

COMMON ERRORS IN REAL ESTATE ARBITRATION

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1. AVOIDING THE MOST COMMON ERRORS IN ARBITRATION WILL INCREASE THE PROBABILITY OF A FAVORABLE AWARD

1.1 The failure of transactional counsel to make a conscious decision before putting in an arbitration clause or leaving it out of a contract or lease.

1.2 The failure to delete from policies of title insurance the now standard arbitration clause contained in the policy because it is fatally flawed from the standpoint of the insured.

1.3 The failure to read and understand the rules of arbitration. If it is an administered arbitration like AAA or JAMS they each have their own rules that you must review and understand before you file the demand for arbitration. The failure to read and understand applicable laws and judicial decisions of the particular jurisdiction controlling the arbitration process.

1.4 Failure to read and understand the rules governing disclosures required of arbitrators.

1.5 Failure to understand that despite the informality of the arbitration trial it is still a trial and requires the skills of a litigator and not a transactional lawyer are required.

1.6 Failure to understand the substantive legal rules applicable to the dispute and the rules that govern the interpretation of real estate leases and contracts such as:

- A. a lease is a contract and a conveyance of real property and the rules of both apply;
- B. the independent covenants concept in leases;
- C. the covenant of good faith and fair dealing;
- D. the meaning of "sole and absolute discretion"; and
- E. the rules that are applicable to the interpretation of documents such as (while I cite California cases the same concepts are applicable in almost all states:

- (1) "The purpose of the law of contracts is to protect the reasonable expectations of the parties. Ben-Zvi vs Edmar Co. (1995) 40 Cal. App. 4th 468

- (2) “A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful”. California Civil Code Section 1636.
- (3) “The interpretation must be fair and reasonable, not leading to absurd conclusions”. Transamerica Insurance Co. vs Sable (1987) 193 Cal App 3rd 1562.
- (4) “The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust or inequitable”. Strong vs Theis (1986) 187 Cal App 3rd 913.
- (5) “The contract must be construed as a whole, without giving a distorting emphasis to isolated words or phrases”. Transamerica Insurance Co. vs Sable (1987) 193 Cal App 3rd at page 1566.
- (6) “When different constructions of a provisions are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made”. California Code of Civil Procedure Section 1864.
- (7) Failure to understand that the rules of evidence do not apply to arbitration but the rules concerning privileged documents do apply.
- (8) Failure to understand that the rules for interpreting contracts also apply to leases and all other documents that relate to real estate.

F. Failure to understand that an arbitration award cannot be usually set aside based on an error of law or facts by the arbitrator.

1.7. Failure to choose an arbitrator who has both “process” expertise and “subject matter” expertise, who is also impartial and does not give the appearance of being partial.

1.8 Failing to require that the arbitrator have specific subject matter expertise for at least a specified number of years.

1.9 Preparing an arbitration agreement which does not state, with clarity and directness, that it is intended to be a binding arbitration. Don't be cagey on this point.

1.10 Preparing an arbitration agreement that is so complex that it is difficult for judges and arbitrators to understand and then finding arbitrators are reluctant to act under it

all with the result that you fight so much over the process that you never get to the substantive issues. This defeats the objective of the arbitration to be faster and cheaper than a law suit in the courthouse, unless this is what you intended.

1.11 Unrealistic time limits are imposed on the arbitrator for issuing an award and the administration of the arbitration process.

1.12 Designating “party appointed” arbitrators who are not intended to be neutral or at least are unclear what role the party-appointed arbitrator is to play. Is that person an additional advocate or a neutral arbitrator? Failing to understand the differences between neutral arbitrators and party arbitrators.

1.13 Failing to consider using multiple neutral arbitrators with both process and subject matter expertise.

1.14 Using appraisers or brokers as arbitrators; (see: *Olympia & York 2 Broadway Company v. Produce Exchange Realty Trust*, 115 Misc. 2d 874, 454 N.Y.S. 2d 814 –*The appraisers viewed themselves as advocates and not impartial.*)

1.15 Using “Baseball Arbitration” procedures; (better in the abstract than reality in the opinion of Mazirow because of huge risks.)

1.16 Failure to require reasoned awards by the arbitrators.

1.17 Failure to require disclosure statements from arbitrators in accordance with law and don’t waive the right to receive disclosure statements. Don’t be reluctant to disqualify a proposed arbitrator early in the process. If you wait too long to seek to disqualify an arbitrator you may be deemed to have waived the right to disqualify.

1.18 Putting in unconscionable clauses.

1.19 Making the contract a contract of adhesion by overreaching.

1.20 Providing for appeal.

1.21 Over-specifying the procedure.

1.22 Failing to be clear and simple – don’t look at the arbitration clause as if it were a condemnation clause.

1.23 Failing to drop the arbitration concept if the other side insists upon a complex arbitration clause or if the other side seeks to qualify or condition excessively the arbitration process. My suggestion is that under those circumstances you drop the arbitration because you will end up litigating the terms of the arbitration agreement and never get to the substantive issue.

1.24 Failure to have a court reporter at the arbitration hearings.

1.25 Failure to understand that there are some circumstances where an arbitration award can be vacated.