# What's Up? FSE Talks for Screenwriters' Guilds in Europe

## Meeting #3

Potestative Clauses and Screenwriters' Contracts :

Between Apparent Creative Freedom and Voluntary Servitude

*Online meeting, January 2026 the 20th from 12:00 to 13:00 (Brussels time)*

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# Writing is rewriting.

Every screenwriter knows this.

Writing is not a solitary act.

It is shaped through dialogue, feedback, and confrontation of ideas.

Good producers are part of this process.

They help writers bring their original vision as close as possible to what can actually be produced.

Rewriting is often about navigating constraints:

- budgetary limits, narrative coherence within an existing series,
- or editorial targets such as age ratings and audiences.

At its best, rewriting is a shared effort

to align a creative vision with production realities.

But what happens when this alignment stops serving its original purpose ?

# But when does rewriting stop being creative?

> *"The writing phase is marked by an excessive number of meetings and rewrites*
>
> *between screenwriter, producer, and broadcaster.*
>
> *Texts pass through many hands at various decision levels.*
>
> *The multiplication of back-and-forth exchanges, often contradictory,*
>
> *is detrimental to the identity of projects.*
>
> *Beyond the third draft, it is no longer about improving the text*
>
> *but about waiting out the decisive production decision.*
>
> *Doubt sets in; a dark period begins."*

— Chevalier Mission Report on French Drama, March 2011

# Common situations for screenwriters

Being asked to rewrite without a contract,

on the grounds that the project is "not ready yet".

Being asked, at version 4, to steer the writing in a direction

that the screenwriter had already identified as essential as early as version 2,

but which had not been taken into account at the time.

Implementing completely contradictory notes,

following a change of interlocutor

(commissioning editor, head of drama, or equivalent).

Being asked to make changes

because the producer shared the script with a third party,

who "would rather see the project more upbeat".

# A simple question :

On what legal basis can one party decide alone when the other gets paid?

# Civil law is not about power.

**Civil law is built on reciprocity.**

It is the law of agreements between equals,

where obligations arise from mutual consent.

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In civil law, no one has the authority

to decide alone for the other.

Unilateral power belongs elsewhere:

to public law, where the State may impose decisions

in the general interest.

And even there,

such power has been increasingly limited and controlled

since the early twentieth century.

# Scope of this keynote

This keynote focuses exclusively

on the **producer–screenwriter relationship**.

This scope alone already covers

a wide range of problematic situations

reported by screenwriters

*(for instance: rewriting before any contract, or after broadcaster feedback and before resubmission).*

It does not address

the **producer–screenwriter–broadcaster** relationship,

which raises different legal issues

and deserves a separate discussion.

# Why this distinction matters

Conditions

that depend **solely on one party's will**

are **prohibited** in many civil law systems

vs.

Conditions

that depend on **several actors' decisions**

(including broadcasters)

are **legally admissible**

## Naming the mechanism

# Potestative clauses

The term potestative does not exist in all legal systems.

However, the mechanism it refers to

is widely regarded as incompatible

with core principles of democratic contract law.

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Depending on the legal system,

this mechanism may exist under different labels

or result from case law,

including in some common law countries.

# What civil law seeks to prohibit

Civil law, in its fundamental principles,

seeks to prohibit contractual mechanisms

in which the existence or performance of an obligation

**depends solely on the will of one of the parties.**

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In such a configuration,

there is neither genuine consent

nor real reciprocity of obligations.

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**This is not a technical rule.**

**It is a fundamental protection**

**against unilateral domination**

in private contractual relationships.

# A shared principle across Europe

For reasons of time,

this overview is limited to a few countries.

It is not exhaustive.

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Its purpose is to illustrate a shared civil law mechanism,

not to provide a complete comparative analysis.

# A shared principle across Europe (Selected legal references)

### France

*Article 1304-2 – Civil Code*

"An obligation is void where it has been entered into subject to a condition

whose fulfilment depends solely on the will of the debtor."

### Belgium

*Article 5.141(2) – Civil Code (Book 5)*

"An obligation may not be subject to a suspensive condition

that depends solely on the will of the debtor."

### Italy

*Article 1355 – Civil Code*

"The transfer of a right or the assumption of an obligation is void

if it is subject to a suspensive condition

that makes it depend solely on the will of the debtor."

### Spain

*Article 1115 – Civil Code*

"Where the fulfilment of the condition depends exclusively

on the will of the debtor, the conditional obligation shall be void."

(Different wordings – same underlying mechanism)

# What this means in concrete terms for screenwriters

Across these systems,

**payment cannot be made conditional**

**on a purely subjective and discretionary assessment**

**by the producer.**

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In other words:

if acceptance, and payment

depend solely on one party's will,

the contractual mechanism is structurally flawed.

# This is not copyright law. This is general civil law.

**These rules do not stem from copyright, authors' rights, or intellectual property.**

They arise from the general principles governing contracts between private parties.

They apply

regardless of the creative field involved.

# Voluntary servitude

## Étienne de La Boétie

Humanist thinker of the 16th century.

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A situation where domination persists

not only through coercion,

but through consent.

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Often without being named.

Often without being intended.

# Not a moral failure. A systemic mechanism.

At an individual level,

agreeing to an unpaid rewrite

can make sense

when feedback is relevant

and genuinely improves the project.

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But when such practices

become contractualised,

they change in nature.

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In some contracts,

refusing to carry out

an undefined number of rewrites

can lead

to the termination of the screenwriter's contract.

**This is where the shift occurs:**

**from freely given consent**

**to a unilateral right**

**enforced through sanctions**

# When unilateral acceptance threatens creative freedom

**When acceptance becomes purely discretionary,**

creative freedom is no longer protected.

**If a project can be endlessly dismantled,**

without objective criteria or contractual limits, original visions are weakened.

**The right to creative experimentation**

cannot become a right to exhaust or silence authors.

# This keynote is not about abolishing rewriting.

Rewriting is an essential part

of the creative process.

Dialogue, iteration and experimentation

are at the heart of writing.

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**The issue is not rewriting itself,**

**but the absence of objective limits**

**and contractual safeguards.**

# Creative trial and error is not a free licence to dominate

**Creative trial and error**

is essential to writing. Experimenting, adjusting and rewriting are often what allow a project to become producible and to reach its audience.

**But this right to experimentation cannot be unlimited and without safeguards.**

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When exploitation revenues are absent — or when authors' shares are extremely low — an unlimited right to creative trial and error effectively shifts most development risk onto screenwriters.

# Solution 1: Shared note of intent

A shared note of intent
agreed by the screenwriter and the producer
should be attached to the contract.

It sets the creative vision
the project is meant to serve.

It provides a common reference point
for the development process
and for subsequent rewrites.

When disagreements arise,
it helps distinguish
legitimate creative dialogue
from purely subjective reassessment.

# Solution 2: Objective writing brief

## An objective writing brief must come first.

An objective writing brief should be established **before writing** and **before any major rewrite**.

It should be:

- precise,
- contextualised,
- and set out **in writing**.

This practice is more commonly reported in some international co-productions, particularly in animation.
It should become the norm in live-action TV fiction as well.

# From acceptance to compliance

**From subjective acceptance to objective compliance**

Payment should be linked

to the delivery of a text

**that complies with the brief.**

Not to a subjective "acceptance".

If the text complies with the brief,

the contractual rewrite process applies.

If it does not,

the writer is not entitled to payment

for that stage.

## Solution 3: Define writing stages

# Writing stages must be clearly defined.

Contracts should distinguish between:

- minor changes,
- technical adjustments,
- polishing,
- and substantial rewrites.

Not all changes are the same.

And not all changes justify

the same amount of work.

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Clear definitions

protect both creative dialogue

and contractual balance.

# Substantial rewrites must be identified, limited and paid.

Beyond an agreed number

of substantial rewrites,

additional remuneration should apply.

> **A change of narrative direction**
>
> or character construction is not a minor adjustment.

# Versions are not a blur

**Versions must be named and numbered.**

Each version should be clearly identified, before and after any substantial rewrite.

This prevents confusion between development, rewriting, and production-driven adjustments.

**Clear versioning protects both accountability and remuneration.**

## Why collective leverage matters

# Individual negotiation is structurally weak.

At an individual level,
screenwriters are structurally too weak
to negotiate clear editorial boundaries
with broadcasters.
Informal, shifting expectations
are rarely negotiable
on a one-to-one basis.

This is where guilds
become essential.
They are the only actors
able to negotiate clarity
at the right level.

## Clarity enables creative freedom

# Constraints are not the problem.

# Opacity is.

Some broadcasters publish
clear editorial guidelines.
They may be strict,
sometimes controversial,
but they are explicit.

Writers know in advance
where the boundaries lie —
and can choose
how to express their creativity within them.

Disney's guidelines are often criticised —
yet few would argue
that Disney productions lack originality
or authorial identity.

**Clarity does not suppress creativity.**
It makes creative freedom workable.

# What can guilds do tomorrow?

Start from general civil law

not copyright or authors' rights.

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Many legal tools already exist

to address unframed, unpaid rewriting practices.

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They are often found

in general contract law.

# Concrete next steps

### Guilds with legal expertise

should ask their in-house jurist

or external lawyer

to explore their national civil law

and identify equivalent mechanisms.

### Guilds without such resources

can reach out to:

law professors, or law students,

to carry out the same exploration

within their national legal framework.