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Director's fury over road block to litigation

Mad Max arbitration to be heard in Hollywood

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Australia continues to prove itself as a robustly pro-arbitration jurisdiction. A more glamorous recent example is *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd*,[1] in which the New South Wales Court of Appeal allowed an appeal by Hollywood studio Warner Bros, staying proceedings brought by director George Miller for a payment dispute in relation to Mad Max: Fury Road.

Starring Tom Hardy and Charlize Theron, the film was released to widespread acclaim. In 2015, it earned $US378 million ($AU500 million) at the box office.

The star-studded decision confirms the $US7 million ($AU9.3 million) dispute should be arbitrated in California and cements Australia's position as a safe seat for arbitration. The case also warns both Hollywood stars and mere mortals: always check the terms and conditions of your agreement (whether they are given to you or not).

The road to arbitration is long and winding

Almost a decade ago, Warner Bros Feature Productions Pty Ltd (**WB Productions**) engaged producer Doug Mitchell and director George Miller on Mad Max through their production companies, Kennedy Miller Mitchell Films Pty Ltd and Kennedy Mitchell Miller Services Pty Ltd (together, **Kennedy Miller Mitchell**). The agreement provided that Kennedy Miller Mitchell was entitled to a $US7 million bonus payment if the 'net cost' of the film came in below the budgeted $US157 million (**Letter Agreement**).

Best Picture ≠ Best Paid

A dispute arose as to the calculation of the net cost. The initial production cost $US154.6 million, however, Kennedy Mitchell Miller claimed that WB Productions made a series of decisions which caused substantial changes and delays, leading to additional costs and expenses which should be excluded from the net cost. Kennedy Mitchell Miller relied on clause 4(b)(ii) of the Letter Agreement, which stated:

> *'(b) The following (the 'Excluded Costs') shall be excluded from the overbudget calculation.*
>
> …
>
> *(ii) Costs incurred or delays caused as a result of new or changed scenes added, or changes in the approved schedule made, at the written request of an officer of WB having the rank of Vice-President or higher, and costs designated in writing as approved overages by an officer of WB having the rank of Vice-President or higher.'*

WB Productions maintained that the total cost blew out to $US185.1 million, and therefore the producer and director were not entitled to bonuses.

A further dispute concerned WB Productions entering into a co-financing agreement with RatPac Entertainment,

1 [2018] NSWCA 81.

allegedly breaching the agreement to first offer Mr Miller and Mr Mitchell the chance to provide finance.

Kennedy Miller Mitchell brought proceedings against WB Productions and WB Entertainment (together, **Warner Bros**) in the Supreme Court of New South Wales. Warner Bros sought a stay of litigation and referral to arbitration on the ground that the Letter Agreement included a term requiring the dispute to be submitted to arbitration in California. The term was allegedly incorporated into the agreement by clause 21, which provided:

> *'BALANCE OF TERMS:*
>
> *The balance of terms will be WB and WB standard for "A" list directors and producers, subject to good faith negotiations within WB's and WB's customary parameters.'*

The parties proceeded on the basis that the repetition of 'WB' and 'WB's' in this clause was inadvertent, and that the relevant parts of the clause should be read as simply referring to 'WB standard' rather than 'WB and WB standard', and 'WB's customary parameters' rather than 'WB's and WB's customary parameters'.

However, there was a dispute as to whether Warner Bros had provided a set of contractual terms fitting the description WB standard terms for "A" list directors and producers, which include an arbitration clause in its standard terms. Warner Bros provided evidence that while most agreements with talent end up in a 'long form' format, some, like the Letter Agreement, do not, and may be documented in a shorter deal letter. Further, deals which are not "papered" in the long form format will often incorporate WB Pictures' standard terms used in the long form agreements by reference to those standard terms.

Warner Bros argued that clause 21 therefore incorporated an arbitration clause which made New South Wales a 'clearly inappropriate forum' for arbitration. The relevant clause, contained in 'form agreements' regularly used for "A" list directors and producers (emphasis added) directed:[2]

> *'Any and all controversies, claims or disputes arising out of or related to this Agreement or the interpretation,*

2 Ibid at [28].

performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate ('Dispute'), except as otherwise set forth below, [REDACTED], shall be resolved according to the following procedures which shall constitute the sole dispute resolution mechanism hereunder. In the event that the parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration. The arbitration shall be initiated and conducted according to either the JAMS Streamlined (for claims under $250,000) or the JAMS Comprehensive (for claims over $250,000) Arbitration Rules and Procedures, except as modified herein, including the Optional Appeal Procedure, at the Los Angeles office of JAMS, or its successor ('JAMS') in effect at the time the request for arbitration is made (the 'Arbitration Rules'). [REDACTED]. The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with the Arbitration Rules. The arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute. The parties waive the right to seek punitive damages and the arbitrator shall have no authority to award such damages.

The arbitrator will provide a detailed written statement of decision, which will be part of the arbitration award and admissible in any judicial proceeding to confirm, correct or vacate the award. Unless the parties agree otherwise, the neutral arbitrator and the members of any appeal panel shall be former or retired judges or justices of any California state or federal court with experience in matters involving the entertainment industry. If either party refuses to perform any or all of its obligations under the final arbitration award (following appeal, if applicable) within thirty (30) days of such award being rendered, then the other party may enforce the final award in any court of competent jurisdiction in Los Angeles County. The party seeking enforcement of any arbitration award shall be entitled to an award of all costs, fees and expenses, including [REDACTED] attorneys' fees, incurred in enforcing the award, to be paid by the party against whom enforcement is ordered.'

Warner Bros evidence was that the clause had been used in WB Pictures' "A" List producer and director form agreements since the early 2000s. Fifty-six agreements dated between 2005 to 2009, which contained arbitration clauses based on, and in most cases identical to the above were presented as evidence.

Justice Hammerschlag dismissed the application for stay, finding that clause 21 operated to incorporate terms into the Letter Agreement, however, the contracting Warner Bros entity did not have any terms which were 'standard' which could be incorporated (as opposed to other Warner Bros entities). Further, His Honour found that, even if it was relevant that other Warner Bros group members had form agreements which required disputes to be arbitrated in California, the studio had not proved these terms were 'standard'.

Warner Bros' fury over decision

Warner Bros appealed Hammerschlag J's decision to the New South Wales Court of Appeal. The main issues on appeal were:

1 whether the Letter Agreement incorporated terms which were 'WB standard for "A" list directors and producers' prior to good faith negotiations occurring; and

2 whether the arbitration clause was incorporated into the Letter Agreement because it was a term which was 'WB standard for "A" list directors and producers'.

Court of Appeal takes the high road

The Court of Appeal (Bathurst CJ, Beazley P and Emmett AJA) unanimously allowed the appeal and set aside the orders made by the primary judge. Chief Justice Bathurst summarised his position in direct terms:[3]

> *'It was not seriously in contest that leave should be granted. The appeal is undoubtedly arguable and, if the applicants' contentions are correct, WB Productions should not be required to litigate in a forum other than the one chosen by the parties through the Letter Agreement. In these circumstances, it is appropriate to grant leave.'*

3 Ibid at [44].

On the first ground, the Court of Appeal found that the Letter Agreement did incorporate terms which were 'WB standard for "A" list directors and producers' prior to good faith negotiations occurring. This was the interpretation suggested by the text of clause 21, and supported by the fact that other terms were not capable of operating unless these terms were immediately incorporated into the agreement. The Court of Appeal noted that it was irrelevant that the standard terms were not supplied to Kennedy Miller Mitchell:[4]

> *'As was pointed out in* Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd *(2004) 219 CLR 165; [2004] HCA 52 at [47], legal instruments are "often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature". Further, there is no reason to assume that those advising [Kennedy Miller Mitchell], who were experienced in the film industry, did not appreciate the meaning of terms which were "WB standard for 'A' list directors and producers".'*

On the second contention, it was held that the Letter Agreement incorporated the arbitration clause which was contained in form agreements held by a division of a subsidiary of WB Entertainment. Clause 21 incorporated terms which were 'habitually proffered' by members of the Warner Bros group for agreements with "A" list directors and producers. The evidence showed that an arbitration clause had been used by Warner Bros group members for almost two decades and was included in the form agreements which were current at the time the agreement was made. Clause 21 therefore operated to incorporate the arbitration clause into the Letter Agreement.

Accordingly, the Court of Appeal granted the application for a stay of proceedings and referred the dispute to the JAMS arbitration body in Los Angeles. Chief Justice Bathurst concluded:[5]

> *'…[the arbitration clause] requires that an arbitrator "shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute". Therefore, the "procedure in relation to arbitration" in the Letter Agreement is "governed by the law of a Convention country" for the purpose of s 7(1)(a) of the International Arbitration Act 1974 (Cth), namely, Californian law as the law of the United States. The present dispute involves a matter that "is capable of settlement by arbitration" under the arbitration clause incorporated into the Letter Agreement. It follows that the proceedings… must be stayed under s 7(2) of the International Arbitration Act 1974 (Cth).'*

The Court of Appeal also ruled that Kennedy Miller Mitchell should pay Warner Bros' costs; not only for the appeal, but also for the original motion for stay.

The award for enforcing arbitration agreements goes to…

Australia! This decision supports a long line of cases which evidence the pro-arbitration stance of Australian courts and reinforce Australia's reputation as a safe seat for arbitration. Parties who contract into an arbitration agreement can rest assured that their preference for arbitration will be respected and enforced by Australian courts.

It also highlights that arbitration clauses can be incorporated by reference in short form contracts – even if a party is not provided the longer terms and conditions of the agreement. If you are signing a short form contract that, by reference, imports more substantial terms and conditions, be sure to read them. Otherwise, you could end up in the same position as George Miller and Doug Mitchell. Even those of us who are ordinary humans, not Hollywood stars, enter into contracts on a regular basis.

4 Ibid at [59].
5 Ibid at [88].