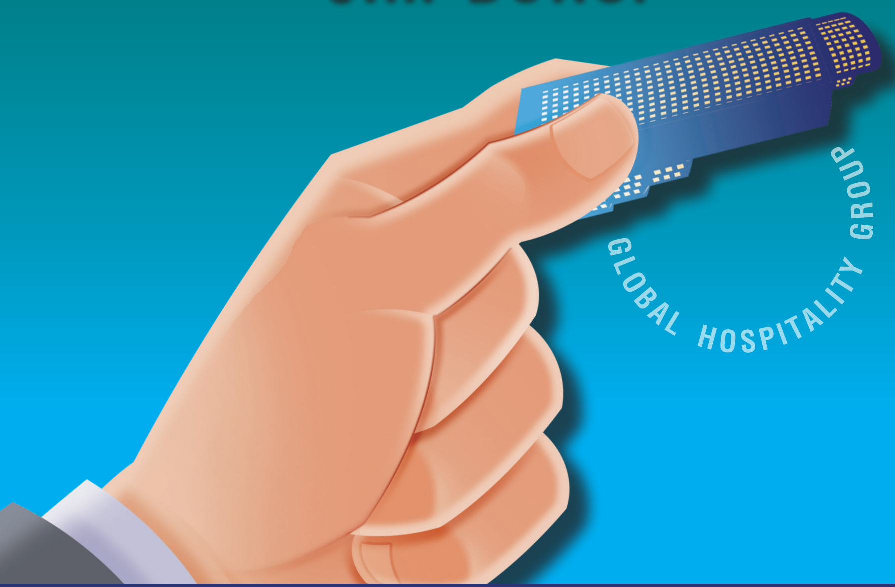
JMBM

THE How to Buy a Hotel Handbook

Jim Butler



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We wrote the book™ series:

- The Developer's EB-5 Handbook for EB-5 construction financing
- The HMA & Franchise Agreement Handbook
- How To Buy And Sell A Hotel Handbook
- The Lenders Handbook for Troubled Hotels
- The ADA Compliance and Defense Guide

Dedicated to the men and women of the hotel industry – a wonderful group of people and an industry that have been so good to us throughout our careers.

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Foreword

Jim Butler has been a career-long industry friend and colleague; I am grateful for his invitation to present this Foreword to the HOW TO BUY A HOTEL HANDBOOK.

There is no more complex form of commercial real estate than a hotel, and no more complex form of commercial real estate to purchase than a hotel.

Employment contracts, collective bargaining agreements, inventories, advance bookings and deposits, non-disturbance clauses in franchise and management agreements, financing, new supply, sensitivity to local, national and global economic trends, changes in Brand standards, PIP requirements, reserve for capital replacement, service contracts, discretionary approval of purchasers by franchisors and management companies, liquor and other licenses, tax structuring and implications, and on and on contribute to the complexity, and risks when purchasing a hotel.

There have been numerous books and articles about developing and purchasing hotels, but this handbook is unique because it presents an extraordinary amount of technical, legal and transaction structuring information based on the expertise and experience of professionals with specific arbitration, litigation, structuring, negotiating, transaction and risk management perspectives.

Although much of the material is highly technical, it is written to be easily understood and applied.

The authors have been generous in sharing information that otherwise would require consultations with attorneys and consultants.

The contents will be invaluable to buyers, sellers, investors, lenders, advisors, and many others.

Bjorn Hanson, Ph.D.
Divisional Dean
The Preston Robert Tisch Center for Hospitality,
Tourism, and Sports Management
New York University

Preface

Over the last 25 years or more, I don't know how many times I have heard from clients, "I wish I had come to you sooner" or "If only I had known that before I started buying this hotel."

We wrote this book to educate and encourage hotel buyers and sellers to consult early with top hotel professionals – when such counsel can provide maximum benefit. Perhaps sharing some of the lessons learned by others will help avoid unnecessary mistakes in buying or selling a hotel.

The *How to Buy a Hotel Handbook* is based on the experience our team has gained from more than $71 billion of hotel transactions, involving more than 3,800 hotels all over the world. It enables us to help clients identify and avoid show stoppers early in the transaction, facilitates smooth and efficient transactions, and provides one of the most extensive virtual data bases of market terms for deals and financings.

The hotel lawyers of JMBM's Global Hospitality Group® are pleased to share these insights, solutions and approaches for successful acquisitions and dispositions of hotel properties. We greatly appreciate the significant contribution to The *Handbook* made by special guest author and friend, Bruce Baltin of PKF Consulting, who is one of the most knowledgeable and experienced hotel consultants in the country.

Please send us an email to let us know how useful you found the *How to Buy a Hotel Handbook*, and share your experiences in the hotel acquisition process. If we can help you achieve your goals in any way, please call us. . . but do it early!

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Introduction

Hotels are different than other kinds of real estate, because hotels involve both special purpose real estate and an operating business. This makes buying a hotel a complex process with a lot of moving parts.

From the moment a buyer begins to evaluate the opportunity to the day the deal is closed, hundreds of details must be assessed, negotiated and locked down.

The *How to Buy a Hotel Handbook* provides a detailed overview of the hotel acquisition process, a thorough due diligence checklist for the buyer, and informative articles that address some of the most important questions that arise when buying a hotel.

We hope the *Handbook* will be a useful reference for a wide cross-section of the hospitality industry, from veteran dealmakers to hospitality students.

We invite you to visit www.HotelLawyer.com to see all the free resources we provide to the industry. This Handbook and other handbooks in the *We Wrote the Books*™ series are available for download on registration, and you can search for articles on a wide range of topics on our Hotel Law Blog (subscriptions are free).

At www.HotelLawyer.com, you can also peruse our brochure, credentials and Global Hospitality Group® members, and see how we have helped many owners, developers, investors and lenders with their hotel projects.

Part 1

A comprehensive overview of the hotel acquisition process: The view from 10,000 feet

Buying a hotel: A detailed overview of the hotel acquisition process

This article, an ongoing collaboration between Jim Butler, Chairman of JMBM's Global Hospitality Group® and Bruce Baltin, Senior Vice President and Executive in Charge of PKF Consulting USA, has been published in various forms over the years. This updated version was made available on www.HotelLawyer.com on 15 February 2013.

Why are we buying this property?

A hotel is a business housed in real estate. It is dynamic. Its market is dynamic. There are no major tenant leases. Every room has to be resold every night. Guests in the hotel's dining and meeting rooms come and go on an hourly basis. Given these circumstances, it is imperative for investors deciding to include a hotel in their portfolio to understand why they are doing so, then make broad assumptions about future market conditions and devise a plan to deal with those conditions.

The first question a buyer should ask is, "Why are we buying this property?" Often, the reasons vary from the pure economics of the deal to the purely emotional. The reality is that many acquisitions are driven, at least in part, by dreams of ownership and emotional incentives, including having a place to visit and/or entertain. Here, we are not trying to imply that there is anything wrong with decisions made for reasons other than economic ones. If one can afford to own a trophy hotel like a piece of art with little or no cash flow yield on his investment, more power to him or her. However, when such a purchase is made, it is important to understand that fact so that financing is not put in place with the expectation that the property will service the debt.

There are as many strategic reasons for buying a hotel as there are willing buyers. One may see the potential for success with a specific type of property (a luxury resort, an all-suite hotel, a limited-service hotel) in a particular location (adjacent to a major demand generator like a theme park, a baseball or football stadium, a university medical center, an industrial park, or an airport). Another may find it advantageous to long-term strategy to have a property in a certain city or a certain part of town, or to be the key amenity for residential, retail and/or office components of a mixed-use project.

The acquisition process begins when investors identify an opportunity, formulate a vision for it, and then proceed to evaluate and possibly acquire the hotel. A prudent buyer requires a thorough acquisition analysis and due diligence process to validate assumptions and avoid surprises. Due diligence may suggest needed deal restructuring or termination of a proposed acquisition. But a prudent buyer will keep an open mind throughout the process.

The hotel acquisition process – 10 steps

Given the complex nature of the interrelated business and real estate components of a hotel, the analysis and process of acquisition can be as complicated or as simple as the potential buyer wants to make it, recognizing that there are practical limitations to the human and financial resources that can be applied to a field of potential purchases. Conversely, there is a real benefit to getting complete information, and the best-informed purchasers usually get the best deals.

Although there can be variations, successful purchasers will typically follow a series of steps in a logical process to acquire a hotel. The steps of this process, each of which will be covered in this article, include the following:

1. Determining acquisition criteria
2. Identifying potential acquisition targets
3. Assembling the acquisition team
4. Evaluating potential targets
5. Calculating your bid price
6. Getting to a "meeting of the minds" with the seller
7. Agreeing on key terms of the purchase and sale
8. Negotiating the definitive hotel purchase and sale contract
9. Conducting due diligence
10. Closing the hotel purchase

1. Determining acquisition criteria

From the purely business standpoint, ownership rationale can vary from active to passive involvement. Some owners position strategically for the short-term, while others take a longer view. In other instances, owners prefer to base their investment on yield or return requirements, which can vary, based on alternative investments available, strategic considerations, and other factors. Decision criteria are unique to each buyer. Among the criteria for deciding upon a hotel or group of properties to purchase are:

- Location
- Property type
- Size of property
- Cost
- Current and potential cash flow yield
- Potential appreciation in asset value
- Risk and stability of earnings
- Upside potential from repositioning, including renovation and/or management changes
- Ability for new competition to enter market
- Ability to replace management and/or franchise affiliation
- Strengths of the buyer in renovation, asset management and/or hotel management

There is no right or wrong answer for each asset or buyer. But no matter what the underlying motivation to purchase a hotel may be, a clearly defined strategy and decision process should be in place before starting the acquisition process.

2. Identifying potential acquisition targets

After the acquisition criteria have been decided upon, the buyer will typically get word into the market that he is interested in acquiring hotels that meet specified criteria. Brokers, asset managers, hotel companies and industry consultants are among those contacted. Often, press releases and advertisements in trade publications and the general business press are used to get the word out.

Once the request for properties has gone out, the buyer will then screen preliminary offerings submitted to him while continuing to network with industry professionals for hints of properties about to go on the market before they are shopped around. The screening process is crucial, as it allows the elimination of numerous properties early on and sets the stage for substantial effort to be expended on other properties. Too often the buyer overlooks the screening step and misses good opportunities and expends unnecessary effort in the long run.

Lacking his own screening team, the buyer will often call upon a team of outside due diligence and acquisition consultants. At this early stage in the process the buyer can "pick their brains" as to their general knowledge of potentially available properties. Using experienced consultants with local market knowledge can materially help both in the screening and in the negotiation and acquisition phases.

3. Assembling the acquisition team

Given the hotel's dual nature as both an operating business and real estate, an investor should be sure to have the advice of those familiar with the hotel industry. Typically, an investor will assemble a team of professionals who will assist in the overall evaluation of a hotel property. Such a team would include the following:

Broker. The broker may represent either the buyer or seller of a lodging property. The broker typically helps market a property and bring the seller and buyer together. Often the broker helps negotiate and facilitate a sale. A broker's fee is typically a percentage of the total sales price.

Appraiser. Since the experience of potential appraisers can vary widely, it is advisable to select an appraiser who has appraised either similar properties or properties in the market in question.

Accountant. An accountant's review of the property's books and record will determine whether funds have been properly applied and whether financial controls and reporting systems are adequate.

Market & financial consultant. A market and financial consultant is called upon to ascertain how a property might perform and what it would take to achieve desired profit or investment goals. Such consultants evaluate prevailing market conditions, prepare projections for both the market and the subject property. The market and financial consultant can also review revenues and expenses and assist in assembling the business plan.

Hotel attorney and legal consultant. Attorneys specializing in hotel work can help formulate the acquisition strategy or game plan, assist in identifying and coordinating acquisition team members, spot "show stopper" issues, advise on terms and structure of transactions, and assist in legal due diligence issues from the significance of pending or threatened litigation and regulatory matters to contracts and title issues. At a minimum, the contracts and issues will likely include hotel management and franchise agreements, labor and employment, land use, entitlement and zoning, real estate, tax, corporate, environmental, ADA, trademark and other regulatory matters. In other situations litigation, bankruptcy, timeshare and other specialties may be critical. Lawyers with hotel experience can document and close what is generally not a "vanilla" real estate deal, but the purchase and sale of a complex operating business intertwined with special purpose real estate.

Architects/Designers. If the acquisition is to involve renovation or upgrading of the property, the architect will be responsible for reviewing the specifications set forth by the owner. In addition, an architect can coordinate the activities of other members of the team who will be responsible for the physical property, such as the engineer and interior designer. The architect can review existing and potential compliance with all building codes as they apply to the existing property and as they will apply to any planned renovations.

Engineer. A qualified engineer or team of engineers should review all the physical components of the property, including mechanical, electrical, plumbing, and structural elements.

Others as needed. Managers, environmental consultants, and others may be required.

4. Evaluating potential targets

Many properties will be weeded out during the initial screening process, based primarily on review of submitted offering packages, the buyer's or consultant's knowledge, and the acquisition criteria itself. For those properties that pass this initial screening, the next step is usually a site visit or a property inspection at which point another "go/no-go" decision will be made. Properties that reach the inspection stage will require a preliminary property and market analysis. The next decision, based on the analysis, will be to develop a bid price and business plan, or to eliminate the property from consideration.

5. Calculating your bid price

Perhaps the most significant element in the buyer's calculation of a bid or purchase price is the analysis of the potential earnings to be derived from the hotel. In many purchases, it's the only element. To develop the proposed acquisition price, the buyer must make assumptions as to future market conditions and the hotel's performance within that market. These assumptions will be reflected in a discounted cash flow or stabilized operating projection. Thus, a preliminary business plan which reflects assumptions as to physical facilities and condition, management, affiliation and other factors must be developed in order to assess the potential acquisition realistically.

Make the business plan realistic. We have seen too many buyers fail to achieve their investment goals because they fell short in developing the business plan. Have realistic expectations as to the amount, scope and timing of renovations and their impact on short- and long-term operating results. If you plan a repositioning, lay out all the details of things you plan to do, how you are going to do them, and the time that will be required.

Because your bid or purchase price is based upon a calculation of anticipated revenues and expenses, the due diligence process is critical to validate or gain comfort with your assumptions on these cash flow analyses, and to avoid unnecessary surprises.

Understanding the market

You've gotta have a plan. Markets change. Change is driven by many factors within a market, including the growth or decline in the supply of hotel rooms, shifts in market segmentation, and the renovation or repositioning of competitive hotels. The prudent hotel buyer will study property and market dynamics and will not purchase a hotel property without a detailed plan to produce the expected return on investment over time. This plan will be based upon an analysis of historical market performance, expectations for the growth in the supply of competitive hotel rooms, and the growth in demand for hotel rooms by market segment (commercial, leisure, group, etc.) by guest demand for hotel rooms at the projected rates, and guest demand as to facilities, design concepts, amenities and services.

Analyzing the potential of the target hotel and its market. The following table sets forth an example of the results of analysis of potential market performance. It presents a detailed picture of the historical and projected performance of the competitive market for our subject hotel and of the historical performance of the hotel within the market. It further provides a framework for quantifying assumptions as to the future performance of the property based on anticipated actions.

	Year	Average Daily Rooms				Occu-pancy		Average Daily Room Rate		Pene-tration	Yield
		Available		Occupied							
		MKT	SP	MKT	SP	MKT	SP	MKT	SP		
historical	2010	1,500	300	945	165	63%	55%	$81	$74	87.3%	79.8%
historical	2011	1,500	300	1,005	168	67%	56%	$83	$74	83.6%	74.5%
historical	2012	1,500	300	1,065	174	71%	58%	$85	$74	81.7%	71.1%
projected	2013	1,500	300	1,097	xxx	73%	xx	$88	xx	xxx	xxx
projected	2014	1,650	300	1,163	xxx	71%	xx	$88	xx	xxx	xxx
projected	2015	1,700	300	1,186	xxx	70%	xx	$89	xx	xxx	xxx
projected	2016	1,700	300	1,210	xxx	71%	xx	$92	xx	xxx	xxx

MKT = Market **SP = Subject Property**

Penetration is defined as the share of demand received by a given property relative to its share of supply; i.e., in 2010 the subject received 17.5% of demand (165/945) relative to 20%

of supply (300/1500). 17.5%/20.0% = 87.3% penetration. A shortcut is to calculate the subject's occupancy relative to the market's (55%/63% = 87.3%).

Yield is a property's RevPAR divided by that of the market, reflecting a property's relative position both as to occupancy and room rate. RevPAR is derived by multiplying Average Room Rate by the Occupancy Percentage; e.g., in 2010, market RevPAR was $51.03 ($81 x .63) and subject RevPAR was $40.70 ($74 x .55). $40.70 divided by $51.03 results in a yield of 79.8%.

In this example, relatively strong growth in demand has occurred over the past several years, as is typical of a market emerging from recession. Demand is projected to grow at more modest levels over the next several years, with the exception of the year in which a new hotel is added to the market. (New hotels in a strong market often create induced demand or accommodate otherwise unsatisfied demand). Average rate has grown modestly and is projected to continue to do so, except while new supply is being absorbed.

The subject property's occupancy and rate have both grown at below-market levels, resulting in the declining penetration and yield. The challenge for the buyer's team is to determine the specific causes of the declines in yield and penetration and devise and test a plan to reverse them, if possible, so as to realistically project future penetration, yield and cash flow.

Other factors to consider. Given market dynamics, the buyer's analysis and plan will consider the quality and condition of the following, which are the basic components of any hotel performance:

Facilities

- Design concept
- Configuration
    - Mix of guest rooms and suites
    - Restaurants and lounges
    - Banquet and meeting space

- Recreational facilities
- Parking
- Other facilities

- Materials used relative to maintenance and durability
- Compliance with current and proposed building and other codes

Identification

- Name
- Franchise or brand affiliation, evaluated in light of its contribution in terms of number of room nights and price/value perception

Whether retaining the current brand or changing to a new one, there are going to be costs involved including transition costs, if applicable, and costs related to a PIP (Product Improvement Program) demanded by an existing brand or new brand. To the extent that a PIP can be identified and priced out prior to the bid being made, the offer can be more realistic.

Management

Successfully matching an operator and hotel can be one of the most important factors determining your hotel's optimal value, gaining access to financing and achieving operational success. It is widely recognized that the business and legal terms of the hotel management agreement – wholly apart from the operator's abilities – can add or subtract 25% of the nominal value of the hotel, or more. Take a hotel nominally worth $100 million. By this industry rule of thumb, the hotel's value could easily swing $50 million (from $75 million to $125 million) depending on the operator and the management contract terms. We have seen it make even bigger differences.

So one of the most important issues to analyze on your acquisition – particularly if the hotel is subject to a long-term branded hotel management agreement is: Is the management company well-suited to the needs of the property vis-a-vis quality, operating culture, cost control and marketing strengths? What are your abilities to terminate the management company if it is not well-suited? How much will it cost? Can your seller terminate and deliver the property to you unencumbered by management (or franchise)? How does this affect your business plan for the property?

Capital structure and financing costs

What does every component of your capital stack (debt and equity) require in terms of interest or return on investment? How will the investment measure up in providing the required returns?

Calculating how much you can pay for the hotel

After reviewing historical and projected market performance, along with the historical performance of the subject property relative to that market, the potential buyer will evaluate and plan for each of the foregoing issues. The result will be a set of assumptions as to future market performance, a plan of action for the property, and a set of cash flow projections resulting from that plan. The cash flow projections, including assumptions as to capital expenditures and reserves, financing costs, an exit strategy and disposition price, will then be discounted back to a present value at a discount rate that meets the buyer's return requirement. In this way, the buyer establishes the price he or she is willing to pay for the property.

Taken as a whole, the analysis outlined above, will help the buyer determine how next to proceed: whether an appropriately priced purchase represents a turnaround opportunity with great upside potential, or whether the hotel has already reached its maximum earnings level, thus posing a significant downside risk to the investment.

In determining an offering price for the property, the prudent buyer will consider the foregoing discounted cash flow analysis, the historical earnings of the property, and the sales prices per room being achieved for comparable hotel sales in the marketplace. The relationship of the offering price to the discounted cash flow analysis is often dependent upon the strength of the market, the buyer's and seller's relative positions, and other market factors. The stronger the seller's market, the higher the offer price, and vice versa.

6. Getting the buyer and seller to a meeting of the minds

Once the buyer makes the initial offer, negotiations begin. The resulting process will either wind up with the buyer and seller coming to a meeting of the minds on the purchase price and continuing into discussions about the definitive agreement, or the negotiations will be broken off.

Once an agreement to purchase has been reached – at least an agreement in principle as represented by a signed letter of intent or term sheet, the buyer will often summarize for internal approval or other purposes the analysis which led to the decision. The resulting investment memorandum may include the following:

- Property description
- Market summary, past and projected
- Projected profit and loss and cash flow statements for the property, with a business plan and key assumptions as to:
    - Management style
    - Affiliation
    - Marketing
    - Operating revenues and costs during the holding period
    - Capital expenditures, with schedule and major categories
    - Financing
    - Exit strategy, including timing and projected value
    - Other elements of any proposed repositioning

This document can then be updated or revised throughout the due diligence process, with the final version being used during the operations transition and beyond.

In any event, as soon as there is an agreement in principle between buyer and seller, or even as a part of the offer and negotiation process, the parties will often negotiate a letter of intent or term sheet as an interim step to negotiating the purchase and sale agreement. With or without a letter of intent or term sheet, the purchase and sale agreement process has begun.

7. Agreeing on key terms of the purchase and sale

After a tentative agreement to buy and sell has been reached, the process of negotiating the major terms of the purchase and sale agreement can begin. Successfully negotiating and preparing a contract for the purchase or sale of real estate requires a thorough understanding of the objectives of the buyer or seller, the legal and tax situation, the character of the property and the interests of third parties, including lenders, brokers, unions and others, who may require contractual provisions for their protection even though they are not parties to the contract.

Because the purchase and sale of real estate involves the investment of a substantial sum of money and the transfer of valuable assets, the parties and their professional advisors should negotiate the terms of the transaction with great care and precision.

Detailed discussion should include the following crucial business elements of the deal:

- The purchase price and any adjustments
- Third-party financing, whether existing at the time of the transaction or to be arranged by the buyer
- Purchase-money financing by the seller
- Condition of the premises
- Limitations on title and possession
- “No shop” or “stand still” provision
- Default by either party
- Indemnifications
- Items included and excluded from the purchase price
- Prorations

The business nature of hotels dictates that a great many assets other than pure real estate would be included to make it a going concern. Likewise, the negotiation of the transaction and the items included and excluded have a substantial impact on the flow and cost of transition from old owner to new owner.

Assets being purchased

As a general rule, hotel assets include the following:

Current Assets

- Cash
- Accounts receivable
- Prepaid expenses
- Securities
- Inventories of food and beverage *
- Inventories of supplies *
- Printing and stationery *
- Other current assets *

Property and Equipment

- Land *
- Building and improvements *
- Furniture, fixtures and equipment *
- Linen, china, glassware, silverware and uniforms *

Other Assets

- Organizational costs
- Pre-Opening expenses
- Other deferred charges
- Deposits *
- Licenses and permits *

The above items tagged with the "*" are those assets that a buyer would normally want included in a hotel purchase. Of these, a distinction is sometimes made between those in use and those in storage. Nevertheless, a buyer would want a sale price to be on a going concern basis, including all of the foregoing, plus assignment of leases and contracts, each at the buyer's option, as well as all advance deposits not consumed by the date of closing.

Non-financial assets are also a consideration in a hotel acquisition. Accounting books and records, operating statistics, employee records, sales and marketing files, licenses and permits and numerous other items are required to keep a hotel going. The hotel buyer should be certain to have his attorney and operational advisors assist in making sure that the purchase terms will ensure a smooth transition of operations from seller to buyer.

Price

The final sales price is often affected by negotiations involving other terms in the purchase and sale contract. For example, the purchaser will at times pay a higher price if the seller is willing to provide purchase-money financing. Other factors that can influence final sales price are the amount of the earnest money deposit, the amount of time over which cash payments can be spread, and whether or not an existing mortgage can be assumed. Other considerations that may affect final sales price include the track record and financial strength of the purchaser, the speed with which the transaction can be completed, and what is being purchased (e.g., receivables, claims, other intangibles). The price may also be affected by the results of buyer's due diligence, and adjustments required as a result.

Existing management or franchise affiliation

When a hotel is subject to a hotel management contract, the contract should be examined by counsel to determine ability to assign, terminate or otherwise deal with it. When the purchaser desires a new operator, the parties must resolve the ability to terminate and address related issues of canceling the management contract. In some instances, the contract can be terminated by paying a cancellation fee. Generally, when a hotel is sold without the requirement that the existing management be retained, the sale price will be higher than it would be if the operator were to remain.

Similar considerations apply to a hotel franchise or license agreement.

Contingencies

In situations where the seller is the present management company operating the property, and the purchaser wants the management company to remain in place, the seller may offer cash flow guarantees or take back purchase-money financing, which essentially pays out the purchase price over time. Such arrangements generally create a higher selling price and make it easier for the purchaser to put together the overall financing.

When a buyer enters into a purchase and sale contract, a sizable money deposit is usually made to demonstrate the purchaser's commitment to closing the transaction. If the deal is not completed, the buyer may forfeit all or a portion of the deposit. To reduce the risk of losing the deposit, the purchaser usually negotiates a set of key terms involving various contingencies that allow the purchaser to back out of the transaction with the return of all or a portion of the deposit.

Some of the more frequently used contingencies include any inability of the purchaser to:

- Obtain specified financing
- Transfer or obtain a specified franchise affiliation
- Obtain specified licenses or permits (particularly a liquor license)
- Approve results of complete due diligence within a specified period of time
- Obtain clear legal title to the hotel's real property

In a seller's market (where the seller has a choice among many competing buyers), the seller usually agrees to encumber a transaction with one or more of these contingencies only when offered inducements such as a larger and/or nonrefundable deposit, a higher price or other more favorable terms.

Use a letter of intent (LOI), or go straight to definitive binding agreement?

The LOI advocates. One school of thought holds that a letter of intent is the best way to get agreement for the purchase and sale of a hotel property. These advocates believe that the letter of intent's more streamlined focus on only the key deal terms (without the distraction of other details) will flush out whether or not a deal can be done. And once the basics are agreed to, the letter of intent provides a good outline for the first draft of the definitive agreement of the purchase and sale agreement (sometimes just called a PSA).

They argue: Why get bogged down in a long agreement with all the details of secondary issues if there is no agreement on price and critical closing contingencies? Why even start on the seller's representations and warranties (and limitations on such representations and warranties) if you can't agree on fundamental deal terms?

Most parties do not intend their letter of intent to be a binding contract. Nevertheless, the letter of intent can be a binding contract if that intention is indicated and sufficient terms are specified. It lays out the basic terms of the agreement. It also serves as an obligation on the part of both the buyer and seller to work in good faith to complete the transaction. After the letter of intent has been accepted by both parties, the buyer must perform tasks of due diligence and must obtain financing. Negotiations regarding the final form of the purchase and sale contract should be ongoing throughout the entire process. When the content, structure and schedule of the transition are agreed upon, the closing takes place at the specified time.

Representative items covered in an LOI. The following is a list of representative deal points that might be included in a letter of intent.

> **Property description.** A description of the property being sold or leased. This is not a legal description, but is sufficiently detailed so that both parties understand the nature of the transaction.
>
> **Selling price.** A description of the price and terms of the transaction and the financing structure.
>
> **Due diligence.** The purchaser is allowed to perform a certain amount of review, documentation, and analysis of the property. The seller will give the purchaser access to its property for such matters. If any of the diligence is invasive (such as an environmental phase 1), the buyer generally will be obligated to repair any damage to the property.

Contingencies. Specific circumstances that allow one or both of the parties to void the deal.

Seller's representations. Representations that are made regarding the owner's legal ability to complete the transaction.

Dates for certain performance. Dates or time periods may be specified for executing a binding purchase contract, making deposits, having deposits go "hard" (nonrefundable), and closing dates.

What protection does a non-binding LOI offer a buyer? Unless the letter of intent provides otherwise (and the provision is stated to be binding), even when the letter of intent is executed, the seller is generally free to continue marketing the property and negotiate with other interested investors. The would-be seller and buyer must make both make a good faith effort to conclude the transaction. Ethically, this restricts the seller only to a limited extent.

Nevertheless, even when non-binding (as most LOIs are), letters of intent may serve a number of important and legitimate purposes:

1. The letter of intent permits the parties to focus on the most important terms to see if they have agreement on these before getting bogged down in detail.
2. If one of the parties is an institution or investment group, a policy may require a letter of intent before negotiations can proceed (in order to minimize legal and other expenses or to minimize the risk of undue publicity if the transaction fails to close).
3. If the transaction is to be financed by the public issuance of securities, the underwriting concern may require a letter of intent as a "comfort document" to justify the time and expense in a due diligence investigation.
4. In a complex negotiation that may take many months to complete, a letter of intent may prevent misunderstandings by identifying the purposes of the parties at the inception of the negotiation.

Should the LOI be binding or non-binding? Depending upon the language used and legal doctrines that may apply, the letter of intent can be (1) binding, (2) non-binding, or (3) partly binding and partly non-binding. The typical letter of intent attempts to detail only the most important deal points to be sure the parties have fundamental agreement of the big issues before they proceed with due diligence and definitive contract negotiation.

When a letter of intent is intended to be non-binding in its entirety, it is usually just a preliminary step used to confirm a meeting of the minds on key terms before expending more time and money on due diligence and documentation. A binding letter of intent can be dangerous, because any party may be able to compel the other party to perform without agreement on the details that are usually worked out in the final definitive agreement. However, a letter of intent is often intended to be binding only in certain regards and otherwise non-binding.

This is the case where the parties want to postpone negotiations of the details to the definitive agreement stage (after they have agreed on price, timing and other key terms), but want certain provisions to be binding, such as a forfeitable deposit by buyer, confidentiality provisions, or a "no shop" provision (preventing the seller from negotiating with others while the buyer completes due diligence, and the parties negotiate the definitive agreement). For example, sometimes a buyer will get the seller's binding agreement to "stand still" (and not sell to anyone else) during a limited period of time (say 30 days) while the buyer conducts due diligence. If due diligence is satisfactorily concluded, the letter of intent may provide some additional period within which the parties must negotiate and execute a definitive purchase and sale agreement.

The language of the letter of intent is very important in determining what provisions, if any, are binding and what provisions are non-binding. Parties should be advised by counsel whether they want a letter of intent to be binding in whole or in part, or to be non-binding in whole or in part. For a letter of intent to form a binding contract, it should expressly state that intention and it must also specify sufficiently the material terms of agreement such as parties, subject matter, price, and terms. If the parties want a letter of intent to be non-binding, that intention should also be clear. But in many states, the law will imply conditions on the parties that they may not have intended or understood.

For example, a buyer or seller may believe a letter of intent is non-binding, but may not be free to walk away from the deal without negotiating in good faith with the other party to consummate the transaction. If the parties want to be able to terminate at any time without damages, then a clause should be added to that specific effect. Similarly, since a buyer may expend substantial money in due diligence, he should understand what rights, if any, he has to force the seller to proceed with the sale.

The definitive agreement advocates (anti-LOI). In contrast to the advocates for using LOIs, another school of thought holds that a letter of intent just wastes time that could be better spent in negotiating a binding definitive purchase and sale agreement (or PSA) with appropriate "outs" or conditions such as satisfactory due diligence, obtaining financing, obtaining necessary regulatory approvals, and other such matters.

Under this approach, the parties execute a binding agreement of purchase and sale and simply provide that the agreement may be terminated (with or without payment of certain sums) in specified events prior to the expiration of the due diligence period. Once under binding contract, a buyer may have greater comfort in spending the money required to complete due diligence, obtain financing, and take the other steps necessary to buy the property. The downside of this approach is the time and money required to negotiate the agreement without the certainty that the diligence results will be satisfactory or that other conditions will be satisfied.

There can be merit to both schools of thought, depending on the circumstances.

8. Negotiating the definitive hotel purchase and sale contract

The final purchase and sale contract negotiations should lead to a document with all the terms and conditions of the transaction. The issues covered in the purchase and sale contract include all those in the letter of intent and many other details that are typically not included in a letter of intent, particularly representations and warranties, indemnifications, and closing conditions.

Hotels are complex operating businesses, integrally intertwined with special-purpose real estate. Parties to a purchase and sale agreement should be advised by experienced hotel lawyers who have a long track record of getting deals done.

Typical provisions in a purchase and sale contract deal with the following matters:

Purchase price. The purchase price and its composition (relative to equity and debt), and when and how it will be paid (i.e. upon closing, in installments, etc.)

Earnest money or deposit. The amount of the deposit and circumstances under which it would be defaulted or returned. Sometimes there is an initial deposit on signing the PSA (or opening an escrow) and additional deposits as conditions are waived or approved (such as due diligence approval).

Real and personal property being sold. A description of what the buyer is getting – the real and personal property being transferred.

Business assets being sold. A listing of the various licenses, contracts, franchises, and other miscellaneous and intangible personal property that are being transferred with the real property.

Due diligence. The review of the property and other aspects of the transaction made by the purchaser and the conditions and limits imposed upon the transaction. The contract should detail the period of time during which this should occur and the rights and obligations of each party.

Terms of purchase financing. The terms of the mortgage involved in transactions in which the seller takes back purchase-money.

Title commitment and survey/search. The specifications for the type and quality of title the purchaser is willing to accept.

Seller's deliveries. The data and information that must be given to the purchaser by the seller and the time by which it must be provided.

Employee issues. Potential liability for past employment practices for the seller and/or future employment practices of the buyer usually motivate both parties to formally terminate all employees at the closing, with the buyer interviewing and rehiring (often on a probationary basis) most of the hotel's staff.[1]

Seller's representation, warranties and covenants. The statements and promises made by the seller to induce the purchaser to buy the property. From the buyer's perspective, the purpose of the seller's representations and warranties is to cause the seller to disclose those facts that, together with ordinary due diligence, are sufficient to allow the buyer to make an informed purchasing decision. Representations and warranties in purchase agreements typically cover 3 general areas: (a) the seller, (b) the purchase agreement and (c) the status and condition of the property and the business being sold.

Representations and warranties of purchaser. The statements and promises made by the purchaser to induce the seller to sell the property.

Indemnifications. If any party breaches the representations and warranties of the agreement, what are the indemnification obligations and limits? Is there a minimum amount of claims in certain categories (or "buckets") before indemnification becomes effective? Is there a maximum or cap on the amount of indemnifications? Must claims be made within a year or some other time period proscribed by the agreement? Are consequential damages waived?

Prorations and adjustments. The specific prorations of the current revenues and expenses between the purchaser and seller.

Closing. The date, time and place of closing.

Closing documents and procedures. The various documents needed to close the transaction as agreed to by both parties. The closing procedure must also be approved by both parties.

Closing expense. The agreement reached on the allocation of closing expenses between the purchaser and seller.

Eminent domain and risk of loss. The details of what occurs if the property is taken by eminent domain (condemnation) or a casualty loss while the hotel is under contract.

General clauses. General housekeeping contract clauses, usually including matters such as the selection of the law that governs interpretation and enforcement of the contract.

9. Conducting due diligence

Particularly in the context of a hotel acquisition, "due diligence" generally refers to the investigation conducted by a potential buyer of the hotel that is the target of the acquisition. The investigation covers both the physical asset (i.e. the hotel structures, parking, systems, equipment, inventories) as well as the operating business conducted at the hotel facility, and the relevant markets and environment.

The purpose of the investor's due diligence is to understand and evaluate the potential investment in the hotel. It is the analytic review of the real and personal property, the business operations and potential of the specific hotel. This effort all seeks to validate the investor's reasons for buying the hotel and to avoid surprises after the purchase has closed.

Perhaps the most significant element in the buyer's calculation of a bid or purchase price is the analysis of the potential earnings to be derived from the hotel. To develop the proposed acquisition price, the buyer must make assumptions as to future market conditions and the hotel's performance within that market. These assumptions will be reflected in a discounted cash flow on stabilized operating projections. Thus, a preliminary business plan which reflects assumptions as to physical facilities and condition, management, affiliation and other factors must be developed in order to assess the potential acquisition realistically.

Because the buyer's bid or purchase price is based upon a calculation of anticipated revenues and expenses, the due diligence process is critical to validate or gain comfort with your assumptions on these cash flow analyses, and to avoid unnecessary surprises. Unforeseen expenditures to replace leaking window systems, replace boilers or cooling towers, demolish a portion of the hotel which encroaches on adjoining property, or meet a new property improvement program from the brand – these can all play havoc with the purchaser's expectations if they weren't anticipated.

Any letter of intent or purchase and sale agreement should provide that the purchaser's obligations are subject to buyer approving satisfactory results from the due diligence investigation. A due diligence review would typically deal with the following items:

- Audited balance sheet (for last 5 years).
- Annual audited profit and loss statements, with full supporting schedules (for last 5 years).
- Current year-to-date profit and loss statement with comparison to previous year.
- Monthly profit and loss statements, with full supporting schedules (for last 3 years).
- Occupancy and average daily rate (for last 3 years).
- Capital expenditures for the last 5 years, with current projections for expenditures.
- All architectural & engineering plans and specifications.
- All inspection reports, including health, fire, building and elevator.
- Copies of all studies, including all recent appraisals, market studies, environmental, engineering reports and marketing plans.
- List of all tenants, rent rolls, deposits and term of lease.
- Inventory of FF&E, supplies, consumables and inventories.
- Real and personal property tax bills for the last 3 years.

- Schedule of all insurance coverage, including cost and expiration.
- The legal property description.
- Copies of all material contacts, particularly including hotel management agreements, hotel franchise or license agreements, employment agreements, union agreements (collective bargaining agreements or CBAs), leases, service contracts, licenses, permits, and any documents evidencing obligations that the purchaser is expected to assume.
- Copies of all trademarks, trade names and copyrights.
- Copies of all notes and mortgages currently encumbering the property.
- Details of any administrative action or litigation threatened or pending against the hotel.
- Estoppel letters from any mortgagors (lenders) and tenants.
- A list of employees, including name, position, salary, benefits, together with the employee's employment file.
- A list of future reservations and bookings, including name of party, deposit received, rate guaranteed, dates and status.
- List of all purveyors and sources of supplies and services.

Tasks performed during the due diligence process include:

In-depth market demand analysis. Validating or refining the assumptions used in the business plan.

Legal analysis. An investigation by an experienced hotel lawyer of all the property's contracts, licenses, permits, franchises and other documents to determine any potential adverse provisions and whether they can be transferred from the seller to the buyer. In addition, a legal review would typically analyze issues such as ADA, environmental, land use, entitlement and zoning, labor and employment, employee benefits and liabilities (such as unfunded pension plan liabilities), title, intellectual property and other such matters.

Financial audit. An independent audit performed by an accountant or firm with experience in the hospitality industry.

Engineering inspection. A detailed study of all physical components of the property, including mechanical, electrical, plumbing, structural elements, telephone systems, computer systems and items of decor.

Environmental inspection. A detailed inspection made by a qualified environmental engineer to disclose any potential environmental hazards that may exist on or within the property site.

Title search. A review of the various factors that could affect the title to a property. The title search should be performed by either an attorney or title company. The results of the title search should be reviewed and evaluated by an attorney.

Property tax verification. A search into the current status of the tax assessment imposed on the property. When a hotel property is sold, the local taxing jurisdiction is likely to investigate the terms of the sale and possibly adjust the property's assessed value upward to reflect the sale price. A new assessed value could adversely affect the property's future cash flow. A property tax verification performed by a knowledgeable property tax consultant will provide an accurate estimate of future tax liabilities. The property tax consultant can also assist in minimizing an upward adjustment made by the assessor.

10. Closing the hotel purchase

The closing of a hotel transaction involves the actual transfer of title of the hotel from the seller to the buyer. Generally, when the buyer will either manage the hotel itself or bring in a new hotel operator, the closing coincides with the takeover of operations by the new operator. The parties likely to be present at a closing include:

- Seller and seller's attorney

- Buyer and buyer's attorney
- Lender and lender's attorney
- Title company
- Real estate broker

The activities that take place at a closing include (1) accounting to allocate and prorate the property's revenues and expenses and (2) a physical inventory of all the assets included in the purchase price. Any items to be transferred that are not included in the purchase price must be inventoried and valued in accordance with the terms of the purchase and sale contract.

After the necessary allocations and prorations are calculated, the mortgages and notes are signed and the requisite moneys are transferred among the parties. Once this process is concluded, the buyer holds title to the hotel.

Notes

[1]It is usually preferable for the seller to officially terminate all employees on the day of takeover and for the buyer's new entity to interview and hire them on a probationary basis. At the same time, an analysis can be made of medical and health benefits, pension and retirement plans, vacation and sick day entitlements. If appropriate, the buyer may choose to allow all employees to carry their benefits forward as if no sale had taken place, with an accounting between buyer and seller for the accrued liabilities for vacation, sick days and retirement assumed by the buyer. Legal counsel can help a buyer avoid unintended "successor liability" for employment practices of the seller or its predecessors. Legal guidance is particularly important where a hotel is the subject of union contracts, union organization activity or some unique plant closing laws (such as can be found in Hawaii). These matters can also be affected by the hotel management agreement.

Part 2

Zooming in for closer looks at specific issues for experienced professionals

Due diligence tips for your next hotel acquisition

This article was first published by the Hotel Law Blog at www.HotelLawyer.com on 9 January 2013.

What is due diligence?

Particularly in the context of a hotel acquisition, "due diligence" generally refers to the investigation conducted by a potential buyer of the hotel that is the target of the acquisition. The investigation covers both the physical asset (i.e. the hotel structures, parking, systems, equipment, inventories) as well as the operating business conducted at the hotel facility, and the relevant markets and environment.

The purpose of the investor's due diligence is to understand and evaluate the potential investment in the hotel. It is the analytic review of the real and personal property, the business operations and potential of the specific hotel. This effort all seeks to validate the investor's reasons for buying the hotel and to avoid surprises after the purchase has closed.

Perhaps the most significant element in the buyer's calculation of a bid or purchase price is the analysis of the potential earnings to be derived from the hotel. To develop the proposed acquisition price, the buyer must make assumptions as to future market conditions and the hotel's performance within that market. These assumptions will be reflected in a discounted cash flow on stabilized operating projections. Thus, a preliminary business plan which reflects assumptions as to physical facilities and condition, management, affiliation and other factors must be developed in order to assess the potential acquisition realistically.

Because your bid or purchase price is based upon a calculation of anticipated revenues and expenses, the due diligence process is critical to validate or gain comfort with your assumptions on these cash flow analyses, and to avoid unnecessary surprises. Unforeseen expenditures to replace leaking window systems, replace boilers or cooling towers, demolish a portion of the hotel which encroaches on adjoining property, or meet a new property improvement program from the brand – these can all play havoc with purchaser's expectations if they weren't anticipated.

What are the biggest complaints from buyers about hotel due diligence?

The complaints we hear usually go something like this:

- I wish I had done more due diligence sooner!
- If I had found this out two weeks ago, I would have had better options.
- We could either have renegotiated the deal or saved a lot of money before we walked from the deal.

In today's seller's market, the time allotted for due diligence, deposits going nonrefundable, and closing has been greatly compressed. All sophisticated buyers know they have to act fast. But it bears repeating:

1. Assemble your due diligence team. Coordinate your team with detailed due diligence checklists. And control the process or have a quarterback do it for you.
2. Start your due diligence as early as possible.
3. Prioritize and push critical areas of due diligence so potential "show stoppers" and other important factors can be identified and evaluated early.

Great due diligence begins with properly drafted seller's representations and warranties in the purchase agreement.

Because most hotel purchase agreements are written with strong "as is" language, and express provisions that a buyer must rely on its own due diligence, many buyers do not spend enough time focusing on seller representations and warranties. This is a mistake. Regardless of significant disclaimers in the purchase agreement, having a set of properly drafted representations in the purchase agreement by experienced hotel counsel can significantly help flush out critical issues concerning the physical and operational hotel issues that only a seller or its management company would understand.

A few buyers may rely upon a seller's representations and warranties in place of their own due diligence plan, but that too is a mistake. A buyer must execute on its own due diligence plan as if the seller made no representations. A fundamental part of a buyer's due diligence plan should be in the discussions, negotiations and tailoring of the seller representations. Even if the seller is unwilling to make a specific representation and warranty on a particular condition, focusing on the issue up front will help frame the buyer's post-signing due diligence.

Some buyers erroneously believe that the indemnification clauses of a purchase contract will protect the buyer.

However, indemnification clauses usually are inadequate to protect a buyer from additional costs that could have been avoided with proper due diligence. Indemnification generally applies only for breaches of representations and warranties, and if the seller limits or qualifies its representations and warranties, the indemnification provision may not be triggered.

In addition, indemnification is often limited by deductibles, buckets, caps and expiration dates, any of which may exclude indemnification. Further, in many cases, once the seller sells the property, the seller (or selling entity) will distribute the proceeds of sale and may have no assets left with which to pay any indemnification. Finally, even if none of the above limitations apply, the seller may simply refuse to pay the indemnification, and the buyer will then incur the cost of suing the seller to obtain the indemnity.

While indemnification can have limited value, it is no substitute for the buyer's independent due diligence.

Conclusion

Because of these issues, the buyer's first line of defense from unexpected loss is solid due diligence, accompanied by a process of working through representations and warranties in the purchase and sale agreement. Indemnification is the last line of defense. By performing due diligence in the early stages of a contract negotiation, the buyer will have more alternatives, less costs and more negotiating power to deal with the issues.

Hotel acquisition checklist

This checklist has been used by the JMBM team for more than 25 years, and continually updated over the years. It was first published by the *Hotel Law Blog at www.HotelLawyer.com on 8 February 2013.*

Buying a hotel is usually a complex process with a lot of moving parts. Just keeping track of all the key people involved can be challenging in a fast-moving deal. And because a hotel involves both special purpose real estate and an operating business, there are many details requiring attention to successfully evaluate and transfer the hotel.

That's why the hotel lawyers in JMBM's Global Hospitality Group® usually start every hotel acquisition or hotel investment transaction by customizing a generic form of checklist to fit the specific transaction at hand. We use a generic form of checklist, such as the accompanying one, as a starting point in preparing a customized checklist for each unique transaction. The customized checklist helps us manage the acquisition or investment process, keep all the participants coordinated, and press forward to meet urgent milestones and deadlines.

We created the accompanying generic checklist based upon our extensive experience with more than $71 billion of hotel acquisitions and investments, involving more than 3,800 properties all over the world. Through use of this checklist, we endeavor to identify all the people involved in the transaction (including the affected parties, advisors, and consultants) as well as all the major documents, tasks to be performed, and timing. By identifying all the tasks, due dates and responsible persons, we smooth the process and avoid overlooking something important as everyone rushes toward the closing of the deal.

The issues and concerns raised by this generic version of our various customized checklists apply to any hotel or other hospitality investment transaction – whether a purchase or sale, a loan or financing. This checklist must obviously be adapted as appropriate.

The notes appearing at the end of the checklist are intended to illustrate some of the interwoven legal and business issues presented with a hospitality investment transaction. Most of the notes are related to Buyer concerns, because the Buyer must get what it pays for and bears the ongoing risk of the investment. The Seller's goal is always to limit liabilities after the sale and to give away as little as possible to realize the fair value of the hotel.

Checklist begins on the following page.

Purchase and sale of ___________ Hotel

File No. ____-_______

Updated as of ________________ ___ , 201__

Parties	Address/Telephone Fax/Email
Buyer	____________________________ ____________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Buyer's Counsel	Jeffer Mangels Butler & Mitchell LLP 1900 Avenue of the Stars, 7th Floor Los Angeles, CA 90067-5010 Attention: ___________________ Telephone No. (310) 203-8080 Facsimile No. (310) 203-0567 Email Address __________________
Buyer's Local Counsel	____________________________ ____________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________

Parties	Address/Telephone Fax/Email
Buyer's Real Estate Broker	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
Buyer's Senior Lender	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
Senior Lender's Counsel	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
Buyer's Mezzanine Lender	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________

Parties	Address/Telephone Fax/Email
Buyer's Mezzanine Lender's Counsel	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Seller	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Seller's Counsel	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Seller's Local Counsel	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________

Parties	Address/Telephone Fax/Email
Seller's Real Estate Broker	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
Ground Lessor	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
Escrow/Title Company	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
Buyer's Hotel Consultant	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________

Parties	Address/Telephone Fax/Email
Appraiser	____________________________ ____________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Buyer's Engineer/ Physical Inspector	____________________________ ____________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Buyer's Surveyor	____________________________ ____________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Buyer's Environmental Consultant	____________________________ ____________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________

Parties	Address/Telephone Fax/Email
Buyer's Zoning/ Entitlements Consultant	___________________________ ___________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Buyer's ADA Consultant	___________________________ ___________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Buyer's Liquor License Consultant	___________________________ ___________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________
Buyer's Insurance Consultant/Broker	___________________________ ___________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address _________________

Parties	Address/Telephone Fax/Email
Current Management Company	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
New Management Company	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
New Management Company's Counsel	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________
Franchisor	______________________________ ______________________________ Telephone No. (___) ___-_____ Attention:_____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address __________________

Parties	Address/Telephone Fax/Email
Franchisor's Counsel	___________________________ ___________________________ Telephone No. (___) ___-_____ Attention:____________________ Telephone No. (___) ___-_____ Facsimile No. (___) ___-_____ Email Address ________________

Table Of Abbreviations

B	Buyer	LEN	Lender
BC	Buyer's Counsel	M	Manager
CIR	Circulated	N/A	Not Applicable
DR	Draft	R	Record
EC	Escrow Company	RCV	Received
F	File	RP	Responsible Party
FIN	Final	S	Seller
INC	Incomplete	SC	Seller's Counsel
LC	Local Counsel	TC	Title Company

Schedule of Documents

		Document	RP	Status
I.		**Organizational/Authorization Documents Of Seller (Where Seller is a limited partnership with a corporate general partner)**		
	1.	Certified Copy of Partnership Agreement	**S**	
	2.	Consent of Partners	**SC**	
	3.	Certificate of Limited Partnership	**S**	
	4.	Certificate of Good Standing-State of Organization	**SC**	
	5.	Certificate of Good Standing-State in which Hotel is located	**SC**	
	6.	Fictitious Business Name Statement	**S**	
	7.	Certified Articles of Incorporation of General Partner of Seller	**S**	
	8.	Certified Bylaws of General Partner of Seller	**S**	
	9.	Certificate of Good Standing of General Partner of Seller	**SC**	
	10.	Corporate Resolution of General Partner of Seller	**SC**	
	11.	Incumbency Certificate of General Partner of Seller	**SC**	
	12.	SS-4/TAX ID NUMBER	**S**	

		Document	RP	Status
II.	**Organizational/Authorization Documents Of Seller (Where Seller is a limited liability company)**			
	1.	Certified Copy of Operating Agreement	**S**	
	2.	Certified Copy of Articles of Organization/ Certificate of Formation	**S**	
	3.	Certificate of Good Standing-State of Organization	**SC**	
	4.	Certificate of Good Standing-State in which Hotel is located	**SC**	
	5.	Authorization of Members	**SC**	
	6.	Authorization of Manager	**SC**	
	7.	Incumbency Certificate	**SC**	
	8.	SS-4/TAX ID NUMBER	**S**	
III.	**Conveyance and Closing Documents**			
	1.	Purchase and Sale Agreement	**BC/SC**	
	2.	Assignment of Purchase and Sale Agreement to Buyer's Nominee	**BC**	
	3.	Ground Lessor's Estoppel Certificate and Consent	**BC**	
	4.	Assignment of Ground Lease	**BC**	
	5.	Deed in form used in State where Hotel is located	**BC**	
	6.	Separate Documentary Transfer Tax Declaration/Affidavit of Value	**TC**	
	7.	Preliminary Change of Ownership Report (for California) or its equivalent	**TC**	
	8.	Other Affidavits/Requirements for Recordation of Deed-to be provided by Buyer's local counsel	**TC**	
	9.	Tenant Estoppel Certificates	**BC**	
	10.	Assignment and Assumption of Intangible Property	**BC**	
	11.	Assignment of Claims (including insurance proceeds where applicable)	**BC**	

	Document			RP	Status
	12.	Assignment and Assumption of Leases/ Subleases (including consents of ground lessor)		**BC**	
	13.	Service Contracts and Equipment Leases, Advanced Booking Agreements, Employment Contracts		**BC**	
	14.	Assignment and Assumption of Union Contracts		**BC**	
	15.	Bill of Sale		**BC**	
	16.	Seller's Closing Certificate/Affirmation of Warranties, if required by Purchase and Sale Agreement		**SC**	
	17.	Buyer's Closing Certificate/Affirmation of Warranties, if required by Purchase and Sale Agreement		**BC**	
	18.	Post-Closing Holdback Escrow Agreement		**BC**	
	19.	Occupancy Tax Clearance Certificate or Conditional Certificate		**LC/ SC/M**	
	20.	Sales Tax Clearance Certificate		**LC/ SC/M**	
	21.	Employee Withholding Tax Clearance Certificate or Conditional Withholding Certificate		**LC/ SC/M**	
	22.	Resale Certificate/Seller's Permit for inventory		**BC/LC**	
	23.	Existing Management Agreement		**BC**	
		A.	Manager's Estoppel Certificate and Consent and/or General Release	**BC**	
		B.	Termination/Assignment of Management Agreement	**BC**	
	24.	New Management Agreement		**BC**	
	25.	Existing Franchise Agreement		**BC**	
		A.	Franchisor's Estoppel Certificate and Consent and/or General Release	**BC**	
		B.	Termination of Franchise Agreement	**BC**	
	26.	New Franchise Agreement/PIP Requirements		**SC**	
	27.	Franchise Default Notices		**BC**	

		Document		RP	Status
	28.	Golf		**BC**	
		A.	Estoppel Certificate re Golf Course Property Use Agreement	**BC**	
		B.	Assignment and Assumption of Golf Course Property Use Agreements	**BC**	
		C.	Notice re Assignment of Golf Course Property Use Agreements	**BC**	
	29.	Off-Site Facilities and Amenities Agreements		**BC**	
		A.	Estoppel Certificates and Consents for Off-Site Facilities and Amenities Agreements	**BC**	
		B.	Assignment of Off-Site Facilities and Amenities Agreements	**BC**	
	30.	Covenants, Conditions and Restrictions		**BC/LC**	
		A.	Declarant or Owner's Association Estoppel	**BC/LC**	
		B.	Assignment of Declarant's Rights	**BC/LC**	
	31.	Account Transfer Letter		**BC**	
	32.	Motor Vehicle Certificates of Ownership/Bills of Sale		**M**	
	33.	Assignment of Trade Names/Trademarks and Other Intellectual Property		**BC/LC**	
	34.	Payment of Conveyance Tax (Real and Personal)		**B**	
	35.	Notices to Tenants of Assignment		**B**	
	36.	Notices to Vendors of Assignment		**B**	
	37.	Attorney Closing Instruction/Recording Letter		**BC/SC**	
	38.	Prorations Schedule		**B/S**	
	39.	Buyer's Settlement Statement		**TC**	
	40.	Buyer's Exchange Documents with Qualified Intermediary		**TC/BC**	
	41.	Title Requirements from Seller (see also separate Title section below)		**TC/SC**	
		A.	Seller's Gap Indemnity to Title Company	**TC/SC**	

		Document		RP	Status
		B.	Seller's Mechanic's Lien Indemnity to Title Company	**TC/SC**	
		C.	Owner's Affidavit to Title Company	**TC/SC**	
		D.	FIRPTA (in lieu of withholding tax on non-US Sellers IRC § 1445) and Equivalent State Certificate	**TC/SC**	
	42.	Documents Permitting Continuation of Liquor Operations (temporary liquor license, assignment of liquor license, interim agreement for use of existing liquor license)		**LC/BC/ SC/M**	
	43.	Updated Rent Roll		**S/M**	
	44.	Updated Personal Property Inventory		**S/M**	
	45.	Updated List of Reservation Agreements and Bookings		**S/M**	
	46.	Schedule of Stored Luggage		**S/M**	
	47.	Tradename/Trademark filings/Transfers		**S/SC**	
	48.	Buyer/Manager Property and Liability Insurance		**BC/M**	
	49.	[Any other closing documents required by the Purchase and Sale Agreement]		**BC/ SC/M**	
	50.	Notice to Utility Companies re change in ownership		**M**	
	51.	Payment of Deposits to Utility Companies re continuing service		**S**	
	52.	Utility Meter Readings		**LEN**	
	53.	House Funds		**M**	
	54.	Tray Ledger (current guest accrued charges)		**M**	
	55.	Delivery of Keys		**M**	
IV.	**Loan Documents**				
	1.	Loan Agreement		**LEN**	
	2.	Promissory Note		**LEN**	
	3.	Mortgage or Deed of Trust		**LEN**	
	4.	Cash Management Agreement		**LEN**	
	5.	Assignment of Leases and Rents		**LEN**	

		Document		RP	Status
	6.	Other Assignment Documents		**LEN**	
	7.	Environmental Indemnity Agreement		**LEN**	
	8.	Guaranty(ies)		**LEN**	
	9.	Estoppel Certificates from Major Tenants		**LEN**	
	10.	Franchise Comfort Letter		**LEN**	
	11.	Assignment and Subordination of Management Agreement		**LEN**	
	12.	Interest Rate Swap Agreement		**LEN**	
	13.	UCC-1/UCC-1 Fixture Filing		**LEN**	
	14.	Other Loan Documents		**LEN**	
	15.	Borrower's Counsel's Legal Opinion		**BC/LC**	
	16.	Escrow instructions from Lender to Title		**LEN**	
V.	**Due Diligence Items – Property**				
	1.	Appraisal		**B**	
	2.	Physical Inspection Reports/Surveys		**B**	
		A.	Structural	**B**	
		B.	Seismic	**B**	
		C.	MEP	**B**	
		D.	Mold	**B**	
		E.	ADA	**B**	
		F.	Soils	**B**	
		G.	Fire Systems and Health Inspection	**B**	
		H.	Elevator Safety Inspections	**B**	
		I.	LEED Certification/Survey	**B**	
	3.	Copies of any current warranties (roof, HVAC, etc)		**B**	
	4.	Ground Lease		**B**	
	5.	Tenant Leases		**B**	
	6.	Subleases		**B**	
	7.	Golf Course Property Use Agreements		**B**	
	8.	Other Offsite Facility and Amenities Agreements		**B**	

		Document	RP	Status
	9.	Phase 1 Environmental Site Assessment and Other Studies	**B**	
	10.	Phase 2 Environmental Site Assessment, if recommended in Phase 1 report	**B**	
	11.	List of Hazardous Materials Used or Stored	**S**	
	12.	List of All Storage Tanks	**S**	
	13.	Zoning/Permit/Entitlement Report by Consultant	**B**	
	14.	Zoning Letter	**B**	
	15.	List of Plans and Specifications and Copies	**S**	
	16.	List of Accounts Receivable	**S**	
	17.	List of Seller's Payables	**S**	
	18.	List of Reservation Agreements and Deposits and Copies	**S**	
	19.	Rent Roll	**S**	
	20.	List of Space Leases	**S**	
	21.	STAR Reports		
	22.	List of Equipment Leases	**S**	
	23.	List of Maintenance and Service Contracts	**S**	
	24.	List of Employees	**S**	
	25.	List of Employment Contracts	**S**	
	26.	Union Contracts	**S**	
	27.	Accrued Vacation/Sick Pay	**S**	
	28.	WARN Act/Plant Closing Law Notification	**S**	
	29.	Employee Benefit Plans (if Multi-Employer, then explore Withdrawal Liability upon change of employer)	**S**	
	30.	Employee Withholding Tax Bills	**S**	
	31.	UCC Search (State of Formation and State Where Hotel Located)	**BC/TC**	
	32.	Litigation Search	**BC/TC**	
	33.	List of Litigation (including potential claims and judgments)	**S**	
		A. Workers Compensation Claims	**S**	

			Document	RP	Status
		B.	Other Pending/Potential Claims	**S**	
		C.	List of Agency Notices to Comply/ Violations	**S**	
		D.	Unfair labor practice claims	**S**	
	34.	Schedule of Construction Work in Progress		**S/TC**	
	35.	Books and Records			
		A.	Operating Reports and Financial Statements	**S**	
		B.	FF&E Reconciliations	**S**	
		C.	Current Annual Plan	**S**	
		D.	Accrued/Prepaid Expenses	**S**	
		E.	Bank Account Listing	**S**	
		F.	Other correspondence, records and files, including guest information, marketing correspondence, etc.	**S**	
	36.	Real Property Tax Bills		**S**	
	37.	Sales/General Excise Tax Bills		**S**	
	38.	Transient Occupancy Tax Bills		**S**	
	39.	List of Tax Returns and Copies of Canceled Checks (Sales, Occupancy, Employee Withholding Tax)		**S**	
	40.	List of Licenses and Permits (See Section VI)		**S**	
	41.	Certificates of Occupancy		**S**	
	42.	Building Permits/Entitlements		**M/LC**	
	43.	Existing Liquor License		**S**	
	44.	Inventory		**S**	
		A.	Inventory of Owner's Personal Property	**S**	
		B.	Inventory of Management Company's Personal Property	**S**	
		C.	Liquor Inventory	**S**	
	45.	Existing Insurance Policies (consider naming Buyer as additional insured)		**S**	
	46.	Existing Management Agreement		**S**	
	47.	Utility Bills		**M**	

		Document	RP	Status
	48.	List of Motor Vehicles	**M**	
	49.	Marketing Videos and Brochures	**S**	
	50.	Reliance Letters for any existing reports Buyer is relying upon	**S**	
	51.	Insurance Certificates required by Purchase and Sale Agreement for entries on Property	**B**	
VI.	**Title Matters**			
	1.	ALTA Survey, including flood zone certification	**TC/LC**	
	2.	Table A requirements for Survey	**LC**	
	3.	Lender's Form of Survey Certificate	**LEN**	
	4.	Lender's endorsement requirements	**LEN**	
	5.	Preliminary Title Reports	**TC**	
	6.	Underlying Title Documents	**TC**	
	7.	Proforma Owner's Title Policy, including endorsements	**TC**	
	8.	Proforma ALTA Loan Title Policy, including endorsements	**TC**	

			Document	Non-transferable must apply	Must transfer	No need to transfer
VII.	**Permits And Licenses To Be Obtained By New Management Company And/Or Owner**					
	1.	Health Permits (State)				
		A.	Food Service Permits			
		B.	Sanitation Permits			
		C.	Pool Permits			
	2.	General Excise Tax License (State)				
	3.	Transient Accommodations Tax Registration (State)				

		Document		Non-transferable must apply	Must transfer	No need to transfer
	4.	Elevator Permits (State)				
	5.	Other Equipment Operating Permits (State/Local) (e.g., Air Permits)				
	6.	Airport Permits (State)				
		A.	Greeting Permit			
		B.	Ground Transportation Permit			
		C.	Permit for Use of Access Road			
	7.	Harbor Permit (State)				
	8.	Beach Maintenance Permit/Right-of-Entry (State)				
	9.	Liquor License (County or State)				
	10.	FCC Radio Permits				
	11.	Postal Permit				
	12.	Underground/ Aboveground Tank Permit (County)				
	13.	Solid/Hazardous Waste Disposal Records				
	14.	Permit to Connect to Sewer System (County)				
	15.	Diesel Oil and Liquefied Petroleum Gas Tax Exemption Certificate (State)				

VIII. Additional issues for consideration

1. A common error in drafting and negotiating purchase agreements is the failure of the parties to agree on exactly what is being purchased for the "purchase price." Is the Buyer acquiring the property and everything in it for a single gross sales price? Or is the Buyer merely purchasing the property with additional sums and adjustments owed for existing inventory, goods, licenses, permits, and other such matters that are the subject of a calculation at or before closing? The difference may amount to hundreds of thousands of dollars in a transaction.

The parties to a purchase and sale transaction should also give careful consideration to the representations and warranties that will be exchanged in the purchase agreement. The representations and warranties serve two important but separate functions: (1) creating liability and a claim for indemnity when the other party makes a representation that later proves to be untrue; and (2) flushing out the issues through disclosure required by the agreement and focusing the parties on important issues and facts. When a Buyer agrees to accept certain representations and warranties being made only to "Seller's knowledge," the Buyer should seriously consider requesting additional comfort in the form of representations and warranties from (or after the Seller's consultation with) the asset manager, the on-site property manager or general manager, the director of marketing, the controller, and the chief structural engineer.

2. JMBM has often been able to use the ground lessor's estoppel certificate as a vehicle to clean up deficiencies in the ground lease–a purpose for which the certificate is not really intended.

3. While an assignment of Seller's claims may seem innocuous, we have found that obtaining an assignment of the Seller's claims, or at least the right to share in those claims, has enabled our Buyer-clients to assert claims or raise various defenses they would not otherwise have, including cross-claims and counterclaims in connection

with pre-Closing liabilities that result in the Buyer being named as a convenient defendant in the lawsuit.

For instance, in connection with an acquisition in Hawaii, we were able to use the Seller's assignment-of-claims provision to assert a claim against an insurance carrier for damage that occurred pre-Closing and was discovered significantly after the Closing of the transaction. This provision was critical because the Seller did not breach any of his representations or warranties and, therefore, the Buyer would not have had any rights to pursue the Seller or the Seller's insurance carrier without the contractual assignment of the Seller's claims.

4. It is important for the Buyer to obtain the tax clearance certificate as close in time to the Closing as possible. A number of counties or other taxing authorities will not issue an occupancy tax clearance certificate or equivalent; however, they are often willing to provide some form of verbal confirmation to a prospective Buyer. As a part of the due diligence, a cautious Buyer should also request copies of previous tax returns and copies of canceled checks evidencing payment.

5. We cannot tell you how often we have seen parties, proceeding without the benefit of the JMBM HIT List™, forget to transfer ownership of motor vehicles pursuant to the state transfer certificates. Many people just assume that, by virtue of the bill of sale, the transfer of ownership has been effectuated. However, for legal title to pass, the parties must comply with the specific certification requirements of the state in question.

We have also often found that Buyers assume that the vehicles are owned, but through our diligence often we have uncovered that they are subject to long-term leases, some of which may prohibit transfer. In such situations, we recommend obtaining a consent and estoppel certificate from the vehicle lessor.

In most states, the rules governing the transfer of pleasure boats and vessels are similar to those governing transfers of motor vehicles. In other words, an effective transfer requires appropriate specific certification from the relevant state agency often the same one that regulates motor vehicles.

6. It is particularly important for a Buyer to review and understand a preliminary schedules of accounts receivable, accounts payable, reservation agreements, and deposits. It is also important to update this review and analysis. A Buyer could be seriously prejudiced failing to require an update of these schedules immediately prior to Closing.

For example, a client came to us following the acquisition of a property that it handled "in house," because it realized that it had failed to ask for up-to-date reservation agreements and an up-to-date deposit list at Closing. Working off of old schedules, the Buyer did not obtain cash from the Seller or a credit against the purchase price at the Closing to cover additional deposits the Seller had received for some major events. For practical business purposes, the Buyer had to honor the significant banquet and other event reservations and give the customers credit for the deposits they paid to the prior owner, but this oversight turned profitable events into loss-leaders.

This is a good example of why it is important to require the Seller to represent and warrant the accuracy of the schedules both at the time of the agreement and as of the Closing. This is a standard representation that is used in JMBM agreement forms.

7. You cannot believe how frequently Buyers fail to pay attention to equipment leases and the impact they can have on the operation of the property after the Closing. Many equipment leases are in fact long-term capital leases that may impose millions of dollars in liability over their terms. Often these equipment leases relate to telephone systems, televisions, computers, and related operational equipment, and may be non-assignable by their terms or result in a default and acceleration upon an unconsented transfer.

Therefore, JMBM strongly recommends that the diligence review include a thorough analysis of the equipment leases themselves to determine whether they are assignable, understand the terms and the payment schedule, and obtain estoppel certificates from the equipment lessors and/or attempt to negotiate a buy-out of the same, if appropriate.

8. Every Buyer should understand each of the employment contracts (relating to the property in question) that may survive the Closing. It may enable the Buyer to negotiate for the Seller to arrange termination of certain contracts, to buy them out, or to give the Buyer a credit for certain burdensome contracts. Failure to deal with these issues could result in the Buyer assuming these liabilities under a general assumption clause in the purchase agreement.

Certain union contracts may, by their terms, also require that they be assumed, thus leaving the Buyer with no opportunity to renegotiate those terms. It is critical, as part of the diligence and underwriting process, that the Buyer understand the legal and economic impact of such contracts.

Moreover, even if the union contract does not require an assumption, a Buyer does have a duty under the National Labor Relations Act to "recognize" a union and negotiate in good faith to reach a new agreement with that union until an "impasse" is reached.

JMBM's Global Hospitality Group®'s transactional lawyers work very closely with the Group's labor lawyers to structure an acquisition for a Buyer in the manner most likely to minimize the Buyer's burdens and liabilities acquired through either an express assumption of union contract obligation or under the duty to bargain in good faith and recognize the existing union. It may not always be possible, or even the right thing, to be "union free," but you should always be "union smart." It is critical that one does not undertake any actions with respect to labor matters without consulting labor counsel, because the effects may be devastating–even from inadvertent and seemingly innocent statements and communications.

9. A litigation search can be a very helpful protective tool for a Buyer. The search should include searches in both the state and federal jurisdictions, and should include a search under the property's formal and "common name," as well as under the name of the ownership entity and the management company.

10. The Buyer should obtain a schedule of prepaid expenses (or accrued liabilities) that are to be transferred. Consider the following: (1) production and other costs for shows and entertainment at the property; (2) real property taxes; (3) charges for water, gas, electricity, telephone, telegraph, and other liabilities; and (4) transferable license fees and other prepaid amounts on maintenance and rental contracts.

11. The Buyer should obtain a list of all inventory to be purchased. The location of the inventory should be ascertained. Consider counting and tagging certain inventory items in advance of the Closing date, provided the storage areas can be sealed or segregated to prevent removal of items. These items include reserve stocks of linen, china, glassware, and silver; certain slow-moving repair and maintenance items (engineering supplies); general stores; stationery and other paper supplies; and excess stocks of beverage inventory. The Buyer and Seller should agree on the method to be used in valuing the following inventory items: (1) opened packages or cartons; (2) inventories or supplies issued from storerooms to the various departments; and (3) open bottles of beverages. The Buyer should coordinate the planning for the physical inventories of all of the inventory to be purchased and determine who is to physically count, price, and extend the inventories. The Buyer should determine if an inventory will be taken of the furniture, fixtures, furnishings, appliances, equipment, improvements, and personal property that will be purchased. These items may be itemized on Exhibit A of the Bill of Sale. The Buyer should

coordinate the planning for these physical inventories, if appropriate.

12. The Buyer should ascertain the method to be used in prorating the various utility charges. A cutoff statement should be requested from the various utility companies of their charges at the Closing date. Preferably, a written confirmation of such cutoff date should be obtained from the utility companies. If cutoff statements are not obtained, the utility bill that is received subsequent to the closing date should be prorated based on meter readings or on a time basis.

13. The Buyer should perform a count of cash on hand, including house banks, petty cash funds, and all other funds belonging to the property. Vouchers and gift certificates should also be listed and the unredeemed amounts should either paid to the Buyer or credited against the purchase price.

14. Some Buyers focus on what they believe to be the major transactional aspects of an acquisition, such as the purchase agreement, the revenues and expenses of the property, the physical and structural aspects of the property, the terms of management and franchise arrangements, and similar items. While these items are certainly critical to the transaction, one should not fail to understand the importance of obtaining or retaining the various permits and licenses that are necessary for the property to continue to operate as a going concern. Failure to maintain any one of the operational permits that were in place with the Seller prior to Closing may have an adverse effect on the operation of the property after Closing.

For instance, if there is a lapse in the liquor license, the property will be prevented from selling liquor to its guests. A great deal of customer goodwill may be lost as weddings, group meetings, conventions, and other profitable business is put in jeopardy. The results may be a dip in beverage revenue, but the net negative guest experience during that time may have repercussions far beyond the period that the property was unable to serve liquor. After all, a major component of a property's value is the goodwill established. The same is true if the property fails to maintain or obtain a cabaret license, for instance, which could result in having the nightclub at the property shut down. Depending on the type of property, this may have a devastating effect.

These are obvious examples of permits and licenses that a property might have, but there are others less obvious, which may include the PUC (public utilities commission) permit to allow the pick-up and drop-off of guests at the local airport. Again, while it may not affect the property's revenue immediately, it may affect the guest experience, and therefore the property's reputation.

Another such example is FCC permits, which are required to communicate over the airwaves (i.e., walkie-talkie radio transmission to and from limousines, vans, busses, and boats). For example, in one transaction that JMBM handled, one of the more difficult things in closing the deal was assuring the maintenance of the FCC permits so that the resort property would continue to have the ability to take its guests out on snorkeling and scuba dives off the coast where the property was located.

15. The Buyer should obtain a schedule of accrued wages and salaries of property employees as of the Closing date, together with accruals for vacation pay, sick pay, holidays, etc., and any other employee benefits such as management bonuses. The accuracy of these various accruals should be tested. The Buyer should also: (1) obtain a calculation of the accrued payroll taxes and test the accuracy of the calculation; (2) obtain copies of the physical inventories (priced and extended) and test the accuracy of the price of the extensions on a test basis; and (3) complete all proration calculations that require the receipt of a subsequent billing, as follows: (a) electricity, (b) telephone, (c) water, (d) fuel, and (e) gas. The calculations of the prepaid expense prorations (real property taxes and any other items) should be reviewed. The Buyer should obtain

a schedule summarizing the concession rent and fees due to the property at the beginning of the month and the minimum and percentage rent and fees due for the month of Closing, then calculate the prorated rent and fees. The Buyer should review the following closing adjustments: (1) payments made pursuant to any subleases, leases, contracts, or agreements pertaining to the property; and (2) all lease, security, deposit, or advance rents. The Buyer should obtain a detailed listing of the travel agent commissions payable for the guests that were in-house on the night of Closing and test the calculation of the prorated commissions. The Buyer should inquire if additional prorations are appropriate for such items as follows: (1) retroactive premium adjustments for workmen's compensation insurance; and (2) trade-out agreements. The Buyer should prepare a proration schedule of the amounts due from (to) the Buyer and Seller. The Buyer should obtain the aged accounts receivable listing as of the Closing date as provided for in the Purchase Agreement.

Hotel buyer beware: When you buy a hotel, don't buy an ADA lawsuit

This article was first published by the Hotel Law Blog at www.HotelLawyer.com on 28 February 2011.

The current legal landscape of ADA enforcement

Private plaintiff lawsuits. The last decade has seen an explosion of private plaintiff lawsuits, including class actions and actions against individual hotels (and other properties classified as "public accommodations"), alleging violations of the ADA. In states like California where ADA plaintiffs can recover actual, punitive and statutory damages, individual plaintiffs of the "sue-and settle" variety have filed thousands of lawsuits claiming nearly identical violations at numerous locations.

DOJ investigations. In addition to private plaintiff lawsuits, the United States Department of Justice also has actively sought to enforce the ADA in the form of individual property investigations, geographical sweeps, and system-wide investigations.

1. Individual property investigations. A DOJ investigation of an individual property often begins with a guest complaint at a particular hotel which is ignored or poorly handled by the owner or operator. Matters commonly escalate if the guest files a formal ADA complaint with the DOJ's Civil Rights Division. All complaints are actively investigated.
2. Geographic sweeps. The DOJ has also instituted geographical "sweeps" such as the New York Times Square/Theater District investigations from several years ago. This comprehensive ADA investigation of 60 Times Square hotels – including boutique hotels and international flag properties – was initiated after a single guest's complaint. It was a targeted investigation.
3. System-wide investigations. The DOJ has also initiated a number of system-wide investigations against the nation's leading hotels and retailers. Over the years, the DOJ has litigated or otherwise negotiated Consent Orders or Decrees with other prominent hotel flags such as Ramada Ltd. (2010), Days Inns of America, Inc. (1999), Marriott International, Inc., Courtyard Management

Corporation (1996), Motel 6 Operating LP (2004 and 2007) and Bass Hotels and Resorts (1998). In November 2010, the DOJ and Hilton Worldwide, Inc. entered into a 45-page "comprehensive precedent-setting agreement under the ADA that will make state-of-the-art accessibility changes to approximately 900 hotels nationwide."

What it means to hotel investors

The current legal landscape has created a new reality for investors. It is very possible for an investor, when purchasing a hotel or motel, to buy itself an ADA lawsuit. The property may contain architectural barriers that violate the ADA and may give rise to a private plaintiff lawsuit and/or a complaint to the DOJ that leads to a DOJ investigation. The policies and procedures of the hotel operation may also be in violation of the ADA. (Procedures would include items such as online and third-party reservations, how to deal with service animals or how to ensure that the number of guest rooms which must be fully accessible are available.) It is also possible the hotel may be currently under investigation by the DOJ, or is currently the subject of an ADA lawsuit. We are currently representing two buyers, including a foreclosure buyer who inherited a DOJ Consent Order or investigation.

Moreover, substantial revisions to the Americans with Disabilities Act Accessibility Guidelines (ADAAG) were included in the DOJ's revised 2010 regulations that implement the ADA. These new regulations go into effect on March 15, 2011 (with certain exceptions, and those go into effect on March 15, 2012). The new 2010 standards impose both technical requirements, (e.g. the specifications a property must meet to be fully accessible), and scoping requirements (e.g. the number of rooms or elements in a facility which must be fully accessible). It is possible that a hotel that has been in compliance with the ADA in the past, will not be in compliance in the near future.

ADA Due Diligence

It is imperative that an investor protect itself before completing a purchase transaction, by performing due diligence in this area. For example, if potential ADA violations exist, the investor can either require that the seller correct the problems as a condition of closing, obtain an estimate for the barrier removal and demand from the seller a credit in escrow or to reduce the purchase price accordingly. Prior to completing a purchase, the investor should consider performing due diligence in three broad areas:

- Legal. Determine whether the property is being investigated by the DOJ or if there are existing ADA lawsuits against the owner or operator;
- Architectural. Retain an ADA consultant to survey the property and determine whether architectural barriers exist; and
- Operational. Determine whether the hotel's operator has effective policies and procedures for serving disabled guests.

If the property is in California, the investor can also seek protection under California's 2009 Construction-Related Accessibility Standards Compliance Act which is designed to curb abusive ADA litigation through the Certified Access Specialist program (CASp). CASp enables business to go through a process to "certify" that their facilities meet state and federal accessibility standards. One benefit CASp offers is that business owners with certification have the option to stay or stop all construction-related ADA litigation initiated against them in state court, and instead proceed to mediation, making it possible to avoid expensive and lengthy proceedings that drive up legal fees.

Buying a hotel and financing a hotel purchase: 10 things every borrower should know

This article was first published by the Hotel Law Blog at www.HotelLawyer.com as a 2-part series, on 9 December and 13 December, 2012.

Buying hotels is in vogue right now. But financing hotel purchases has some twists every borrower should understand. The industry fundamentals continue to go from good to better, and values are increasingly favorable compared to alternative investments. Many think that this is the time to jump in, before it is too late. Most hotel buyers will want financing. Some of the big REITs or other cash rich players will buy for all cash and then find financing at their leisure. That gives them an advantage in bidding on hot properties. But most buyers will want financing to pay for their acquisition.

Hotels are operating businesses, but for lending purposes, hotels have traditionally been financed as real estate. Nonetheless, savvy hotel lenders take hotel operational aspects into account by lenders in hotel loan underwriting and documentation.

The following are some special aspects of hotel lending for borrowers to be aware in negotiating hotel loans. Many of these matter are appropriately addressed at the term sheet or commitment stage, rather than leaving them to be negotiated in the loan documents.

1. Franchise Agreements; Comfort Letters

Franchise Agreements. A hotel franchise may be important in the lender's underwriting of a hotel's economic performance. Many contracts valuable to the real property collateral for a hotel loan, such as leases and management agreements, can be collaterally assigned to the lender and preserved after a mortgage foreclosure. However, major brand hotel franchise agreements typically are not assignable to hotel lenders and are not assumable by a foreclosure purchaser. Also, the hotel lender is exposed to the risk of a borrower default under the franchise agreement and its termination before the hotel lender is in a position to cure. In the absence of a separate agreement between the hotel lender and franchisor, the hotel lender faces the risk of franchise loss following a foreclosure or imposition of new franchise fees, property improvement requirements (known as a property improvement plan or program (PIP)), or more stringent franchise terms as a condition of franchise continuation.

Comfort Letters. To improve the lender's position, typically it will require the franchisor to enter into a separate agreement addressing lender cure and franchisor termination rights upon a borrower franchise agreement default and lender rights to continue the franchise after a foreclosure. This agreement is known as a "comfort letter."

Typical terms of a comfort letter

The following are some typical terms of a comfort letter:

- Franchisor default notice to the lender and lender cure rights, including time extensions (such as 120 days) for the lender to gain access to the hotel through a receiver or by completing a foreclosure before the franchise rights are terminated;
- the lender's right to obtain a new franchise agreement following foreclosure without having to pay a full franchise application fee or complete a PIP, or continue the existing franchise agreement for a limited period while the lender decides whether to continue it on a longer term basis or permit a purchaser from the lender to make that decision without the lender incurring franchise termination fees;
- the lenders right to transfer the franchise agreement post-foreclosure to a hotel purchaser and be relieved of future liability under the franchise agreement;
- the lender's rights to transfer the comfort letter benefits to its successor, if it sells the hotel loan.

The hotel lender will require a borrower covenant to perform its obligations under the franchise agreement and not amend or terminate the franchise agreement without the lender's consent. The borrower should negotiate for exceptions to the restrictions on amendments for minor changes and modifications not detrimental to the lender's interests, such as a franchise fee reduction or term extension. Also, the loan documents should detail the time the lender has to respond as to whether proposed amendments are approved and what happens if the lender does not respond on a timely basis (see Point 10 below hereafter referred to as the "Approval Mechanism").

2. Hotel Management Agreement; SNDAs

Hotel Management Agreement. The hotel lender will typically also require the assignment of any hotel management agreement to it as additional loan security. If the hotel manager is a borrower affiliate, the hotel management agreement, or at least the manager's right to fee payments, will have to be subordinated to the hotel loan payments. The borrower will be restricted from amending or terminating the hotel management agreement without the lender's consent. The borrower may want to negotiate for rights to terminate for a manager default or performance test failure, or to make modifications that are minor or not detrimental to the lender's interests without having to obtain the lender's consent, such as management fee reductions, or a term extension if the manager is not in default.

The hotel lender may require the borrower to replace the hotel manager if there is a failure of financial covenants in the loan documents. The borrower should determine at the loan commitment stage what rights the lender will require to force the hotel manager termination. That way the borrower can evaluate whether it has those rights under the hotel management agreement or if the manager will modify the borrower rights to terminate to conform to the loan documents.

Even if the borrower can terminate the hotel manager, the logistics of doing so while remaining in compliance with the loan document covenants may be difficult, unless the covenant terms are carefully negotiated in the loan documents. The loan documents will generally require that the hotel continuously be managed by a qualified hotel manager, while any new hotel manager and new hotel management agreement must be approved by the lender, which can take time. The borrower may be able to negotiate in the loan document a standard for new hotel manager qualification and permitted new hotel management agreement terms, so that the selecting an replacement manager selection process can be streamlined. For instance, if the hotel is branded, the franchisor may maintain a pre-approved management company list, and the lender may allow any franchisor-approved management company to be the manager.

Subordination, Non-disturbance and Attornment Agreements (SNDA). A hotel management agreement is a contract for services that binds the hotel owner, but not the hotel real property, as distinguished from a lease of hotel space, for instance, that creates a real property interest to which a future hotel owner's rights will ordinarily be subject. A successor hotel owner, including a lender acquiring by foreclosure, is not typically bound by the hotel management agreement and may terminate the existing hotel manager without liability to it. Major hotel management companies entering into long term hotel management agreements may require that as a condition of the hotel owner obtaining a hotel loan, the general legal principles regarding hotel management agreement survival be reversed.

This change is accomplished through a separate agreement of the lender to be bound by the hotel management agreement following a foreclosure, which is commonly known as a Subordination, Nondisturbance and Attornment Agreement (SNDA), a name taken from the real estate leasing world. Lenders also may have want an SNDA with the hotel manager confirming the subordination principle, providing for the lender to receive notices of default and cure rights before the hotel management agreement can be terminated, and imposing restrictions on amendments and terminations without lender consent.

3. Cash Management

A cash management mechanism is required in almost all major hotel loans, particularly for loans to be securitized. The cash management system ordinarily requires that hotel revenues be deposited directly into a bank deposit account sometimes referred to as a clearing account or lock box that is blocked to borrower withdrawals. The borrower is required to send payment direction letters to credit card processors and other major hotel revenue sources, such as travel agencies, group travel organizers, airlines, and retail tenants, requiring them to make payments into the clearing account.

The next stage of the cash management system is more critical to the borrower in terms of its practical effects on day to day hotel operations. In the more restrictive version (sometimes known as a hard lock box or cash management arrangement), the clearing account receipts are swept periodically into a lender-controlled account for distribution to subaccounts, such as for debt service, property taxes, insurance premiums, capital reserves, and operating expenses or excess cash flow subaccount. The subaccounts are filled from the available cash in the clearing account in the priority set forth in the loan documents known as a "cash flow water fall." In this arrangement, the amount payable for operating expenses may be based upon a lender approved annual operating budget, or the amount in the excess cash flow subaccount will be distributed to the borrower's operating account for use to pay operating expenses instead of there being a specific allocation to an operating expense subaccount. The borrower's right to the excess cash flow or operating expense payments may be suspended in the case of loan default.

In the less restrictive system more favorable to the borrower (sometimes known as a soft lock box or cash management arrangement), the funds in the clearing account will automatically be distributed or swept to a borrower operating account for use by the borrower in its discretion, until the lender notifies the clearing account bank to cease the sweeps to the borrower operating account. The lender may terminate the sweeps to the borrowing operating account upon a loan default or other triggering events identified in the loan documents, such as a debt yield or debt service ratio test failure. When those sweeps terminate, the funds will be redirected to the cash collateral account and handled in a similar fashion as in the hard cash management system.

In negotiating the cash management system details, the hotel owner should take into account the requirements of its hotel manager, which may want hotel revenues to flow through its cash management system, so it has control over the funds to pay hotel operating expenses for which the manager may have personal liability, such as employee wages and benefits. It is advisable for the hotel owner to build in flexibility to meet lender cash management requirements when it negotiates its hotel management agreement.

4. PIP Reserve; Capital Reserves

PIP Reserve. If the hotel financing is funding a branded hotel purchase, the franchisor may require a PIP to be completed following the closing the purchase and finance closing. A hotel lender will typically require that the borrower deposit funds needed to pay for the PIP (plus a contingency) in a pledged reserve account or in a "hold back" from the loan proceeds to be disbursed to pay costs as the work progresses or upon completion. Alternatively, the borrower may be able to negotiate to substitute a letter of credit for the reserve account. The lender may also require a completion guaranty from the borrower's principals, or if the borrower has strong enough sponsorship, the lender may accept a parent completion guaranty in place of the reserve. The borrower should make sure the loan document terms for reserve disbursements are consistent with its cash flow requirements for funding the work, and the time schedule for progress payments to the borrower's contractor. To allow the borrower to complete the PIP work in an orderly manner and in accordance with the franchisor's time schedule, the borrower should negotiate for the Approval Mechanism to apply to lender approvals of plans, design changes, contractors, and applications for payment.

Capital Reserve. The hotel lender will typically require that a capital reserve be funded periodically from hotel gross revenues, usually 4% of gross revenues, and deposited in a lender controlled account. The loan documents will address the permitted capital reserve uses, and the conditions upon reserve disbursements. If lender budget approval is required, the capital reserve use may be limited to projects identified in the budget, or else, the capital reserve funds may be available for any projects necessary to keep the hotel in the condition required by the loan agreement, franchise agreement, and hotel management agreement. The conditions upon disbursement may include lender approval of the contractors, plans for major projects, bonding requirements, invoices and lien releases in applications for payment, and title insurance endorsements.

Borrower compliance with these requirements may be burdensome and expensive. Through negotiation, certain requirements may be eliminated or restricted only to projects costing above a minimum threshold. Exceptions to the requirement that capital expenses be on the approved budget may also be qualified for improvements to meet brand standards, improvements costing less than an agreed upon maximum, code-required improvements, and tenant improvements. The Approval Mechanism should also be applicable to lender decisions concerning capital reserve use.

5. Annual Operating Budgets

The degree to which a hotel lender will require control over the hotel's annual operating budget will depend in part upon the level of cash management control imposed. In those cases, whether at the loan inception or following a triggering event, where the disbursements to the borrower to pay operating expenses are subject to lender control, it follows that the lender will have to approve the annual operating budget. Where the cash management controls are not as strict, the hotel lender may be willing to forego budget approval, particularly for lower loan-to-value ratio loans. Also, if the annual operating budgets are being prepared by a major hotel management company, the hotel lender may be willing to eliminate budget approval as long as that management company operates the hotel. In any case where lender approval is required, the borrower should negotiate for coordination of the lender approval process with the time schedule for budget delivery and approval in the hotel management agreement. Provisions addressing the temporary budget to be used if the final annual operating budget has not been approved in time, and dispute resolution provisions in the hotel management agreement, also need to be consistent with the loan documents. Finally, having the Approval Mechanism apply to the lender-budget approval is an important part of the coordination effort.

6. Limits on Other Indebtedness

The loan documents may restrict the borrower from having any indebtedness other than the mortgage loan, with an exception for a limited amount of accounts payable that may be outstanding for a short time (consistent with the normal payment cycle – such as 60 days), as long as the indebtedness is not evidenced by a promissory note. The aggregate amount of other indebtedness that may be outstanding at any time will ordinarily be expressed as a percentage of the mortgage loan amount (such as 2%). The borrower should review the historical accounts payable levels and payment cycle to make sure it can comply with the loan document limits. Also, equipment leases are considered to be other indebtedness, so the amount and time limits may need to be adjusted to take them into account. For instance, an additional 1% or 2% may be permitted (or the total other indebtedness cap increased) for leases of equipment that are normally leased in the hospitality industry, such as airport shuttles, other vehicles, and office equipment.

7. Trademarks

A trademark or service mark is a word, symbol, or design that identifies and distinguishes a source of goods or services. If a hotel is not using branded names licensed from others, the hotel name and names of facilities within the hotel, such as restaurants, bars, and spas may be trade marks or service marks, the rights to which the hotel owner may protect by registration in the United States Patent and Trademark Office. If in its underwriting, a lender determines that the trademarks or service marks add value to the hotel, it may require that the trademarks or service marks be registered to protect the hotel owner's interest (unless already registered), so that the lender can have the registration protection benefits following a foreclosure. The pledge of the trademarks and service marks may also then be registered in the Patent Office. Based upon the pledge, the trademark and service mark rights can be foreclosed upon in the case of a default, so that the lender or other successor owner has the protected use rights afforded by the registration. In granting such a pledge, a hotel owner has to be careful if it uses, or may use in the future, its trademarks or service marks at other locations. If unlimited rights are pledged to its lender on one hotel, the lender could receive the rights to the trade names and service marks for all locations in which they are or may be used, and that may not be the hotel owner's intention. In such a case, the hotel owner should establish a licensing arrangement and only grant the lender a security interest in the relevant license (for the property being financed), so that upon a foreclosure the lender does not receive by foreclosing ownership of the trademarks or service marks in use at other hotels or potential use rights at other locations.

8. Liquor Licenses

If alcoholic beverage sales represent an important part of a hotel's business, a hotel lender will want to ensure the orderly transfer of the rights to sell alcoholic beverages following a foreclosure. State laws generally have strict qualifications for persons permitted to be issued liquor licenses or to acquire through a transfer existing liquor licenses. Also, the number of liquor licenses available in a particular jurisdiction may be limited. Under California law, a lender cannot take a security interest in a liquor license, and agreements to sell liquor licenses made more than 6 months in advance of the transfer date will not be accepted by the state authorities. Lenders will evaluate the applicable state law requirements and limits to determine what viable steps must be taken to assure that the lender or other successor owner following a foreclosure may take control of the liquor license and continue alcoholic beverage sales at the hotel. As an example, assuming the hotel loan is nonrecourse to the borrower, the lender may require that the borrower's failure to effect the orderly transfer of the liquor license and alcoholic beverage operations upon a foreclosure be a carve-out for which the borrower and guarantor would be liable either for losses attributable to the failure or for the entire loan deficiency. Another way to allow the hotel lender to gain control of the liquor license following foreclosure is to have the license held by a separate entity initially controlled by the borrower in which a party friendly to the lender has a minority interest. Upon a foreclosure, the minority interest is granted control rights over the liquor license. Borrowers should expect to encounter these and other creative means from their lenders to gain control over liquor licenses following a foreclosure, depending upon the restrictions on liquor license transfers in the applicable state laws.

9. Timing of Lender Remedies

Under California law and typically under other state laws, the timing and procedures for a lender to foreclose on the real property collateral securing a hotel loan may be different than those under the Uniform Commercial Code for foreclosing on personal property. The collateral assignment of the hotel management agreement may provide for the immediate exercise of lender remedies respecting that agreement following a loan default. Also, under California law, in the case of periodic payment defaults, the borrower has reinstatement rights that give it an extended cure period by law before the lender may complete a real property foreclosure. This law does not restrict the lender's remedies against personal property collateral, even though the borrower's reinstatement period is still pending.

Although the hotel lender will ordinarily conduct a unified foreclosure sale of real and personal property and not have an incentive to exercise its remedies against the personal property or hotel management agreement before completing the real property foreclosure, it might do so to place maximum pressure on the borrower. Consequently, the borrower may want to negotiate a requirement that the lender use the unified sale procedure to foreclose on real and personal property collateral concurrently.

10. Lender Approval Mechanism

As noted in a number of the points above, the issue of timing of a lender response to borrower requests for its approval is important in many contexts given the immediate impact on hotel operations that a delay in obtaining lender approval may have. Loan document provisions are sometimes written in a way that suggests the lender is committed to communicating its decision within a specified time period while it actually is not. For instance, a loan document provision might say the borrower must request the lender's approval of a change in management at least 30 days before the borrower wants the change to take effect. That provision does not commit the lender to act in 30 days. Also, borrowers have become more sensitive to timing issues in connection with securitized loans because the loan will be administered by a servicer with which the borrower does not have a prior lending relationship. For these reasons, the borrower should negotiate loan document provisions applicable to all lender approval rights concerning important hotel operational issues requiring the lender to respond with its approval or disapproval within a specified reasonable period and addressing the effect of the lender's failure to give or withhold its approval in the stated time. Ideally, the borrower would like a provision stating that the lender's approval is deemed to be given if the lender does not respond on a timely basis. However, lenders are reluctant to allow the borrower to proceed with what may be a significant change affecting the hotel based upon a lender failure to respond to a notice, which may have been overlooked inadvertently. The compromise is known as the second notice provision. If the lender does not respond to the first notice, before "deemed approval" applies, the borrower has to deliver a second notice containing language warning the lender that the failure to respond within the time specified after the second notice will be a "deemed approval." Ordinarily, the time period for the lender to respond to the second notice will be shorter than the time period for responding to the first notice.

Can I use the EB-5 Visa Program for financing hotel acquisition and renovation?

This article was first published by the Hotel Law Blog at www.HotelLawyer.com on 10 January 2013.

QUESTION: Can I use EB-5 financing to buy an existing, operating hotel?

ANSWER: Generally, no. An EB-5 investment must create a minimum of 10 new jobs for each investor. Jobs that already exit at a hotel that is open and operating when a buyer purchases the hotel are not considered new jobs. Therefore, for most purchases of an existing and operating hotel, EB-5 financing is not available as a source of funds for the purchase. There are, however, a few exceptions to that general rule, which we will discuss below.

QUESTION: Under what circumstances can I use EB-5 financing for acquisition of an existing hotel?

ANSWER: There are basically three situations where a hotel buyer might be able to use EB-5 financing for the purchase of an existing hotel: (1) the purchase of a hotel that qualifies as a "troubled business", (2) the purchase of an existing hotel that has closed before the purchase date, or (3) the purchase of a hotel (or other building) that is going to be shut down for a substantial renovation that will result in additional rooms, additional restaurant business, or some other new source of business that was not there before the purchase.

QUESTION: How does a hotel qualify as a "troubled business" for EB-5 financing?

ANSWER: A troubled business is one that has been in existence for at least two years and has incurred a net loss during the past 12- or 24-month period at least 20 percent of the troubled business' net worth prior to the loss. For purposes of determining whether the troubled business has been in existence for two years, successors in interest to the troubled business are deemed to have been in existence for the same period of time as the business they succeed. Therefore, a hotel buyer that purchases a hotel with the required amount of net losses, based on the seller's net worth, could potentially qualify as a troubled business. If the hotel did qualify as a troubled business, then the jobs that are saved by the buyer purchasing the hotel and having a new business plan to improve the business will be counted for EB-5 financing purposes.

QUESTION: Can I buy the hotel and shut it down myself for renovations, and qualify for EB-5 financing that way?

ANSWER: No, the hotel would have to be closed before the buyer bought the hotel, such as in a bankruptcy or foreclosure where the prior owner or lender shut down the business, and the new buyer had the intention of re-opening it.

QUESTION: What if I intend to shut down the hotel for substantial renovations that include expanding the number of rooms, or expanding restaurant or meeting space, and I can show that it will result in more revenues as a result of the expansion?

ANSWER: In that situation, you will be able to count the additional employees that will be added as a result of the expansion, but you likely won't be able to count the existing number employees who are already working at the hotel when you buy.

QUESTION: What if I buy a building that isn't a hotel right now, such as an office building or a residential building, and I want to convert it into a hotel?

ANSWER: That would be considered the establishment of a new business, and you could count all of the employees whose jobs are created as a result of the new business (including direct and indirect employees) as new employees for EB-5 financing purposes.

QUESTION: Assuming I can qualify for an EB-5 financing when I buy a hotel, how long will it take me to get the money? Can I get it soon enough to use for the closing of the purchase?

ANSWER: EB-5 financing is often a process requiring several months of work before you receive the financing. A typical timeline for EB-5 financing is 9 to 12 months. Therefore, you may not have the EB-5 financing in hand in time to fund the closing of the purchase of the hotel. In that case, you can consider obtaining a bridge loan or bridge equity contribution to fund the closing, with proper documentation showing that you intend to repay the bridge loan or equity with EB-5 financing.

QUESTION: How can you help me get EB-5 financing if I qualify for it?

ANSWER: We work with many hotel owners and developers throughout the United States to obtain EB-5 financing to build new hotels, renovate and expand old hotels and repurpose other buildings as hotels. We help structure your project to qualify for EB-5 financing, locate and negotiate deal terms with an approved regional center in the area where the hotel is located, prepare EB-5 investment offering documents, and assist in finding qualified marketing agents for the project. We have relationships with regional centers in many areas of the country and experience with over 40 hotel projects using EB-5 financing. Our goal is to make the EB-5 financing fit the hotel owner's needs.

Opportunities for public-private financing of hotel developments

This report was first published by the Hotel Law Blog at www.HotelLawyer.com on 4 June 2010.

We were fortunate to have the following leading experts in the field of public-private hotel financing share their experience with us at Meet the Money® 2010.

- Mark Tobin, President of HREC Development Resources
- Ray Garfield, principal and founder of Garfield Traub Development
- William ("Bill") Corrado, Director of the Public Financing Department of Citigroup

Mark, Ray and Bill provided a wealth of information for hotel developers, governmental entities and educational institutions about the feasibility and economics of building a hotel using a variety of public and private financing.

Mark Tobin,President of HREC Development Resources

Mark Tobin advises municipalities and other governmental entities on the development of publicly-owned or publicly-financed hotels and related developments.

Many cities seeking a hotel development begin the process thinking that they can sell the land to a private developer without any further involvement in the process. However, especially in today's financial environment, cities have to be more actively involved in the financing process because it is very difficult for private developers to obtain all of the financing required to build new hotels. This could include the use of recovery zone bonds, development bonds, credit support from pledge of future revenues, tax increment financing, or direct lending to the hotel developer. In some cases, especially large convention center hotels, once the city compares the costs, risks and rewards of providing financing or credit support to a private developer versus city direct ownership of the hotel, public ownership of the hotel is the better economic option for the city. Helping cities analyze their options and run the numbers on each alternative structure is often a lengthy process, and one that is subject to political risks as well as financial risks. It takes patience and persistence to successfully complete a hotel development using public-private partnership financing.

Ray Garfield, principal and founder of Garfield Traub Development

Ray Garfield and his company, Garfield Traub Developments, specialize in turn-key development of hotels, conference centers and entertainment venues for municipalities, airports, college campuses and hospitals.

Ray points out that the number one factor for group meeting planners in selecting a location for a conference is the number of suitable hotel rooms nearby the meeting facility. So, if a city is in the convention center business, it has to be in the hotel business in one form or another.

Ray noted that with loan underwriting much more conservative today than it has been in the past, there is a significant gap between the equity that private developers are willing to invest and the debt that private developers are able to raise to develop a new hotel. Public-private financing is often the only way to fill the gap - without it, a hotel development will very difficult to build in today's financial environment.

Ray has developed some innovative ideas for piecing together a variety of sources of financing for his projects. For example, Garfield Traub completed a $67 million, 303 room, independent hotel in Lubbock, Texas across from Texas Tech University, using a combination of two-thirds private funds and one third public funds. In collaboration with the University's Restaurant-Hotel-Institutional Management school at Texas Tech, Garfield Traub designed a classroom in the city's conference facility, and raised $11 million in grants to the city to help with the financing for the facility. The city also sold $11.4 million in bonds for the project. The combination of grants and bonds helped to fill the gap between the total cost of the project and the private equity and first mortgage loan.

William ("Bill") Corrado,Director of the Public Financing Department of Citigroup

Bill Corrado has helped cities around the country raise financing for large convention center hotels and sports arena projects.

Bill notes that cities can access tax-exempt bond financing for projects that are entirely owned by a public entity. Typically, cities will need to pledge tax revenues or their general credit support to backstop hotel revenue bonds, even if hotel projections show that the hotel should be revenue self-sufficient. Private owners can access tax-exempt capital using empowerment zone bonds, liberty bonds, go-zone bonds, and recovery zone facility bonds. Bill's job is to sell the bonds to private investors. To do that, he has to be able to show that the value of the property and the projected debt service coverage from hotel revenues will be sufficient to support the repayment of the bonds, and that a city is willing to provide further credit support if the revenues are not sufficient.

The larger convention center hotels are generally branded, because they need the marketing power of a brand to attract large group business. Convention center hotel projects have been Starwoods, Hiltons, Hyatts, Omnis and Marriotts. Bond investors look for a solid operator that can drive revenue to the hotel to support repayment of the bonds. The key to selling a tax-exempt deal to an investor is knowing the operator can support the marketing and operation necessary for a large hotel project.

We are grateful to our panelists for providing us this insightful view into opportunities available now for public-private financing of hotel projects throughout the United States.

These presentations – and others made at past Meet the Money® conferences – can be found at www.HotelLawyer.com.

Buying and selling hospitality properties: What representations and warranties do you want in your hotel purchase and sale agreement?

This article was first published by the Hotel Law Blog at www.HotelLawyer.com on 4 November 2012.

Purchasing real estate along with an operating business (whether a hotel, resort, vacation ownership project, restaurant, spa, golf course or tennis facility) can be complex and risky. There are practical and financial limitations to the information that can be secured and reviewed during what is typically a short (e.g., 15-60 day) due diligence period. In most traditional sales (as opposed to note or foreclosure sales), the seller of the business and property will have knowledge of the assets, and securing representations and warranties from the seller regarding the subject assets will provide the buyer with some additional information, and comfort that the information the buyer finally receives is comprehensive and accurate.

In this article, we will cover (I.) What are representation and warranties, and what is their purpose? (II.) What areas are typically covered by representations and warranties? and (III.) What are typical representations and warranties in today's "seller's market" for a transaction involving a hotel or other hospitality property?

I. What are representations and warranties? What is their purpose?

The term "representation" is used in reference to a statement made by one party to a contract to another regarding a "particular fact or circumstance that serves to influence the consummation of the deal." A "warranty" is defined as "a promise that a proposition of fact is true." (source for definitions: Black's Law Dictionary)

From the buyer's perspective, the purpose of the seller's representations and warranties is to cause the seller to disclose those facts that, together with ordinary due diligence, are sufficient to allow the buyer to make an informed purchasing decision.

Sellers, however, are hesitant to provide meaningful representations and warranties, because ultimately, by providing representations and warranties, the seller is accepting the allocation of risk of inaccuracy. As a basic premise, sellers prefer to sell property "as is" and with no representations and warranties whatsoever. Buyers, on the other hand, would like a comprehensive list of unqualified representations and warranties.

Most buyers ultimately "just want to know what the seller knows." Therefore, in nearly all circumstances, representations and warranties of the seller of the property that relate to conditions of the property or its operations will be qualified to the actual knowledge of the seller or the actual knowledge of one or two key employees of the seller.

II. What areas are typically covered by representations and warranties?

Representations and warranties in purchase agreements typically cover 3 general areas: (a) the seller, (b) the purchase agreement and (c) the status and condition of the property and the business being sold.

Seller. This will include a statement regarding the existence of the seller entity, that the seller is in good standing, that the seller is not a foreign entity, that the seller is not a debtor in bankruptcy or otherwise the subject of an insolvency proceeding, that all consents have been obtained by the seller, and that the seller has the right and authority to sell. These representations and warranties are important to ensure that the buyer has a claim for damages under contract (and possibly under tort) law if the seller does not have the authority to enter into the agreement. While the title company handling the sale will typically confirm these issues when it insures the transfer of title if the escrow closes, title insurance will not cover a claim for rescission based on claims that the seller did not have the right to enter into the agreement in the first place. As buyer's counsel, we typically also independently verify the seller's status and confirm that it is not in bankruptcy.

Note that while the seller itself may not seek to nullify the agreement for lack of corporate capacity, a shareholder of the company and certain other third parties may seek to enjoin the agreement based on a claim that the officers of the corporation exceeded their capacity.

These representations and warranties typically do not include a knowledge qualifier (e.g., to seller's actual knowledge) because they are within the seller's knowledge.

Purchase Agreement. This will include a statement that the agreement does not conflict with other obligations of the seller and the applicable law and that the agreement is enforceable against the seller under all circumstances, with a carve-out for bankruptcy. These representations and warranties typically do not include a knowledge qualifier as to a conflict with existing agreements because they are within the seller's knowledge, but a knowledge qualifier is typical for statements regarding compliance with applicable law.

Property and Business. These representations and warranties are intended to cause the seller to disclose those facts that the buyer needs, along with the results of its own due diligence, to make an informed decision as to whether to purchase the property. In the next section we list 13 representations and warranties that we typically see in purchase and sale agreements for hotels, restaurants, resorts, vacation ownership projects, spas, golf courses and other similar hospitality properties.

III. What are typical representations and warranties, in today's "seller's market" for a transaction involving a hotel or other hospitality property?

In addition to the representations and warranties regarding the seller, and the purchase agreement discussed above, the following are 13 of the subject matters that we typically deal with in a purchase and sale agreement for a hospitality project.

1. No condemnation. The seller typically represents that there are no condemnation proceedings pending or threatened (except as specifically disclosed on a schedule). Typically, "threatened" may be qualified based on actual knowledge and/or receipt of a written notice.
2. No litigation. The seller typically represents that there is no material litigation (as defined) pending or threatened (except as specifically disclosed on a schedule). Again, "threatened" may be qualified based on actual knowledge and/or receipt of a written notice. Consider also including a written disclosure of customer claims that do not rise to the level of litigation (e.g., illness or bed

bugs).

3. No violations of law/CC&Rs and other items of record. Usually, the seller will seek to limit its representations and warranties on this subject a statement that seller has not received any written notice of such violation. There should also be a statement as to who bears the risks of violations discovered during escrow.

4. Environmental conditions. The buyer wants to know that it will not be responsible for any costs or expenses relating to environmental conditions or claims relating to the period prior to its ownership. These representations and warranties are often the subject of significant negotiation, because the seller will want a full release of all liabilities once it sells the property. At the same time, most sellers do not want invasive testing to occur, thereby effectively limiting the buyer to perform a Phase I (visual) environmental site assessment. Therefore, it is important for a buyer to secure a representation and warranty (almost always qualified to seller's knowledge) that there have been no releases of hazardous substances and that no violations of environmental law exist.

5. Ground and space leases. The seller will typically agree to a representation and warranty that no ground leases or space leases exist or a statement that only the scheduled leases do exist, that full and accurate copies have been provided, and that no defaults exist in connection therewith. If there are leases, and if they are material to the value of the property or the operations of the business, then the buyer should also request estoppels from the other parties to the leases.

6. Conveyance free of all liens. The ability of the seller to sell the property free of all liens may be addressed through proper title review along with a covenant on the part of the seller to sell the property free of all liens other than the "permitted exceptions" (as determined during the due diligence period, but typically with an agreement on the part of the seller to extinguish all, or specified, monetary liens and encumbrances.

7. Contracts/management agreement/franchise agreement. The purchase agreement will typically provide that the buyer will assume certain (or all) contracts. If that is the case, then the buyer will want a representation and warranty from the seller that only the scheduled contracts exist and that there is no default in connection

with any of them. This statement may also address management and franchise agreements, or those agreements may be addressed separately due to their importance to the value of a hospitality asset. In any event, all material contracts should be reviewed for their terms and assignability. Note: Before assuming all contracts, a buyer should consider whether there are some, such as union contracts, that it may not wish to assume and may not be obligated to assume.

8. Financial and operating statements. Even in this time of limited seller representations and warranties, the seller should represent and warrant at least that full and accurate financial and operating statements have been provided for the periods in question and, if the statements were prepared by the property's management company, that the statements are all of those that the seller uses in making its decisions with respect to property operations. This representation and warranty is often the subject of significant negotiation because of the importance of this information to the buyer when determining the value of a hospitality property.

9. No right of first refusal/rights to purchase or lease. The rights of third parties to purchase a property may or may not be a matter of public record, making it difficult for a buyer to assess the risk of a third party seeking to enjoin the sale. Therefore, the seller should be willing to represent and warrant that no other party has a right to purchase or lease the property. This is particularly important with a branded hotel, as many franchise and brand management agreements provide for a right of first refusal. Ground leases also often contain such a right and should be carefully reviewed.

10. Taxes. Due to the risk of successor liability and a lien against the property, the buyer should confirm that the seller has paid all taxes and assessments including real property (which should be reflected on an updated title report), transient occupancy, employment, sales, etc.) prior to delinquency. In addition to securing this statement from the seller, the buyer may also want to secure tax clearance certificates (or their equivalents) to ensure that taxes are paid through closing.

11. Maintenance and No Defects. Proper due diligence by a buyer includes a comprehensive physical inspection by a qualified consultant or contractor, but the buyer still wants to know if the seller knows of any defects in

the facilities comprising the property (particularly those that may be latent, such as mold not visible through a physical inspection). The seller, however, will typically seek to limit representations and warranties regarding the condition of the property and its improvements, and if provided, they will be heavily negotiated.

12. ERISA. If the buyer or the seller, directly or through a management company, is contributing to a pension plan that is subject to ERISA, then the details of the plan(s) may be provided as part of a tailored representation and warranty.

13. Money Laundering. The buyer should confirm that the seller is not on any governmental list related to money laundering (e.g. OFAC) and is not the subject of a criminal investigation relating to money laundering. Note: This statement is more important with respect to the buyer, as the buyer is providing the funds for the purchase.

Conclusion

This is a seller's market. Therefore, the representations and warranties in a hotel purchase and sale agreement tend to be lighter than they might be in other market environments.

The seller would ideally like to make no representations and warranties so it never has to "look back" after the closing and worry about buyer claims.

The buyer would like to know that it has all the relevant information and has not missed anything important that might affect the value of the property or the business. Ideally, the buyer would like seller to be financially responsible for any surprises – at least those that were known to the seller prior to the closing.

Usually, there is a compromise that can work for everyone if the parties are motivated and reasonable. We help buyers and sellers find solutions in these situations.

The hotel purchase and sale agreement – What do representations and warranties mean in a purchase and sale agreement?

This article was first published in the Hotel Law Blog at www.HotelLawyer.com on 9 November 2012.

Purchasing real estate along with an operating business (whether a hotel, restaurant, resort, vacation ownership project, spa, golf course or tennis facility) can be complex and risky. There are practical and financial limitations to the information that can be secured and reviewed during what is typically a short (e.g., 15-60 day) due diligence period. In most traditional sales (as opposed to note or foreclosure sales), the seller of the business and property will have knowledge of the assets, and securing representations and warranties from the seller regarding the subject assets will provide the buyer with some additional information, or comfort that the information the buyer already has is comprehensive and accurate.

What is the value of a seller's representations and warranties in a hotel purchase and sale agreement?

Pre-closing breach. The seller's representations and warranties can have significant value.

The purchase and sale agreement typically includes closing conditions in favor of the buyer which, if not satisfied, will provide the buyer with the opportunity to terminate the agreement and receive a refund of its earnest money deposit. These closing conditions almost always include a statement that the seller must have performed its covenants under the agreement and that the seller's representations and warranties must be true and correct (typically both when made and as of the closing date).

So are the seller's representations and warranties important prior to the closing date? **Yes**, as they may support a termination of the agreement by the buyer. In some circumstances, if the inaccurate representation or warranty also constitutes a breach of the agreement by the seller, the buyer may also be able to seek damages for the breach by seller (which may be capped and limited to buyer's out-of-pocket costs incurred to date or may not be capped/limited, depending on what the buyer and seller negotiated in the default section of the agreement).

The proper drafting of both the seller's representations and warranties and the buyer's conditions to closing is critical. Depending on the knowledge qualifier used in the representations and warranties section and the wording of buyer's conditions to closing, the seller's representations and warranties may be true and correct even if inaccurate. In such case, the buyer may not be able to terminate the agreement even if it discovers the inaccuracy prior to the closing date. At the same time, if the conditions to closing section is not drafted carefully, a buyer may be able to terminate the agreement and secure a full refund of its deposit (effectively securing a very extended "free look" period) if it discovers even an immaterial service contract that was not scheduled in accordance with the seller's representations and warranties.

Needless to say, these areas of the agreement should be reviewed and drafted with great care, as they are interrelated. Sloppy drafting may result in unintended consequences, including the ability of the buyer to terminate the agreement without liability right up until the closing date.

Post-closing breach. The seller's representations and warranties may have relatively little value (depending on what the purchase agreement provides)

If the buyer discovers post-closing that a representations or warranty of the seller is false, then the buyer may have an opportunity to pursue a claim for damages incurred by the buyer (e.g., reduction of property value) or indemnification for amounts paid to third parties.

However, the protection is typically limited in a number of ways. For example, it is not unusual for a purchase agreement to provide that any breach of a seller representation or warranty known by a buyer prior to closing is waived if the buyer elects to proceed to close escrow rather than terminate the purchase agreement. Such a provision is generally enforceable.

As a practical matter, I cannot remember even one of my buyer clients pursuing a claim against a seller post-closing for a breach of representation and warranty. That might be a sign of the high quality sellers on the other side of my transactions, but it is more likely the commercial reality of the marketplace. That is, purchase agreements often include limited seller representations and warranties, and little recourse if a breach is discovered, particularly in overcoming the hurdles of enforcement.

What are the hurdles to recovering?

Proving knowledge: If the seller's representations are qualified by knowledge, then in order to successfully recover from the seller in an action against the seller based on a claim of breach, the buyer will need to prove that the seller had knowledge (or in some limited cases, where the knowledge qualifier is not limited to "actual knowledge," then the buyer must prove the seller should have had knowledge) of the inaccuracy of the statement in question. This can be an extremely difficult hurdle to overcome unless the buyer has found the "smoking gun" memo evidencing such knowledge.

Limited survival period. The seller typically will seek to limit the survival of any of its representations and warranties to a fairly short period of time (e.g., 3 to 12 months), and this will provide the buyer with a limited period of time to both discover an inaccuracy and make a claim.

Bucket and Cap. The seller will often negotiate for a "bucket" (i.e., a dollar amount below which the seller will have no liability for a breach of its representations and warranties). This may be documented as a threshold above which seller will have liability for the entire claim or a deductible above which the seller will begin to have liability. The seller will also negotiate a "cap", i.e., a maximum liability for such breach. This will sometimes mean that the buyer will have no recourse for "small" claims (even if the seller breached its representations and warranties) and will have limited recourse for larger claims. This sort of arrangement may remove much of the incentive of the seller to carefully review its files and its statements, and therefore, the buyer should carefully consider the implications of agreeing to this provision.

Limitation on Remedies. The purchase agreement may provide that the sole remedy of the buyer in connection with a post-closing claim of breach and representation or warranty will be a claim for indemnification. This may effectively prevent the buyer from seeking to rescind the contract based on the inaccurate statements of seller, which may otherwise be available to the buyer under contract law; however, there are numerous cases (including the 2006 ABRY Partners case out of Delaware) that provide that buyers have remedies under tort law (e.g., based on claims of fraud or negligent misrepresentation) even where the contract purports to significantly limit available remedies.

Holdback or Joinder. The seller will likely be a single purpose entity. So what if the seller does breach its representations and warranties and what if such breach is discovered during the survival period and it is of a sufficient amount to support a claim for damages or indemnification? If the seller, after the close of escrow, distributes its sales proceeds to its members/partners, then the buyer will be in the unenviable position of having to trace the proceeds by making claims of fraud or inadequate capitalization of the selling entity to cover expected contingent liabilities.

Therefore, as a buyer, it is important to make sure that the seller has a pool of funds to cover the damages associated with a breach (as well as the seller's post-closing indemnification and proration obligations). This issue can be addressed in a number of ways, but the easiest and most typical way to address the issue is to require either of the following:

a) Holdback. The seller to holdback with a escrow agent (and therefore not distribute to its members/partners) a mutually agreed upon amount expected to cover contingent liabilities for the period during which such claims may be brought by buyer, or

b) Guaranty or joinder. The parent company or principals of the seller (i.e., an entity or person with substantial assets or liquidity) to sign a guaranty or joinder to be jointly and severally and primarily liable for the post-closing liabilities and obligations of the seller.

The take-away?

If drafted with care, the purchase agreement can be negotiated and drafted to avoid an unintended extended "free look" period for the buyer and yet provide a meaningful incentive for the seller to make accurate statements with respect to the subject property that help the buyer complete its due diligence as quickly and as comprehensively as possible.

Brand franchise issues in hotel purchase and sale transactions

This article was first published by the Hotel Law Blog at www.HotelLawyer.com on 1 August 2012.

Key issues in hotel purchase agreements for buyers and sellers of branded hotels operating under franchise agreements.

Buying or selling a hotel operating under a brand name requires special attention. Typically, the existing franchise agreement will be assumed, terminated or modified in some way, and the new branding arrangements will usually have a significant impact on the value and profitability of the hotel. The JMBM Global Hospitality Group® has represented buyers and sellers of hotels with all the major hotel brands, and has developed practical solutions to achieve a smooth transition of the franchise from the seller to the buyer, or to change the franchise if that suits the buyer's goals. Knowing when and how to work with the franchisor as part of the transaction can save both parties a lot of money, avoid major disruptions of hotel operations upon the sale and increase the value of the property itself.

In this article, we discuss some of our experience in dealing with a few key hotel franchise issues that need to be addressed during the hotel purchase and sale agreement negotiation and during the transition process.

The first thing you need to know: The franchise does not follow the property. It terminates when the hotel is sold.

Some hotel buyers and sellers believe that the hotel brand can be sold along with the hotel. That is not true. Virtually all franchise agreements currently used by the major brands provide that the seller's existing franchise agreement terminates when the hotel is sold. The buyer will need to enter into a new franchise agreement if the buyer wants to retain the brand. This leads to two key concerns.

First, unless a franchisee (the seller) has negotiated otherwise with the franchisor, the sale of the hotel will cause the termination of the franchise agreement, obligating the seller to pay a significant termination fee. While most franchisors will waive the termination fee when an approved buyer enters into a new franchise agreement, the transaction documents, conditions and timeline must deal with this reality.

Second, the new franchisee (the buyer) must make independent arrangements with the franchisor to continue to operate the hotel under the same brand (if it chooses to do so), starting on the day the transfer takes place.

The hotel purchase and sale agreement should address these concerns. For example, the seller might include provisions in the hotel purchase and sale agreement to require that the buyer receive approval from the franchisor and a new franchise agreement from the franchisor before the closing of the transfer. If the buyer intends to change the franchise, then the seller needs to take into account the termination fees that the franchisor will charge for termination of the franchise, and the seller may want to increase the purchase price or negotiate terms with the buyer that reflect the seller's payment of any franchise termination fees. The parties' respective obligations to effectuate the transition should also be spelled out.

The hotel purchase agreement must allow enough time to complete the new franchise approval and execution as part of the transaction process.

Hotel franchisors have an application process, which requires detailed background and financial information from the prospective hotel buyer before they will accept the buyer as a new franchisee. The seller will want to find out how long the franchisor will take to review the buyer's franchise application. The buyer needs to be prepared to file a franchise application and submit the necessary background and financial information to the franchisor as early as possible. A franchisor can take several weeks to review a franchise application from a new franchisor. Less time may be required for a buyer who already operates other hotels under the same franchise, but the buyer will generally still need to submit a new application and obtain franchisor approval.

The franchisor may also require the buyer to commit to upgrades of the hotel as a condition of approval (more about that below). The buyer will want to review the franchise agreement presented by the franchisor, and perhaps negotiate a few modifications. The seller and buyer need to provide time in the transaction process for the buyer to go through the approval and negotiation process with the franchisor before the closing. Once the buyer and the franchisor have agreed to the terms of the new franchise agreement, it may take additional time for the buyer to receive the signed franchise agreement from the franchisor. It is prudent for both the seller and buyer to wait until after the buyer has a signed (new) franchise agreement before closing the sale of the hotel.

For the buyer: How to deal with "PIP" requirements of the franchisor.

Almost every hotel franchisor will require a new franchisee to undertake a property improvement program or "PIP" as a condition of receiving a new franchise agreement. If the hotel has not been upgraded for several years, which many hotels have not since the economic downturn began in 2008, the franchisor may require the buyer to make a substantial investment in property upgrades. If, on the other hand, the seller has recently made upgrades, the buyer may be able to reduce the required improvements, and/or to negotiate a longer time period after closing for the buyer to complete property improvements.

The buyer will want to start the discussion process with the franchisor early in the purchase transaction, so that the buyer can determine the costs of the improvements being requested by the franchisor, and be prepared to discuss a timeline with the franchisor to manage the costs and operating disruptions that will be required for the upgrade. Inexperienced buyers will want to engage knowledgeable consultants to help review and evaluate the franchisor's requested improvements, and suggest "value engineering" modifications to the franchisor's property improvement plan to reduce the buyer's cost.

For the buyer: How to negotiate with the franchisor for better terms in the franchise agreement.

Although many of the terms of a franchise agreement will not be negotiated by a franchisor, there are some provisions that are negotiable. Some of the most frequently negotiated provisions include:

- a lower initial franchise fee rate, with a ramp-up in franchise fees over time

- the inclusion or expansion of a restricted area within which the franchisor will not issue new franchises for the hotel brand
- flexibility in transfer provisions to reflect the terms of the buyer's internal ownership or financial structure
- the elimination of a right of first refusal of the franchisor
- elimination or reduction in termination fees for the future sale of the hotel by the buyer
- some required standard before the franchisor can require the buyer to make future renovations

Another major issue for negotiation will be the guarantees that the franchisor requires from the buyer and its affiliates. Buyers should be aware that there are different forms of guaranty, and it is possible to negotiate a guaranty that will reduce the potential liability of the guarantor. For additional recommendations on Hotel Franchise Agreements, see our article on the Hotel Law Blog, "Hotel Franchise Agreements: The Five Biggest Mistakes an Owner can Make."

For the seller: How to deal with liquidated damages.

Most hotel franchise agreements require an owner/seller to pay a termination fee or liquidated damages on termination of a franchise. Often this amount will be a multiple of the average annual franchise fee earned by the franchisor over the prior years. The franchisor may also charge the seller other fees, such as charges for the hotel signs that the franchisor leases to the seller for a fixed term. The seller will want to ask for a waiver of all liquidated damages, which the franchisor will often grant, as long as the buyer enters into a satisfactory new franchise agreement with the franchisor. The seller should not allow a buyer to close on the hotel purchase before the seller has obtained a waiver from the franchisor and the buyer has obtained a new franchise agreement from the franchisor.

Unless there is a specific condition in the contract, even if the buyer is obligated by the purchase agreement to execute a franchise agreement after the closing (and does so), the franchisor has no obligation to waive termination fees. And of course, if the buyer does not enter into a franchise agreement after the closing, the franchisor can demand that the seller pay all of the termination fees and charges.

Often times, such termination fees and related charges are secured by the personal guaranty of the owner/seller, which means that the franchisor can sue the owners directly for these amounts. Therefore, it is critical to the seller to obtain the waiver of termination charges by the franchisor before the closing.

For the buyer: How to coordinate a de-branding if the hotel is changing flags.

If the buyer intends to change the hotel flag, the process of removing the old name and replacing it with the new name will require coordination and timing. This is typically done by the buyer immediately following the closing, in accordance with a pre-arranged schedule. The buyer will want to coordinate with the franchisor, because hotel brand signs are often leased, rather than owned, by the seller. In addition, all items with the old hotel brand name and logo will need to be removed from the hotel and replaced.

In addition, a change of hotel brand will likely also mean a change of reservation systems. This may necessitate replacement of existing technology at the hotel to accommodate the new reservation system and training of personnel who are not familiar with the new system. The buyer will want to be in a position to immediately turn on the new reservation system when the old one is turned off, to avoid a disruption in bookings. If the hotel does a significant amount of group business, the buyer will want to discuss existing group bookings with the franchisor, and if possible obtain a commitment from the franchisor to leave the existing group bookings in place without soliciting the groups to move to another hotel within the franchisor's system.

At the same time, buyers should be aware that franchisors often steer bookings away from properties when those properties change brands. Thus, the buyer needs to start marketing the property a soon as possible to avoid unreasonably low occupancy when the hotel opens under new ownership and brand.

For the buyer: Obtaining approval of the independent hotel manager and the right to change hotel managers in the future.

The hotel buyer will often bring in an independent hotel management company to manage the hotel under a hotel brand franchise agreement. Since the hotel franchise agreement will include a provision that requires the franchisor's approval of any third party manager of the hotel, the hotel buyer will need to confirm early in the transaction that the franchisor will approve the buyer's choice of hotel manager. For future flexibility, it is also wise to negotiate for the ability to change hotel managers without the franchisor unreasonably withholding its consent.

Buying and selling hotels: Hotel purchase agreement essentials – Key employment issues

This article was first published by the Hotel Law Blog at www.HotelLawyer.com on 13 March 2012.

The first thing you need to know: Who Is the "employer"?

Is the hotel owner or hotel operator the "employer" of the workers at the hotel. Where the hotel is managed by anyone other than the owner, the answer will usually be in the hotel management agreement. If the seller is the employer, then the employment issues can be worked out between the seller and the purchaser in the purchase agreement. If the hotel operator is the employer, the buyer will also need to work with the operator on employment termination and transfer matters.

Because of the WARN Act notification requirements (discussed further below), the seller and buyer will want to make sure that these issues are decided more than 60 days prior to the intended effective date of the transaction.

A key decision for the buyer: Who should be the employer after the closing?

Outside the U.S., the hotel owner is usually the employer of all hotel workers. However, in the U.S., the hotel operator is probably most frequently designated as the employer. Some hotel owners believe that it is always better to have the hotel operator be the employer of the hotel employees, because the operator has labor experts necessary to handle employment matters and the owner does not. Some owners also believe that if the hotel operator is the employer, then the owner will not be liable for wage and hour claims, harassment, discrimination and other labor law violations at the hotel.

It is often a surprise to the owner to find out that these assumptions may be wrong. Under many state laws, if the hotel operator violates labor laws, courts have ruled that a business owner may be a "joint employer" with a third party operator of the business, and that both the owner and the operator are jointly and severally responsible for employment claims, regardless of who is the actual employer. Even if joint employer liability does not apply under applicable state law, virtually all hotel management agreements provide that the hotel owner will be 100% responsible for all employment wages, benefits, costs and liabilities, including claims brought against the hotel operator by the employees. There are usually limited exceptions to the owner's indemnification obligations where the operator has committed gross negligence, willful misconduct or other specified acts. As a result, however, even if the hotel owner is not formally named as the employer, the owner will have virtually the same liability as if it were the employer of the hotel employees.

There are also disadvantages to the owner of having the hotel operator be the employer. In such cases, the owner will have more restrictions on what it can do with employees on termination of the operator, or transfer of the hotel. For example, we have seen hotel operators who are in the process of terminating their relationship with a hotel stampede the employees into finding new jobs prior to a sale. The operator tells employees that the operator is leaving, everyone will lose their jobs, and they better find new jobs quickly. WARN Act notices can easily be misunderstood by employees unless the owner can explain that the termination by the operator is rather "technical," and all employees will be interviewed for their old position with the expectation that virtually all of the workforce will be rehired.

Unfortunately, the owner is not legally permitted to interfere with the hotel operator's employees during the employment period, and therefore could be subject to claims against it by the hotel operator. And in the meantime employees may either find new work or the operator may lure the employees to other hotels in its system before the owner is free to approach them. All of this can be more easily avoided if the owner is the employer of the hotel employees, without the owner assuming any greater liability than it would with the hotel operator as the employer. Therefore, it is important for the buyer to consider this issue as part of the hotel acquisition process.

How to deal with collective bargaining agreement successor liability.

Unionized hotels present special problems and risks for hotel buyers that can be avoided by knowing what to look for and addressing the issues as part of the hotel acquisition process. Sometimes a collective bargaining agreement or "CBA" (the contract between an employer and a union) will provide that upon a sale of the hotel, the buyer must agree to assume the CBA. If the unionized employees are employed by the hotel operator, the buyer will assume the obligations under the union contract simply by assuming the hotel operating agreement.

In other circumstances, the CBA may not bind the current employer to ensure that subsequent hotel owners or employers are bound. But we have seen cases where hotel buyers unwittingly sign a purchase and sale agreement where they agree to assume all the "assets and liabilities of the hotel" upon closing. The buyer may have understood that it was taking on outstanding debt or most existing contractual obligations, but it may not have understood that it was also agreeing to be bound by a current CBA, even if it did not have to do so.

Studies have shown that operating a hotel under a union contract can increase the operating costs of the hotel by as much as 38%, primarily because of the expense of complying with union work rules. These work rules often restrict who can perform particular tasks, and limit flexibility on scheduling. For example, a restaurant hostess may not take food orders or bus dishes. Those tasks must be performed by exclusively by the servers and bus staff. And furthermore, although there may not be enough work to support a full time position of a restaurant hostess, work rules might require that position must have a minimum of 8 hours paid time a day. These types of restrictions can add significant labor expenses to the cost of running the hotel.

Hotel buyers also need to carefully examine any relevant CBAs for terms that might affect the buyer's non-union properties elsewhere. For instance, some CBAs provide that anyone assuming or becoming bound by that CBA agrees to union card-check neutrality agreements at any of its other properties, thus facilitating the union organization of the other properties. These neutrality agreements may seem innocuous to some hotel owners, but in fact they mean that a hotel owner will not have the right to oppose union organization at the buyer's other hotel properties.

Buyers also need to find out if there are multi-employer pension plans that apply to any union employees of the hotel, because if those plans are underfunded, the buyer may be assuming the liability for the amount of the underfunding. And this liability may become due immediately on termination of the operator, the employees, or the closure of the hotel. We recently had a case where a buyer (acting without our advice) acquired a hotel and thereby assumed an unfunded pension liability of more than $5 million, that came due immediately if the owner significantly reduced the hotel staff, even for a temporary period during a hotel renovation. The buyer could have avoided that liability at the time it bought the hotel by addressing it as part of the hotel acquisition negotiations.

Practical ways to handle WARN Act and state law layoff notice requirements and avoid penalties.

When employees are being terminated as part of a hotel transaction, the seller and buyer should quickly determine whether the termination event will be covered by the federal WARN Act (Workers Adjustment, Retraining and Notification Act), or by any similar state or local laws. If the laws of the jurisdiction where the hotel is located provide a broader protection to employees than the federal WARN Act, then the state or local laws will also apply. Therefore, it is always necessary to check the laws of the state where the hotel is located to determine if those laws will apply, and what they will require.

Generally speaking, the WARN Act requirements will apply if the hotel has at least 100 or more full-time employees, and at least 50 employees will be terminated as a result of the transaction. If the WARN Act requirements do apply, then the seller is responsible for giving the required notice for layoffs occurring up to and including the date of closing, and the buyer is responsible for notice of layoffs occurring after the closing. If the buyer will rehire all employees, or at least enough employees so that less than 50 employees will lose their employment at the hotel following the effective date of the sale, then the WARN Act requirements will not apply, and no advance notice will need to be given to employees.

If the WARN Act or other similar local laws do apply, then the responsible party will have to provide at least 60 days advance notice of the termination to the appropriate state agency, local government, and representative of union employees and/or individual non-union employees. The form of notice has to meet the requirements of the WARN Act. If the party responsible fails to provide at least 60 days notice, the responsible party is liable to each employee for back pay and benefits over the period the employee was not notified, up to

60 days. If the local law requires a longer notice period, then the penalties could be up to the longer period provided by that local law. Sellers should keep in mind that the operating agreement they have with the hotel operator typically provides that the hotel owner is responsible for any WARN Act liabilities, so the seller will want to make sure that any required notices are given to avoid this liability.

In addition to WARN Act and local laws, there may also be plant closing provisions in CBAs, such as employment separation payments required on termination based on longevity. In one resort location, the average longevity for hotel employees exceeded 30 years, and the severance pay requirements would have been very significant. It is always best to discover these issues early in the process, so that buyers and sellers can resolve the issues in the negotiation of the hotel purchase and sale agreement.

Make sure to provide for the unpaid employee benefits.

A hotel buyer will want the hotel purchase agreement to provide that the seller shall be solely responsible for any unpaid employee salaries, wages, bonuses, profit sharing and other benefits. If possible, we like to see our buyer clients find out the amount of those obligations and require that the seller make those payments before (or at) the closing of the transaction. If the hotel operator is the employer and the buyer assumes the seller's obligations under the hotel operating agreement, the hotel operator may hold the buyer responsible for those costs if the seller does not pay them.

Decide how to handle pre-closing discussions with hotel employees

Aside from WARN Act and similar state law notice requirements, a hotel buyer and seller will want to coordinate the timing, content and party responsible for communications with hotel employees. Ideally, a hotel buyer would typically want to interview the executive staff, either with the intent of deciding whether to hire them after the closing, or just as a part of the buyer's due diligence. The hotel purchase and sale agreement should include provisions that discuss the parties' intentions with respect to these pre-closing discussions. As with a number of matters discussed above, the owner's (and buyer's) ability to communicate with hotel employees, access to employment files, compensation records and the like will typically be greater where the seller is designated as the employer of the hotel workers. In addition, by deciding in advance how communications will be handled, both the seller and the buyer can ensure a smooth closing and transition to new ownership, and benefit everyone involved in the transaction.

Buying a hotel: What you don't know about undocumented workers could really hurt you!

This article was first published by the Hotel Law Blog at www.HotelLawyer.com on 14 October 2012.

Let's say you are buying a hotel. You have engaged the right legal and due diligence team. One of the items your team is investigating is whether the hotel employees are legally documented. Upon review of the hotel records, your team discovers that there is a fairly high turnover of hourly workers. You know the challenge of attracting and retaining enough good workers.

New focus on the employer,not the employees.

In the past, you may have risked hiring undocumented workers. In practice, only employees were targeted. In many cases, authorities would pull up to a worksite, round up dozens of employees and load them on a bus. However, an indictment by the United States Attorney's Office, District of Kansas, in September 2012 marked a significant turn of events, with hotel owners charged with conspiracy to harbor undocumented immigrants for personal gain, five counts of harboring undocumented immigrants and wire fraud.

In other words, this new approach by the Feds suggests:

- Forget the illegal workers
- Bring criminal indictments against owners and
- Seize the hotel where undocumented workers are employed

What are your concerns about your pending hotel purchase?

In this new environment, here are 3 key things you should be concerned about as the owner of a hotel with undocumented workers:

- First, you worry about having documented workers or possibly going to prison and having your hotel or restaurant seized.

- If there are too many undocumented workers, you could possibly have a shortage of workers and need constantly to find new ones. In many hotels, a significant number of employees can be undocumented. What could this cost be to you?
- You have concerns about whether you can legally ask workers for documents without violating their rights of privacy or civil liberties or being accused of discrimination. What safe harbors do you have? Do you need to verify accuracy of any documents you receive? How far beyond the papers can you go/should you go to verify? Are you responsible for forged or phony papers?

What should you do? What can you do?

Under Federal law, employers are required to ensure that their employees are entitled to work in the US and complete form I-9 (Employment Eligibility Verification) published by the Department of Homeland Security. The purpose of form I-9 is to document that each new employee is authorized to work in the United States. Knowingly hiring or retaining an unauthorized alien violates the Immigration Reform Control Act (IRCA). For hiring violations (knowingly hiring or continuing to employ unauthorized alien), fines can run to $11,000 per unauthorized alien, plus additional fines up to $1,100 for failing to maintain necessary paperwork for the I-9 of $110 - $1,100 for each individual for whom the paperwork was not properly kept. There are also civil and potentially criminal penalties.

So you don't step into some problems you don't want when you buy a hotel, here are a few steps you should consider taking as a hotel buyer (and prospective employer):

1. Require that the seller provide you with a complete list of the employees and their corresponding I-9 forms.
2. Require that the purchase agreement contain adequate remedies if a certain number of hotel employees are undocumented. Such remedies could include a credit against the purchase price for the cost of hiring and training a certain number of employees.
3. Prior to closing, smart buyers will typically require that the seller (or operator if the operator is the employer) terminate all its employees. Simply transferring the employees is risky because the buyer would have to trust that the seller correctly prepared form I-9s for all

employees. In our experience, when performing due diligence, we rarely see a perfectly prepared set of form I-9s. If the employees are transferred to the buyer, the buyer cannot re-run form I-9s.

In re-hiring, the buyer must comply with IRCA and complete a new I-9 form for each employee. Any form not completed should be rejected. Any employee that cannot provide a completed I-9 form cannot legally be hired.

This all means that you need to pay more attention to the undocumented worker issue and do things right.

It's costly to replace and train an employee. Not having a sufficient number of properly trained employees can lead to loss of services and hurt the hotel's reputation, and hence, a loss of revenue. It can be even more costly and risky for any hotel employer to suffer potential civil and criminal penalties by employing undocumented works. A sophisticated hotel buyer will properly negotiate appropriate remedies in the hotel purchase agreement, perform adequate due diligence and follow appropriate employment procedures to ensure that it is complying with applicable law when re-hiring the seller's or hotel manager's employees.

Successful joint ventures for hotel development, acquisition and financing: What the experts are saying

This report was published by the Hotel Law Blog at www.HotelLawyer.com on 22 May 2012.

The hotel joint venture experts

The Joint Venture Panel from Meet the Money® 2012 featured 5 veteran hotel investors and operating partners:

- Mark Burden, CEO, Rim Hospitality
- Lamont Meek, SVP and COO, Circa Capital
- Rick Frank, SVP Hospitality, Behringer Harvard
- Jonathan Martin, VP, AEW Capital Management
- Kam Babaoff, Managing Director, Ensemble Hotel Partners

Each of these participants has a long history of investing in and operating hotels, and they represent the spectrum of views currently prevailing in the industry. While each has been successful, each has taken a different road to achieve success. The individual strategies and approaches of each stands out, as does the talent and vision necessary to navigate some of the toughest years in the hotel industry.

Sweet spots for hotel joint ventures differ

While joint venture investors tend to have their individual sweet spot – a specific set of criteria which makes a deal attractive – they often find deals slightly outside their comfort zone. And we witnessed some indication of that on this panel.

Rick Frank, SVP Hospitality, Behringer Harvard. Rick Frank sees this time as "the beginning of the next cycle" and believes the market remains out of equilibrium, with a disconnect between buyers and sellers. For example, Behringer Harvard itself wrestles with an internal conflict, as it is often unwilling to sell properties for the price it would pay for them.

Jonathan Martin, VP, AEW Capital Management. Jonathan Martin tells us that AEW is focusing on the top 15-20 markets, returns in the upper teens, and assets from $10-20 million. Like most of the opportunity funds, AEW stays away from ground up development. For AEW, its all about the real estate. Branding is secondary.

Mark Burden, CEO, Rim Hospitality. In contrast to AEW, Mark Burden of Rim Hospitality focuses on and believes heavily in branding. The right brand with the right asset can drive revenues. Rim also places a heavy emphasis on cost containment, particularly keeping labor costs in check. Mark is quite optimistic as Rim is closing out rate discounts and seeing the market react positively with an uptick in ADR.

Lamont Meek, SVP and COO, Circa Capital. Then breaking from Rim's focus on branding to a significant extent, Circa Capital is proving that this market is a great place for independent hotels. Lamont Meek tells us that Circa's hotels have rebounded to 2007 levels in 2011. Half of Circa's hotels are branded, and yet Lamont believes that it's Circa's creativity and the freedom to act on its instincts without being hampered by heavy brand requirements that has driven the positive performance of its independent hotels.

Kam Babaoff, Managing Director, Ensemble Hotel Partners. Kam Babaoff stated that based on the nature of capital returns, Ensemble is looking for something that has a value add component – something that involves rebranding and deep PIP refreshment. Like most operating partners, Ensemble is staying away from ground up development.

How great partners make great projects

Panelists shared similar views on how great partners make great projects.

AEW's approach has been focusing on debt transactions and REO, with operating partners around the country who have competitive advantages in their markets.

Likewise, according to Rick Frank, Behringer Harvard also has a set of partners that they know and trust. Both Frank and Martin said that that they are not taking on new partners at this time. And yet, when a member of the audience mentioned a deal that sounded particularly appealing, both Rick and John indicated a willingness to look at that deal. Thus, the right deal creates an exception to the "no new partner" stance.

Lamont Meek and Kam Babaoff likewise agree upon the importance of partnering with someone who is in the hotel business and with whom they are familiar. Circa has had very few partners over its 21 year history. Both believe it's helpful to have a capital partner that understands the hotel business. It's about people not an institution. With the capital partner investing 90% or more of the required capital, that partner is entitled to control and a great deal of respect.

Mark Burden believes the biggest challenge with capital partners is fighting the pessimism still prevailing in the underwriting. However, all panelists expect optimism to prevail over the next 12 to 24 months, and that now is the time to be active and buying in this market.

Other reports and presentations made at past Meet the Money® conferences can be found at www.HotelLawyer.com.

Hotel joint ventures: 4 Keys to Success

The first version of this article was published in Hotel Business in September 2010 and is reprinted with permission.

Joint ventures are popping up everywhere in the hotel industry. Nearly two years after the collapse of the old economic order of easy money, the biggest players in the hotel industry are using the joint venture structure to seize opportunities for acquisitions and expansion. In recent months, Starwood Capital and Hersha Hospitality Management announced their joint venture to expand Hersha's hotel management platform, and Thayer Lodging Group and Jin Jiang Hotels formed a joint venture to acquire Interstate Hotels & Resorts. Though the number of hotel acquisitions is still small, several of those transactions that have successfully closed have used the joint venture model, including the just completed acquisition of the 279-room/suite Renaissance Syracuse Hotel in a joint venture between Richfield Hospitality and Shelbourne Falcon Investors.

Joint Ventures Offer an Alternative to Traditional Financing – and Have Different Risks and Rewards. Using a joint venture model for hotel acquisitions offers the benefits of increased access to capital, sharing of risks and rewards with a partner, access to greater resources, such as specialized staff, technology and expanded relationships. Particularly in the current economic environment where traditional lenders are reluctant to invest new capital in the hotel business, a joint venture with partners already active and committed to the hotel business offers an alternative means of financing potential future business expansion. Hotel investors hoping to seize buying opportunities for prime assets may find that the only way they can finance the cost of acquisition is by bringing in joint venture partners. However, a joint venture also creates its own risks, and these risks are best be addressed by the parties at the time the joint venture is formed, rather than waiting until problems develop later.

The Essence of a Joint Venture. A joint venture is, essentially, a partnership between two or more partners who intend to be active in the business. In many joint ventures, the parties intend that the partners will be co-equal in making key decisions for the joint venture, including such key decisions as when to contribute more capital to the joint venture, and when to buy or sell an asset. A joint venture is often created through the formation of a new entity, most often either a general partnership, limited partnership or limited liability company. The rights and obligations of the parties to the joint venture are governed by the partnership or limited liability company ("LLC") agreement entered into by the parties as investors in the partnership or LLC.

The Key Internal Risks of a Joint Venture. As Peter Connolly, Executive Vice President - Operations and Development of Hostmark Hospitality Group and former General Counsel of Hyatt Hotels puts it, "So many times venture meetings, particularly in large ventures will go on waxing poetic about the wonderful opportunity without focusing on the nitty gritty issues of how capital comes in to the deal, how the venturers will decide to spend money, and ultimately, if there is a division of opinion about what the right course of action is in the deal process, who gets to decide." In other words, the biggest internal risks of a joint venture are disagreements between the partners on important business decisions, such as whether or how much more capital to invest in the business, whether or on what terms to sell assets, what contracts and commitments should the business enter into, and whether both partners are contributing the quantity or quality of services they promised to the business, and when and on what terms new partners should be admitted to the joint venture, or existing partners should be allowed to exit the joint venture.

Addressing the Key Internal Risks of a Joint Venture. Here are some of the most important ways that the internal risks of a joint venture can be assessed and minimized:

1. Know Your Partners. Do a thorough assessment of the relative financial strength of the partners, their past history with other business partners, their management style and philosophy, and the personal chemistry between the management of both partners.
2. Pick the Bus Driver. Pick the party or the person who is going to run the venture, and vest that entity or individual with the power and ability to get things done. As Peter Connolly advises, "Someone has to drive the bus, and that role has to be made clear at the outset or, when the negotiating process gets to the difficult points,

nothing will get done." That obviously requires that the venture partners have a great deal of trust in the person or entity who holds the primary power in the venture, but without that, the joint venture will not be able to act decisively when it is necessary to make decisions and take actions.

3. Decide All the Important Issues in Advance and in Writing. Create a thorough partnership or LLC agreement that provides the full details of each party's specific obligations, with timelines for performance, as well as specific steps that can be taken by the aggrieved party when the other party fails to fulfill its obligations. The partnership or LLC agreement is what the parties have to protect them when things go wrong, and the more detail there is in the document, the easier, faster and cheaper it will be to resolve any problems if and when they arise or, if need be, unwind the joint venture if it is not possible to continue.

4. Deal with Conflicts of Interests Up Front. If there are inherent conflicts between venturers (i.e., a manager/owner conflict) get those out on the table at the beginning and resolve them or resolve the method for resolution before engaging in any serious negotiations. For this process to work, the partners have to understand and agree that they cannot have secrets from each other on matters that involve the venture. If there are issues that likely will cause parties to distrust each other's motivations, set up a process that forces conversation and resolution within a specified time period.

Peter Connolly tells this story to illustrate this point: "I once ran a venture between six hotel companies doing an internet startup deal. The process was much like herding cats. Every day I would have to remind the venture parties why it was good for them to overcome their natural distrust of each other to do the deal, then get them together to advance a couple of issues, and then pull them apart before they remembered how much they really hated each other. Two of the companies were there because they were afraid not to be there. When it came time to close, they bolted, and the structure failed as a result. The process of deal making takes too long and costs too much to let that happen."

Hotel investment through buying hotel notes: 5 things to remember

This article which was published by the Hotel Law Blog at www.HotelLawyer.com on 13 March 2012.

The hotel industry experts have published their forecasts for 2012 and they seem to agree on the following two predictions:

1. The hotel sector will continue to improve in 2012, with RevPar increasing anywhere from 4 to 6 percent, depending on which expert you follow.
2. It's going to be a rocky year for hotel loans held by lenders, particularly for those loans made at the peak of the last cycle in 2006 and 2007, and especially for loans that cannot be extended further. Some of these loans are securitized with complicated structures that involve multiple tranches of senior and junior debt sold. Others never got securitized and weigh heavily on lenders' books.

Our prediction: Capital providers and special servicers will sell more hotel notes and assets in 2012

While the capital markets are warmer, they are still cold and the velocity of debt and equity flows are currently insufficient to preserve many of the hotels in the hands of their current owners. As hotel metrics improve, hotel notes will command a better price, and lenders will sell more of them. We predict that capital providers and special servicers will sell more notes and assets in 2012 than in the past two years.

Out hotel lawyers at Jeffer Mangels Butler & Mitchell LLP (JMBM) have been involved in the purchase of hundreds of notes secured by real property, and experience tells us that most note buyers (other than institutional participants) are looking to obtain the locked up value in the hotel real estate – and not really interested in the fixed income of the note. These note buyers want to get at the hotel asset as quickly as possible, and either operate or sell the underlying hotel. This is the case whether it is a portfolio or an individual note that is being purchased.

What buyers of hotel notes need to know

If you are a buyer of hotel notes, whether it's a portfolio or single loan, there are some key things to keep in mind, particularly for this coming year. Here are my top 5.

1. Update your checklist and use it

Step one: get your checklist in order. Yes, this is a mundane point. But it will also save your investment. Under FAA rules, not even the most skilled engineer is permitted to check the plane without using a standard checklist before giving approval for take off. Note buying is no different. Without a checklist, it is simply too easy to miss a critical item or issue.

No checklist fits every asset or circumstance, so you must tailor your checklist to your asset. My team starts with a comprehensive checklist that covers virtually every hotel issue we have come up against. Then we brainstorm the particular asset at hand and conform the checklist accordingly.

We almost always find concerns in the hotel loan file that need to be addressed. Do not assume because the loan was prepared by a good law firm that the loan documents work. First, good firms can make mistakes. Second, many hotel loans are done by good law firms that simply do not typically handle hotels, so they miss many hotel related issues. Remember, a hotel is made of anywhere from 15-25 percent personal property. Some of that property could have liens or be leased from third parties. The UCC has an entire body of hidden liens many real estate lawyers simply do not know about. The note buyer must run a proper UCC search. In many states, liquor licenses, which provide value to the hotel, cannot be collateralized. Also, the loan may have been previously modified without guarantor approval; there could be important waivers missing in the note or guaranty. Finally, your checklist needs to take into account any new laws that have come into effect. For example, on March 15, 2012, new ADA Standards become mandatory. The loan could have been assigned multiple times but the assignment documents are incomplete. The note buyer may find that it has to prove up the outstanding amount of loan in front of the bankruptcy judge who requires additional proof. (Good luck getting that done without the assistance of the note seller!) And if you are buying from a note flipper...beware.

Don't miss this step. Mundane, yes, but well worth the effort.

2. Think like a lender: You are buying a loan not the real estate

Buyers of loans are so eager to get to the property, that when they close on the loan, they often forget that all they have is the loan...not the real estate. Such buyers can often unwittingly trigger liability and claims, causing a devaluation of the loan just acquired. Closing on the loan is different from closing on the hotel. As the new note holder you have to act like a lender, not a hotel owner. You don't want the value of your note to be eroded by the cost of litigation, so be aware that casebooks are filled with lender liability lawsuits against lenders (even experienced lenders) who overstepped their legal boundaries.

Before buying a loan, know the "dos and don'ts" of lending. If you do not have that expertise, you are strongly advised to engage legal counsel who does. A wrong step can cause you to lose lien priority of all or a part of your loan. Even seemingly innocent acts such as your making decisions on hotel operations or approving or disapproving borrower expenditures can be problematic. In some states, the note buyer can lose its security interest in the hotel altogether.

Hotels are operating businesses, and it is rare that a lender will be comfortable leaving the operations of a distressed hotel in the hands of a hotel owner who has lost its equity. The sophisticated note buyer will understand the applicable rules of receiverships and employ a receiver where permitted. In many states, the receiver has authority to cause a transfer of the liquor license, even if not collateral of the hotel, which can be quite valuable. But again, tread carefully, particularly in single action states.

Remember, think like a lender, not a hotel owner.

3. Due diligence, due diligence, due diligence

Substantially more due diligence needs to be done when buying a hotel loan than most typically real estate secured loans. The hotel note buyer needs to review a) the loan file, b) the operating business of the hotel and c) the real estate. Make certain the loan file is complete with all loan documents in place, and that the documents work properly. If possible, obtain a copy of the note seller's correspondence file. Pay particular attention to any hotel management agreement in place and any subordination or comfort agreements. Depending on how they are drafted, they will likely affect the value of the note collateral.

Understanding hotel operations is important and is discussed below in more detail (see 4 below). A greater scrutiny of the physical improvements is required for a hotel than for ordinary commercial real estate. For example, if the secured property were a retail supermarket, the supermarket tenant is charged with maintaining and insuring the asset. Thus, if the windows leak or the sprinkler systems do not comply with applicable law, the burden and costs of fixing these items often can be passed through to the supermarket tenant. Not so with a hotel. These issues fall squarely on the shoulders of the hotel buyer. To make matters more challenging, note selling lenders actually often give a shorter period of time to note buyers to review the file and asset when compared with sellers of other real estate.

Use experienced hotel contractors and engineers to walk through the level of physical due diligence needed. Have a zoning specialist ready to review the hotel entitlements. Confirm all signage and parking are on the real property collateral. Confirm the number of parking places complies with zoning requirements. Confirm the asset complies with all environmental laws and any governmentally issued conditional use permit. Hotel owners often tweak the physical improvements which can cause the hotel to become non-compliant. The key is to have your due diligence team (hotel consultant, construction/engineer consultant, zoning consultant and legal counsel) ready to move before the note hunting begins, so they can hit the ground running.

Proper due diligence cannot be stressed enough.

4. Understand the hotel business

Secured hotel loans are not like typical real estate secured loans. The value of the hotel, hence the value of the loan, depend highly upon the hotel's business. Therefore, the analysis and due diligence reviews should focus on hotel elements as well as the real estate. Regardless of intentions, the Noteholder should assume it will own and operate the hotel, and be prepared to do the following:

- Labor and employment. Replacing hotel employees is costly, at any level. Review employees records to determine if they are legal workers. We have been involved in many hotel purchases in the last two years where this was not the case. If the note is secured by a major hotel, the note buyer should analyze all employee positions, including general manager, concierge, front desk manager, chief engineer, F&B director and director of sales. Is the hotel the subject of a union campaign? Unionization increases hotel operating costs by as much as 38%, and lowers the quality of hotel service. Employee morale will likely be at a low, so the note buyer should be prepared, following foreclosure, to implement a program to boost employee morale and implement an employee policy handbook and benefits package.

- Brand issues. Keep in mind that the franchise brand owner has to approve any new hotel owner. The brand may insist on the pay back of all unpaid fees as a condition of keeping the franchise. The brand may require a costly property improvement plan. These will impact the value of the loan. Determine whether the current brand is the best one for the hotel. If the brand is holding down hotel value and should be replaced, have a strategy to replace the brand. This can be challenging, and should be discussed with legal counsel with substantial experience with removing the brand.
- Hotel systems. The note buyer should also review the cost of keeping or changing hotel concepts, protocols and systems. The note buyer should assume it will have to correct and/or complete the hotel's budgets and financials (which will not be easy if the current owner has mismanaged the hotel) and implement new revenue management and cost containment systems, reservations systems and booking engines. The sophisticated hotel loan buyer will understand the process and have a plan ready to be implemented.

Remember: Hotels are more than just real estate.

5. Review your tax plan with an expert

Finally, do not forget tax considerations. Many note buyers end up restructuring the notes with the current hotel owner/debtor. Most of the tax consequences from restructuring a secured loan will belong to the debtor, but certain actions can hurt the note buyer, some of them significantly. Experienced note buyers will review its plan with a tax lawyer or accountant. Again, because hotels are different from typical real estate, it is important that you consult legal counsel with experience in tax planning for hotel loan or hotel asset ownership.

It's a good time to buy hotel notes

Truth be told, there are many more than 5 key considerations for buying hotel secured notes. Do not let that be daunting. Purchasing hotel debt can be exceptionally attractive – but not for the inexperienced note buyer or hotel novice. There are too many complex issues that simply do not exist with distressed debt secured by ordinary commercial real estate. Experience is the key. With seasoned hotel advisors behind them, the experienced note buyer can carefully and fully understand the issues at hand and how they impact the note purchase and business plan.

There are lenders and special servicers itching to get hotel loans off their books, and note buyers eager to unlock the value that is languishing in distressed hotels across the country. For lenders and buyers alike, 2012 could be a very good year.

How to buy distressed notes secured by vacation ownership projects

This article was first published by the Hotel Law Blog at www.HotelLawery.com on 24 April 2010.

A wide variety of loans secured by vacation ownership real estate are in distress as receivables financing lenders have pretty much cutoff most time-share, fractional and private residence club developers, leaving limited carry-back financing options to offer to consumers. While there may be signs of recovery, we are seeing more timeshare developer construction loan defaults. In this distressed economic environment, a lender with a non-performing mortgage loan is faced with difficult choices. It may elect to pursue foreclosure, but this process can be long and expensive (especially if the borrower files bankruptcy). Most lenders lack the desire or the expertise to own and manage a timeshare or fractional project or the related interval sales. In addition, many do not want to assume the liabilities and obligations of ownership, including real property taxes, environmental liability, and obligations to existing owners. Furthermore, if the lender has written-off some or all of the loan, then selling the loan may reflect favorably on the lender's books. As a result of all of the foregoing factors, some lenders are selling off loans secured by timeshare, fractional and other vacation ownership developments at meaningful discounts. Other lenders are selling portfolios of loans that are performing because the lender has decided to exit the business or the market segment. In many cases, the decision to sell performing debt has nothing to do with the debt itself - the lenders may be focused on other problems that they or their affiliates have. For our clients with liquidity and patience, this means opportunity!

Due diligence is critical when purchasing a loan secured by a vacation ownership property

The purchaser of a loan secured by any commercial real estate should conduct due diligence in connection with the loan (including the borrower under the loan) and the property that secures it. Conducting loan purchase due diligence is usually difficult because (1) the lender has often kept poor files, (2) the lender is hesitant to provide full access to its files to avoid claims of misrepresentation and in support of the "as-is, where-is" nature of the sale, (3) the borrower is uncooperative, and/or (4) the third party management company or broker responsible for handling project management and sales is, for one or more reasons, uncooperative. When you include all of the issues that are specific to a vacation ownership property, completing due diligence becomes a major undertaking.

Ask the right questions

It is critical that a loan purchaser asks the questions below and understands the answers or that the purchase price of the loan has been risk-adjusted if these questions have not been answered:

1. Are the loan documents enforceable? How much is owed?
2. Do the borrower(s) and/or guarantor(s) have any claims against the selling lender?
3. What is the financial condition of the borrower(s) and guarantor(s)? Have the guarantor(s) been released?
4. What percentage of the project construction is complete? What remains to be done? How much will it cost to complete construction? How long will it take to complete construction?
5. Do any contractors or other parties have rights to lien the property that are prior to the subject loan?
6. Are there potential construction defect claims
7. Are there purchase contracts for intervals that will expire before the units can be completed?
8. What commission obligations are there in connection with pending sales?
9. Was the property sold in compliance with applicable laws? If not, what are the statutory rights of rescission of the timeshare/fractional interval purchasers?
10. What representations and promises (e.g., promises of future benefits or amenities, guaranteed buybacks, exchange affiliations, etc.) were made to the interval purchasers?
11. Were there any sort of violation or misrepresentations by the developer could result in a potential claims against the current and successor owners of the development or that may adversely affect public relations for the

development or mire the project in litigation?

12. Is the project phased? Are there any obligations or opportunities to construct future phases?

13. Is the project operating? Are sales continuing?

14. What approvals are necessary from state regulators under state timeshare registration laws where the project is being sold and where the project is being marketed for sale? Is there a temporary exemption for foreclosing lenders in the state where the project is registered?

15. Has control of the Timeshare Owners Association been turned over to the purchasers?

16. What rights are there to continue to sell timeshares on the property?

17. Have assessments been paid on sold and unsold units? Does the borrower have a bond in place to protect the interval owners from its failure to pay assessments or subsidies on unsold units?

18. Are existing interval owners facing foreclosure? If so, how will the shortfall from their unpaid assessments be funded?

19. Is the current budget sufficient to fund the operations and maintenance of the project? If the lender forecloses on the property, how any deficiencies be cured?

20. Can the property, after foreclosure, be modified based on the governing documents? If it is repositioned, will the current budgeted assessments be sufficient to pay for the operations and maintenance of the repositioned property?

21. Who manages the association? What are the terms of the management agreement? Can the management agreement be terminated? See below regarding issues involving the lender's right to terminate the management agreement.

22. Is there a rental program in place? Does it comply with applicable securities and real estate laws?

23. Is the property affiliated with the right exchange company(ies)? Can the affiliation agreements be terminated upon foreclosure or deed-in-lieu of foreclosure?

24. Does the property and its operations comply with the

Americans with Disabilities Act and applicable state access laws?

25. Are the interval owners complaining or threatening litigation? Can relations with the interval owners be improved through clearer communications?

26. Can the sold intervals be repurchased at a discount that makes sense and that would allow the lender to completely reposition the property after foreclosure and interval buyback? What would incentivize the interval owners to sell their intervals back if desired?

27. Will the loan purchaser continue selling intervals post-foreclosure? If so, can the intervals be sold without seller financing? Are there sources of receivables financing available to the property?

28. If the loan purchaser intends to change the use of the property, do applicable zoning laws allow for the intended use? Will the planning department support the change in use?

29. Is the property adequately insured for losses and liability claims?

30. Would the loan purchaser benefit from the appointment of a receiver pending foreclosure to take immediate possession of the property's cash flow, if any, and secure the property?

Negotiating the loan purchase agreement

We intend to cover the key terms of a Mortgage Loan Purchase Agreement or its equivalent in a separate article. We have significant experience from this downturn and previous downturns negotiating loan purchase agreements. Needless to say, because most lenders did not intend to be in the business of selling loans and because the sellers perceive these sales to be at highly discounted prices, the loan purchase agreement tends to be seller-oriented (as-is, where-is, etc.). Nonetheless, to the extent possible, we try to mitigate, through the provisions in the agreement, certain of the risks associated with purchasing a loan secured by a complex and regulated collateral like a vacation ownership property with intervals for sale.

Challenges associated with a bankrupt borrower involving a vacation ownership project

Another wildcard that a loan purchaser may need to deal with is a borrower bankruptcy before foreclosure is complete. Unfortunately, bankruptcies involving timeshare or vacation ownership properties are particularly challenging. They have a lot of stakeholders (e.g., receivables and other lenders, individual timeshare interval owners, management companies, brokers, and vendors), and the property, with its wide variety of components, may be very difficult to classify as a "Single Asset Real Estate" proceeding for purposes of securing an expedited relief from stay (to allow the lender to proceed with its pending foreclosure) pursuant to Section 362(d)(3) of the Bankruptcy Code. For a detailed analysis of this issue, go the Hotel Law Blog and search for the article, "Speed bumps in the road to bankruptcy for hotels and resorts", which explains that "the classic cases for single asset real estate involve a single office building or apartment house passively held for income. Properties involving an operating business, like hotels, are more problematic"). When there are many creditors, a borrower may be able to not only significantly delay the relief from stay, but it may be able to successfully secure bankruptcy court approval of a "cram down" pursuant to which the loan terms can be modified in a way that is unfavorable to the loan buyer as the new lender.

Understanding obligations to third party management companies

Whether or not a timeshare or other vacation ownership property is operated sold using a branded affiliation, most such properties are managed by a management company. If a loan purchaser intends to foreclose on the property after buying the loan, that purchaser must be certain that the original lender/seller has not signed a non-disturbance agreement. If so, then it may not be possible to terminate the services of the management company except pursuant to the terms of the management agreement itself. For a detailed analysis of this issue, read *The HMA Handbook*, found at www.HotelLawyer.com.

Now is a great time to buy a hotel (and not a bad time to sell) – For savvy investors, the time could be right

This article was published by the Hotel Law Blog at www.HotelLawyer.com on 17 February 2013.

Investors,Take Note!

In January, 2011, I wrote an article titled, "So, you think you want to buy a hotel?" In it, I noted that hotel investors who delayed investment for another year or two in search of the holy grail of the bottom of the market or the "perfect" opportunity were going to be disappointed. I couldn't help but reference my Uncle Bernie who often laments about the deals he should have closed on but didn't. To his credit, Uncle Bernie closed plenty. But as he loves saying "the disappointments experienced on missed opportunities do not make my successes feel any better." So, let's recap some salient points from that article and see how they stand up today.

A parable of real estate investing tells us this: When prices are in a free fall, the average investor believes prices will keep falling. That same investor will believe prices will continue to rise when prices are rising. So in declining market transitions, the average investor will... do ...nothing. Only in hindsight, will the average investor regret his or her indecision. Savvy investors – the 3% who know how to make money no matter which way the market is trending – know what the rest do not: smart investment decisions do not need to be made at the bottom or top of a market.

Savvy investors buy or sell when key market indicators tell them to do so. Moreover, savvy investors know that they cannot time the market. By waiting, they know they would miss a key opportunity, and then be left scrambling like the rest of the herd. Hotel investors who delay investment for another year or two waiting for the bottom of the market will surely kick themselves. I can hear uncle Bernie's gruff old world voice saying, "I could of had that hotel for a song compared to prices today."

Well into recovery now with 5 years of projected industry improvement

Barring unforeseen circumstances, most hotel industry experts now believe we are well past the bottom the hotel cycle and into the upward inflection. For the first time in many years, there seems to be a consensus that industry fundamentals are poised to continue their improvement, driving both profitability and values, for at least another 5 years!

Here are then-and-now perspectives from our last article on this subject:

- In 2011 we said "Hotel values per room are back to where they were in 1996, without adjusting for inflation, and HVS believes that hotel values have already increased more than 10% nationwide for 2010." Values have continued to increase over the past two years.
- Today, Smith Travel Research reports that RevPAR growth will continue to grow at nearly 6% per year through 2014.
- In 2011, we said "Debt financing for existing hotels is improving significantly (enhancing liquidity and value), while development and construction financing for new hotels is virtually non-existent, restraining the influx of new supply and competition for existing hotels.
- Today, debt financing is readily available for existing hotels with good cash flow in the top 25 markets, and 10-year, fixed rate debt costs about 4% or less for them.
- In 2011 we said: "Hotel industry fundamentals are improving from the worst collapse since the Great Depression, and look to get much stronger in second half of 2011 and are poised for double digit growth for the next three or four years."
- Today, although demand has rebounded robustly, rates were slower to rise, and the first years of the recovery were clearly led by the luxury and upscale segments of the market. All the experts worried that the industry would be hurt by the impact uncertainty and concerns over a succession of events – the election, fiscal cliff, frustratingly high unemployment rates, troubles in Europe, Hurricane Sandy, and slowdown in China and India. None of these negative factors seemed to affect increasing demand for hotel rooms, and hotel

fundamentals are projected to continue at a strong rate through at least 2017.

- In 2011 we talked about the significant drop in labor and materials costs since 2008, making new construction cost in certain areas feasible. According to the 2012 HVS JN+A Cost Estimating Guide, since 2009, across all markets, the cost of construction fell from 2009 to 2010.
- Today: Since 2010 construction costs generally continue to escalate. According to the HVS Hotel Development Cost Survey, in 2011 and 2012, the price of gypsum, copper pipe, and plywood exceeded inflation. At the same time, the cost for some materials, particular lumber, remains low. No doubt those material costs will also soon increase as the housing market begins to warm.

Buy early in the hotel recovery cycle! Buy right.

It is a good time to buy a hotel almost anytime you can purchase a good hotel in a good market for less than replacement cost . . . and even more so if the hotel can service debt with its present cash flow. And with the expectation of continued improvement in industry fundamentals for 5 more years, there should be some great buys possible over the next two or three years with some interesting upside to your investment.

Buying after a long down-market cycle is always safer than jumping in at the top of the bubble after a long run up. This is the easy part. The difference for the savvy hotel investor is buying a good asset at a good time in the market cycle and doing enough due diligence.

Happy hunting. Don't forget to do your homework, use your checklists, and get good hotel consultants and hotel lawyers to help avoid unnecessary pitfalls.

About the authors

Jim Butler is recognized as one of the top hotel lawyers in the world. He devotes 100% of his practice to hospitality, hotel owners, developers and lenders. Jim leads JMBM's Global Hospitality Group® – a team of 50 seasoned professionals with more than $71 billion of hotel transactional experience, involving more than 3,800 properties located around the globe. He is frequently called upon to comment on hotel issues and has been quoted by The New York Times, The Wall Street Journal, Los Angeles Times, Forbes, BusinessWeek, Hotel Business, Thomson Reuters and Bloomberg News. He is the author of The Hotel Law Blog, and two other books in the We Wrote the Book™ series: The HMA Handbook, and The Lenders Handbook for Troubled Hotels. Contact him at jbutler@jmbm.com or 310.201.3526.

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THE HOW TO BUY A HOTEL HANDBOOK

Hotels have more moving parts than other kinds of commercial real estate, and it is no surprise that buying them is more complicated than buying other kinds of real property.

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The *Handbook* provides a detailed overview of the hotel acquisition process, a thorough due diligence checklist, and informative articles that address some of the most important questions that arise when buying or selling a hotel.

In the Foreword to the *How to Buy a Hotel Handbook*, Bjorn Hanson Ph.D., divisional dean of the Preston Robert Tisch Center of Hospitality, Tourism, and Sports Management at New York University, writes that "The [book's] contents will be invaluable to buyers, sellers, investors, lenders, advisors, and many others."

For those who want a broad understanding of the hotel acquisition process, as well as those who want to delve deeper into specific areas, the Handbook will be a practical guide throughout the purchase of a hotel – from the moment that the opportunity arises until the day the deal is closed.

About the Author

Jim Butler is the Chairman of JMBM's Global Hospitality Group® and the author of the Hotel Law Blog. The *How to Buy a Hotel Handbook* is based on the experience Jim's team has gained from more than $71 billion of hotel transactions, involving more than 3,800 hotels all over the world. It provides one of the most extensive virtual data bases of market terms for deals and financings, enables them to help clients identify and avoid show stoppers early in the transaction, and facilitates smooth and efficient deal closings.

Experienced in all aspects of hotel transactional matters, JMBM's hotel lawyers can help you identify, evaluate and resolve all the issues that may affect the value and profitability of your hotel. To find out more about Jim and JMBM's Global Hospitality Group®, go to www.HotelLawyer.com.

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