

What Meeting Planners Need to Know About Hotel Bankruptcy

By Rob Sumner and Garrett Tomlinson

Like many industries, the current economic woes have created a crisis in the meetings industry with little expectation for a quick turnaround. The previously unthinkable has become true for meeting sponsors: hotels and other meeting properties are operating with a risk of bankruptcy and some have already filed for liquidation or reorganization under the U.S. Bankruptcy Code.

You may have already checked your contracts for provisions on meetings property bankruptcy, but don't rely on contract language for your peace of mind. This article briefly covers what happens when meetings property bankruptcies intersect unperformed contracts. Specifically discussed is what to do about handling a hotel bankruptcy and whether deposits can be recovered. Like many situations a party opposing a bankrupt entity faces, this news is not good. However, armed with the facts, you are in the best position to make the right decisions now, as well as plan for the future.

Bankruptcy Background

A hotel in severe financial trouble may consider filing for bankruptcy. There are two general forms this may take: filing for liquidation, which results in distribution of the remaining assets to the creditors, and reorganization, a more complex plan for repayment of debt and re-emergence as a healthier corporation. In both cases, the meeting planner has serious concerns for the meeting to be held in a bankrupt facility. Meeting contracts sometimes contain bankruptcy clauses which attempt to specify what happens to the contract upon a filing of bankruptcy. Ideally, the meeting planner would have the option to cancel the meeting in the bankrupt facility and have all deposit monies refunded. Unfortunately, these clauses are generally unenforceable.

The Bankruptcy Code contains special provisions on "executory contracts," that is, contracts containing major, unperformed obligations on both sides. For instance, in an unperformed hotel contract, the hotel is obligated to hold open the room block, accept reservations, and provide meeting space. In return, the meeting sponsor must pay the master account, fill the room block to meet the contract requirements, and pay attrition damages if it does not meet those obligations. The Bankruptcy Code gives a special right to a debtor (or the trustee in bankruptcy) to "assume" or "reject" an executory contract after the bankruptcy filing. Thus, any clause which attempts to give the meeting sponsor a right to terminate a contract upon bankruptcy is overruled by bankruptcy law specifically allowing continued performance.

Upon filing for bankruptcy, the contract is essentially frozen. The meeting sponsor has not been released from it, so it must continue performing as if the contract is still in effect. In a liquidation bankruptcy, the debtor must ordinarily decide within 60 days whether to assume or reject the contract. In a reorganization bankruptcy, there is generally no specific timeline, but assumption or rejection of a contract must be made before the reorganization plan is confirmed by the court. If the bankrupt property rejects the contract, the meeting sponsor may act as if the contract was materially breached on the day before the bankruptcy filing. Unfortunately, this means the meeting sponsor has a general

unsecured claim and will need to stand in line with the other creditors. However, it is released from the contract and may start contracting with a new property.

If the contract is assumed, any breach by the meetings property must be cured -- even breaches arising prior to the bankruptcy filing. Also, assurance of continued performance must be given by the debtor or, if the property was sold or contract assigned, another party who will perform the contract.

Deposits

Since the meeting sponsor cannot terminate a contract with a meetings property even when the contract specifically allows, there is no right to have deposit money refunded. Obviously, the meeting planner would like to recover deposits as quickly as possible, certainly before other creditors obtain them. Because the meetings property has quite some time to determine whether to assume or reject the contract, refunding of deposits cannot be forced. The sponsor might attempt to negotiate termination of the contract and refund of deposits paid, but the meetings property may decline.

There may be special remedies available to you if significant hardship is imposed by the waiting period, but this would require hiring a bankruptcy attorney to argue your case to the bankruptcy court. Every acceptance or rejection is subject to the court's approval, but understand that each creditor to a bankruptcy feels pain. It would take more than an ordinary case to convince a bankruptcy court to alter the standard bankruptcy rules. Also note that the timelines for assumption or rejection of a contract may be altered by the court. In bankruptcy, the court and trustee in bankruptcy have extraordinary power and discretion in order to maximize fairness.

Other Termination Clauses, Seeking Assurance

A meeting contract may also contain more general termination conditions, such as for "insolvency." Insolvency will be defined by the applicable state law. In short, it means that the party is unable to pay its debts as they become due. Such clauses appear enforceable, so a termination and refund of deposits might be forced by a meeting sponsor that becomes aware that a hotel is insolvent prior to a bankruptcy filing. Prior to the filing, no special protections exist and the normal rules of contract apply. The property would be reluctant to agree that it is insolvent, terminate the contract, refund the deposits owed, and settle on other damages. And, even if deposits are refunded, they could be recaptured -- provisions of the Bankruptcy Code allow the trustee to recover payments to creditors during the period within 90 days prior to the bankruptcy filing so that funds can be distributed evenly among creditors.

Prior to a bankruptcy filing, if you are concerned whether a meetings property will be able to perform a contract, you have a right to seek assurance of performance. This means that you contact the meetings property and explain that you have reason to believe it may not be able to perform the contract and you want either unequivocal assurance that it fully intends to perform the contract, or alternatively, to be released so that you may mitigate your harm, recover damages, and seek another property for the meeting.

When a meeting planner faces situations described in this article, it should seek the advice of a bankruptcy attorney with experience in protecting creditors' rights. Bankruptcy law is a complex area of the law with many potential alterations to the general contract law.

Rob Sumner and Garrett Tomlinson are with the law firm of Sumner & Associates, P.C., www.sumnerfirm.com, an Atlanta-based firm that provides legal advice and consultation to associations and other meeting sponsors. The content of this article does not constitute legal advice and you should not rely on it without consulting an attorney who can carefully review your specific issue. For more information, please visit www.hospitalitylawyer.com.