

# CONTRACT BASICS

## I. Overview<sup>1</sup>.

A contract is an agreement between two or more persons<sup>2</sup>, and is enforceable by a court of law or equity. To be enforceable, a contract must contain certain basic information that courts have determined over the past several centuries to be necessary. The principles of what must be agreed for a contract to be enforceable date back nearly to the foundations of the English common law.

Use of a written contract in the business aspects of artists' affairs facilitates, to some extent, the performance of the agreement, because a party that breaks a contract may be sued in court for the damages caused by the breach, or for specific performance of the obligation not yet discharged. Even absent litigation, a well-formed contract may induce the "other side" to make a decent out-of-court settlement, thus saving the expense of legal proceedings.

An oral contract is also enforceable according to law. However, the difficulty of proving the significant terms of an oral contract renders its enforceability far more difficult.

A contract arises when one person offers to do one or more specified acts on certain terms (an "offer") and the offer is accepted. An offer contains a promise (for example, "I will produce a sculpture" or "I will dance at your theater") and a request for something in return ("if you will pay me \$X"). The acceptance consists of an assent by the person to whom the offer is made, showing that the person agrees to the terms offered.

The offer may be terminated before it becomes a contract, in a number of ways. For example, the person making the offer may cancel it before it is accepted (a "revocation"), or the person to whom the offer is made may reject it. When the person to whom the offer is made responds with a different offer (a "counteroffer"), the original offer is terminated. Then the counteroffer may be accepted, or not, by the person who made the original offer.

## II. Requirements of a Valid Contract

### A. Definiteness of Material Terms

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<sup>1</sup> Portions of this presentation derive from materials of The 'Lectric Law Library, at <http://www.lectlaw.com>.

<sup>2</sup> The word, "person," will be used here as though it includes the word, "entity." However, please note that where an entity is involved in making a contract, the human acting for the entity must have the authority to do so.

As implied by the overview, one requirement for a valid contract is that the parties to the contract are able to demonstrate a “meeting of the minds,” i.e., full agreement, on the “material” provisions of the contract. “Material” provisions are the most important, or key, provisions at the core of the agreement, such as, for example, the kind and amount of consideration, the description of the artwork or performance, and the timing of delivery or performance, the discretion of the artist, ownership of copyrights in work. Which state’s law should be applied in deciding disputes relating to the contract would generally be considered to be a “non-material” provision, in most instances, as would various other “boilerplate” provisions.

## B. Consideration

“Consideration” is definable as the “inducement to a contract,” or the “cause, motive, price, or impelling influence which induces a contracting party to enter into a contract.” *Black’s Law Dictionary*, 4<sup>th</sup> Ed. (West Publishing Co. 1968) at 379. Generally and most simply, this means the price or value that one is to receive in exchange for the price or value the other is to provide. A contract results from a bargain. This requires that each person who is a to a contract gives up something, or promises to, in exchange for something given up or promised by the other person. In the examples given above, thus, the consideration on one side is the promise to create art, and on the other, the promise is to pay \$X. In the absence of a clear obligation to provide consideration by either party to a supposed contract, the contract may well be found to “lack consideration,” and thus be unenforceable.

However, note that the value of the consideration received by each person need not be equal. Determining how good a bargain is becomes the responsibility of the people involved. Otherwise, the courts would be in the impossible position of having to appraise the relative value of millions of promises made every year

## C. Legality

Another requirement of a valid contract is that its material provisions be legal. In the context of artists’ contracts, legality of provisions normally is not a major issue. An agreement for the consideration to be paid in the form of illegal drugs would be an example of an illegal material provision.

Thus, any contracts containing material provisions that are not legal, such as provisions requiring criminal acts, the commission of a “tort” (a breach of civil law such as defamation, breach of a copyright or license, misrepresentation or trespass), or those in breach of public policy, will be ruled to be illegal and/or unenforceable. Illegality, of course, is determined by statutes. While public policy is sometimes difficult to define, it generally includes serious breaches of conventional morality or ethics.

If non-material provisions that are not legal exist in a contract, they may well be disregarded by a court (for example, an illegally discriminatory requirement for hiring support crew). However, if a court finds and rules that illegal provisions exist in a contract that are material to the performance or the preparation of the artwork, then the contract might indeed be ruled to be unenforceable.

#### D. Competent Parties

Finally, for a contract to be enforceable it must be made by competent parties. Therefore, while one can enter into what one believes may or should be an enforceable contract, if it has been made with a person who has been adjudicated to be insane or otherwise not mentally competent, or with a minor,<sup>3</sup> it likely will be ruled to be invalid.

### III. Remedies for Breach of Contract

In the event of a breach of contract, the injured party can sue for money damages (the award of money designed to compensate for losses stemming from the breach) or “specific performance.” Damages are measured – and limited -- by what may reasonably be foreseen as financial losses; unforeseeable losses may not be collected. If a court agrees that an award of money is not adequate and fair compensation because something about the promised performance was unique (for example, if an artist has refused to deliver a work of art), then the person who has broken the contract may be ordered by the court to perform as agreed. This is called specific performance.

If a court finds that the parties to the supposed contract never agreed on one or more material terms, it will likely rule that no enforceable contract exists, and therefore that no enforcement is possible. However, in such cases it is possible that a court would make its decision on the basis of “quantum meruit,” a doctrine meaning “the value of the labor,” or on the basis of “unjust enrichment.” Under either of these doctrines, if a court finds that an artist’s performance was provided, or that an artwork was delivered, then even in the absence of a firm agreement the court can receive evidence of the value of what was provided and award damages against the recipient. Not having had a contract, the artist’s compensation, if any, will become wholly dependent on the decision of the court.

Other remedies include what generically is called “alternative dispute resolution.” The two best-known types of alternative dispute resolution are mediation and arbitration. “Mediation” is the non-binding discussion of possibilities for resolving a dispute, which involves the persons who disagree and one or more neutral persons, who is the “mediator.” “Arbitration” is a more formal process to resolve a dispute by a

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<sup>3</sup> In Virginia and most states a “minor” is a person under 18 years of age.

person or persons – the “arbitrator(s)” -- chosen to hear both sides and come to a decision.<sup>4</sup> Arbitration can be non-binding but usually is binding.

#### IV. Conclusion

The concepts presented above constitute only general guidelines and explanations for how contracts are formed and applied. Those in the arts community who recognize the benefits of using carefully prepared, well-thought out, written contracts, and who ensure that they use such contracts, can simplify their businesses and have more time and energy to devote to their art.

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<sup>4</sup> Both definitions derived in part from *Webster's New World Dictionary & Thesaurus*, Accent Software International and Macmillan Publishers, Version 2.0 – 1998, © 1988, 1991, 1994, 1996 Simon & Schuster, Inc. © 1997-98 Accent Software International Ltd.