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Insights

DISPUTES UNDER HOTEL MANAGEMENT AGREEMENTS IN A COVID-19 WORLD – PART IV: KEY ISSUES WHEN CONSIDERING DISPUTE RESOLUTION CLAUSES – ARBITRATION CLAUSE

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SUMMARY

The COVID-19 pandemic has wreaked havoc on the hospitality sector, significantly impacting the financial performance of existing hotels and causing delays to new hotel projects. These impacts may result in hotel owners and operators breaching the terms of their hotel management agreements ("**HMAs**"), which could lead to disputes. In this four part series of articles, the team at BCLP examines the likely areas where disputes may arise under HMAs during the hotel's development and operational phases, as well as key issues for the parties to consider when drafting or reviewing their dispute resolution clauses in the event they wish to invoke the same.

Introduction

The COVID-19 pandemic has wreaked havoc on the hospitality sector, significantly impacting the financial performance of existing hotels and causing delays to new hotel projects. These impacts may result in owners and operators breaching the terms of their hotel management agreements ("**HMAs**"), which could in turn lead to disputes between the parties. In this four part series of articles, the team at BCLP examines the likely areas where disputes may arise under HMAs as well as key issues when considering dispute resolution clauses.

In this Part IV, we conclude our discussion of potential disputes under hotel management agreements by examining some key tenets of an arbitration clause. Given the potential rise in disputes or fall out from continuing and unknown risks, it is useful to revisit the four corners of this clause and how it impacts the business e.g. the enforcement of an arbitral award or the law governing how an arbitration is conducted. This would also be useful in identifying the issues if the owner and the operator wish to proceed with an expert determination or arbitration for a current dispute.

Mediation

Just ahead of referring a matter to arbitration, some contracts may expressly refer to alternative steps in the process such as referring the matter to the most senior representative of the owner and the regional head of the operator. Others may also include a requirement to enter into a mediation process before an arbitration hearing can be initiated. Even when mediation has not been expressly included some jurisdictions may still require evidence that the parties have attempted to mediate before commencing, in particular, litigation proceedings, or that adverse cost orders may be imposed on parties where there has been an unreasonable refusal to mediate. Parties will therefore need to consider this latter approach even if not specified in the contract.

Arbitration Clause

Disputes not referred to expert determination and not resolved by mediation are usually referred to arbitration. This is a process that is familiar to many – although the nuts and bolts of the clause are worth re-visiting.

When considering the arbitration clause, two pertinent questions are:

- the seat of the arbitration; and
- the law of the arbitration agreement.

There are certainly other aspects such as the number of arbitrators and applicable arbitral rules - but disputes on the above are frequent and can be quite complex, which can prove costly even before the arbitration on the substantive dispute begins. Accordingly, careful drafting and understanding of these issues is crucial.

Seat of the arbitration

The seat of the arbitration acts as the "home" of the arbitration – and it determines the relationship between the arbitral tribunal and the courts and in turn, the court which has supervisory jurisdiction over the arbitration. The seat will also determine where the award has been made, which is significant when trying to enforce an award. If the country where the arbitration takes place is party to, for example, the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), an award made in that arbitration can be recognized and enforced in the countries which are also parties to that convention, subject usually to the satisfaction of certain regulations specific to each signatory country or being in line with public policy.

When choosing the seat of the arbitration, it is also key to consider the legal system and framework – such as whether the courts and institutions support arbitral proceedings and predictable enforcement if there are any issues with jurisdiction and interim reliefs. Given that parties usually look to arbitration for finality, they may also wish to consider the arbitration policies and legislation – for instance, is there limited recourse in appealing or setting aside an award? Some countries

may also have laws which reduce party autonomy by permitting more court intervention in the arbitration process or impose conditions on arbitrator eligibility.

Finally, a brief but relevant point to bear in mind is the distinction between the "seat" and "venue" of the arbitration. While they are quite commonly the same "place", the "venue" of the arbitration simply refers to the physical location of the hearing.

The seat therefore has a broad impact on the conduct of proceedings and the effectiveness of an award. It would be most frustrating for parties to encounter roadblocks when trying to achieve efficient arbitral outcomes and recovering monies pursuant to a final award.

Law of the arbitration agreement

In the earlier part of this article, the importance of the choice of governing law for the HMA was discussed. It is equally important that the law governing the arbitration agreement is provided for, in particular when:

- it differs from the law of the underlying contract; and
- in addition, the law of the underlying contract is different from the seat of arbitration e.g. Vietnam governing law and Singapore seat.

The law of the arbitration agreement will affect the validity and interpretation of the clause, which means it could potentially negate the parties' agreement to arbitrate (per how the arbitration clause is drafted) or how the agreement is enforced e.g. both parties' consent is required before a dispute can be referred to arbitration. This would have serious consequences on whether a party can progress the resolution of the dispute as intended.

We touch briefly on the Singapore and UK position, where there is a dispute as to the law of the arbitration agreement. The three stage inquiry follows:

- the parties' express choice;
- the parties' implied choice, as inferred from their intentions at the time of contracting; and
- the system of law which the arbitration agreement has its closest and real connection to.

The first stage is clear enough. In the second and third stages, the inquiry extends to:

- governing law of the contract. There is a starting presumption that the governing law of the contract is the law that governs the arbitration agreement;
- seat of the arbitration. A different choice of seat is not in and of itself sufficient to rebut the presumption that the contract's governing law extends to the arbitration clause. However,

where there are other factors e.g. under the governing law of the contract the arbitration agreement is at risk of being ineffectual, the seat is taken into consideration;

- where there is no express or implied choice of law, the court will consider which system of law the arbitration agreement has the closest and more real connection. In this light, the choice of the seat is likely to be a decisive factor. As discussed above, the choice of a country as an arbitral seat is an expression of the parties' choice that the laws of that country apply to the supervision and conduct of arbitration; and
- it also bears noting that the New York Convention provides that, in the absence of an express or implied choice, the relevant law will be the law of the seat when it comes to the recognition and enforcement of foreign arbitral awards. The relevant article is mirrored in various arbitration legislation.

This thus demonstrates the complexity in ascertaining the law of the arbitration agreement when it is unclear or there is a conflict as to what it should be. It is therefore important to expressly provide for it, in order to minimise the scope of disputes in court proceedings relating to the jurisdictional and enforcement stages.

Conclusion

In a time where risks are evolving and unpredictable, hotel owners and operators should be alive to the potential for disputes and how the terms of the HMA and choice of law play a significant role in shaping how these disputes play out and how they can enforce their rights. On some level, a great dose of commercial realism and camaraderie is required to navigate through current waters, but the ability to utilize the right tools and mechanisms in a dispute is essential, now more than ever.

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