DISPUTE RESOLUTION & AGREEMENT- REACHING MECHANISMS

For many Canadian business people, the timeliness of decisions, transactions and payments, the limited resources for protracted litigation, as well as the protection of relationships and reputations are constant key considerations. Furthermore, disputing parties in various industries are increasingly intolerant of: the cost, delays and risks of litigation; especially litigating a matter in a foreign jurisdiction and being governed by a foreign law; an appeal; the paucity of jurisprudence concerning their own industry and the judiciary's lack of expertise in that regard; the loss of privacy and confidentiality; and the emotional toll.

This is particularly true of Canada's entertainment industry, principally feature film and television production, music recording and book publishing. It is essential for artistic property owners and creators, both from a financial and critical acclaim standpoint, that their works are exploited internationally, on a timely and payment-respected basis. Major league sports in Canada do not have the same problems, and their collective bargaining agreements provide for arbitration of disputes. Amateur sport at the federal level in Canada benefits from the ADR mechanisms provided by the Sport Dispute Resolution Centre of Canada. The Canadian entertainment industry is extremely agreement-oriented, for it is based upon numerous intellectual property and other negotiated rights. Entertainment lawyers are often accused of destroying more trees to create paper for a film than would be used in the case of a merger of large corporations.

The principal advantages and disadvantages of private commercial arbitration as an alternate or appropriate method of dispute resolution are well-known to you. My own experience is that in addition to arbitration, there are various traditional and hybrid ADR methods which are not only dispute risk management and dispute resolution mechanisms, but also effective agreement-producing mechanisms. This article will examine, in increasing order of intensity of complexity, contestation and cost, how some of these methods are or can be used in the entertainment and other industries to both settle existing disputes and, perhaps more importantly, to assist the parties to overcome negotiation hurdles so that they can conclude new agreements and establish new relationships.

NEUTRAL EVALUATION

In order to avoid a claim being made, or to help settle one after it is made, a neutral person is engaged who hears the parties' positions in private caucus and/or together. The mediator provides his/her evaluation of the merits of their cases and/or a legal opinion, which the parties are free to accept or reject. The "neutral" may then propose non-binding solutions, verbally or in writing, and/or advises as to the probable court judgment if the dispute went that route. The parties might then be able to reach agreement on the disputed grant of rights, a claim for payment of residuals/royalties, contingent or net profits payments, or the interpretation of a contractual provision.

Similarly, when the neutral causes the parties to do an on-the-spot, serious reality and risk-reward check of their respective positions and demands, stalled or terminated deal negotiations may be transformed into signature of an agreement. This new agreement might well lead to a successful production, as well as a profitable on-going relationship between a film producer and its distributor, a television producer and its private ("angel") investor or a film producer and the author of the book or script from which it will be derived.

MEDIATION/CONCILIATION

Whether “rights-based” or “interest-based”, a mediator is engaged to facilitate negotiation among the parties, and helps them do the mental gymnastics so that they might create what they believe is a fair solution to their dispute.

Through mediation, the parties might then be able to reach agreement on copyright ownership, publisher-composer shares, the disputed payments, whether consent was unreasonably withheld, and what is, or is not, a standard or customary industry practice. Mediation is well-suited to disputes concerning the termination of key creative personnel, with or without just cause, and disputes among co-producers, joint venturers or shareholders concerning their rights, obligations, services, contributions and termination of the production or joint venture or the liquidation and dissolution of the corporation.

Mediators often assist volatile and widely-divergent parties to conclude collective bargaining agreements with a term of several years. This past February, a mediator’s efforts helped settle the bitter, important and costly strike by ACTRA, Canada’s guild of film, television and radio performers. At issue were not only the traditional re-negotiation of wages and benefits payable by producers of programming, but also the new payments sought for use of programmes exploited on the internet and other new and emerging media. The negotiations were rendered all-the-more complicated because exploitation in such media is too recent to have produced viable business models and arrangements, and because of the attendance at the negotiations of representatives of the powerful USA film and television industry, since their respective collective agreements come due for re-negotiation this year and next, the spectre of a Canadian precedent looming large.

"DOCUMENTS ONLY" ARBITRATION

When the only issue is the interpretation of the contract and no witnesses need be heard, an arbitrator may be engaged to render an award based solely upon his/her study of documentation submitted by the parties, with or without written and/or legal argument by counsel. This method is particularly cost and time-effective for disputes about: the order and amount of payments to parties named in the “waterfall” payments clause pursuant to a collection and disbursement agreement; the deductibility of distribution expenses; the recoupment of the advance made by a record company or book publisher; whether the movie, book, record, music video or video game has been produced and delivered in accordance with the specifications in the applicable agreement; whether the coverage or exclusion provision applies in a completion bond or insurance policy; and the ranking of security amongst lenders and investors pursuant to an inter-creditor agreement.

EQUITABLE ARBITRATION

If the arbitrator is either expressly appointed as an “amiable compositor” or authorized to decide “*ex aequo bono*”, he/she is thereby empowered not to apply the strict letter of the law or to strictly interpret the contract, but must, of course, hold a hearing and apply the rules of natural justice. The arbitrator may then render an award based upon the principles of fairness as well as upon the spirit of the contract. The parties’ continuing relationship may well be enhanced as a result of this process and its award. An amiable compositor may also be authorized to prospectively amend the contract, thus changing the parties’ rights and obligations on a going-forward basis. This method lends itself to such disputes as those concerning “droit moral”/moral rights, as well as long-existing business manager and talent agent relationships. An equitable

arbitrator can also establish the contingent payments for a writer, director, performer, composer or author, and the commissions payable to agents and managers for their services rendered prior to termination, and the results of such services which only occur after termination, when the relevant agreement is unclear, silent or was originally poorly negotiated.

MEDIATION-ARBITRATION

In “Med-Arb”, mediation generally takes place for a fixed period or until the parties or the mediator determine its futility. Arbitration is then conducted by the former mediator, or by a new neutral, but only concerning any issue not solved by the mediation. Given the time and cost of these two stages, this method is best suited to larger amount and multiple-issue disputes, whether a continued relationship is desired or not. This method is geared for: parties locked in a defamation or violation of publicity/personality rights battle; the various parties entangled in the termination, removal, replacement and re-payment of one of the co-producers, particularly when shooting of the film is well-advanced, but now jeopardized by the co-producer’s insolvency or failure to contribute the stipulated creative talent or studio facilities; parties trying to settle a chain-of-title problem or a “sunset/reversion/turnaround” problem; and claims concerning interparty and similar agreements, pursuant to which the intended payor refuses to make payment on the basis of alleged partial or total failure to timely deliver the programme, delivery and other defenses to payment of minimum guarantees and license fees for same. Agreement is facilitated during mediation because the parties and their counsel should become more realistic and reasonable when faced with the prospect of an arbitrator’s final and binding decision.

ARBITRATION-MEDIATION

After conducting the arbitration hearing, the arbitrator signs and seals his/her award, but does not deliver it. The arbitrator, or another neutral, then acts as mediator. If mediation succeeds, this award is not delivered. However, if mediation fails, this award is delivered and constitutes the agreement of the parties. This method facilitates settlement because a completion guarantor, bank, investor, distributor, producer and their counsel, after experiencing a full hearing, paying their respective expenses and knowing that the sword of Damocles, namely, the sealed award, awaits them, are infinitely more focused on the reality of their positions and the risks of not settling. Arb-Med is efficacious for such disputes as: premature or unnecessary takeover of production by the completion guarantor; failure of the completion guarantor to complete and deliver the programme; and “waterfall” payments pursuant to collection and disbursement agreements.

"BRACKETED" or "HIGH – LOW" ARBITRATION

The parties, often after mediation, fix the minimum and maximum amount which the arbitrator may award, but the arbitrator is not told such amounts. This method is also called “Bracketed Arbitration”, because these amounts create the low and high ends of the bracket, the arbitrator’s jurisdiction to award an amount being limited to an amount which falls within the bracket. Thus, the parties limit their exposure before the arbitration is conducted. If the amount of the award does so fall within the bracket, then the award is rendered for that amount. However, if the amount of the award exceeds the high/maximum end of the bracket, then the award is rendered for the agreed high amount, and if the amount of the award is less than its low/minimum end, then the award is rendered for the agreed low amount.

It generally does not occur to parties and/or counsel who are unable to agree during conference room negotiations, or after exchanging multiple drafts of an agreement, that a neutral resource person could assist them in concluding an agreement in such situations. Once the arbitrator helps the parties to establish the brackets, the parties are often set to further agree upon an amount within the bracket, or agree upon several amounts, one or more of which would be applicable in accordance with stated conditions. This process works to determine the purchase price for a class of assets, the amount of damages for breach of contract, loss of profits or a merchandising royalty, where the parties' offers and independent evaluations are divergent.

"BASEBALL", "LAST BEST OFFER" ARBITRATION

This method, whose name drives from its use in baseball disputes, is also called "last best offer" or "final offer" arbitration, because after the arbitration hearing, the arbitrator must choose one of the last/best amounts offered by one of the parties, the parties thereby clearly limiting the arbitrator's jurisdiction. Sometimes mediation is initially tried in an attempt to narrow the gap between the amounts. "A quick decision is a valuable feature of the classic version of baseball arbitration. The arbitrator must pick one figure or the other and is encouraged to render his or her decision within twenty-four hours. …Also, the arbitrator may give no explanation for the decision." – John W. Cooley, "The Arbitrator's Handbook". In an hybrid "Bracketed" version, the arbitrator is not advised of the amounts offered, in which event the award is delivered for the amount offered which is closest to the amount chosen by the arbitrator. This process can expeditiously determine the purchase price of assets or shares pursuant to a "shotgun" clause or where independent valuations are too disparate, the amount of recoupable distribution expenses, or any monetary claim.

APPEAL OF ARBITRAL AWARDS

By agreement, the parties appoint an arbitrator; all of them then design a private appeal process with respect to an award rendered by another arbitrator. They fix the delays for filing briefs, the maximum number of brief pages, the date for hearing counsels' arguments, if any, and the rendering the appeal award. Legal costs are limited to preparation of the briefs and possibly some oral argument.

In Ontario, Articles 3, 5(2) and 45 of the Arbitration Act (Ontario) in conjunction with clear provisions in the arbitration agreement, or the absence thereof, govern appeals of arbitral awards, which, if permitted, are heard by the Ontario Court (General Division). In Quebec, the Code of Civil Procedure provides that there is no right to appeal or review the merits of an arbitral award, the only possible recourse being an application for its annulment. However, can the parties validly agree to appeal an arbitral award to another arbitrator or panel of arbitrators? While a discussion of the law is beyond the scope of this article, I believe that appeal of an arbitral award to another arbitatror(s) is valid in Quebec if properly agreed to. If the arbitration was conducted under the jurisdiction of JAMS, Inc., a leading USA dispute resolution company, pursuant to Rule 34 of JAMS, the parties may, before an arbitral award becomes final, elect to appeal it to a panel of arbitrators, in which event maximum 25 page double-spaced briefs may be filed, and a decision is rendered within 21 days.

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CONCLUSION

Given the international nature of the Canadian entertainment industry as well as the increasing complexity of its relations and transactions in development, production, financing and exploitation, industry players can, together with skilled ADR people, creatively structure a process that is appropriate to the exigencies of their special problem, whether to help the parties reach a new agreement or to settle a dispute. No doubt this applies to many other Canadian business sectors. In the words of arbitrator-Professor Stephen Hayford of Indiana University, “Be bold. Be cautious”.

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This article contains general comments only. It is not intended to be exhaustive and should not be considered as advice in any particular situation.

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