

# Typical Claims that Might Arise from a Management Contract, Possible Resolutions, and Alternative Dispute Resolution

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Alexandra Cole, Perkins Coie  
Clark Schweers, BDO Consulting

# Presenters



- Richard Barrett-Cuetara, Esq., Chair, Hospitality Group
- 25 years of experience with complex real estate disputes, special emphasis on the hospitality industry
- Represents owners, operators, franchisees, franchisors, real estate developers, and real estate investors
- Hospitality Litigation Experience
  - Special Litigation Counsel, Adversary Proceeding, U.S. Bankruptcy Court
  - CMBS Litigation against REIT, Master/Special Servicers
  - Price-gouging defense, Attorney General, State of Texas
  - Constitutionality of hotel ordinance, actions by hotel inspectors, city manager and law enforcement personnel
  - Franchisor/Franchisee Disputes
  - Partnership litigation, division of assets/liabilities and breach of fiduciary duty, mismanagement, conversion, disgorgement, negligence, fraud and civil RICO claims

# Presenters



- Alex Cole, Partner, Perkins Coie
- Focuses her real estate practice in the areas of real estate transactions and development, hospitality, international real estate, project finance and construction law.
- Routinely involved in large real estate acquisitions (hotel, office and retail) and represents all the various parties in the construction and development process.
- Past projects include: Park Hyatt Australia, purchase and disposition of The Carlyle in transaction including sale of Rosewood Hotels and Resort and four other hotels, Fairmont Hotel and Canadian Pacific Hotel merger, numerous buildings in Illinois Center, Chicago Mercantile Exchange, The Harold Washington Library, McCormick Place Expansion and Hotel, Underwater World at Pier 39, Warsaw Financial Center, and the construction and renovation of numerous plants, industrial complexes, hotels, shopping centers and other commercial projects in the United States and Europe.

# Presenters



- Clark Schweers, Managing Director and head of Insurance Claim Services Practices, BDO Consulting
- Leads BDO's Insurance Claim Services practice with more than 13 years of experience advising clients on complex property and business interruption claims for insured businesses.
- Has assisted Fortune 1000 companies in preparing and analyzing complex insurance claims relating to losses from catastrophic events.
- Has conducted extensive work on international losses, leading engagements encompassing more than \$1 billion dollars in recoveries.

# Failure of Performance Standard

- Is it a pure financial test?  
e.g., Hotel must achieve a threshold NOI.
- Based against budget?
  - What if arbitration pending regarding budget?
- Is it a two prong test?  
e.g., must achieve
  - (a) GOP is less than x % of budgeted GOP
  - (b) RevPar Index is less than x %
  - (c) Is it "and" or "or"?
- Application of force majeure or major renovation.

# Rights to Cure

- Payment of shortfall of NOI.
- If multiple years, does the HMA require cure payment of shortfall in both years – greater of the two? Only the last year?
- Parties can read the same words and come away with a different interpretation – often wise to use examples of calculations.
- How many times within the term are you allowed to cure?

# Expert Determination

- Only one – named in HMA?
- Accounting issues
  - Appropriate categorization under uniform system
  - Did force majeure really affect performance?
  - Did a manager manipulate the numbers?
  - What if numbers themselves are in dispute?
    - Whose numbers are correct – do you have the right to audit – will you get cooperation to do so?

# Right to Terminate

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- What notices / approvals are required before you exercise right?
- Generally is a "right" and not automatic but must be exercised timely or waived.
- Presence of right gives you opportunity to negotiate
- Can you reserve your right to terminate? – Build in additional time frames?



# Consequences of Termination

- What rights do you have to negotiate with a replacement brand?
- Orderly transition – how do you rebrand?
- Do you owe any portion of key money upon termination?
- What effect does the litigation / arbitration and potential rebrand have on hotel operations?
  - Have a PR plan in place.

# Damages for Wrongful Termination

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- Assessment of costs of proceeding
- Present value of income stream for remaining term of HMA

# Typical Dispute Types

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- Contract Termination
- Working Capital
- Property Claims
- Binding Contracts
- Relationship Conflicts

# Typical Disputes (cont.)

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- Hotel Standards
- Incentive Fee Disputes
- Performance Termination
- Management Transition
- Termination Fees

# Typical Disputes (cont.)

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- Construction Projects
- Fraudulent Transactions

## The Resolution Process – Now What?

Appeasement, the Art of War, or the  
United Nations???

# Appeasement

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- Mediation
  - Does it work?
  - Waste of time and money?
- The Mediator
  - Industry specific?
  - Generalist
- Expectations
  - Reasonable v. Unreasonable
  - Likelihood of Success

# The Art of War, Sun Tzu

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- “If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle....”



# The United Nations - Arbitration

- Single Arbitrator vs Arbitration Panel
  - Neutral Arbitrator
  - Non-Neutral Arbitrators
- Read the briefs, follow the law?
- Professional fees
- Appeal Problems



# Session Evaluation

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