

A large, abstract graphic composed of several overlapping, curved orange lines that form a star-like or geometric pattern. The lines are thick and have a slight gradient, creating a sense of depth and movement. The graphic is positioned on the left side of the slide, partially overlapping the title text.

# **Doing Business in a Changing Economy: Contracts, Liability, and Understanding Risk**

2010 Annual Association Law  
Symposium in Washington, DC  
September 24, 2010



# Presentation Overview



- Contracting Trends in the Current Economy
- Key Contract Provisions
- Managing the Internal Contracting Process
- The Top “Take-Aways”

# Contracting Trends in the Current Economy?



- **Low or no tolerance** for risk or responsibility
  - Renegotiation despite long relationships
  - More legal review
- Pressure on **prices**
- In-house counsel doing **more with less**

# Contract Drafting – A Few Tips



- Your **negotiation posture** will determine your ability to address the points we will discuss today.
  - Maximize position by leading with **your own contract draft**.
    - Know which contract points are central for your organization.
  - **Competition reaps savings** – consider RFPs
  - **Consider markets**, particularly with meeting contracts.

# Key Contract Provisions



- **Payment and Ownership:**
  - Budget and Scope Control
  - Ownership
- **Risk Allocation:**
  - Damages
  - Indemnification
  - Insurance
- **Managing Disputes**

# Key Contract Provisions: Budget Management



- Define “**Scope**” - Carefully **define** what the organization is obligated to do or what you are paying for.
  - Particularly important in “**soft**” **contracts** – research, writing.
- Tie payment to **satisfactory delivery** of deliverables according to the timeline.

# Key Contract Provisions: Budget Management



- Withhold final payment **until all items are delivered** – always need an incentive to perform.
- **Renegotiating prices/payments**
  - Consider renegotiation triggers
- Beware of **third parties receiving funds due to you** – particularly in this economic climate

# Key Contract Provisions: Budget Management



- Be Careful with **Commissions/Exclusivity** –
  - Housing Contracts
  - Ad Sales
- Require **Mitigation of Damages**
  - Particularly in Hotel/Meeting Agreements



## Key Contract Provisions: Budget Management -- 5 Essential Tools for Meeting Agreements



1. Mitigation Clause: Hotel shall undertake all reasonable efforts to **resell** canceled rooms, and will **credit** those revenues against the liquidated damages in an amount not to exceed the full amount of such damages.

## Key Contract Provisions: Budget Management -- 5 Essential Tools for Meeting Agreements



2. Timing of Payment: Damages, if any, shall be due and payable X days after [original meeting date] provided the Hotel provides proof of its efforts to mitigate damages and proof that rooms being held for Group's attendees were unsold.

## Key Contract Provisions: Budget Management -- 5 Essential Tools for Meeting Agreements



3. Exclude Fees/Commissions/Taxes: Fees, penalties, or liquidated damages, if any, shall exclude service charges, surcharges, commissions, and rebates as well as state and local sales taxes, unless required by law.

## Key Contract Provisions: Budget Management -- 5 Essential Tools for Meeting Agreements



4. Deduct Overhead/Profit Margin: If Association is required to pay an attrition fee, the fee shall be calculated by multiplying X% of the Single Room Rate by the difference between the number of actually used rooms and the Room Block with credits from guaranteed no-shows, cancellations, and early departure charges, if applicable.
  - Guest Rooms 75 - 85%
  - F & B – 20-40%

## Key Contract Provisions: Budget Management -- 5 Essential Tools for Meeting Agreements



### 5. Average Occupancy Rate – Not Last Sell:

Association shall not owe any fees, penalties, or liquidated damages if Hotel meets or exceeds its **average occupancy level** for that **particular period of the year**.

*Example: Hotel has 100 rooms, but only sells 50 on an average night.*

# Key Contract Provisions: Budget Management



- How do you establish “Average Occupancy?”
  - Hotel ledgers
  - Have a formula, such as last 3 years
- Negotiate attrition based on cumulative room nights rather than each night
- Consider clause giving credit for rescheduled meetings
- Exclude taxes from calculations

# Key Contract Provisions: Risk Allocation – Damages



- Increase of proposals to **cap damages to the value of the contract**
  - Evaluate potential maximum harm and costs to repair in the event of breach
- More suggestions to **limit damages to actual damages**
  - Consider possible exclusions

# Key Contract Provisions: Risk Allocation – Indemnification



- Indemnification. Compensation. Making reimbursement to another for a loss already incurred.
- Can apply to negligence, IP, breach, data breach etc.



# Key Contract Provisions: Risk Allocation – Indemnification



NO

- “Sole,” “Gross” or “As determined by a court” – Limits providers responsibility
- Coverage for third party’s acts, omissions, negligence, etc.
- No provider indemnification
- Any occurrence related to a meeting

# Key Contract Provisions: Risk Allocation – Indemnification



YES

- **Reciprocal/Mutual** – Each indemnifies the other for its own negligence.
- **Control** – Each party is responsible only for what is within its control

# Key Contract Provisions: Risk Allocation – Indemnification



- **Defense Costs** included
- Consider **duty to defend**
  - Choice of counsel (insurance may limit)
- Scope Limited to **Insurance Coverage**
- Consider how long the indemnity obligation should **survive** beyond termination of the contract.

# Key Contract Provisions: Risk Allocation – Special Indemnification Considerations



- **Government Agencies**
  - Consider “to the maximum extent allowed by applicable law” clause
- Intellectual Property Infringement

# Key Contract Provisions: Risk Allocation – Limiting Third Party Reliance



- Endorsements
- Warranties

# Key Contract Provisions: Risk Allocation – Managing Liability and Indemnification Obligations



- “Flow down” to third parties, contractors
- Waivers
- Insurance

# Key Contract Provisions: Insurance



- Secure and maintain coverage
  - Understand scope and coverage
  - Consider event insurance
- Coverage types and amounts **should correspond to indemnification** obligations and potential liability exposure

# Key Contract Provisions: Insurance



- Document that your providers have it
  - Additional insured
  - Notice of cancellation
  
- Important Nuances
  - Waiver of subrogation



# Key Contract Provisions: Additional Terms – Information Technology



- **Data Security**
  - Party receiving and storing personal data bears responsibility for security and any breach of security
- **Data Storage/Recovery**
  - SLAs and remedies for downtime can help control risk

# Key Contract Provisions: Dispute Resolution



- **Litigation**
  - Inclusion of venue
  - Attorneys' fees and costs
  
- **Arbitration**
  - Expenses

# Managing the Internal Contracting Process



- Reevaluate the current review process
  - Identify types of **lower risk contracts** that can **forgo legal review**
  - Identify **certain dollar thresholds** for requiring **contract review**

# Managing the Internal Contracting Process



- Use **contract templates** and guidelines for non-legal staff
- **Implement and communicate** the revised process

# The Top “Take-Aways”



1. **Push back** when reasonable on clauses for limitation on liability and indemnification
2. **Minimize cost overruns** by narrowing attrition and cancellation clauses
3. Reexamine and revamp **internal contracting procedures**

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