

Soaked in Buyer's Remorse? **CONSIDER ARBITRATION**

When new owners move into their dream homes, the happily-ever-after they expect is sometimes drowned in a flooding basement, choked by a clogged chimney, or in one nightmarish Minnesota case, overrun by an [infestation of snakes](#). As they open their checkbooks to pay for the damages, the question that's usually top-of-mind is, what did the sellers, and sellers' agent, know about this mess and when did they know it?

Although it's always best if parties can resolve disputes on their own, sometimes the negotiation becomes too adversarial. That's when it makes sense to turn to an impartial outside entity. While taking the case to court is certainly an option, arbitration offers a faster, cheaper alternative that can save all parties a lot of time, money, and aggravation. That's why the Minnesota REALTORS® endorses the Residential Real Property Arbitration program run by the National Center for Dispute Settlement (NCDS), a private and impartial organization.

In this article, we'll explore how arbitration works, look at ways to educate your clients about this option, and consider the best strategies for keeping yourself—and your brokerage—out of arbitration proceedings.



Agents, sellers, and the law

Let's start with the basics. Real estate licensees are bound by MN state law and the Code of Ethics to disclose all material facts that they are aware of that could affect a buyer's use or enjoyment of a property or the buyer's intended use of a property. For residential property, sellers, too, are obligated by state law to make these material fact disclosures. So, unless the buyer agrees to sign a waiver of the seller's disclosure obligations, the burden for revealing known material facts is on the seller and licensees.

Why go to arbitration?

Although having your day in court is a fundamental American right, it's also an expensive one. In addition to hiring a lawyer, there are court fees plus other expenses such as obtaining witnesses, experts, discovery, depositions, etc. There's also that most precious commodity of them all—time. Court cases can drag on for months, and even years. By contrast, arbitration can be a fraction of the cost and happens much faster. Hearings are usually held within three months of filing an arbitration request. And because decisions are final and binding, the matter is permanently settled. There are very few reasons an arbitration award can be overturned. For most of your clients, this makes arbitration well worth considering.

Pros and Cons of Arbitration

 PROS	 CONS
<ul style="list-style-type: none">• Less formal and not as complex as litigation• Decided by an arbitrator (private citizen)• Generally less expensive than litigation• Discovery of documents is limited (if you want to avoid the burden of discovery)• The decision of the arbitrator(s) is final and binding• Decisions in arbitrations made more quickly than in court (hearing is usually scheduled within 90-100 days of receipt of demand, plus 30 days for the decision)• Party can participate in choosing the arbitrator(s)	<ul style="list-style-type: none">• Give up your right to go to court for claims over \$15k• Give up right to have a judge/jury• Give up access to the courts/court rules• Discovery of documents is limited (if you want to force discovery of documents)• Give up rights to an appeal

“It’s an informal process. No court rooms. The Arbitration hearing is usually held at the house that is the source of the dispute,” said Susan Dioury, Minnesota REALTOR® Senior Vice President, Risk Management.

When a party enters into the *Residential Real Property Arbitration Agreement* offered by the Minnesota REALTORS®, they agree that disputes over material facts where damages exceed \$15,000 or more will be addressed through arbitration with NCDS. Any damages \$15,000 or less will be resolved in conciliation court, also known as small-claims court.

The Arbitrator: Judge, jury, and jack of all trades?

In principle, anyone can serve as an arbitrator. There are no specific credentials or certificates. However, many people prefer a person who has expertise in real estate and the material fact disclosure requirements. In practice, most of the 30 NCDS-approved arbitrators in Minnesota are attorneys. Other arbitrators have experience in a real estate related field such as architecture, building inspection, etc. Those who choose arbitration get to participate in selecting the arbitrator (a process fully detailed in the Arbitration Rules). So, your clients can be confident that the arbitrator assigned to their case will be someone they are comfortable with in resolving their disputes.



How arbitration works

Arbitration is only an option when all parties agree to participate by signing an arbitration agreement. That's why it's critical to educate your client about the arbitration option early on in the transaction, preferably at the same time they enter into a representation or facilitator services agreement with you. This way, when it's time to enter into a purchase agreement, your clients will already know their options for resolving material fact disclosure disputes.

"Have your clients understand that this an alternative dispute resolution process," says Dioury. "We endorse this program that gives buyers, sellers, and licensees an alternative to going to court. Each client and brokerage have this option available."

The wheels of arbitration start rolling when the buyer or other aggrieved party files a submission form with NCDS (these can be obtained by calling 866.727.8119). The required documentation includes multiple copies of the demand for arbitration form; purchase agreement; arbitration agreement; and all inspection reports prepared for the claimant. For more details on requirements, you can obtain a copy of the Rules and a copy of *A Guide to Residential Real Property Arbitration* from [Minnesota REALTORS®](http://MinnesotaREALTORS.org) or visit www.ncdsusa.org.

After receiving the paperwork, NCDS serves copies of the demand to all the parties named by the claimant. The respondent—usually a seller—can ask NCDS to have an arbitrator evaluate the demand and determine if it is timely or request clarification of the allegations. If it isn't clear, the arbitrator can give the claimant a chance to clarify the allegations.

The arbitrator may determine that the demand for arbitration is not timely filed and dispose of it.

If the demand meets the criteria for timeliness and specifics, a hearing date is set within three months. Most hearings are held at the property that is the source of the dispute. At that time, each party can present evidence through exhibits, witnesses and testimony. After all of the parties have had an opportunity to present their case, the arbitrator closes the hearing. The arbitrator's decision must be rendered no later than 30 days from the date of closing of the hearing. The arbitrator's ruling is final and binding.

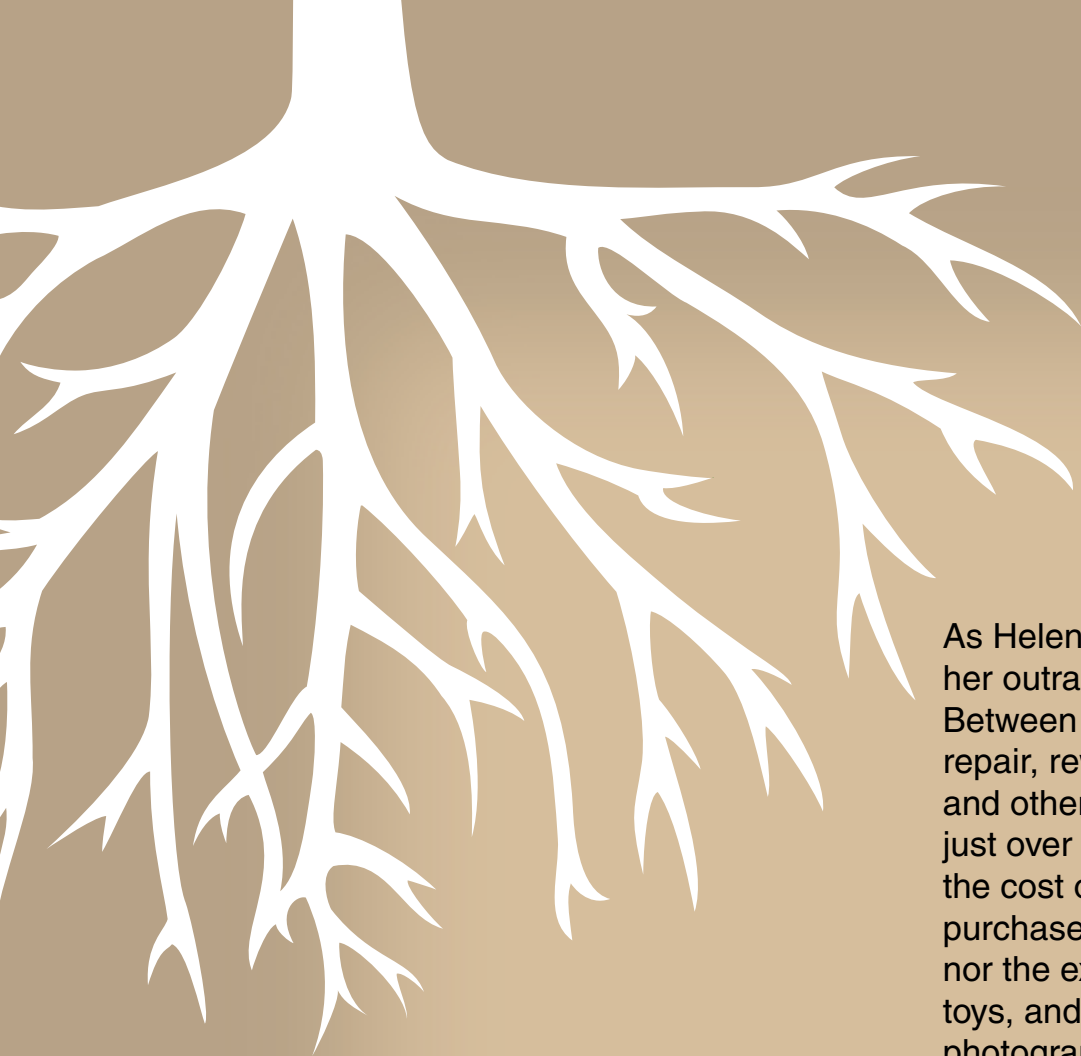
Straying into murky waters

Although arbitration is a forum for buyers and sellers to resolve disputes, you, as a REALTOR® involved in the transaction may not be immune from involvement. In fact, some of the very qualities that exemplify excellent customer service can be an Achilles heel when used at the wrong moment.

Consider the case of REALTOR® Bob Cratchit and his buyer client, Helen T. Tim.

Helen, a 78-year-old retired schoolteacher, had been happily settling into her 1940's-era bungalow for about eight months when the basement flooded after a heavy summer storm. It was a disaster. Three inches of filthy brown water soaked the wall-to-wall carpeting, and the bottom of the dry wall bulged and cracked.

The plumber—whose name she got from a sticker on the water heater—rapidly cleared



the sewer line of the obstruction, a thick root from an old oak tree on a neighboring property. He beelined to the problem like he knew the way.

Because, in fact, he did.

Helen soon learned the plumber had visited the property at least five times over the last decade to drain floods caused by the pernicious root.

“I’m surprised the previous owner didn’t tell you about it.”

So was Helen.

When the carpet installer ripped out the moldering carpet, a patchwork of heavily damaged linoleum tiles was revealed beneath. It was obvious that the disintegrating floor had seen many floods over the decades.

As Helen collected repair estimates, her outrage grew with the price tag. Between the new carpet, dry-wall repair, rewiring the electrical system, and other items, the price tag came to just over \$17,000. That didn’t include the cost of the ruined playpen she’d purchased for her infant grandson, nor the expensive German wooden toys, and soaked boxes of precious photographs and other heirlooms she hadn’t yet unpacked.

By the time Helen picked up the phone to call her real estate agent she was fuming.

Anxious to help his ex-client and smooth the way for future business, Bob offered to connect with the seller’s agent to find out why the flooding issue had not been disclosed on the Seller’s Disclosure form and begin negotiating a settlement from the seller. He also told Helen she has a solid case for an arbitration proceeding and said he would begin drafting the demand for arbitration on her behalf and completing forms to get the matter rolling.

“Those were Bob’s first mistakes,” said Dioury. “A real estate licensee is not in a position to assist a former client in resolving a post-closing legal dispute.”

As a profession, REALTORS® tend to be problem solvers, Dioury observed. They are eager to meet their clients’ needs with advice and guidance. This is appropriate and expected during the real estate transaction and the term of your representation or facilitation agreement. However, real estate licensees cannot draft legal documents or provide legal advice or counsel outside of documents concerning the transfer of property. So, once a legal dispute arises, REALTORS® need to refer their former clients to legal counsel for assistance.

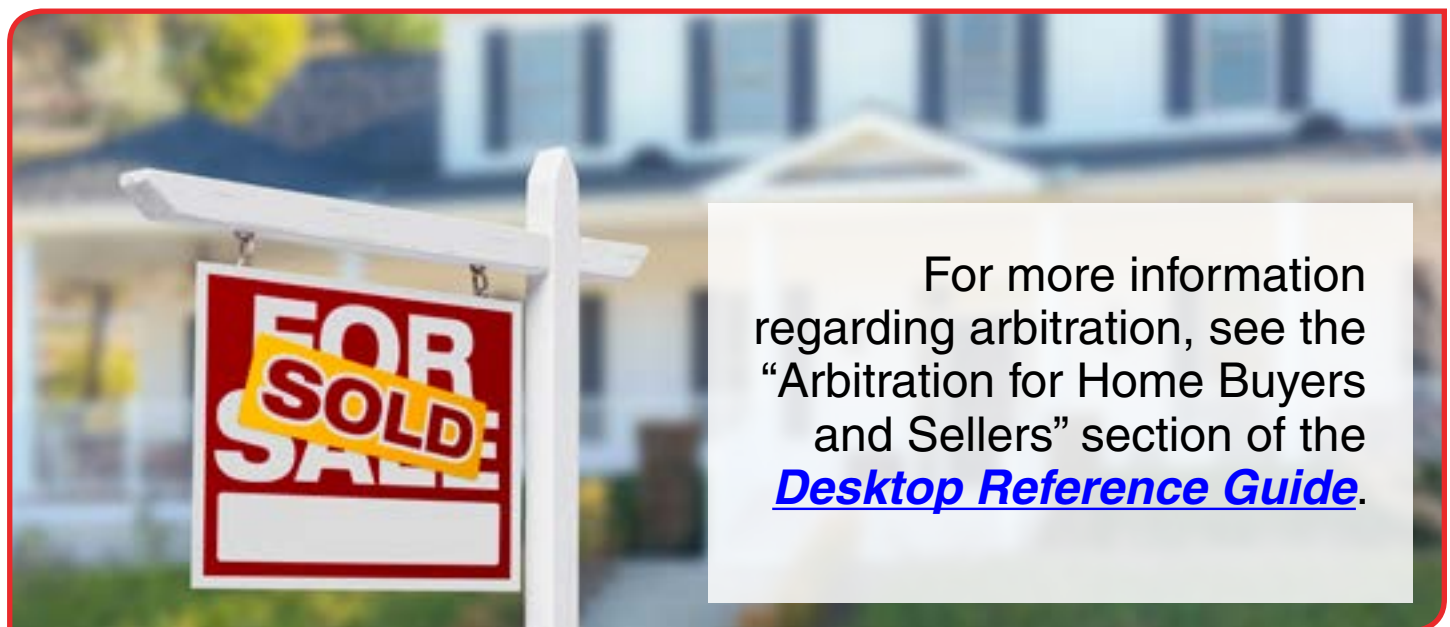
After Bob forwarded drafts of his demand for arbitration to Helen, she realized that Bob may also have known the property had prior issues with flooding. Helen’s fury rose higher than the water in her basement and she now wants Bob to pay for the problem.

In his efforts to help his former client, Bob is in the midst of defending himself as well.

“Of course, the ideal way for buyers and sellers to work out their civil disagreements is between themselves, preferably in person, over a cup of coffee, a firm handshake and follow through on whatever terms they both agree to,” says Dioury. “Not so long ago, that’s how many disputes were resolved. Not only did it create a lot of trust and goodwill, it built stronger communities.”

Those are words for your clients to ponder if they find themselves in the midst of a dispute over material facts. They should also know that when the stakes are high, and softer forms of resolution fail, NCDS’s arbitration system offers a fast, efficient, and fair system for reaching an equitable resolution.

contributed by:



For more information regarding arbitration, see the “Arbitration for Home Buyers and Sellers” section of the [**Desktop Reference Guide**](#).