

Legal Documentation Guide On Film Financing and Production

Executive Summary

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Sponsored by:

FILM DEVELOPMENT FUND, HONG KONG

About this Guide

Hong Kong filmmakers generally rely on distributor and equity financing for film production. Film companies rarely seek bank financing and when they do, they face difficulties because of the inherent risk of film projects and inadequate supporting infrastructure. In order to advance the long-term development of the film industry, it is necessary for Hong Kong filmmakers to have an understanding of the legal documentation and major legal issues frequently encountered in film financing and production.

This guide **aims** to assist the local filmmakers in understanding the major legal documentation and legal issues related to the film business. It contains comprehensive specimen contracts and documentation which are grouped into five sections: (i) Production & Services; (ii) Financing; (iii) Distribution; (iv) Soundtracks; and (v) Merchandising. The contracts and documentation were based on a model commonly used in Hollywood and Canada and have been suitably adapted for use by the Hong Kong film industry. Special emphasis is placed on the financing section to equip the filmmakers and financiers with the relevant information to synchronise with the launching of the Film Guarantee Fund by the Government of Hong Kong Special Administrative Region in April 2003.

Production and Services

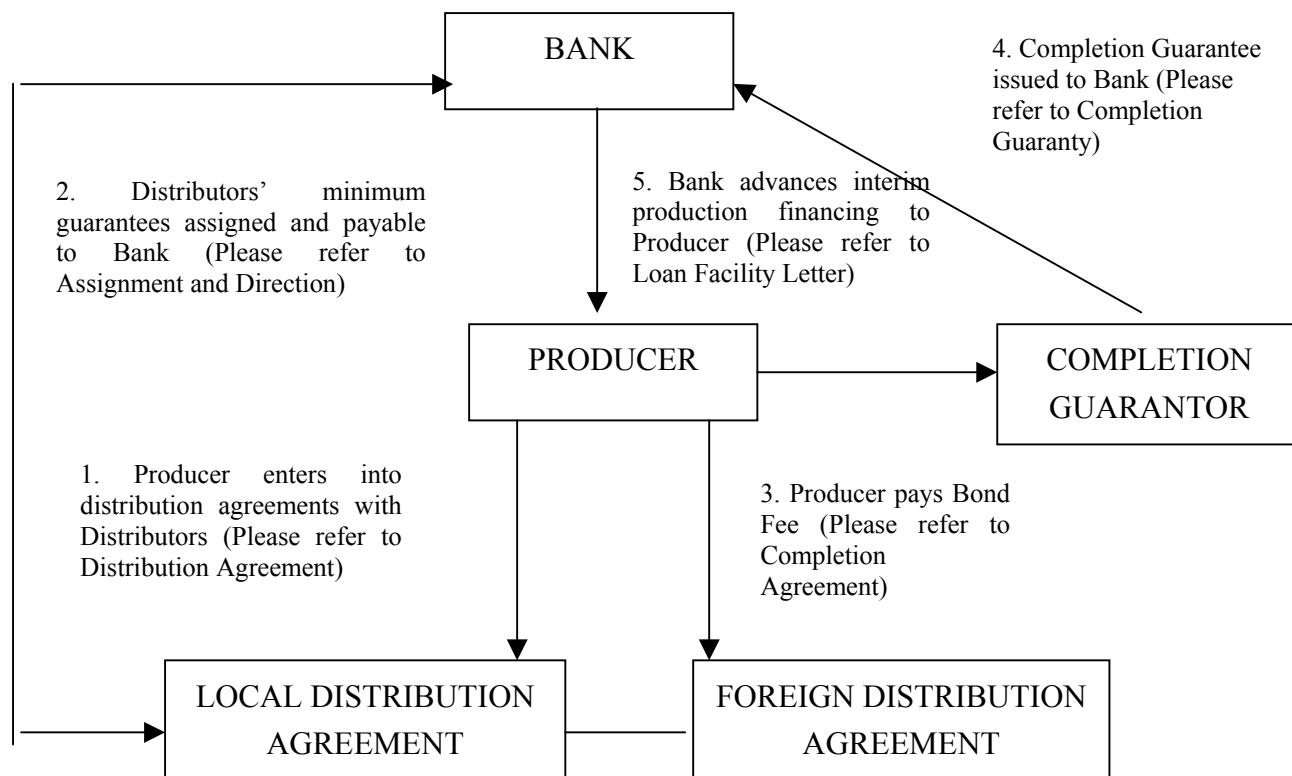
To ensure the production will proceed smoothly within budget and time limit, comprehensive production agreements covering all aspects of film-making are necessary to minimize the risk therein.

A producer must reconcile the different and sometimes conflicting rights (including copyrights, moral rights, trade-marks, and other personal rights) of the actors, actresses, directors, scriptwriters, and others who are involved in the production to ensure an unimpeded screening and distribution of the film. Before and during the production of a film, the producer and/or the owner of the production must seek to ensure all of the rights pertaining to such array of creative materials have been secured from all the relevant copyright owners for future licensing and distribution purpose and that none of the materials will violate any third party's contractual, personal privacy and/or intellectual property rights.

The collection of sample contracts contained in **the guide** represents the key agreements that will be signed by a film company with its producer and correspondingly by a producer with intending actors, scriptwriters, music composers, directors, executive producers and other key creative personnel in the filming process, together with the ancillary licenses or release letters relevant for such purpose. **The sample contracts are for general reference. They may have to be suitably amended to cater for the specific situations inherent in the film projects.**

Financing

The following diagram sets out the scheme of a typical financing arrangement for the US film-making industry:



Prior to approaching the bank for production financing, the producer will have negotiated and entered into distribution agreements with distributors. Pursuant to the distribution agreements, distributors acquire the right to distribute the production for a specified period of time in specified media and territories prior to completion of the production. In return, the producer will receive a distribution advance (also known as a minimum guarantee) from the distributor upon completion and delivery of the film to the distributor. The producer may then use the distribution agreement as a collateral to secure interim production financing from a bank. As a condition of the loan, the bank will usually require the producer to assign to it all amounts payable to the producer by the distributor under the distribution agreement. Since the distributor's obligation to pay the bank only arises when the film is completed and delivered to the distributor, the bank will require the producer to obtain a completion guarantee (also known as completion bond) in its favour. The completion bond guarantees that the film will be finished and delivered on schedule and within budget.

As a condition of advancing production funding to the producer, the producer will grant to the bank a security interest in all of the producer's right, title and interest in and to the film. The bank will require a film laboratory to hold and protect the film materials for its benefit.

Distribution

Production companies usually contract out the distribution rights and obligations of the film. In a distribution arrangement between a production company and a distributor, the production company's objectives are: (i) to obtain the fullest release; (ii) to have editorial autonomy; and (iii) to ensure the proper remittance of overages¹. On the other hand, the distributor's objectives are: (i) to recoup any advance, minimum guarantee and prints and advertising expenditure; (ii) to have all physical materials necessary to exploit film; and (iii) to have widest acquisition of rights.

Production companies enter into distribution agreements both before and after the film is finished. For distribution agreements entered into before completion of the film, they serve an additional purpose of providing additional financing to the production company for the production, either by way of advance made under the distribution agreement, or as security to loans provided by a lending syndicate to the production company. Thus, the rights of a production company to distribution revenues under such agreement are usually assignable, and may be assigned to a lending syndicate in exchange for loans provided to the production company at the earlier stages of production.

Soundtracks

Producers who decide to use existing music must be careful to determine who owns the music in order to secure the right to use the music from the owner. When a producer chooses to use an existing musical composition in its production, it must license synchronization and related rights from the music publisher or copyright owner. When a producer also chooses to use an existing recording of a musical work in its production, it must, in addition to synchronization rights to the music, license master use and related rights from the music recording's copyright owner.

Alternatively, the producer may decide to commission a composer to compose an original musical score for the film's soundtrack. The producer needs complete freedom to exploit the film's score and masters and, as such, must commission on such basis so that the right to use the music rests with the producer.

¹ Overage can either mean the current amount of overspend on a film, or the sums paid to a receipt of a film's revenues over and above any minimum guarantees or expense which are recouped. In this current context, the word "overage" refers to the latter meaning.

Merchandizing

Film merchandising can generate substantial revenues for production companies. Typically, production companies enter into two basic types of agreements: (1) product placement agreements where a manufacturer supply samples of their products, and sometimes money and promotion to a producer in return for having its product shown in a film; and (2) merchandising agreement where the producer licenses to a manufacturer the right to manufacture and sell spin-off products such as toys, clothing, posters and soundtrack albums using names, characters and artwork in a film.

To provide the reader a quick and easy reference, the following is a brief introduction of the various key or more complicated contracts provided in this Guide:

Production Services Agreement

This agreement contemplates a film company engaging the services of another company (i.e. a service provider) to produce a film and deliver it back to the film company. This is quite a common arrangement and the form reflects some of the typical attributes of this legal relationship.

Co-production Agreement

This agreement provides specifically for the treatment of joint ownership rights and approval rights in the final production, recoupment of royalties and profits generated from sales and distribution in different countries, as well as the share of contribution, commitments and responsibilities required of the foreign and local producers.

Location Agreement

A Producer who wishes to feature buildings, structures or sculptures in the film (otherwise than situated in a public place) must first secure permission from the owners and creators of such architectural works by way of a Location Agreement. Under such agreements, the property owners agree to grant the Producer license to use images of their properties in the film, usage which otherwise would constitute infringements of their intellectual property rights. Without a signed Location Agreement between the production company and the relevant owner of a building, mere entry by a filming crew thereof will amount to illegal trespass on private property.

Artwork License

The use of pictures or photographs (otherwise than in the public domain) depicted in the film requires the consent from their appropriate owners to be obtained in advance of production. Once the Producer has determined the identity of the owner(s) for a target Artwork, an Artwork License can be negotiated to confer a limited right for its use in the film. Such licenses are usually made on a non-exclusive basis in the sense that it pertains solely to the specific production in question.

Product /Name/Logo/Trademark License

This is a general licensing agreement between the Producer and the owner of a product/logo/trademark/item which the Producer may make use of in its production. For example, such licence is necessary in production where the logo of a famous brand will be photographed in the production. Remedies for breach of the license are limited to damages so that the Licensor may not seek an injunctive relief, such as a court order preventing the use of the footage/material that will interfere with the continual circulation/broadcast of the film.

Film/Video License

This Agreement is a license for the use of certain footage/materials by the Producer in its production. For example, if war is the subject matter of a production, the Producer might want to include certain footage of a war documentary in the film. The owner of the footage/materials (in this Agreement, the Licensor), grants the Producer the right to use the footage/materials. The Producer will make certain payments to the Licensor for the actual use of the footage/materials in the final production. It should be noted that no ownership right in the footage/materials is transferred in such a license. Remedies for breach of the license are limited to damages so that the Licensor may not seek an injunctive relief, such as a court order preventing the use of the footage/material that will interfere with the continual circulation/broadcast of the film.

Name and Likeness Release

In a production where its characters are based on or reflect real living people, a Release will need to be obtained from such real living people for the use of their names and likeness in the production. This is often necessary for a production that is an adaptation of the biography of a celebrity. Remedies for breach of the licence are limited to damages so that the Licensor may not seek an injunctive relief, such as a court order preventing the use of the footage/material that will interfere with the continual circulation/broadcast of the film.

Executive Producer Agreement

In this agreement, the individual executive producer contracts with the production company through his loan-out company (a loan-out company is often used by artists in order to take advantage of certain tax benefits as well as the protection afforded by the limitation of personal liability).

Director Agreement

This agreement can be modified for direct employment if the director does not use loan-out company.

Writer Agreement

This agreement delineates the legal relations of a Producer who has engaged the services of a professional Writer in the employ of a scriptwriters loan-out company (the “Lender”), which is geared towards Producers in the development of original cinematic productions. An agreement between Producer and self-employed Writer will be termed a Writers Employment Agreement. This agreement may be tailored to fit the needs of production companies engaged in adaptive or derivative screenplay, either from existing script works, teleplays, novels, literary works or combinations thereof.

Artist Services Agreement

This form of Artist Services Agreement is adopted from and contains standard provisions recommended by guides and unions of actors (specifically the Screen Actors Guild) in Northern America, with minimum stipulations pertinent to same. Given such background, readers should consider whether their interests coincide with the rights of actors advocated herein and relocate the balance of rights and duties accordingly.

Director of Photographer Agreement

This agreement depicts the legal relations between a production company and one of the key creative personnel in the film production project – the Director of Photography, who specialises in visualizing and maintaining the overall photographic and artistic consistency of the elements involved with and pertinent to the film.

Costume Designer Agreement

Costume Designer is directly responsible for designing wardrobes and costumes in the Production. A Costume Designer ensures that the fashion for each actor or actress in the

film maintains the intended look and feel consistent with the theme of the movie, and co-ordinate with the Production Designer to maintain the basic "look" of the film.

Production Financing and Distribution Agreement

When a production company has gathered the necessary artistic elements for the film, it may try to finance the film through advance sales of distribution rights in various media and territories. The production company may also go to various distributors for pre-production commitments to distribute the film after it is made. The provisions of this agreement permit a film company or major independent production and/or distribution company to acquire distribution rights in the film as well as a substantial equity in exchange for a commitment to finance production of the film.

Loan Facility Letter

A loan facility letter details the terms and conditions upon which a bank will advance funds to a production company to finance production of a film. The form of loan agreement is typically prepared by the bank's lawyer and addresses issues such as the amount of the loan, the interest rate, the purpose of the loan, the fees payable by the borrower, the security for the loan, the representations, warranties and covenants of the borrower and the events of default.

Completion Guarantee

A completion guarantee is generally issued by the completion guarantor to those parties that have advanced monies to the production prior to the completion of the production (e.g. banks, investors, certain distributors and broadcasters, funding agencies). The completion guarantee is the provision of a guarantee of completion and delivery of a production on certain terms and conditions (e.g. delivery of film on time and within a certain budget).

Completion Agreement

As a condition of lending money to a producer for production of a film, a bank will require that the producer obtain completion guarantee from a completion guarantor. In order to procure a completion guarantee, the producer will enter into a completion agreement with the completion guarantor. This agreement details the respective rights and obligations of the producer and the guarantor with respect to the issuance of the completion guarantee.

Assignment and Direction

As a condition of a loan granted by a lender to assist in the production of a film, the lender will require an assignment to the lender of certain amounts payable to producer/borrower pursuant to other agreements. This assignment provides that the distributor will pay its distribution advance to the bank upon the occurrence of a specific "trigger" event (e.g. delivery of certain materials).

Laboratory Pledgeholder Agreement

This form of agreement is made between the producer, the financier and the laboratory in which the actual film is developed and stored. Under this agreement, the laboratory is obligated to protect the film materials in its possession for the benefit of the financier. An important feature of this agreement is the granting of access to the producer to the negatives and other pre-print materials of the film for the purposes of inspecting, editing and scoring the film.

Distribution Agreement (Pre-Completion)

The provisions of this agreement permit a Distributor to acquire the distribution rights of the film. Under this agreement, the Distributor acts as a contractor of the Producer for the distribution of the film upon completion, and is given much discretion in the manner, medium, style and scale of distribution, including the promotional and advertising campaigns necessary for and associated with such distribution. The Distributor pays the Producer a basic consideration for the assignment of such distribution rights and then is compensated by commissions based on the revenues generated from such distribution. The Producer may use this agreement as a collateral in securing other sources of financing. Without them and absent any other security, it is unlikely that a lending syndicate will advance money to the Producer for the production of the film.

Negative Pickup Agreement

Similar to the production financing and distribution agreement, the "negative pickup" is a sale or license of distribution rights in a film by a production company to a distributor typically made prior to completion of the film as a means of obtaining financing for the film. The sale usually includes the continuing financial participation by the production company in the revenues of the film.

Sales Agency Agreement

This agreement is specifically intended to be used to engage the services of an individual or company that seeks distribution or license agreements with foreign distribution companies in

certain countries or territories. These "foreign sales agents" are usually compensated on a percentage of sales basis.

Distribution Agreement (Post-Completion)

This Agreement, in the form of a letter, sets out the agreement between a production company and an independent distributor regarding the distribution rights of a film after it is completed. Under this Agreement, the Distributor acts as the general agent of the Production Company, responsible for the entire distribution undertaking, including work incidental to distribution, such as rating of the film. In this instance, the Distributor will enter into agreement with sub-distributors for distribution of the film in different geographical areas and media. The Distributor is compensated by sharing in the revenues generated.

Music Synchronization License Agreement

Although similar to the master use license agreement, this agreement limits the licensee's rights to synchronization rights only. In other words, the licensee in this case has no right to the original master recording of the music, but only the specific copyrighted musical composition described in the agreement.

Master Use License Agreement

This agreement allows the licensee to use the master recording of a musical work and reproduce the master recording for use in the production. This agreement also grants the licensee synchronization rights, that is, the licensee is also permitted to use the master recording "in time relation" to the production.

Composer Agreement

The musical tracks which underscore a movie may be acquired by the Producer from pre-existing works or created by hired professional composers. Original musical scores in a film production is usually arranged through the engagement of a Composer who will be responsible for writing and orchestrating the underlying theme music of the film.

Merchandising Agreement

This agreement is made between the owner of the merchandising rights (the "Licensor") and the manufacturer/distributor (the "Licensee") who is to produce and distribute certain

licensed products based on characters or objects portrayed in the production. The Licensee is granted certain rights to exploit licensed products in return for a percentage of the gross retail sales of the licensed products. In negotiating a merchandising agreement, care should be taken to carefully define the scope of the license. The agreement should specify the terms, territories and the particular articles which the Licensee can manufacture. Since many different licenses may be granted by the production company, and each is usually on an exclusive basis, the parties will want to make sure that a license does not conflict with any other licenses.

Product Placement Agreement

As a marketing strategy, manufacturers of products often want to show their products in films in order to increase awareness and boost sales. This form of agreement may be used when commercial products are featured in theatrical motion pictures. Where a product is featured prominently or provides an important element in the story, then the manufacturer may pay a substantial fee for the product placement. The Supplier may be granted rights of approval over the scenes in the Production in which the Product appears. The level of approval granted to the Supplier will vary depending upon the amount of the fee paid by the Supplier to the Production Company for the product placement.