

G A R V E Y S C H U B E R T B A R E R

GROUP SALES CONTRACTS:
INTERESTING CASE STUDIES

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GSBlaw.com



Agenda Options

- Case Study No. 1 – The New Contract Paradigm
- Case Study No. 2 – Insult to Injury – Group Bankruptcy
- Case Study No. 3 – Government Contracting Pitfalls
- Case Study No. 4 – Contracting in the Dark – Blind Commissions

Case Study No. 1 – The New Contract Paradigm

Background

1. Group: Large International Technology Company
2. Venue: National Chain of 3-4 Star Hotels
3. History: Long-Standing Relationship – Bay Area Hotels
4. Status: Master Services Agreement

Case Study No. 1 – The New Contract Paradigm

Fees

As consideration for Venue's performance of the Services, Group shall compensate Venue as set forth in, and subject to, the terms and conditions of the applicable Event Addendum. Venue acknowledges and agrees that the payment provided for in the Event Addendum constitutes Venue's entire remuneration for its performance of the Services under this Agreement. Venue will not be reimbursed for any additional charges or expenses of any kind without the express prior written approval of an authorized Group representative.

Case Study No. 1 – The New Contract Paradigm

Requests for Services

BY ITS EXECUTION OF THIS AGREEMENT, VENUE EXPRESSLY ACKNOWLEDGES AND AGREES THAT IT SHALL NOT PERFORM ANY SERVICES HEREUNDER UNLESS AND UNTIL VENUE HAS BEEN ISSUED A PURCHASE ORDER FOR THE SERVICES BY GROUP'S CORPORATE TRAVEL DEPARTMENT. GROUP SHALL HAVE THE RIGHT, IN ITS SOLE DISCRETION, TO REFUSE PAYMENT FOR ANY SERVICES PROVIDED PRIOR TO OR WITHOUT A PURCHASE ORDER.

Case Study No. 1 – The New Contract Paradigm

Audit

Group shall have the right, at any reasonable time during the term of this Agreement and for a period of three (3) years after expiration or termination hereof, to audit Venue's records pertaining to Venue's obligations under this Agreement. Venue shall maintain all such records for at least three (3) years after the expiration or termination of this Agreement.

Case Study No. 1 – The New Contract Paradigm

Non-Disclosure

Venue shall not disclose any Confidential Information to any third party or otherwise, and shall take all reasonable precautions to prevent its unauthorized dissemination, both during and after the term of this Agreement. Venue shall take steps to ensure that dissemination is so limited, to Venue Personnel who (i) have a need to know solely for the purposes of this Agreement, (ii) have been advised of their confidentiality obligations, and (iii) are under substantially similar obligations of confidentiality as those set out in this Section.

Case Study No. 1 – The New Contract Paradigm

Personal Data

Venue shall, and shall ensure that any Venue Personnel assigned to perform the Services, collect, access, maintain, use, process and transfer Personal Data in accordance with the requirements set forth in this Section and for the sole purpose of performing Venue's obligations under this Agreement.

Case Study No. 1 – The New Contract Paradigm

Protection of Personal Data

Venue and Venue Personnel shall at all times comply with Group's instructions regarding Personal Data, as well as all applicable laws, regulations, and international accords, treaties, or accords, including without limitation, the EU/US Safe Harbor program (collectively, "Legal Requirements"). Without limiting the generality of the foregoing, with respect to any data received directly or indirectly from the European Economic Area or from Group's European affiliates, Venue shall abide by the Safe Harbor Privacy Principles of the U.S. Department of Commerce, located at <http://www.export.gov/safeharbor>, as may be amended from time to time.

Case Study No. 1 – The New Contract Paradigm

Protection of Personal Data (cont'd)

Venue may only disclose Personal Data to third parties (including Venue Personnel), who have a need to know and have signed agreements that require them to protect Personal Data in the same manner as detailed in this Agreement. Venue shall hold such third parties with access to Personal Data accountable for violations of this Agreement, including imposing sanctions and, where appropriate, terminating contracts and employment.

Case Study No. 1 – The New Contract Paradigm

Security Procedures

Venue shall maintain reasonable operating standards and security procedures, and shall use its best efforts to secure Personal Data through the use of appropriate physical and logical security measures including, but not limited to, appropriate network security and encryption technologies. Venue shall use reasonable user identification or password control requirements, and other security procedures as may be issued from time to time by Group in relation to Personal Data.

Case Study No. 1 – The New Contract Paradigm

No Gratuities

Venue shall not offer or give any Group employee, contractor or agent any gratuity, payment or other personal benefit or inducement with a view toward securing business from Group or influencing the terms, conditions or performance of this Agreement, Event Addendum or purchase order, or otherwise take any action that is or may be perceived as inconsistent with the United States Foreign Corrupt Practices Act (FCPA).

Case Study No. 1 – The New Contract Paradigm

Supplier Code of Conduct

At all times during the term of this Agreement, Venue shall comply with, and shall ensure that all Venue Personnel comply with the requirements of Group Supplier Code of Conduct found at www.group.com/supplierresponsibility (“Code of Conduct”). Subject to Venue’s site-safety and security requirements, Group, or an external monitor shall have the right to visit Venue’s facilities to assess compliance with the Code of Conduct, and to audit Venue’s wage, hour, payroll, and other worker records and practices.

Case Study No. 1 – The New Contract Paradigm

Supplier Code of Conduct (cont'd)

To the extent that this Agreement contemplates Venue's engagement of subcontractor(s) to perform any of its obligations under this Agreement. Venue shall ensure that its agreements with each such subcontractor; (a) require such subcontractor's compliance with the Code of Conduct; (b) provide that Group shall have the right to assess such subcontractor's compliance with the Code of Conduct; and (c) require such subcontractor to promptly implement corrective action to remedy any material non-conformance, identified by Group.

Case Study No. 2 – Insult to Injury: Group Bankruptcy

Background

1. Group: Private Travel Club
2. Venue: Large Luxury Resort
3. Event: August 25-29, 2010 / 52 room nights / \$100,000 room and F&B revenue
4. Status: Hotel Tour Contract issued on April 21, 2010

Case Study No. 2 – Insult to Injury: Group Bankruptcy

Prepayment

All reservations must be prepaid in full to the Hotel 14 days prior to Travel Company's clients' arrival. For bookings made within 14 days we require a credit card or a certified cheque for the full amount. Reservations not prepaid will be released without prior notice.

Case Study No. 2 – Insult to Injury: Group Bankruptcy

Group Deposit

A non-refundable deposit of \$500 per group booking per property is required with signed contract. The balance of the account is paid in full 30 days prior to arrival

Case Study No. 2 – Insult to Injury: Group Bankruptcy

Deposit History

Total Charges:	\$98,207.60
Initial Deposit (Aug. 25):	\$29,175.00
Second Deposit (Aug. 25):	<u>\$ 500.00</u>
Total Deposits:	<u>\$29,675.00</u>
Balance (Aug. 25):	\$68,532.60

Case Study No. 2 – Insult to Injury: Group Bankruptcy

Payment History

Event (Aug. 25-29):	\$68,532.60
1 st Payment (Dec. 16, 2010):	\$30,000.00
2 nd Payment (Jan. 13, 2011):	<u>\$15,727.50</u>
Balance:	\$22,805.10

Case Study No. 2 – Insult to Injury: Group Bankruptcy

B9B (Official Form 9B) (Chapter 7 Corporation/Partnership No. Asset Case) (12/07)		Case Number
UNITED STATES BANKRUPTCY COURT Eastern District of Michigan		
Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines		
A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on 2/28/11.		
You may be a creditor of the debtor. This notice lists important deadlines. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.		
See Reverse Side For Important Explanations		
Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address): Group		
Case Number:	Social Security / Individual Taxpayer ID / Employer Tax ID / Other nos.:	
Attorney for Debtor(s) (name and address):	Bankruptcy Trustee (name and address):	
Telephone number:	Telephone number:	
Meeting of Creditors		
Date: March 31, 2011	Time: 01:30 PM	
Location:		
Creditors May Not Take Certain Actions:		
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.		
Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.		
Creditor with a Foreign Address:		
A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.		
Address of the Bankruptcy Clerk's Office:	For the Court:	
Telephone number:		
Hours Open: Monday – Friday 08:30 AM – 4:00 PM	Date: 2/28/11	

Case Study No. 2 – Insult to Injury: Group Bankruptcy

CHEATEM & STEALEM
PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW

June 25, 2012

BY U.S. MAIL

Dear Sir/Madam:

On February 28, 2011 (the “Petition Date”), [Group] filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. My firm represents Cindy Lewis, in her capacity as trustee of the [Group’s] bankruptcy estate (the “Estate”).

According to [Group’s] books and records, [Resort Hotel] received payments from [Group] totaling \$46,180.50 during the 90 day period prior to the Petition Date. Trustee believes that the payments may constitute preferential transfers which Trustee may avoid and recover pursuant to Sections 547 and 550 of the United States Bankruptcy Code.

If [Resort Hotel] disputes that the payments constitute preferential transfers that Trustee may avoid and recover, please promptly provide me with information which supports your position. Otherwise, please send me a check payable to “Cindy Lewis, trustee of the Chapter 7 bankruptcy estate of [Group],” in the amount of the payments (i.e., \$46,180.50). If, on or before July 31, 2012, I do not receive a check in the amount of the payments or otherwise hear from you, Trustee intends to file with the Court a complaint against [Resort Hotel] to avoid and recover the payments.

Case Study No. 2 – Insult to Injury: Group Bankruptcy

Preferential Transfer?

Case Study No. 3 – Government Contracting Pitfalls

Background

1. Group: U.S. Government Agency
2. Venue: Large Convention Hotel – Top 25 Market
3. Event: February 2013 Military Training Program / 5700 room nights / \$900,000 room and F&B revenue
4. Status: Hotel's group agreement executed in Sept. 2008
5. Additional Details:
May 2012 – OMB issues new regulations prohibiting federal agency from spending more than \$500,000 on single conference

Case Study No. 3 – Government Contracting Pitfalls

Cancellation

If Group elects to cancel this Contract for any reason other than a termination for cause or pursuant to the force majeure clause of this contract, Group agrees to provide written notice to Hotel accompanied by the payment indicated in the following scale:

Contract Signing to November 2009	\$ _____
From November 2009 to January 2011	\$ _____
From January 2011 to March 2012	\$ _____
From March 2012 to May 2013	\$ _____

If such payment does not accompany the Group's cancellation notice, the amount owed by the Group shall be determined in accordance with the scale above by using the date the payment is actually made.

Case Study No. 3 – Government Contracting Pitfalls

Force Majeure

The performance of this Contract is subject to acts of God, government authority, government rules and regulations, war, strikes, civil disorder, curtailment of transportation facilities, disaster, or other emergencies, any of which make it illegal or impossible for either party to perform its obligations. It is provided that this Contract may be terminated for any one or more of such reasons by written notice from one party to the other without liability.

Case Study No. 3 – Government Contracting Pitfalls

Group Letterhead

Attn: Hotel Director of Sales

This letter is to notify you that [Planner] is terminating for cause its Letter of Agreement for the Training Symposium to be held February 2013. [Planner] terminates this contract because several government rules, regulations and government authorities have materially affected and/or made it impossible for [Planner] to perform its obligations. The Office of Management and Budget (OMB) recently sent a memo to all Federal agencies prohibiting Federal Agencies from spending over \$500,000 on a single conference. We have received notification that the [Federal Agency] is canceling this event.

Case Study No. 3 – Government Contracting Pitfalls

Group Letterhead

Attn: Hotel GM

[Planner's] position is that we strongly disagree with your assessment that the cancellation of the Symposium is not covered by the terms of our contract.

However, since you strongly protest that this is not the case, as a matter of compromise, [Planner] will agree to submit your claim to the [Federal Agency] as a pass through claim under the condition that [Hotel] and [Planner] agree that [Planner] shall be liable for [Hotel's] damages and costs incurred as a result of the [Planner's] cancellation, but, as a condition precedent, only as, when, and to the extent [Planner] receives payment from the Government for [Hotel's] damages and costs.

Case Study No. 3 – Government Contracting Pitfalls

Government Contracting Basics

- Prime Contractor vs. Subcontractor
- Termination for Convenience
- Recoverable Damages Limited by Law
- “Pass Through” or “Sponsored Claims”

Case Study No. 3 – Government Contracting Pitfalls

Contracting Considerations

- Termination For Convenience
- Coordinate Claims Calculation and Submission
- Force Majeure
- Don't Waive Claims/Rights

Case Study No. 4 – Contracting in the Dark

Background

1. Group: National Homebuilder
2. Venue: Large Convention Hotel – Caribbean
3. Event: National Sales Meeting – July 2013
4. Status: Negotiation of Hotel's form group sales contract underway

Case Study No. 4 – Contracting in the Dark

From: Meeting Planner
Sent: Wednesday, January 30, 2013
To: Sales Director
Subject: Blind Commission Letter

Hello Sales Director,

Attached is a standard letter we prepared for our hotel partners to submit to us and as you will read it holds you harmless.

I have used this for independent hotels as well as chain hotels without ever having an issue.

Please let me know if this will work.

Kind regards,
Meeting Planner

Case Study No. 4 – Contracting in the Dark

From: Meeting Planner
Sent: Wednesday, January 30, 2013
To: Sales Director
Subject: Blind Commission Letter

Hi Sales Director,

Some of our clients' corporate agreements take hotel commissions into consideration and the clients "confuse" Meetings & Incentives with the corporate agreements.

In my division we provide ancillary services for sourcing, contract negotiations and meeting management and we are able to offset our fees by the commission we earn from our hotel partners. The blind commission keeps things balanced for us and the release protects you.

I am hoping this will work. Thank you so much for your consideration.

Kind regards,
Meeting Planner

Case Study No. 4 – Contracting in the Dark

January 30, 2013
Meeting Planner

Re: National Homebuilder

Dear Meeting Planner,

Enclosed please find a copy of the Sales Agreement between Convention Hotel (the "Hotel") and Group for the 2013 Sales Meeting (the "Event"). Per your request, we have omitted that Meeting Planner will be compensated by the Hotel with a 10% commission for its services in connection with this group booking. The commission is based on the actual rooms picked up within the contracted block only (excluding staff and other discounted rates) and will not be paid to Meeting Planner until final bill has been settled. Due to the non-disclosure of the 10% commission being paid to Meeting Planner by Hotel for the booking of the Event, Meeting Planner agrees as follows:

Meeting Planner agrees that it is fully responsible for determining whether further disclosure of the 10% commission is required and for making such disclosure if it is required. Meeting Planner further agrees that it will indemnify, defend and hold harmless the Hotel, its parents and affiliates, from and against any fees, costs, liabilities, or expenses whatsoever claimed from or imposed upon the Hotel, its parents and affiliates, as a result of the omission of the commission or any claim that disclosure was insufficient or misleading.

Please indicate Meeting Planner's acceptance of the terms of this letter agreement by signing below and returning a copy of this document to me by _____.

With regards,
Hotel Sales Representative

Agreed and Accepted by:

Meeting Planner

By: _____
Name: _____
Title: _____
Date: _____

Case Study No. 4 – Contracting in the Dark

Problems?

Case Study No. 4 – Contracting in the Dark

Blind Commission Considerations

1. Misrepresentation / Fraud
2. State Bribery Laws
3. Appearance

Questions?

Thank You

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