

✚ TRICKS, TRAPS AND TRENDS IN HOTEL CONTRACTS--2010

Uncertainty is everywhere in our economy. People have general concerns, like: How bad will it get? When will it turn around? How will I be impacted? Meeting planners have specific questions about what their rights and obligations are under event contracts. Knowing the difference between legal rights and business negotiations can make working with hotels easier. The following are answers to some of the questions most commonly asked by meeting planners:

✚ OUR ATTENDEES NO LONGER HAVE THE BUDGET TO GO TO MEETINGS OR THERE IS A COMPANY BAN ON TRAVEL. IS THAT A FORCE MAJEURE THAT ALLOWS US TO CANCEL WITHOUT PAYMENT?

No. Courts across the country have ruled that business risks that were foreseeable at the time the agreement was made cannot be used to claim impossibility or Force Majeure.¹ Risks such as economic downturn are inherent in business and do not excuse parties from their contracts. Even if such circumstances will make performance more expensive or even will result in a loss to one party, it is still generally considered a risk of doing business, not a Force Majeure.

When a hotel and a customer enter into an event contract, they are agreeing that at a date in the future the hotel will provide and the customer will use and pay for the guest rooms, meeting space and food and beverage events at the prices agreed upon in the contract. Both sides are aware and understand that the rates and terms of the contract may turn out to be more or less favorable than what might be available in the market place when the actual performance occurs. That is why hotel contracts typically include attrition clauses that apply if it turns out that attendance is less than expected, whether due to the economy, or some other reason. The economy may be worse than anybody expected, but that does not allow parties to abandon their contracts without payment.

¹ *Home Designs Center v County Appliance of Naples, Inc.*, 563 So.2d 767 (Fla., 1990); *Hilton Oil Transp. v. Oil Transp. Co.*, 659 So.2d 1141, 1147 (Fla. 3d DCA 1995); *Macalloy Corp. v Metallurg, Inc.*, 728 N.Y.S. 2d 14 (2001)

✚ **HOTEL RATES ARE GOING DOWN WITH THE ECONOMY. IS THE HOTEL REQUIRED TO REDUCE THE RATES IN THE CONTRACT THAT WAS SIGNED THREE YEARS AGO WHEN RATES WERE INCREASING?**

No. Again, a hotel contract is a commitment by both sides to use and pay for the reserved facilities at the agreed price. The hotel cannot force the group to pay a higher rate if the economy is good, and the group cannot force the hotel to reduce the rates if the economy is bad.

However, hotels do understand the realities of the economic situation. Hotels would probably rather fill rooms at a lower rate than have higher rated rooms sit empty. Thus, if a planner believes that a rate adjustment might increase pick up, the planner should ask for the adjustment, rather than “demand” it. Suggesting a partnership to address both sides’ financial concerns is more likely to work than insisting on an adjustment that the hotel is not legally required to make.

✚ **MY CLIENT RECEIVED FEDERAL BAILOUT FUNDS. DOESN'T THAT MEAN THAT THEY CAN'T HAVE ANY MEETINGS?**

Not necessarily. While the government is discussing placing restrictions on entities that received bailouts, no regulations have been passed yet. Even if they are passed, they could take many forms. Restrictions might apply to only certain types or values of events and not others, to allow businesses to continue training or other necessary meetings. Also, restrictions might apply only to new events, not to ones that are already contracted. Finally, while the bailout recipients might be prohibited from having certain meetings, the regulation might not relieve the obligation to pay cancellation damages. Many of the companies involved in the recent highly publicized cancellations paid all cancellation damages owed under the contracts. If legislation or regulations are passed, each group will have to work with its legal counsel to determine how it applies to events that are already contracted and to future events.

✚ **ATTENDANCE PROJECTIONS ARE WAY DOWN. IS THERE ANYTHING WE CAN DO TO REDUCE OUR OBLIGATIONS?**

Yes! Your first step should be to gather as much information as possible. Survey your membership or past attendees to determine how many will attend the event. Armed with this information, review your contract to determine how much you would owe the hotel if you decide to cancel versus what you would owe in attrition. Then review these options with the hotel. Remember, the hotel is not legally obligated to renegotiate your contract, but hotels want events to go forward. It is better to have housekeepers, cooks, banquet servers and the rest of the staff working than to collect cancellation fees and have the hotel sit empty and employees not working. The hotel may be willing to renegotiate some obligations, provide marketing dollars or other incentives to attract attendance or do other things to help you and your event.

If you must cancel, don't expect the hotel to absorb the entire loss and waive all cancellation fees. However, the hotel may be willing to apply a portion of the damages to a future event in order to confirm new business. Approach a hotel as a partner rather than "the enemy" and you may be surprised what you can accomplish.

✚ **WHAT ARE STRATEGIES I CAN USE TO PROTECT MY CLIENTS AND WHAT APPROACHES SHOULD BE AVOIDED?**

Many planners have advocated demanding "no attrition" or "lowest available rate" clauses in hotel contracts. These types of clauses are not a good idea from both legal and business perspectives. First, if there is no minimum commitment (no attrition) and no minimum rate set in the contract, then it is very likely that the contract is not a binding commitment. If that is the case, then the hotel could cancel your contract if a better business opportunity arose and owe nothing.

Hotels must to have “real” business to forecast to owners and lenders: a minimum room night and revenue commitment. “No attrition” and “lowest rate” clauses provide neither to a hotel. If a planner is concerned about attrition, it is better to consider some or all of the following:

- ✚ Wait to enter into contracts. Instead of booking years in advance, wait until closer to the event dates when you can better project your needs.
- ✚ Block rooms conservatively. It is better to underestimate the amount of rooms you will need than to risk attrition damages.
- ✚ Look for “need dates” when a hotel has openings and will be willing to offer special deals to fill them.
- ✚ Negotiate room block review dates that allow you to release a certain portion of the block without payment. A hotel may rather have rooms released earlier to have an opportunity to resell than be left with empty rooms at the last minute, even if it is paid attrition damages.

Not all these strategies will work for every group or be attractive to every hotel, but the point is to negotiate a contract that is a definite commitment for the hotel but reduces the risk to the group. This is far better than asking the hotel to bear all risk of low attendance by demanding a “no attrition” clause.

Uncertainly is difficult for everyone. Knowing your legal rights can help you negotiate a “win-win” agreement in tough economic times.