

MADE IN HEAVEN OR OIL AND WATER: ADR IN COMMERCIAL FINANCE DISPUTES

Commentators have reported that with trillions of dollars of financing activity in the United States each year, commercial finance disputes make up a disproportionately small proportion of the cases decided using alternative dispute resolution (“ADR”) techniques. Hostility to use of these techniques is legend – an informal poll taken of the members of the equipment lender’s association in 2006 found an overwhelming proportion of their members rejected ADR out-of-hand. Share a cocktail with a business finance lawyer and mention ADR and you will be regaled with stories of arbitration proceedings run amok or fear of ‘split the baby’ decisions by arbitrators that wouldn’t recognize a security interest if it introduced itself.

Under this situation, why should lenders, borrower and their counsel care about ADR? Simply because ADR is immensely powerful and has the potential to simplify, streamline and substantially reduce the cost of resolving commercial finance disputes. This fact has been recognized in international transactions for decades – in fact, an arbitration award is recognized and given effect in over 120 countries (under the 1958 New York Convention on arbitration awards), while a similar judgment of a state or federal court of the United States would be ineffective. Share a similar cocktail with an ADR lawyer and you will hear a tale of the power and effectiveness of these techniques – including the wide latitude for the parties to draft the kind of dispute resolution mechanism that will be most effective for their transaction.

The problem up to now is that the business finance lawyers and the ADR lawyers rarely have cocktails with each other.

The purpose of this panel is to start a year-long “colloquium,” a process of discussion, between the ABA Business Law Section and the ABA Dispute Resolution Section on the potential uses of, and concerns of practitioners, lenders and borrowers relating to, ADR techniques in commercial finance transactions. ADR experts will discuss the power of ADR techniques at the opening panel on April 10, 2008 at the Spring Meeting of the Business Law Section in Dallas, Texas. The colloquium will conclude with a panel at the ABA Dispute Resolution Section meeting in New York City in April of 2009. Michael S. Greco, a K&L Gates partner and former President of the American Bar Association, will chair the colloquium panels and editorial board to underscore the importance and ABA cross-Section nature of this discussion.

The result of this discussion between business finance and ADR lawyers will be the development of techniques and model rules constructed specifically for commercial finance transactions. The opening panel on April 10, 2008 will feature, in addition to Mr. Greco, James N. Roethe, a Winthrop Pillsbury partner and former General Counsel of Bank of America, Sandra Partridge, Vice President of the American Arbitration Association’s New York City office, Professor Lela P. Love, of Benjamin N. Cardozo School of Law, and Thomas J. Welsh, a commercial law practitioner and Colloquium Reporter. Model Supplementary Arbitration Rules for commercial financial disputes will be presented and each of these speakers will provide the

latest information and perspectives on how these ADR techniques can, and should, be properly used in commercial finance transactions.

As you will hear, the use of ADR in these disputes is growing. The future of commercial finance dispute resolution is ADR. This panel will help you to be ready for it.

This colloquium is sponsored by the American College of Commercial Finance Lawyers, the ABA Business Law Section Committees on Commercial Finance and Alternative Dispute Resolution, as well as the College of Commercial Arbitrators and the ABA Dispute Resolution Section Arbitration Committee.

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