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Arbitration in the Entertainment Industry

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ARBITRATION IN THE ENTERTAINMENT INDUSTRY

Michelle Palagi

The entertainment industry is driven by contractual agreements between actors, film studios, and countless behind-the-scenes players.¹ When disputes inevitably arise, it is often within the parties' best interests to resolve the issues quickly and privately, without garnering media attention.² Arbitration provides disputants this avenue and it is why binding arbitration clauses are so prevalent within the industry.³ Arbitration clauses within a contract state that, should an issue arise between the parties, the parties will submit the dispute to arbitration.⁴ Arbitration allows for the parties to select an arbitrator, with a facilitator overseeing the negotiation, resulting in a legally binding outcome.⁵ Contrary to litigation producing information in the public record, arbitration ensures that the parties can reach an agreement confidentially and without having to incur exuberant attorneys' fees.⁶ Additionally, the entertainment industry can oftentimes involve complex matters that an arbitrator with expertise in entertainment issues would uniquely be able to resolve, more so than a judge who lacks such knowledge. Furthermore, parties within the entertainment industry often have ongoing relationships, both within the project from which the dispute arose and beyond. Resolving disputes as quickly and efficiently as possible, which arbitration accomplishes, maximizes the chances of these relationships continuing peacefully and lucratively.⁷

Many controversial and media-generating disputes within the industry have been resolved via arbitration. For example, when Kevin Spacey was fired from the hit Netflix show, "House of Cards," after sexual assault and misconduct allegations were levied against him, the ensuing disputes were submitted to arbitration per his contract with MRC, the show's production company.⁸ In November 2021, the results of the arbitration were made public, after Spacey's appeal was denied and a petition was filed by MRC to make the results publicly confirmed.⁹ The arbitrator had concluded that Spacey violated his contract, as MRC had to compensate for Spacey's firing with millions of dollars in additional producing fees, not to mention millions of dollars in lost revenue.¹⁰ The arbitrator awarded MRC nearly \$31 million in damages.

¹ Jeffrey Grubman, *Taking Advantage of ADR in the Entertainment Industry*, JAMS ADR INSIGHTS (June 12, 2013) <https://www.jamsadr.com/blog/2013/taking-advantage-of-adr-in-the-entertainment-industry> [<https://perma.cc/FHX7-CZP9>].

² *Id.*

³ Stan Soocher, *How Disney's Motion to Compel Arbitration of Scarlett Johansson's Lawsuit Over 'Day-and-Date' Release of 'Black Widow' Movie Might Have Played Out*, LAW.COM (Oct. 4, 2021, 5:02 PM), <https://www.law.com/2021/10/04/how-disneys-motion-to-compel-arbitration-of-scarlett-johanssons-lawsuit-over-day-and-date-release-of-black-widow-movie-might-have-played-out/> [<https://perma.cc/RK7Y-H9CC>].

⁴ BELLO Adesina Temitayo, *Entertainment Industry Disputes; Arbitration as a Catalyst to Perennial Malady*, SSRN 1, 2 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3055732 [<https://perma.cc/85ES-MCSN>].

⁵ *Id.* at 8.

⁶ Grubman, *supra* note 1.

⁷ Soocher, *supra* note 3.

⁸ Joe Flint, *Kevin Spacey Loses Arbitration Case Against 'House of Cards' Production Company*, WALL ST. J. (Nov. 22, 2021, 12:31 PM), <https://www.wsj.com/articles/kevin-spacey-loses-arbitration-case-against-house-of-cards-production-company-11637602277> [<https://perma.cc/57Q4-CNBD>].

⁹ *Id.*

¹⁰ *Id.*

In July 2021, actress Scarlett Johansson filed suit against The Walt Disney Company for the simultaneous “day and date” release of *Black Widow* in both theatres and the Disney+ streaming service, contrary to Johansson’s understanding that the initial release of the movie would be exclusively limited to theaters.¹¹ Her complaint stated that such a release “dramatically decreased box office revenue for the Picture” and, thereby, box-office revenue for Johansson. In August, Disney’s counsel from O’Melveny & Myers filed a motion to compel arbitration, per Johansson’s contract with Disney.¹² Eventually, a confidential agreement was reached between the actress and Disney, with which both parties have claimed they are satisfied. Both Disney and Johansson also noted in their statements that they were looking forward to working on future projects together.¹³

Although a private settlement was reached between the parties in this case, the issue of a court resolving whether a dispute is arbitrable is worth noting. In their motion to compel arbitration, and thereby asking the court whether the issue falls within the arbitration clause, Disney noted that Periwinkle, Johansson’s loan-out company and plaintiff in the lawsuit, intentionally named Disney (Marvel’s parent company), and not Marvel itself, as party to the suit.¹⁴ Disney claimed that this was an attempt to generate media attention and capitalize on Johansson’s fan base. In this case, both parties agreed that an arbitrator would decide whether the dispute was within the scope of the arbitration clause, per the arbitration rules of JAMS, the alternative dispute resolution provider.¹⁵ However, parties challenging a dispute’s arbitrability are common in the entertainment industry.

In 2021, the District Court for the Southern District of New York decided in *Downing v. A&E Television Networks* that the agreement’s incorporation of the rules of JAMS must be weighed in determining the arbitrability of the dispute.¹⁶ JAMS Rule 11(b) states, “Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which [a]rbitration is sought . . . shall be submitted to and ruled on by the [a]rbitrator. The [a]rbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”¹⁷ Beyond the decisions in these cases, and the challenges arbitration clauses endure, arbitration remains a utilized technique within the entertainment industry. Ultimately, it provides an effective and cost-efficient way for parties to resolve their disputes without generating negative press and it ensures that professional relationships can be maintained post-dispute.

¹¹ Kimberlee Speakman, *Scarlett Johansson Settles ‘Black Widow’ Lawsuit with Disney*, FORBES (Oct. 1, 2021, 12:11 PM), <https://www.forbes.com/sites/kimberleespeakman/2021/09/30/scarlett-johansson-settles-black-widow-lawsuit-with-disney/?sh=37ef4f4443aa> [<https://perma.cc/S4ZN-GK6T>].

¹² Soocher, *supra* note 3.

¹³ Speakman, *supra* note 11.

¹⁴ Soocher, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*