Ruskin Moscou Faltischek: Innovating Dispute Resolution

Lenders and other players in the financial services marketplace have generally tried to avoid litigation in employment disputes by utilizing arbitration provisions in their employment agreements. At the same time, however, they have provided for litigation in their loan documents and intercreditor agreements.

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Jeff Wurst, a senior partner at Ruskin Moscou Faltischek in New York, is working together with the American Arbitration Association to advance the use of arbitration in disputes between lenders and their contract parties, including borrowers, guarantors, co-lenders, participants, etc.

According to Wurst, the cost and time involved in litigation has become prohibitive. This is exacerbated by the judiciary's growing lack of familiarity with commercial finance and UCC law, creating a need for alternatives to the traditional judicial process.

Wurst cites the American Bar Association Business Law Section's Task Force on Alternative Dispute Resolution in Commercial Finance Transactions and its Section of Dispute Resolution, Arbitration Committee Subcommittee on ADR in Commercial Finance Transactions' Final Report and Supplementary Arbitration Rules for Commercial Finance Transactions, adopted in 2011, as a basis to start to rethink and innovate how lenders resolve their disputes with contract parties.

While major litigations often attempt resolution by mediation, whether voluntarily or through the prodding of the state or federal judge, it is rare for a lender to provide for arbitration — instead of litigation — in its documents.

Wurst emphasizes that the cost of arbitration is a fraction of the cost of litigation, to a great extent because discovery is minimal, if at all. Decisions are typically required to be issued by the arbitrator within thirty days following the close of the hearing.

Arbitration also provides an opportunity to craft a process specifically tailored to resolving lending disputes. Arbitration is a creature of contract and the parties are responsible for choosing (or creating) a process that adequately addresses potential disputes. Leaders in the financial services industry—like Wurst —who concentrate in lending disputes are uniquely equipped to develop a process that will efficiently address the industry's disputes.

Courts frequently recognize the importance and utility of alternative dispute resolution mechanisms. For example, the rules of the Commercial Division of the New York trial courts were recently amended to require that as of January 1, 2018 "counsel for each party … submit to the court at the preliminary conference and each subsequent compliance or status conference … a statement … certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms … and stating whether the party is presently willing to pursue mediation and/or arbitration."

The icing on the cake, Wurst points out, is that arbitration can be a confidential process and not easily reported in the press or other public vehicles.

According to Wurst, the first step in advancing the process of dispute resolution begins with a modification to the loan documents by changing the provisions on jurisdiction for disputes from the courts to arbitrators who are well versed in Commercial Finance and UCC law. Like any other innovation, first steps can be the hardest. Wurst encourages lenders to take a hard look at their employment agreements and question why what is good for employment agreements would not be good for loan agreements.