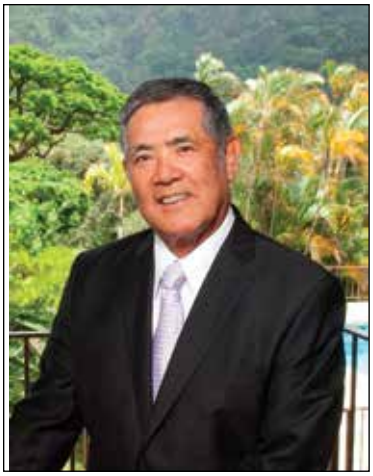
# My Hotel Deserves a Brand—But What If I Want To Terminate the Brand?



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**Raymond S. Iwamoto**

**It isn't easy, so plan for it in advance.**

**I BUILT WHAT I CONSIDERED** a luxury hotel in a resort area where I live and engaged a small hotel company to manage and operate my hotel. My hotel is doing fine but I have decided that my hotel deserves a world-class brand. I feel I owe it to my hotel. Also, I deserve the income that maybe a world-class brand will give me. I am also attracted by the prestige factor. I am convinced that a brand creates a bond between the hotel and the hotel guest. The brand is a promise of a level of experience. If I can brand my hotel, I would acquire an intangible asset. However, soon after embarking on this journey, I learned what it might cost me to acquire this asset and that my desire to brand my hotel may have to be so strong that I might have to abandon any thoughts of better financial returns. The brands have all of the leverage and a hotel owner must really be committed to paying for the privilege of using the brand to call his hotel by a brand name.

There is a brand-name hotel that operates here that I have had my eye on. So I contacted Brand WOA. Brand WOA is one of the most highly respected and honored hotel brands in the luxury hotel business in the world. WOA stands for World of Aloha, which brand is known throughout the world, although originating in Hawaii. I am honored that they think that my hotel might qualify. I call my lawyer, a Fellow in the American College of Real Estate Lawyers and he is delighted as he seems to

be aware of the high intensity legal work and legal documentation that will be involved. He is correct. There is much to do.

After several meetings at my hotel, where I provide rooms and meals both at high standards, I am informed that we can start to discuss, negotiate, and document my hotel's journey into the world of world-class hotel brands. We begin to negotiate a Hotel Management Agreement, which entails a lot more than managing the hotel. In fact, it entails a lot even before we rebrand my hotel, as well as before and after WOA actually manages my hotel in order to be deserving of the WOA brand. I learn that the WOA brand is so coveted and protected that WOA will even manage and operate my hotel during a transition period before they will allow my hotel to bear the name of WOA. All of this is expressed in the hotel management greement that we eventually sign. My lawyer took some time reviewing it and he had a few comments and requests which I will admit were valuable.

He advised me that he had heard that brand-name companies make money while the owners don't. But during the negotiations of our Hotel Management Agreement, WOA is quick to agree to provisions suggested by my lawyer designed to protect me from any ability of WOA to profit from transactions with third-party vendors and affiliates of WOA. I believe that WOA is genuinely looking to earn its incentive fee on profits and not only on its base fee based on gross revenues and that way I stand to share in profits. While I give up a lot of control, I am willing to do so and I still retain some control. My attorney's bill was reflective of how well he reviewed the pages and pages of paper that it took to agree on how we would brand my hotel.

My lawyer also reviewed my contract with my existing hotel manager and advised me to sit down with them and negotiate a transition and possible termination. All of this even though I am not assured that I will be successful in giving my hotel a brand name. My hotel manager is cooperative and they agree to continue to manage my hotel and they have agreed that if I am successful in getting to the stage where WOA will manage my hotel, they will cooperate in the transition and termination.

**THE MANAGEMENT AGREEMENT** • My Hotel Management Agreement provides for an initial phase, an operating phase, and a rebranding date. We will have to go through both the initial phase and the operating phase before I can proudly say my hotel has a brand new brand name and I can start to call it a WOA hotel.

### Initial Phase

During the initial phase, we discuss and together lay the foundation for my hotel's metamorphosis into a WOA hotel. During this phase, WOA personnel went over my lovely hotel with a fine tooth comb, thoroughly inspected its architectural, structural, mechanical, electrical systems, floor patterns, room configurations and design, and they worked with me and explained to me what would be required in terms of major renovations or reconstruction that would change and upgrade my hotel to their required standards. My lawyer asked me if I could afford it or would I have to finance the cost.

My lawyer is absolutely correct as I learn that my dream to brand my hotel is not going to be cheap and that even after I pay the rebuilding costs, my continuing funding ability will be a critical part of branding my hotel. It was explained to me that in addition to the initial reconstruction costs, I will be required to fund all future capital needs for my hotel and to convince WOA that I had the financial wherewithal to do that. I might even have to provide a letter of credit to support these obligations. Naturally, this would be a letter of credit that provided for WOA to be the beneficiary who would be able to draw upon the funds with a mere notice to the bank. I will make the financial commitments to keep my hotel at the WOA standard throughout the term my hotel has the brand name. Fortunately, my

patented bobblehead hula dancer dolls are making me tons of money.

We then examined my artwork, carpets, furniture, fixtures, bedspreads, cutlery and other items that fall under the category of furniture fixtures and equipment. I am advised that I could hold an auction or make a charitable contribution of all of my Furniture, Fixtures and Equipment (FF&E) and advised as to what FF&E I must acquire and at what level of quality. The same goes for operating supplies and even consumables. Apparently, all of these must rise to a certain standard that WOA requires. My wife had gotten emotionally attached to many of these items that we handpicked ourselves and for which we had travelled the globe to acquire. But alas, they were not suitable for the new brand my hotel would acquire.

**Operating Phase**

After the preliminary phase, we moved to an operating phase. This is where I part company with my existing hotel manager and WOA begins to manage and operate my hotel. The purpose of this phase is for WOA to test the hotel and its operations. During this phase we continue to work on a retrofitting budget and retrofitting plan. After several more meetings (and meals) at my hotel, we agree on the budget and a formal retrofitting plan that will cost me a lot but will assure that my hotel will be at the standard of WOA. It is actually a reconstruction and refurbishment plan but they call it a retrofitting plan.

Once the operating phase starts, I am entitled to participate in WOA's centralized purchasing system where I can purchase FF&E, supplies, and consumables using WOA's worldwide buying power. For this I pay a fee which is what is charged to all WOA's hotels. Also, during the operating phase, WOA provides an extensive training program for my employees. No mistake they are my employees, although I find that I lose control. They are my employees, I am their employer, but I sign an agreement that says WOA selects, employs, supervises, and fires my employees. Every department of my hotel comes under strict scrutiny and evaluation as to performance and inherent problems.

I will make the financial commitments to keep my hotel at the WOA standard throughout the term my hotel has the brand name. We work long hours not only on the retrofitting budget but on the operating and reserves budget. Both must live up to the WOA standards. Together, WOA and I will evaluate my hotel's need for repair, replacement, restoration, capital improvement, and maintenance on an annual basis. We will estimate revenues and expenses as well. During this period WOA is evaluating my financial strength and ability to respond to cash calls in response to fluctuations in revenues, such as those resulting from disruptions in vacation travelling due to stresses in the economy. They also disabuse me of my notion that the guests of WOA are immune to these economic cycles. Our market is not the super super rich and I am not acquiring a super luxury brand. Somehow I pass all these tests and WOA does not exercise their rights to terminate. My lawyer reminds me that all of the financial commitments that I am required to make have no relationship to any return on investment ideas I may have. I assure him that my desire to brand my hotel is greater than my love for returns.

I ask WOA if that's all and that once I close my hotel, embark upon and complete the reconstruction, will I be assured that my hotel will be branded. The answer, however, is "No." There is much more to come. I am worried that the closing of my hotel and the reconstruction period will drive many of my former repeat guests away to my competitors and so WOA assists me in a public relations and advertising campaign aimed at enticing my regular guests to want to return to my hotel once it reopens. In none of these public relations or advertising campaigns can I mention my hotel's pending rebranding. My lawyer takes this opportunity to discuss with me what I already know but my infatu-

ation with branding my hotel has made me forget. He reminds me how occupancy at my hotel ebbed and flowed with the tides of economic cycles. Undaunted, I continue on.

I am not permitted to use the brand name until a branding date, which will be after the renovations are completed and other hurdles are met, namely WOA says the rebranding date has arrived. Of course they will provide advance notice of the anticipated branding date subject to conditions. This is actually a rebranding, as my hotel will be changing names. There are several conditions to rebranding besides the physical reconstruction of my hotel. I must admit my hotel never looked better and even my lawyer is enjoying staying there.

According to the Management Agreement, each year I get to "approve an annual plan" meaning an annual forecast of revenues and expenses, capital needs, and a marketing plan that WOA will provide me for review and approval. I am pleased to discover that WOA will actually agree to abide by the limitations in this annual plan subject to having the right to deviate within certain percentage parameters. Beyond those percentages (on a line-item by line-item basis), WOA will need my approval for any deviations. Naturally, I agree that the projections are just that—projections—and WOA does not warrant any results.

During the operating period and prior to the rebranding date, WOA starts to incorporate my hotel with WOA's reservation system, corporate sales and advertising and marketing systems. These are in anticipation of the rebranding date. From and after the rebranding date, my hotel will participate in WOA's centralized reservation services. While I agree to pay a fee for all of these, it is understood that these are not profit centers for WOA but a charge to my hotel of a pro rata share of WOA's expenses in providing these services to all of its hotels.

I want to protect "my" brand and so I negotiate certain restrictions on WOA's rights to manage other hotels that could be competitive with my hotel. These "restrictions" are limited by geographical area. WOA has brands within brands and is already managing certain other hotels and so we carve those hotels out of the restrictions. WOA negotiates also to carve out time share projects from the Restrictions.

My lawyer and I negotiate pages and pages of other provisions but most of those are provisions that would be included in all hotel management agreements and are not peculiar to brand hotels. We did negotiate "divorce" or termination clauses, in the event I want a divorce, which are tied to performance standards. I note that these performance tests have nothing to do with my financial investments and return on that investment but are based on revenues per available rooms. WOA negotiates to protect itself by inserting cure rights in the form of cash payments.

### The Rebranding Date Comes…and the Honeymoon Ends

All of these are incorporated into a Management Agreement which WOA and I sign at a signing party. The champagne flows. Of course my lawyer is invited. Both he and I look forward to my hotel's new name in due time.

The years go by and I am very unhappy with the performance of my hotel—which is still *my* hotel. I ask my lawyer whether I can terminate WOA. He asks me if WOA has met the performance standards and I answer yes, but I still would like to terminate WOA. He asks me if WOA has done anything wrong. I answer, "Not that I know of." He tells me that I do not have cause to terminate them. He says I have the power to terminate them but not the right to do so, but that if I exercise this power it will most likely expose me to liability for damages, since I agreed to let them manage my hotel for years so long as they met the performance standards and

lived up to their other agreements. I tell him I don't understand how I can have the *power* to terminate but not the *right* to terminate and anyway—What's the difference? In response, he said "I'm glad you asked," after which he gave me the following written analysis, which he had prepared when we first embarked on this journey to rebrand my hotel.

**TERMINATION OF HOTEL MANAGEMENT CONTRACTS** • The economic downturn has depressed many hotel properties and there are discord and disputes between hotel owners and hotel operstors. Owners have sought to change management companies, and the resulting litigation involves some of the following legal issues:

- Power to terminate versus right to terminate;
- Contract law and franchise law;
- Landlord and tenant law;
- The laws of principal and agent;
- Agency coupled with an interest;
- Independent contractor status;
- Personal service contract.

**Contract Law and Franchise Law**

Contract law and franchise law will determine whether the owner had the right to terminate the Manager and if not, whether the owner is liable for damages for breach of contract. Customarily, the Hotel Management Agreement, as with almost all management contracts, will address termination in terms of termination for cause, termination without cause and ancillary matters such as notice, right to cure, etc.

The parties will negotiate and will include agreements as to the definition or standards of "for cause." While there are specific events of default such as the filing of bankruptcy and specific financial performance standards, typically there will be the general event of default described as the failure to perform or observe a material covenant. Frequently, this has to be determined in a court of law or by an arbitration panel.

At times the parties will have agreed on a price or fee to be paid if termination is "without cause." Sometimes the owner will negotiate a termination right upon sale of the hotel and will often be rebuffed by the operator or the parties will agree upon an acceptable termination fee.

**Landlord and Tenant Law**

If a hotel operator actually leases a hotel property for its own accord and business, then in those situations the owner probably has only contractual rights of termination as described in the Lease and no power to terminate. But this arrangement clearly falls outside the principal-agent relationship because here the owner's business is one of being a landlord and only the hotel operator's business is that of running a hotel.

The current controversy has more to do with whether the owner has the power to terminate the operator even if he has no contractual right to do so under the Management Agreement.

**Law of Principal and Agent; Agency Coupled with an Interest; Independent Contractor Status**

The law of principal and agent, agency coupled with an interest, and independent contractor status will determine how the courts will view these legal issues and whether the owner has the power to terminate, subject to damages for terminating. In addition, the power to terminate will involve litigation principles such as the courts' reluctance to enforce personal service contracts.

**The Midnight Raid or *"Coup d'état"***

This was the leading paragraph in the April 18, 2012 *New York Law Journal*:

"It's midnight. Everyone at the hotel is sleeping. Suddenly, the hotel is surrounded by guards. Then construction workers. Every sign indicating the brand affiliation is removed. Menus, napkins and

towels are all replaced. The sun rises. The hotel's workers are summoned to a conference room and fired. When executives from the hotel management company attempt to enter the hotel they have managed for the last five years and have a contractual right to manage for the next 40, they are barred from the property."

This *New York Law Journal* article is an excellent discussion of this topic. It discusses the following leading cases, distinguishing between the power and the right to terminate: *Woolley v. Embassy Suites*, 278 Cal. Rptr. 719 (Cal. Ct. App. 1991); *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555 (1993); *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291, 300 (3d Cir. 1996); and *2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 1998 WL 1469541 (D. Del. Feb. 4, 1998).

In his article titled "Protectable Interests in Management Agreements," *Hotel News Now* (September 28, 2011), available at http://www.hotelnewsnow.com/Article/6544/Protetable-interests-in-management-agreements, Forrest A. Hainline III lists and cites the above-cited cases and states that he has heard lawyers representing hotel owners claim that these cases supposedly allow hotel owners to terminate their Hotel Management Agreements at will without consequences and that this view has let to mischief and the midnight raids. Actually, these cases would not allow owners to terminate with impunity and without regard for consequences, but they do stand for the proposition that the owner has the power to terminate while having exposure to liability for damages for breaching the contract. These rulings are premised on agency law and how the law will not impose injunctive remedies against terminating the agency. The Hainline article argues against using obsolete agency laws and observes that Hotel Management Agreements have become increasingly more sophisticated. It further claims that these modern Hotel Management Agreements are not traditional agency relationships.

A recent case to address this issue is *Marriott Int'l, Inc. v. Eden Roc, LLLP*, 962 N.Y.S.2d 111 (N.Y. App. Div. 2013), where the New York Appellate Court reversed a lower court's injunction against the termination, thus upholding the owner's power (if not the right) to terminate the operator. However, the appellate court said that it determined that the Hotel Management Contract "is a classic example of a personal services contract that may not be enforced by injunction." *Id.* at 112. The court also stated in dicta that there was no agency relationship.

The Hainline article argues that the litany of cases upholding the power to terminate are outdated relics and applies agency law as it applied to the ownership of a cow in the seventeenth century. Hainline then contrasts that against the ownership of a hotel and the control over the hotel that the owner surrenders to the hotel operator.

This article discusses the principles of traditional common law, especially with respect to the law of principal and agent, as they apply to the current question of whether a hotel owner has the power to terminate the hotel operator even where he does not have the right to do so. I believe that the leading treatise on the traditional common law of agency is still Floyd R. Mechem, *Outlines of the Law of Agency* (4th ed. 1952) ("Mechem") and Mechem is cited extensively below.

**Agency and Control**

The Hainline article states that an essential component of a principal-agent relationship is the right of control and under modern Hotel Management Agreements the manager has full control subject only to the owner's rights of limited approval. The definition of "agency" as found in the Restatement (Third) of Agency (2006) § 1.01 provides:

**Restatement of the Law – Agency**.

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act

on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Comment (f) to this definition states, "Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency, the principal initially states what the agent shall and shall not do, in specific or general terms." Thus, in Hotel Management Agreements, the owner agrees that the agent may manage the hotel and the agreement states what the operator shall and shall not do and reserves certain approval rights such as the right to exceed budgeted expenditure levels.

Under the traditional common law "control" is more germane to the categories of "master and servant" and the "independent contractor." Mechem § 15. According to Mechem, the law of agency is a constituent of the general law of business organization and there are three categories identified below. (Mechem § 2 and § 11):

- **Principal and Agent.** The first category is that of principal and agent and the "distinguishing characteristic of the agent is that he represents his principal contractually". Mechem § 12 (A). The agent makes contracts or other negotiations of a business nature on behalf of his principal and by which his principal is bound. Certainly, the hotel operator enters into contracts with third parties which bind the owner's property, and therefore the owner, of the hotel;
- **Master and Servant**. The second category is that of the master and servant. "A servant is one who works physically for another subject to the control of that other". Mechem §13 (B);
- **Independent Contractor**. The third category is that of the employer and independent contractor. The independent contractor is one who is neither a servant nor an agent. His "job is to do a job for a price, the finished job to meet certain specifications, but the manner and control of doing it to be up to the contractor." Mechem §14 (C).

Under the traditional common law of agency as described by Mechem, the independent contractor has no power to represent the employer contractually, which is the domain of the Agent. Also according to Mechem, the law of independent contractor is largely concerned with the nature and extent of respondiat superior and when the principal can be held liable for the torts of the agent or independent contractor. Mechem also discusses whether there is an exception to the rule that the principal is not liable for the torts of an independent contractor, "particularly in cases of work to be done on the premises of the constituent" Mechem § 15.

Apparently at the time of publication in 1952 of the fourth edition of *Mechem on Agency*, there was a trend in changes to the common law having to do with independent contractors and services to be performed on the premises of the employer. In Mechem § 484 there is a reference to exceptions to this rule of principal non-liability for "innkeepers" who have non-delegable duties, that is, duties that cannot be delegated to whoever is operating or managing the inn.

How do we apply these traditional common law concepts to the modern and sophisticated Hotel Management Agreements? Clearly the hotel operator is not a servant. Since the hotel operator has the power to represent the owner contractually and does, in fact, enter into contracts for the owner, the hotel operator could be an agent. However, if the owner has given up too much control to the hotel operator, the operator may not be an agent but instead may be deemed an independent contractor. What is clear is that in today's modern Hotel Management Agreements, the hotel operator has attributes of both an agent and an independent contractor.

Here again Mechem and the traditional common law provides some insight. According to

Mechem §427, the conventional independent contractor concept is that he "is one performing a physical service for an employer but not as a servant" because he is not under the control of the employer and "because he is engaged not in the employer's enterprise but one of his own." The examples that he gives is that of a radio repair man who is in the business of repairing radios while the owner of the radio is not in that business.

Unlike the owner who leases his property to a lessee who will operate a hotel, the owner who enters into a Hotel Management Agreement with an operator is engaged in the hotel business along with the hotel operator. If a requirement for an independent contractor is that his enterprise or business is different from the employer or owner, here we have both the owner and the operator engaged in the same enterprise or business.

Applying these principles to the determination of the status of the hotel operator under modern Hotel Management Agreements, the following could be said: It is true that much control is given to the operator by the owner and this could argue for the status of an independent contractor. It is also true that the operator is authorized to enter into contractual obligations that are binding on the owner or at least on the owner's property and this argues for the status of an agent. Since the operator and the owner are engaged in the same enterprise or business, this argues for the status of an agent. Perhaps the best that can be said under modern Hotel Management Agreements is that the hotel operator is both an agent and an independent contractor. He is an independent contractor for purposes of determining if the owner is liable for the torts of the operator and he is an agent for purposes of contractual liabilities.

Since the hotel operator is an agent, under the traditional common law the owner has the power to terminate his agency. According to Mechem § 262, the basic concept of the subject is that no one can be forced to be a principal or agent against his will: "It should be noted, however, that we are speaking of a power and not a right. The renunciation of the agent or the revocation by the principal may well violate contractual or other rights of the other, and in such a case the law may (and does) say that the existence of a power to terminate does not carry with it the right to terminate in violation of vested obligations." *Id.* at 173-174.

Thus, the recent "litany of cases" listed in the opening paragraphs of this Section 3 appears to be consistent with the traditional common law.

**Agency Coupled with an Interest**

An Agency coupled with an Interest is one exception to the rule that the principal has the power to terminate (subject to liability for breach of contract) and traces its roots in the American common law in an opinion by a famous Jurist, Justice Marshall, in *Hunt v. Rousmanier's Adm'rs,* 21 U.S. 174, 5 L. Ed. 589 (1823). In that case, a lender was given an agency to sell ships as security for a loan. However the principal died and the Court ruled that the power terminated upon the principal's death. "The fame of the case and the reputation of the judge who wrote the opinion, has led to the assumption, stated in cases and texts, that it states the law on the subject, that is, a power coupled with security is irrevocable by the grantor but does not survive his death." Mecham did not agree that this stated the law at that time on the question. Mechem § 269 page 1/8. The subject is still confusing to the courts.

The hotel management industry has attempted to insert into the Hotel Management Agreements agreements by the owner designed to deny to the hotel owner the power to terminate. They have inserted into the Hotel Management Agreements an acknowledgment by the owner that the operator has an "agency coupled with an interest" or that the operator is not an agent but an independent contractor. Sometimes, taking a cue from leases, they

have sought to add a covenant of quiet enjoyment. However, once again these are contractual provisions under contract law and they have not been successful in overcoming the principles of agency law and the judiciary's reluctance to enforce personal services contracts.

**Restatement (Third) of Agency §3.12**

The Restatement (Third) of Agency (the "Restatement") defines "Power Given as Security" as follows:

(1) A power given as security is a power to affect the legal relations of its creator that is created in the form of a manifestation of actual authority and held for the benefit of the holder or a third person. This power is given to protect a legal or equitable title or to secure the performance of a duty apart from any duties owed the holder of the power by its creator that are incident to a relationship of agency under §1.01. It is given upon the creation of the duty or title or for consideration. It is distinct from actual authority that the holder may exercise if the holder is an agent of the creator of the power.

In reviewing the Restatement, we first ask whether the power given as security has been created for the benefit of the principal or the third party agent. "Distinguished lineage aside, the quest for an interest to which a power has been coupled is not a useful exercise when it is clear that the power has been created for the benefit of a person other than the creator, as in *Hunt* itself. It is unnecessary to impose further limits on the creator's range of choices." Restatement (Third) Of Agency § 3.12 (2006), cmt c.

There is a lack of clarity as to what is required to qualify as an agency coupled with an interest sufficient to defeat the power of the principal to terminate the agency. While the courts in the modern cases that addressed this issue have been consistent in finding that the interests claimed by the hotel operators did not qualify, the guidance their opinions give is less than stellar. It should be first noted that the *Wooley* and *Pacific Landmark* cases involved California code law which is not necessarily consistent with the common law.

In *Pacific Landmark*, the court ruled on the basis of the legal separateness of affiliated corporations and found that while affiliates may have an interest, what was required was that the hotel operator itself and not its affiliates had to have the interest. In so holding, the court also ruled that the intent of the parties to create an agency coupled with an interest was irrelevant since the question was a question of law.

*Government Guaranty Fund* reached the same conclusion even though Hyatt distinguished *Pacific Landmark* by arguing that *Pacific Landmark* was decided on the basis that an affiliate of the agent owned the interest whereas Hyatt itself directly owned the interest in the subject matter of the agency that required protection. The California court brushed aside this argument by stating that even though an affiliate of Marriott had invested loans of $15 million and $8 million in capital contributions, as a matter of law, Hotel Management Agreements did not create an agency with an interest in favor of Marriott and said not a single word regarding Hyatt's argument that in Hyatt's case it was Hyatt itself that made the investment and not a Hyatt affiliate.

Another feature of both *Wooley* and *Government Guaranty Fund* is that in each case the Hotel Management Agreements included a clause disclaiming any partnership or joint venture. Perhaps in order to have an agency coupled with an interest, the Hotel Manager has to make a capital contribution to a joint venture, a limited liability company or partnership that is the hotel owner and then insist that in order to protect its investment, it be given a Hotel Management Contract. In doing so, the hotel manager would be well-advised not to use different corporate entities or affiliates but to be the single

entity to partner with the owner and to manage the hotel.

A second question to ask in our review of the Restatement is whether the fundamental purpose of the agency is to manage or operate the hotel or to provide security for the hotel operator's investment. In order for the power to have been given as security, the power must be held for the benefit of the agent and not for the benefit of the principal. It appears that in order to qualify as a power coupled with an interest or security, the trick is to create the power primarily for the benefit of the hotel manager and only incidentally for the benefit the owner. *Guaranty Fund* refers to the Restatement and states, "On the other hand, the power giver can revoke the power if it was created only for the benefit of the power giver, i.e., when there is a simple agency relationship. If the agent has an interest in the exercise of the power only because of the compensation to which it is entitled upon its exercise, then the power is not given as security and is revocable." *Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291, 300 (3d Cir. 1996).

Finally, we examine whether an agency coupled with an interest will survive the reluctance of courts to enforce personal service contracts. If a power coupled with an interest or security is properly established, will the courts then conclude that there is no personal service contract? In another case, *FHR TB, LLC v. TB Isle Resort, LP.*, 865 F. Supp. 2d 1172 (S.D. Fla. 2011), Fairmont negotiated contract language describing its agency as one coupled with an interest. It had different investments in the resort such as a right of first refusal, right of first offer, right of quiet possession and quiet enjoyment and others. The court noted that it was not aware of any authority supporting the conclusion that an agent who holds multiple contractual rights in a hotel it manages has an agency coupled with an interest even if those rights are looked at collectively.

Therefore, even if Fairmont could demonstrate the likelihood of success to establish that it had an irrevocable agency coupled with an interest, it would still have the obstacle that personal service contracts are not specifically enforceable.

In its opinion, the District Court also examined the requirement for irreparable harm to successfully argue a claim for injunctive relief and ruled that guest confusion, damage to reputation with guests and with stakeholders, damage to the brand, havoc in the industry and loss of proprietary information were insufficient and that monetary damages would be an adequate remedy. The court noted that even if there was some concern that the owner could not pay them, such concern was too nebulous and speculative.

Looking at the concept of power coupled with an interest or power given as security from another point of view, when an owner finances the hotel, the operator will seek to protect its status. Prior to closing the loan, the lender will ask the operator to sign a Subordination Agreement and the operator will insist that it also include a Nondisturbance Agreement whereby the operator is assured that it will continue to operate the hotel under its Management Agreement, after foreclosure or deed in lieu of foreclosure. Lenders will ask the operator to subordinate all of the hotel revenues and the operator will push back and agree to subordinate only the portion of hotel revenues payable to the owner. See my article, "Hotel Operator's Agreement With the Owner's Lender (with Forms)" in *The Practical Real Estate Lawyer*, Vol 22, p. 7 (Sept. 2006). Such Non-Disturbance Agreements substitute the lender or the successor in interest as the principal and are contractual in nature, unable to defeat a power to terminate that arises by operation of law. *See Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291, 307 (3d Cir. 1996).