

Report from PA Presenters Conference June 9-11, 2010 Gettysburg, PA
Submitted by Lois Welk, Director Dance/UP

Top Ten Contractual Mysteries Revealed

Panelists:

Robyn Guillam Esq, FTM Arts Law, Washington. DC (RG)

Robert Baird, Baird Artist Management, Toronto (RB)

Randall Presswood, Director of Performing Arts Facility and Programming, Bloomsburg University Bloomsburg PA , PA (RP)

RG: These are the issues we get a lot of calls about:

When do you have an enforceable contract?

The presenter might send a contract, it sits on a desk for a while. A rider is shared. When do you have an enforceable contract? You have an enforceable contract when you have an agreement that includes all the material elements. That includes the artist, date, fee, and technical requirements. Usually the grey area is over the tech rider, which is material to the contract. If you don't have agreement on the tech rider you probably don't have an enforceable contract. However, if it is a simple show (lights on, lights off) the tech rider might not be material.

RB: If you have a verbal agreement you have an enforceable contract. Just because an agreement isn't in writing doesn't mean it is not enforceable.

RP: Where does the onus of understanding lie? Often there is an existing rider, but when does the rider get put in the presenter's hands? And if the rider changes, who is responsible for making sure the presenter has the most up to date rider?

RG: The agent, or artist's representation, should send the tech to the presenter. It's up to the presenter to respond to the tech rider, clearly and quickly.

RB: It's the artist's responsibility to get the rider to the agent and it's the responsibility of the agent to get the rider to the presenters. The dialogue is important

RG: Contracts are about communication.

RP: When you red line a contract, you should initial every change and the other partner needs to initial those changes too.

RG: It's best for both parties to initial changes as proof of the terms.

RG: If a presenter sits on a contract, the agent can say "we are moving forward on the contract" and if they don't hear back from the presenter the agent can assume they have a deal. Agents should let the presenter know that they are assuming there is a

deal. A problem with many university presenters is that their budgets are approved so late. It's really a problem.

What's the relationship of a deal memo to this process? Is a deal memo binding?

RG: If there is a tech rider involved, you probably don't have a deal, because the tech rider is material to the agreement. If it's a simpler show, you do have a deal based on the deal memo.

We had a contract, and a month before the show, the artist's new TD sent an updated tech rider. What about that?

RG: An artist can't do that. The new rider is not binding. Artists need to understand that they can't make last minute changes to their riders. Non-material terms can change but anything that requires additional expense is a material term.

RB: I always put deadlines on the contracts. If I don't hear back by a date, the deal is off.

RB: Don't generate two contracts – one from the presenter and one from the agent/artist. Not a good practice. If they have already signed the agent contract, the presenter shouldn't send their own contract on top of it. Use one contract for the gig.

Material terms?

Material terms are items that are integral to a successful artistic event and involve additional expense for either party. What about terms like a doctor on site or special food requests?

RG: Those kinds of requests are not material to the performance.

Case: Contract was signed. The night of the performance the artist had a problem with the video rights and was forced to break contract. The agent signed the contract, sent it to the presenter, the presenter added the video rights clause to the rider (he stamped in added language that is standard, like no smoking on stage). That particular presenter broadcasts all performances on their tv channel. The agent needed to initial each addition because they weren't part of the original contract that the agent signed. The agent hadn't initialed and the artist was unaware of the clause. Changes to contracts should be acknowledged by both parties

Pick up the phone and discuss changes, don't just throw back a marked up contract.

Sometimes the agent is signing on behalf of the artists and hasn't shared the details with the artist. When the company is doing the advance, the artist needs to know what

the changes are. If the agent is signing for the artist, the agent needs to go over the contract in detail with the artist.

Likewise the tech team at the venue should review the rider before the presenter signs.

If you do have an enforceable contract what do you do if the other party breaches? What are your options?

Litigation is a nightmare. Try to work something out. If the artist is canceling without a good reason, the agent should give a break on another fee in the future. For the presenter- walk away and never book that artist again, you might be able to recover the cost of the cancelation. If the artist cancels without a good reason, within days of the concert, the losses to the presenter will be much higher. If the show was expected to net \$100,000 the artist might be liable for that.

RB: If an artist cancels, smear their reputation. From the agent standpoint, I would drop them from the roster. A deal is a deal.

If the artist shows up and the tech isn't provided that was agreed upon and the artist goes out and gets what they need then the presenter is liable for the artists' additional expenses.

However 5 dressing rooms, instead of 10, is not a material breach. If the artist can do the show, it's a non-issue.

It's very difficult to "collect" damages related to "damage of reputation"

Pay or Play clause -- The Boston pops canceled Redgrave, but they said they would pay. She sued because she said that performance with the Boston Pops was important for her reputation. She won. So a pay or play clause, protects the venue, so they can just pay the fee if they need to cancel not other damages or losses. .

Include a "Kill clause"- if the presenter cancels on or before a certain date, the presenter has to pay a kill fee.

RB: But of course it's hard to collect, all we have left is to avoid people who don't do good business.

Breach of contract re: exclusivity clauses. The act was booked within 60 miles of the anchor date, breaching the exclusivity clause. The response was deal with it or cancel.

RG: It is a problem. You're stuck if an artist violates an exclusivity clause. You can add language to your contract that if the exclusivity clause is breached, the artist's fee will be reduced.

Force Majeure

RG: Recently there have been a lot of force majeure cancellations because of the volcano in Iceland. Force majeure generally means circumstances beyond the control of both parties. Each party eats their own costs. Both sides will have losses. The artist loses their investment be it plane tickets, rehearsal etc...

RG: Labor disputes? If you are a union venue, you should include labor disputes in your definition of force majeure.

RB Force Majeure should be defined in the contract. Some artists think if my mother dies and I feel bad, it's grounds for force majeure. It should be defined in each contract. Include illness or death of the artist or a member of their immediate family.

What about the artist canceling gigs in Arizona in protest of the immigration policies?

RG: That is not force majeure.

What about when the artist is on site and the roads are closed because of bad weather conditions before the performance?

RG: I feel the artist should be paid

RG: Force Majeure clauses can include the presenter's decision to cancel because of weather, even when there is no "declared snow emergency". But it has to be defined in the force majeure clause.

RG: Force majeure is an act beyond the control of either party. It's best practice to add defining language in the contract re: labor disputes, weather conditions, etc.

If you have an artist there but the show can't go on because of weather, you are responsible for paying the artist. A presenter can build in language that says if the show is canceled for weather and they pay out, that the artist will re-negotiate for a future engagement at a reduced fee. Or maybe 50% for the canceled engagement and 100% for the guaranteed future engagement. Stipulate the terms in the contract.

Who are the contracting parties?

RG: Is the contract with the artist or the agent?

"With Baylin Artists for the services of xyz artists" means that the agent is on the hook. If you are dealing with an artist who is outside of the USA it is better for the presenter to have wording in the contract that has the agent on the hook. If the international artist cancels, it's very hard to sue an artist in a foreign country. Very difficult. But if you have the contract with the agent in this country, it is easier to get your money.

If the contract reads “between venue and Baylin Artists as representatives of xyz artist”
Then your contract is with the artist.

RG: I have power of attorney with my artists

Litigation

RG: Robert Baird’s contracts says arbitration must take place in Toronto. Very difficult. You should be sure that the arbitration clause says that litigation can happen at the venue’s community. “Venue” for litigation should be where the presenter is.

Read litigation clauses carefully!

Arbitration

In lieu of going to court, arbitration is a faster process. Not recommended for disputes over smaller amounts of money. The fee is generally 2,000. If the artist has a small fee, under \$5,000, don’t agree to an arbitration clause. Read arbitration clauses carefully!

Attorney’s fees provisions

Generally the way the law reads, each side pays their own attorney’s fees. If an artist has to pay their own attorney’s fees it’s not worth it for them. You want a clause that says that in the event of litigation the prevailing party will be entitled to all attorney fees.

Intellectually property- performance rights.

Artists must have the rights to perform a show, a piece of music, a dance. The contract should read that the artist should have the rights to any intellectual property used in the show. .Generally venues get a blanket license from ASCAP, BMI and SESAC for music rights. Artists have to obtain all other rights to intellectual property in the show.

There are no blanket licenses for dramatic rights

Dance companies need to have the rights to the music they use, because **creating a new work with the music is not covered by BMI, ASCAP or SESAC**. Those blanket music licenses rights only cover straight forward music performances or usages.

Let’s say they use Phillip Glass and they never got permission. Indemnification, protects the venue. If Phillip glass sues the dance company and venue.

Indemnification has to do with third parties, in this case the venue. .

An indemnification clause protects the venue if some third party sues eg. an artist performs without rights and the venue gets sued. Then by virtue of the indemnification clause, the artist will have to cover the costs of attorneys fees etc for the venue.

Know how your insurance works. Know what your insurance covers so you know how the indemnification clause should read.

RB: More venues are asking the artists to have their own liability insurance.

Visa

Put in the contract who is responsible for getting the visa, and who is responsible for paying for it.

PB- even going back and forth to Canada is problematic.

Apply a year in advance...allow a lot of time.

Taxes for foreign artists

If the artists is asking for \$xx, xxxx, stipulate in the contract whether this is gross or after taxes? Is the artist eligible for a tax exemption? Deal with it up front.

Can the venue pay an agent and get around the tax?

No. Paying the agent is the same as paying the foreign artist. The venue still has to withhold the 30%

Foreign artists can use a central withholding agent (CWA). The artist has an agreement with the IRS and they'll apply tax to only the net profit rather than the gross. No artist can use a CWA unless they have filed for every engagement they have ever down in the US

Clauses about presenters paying income taxes are bogus. The artist should pay their own taxes.