

## Hospitality Contracts Written Materials

### **Hotel Contracts**

In most hospitality settings, a hotel contract represents either a commitment on behalf of a group to occupy space at the hotel or a commitment on behalf of an association for its members or attendees to occupy the space. Care should be taken with respect to any formalities that must be entered into to create a binding agreement. See JCD Marketing Co. v. Bass Hotels and Resorts, Inc., 812 So.2d 834, 839-840, 2001-1096 (La.App. 4 Cir. 3/6/02), (La.App. 4 Cir. 2002):

[T]he parties clearly contemplated that a written agreement would be entered into before the arrangement between them would transform from a tentative to a definite booking of the room nights for the Reservation Dates. When, as here, the parties during their negotiations contemplate a certain form, La. C.C. art. 1947 applies. Article 1947 codifies the long recognized concept that when the parties “intended from the beginning to reduce their negotiations to a written contract, neither the plaintiff nor the defendant was bound until the contract was reduced to writing and signed by them.” *Breaux Bros. Constr. Co. v. Associated Contractors*, 226 La. 720, 728, 77 So.2d 17, 20 (1954). Particularly, Article 1947 provides: “[w]hen, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form.” La. C.C. art. 1947.

Applying that concept here, the contemplated written agreement was the Booking Contract. Although the Hotel sent that contract to JCD on August 31, 1988, JCD's altering that contract, as a matter of law, was “[a]n acceptance not in accordance with the terms of the offer [and thus] is \*840 deemed to be a counteroffer.” La. C.C. art. 1943. The parties contemplated that the Booking Contract would be signed by both parties, yet the Hotel never signed it. It follows that no contract was ever entered into between the parties. Because we find that no contract existed between the Hotel and JCD, “none could be breached.” \*\*9 *Delta Testing and Inspection, Inc. v. Ernest N. Morial New Orleans Exhibition Hall Authority*, 96-2340, p. 4 (La.App. 4 Cir. 8/20/97), 699 So.2d 122, 125. We thus affirm the trial court's dismissal of JCD's contractual claim.

As for the contents of the contract, while all facets of the group or association's stay are addressed, there are a number of areas which can deviate and demand particular focus, most typically:

*Attrition* – The group reserves a block of rooms over the course of its event. To what extent is the group required to use all of the rooms it has reserved? Since the hotel has removed these rooms from its saleable inventory, the hotel may not be able to resell the unused rooms. Because the opportunity to gain revenue from the sale of that room night cannot be regained, the hotel may be damaged. Depending on the nature of the group at issue, the hotel may be unwilling to take the risk of this occurrence. An attrition clause specifies the amount of rooms which must be used for the group to avoid liability for any unused rooms. A similar attrition provision will typically be applied to food and beverage requirements. In the absence of an attrition provision, the hotel will not be able to recover for unused rooms. See Hyatt Corp. v. Women's Intern. Bowling Congress, Inc., 80 F.Supp.2d 88, 98-100 (W.D.N.Y. 1999):

[A]n interpretation of the Agreement that the hold placed on the room block was intended as a reservation for that entire block of rooms would render meaningless the need for Convention attendees to make subsequent reservations through the WIBC travel agency, with Hyatt. There is, significantly, no language in the Agreement to suggest that WIBC was to collect the costs of attendees' rooms and remit the amounts required to Hyatt. . . . Hyatt's assertion that it was intended that the word "hold" as used in the Agreement be interpreted synonymously with the word "reserve" is without merit.

*Cancellation* – One of the difficult parts about drafting a hotel contract is accounting for contingencies that may or may not occur multiple years from the time which the contract is signed until it has been fully performed. Despite these efforts, changing business

conditions or circumstances may lead to a situation where the contract ultimately must be cancelled. The hotel may elect to cancel due to a more attractive offer from another group, the group may cancel recognizing that the penalties for doing so are less dire than for going forward with a meeting which is not shaping up as planned, or there may be some intervening change in circumstances which might permit the group to cancel without liability, such as:

*Financial difficulties* – bankruptcy, etc. – more than just tough times;

*Deterioration in quality* – hotel loses stars, etc.;

*Construction or renovation* – where group is materially affected;

*Strike or other labor dispute* – sensitivity on this issue will depend upon the nature of the group;

*Change in management* – group may insist that the brand it books with is the brand it stays with;

*Alternate facilities* – requires hotel to assist group in finding alternative accommodations in situations where hotel cancels or group cancels without liability

Where a group cancels for reasons which are not excused under the contract, the group will typically pay a cancellation fee determined by a sliding scale which provides little in the way of penalties immediately upon the signing of the agreement but which escalates over time so that a cancellation on the eve of the event results in the hotel's realization of all amounts anticipated under the agreement. As to cancellations by the hotel, the contract will traditionally specify that the hotel is responsible for all documented expenses incurred by the group due to the hotel's cancellation and may include a provision which obligates the hotel to assist the group in securing alternative

accommodations. A recent trend in this area involves the mutual application of the sliding scale approach. As to this variation, however, groups should be mindful that this figure has been set based on the anticipated damages to the hotel and may not be entirely appropriate as applied to the group.

**Walking** – to minimize the potential for empty rooms, hotels frequently overbook. Often the extent of overbooking is offset by the number of people who do not make use of their reservation. Sometimes, however, more guests honor their reservations than the hotel may have anticipated. When this occurs, some guests will need to be relocated. In group contracts, it is customary to include a provision which anticipates this circumstance and obligates the hotel to provide certain concessions in the event the group's guests are relocated. Such a provision may obligate the hotel to provide:

- Free lodging at an equal or better nearby hotel approved by the group;
- Reimbursement of all additional transportation costs incurred by the confirmed guest(s) for travel to and from the event and any related group functions;
- Any communications necessary for the guest(s) to inform family or work of their changed location;
- A priority reservation for the first available room at the overbooked hotel;
- An amenity placed in the guest's room upon the guest's return to Hotel;
- Placement of the name and phone number of any relocated guest(s) into the overbooked hotel's telephone system so that callers are directed to the hotel in which that person is staying.

Such contracts also frequently require the hotel to notify the group prior to relocating any group guest, and for the group to reserve the right to determine who will be relocated. Any provision addressing this relocation should also specify that all walked room nights will be considered to be sold for purposes of the contract and will be credited toward the group's complimentary room nights and attrition fee, if any. For a discussion on "walking," see McCoy v. Homestead Studio Suites Hotels, 390 F.Supp.2d 577, 586 (S.D.Tex. 2005).

Assuming arguendo that Plaintiffs' reservations constitute "contracts" with Homestead, Defendants are entitled to summary judgment because Plaintiffs have failed to marshal any evidence demonstrating that they suffered any damages or rebutting Defendants' claim of substantial performance. The undisputed evidence establishes that Defendants offered to provide Plaintiffs with comparable accommodations at a nearby location; to provide free transportation to Plaintiffs to and from the alternative lodgings; and to assume the cost of Plaintiffs' first night stay at the alternative locations. Plaintiffs refused Defendants' offer. Plaintiffs have not demonstrated to this Court in any way how they were damaged by Defendants' alleged breach of contract. Nor have Plaintiffs offered any substantive response to Defendants' claim of substantial performance. Accordingly, the Court finds that Defendants are entitled to summary judgment on Plaintiffs' breach of contract claim.

See also McCoy v. Homestead Studio Suites Hotels, 177 Fed.Appx. 442, 446, 2006 WL 1160758, 3 (C.A.5 (Tex. (C.A.5 (Tex.),2006)

Because the evidence suggests that Homestead's "walk policy" is a standard practice in the hotel industry, and because Homestead offered plaintiffs reasonable alternative lodgings, plaintiffs cannot prove the high degree of unfairness necessary to sustain an action under the [Deceptive Trade Practices Act]. Likewise, plaintiffs cannot prevail on their breach of contract claim because they have presented no evidence that they suffered damage as a result of the transfer of their reservation from one hotel to another.

Plaintiffs merely assert, without citing record evidence, that they suffered inconvenience. Even were there such evidence, supporting their claim that they suffered inconvenience as a result of Homestead's actions,

they point to no evidence that damages from disappointment or distress from being relocated further from Zemin and the PRC delegation were within Homestead's contemplation when the contract was formed.

*Force majeure* – Force majeure provisions address circumstances beyond the control of the parties which affect the parties' ability to fulfill the obligations of the contract. Historically force majeure provisions have been narrowly drafted to account for circumstances which make performance impossible or illegal. Since performance can be affected by circumstances which do not rise to the level of impossibility or illegality, groups in particular may wish to adopt a standard which accounts for other circumstances beyond the control of the parties. Courts have made clear, however, that such force majeure events must truly be unexpected and beyond the control of the parties. See National Ass'n of Postmasters of U.S. v. Hyatt Regency Washington, 894 A.2d 471, 476 (D.C. 2006):

This unexpected conflict of schedules was not “of the same kind” as the events listed. It would excuse the payment of liquidated damages only if it qualifies as “any other emergency” under the residual exception. However, the word “emergency” describes an unexpected development urgently requiring a prompt response, not one where the effects will be felt in a year's time or two years' time. See WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 427 (1994) (defining “emergency” as “[a]n unexpected, serious occurrence or situation urgently requiring prompt action” (emphasis supplied)); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 602 (3d ed.1992) (defining “emergency” as “a serious situation or occurrence that happens unexpectedly and demands immediate action”). NAPUS learned of the rescheduling of the Rural Mail Count a full year in advance of the 2003 leadership conference and two years in advance of the 2004 leadership conference. The rescheduling of the Rural Mail Count may be an inconvenience or even make compliance with the contract inadvisable, but without an urgent need for prompt reaction, it cannot be considered an “emergency” as that term is properly understood.

The force majeure provision can be expanded, however, to reference conditions which may make it inadvisable or commercially unreasonable to hold the meeting as scheduled. In addition, specific incidents which will trigger force majeure conditions can be listed such as: acts of terrorism, disease, epidemic, State Department or other governmental or international agency travel advisory, or civil disturbance. Other factors can be added which are tailored to the location of the meeting. This is particularly useful where hurricanes or other inclement weather conditions may be present over the meeting dates. To avoid confusion as to the application of a force majeure clause in the event of the occurrence of one of the listed events it contains, the parties may wish to specify a geographic radius within which the occurrence must take place to trigger the clause. However, parties are not permitted to look back in hindsight for force majeure events that would have permitted for the cancellation of a contract that had been cancelled prior to the occurrence of the force majeure event. See National Ass'n of Postmasters of U.S. v. Hyatt Regency Washington, 894 A.2d 471, 477 (D.C. 2006):

We also think it would be impermissibly speculative to permit NAPUS to rely upon the vagaries of the weather in 2003 to justify actions it had taken nearly a year earlier.

Another approach in the drafting of force majeure provisions is to specify that the provision will be triggered if a set percentage of attendees is prevented from attending due to a force majeure event. Finally, to encourage good faith efforts to perform under the agreement, the parties may wish to include in the force majeure clause a provision which specifies that, in the event the group opts to go forward in performing the agreement despite the presence of force majeure conditions, the hotel will agree not to pursue any attrition penalties.

*Fees and Charges* – hotels need to take care when charging for items not contractually agreed upon. See Terrill v. Oakbrook Hilton Suites and Garden Inn, LLC, 338 Ill.App.3d 631, 634-636, 788 N.E.2d 789, 791-792, 273 Ill.Dec. 198, 200 - 201 (Ill.App. 2 Dist. 2003):

“If any hotel operator collects an amount (however designated) which purports to reimburse such operator for hotel operators' occupation\*635 tax liability measured by receipts which are not subject to hotel operators' occupation tax, or if any hotel operator, in collecting an amount (however designated) which purports to reimburse such operator for hotel operators' occupation tax liability measured by receipts which are subject \*\*792 \*\*\*201 to tax under this Act, collects more from the customer than the operators' hotel operators' occupation tax liability in the transaction is [ sic], the customer shall have a legal right to claim a refund of such amount from such operator. However, if such amount is not refunded to the customer for any reason, the hotel operator is liable to pay such amount to the Department.” 35 ILCS 145/3(f) (West 2000). . . . Here, defendant charged and collected from plaintiff a security fee under the guise of a hotel tax.

### **Convention Center Agreements**

Convention centers frequently can meet space and location requirements that single hotels cannot. However, since they are municipally owned and operated, unique challenges arise. Convention centers tend to inflexible in a number of areas, principally:

*Indemnification* – many convention centers won't offer it – this is a major concern. In addition, there are other restrictions on governmental entities as to the payment of damages which may apply to convention centers. In one case, a convention center was not liable for wind related property damage due to a statute restricting municipal liability for such damage. See International Memory Products of Illinois, Inc. v. Metropolitan Pier and Exposition Authority, 335 Ill.App.3d 602, 613, 781 N.E.2d 505, 514, 269 Ill.Dec. 708, 717 (Ill.App. 1 Dist. 2002):

“(a) Neither a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions as such on the use of \* \* \* other public ways, or places, or the ways adjoining any of the foregoing\* \* \* or structures on or near any of the foregoing or the ways adjoining any of the foregoing. For the purpose of this section, the effect of weather conditions as such includes but is not limited to the effect of *wind* \* \* \* *but does not include physical damage to or deterioration of* \* \* \* *other public ways or place or the ways adjoining any of the foregoing.*” (Emphasis added.) 745 ILCS 10/3-105(a) (West 1998).

*Third party vendors* – most convention centers have exclusive arrangements with certain vendors. This can be particularly problematic with respect to groups that may want to provide certain services (foodservice or audio-visual services for example) that are the subject matter of an exclusive contract. Sometimes these exclusive requirements are added after the initial contract has been executed but can still bind the organization. This is an area which can be rife with confusion.

*Utilities* - convention centers also often charge for utilities.

*Incorporation by reference/rules and regulations* - Many convention center contracts reference external documents, particularly rules which are to impact the use of the facility. Many licensees fail to consult or consider the applicable restrictions on their use of the facility. This is a primary source for confusion and conflict.

*Conflicts and sharing of space* - A bigger facility with a prime location and particular motivation to be fully utilized can mean more potential issues with those who are sharing space. Are the groups compatible? Will anyone be offended or embarrassed by being in such close proximity to a group whose views may be incompatible with its own?

*General inflexibility* - Convention center contracts overall tend toward a heavy handed, “sole discretion” style language.

## **Presenter Agreements**

Presenter agreements should ensure that the presenter adheres to the guidelines established by the event sponsor as far as content and any applicable restrictions. They should contain a provision which ensures that the presenter has the rights to use any material he or she incorporates into the presentation and an accompanying indemnification clause which states that he or she will be responsible for resolving any claims to the contrary. This material can simply be licensed for use in the presentation or can be assigned to the sponsor. In licensing situations, particular attention should be paid to what use the sponsor is authorized to make of the material.

Frequently sponsors like to record audio or video from the presentation for future use. To prevent any misunderstandings or future disputes, this should only be undertaken with the express consent of the presenter. Consideration should also be given as to what use the presenter may make of this material and any restrictions that may be placed on its reuse in a competitive context. Finally, the implications for nonperformance should be considered and addressed.

## **Exhibitor Agreements**

In many respects exhibitor agreements function as subleases. A trade show sponsor is responsible for leasing space from the facility and in turn partitions and releases the space to its exhibitors. However, due to the nature of the arrangement, the group may be responsible for activities undertaken by exhibitors. As a result, a comprehensive exhibitor agreement should set out the requirements and restrictions as to exhibiting and should also properly allocate risk between the parties.

Among the important terms to include are:

*Qualifications and requirements as to exhibiting* – should be clearly and objectively stated but sponsor discretion should be reserved.

*Restrictions on the use of space* – what can and can't be done within the confines of the exhibitor's space?

*Hospitality functions* – Is the sponsor OK with exhibitors piggybacking off of the event?

*Indemnification* – exhibitor will indemnify the event sponsor for any claims based on the exhibitor's activities.

*Licensed and regulated activities* – drawings, raffles, give-aways, and the use of music may have legal implications that could also implicate the event sponsor.

*Venue related restrictions* – use of unions, exclusive vendors, and any other restrictions the sponsor has agreed to in connection with the use of the space.

*Insurance requirements* – setup, tear down, and maintenance of exhibitor booths and materials are ripe for claims

### **Third Party Vendor Contracts**

*Performance* - Contracts should address the date, time, place, method, standards, and other specific requirements of performance. The supplier's responsibilities and deadlines should be clearly spelled out. These can be detailed in an exhibit which is attached to and referenced in the contract. A request for proposal and/or response can function as such an exhibit if appropriate.

*Payment* - The contract should include the compensation to be paid, along with a time frame of payment due dates. While vendor contracts frequently call for advance deposits, final payments should be conditioned upon the supplier's complete performance of its

obligations. The supplier's reimbursement, if any, of expenses should be addressed as well.

*Cancellation* – conditions permitting for cancellation of the contract and any consequences related to unauthorized cancellation should be specified.

*Insurance* – type and coverage amounts should be specified depending on the nature of the activity involved. For added protection, the hiring party may also wish to be listed as an additional insured.

*Ownership* – if anything tangible is to be produced by the vendor, the ownership of the work product should be addressed. Intellectual property should either be assigned or appropriately licensed.