

CONDO & HOA MANAGEMENT

Arbitration and mediation as speedy, cost-efficient means of dispute resolution

BY LEE KANON ALPERT

Condominium association boards are given the thankless job of dealing with disputes that arise involving the condo complex, its owners and its vendors. These disputes range from clashes between owners over excessive noise to disagreements over insurance coverage after an earthquake or other natural disaster. Resolving these disputes through the traditional litigation process is often costly and time consuming. More and more, condo associations are turning to arbitration and mediation as a speedier and more cost-effective means of dispute resolution.

Arbitration involves the use of a qualified neutral third party (or panel of neutral arbitrators in large cases where high dollar amounts are at stake). The arbitrator hears both sides of a disagreement and makes a decision, often binding, that the parties must follow. Mediation allows the parties to come to an agreement on their own, with the mediator acting as a facilitator. Arbitration and mediation work best when the terms for their use are clearly stated upfront in any agreement or contract the association creates.

Provisions can be included in the association bylaws that require arbitration or mediation to be used whenever a dispute arises between condo owners or between owners and the association. Specific instructions on what type of disputes will be mediated and what type will be arbitrated can be spelled out. Disputes between condo owners over noise, parking, pets and other non-monetary issues are most often resolved through mediation. Disputes involving property damage in which a party could be held financially responsible (or when mediation fails) are typically resolved through arbitration.

Just as arbitration and mediation provisions must be included in association bylaws, so too should these clauses be included in all contracts with outside vendors. It is difficult to agree to the guidelines for arbitration once a dispute arises. Making these decisions at the beginning of a relationship when terms are being negotiated is much easier

than attempting to agree on arbitration parameters when the parties are at odds.

Arbitration and mediation clauses should be specific. They can contain the qualifications of the arbitrator or mediator (i.e., retired judge, attorney with condominium or real estate law experience), how they should be selected, where the arbitration or mediation will take place (in a neutral setting or in the club house, for example), whether state law must be applied to the arbitration hearing (if not specifically stated, it may not be), allowing witnesses or depositions, if discovery (reviewing records, talking to witnesses) can be used and if expert witnesses can testify. Other issues include who will pay for the costs of the arbitration/mediation, whether mediation is required before the more formal arbitration process and will the arbitration decision be binding.

Lenders, insurance carriers and other large businesses often include arbitration clauses in their agreements. Review the wording of these clauses carefully to ensure that they are not written to favor the large company (most will, so be ready to negotiate). Since many big businesses use arbitration regularly, they often use the same arbitrators. This practice can lead to at least the appearance of bias, since the arbitrator may unconsciously favor the party that supplies a steady stream of work. Select an arbitrator without these ties to ensure a truly neutral hearing.

Standard arbitration and mediation clauses can be obtained from the American Arbitrators Association (AAA) but have little value because of their generic nature. Some contracts contain references that arbitration will be carried out following AAA guidelines, but AAA guidelines can change. If a dispute occurs, there may be some question of what AAA verbiage to use unless expressly included in the contract. For arbitration and mediation clauses to be most effective and free of ambiguity, however, they should be specifically written to address condominium-related disputes.

Care should be given when seeking arbitration to resolve damage-related disagreements. For example, a contractor accidentally runs into a portion of the condominium clubhouse with a bulldozer. The association reaches a settlement through arbitration for damages above the amount covered by insurance. As part of the settlement, the association agrees to give up the right to take any legal action against the contractor in the matter. The association's insurance company may not take kindly to this arrangement because, as the insurer, it too must give up that right. This means its rights under the insurance agreement to seek reimbursement from the responsible party for money paid on the claim would be voided. Before agreeing to these kinds of damage settlements through arbitration, the association should contact the insurance company to receive its consent to the terms in writing.

When drafting contracts, many lawyers and their clients focus almost all of their attention on the substantive terms of the contract and short-shrift enforcement mechanisms. This can be a costly mistake. Condo associations and its owners do not typically have vast financial resources for litigation. Therefore, it is in the best interest of the association to resolve disputes quickly and efficiently. With arbitration and mediation, legal costs can be managed by using terms and conditions set forth in the condo bylaws and in all contracts.

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