



NORTHERN CALIFORNIA CHAPTER

MEETING PROFESSIONALS INTERNATIONAL



***“ADVANCED CONTRACT LEGAL  
ISSUES AND NEGOTIATION  
STRATEGIES”***

May 20, 2009

South San Francisco Conference Center

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Presented by:

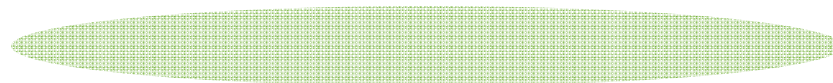
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# Negotiating Considerations

- Current Climate
- Contracting Trends
  - Renegotiation of existing contracts
  - Buyer's Market but Few Buyers
- Flexibility
  - Timing
  - Patterns
  - Destinations



# Negotiating Tips – “Big Picture”

- Don't ever give up something without getting something in return
- Don't negotiate non-economic items, e.g., risk management
- Consistency is key – exceptions CAN and WILL hurt organization
- Hope for best but plan for worst
- Use your legal resources
- Address inside and outside of contract

# Negotiating Tips –Hotel Contract Template

- Format
  - Focus on common objections
  - Focus on fallback options
- Room Block
  - Right size?
  - Right to increase or decrease?
- Room Rates
  - Confirmed or current year with cap?
  - Lowest rates
  - Pre/post rates
  - Staff rates

# Negotiating Tips –Hotel Contract Template

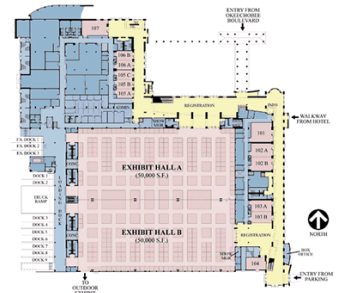
- Cut-Off Date
  - Comfortable with date?
  - Notice before release
  - Rooms sold after at group rate
- Relocation Clause
  - Equal or better nearby room
  - Transportation and other considerations
  - “Police” before the meeting

# Negotiating Tips –Hotel Contract Template

- Complimentary Concessions – Interactive Exercise
  - What concessions should meeting professionals be requesting?
  - Focus on rooms, suites, function space, food and beverage, audio-visual, shipping and handling, technology, security
- Master Account
  - Establishment and billing practices
  - Deposit
  - Payment after reports received

# Negotiating Tips –Hotel Contract Template

- Function Space
  - Correct agenda with room names?
  - 24 hold?
- Conflict Avoidance
  - Specify groups
- Reassignment of Space
  - No reassignment without prior written consent
- Quiet Enjoyment
  - Cover noise, odors, dust



# Negotiating Tips –Hotel Contract Template

- Audio-Visual Equipment Rental
  - Exclusives?
  - Use of group's equipment
- Room Block Attrition
  - Right to reduce before?
  - Minimum pickup
  - Per night or cumulative?
  - Dollar multiplier – lost profit vs. lost revenue
  - Treatment of Resold Rooms
  - Right to audit pickup and resell numbers
  - Credit for all group rooms regardless of rate paid or method of reservation

# Negotiating Tips –Hotel Contract Template

- Food and Beverage Pricing
  - When established?
- Food and Beverage Attrition and Cancellation
  - Minimum guarantee
  - Exclusive or inclusive?
  - Sponsor/Affiliate/ICW income



# Negotiating Tips –Hotel Contract Template

- Service of Alcoholic Beverages
  - Training
  - Service Standards
  - Indemnification
  - Hospitality Suites
- Hotel Duties and Responsibilities
  - Focus on safety, quality of service

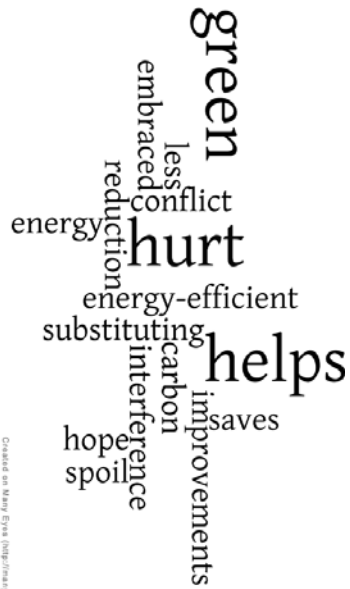


# Negotiating Tips –Hotel Contract Template

- Americans with Disabilities Act
  - Hotel obligations vs. group obligations
  - Avoiding problems
- Use of Outside Vendors
  - Define by category
- Security
  - Planning and management
  - Key access



# Negotiating Tips –Hotel Contract Template



- Insurance
  - Amounts and Types
  - Exhibitor obligations?
- Indemnification
  - Good and bad words
  - Mutuality

**WHAT'S**  
*the*  
**WORD?**

# Negotiating Tips - Hotel Contract Template

## Rights of Termination

- Force Majeure
  - “Grocery list” with “catch all” statement
  - Standard of impact
  - Perform anyway
- Unavailability of Convention Center
  - Unavailable or unsuitable (outgrow) space



# Negotiating Tips - Hotel Contract Template

## Rights of Termination (Cont'd)

- Financial Difficulties
  - Hotel or group problems
- Deterioration of Quality
  - Determine standard



# Negotiating Tips - Hotel Contract Template

## Rights of Termination

- Site Inspection
  - Establish time frames
  - Written notice of cancellation
- Construction or Renovation
  - Notice
  - Group gets to decide whether construction will impact its meeting
  - Specific representations for known construction projects

# Negotiating Tips - Hotel Contract Template

## Rights of Termination

- Strike or Labor Dispute
  - Cover both legal strikes as well as any type of labor dispute
- Disruption in Services
  - Notice and right to decide if it will impact meeting
- Change in Management
  - Could be management company or rebranding of hotel within management company family



# Negotiating Tips – Hotel Contract Template

## Rights of Termination

- Cancellation by Meeting Professional
  - Sliding scale
  - Negotiate date parameters
  - Fee based on lost profit or revenue?  
Include food and beverage?
- Cancellation by Hotel
  - “Grocery list” approach
  - Include indirect and consequential damages and attorney’s fees



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What Else is  
On Your Mind?

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### ***BEST PRACTICES FOR DRAFTING AND MANAGING ATTRITION FEE PROVISIONS IN TODAY'S DIFFICULT ECONOMIC TIMES***

Will someone please stop this roller coaster ride? I want to get off. Like most of you, I have felt challenged over the last few weeks and months as we process the changes taking place in the U.S. economy and financial markets. The questions and considerations abound. As we continue to process how to manage these challenges in our daily lives, we must also consider the impact that today's economic challenges will have on the meetings industry.

As you well know, the meetings industry has weathered tough times including the tragic events of September 11, 2001. Through the course of that tragedy, organizations adapted their operations to fit the climate. Now, developments in the U.S. economy have once again forced organizations to assess how to adapt their meetings and events to weather the current marketplace.

When we think of the potential negative effect the economic downturn may have on the meetings industry, we anticipate that fewer people will attend our meetings because spending may be limited. Fewer attendees mean fewer rooms. Fewer rooms than anticipated can mean hotel room block attrition. And attrition, as we know, can lead to the organization having to pay attrition fees. So what are some best practices in drafting and managing attrition fee provisions in today's volatile marketplace?

#### *Adjust the Room Block Before the Meeting*

If you have already signed a hotel contract and are concerned the contracted number of rooms is more than what will be needed, check to see if the contract has a room block adjustment provision. If it does, you should follow the terms of the provision and adjust the room block. If the contract does not include a room block adjustment provision, you should contact the hotel to discuss whether they will permit an adjustment of the room block. Such adjustment

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would help the hotel by returning rooms back to inventory to be resold. If the parties agree to adjust the room block, they should develop and sign an Addendum to the contract which provides for the original room block and what impact the new room block has on the contract's attrition fee provision. Ideally, any adjustment to the room block will be considered the contracted room block for any attrition fee provision. For example, if the contract language states that the group is responsible for utilizing 80% of its contracted room block, the Addendum should note that the revised room block is the "contracted room block" for purposes of the contract's attrition fee provision.

If you are currently negotiating a hotel contract, you should consider whether you want the right to make adjustments to your room block prior to the meeting.

While most hotel contract provisions permit the group to take certain percentage reductions to their room block prior to the meeting, our experience has been that most groups do not take such reductions prior to the meeting. Depending on the language of the attrition fee provision, the group may not get the benefit of those reductions if it does not take them. For example, if the group can release up to 10% of its room block 60 days prior to the meeting but it does not take the reduction, the hotel could assert that the group's attrition is based on 100% of the room block rather than 90% of the room block.

So what if you want the right to make adjustments to the room block? We recommend being specific about the percentage of reduction, the time frame for the reduction (stating it in actual dates rather than "60 days prior"), and the procedure for taking the reduction (e.g., group sends written notice to the hotel). The provision should also reflect that regardless of whether the group takes the reduction, it should get the benefit of the reduction after the meeting. Thus based on the above example, the group's attrition would be judged on 90% of the room block regardless of whether it took the 10% reduction.

Sample language:

"On or before [date] Group may reduce its room block by 10% without fee by sending written notice to the Hotel however regardless of whether Group reduces its block, any subsequent attrition fee shall be based on 90% of the total room block."

### *Select the Right Room Block*

In moving forward, you should consider with each meeting how comfortable you are with the proposed room block. The group's comfort level with its room block will help to gauge how much time and effort the group must spend in negotiating its attrition fee provisions. If the group is very comfortable with its room block, e.g., mandatory corporate meeting, the group may need very little "cushion" from an attrition standpoint. However, a group that is not comfortable with its room block, e.g., association meeting, new corporate meeting, will need more of a "cushion" from an attrition fee standpoint.

The group's comfort level with its room block will help determine the minimum number of room nights it is prepared to guarantee that it will utilize during its meeting. Many years ago,

we used to see hotels require the groups to pick up 80% of the room block; today, 90% pick up is more common. Ultimately, though, the minimum number of room nights will depend on the size and type of the group, where they are going, when they are going, and their arrival/departure pattern.

When in doubt, err on the conservative side. We have seen too many groups get assessed substantial attrition fees because they were overly optimistic with their numbers. Remember, except for an isolated island retreat, having to find overflow accommodations is a good problem. Yes, a lower block may result in a higher room rate, but passing along the higher cost is often far better (and cheaper) than the group taking the sole responsibility for attrition fees.

Sample language:

"In the event Group fails to utilize and pay for less than [*insert minimum number of room nights, e.g., number equal to 85% of the total room nights*] total room nights....(see below)"

#### *Select the Right Formula for Calculating the Attrition Fee*

While several years ago we saw many different formulas for calculating attrition fees, it appears the industry is approaching one formula. It's based on the difference between the minimum number of room nights which must be utilized by the group and the actual number of room nights utilized by the group. But what is that number -- namely the difference between the minimum required pick up and the actual pick up -- multiplied by? The group's single rate? Average rate? Net, non-commissionable rate? Rate which reflects the hotel's lost profit? We've seen it all and the point is that any of the above can be negotiated, depending upon the group's bargaining power. Whatever the number used, though, we recommend inserting a specific dollar amount into the contract.

Another issue that arises is whether the number of rooms utilized by the group should include rooms sold to the group's attendees at a lower rate and/or through non-prescribed reservation methods, e.g., discount hotel Internet web site. We believe they should be and recommend the attrition fee provision reflect this issue.

Sample language:

"...(see Section 2), Group shall pay to the Hotel an attrition fee equal to the difference between [*minimum number of room nights*] and the actual room nights utilized and paid for by Group (regardless of rate or method of reservation) multiplied by \$[*negotiated amount*]."

#### *Ensure Credit for Resold Rooms*

Our experience has been that most hotels, regardless of what the attrition fee provisions state, will credit the group for rooms it resells. But which rooms are sold first -- the group's extra rooms or the hotel's? And what if they are sold at a lower rate or there are costs to resell the

rooms, e.g., advertising? It is for these reasons that we recommend the attrition fee provision address the issue of resold rooms.

Most groups and hotels agree that if the hotel is 100% sold out over the blocked dates, the group is not responsible for any attrition fee charges. But the contract should state just that.

Yet it is a rare occasion that 100% of the hotel's rooms would be available for sale on any given night. There may be some percentage of rooms, either because of repairs or renovation, which are not available for sale. Therefore, those rooms should be deducted from the number available for sale.

Also, what if the hotel's average occupancy rate for the blocked dates is 80%? Should the group only get credit for total sell outs? Many groups are now including language in their attrition fee provision which states that the group will not be responsible for any attrition fee if the Hotel meets or exceeds its average occupancy rate (for a certain period of time, e.g. the last 3 years) for the blocked dates or simply specifying the percentage in the contract.

Further, if the hotel sells some, but not all of the rooms, the group should get the benefit of the partial resell. For example, if the group slips 100 rooms on one night of its stay but the hotel only has 50 rooms for sale, the group's attrition fee for that night should be based on 50 rather than 100 rooms. Again, the attrition fee provision should reflect this scenario. It also should state which rooms are sold first -- the group's extra rooms or the hotel's? For example, if there are 200 rooms left in the hotel to sell, the group has slipped 100 rooms that night, and the hotel sells 100 of those rooms, the 100 rooms would not be credited to the group if the hotel used a "last sold" basis, but would be credited if the hotel used a "first sold" basis. We've sometimes used a 1:1 approach which, based on the above example, would mean 50 rooms credited to the group and 50 rooms credited to the hotel.

Further, should the group's room pickup be judged on a cumulative or per night basis? We recommend a cumulative basis, e.g., in the event the group fails to use 100 total room nights during its stay. However, for purposes of resale, we believe that should be evaluated on a night-by-night basis, e.g., in the event the hotel is sold out during any night during group's stay, group shall not pay an attrition fee for that night.

Sample language:

"However, the attrition fee shall not be in effect for any night during Group's stay in which the Hotel has met or exceeded its average occupancy rate for the blocked dates for the previous 3 years, based on the number of available rooms (not counting unavailable rooms, e.g., rooms under repair). In the event a portion of the Hotel's available rooms have been sold, the attrition fee shall be based on either the difference between [*same number as above*] total room nights and the total room nights utilized by Group or the number of rooms available in the Hotel (deducting unavailable rooms as noted above), whichever is lower. Any rooms resold by the Hotel shall be credited to the Group on a first-sold basis regardless of the rate or method of reservation."

### *Review and Audit Room Block Utilization and Resale*

How will the group know how many rooms it used or how many rooms were resold by the hotel?

This question is by far one of the most controversial issues regarding room attrition fee provisions these days. With many different methods of making hotel room reservations, it is very possible that some individuals who attended the conference will not be credited to the group's block because they did not utilize the prescribed reservation process, e.g., housing bureau. Further, how does the group know how many rooms were sold at the hotel and the number of unavailable rooms (because of repairs, etc.)?

Groups want to see the entire list of names of people who stayed at the hotel during the blocked dates in order to check the list against their conference attendee list. Yet hotels are reluctant to provide such information claiming that it is proprietary and confidential. While we would argue that such information does not rise to the level of being proprietary or confidential, we recommend groups include a statement in their attrition fee provision which requires the exchange of information and documentation.

What should the statement say? It should state a process by which the hotel is required to provide specific information to the group by a specific date, e.g., a list of hotel occupants during the blocked dates and a full count of available rooms for each night.

Further, it should make payment of any attrition fee contingent upon the receipt of such information and documentation.

Finally, after reviewing the information and documentation, the group should have the right to notify the hotel of additional rooms which should be credited to its block.

Sample language:

"Payment of any attrition fee shall be contingent upon Group's receipt of information and documentation within fifteen (15) days following the meeting which reports both the number of rooms available in the Hotel for each night during the blocked dates and the names of the individuals staying at the Hotel during the blocked dates. Upon receipt of such information, Group shall have the right to identify additional room nights which should be credited toward its room block and the Hotel shall credit such room nights to Group regardless of rate or method of reservation."

### *Receive Credit for Attrition Fees on Rebooked Meetings*

We have been asked this question by clients more frequently nowadays. It is another negotiating item, but we have recommended that groups who wish to pursue this option, put language into the contract to that effect.

Sample language:

"In lieu of paying any attrition fee, Group may elect to contract with the Hotel for another meeting(s) which, in total value, meet or exceed the attrition fee provided such meeting(s) occurs on or before[*insert future date*]. The specific dates of such meeting(s) shall be mutually agreed by the parties."

*Ensure the Group Will Not Be Subject to Additional Damages for Attrition*

With payment of the fee, it is important to ensure that the group will not be liable for additional damages once attrition fees are paid. We recommend including an exclusive remedy statement at the end of the attrition provision. Such a statement would foreclose the hotel from pursuing the group for other fees such as function space rental or charging for complimentary concessions.

Sample language:

"This attrition fee shall represent the Hotel's exclusive remedy for Group's failure to utilize and pay for at least [*minimum number of room nights*] total room nights during its Meeting."

\* \* \* \* \*

Finally, when it comes to room block attrition fees, planners should try to be proactive rather than reactive, in addressing this important financial aspect of the contract. As this roller coaster ride continues, planners should put on their seat belts, review their attrition clauses and get ready for the ride!

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“Dissecting a Force Majeure Provision”

By:  
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One of my strangest school memories comes from my junior high life science class. We were required to dissect a frog. My friends and I decided that the smell of the preserved frog smell was so bad, we would spray the inside of the frog with Love’s Baby Soft perfume. Needless to say, to this day, when I smell that perfume, it reminds me of our ill-fated frog.

Dissecting a force majeure provision is often not as difficult as dissecting a frog but it can be just as unpleasant. So, for those new to the meetings industry and those who have worked in this industry for far too long, let’s dissect a force majeure provision and see what is inside.

Black’s Law Dictionary defines the French term “force majeure” as “superior or irresistible force” which is commonly addressed in contracts “to protect the parties in the event that a part of the contact cannot be performed due to causes which are outside the control of the parties and could not be avoided by the exercise of due care.”

In the world of meetings contracts, the force majeure clause was catapulted into the spotlight following the tragic events of September 11, 2001. Since that time, the force majeure clause has become the topic of much debate within the industry.

When dissecting the clause, I focus on the three main components: 1) the listing of calamities which could occur, 2) the standard of impact such a calamity has to have on a party’s performance in order to excuse such party from performing the contract and 3) the net effect if such party chooses to perform the contract despite force majeure. So let’s examine each of these components without Love’s Baby Soft.

### *The “Grocery List”*

Much focus is often on the listing of the various calamities which might occur to affect the parties’ performance. Weather, war, terrorism and the like are often included in the list. While it is important to make the listing as comprehensive and customized as possible, the fact of the matter is that it really does not matter which calamities are listed since most clauses include a “catch all” provision at the end of the list such as the following: “or any other cause beyond the parties’ control.” With that “catch all” statement on the list, as long as a party can establish that the calamity was beyond its control, the first component of the clause will be met.

### *The Standard of Impact*

When a client asks whether the force majeure clause in their contract will apply in the event of any calamity, the key component of the clause I focus on is the standard of impact. Most clauses you see in contracts use two standards: impossible or illegal. Impossible truly means “no way, now how” – meaning that, in the case of a hotel contract, the hotel is destroyed. Anything short of that is likely not “impossible” under the letter of the law. “Illegal” would apply if a governmental entity said that performance of the contract was in violation of the law such as due to a curfew. These two standards, however, are very rare and difficult to meet. For that reason, it is critical that this component of the clause include a standard of impact which is less than impossible or illegal. Alternatives abound but two widely used terms are “commercially impracticable” or “inadvisable”. Both of these terms impart an objective, business standard. Another alternative is to include a certain percentage of attendees or exhibitors which would be “deterred” or “materially affected” from coming to the meeting. This percentage may be in the neighborhood of 30-40% and, if the group can produce data showing that this percentage requirement has been met, the group may exercise its rights under the provision.

### *Holding the Meeting Despite Force Majeure*

Groups are now also including a third component in their force majeure provisions which states that if the group could cancel under the provision but chooses to perform the contract anyway, the hotel will waive room and food and beverage attrition fees related to a smaller meeting and honor any lower room rates. For example, if a snowstorm in the meeting city closes airports and results in lower attendance for the meeting, the group, which could have cancelled its meeting under the contract’s force majeure provision, can hold the meeting and not be subject to attrition fees for a lower utilization of its room block.

\*\*\*\*\*

Through this dissection process, I hope you have gained a new understanding and appreciation for the force majeure clause. Meeting professionals should ensure that this

clause is part of every contract relating to its meeting. No Love's Baby Soft perfume is necessary.

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“Mirror, Mirror on the Wall, Who Has the Best Rates of All?”

By:

Barbara F. Dunn, Esq.

This fabled statement rings true of the current climate of hotel contract negotiations. Once groups convince themselves that it’s “safe” for them to go back into the negotiation for upcoming meetings, the fear surfaces that their negotiated rates may end up being higher than those promoted by the hotel over the same dates. So what’s a group to do in this tough market where rooms must be sold at all cost – whether by the hotel with lower rates or paid by the group in the form of attrition fees? I will focus our discussion on contracts still in negotiation and previously signed contracts.

### Contracts in Negotiation

When negotiating contracts, groups should work hard to get competitive rates which are confirmed for the meeting dates. If a meeting is scheduled to take place 2 or more years in advance, the group can agree on a discounted rate for the current year and then agree on a maximum percentage increase for each year leading up to the meeting year.

In addition to ensuring that rates can be confirmed, groups should include a rate protection clause which addresses the possibility that the hotel could offer lower rates over the blocked dates. The clause should address what the hotel will do in such event – either stop offering such rates or offer the lower rates to group’s attendees. Most properties are willing to accept such rate protection clauses provided that corporate and airline crew rates are excluded. So, for example, the rate protection clause could read as follows:

“In no event shall Hotel offer lower rates over the blocked dates than those offered to Group’s attendees except for corporate and airline crew rates. Should the Hotel offer lower rates, it shall offer such lower rates to Group’s attendees as well.”

In certain marketplaces, properties may want to limit the rate protection clause to state that it will not offer any lower group rates or that the hotel will not offer lower rates on its web site or toll free reservation line. Keep in mind that it is not reasonable for groups to include

language that there shall be no lower rates on the Internet since the hotel does not control the Internet rates – many of which are offered by wholesalers such as priceline.com.

It is also important to address the topic of rates within the attrition provision by stating that any rooms sold to group's attendees will be credited toward any attrition fees regardless of rate paid or method of reservation. That way, even those who reserve rooms through Internet wholesalers will receive credit toward their room utilization.

### Previously Signed Contracts

If you have a signed contract and learn that the hotel is offering lower rates over the group's blocked dates, the group should address this issue with the hotel, the hotel chain's national sales office, and the convention and visitors bureau in the city in which the hotel is located. Groups should press the parties to correct the situation by either honoring the same rate for the group's attendees or ceasing to offer the lower room rates. Regardless of the remedy on which the parties agree, the commitment should be put in writing and signed by the parties as an amendment to the contract.

In all cases, groups should work closely with their attendees to ensure they are reserving rooms within the group's room block and receiving the correct rate. It is also important to periodically check the hotel's reservation line to ensure that the group's attendees are receiving the correct rate. If there is a problem, the hotel should be notified immediately.

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As we weather this storm together, groups should ensure that contracts are put in place with strong rate protection clauses to handle any possible rate challenges. While groups will still need to be diligent in monitoring rates, having a strong position in the contract will serve the group well as they work to enforce their rights.

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“Look Before You Sign: Key Provisions to Address in Hotel Contracts”

Part One in a Series of Two

By:  
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Howe & Hutton, Ltd. – St. Louis

Negotiating hotel contracts for meetings and events these days is not an easy task. Planners and suppliers must balance their legal requirements within the confines of the negotiation climate. But what legal provisions are essential to include in a hotel contract? Here’ part one of a two part sampling of some of the key provisions, from both a legal and a business standpoint, to include in hotel contracts:

Room rates

One of the most widely discussed topics these days in the hotel contract arena is room rates. While planners and suppliers work hard to negotiate a competitive room rate for the meeting, how do they know that the room rate will be competitive when the day of the meeting arrives – sometimes years down the road? How do planners and suppliers address the issue of special discounted rates often found by attendees on the Internet?

First, the hotel contract should state the confirmed rate for the meeting – especially if the meeting will occur two or less years from the date when the contract is signed. If the meeting is more than two years away, planners should seek to have a current year discounted rate stated in the contract with a stated percentage cap on the annual increases of that rate and a date when a confirmed rate will be provided (usually 12 months in advance of the meeting).

Next, planners should state that regardless of the group rate, if the hotel offers lower rates to guests during the meeting dates, the hotel will offer those rates to the group’s attendees. This can be a controversial request since many hotels have special rate programs with airlines and corporations. So while some hotels may not be willing to agree on the lowest rate offered, they will usually agreed on the lowest *group* rate and that they will not advertise lower rates

(including on their web site). Keep in mind, though, hotels that sell rooms to hotel room wholesale web sites, such as priceline.com or expedia.com, cannot control the prices offered via those web sites once they have sold the rooms to the site. So in the end, planners must regularly check on rates prior to their meeting dates.

Planners should also add a provision stating the group rates will be available for 2 or 3 days pre and post the blocked dates, subject only to room availability. Finally, if the hotel has agreed to provide the group with specially rated rooms for staff, the contract should provide for the number of staff rooms per night and the staff room rate.

### Walking

Hotels, just like airlines, often accept more room reservations for a given night than they have in their inventory on the basis that many of those room reservations will be cancelled prior to arrival. However, in the event a sufficient number of reservations are not cancelled, the hotel may not be able to honor every room reservation and will have to relocate or “walk” some guests with a confirmed reservation.

The contract should state the hotel’s obligations in the event of a “walk” situation. First, the planner should be notified prior to any of its guests being “walked” so that it can establish a priority list of guests. Second, guest should only be walked to nearby hotels of equal or better quality and the hotel must pay for the guest’s transportation to and from their hotel as needed. The contract should also state that the hotel will work to relocate the person back to their hotel as soon as possible and provide them with an upgraded room, in room amenity, etc. Many groups customize this provision to include their “wish list” in the event of a walk situation.

### Room Block Attrition

There is no doubt that groups continue to struggle with how to address the subject of room block attrition. Suppliers struggle with this topic too as they need to ensure the total room revenue that will be generated by the group. While this topic has been, and certainly can be, addressed at length, here are some quick tips for room block attrition provisions in hotel contracts.

First, make sure you are comfortable with your total room block. In fact, book “ultra conservatively” these days remembering that it’s always a good problem to go shopping for additional rooms. Second, decide what the minimum room block pickup that your group can agree to utilize. Usually, groups can negotiate a minimum pickup that represents 80%-90% of their total block. That minimum room pickup number should be stated in the contract.

Next, the provision should state how the attrition fee is to be calculated. Usually the fee is calculated based upon the difference between the minimum room pickup number and the actual room pickup number utilized by the group. The contract should state that any rooms utilized by the group will be counted in its total *regardless of rate or method of reservation*. This is key given the amount of Internet rate specials as discussed above. The room pickup differential number would then be multiplied by a dollar amount which could be the group’s

single room rate or average room rate or 70-75% of the room rate (representing lost profit). This dollar amount is, as with everything else, a negotiating item which will vary depending on the group's bargaining power.

If the hotel is sold out on any of the blocked nights, the group will not pay an attrition fee for that night. Also, if the hotel is partially sold out, i.e., there are fewer rooms remaining for sale than the slippage of the group for that night, the group will pay for the lesser of the two (e.g., group slipped 30 rooms on one night but the hotel only had 10 rooms left for sale, group pays fee on 10 rooms not 30 rooms).

Finally, the contract should state that upon the billing of any attrition fee, the hotel must provide the group with information and documentation to verify any attrition fee. That information should include a list of guests during the blocked dates so that the group can ensure that everyone was counted toward its block as well as an accounting of the total number of rooms available for sale at the hotel over the blocked dates.

Note that some groups seek to include a contract provision which states that if the group returns to the hotel for another meeting within a certain time period, the hotel will waive the attrition fees from the present meeting altogether or offer a credit on the master account for the future meeting.

#### Food and Beverage Attrition and Cancellation

Just as with room attrition, groups often struggle on deciding which food and beverage events they will hold at the hotel and how many people will attend each event. That can make calculating food and beverage attrition and cancellation fees on a per event basis very difficult.

To avoid this challenge, planners should consider guaranteeing a minimum amount of total food and beverage revenue it will generate over the entire blocked dates. That gives the group flexibility to add, change or cancel events so long as the total number meets the minimum amount. If it doesn't, the group will pay a fee based upon the difference between their guaranteed minimum amount and their actual revenue amount. The contract should state whether the minimum amount is inclusive or exclusive of tax and service charges. Also, for groups who have sponsored food and beverage events, the contract should state that the revenue generated by those events will be included in the group's total food and beverage revenue amount.

#### Function space

There are many key provisions to address relative to function space. First, the function space room names, dates, times, attendee numbers, and room set up should be clearly outlined in the contract or in an attachment. The contract should state that the hotel will not make room reassignments without the group's consent.

The contract should also state whether function space is complimentary or whether there is a fee for the space – either stated in total fee terms or on a per room basis. Many hotels

propose a “sliding scale” for function space rental fees depending upon the group’s total room utilization.

Further, the contract should state that room set up and other items, such as pencils and notepads, are complimentary. Groups may also want to include a “quiet enjoyment” contract provision to address the hotel’s obligation in the event their use of the space is disturbed by noise or odors.

Finally, groups that are concerned with competitive groups meeting at the hotel can seek to include a provision which prohibits the hotel from reserving space for such competitors without the group’s consent.

\* \* \* \* \*

In the next part of this series, the topics of Master Account/Billing, Service of Alcoholic Beverages, Compliance with Laws, Indemnification, Rights of Cancellation (such as Force Majeure), and Cancellation Fees will be addressed.

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“Look Before You Sign: Key Provisions to Address in Hotel Contracts”

Part Two in a Series of Two

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While the hotel contract provisions discussed in Part One of this series dealt with critical economic issues such as room block, rate and attrition fees, Part Two of this series will focus on other key contract provisions addressing performance, risk management and cancellation issues.

Master Account

If the group is interested in establishing a master account, the contract should make clear that the hotel will establish a master account for the group subject only to objective standards of creditworthiness. The group may also be required to complete a credit application. With the establishment of a master account, deposits should not be necessary but some hotels, particularly resort properties, will require a deposit.

The contract should make clear that the only charges to be posted to the group’s master account are those charges approved by the group’s authorized representatives. The contract should also allow for a daily review of the master account during the group’s stay.

It is important to include a provision regarding payment of the master account. The contract should require the hotel to provide the group with a master account statement along with all supporting information and documentation and a post-conference report. The group should be required to pay all undisputed charges within thirty days of its receipt of the final statement and documentation. Disputed charges should not be due until they are resolved by the parties

## Alcoholic Beverages

Given the potential that the group could be held liable for a liquor related claim, it is important to ensure that the group addresses the issue of service of alcoholic beverages in the hotel contract. The contract should include a statement that hotel's bartenders and servers have been trained and will not serve anyone who appears to be intoxicated.

The contract should also include an indemnification provision which protects the group in the event it is sued because a hotel bartender served an intoxicated person which later resulted in an accident. For example, if the hotel bartender served an intoxicated attendee during the group's reception and the attendee injured someone while driving home, the hotel would be required to defend the victim's lawsuit on the group's behalf and to pay any damages awarded against the group.

## Compliance with Laws

The contract should include a statement that the hotel will be in compliance with all federal, state and local laws during the group's meeting. The group may also want to request a copy of the hotel's latest fire and health department inspection certificates.

## Indemnification

Indemnification is one of the most powerful and cost effective risk management techniques that a group can employ to minimize its exposure to financial liability. Indemnification clauses are a way of shifting risk to the party who can best control the risk. In the hotel contract, it is important that the group is indemnified against the negligent acts of the hotel's officers, directors, employees and agents. For example, if a hotel waiter spills hot coffee on someone's lap and that person sues the hotel and the group for their injuries, the indemnification provision will require the hotel to defend the lawsuit on the group's behalf and to pay any damages awarded against the group. Essentially, the group is left "whole" from a financial standpoint as they are not the one that hires, fires and trains the hotel's employees. Note that often hotels will ask groups to indemnify the hotel against the group's negligent acts. Many groups agree to include such provisions in order to be indemnified by the hotel as outlined above.

## Rights of Cancellation

It is essential to include in the hotel contract a list of contingencies which, if they happen, will give the group a "right" of cancellation without liability, i.e., right to cancel without paying a cancellation fee. Here is a list of some commonly addressed contingencies:

### Force Majeure

This French term, which refers to an occurrence beyond either party's reasonable control which affects performance of the contract, has stirred up much controversy since the tragic

events of September 11, 2001. These clauses went from the “forgotten child” in hotel contracts to the “prodigal child” in terms of their importance.

Force majeure clauses are an essential to include in every hotel contract but what are the critical elements? First, it is important to include a comprehensive list of items which could arise to affect either party’s performance such as acts of God, weather, strikes, wars, threats or acts of terrorism, travel advisories, or diseases. It is also important to include a “catch all” provision at the end of the list such as the following: “or any other cause beyond the parties’ control.”

The second element addresses the issue of performance of the contract. If any of the items on the list occur, what has to happen to performance in order to trigger the protections of this provision? Does performance have to be rendered impossible? Or illegal? Inadvisable? Commercially unreasonable? Depending on what requirement is included in the contract, the group may have a difficult time exercising its right to cancel the agreement without liability. Standards such as “inadvisable”, “commercially unreasonable” or “materially affected” make it easier to invoke protections for the group.

Groups are now also including a third element in their force majeure provisions which states that if the group could cancel under the provision but chooses to perform the contract anyway, the hotel will waive room and food and beverage attrition fees related to a smaller meeting and honor any lower room rates. For example, if a snowstorm in the meeting city closes airports and results in lower attendance for the meeting, the group, which could have cancelled its meeting under the contracts’ force majeure provision, can hold the meeting and not be subject to attrition fees for a lower utilization of its room block.

### Strikes

Contingencies such as strikes involving the hotel’s labor are important to address in hotel contracts. The group should have the right to cancel the contract without liability if any segment of the hotel’s labor is on strike. Many groups routinely ask the hotel for a list of labor contracts which are coming up for renewal.

### Construction/Renovation

It is important to include a provision in the hotel contract which states that if the hotel will be undergoing any construction or renovation during the meeting dates, the group will have the right to cancel the contract without liability if the group determines that the construction/renovation will interfere with the group’s meeting. This will help to ensure the integrity of the group’s meeting.

### Change in Management Company

If the group is concerned that the current management company of the hotel will change from a favorable chain to an unfavorable chain, the group can include a provision in the contract which gives it the right to cancel the contract without liability in such event. This provision is especially important to include in contracts booked well in advance of the meeting dates.

### Deterioration of Quality

If the group is concerned that the quality of the hotel will significantly decline between the time the contract is signed and the meeting dates, the group can include a provision in the hotel contract which gives the group the right to cancel the contract without liability in the event the hotel's quality deteriorates. As with the change in management company provision discussed above, this provision is especially important to include in contracts signed well in advance of the meeting dates.

### Unavailability of Facilities

If the group will be using the convention center or another facility for its meeting or trade show, it is important to include a contract provision which gives the group the right to cancel the contract without liability in the event the center or facility becomes unavailable or unsuitable for the group's use.

### Cancellation Fee

So now that the rights of cancellation have been discussed, what if the group decides it must cancel the meeting for business reasons, i.e., reasons not addressed in the contingencies above? The hotel contract should include a provision which states the amount of cancellation fee which the group must pay to the hotel. Such fees should be stated on a "sliding scale" basis such that the farther out from the meeting date the cancellation notice is received by the hotel, the smaller the cancellation fee; the closer the notice is received, the higher the cancellation fee. Cancellation fees can be based on a percentage of total room revenue, total room and food and beverage revenue, total lost profit on rooms, total peak night room revenue, and many other options. Ultimately, the cancellation fee will be based on how much bargaining power the group has in the negotiation.

In addition to specifying the cancellation fee, the group should require the hotel to attempt to resell the rooms and to refund to the group any revenue collected by the hotel for resold rooms over the meeting dates. The group may also want to include a provision which states that in lieu of paying a cancellation fee, the group can contract with the hotel for the same or similar sized meeting to occur at the hotel within a certain time frame. Finally, the provision should state that the cancellation fee is the exclusive remedy for the group's cancellation for reasons not otherwise permitted under the contract (e.g., force majeure).

### Miscellaneous

Many hotel contracts include a host of miscellaneous or "boilerplate" provisions at the end of the contract. Here are some key clauses to watch out for:

### Choice of Law and Forum

Many hotels will state in their contracts that the law of the state where the hotel is located will govern in the event of any disputes and disputes will only be heard in courts located in the hotel's county and state. These provisions, while difficult to change, put the group at a disadvantage if the state is not the same as their state or the state of their incorporation.

### Alternate Dispute Resolution

In lieu of going to court first, more and more hotel contracts these days include provisions which require the parties to submit their dispute to some form of alternate dispute resolution including arbitration and mediation. Before agreeing to one form of dispute resolution, the group should consider all of its alternatives and determine which form, if any, of alternate dispute resolution would work best for their organization.

### Prevailing Party Attorneys Fees

Many contracts state that the winning party in a dispute is entitled to recover its attorneys' fees and costs from the losing party. While these provisions may seem harmless on their face, they frequently work to the disadvantage of groups in that if the dispute involves the payment of money, such as attrition fees or cancellation fees, the hotel will likely be deemed the "winning party" by a court of some amount of money and the group will then have to pay the hotel's attorneys fees along with their own attorneys fees. These provisions are often used during settlement negotiations to "strong arm" groups into settlement. It is often better for groups to delete these provisions and to bear the cost of attorneys fees if they become an issue.

### Incorporation by Reference

Many contracts include provisions such as the following: "The policies and procedures of the hotel are incorporated into this agreement." The problem is that most groups have not seen the "policies and procedures of the hotel" yet by the statement above, they are bound to them. Bottom line: Obtain copies of all documents incorporated by reference.

\* \* \* \* \*

As you can see from the above sampling of hotel contract provisions, as well as the sampling addressed in Part One of this series, there are many key provisions which must be addressed in hotel contracts. Groups should consult their attorney regarding any contract before signing on the dotted line so as to be fully aware of the risk, benefits and potential liabilities.

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