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# ENTERTAINMENT ARBITRATION WITH REFERENCE TO THE HOLLYWOOD INDUSTRY

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## ABSTRACT

The entertainment industry is rife with expansive potential for arbitration on an international scale due to its discreet nature and speedy form of justice which is vital for high profile talents, who prefer private proceedings, away from the eyes of the public. Moreover, entertainment contracts involving studios and intellectual property rights tend to be some of the most expensive litigation suits in legal history. Opting for an alternate form of dispute resolution would indeed be highly cost-effective and boost efficiency of the movie studio overall. This article aims to highlight the fact that arbitration is rarely used in these spheres of legality and calls for an increase in its sphere of influence, taking into consideration that some movie studios have expanded their scope of influence on a global scale.

**Keywords:** entertainment industry, entertainment dispute, arbitration

All forms of programming, which may be live or pre-recorded, involves many different phases including project development, packaging, pre-production, production, post-production, marketing, distribution and exhibition. Some participants indulge in all of these phases and others have cameo roles, depending upon the needs of the production. A majority of contracts define the relationship of the participants to one another and to the production itself. Frequently, they contain an arbitration clause, making arbitrators with specific knowledge of the entertainment industry a vital part of the process of resolving disputes that invariably arise. The contracts deliver the setting upon which all other activities take place.

### **The Individual Components Involved**

**Creative Talent:** The performers are the most visible of the players in any production. Talent includes actors, singers and dancers on stage, in film, and in the broadcast media; and musicians who perform live or on audio or video recordings. Creative talent includes stage, film and television directors, conductors, choreographers, music producers, directors of photography and film editors. The talents and creative energies of all of these individuals are enmeshed in the final product. While the viewer or listener is often unaware of how much talent is involved in a production because their names do not appear until the credits at the end of a film or television show, or appear only in printed programs at the theatre, concert hall, dance or opera house, the unnamed individuals and companies contributing to the product far exceeds those identified.

**Production Companies:** Production companies take as many forms as creative minds can invent. They are often responsible for the overall production of theatrical performances (on film or live), recordings, musical events, television programs, and other forms of entertainment. The motives for creating them are often financial but, in many instances, their creators become involved solely because of their passion for the art form. In general, many documentary filmmakers, symphonies, opera, ballet companies, and some theatre companies are not-for-profit and depend upon the largess of private donors and government grants. These artistic ventures tend to be costly, so a cost-effective approach to the project is essential.

Production companies are ultimately responsible for all decisions involving their projects, some of which lead to success and others to failure. For purposes of this article, the term “production company” will be used interchangeably with the term “producer,” which generally refers to the executive producer, the artistic director, or the general manager.

**The Distributor:** The distributor is responsible for the exploitation of a product in a geographical area defined by the distribution contract. Depending on the resources available, a distributor may be responsible for worldwide, regional, national, and/or local placement of the product. Using the film industry as a model, with necessary refinements for the distribution of products in other sectors, the distributor oversees the entire post-delivery process. This includes arranging for licensing agreements, printing of films, production of DVDs, book tie-ins and screenings. The producer enters the film in various festivals, while the distributor often arranges exhibitions and develops advertising opportunities to promote the film.

In conjunction with the producer, the distributor arranges for the initial release of the film (usually in theatres) and subsequent releases in allied and supplemental markets. These markets include such venues as network and cable television, home video, satellite transmissions, airlines, hotels, musical releases and merchandise offerings. The distributor is responsible for determining the order, the time and the duration of these releases. The distributor promises the producer to advertise and promote the product to ensure the maximum visibility for each release. To accomplish this, the producer grants the distributor an exclusive license to exploit the film for a definite time period in specific territories.

### **The Nature of Entertainment Contracts**

As with all commercial dealings, the contracts in the entertainment industry take many forms, some recognizable to attorneys engaged in the drafting and litigation of contracts, and others requiring more specialized knowledge. In the latter category are employment contracts, whether they are collective bargaining agreements or individually negotiated contracts, or both. Numerous statutes govern the relationship between producers and unions and between unions and their members. There are also laws governing the operation of pension funds and industry union health and welfare plans. The entertainment field is very complex, and most disputes between producers and unions are resolved by an arbitrator who will interpret the contract.<sup>1</sup> If an arbitrator awards a remedy, a court may be called upon to enforce the award.<sup>2</sup>

### **Union Agreements and Individual Artist Contracts**

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<sup>1</sup> For an analysis of arbitration involving union and private employment agreements, see Walter J. Gershenfeld, "Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe," 14 Hofstra Lab. L.J. 245 (Fall 1996).

<sup>2</sup> Court enforcement is necessary in very few arbitration cases, especially in the international context. Richard W. Naimark & Stephanie E. Keer, "Post- Award Experience in International Commercial Arbitration," 60(1) Disp. Resol. J. 94 (Feb./April 2005).

In the United States, the talents are, by and large, represented by guilds and unions. Union contracts address wages and working conditions (such as hours of work, safety requirements, etc.), jurisdictional issues, benefits (such as pension and health insurance), strikes and lockouts and, except for very few contracts, dispute resolution procedures. A distinctive feature of union contracts in the entertainment industry is that they provide minimums only. Thus, for example, the wages of an actor engaged to work on a production will be the total of the minimums provided for in the union agreement, plus any additional compensation individually negotiated by the actor or her agent. Compensation in excess of union minimums is referred to as “overscale.” As noted above, the great majority of lawsuits involving union employees are resolved through arbitration, since union contracts have long resorted to this process to expedite the resolution of disputes. Often at issue in labour-management arbitrations is the interpretation of contract provisions, adherence to rest-period requirements, turnaround times, lunch breaks, the payment of performance fees, travel allowances and per diems, compliance with safety requirements and, of course, the termination of employment. Provisions negotiated in Individual Artist Contracts (IACs) may determine the brevity of costumes, the budget for set design, the venue for performances, editing decisions and obligations applicable to other elements of a production.

Generally speaking, the engagement of performers and production staff are memorialized in “deal memos.” These are very simple contracts containing abbreviated industry language, that must be interpreted with industry practice in mind. An example of the application of industry practice is illustrated by an arbitration involving an artist hired to perform in an opera chorus. The director required the chorus to move in a certain manner while on stage. The union contract provided that choristers are entitled to additional fees if required to dance. The choristers claimed that the movement requirement entitled them to these fees. The producer claimed the movement was not dance as contemplated in the contract. Thus, in order to determine whether extra fees were due, the arbitrator had to decide “what is dance?”

In film, an arbitrator might be called upon to interpret provisions in a union agreement providing that a director be given the opportunity to have input into the editing of her film. For example, the issue for the arbitrator in one case was whether the amount of time, the place and scope of editing the producer actually afforded the director gave her a suitable opportunity to have input. Another issue sometimes brought to arbitration is the size and placement of credits. Under one union contract, for example, the director’s credit must be the last credit before principal photography or the first credit following principal photography. It must have its own

card. If the placement or size of the credit is incorrect, the arbitrator could order a change in the credit, if it is possible, or a monetary award.

An arbitration proceeding can be brought under the union contract, the IAC or both. If the IAC alone is involved, the arbitrator's award may only affect the grievant. Often, however, its effect is more far-reaching because the interpretation of a provision of a collective bargaining agreement necessarily affects all workers in that and other companies who are signatory to the same agreement or a similar one. For example, the cancellation of a performance may bring into play provisions such as "pay or play" (which ensures that the artist who was engaged to perform in or to direct a production or show will be paid, whether or not she actually performs or directs, unless her failure to perform or direct is due to her own actions) or force majeure (where a production does not go forward due to circumstances beyond the control of the producer and the cause is specifically delineated in the force majeure provision in the contract). Both of these provisions govern the obligations of the parties when a performance does not go forward. Thus, interpretations of these provisions have wide effect. Arbitrators in the entertainment field recognize the tremendous import of their decisions and formulate their awards with the repercussions on the industry in mind. Unlike many commercial disputes where the parties have terminated their relationship before the arbitration commenced, entertainment industry disputes, and labour disputes in particular, involve a continuing relationship. The industry itself is a small cosmos, especially in the top tier. The parties will contract again and the decision will have to "work" in that context as well. Entertainment arbitrators understand and respect these relationships and their continuity.

### **Contracts Creating the Production**

In order for a producer to go forward with a project, she must have an idea and a script. She must then assess the availability of creative talent, marketing potential, distribution and funding. For example, a producer may have learned of an idea for a new opera, or may want to produce an opera that has not been seen in some time in its opera house, or may have received an offer from a donor to finance the production of a specific opera, or may know that a particular artist with a desire to perform a certain role is available. Factors such as these provide a frame of reference within which the producer can decide on the season's programming. The producer will then attempt to balance the season's productions while comporting with the desires of the board of directors.

Still, the contracting process cannot begin until favourable answers are obtained to questions about the ownership of the rights to the underlying product, the costs involved in attracting the people who can make it all work, and the cost and availability of necessary facilities and equipment. In this regard, the entertainment industry is unique. Generally, it operates with freelancers, almost all of whom are highly skilled individuals hired specifically for each project at rates that vary dramatically from production to production. To different degrees, a production consists of a workplace that has no permanent staff or facilities dedicated to the production. Under these circumstances, a process similar to “re-tooling” in a factory setting occurs with each new production. Once the components for re-tooling are identified, the contracting process can begin. Similar issues arise for dance, theatre, opera and recording companies, as well as for symphonies, cabarets,<sup>3</sup> and productions on the Internet. In addition, touring is often an important part of the producer’s concerns and the location of other venues is a consideration when the packages are developed. Once a package is together the contract process begins.

### **Contracts Necessary to Release the Production**

Entertainment contracts address such matters as ownership rights in the material to be produced; licensing concerns; the engagement of creative talent, editors and technicians; the securing of locations, sets, costumes, facilities and equipment; marketing relationships; distribution; licensing of collateral products; and financial and legal matters. The list is never-ending. These contracts often contain arbitration provisions to address disputes that may arise. Arbitration is gaining more acceptance in both international and domestic entertainment contracts<sup>4</sup> since it provides the parties with a less expensive and more efficient resolution by a person who has experience in the industry. Litigation in court before inexperienced judges and juries takes longer and is more expensive and not as satisfactory.

Disputes arising under distribution contracts generate their own complex problems for arbitrators. The cases often involve performance issues, such as whether the producer properly delivered all necessary materials to the distributor, or whether the distributor’s promotion and marketing efforts were sufficient, or whether the distributor entered the film into the necessary film festivals or markets, or whether the distributor used its best efforts to solicit sub-distributors or exhibitors in various territories around the world. Arbitrators with experience in

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<sup>3</sup> Sidney Shimel & M. William Krasilovsky, *This Business of Music* (9<sup>th</sup> ed. Atson-Guphill Publications 2003).

<sup>4</sup> Eric Ervin, “Arbitration in the Independent Film Distribution Contract: An Independent Filmmaker’s Tool to Battle Large Litigation Budgets,” 3 *Cardozo Online J. Confl. Resol.* 2 (May 2002).

the entertainment field are likely to be better at correctly deciding these issues than judges or juries. Another issue that often arises for performers centres on accounting practices. Terms such as gross income and net profit are used in the computation of residuals, royalties, commissions and other categories of remuneration found in entertainment contracts. Accounting practices tend to vary, leading to very different results in different jurisdictions. Arbitrators with a background in entertainment accounting are better prepared to hear these disputes than judges and juries with no such experience.

### **Multinational Contracts and the Berne Convention**

Contracts between parties from different countries involve a myriad of laws and treaties. Most notably, signatories to the Berne Convention for the Protection of Literary and Artistic Works of 1886, as amended throughout the 20th century, have conforming and non-conforming laws by which covered contracts are interpreted. Costly litigation can be avoided when there is a well-drafted arbitration clause in the contract. Illustrative of the type of litigation that can arise in this context is the case of costume designer/manufacturer Dominic Murray, a citizen of the United Kingdom. Murray designed a costume named Mr. Blobby for “Noel’s House Party,” a BBC television program. Mr. Blobby was so successful with the British public that the BBC licensed the image for the manufacture of retail products bearing the likeness. When the BBC brought Mr. Blobby to the United States, Murray sued in federal court in New York,<sup>5</sup> alleging that he was the owner of the image.<sup>6</sup> The case was ultimately dismissed on the BBC’s motion for a change of venue. However, another plaintiff sued the BBC in the same court and made the same arguments as Murray. On the BBC’s motion for a change of venue the court arrived at the opposite result.<sup>7</sup> The parties in both actions would have benefited had the contracts contained a properly drafted arbitration clause. It would have designated the administrator, the place where the hearing would be held without regard to jurisdictional limitations and the law to be applied.

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<sup>5</sup> *Dominic Murray v. British Broadcasting Corp.*, 81 F.3d 287, 290 (2d Cir. 1996).

<sup>6</sup> The BBC moved to dismiss the case based on the doctrine of *forum non conveniens* and the plaintiff Murray defended, claiming he had the right to sue in an American court because “he must be accorded ... the reference given domestic plaintiffs” under the “Berne Convention for the Protection of Literary and Artistic Works, to which both the United States and the United Kingdom are signatories.” *Id.*, at 291 n.13. Murray averred that he was financially unable to bring suit in the United Kingdom because U.K. lawyers would not take his case on a contingency basis but lawyers in the United States would and he could not afford to hire a U.K. lawyer. The court was sympathetic but interpreted the provisions of the Berne Convention as not imposing jurisdiction.

<sup>7</sup> *Pat Gross v. British Broadcasting Corp.*, 386 F.3d 224; (2d Cir. 2004). The BBC filed a motion to dismiss on *forum non conveniens* grounds but the motion was denied because great deference was given to the plaintiff, a U.S. citizen.

In one of its most important articles, the Berne Convention distinguishes between economic rights and moral rights (or *droit moral*).<sup>8</sup> “Moral rights are a European concept ... entirely created under French judicial law.” Unlike economic interests, such as the right to publish or exhibit, which are freely alienable upon release by the creator (or by operation of law), moral rights cannot be sold or assigned so they pass freely to the heirs of the creator. The moral rights clause protects against any action that is prejudicial to the “honour” of the work. An economic interest in a work of art can be owned by someone or some entity other than the artist. The law of each nation governs the attribution of ownership when not determined by contract. In some nations, economic interests are vested in the creator of the product. For example, in the United States, ownership of a product is determined by the relationship between the creator and the party responsible for the actual production. If an employment relationship existed between the creator (an employee) and the party claiming ownership (the employer), then the product is termed a “work-for-hire” and ownership is presumed to be in the hands of the employer. One substantial consequence of the determination of ownership is that licensing agreements are only effective if the licensor holds title to the product. Disputes involving licensing contracts are often lengthy and complex and involve numerous parties. Arbitrators experienced in the industry are familiar with the relationships between talent, producers and distributors and are preferred adjudicators by informed parties.

The Berne treaty requires signatory countries to conform their national laws to effectuate the treaty’s obligations. The U.S. Congress, after heated debate, passed the Berne Convention Implementation Act of 1988. The United States claimed that, in doing so, it satisfied its obligation to comply.<sup>9</sup> Many disagreed, specifically claiming non-compliance with the *droit moral* provisions of the treaty. In response to this criticism, Congress passed the Visual Artists Rights Act of 1990. This act, however, provides *droit moral* only to authors of a “work of visual art”, a narrow class of art defined to include paintings, drawings, prints, sculptures, or photographs produced for demonstration purposes, existing in a singular copy or limited edition of 200 reproductions or fewer. Notably, literature, plays, operas, dance pieces, films, and music are not mentioned. It is fairly apparent that the *droit moral* doctrine does not have the required breadth in the United States. Choice of law, then, is an important issue when negotiating contracts involving the creation of artistic and musical works. Arbitrators familiar with the

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<sup>8</sup> Leslie A Pettenati, “Moral Rights of Artists in an International Marketplace,” 12 Pace Int’l L. Rev. 425 (Fall 2000).

<sup>9</sup> John Carter v. Helmsley-Spear, Inc., 71 F.3d 77,83 (2d Cir. 1995).

entertainment industry are aware of these values and use their experience when applying the laws of foreign jurisdictions in a knowledgeable and fair manner.

### **Resolution of Entertainment Disputes through Arbitration**

More than 85% of the entertainment industry disputes have been resolved through an arbitral tribunal. The delay in court proceedings is not good for the entertainment industry since entertainers could be called upon anytime and such delay could affect their performance.

- In Nigeria, the defunct Mo' Hits Record v. Wande Coal had their reef. Through an arbitral setting, Wande Coal peacefully left Mo' Hits Record for a new record label.
- In the case of EME Boys v. Wiz kid, Wiz kid's contract with EME Boys was not over when he set up his own record label. A dispute arose between the two parties and arbitration resolved it amicably. Wiz kid left EME Boys without any grudge between the parties.
- Vincent Enyeama v. Nigeria Football Federation, their dispute came to an end through a round table in an arbitral setting.
- In the popular case of 2face Idibia v. Kennis music, litigation made the dispute linger but the impact of arbitration brought every dispute to an end and both parties successfully moved on with their careers.
- In the United States of America, a case between World Wrestling Federation v. CM Punk was resolved through an arbitral setting. CM Punk's contract was not over when he was fired by the board of WWE. An arbitrator stepped in and it was resolved.
- Arbitration was also used in Grigson v. Creative Artist Agency as well as in the case of Linland v. United States of America Wrestling Association.

Parties to dispute in the entertainment industry are always famous people with a lot of lovers fondly called fans, when disputes between them gets to the public, their fans take it personal and this in most times have caused a lot of individual disputes between these fans. Litigation will only expose the disputes to the public because the press is allowed into the court but arbitration will help them to keep their disputes secret till, they are settled; hence their fans will not be aware of the disputes and individual disputes between them will hardly come up. Also, the parties to the disputes have the option of selecting and removing the arbitrators of their choice, which encourages transparency unlike litigation where the judge is usually appointed by the state. This transparent system stimulates the stakeholders in the entertainment industry

to select arbitration over litigation. Most of the stakeholders in the entertainment industry are usually public figures who wouldn't want their disputes to be out in the public; arbitration however encourages their privacy by allowing them to select a private venue of their choice unlike litigation where the venue is a fixed place usually a trial court.

Due to the tight schedule of entertainers, it is usually very pertinent for them to be able to comfortably select the time and place of their hearing that would be convenient for them and also private. Proceedings under arbitration are usually less formal and are easy for the entertainers to understand, unlike court trials which are very formal and constrained by a lot of rules making the process very rigid. There are uniform rules that guide the recognition and enforcement of an award using arbitration, which encourages transparency for those in the entertainment industry, who know little or nothing about the legal realm unlike litigation, which has no statutory form of judgment. Under arbitration, an award is not subject to Appeal. But may be set-aside on specified grounds, this helps the matter to come to a closure and help the parties involved to deal with other important issues, unlike arbitration which allows for appeal and subsequently gives space for the matter to drag on for even years. Although there are numerous advantages for litigating recapture right disputes, the risks present in litigation are insurmountable. The major disadvantages of litigating these disputes include: inefficiency, high cost, rigidity of the result, uncertainty over the outcome, negative publicity, and harm to the potential for a future business relationship.

### **The Final Curtain**

Arbitration should be considered for all entertainment contracts. An arbitrator with industry knowledge and expertise understands the need to maintain confidentiality and to work quickly, especially when disputes occur in the midst of a production and distribution schedule. These arbitrators understand that the parties often have ongoing relationships and they can maintain an “atmosphere conducive to continuing positive working relationships.” Arbitration significantly cuts litigation costs and the parties can negotiate process, discovery, time periods, venue, choice of law, arbitral authority and other elements to suit their needs. In international cases, the parties avoid the many and significant problems inherent in the use of courts in foreign jurisdictions.