

II. Making the Contract of Accommodation - Bookings

■ Main Headings:

- How a bedroom booking creates a contract
- 'Consideration'
- When is the contract made?
- Contract parties
- Online bookings
- Deposits
- Credit cards
- Group bookings



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How a Booking creates a Contract

- Booking a hotel bedroom typically creates a contract because it satisfies the legal rules of contract law for deciding if a contract has been made
- These rules decide:
 - Was a contract actually made?
 - If it was, when was it made?
- These (technical) rules involve ...

How a booking ...

- The consumer makes a specific and unconditional offer (knowing dates, rates, hotel etc) to stay and pay
- Hotel accepts offer
- Hotel informs consumer it accepts offer
- Or, hotel can make its own offer and consumer accepts etc.



How ...

- This process creates an agreement which at the same time becomes a contract because two other technical legal rules are satisfied:
 - ‘Consideration’ (only necessary in English-speaking states)
 - Both sides intend their agreement to be legally enforceable (invariably assumed if money involved)



How ...

- Another (non-technical) analysis simply asks is there **certainty** about:
 - the essential elements of the booking (the parties, in/out dates, hotel, the bedroom rate, type of bedroom)
 - the unconditional commitment from both sides to the booking?



Opaque Bookings

- Sometimes consumer is willing to make an online booking knowing hotel standard, dates, room type/price, but **not knowing** the precise identity/location of hotel, (knowing only general information about its location/features etc) in order to obtain a cheaper rate



Opaque Bookings

- Booking is typically made with independent **website, not hotel**
- Website **might/might not** have previously bought rooms from hotel
- If former, contract is with website, not hotel, but with additional contract duty on website to reveal precise details within specific time
- If latter, contract is with hotel



'Consideration'

- Relevant only in **English-speaking** states
- **Special meaning** in contract law - each side gives something of value to other side
- Typical consideration in a hotel booking is:
 - hotel **promises** to provide the use of a bedroom and related **facilities**
 - consumer **promises** to occupy and pay for the bedroom (nowadays increasingly evidenced by giving credit card number) or make full **pre-payment** (as with a casual callers)



Consideration

- For larger more complex bookings there can sometimes be another type of consideration
- Event organiser makes a booking for a variety of facilities/services - meetings, conferences, exhibitions, receptions, meals (sometimes bedrooms for executive committee) etc



Consideration

- Event organiser also wants hotel to promise to '**set-aside**' bedrooms at special rate for event attendees themselves to book directly with hotel
- Event organiser does not pay for this promise
- So, if hotel increases set-aside rate/decreases number of rooms, how can hotel be forced to keep its promise?



Consideration

- Contract law says unpaid promise can still be fitted inside a contract 'envelope' in either of two ways
- The '**set-aside**' promise is intended to be bundled up with the rest of the deal in one single contract covering all matters and is paid for, although not specifically

Consideration

- Or, the 'set-aside' promise could be treated as part of a separate **parallel (artificial) contract** the consideration for which is:
 - Hotel promises to 'set-aside' the agreed number of rooms at the agreed rate
 - (in exchange for) the event organiser agreeing to make the main contract
- And no specific payment for the 'set-aside' promise



No Consideration

- General importance of consideration is if no consideration (only an unpaid promise) then no contract and promise not legally enforceable/does not have to be kept, **except**
- Where hotel promises to 'set-aside' bedrooms for a tour operator who does not pay for them yet because it does not know how many it wants because it still has to market and sell the package



No Consideration

- If the hotel later wants to give the set-aside rooms to another tour operator (who will pay for them) and it knows the first one has spent money marketing the hotel and will suffer a loss, it is unreasonable and unfair to let the hotel go back on its word
- A principle from equity law – **promissory estoppel** – can be used to prevent the hotel going back on its word

When is the Contract made - the Contract Moment

- **Contract moment** is moment a booking become a contract and is legally enforceable
- Contract law says hotel and consumer are free to decide the contract moment, meaning the moment can be delayed/postponed etc
- Typically hotel decides and configure its online and offline booking procedures/confirmation notices as it wishes

Contract Moment

- Allowing hotel to attach conditions etc to any booking process to prevent/delay the booking becoming a contract
- Hotels can delay contract moment (by using 'subject to ...') or by say moment **will only arrive when:**
 - Hotel receives credit card number/deposit/email
 - Hotel issues confirmation email/fax/letter



Contract Moment

- If hotel does not delay contract moment then the booking will create/become a contract as soon as there is the necessary certainty etc
- Meaning a phone booking by a first-time customer can create a contract
- Confirmation email after this point (with booking terms etc on it) is probably too late
- Except when customer is a repeat business and knew of terms

Contract Parties

⊙ Important because:

- ◆ Need to clearly identify who contract is made with
- ◆ Because that's usually who is liable to pay bill
- ◆ Except where circumstance indicate otherwise
- ◆ Only contract parties can sue/claim rights under a contract, though sometimes exceptions allowed



Contract Parties

- Identifying contract parties can sometimes be difficult especially with group bookings, made well in advance and different individuals have a say in the event
- **Conferences** – is it organiser or attendees?
- **Weddings** – is it couple (individually or jointly) or parents (from both sides individually/jointly) or others or some combination?
- **Reunions** – is it organising committee (individually or jointly) or each individual attendee?

Contract Parties

- Generally, booking process will clarify who made booking
- General principle of contract law is that whoever demands/seek the service makes the booking/contract (the booker) and is liable to pay the bill
- **Unless** circumstances indicate otherwise



Who made the Contract?

- ⦿ Some online booking procedures allow provider of credit card details to be different from booker
- ⦿ Meaning payer is not a contract party (no intent because hotel does not know during booking if payer has genuinely agreed to use of his/her credit card details and payer has not requested the service)

Who made the contract?

- ⊙ If provider of credit card details does not pay
booker remains liable
- ⊙ Company executive booking:
 - ◆ in own name on company account with hotel
 - ◆ in company name on company account with hotel



Who can sue under contract?

- A rule of contract law (doctrine of ‘privity of contract’) says a **non-party to a contract** gains no rights/cannot sue under it
- So guest of booker cannot usually sue hotel under contract
- **Exceptions**
- Some states have wide exceptions to this allowing anyone for whose benefit a contract was made to sue under it



Who can sue under contract?

- Other states only allow, say, husband/wife/child of booker to sue under it
- However, if initial booking was made in, say, name of two/more customers each can sue under the contract
- In some states package travel law says beneficiary of a package contract can sue under it



Who can sue under contract?

■ Meaning:

- If **hotel sells its own packages** (accommodation plus golf/painting lessons/concert tickets etc) any guest of booker can sue hotel under the contract
- If **tour operator sells its own package** which includes hotel accommodation the package booker and guest:
 - Can sue tour operator under package contract
 - But not hotel

Online Bookings

- E-commerce law says an online booking creates a valid accommodation contract just as much as an offline booking
- E-commerce law says websites which offer online bookings must provide defined information about themselves on their website



Online Bookings

- Five main types of hotel accommodation websites:
 - Hotel's own website selling direct to consumer
 - Website (**independent of hotel**) selling as **agent on behalf of hotel** (most common type of booking)



Online ...

- Website buying as **agent on behalf of consumer** (less common)
- Website buying first from hotel and later selling **on its own behalf** (not as agent) to consumer (less common)
- Website which merely offers a virtual place for consumers to sell hotel accommodation to each other (less common)



Independent Website

- Most common website is independent of hotel
- When consumer books through independent website (which sells as agent for hotel), two different contracts are involved:
 - contract of accommodation between **hotel and consumer** (not between website/agent and consumer)
 - contract of agency between hotel and website authorising website to sell on behalf of hotel

Online Booking

- No specific website law governing layout, content or booking procedures of websites selling hotel accommodation
- Only general laws banning unfair marketing/advertising practises and law on unfair terms in written consumer contract and protecting personal data

Online Booking

- Unfair marketing law says layout and content of website **must not mislead** (by leaving out information needed by consumer) **or confuse** consumer
- Website users can be mislead/confused by failure to clearly distinguish between:
 - website **terms of use** and hotel **terms of contract** of accommodation
 - **roles of agent and hotel**
- Resulting in consumer believing the contract is with website, not hotel



Online Booking

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Online Booking

- Resulting in consumer believing the contract is with website, not hotel
- Also:
 - website terms of use/contract often not written in plain language
 - booking procedures can be unfair - not giving enough time to complete, using pre-ticked boxes, not disclosing full price until end, not revealing hotel's standard contract terms (if it has any)
- Need for specific law on hotel websites

Deposits

- Sometimes hotels look for a deposit in connection with a booking and sometimes say its 'Non-refundable'
- Legal significance of paying deposit can be unclear because 'deposit' is an ambiguous word and 'non-refundable' is to blunt
- Both words should be avoided
- Different possible meanings of deposit:
 - Advance payment for contract already made

Deposits

- Advance payment for contract not yet made (sign of seriousness/goodwill in wanting to make contract) with intention if contract is made to be treated as part payment
- Payment under an **options** contract, i.e. booker pays hotel (not for bedrooms) but not to make contract with anyone else until booker decides by defined date and then hotel being willing to accept a booking (buying 'first call' on the room)

Deposits

- Actual meaning depends on parties intentions
- Ideally hotel should clarify what it means when it uses word 'deposit'
- If hotel does not clarify what it means it will be more difficult for hotel to keep deposit because courts will say consumer consent to hotel keeping/using deposit was **not real/genuine**



Deposits

- ⦿ If meaning unclear, courts typically favour the second meaning because they do not like non-refundable deposits when hotel gives nothing in return
- ⦿ ‘Non-refundable’ is unclear because it can suggest hotel gave nothing in return
- ⦿ But, if meaning is first or third hotel does give value in return as part of a contract



Bookings and Credit Cards

- Hotels typically obtain credit card details (name, number, expiry date, security code) for booking to become a contract
- This does not entitle hotel to use credit card for any purpose because consumer giving card details is an ambiguous act
- And is not a real consent to hotel use of card

Bookings and Credit Cards

- ⊙ Different possible meanings ...
- ⊙ To be genuine consent:
 - hotel must explain to consumer at time of purpose of obtaining card details
 - Unless consumer already knows from previously staying in hotel
 - Many hotels now explain purpose of obtaining card details

Pre-authorisation by Credit Card at Check-in

- Pre-authorisation is ...
- Hotel often does not inform consumer of amount, how calculated or possible consequences of obtaining pre ...
- Pre-authorisation can block consumer use of that credit for other transactions (outside hotel) before check-out
- Benefit to hotel is that it knows card is genuine/not stolen and payment can be secured using it

Pre-authorisation

- For pre-authorisation to be valid customer must **genuinely consent** to it
- Consent only genuine if beforehand hotel fully explains purpose, amount, how calculated and possible consequences
- Otherwise, blocking of credit might be illegal



Pre-authorisation ...

- Because it wrongly interferes with consumer's remaining credit availability and thus his/her capacity to make purchases using the card (cannot pay shopping/restaurant bills etc.)
- No legal authority on pre-authorisation:
 - ◆ saying hotel must first inform
 - ◆ clarifying position

Group Bookings

- Who, if anyone, is liable to pay hotel when 'set-aside' bedrooms are unfilled?
- Depends on what contract says
 - Hyatt Regency v WBC, US case 2001
- With conferences/conventions/weddings typical scenario is that booker negotiates bedrooms to be 'set-aside' at special rate for direct booking by attendees
- Booker not liable if these are unfilled

Group Bookings

- Hotels implicitly acknowledge this by setting a cut-off date after which un-booked bedrooms revert to hotel for sale
- What if hotel **changes number** of set-aside bedrooms or **increases** the room rate?
- Typically it's a breach of contract with group booker, not with attendee because has not yet booked the bedroom

