Mediation and arbitration of music disputes:

An alternative forum for transnational disputes

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Introduction

Commercial exploitation of musical works has rarely been confined to the domestic context. It is not often that artists[1] perform in a single country or stay off-line. Instead artists will seek audiences in multiple jurisdictions and even more importantly, share their works via the Internet. Equally musicians will not only benefit from their music (including lyrics) but also merchandising or endorsement deals and performance contracts. It is now common that contracts regulating the exploitation of rights will be drafted in the form of 360-degree agreements (Stopps 2014), which will cover all aspects of valuable assets related to the creativity and image of a musician, such as sound recordings, musical compositions, image rights, merchandising and live performance work. This presents a challenge for musicians who are not supported by large legal teams, because they face not one, but potentially multiple legal regimes, coupled with the complexities of commercialisation over the Internet (mainly jurisdictional issues). It has already been argued that artists are not always well-acquainted with the systems of intellectual property (IP) laws or court procedures behind enforcing or protecting their creative works (Denoncourt 2016).[2]

[1] This chapter explores the position of artists, and other creative talent in the music industry. The umbrella term 'artists' includes performers, creatives, and musicians etc.

[2] Findings in similar vein supported with empirical data, which the author collected in 15 semi-structured interviews with artists, who expressed that IP law is complex and often difficult to understand; unless prompted, IP law is not high on their agenda of awareness; this empirical study is a pilot project and referenced at note 6.

How are therefore music disputes best resolved? And what if these disputes involve multiple parties, from different regions of the world? Which law will regulate an international tour? In order to address some of these questions, while accepting the limitations and cost of domestic litigation, IP organisations are focusing their efforts to highlight the benefits of 'out-of-court' dispute resolution mechanisms, offering a range of benefits to the parties of the dispute. For example, the World Intellectual Property Organization (WIPO) has been actively promoting its Arbitration and Mediation Centre (established in 1994), that operates under its institutional rules and has in recent years seen a rise in case load.[3] In the United Kingdom (UK) the Intellectual Property Office (IPO) now promotes its Mediation Services as an alternative to court litigation.[4]

Will any 'out-of-court' solution do? Alternative dispute resolution (ADR) is an umbrella term which includes mediation and arbitration. Mediation is a form of ADR, which offers the parties an 'out-of-court' forum to solve their dispute with the assistance of a neutral, the mediator. The approach is similar to contract negotiation, is less confrontational and is distinctive for a 'win-for-all' approach. Differently arbitration is a more formal form of ADR, where an arbitrator (or a tribunal), solves a dispute on the facts in front of them, under the law chosen by the parties.

In light of the foregoing, this chapter explores the suitability of mediation or arbitration for the settlement of music disputes, whilst also drawing a distinction between the two ADR methods. ADR mechanisms are promoted (*e.g.* by WIPO) for numerous advantages,[5] including (1) a single procedure, or the so-called 'one-stop-shop' approach; (2) party autonomy; (3) neutrality

[3] Caseload has risen from 47 cases in 2009, to 179 cases in 2019 (bringing the total to over 700 mediation, arbitration and expert determination cases, with most cases filed in recent years) https://www.wipo.int/amc/en/center/caseload.html.
[4] IP Mediation, https://www.gov.uk/guidance/intellectual-property-mediation.
[5] WIPO promotes these advantages specifically in IP disputes: https://www.wipo.int/amc/en/center/advantages.html.

of forum (as opposed to domestic courts); (4) confidentiality of disputes (as opposed to the public court proceedings); (5) finality of awards (challenge to an award is substantially limited when compared to appeals in litigation); and (6) easy enforceability of international awards under the New York Convention (1958) (NYC) or mediation agreements under the Singapore Convention (2018).[6]

Informed by empirical data,[7] it is argued here that the general preference for ADR over traditional litigation notwithstanding, there are fewer ADR advantages for individual artists (independents, not-signed talent), who lack the know-how in IP or contract law, or are unfamiliar with the ADR process. Artists who are signed by Traditional Record Labels (TRL), are more likely to have the infrastructure and support needed to gain access to ADR processes. To illustrate, an artist, who has a recording contract with a TRL, will have the support of the business services, accounting, marketing, public relations (PR) or access to a legal team. This pool of artists is however not particularly diversified in countries such as the UK or the US (Bain 2019; Smith *et al* 2020; Coogan Byrne 2020).[8] This chapter therefore concludes with an evaluation of the suitability of mediation and/or arbitration of contractual and IP disputes in the music industry, from the perspective of different stakeholders, including the individual artist when they are not privy to expert legal advice. It is argued here, that the individual musician is better served in mediation. Should they decide to take their case to international arbitration, this might prove to be a procedure as complex as domestic court litigation.

[6] See pages xx-yy (to insert a reference, for the old sections 4 and 5).

[7] The empirical study was possible due to the support given with the Early Research Awards Scheme at the University of Wolverhampton (ERAS): Metka Potočnik, "Breaking Monopolies: a Feminist Approach to Intellectual Property Law in the Creative Industries," (September 2019 – August 2020).

[8] To illustrate the lack of diversity: (1) Bain found for the UK that "just over 14% of writers currently signed to publishers and just under 20% of acts signed to labels are female." (2) Smith *et al* found that "women are missing from popular music." (3) Coogan Bryne finds underrepresentation of female musicians across British Radio Stations (2019-20).

Music disputes

The glocal and transnational nature of music disputes

With the Internet, the music industry has seen a drastic shift in how it operates (Stopps 2014). Users and artists have changed the ways in which they create, access, listen to and exchange musical works. The change in the creative environment has not however been matched with a change in the law relating to jurisdiction for disputes: the main protection of IP assets is still linked to territories of states. There is no single, 'world' or 'global' IP right, which would cover an artist and her creative works. As soon as an artist shares her work online, they or their representatives should follow a 'glocal' strategy, which is 'a strategy of thinking globally but acting locally' (Svensson 2001: 13).

A recorded musical composition can be protected by various types of copyright (separate copyright for the music and lyrics to a song), sound recordings of those musical works and their broadcast. For performers, a set of related, or neighbouring rights is provided. Because copyright is a territorial right (there is no global copyright), laws regulating the extent of protection can differ substantially. This means the artist must carefully contemplate any contractual arrangements about the use of their rights and this will often mean a detailed consideration of the interests of several stakeholders. Artists will also devise their own image; and with reputation and fame, comes the legal protection of personality or image rights (Kessler 2017). If artists are expanding outside their craft of music (for example into the fashion industry) or endorsing commercial products, issues of trade marks or designs are to be thought of. If the artists come up with ways to improve an instrument or other technical products, patents will be involved.

Contract disputes

In order to engage with exclusive rights reserved for copyright owners (reproduction, distribution, communication to the public) users need permission. Permissions to access IP protected works are granted either by purchase or via licences. When IP is assigned (*i.e.* transfer of title), the assignee becomes the new IP rights holder. Licenses are contracts, which give third parties the permission from the IP rights holder to use the works protected by the IP. Licences will set duration, terms of the use, remuneration, the territory and exclusivity/non-exclusivity of use, and are usually in writing. Licences, as all other contracts, are valid between the two contracting parties, and can be terminated under the terms of the contract or the law, applicable to the contract. Licences or other contracts in the music industry might contain ADR clauses.

Intellectual property disputes

In cases where there is no contract between musicians, or users of particular music (*i.e.* a non-contractual dispute); or where there is an accusation of unlawful copying (*i.e.* IP infringement dispute), IP law will play an important role. Whether there are unresolved issues of copyright authorship/ownership; the extent of exclusive rights or copyright infringement; the rights to the use of personality of the artists; or perhaps trade marks resulting from a particular artists' brand, IP disputes are first, and foremost territorial. Although the phenomenon of music is transnational or glocal, the nature of IP rights is distinctly territorial: there is no 'world copyright;' instead there is copyright in the UK, China, Nigeria, Germany, *etc* …

Because IP rights are territorial, they are innately linked to a State's sovereignty and a States' discretion to grant IP monopolies as per their policies.[9] Although the music industry calls for

[9] Although all World Trade Organization (WTO) Member States are bound by the minimum of IP protection set in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), States have ample discretion to offer "more" protection in their domestic laws.

the effective resolution of disputes outside the confines of domestic courts, IP disputes have not always been deemed right for settlement outside of the supervisory court control. Experts have considered this as a public policy limitation in their discussions on "arbitrability" *i.e.* whether disputes in an area of law are suitable for settlement by arbitration (Potočnik 2019; Cook and Garcia 2010).

The territorial nature of IP rights is however no longer a barrier to ADR mechanisms of settling disputes. It is now accepted in general, that IP disputes are arbitrable, which means that parties can solve their IP disputes effectively outside the confines of domestic courts. There is an important limitation to this freedom however, and that is that the validity of any IP right which must be registered (*n.b.* copyright is not a registrable right)[10] will not be affected by decisions made outside national courts with the effects towards third parties (Cook and Garcia 2010).[11] In other words, decisions made by arbitral tribunals or by the parties in mediation will have a binding effect on the disputing parties alone (*inter partes*) and not against third parties (*erga omnes*).[12]

Replacing the courts: specialised institutions

Some countries will have specialised institutions, such as IP tribunals or courts, dealing with IP disputes separately. There are at present no 'creative industries' or 'music' courts, but there are some industry actors that will offer some forums for dispute resolution.[13] For ADR of music

[10] Trade marks are registrable rights (but some States also protect unregistered trade marks); patents must be registered, to give protection.
[11] In Switzerland even with *erga omnes* effect: see PIL Art.177 (disputes involving property).
[12] For example, if an arbitral tribunal find that a trade mark is descriptive and invalid, resulting in no infringement, this would not affect the entry of this mark on the register. The validity could only be done through an action for revocation, not a decision by an arbitral tribunal.
[13] For example, there are several mediation commercial companies, and in the UK, one of the more well-known is Centre for Effective Dispute Resolution (CEDR), https://www.cedr.com. Specifically, for TM disputes, International Trademark Association (INTA) offers mediation services, https://www.inta.org/resources/mediation/.

disputes, parties may therefore wish to avoid 'lay judges' and instead employ experts at specialised institutions, accustomed to dealing with IP disputes. The most experienced in this area is the WIPO Mediation and Arbitration Centre,[14] which offers services of both mediation and arbitration.

The WIPO Mediation and Arbitration Centre offers a number of ADR options. The main benefit of WIPO ADR proceedings is the participation of experts in IP matters,[15] which is not an expertise all international ADR specialists would share (Potočnik 2019).[16] Moreover, WIPO has recently issued ADR Rules and Model Clauses,[17] which should help parties avoid some of the common pitfalls of newcomers to ADR proceedings, in particular with an international element. This builds on recent increase in technology and highly technical cases (patents), which include IP issues, administered by the WIPO Mediation and Arbitration Centre.[18] In these cases, the literature supports the use of WIPO arbitration (Laturno 1996; Martin 1996). WIPO supports the use of the WIPO Arbitration and Mediation rules through a series of industry targeted events[19] under the auspices of its Mediation and Arbitration Centre.

[14] https://www.wipo.int/amc/en/center/background.html.
[15] WIPO's List of Neutrals: https://www.wipo.int/amc/en/neutrals/.
[16] Potočnik empirically confirmed that international arbitrators are not that "comfortable" with IP law, but equally, they are flexible to learn its rules.
[17] (1) Mediation: WIPO Mediation Rules ("MR") (Effective from 1 January 2020); Mediation Model Clause, https://www.wipo.int/amc/en/clauses/mediation/. (2) Arbitration: WIPO Arbitration Rules (Effective from 1 January 2020); Arbitration Model Clause, https://www.wipo.int/amc/en/clauses/arbitration/.
[18] In 2019, there were 179 cases (from 40 cases in 2010), and they include disputes arising from: "licensing agreements (e.g., trademarks, patents, copyright, software); research and development agreements; technology transfer agreements; distribution agreements, franchising agreements; Information Technology agreements; data processing agreements; joint venture agreements; consultancy agreements; art marketing agreements; TV distribution and formats; film production; copyright collective management; cases arising out of agreements in settlement of prior court litigation."
[19] https://www.wipo.int/amc/en/events/.

Dispute settlement through agreement: mediation

Not to be confused with negotiations, conciliation or arbitration, mediation is a form of ADR proceedings where parties to a dispute agree to settle their dispute by communicating to each other with the skilled assistance of a mediator (a 'neutral') (Blake *et al* 2018). Mediators are independent and must remain impartial, but unlike judges or arbitrators, they will not have a final say. It is the parties that will either agree on the form of settlement, or not. Mediation is also praised for enabling an imaginative approach to solutions, which will often result in a 'win-for-all' outcome of the case (De Girolamo 2016).

The legal framework

Parties are legally bound by any agreements made in their 'agreement to mediate' (or mediation contract/clause).[20] The process of mediation, when regulated, sources its rules either internationally or domestically. Internationally there are two legal instruments available for countries aiming to create a mediation-friendly environment. First, the UN Commission for International Trade and Commerce has prepared a 'template' or 'model law' on mediation (UNCITRAL Mediation Model Law (MML)).[21] To date, thirty-three countries have been influenced by the MML.[22]

The second relevant legal development from the perspective of the music industry, as a 'global' or 'glocal' industry, is the adoption of the Singapore Convention on Mediation in 2018.[23] It has always been stated that the success of international commercial arbitration[24] can be attributed

[20] See pages xx-yy (section 4.2).
[21] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).
[22] Status regularly updated: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status.
[23] The United Nations Convention on International Settlement Agreements Resulting from Mediation (2018).
[24] See pages xx-yy (section 5).

to the ease of enforcement under NYC (Redfern and Hunter 2015).[25] States wishing to promote international arbitration have signed on to the standards of enforcement under NYC, and there are currently 165 signatory States. Until recently, mediation settlement agreements ("MSAs") did not have an equivalent legal framework, making it more difficult to get legal recognition for any agreements reached in mediation proceedings with an international element. This has now changed, and the Singapore Convention on Mediation has already fifty-two signatories and four parties.[26] If NYC is any indication, this Mediation Convention is expected to have many more signatories in the next few years. States, wishing to promote mediation in international commercial disputes will wish to offer a legal framework, which will facilitate a quick and simple enforcement of international mediation settlement agreements. The Singapore Convention offers rules, which make a jurisdiction 'mediation friendly.'

States which have not adopted MML, have their own rules, and parties wishing to understand those, would need to consult the domestic legal framework separately. In the United Kingdom (UK), which has not followed the guidance of MML, mediation is not heavily regulated (Wechs Hatanaka 2018). Some aspects of cross-border mediation are harmonised through the EU Mediation Directive, which contains the rules on the enforceability of mediation agreements; confidentiality and limitation/prescription periods.[27]

There is another set of rules that parties are encouraged to be familiar with when thinking of mediation. ADR Centres across the world have sought to help individuals and businesses wishing to make greater use of ADR mechanisms by drafting helpful mediation rules.

[25] See pages xx-yy (section 5.4).
[26] The UN keeps records of the signatories and entry into force: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.
[27] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24 May 2008). Situation after Brexit, is due to its uncertainty, not contemplated.

Examples include Mediation Rules by the International Chamber of Commerce (ICC);[28] or WIPO Mediation Rules, specifically for IP disputes.[29] These rules will apply only if both parties agree to their application.

Access to mediation

Mediation can only begin if the two parties in a legal dispute agree to solve this dispute through mediation. The agreement can be made either before the dispute arises (Mediation Agreement (MA) for future disputes); or alternatively, parties can agree to settle their dispute in mediation after the dispute has already arisen (Mediation Submission Agreement (MSA)).[30] When an agreement has not been made yet, parties can request the mediation to start through the WIPO Centre (Unilateral Request for Mediation (URM)).[31] Here the case will proceed only if the other party consents to the proceedings. Accordingly, all mediation discussed here, is voluntary and based on parties' consent.

Mediation agreements need not be overly formal, but in order to ensure their legal effectiveness and avoid and issues for the future, it is recommended that the parties follow institutional model clauses. To illustrate, WIPO offers a clear Model MA, which is to be inserted in the main legal agreement (*i.e.* the main contract),

> Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].[32]

[28] Effective from 1 January 2014.
[29] See section 4.3.
[30] WIPO MR Art.3.
[31] WIPO MR Art.4. Form provided online, https://www.wipo.int/amc/en/clauses/mediation/.
[32] https://www.wipo.int/amc/en/clauses/mediation/. WIPO also offers a model MSA and URM.

Mediation proceedings

Mediation proceedings are informal and confidential. WIPO Mediation Rules have only a handful of provisions that will set some procedural rules, but only in the broadest terms. Proceedings are facilitated and organised by the mediator (with the assistance of the ADR Centre if agreed by the parties) and all mediators must be independent, neutral, and impartial.[33]

Mediation proceedings will begin once the Request for Mediation has been sent to the ADR Centre by the party who has initiated the proceedings.[34] After consent is established, the parties must appoint a mediator.[35] If they find it useful, more than one mediator can be appointed. Particularly in music disputes it is recommended they also be experts in IP law, and if possible, musical experts (*i.e.* musicologists or on the business of music). When parties fail to agree on a mediator in an effective manner, the ADR Centre might have the appointing authority and name a mediator for them.[36]

Once a mediator is in place, a schedule of meetings is to be agreed with the parties.[37] Parties can choose to be represented in the mediation meetings but legal representation is not mandatory.[38] If the parties do not agree specifically on how to conduct the proceedings, the mediator has the discretion to conduct the proceedings as they find appropriate and in accordance to the applicable Mediation Rules.[39] Both the mediator, and the parties, have the duty to cooperate and conduct the mediation as expeditiously as possible.[40]

[33] WIPO MR Art.8; also, a ground to refuse relief under the Singapore Convention on Mediation Art.5(1)(e).
[34] WIPO MR Art.6.
[35] WIPO procedure detailed in WIPO MR Art.7.
[36] WIPO MR Art.7(a)(v),(b).
[37] WIPO MR Art.13 (referring to a timetable for submissions).
[38] WIPO MR Art.9.
[39] WIPO MR Art.10.
[40] WIPO MR Art.11.

Mediators usually have the authority to meet with parties in private sessions, which will remain confidential (Blake *et al* 2018).[41] So-called *caucus* sessions are also available under WIPO Mediation Rules, which expressly stipulate that the information shared with the mediator in separate meetings is not to be disclosed to the other party, and is to remain confidential, unless express agreement to the contrary has been made.[42]

Outcome of mediation

A successful mediation ends with the parties' agreement. This is not the same as a court decision or an arbitral award. Mediators cannot impose their judgement on the parties. Instead, it is the will of the parties to reach a settlement regarding their future legal relationship. The binding nature of MSA originates with the parties' having made an agreement. This result is often referred to as a 'mediation settlement' or 'a settlement agreement.' Courts will however assist with the enforcement of these agreements, when one of the settlement parties refuses to honour such a settlement. If Singapore Convention on Mediation applies, such settlement agreements are now much easier to recognise and enforce in multiple jurisdictions across the world.[43]

If mediation fails, all documentation or communication from the mediation proceedings remains confidential cannot be used in subsequent arbitration or litigation.[44] It is also worth stating that any party can terminate mediation proceedings without any risk to its legal position at any time. All information from a failed mediation must remain confidential. Under some

[41] WIPO MR Art.12.
[42] WIPO MR Art.12.
[43] In practice, it is helpful to have access to court enforcement proceedings in any State where the debtor might have assets which could be sold to satisfy any outstanding debt.
[44] WIPO MR Arts 15-19.

rules, termination of a mediation must be done in writing.[45] When the parties are mediating in the UK there are distinct obligations when mediating on the referral of the courts and some important cost implications reinforce the parties' good faith obligation to attempt to mediate earnestly (De Girolamo 2016).[46]

Dispute settlement through private courts: arbitration

Arbitration is another form of ADR, which sits between the more informal mediation on the one hand and the formal litigation in front of domestic courts on the other hand. There are a number of distinct advantages to arbitration, and in particular international arbitration, but there are also some specifics which might make it less accessible to individual artists. Arbitration is built on party autonomy which leads directly to greater flexibility to design arbitration proceedings. This can however only be done effectively if both parties have the funds and experience needed to conduct arbitration proceedings to their best interest.

The legal framework

There are distinct legal sources in arbitration, which have clear hierarchy amongst them. The first, and the most important legal source is the parties' agreement to arbitrate.[47] The parties' autonomy is the corner stone to every arbitration and can only be limited in cases of mandatory rules (Cook and Garcia 2010; Redfern and Hunter, 2015), such as rules for challenging an arbitrator for conflict of interest[48] or challenging an award.[49] The second legal source are arbitral rules, which the parties have agreed to use. Parties can choose to have their arbitration administered by an arbitral institution (*i.e.* institutional rules) or can adopt arbitral rules

[45] WIPO MR Art.19(iii).
[46] Parties should attempt a good faith mediation, at the risk of cost sanctions: *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576; [2004] 1 WLR 3002.
[47] See pages xx-yy (cross reference to the old section 5.2).
[48] Section 24 Arbitration Act 1996.
[49] Sections 67-69 Arbitration Act 1996.

prepared for application in individual cases (*i.e. ad hoc* arbitration). Examples of institutional rules include LCIA Rules;[50] ICC Rules;[51] WIPO Rules;[52] AAA Rules[53] or SIAC Rules,[54] to name but a few. The oft used *ad hoc* arbitration rules are UNCITRAL Arbitration Rules (Redfern and Hunter, 2015).[55]

The third legal source in arbitration are the domestic laws at the place of arbitration (*lex (loci) arbitri*) (Cook and Garcia 2010). Also known as the 'law of the seat,'[56] these are the domestic legal rules on (international) arbitration at the legal place of arbitration. The place of arbitration, or the 'seat' is often chosen by the parties in their arbitration agreement. This law has had its role decreased over the years, but continues to be important (1) in its application to domestic arbitration; (2) as a support mechanism to international arbitration, when enforcement against third parties is requested through courts; (3) as a gap-fill set of procedural rules when the parties do not settle a matter expressly; and (4) as a guardian of the public interest (Redfern and Hunter, 2015). The law of the seat has seen its fair share of harmonisation through the UNCITRAL Model Law instrument,[57] but some countries like the UK,[58] have found ways to keep some of their unique legal infrastructure.

The final legal source in arbitration, which most authorities count as pivotal to the overwhelming success of international commercial arbitration since the 1960s, is the NYC.[59] This convention sets the minimum standard of the enforcement and recognition of foreign

[50] London Court of International Arbitration, Arbitration Rules (2014).
[51] International Chamber of Commerce, Arbitration Rules (2017).
[52] See references at note 14.
[53] American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures (2013).
[54] Singapore International Arbitration Centre (SIAC) Arbitration Rules (2017).
[55] UNCITRAL Arbitration Rules (as amended in 2010).
[56] Section 3 Arbitration Act 1996.
[57] UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments in 2006).
[58] If parties choose the legal seat of their arbitration to be the UK, the law of the seat is the Arbitration Act 1996.
[59] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

arbitral awards. This means that in most cases decisions rendered by international commercial arbitral tribunals under a valid arbitration agreement as set in Article II NYC will be recognised in any ratifying country. Domestic courts do not have the flexibility to impose barriers or obstacles to enforcement, if these are not listed in NYC. Comparatively it is easier to get satisfaction on an arbitral award than a foreign court judgement.[60] This is because there is no comparable multilateral convention, which would simplify the recognition and enforcement procedure for foreign court decisions.[61]

Access to arbitration

An arbitration can only take place if the parties agree to entrust their disputes to an independent and impartial tribunal to the exclusion of the jurisdiction of courts. There are two ways of establishing consent in arbitration: firstly, before the dispute has arisen (*i.e.* for future disputes, via an arbitration clause); or alternatively, after the dispute arose (*i.e.* a submission agreement).

The content of submission agreements will be complex and will involve technical and detailed legal drafting on the part of both (all) parties involved. In contrast, arbitration agreements for future disputes are usually done in brief form and will rarely extend beyond a paragraph or two. All arbitration agreements are valid, when parties agree to take their dispute to arbitration (*i.e.* finality of arbitration), to the exclusion of national courts (Redfern and Hunter, 2015).[62] Arbitration clauses are common in international commercial contracts (Redfern and Hunter, 2015), but are not always carefully planned or negotiated. That is different with submission agreements, which are more difficult to negotiate, as the parties are already in a legal dispute (Redfern and Hunter 2015).

[60] Contracting States: http://www.newyorkconvention.org/countries.
[61] There is an exception in the EU, with court decisions of domestic courts of EU Member States being easily recognized and enforced under the rules of the Brussels Regulation 1215/2012.
[62] NYC Art.II.

Having learned from past cases, arbitral institutions offer a number of model arbitration clauses. Any party new to arbitration proceedings is strongly encouraged to consult a model clause of an institution in order to minimise the risk of an invalid arbitration agreement. WIPO offers the following Model Arbitration Clause,

> Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].[63]

One of the peculiarities of the music industry, or more broadly, IP disputes in general is that often the disputing parties will not be in a prior contractual relationship. Whereas that is not common in international commercial arbitration generally, IP infringement claims will often occur outside of, or separate from any contractual relationships. In those cases, the WIPO's recommendation for a brief form of Submission Agreement is uncharacteristic when compared to other institutional rules, yet a welcome instrument to parties new to music arbitration:

> We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules:
>
> [brief description of the dispute]
>
> The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction].[64]

[63] https://www.wipo.int/amc/en/clauses/arbitration/.
[64] https://www.wipo.int/amc/en/clauses/arbitration/.

For any arbitration agreement to be valid, it has to be a clear demonstration of the parties' consent to take their dispute to arbitration, to the exclusion of national courts. Arbitration agreements must also meet the requirements of Article II NYC: (1) agreements must be in writing; (2) about differences, which have or may arise between the parties, regarding a defined legal relationship (contractual or not); and (3) regarding subject-matter, capable of settlement by arbitration (arbitrability requirement). It is now accepted that most IP disputes are indeed arbitrable.[65]

Arbitration proceedings

Arbitration is more formal than mediation. International businesses find international commercial arbitration particularly appealing, because it gives the parties (and their legal teams) almost complete control over the proceedings (preserving only minimum due process safeguards). Arbitral proceedings are one of the clearest examples of transnational law as it is the arbitration community that has devised a set of procedural rules that transcend the particular characteristics of common law v civil law systems. International arbitration now has its own character, which endorses party autonomy. For parties to truly exercise their autonomy however, they should be familiar with the process and be equal to the opposing party in their negotiation position (at least at the time of the contract formation).

Absent parties' agreement, arbitral tribunals conduct arbitral proceedings with great discretion. Soft law such as the IBA Rules on the Taking of Evidence in International Arbitration (2010)[66] offer great guidance to arbitral tribunals operating in the transnational arena. Here arbitral tribunals do not act as common law courts (adversarial approach) or civil law courts

[65] See pages xx-yy (section 2.3).
[66] International Bar Association (IBA), is a professional body, which has issued several codes of practice, that are well accepted by the arbitration community as good practice.

(inquisitorial approach), but instead, conduct the proceedings in an effective manner, which will result in a speedy and efficient resolution of the dispute (Redfern and Hunter, 2015). Arbitrators will therefore accept written submissions, hear oral evidence (witnesses), collect written evidence, and consult experts, if necessary. When needed, arbitrators can seek assistance from the courts at the seat of arbitration (*lex (loci) arbitri*); for example, when third parties are ordered to do something, *i.e.* instructed action (witnesses or freezing orders).

Outcome of arbitration

Arbitrators make their decision in writing, an arbitral award. An arbitral award is similar to a court decision in that it will be the arbitrators dictating the terms under which one party has prevailed over the other, either fully or partially. Unlike mediation, arbitration results in an arbitral tribunal 'declaring the outcome of the dispute.' The result is an enforceable award, which means, that a party that has lost its case, can be forced to satisfy the award by the courts at the place of enforcement.

Arbitration is often called a 'one-stop-shop' because the arbitral award is final and binding. This means that there are no appeal mechanisms to appellate arbitral tribunals which would allow the losing party to trial their case anew. Instead, a losing party can only challenge an arbitral award for limited reasons, as set out in the arbitral law at the seat of arbitration. For example, if arbitration took place in London, the seat of arbitration was the UK, and the Arbitration Act 1996 (*lex (loci) arbitri*) would dictate the scope of its reviews in Sections 67-69.[67]

[67] Similarly, UNCITRAL ML Art.34.

In brief, arbitral awards will not survive a challenge, if the parties' agreement has not been honoured by the arbitral tribunal (*i.e.* there is no jurisdiction to hear the dispute, as decided), or if the tenets of due process have been violated (either the parties' right to be heard has been violated or the arbitral tribunal was not independent or impartial). In general, courts will not review the evidence or merits of a case which has been decided by arbitral tribunals. State judges do not have the power to check whether the arbitrators got it right. Courts will, however, safeguard the application of mandatory domestic rules and public policy preservation (including arbitrability).[68]

Stakeholder's perspectives: an evaluation and recommendations

All ADR methods are based on consent. Party autonomy and relative equality are integral to ADR success. If the parties are not of equal power, it is argued here, the system will serve the stronger party. The literature posits that artists have less negotiation power than record labels (De Orchis 2015; Ormsbee 2011; Scamman 2008). This has been confirmed empirically (Potočnik 2019-20), and leads to some important considerations: (1) access to finance and legal support is unequal; (2) which results in the unequal understanding of the legal and business complexities of music disputes; and (3) artists will have the 'fear of losing out' and this will lead to a chilling effect for artists thinking of actioning a legal dispute.

Overall, it is argued here, that in music disputes ADR methods are to be preferred over traditional court litigation. On balance however, it is further argued that international arbitration is better suited for record labels (and other business organisations in the music industry), whereas individual artists (and smaller organisations) will benefit more from mediation (Ormsbee 2011; Scamman 2008). Arbitration is a formal process, which offers great

[68] NYC Art.V.

flexibility on choices of applicable law, place of hearings and evidence taking. This flexibility is however not free (or cheap), especially in complex cases. At the same time, cross-border proceedings can be complex, and arbitrators will have to make a decision based on the applicable law within the terms of original submissions. Once initiated, the power of the decision rests with the arbitrators, unless the parties settle early. Arbitration also suffers from qualified confidentiality in that courts have a supervisory role over the final award. Court proceedings are public (unless an exception applies (*i.e.* trade secrets etc)).

One of the oft lauded advantages of arbitration, over court litigation is the reduced cost of the legal fees attached. That does not mean that the arbitration cost is negligible. Particularly in complex cases, where both parties engage legal teams to advise them of their positions in the case; cases, where more than one arbitrator is appointed, and several oral hearings are needed, the cost of legal and arbitrators' fees will be prohibitive to an emerging or individual artist, who is struggling to make a living from their work (Potočnik 2019-20). Additionally, the evidence taking procedure, although flexible and left to the agreement of the parties, will often be expensive, unless the parties agree on restricted evidentiary procedure from the start. To illustrate, international disputes will often involve parties, who speak different languages, and arbitrators from different countries. The cost of translation alone can be prohibitive for an individual, thinking of bringing forth their claim of IP infringement against a party, better established in the industry.

The suitability of arbitration as a dispute settlement mechanism is not to be disregarded in complex international disputes, where IP rights span over numerous territories, or involve complex contractual arrangements of commercial exploitation of music works and related artists' rights (image, merchandising, *etc*). Here, the appeal of international arbitration is clear,

as the law allows parties to select their decision maker(s); the law to be used for reaching the final outcome of the case; the evidentiary procedure;[69] and the legal place of arbitration ('the law of the seat') which will suggest, which courts are to assist the arbitral tribunal, if necessary. Overall, in such cases and when handled by experienced arbitration practitioners, international arbitration is the preferred method over domestic court litigation. This is because of the 'one stop shop' nature of international arbitration, which means that there are no appeals proceedings in arbitration, rendering arbitration a faster solution. Unlike in domestic litigation, once the final decision has been made, the supervisory body (the courts at the seat or the place of enforcement) will not have the power to review the facts, evidentiary findings or merits of the case. Beyond the limited grounds for challenging an award, national courts do not have the power to check, 'whether the arbitrators got it right.'

Mediation on the contrary, is less expensive, less formal, and completely confidential. Due to its nature, where mediators are facilitating the conversation and exchange between the parties, the imbalance in legal or business skill will not be as prevalent, and if the appointed mediator is a music expert, the independent artist will benefit from a more equal forum. Any concerns of the parties can be discussed confidentially with the mediator (in '*caucus*'), all with the aim of the final resolution of the dispute, acceptable to both parties. Without the confines of initial submissions, the mediator also has creative powers of suggesting imaginative solutions to the existing problems, thereby leading to 'win-for-all' settlements in the end. The cost of legal fees can be reduced substantially, as there is no need for a formal evidentiary procedure, or the involvement of several legal teams, over a prolonged period of time. Mediation is often restricted to a shorter period, when compared to an international arbitration (Blake *et al* 2018).

[69] Parties can choose a purely written procedure; or opt to add oral hearings; parties also have to discretion to limit the type of admissible evidence (documents, witnesses, or expert opinions).

Because mediation is a method of communication between the parties without a formal (and expensive) procedure attached to it, it is argued here that artists should always strive to have mediation clauses inserted in their contracts with the bigger players. These, as it is recommended here, golden tickets for future conversation, would override the power vacuum between the two parties, when it is only the artists, wishing to settle a dispute, and the record label avoiding the matter. Equally, a mediation clause could offer a way to renegotiate artists' position in urgent situations, such as the Covid-19 pandemic. But, without an agreement there can be no mediation. In order for mediation to become the new industry standard for settlement of music disputes, it is recommended that professional bodies and organisations take a lead in promoting and facilitating mediation (*e.g.*, the Incorporated Society of Musicians for the UK).[70] This could include (1) educating artists in the power of mediation; (2) recommending mediation as the industry standard; (3) using mediation in their own affairs (with the potential of combining mediation and arbitration in a tiered ADR clause (*i.e.* Med-Arb clause)); or (4) setting up funds, to cover artists' expenses in mediation.

[70] The UK's professional body for musicians and subject association for music. Other organisations to be considered: Association of Independent Music (AIM), which has members among the record labels and self-releasing artists; or professional; Music Managers Forum (MMF) as the professional association for music managers; or the International Federation of the Phonographic Industry (IFPI) (for a world-wide reach).

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