

Arbitration & creative industries: what's new?

Back in 2018, I wrote an article on the use of alternative dispute resolution (“ADR”) – in particular, arbitration – in the creative industries. On the back of the California arbitration week, and the Paris arbitration week, which both took place earlier this year in March and April 2022, it is worth revisiting whether ADR is really becoming the tool of choice, for the creative industries, to resolve their disputes.

1. More and more ADR institutions have specialty panels of neutrals specialising in creative industries

One major trend which erupted since 2018 is that ADR institutions (i.e. bodies which have sprung up over the years, specialising in providing either mediation and/or arbitration services) have understood the need to provide a pool of arbitrators and mediators (i.e. neutrals) who are deeply cognisant of the inner workings of a particular industrial

sector.

For example, the Court of Arbitration for Art ("**CAfA**") was set up in 2019, in the Netherlands, as a specialised arbitration and mediation tribunal exclusively dedicated to resolving art law disputes. While it is not clear whether CAfA has already been used yet, to resolve many art disputes, its "*raison d'être*" is to administer domestic and international arbitrations conducted by arbitrators with significant expertise in art and art law. On this note, I am an arbitrator and mediator registered on CAfA's panel of neutrals specialised in art law.

As far as the films and entertainment sector is concerned, the big news from 2021 were that the Independent Film & Television Alliance ("**IFTA**"), based in Los Angeles, USA, devolved the whole management of its panel of entertainment law-focused arbitrators to another ADR centre, i.e. the American Arbitration Association ("**AAA**") and its international posting, the International Centre for Dispute Resolution ("**ICDR**"). So, as a neutral on the IFTA panel, I was inducted into the AAA/ICDR entertainment panel in February 2022, during a mandatory case management training conducted on Zoom, along with most other arbitrators from the IFTA panel.

For the information technology sector, the Silicon Valley Arbitration & Mediation Center ("**SVAMC**") really took off, since 2018. While SVAMC is not an ADR institution providing mediation or arbitration services *per se*, it publishes the Tech List each year, which it brands as "*the list of the world's leading technology neutrals, peer-vetted and limited to exceptionally qualified arbitrators and mediators known globally for their experience and skill in crafting business-practical legal solutions in the technology sector*" (sic). While this list is still very US-centric, as well as male-centric, it may prove useful for parties who want to ensure that the arbitrators appointed to resolve their disputes are tech-specialised and understand the international tech

business world.

2. More and more disputes taking place in the creative industries are resolved through arbitration

While my 2018 ADR article was a bit of wishful thinking, ADR has since really found its place, as the tool of choice for the creative industries to resolve their disputes, in a confidential, efficient and technology-savvy way.

With the management of the COVID 19 pandemic causing a vast backlog of court cases, on the dockets of almost all courts in the world, for the last two years, and with an inability from public courts to adopt virtual hearings and electronic case management methods, creatives around the world have really started to appreciate using mediation and arbitration services to decisively and efficiently sort out their civil and commercial conflicts.

This is a bonanza for ADR institutions, with Chris Poole, the CEO of Los Angeles-based Judicial Arbitration & Mediation Service (“**JAMS**”) bragging, during an interview, that even the Kardashians are using JAMS’ services to resolve their commercial disputes!

As highlighted during the first edition of the California International Arbitration Week, California-based ADR institutions, such as JAMS and AAA/ICDR, and California-located neutrals, have everything to win from this newly-found interest in ADR, from the entertainment, music, information technology and media industries, which stakeholders are majorly based in Los Angeles and Silicon Valley. It is therefore possible that California may become a prominent arbitration location, in the future, on a par with Paris or London.

ADR institutions are also positioning themselves at the

forefront of dispute resolution, by adopting tech-solutions and tools, such as:

- conducting arbitration via virtual hearings;
- using electronic signatures to sign arbitral awards and other official documents;
- making the most of proprietary electronic case management platforms that are simultaneously used by neutrals, parties and ADR case managers during arbitrations or mediations, and
- putting robust data privacy terms & conditions, and cyber-attack firewalls, in place, to protect all stakeholders' data which is disclosed online, during the resolution of such disputes,

so that parties and neutrals alike may virtually meet, despite the lockdowns and travel restrictions, to get on with the arbitration or mediation processes and issue some timely arbitral awards or mediation decisions.

The 2022 Paris arbitration week hosted several events on sports' and esports' disputes and ADR, highlighting how essential arbitration has become to resolve conflicts in sports, and, potentially, esports, via the services of the quasi-monopolistic ADR institution called Court of Arbitration for Sports ("**CAS**"). Indeed, established in 1984 by the International Olympic Committee, Geneva-based CAS deals with disciplinary and commercial disputes directly and indirectly linked to sport. Via its two main divisions, the Ordinary Arbitration Division (which functions as a court of sole instance), and the Appeals Arbitration Division (which hear cases brought to it on appeal from federations and sports organisations), CAS has delivered arbitral awards on the most high-profile recent sports disputes, such as the Caster Semenya v International Association of Athletics Federations ("**IAAF**") case and China's Sun Yang anti-doping saga.

3. Why arbitration is the way to go, to resolve cross-border disputes, post Brexit, between parties located in the European Union and the United Kingdom

As explained at length in my 2021 article "How to enforce civil and commercial judgments after Brexit?", the new regime of enforcement and recognition of European Union ("EU") judgments in the United Kingdom ("UK"), and vice versa, is uncertain and fraught with possible litigation with respect to the scope of application of the Hague convention dated 30 June 2005 on choice of court agreements.

In this context, which is unlikely to change until the UK enters into bilateral agreements with the EU on the enforcement and recognition of court judgments, it is high time for the creative industries to ensure that any dispute arising out of their new contractual agreements are resolved through arbitration.

Indeed, as explained in our article "Alternative dispute resolution in the creative industries", arbitral awards are recognised and enforced by the Convention on the recognition and enforcement of foreign arbitral awards 1958 (the "**New York convention**"). The New York convention is unaffected by Brexit, since it was signed by the UK as a contracting state. Moreover, London, the UK capital, is one of the most popular and trusted arbitral seats in the world. Conscious of the issues caused by Brexit on the enforcement and recognition of court judgments, the UK government has decided to boost further its country's attractiveness as an arbitration seat, by reviewing, and upgrading its Arbitration act 1996.

Creative companies and individuals would therefore be well-inspired to set out some arbitration clauses in their contracts, going forward, in order to:

- preserve long-established relationships with their cross-border trade partners;
- protect their reputation and goodwill via the confidentiality afforded by arbitration processes;
- resolve their disputes in tech-savvy environment, which limit any obligation to travel to the arbitration seat, via the wide-use of virtual hearings;
- entrust specialist arbitrators, who know the creative sector in which the dispute has arisen inside out, with delivering fair, accurate and impartial arbitral awards.

Crefovi's live webinar: arbitration & creative industries – how to make the most of ADR? – 9 May 2022

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