

## **Arbitration Trumps Litigation: Home Builder Construction Disputes**

You may have heard that President Donald Trump uses an arbitration provision in his confidentiality agreements to settle disputes. No fake news there! Arbitration is not a new clever legal maneuver concocted by Trump's legal team. In fact, George Washington used arbitration in his will to settle disputes between heirs. Abraham Lincoln served as an arbitrator to settle disputes between landowners. Today, arbitration is widely used in most industries, but it is particularly beneficial for home builders and homeowners to expeditiously settle construction disputes, which are often technical in nature.

### **Why is arbitration preferred over litigation?**

It is often said that no one wins in litigation except the attorneys. Arbitration, when compared to litigation in the court system, is fast, cost-effective, more predictable, fair and private. The final arbitration decision is legally binding and non-appealable (unless in very rare cases there are arbitrator procedural violations). The National Association of Home Builders (NAHB) policy is to support initiatives that promote binding arbitration in residential construction contracts. Having an arbitrator with construction experience is much better than going before a judge and/or jury who will need to be educated about the construction issues involved in the dispute.

### **What is the legal basis for arbitration?**

Arbitration is the out-of-court settling of a dispute between parties, administered by an impartial person (arbitrator) chosen by the parties. It is legal and enforceable in all 50 states as per the 1925 Federal Arbitration Act. It has been upheld to settle construction disputes by the U. S. Supreme Court. It is a fair and efficient means to arbitrate disputes individually rather than in a class action where there is less control.

### **Can arbitration expedite the resolution of disputes?**

Construction litigation is backlogging the courts in many states. Thus, home builders and homeowners are seeking an alternative expedited dispute resolution process. All parties can more efficiently settle disputes by agreeing to an arbitration provision in the warranty and in the general construction contract. All leading third-party new home warranty companies typically include an arbitration provision. Warranty companies generally offer pre-arbitration conciliation for both homeowners and home builders.

Home builders may also include arbitration provisions in subcontractor agreements so that all potential parties involved in a dispute can settle upon an agreement in a single arbitration. A local attorney should review all legal documents to ensure they are consistent throughout the process and comply with the law. Ambiguous, contradictory or inconspicuous language in the legal documents may cause a judge to nullify arbitration provisions.

### **Does arbitration stop lawsuits?**

Homeowners always have a constitutional right to sue for any reason. However, it is generally in the homeowner's and home builder's best interest to settle construction disputes outside of the courtroom in a fair, equitable and expeditious manner. The home builder and homeowner should agree to and sign the construction contract and warranty document with arbitration provisions prior to closing. If a homeowner changes his or her mind and decides to file a lawsuit regarding the home builder's express contract obligations, then a judge will most likely require arbitration be used to settle the dispute as originally agreed upon by the parties.

### **What is the actual arbitration process?**

The disputing parties need not fear the relatively simple informal arbitration process. The vast majority of home building arbitrations are conducted between only the home builder and homeowner in front of an arbitrator. It is recommended that the arbitrator be selected from a dispute resolution firm that specializes in construction disputes. The parties have an opportunity to agree upon the chosen arbitrator. Arbitrators are commonly seasoned professionals, such as code officials, engineers, architects and general contractors. Arbitrators have a duty to be impartial with no conflicts of interest.

Home building disputes, especially warranty arbitrations, are typically held privately in the home so that the parties can show the arbitrator firsthand the disputed construction items. The arbitrator can only consider the testimonies of the parties (and any witnesses or experts), and information identified in submitted documents. After the arbitrator has heard the testimonies, the arbitrator will render a final binding decision, which is enforceable in a court of law (if needed). When there is a large number of disputed construction items, it is common for an arbitrator to find some items in favor of the homeowner and some in favor of the home builder.

### **What is the cost of arbitration when compared to litigation?**

The average total cost for a home warranty arbitration is \$750-\$5,000 (commonly split evenly between the parties), compared to \$25,000-\$50,000 for litigation. The entire arbitration process takes an average of 6-10 weeks (some as little as 2 weeks), compared to 2-6 years for litigation. The average arbitration hearing takes 1-3 hours, compared to 5-10 days for a court trial.

Arbitration is particularly effective in home building, due to the often technical nature of construction disputes. It is fast, cost-effective, fair and equitable for all parties. Construction dispute arbitration held in a dining room is much preferred over litigation held in a courtroom.

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