

Lights, camera, mediation!

FILM & TV

As the awards season reaches fever pitch, Andrew Hildebrand considers why mediation deserves to play a leading role in the entertainment industry

By the time this issue of *The Resolver* reaches readers, the news bulletins will be full of red-carpet moments, tearful acceptances, and tales of triumph over adversity in pursuit of elusive statuettes.

But as the big stars garner the column inches, spare a thought for those productions that have come unstuck along the way and that are now more likely to end up being judged by members of the judiciary than members of the Academy.

But they don't have to end up in the Chancery Division. Mediation has already proven to be an effective solution, and one particularly suited to resolving entertainment industry disputes.

Putting together any multi-party production requires complex collaboration, creatively and financially. Invariably, it also involves partnerships with overseas partners and an international dimension, reflecting the industry's licensing and distribution models. The UK film and television industry, in particular, has also inherited a number of US customs, including the practice of using in-house 'business affairs' – rather than finance – personnel to handle production financing and revenue distribution. These figures act as the industry's 'glue', cobbling together deals in short order and heading off potential disputes.

Furthermore, within individual sectors such as film, television and music, there is invariably a real sense of community. Companies regularly conduct business with one another, and relationships and reputations (individual and corporate) are often key.

CREATIVE TENSION

Despite obvious tensions between creative and commercial interests, the industry isn't particularly litigious compared to other sectors. Producers tend to be reticent about suing their 'commissioners' (for obvious reasons) and, because everyone needs to be seen as 'talent friendly', suing the talent is rarely a viable option either. The industry is also less litigious than it used to be, which reflects both the increasing cost of such action and the financial impact that technological advances have had on revenues.

Overall, entertainment industry clients



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tend to respond well to the experience of mediating. The informality suits them, as does the flexibility of being able to create tailor-made solutions, which isn't surprising when you consider how unregulated the entertainment industry is. That said, parties tend to prefer using mediators who speak their language, know their way around industry business models and aren't fazed by idiosyncratic behaviour.

It is well known that mediation can be invaluable when a dispute has the potential to be expensive, embarrassing or time consuming to resolve, or when litigation might not give a party what it wants, when it wants it, cost-effectively. If a dispute occurs during the production process another factor comes into play, which is that films and television productions are generally produced to tight time frames, and financing is conditional on specified delivery and release/transmission dates being met. Mediation is generally the only effective way of insulating a production against inter-party fall-out and ensuring that deadlines can be safely met. Importantly, when international partners are involved mediation tends to be considerably easier and less protracted than suing and enforcing in a partner's home jurisdiction.

ELIMINATING RISK

Mediation can remove 'the risk factor'. I mentioned that transactions tend to be conducted by 'business affairs', but when they can't head off a dispute it is sometimes the case that the contractual position isn't clear-cut because of the way a deal has been cobbled together.

Standard legal remedies don't always give a client the result it wants. The right to terminate a distribution deal, for instance, is rarely a licensor's best commercial option. Mediation allows clients to create their own preferred solutions, re-engineer deal terms and even settle on a non-precedential basis. These are things a judge can't offer and can be important when parties are concerned about possible third-party satellite claims. In a royalty audit, for instance, a headline figure could be agreed in principle and then recomputed to factor in legal costs and interest. Where cash flow may be an issue, future revenue streams can be adjusted instead.

Mediation can be invaluable when clients find themselves in disputes they can't stop because the other side won't let them. A mediator can

be the bridge that gets the other side to see things differently – for example, when a non-industry claimant has unrealistic ideas about infringement or damages, or when a collaborator from a tangential industry is wary of another party's business practices or business models.

The fact that mediations remain confidential and take place far from any media glare can appeal to broadcasters, publishers, licensors and public figures who are concerned about causing damage to projects or brands, or alienating talent or business partners. They know better than most that reputational damage tends to occur on publication: people don't always remember who wins or loses, but they usually remember the juicy bits.

Whether it is a production dispute, a band dispute or a boardroom dispute, an entertainment industry clash is often also about relationships and egos. These are not things the court is particularly good at dealing with.

Mediation works especially well when there's a business or creative relationship involved that a client doesn't want to jeopardise, or when personal differences or changing circumstances are part of the problem. The relationship could be with a third party, but it could also be inside a client's business, with its fellow partners, directors, shareholders or employees or, in the case of literary and artistic estates, with family members.

I mediate a lot of production and distribution disputes, but also partnership/founder disputes for people who have built successful creative businesses together and then fallen out.

One of the key advantages of hiring an independent mediator in these cases is that the mediator can resolve problems as soon as they flare up – and not after the damage has been done. That means that people can separate inexpensively without destroying themselves or their business but also, provided mediation happens early enough, the mediator can test whether a relationship is salvageable and, if it is, who needs to change what to get it safely back on track.

UNTAPPED VALUE

While mediation tends to be thought of more as a litigation tool, a mediator can also broker a deal – and that is where, I think, the real untapped value is. Last year, for instance, I mediated the Major Motion Pictures Pact/BECTU Terms of Trade, the negotiations for which had already taken more than five years. It is the first UK national agreement covering the terms and conditions of work for crew on major motion



ABOUT THE AUTHOR

Andrew Hildebrand is a leading UK mediator and an IFTA arbitrator. He also runs a specialist Entertainment, Sports and Licensing mediation practice. A former Mishcon de Reya partner, his career included senior GC roles at Channel 4 and FilmFour, executive producing for the late Richard Attenborough and co-financing more than 100 feature films. Follow him @ah515





£30m+

The budget above which UK feature films will now be required to meet agreed terms for workers' rights and conditions from 2 April 2018, following five years of negotiation towards the Major Motion Pictures Pact/BECTU Terms of Trade. The draft was finalised in October 2017, after four months of intensive around-the-clock negotiations with the assistance of the author.

THE MIDDLE MAN



In 2010, New Zealand Prime Minister John Key offered to mediate a dispute between director Peter Jackson and union workers who threatened the filming of *The Hobbit* in the country. Jackson had threatened to move production to eastern Europe.

GANG CLASH ENDED

In November, a 16-hour mediation session put an end to a months-long dispute between two production companies involved in film projects highlighting efforts in Los Angeles to reduce gang violence. Source: PRWeb

DRAMATIC TURN



Following the spate of allegations regarding sexual harassment in the entertainment sphere, an initiative that will provide pro-bono, third-party mediation for members of the theatre community has been proposed.

Source: variety.com

pictures (with a budget of £30 million or more), and will be implemented on 2 April 2018.

Hiring someone who understands people's respective positions and has 'no skin in the game' can be a game changer when people are experiencing difficulties over a negotiation. As in any type of dispute, the mediator gets people to concentrate on what they all want to achieve – rather than on what has been separating them – and gives them the confidence that it is going to work. Having done that, the mediator drives the closing process, managing any wobbles along the way.

Despite the fact that 85% of UK civil mediations settle either on the day or shortly after, mediation doesn't tend to be people's first choice when it comes to dealing with a British media industry dispute. This may be because, compared with their US counterparts, UK entertainment businesses aren't as aware of mediation, or it could be a reflection of the extent to which international distribution contracts tend to be governed by Californian law and stipulate arbitration. Of course, it may simply be that, when it comes to negotiating contracts, dispute-resolution clauses feature low on the business affairs radar.

Whatever the reason, there is a danger that the industry is sleepwalking into problems. Half of all independent film and television distribution contracts, for example, are governed by the Independent Film and Television Alliance (IFTA). IFTA contracts typically stipulate resolution by arbitration under Californian law. Since only a handful of IFTA arbitrations take place in England each year this means that parties don't have much of an option if they would prefer either not to arbitrate, or to do so but in England.

Sadly, by the time you find yourself in a dispute, it isn't always easy to persuade a counter-party to mediate. Bearing this in mind, there is a lot to be said for entertainment industry clients considering more seriously whether they should be providing for mediation as part of their dispute-escalation provisions in business-critical contracts, in the future.

Whatever the focus of a production dispute, a band dispute or a boardroom dispute, it is often also about relationships and egos. These are not things the court is particularly good at dealing with

LEARN MORE

Andrew Hildebrand was one of several industry experts who addressed members of CIARB's London Branch at a seminar on this topic in 2017, held in association with the British Screen Advisory Council. Go to bit.ly/ADRinFilm for details.