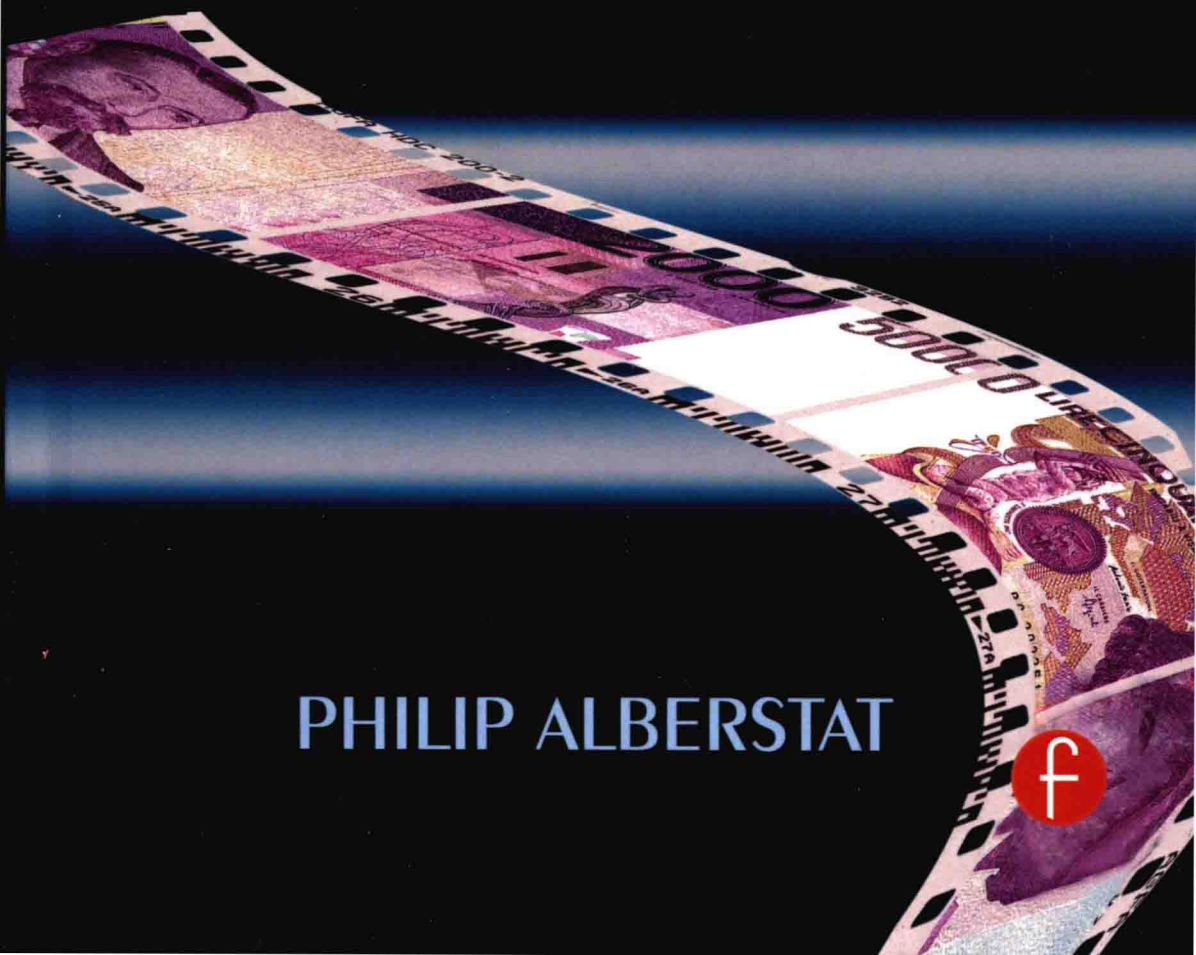


THE INSIDER'S GUIDE TO FILM FINANCE



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The Insider's Guide to Film Finance

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The Insider's Guide to Film Finance

To Theodora and Alexandra

Foreword

Barely a day goes by without some film-related story making the pages of the average newspaper. We are not just talking about the reviews ghetto, but the lifestyle, travel and business sections. With some films and film companies having become brands in their own right, the corporate divorce between Disney and Pixar was treated to front page treatment.

What does this tell us? Film has become big news, big business and dominated by the studio big-boys. Maybe.

But at the same time part of its fascination is that film making is also a cottage industry and a craft industry. There are layers of detail to which the simplistic approach fed to newspaper readers cannot do justice.

The independent film community is made up of highly motivated individuals, struggling to put together financing, logistical and legal puzzles that would defeat many a 3D chess player. Frankly it is a miracle that any independent film ever gets made. Even more of a miracle that any of them are any good at all.

Clearly, it is beyond the scope of this book to tell anyone how to make a good film or a commercially successful one. It would be both patronizing and foolhardy to try. After all, some of the best brains in the business have come horribly unstuck attempting to do that.

But neither is it quite true that 'nobody knows nothing', as ace screenwriter William Goldman once suggested. Studios maximize their chances through a combination of 'portfolio theory' and marketing muscle. Independents can maximize their chances, if not of success, then at least of surviving the production experience by using some of the right techniques. A little knowledge can go a long way.

That means getting a film's budget in line with its recoupment potential; it means knowing what to ask your lawyer and when; and it means understanding the choices you make when opting for equity over debt, pre-sales over independent finance; or shooting on location in Ireland over studios in Luxembourg.

The Insider's Guide to Film Finance is intended to answer many of these questions. Written by a film lawyer whose role it has often been to raise and structure film finance, the book addresses problems with simplicity and clarity; with theory matched by practicalities; with checklists, case studies and sample documents.

It will not prevent anyone from making mistakes but, used wisely, it should enable the averagely intelligent newcomer to avoid making all the basic errors. And for the more experienced player it provides a yardstick against which they can measure their financial, legal and chess-playing creativity.

Take some of Phil Alberstat's advice and, who knows, you could end up making the newspapers sooner than you thought!

Patrick Frater
International Editor, *Screen International*

About the Author

Philip Alberstat is a media finance and production lawyer specializing in film, television and broadcasting. He has worked on films such as *The 51st State*, *Goodbye Mr Steadman*, *Beyond The Sea* and numerous television programmes and series. He is on the editorial board of *Entertainment Law Review* and is the author of the *Independent Producers' Guide to Film and TV Contracts* (2000), and *Law and the Media* (2002).

Philip is involved in raising finance for film and television productions and negotiating and structuring film and television deals. He undertakes corporate and commercial work and handles the intellectual property aspects of broadcasting and finance transactions. He has also executive produced numerous film and television productions. In 2004 he won an Emmy Award as a Producer of the film, *The Incredible Mrs. Ritchie*.

Philip joined Osborne Clarke as a partner in February 2002. Prior to that he was Head of Legal and Business Affairs with one of the largest independent TV production companies in the UK. He was previously Head of Media at Baker & McKenzie and began his career at Olswang. He was winner of the Lawyer/Hifal Award for Solicitor of the year in 1997 and is listed in Legal Experts in the area of Film Finance/Media.

List of Contributors

Alan Harris (BCom, BSc, MBA, ACCA), Managing Director, Atlantic Film Group

Alan is Managing Director of Atlantic Film Productions Limited, a specialist company that is involved in development and production of feature films.

Some of the features with which Atlantic has been involved include *Imagining Argentina* (with Myriad Pictures starring Antonio Bandaras and Emma Thompson), *Citizen Verdict* (starring Jerry Springer) and *Nicholas Nickleby* (with MGM Studios).

Alan was formerly Financial Director at Grosvenor Park Media where he completed several hundred million pounds worth of feature film transactions and advised on the setting-up of many international co-productions.

Alan is an expert on international film structuring and financing and has lectured at such prestigious venues as UCLA, Screen Producers Guild of Australia, The Luxembourg Film Finance Forum, The UK Producers Association for Cinema and Television and the New Zealand Screen Producers and Directors Association.

Rob Sherr

Rob is the Commercial Banking Manager and an Assistant General Manager at Bank Leumi (UK) plc. He has been in banking for 27 years during which time he has largely been involved with commercial lending. He joined Bank Leumi in 1999 as Head of Media, having spent the previous nine years working at Coutts & Co. In 1993 he became one of the founding managers of Coutts' Media Banking Office.

Under Rob's guidance, Bank Leumi participated in the development of completion bonded finance to video games

developers and to structuring the advance finance of net producer benefit under sale and leaseback.

Lucy Walker

Lucy Walker joined Osborne Clarke in 1998 and is currently an associate in the banking and finance group. Lucy specializes in film finance together with general finance, leasing and regulatory work (including issues relating to cards and payment systems, and the regulatory issues affecting consumer credit and banking and financial services).

She has acted for Barclays Bank plc on a series of structured film finance transactions and has also advised both funds and producers on a wide spectrum of production and distribution finance arrangements, fundings and sale and leaseback transactions.

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A Note From the Author

This book is designed to help non-lawyers understand legal issues frequently encountered in the film industry.

The book provides readers with an understanding of both basic and complex legal principles, enabling them to better communicate with their lawyer.

Nothing in this book should be construed as legal advice. The information provided is not a substitute for consulting with an experienced lawyer and receiving advice based on the facts and circumstances of a particular transaction.

The sample agreements contained in each chapter need to be tailored and modified to fit the specific circumstances of each transaction. These agreements are based on legal principles that often change and vary by case law, statutes and laws of different jurisdictions.

Introduction

Money frees you from doing things you dislike. Since I dislike doing nearly everything, money is handy.

Groucho Marx

1890–1977

The unpredictable nature of making movies means that negotiating a film finance deal can be a minefield. For producers, the strategies and structures of financing arrangements are as numerous as the films that are made. The aim of this book is to attempt to demystify some of the complexities of the film industry and specifically a film financing transaction. One of the most common complaints from the banking industry sector is the apparent misapprehension of film makers as to the role banks play in the financing of films.

This book will focus on the world of independent film making where producers working outside the Hollywood studio system put together films by an assortment of international, bilateral and multilateral co-production treaties, pre-sales, equity investment, tax funding, gap financing and whatever other means it takes to get their films made. A great deal of creativity is required in putting together the necessary elements to attract finance to any particular production.

Rather than a guide of where to get the money, this book will look at the technical and legal issues involved once a producer has the money to produce his or her film. For many producers, finding money for their films can take years. Sourcing funds for production can be a long, arduous battle. Countless meetings, attendance at film festivals, promises, broken promises, changes in tax legislation, actors dropping in, dropping out and countless other variables. The process can take months, years, even a lifetime. Financing is one of the most crucial areas of the film industry, but one that has often not been given the importance it deserves.

Once a producer has cobbled together all of the finance for a production, the battle has just begun. Imagine the scenario – after five years of hard work and travelling the globe, a British producer

has several pre-sales with foreign distributors in place, a co-production deal with a Canadian co-producer who will bring 40 per cent of the budget from an assortment of tax credits, a television sale, various subsidies, a distribution deal, Telefilm Canada subsidy, a sale and leaseback deal in the UK, equity from private investors, UK Film Council money, a UK broadcasting deal and a UK theatrical deal. At last, a fully financed film! The question is, how does the producer then turn all of these contracts from paper into cash?

With all of these deals in place, the fun part of film making begins. Lawyers, bankers, civil servants, more lawyers, more bankers and perhaps even more civil servants for the producer to deal with. Gone are the days when two or three sources of finance will green-light production of a film. Fortunately or perhaps unfortunately, multiparty financing of independent films is the norm. For a creative producer taking the step from development to assembling the finance is a difficult and time-consuming process. What many creative producers are not prepared for is the next step, into the mysterious world of financiers, bankers and lawyers. On the face of it, banking and finance for the film industry appears to be a highly specialized world. However, most banks in the film business are basic commercial banks. They simply lend cash for a certain period of time, would like a fee and some interest and, of course, they would like their money back. The fundamental purpose of a bank is to make money. Many banks see film financing as a basic banking product. Although they can play a vital role in the financing of a given production, banks do not invest in films.

From a lawyer's perspective, film financing involves many different aspects of law. Issues such as intellectual property, contracts, insurance, employment and other areas can sometimes make closing a film financing transaction very difficult.

Each chapter of this book will look at an integral part of a film financing transaction. Chapter one looks at underlying rights, such as a book, a script or other works of intellectual property, which will form the basis of a bank's or financiers' security. When a bank makes a loan to a film producer, all they really have is an interest in a book or script and some film that is 35 mm wide and 1 mm thick. This chapter analyses the importance of rights ownership and specifically looks at the chain of title in a film and a title opinion.

Chapter two, Co-productions, is written by Alan Harris, an experienced financier and producer, and looks at how bilateral