

Tourism Basics: Laying the Legal Foundation Part 1 – Understanding Contracts (Bosque)

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What is a contract?

- Exchange of promises that some government will enforce. The future.
- What type of contracts are we talking about today?
- Tourism, a wide range.
 - Contract to provide tourists to a Tribe in return for payment
 - Contracts with the visitors to follow rules of conduct
 - Contracts with insurance companies to insure the visitors or your property
 - Contracts with your own vendors, for vehicles, food, software, entertainment.
 - Employment contracts

The Contracting Process:

Contracting is communicating values and goals with your business partner, and then recording those goals in writing with clarity

Why is it hard? Can't we just jot our notes down?

Is drafting a contract a cynical task, is the goal to trick the other side?

NO!

Not a simple task even with shared goals:

- Contracting as a Sovereign Nation
- Contracting across cultural and linguistic lines;
- Contracting across distinctive legal cultures;
- Positive thinking negotiators are reluctant to grapple with pessimistic possibilities, except maybe at end after emotional commitment to project;
- Technical legal issues and traps; and
- A third party decides issues raised by the contract; might be fair but might be international
- Things always change! Always.

Contracting across cultural and linguistic lines

- Different cultures, with different expectations.
- Tribal goals go beyond maximizing profit; convey those additional values

Contracting across legal cultures is challenging

- Civil (European) v. Common Law (UK/US).
- The Civil Law is based on codes and is, as a general matter, focused on relationships rather than specific issues
- Fundamental structural differences such as the availability of health insurance

Positive thinking negotiators excited about a new relationship are reluctant to grapple with pessimistic or otherwise unexpected possibilities:

- Flow of tourists
- Accidents or injuries
- Visa Issues
- Changes in Trends
- Or even unanticipated success

Technical Legal Issues and Traps; Not Intuitively Obvious Problems

Examples

- Data Privacy Rules--EU
- Heavy regulation of Tourist Entities Overseas
- Nature of insurance; have to protect against risk and pay for it
- No relationship with key personnel of foreign entity, because of intermediary
- Potential sovereign immunity of foreign corporation
- Broad indemnification clauses; you can end up paying for issues not your fault
- Non-compete or non-disclosure clauses—future future!

A Contract Also Only Has Meaning When Enforced.

- Words only mean what the ultimate decision maker says they mean
- You can lose almost any case
- Cost of proceedings can differ or be expensive
- Not just what actually happens, people negotiate over what they anticipate will happen and so if you fear the tribunal, you will negotiate less aggressively

Not an Insurmountable Problem

- We love these projects; not a product of cynicism but collaboration
- It is a way really to help clients and others build something positive

Structured approach

- Checklist for contracting
- Each case is different, this is a model approach, but represents our general philosophy

This structured approach assumes initial discussion of relationship, goals and issues

- We help record those goals and values in a contract

Sample Master Contract Checklist

- Remedies
- Forum
- Term
- Responsibilities
- Pricing
- Ownership of intellectual property
- Warranties
- Insurance
- Indemnification
- Modifications

Remedies

- Start with remedies, including reasons for termination, first.
- What is a remedy? What are types of remedies?
- Reverses the initial approach, considering the apparently less likely situation
- Who is the contracting party (agent?)
- What are their resources?
- What is their legal status?
- How will you respond to a contingency and what do you expect your partner to do? They will have the same questions for you.

Forum

- Forum, where and who (arbitration, litigation)
- Hotly contested issue, may have to trade to get what you want
- Everybody wants to have their “home court” decide a dispute
- Often the last issue on the table during a discussion

Legal issue—Tribal Waiver of Sovereign Immunity

Stifel, Nicholas & Company, Inc. v. Lac Du Flambeau of Lake Superior

- Tribal Entity Issued Bonds; Later Sought to Repudiate \$46,000,00.00 as improperly issued and thus did not bind the Tribe
- Tribe sought a declaration that the bonds were invalid in Tribal Court
- Decision is not about who was right, but who was going to decide
- Federal Court asked to stop Tribe's action in Tribal Court
- Court found both valid waiver and that the litigants did not have to exhaust remedies in Tribal Court first
- **Lesson: Contracts have the ability to change fundamental forum rights of even sovereign nations.**

Sovereign Immunity of Foreign Partner

OBB Personenverker v. Sachs (United States Supreme Court 2015)

- Sachs bought a Eurail Pass in the United States
- Seriously injured on an Austrian Railway
- Why does it matter that it was a government-owned railway?
- “Commercial Activity” Exemption to Sovereign Immunity In the United States
- Purchase of the Eurail Pass was not sufficient to create an exemption

Term—obvious but often overlooked

- Term, how long, and how renewed and on what terms
- How many years are you capturing
- Exclusivity
- Right to renew contract and then on what terms, increased prices, change in circumstance

Right To Terminate

- Respect for sacred sites—what happens if that is violated?
- Timely performance—did you get paid?
- When can the customer terminate the contract?

Responsibilities (in travel situation)

- Responsibilities
 - Who is responsible for visas?
 - Who is responsible for booking and refunds?
 - What about multi-site trips involving other nearby destinations?
 - Who is responsible for guest commitments and promises?
 - Who intervenes in the event of a major event or accident?
And medical insurance?
 - Who is responsible for marketing?
 - Right to evict guests from site?
 - Exclusivity, do you have to provide all your attention to one company

Pricing

- Pricing—per person and what if falls short, or goes over.
 - Formula? Are formulas too rigid?
 - Agreement to Agree
 - Third Party Decision Maker
 - Tie to objective index, inflation, or other item.

Adtrav Corporation v. Duluth Travel (Alabama 2018) – Formula Problems

- Set a goal of 51% to 40% division of revenue
- Adtrav and Duluth fought over whether future business opportunities needed to be shared (not in the contract) which resulted in several complex modifications
- Duluth shut Adtrav out effectively immediately as they claimed Adtrav breached the contract
- Court awarded Adtrav nearly one million dollars in damages and fees
- Loose formula, failed to account for future business, and tried to resolve the disputes with more modifications

Ownership of Intellectual Property

- Customer List, if not Renewed
- Marketing Material including trademarks
- Tribal images
- When the contract is over, do you have to start over?

Warranties

- Warranties, what are you promising, what are they promising and how is it measured
- Probably the most legal of subjects, a lot of ink spilled on warranties.
- Most common with things
 - Cars
 - Air Conditioners
 - Surgical implants

With service contracts, primarily finding a way to measure performance

- Measurement
- Offer difficult in a service contract. You can measure the strength of a cable, but how do you measure the quality of a tour
- “Best Efforts”
- “Reasonable Efforts”
- Are these useful tests?

Contingencies and Changes

- Contingencies:
 - Changes in law
 - A police investigation into a criminal act
 - An accident
 - Even great success—four times as many customers may create problems
- Two Big “I”s

Insurance

- Insurance, what type and **who pays**
- People can be injured
- People can cause damage
- Verify that insurance is in place—are you listed as “additional named insured.”

Indemnification, boring boilerplate, but it matters

- Breach of Contract – failure to perform
- Data Privacy Issues – credit card breach
- FCPA – can't bribe foreign officials
- TCPA—can't text or fax without permission
- Car crash
- Injuries to customer or third party

Modifications—intentional or inadvertent

Cloud Corp. v. Hasbro, Inc.

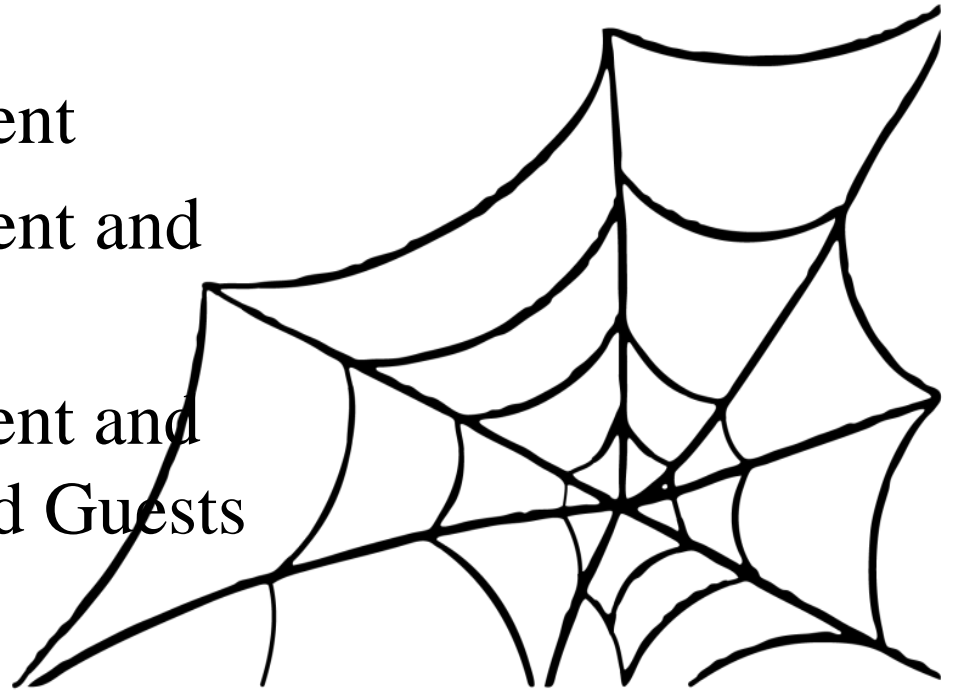
The Lousy Toy Case – one of my favorite cases

- Classic miscommunication
- Hasbro ordered way too much gel for its lousy aquarium toy from a Chinese Company, Cloud Corp with informal emails
- At trial, it blamed Cloud Corp, which had not ordered under the contract, and relied upon the contract, which forbid amendments
- Trial court ruled in favor of Hasbro
- Court of Appeals said that Hasbro's mistakes can't be dumped on Cloud Corporation
- Hasbro loses the case, and the emails were the reason

Consider the extended international supply chain – travel agency

Spider Web of relationships

- You and Them
- You and Them and Parent
- You and Them and Parent and Insurance Company
- You and Them and Parent and Insurance Company and Guests



Extended Supply Chain Creates Complex Issues

Multiple Projects with Same Company

Project A

BUYER ←———— SELLER

Project B

BUYER —————→ SELLER

Huge Business Component to Supply Chain

Any change or disruption changes
all the relationships up and down
the chain



What about after signing

- You followed the checklist, you have a contract and a business partner, what happens now?

Typical Client Approach: Contract as Reference Work

- Contract is in a drawer; not consulted; send out e-mails and texts for months and years;
- Issue arises – for example, visitors misbehave on site;
- Read contract to understand form of default notice;
- Send vague or aggressive notice; send angry or unreflective internal emails;
- Supplier begins to cure;
- Negotiations begin; and then
- Call Lawyer

Typical Questions

- Imagine you have a lemonade stand
 - Can I stop buying the lemonade (terminate)?
 - Is the quality of the lemonade poor (warranty)?
 - Can I drive the price of the lemonade down if one of the kids goes home and supplier labor costs drop (pricing)?
 - What if they run out of lemons (requirements contract)?

What do you do?

- Look at the contract
- What is the remedy?
- How do you exercise?
- Check for modifications?
- Post contract obligations?

Excuse For Non-Performance

What is “force majeure”?

- General idea: excuse for nonperformance due to an event outside the obligor’s control
- Shifts risk, in unanticipated ways
- You see this type of clause all the time

RMI v. Manfred Forberich (N.D. Ill.)

- Seller: Unable to perform because St. Petersburg Port froze earlier than expected
- Buyer: Freezing foreseeable “because any grammar school geography student” would know the port might freeze “in the Russian winter months”
- Court: Issue of fact for trial whether early freezing was foreseeable and prevented performance

Are These Force Majeure Events?

- Tropical Storm
- Heavy Rain
- Snowstorm
- Ice Storm in Geneva
- Ice Storm in Dallas
- Ice Storm in Albuquerque
- St. Petersburg port freezes over
- Bird Flu

Force Majeure Events May Be:

- Natural Occurrence
 - Hurricane
 - Tornado
 - Earthquake
- Manmade/Societal
 - War
 - Terrorism
 - Riots
- Governmental
 - Change in law or regulations
 - Change in ruling regime
- Market
 - Inability to obtain customers
 - Strike
 - Transportation shortage
 - Currency issue

What if you have dispute and it cannot be resolved?

Litigation Process

- Litigation/Arbitration/Mediation
 - Litigation
 - Discovery
 - Trial
 - Arbitration
 - Private
 - Mediation
 - Non-Binding

Attorney Client Privilege

- Allowed to keep matter confidential
- Otherwise, in the United States, you have to turn it over

Questions?



Conclusions

- Rewarding process
- Well written contract limits disputes – and provides the mechanisms for resolution

Thank you

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