EQUITABLE CONTRACTING
Vs. 4.4.2021

WHY WE CAME TOGETHER
Covid 19 exposed numerous systemic inequities in our field that manifested themselves as residencies and performances were rapidly canceled in the spring of 2020. By summer 2020, Members of Dance/USA, comprised of Presenters, Agents, Managers, Producers and Promoters (AMPP) formed a Joint Working Group to specifically address imbalances in the contracting and force majeure process to create a more equitable and conscientious approach. We acknowledge there are many inequities that must be addressed throughout the Performing Arts industry, for purposes of this Joint Working Group, we focused on contract terminology and understandings to promote shared financial risk and investment in three (3) main Principles.

Principles:
I. Fair and Equitable Contracting
II. Fair and Equitable Payment Structures
III. Fair and Equitable Force Majeure/Cancellations

We believe Implementation of these Principles will support a more sustainable future for those of us engaged in touring and presenting dance.

The Dance/USA Joint Working Group acknowledges that some organizations may not be able to fully implement these principles and that circumstances may differ from one situation to another. Our goal is to offer some practical ideas on the contracting process to support the incorporation of equitable business practices throughout our communities for fieldwide sustainability.

Equity: (n) the quality of being fair and impartial.
Fair: (adjective) marked by impartiality and honesty : free from self-interest, prejudice, or favoritism
Impartial: (adjective) not partial or biased : treating or affecting all equally
Bias: (n) prejudice in favor or against one thing, a person or group compared with another, usually in a way considered to be unfair.
Equitable: (adjective) having or exhibiting equity : dealing fairly and equally with all concerned
Transparency: (n) communicating openly and honestly.

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In December 2020, the Dance/USA Joint Working Group consulted informally with Jay A. Mitchell, a professor at Stanford Law School and the director of a legal clinic that has worked with Dance/USA and several dance nonprofits in Northern California. The Working Group did not engage Jay Mitchell or any other lawyers for legal advice, market practice research, or other work, and this document is not work-product of, either Jay or his clinic.

PLEASE NOTE:
The individuals and parties noted above, which includes Dance/USA, are not giving legal advice in this document. This is intended as a resource for Dance/USA members and interested parties. We encourage you to consult with your counsel regarding adoption of the principles set out in this document, including any relevant considerations under local law. We make no representations or warranties relating to the Principles and ideas set out in this document.

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OUR PROCESS

I. Fair and Equitable Contracting

*Engagement: (n) the act of engaging or the state of being engaged; involvement*

Revising “Performance” Agreement to “Engagement” Agreement

1. The “Engagement” refers to the period of preparation, communication and activity between the Artist, AMPP and Presenter, which includes but is not limited to contracting, advancing technical and residency activity details and ultimately completing a final performance.

2. The majority of traditional industry Agreements identify the “Performance” as the element that is being contracted and compensated, failing to recognize the ongoing labor and financial investment from the Artist and AMPP that is necessary to realize said “Performance.”

Thus we are making the suggestion to revise the contract terminology from “Performance” to “Engagement,” whereby an “Engagement Agreement” acknowledges and allows contracting parties to ascribe a mutually agreed upon value to services that are being provided ahead of the final performance by the Artist and AMPP.

II. Fair and Equitable Payment Structures

*Payment: (n) the act of giving money for something bought or for a service used*

*Deliverable: (n) any service, product, service, or result that must be completed to finish a project.*

*Non-Returnable: (adj) not repayable in any circumstances*

Revising “Deposit” with “Payment”

1. Expenses are incurred by all parties: Artists, AMPP and Presenters.

2. Well before the final performance, the Artist and/or AMPP begin to provide tangible services to meet the needs of the engagement agreement. We are identifying these as "deliverables"[2]. Therefore it is understood that a payment prior to the completion of the performance, which has typically been referred to as a “deposit”, is in fact a “payment” and should be compensated by the Presenting entity for services rendered. The goal is to acknowledge that the payment for deliverables is non-returnable.

[2] See page 6 Item I.1 for some examples of possible deliverables. Note that presenting organizations may differ on what is/is not an acceptable deliverable, Presenters should inquire with their organizations.

Thus we are proposing the following suggestions:

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Artists, AMPP and Presenters to mutually agree upon the deliverable(s)/services rendered and payment schedule which includes itemized, non-returnable amounts, for said deliverables, identifying them as such in the engagement contract.

Rather than requesting/offering a “deposit” payment to the Artist, engagement contracts should include language that supports the practice of Artist and AMPP receiving a minimum 40% non-returnable payment of the full engagement compensation. This is paid upon receipt of mutually agreed deliverables/services rendered by Artist and AMPP prior to the culmination of the engagement. We understand that some parties may need to adjust the payment percentage or the number of payments.

III. Fair and Equitable Force Majeure/Cancellations

*Force Majeure: (n) unforeseeable circumstances that prevent someone from fulfilling a contract.*

*Cancellation: (n) the action of canceling something that has been arranged or planned.*

Working in Good Faith: Approach to Force Majeure and Cancellations

1. We recognize that Force Majeure clauses are necessary to protect both parties from unforeseen and uncontrollable circumstances and that Cancellation clauses are also needed to protect both parties.

2. The uncertainty caused by Covid 19 and the wave of force majeures which were invoked, resulted in strained relationships between Artists/AMPPs and Presenters, due to the unforeseen financial and logistical hurdles that affected all parties.[3]

3. While Force Majeure is not foreseeable, having contingency plans within the engagement agreement rather than assuming a complete termination of agreement by either party (should FM be invoked) allows for all parties to be better prepared, and for the conversations that follow, to be rooted from a place of working in good faith and mutual understanding.

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Thus we are proposing the following suggestions:

FORCE MAJEURE:
Both parties shall make reasonable efforts to be communicative, transparent and operate from a place of mutual understanding and recognition of the other’s concerns throughout the force majeure process.

If force majeure is invoked by either party, both parties agree to work in good faith to revise the engagement schedule and associated compensation.

If force majeure is invoked by either party, payment/s made to the Artist and AMPP outlined in the agreement as deliverables that have been contractually fulfilled by Artist and AMPP, and have been paid prior to the in-person presentation, is/are non-returnable.

If force majeure is invoked and the engagement is to be rescheduled, Artist may not be able to allocate all or a portion of the non-returnable payment towards the future engagement due to potential touring cost variables (ex. visas, flight costs, change in artistic wages, etc.). Both parties understand that the contracted compensation might need to be renegotiated and will work in good faith to arrive at a mutually agreeable solution.

If force majeure is invoked and parties are unable to come to mutually agreeable terms to reschedule, resulting in termination of the agreement, Artist/AMPP and Presenter would enter into conversation to determine a fair and equitable final payment to the Artist/AMPP at the time of termination. Any non-returnable payments made to Artist and AMPP at the time of cancellation shall be applied towards the balance of the agreed upon final payment due to Artist and AMPP.

CANCELLATION (not related to Force Majeure):
If cancellation is invoked by Presenter for reasons other than Artist’s/AMPP’s breach of contract, the Presenter shall pay the full agreed upon compensation in the engagement agreement. Any non-returnable amounts paid to Artist and AMPP at the time of cancellation shall be applied towards the balance of the final payment due to Artist and AMPP.

If cancellation is invoked by Artist or AMPP for reasons other than Presenter’s breach of contract, the Artist and AMPP shall return all payments that have been made by the Presenter to the Artist and AMPP as well as 10% of the contracted engagement fee to cover Presenter’s marketing and other expenses associated with the engagement.

An engagement contract may propose contingency plans as a way to ensure that efforts are made by both parties to reschedule or compensate Artist and AMPP if force majeure is enacted.

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IMPLEMENTATION / ACTION

The following is an informal effort from Jay A. Mitchell (December 2020) to articulate Dance/USA Joint Working Group Principles.

I. Fair and Equitable Contracting

Contract title and gestalt

1. The title of the contract should be “Engagement Agreement,” not “Performance Agreement,” to better reflect Artist and AMPP pre-performance work and close interaction with Presenter. The idea is to signal a relationship, not a transaction.

2. A corollary to this notion is a shared commitment to open and regular communication.

II. Fair and Equitable Payment Structures

Pre-performance deliverables and payment

1. The contract should identify Artist and AMPP activities and interactions with Presenter (collectively, “Deliverables”) to take place before the first performance. Such deliverables could include, without limitation, delivery and completion of a tech rider, participation in planning meetings, participation in promotional and residency activities, rehearsals, online/digital/virtual, and delivery of marketing information and collateral.

2. The contract should specify deadlines for each of the Deliverables.[4]

3. The contract should provide for pre-performance payments by Presenter to Artist and AMPP in respect of timely completion of specified Deliverables. For example, the compensation structure might contemplate payment of 20% of the total compensation upon contract signature and completion of the first set of Deliverables, and 20% of the total compensation upon timely completion of the second set of Deliverables, for a total pre-performance payment of 40% of the total compensation.

4. Such pre-performance payments are not returnable by the Artist or AMPP if the contract is terminated for any reason, including party breach by Presenter or force majeure.

[4] A useful way to capture such deliverable information is a table in an exhibit specifying each deliverable and its due date.

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III. Fair and Equitable Force Majeure/Cancellations: Working in Good Faith

Force majeure

1. The contract should contain a force majeure provision.

2. The force majeure clause should be mutual.

3. The force majeure clause should be narrow. It should excuse contract performance but only for the duration of, and to the extent performance is actually prevented or delayed by, the force majeure event. The clause should not result in an immediate right in the party affected by the event to terminate the contract.[5]

4. The force majeure clause should require the affected party to take reasonable measures to mitigate or work around the problem.

5. The affected party should promptly notify the other party of the occurrence of a force majeure event. The notice should describe the nature of the event, the expected impact on pre-performance activities and performance dates, and the steps the affected party is taking to mitigate the problem.[6]

6. The force majeure clause should entitle the party not affected by the force majeure event to suspend its performance for so long as the affected party is not performing.

7. Presenter, Artist and AMPP will stay in close communication during the pendency of the force majeure event. Discussion topics will include the likely duration of the event, rescheduling and digital-only possibilities, and continuation by Artist and AMPP if possible of work on some Deliverables.

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[5] The notion is that multi-month events of mutual and sweeping global consequence, such as COVID-19, are exceedingly rare, and that force majeure in the ordinary course should initially result in a permitted delay of performance by the affected party, not an immediate right to walk away.

[6] Items 3 - 5 are common ways to limit the impact of invocation of the force majeure clause. There are additional ways to narrow the clause. Exploring such approaches is useful if the goal is to protect the artist, the assumption being that Presenters are more likely to invoke the clause given that they are more exposed to physical or proximity risks such as earthquakes, hurricanes, and civil disorder, and to business risks such as government actions or labor disputes.

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8. Discussions and contract modifications regarding rescheduling or other modifications should reflect not only scheduling and logistical considerations but also economic consequences for the parties. For example, the delay may result in additional travel, staffing, rights and permissions, or other costs for Artist. The goal of such discussions is to find a solution such that Artist ultimately performs at Presenter’s venue on an economic basis that is workable for both Artist, AMPP and Presenter. Changes in compensation and/or programming may be necessary.

9. If the force majeure delay continues and Artist, AMPP and Presenter are unable, during the 24 month period\([7]\) following the commencement of the force majeure event, to reach agreement on rescheduling the performances, then either party may terminate this Agreement, without liability to the other party.

10. Neither Artist or AMPP will be required to return any compensation payments received prior to any such contract termination.

11. If the force majeure event is invoked by either party, and it is determined that the contract shall be terminated, Artist and AMPP shall retain an amount such that the total pre- and post-termination payment totals __% of the original total fee.\([8]\) The idea here is to give Presenter an additional incentive to find a way to present Artist and to provide Artist with some financial support in recognition of the impact of termination on Artist and their collaborators.

**Special considerations for COVID-19**

1. The contract should address COVID-19 matters directly.

2. The contract should provide that Artist, AMPP and Presenter will cooperate in rescheduling if Artist in good faith decides, for health and safety reasons, against traveling to or performing in Presenter’s location. That should be the case whether or not local regulations or Presenter policies would allow the performances to take place on the original dates. (This provision should be in addition to any specific provisions in the contract addressing Artist illness or injury.)

3. The contract should provide that Artist, AMPP and Presenter will cooperate in rescheduling if Presenter in good faith concludes that local regulations prohibit or will prohibit the performances [or reduce the allowable audience size by more than __% from the audience size permitted at the time of contract signature].\([9]\)

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\([7]\) [Joint Working Group note: we recommend 24 months.] The idea here is to have some deadline for resolving the situation.

\([8]\) [Joint Working Group note: we suggest full compensation amount or at minimum 50%.] The idea here is to give Presenter some protection if a performance is technically possible but only with a much smaller audience resulting in unjustifiable expense or loss.

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4. Subject to item 5 below, Principles 2 and 3 should apply to rescheduled dates. That is, if a performance is rescheduled from January to April and the factors leading to the rescheduling also exist in April, the parties will again work to reschedule.

5. If for any reason the Artist, AMPP and Presenter are unable, during the 24 month period\textsuperscript{[10]} following the postponement, to reach agreement on rescheduling the performances, then either party may terminate this Agreement, without liability to the other party. The financial consequences will be the same as for a termination by reason of force majeure.\textsuperscript{[11]}

6. The contract should provide that slow ticket sales, in and of themselves, are not a basis for COVID-related cancellation or rescheduling. The same is true with respect to reductions in mass transit access to the venue.

7. The contract should address venue health and safety considerations, with a recognition that health and safety protocols may change over time.

8. The contract should address liability considerations, in order to avoid misunderstandings regarding liability waivers and the like.

\textsuperscript{[10]} [Joint Working Group note: we suggest 24 months.]

\textsuperscript{[11]} Again, the idea here is to have a deadline.