DISPUTE RESOLUTION & AGREEMENT- REACHING MECHANISMS

In the Canadian entertainment industry, the timeliness of decisions, transactions and payments, the limited resources for protracted litigation and the protection of relationships and reputations are constant key considerations. Moreover, disputing parties are increasingly intolerant of the cost, delays and risks of litigation (especially litigating a matter in a foreign jurisdiction and governed by a foreign law, and/or of an appeal), the paucity of jurisprudence, the judiciary's lack of industry expertise, the loss of privacy and confidentiality, and the emotional toll.

In a previous article, I examined the principal advantages and disadvantages of private commercial arbitration as an alternate (also called "appropriate") method of dispute resolution (known as ADR) for the entertainment industry. The advantages include: the parties themselves design the schedule and procedure; natural justice governs, namely, the appearance and practice of "fair play", and the full opportunity to present one's case; rapidity-short duration of the process; the arbitrator usually has particular industry costs, and the arbitrator's fee and expenses are shared by the parties; lawyers are not always needed; videoconferencing and teleconferencing are encourages, thereby further reducing travel and other costs; arbitration is conducted in private, striving to preserve confidentiality of its existence, the parties' trade secret/proprietary and/or compromising information, as well as its outcome; good working and personal relationships can be built or re-established; trade or professional organizations provide case management, arbitration rules and fee rates; the right to appeal or annul the arbitral award is highly not restricted, especially since the actual merits of the award are not reviewable by the court. The disadvantages include: the arbitrator's fee and expenses, and sometimes a hearing room, must be paid, whereas there is no charge for a judge and courtroom; multi-party and/or multi-witness arbitrations may dissipate expected cost savings, as may the bad faith of a party; for some parties, that discovery may be limited, some rules of evidence (such as "hearsay") may not be strictly applied, and, as mentioned above, the right to appeal or annul the award is highly restricted.

In this and two subsequent articles, I will discuss several methods of mediation and arbitration, in increasing order of intensity of complexity, contestation and cost. The parties can use these methods to both solve disputes as well as to overcome hurdles so that they can conclude new agreements and potentially establish new relationships. In today's article, I look at Neutral Evaluation, Mediation and Documents Only Arbitration.

1. 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 "neutral" then proposes non-binding solutions, verbally or in writing, and/or advises as to the probable court judgment if the dispute went that route. Through neutral evaluation, the parties might then be able to reach agreement on the disputed grant of rights or residual/royalty and net profits payments. If the parties agree, the written proposal constitutes a binding, enforceable award. The neutral's chargeable time is controlled by the parties, and his/her hourly rate is typically shared by them.

When the neutral presents the parties with certain facts, arguments and a risk-reward scenario, he/she causes them to do an on-the-spot, serious reality check of their respective positions and

demands, often thereby transforming stalled or terminated deal negotiations 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 producer-distributor, producer-private investor or a producer-book or script author. The one-time cost of the neutral is thus rendered minimal.

2. MEDIATION

In “facilitative mediation”, a mediator is engaged to facilitate negotiation among the parties. The mediator challenges the parties to do reality checks of their positions, and helps them brainstorm so that they might create what they believe is a fair solution to their dispute.

Facilitative mediation may be "rights based”, whereby the mediator focuses on the parties’ legal positions. Facilitative mediation may be “interest based” or “principled mediation”, whereby the mediator: helps each party to understand the interests underlying, and the motivation for, the positions of the other parties; and focuses on each party's needs as compared to its demands. In "evaluative mediation", also called "non-binding arbitration", the parties and their counsel present their cases, without a formal hearing. 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. In the latter event, the mediator may try to persuade them to accept what the mediator believes is a fair solution.

In addition to the examples cited in #1 above, mediation is well-suited to settle disputes as to whether consent was unreasonably withheld, what is or is not standard or customary industry practice, and the termination of key creative personnel, with or without just cause. While the mediator's chargeable time is a function of the complexity of the issue and the number of sessions agreed upon by the parties, his/her hourly rate is typically shares by the parties.

Mediators often assist volatile and widely-divergent parties to conclude collective bargaining agreements with a term of several years. A mediator can similarly do so for single transaction or multi-stage industry agreements.

3. “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 waterfall payments pursuant to a collection and disbursement agreement, distribution expenses, completion bond coverage exclusions, ranking of security pursuant to an inter-creditor agreement and disputes among co-producers or shareholders.

The second article will deal with Equitable Arbitration, Mediation-Arbitration and Arbitration-Mediation, while the third will cover Bracketed Arbitration, "Baseball" Arbitration, as well as Appeals of Arbitral awards and Court Judgments.

CONCLUSION

Given the international nature of the film-television industry as well as the increasing complexity of its relations and transactions in development, production, financing and exploitation, the parties can, using these alternate dispute resolution models, creatively structure a resolution

process that is appropriate to the exigencies of that case, whether to help the parties reach a new agreement or to settle a dispute.

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