

Arbitration of Disputes under PA Commercial Agreements of Sale

By Bradley S. Dornish, Esq.

Unlike the mediation process under the PA Association of Realtors' ASR residential agreement of sale discussed in my last article, the Realtors' Association's ASC commercial agreement of sale form has a provision for mandatory, binding arbitration of disputes arising under the agreement. Paragraph 25 of the current form, last updated in 2015, provides that either a buyer or a seller can make a written demand for arbitration, after which each party has thirty days to select a competent and disinterested arbitrator. The arbitrators selected by each side then select the third arbitrator, referred to as the neutral arbitrator.

If the arbitrators selected by the parties cannot agree on the neutral third arbitrator within thirty days, either party can ask the Court of Common Pleas of the county where the property is located to select a third arbitrator. Each party bears the expenses, typically hourly charges, of the arbitrator of its choosing, and the parties split the cost of the neutral arbitrator. Though not required by the contract, the arbitrators chosen are, in my experience, usually experienced real estate lawyers or former judges, and their fees can be expected to run hundreds of dollars per hour. Likewise, the arbitrators chosen by the parties typically select another experienced real estate lawyer or retired judge to be the neutral arbitrator.

When you consider that each party to the arbitration will then be paying his or her own lawyer to handle the case, the fees of the selected arbitrator, and half of the fees of the neutral arbitrator, the process for arbitration under commercial agreements of sale is not cheap. However, the high cost per hour or day of the arbitration is usually balance by the greater speed of the process, as compared to trials in court, and by the privacy of the process, as opposed to the public nature of court proceedings. Both the privacy and the relative speed of arbitration are very important to many real estate transactions, where the seller's ability to complete the sale of the property to anyone can be delayed by the dispute with the current buyer.

I have served as an arbitrator in commercial real estate arbitrations and as counsel to parties. I have also handled many real estate related trials in the Courts of Common Pleas, and on appeal. I have found that the typical arbitration proceeding is over in about three to five months, mostly dependent on the schedules of the five lawyers serving as counsel and arbitrators. By contrast, typical time frames for non-jury litigation of real estate disputes run for a year or two, and with appeals can be much longer than that. The longest arbitration I can recall being involved in ran for close to a year, only because of the illness of an arbitrator part way through the proceedings. There is also a virtual elimination of the appeals process for arbitration, which is under the rules for PA Uniform Arbitration Act, Common Law Arbitration provisions, found at 42 Pa. C.S.A. Section 7341, et.seq. The act makes appeals except in egregious situations of misconduct by arbitrators, almost impossible.

Another advantage to the arbitration process over court proceedings is its flexibility. The arbitrators selected are typically busy lawyers or retired judges, and they are able to look at the issues between the parties and structure, in consultation with counsel for the parties, a more efficient process for the case to proceed than the more rigid structure of court proceedings under the rules of civil procedure. Information is generally exchanged between the parties in a less formal manner; testimony of witnesses is often taken by depositions, with the transcripts of those depositions provided for the review of the arbitrators, without the need for a separate trial. Once the documents are exchanged and depositions completed, the arbitrators can schedule argument and request briefs on limited issues, and quickly thereafter render a decision on the merits.

This contrasts to the proceedings in court, where substantial time and legal fees can be spent on preliminary objections to formal pleadings and motions for judgment on the pleadings before discovery begins. Thereafter, discovery is often scheduled and rescheduled over a number of months, punctuated by motions to compel discovery and attendant delays, followed by motions for summary judgment, briefs on those motions and arguments before the court, before a pretrial and trial process, and an ultimate trial where most witnesses are presented live in court, in addition to having been deposed for discovery.

For cases involving high profile real estate developments, the interested public can follow court proceedings, and each of the motions and the trial itself are open to the public, to observe but not participate. I do believe that the presence in the courtroom of many spectators has an influence on witnesses, the conduct of lawyers, and even in some cases, the conduct of judges. Private proceedings in arbitration are much more comfortable for the party facing public opposition, as well as for witnesses whose testimony is mostly given in depositions in front of only a court reporter, the attorneys for the parties, and some of the parties.

While the arbitration clause can certainly be modified, for example to a single arbitrator or to non-binding mediation, as in the ASR form agreement, or can be stricken entirely by those who do not want to go through either arbitration or mediation, but prefer litigation in the courts, I recommend keeping the arbitration clause in commercial agreements of sale to my clients who are buyers, sellers and real estate brokers. I have found the process to be more beneficial to all parties than protracted litigation, which usually benefits the lawyers being paid by the parties more than the parties themselves.

Sooner or later, most real estate investors who buy and sell commercial properties have a dispute over a transaction or agreement which they cannot resolve amicably. Understanding the arbitration process before you have such a dispute, and getting the language you want into every commercial agreement of sale you negotiate means that when your dispute comes up, you will be fully prepared to deal with the process.

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