

# Managing Risk

## Your Pre-Inspection Agreement: **ARBITRATION**

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***Note:** The Managing Risk column with InspectorPro Insurance provides home inspectors with tips to protect their businesses against insurance claims and examines best practices for crafting effective pre-inspection agreements.*

**M**ore than a year after their inspection, one of our insured home inspectors received a letter from an attorney. The attorney alleged that the home inspector was negligent in performing his clients' home inspection and failed to identify multiple defects. The letter demanded that the inspector pay the cost of repairs to multiple areas of the property. These included dormer repairs, window repairs, drywall repairs, heater repairs, mold remediation (even though it was not a mold inspection), flooring replacement, painting, and toilet and sink reinstallation.

But the claimants and their attorney did not stop there. The letter also made a claim for reimbursement of alternative housing at a bed and breakfast while repairs were being made. (Yes, a bed and breakfast.)

As every home inspector should, our insured home inspector required these clients-turned-claimants to sign a contract prior to the inspection. And that pre-inspection agreement contained an arbitration clause.

### WHAT IS AN ARBITRATION PROVISION?

Our article in the May issue of the *ASHI Reporter* covered dispute resolution provisions, which specify just how clients should file claims. Arbitration clauses are subsets of dispute resolution provisions that designate arbitration as the preferred method of claims handling.

Rather than going to court and appearing before a judge, arbitration brings your issue before an impartial third party (an arbitrator). The arbitrator will make a determination based on evidence that each side presents.

### BUT WHAT MAKES ARBITRATION THE PREFERRED DISPUTE RESOLUTION METHOD FOR HOME INSPECTORS?

#### THERE ARE SEVERAL REASONS EXPERTS RECOMMEND ARBITRATION OVER OTHER FORMS OF LITIGATION:

1. By designating the process, inspectors make sure that claimants file in a place that will treat them fairly. Not all mediators are familiar with the home inspection industry. A lack of familiarity with the field can lead judges and arbitrators to make decisions that don't acknowledge the standard of practice used and the inspectors' limitations. Inspectors can avoid unfair determinations by having arbitration clauses that designate arbiters with construction knowledge.
2. Specifying an effective dispute resolution process can help close cases quickly. By having a process laid out in the agreement, inspectors can streamline the claims process. Additionally, arbitration tends to be cheaper and faster than litigation. Thus, inspectors are more likely to resolve disputes promptly and with less impact to their insurance premiums. Not only can arbitration save inspectors money, but it also can help them lose less valuable inspection time resolving their claim.
3. With an arbitration provision, inspectors can keep their claims more private. Due to the principle of open justice, most documents filed in a court immediately become public record. Alternatively, motions that go to arbitration are kept confidential. With a dispute resolution provision mandating arbitration, home inspectors can protect their reputations.

## WHAT DOES A DISPUTE RESOLUTION PROVISION LOOK LIKE?

To get your claims in front of an arbitrator instead of another type of mediator, you need to have an arbitration clause in your pre-inspection agreement. According to Peter Merrill, President and CEO of Construction Dispute Resolution Services (CDRS), LLC, failing to have an arbitration provision often results in claims going to court.

“The U.S. Constitution provides all U.S. citizens with the right to utilize the U.S. court systems to settle disputes. Basically, anyone can sue anyone if they wish. If a contract does not address dispute resolution, the parties have the built-in right to go to court,” Merrill said. “People can waive that ‘right’ though a written contract specifying another method of settling disputes. By specifying binding arbitration in an agreement, parties are waiving their right to use the court system to settle a dispute.”

## THE FOLLOWING IS AN EXAMPLE OF A DISPUTE RESOLUTION PROVISION WRITTEN BY OUR CLAIMS TEAM:

### DISPUTE RESOLUTION:

*Any controversy or claim between the parties hereto, arising directly or indirectly out of, connected with, or relating to the interpretation of this Agreement, the scope of services rendered by Inspector, the Inspection Report provided to the Client by Inspector, or as to any other matter involving any act or omission performed under this Agreement, or promises, representations, or negotiations concerning duties of the Inspector hereunder, shall be submitted to Small Claims Court in the county in which the inspection takes place. If the alleged damages exceed the jurisdictional limit for Small Claims Court, the dispute shall then be submitted to binding arbitration before Construction Dispute Resolution Services (“CDRS”). If CDRS is unavailable, then by Resolute Systems.*

Note how the agreement doesn’t leave the claimant to choose any arbiter. Rather, the contract appoints a specific arbitration company with experience in the construction space. And, in case that company isn’t available, the agreement provides an alternative arbitration company that also has inspection industry experience.

## “BY SPECIFYING, THAT CLAIMS WILL GO TO INDUSTRY-EXPERIENCED ARBITRATORS, (IN YOUR CONTRACT,) MERRILL BELIEVES THAT HOME INSPECTORS CAN HAVE BETTER CLAIMS OUTCOMES.”

“If you hurt your knee and were experiencing pain, you would likely go to see your doctor. Your doctor would likely refer you to a knee specialist. That knee specialist would know how your knee is built, how it works and, most importantly, how to correct your knee injury,” Merrill said. “Likewise, if you have a construction defect or some other construction-related dispute, it would be best to utilize someone who understands the issue and has the construction knowledge to render a decision that would remedy the dispute based on construction knowledge.”

## HOW CAN YOU WRITE A DISPUTE RESOLUTION PROVISION FOR YOUR PRE-INSPECTION AGREEMENT?

Provisions, like the one above, must have complementary provisions within the agreement so that, when taken in total, you have an enforceable contract. In other words, if you take the above provision and simply add it to your existing agreement, there’s no assurance the provision’s enforceable.

In fact, manufacturing an agreement with disparate pieces of material could make a contract less enforceable. Why? Most provisions contain specifics, including what services the inspection covers and how claimants must submit disputes. By inserting unvetted provisions into an existing agreement, you could create inconsistencies or contradictions throughout the agreement.

You’ll remember the example from Florida that we shared last month: Contradictory statements within an inspection agreement rendered the limitation of liability provision unenforceable. The judge deemed the provision “vague and ambiguous” because there were several contradictory statements throughout the agreement.



Additionally, some states have specific laws regarding arbitration. Legal assistance can help you cater your arbitration clause to whatever regulations exist in your area. They can also help you avoid incorporating an arbitration provision in locations where such provisions aren't permissible.

Don't risk having a judge dismiss any portion of your pre-inspection agreement for contradictions or lack of adherence to regulations. Be sure that any changes you make mesh with the rest of your contract and abide by local legislation. As you craft your agreement, we strongly recommend you consult a state-licensed attorney who is knowledgeable in both contract law and the inspection industry.

## MANAGE YOUR RISK AGAINST POTENTIAL CLAIMS.

Returning to the case study described in this article, when the insured home inspector's complaint went before arbitration, his insurance-appointed defense counsel made the following arguments:

- The claimants were fully aware of the provisions in the contract, including the limitations to the scope of inspection.
- There were specific exclusions within the inspection, including the review of items such as mold, carpeting, paint and many other items that were submitted as part of the claim.
- The claimants did not follow the notice provision in the contract, the matter was time barred and there was no liability.
- If liability had been found, the limitation of liability in the contract should prevail.

**DON'T FORGET THAT IT'S YOUR RESPONSIBILITY TO GET CLIENTS TO SIGN THE PRE-INSPECTION AGREEMENT PRIOR TO THE INSPECTION.**

The arbitrator issued a final and binding arbitration decision in favor of the insured home inspector based on the terms found within the pre-inspection agreement. The inspector did not owe the claimants anything. The claimants did not receive money for their repairs, nor did they get a stay at a bed and breakfast.

Ensure that your claims go to arbiters who understand the home inspection industry by incorporating an arbitration clause, where permissible. Don't forget that it's your responsibility to get clients to sign the pre-inspection agreement prior to the inspection. Failure to do so may render your dispute resolution provision unenforceable.

**NOTE:** Construction Dispute Resolution Services (CDRS), LLC, is always looking for qualified arbitrators. If you're interested in becoming a home inspection dispute arbitrator yourself, visit the CDRS website ([www.cdrslc.com/](http://www.cdrslc.com/)) for training information.


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