to general questions and is not intended as a substitute for individual legal advice. Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney. Revised by Neil Kalin, Esq.

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