

LESSONS IN SELF DEFENSE

Distribution Contracts and Arbitration Clauses

MARK LITWAK

As an entertainment attorney who represents many independent filmmakers, I often find myself in the position of trying to get unscrupulous distributors to live up to their contracts. I am constantly amazed at how many distributors simply refuse to abide by the terms of their agreements.

I am not talking about the major studios. While they engage in creative accounting by interpreting ambiguous clauses in their favor, they usually feel obliged to comply with the clear terms of their contracts. I am talking about the many small, independent distributors who flagrantly breach contracts and take unconscionable advantage of inexperienced filmmakers. Their attitude seems to be: promise anything to get the film, then defraud, deceive, and fleece with abandon. If the victim has the audacity to complain, the distributor will usually 1) lie, 2) claim the film wasn't any good, the company lost money distributing it, and therefore its obligations are terminated, or 3) offer to settle for ten cents on the dollar.

Recently I represented a filmmaker who had signed an agreement with a small distributor. The filmmaker was entitled to an advance, payable in four installments. After the second installment was paid, the company changed hands, and the new owners simply refused to make payments. There was no question that my client was entitled to the money, and nobody claimed he had not lived up to his obligations. The only excuse the distributor offered was that it was experiencing "financial problems." We offered to accept monthly payments to work off the debt. Payments were promised but never made. After an arbitrator ruled in our favor, I went to court to confirm the arbitration award and had the sheriff seize the distributor's film library. Only after that did they cough up the dough.

Distributors of low-budget films know that the amounts at stake are often not enough for the filmmaker to hire an attorney and bring suit. Consequently, one of the most important terms for the filmmaker to include in an agreement with a distributor is an arbitration clause. Such a provision says that in the event of a dispute, the matter will be settled through binding arbitration, not litigation. The difference is that litigation is a judicial process, requiring one to go to court to resolve the matter, whereas arbitration is an infor-

mal, expedited procedure before an impartial arbitrator who is not a judge.

Here is a sample arbitration clause:

ARBITRATION: Any controversy or claim arising out of or relating to this Agreement or the validity, construction, or performance of this Agreement or the breach thereof, shall be resolved by arbitration according to the rules and procedures of the American Arbitration Association, as they may be amended. Such rules and procedures are incorporated herein and made a part of this Agreement by reference. The parties agree that they will abide by and perform any award rendered in any such arbitration and that any court having jurisdiction may issue a judgment based upon the award. Moreover, the prevailing party shall be entitled to reimbursement of reasonable attorney fees and costs.

Arbitration provides a much quicker and less expensive remedy than going to court. Instead of spending years in litigation and tens of thousands of dollars in attorney's fees, matters in arbitration are often settled after a one-day hearing scheduled within a few months. The party that wins an arbitration award can then file a simple motion and ask a court to confirm the award. Once this is confirmed, it is as good as any court judgment. The filmmaker can then use the sheriff's office to enforce the judgment by seizing the defendant's money or property.

There are other ways to improve upon the standard distribution agreement. In my dispute with a small distributor, I had negotiated the original distribution agreement. I insisted that a special clause be inserted in the contract, which provided that in the event the distributor breached its promises, my client could not only recover all the money owed him, he also was entitled to regain all rights to his film. Thus my client recovered his money and film, and promptly sold the distribution rights to another distributor from whom he received another chunk of cash.

One of my current cases involves a dispute with a home video distributor. My client entered into an agreement with the distributor that guaranteed a minimum of \$40,000 would be spent on marketing and sales expenses. Our audit found that the company had spent at most \$26,000. We uncovered numerous errors in accounting. We contend that when the company entered into the agreement, it made fraudulent representations.

We found a number of filmmakers who had made agreements on which the company had also reneged. The distributor told one filmmaker that his film hadn't made any money, when in fact it

had earned the company more than \$700,000. The filmmaker, unfortunately, didn't have an arbitration clause. Because he was in desperate financial shape, he was forced to settle for \$25,000, although he was owed several hundred-thousand dollars.

My experience with distributors has taught me that filmmakers need to be very careful when entering into distribution agreements. Make sure all promises are in writing. Don't turn over your original negative—give the distributor a lab access letter instead. Make sure there is a minimum advertising budget specified and that "advertising expenses" are carefully defined. One must also add strong penalties in the event that the distributor defaults.

There are a hundred ways that distributors can and do cheat filmmakers. They know all the tricks of the trade, while the filmmaker usually knows little about distribution and how to protect him- or herself. The savvy filmmaker will carefully check out potential distributors by calling other filmmakers who have dealt with them. It is also a good idea to retain an experienced producers' rep or entertainment attorney *before* the deal is concluded. An experienced negotiator will be able to obtain many important provisions just for the asking. Don't sign the "sucker" contract the distributor first sends out. Remember, everything is negotiable.

Mark Litwak is an entertainment attorney and law professor based in Santa Monica, California. He is the author of Reel Power: The Struggle for Influence and Success in the New Hollywood and the upcoming Dealmaking in the Film and Television Industry (Silman-James Press).

