

ARBITRATION in the CANADIAN FILM & TV INDUSTRY

In the entertainment industry, timeliness of decisions, transactions and payments, limited resources for protracted litigation, and ongoing relationships are key considerations. Disputing parties are increasingly intolerant of the cost, delays and risks of litigation (especially in a foreign jurisdiction), paucity of jurisprudence and industry expertise of judges, possibility of appeal, loss of privacy and confidentiality, and the emotional toll.

This article examines some of the advantages and disadvantages of private commercial arbitration in the entertainment industry, as opposed to a collective agreement's or statute's arbitration whose arbitrator is chosen for the parties. Private commercial arbitration pursuant to the rules of a trade organization, such as L.A.-based Independent Film & Television Alliance (IFTA – formerly, AFMA, the international association of independent buyers and sellers of programming, excluding the US studios), may enhance some of these advantages and diminish or eliminate some disadvantages. See www.ifta-online.com.

Arbitration is one type of Alternative Dispute Resolution method. Private commercial arbitration is an **appropriate dispute resolution** method whereby the parties appoint a single independent arbitrator (or each party appoints an arbitrator who jointly appoint the third) to decide the dispute by an award which is: legally binding on the parties; final (generally, not to be appealed to a court); recognizable and enforceable by the courts; and enforceable in other jurisdictions. It is sometimes pejoratively referred to as "Rent a Judge". The parties may, in their contract, commit to binding arbitration in the event of a future dispute, or they may appoint an arbitrator only after a dispute has arisen. The arbitrator must be impartial (no bias) and independent (no business, financial, family or personal relationship with any of the parties or their counsel) pursuant to initial and continuous disclosure of actual and potential conflicts of interest.

Arbitration's objective is a fair, faster, lower-cost, party-structured method for the full and final disposition of disputes by a commercially experienced neutral person, in a private and more relaxed atmosphere, with confidentiality of the process and the award, which may preserve or enhance the parties' relationship despite the dispute.

Some examples of entertainment industry disputes that arbitration has been, and could be, resolving are:

1. was the option duly exercised?
2. interpretation of "grant of rights", eg: was internet or merchandising exploitation granted, although not specifically mentioned?

3. was approval unreasonably withheld, à la "...which must be approved by the grantor, producer, etc., such approval not to be unreasonably withheld"?
4. does the alleged act constitute "standard industry practice or custom"?
5. completion bond coverage exclusions.
6. was delivery made, and are defences to (non-) payment of minimum guarantees and other amounts valid under an interparty or distribution agreement?
7. challenges to distributors' allocation and deduction of expenses.
8. payments and security ranking pursuant to an inter-creditor or collection/disbursement agreement.
9. shotgun, buy-sell clauses and restraints on directors' powers in shareholder agreements.

ADVANTAGES

1. The parties can **design and control a flexible process** by choosing an experienced arbitrator and fixing the schedule and procedure for motions, discovery and hearing in coordination with the arbitrator and/or pursuant to a trade organization's rules.
2. The **rules of natural justice** govern: the appearance and practice of "fair play" is fundamental. Each party must have a full opportunity to present its case and hear the other party's case. Juxtapose this with often brutally adversarial litigation where the parties themselves, and sometimes the dispute, are nigh forgotten.
3. The arbitrator's **expertise**, as opposed to the judiciary's general lack of expertise in specialized commercial matters, impacts directly on the predictability of the award as well as the efficacy of arbitration.
4. Arbitration **costs** should be, and generally are, significantly lower and more predictable than litigation costs. The arbitrator's fee and expenses are generally shared. Lawyers are not always needed, which increases speed, lowers costs and accentuates the business and/or artistic focus. Videoconferencing and teleconferencing are encouraged, which limit travel and hotel costs for discovery and hearing. Arbitration alleviates the risk of litigation and appeal costs in Canada, and the even greater risk and cost of litigating in a foreign jurisdiction with foreign law governing .

5. The parties may not want anyone else to know that they are claimant or respondent, the facts and issues in dispute, the trade secrets and confidential information that might be disclosed, who lost, and on what terms. Arbitration is conducted **in private** among the parties, counsel and the arbitrator, although certain witnesses and a stenographer may attend the hearing. The award is **confidential**, being delivered only to the parties, counsel and any applicable organization.
6. Properly conducted arbitration should better permit the parties to preserve, and possibly build or re-establish, good working and personal **relationships**, such as a producer and its principal broadcaster or sales agent, a distributor and its merchandiser or sub-licensees. Protracted, expensive litigation tends to terminate relationships.
7. IFTA, ADR Institute of Canada and the American Arbitration Association provide case management, fee rates and rules which, where necessary, complete what the parties may not have specifically addressed in their arbitration agreement.
8. Arbitration is a separate dispute resolution process not subject to appeal or annulment except as the arbitration agreement may provide or as difficult statutory requirements may permit. The merits of the award are **not reviewable** by the court.
9. These advantages are all the more prominent in **other arbitration methods** such as: (a) "documents only" arbitration, in which the parties agree that an award be rendered without a hearing; and (b) private arbitral appeals, in which an arbitrator hears an appeal of an arbitral award or court judgment.

DISADVANTAGES

1. The arbitrator's fee and expenses, the hearing room and other costs are generally shared by the parties, whereas the judge and courtroom are free. Multi-party or witness arbitrations and bad faith may dissipate expected cost savings.
2. Some parties are reticent about limited discovery, that all the strict rules of procedure and evidence may not be applied, or that a non-lawyer industry arbitrator may not have the requisite legal expertise.
3. Arbitration is unfavourable to parties who want to delay paying, delay in order to hide assets or re-structure, or to cause the other party to incur big legal bills. These risks are mitigated by a well done arbitration agreement or a trade organization's rules.

4. Punitive damages are not enforceable in various jurisdictions. IFTA Rule 8.4 does not allow punitive damages because its members want rights and/or money, not punishment.
5. Appeal and judicial review are restricted.
6. Awards are generally not published, thus unavailable to guide potential arbitrating parties, whether on business or legal points or the record of a potential arbitrator. The award may become public if it is appealed, homologated (in Quebec), requires recognition or enforcement, or if any of these procedures are challenged.

Arbitration is particularly effective for pure monetary claimants, assuming payment by the respondent and the benefit of the time value of money received within several months of initiation of arbitration, as opposed to 2.5 years to get to trial plus the risks of appeal and respondent's insolvency. Arbitration is similarly beneficial for a distributor who wants delivery of a picture in time for a key festival or market, or for a rightsholder or claimant who cannot wait for, or bear the cost of, a court or appeal court judgment.

Given the international nature of the film-tv industry and the increasing complexity of its relations and transactions in development, production, financing and exploitation, arbitration is well-suited to resolve its disputes. The parties can creatively structure an arbitration process that is appropriate to that case's exigencies.

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