

THIRD-PARTY AGREEMENTS (F&B, SPAS, RETAIL, ETC.)

INDUSTRY TRENDS – TODAY’S ISSUES

Presenter



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Marriott International, Inc. – Law Department Structure



- Over 70 Attorneys, 180+ total Associates in 9 Offices:
 - Bethesda, Maryland (MI Global HQ)
 - Chevy Chase, Maryland (Ritz-Carlton HQ)
 - Orlando, Florida (MVCI HQ)
 - Zurich (Europe Continental Division HQ)
 - Dubai (Middle East & Africa Development Office)
 - Hong Kong (Asia Pacific Continental Division HQ)
 - Beijing (Asia Pacific Regional Development Office)
 - London (MVCI Regional Development Office)
 - Singapore (MVCI Regional Development Office)

Issues facing the Hotel Industry in General



- Uncertain market conditions
- Security/terrorism concerns

Common Examples of Third-Party Arrangements within a hotel context



- Restaurants
- Retail Shops
- Spas
- Antenna Licenses
- Parking Valet
- Nightclubs
- Casinos
- Coffee Shops

Why Enter Into Third-Party Arrangements?

- Provides important services to the hotel's guests
- Third-Party providers may have expertise and name recognition that can also draw locals to the hotel (e.g., well known chef/restaurateur; nightclub, spa and other fitness facilities)
- Can provide more financial certainty for a hotel's bottom line (for example – a fixed lease payment)
- Can also provide for a fee payments to the third-party provider (for example – sub management agreements)
- Can provide for risk allocation to the third-party provider that is experienced in providing such services

Threshold Issues to Consider

- Will the hotel owner or the hotel manager negotiate the agreement and how much input from the non-negotiating party is appropriate?
- Will the hotel owner or the hotel manager enter into the agreement with the provider?
- Which party will be responsible for build-out costs? On-going maintenance?
- Issues related to the third-party provider's employees (discussion below)
- How closely will the third-party provider be required to follow a hotel's standards?
- What are the hours that the establishment must be open?
- Will the hotel have audit rights over the books and records of the third-party provider?
- Under what instances may a third-party provider terminate the arrangement?

Typical Concerns re: Employees

- Are the hotel employees unionized?
- Are the employees of third-party provider unionized?
- Hotel access issues of the employees of a third-party provider (from a security perspective and union concerns)
- Background checks on the employees of the third-party provider
- Employee training (e.g., acceptable spa treatments, hotel brand standards and an employee's failure to adequately reflect such standards)
- Requirement that all employees of third-party provider

Security Concerns re: Employees

- From a hotel owner/operator perspective – guest and associate safety is of paramount concern.
- Access within the hotel for the third-party provider employees
- Background Checks – Depending on local law and custom and the course of dealing of the third-party provider, whether employees of the third party provider can be a heavily negotiated point

Restaurants

- Is there another 3 meal-a-day restaurant within the hotel?
- Are there brand standard food items that must be served?
- Will hotel guests be permitted to charge the cost to their room?
- How much input will the hotel owner/operator have related to menu and pricing?
- Are there certain exclusives that govern what brands of merchandise may or may not be sold within the hotel (e.g., certain coffee or soda brands)
- Licenses and permits
- Will the restaurant provide room service?
- Insurance/Indemnification issues (discussed below)

Retail



- What happens to the existing retail merchandise?
- Are there certain exclusives that govern what types/brands of merchandise must or must not be sold within the hotel (e.g., certain coffee or soda brands, sundries, etc.)
- Does a hotel brand restrict what types of adult materials may be sold in a third-party retail outlet (e.g., alcohol, tobacco, adult reading materials)
- Proper licenses and permits
- How much input will the hotel owner/operator have related to menu and pricing?
- Insurance/Indemnification issues (discussed below)

Spas

- Does the agreement cover the hotel's pool and fitness center?
- Can cover typical spa-type procedures (manicure/pedicure) but often also includes massage, waxing and other "medical" type procedures such as botox
- The third-party provider employees must be properly trained and licensed
- Age requirements for certain treatments
- Will the spa employees be permitted to go to a guest's room to perform services?
- Will memberships be sold to the general public?
- Insurance/Indemnification issues (discussed below)

Antenna Licenses

- Antenna carriers pay market rates to place specified antenna equipment on the rooftop of taller structures
- Good income source for hotels
- Important to require antenna carriers to adhere to any legal requirements regarding the types of equipment present on the rooftop
- Insurance/Indemnification issues (discussed below)

Parking Valet

- Important to adequately define the services to be performed
- This arrangement lends itself to a lot of interaction with hotel guests, so again, proper training of the third-party provider's employees is essential
- Insurance/Indemnification issues (discussed below) are key in this type of agreement.

Considerations re: Insurance Provisions

- The agreement should require that the third-party provider procure operational insurance on or prior to the date it begins its pre-opening responsibilities within the hotel (not when such business opens to the public)
- Require that the third-party provider's coverage is primary and not in of any other party's coverage
- Ensure that Hotel Manager and Hotel Owner and their respective affiliates are added as additional insureds. What about mortgagees?
- Coverage should cover the entire premises of the business within the Hotel (including any walkways leading thereto)
- Will third-party provider obtain its own coverage for its personal property within the premises?
- For spas with personal services – special insurance coverage should be considered

Examples: Insurance Provisions

- Commercial general liability insurance against claims for bodily injury, death and property damage occurring in conjunction with the operations of the Restaurant including, without limitation, coverage for liquor liability, products/completed liability (specifically covering food products) and contractual liability, with a combined single limit for each occurrence of not less than \$10,000,000;
- Workers' compensation coverage as may be required under applicable laws covering all of Restaurant employees at the Restaurant, and employer's liability insurance of not less than \$1,000,000 per accident/disease;
- Fidelity bond coverage in an amount not less than \$250,000 covering the Restaurant's employees at the Restaurant. Hotel Manager and Hotel Owner, shall be named as loss payees on the fidelity bond coverage;
- If the Restaurant will use vehicles in the operation of the Restaurant or for any catering or delivery services, then the Restaurant shall procure commercial automobile liability insurance covering bodily injury (including personal injury) and property damage with a combined single limit of not less than \$1,000,000;
- Employment practices liability insurance for harassment, discrimination and wrongful termination in an amount not less than \$1,000,000 covering the Restaurant's employees at the Restaurant. Said policy shall include coverage for third party claims for harassment and/or discrimination. If the third party coverage is not included under the employment practices liability policy, then the commercial general liability insurance must include such coverage.

Considerations re: Indemnifications

- Again, the hotel's owner and manager and their affiliates are often the indemnities. Do the loan documents require the mortgagee to also be named?
- Consider requiring indemnification for: (i) trademark or name infringement claims against the third-party provider; and (ii) employee claims matters
- In the situation of a "celebrity chef" restaurant, consider indemnification in the event of a disagreement between such chef and his or her business partners related to the Restaurant (including, menus, recipes, designs, concept, product sourcing channels)

Example: Indemnification Clause

- The Third-party Provider shall defend, indemnify, and hold harmless the Hotel Manager and the Hotel Owner, as well as each of their respective subsidiaries, affiliates, officers, directors, agents, employees, representatives, successors and assigns (collectively the “Indemnified Parties”) from and against any and all actions, claims, suits, demands, judgments, losses, costs, expenses and/or damages, including attorneys’ fees, arising out of or resulting from the performance of the Services including, but not limited to, any damage or loss to the Hotel or Third-party Provider's equipment and/or Third-party Provider’s violation of a Legal Requirement.

Third-party Provider shall further defend, indemnify, and hold harmless the Indemnified Parties from and against any and all actions, claims, suits, demands, judgments, losses, costs, expenses, and/or damages, including attorneys’ fees: (i) for or arising out of any personal injuries to, or the death of, any of Third-party Provider's employees or agents working at the Hotel; or (ii) for or arising out of any personal injuries to, or the death of, any other person arising out of Third-party Provider's Services or the presence of Third-party Provider’s employees or agents at the Hotel. The foregoing indemnification obligations shall not apply to the extent of Manager’s sole negligence or willful misconduct. The provisions contained in this paragraph shall survive the termination of this Agreement.”

Other Considerations

- Type of the agreement with the third-party provider (for example – lease, license, sub-management agreement)
- Length of the term of the agreement with the third-party provider
- Hotel owner/operator’s rights to terminate the agreement
- Use of the hotel’s marks by the third-party provider for advertising and on the internet and in other marketing materials

Conclusion

- Agreements with third-party providers are often beneficial to hotels to drive business from the local community (e.g., popular restaurants, spas)
- These arrangements provide for parties with certain expertise to provide services for the benefit of the hotel's guests and beyond
- Hotel owners and operators must give careful consideration to the types of third-party services that will be beneficial to customers and the providers engaged to provide such services
- With a well-drafted agreement, third-party arrangements can provide hotels and their guests with many beneficial services and make a positive financial on the hotel - all while allocating risk between the third-party service provider and the hotel's owner and/or operator