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“Mediation”

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(Monday's Leasing #102 by Terry Winders, CLP, discussed arbitration, and did mention mediation. Perhaps one of the best, if not the best authority on leasing mediation is attorney Paul Bent of the Alta Group. Here he brings up points that readers may not know about the process. editor.)

Mediation is always non-binding and always completely confidential, so the parties don't have to worry that their statements or positions during the mediation will be used against them if there is no settlement. However, once they reach a settlement and sign an agreement, that agreement is just as binding as any other contract. In fact, many settlement agreements include very tough sanctions that automatically come into play if a party breaches the settlement agreement itself. (I just mediated and settled a case in which, if the borrower defaults on the settlement agreement itself, the lender can immediately go to court and automatically get a judgment against the borrower, with no trial or other delays. This is called a “stipulated judgment,” and it gives the lender or lessor a lot of comfort that the borrower/lessee can't just default again like he did on the original loan or lease.)

Regarding arbitration, this can be either non-binding (advisory) or binding, as chosen by the parties themselves before the hearing. As Terry says, in binding arbitration the arbitrator's award can be filed in court and enforced as a judgment. Also note there are other providers of arbitration services besides the AAA, including the National Arbitration Forum (NAF) and JAMS. All have their own rules and all have panels of arbitrators to choose from in various areas of the law. (AAA arbitrators are not required to be lawyers, although many of them are. NAF arbitrators are all lawyers.) Usually, the parties can select the arbitrator from a list provided by the arbitration service – a

“strike list,” from which the parties strike the ones they don’t like. There aren’t a lot of arbitrators who are experts specifically in leasing and secured lending, although there are usually enough that the parties can select someone they feel is well qualified. (E.g., I’m on both the AAA and the NAF panels, and all of my cases are in leasing or secured lending.)

One other thing to note. The parties have complete control of the process, whether mediation or arbitration. They can pick the mediator or arbitrator, they can select the provider, they can make the rules for the hearing, and they can decide how they want to hearing to be handled. The courts will honor almost anything they agree on as to rules and procedures, as long as they’re spelled out in the agreement. Therefore, it’s very important for lessors to make sure their lawyers or documentation specialists include complete language and rules in the lease agreement itself. Some arbitration provisions go on for several pages and lay out exactly how the process should go. (As just one example, I recently arbitrated a commercial lending dispute in which the loan agreement included, among many other things, detailed provisions for who should pay the arbitration fees and costs, and when and how they should be divided up.) Lessors should not hesitate to include as much detail as possible in the dispute resolution section of the lease agreement. That is almost always better than simply relying on the AAA rules or the Federal Arbitration Act, which don’t address specific financing issues at all.

Paul Bent
Principal

As a principal of the Alta Group, he serves as an industry expert in legal matters involving leasing, complex corporate financings, transaction structuring, and contract interpretation; and he provides services as a neutral mediator and arbitrator in difficult disputes over leasing and corporate finance, with emphasis on maintaining relationships and avoiding litigation.

In addition to serving as a principal of The Alta Group, he is the founder, president and general counsel of GoodSmith & Co., Incorporated, a corporate financial services firm specializing in large-ticket leasing and asset-based corporate financing.

Paul Bent is an active musician; – now a singer, formerly a violinist and bass player. He is a professional, on the payroll of the Los Angeles Master Chorale, singing at 8 concerts a year at Walt Disney Concert Hall. He also is active in singing in the Los Angeles , California area, jazz and classical, mostly.

“Dispute Resolution” by Mr. Terry Winders, CLP

<http://www.leasingnews.org/archives/April%202008/04-21-08.htm#102>