

A pineapple with its green crown sits in a field of vibrant green grass. The background is a clear blue sky with soft, white clouds. The entire scene is framed by a white horizontal band that contains the conference title.

THE HOSPITALITY LAW CONFERENCE: SERIES 2.0

April 12-13, 2018 • Houston, TX

Dispute Resolution Provisions in Management Agreements

A non-lawyer's perspective

2018 HOSPITALITY
LAW CONFERENCE:
HOUSTON

APRIL 12-13

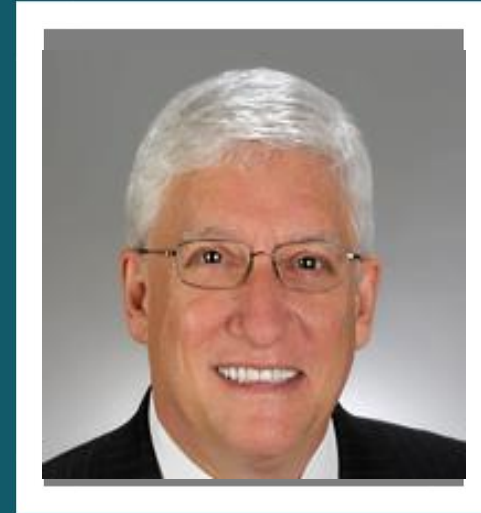


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Managing Partner

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- 52 year veteran in lodging industry.
- Experienced owner, manager, asset manager and consultant
- Involved in negotiation of scores of HMAs, expert witness and arbitrator in contract disputes



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What's the Problem?

- Too little attention paid to Dispute Resolution provisions
- Poor provisions can handicap counsel, mediators and arbitrators
- Added cost and time if not spelled out thoroughly and in detail



A Three-Step Process

- Expert determination of many types of disputes
- Mandatory mediation
- Arbitration by panel of qualified neutral arbitrators



Expert Determination

- Single Expert should decide disputes relating to:
 - Annual Plan including Marketing Plan, Operating Budget, CapEx and FF&E Budgets
 - Financial information provided to Owner
 - Changes to the Comp Set
 - Changes to Performance Test threshold and failure to meet performance standard
 - Central services charges
 - Approval of Executive Personnel
 - Force majeure event scope and effect
 - Assignments by Owner or Operator
 - Amounts owing on termination of HMA



Qualifications of Expert

- A “Qualified Person” who is:
 - Independent and neutral
 - Not less than ten years hospitality industry experience relevant to the dispute
 - Has not been an employee, consultant, expert, mediator, or arbitrator to either party for past three years
 - Agrees to not serve in any of those capacities for either party for next three years
 - Is not, nor has been, the owner of any debt or equity position in the hotel, Operator or Owner and their affiliates for past three years.
- Legal credentials are not required unless agreed to by the Parties.



The Expert Resolution Process

- Notice by complaining party of dispute requiring Expert resolution
- Agreement by parties to appoint Qualified Person within 20 days (if no agreement, appoint two other Qualified Experts to determine the Expert)
- If no agreement, AAA appoints Qualified Person
- Expedited Procedures and Commercial Arbitration Rules of AAA and Federal Arbitration Act (FAA) but provisions of HMA prevail in event of conflict
- Written submissions exchanged per Expert Scheduling Order
- One in-person hearing
- Decision within 45 days of appointment of Expert
- Expert decisions final and binding on Parties



Mediation

- Except for disputes subject to Expert resolution, Parties may request mediation administered by JAMS.
- Mediator appointed by JAMS but must be a Qualified Person.
- Non-binding conference but Parties must agree to minimum 8 hours of mediation.
- Neither Party may initiate arbitration until mediation is complete but emergency relief from court may be sought.



Arbitration – The Panel

- Arbitration Tribunal Per AAA Commercial Arbitration Rules
- Chairman of Panel from AAA list. Must be retired federal judges or magistrates, or practicing attorneys with more than twenty years experience litigating in US District Courts in the subject District.
- Two other members of the Tribunal appointed by Parties but must be (a) Qualified Persons and therefore neutral under AAA rules, and (b) prohibited from communicating with the party that appointed them or their counsel throughout the arbitration.



Arbitration Process

- AAA Rules for Large, Complex Commercial Disputes apply.
- Discovery, including timeframes, and Evidentiary Matters governed by FAA and local rules of appropriate federal District.
- Tribunal issues scheduling order within six weeks following appointment of the Tribunal.
- Tribunal issues findings of fact prior to issuance of decision or award.
- Tribunal shall have no more than one year from Notice of Requirement to Arbitrate with nine months for discovery and pre-trial tasks.
- Decision and award within 45 days of arbitration hearing.



Don't Forget to Spell Out in the HMA

- Any limitations on discovery such as document production, interrogatories, and depositions. The HMA governs over FAA & AAA.
- Pre-hearing submissions required.
- Any post-hearing submissions including Memoranda of Law.
- Arrangements for payment of Tribunal and other costs, and for determination of “prevailing party” by the Tribunal.
- Post dispute restrictions on employment of arbitrators.
- Limitations on Grounds for Appeal.



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Lastly,

- Hire expert witnesses who are as experienced in the lodging industry to at least the same degree as the Qualified Persons who will be judging their testimony, and pay attention if they tell you that your baby is ugly. Most economists need not apply.
- The only people profiting from your disputes are us! Be reasonable, but be prepared.

