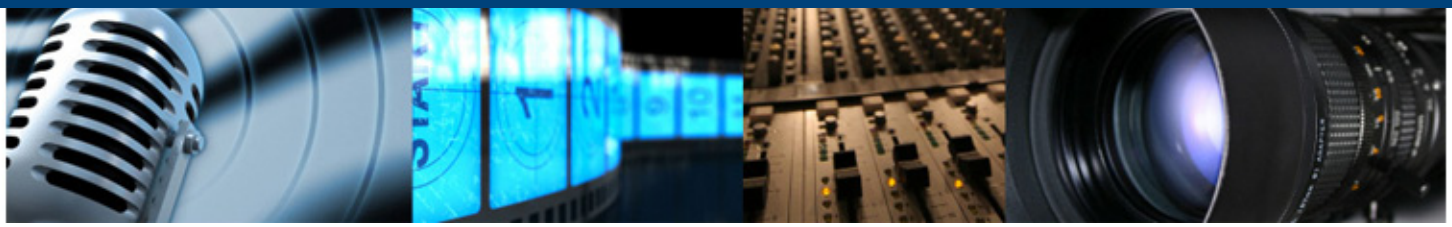


Entertainment & Media Law Signal

Heenan Blaikie

Dispute Resolution Processes in Entertainment Contracts

October 18, 2011 by Bob Tarantino

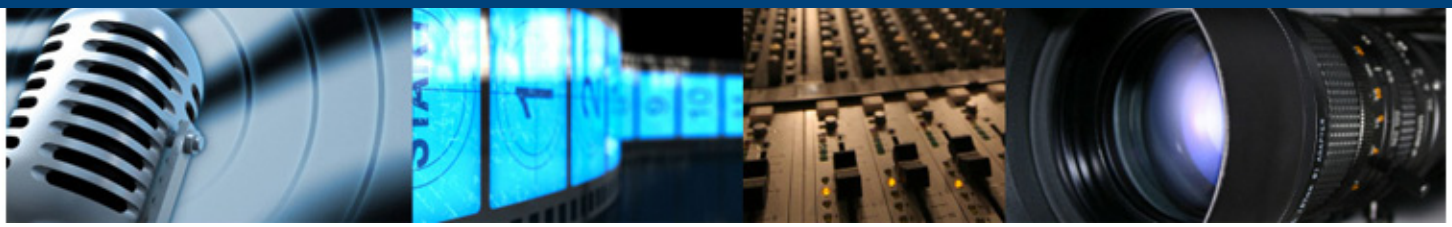
James Kosa wrote an interesting and thoughtful piece over at slaw last week: Shape-Shifting Dispute Processes: Adapting the Process to the Type of IT Dispute. In it, he discusses "alternative dispute resolution (mediation or arbitration) as a means for resolving disputes" in the context of information technology (IT) contract disputes. James raises a number of issues which entertainment practitioners would do well to consider in the context of the industries whose participants we are called on to advise. Dispute resolution clauses (or the absence thereof) in contracts can be, dangerously, viewed as "boiler plate" clauses, deserving no more attention than, say, a counterparts clause - but each contract, or at least each "type" of contract, and the relationship which is documented thereby, should be assessed for what type of dispute resolution mechanism is most appropriate.

It is not uncommon for entertainment contracts to contain arbitration clauses: particularly in the United States, the presence of multiple service providers who specialize in making available experienced arbitrators who also have an entertainment industry background make arbitration a seemingly attractive option. But as James identifies, some types of disputes may warrant different treatment:

One way to distinguish disputes is by the remedy sought by the parties. In my view, **a dispute should be handled differently if the parties are looking for injunctive relief or specific performance than if the parties are merely seeking payment or some other remedy.** A dispute resolution process should be flexible enough to allow the parties to select a method of dispute resolution that will provide them with the remedy they seek. To avoid additional friction when a dispute arises, I would suggest that the parties turn their minds to this issue when preparing the agreement, and carve out from a general dispute resolution clause and the convention escalation procedures any disputes that require a special remedy. **Some agreements will carve out intellectual property related disputes from a mandatory ADR clause, allowing the parties to seek emergency injunctive relief.** It would also be appropriate to provide such a carve-out for disputes involving a breach of confidence for the same reason. [emphasis added]

Access to the courts in case of a dispute may be useful not just for the *type* of remedy they can award, but also because there is a certain power of persuasion which can arise: people generally hate being sued - getting pulled into binding arbitration doesn't sound nearly so bad. It is also worth remembering that if a contract only provides for resort to the courts in the event of a dispute, the courts then serve as a "final forum" - an aggrieved party can't try to impose an arbitration or mediation process onto the dispute; conversely, if a contract provides for arbitration or mediation, a recalcitrant party can advanced claims through the courts that the arbitration/mediation is improper or otherwise deficient.

James also provides a very useful heuristic for assessing what type of dispute resolution mechanism is appropriate for a particular type of dispute. To paraphrase (and oversimplify James' great work):



- if the dispute relates to the interpretation of a contract - the adjudicator should have a legal background (which counts in favour of using the courts as the dispute resolution forum)
- if the dispute relates to "standards of care" (or how a particular party should have acted in particular circumstances) - the ajudicator should have industry experience (which counts in favour of using an arbitrator)
- if the dispute relates to compliance with technical specifications - the adjudicator should have significant technical expertise

Of course, in the entertainment industries (as in, I imagine, all other industries), disputes don't always co-operate and break down into agreeable chunks with pre-affixed labels: is a dispute over royalties owing more akin to a pure "contractual interpretation" dispute suitable for a judge, or would it be better to have an experienced arbitrator who understands the nuances of a vague "adjusted gross receipts" definition? (The answer may depend on which party you represent, naturally.)

A separate issue which should be canvassed is whether the particular agreement is being entered into under the auspices of a guild/union collective bargaining agreement, and whether and how any dispute resolution process under that collective bargaining agreement interfaces with the proposed resolution mechanism in a particular contract.

There are an enormous number of entertainment industry-focused materials available on dispute resolution mechanisms - here is only a sampling:

- Alternative Dispute Resolution In the Entertainment Industry (Cardozo Journal of Conflict Resolution panel)
- Arbitration in the Canadian Film & TV Industry by Sander Gibson
- Survey: A Look at ADR in the Entertainment Industry by Gerald F Phillips and Arianna Tatum
- Alternative Dispute Resolution in the Entertainment Industry by A. Nicole Weaver
- A Proposal for the Entertainment Industry: The Use of Mediation as an Alternative to More Common Forms of Dispute Resolution by Veronique Bardach

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