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Explanatory Report to the European Convention on Cinematographic Co-Production [*]

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European cultural co-operation in the cinema field takes place primarily through co-productions. In these joint efforts to support creation (for a long time exclusively bilateral, although now increasingly multilateral), the rules governing state support for film production are not always the same. The main objectives of this convention are to, minimise these differences and to harmonise multilateral relations between states when they decide to co-produce a film.

Designed to encourage the development of film co-productions in Europe, the convention tries to simplify procedures and production on the basis of criteria established by the Eurimages fund (a European fund set up within the framework of the Council of Europe in 1988 in order to support co-productions and the distribution of film and audiovisual productions). It also constitutes a step forward in lowering the threshold of financial participation in co-productions and also, in permitting financial co-productions, provided these promote European identity. This requirement concerning identity is in some respects the guiding principle of the convention, which is inspired by a versatile but unified vision of European film production.

Introduction

Cinematographic production in Europe is essentially an activity carried out on a national basis. Linguistic and cultural differences have resulted in each nation creating its own cinema, each with its own clearly defined characteristics. The differing traditions typifying Italian, British or French cinema, for example, are readily identifiable.

This situation has led to the conception of films targeted first and foremost at national markets. Of course, the quality and value of some productions has resulted in their being more widely distributed. Neo-realism, the great Italian comedies, Nouvelle Vague and the British Free Cinema, to cite but a few examples, have been hailed far beyond the frontiers of their countries of origin. They were, however, produced with financing that took account principally of national markets.

(*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

The development of television caused a marked drop in cinema attendance during the 1960s and 1970s. The natural source of film financing, from box-office takings, became less and less reliable. A considerable increase in production costs further increased the difficulties. With national markets often no longer sufficient to finance productions – unlike the United States domestic market, which has a population of 250 million, the great majority of whom speak the same language – European film producers turned to co-productions. These require a prior agreement between states, each of which accords its nationality to films produced by both countries. In this way, a production can take advantage of the benefits granted to national works and attract private or public financing in both countries. The first agreement of this type, which set the pattern, was signed between Italy and France. Since then a large number of agreements have been drawn up between European film-producing countries.

In its classic form, co-production has undoubtedly helped European cinema to survive. It does, however, have its limitations, and may lead to undesirable side-effects. Since it calls for technical and artistic participation commensurate with financing, it has led to the creation of artificially conceived works in which actors and technicians are some- times chosen more for their nationality than for reasons connected with the coherence of the film.

While appropriate for bilateral relations, co-production agreements have also been used to set up co-productions involving more than two countries. In fact, most such agreements expressly provide for that possibility. However, bilateral agreements are not standardised, and leave room for disparities, with the danger that one of the co-producers may be offered less favourable terms than the others.

With the setting up of the Council of Europe Eurimages support fund, the need for harmonisation has become urgent. Intended to support cinematographic works co-produced by partners established in at least three countries, the Eurimages fund has led to a substantial increase in multilateral co-production, while establishing conditions different from those contained in co-production agreements. For example, Eurimages requires only 10% funding by one of the partners, whereas most co-production agreements require 20% or even 30% participation.

It has thus become necessary to adopt rules adapted to the whole range of European multilateral co-productions, while not of course calling into question the existing bilateral relations. A convention seems to be the most appropriate form of legal instrument for this purpose.

In fact, a European convention has the advantage of providing a common legal basis, governing the multilateral cinematographic relations of all the States Parties to the convention. In setting out conditions for obtaining co-production status applicable to all State Parties, such a European convention enables the drawbacks which would result from many different multilateral intergovernmental agreements to be dealt with, drawbacks deriving as much from the disparity of the stipulations laid down by these agreements, as from the complexity of the legal relations which would ensue, in particular, with regard to States Parties to several bilateral agreements setting out different co-production conditions. A single contractual instrument constitutes; an important means

of development and promotion of co-productions in Europe and simplifies cinematographic relations between the producing States. In this respect, it should be noted that the European Convention on Cinematographic Co-production has an extensive geographic field of application, being open to signature by the member states of the Council of Europe and the other States which are Parties to the European Cultural Conention, as well as to the accession of European non-member States.

Furthermore, the possibility of association with countries such as Canada, which have observer status to the Parliamentary Assembly of the Council of Europe, and which have established numerous cinematographic agreements with European countries, with whom they have close cultural links, is under consideration.

A number of European States have not as yet concluded mutual co-production agreements. It was considered a good idea to allow for bilateral application of the terms of the convention by those States wishing to do so. In acceding to the Convention, those States thus enable their producers to engage in co-productions with partners from any other State that has ratified the Convention.

Finally, by authorising purely financial co-productions, that is, co-productions without artistic and technical participation by the minority co-producers, the Convention provides a response to traditional co-productions, in which the proportions of contributions by different partners sometimes lead to what have been called "Europuddings". By leaving the majority partner free to retain full technical and artistic control over the work, this type of co-production fosters the defence of the various European countries' individual cultural identities, thereby fulfilling one of the aims set forth in the Council of Europe Cultural Convention.

Commentaries

Article 1 – Aim of the Convention

The purpose of this article is to define the aim of the Convention, namely, the promotion of European cinematographic co-productions.

The Parties did not wish to extend the scope of the Convention to audiovisual works because these are not normally governed by co-production agreements concluded between States. There is thus no need to harmonise the international rules concerning them.

Article 2 – Scope

1. The Convention refers to the fact that the convention institutes rules of international law intended to govern relations between States with regard to cinematographic co-production arrangements involving producers from at least two States. The Convention may also serve as a bilateral agreement between two countries when no bilateral co-production agreement has been concluded between them and when they have not decided against making a reservation under Article 20.

It has been agreed that the words "multilateral co-productions originating in the territory of the Parties" do not imply that there exists one single certificate of origin, but one per co-producing State.

The Parties are those that are Parties to the Convention. The Convention may be invoked only by producers who are nationals of States which are Parties to the Convention. These producers must furnish proof of their origin, that is, of their establishment in one of the States Parties to the Convention.

2. When the Convention applies to a multilateral co-production, it may also include co-producers who are established in countries not Parties to the Convention, provided that the co-production involves at least three co-producers established in States Parties to the Convention and that those co-producers contribute at least 70% of the financing of the production. In order to comply with the aims set forth in Article 1 of the text, namely, the promotion of European co-productions, it seemed necessary to establish a general eligibility condition regarding the European origin of the work. The criteria used to define that origin are set forth in Article 3 and in Appendix 11, which is an integral part of the Convention.

3. In the case of a bilateral co-production, the provisions of the bilateral agreements are fully applicable. In the case of multilateral co- productions, the provisions of the bilateral agreements between States Parties to the convention are applicable only if they do not contradict the provisions of the Convention. If there is a discrepancy, the provisions of the Convention are directly applicable and override the conflicting provisions of the bilateral agreements.

Article 3 – Definitions

a. The definition of a "cinematographic work" reproduces the definition generally adopted in existing co-production agreements. Given the distribution difficulties in Europe, the fact that a cinematographic co-production is not screened in a cinema does not cause it to lose its co-production status.

b. It is for each Party to define the status of a producer in accordance with the rules laid down for the purpose by that Party. As a general rule, the production enterprise must be specifically engaged in the production of cinematographic works, which excludes, *inter alia*, financial institutions.

Article 4 – Assimilation to national films

1. The chief aim of a co-production agreement is to confer on cinematographic works that can lay claim to it the nationality of each of the partners in the co-production. Works may thus benefit from national aids accorded to the cinematographic industry and the exhibition of films. They may also benefit from national rules regarding origin where television broadcasting is concerned. Co-production agreements also make it possible to extend the benefit of tax exemptions granted to these works in certain countries. Co-production works are thus placed on an equal footing with national works with regard to access to the advantages available to the latter.

2. Co-production works are, however, subject to the national rules governing cinematographic production and access to aids in the various countries that are partners in the production. By virtue of the non-discrimination rule, a co-production, even where it is a minority co-production, cannot enjoy a status different from a majority co-production.

However, the application of the above-mentioned national rules implies prior proof of the conformity with the provisions of the convention (see Article 5) of those co-productions claiming the benefits thereof. This statement is actually the result of the convention system, which specifies the conditions in which the co-productions concerned are assimilated with national films in order that they may benefit from the advantages provided by the domestic legislation of the various partner countries involved in the co-production.

Article 5 – Conditions for obtaining Co-production status

1, 2 and 5. In accordance with the rule laid down in bilateral co-production agreements, recognition of the status of co-production requires consultation between and approval by the competent authorities of each country. The purpose of these formalities is to establish that the co-production conforms to the rules set forth in the Convention. Each party designates the competent authority to be responsible for application of the Convention. A list of such authorities will be transmitted to the Secretary General of the Council of Europe and be regularly up-dated by the Parties.

4. As regards recognition of the producers qualifications, it should be borne in mind that these may be officially recognised in some countries (by means of a system of professional identity cards or lists), but that this is not usually the case. The purpose of the provision is above ail to prevent producers whose professional incompetence is commonly acknowledged and amateur producers from making co-productions. Companies existing in name only ("letterbox"

companies), and set up merely to help with the financial backing of a given multilateral project, should also be excluded.

Article 6 – Proportions of contributions from each co-producer

1 .The agreements currently in force provide for levels of participation by minority countries ranging from 20% to 30%. The Eurimages fund, on the other hand, provides for a participation level as low as 10%. However, this possibility does not entitle the co-production to be accorded national status if the threshold adopted for Eurimages is lower than that established in the agreements. In view of the larger number of partners involved in multilateral co-productions, which necessarily entails a concomitant lowering of participation by the co-producers, it was considered appropriate to adopt a minimum threshold of 10%, which will also make it possible to bring the regulations into line with the practice adopted at Eurimages. On the other hand, a participation lower than 10% cannot be described as a co-production, usually merely denoting a pre-purchase. With a view to preserving the status of co-production, which genuinely brings together several partners in a joint work, it was proposed that the majority share should be limited to 70%. Between 70% and 80%, the majority participation threshold continues to be acceptable in the case of a bilateral co-production, but rules out the involvement of a third co-producer.

However, in the case of a minority participation lower than the traditional threshold of 20%, with a view to resolving the problems that arise particularly in countries where automatic aid is granted to the co-producer in full, irrespective of the national share in the co-production, it is provided that the state of origin of the minority co-producer may take steps to limit access to national mechanisms for aid to co-production.

2. Where bilateral co-productions are concerned, 20% and 80% are the percentages most usually recognised in the agreements currently in force.

Article 7 – Rights of co-producers

1. Since the object of the co-production is to share the rights over the original negative, the negative must belong to each of the co-producers. In order to preserve the rights of co-ownership implied by co-production, each co-producer must be able to have free access to the negative, so as to be able to make the copies necessary for the exploitation of the work.

2. In order to facilitate distribution, it is often necessary for the co-producer to have, for his own use, an internegative or any other medium which enables the work to be reproduced. That right is sometimes relinquished for financial reasons. In that case, agreement must be reached between the various co-producers regarding the place where the original negative is to be kept.

Article 8 – Technical and artistic participation

1. Given that the Convention grants the co-produced work the nationalities of the various countries that are partners in the co-production, that recognition of nationality must be reflected in a genuine participation by technical and artistic staff of those countries in the making of the film. Such participation makes it possible to create a link between the co-produced work and the countries whose nationality it will acquire. That Participation must logically be commensurate with the size of each partner countries share of the co-production. It is clear that where the financial participation fails to be proportional to the artistic and technical participation the competent authorities may either refuse to grant co-production status to the project or withdraw their provisional agreement. That rule is to be understood in the light of the international obligations assumed by the various States Parties to the Convention, and in particular, the rules regarding free movement of workers set forth in the Treaty of Rome. The content of the terms, both artistic and technical, is defined in Appendix II.

2. The obligation, except as otherwise provided, to use technicians and technical industries established in the countries that are partners in the co-production ensures that it will not be possible to use workers or technical industries enjoying a lesser degree of protection, outside the framework of a co-production. Technicians legally established in the countries that are partners in the co-production are considered to be nationals of these States.

As far as post-production is concerned, this may not be carried out in a country which is not a partner in the co-production except in the absence of adequate technical facilities in those countries.

A State may assimilate to its residents the residents of countries belonging to its cultural sphere.

Article 9 – Financial co-productions

1 . While the principle, referred to in Article 8, of a technical and artistic contribution commensurate with the financial investment remains legitimate, concerns as to the identity and financing of national works have led to the retention of an alternative method of editing. Quite frequently the principle of an artistic and technical contribution commensurate with the share in financing may lead to choices that take greater account of the requirements; of the co-production agreement than of the need for artistic coherence. Furthermore, the growing financing needs of European productions mean that co-production is becoming a model generally adopted even in the case of projects whose inspiration derives from just one country. In order to take account of the need to respect the cultural identity of each of the States Parties and the coherence of the producers' artistic choices, it has been proposed that the financial co-production model, which at present is recognised only by a very small number of bilateral agreements, should become the general model. Recourse to the provisions governing financial co-productions does not confer exemption from the conditions set forth in Article 5, paragraph 4 concerning the involvement of bona fide co-producers. Furthermore, and particularly where the financial co-production gives full entitlement to the aids to traditional co-productions available at national level, the conditions regarding an overall balance set forth in Article 10 below take on particular importance.

a. With regard to the particular requirements for financial co-productions, it is considered that the maximum financial participation should not exceed 25%, since it can be argued that beyond that threshold the financial contribution of the minority producer is such that technical and artistic production will follow as a matter of course. A party is free, however, to derogate from this rule under the conditions laid down in Article 20.1.

b. It also follows from the text that only minority participations may be granted exemption from the rule set forth in Article 8 concerning artistic and technical participation. As the purpose of financial co-productions is to ensure respect for cultural identities, the artistic and technical participation by majority producers is in fact logically larger than the co- producers' shares in the co-production.

d. Furthermore, any financial co-production must be able to present co-production contracts, providing for the sharing of income between all the co-producers. This self-evident provision is particularly necessary in the case of financial co-production, so as to avoid participation by purely financial institutions that do not participate in the risks and profits of the production. Where these conditions are fulfilled, financial co-productions may prove a particularly appropriate instrument for the development of European cultural identities. In fact, by mobilising substantial financial resources from several European countries while respecting the national identity of the majority producer, who is the real artistic driving force behind the work, they will make a real contribution to an expression of national cultures that are authentic.

2. The conditions for authorisation for financial Co-productions (which vary according to the case) may give rise to individual agreements between States.

Article 10 – General balance between Parties

1 – The objective of the Convention is the development of the cinematographic industry in each of its States Parties. The development of co-productions is one of the most effective and appropriate instruments for that purpose. However, the development of traditional or financial co-productions may in some cases lead to a lack of balance between a country and one or more of its partners over a given period of time. Since in most countries of Europe the cinematographic industry receives substantial financing from public funds, the concern of states to preserve their own culture is a legitimate one. That is why it was considered necessary to introduce into the text the concept of an overall balance between Parties, which must be applicable to traditional co-productions and financial co-productions alike. It cannot be part of the intention of the Convention that a national fund should be used to contribute to other States' cinematographic undertakings where insufficient reciproc ity exists. States must necessarily be allowed some latitude in interpretation of the concept of reciprocity while bearing in mind that the spirit of the Convention calls for a flexible and open assessment of that principle.

2. Where a Party observes a deficit in its co-production relations with one or more other Parties, that deficit may take several forms:

– a State may observe a manifest imbalance between the flow of national investment to finance foreign films and the flow of foreign investment to finance its own film industry;

– it may also observe an imbalance over a given period between the number of majority co-productions and the number of minority co-productions with one or more partner countries;

– finally, the imbalance may take the form of a Jack of correlation between use of directors and artistic and technical staff on the one hand, and the number of majority and minority co-productions on the other.

However, the competent authority should refuse to grant the status of co-production only as a last resort, after the usual channels of consultation between the Parties concerned have been exhausted.

Article 14 – Languages

With regard to the language of the original version, it is obvious that the spirit of the Convention, whose aim is to promote the emergence of co-productions reflecting the European identity, which depends on the expression of an authentic national identity, is clearly in favour of the use of the language culturally suited to the work.

Choosing to shoot the film in a language unrelated to the demands of the screenplay for purely commercial reasons in the hope – frequently belied by the facts of penetrating the "world market" is patently contrary to the real aim of the Convention.

However, it has not proved possible to clearly formalise this requirement in the Convention in the form of a legal rule. The reason for this is that the language deemed as culturally appropriate may be defined in several ways. It is generally defined as the language of one of the countries participating in the co-production; but in a tripartite co-production, if the language used is that of a co-producer whose stake is only 10% and which has provided neither the director, nor the actors, nor the story-line, this is clearly artificial. Formalising the

requirement to use the language of the co-producing countries may, in these circumstances, encourage the mounting of "*ad hoc*" co-productions.

In fact, the most suitable orginal version language seems to be what might be termed the "natural language of the narrative", the language which the characters would naturally speak according to the demands of the screenplay. The language of the narrative, defined in this way, may be completely unrelated to the financial set-up adopted by the co- production, which means that there can be no legal definition of that language.

For that reason, it seemed preferable to leave the States Parties to the Convention entirely free on this point, so that they could define their own expectations in this matter.

Consequently, Article 14 merely provides that in order to enable a film to be distributed in all the countries which co-produced it, the countries concerned may require presentation of a final copy in their own languages, either dubbed or sub-titled, depending on each country's cultural customs. In accordance with the provisions of Article 4, Article 14 does not exhaust the possibility for a State Party to the Convention to lay down linguistic rules regarding access to certain aid systems, provided that such arrangements are not discriminatory in relation to the nationality of the film.

Articles 16 to 22

The final provisions of the Convention draw upon the model final clauses for Conventions and Agreements concluded within the Council of Europe, as adopted by the Committee of Ministers.

In accordance with Articles 16 and 18, the Convention is open for signature by member States of the Council of Europe and the other States Parties to the European Cultural Convention, as well as for accession by non-member European States. The geographical scope of the Convention thus reflects the latter's purpose, namely the development of European cinematic co-productions.

Only two reservations are permitted by Article 20, one with a view to non-application of Article 4, paragraph 2, of the Convention to the bilateral co-production relations of the State making the reservation with one or more Parties, the other allowing a State to fix the maximum limit of minority participation restricted to the financial contribution in a manner other than the one foreseen in Article 9, paragraph 1.a.

Appendix I

Appendix 1 details those practices, arising from the provisions of the bilateral agreements, that have given practical proof that they are particularly well-suited to their objective.

Appendix II

Given that the aim of this Convention is the creation of European cinematographic works, it was considered necessary to define that concept as objectively as possible, adopting as the criterion the European origin of the participants in the co-production. This is interpreted in the broad sense as referring to the establishment of the collaborators in the work in one of the countries of the geographical territory of Europe, without discriminating between countries that are signatories to the convention and the other European countries.

The table of points contained in Appendix II is not intended to exempt the co-produced work from the provisions of Article 8 regarding the technical and artistic participation of the various partners in the co-production. It merely constitutes a necessary, but not a sufficient, condition for eligibility for the status of co-production.

The appendix is divided into three groups of more or less equal importance, though producers are not mentioned, since, under the provisions of Article 2 of the Convention, the European co-produced work is of necessity controlled by co-producers established in one of the Parties to the Convention. The table of points breaks down the collaborators in the work into three units: the creative unit, the performing unit and the technical unit. In the first unit, equal importance is accorded to script-writing and direction. As regards the script, it goes without saying that the three points may be distributed, on the basis of the nationality of each, between the creator of the original idea, the adaptor, the scriptwriter and the writer of the dialogues. As regards the performing unit, calculation of the number of points is based on actual days present during the shooting. Finally, as regards the technical craft group, the point is allocated to the studio, the location being taken into consideration only where a studio is not used.