Arbitration clauses irk biz creatives

WILSHIRE AND WASHINGTON

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Charlie Sheen's case against Warner Bros. has settled, the theatrics of the dispute replaced by a conciliatory tone. But one issue remains an ongoing source of discontent in the legal community: arbitration.

Before Sheen and Warner Bros. came to terms for an undisclosed amount, they squared off in court, with Sheen's reps anxious to have his case heard in a public proceeding and the studio determined to enforce a clause in his contract that would have put it in the hands of an arbitrator, typically a retired judge, and with most everything done in private.

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Although the Sheen case is yesterday's news, it exposed a long-lingering flashpoint between talent's legal reps and studio general counsels.

The whole point of arbitration was to get disputes through the system at greater speed and lower cost. Plaintiffs, i.e., stars and creators suing studios, usually over their share of the backend, say it does neither. The system, they say, has morphed into one that favors the studios, particularly when it comes to accounting and distribution of profits, and that's why it's now a studio standard to demand that contracts include arbitration clauses.

"Do we really get a fair shake if we are representing talent and we have no jury, and we have punitive damages waived and we have a lot of the other things that are caused by having arbitrations instead of litigation? I don't think so," Michael J. Plonsker of Robins, Kaplan said at a recent panel of litigators that I moderated before the Beverly Hills Bar Assn.

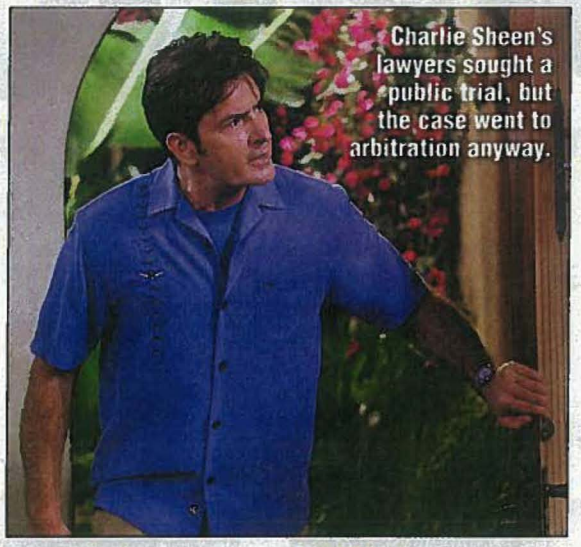
In the Sheen case, his attorney Marty Singer argued that his contract's arbitration provision was "unconscionable." In other words, even though Sheen was one of the highest-paid stars on television, he didn't have any choice but to accept an arbitration provision in his contract.

John Spiegel, who repped Warner Bros., challenged the notion that Sheen didn't have leverage to negotiate, noting that he commanded $2 million an episode and was able to demand things like a private hairstylist and use of a private jet. Sheen, Spiegel said, didn't even mention an arbitration clause in the long list of things he wanted when his contract came up for renewal in 2010.

The judge ended up sending the case to arbitration, and as for the question of whether the arbitration clause was "unconscionable," he said that that could be left in the hands of ... the arbitrator.

That's why, at the Beverly Hills Bar Assn. panel, Plonsker said the recourse in a contract negotiation would be to get a studio to actually say, "Take it or leave it" to an arbitration clause.

"Send them an email or a letter saying, 'We don't want arbitration,' and make them say, 'You have no choice.' Then, as litigators, we will get the opportunity to say, it is 'unconscionable,'" he said.



Charlie Sheen's lawyers sought a public trial, but the case went to arbitration anyway.

Also irking these legal reps is that contract disputes settled in arbitration have no precedential value. Plonsker suggests a central repository to at least glean information about arbitration awards. But given that confidentiality is often a rationale for arbitration in the first place, good luck with that.

"We are going to have no input from the courts to what these contracts mean, and every time we start a new proceeding, it is going to be like 'Groundhog Day,' and that is not good, for the industry or for people representing talent," Plonsker said. "I don't even know if it is good for the studios." He found agreement from two others on the panel, Larry Stein of Liner Law and Bonnie Eskenazi of Greenberg, Glusker.

Talk to studio reps and they will insist that while arbitration clauses have become a standard, they are still on the table in negotiation, and it's faulty to assume that arbitration favors their side.

"We negotiate, and not all of our arbitration provisions remain the same," Warner Bros. general counsel John Rogovin said in an interview.

One industry source said that "it used to be talent that asked for the provision, and the studios resisted. They didn't want the time, money and delay of a court proceeding."

Often cited as a benefit to both sides is that an arbitrator can devote "undivided attention," while judges in the court system are overworked.

Studios have reason to avoid the dynamic of a court trial: Jury consultants suggest that when a jury is forced to choose between a star or content creator and a major media conglom, David gets a more sympathetic ear than Goliath.

At the panel, Martin Katz of Sheppard Mullin, who has repped studios in many high-profile cases, said, "If we go back to what the primary objectives really were on arbitration, which is cost containment and speed to judgment, and we agree for the sake of argument that it doesn't work so great 10 years later, the question is what is the fix? Is the fix scrapping it, or is the fix figuring out how to have arbitration provisions that are enforceable but do in fact streamline the process?"

Until such issues are addressed, there'll be plenty of rancor over a clause designed to bring relief.

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