

# Hotels Resorts & Tourism

## Newsletter

Global

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## Baker & McKenzie's observations from the field: The impact of the global financial crisis on hotel management

By Baker & McKenzie Partners Graeme Dickson and Robert Williams

In the last 18 months, the hotel industry has moved from an environment where there was a frenetic desire by both owners and operators to sign up new management agreements to one where new signings are comparatively rare. We are being told that attention is switching to how to make the agreement provisions work to maximize operating performance and hotel saleability. Although in more instances than we would like to see, this is really code for "survival".

The current environment is very challenging. A range of factors have come together to put a level of stress on the owner/operator relationship which is unprecedented. In our view, the accepted hotel management contract structure and common terms have, arguably, passed their "use-by date".

To quote President Obama's Chief of Staff, Rahm Emanuel "Never let a serious crisis go to waste".

Will the hotel industry take the opportunity that the current crisis provides to fundamentally review and refashion long developing trends which have had, and continue to have, a negative impact on hotels as an attractive property investment asset class.

In our view, this is perhaps the most important article we have penned. We trust that you find it interesting and thought provoking.

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## The observations according to Baker & McKenzie partners Graeme Dickson and Robert Williams

*Approximately 50% of the contracts we have negotiated over the last few years, have failed to proceed past the concept stage.*

### 1. Dramatic slowdown in new contract activity

From 2000 to approximately 18 months ago, we experienced an exponential increase coupled with increase in "fallos" in the number of management agreement negotiations we were involved in – particularly in the Asia Pacific region.

Over the last 18 months there has been a dramatic slowdown in the volume of management agreement negotiations being conducted and an unprecedented number of agreements negotiated in the last few years have “fallen over”. Prior to the last 18 months, it was rare for a management agreement for a new build hotel to be terminated before construction of the hotel began. By contrast, approximately 50% of the contracts we have negotiated over the last few years, have failed to proceed past the concept stage.

Almost all of these failures are attributable to the inability to obtain necessary debt funding. This is primarily because of the following factors:

- the prospective lender has become a victim of the crisis (e.g. Lehman Brothers);
- the prospective lender has withdrawn the offer to provide debt funding; or
- the prospective lender has dramatically increased the cost of the debt (including “new” upfront fees, and a dramatic escalation in the interest rates payable) or has significantly ramped up the terms upon which the debt is to be offered (e.g. reduction in LVR and/or significant increase in interest cover requirements).

Because of its central position in the current financial crisis, the topic of debt financing is covered further below.

### 2. Operator response to developer inability to fund hotel construction – is it friendly or not?

*Owners did not push for any funding related conditions precedent because debt funding was so readily available when the deal was signed.*

In addition to the unprecedented number of agreements terminated prior to construction commencement, there is also a relatively large pool of existing agreements that involve owners experiencing significant funding difficulties.

The vast majority of these agreements were not structured as options, and the construction obligations imposed upon the owner did not provide a termination right if suitable debt finance was not available. In our experience, owners did not push for any funding related conditions precedent because debt funding was so readily available when the deal was signed. Also where an operator was offering some degree of exclusivity, the operator was not willing to sign an optional deal – it wanted a firm commitment.

Without a termination right available to the owner if it cannot build or fund a hotel because debt ceases to be available, or available on commercially viable terms, an owner who cannot so build or fund will probably be in breach of its contract with the operator.

So what evidence are we seeing that operators are seeking to use these provisions against owners and commencing legal action for breach of contract?

Not much.

From what we can determine, operators are adopting a calm and rational approach to the problem, and are dividing owners who are unable to proceed with construction of the hotel or resort development into two categories:

1. those where there is little or no prospect that the owner will secure suitable debt funding; and
2. those where the owner's prospects are significantly brighter.

It is our understanding that operators are seeking to end contractual relations with the owner as soon as it becomes evident that the relationship has no future. This is not just altruism. Many of these contracts impose obligations on the operator which would prevent the operator from pursuing a competing opportunity within a specified area surrounding the site of the proposed hotel or resort. It would certainly add insult to injury to not only lose the contractual opportunity first secured but to then be precluded from an alternate opportunity because of restraints in that initial contract. Also, in the tightly knit confines of the hotel industry, any belligerent or overly aggressive action by an operator where it is generally considered that developers are victims of events totally out of their control would be remembered for a very long time, potentially to the detriment and future expansion prospects of any such operator.

Where operators perceive greater prospects of reaching a solution, they are working closely with owners to identify alternate sources of funding whether it be debt or otherwise.

For operators who wish to take a more aggressive approach, achieving a successful outcome would not be without its challenges. In our view, consideration would at least need to be given to whether the inability to obtain debt funding on commercially realistic terms, or at all, would allow the owner to terminate the contract without penalty based on the common law doctrine of frustration.

The modern common law concept of frustration is generally considered in these terms:

*“Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render the thing radically different from that which was undertaken by the contract.”*

(source: Carter on Contracts)

Without going into this in too much detail, if it can be demonstrated that the business environment has changed so “radically” since the contract was executed, it could be argued that the agreement has been “frustrated” by the debt crisis. Frustration would be available even if not specifically addressed in the agreement.

Even if frustration is not available, and a court could be convinced that the owner has improperly repudiated the contract and the operator is entitled to be compensated with a damages award, we expect there would be real difficulties in demonstrating the quantum of these damages. The usual approach would be to look at the anticipated fee stream over the life of the contract, discount this amount by a factor which recognises that it is being paid now rather than over the term of the agreement and then further reduced it by the prospect that these damages would be mitigated by allowing the operator to pursue competing opportunities which would not have been available if the contract had proceeded (generally due to some restraint provision contained in the agreement). The mitigation aspect of this calculation would be the part which would be most difficult to assess even with the aid of expert testimony.

### **3. Who can buy my hotel – is the pool of potential purchasers drying up?**

*If the hotel is to be sold subject to the operator's continuing management, generally the owner is prevented from selling the hotel to a "competitor" of the hotel operator.*

This is perhaps the most confronting issue currently in hotel deals involving independent operators. Management agreements are giving these operators greater control over who the owner can sell their hotel to and on what basis. This is having an impact on hotel valuations and in turn on how attractive hotels encumbered with management agreements are to investors.

From the operator's perspective, it is all about tenure and being in a long term contractual relationship with an owner that the operator understands, can work with, and who the operator can be confident will fund the hotel's operations.

Clearly, this desire on the operator's part can conflict with the owner's desire to sell the hotel for the best price attainable.

The starting point is to examine whether the operator has any pre-emptive rights to purchase the hotel, and if so the extent of those rights. It can make a huge difference to the saleability of the hotel as to whether the operator has, "first right of refusal" as opposed to "last right of refusal". Pre-emptive rights of this kind are unusual but if they exist, they can make the sale process very messy and significantly increase the transactional sale costs. This is particularly so, if the pre-emptive rights effectively require the owner to contribute to the due diligence costs of prospective purchasers as an inducement so that prospective purchasers will feel comfortable given that the exercise by the operator of a "last right of refusal" option could result in the due diligence process being a complete waste of time and money.

It is generally accepted that a hotel with vacant possession attracts a higher price than one encumbered by a hotel management agreement. However, in recent times operators have been reluctant to agree to management agreement terms which permit sale with vacant possession. Operators overwhelmingly prefer for any sale of the hotel to be accompanied by a novation of the management agreement to the hotel purchaser. On the rare occasions where the operator will agree to vacant possession on sale, there is normally a substantial fee payable to the operator (often calculated by reference to the number of years fees that would have been payable for the balance of the term of the management agreement).

If the hotel is to be sold subject to the operator's continuing management, generally the owner is prevented from selling the hotel to a "competitor" of the hotel operator. While this seems straight-forward enough, it has become difficult to determine whether a particular company or person is a competitor. The environment has now evolved to a point where many hotel investors hold equity in hotel operators as well as owning hotel real estate assets.

This would, for example, include Blackstone (which owns Hilton Hotels), Colony Capital (which owns Fairmont Raffles), Kingdom Holdings (which has a significant interest in Four Seasons), and Morgan Stanley (which runs the Panorama Hospitality Group).

The definition also needs to be closely considered to ensure that it doesn't disqualify owners of hotels that have operating businesses (as distinct from hotel operating companies) such as Singapore's GIC.

The balancing of the competing interests of the owner and the operator on this issue is in our view a significant challenge to the ongoing viability of hotel real estate as a viable property asset sub class as discussed further below.

#### **4. Is debt still available and on what terms?**

The short answer is – it depends. It is clear that debt is far harder to source in the current economic climate than at any other time in living memory.

We are seeing a number of trends emerging in debt funding:

- Existing customers of lenders stand a significantly better chance of lenders obtaining a loan than a newcomer (in fact we are advised that some are not talking to new customers at all).
- As real estate values continue to decline, commercial property lending is not viewed particularly fondly. This is even more pronounced in relation to hotel property assets.
- Where financiers do lend, terms have become significantly more onerous for the borrower (more fees, higher interest rates, lower loan to valuation ratios, lower interest cover ratios, intensive ongoing monitoring, refinancing consequences for other borrowings etc, etc, etc).

We are also aware of numerous instances where lenders are putting significant pressure on existing hotel clients to refinance now, even though the relevant loans mature in 12 to 24 months' time.

A two-tier financier approval process seems to be emerging. In former times, it was only necessary to run the gauntlet of the credit committee. Now, if you are lucky enough to get approval from the credit committee, it's off to the "asset allocation" committee. The task of this committee is to allocate increasingly scarce resources between asset classes. We are reliably advised that property (hotels) is not a favorite of this committee for a range of reasons.

*It is clear that debt is far harder to source in the current economic climate than at any other time in living memory.*

## 5. Condo hotels – a particular source of concern

We have written at length in previous newsletters of our particular concerns regarding condo hotels. Click [here](#) to view our condo hotels article.

In the current climate, condo hotels (in the pre-construction and operating phases) are under particular stress.

However, the biggest problems are with the hotels in the pre-construction phase. We are aware of instances where the developer is under financial stress as lenders seek to reassess their willingness to continue to fund hotel projects, and of instances where the lenders are putting pressure on the developer to refinance either on a stand-alone or portfolio basis as part of a general retreat from the property sector in general and hotels in particular. In some cases, the developer's position is even more precarious, with intensive discussions with financiers to ward off the mortgagee taking possession or appointing an insolvency administrator to the hotel assets. In the "dead man walking" category, actual capitulation and consequent surrender of the hotel development is happening.

At the same time, investors who have contracted to acquire apartments in the condo hotel usually on a leveraged basis are doing their sums to assess what their potential financial exposure would be where all of their investments have declined in value, and/or stopped producing income as dividends decrease. In the worst cases, in addition to their leveraged condo investment, such investors have to fund share market investments. Some such investors will be ill placed to fund the final installment of their purchase price when their condo is completed.

In the middle of all this is the operator who must work out its contractual position with the developer and its financier. At the same time, it must determine its exposure to litigation from potentially disgruntled and desperate investors for whom commencing legal action may be the only recourse available to stave off financial ruin.

There is also significant stress emanating from operating condo hotels generally arising from the same factors – too much debt and too little operating income to pay it off or meet interest payment obligations. This is especially true for condo developments in destinations that are suffering worst as tourism/occupancy falls.

*We expect to see a disproportionate fallout emanating from this sector of the industry.*

We expect to see a disproportionate fallout emanating from this sector of the industry. It will be particularly disconcerting because it will inevitably attract the attention of regulators, bureaucrats, and politicians who will rush to the defence of the helpless "mum and dad" investors who were "coerced" into this investment by guileless developers. This could have adverse consequences for the broader hotel industry.

## 6. What can the owner do if the hotel is underperforming?

*Most management agreements contain performance-based termination provisions, but these clauses are usually incapable of being triggered.*

The current economic circumstances are having a severe negative impact on the financial performance of hotels across the world. A significant number of these hotels are operated by independent hotel management companies under the terms of management agreements.

If an owner considers that its hotel is underperforming, they will seek to identify the most significant factors attributing to this underperformance.

Hotel underperformance can arise from factors beyond the operator's control, factors within the operator's control or a combination of both.

If it is factors beyond the operator's control, then there is usually very little that can be done in the short term to alleviate the problem.

If underperformance is solely or predominantly due to the operator, then what can the owner do to fix the problem?

The short legal answer is, in the absence of a provision which allows the owner to terminate at any time without cause (usually in consideration for a significant termination payment) – owners will not be able to exercise the ultimate sanction of terminating the HMA.

Most management agreements contain performance-based termination provisions, but as we have stated in our previous [newsletter](#), these clauses are for practical purposes, usually incapable of being triggered.

In many circumstances, the more practical approach is to begin a closer working relationship with the operator and really seek to work together with them to drive as much efficiency and occupancy as possible. Many owners engage experienced hotel asset managers to assist in this dialogue.

However, faced with financial oblivion, some desperate owners seem to be turning to the only alternative available – repudiation of the management agreement.

This is a complex area but, in short, when one party to a contract elects to “walk away” from the contract (deciding to no longer perform the contract in accordance with the obligations contained in the contract) the innocent party usually has a selection of remedies from which to choose. Generally, they can seek a court order that the owner must continue to perform the contract or risk being held in contempt of court (a so-called mandatory injunction), or accept the repudiation and sue for damages.

If the operator seeks an injunction, the court's task is to determine whether an injunction is justified. In most jurisdictions, the court will determine whether damages is an adequate remedy and, only if it is not, will an injunction be considered. Assuming the court determines damages is not an adequate remedy, then it needs to consider whether there is any other reason why an injunction should not be granted. Courts will generally not grant an injunction where the contract can be likened to one where “personal services” are involved (the best example being an employment contract because the court will not force a person to work for an employer). Whether management

agreements form a category of “personal service” contracts has been interpreted differently in different jurisdictions around the world.

Sooner or later, we expect to see a desperate owner running a case on this basis and asking a court to rule on this issue.

## **7. Contract negotiations – is it getting easier or harder to cut a deal?**

*Both operators and financiers are raising the stakes.*

In our view, the momentum is growing to ensure that the next round of contract negotiations are going to be much harder than anything we have ever seen.

Both operators and financiers are raising the stakes.

Just about every international operating company general counsel we speak to is in the process of “tightening up” their contractual terms. Everything is up for grabs – term, control provisions, sale of the hotel, non disturbance agreements – but not termination provisions. Attention is also being given to tightening up assignment provisions and the impact that this will have on an owner’s ability to sell a hotel. The potential impact it will have on price can only be imagined.

Of greatest concern is the trend we are seeing develop with non disturbance deeds (**NDA**). NDA’s are tri-partite agreements between the owner, operator and financier designed to require the financier to only act in a manner which is consistent with the management agreement provisions. It seems evident that just about every major hotel operating company is moving into a position where it is going to make an NDA a standard requirement for every deal. This will significantly increase the time and cost involved in getting a hotel management negotiation over the line.

Whilst there are not many new deals around, the discussions on refinancings suggest that the financiers are ramping up their requirements as well. In particular, there is some anecdotal evidence to suggest that where potential borrowers are requesting debt funds to finance hotels encumbered by NDAs, the lenders may focus on the NDA terms to a much greater extent than has been the case in the past. The purpose of the NDA is to elevate the operator from the status of an unsecured creditor to a position where the operator has effective security of tenure for the term of the HMA. The result from the owner’s perspective is an even more stringent loan proposal and higher cost of financing than would be the case if the NDA was not on the table.

Of course who ultimately should pay this enhanced borrowing cost is something that can be negotiated.

## 8. What is the future for hotels as a viable asset class?

*If you accept the majority of the observations which we have made so far, then we believe you are left with a rather disturbing picture.*

If you accept the majority of the observations which we have made so far, then we believe you are left with a rather disturbing picture.

In our view, it is going to be harder for potential purchasers of hotels to justify to themselves (and their investment committee in the case of institutional investors) that it makes sense to invest in hotels as opposed to, for example, commercial properties.

Investors in commercial property with sufficient bulk generally have all the resources internally to satisfactorily manage their investments on a day to day basis. They do not outsource the management function to a great extent.

It is a completely different story with a hotel.

Generally, the owner lacks the ability to run the hotel, particularly a five-star hotel, without the services provided by an international hotel operating company. These services are increasingly being offered with some big strings attached.

To name but a few:

- Debt funding is getting much harder to obtain and the cost can be increased if the operator insists on a NDA. This results in increased funding costs.
- Even if the operator is underperforming to a profound extent over an extended period, it is extremely difficult if not impossible to terminate the operator in an effort to fix the problem. Furthermore, the owner's ongoing ability to secure an enhanced involvement in the management of the hotel is generally prohibited by most current management agreements.
- Generally hotels need to be sold subject to the management agreement, and the operator will have a role in determining whether a prospective purchaser is eligible to buy the hotel. This can have a depressing effect on the price that the hotel would otherwise fetch especially in a market where there are not many buyers. At worst, it can make the hotel unsaleable because all the potential purchasers have been eliminated by the operator or do not wish to own a hotel which is managed by that operator.

All this is not new though.

What is new is the economic fallout from the global financial crisis. Since the turn of this century, up to the start of the crisis we were living in boom times with the capital value of hotels like just about every other asset class increasing year on year. The increase in capital value alone was sufficient to make most hotels an attractive investment proposition even if operating performance was unsatisfactory. With the crisis, asset values have nose dived and owners are looking to operating performance as a means of justifying the value of the asset (as well as seeking to ensure that operating performance does not lead to a breach of their loan covenants).

The big question for the industry is whether the current crop of owners, faced with the rigidities that management contracts produce, will buy more hotels or recommend hotels to their associates. There are currently not too many positive recommendations coming from the people we talk to.

## 9. What is the way forward?

*The standard management agreement currently in use needs to be pulled apart clause by clause and reassembled in a way which deals proactively with the issues raised in this article.*

We are extremely mindful when writing this article that we did not want to lay all of the issues currently facing the hotel industry at the feet of the operating companies. That is not our intent. In fact, many of the operating companies around the world are our clients and we are very proud of that fact.

What is said in this article is common knowledge in the hotel industry and shouldn't come as a surprise to any genuine industry insider.

If what we are saying is correct then it will eventually lead to a substantial evaporation of capital available to our industry. If this occurs, then the operators are going to have to take up the funding challenge or potentially watch the industry contract. This would be a difficult situation for many operators because, over the last few years, they have sold the "asset light" message to their shareholders. To go back to those shareholders for more capital to fund hotel acquisition because there is no other capital available could be a difficult message to sell. Perhaps we will also see a change in the type of investors who buy hotels: the institutional investors who have contributed to transaction activity so strongly may be replaced by wealthy private investors who are structurally better placed to deal with the ups and downs of the industry.

So, what is the way forward? The process must start, in our view, with the operators. The standard management agreement currently in use needs to be pulled apart clause by clause and reassembled in a way which deals proactively with the issues raised in this article.

In our view, there are numerous options available in respect of each of the other issues identified. With respect to each, there needs to be an analysis undertaken to identify the issue from the owner's position and where compromise strategies can be found.

For example, a more sophisticated approach needs to be taken to an NDA. Rather than just a blanket insistence that it is required in all circumstances there needs to be a recognition that "one size does not fit all" – particularly if it can be demonstrated that insistence on an NDA is going to result in the cost of finance to the owner being higher.

Some people may be inclined to think why change now: they would prefer to see if the events identified in this article unfold and then react to them. In our view, this approach would only be successful if all other operators adopt the same strategy. If any one or more operators significantly change their approach to management agreements to address the issues identified in this article, then such operators, in our view, would obtain "early mover" advantage and become far more competitive from a far earlier point in time.

*The hotel industry needs to honestly ask itself whether sufficient attention is being given to exploring what things could be done to promote the hotel sector.*

Please do not hesitate to contact us if you would like further information in relation to these matters.

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## 10. Is more research and development the right answer?

A year ago, we wrote a similar type of newsletter to this one but in the context of a different economic climate. Looking back on that newsletter, the part of it which for us still rings as true today is the need for far more research and development into the complex relationship between owners and operators which is reflected in the modern hotel management agreement.

The hotel industry needs to honestly ask itself whether sufficient attention is being given to exploring what things could be done to promote the hotel sector as an attractive asset class and, as part of this exercise, consider what improvements could be made to hotel management agreement terms. This is certainly a challenge for the operating companies with the enhanced importance that hotel management agreements now have on the intrinsic value of hotels. But it is not just the operating companies. At no stage in the evolution of the hotel industry has hotel ownership been so concentrated. Many owners hold substantial portfolios of hotels spiraling in value into the billions of dollars in often diverse locations. Research and development by these organizations is as equally justified as it is for the operating companies.

We are all participants in a great industry but, like any industry, there is a constant challenge to improve and innovate. We believe that we are all up to that challenge.

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*PLC Which lawyer? Yearbook in 2009*

**Indonesian Law Firm of the Year**

*IFLR Asian Awards in 2009*

**Law Firm of the Year (Asia)**

*PLC Which lawyer? Law Firm Awards (5<sup>th</sup> consecutive year) in 2009*

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**Highly recommended for Corporate Real Estate in Australia**

*PLC Which lawyer? in 2008/09*

**Finalist Deal of the Year for the sale by PH Sydney Hotel Trust of the iconic Park Hyatt Hotel, Circular Quay in Sydney**

*19<sup>th</sup> Annual Hotel Investment Conference Asia Pacific (HICAP) in 2008*

**Corporate and Commercial and M&A**

*Asialaw's Fourth Annual Local Law Firms Poll in 2007*

**Indonesia Deal Firm of the Year**

*ALB Southeast Asia Law Awards (2<sup>nd</sup> consecutive year) in 2007*

**No 1 Firm**

*PLC Which lawyer? Top 20 Firms (4<sup>th</sup> consecutive year) in 2007*

**Real Estate Deal of the Year for the InterContinental Hotels Group/All Nippon Airways operating joint venture partnership**

*ALB Japan Law Awards in 2007*

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