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Arbitration of California Real Estate Disputes

Parties to real estate transactions (which include purchase and sale agreements, financing, leasing and exchanges) are using binding arbitration as a preferred method of dispute resolution for a multitude of reasons (which include privacy, quicker resolution and potential cost savings). It is therefore important for parties who are drafting arbitration provisions or signing documents containing them to pay attention to detail. Otherwise, there can be some undesirable repercussions (e.g., an unenforceable arbitration provision, an inability to utilize discovery, or the danger of not requiring the arbitrator to comply with California evidence laws). A few things to consider when drafting or signing arbitration provisions are generally summarized below:

(i) Transactional Documentation. The arbitration provisions must be included as an alternate dispute resolution in the transactional documentation. The provisions should be broadly stated to include tort and contract disputes.

(ii) Commencement of Arbitration. A provision acknowledging that the parties are voluntarily agreeing to an arbitration is essential. Among other things, the provision should clearly and affirmatively state that:

(1) the parties are knowingly and voluntarily waiving any right to a jury or court trial,

(2) any uncooperative party may be compelled to arbitrate through a court order, and

(3) the arbitration is binding and may not be appealed.

(iii) Arbitrator Selection. Arbitrators who are retired judges or appellate justices bring considerable experience and are preferable to using a private attorney. The provisions for arbitrator selection must be clearly established. The professional entity being used for the arbitration should provide a list of seven judges/justices to the parties, and each of them can strike three of them. Any of the judges/justices who are not rejected by the parties will be selected. It is important to put specific time parameters on the obligation of the parties to be responsive. For example, if one party is unresponsive, it will be bound by the selection of the other parties.

(iv) Rules of Evidence. Existing law allows arbitrators to be “arbitrary,” which can be avoided by having the arbitration provisions require the arbitrator to adhere to the rules of evidence for proceedings at law.

(v) Discovery. Discovery rights should be specified. Otherwise, the arbitrator is not required to permit discovery. The provisions should be detailed and provide time periods for discovery to be conducted.

(vi) Court Reporter. The sharing of court reporter costs is frequently overlooked.

(vii) Initials. In order to be effective, the arbitration provisions must be initialed by all of the parties.

(viii) Exclusions. Arbitration exceptions should be included in the arbitration provisions. For example, common exceptions are (i) foreclosure proceedings, (ii) unlawful detainer actions, (iii) the appointment of a receiver, (iv) bankruptcy or probate, (v) the exercise of rights under the Uniform Commercial Code, and (vi) injunctive relief.

(ix) Entry of Judgment. The arbitrator must be authorized to enter their award as a court judgment.

It may, in some cases, be useful to have a stand-alone arbitration agreement (which should be referred to in the transactional documentation) that is a more definitive document.

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