The 2009 Hospitality Law Conference

DOING HOTEL DEALS AROUND THE GLOBE: A PRIMER FOR U.S. LAWYERS

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Cliff Risman is a partner at the law firm of Gardere Wynne Sewell LLP where he chairs the Business Department and leads the Hospitality Industry Team. Cliff has a comprehensive real estate and finance practice representing public, private, and institutional developers, purchasers, investors, tenants, operators and lenders in the development, acquisition, financing, leasing, operation and sale of all forms of commercial and residential real estate with particular emphasis on the hospitality industry. Cliff advises clients in the development, acquisition, financing and operation of hotel and resort properties globally, with significant experience throughout the Americas, Europe and Asia; the structuring of equity investments; the negotiation of management, franchise and development agreements and operating leases; and the structuring and negotiation of major lease and other facilities transactions. In recent years, Cliff has devoted a significant portion of his practice to the representation of both owners and operators with respect to the development, senior and mezzanine financing, equity arrangements and operating agreements for a number of recognizable domestic and foreign luxury mixed use hotel and resort projects.

Education

J.D., Syracuse University College of Law, magna cum laude (1984)
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Professional Affiliations

- Member, International Society of Hospitality Consultants (ISHC)
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Gardere has approximately 300 lawyers located in the U.S. and Mexico, organized in 30 practice groups serving clients worldwide. Gardere represents owners, developers, investors, lenders, operators and franchisors in all aspects of the hospitality industry including acquisitions, financing, design and development, operations, labor and employment, intellectual property, technology, food and beverage and other matters unique to the hospitality industry. As lead counsel, Gardere has added value to billions of dollars in domestic and foreign hospitality industry mergers, acquisitions and financings.

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Cynthia Brotman Nelson practices in the Real Estate Practice Group and is on the Hospitality Industry Team. She has vast experience in real estate law and finance, including acquiring, disposing, leasing, financing and managing shopping centers, multi and single family housing developments, hotels, office buildings, industrial properties and unimproved land with a particular emphasis on lodging properties and the hospitality industry. Ms. Nelson has represented borrowers, purchasers, developers and lenders and brings significant experience in corporate restructurings involving entities ranging from $50,000 to $1 billion. Her experience includes extensive trial preparation work and bankruptcy appellate work, including argument, legal research and drafting briefs and other pleadings.

EDUCATION

J.D., St. Mary's University School of Law (1991)

- Member, Phi Delta Phi Honor Society
- Recipient, Am Jur Award – Property II
- Law Intern, Judge Leif Clark, Western District of Texas
- Senior Associate Editor, *St. Mary's Law Journal*, 1989 - 1991
- Teaching Assistant, Legal Research and Writing

B.B.A., University of Texas at Austin (1988)

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Alejandro Ortiz is a Corporate and Global Projects partner at Gardere Wynne Sewell LLP (www.gardere.com). His practice focuses on the corporate and tax planning of international transactions and corporate finance, including international acquisitions of all types of businesses, procurement of government contracts in Mexico and Latin America, and counsel on private securities offerings, commercial loan transactions, privately placed investments, debt restructurings and bond transactions. Recent deals include an emphasis on the purchasing and financing of hospitality related assets in Mexico and Latin America. Mr. Ortiz is both a Mexican and a United States attorney, fluent in Spanish and English.

EDUCATION

LL.M., Columbia Law School (1996)

- Concentration in International Corporate and Tax Law
- Recipient, Cotacyt Fellowship

J.D., Instituto Tecnológico Autónomo de México (ITAM) (1994)

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PROFESSIONAL AFFILIATIONS

- Admitted to practice before:
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Irv chairs Graham & Dunn's Hospitality Industry Group. He and his team counsel hospitality companies about acquiring, financing, managing, and franchising properties; all aspects of financially distressed hotels, condo hotels, and mixed use projects, including debt and equity restructuring, workouts and bankruptcy; developing and protecting technology, brands, e-commerce solutions, and other intellectual property; real estate associated with hotels and resorts; negotiating and drafting franchise agreements, management agreements, strategic partnerships, and other relationships; managing employment and diversity matters; and litigating disputes. Irv has led the Hospitality Industry Group since its formation in 1993.

Irv is the 2008 recipient of the national Anthony G. Marshall Award. Bestowed annually by the Board of the Hospitality Law Conference in Houston, the Marshall Award is awarded to an individual who has made pioneering and lasting contributions to the field of hospitality law.

Over the last twenty years, Irv has served as lead counsel in hotel transactions worldwide representing asset values totaling in excess of $1 Billion. Irv is a frequent national speaker on hotel topics, having made recent presentations, for example, at the Lodging Conference in Phoenix, the Hospitality Law Conference in Houston, and the Condo Hotel Summit in Miami.

Irv utilizes an extensive background of business and lodging industry experience accumulated in over 25 years as a Graham & Dunn lawyer. Irv litigated business cases from 1980 to 1983. From 1983 to 1993 he established a recognized corporate recovery and business bankruptcy practice, in which he assisted hotel companies and stakeholders in successfully addressing a wide range of corporate, financial, business, transactional, and courtroom challenges. Since 1993, as leader of the Hospitality Industry Group, Irv has focused exclusively on helping hotel companies succeed, from structuring, consummating, and restructuring hotel deals of all kinds, to handling operational challenges, to strategically guiding disputes to resolution.

Irv is Chair of the American Bar Association's Hospitality Industry Liaison Subcommittee, is a charter member of the Academy of Hospitality Attorneys, is a founding member of The Lodging Roundtable, and is a board member of the Seattle-King County Convention & Visitors Bureau. Irv chaired the

Washington State Bar Association's Creditor/Debtor Section from 1988 to 1990 and was editor of its newsletter from 1988 to 2006.

PRESENTATIONS AND PUBLICATIONS

Irv is a frequent author and presenter on topics of interest to the hospitality industry. Following is a short list of Irv's most recent articles and speaking engagements. A complete list is available upon request.

Moderator and Presenter, "The Formula for a Successful Joint Venture," The Lodging Conference (September 25, 2008).

Presenter, "Ask the Experts: Best Practices Panel," Washington Hotel & Lodging Association (October 6, 2008).

Program Co-Chair, "Buying & Selling Hotels Workshop," (August 18, 2008).

Moderator and Panelist, "Strategies for Buyers: Fitting the Plan to the Property," Buying & Selling Hotels Workshop (August 18, 2008).

Author, "Troubled Condo Hotel Workouts – The Time Has Arrived," CyberGraham (July 25, 2008).

Moderator, "Hospitality Real Estate Transactions Workshop," Hospitality Law Conference (February 11, 2008).

Moderator, "Condo Hotel Financing and Legal Issues," The Lodging Conference (September 27, 2007).

Author, "What's New in Condo Hotels?" Cyber-Graham (May 24, 2007).

Author, "Condo Hotels, Three Years into the Concept" (May 24, 2007).

Author, "What is a Condo Hotel, Why does it Work, and Why is it Challenging?" (May 24, 2007).

Presenter, "Condo Hotels, Three Years into the Concept," Hospitality Law Conference (February 8, 2007).

Panelist, "Sidestepping SEC Trouble: Complying with Securities Laws," NACHO Condo Hotel Summit (November 30, 2006).

Panelist, "Condo Hotels from a Legal and Financial Perspective," The Lodging Conference, (September 20, 2006).

Moderator, "Condo Hotel Development," The Lodging Conference (September 20, 2006).

Co-Author, "National Association of Condo Hotel Owners Enters the Equation," Cyber-Graham (May 2, 2006).

Panelist and Moderator, "Condo Hotels – The Product and the Plumbing," Hospitality Law Conference (February 2, 2006).

Co-Author, "Condo Hotels: How Developers and Owners' Associations can Avert a Hotel Implosion" (January, 2006).

Panelist, "Condo Hotels," The Lodging Conference (September 30, 2005).

Moderator, "Mixed-Use Review," The Lodging Conference (September 29, 2005).

Moderator and Panelist, "Hotel Revolution - Are we Becoming a Condo Nation," American Bar Association Joint Fall CLE Meeting (September 15, 2005).

Moderator, "Acquisition, Development and Financing Issues: Focus on Condominium Hotels," The Hospitality Law Conference (February 4, 2005).

Moderator, "Mixed-Use/Hotel Condominium Development," The Lodging Conference (September 20, 2004).

Panelist, "Internet Issues of Interest to Hospitality Client," Academy of Hospitality Industry Attorneys (May 14, 2004).

Co-chair, "The Legal Strategy Behind a Successful Mixed-Use Project: The Implication of Use Restrictions and Zoning," American Bar Association Spring Symposium (May 14, 2004).

Panelist, "Hotel Mixed-Use Development Projects," The Hospitality Law Conference (January 22, 2004).

PROFESSIONAL & COMMUNITY ACTIVITIES

Chair, American Bar Association Hospitality Industry Liaison Subcommittee
Charter Member, Academy of Hospitality Attorneys
Founding Member, The Lodging Roundtable, Seattle
Founding Member, Rotary Hospitality Industry Circle, Seattle Rotary #4
Board Member, Seattle-King County Convention and Visitors Bureau
Former Co-Chair, American Bar Association Hotels, Resorts and Tourism Committee
Former Chair, Washington State Bar Association Creditor/Debtor Section
Former Editor, *The Creditor/Debtor Newsletter,* Washington State Bar Association Creditor/Debtor Section

EDUCATION

J.D., UCLA School of Law, 1980; member, UCLA Law Review B.A., *summa cum laude,* University of Washington, 1976

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I. INTRODUCTION.

Acquiring and developing hotel projects, even within the United States, is very complex, as a hotel project is not just a "building", but an "operating business". Combining typical real estate and construction matters, with the added complexities of managing and operating a hotel and hotel related facilities, presents a myriad of issues which must be scrutinized and negotiated. When all of this happens around the globe, even more complexity is added to the transaction, including local legal systems and cultures, taxation and employee related matters. This article addresses, generally, the implications of developing, owning and operating hotel projects internationally.

II. APPROACHING THE INTERNATIONAL HOTEL PROJECT INTELLIGENTLY: CONSIDERATIONS TO REDUCE COMPLEXITY, COSTS, AND RISKS

A. How Much Foreign Law Will You Need?

All international hotel projects are not alike. Some are more affected by the law of the foreign jurisdiction than others. For example, an ordinary hotel franchise agreement that is governed by U.S. law and that has a strong arbitration clause may require little application of foreign law. In contrast, a co-investment in the development of foreign real property by citizens and entities of multiple countries will require extensive application of foreign law.

Accordingly, the first step in approaching the international project is to inventory and understand the objectives of the legal documents and relationships. To do this, it is important to bring back from the subconscious essential concepts that experienced lawyers take for granted in a domestic deal .

For example, when we enter into a contract, such as a hotel management agreement or franchise agreement, our ultimate objectives are usually the following:

- We want the parties to understand and accept their promises.
- If the other side breaches, usually we want to be able to take legal action in pursuit of damages or other bargained-for remedies.
- We then want to be able to get to judgment, enter the judgment in appropriate jurisdictions, enforce the judgment, and collect.

In contrast to the objectives in creating simple, contractual relationship, if we are investing in real estate, our ultimate objectives include the following:

- We want to "own" the property and understand what the normal attributes of ownership are.

- We want to know how to establish and protect our "ownership."

- We want to know what we have to do, legally and practically, to accomplish our development objectives.

- We want to know how we will be able to protect our interests if things do not go according to plan.

Hotel projects can involve dozens of different kinds of legal relationships and transactions. In each relationship, the U.S. lawyer should start with these basic questions. Then the lawyer can begin to understand how deeply the lawyer will need to delve into foreign law and foreign issues to accomplish the expected results and have recourse to the expected remedies.

B. Arbitration: The Most Important Cleavage Point for Drafting Contracts.

In any contract, the most essential, ultimate legal concern is enforcement. A contract accomplishes little if it cannot be enforced according to the parties' expectations.

If the parties do not effectively establish the law and forum for enforcing the contract, then the possibility remains that a foreign court will be involved. And if a foreign court will be involved, then local procedural or substantive law might govern the contract and what it means. And if the foreign courts might decide those critical matters, then the deal lawyer will have to start from scratch in drafting the contracts so they conform to local law and can be enforced under it. This slippery slope leads to very large local and U.S. legal bills.

The answer usually does not lie in specifying venue in U.S. courts. In general, courts in every country do not give much weight to the judgments entered by the courts of other countries. This is even the case when, for example, a party attempts to enter and enforce in Canada a judgment obtained in a U.S. court. Very often, the foreign court will reopen the facts and a new mini-trial or a retrial may occur. This risk then leads back to the slippery slope.

The answer usually *does* lie in arbitration. Interestingly, although countries seldom give much deference to foreign courts' decisions, virtually all countries must give great deference to arbitration awards. This is because most countries are bound by one or more treaties that require it. More than 120 countries are now parties to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), 21 U.S.T. 2517 (1958). These countries include, for example, Mexico, Canada, and the Peoples Republic of China. A few South American countries that are not parties to the New York

Convention are parties to the similar Inter-American Convention on International Commercial Arbitration, 14 I.L.M. 336 (1975), which the U.S. has also ratified.

These two treaties (the "Arbitration Enforcement Treaties") are pivotal. They allow the parties to effectively choose the applicable law, the venue, the trier of fact, and the procedures for the hearing process. Then, when the arbitrator's judgment is obtained, the foreign court *must* enter and recognize the judgment as the equivalent of a final judgment in the foreign court. The only exceptions to the obligation to do so are narrow defenses based on gross abuses of procedural rights or violation of public policy.

C. Making Choices About Arbitration: Selecting the Arbitrator, Governing Law, and Venue.

Even though the Arbitration Enforcement Treaties provide for only narrow defenses to recognition, those narrow defenses do exist. Accordingly, a primary consideration in choosing the arbitrator, the governing law, and the venue is whether the choices will help steer clear of those narrow defenses. A secondary consideration is the impact these choices will have on the objective of diminishing involvement of foreign law and foreign lawyers in the negotiation and documentation of the deal.

1. Choosing the Arbitration Service.

An arbitration provision can call for arbitration with the assistance of an international arbitration organization. This kind of arbitration is often called an *administered* arbitration. Alternatively, the provision can identify a specific, independent arbitrator (often called an *ad hoc* arbitrator or a *non-administered* arbitration).

One of the defenses under the Arbitration Enforcement Treaties is that "the recognition or enforcement of the award would be contrary to the public policy of" the country where recognition is sought. Another defense is that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties."

These defenses suggest that the U.S. lawyer should make all aspects of the arbitration procedure as mainstream as possible. Also, the lawyer should ensure that the arbitration service has a good deal of international arbitration experience. By doing so, one can expect to reduce the risks that the procedure or the arbitrator will inadvertently trigger defenses under the Arbitration Enforcement Treaties.

The leading international arbitration organizations are:

- The International Chamber of Commerce's Court of International Arbitration (ICC). It is based in Paris but administers proceedings worldwide, with Switzerland being a particularly important site.

- The American Arbitration Association. Its International Center is based in New York, but it operates nationwide.

- The LCIA Court of International Arbitration in London. It is active in England and elsewhere, primarily in Commonwealth countries.

- The International Centre for the Settlement of Investment Disputes (ICSID). It is operated by the World Bank and is a specialized arbitration organization for disputes in transactions between private investors and foreign governments.

All of these organizations have generally similar rules, typically available on their web sites. They also all provide basically equivalent types of services.

If an ad hoc or nonadministered arbitration process is chosen, then the arbitration clause will have to specify a governing set of rules. The most commonly used rules in nonadministered arbitration are those published by the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

2. Choosing the Governing Law.

Of course, any U.S. lawyer will want U.S. law to apply and, ideally, the law of the State in which the lawyer practices. The closer to home the lawyer can keep the governing law, the less advice will be needed to make sure the laws of an unfamiliar jurisdiction will not unexpectedly override the intentions and expectations of the parties.

Also, one of the defenses to enforcement under the Arbitration Enforcement Treaties is that the parties' agreement "is not valid under the law to which the parties have subjected it." To the extent that the applicable law is familiar and accessible to the U.S. lawyer, the lawyer can more easily reach comfort that the agreement is valid under the applicable law and that an arbitration award based on the agreement will be enforceable under the Arbitration Enforcement Treaties.

If, despite the U.S. lawyer's best efforts, the parties' negotiations lead them away from U.S. law, then normally a U.S. lawyer should fight hard to make sure the foreign law is based on common law and not civil law.

The law in the U.S. and all its States (other than Louisiana) is based on common law. Courts are responsible for creating and applying case law and resolving most civil disputes. The system is borrowed, essentially, from English common law. Many other countries around the world have also borrowed this system. It is remarkable how similarly contractual

issues and enforcement are handled in common law jurisdictions. The familiarity and similarities help diminish the amount of foreign law advice and contractual modifications needed to make sure the documents do what they are supposed to do.

The civil law system, in contrast, is based on the Napoleonic Code. Under this system, almost everything that a U.S. lawyer knows is wrong. If the governing laws are those of a civil law country, then foreign lawyers will need to be heavily involved, and the documents will need significant modification in form and substance to make sure they are enforceable and fulfill the parties' expectations.

3. Choosing the Venue

The New York Convention states that a country ratifying the Convention may "declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." As a result, it is important that venue selected is in a country that is a party to the Convention.

Also, one might reasonably conclude that arbitrators who are in, or close to, the governing law jurisdiction might have more experience with and knowledge about the governing law. This experience and knowledge should help reduce costs and the chances of an aberrant ruling. Accordingly, it is logical to select a venue that correlates to the governing law.

4. Other Choices.

Sample arbitration clauses can be obtained from the websites of the leading arbitration organizations mentioned above, as well as UNCITRAL. These clauses will help identify other choices.

The choices will include, for example, the identification of the language to be used in the proceedings. They also may suggest mediation as a step before arbitration. The considerations in making these choices are rather obvious or are no different than those involved in usual, domestic transactions.

D. Considerations When Foreign Property Investments are Involved.

If the international hotel project will involve the client in foreign ownership, then the lawyer and client will, by necessity, need to become heavily involved in local law. Local counsel will be required and will be an essential part of the team. The U.S. lawyer will need to apply all of his "issue spotting" skills and his/her ability to "think like a lawyer" to ferret out and understand the areas where local law impacts the client's normal expectations, and then the lawyer will need to skillfully communicate those variances and risks to the client.

Even when ownership of foreign real estate is an essential part of the client's rights and expectations, however, the lawyer still can and should work to structure the deal so that application of foreign law will be minimized.

If, for example, multiple parties will have interests in the real estate, a single entity can be created to own the property. Then, a separate entity can be created in a familiar jurisdiction under familiar laws. The deal between the parties can then reside primarily in the documents governing that entity. The documents can include an effective arbitration clause that follows the suggestions set forth in previous sections of this part II. Obviously, tax considerations, the laws of the foreign jurisdiction, and the parties' expectations will affect the structure. But the impact of foreign law can be minimized and costs and complexity can be reduced by isolating the real estate issues and then building the deal points into separate entities governed by familiar structures, documentation, and enforcement mechanisms.

E. Selecting And Working With Foreign Counsel.

Once the U.S. lawyer has taken inventory the objectives of the legal documents and relationships and has determined how much foreign law and lawyering will be needed, the U.S. lawyer must then select foreign counsel.

As suggested above, every international hotel deal will have some foreign law to consider. At a minimum, local counsel is usually needed to help evaluate and anticipate circumstances that could trigger enforcement defenses under the Arbitration Enforcement Treaties. And if, for example, the U.S. party's main recourse upon a breach is to arbitrate to judgment, enter the judgment in the foreign jurisdiction, and execute on foreign assets, then the U.S. lawyer likely will need to learn from local counsel how effective that execution process will be and then steer the transaction to accommodate those considerations.

At the other end of the spectrum, the project may involve acquisition and development of foreign real estate. Then, local counsel will be an essential part of the team, as heavily involved as the local real estate/land use/construction lawyer in a domestic development project.

The choice of foreign counsel should be made with full understanding of these needs and roles. Then, a number of considerations may weighed.

1. Factors in selecting foreign counsel.

First, the U.S. lawyer should understand what kind of lawyers are available in the foreign jurisdiction and what they do. In common law countries, one can expect barristers and solicitors. They often have different roles and capacities. In civil law countries, the notary is a distinct legal profession and may be required. The U.S. lawyer may also encounter a "foreign legal consultant ("FLC"). The FLC may not, for example, be permitted to advise on purely local-law matters. If the U.S.

lawyer is not aware of these limitations, the employment of the FLC may unknowingly build in an extra layer of expense.

Next, the U.S. lawyer can tap a number of sources to create a list of potential foreign counsel choices. Personal experience and trust with the foreign lawyer is, of course, very useful. One normally also seeks out recommendations from other lawyers, law firms, and other professionals whom the U.S. lawyer knows and trusts. Research and verification on the Internet has its usual role, as well.

Once a list of potential foreign counsel has been compiled, U.S. counsel should contact and talk with each of them. The process of coming to a final selection is essentially the same as the process of selecting local counsel in a domestic transaction. Ask:

- What skills and experience are needed for the engagement?
- Does the candidate have those skills?
- Does the candidate have a good reputation for honesty, service and integrity? Does the candidate reflect these attributes in his contacts with you?
- Can you communicate with the candidate easily and without waste of time?
- Do you feel a comfortable connection with the way the candidate behaves and thinks?
- Do you believe that the candidate will be a team player? Or do you sense the candidate be or driven by personal gain, fee generation, and ego?
- Will the candidate be able to work well with those he or she will needs to work with?
- Does the candidate have the technology needed to communicate effectively and accomplish the work?
- Are the fees and rates reasonable?

2. Special Factors and Hazards.

U.S. lawyers take for granted and expect behavior and conduct mandated by ethical rules applicable to U.S. lawyers. *Do not assume that they apply in the foreign country*.

For example, the foreign jurisdiction might not require that the lawyer treat your communications as confidential and privileged. Obviously, if the project is not publically announced and confidentiality is important, the failure to recognize the absence of these protections can have grave consequences.

Similarly, the foreign jurisdiction may not protect against conflicts of interest. It is very annoying to hire a local lawyer only to find that he has a personal interest diametrically opposed to the client's objectives and is actively pursuing them to the client's detriment.

3. The Engagement Letter.

As indicated above, the ethical rules, expectations, norms, and customs applicable in a foreign legal engagement may not line up with our normal expectations. The engagement letter is a key document to help bring these expectations in line.

In addition to the usual terms of a typical engagement letter, the letter can provide for confidentiality, protections against conflicts of interest, provisions about service expectations and deadlines, billing expectations, and specific terms about the opinions or other work product expected from the foreign lawyer. If these terms are critical, consider the advantages of employing arbitration provisions, as discussed earlier in this Section II.

III. CULTURE: LANGUAGE AND LOCAL PARTICIPATION

A. Customs, Culture and Religious Matters. Understanding the culture, religious beliefs and customs of a location for a hotel is essential for the success of any project. The belief that everyone adheres to the "American way" of doing things is a fallacy. Each country has its own manner and timeframe of doing business and each project needs to address and manage these idiosyncrasies. Understanding a culture is more than just acknowledging or adopting local ritual or customs, such as holidays or hours to conduct business, the acceptance of a class system, etc. The understanding of a culture includes a deep understanding of the business mentality in such locality. For example, in Japan, a businessman may first want to establish a personal bond before creating a business relationship. If the personal bond fails, the business relationship may never materialize. The same may not hold true in the U.K. However, in Latin America a businessman may spend the first two hours and fifty minutes of a three hour meeting talking about personal issues and the state of the world before moving to a brief business discussion. Afterwards, and without the presence of the principals, a substantial business discussion may occur with the subordinates. Understanding these subtleties may be the difference in closing a successful deal or seeing what otherwise would be a good deal fall apart. Understanding the essence of the business mentality in a locality is essential. For example, in certain Asian countries the spoken "word" may have more meaning than what the agreement specifically provides. In such

cases, if there is a dispute on what an agreement provides and what the parties discussed, it may be expected that the oral discussion prevail. In Latin America, an agreement may be subject to being revisited regardless of what the agreement provides, and if a dispute ever does arise, the parties will expect some type of amicable discussion to resolve the dispute, leaving a lawsuit as a last option. Threatening letters do not work well in certain jurisdictions and may create a more hostile adversary in case of a dispute.

Ignoring the culture and adopting only the American business style will no doubt create issues and more than likely cause the deal to fail. The use of local counsel or a local partner may help bridge these issues. When in Rome, do what the Romans do, with an American twist.

B. Language Issues. One of the first hurdles to overcome when negotiating a foreign transaction is whether to document the transaction in English or in the local language. In some cases, the decision is easy because local law may require the documents to be in the local language in order to be enforceable (e.g. usually documents relating to title to real estate, employment matters or documents to be notarized and registered in the local jurisdiction). In other cases, the decision is more difficult and will depend on a series of factors, such as choice of law provisions, cultural aspects, transaction cost and type of deal. For example, if the local court will be the court with jurisdiction to resolve any controversies, documents in English will more than likely need to be translated into the local language for the court's consideration. This may present a future problem for the parties because (i) the translation will be done only after a controversy has started, and (ii) the translation will be performed by a local certified professional translator, which is usually appointed by the court. Choosing the local language at the beginning of the negotiation or agreeing from the onset on a translation of the English document is the best course of action. Additionally, it is not uncommon for the parties to use side-by-side agreements (i.e., in both the local and English language). The benefit of side-by-side agreements is sometimes overshadowed by the legal and translation cost involved in keeping the two versions current, particularly in deals with lengthy agreements.

C. Local Partners. As opposed to the United States where using a local partner is a choice and not a necessity, in certain countries or in certain situations the need to team-up with a local partner is essential for a successful project. Having a local partner can provide the best and worst alternatives. On the one hand, a local partner can ease the growing pains of doing business in a new jurisdiction, resolve matters before they become issues, and immediately produce contacts that are needed to properly develop the new venture. On the other hand, the complexities of having a local partner may be overwhelming at times, since the local partner will have to be treated respectfully based on his culture, have a "de facto" control over the project and may use some of his influence to benefit himself in lieu of the project. Further, some jurisdictions grant favorable treatment to local partners and in case of a controversy, local courts may unjustly side with the local partner. Notwithstanding the foregoing, with proper up-front due diligence, ongoing and

constant supervision and the use of independent local counsel, the use of the local partner may outweigh the risks.

A good local partner can become a partner for life and create a long lasting and profitable relationship. So when is a local partner needed? A local partner is needed when a party has no prior experience in a country or when the rule of law is not always enforceable and the success of the project depends on interaction with the government or quasi-government entities. When determining whether a local partner is needed, consider the following questions: Where is the project? What experience do you have in that country? How complex are the legal and business issues for the project to be successful? How developed is the particular country's laws, bureaucracy and judicial system? For example, if a party decided to purchase land and develop a hotel in the Middle East, and such party had no prior experience developing hotels in the Middle East, the need for a local partner would almost be mandatory. If that same party with no experience decided to do the same deal in the U.K., a local partner would not be necessary.

The world, however, is changing and the need for local partners has reduced considerably in the last 20 years particularly since countries have adopted more foreign investment friendly regimes and local lawyers have stepped-up their role in easing the cultural shock and facilitating relationships with the community. An additional factor in reducing the need for a local partner is that more and more companies have employees that are familiar with the local culture, so there is no need to go outside of the company for the expertise. Hopefully, in the not to distant future, electing to have a local partner will be more of a choice than a need.

IV. INTERNATIONAL COMPLIANCE AND GOVERNMENTAL MATTERS

A. Foreign Corrupt Practices Act. Bribing government officials is part of the culture of many countries. The U.S. Foreign Corrupt Practices Act (FCPA), however, imposes severe penalties for U.S. companies (and even their foreign subsidiaries) that provide "anything of value" to an official of a foreign government or political party to obtain or retain a business advantage. The penalties can include multi-million dollar fines for corporations and fines and imprisonment for individuals.

The opportunities ("open hands") for bribery in international real estate transactions are common. These transactions are subject to numerous laws and regulations requiring decisions, permits, or approvals regarding authorization to do business, taxes, zoning, etc., at various levels of the foreign government. There can be penalties for illegal payments made not only by officials or employees of the U.S. developer (or its foreign subsidiary), but also for payments on their behalf made by their representatives, including agents, consultants, intermediary businesses, banks, or even lawyers.

In view of the recent, renewed emphasis on FCPA enforcement, any corporation contemplating international business should have a carefully drafted code of

conduct, compliance program, and specialized training for all employees with any responsibilities related to the transactions. Equally important, there should be a thorough "due diligence" checklist to evaluate the experience, reputation, performance record, and credibility of foreign companies or individuals under consideration for any representative work. It is also very important to have specialized FCPA contract provisions (including acknowledgements, representations, and indemnifications) for all engagement agreements with such foreign representatives.

B. Patriot Act/OFAC. In the wake of the terrorist attacks of September 11, 2001, Executive Order 13224 and the USA Patriot Act of 2001 were implemented. Both require consideration in international transactions. The Executive Order, issued by President Bush, attempts to halt financial support for terrorist organizations by blocking assets of foreign persons who pose a risk of committing acts of terrorism. The Executive Order mandates that a domestic company shall not do business with persons identified in the Executive Order or on the list of Specifically Designated Nationals and Blocked Persons provided by the Office of Foreign Assets Control ("OFAC"). That list contains the names of individuals and entities that are suspected of terroristic activities or money laundering. OFAC maintains an updated list on its website. To the extent that a domestic entity is involved in an international transaction, it may be desirable to obtain a representation that none of the parties to the development are currently subject to any U.S. sanctions administered by OFAC; and none of funds relating to the transaction will be lent, contributed or otherwise make available to any subsidiary, joint venture partner or other person or entity, for the purpose of financing the activities of any person currently subject to any U.S. sanctions administered by OFAC.

The Patriot Act requires financial institutions, which include "persons engaged in real estate closings and settlements," to adopt anti-money laundering programs that include (1) the development of internal policies, procedures, and controls, (2) the designation of a compliance officer, (3) an ongoing employee training program, and (4) an independent audit function. While "persons engaged in real estate closings and settlements" have been temporarily exempted from coverage under the Patriot Act and at present no rules affecting such persons engaged in real estate closings and settlements have been adopted. Thus, none of the Patriot Act programs are currently required of domestic real estate clients. The Financial Crimes Enforcement Network of the Treasury Department, however, may in the near future issue regulations that affect real estate clients, but that situation could change.

V. REAL ESTATE STUFF

A. Recordation, Memoranda and Notaries.

1. Recordation of Memoranda and Other Documents. Different legal systems provide for different rules as to what types of documents can be

filed of record and, what form is required in order for a document to be recorded in the applicable public records. Unlike in most jurisdictions in the United States, in many foreign jurisdictions only documents that create or convey interests in real property may be recorded. Thus, only deeds, leases, condominium declarations, mortgages and similar documents may be recorded and there is no mechanism for recording a memorandum of contract or other similar "notice" documents. Local counsel should be consulted to understand restrictions on recordation and required formalities. One practice tip for hotel managers in several jurisdictions, particularly in Europe, is to obtain the equivalent of a subordinate or junior lien on the real property comprising the hotel that secures sums payable under the management contract. If the hotel owner and lender consent to this arrangement, a mortgage can be recorded to put parties on notice of the manager's rights.

2. The Notary. When executing transaction documents in a foreign jurisdiction, it is critical to understand what documents, if any, are required to be notarized and what formalities and fees are involved in the notarization process. In the vast majority of foreign jurisdictions some form of notarization is required to transfer title to real estate. In certain jurisdictions, management agreements and other transaction documents are required to be notarized in order to be valid and enforceable. In the United States, notarization is considered somewhat of a technicality and can be performed by anyone who obtains a notary certificate. In many other countries, notaries either must be lawyers and/or must receive significant training. The role of the notary also varies. In several European jurisdictions, the notary must literally review all of the documents being notarized and take such action as is necessary to confirm that the parties to the documents fully understand the contents of the documents. Also, in many jurisdictions around the world, notary fees are quite significant. In some jurisdictions the fees are a stated percentage of the "value" of the transaction and, in certain jurisdictions, notary fees are negotiable, although often subject to a minimum and a maximum amount.

B. Title Insurance. Although common in the United States, the availability of title insurance is a relatively recent development in certain parts of the world, such as Mexico and the Caribbean, and remains unavailable in other parts of the world. A number of title insurance companies based in the United States have entered the Mexican and Caribbean market. In these jurisdictions, when a sophisticated United States lender or investor is involved in a transaction, you should assume that title insurance will be required. When issuing a title insurance policy in these jurisdictions, the insurer will generally rely heavily on the opinion of their local counsel. Also, because of the form of policy and exclusions from coverage, consideration should be given to the cost/benefit of acquiring title insurance in the various foreign jurisdictions where insurance is available. Specifically, in jurisdictions where title can only be transferred by recording a deed with a specific registrar and a certification of title or similar report is available from the

registrar, the added value of the insurance can be questioned. Also, when one considers that one of the most significant risks to title in many foreign jurisdictions is political (*i.e.*, expropriation or nationalization of assets) and that these risks are generally excluded from coverage, the value of purchasing a title insurance policy must again be questioned.

C. Restriction on Foreign Ownership. Many jurisdictions continue to restrict ownership of property by foreign persons and entities. At times these restrictions can be circumvented by use of a local entity or a trust. One interesting example is Mexico. Under the Mexican Constitution along with its foreign investment law, foreigners are forbidden from acquiring direct title to land for residential purposes within the so-called "Restricted Zone." The Restricted Zone encompasses areas within 50 km (approximately 30 miles) of the coastline and 100 km (approximately 60 miles) of Mexico's borders and represents approximately 40% of the land area in Mexico. However, foreigners may acquire the effective use of residential property within the Restricted Zone through the establishment of a 50-year renewable trust, or fideicomiso, arranged through a Mexican banking institution that will hold title to the property for the benefit of the investor and future beneficiaries. Under such a scheme, the foreign investor is able to direct the trustee (the bank) in regards to every matter including financing, development, and transfer of title. Additionally the Mexican Constitution, as well as other applicable statutes, provide that certain natural resources are not subject to private ownership (*e.g.*, the beach, rivers, etc). However, these natural resources may be the subject of a concession, which enables its holder to use these natural resources by paying a fee to the applicable governmental authorities. Thus, many hotels in Mexico obtain beach access via license or concession from the Mexican government.

D. Recognition Agreements. Setting aside the current economic climate and the general reluctance of lenders to enter into subordination, non-disturbance and attornment agreements and thereby grant recognition to the hotel manager; particularly outside of the United States, consideration must be given to whether "recognition" is a recognized legal concept in a particular jurisdiction. Often, although not customary, private agreements between the lender and the hotel manager can be accomplished, but will not be binding on a third party purchaser at foreclosure. In these hybrid circumstances, if the lender acquires the hotel post-default, the lender, as the successor owner, will be obligated to honor the terms of the management contract; whereas a third party purchaser at a foreclosure sale or similar auction of the property will take free of the management contract. As a practice tip, keep in mind that even if your local counsel tells you that a recognition agreement is not customary, inquire whether such an agreement, although not customary, would be enforceable.

VI. **HOTEL OPERATIONAL MATTERS**

A. Management Contracts versus Leases. Both management contracts and operating leases are recognized in the United States. Without getting into much detail and

history, although the pendulum swings back and forth, the management contract is currently, and has for the last several decades, been far more common in the United States. In contrast, in Europe, although the management contract continues to increase in popularity, the operating lease was, historically, the norm. In any event, there are jurisdictions that do not recognize the hotel management contract as a legal concept. In these jurisdictions, one can craft a lease with a single purpose operator that effectively provides for the same economics and risk allocations as would be obtained via the use of a hotel management contract.

B. Privacy Laws. Consideration must be given to applicable privacy laws. Although the United States has recently seen an increase in various privacy protections, most other jurisdictions, particularly those in the European Union, which in 1998 enacted sweeping data protection legislations, have significantly more advanced legislation in this area. When doing business in these jurisdictions one must understand these rules as they require significant safeguarding of both guest information and employee information.

C. Entity Formation. As noted above, certain jurisdictions have prohibitions on foreign direct ownership of real estate. Additionally, for the tax reasons noted below, it may be beneficial to form a local entity when transacting business in certain jurisdictions. The one thing to keep in mind is that unlike in the United States where you or your legal assistant can often form an entity on a few minutes notice at modest cost, the entity formation process can be very time consuming and require various governmental approvals and formalities. Also, various jurisdictions, particularly those in Asia, may require any number of (i) local officers, (ii) local directors, and (iii) local employees, as well as minimum capitalization requirements and as well as a number of ministerial requirements that can take weeks and, at times, even months to accomplish.

D. Bank Accounts. Consideration and advance planning must be undertaken when opening bank accounts in various jurisdictions. Just as the recent Patriot Act and other legislation in the United States has made it more difficult for a foreign person or entity to open an account in the United States, the same is true, often to an even greater extent, in many foreign jurisdictions.

E. Employment Matters.

1. Employment at Will. United States employers are accustomed to the prevailing employment at will doctrine; however, most foreign jurisdictions rejected this doctrine some time ago. Thus, many jurisdictions provide for mandatory severance and counseling as well as other termination benefits. Further, although the United States has the WARN Act which essentially requires minimum notice for a mass layoff or facility closing, many jurisdictions provide more employee protection in this area and, in some cases, require actual government approvals in connection with layoffs and terminations.

2. Profit Sharing. Although generally optional in the United States, certain jurisdictions have mandatory profit sharing for employees. For example, the Mexican Constitution, as well as the Mexican Federal Labor Law, provides employees the right to participate in the profits of their employer (10% of the profits). In order to reduce the impact of this provision, most employers customarily incorporate a services company to employ the employees, and allocate a non-significant profit to such service company.

3. Unions. Although this issue will obviously vary from jurisdiction to jurisdiction, consideration should be given to the likelihood of a unionized work force. Also, collective bargaining rules and requirements vary by jurisdiction. Often, in jurisdictions where a unionized work force will be inevitable, managers and owners should seek out so-called "friendly" unions (ones with good reputations for fair dealing, etc.), prior to the work force being contacted by unfriendly or unscrupulous unions.

4. Expatriate Workers. Consideration should be given to the fact that local labor laws may be applicable to United States citizens working in a foreign jurisdiction. Thus, the matters noted above (such as data protection and mandatory severance) may be applicable to your client's United States employees that are temporarily relocated to a foreign jurisdiction.

VII. TAXATION (A/K/A GETTING YOUR MONEY HOME)

A. Jurisdictional Tax Matters. Unlike most foreign jurisdictions, the United States subjects its residents to taxation on their worldwide taxable income. As such, prudent U.S. taxpayers conducting transactions in foreign jurisdictions must give careful consideration as to the structuring of their foreign transactions to minimize their combined worldwide taxable income and to control the timing of U.S. taxation of their foreign profits. Note that the U.S. provides a tax credit against U.S. income taxes for foreign taxes paid, which means that the combined tax rate will generally not exceed the maximum U.S. rate then in effect. However, if the foreign jurisdiction imposes rates significantly lower than the U.S., the taxpayer may consider conducting its offshore transactions through a foreign "blocker" entity, which can control the timing of when foreign income must be reported on the taxpayer's U.S. tax return. When implemented properly, this type of structure may provide a valuable mechanism for deferring U.S. taxation until foreign income is ultimately repatriated to the U.S.

Taking a step back from implementing complex structuring alternatives, a taxpayer may choose to argue that the foreign jurisdiction has no right to tax its operations because the taxpayer does not have sufficient presence, or nexus, within the foreign jurisdiction to support taxation. Where a tax treaty exists between the foreign jurisdiction and the United States, this argument is phrased as an argument that the taxpayer does not have a "permanent establishment" in the jurisdiction at issue. In any case, and although well beyond the scope of this

presentation, whether an entity has sufficient nexus with a foreign jurisdiction to support taxation by that jurisdiction is determined by weighing the particular facts and circumstances at issue. Facts such as having a physical address, having local employees and bank accounts will be considered. Correctly or not, many United States-based companies take the position when performing technical services and management duties in foreign jurisdictions where all on-site employees are employed by the resident owner or an owner affiliate, that they do not have the minimum presence in the jurisdiction required to subject it to local taxation. Obviously, to the extent that an operator manages multiple properties in a particular jurisdiction, this position becomes far less credible.

B. Withholding. In many jurisdictions, payments to foreign entities will be subject to withholding. The withholding rate may differ from the tax rate. The question as to who is liable for withholding and, more importantly for the failure to withhold – the payor, the payee, or both – can vary.

C. Value Added Tax. In some jurisdictions, certain fees and royalties are subject to value added tax. This tax is generally calculated on the gross amount of the fee or royalty, without deductions. If an entity is collecting VAT from the purchasers of its services and paying VAT to the providers of the services and materials it consumes, the ultimate VAT payment to the taxing authority is a net amount. However, if a hotel company provides services for a fee that is subject to VAT, but does not purchase services in the applicable jurisdiction, there is no ability to offset and make a net payment. Thus, most service providers seek to be "grossed-up" for VAT payments such that they receive the correct amount of their negotiated compensation net of VAT. This is often a subject of much negotiation.

D. Document Bifurcation. Service providers, licensors and owners are taxed differently in different jurisdictions. Each party should be careful to research and draft the most tax advantageous agreements. Often a foreign management company will bifurcate the fees earned as the manager and/or licensor between several agreements and each such agreement may be with affiliated entities of the hotel manager that may be based in several different jurisdictions. For optimal tax treatment and the most advantageous structure and terms, local counsel and a reliable tax advisor are necessary for any international transaction. From an owner's view, the bifurcation of the applicable fees and documents should not be a concern so long as when aggregated, the various fees and documents correctly reflect the totality of the business arrangement that was negotiated and provided the documents correctly reflect the intentions of the parties as to default and other potential termination rights and survival. For example, if a typical branded management arrangement is, for tax reasons, bifurcated into both a management contract and a royalty agreement, the owner needs to be certain that the agreements are cross defaulted and provide for automatic cross termination so as to not be left in a situation where one agreement terminates while the other remains in place. Note also that it is important for the owner to keep track of the locations of its payees in order to ensure that it is complying with any withholding obligations it may have with respect to such payments.

E. Transfer Taxes. Transfer taxes can vary from the negligible to amounts exceeding 10% of the value of the property to be transferred. Care must be taken to minimize these taxes and, in some jurisdictions, they may be negotiable. In many jurisdictions, equity transfers can also trigger these tax payments.

VIII. MISCELLANEOUS

A. Currency Issues. One of the most important features of any international hotel transaction or project is the ability of the U.S. developer or operator to repatriate income out of the country where the project is being developed. Many jurisdictions have currency control regimes in place that restrict the ability to transfer U.S. dollars into a jurisdiction, as well as transfer funds back out of the country in U.S. dollars. In Venezuela and Brazil, for example, the Central Bank or similar regulatory authority regulates the transfer into the country of U.S. dollars by requiring that the owner of the funds enter into an arrangement with the Central Bank or similar authority in order to convert the U.S. dollars into local currency at an official exchange rate that may differ from the open market rate.

In the case of Venezuela, this control by the regulatory authority gives the government discretion to grant or deny the developer or operator funds requested for specific projects. It also makes it very difficult for a developer or operator to negotiate contracts with local parties because although the unofficial currency exchange rate is used by most parties, the government prohibits the use of the unofficial currency exchange rate. Once the U.S. party is ready to extract funds from the country, the U.S. party may then repurchase dollars at the official exchange rate. However, another negative consequence of this regime is the delay by the regulatory authority in delivering U.S. dollars to the developer or operator once the currency exchange has been authorized. In light of these circumstances, the U.S. developer or operator may wish to investigate whether financial institutions provide hedging products to mitigate the currency risk in a particular country.

Currency risks can also arise even in countries that do not have a currency regime in place. For example, in Mexico, there is no currency control mechanism. However, if any of the transaction documents are denominated in U.S. dollars but allow the local party to make payments in Mexico, the payor is entitled by law to pay the sum in Mexican pesos at the then-applicable official exchange rate as published by the Central Bank. Thus, the U.S. developer or operator may suffer currency exchange costs by being paid in Mexican pesos at one exchange rate but then having to purchase U.S. dollars at a higher exchange rate. The solution to the preceding problem is to require that all payments are made to the developer or operator in U.S. dollars and outside of Mexico.

B. Hotel Branding and International Trademark Protection. Regardless of jurisdiction, the ultimate value of a trademark to its owner is dependent upon a number of factors, including its market appeal, the availability of the mark for use, its registrability, and how easy it is to enforce against others in the

marketplace. A well-planned trademark portfolio adds value to a hotel brand's bottom line, provides leverage during negotiations, and keeps competitors at bay. But, what are protectable trademarks and how does a company secure such rights?

A trademark is anything — including a word, symbol, color or even a sound — that serves to identify a particular good or service with its source. Trademark rights arise automatically in the U.S. under the common-law upon use of a mark in commerce. However, these common law rights are limited in scope to the geographical area where actually used, plus a reasonable zone of expansion around that area. Federal and state trademark registrations provide greater protection to a trademark owner, including greater geographical rights — the entire U.S. for federal registrations and the entire state for a state registration. Federal registrations have a term of ten years, but can be renewed indefinitely, so long as the mark is still being used. Common-law trademark rights do not expire at any particular time. Instead, they are perpetual rights that last for as long as a trademark owner is using the mark and protects it.

When a federal trademark application is filed, the U.S. Patent and Trademark Office ("PTO") will examine the application to determine if the mark is registrable. The PTO may refuse registration of a mark for a variety of reasons, such as: (a) if it is likely to be confused with another pending or federally registered mark, (b) it is generic, or (c) it is descriptive of the goods or services for which it is used. The more arbitrary a mark, the more likely it is to achieve registration. Nonetheless, sometimes more descriptive, unregistrable terms have greater market appeal than arbitrary marks. Thus, there may be times when a hotel forgoes trademark registration protection in order to promote its products or services.

In choosing trademarks, a hotel brand should consider whether its trademark is sufficiently distinctive from other trademarks and trade names that it will generate recognition amongst consumers of the source of the goods or services sold with the mark. Ideally, a company's customer base will develop strong recognition between a trademark and the company as the source of the goods or services at issue. The value of a trademark ultimately depends largely on such customer recognition. A distinctive trademark meets another important goal; *i.e.*, it is a stronger mark and is easier to enforce against infringers. Brands that develop reputations associated with their brand names will benefit from protecting their trademarks internationally too. Once a U.S. trademark application is filed, "priority" applications may be filed in other countries that claim the benefit of the U.S. application filing date. After that date, a company may still file foreign applications for the trademark, but the applications will receive their application filing date, rather than the earlier date of the U.S. application. Delay in foreign filing creates risk that another company may acquire foreign trademark rights in a mark before the U.S. trademark owner.

A European Community trademark application may be of interest to a brand with international business, since it provides coverage for the entire European

Community – about 28 countries of the European Union. Another cost-effective approach is to file a Madrid Protocol international application. Such an application provides the option of protecting a mark in about 75 countries, one of which is the European Community, by filing one application with the World Intellectual Property Office ("WIPO"), in one language, with one set of fees, and in one currency. An international trademark application is transmitted by WIPO to the national trademark offices that are members of the Madrid Protocol. Each country examines the application, and if the trademark office of a designated country does not refuse protection within an eighteen month time period, trademark protection is automatic in that country with no additional fees. Thus, a Madrid Protocol application provides a streamlined and cost effective means for international protection.

With proper planning, a valuable international trademark registration portfolio can be developed and protected.

C. Tidbits for Your Client. As a final item, when representing a domestic client doing business around the globe, there are a number of items that should be considered in order to help your client's bottom line and avoid unintended costs and consequences. First, when expense reimbursements are addressed, be sure to inquire whether your client intends for any of its executives or other personnel to travel business or first class. If so, the expense reimbursement provision of the agreement should provide for reimbursement of travel at business or first class rates. Second, if there will be unintended or unavoidable costs of doing business in a foreign jurisdiction such as VAT payments and/or obtaining foreign work permits or visas, endeavor to negotiate for all payments to your client to be grossed-up for these items (as provided above). Finally, be sure that any nonsolicitation provision (as to project employees) excludes any employees that your client has relocated from the United States to the foreign jurisdiction where the project is located as those people may likely want to return home to the corporate office at the end of your client's involvement in the project.

IX. **CONCLUSION.**

Being an operating business, acquiring, developing, owning and managing a hotel project is very complex. Adding to the mix, operating a hotel project internationally, one must consider, among other matters, the laws and customs of the jurisdiction in which the hotel is located, the existence or non-existence of governmental incentives, United States' federal laws, such as the Foreign Corrupt Practices Act, as well as local real estate, employment and tax laws. Hopefully this article will aid you in navigating these complex issues and representing your clients around the globe.