



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

MEMORANDUM

Disclosures Concerning Arbitration Provisions

March 22, 2013

The Department of Law (DOL) has recently seen an increasing number of plans providing for arbitration of disputes between sponsors and purchasers concerning the disposition of escrowed funds. The DOL's regulations do not specifically address arbitration of such disputes, but arbitration is clearly a material term of the offering. This memorandum sets forth the relevant disclosure requirements for plans that provide for such arbitration.

Special Risks

If the purchase agreement requires arbitration of disputes concerning the disposition of escrowed funds, the plan should include a special risk disclosing:

1. that the purchase agreement contains a clause requiring that disputes regarding the disposition of deposits, down payments, or advances received by sponsor be submitted to arbitration;
2. the arbitration forum (e.g., the American Arbitration Association);
3. that purchasers may be required to bear at least a portion of the costs of any arbitration, including compensation of the arbitrator(s); omit if sponsor will bear all costs and fees associated with the arbitration;
4. that, if the arbitration clause contains an attorneys' fees provision, the losing party may be required to pay the prevailing party's attorneys' fees, if sponsor prevails; and
5. that additional details concerning the arbitration clause may be found in the procedure to purchase section of the plan and purchase agreement.

Procedure to Purchase and Purchase Agreement

The procedure to purchase section and purchase agreement must include the following disclosures:

1. the arbitrator will be neutral and independent of the sponsor and its principal(s);
2. the arbitration forum (e.g., the American Arbitration Association), the identity of any individual arbitrator(s), and the criteria and procedure for selection of the arbitrator(s);
3. that the arbitration will take place in the city or county in which the unit, apartment, or home is located or, for out-of-state plans, the city or county in New York in which the escrow agent maintains its office or, if the escrow agent does not maintain a New York office, the county in which it has consented to jurisdiction of the New York courts;
4. the scope of issues that will be subject to arbitration;
5. the parties to the purchase agreement are giving up the right to bring suit in court, including the right to a trial by jury, concerning disputes over the disposition of escrowed funds, except as provided by the rules of the arbitration forum in which a claim is filed;
6. arbitration awards are generally final and binding, and that a party's ability to have a court reverse or modify an arbitration award is very limited, see New York Civil Practice Law and Rules § 7511;
7. the ability of the parties to obtain documents, witness statements and other discovery may be more limited in arbitration than in court proceedings;
8. the arbitrators may not have to explain the reason(s) for their award;
9. the rules of some arbitration forums may impose time limits for bringing a claim in arbitration;
10. New York law does not authorize the filing of a notice of pendency based on ongoing arbitration proceedings, unlike litigation;
11. a statement as to where the rules of the arbitration forum may be found;
12. the location in which the arbitration will take place;
13. whether and to what extent a purchaser may be required to share the cost of the arbitration, including the arbitrators' fees, and a statement as to where the fee schedule for the arbitration forum may be found, if available;

14. the terms of any attorneys' fee provision in connection with the arbitration; and
15. that the deposit shall not be released from escrow until at least 90 days has elapsed from the issuance of a final arbitration award (see CPLR § 7511). If the purchaser brings a proceeding pursuant to CPLR § 7511 to vacate the award, the funds must remain in escrow until that proceeding is finally adjudicated.