NEGOTIATING POINTS FOR ADR PROVISIONS IN ENTERTAINMENT CONTRACTS

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I. The Benefits of Alternative Dispute Resolution (ADR)

While sometimes ego satisfying and financially rewarding for trial attorneys, the bottom line is that litigation is often fatal to industry relationships, costly and always over budget, disruptive to conducting business, open to public scrutiny, unpredictable, and subject to multiple reviews, revisions, and even reversal on appeal. Any seasoned trial lawyer will confess that he or she has lost cases that were projected victories and have won other cases that were snatched from the jaws of defeat. ADR is a process that is available as an alternative to litigation under various federal and state statutes.

While there are certain types of disputes that may be perceived as being strong candidates for ADR (royalties, fees, payments and credit for work, copyright, etc.), any issue or claim that may result in litigation can benefit from the ADR process. In fact, over 90% of all litigation is settled before trial. A very small percentage of the remaining disputes that go to trial are commercial cases. Why? In the high stakes business world, good lawyers and savvy clients know this to be true: a gladiator mentality and macho chest beating often catapult a resolvable dispute into expensive scorch the earth discovery battles and litigation, when an agreement to exchange information may facilitate an early resolution of everything from major conflicts to minor misunderstandings.

Negotiation, mediation, and arbitration are all first choice alternatives to litigation, particularly in the relatively small world of entertainment. We need to use every reasonably available opportunity to avoid the hazardous litigation, which often leaves both sides unsatisfied, and commit to a more constructive path. The front end of contract negotiation is the best beginning.

There are, of course, in all contract negotiations, differences in bargaining positions. For this reason, it is important for lawyers and parties to know why ADR is always a process that should be given serious consideration as an alternative to litigation.

Here are some of the starting points in drafting ADR provisions in entertainment contracts.

II. ADR Clauses

A. Negotiation

1. Negotiation in Good Faith

The parties will attempt in good faith to resolve through negotiation any dispute, claim or controversy arising out of or relating to this Agreement. Either party may initiate

negotiations by providing written notice in letter form to the other party, setting forth the subject of the dispute and the relief requested. The recipient of such notice shall respond within five days with a written statement of its position on, and recommended solution to, the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each party will full settlement authority will meet at a mutually agreeable time and place within ten days of the date of the initial notice in order to exchange relevant information and perspectives, and to attempt to resolve the dispute. If the dispute is not resolved by thee negotiations, the parties will consider and decide whether the dispute should be submitted to JAMS, or its successor, for mediation or arbitration.

JAMS Standard ADR Clause

In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall uses the best efforts to settle the dispute, claim, question, or disagreement. To this effect they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules.

AAA Standard ADR Clause

2. Negotiation and Mediation

The parties will attempt in good faith to resolve through negotiation any dispute, claim or controversy arising out of or relating to this Agreement. Either party may initiate negotiations by providing written notice in letterform to the other party, setting forth the subject of the dispute and the relief requested. The recipient of first notice will respond in writing within five days with a statement of its position on and recommended solution to the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each party will full settlement authority will meet at a mutually agreeable time and place within ten days of the date of the initial notice in order to exchange relevant information and perspectives, and to attempt to resolve the dispute. If the dispute is not resolved by these negotiations, the matter will be submitted to JAMS, or its successor, for mediation.

JAMS Standard ADR Clause

If a dispute arises out of or relates to this contact, or the breach thereof, and if the dispute cannot be settled through negotiations the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

AAA Standard ADR Clause

B. Mediation

Except as provided herein, no civil action with respect to any dispute, claim or controversy arising out of or relating to this Agreement may be commenced until the matter has been submitted to JAMS, or its successor, for mediation. Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with JAMS and with one another in selecting a mediators from JAMS' panel of neutrals and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator and any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered in admissible or nondiscoverable as a result of its use in the mediation. Either party may seek equitable relief prior to the mediation to preserve the status quo pending the completion of that process. Except for such an action to obtain equitable relief, neither party may commence a civil action with respect to the matters submitted to mediation until after the completion of the initial mediation session, or 45 days after the date of filing the written request for mediation, whichever occurs first. Mediation may continue after the commencement of a civil action, if the parties so desire. The provisions of this Clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorney's fees, to be paid by the party against whom enforcement is ordered.

JAMS Standard ADR Clause

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial mediation Rules [the clause may also provide for the qualifications of the mediator(s), the method of allocation fees and expenses, the local of meetings, time limits, or any other issue of concern to the parties].

AAA Standard ADR Clause

C. Arbitration

Any dispute, claim or controversy arising out of or relating to this Agreement or breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by arbitration in (location of arbitration), before a sole arbitrator, in accordance with the laws of the State of for agreements made in and to be performed in that State. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures. Judgment

on the Award may be entered in any court having jurisdiction.

Any dispute, claim or controversy arising out of or relating to this agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by arbitration (in location of arbitration), before a sole arbitrator, in accordance with the laws of the State of for agreements made in and to be performed in that State. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. Judgment on the Award may be entered in any court having jurisdiction.

JAMS Standard ADR clause (streamline and comprehensive)

Any controversy or claim arising from or relating to this contract or the breach therefore shall be settled by arbitration administered by the American Arbitration Association under its [applicable] Large, Complex Commercial Arbitration Procedures, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

AAA Standard ADR Clause

Any dispute under this Agreement will be resolved by final and binding arbitration under the Rules for International Arbitration and AFAM® in effect when the arbitration is filed ("AFAM® Rules"). Each Party waives any right to adjudicate any dispute in any other court of forum, except that a Party may seek interim relief before the start of arbitration as allowed by the AFAM® Rules. The arbitration will be held in the Forum designated in the Agreement, or, if none is designated, as determined by the AFAM® Rules. The Parties will abide by any decision in the arbitration and any court having jurisdiction may enforce it. The Parties submit to the jurisdiction of the courts in the Forum to compel arbitration or to confirm an arbitration award. The Parties agree to accept service of process in accordance with the AFAM® Rules.

AFAM Model Licensing Agreement

If any dispute shall arise relating to any matter under this Agreement, including performance or interpretation, the parties shall make good faith efforts to negotiate a resolution to such dispute. If negotiations fail, such dispute (including whether any particular dispute is arbitrable hereunder) shall be determined by arbitration before an arbitrator mutually acceptable to both parties. If the parties cannot agree on an arbitrator, both agree to use an independent arbitrator chosen by the [selected arbitration forum]. The arbitrator shall determine by whom and in what proportion the cost of arbitration shall be paid. The parties hereby grant such arbitrator full and absolute power to decide any dispute under such rules of procedure as the arbitrator shall adopt. The arbitrator's award shall be final, binding, and conclusive and may be enforced in any court of competent jurisdiction.

D. Other Provisions

1. Damage Exclusions and Limitations

| The arbitrators will have no authority to award punitive or other dam | ages not |
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| measured by the prevailing party's actual damages, except as may be required by statute. In | no eveni |
| shall an award in an arbitration initiated under this clause exceed \$ In | no event |
| shall an award in an arbitration initiated under this clause exceed \$ | for any |
| claimant. The arbitrator(s) shall not award consequential damages in any arbitration initiate | ed under |
| this section. Any award in an arbitration initiated under this clause shall be limited to n | nonetary |
| damages and shall include no injunction or direction to any party other than the direction | to nav a |
| monetary amount. If the arbitrator(s) find liability in any arbitration initiated under this class | use they |
| shall award liquidated damages in the amount of \$. Any monetary was | rd in an |
| arbitration initiated under this clause shall include pre-award interest at the rate of \% | from the |
| time of the act or acts giving rise to the award. | |

AAA Standard ADR Clause.

In no event shall the arbitrators have the authority to award incidental, special, consequential, or punitive damages to either party.

2. Time Bar for Claims

Demand for arbitration under this agreement shall be forever barred unless made within one year from the date when the alleged dispute arose, and shall be made by written notice delivered via certified U.S. Mail to the other party and the [arbitration forum].

All claims and disputes that arise under this Agreement shall be submitted to arbitration by initiating the arbitration note later than one (1) year after the act or omission giving rise to the claim or dispute occurred. The failure to initiate arbitration within the one year period constitutes an absolute bar to the institution of any proceedings based on such act or omission. The aggrieved party may initiate arbitration under this paragraph by sending written notice of an intention to arbitrate to all parties. The notice must contain a description of the dispute, the amount involved, and the remedy sought. Each party agrees that service of process, summons, notices or other communications related to the arbitration procedure shall be deemed and served and accepted by the other party if given in accordance with the provisions of this Agreement.

3. Location for Arbitration

Any and all disputes subject to arbitration under this agreement shall be submitted for hearing in the City, State of [specify arbitration forum].

The arbitration shall take place in City, State, and a location selected by the arbitrator(s).

| | 4. Arbitration Qualification and Selection Process |
|-------------------------------------|---|
| determined by | In the event the claim of any party exceeds \$, the dispute shall be heard once three arbitrators. |
| judge]. | The arbitrator(s) shall be a [specify profession: accountant, practicing attorney, retired |
| shall be attorne for at least | The arbitrator shall be conducted by a panel of three neutral arbitrators, all of whomeys who are members in good standing of the bar of the state of and practicing years. |
| profession], an | The panel of three arbitrators shall consist of one [insert profession], one [insert d one entertainment attorney. |
| entertainment f shall be an atto | The panel of three arbitrators shall consist of persons having experience in the field, specifically, and at least one of the appointed arbitrators rney. |
| | In the event that a dispute is submitted to arbitration for resolution, the parties may |

In the event that a dispute is submitted to arbitration for resolution, the parties may agree on a jurist from the JAMS, AAA, or other panel. If the parties are unable to agree, the selected arbitration or mediation service shall provide a list of three available panel members and each party may strike one. The remaining panel member will serve as the arbitrator.

5. Expedited Injunctive Relief

Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights of property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy.)

AAA Standard ADR Clause

6. Exchange of Information, Investigation and Enforcement

(i) Mediation

In the event any party has substantial need for information in the possession of any party to prepare for the mediation conference(s), the parties shall attempt in good faith to

agree upon procedures for the expeditious exchange of information, with the help of the mediator, if required.

(ii) Arbitration

Consistent with the expediter nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

AAA Standard ADR Clause

7. Confidentiality

(i) Mediation

The mediation will constitute settlement negotiations for the purpose of all state and federal rules protecting disclosures made during settlement negotiations. Communications made and materials submitted in, or in connection with , the mediation are privileged and confidential and not subject to disclosure by the parties or the mediator; provided, however that evidence otherwise subject to discovery or admissible is not excluded from subsequent discovery or admission in evidence simply as a result of having been used in connection with the mediation. The mediator shall not be compelled to testify or to divulge such communications. No stenographic or other records shall be made of the mediation, except to memorialize a settlement.

Without limiting the foregoing, and recognizing that little to no discovery will have occurred prior to mediation, the parties agree specifically that this mediation agreement itself, the tentative reports of experts, and statements of damages submitted in connection with the mediation shall be privileged, confidential, not admissible in any judicial proceeding or arbitration, and not subject to disclosure by the parties or the mediator. The provisions of paragraph 8 shall survive the termination of this Agreement.

(ii) Arbitration

Except as may be required by law, neither a party not an arbitrator may disclose the existence, content, or results or any arbitration hereunder without the prior written consent of both parties.

AAA Standard ADR Clause

(iii) Media Contact

If contacted by the media, the parties and their respective counsel shall respond only by issuing the complete text of the following agreed statement:

[prepared and approved text]

The parties shall not seek media attention for this dispute. Other than providing the complete text of the entire prepared statement, the parties and their counsel shall made no further comment to any media inquiries concerning this dispute. The parties' counsel shall inform each other promptly of each and every media inquiry concerning this dispute and the substance of the response given, if any. The provisions of paragraph 9 shall survive the termination of his Agreement.

(iv) Judicial Enforcement

The parties agree and stipulate that any violation of the confidentiality and/or media provisions would result in irreparable harm, and that any enforcement proceeding for injunctive relief shall be brought exclusively in the [specific court and location].

8. Prevailing Party and Enforcement

In the event any arbitration or court action is commenced by either party, the substantially prevailing party in such action shall be entitled to its out-of-pocket legal costs and reasonable attorney's fees incurred therein.

The arbitrator shall, in the Award, allocate all of the costs of the arbitration (and the mediation, if applicable), including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party, against the party who did not prevail.

JAMS Standard ADR Clause

9. Enforcement of Final Award

There shall be no right to appeal the decision of the arbitrator, which shall be final and binding. The award of the arbitrator may be confirmed or enforced in any court having jurisdiction.