

Tips for Easier Hotel Contract Review

By Robin Roth

Reviewing a hotel contract can be time-consuming, confusing, and frustrating. As a meeting manager, you are seeking a fair agreement that accurately and comprehensively covers your meeting arrangements. Yet the contract you receive from the hotel may be one-sided in favor of the hotel, vague in many places, and missing essential language.

The next time a hotel contract lands on your desk, read it twice. First, read what is there and identify the terms that need to be rewritten, changed, or deleted. Then, read it for what is not there and needs to be added. The following checklist will help you determine what to look for and what is missing. *(Note: This information is not intended to be “legal advice.” Meeting planners and hotel managers should consult a qualified attorney to review all contract issues.)*

CONTRACT SECTIONS

General Contract Issues

- Date of contract initiation.
- Accurate and complete legal names of both parties, addresses, and contact information as well as the name of the meeting. Be sure the contracting party is not listed as the name of the meeting; they are often not the same.
- Actual dates of the meeting, *not* the dates of the room block.
- Statement of whether the contract is a first or second option. A *first option* should specify the date by which the contract must be signed and returned to the hotel, after which date the option will expire and the contract may have to be renegotiated. A *second option* should include

the above as well as the date by which the hotel must reply to you after receiving the signed contract (typically three business days) and notify you of its decision.

Sleeping Room Block

- Table format showing the year, days of the week, and dates of the room block.
- Specific breakdown by type(s) of rooms/suites and number(s) per night.
- Beware of language that locks you into payment for the entire contracted block.

Room Rates

- Year quoted. If rates are quoted for any year other than the current year, that year should be specified.
- Future rates. If rates are not definite yet, indicate the formula to be used and when final rates will be established (usually 12 months out). Use at least two factors in the formula, such as percentage off rack rate, maximum percentage increase per year, or the Consumer Price Index, and state that final rates will be the lesser of the two formulas.
- Breakdown of rates by type of room/suite, single/double, deluxe, and government rate. State the percentage blocked in each rate category.

- Applicable taxes (sales, occupancy), service charges, and gratuities.
- Applicable charges for extra person in room.
- Currency. If the contract was initiated in another country, the rates are usually quoted in that country's currency.
- Ensure that final rates are not subject to change.

Complimentary and Other Negotiated Concessions

- One complimentary room per 50 revenue-producing rooms actually utilized. Spell out how the comps are calculated (on a cumulative or per-night basis) and whether they can be credited to the master account.
- Additional concessions. Include specifics such as the duration of each concession, i.e., comp rooms are for five nights each.
- If concessions are based on 80 percent of the room pickup, specify what happens if the pickup is less than 80 percent.
- State if a concession is complimentary.

Reservations

- Procedure. Is the group, hotel, or a third party handling housing? Will individuals call in, use reservation cards, be identified on a rooming list, or be serviced by a housing bureau? Will you use your own reservation form or the hotel's?
- Cutoff date. Identify the exact cutoff date — usually 30 days prior to the major arrival day. Indicate whether reservations received after the cutoff date will be honored at the group rate or a rate at the hotel's discretion.
- Confirmations. Specify if/when they are to be sent by the hotel.
- Check-in/check-out times.
- Dishonored reservations. Spell out what will happen if individuals with guaranteed reservations are turned away or "walked." Consider reimbursement of replacement accommodations or transportation to and from the new hotel.

Payment

- Rooms. Will individuals or the organization be responsible for payment?
- Deposits. For the group's master account, how much is due and when? For individuals, a credit card guarantee or one night's deposit is usually required.
- Early departure charge. Specify the amount (it should be less than one night's room rate) and that guests will be informed of this potential charge upon check-in.
- Master account. Typically, the credit application is due 90 days prior to arrival. Stipulate items that are to be included on the master account, as well as authorized signatories and payment terms.

Reports/Printouts to Request

- A per-night room pickup report.
- Individual cancellations and no-shows.
- Statistics for food and beverage revenue.

Function Space and Meeting Arrangements

- Agenda. Is it tentative or finalized? What are the due dates for the program? When will the hotel provide room names?
- Exact days, dates, setups, and functions.
- Specific room names or minimum square feet required; start/end times for 24-hour hold on space.
- Ancillary charges. Are there charges for meeting room rental and/or setup? Is there a fee for "extensive" meeting room setups and how is that defined? Is there a charge for using outside suppliers or contractors? If there is no charge for any of these services, be sure to state that.
- Release of space. What are the terms?
- Security guards. Hotel should "request," not "require," security guards.
- No changes to function space assignments or requirements should be allowed without written group consent.

Food and Beverage

- Menu prices. Firm prices should be established no later than six months out.
- Guarantees. Most guarantees should be given 48 or 72 hours prior to the function. Specify how weekends affect this deadline.
- Taxes and gratuities. State whether the service charge is taxable.
- Hotel's alcohol service policy, adherence to laws, and intoxication policy.
- Food and beverage cancellation or reduction/mitigation clause.

Exhibit Space

- Exact dates. Include beginning and ending times, setup and move-in, tear-down, and move-out.
- Costs. What is the rental fee? Does it include daily maintenance and vacuuming of the aisles? Be sure the charges are by net, not gross, square feet.
- Booths. List type, size, and number.
- Box delivery. What are the charges? When shipping boxes to the hotel prior to the meeting, where and by when should they be shipped?
- Security guards. Are they required?
- Release of space. What are the terms?
- Exhibitor responsibility clause. Make sure it absolves both the hotel and your organization of liability.

Room Block Control and Pickup

- Provisions for attrition and mitigation. (See “Analyzing Attrition Clauses” and “Making Sense of Mitigation” on pages 37 and 40, respectively.)
- Meeting room rental/facilities service fees. Does the rental fee apply per day for a certain number of days (if so, it should apply only to the major days) or is it all-inclusive? The rental scale should be based on sleeping room revenue.
- Include room block review dates and allowed adjustment/attrition.
- If there are no room block performance charges, that should be stated.
- Any nonrefundable individual cancellation or early departure fees that are collected should be applied to any group performance or cancellation charges due.
- Do not allow more than one room block performance charge.

Rights of Termination for Cause

- Force majeure for termination in the event of an emergency over which neither party has control (also known as an “impossibility”) should be mutual and state that termination will be without a cancellation charge.
- Termination should be allowed for construction, change in management company or ownership, bankruptcy, conflicting booking/competitor, and unavailability of convention center or other facility.
- “Without liability” is often missing in these clauses.

Cancellation

- By the group. There should be a sliding scale of charges as well as mitigation.
- By the hotel. The group should be made whole for its losses.
- The same clause should not include both the hotel and the group; issues affecting the group and the hotel are too different to have the same charges owed.
- Cancellation clause. Be sure to include one for your group or total revenue could be owed.
- Watch out for cancellation clauses that seek to recoup all revenue that the hotel would have lost; damages owed should be in terms of lost room revenue only.

Americans with Disabilities Act

- Hotel should warrant its compliance.
- Specify the group's obligations.
- State mutual cooperation in identifying needs.
- Each party should indemnify the other for violations by the indemnifying party.
- Beware of vague language and one-sided obligation for the group.

Dispute Resolution

- What method will be used — arbitration, litigation, or other?
- Which side pays attorney fees?
- In the event the hotel sues the group for collection of funds the group owes, and the hotel wants to be reimbursed for its attorney fees, the hotel should be reimbursed only for attorney fees the hotel incurred to collect charges that the group does not dispute that it owes.
- Any dispute resolution should be at a neutral site.

Miscellaneous Issues

- Indemnification should be reciprocal and each party should be responsible for its own negligence.
- Insurance should be a mutual clause.
- The hotel should warrant the condition of the facility. It should be the same or better than at the time of the on-site visit or contract signing.

- The hotel should state its adherence to laws regarding fire, safety, and health codes.
- The hotel will usually ask that the laws of the state where the hotel is located will apply in the event of a dispute, as will venue and jurisdiction, but that may unnecessarily lock the group into traveling if there is litigation.
- The laws of which state govern the contract?

Closing Issues

- Can the contract be assigned to other parties?
- How are notices to be given?
- Itemize all attachments.
- Merger clause. State that this contract constitutes the entire agreement and supersedes previous agreements.
- Changes can be only in writing.

- Severability. Is the contract enforceable if any provision is ruled unenforceable?
- Is a faxed document valid? It should be if the original is received within 72 hours of the receipt of the fax.
- What is the authority of the signatories?
- Signature information — name, title, group name, and date.

Robin Roth is senior contracts editor at Conferon, Inc. in La Quinta, California.

Analyzing Attrition Clauses

As hoteliers and meeting planners both know, contracts have gotten increasingly longer and more complex in recent years, mainly for two reasons:

1. Hotels are trying to protect themselves from previous mistakes that have cost them money.
2. Prosperity reigns. Convention hotels have experienced record-breaking occupancy, profits, and annual rate increases.

As a result, performance-related clauses are now the rule rather than the exception. Some other reasons for this trend include:

Owner demands have increased. In the past, owners purchased hotels for real estate investments and tax write-offs. Today, however, many of the hotel chains and ownership groups are publicly traded and need to deliver a return to their shareholders. Properties are now competing not only against each other, but also against other investment opportunities.

Availability is shrinking. Growth in the meetings market has outpaced the building of convention hotels.

Many hotels continue to invest tremendous amounts of capital to improve their product through renovations and additions and they need a return on these investments.

Guest rooms are perishable. Today's available guest room cannot be sold tomorrow — enter the buzzword “yield management.” Given the fact that hotels' goals are to maximize revenue and occupancy, hoteliers now must ask themselves the critical question: “Can we afford to take a piece of business that is unprotected?”

Unfortunately, there isn't much you can do about this trend toward including performance clauses in contracts

other than make sure the clauses are fair to both parties. Here are several tips to consider for your future negotiations:

Restrict room block performance to a single clause. Many hotel contracts include multiple performance clauses all tied back to room pickup. Conferon encourages hotels to narrow room pickup liability to one clause — no double jeopardy. Include language that encourages both parties to manage the room block.

Ensure that attrition fees are due after the date the meeting would have been completed. Remember that if the meeting hadn't been cancelled or there was no attrition, the hotel would not have received the room revenue until after the meeting concluded. No fees should be paid before the meeting date.

Do not use the term “penalty.” Penalties constitute unfair, unequal financial payment and are frowned upon by the courts.

Attrition fees typically should not include room tax. In many states, liquidated damages are not taxable. Ask the property to provide documentation of taxation of liquidated damages prior to including it with your payment.

Get credit for miscoded rooms. Make sure you (or the hotel) compare your registration or attendee list to the hotel's in-house guest list and receive credit for all of the rooms associated with your group.

What if there is no attrition clause? If there isn't a clause, consider adding a clause that states: “The Group will not be liable for utilization of the entire room block or any guest room slippage.”

Computing Attrition Damages

For any room block reductions or room pickup deficits that exceed the agreed-upon scale, include a very clear and concise formula to determine the damages due. This should be a formula that all parties can interpret, calculate, and use to derive the same answer. It needs to take into consideration making the hotel “whole” for the actual damages. A provision including the property’s duty to attempt to mitigate, or lessen, the damages is recommended.

Actual Contract Clauses

Below you will find a review of two sample clauses from actual hotel contracts, pinpointing language that needs more definition, identifying pieces that are missing, and suggesting language that should be added. (Note: None of the information contained here is intended to be legal advice. Meeting planners and hoteliers should consult a qualified attorney to review all contract issues.)

The first example is found in many small-meetings contracts and is more typical of a small chain hotel.

Sample Clause 1

If the Group room count should fall short of utilizing 80 percent of the original group commitment, or should any food and beverage function be deleted from your agenda, we reserve the right to review and adjust the special rates offered, and/or a charge for meeting space may result.

This clause presents several challenges:

- Very few groups can support a room rate increase after promoting the group rates to potential attendees.
- The language is so vague that it’s impossible to determine the organization’s actual liability.
- Terms don’t encourage review of pickup and advance management and adjustment to the room block.
- This clause does not allow for the hotel to reduce the group’s damages if it is able to recoup lost revenue.

The next clause, more typical of a large convention hotel, is far more detailed.

Sample Clause 2

Should the hotel not realize the full amount of its anticipated revenue from sleeping rooms and food and beverage functions, due to reduced usage of sleeping rooms within your block and/or reductions in food and beverage functions or their scope, the parties agree it would be difficult to determine the Hotel’s actual loss, because the Hotel would not only have lost the anticipated revenues derived from this agreement, but also the opportunity to have offered the unused sleeping rooms and/or food and beverage services individually or as part of a larger block to other parties. Accordingly, the parties agree that the following performance scale (see Performance Scale Chart below) will apply, that it rep-

resents a reasonable effort on behalf of the Hotel to establish its loss prospectively, and that it shall represent liquidated damages.

Performance Scale for Determining Liquidated Damages

If the percent of anticipated revenue from sleeping rooms and F&B functions actualized by the hotel is 80 percent or more, then the percent of anticipated revenue from rooms and functions to be paid by Group in addition to revenues actualized = No fee.

If the percent of anticipated revenue from sleeping rooms and F&B functions actualized by the hotel is 70 percent to 79 percent, then the percent of anticipated revenue from rooms and functions to be paid by Group in addition to revenues actualized = 10 percent of total room revenue.

If the percent of anticipated revenue from sleeping rooms and F&B functions actualized by the hotel is 60 percent to 69 percent, then the percent of anticipated revenue from rooms and functions to be paid by Group in addition to revenues actualized = 20 percent of total room revenue.

If the percent of anticipated revenue from sleeping rooms and F&B functions actualized by the hotel is 50 percent to 59 percent, then the percent of anticipated revenue from rooms and functions to be paid by Group in addition to revenues actualized = 30 percent of total room revenue.

If the percent of anticipated revenue from sleeping rooms and F&B functions actualized by the hotel is 49 percent or below, then the percent of anticipated revenue from rooms and functions to be paid by Group in addition to revenues actualized = 75 percent of total room revenue.

Items that should be negotiated to make this clause more equitable include:

- There is no “resell” provision. The hotel is assuming it will definitely lose revenue. If it is successful in reselling, it may not suffer a loss.
- There is no formula for computing the total anticipated revenue expected by the hotel. Could two different salespeople at the same hotel come up with the same figure?
- If there’s no fee for an 80 percent pickup, should the group really pay 10 percent of total room revenue if it actualizes 79 percent?
- This clause does not encourage review of pickup and advance management of the room block.

An Alternative Clause for Consideration

The following clause addresses many of the difficulties discussed above:

Group is required to utilize 85 percent of the final adjusted room block that has been mutually agreed upon in writing (“85%”). Adjustments to the room block herein may only be

made with the written consent of both parties. If Group fails to utilize “85%,” it will pay to the Hotel as liquidated damages, not a penalty, an amount equal to the lost profit on the room revenue: 75 percent (assumes hotel gross room profit at 75%) of Group’s single room rate multiplied by the difference between “85%” and the number of rooms utilized.

Group will only pay liquidated damages for rooms that are not resold and remain available for sale. Group will not be charged for more rooms on a particular night than Group had blocked on such night. Prior to the billing for the attrition payment, Hotel must submit to Group a copy of the city ledger or daily occupancy report documenting that the rooms were not resold and were available for sale. Hotel agrees that after receipt of this attrition payment it will not seek additional damages.

Several features of this attrition clause are desirable from a meeting planner’s perspective:

- The term “final room block” allows for adjustments in the room block.
- The group’s liability for 85 percent of the room block is generally accepted by most hotels.
- Limiting the payment to lost profit on the room revenue is consistent with the legal remedy recommended to make the hotel “whole” in the event of breach of contract.
- There is a resale provision with documentation required from the hotel to prove its damages.

—Robin Roth

Making Sense of Mitigation

If the cancellation and attrition clauses in your contracts with hotels don’t include a mitigation provision, you could find yourself in an expensive situation in the event that you need to cancel a meeting or your group fails to pick up all the guest rooms that were contracted for.

What is mitigation? It is the duty that the hotel has to a group to reduce or minimize its damages by reselling canceled or released rooms. It is part of the process of compensating the property for actual damages, and it helps to make the property “whole.” Although hotels are not legally obligated to agree to both liquidated damages and mitigation, they will often do so in order to maintain a sense of fairness and to avoid the appearance of “double-dipping” — receiving payment both for the canceled or released rooms and for the same rooms if they are successful in reselling them.

Have you ever wondered how to figure out the amount due for actual damages after mitigation? Contracts initiated by hotels rarely have mitigation clauses, and these are usually limited to vague statements along the lines of “If the hotel is able to sell any of the guest rooms canceled, that portion of the damages will be refunded based upon the number of guest rooms resold.”

There is no industry-wide formula generally agreed upon for the calculations, so it’s often difficult for two people to agree on the amount due. The language of the provision needs to be fair, clear, and concise. No hotel should receive

more room revenue from an attrition or cancellation fee on any single day than it would have received had it been sold out.

Let’s say a group cancels its meeting six months out and owes 75 percent of unsold room revenue from the rooms in its block. Correct interpretation of this clause would be that the group owes 75 percent of the daily contracted room revenue for its room block or the unsold room revenue at the hotel for that day, whichever is less. You should first multiply

Example

	Group’s Favorite Hotel	
	Wednesday	Thursday
Total Rooms in Hotel	200	200
Rooms Unavailable for Sale:		
Out of Order and Complimentary	10	6
Total Net Available Rooms for Sale	190	194
Total Occupancy, Including Group Rooms	180	95
Group Rooms Blocked	100	115
Rooms Utilized by Group	65	81
Group’s Average Rate	\$140	\$140

the total number of rooms in the group’s block for each day by 75 percent and then multiply the resulting figure by the group’s average rate as shown in Formula 1. (For purposes of this example, average rate equals \$140 per night.) The sum for each day will equal the group’s maximum liability.

To see if this amount can be reduced, you need to determine the total number of rooms available for sale each day

by taking the number of rooms in the hotel and subtracting any complimentary rooms and rooms that are “out of order” for that day as shown in Formula 2. From this figure, subtract the total number of occupied rooms and multiply that sum by the group’s average rate (\$140).

Let’s take each day, according to the example.

Wednesday

- Formula 1: 75% of 100 rooms blocked = 75 rooms that the group is responsible for: $75 \times \$140 = \$10,500$
- Formula 2: 200 rooms in hotel minus 10 rooms unavailable for sale = 190 rooms available for sale, minus 180 rooms occupied = 10 unsold rooms: $10 \times \$140 = \$1,400$

Amount Due:

For Wednesday, the group would owe the lesser of the two totals: \$1,400. On this day, the hotel recovered damages by reselling some canceled rooms. The group was responsible for 75 rooms, but the property only had 10 rooms unsold that were available for sale. Mitigation saved the planner more than \$9,000 and the hotel received full value for 100 percent of its rooms.

Thursday

- Formula 1: 75% of 115 rooms blocked = 86 rooms that the group is responsible for: $86 \times \$140 = \$12,040$
- Formula 2: 200 rooms in hotel minus 6 rooms unavailable for sale = 194 rooms available for sale, minus 95 rooms occupied = 99 unsold rooms: $99 \times \$140 = \$13,860$

Amount Due:

For Thursday, the group would owe the lesser of the two totals: \$12,040. On this day, the hotel was not able to recover any damages by reselling the canceled rooms. The group was responsible for 86 rooms, but the hotel had more than that — 99 rooms — unsold that were available for sale.

By using the above method, all parties can easily calculate and arrive at the same figures, and the damages due are a fair amount for both parties.

Calculating Attrition Damages

The same method can be used to calculate attrition damages. Let’s say the group is responsible for 80 percent of the room block. Should the group’s actual pickup fall below 80 percent, then the group must make up the difference to the hotel. We’ll use the same figures as before, only we also need to take into account the number of rooms the group utilized.

Let’s take each day again, according to the example.

Wednesday

- Formula 1: 80% of 100 rooms blocked = 80 rooms that group is responsible for. Group picked up only 65 rooms, so $80 \text{ minus } 65 = 15$ rooms that group is

responsible for: $15 \times \$140 = \$2,100$

- Formula 2: 200 rooms in hotel minus 10 rooms unavailable for sale = 190 rooms available for sale, minus 180 rooms occupied = 10 unsold rooms: $10 \times \$140 = \$1,400$

Amount Due:

For Wednesday, the group would owe the lesser of the two totals: \$1,400. On this day, the hotel recovered damages by reselling some of the rooms that the group failed to pickup. The group was responsible for 15 rooms, but the hotel had only 10 rooms unsold that were available for sale. Here, having mitigation in the contract saved the group \$700.

Thursday

- Formula 1: 80% of 115 rooms blocked = 92 rooms that group is responsible for. Group picked up 81 rooms, so $92 \text{ minus } 81 = 11$ rooms that group is responsible for: $11 \times \$140 = \$1,540$
- Formula 2: 200 rooms in hotel minus 6 rooms unavailable for sale = 194 rooms available for sale, minus 95 rooms occupied = 99 unsold rooms: $99 \times \$140 = \$13,860$

Amount Due:

For Thursday, the group would owe the lesser of the two totals: \$1,540. On this day, the hotel was not able to recover any damages by reselling the rooms that the group did not pickup. The group was responsible for 11 rooms, but the hotel had more than that — 99 rooms — unsold that were available for sale.

Since an important part of the mitigation process is accounting for resold rooms, it’s important to get proper documentation from the hotel as to its occupancy. Ask the property to provide a city ledger report, which will show occupied rooms as well as complimentary and out of order rooms. A city ledger report is run on a nightly basis by the hotel to document room tax that is paid to the city.

Using these easy-to-follow formulas, you and your hotel sales representative should be able to arrive at an amicable agreement in the event that you need to cancel a meeting or your room pickup is off by a wide margin ... provided that a mitigation clause is included in your contract with the hotel.

—Robin Roth

Food and Beverage Performance

In recent years, performance clauses dealing with attrition and/or cancellation of food and beverage functions have become commonplace ... and fraught with problems. Often it's difficult to determine the damages due and whether the terms are fair to both parties, leaving meeting managers to contend with a three-ring circus of language that is too vague, too broad, and overly punitive.

Consider the following excerpt from a food and beverage attrition clause in a hotel contract:

More than 6 months prior to the scheduled date: 33 percent of the food, beverage, and meeting room revenue [is due] based on the minimum estimate of the total cost of the function.

This clause presents several challenges. First, you probably won't know what the "minimum estimate" is since menu prices usually aren't confirmed until six months out, nor is the final agenda typically submitted by that time. Second, meeting room rental may not be defined six months before the start of the meeting.

The situation gets even more complicated when F&B performance is tied into room block attrition and/or cancellation clauses as in the example below:

The commitments and concessions the Hotel has made on behalf of the Organization are based upon the revenues the Hotel expects to realize under this agreement and are based upon full usage of the sleeping room block and/or the full attendance at the catered food and beverage functions to which the Organization has committed. Should the actual revenue fall below 90 percent of the Committed Revenues herein, the Organization agrees to pay additional charges in the amount which would bring the total to equal 90 percent of the Committed Revenues.

What are the "Committed Revenues"? In this particular contract, the only term that even remotely resembles "Committed Revenues" is a term called "Total Committed Guest Room Revenue," a total of the revenues expected from the room block being held. Also in this specific contract, there are no catered functions, but they may be added at a later date. If a food and beverage function is included at some point in the future, will "Committed Revenues" be defined at that time? The clause doesn't address this issue.

In addition, this contract was signed three years out. How can the group contract for a fixed amount of F&B revenue

three years out when the agenda and the hotel's meal prices probably won't be finalized until six months out? A slippage allowance of only 10 percent in three years leaves little room for adjustment.

If the organization *did* include F&B in the agreement and, two years out, the expected attendance at a dinner decreased to a number below 90 percent of the originally contracted number, would it be fair for the property to charge the group the difference that far in advance? Lastly, is it fair for the hotel to charge the same amount for F&B slippage as for room block slippage when the profitability of the two areas is so different?

The following points should help you make sense of food and beverage performance clauses and negotiate terms that are fair to both your organization and the hotel:

F&B performance should be addressed in one separate clause. The clause should be clear as to whether F&B attrition or cancellation or both are applicable, and it should include specific time frames as well as a specific method for determining the damages due.

It should *not* include meeting room rental, and there should be no tie-in to room pickup. Room block performance issues are better left to a completely separate clause.

What happens if the contract contains a food and beverage cancellation clause and the organization cancels the whole meeting? The contract should explicitly address this possibility in an independent cancellation clause. Remember, F&B attrition and/or cancellation clauses are intended for individual functions — not entire events.

The hotel should recover lost profit only. If a dispute arising from a food and beverage performance clause were settled in court, the hotel would most likely be entitled to recover its lost profit in order to be made "whole." Surely liquor offers more profit, breakfast less. However, most hotels are willing to agree to an overall profit percentage of between 30 percent and 40 percent for all functions.

Define lost profit. Define profit both in terms of a percentage range (30 percent to 40 percent) and actual dollar amounts for each meal. For example, if the property's profit from F&B is 35 percent, a \$15 breakfast would net the hotel about \$5 profit per person, a \$21 lunch would net \$7

per person, a \$36 dinner would net \$12 per person, and a \$24-per-person reception would net \$8 per person. These numbers can be negotiated and changed depending on the circumstances of the individual hotel and meeting.

Include only definite major functions. Smaller events like coffee breaks and committee luncheons should *not* be included in performance clauses. Definite major functions can be defined by referring to the schedule of events in the contract.

F&B liability time frames should be close to the meeting. Many groups have been successful in negotiating with their meeting property to have the liability not become effective until two or three months prior to arrival. The hotel does not purchase food until a week before the meeting, so technically it does not suffer any lost profit from canceled or reduced functions until after the meeting.

What it *does* suffer is a loss of profit for the event cancelled. Remember, the closer to the meeting dates a cancellation takes place, the harder it is for a property to resell the banquet space. Everyone's goal should be that no party loses financially should an F&B function be cancelled. Give the hotel enough lead time to book another group. Accordingly, within two to three months of arrival is a recommended compromise point for food and beverage liability to kick in.

Get credit for resold functions. If the group cancels a function and the property is able to replace it with another function, the resulting profit should be credited toward the damages owed by the group. In addition, if events are added in conjunction with the meeting, the resulting profit should be credited toward the damages owed.

Performance fees should be due after the meeting. This is the same time the hotel would receive revenue from F&B functions if the meeting had occurred. It gives you time to review the hotel's actual loss and adjust your fees should mitigation be in your contract.

Do not use the term "penalty." Penalties constitute unfair, unequal financial payment and are frowned upon by the courts.

Performance fees typically should not include tax. In many states, liquidated damages are not taxable. Ask the hotel to provide documentation of taxation of liquidated damages prior to including taxes with your payment.

What if there is no F&B performance clause? If there isn't a clause, it may not mean you are free from liability if the hotel suffers a loss. Consider adding a clause stating that the group will not be liable for any performance charges other than those specified in the contract.

Use either a per-event or an aggregate clause. A

performance clause may be based on each event according to the schedule of events or it may be based on an aggregate dollar amount of your total meeting's anticipated food and beverage revenue.

An example of an acceptable per-event clause is:

If any definite major food and/or beverage function in the schedule of events in this contract is canceled within two (2) months of arrival, Group shall pay to Hotel as liquidated damages, not as a penalty, an amount equal to Hotel's lost profit for each such function. If Hotel is able to replace a canceled function, or if a food and/or beverage function is added in conjunction with this meeting, the resulting profit shall be credited against the liquidated damages owed by Group.

- *Reduction: If attendance at any definite major food and/or beverage function is reduced within two (2) months of arrival to a number below 75 percent of that specified in the schedule of events in this contract, Group shall pay to Hotel as liquidated damages, not as a penalty, an amount equal to Hotel's lost profit for each cover below 75 percent. If a food and/or beverage function is added in conjunction with this meeting, the resulting profit shall be credited to Group against the liquidated damages owed by Group.*
- *Definition of "profit": As used in this clause, the term "profit" is defined as 30 percent to 40 percent of the anticipated food and/or beverage revenue. However, it is agreed that lost profit will not exceed \$5 per person for breakfast, \$7 per person for lunch, \$12 per person for dinner, and \$8 per person for a reception.*

The following is an example of an acceptable aggregate clause:

Hotel is relying on, and Group agrees to provide, a minimum of \$ [INSERT 80 percent of anticipated amount] of the total food and beverage revenue. If Group's total actual food and beverage revenue slips below this amount, Group agrees to pay as liquidated damages (agreed not to constitute a penalty) the lost profit on the food and beverage revenue: 30 percent of the difference between the agreed minimum and the actual total food and beverage revenue. Group also agrees that, with respect to guaranteed functions, Group will pay for the greater of (1) actual attendance or (2) the guaranteed attendance, with the revenue from such payments counting toward the satisfaction of Group's minimum total food and beverage revenue commitment.

Please keep in mind that none of the above information is intended to be legal advice. Meeting planners and hotel managers should consult a qualified attorney to review all contract issues, not just those related to performance.

— Robin Roth