Alternative dispute resolution in the entertainment and creative industries | ADR

by Crefovi - Sunday, January 07, 2018

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In the aftermath of the Harvey Weinstein’s revelations, which

triggered many more about sexual predators killing it in Hollywood and other creative industries, it is topical to look into the pros and cons of alternative dispute resolution in entertainment. While Weinstein and other top brass in the entertainment industry used to do away with accusations of predatory sexual behaviour made against them, by signing non-disclosure and out-of-court settlement agreements with their victims, the crux of the matter is that creative endeavours rely heavily on the goodwill, reputation and other intangible assets owned by the above-the-line personnel (film director, producers, scriptwriter) and by the casted actors.

In this context, how to make the most of ADR, in the entertainment and creative industries, while retaining and respecting work ethics and human values?

How to balance the need for secrecy and protection of the goodwill and reputation of top creatives, with the moral obligation to ensure that they are held accountable for their actions and business endeavours in the creative community and beyond?

1. What is alternative dispute resolution in entertainment, and why use it?

Alternative dispute resolution (ADR) is the use of methods such as mediation, negotiation or arbitration to resolve a dispute without resort to litigation.

ADR procedures are deemed to be usually less costly and more expeditious than litigation, especially in Anglo-Saxon countries where merely the court costs represent a substantial portion of the financial budget to allocate, in order to resolve a dispute through litigation.

ADR procedures, unlike adversarial litigation, are often collaborative and strive to allow parties to understand each other's positions. ADR also allows the parties to come up with more creative solutions than a court may not be legally allowed to impose.

ADR also offers the option of confidentiality and secrecy to the parties involved in a dispute, while such option very rarely exists in court, especially in common law litigation proceedings which rely heavily on broad, expensive and virtually unlimited discovery such as in the USA and, to a degree, England & Wales. Instead of draining the financial resources and competitiveness of your creative business, which could well be invested in job creation or Research & Development for example, why not use ADR to limit the reputational impact and financial consequences of resolving a dispute?

For these reasons above, ADR procedures are increasingly being used in disputes that would otherwise result in litigation, including high-profile labor disputes, divorce actions and personal injury claims.

While arbitration is a process similar to an informal trial where an impartial third party – the arbitrator – hears each side of a dispute and issues a decision, mediation is a collaborative process where a mediator works with the parties to come to a mutually agreeable solution.

2. In which context should you use ADR services?

ADR services are becoming increasingly en vogue, with courts strongly pushing antagonised parties to resolving their disputes out of court, in a move to unclog court dockets. Many judiciary stakeholders complain that court dockets are heavily and unjustifiably congested as a result of the indiscriminate filing and delayed processing of cases in the courts of justice.

While English courts made it compulsory for parties, a long time ago, to have complied with the Practice Direction on Pre-Action Conduct and any relevant of the 14 Pre-Action protocols before commencing legal proceedings, as well as to have considered ADR (such as mediation) both before commencing litigation and during the litigation process, French courts have finally caught up with such trend further to the entering into force of the new articles 56 and 58 of the French civil procedural code: on 1 April 2015, at last, it became compulsory for parties to attempt to resolve their disputes out-of-court, through ADR, and for any claimant to prove and justify that he attempted to solve the dispute out-of-court with the defendant, prior to litigation.

This reform remains wishful thinking in France though, since these articles 56 and 58 of the French civil procedural code do not even clearly define the notion of "attempting to resolve the dispute out-of-court". However, I have noticed that my French peers, "avocats a la cour" in France, tend to send one or two "lettres de mise en demeure" (letters before court action) before filing a litigation claim with a French

court, instead of merely sending court summons without any warning to helpless defendants being sued for tens of millions of euros by aggressive French claimants and their French counsels, as was usual practice and totally acceptable in France prior to that reform!

Even French bars promote mediation and "collaborative law" to their lawyer members, coaxing them into registering as lawyers trained for ADR.

The entertainment sector is notorious for the considerable number of pending court cases, arguments, disputes it generates, and for the sheer variety of conflicts that arise in this business, as any reader of major trade papers *Daily Variety* and *The Hollywood Reporter* would attest. Consequently, the creative industries are a particularly fertile soil for ADR proceedings, and ADR has grown substantially over the past 15 to 20 years in these industrial sectors.

3. Who can provide ADR services?

While the two most common forms of ADR are arbitration and mediation, negotiation is almost always attempted first to resolve a dispute. It is the preeminent mode of dispute resolution. Negotiation allows the parties to meet in order to settle a dispute. The main advantage of this form of dispute settlement is that it allows the parties themselves to control the process and the solution.

As explained below in section 4, negotiations are better conducted by French "avocats" in France, since the without prejudice privilege rule does not apply to any communication exchanged between contractual parties, prior to filing a lawsuit. Only communications exchanged between French lawyers is protected by confidentiality and secrecy.

In England & Wales, however, parties can conduct negotiations directly, by making use of the without prejudice rule explained below in section 4, which will prevent all their attempts and negotiating communications from being used in court by the other party.

Mediation is also an informal alternative to litigation. Mediators are individuals trained in negotiations, who bring opposing parties together and attempt to work out a settlement or agreement that both parties accept or reject. The leading mediation institution in England is the Centre for Effective Dispute Resolution (CEDR).

Arbitration is a simplified version of a trial involving limited discovery and simplified rules of evidence. The arbitration is headed and decided by an arbitral panel. To comprise a panel, either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third.

As a result, several bodies have sprung up over the years, specialising in providing either mediation and/or arbitration services and panels to the creative industries, such as:

- the American Arbitration Association (AAA), which has an entertainment panel, and its international posting The International Centre for Dispute Resolution (ICDR) ;
- the Judicial Arbitration & Mediation Service (JAMS), in the USA and JAMS International in London, UK;

- the Independent Film & Television Alliance (IFTA) in Los Angeles, USA, which has a panel of arbitrators in all regions of the world;
- the Mediation and Expedited Arbitration for Films and Media Centre, for the resolution of all types of disputes in the entertainment and media sectors, as well as the Domain name dispute resolution services, exclusively for the resolution of domain name disputes, from the World Intellectual Property Office (WIPO) in Geneva, Switzerland;
- the London Court of International Arbitration (LCIA), in London, UK, which is the major arbitration institution in England;
- Trademark mediation services of the International Trademark Association (INTA), exclusively for the resolution of trademark disputes;
- and, of course, the dispute resolution services of the widely-renowned International Chamber of Commerce (ICC), which has offices all over the world.

Even online platforms have been set up, in the last 5 years, to offer ADR services to natural persons and businesses who want to avoid the intricacies, costs and lengthy duration of fully-blown litigation, such as eJust and Mediaconf. It is a little early to assess whether such online ADR platforms do provide adequate resolution services to members of the public and the business community at large, but it is telling that they even managed to get financing from tech investors and venture capital and seed funds.

4. How does ADR support you in resolving your dispute?

ADR refers to any means of settling disputes outside the courtroom. It typically includes early neutral evaluation, negotiation, conciliation, mediation or arbitration.

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In England & Wales, any pre-litigation negotiation process should be conducted on a “without prejudice” basis, pursuant to the without prejudice principle. Indeed, if a communication between negotiating parties has been made in compliance with the without prejudice privilege, it will not be admissible in court and therefore cannot be used as evidence against the interest of the party that made it. The rationale behind this form of legal privilege is that it is in the public interest that disputing parties should be able to negotiate freely, without fear of future prejudice in court, with a view to settling their disputes wherever possible.

It works! Many parties in England & Wales who have disputes, in particular employment disputes which can be conducted through the robust ACAS dispute resolution process, make the most of the without prejudice privilege during negotiations, and settle their claims out-of-court.

Even mediation, which, at its most basic level, is nothing more than a negotiation conducted through an intermediary (the mediator) to resolve commercial matters and even, sometimes, family disputes, benefits from the without prejudice privilege rule in England & Wales, according to which no communications made during the proceedings can be disclosed without the express agreement of the mediating parties in the event that no settlement is reached. If successful, a mediation concludes with a settlement agreement, which is enforceable as a contract.

In France, such without prejudice rule does not apply, which means that any attempt to negotiate and settle out-of-court must be lead by French “avocats à la cour” representing the parties, since only the discussions and negotiations of French lawyers are protected and confidential, and therefore not disclosable in court. This is a serious hindrance to the emergence of sturdy ADR in France, since parties cannot confidentially negotiate an out-of-court settlement without French lawyers and since all their direct communications will be disclosable in court. ADR is therefore a costly process in France because parties must instruct French “avocats” from the get-go, especially when the parties put in the balance the fact that litigation is free in France, i.e. that the French court costs are close to nil. Why then bother with ADR when filing a lawsuit would result in a cheaper process to obtain a 100% enforceable judgment?

Of course, both the UK and France must comply with Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the European Mediation Directive), which objective is the facilitation of access to ADR and the promotion of the amicable settlement of cross-border disputes, by the promotion of the use of mediation as well as of a balanced relationship between mediation and judicial proceedings. It seeks to protect the confidentiality of the mediation process and ensures that when parties engage in mediation, any limitation period is suspended.

In England, arbitration proceedings are governed (“law of the seat”) by the Arbitration Act 1996, which applies to both domestic and international arbitration. In France, articles 1442 to 1527 of the French civil procedural code, govern arbitration proceedings. Apart from the Arbitration Act in England and articles 1442 to 1527 of the French civil procedural code in France, and depending on the parties’ arbitration agreement, various institutional arbitration rules may find application, such as the rules of the LCIA, ICC, etc. In England and France, virtually all commercial matters are arbitrable, while disputes involving criminal and family law matters are generally considered non-arbitrable.

Parties can decide to use arbitration when they have agreed to do so in a contract, in particular in the dispute resolution clause (“clause compromissoire” in French) set out in such contract. If there is an international aspect to the commercial transaction, depending on the type of disputes which are likely to arise between the parties, depending on who the parties are as well as the secrecy of their contractual commitments and obligations, parties may be inclined to set out a dispute resolution clause which chooses arbitration over litigation, in their contract. Such dispute resolution clause would ousts jurisdiction of courts except for purposes of supporting and/or supervising arbitration proceedings and would define the seat (legal place) of any future arbitration. In addition, the dispute resolution clause would clearly set out the governing law, the applicable procedural rules (LCIA, IFTA, ICC, etc.), the number of arbitrators, the language of the arbitration and whether some rights of appeal apply.

If and when a dispute arises, the aggrieved party would merely refer to that dispute resolution clause set out in the contract and, probably after a few attempts to negotiate and resolve this dispute directly with the other party, would file an arbitration with the arbitration body designated in this dispute resolution clause, pursuant to the designated institutional arbitration rules.

Arbitration is very often used in the entertainment sector and creative industries, where reputation and goodwill are some of the most important assets owned by a creative business, and therefore where confidentiality and secrecy are of the essence.

For example, on 19 July 2017, an arbitration panel from the Mediation and Arbitration Centre of WIPO

decided a matter in dispute between major and independent music publishers BMG, Peermusic, Sony/ATV/EMI Music Publishing, Universal Music Publishing and Warner/Chappell Music as well as AEDEM (over 200 small and medium sized Spanish music publishers), on one side, and the Spanish collective rights society SGAE, on the other side. The binding arbitration focused primarily on two claims:

- the inequitable sharing of money received by SGAE from a user of music and distributed by SGAE back to the user of that music as a copyright holder and
- the improper distribution of royalties for the use of inaudible or barely audible music.

After considering the evidence, the three WIPO arbitrators decided:

- to have an equitable distribution, so as not to prejudice other authors, there must be changes in the SGAE distribution rules. These rules must change so that the broadcasters receive via their publishing companies for music uses in the early morning hours (when there is no significant audience or commercial value) a variance between 10% and 20% of the total collected from them, respectively. The arbitrators unanimously agreed it should be 15%. After applying this limitation, new distribution rules also should reflect an equitable value for music broadcast during other programming blocks of time;
- Distributions must stop for inaudible music, as identified by the technology used by Spanish company BMAT or a company using similar technology;
- SGAE should disperse its 'scarcely audible fund' as described in the written decision.

5. Are ADR decisions enforceable? How binding are the available methods of ADR in nature?

An arbitral award is final and binding but a party can appeal to the courts on a point of law, unless the arbitration agreement excludes this ability. Leave of the court to appeal the award is severely restricted under the Arbitration Act 1996 in England & Wales, and under articles 1442 to 1527 of the Civil procedural code in France (and can even be excluded by the arbitration agreement) and the applicant must show, among other things, that the determination of the question of law will substantially affect the rights of the parties and that it is just and proper for the court to determine the question/dispute.

The arbitral award may also be challenged on the basis that the arbitral tribunal did not have jurisdiction to decide the dispute, or that there was a serious irregularity affecting the arbitral tribunal, the proceedings or the award (for example, the tribunal failed to deal with all the issues that were put to it or was biased).

The Convention on the recognition and enforcement of foreign arbitral awards 1958 (the "New York Convention"), to which both England and France are parties, allows the enforcement of either an English arbitration or a French arbitration award across the 157 Convention countries in accordance with those countries' own laws. Likewise, the Arbitration Act provides for enforcement in England of an arbitration award rendered in another New York Convention country. The most common method of such enforcement is to seek judgment of the English court in terms of the award (and that judgment can then be enforced as a judgment of the English court). Meanwhile, articles 1442 to 1527 of the French civil procedural code provide for enforcement in France of an arbitration award rendered in another New York

Convention country, further to the issue of an exequatur order (“ordonnance d’exequatur”) by the competent “Tribunal de grande instance” in France.

Settlement agreements which are reached through mediation or negotiation are contracts and are therefore enforceable if the requirements for a valid contract are satisfied. If, by extraordinary, one of the parties breaches the provisions of the settlement agreement, the other parties will be entitled to file some contractual breach claims with the courts.

To conclude, ADR proceedings are especially adapted to the requirements of the entertainment sector and creative industries at large, where cross-border deals are the rule and the need to protect the reputation and goodwill of contracting business partners is paramount. While the legitimacy of non-disclosure and confidentiality provisions set out in existing settlement agreements is hotly debated at the moment, in relation to sexual harassment cases against Harvey Weinstein, Bob Weinstein, Brett Ratner, Dustin Hoffman, James Toback, Kevin Spacey, Louis C.K., etc., it is wise to set out well-drafted arbitration clauses in film production agreements as well as employment agreements with the above-the-line film team and casted actors, in order to avoid promotional and marketing disasters, such as that suffered by Lionsgate upon the release of “Exposed”, a thriller starring Keanu Reeves, after the film’s actual director asked for his name to be removed.

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