

Phuket Breakfast Briefing

Navigating Hotel Disputes



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9:00 - 11.00 hrs.
Friday, 16 June 2023



Tree House Restaurant
Blue Tree, Phuket





Desmond Hughes, Senior Partner/Co-Founder, Hughes Krupica






- Registered Panel Arbitrators of Thai Arbitration Institute
- Fellow of CIArb
- Former Chair of ICC Thailand ADR and Arbitration Commission 2021-2023
- Former Vice-Chair of ICC Thailand ADR and Arbitration Commission 2020-21
- Former Vice-Chair of CIArb Thailand Branch - 2019-22
- ICC Commission Member
- Counsel and Co Counsel Arbitration Cases - Trade; Joint Ventures, Hotels, Real Estate, Luxury Yachts/Construction
- Operated law firm in Thailand for 20 years
- Represented both hotel operators and owners, mostly owners



Frank Janik, Senior Partner, Advisory at BDO Thailand

- 17 years in the Distressed Debt Group of major audit/advisory company
- 7 years + Partner at major/audit/advisory company in Thailand
- 20 years of Pan Asia experience including advising to lenders and borrowers on debt management, lead sell side, lead buy side, restructuring (informal and formal), M&A and Investigations
- Forensic investigations in diverse markets, including in hotel disputes
- Thailand's leading non-performing loan transaction specialist
- Qualified Chartered Accountant (CA ANZ)
- Member of ARITA (Australian Restructuring Insolvency and Turnaround Association)

Power Dynamic - Owners and Operators






-  Market Power of Operators - recent consolidation of power
-  Approach of Operators since 1970s - to 'control' the asset and transfer liability to owner
-  Management Agreements and Related - drafted, openly, in favour of operators - mostly take it or leave it
-  Trade-Off - Owners seeking higher returns/margins but understanding certain expenses will be higher than self-operated assets / Saleability and Capital Appreciation of Business/Assets
-  Local Compliance - owners might control this

Planning for Success

BDO

**HUGHES
KRUPICA**
Pragmatic Legal Expertise

BLUE TREE
PHUKET

-  Smooth information exchange procedures, timely budget planning, close co-operation on HR and budget sensitive matters
-  Owner not interfering in the operations / Operator not ignoring the commercial reality of owner's financial objectives
-  Contracts not simply 'imposed' leaving trailing bad-will a 'buy-in' process is preferable
-  Issue escalation process - management tiers, requirements for meetings, avoiding either party ignoring the other party
-  Expert Determination to avoid arbitration/courts on certain issues

Case Study 1

Valuation - parties didn't pre-agree on valuation method, the implementation of valuation when each party obtained a valuation but then had to compromise on a third party valuation resulted in excessive delays and high costs

Case Study 2

Impractical 'Multi-Tiered' dispute resolution clauses - with provisions for disputes outside of formal venues, and a series of steps for parties to satisfy. These clauses can sound and read well in theory, in practice, in a case involving allegations of fraud in a franchise case regarding the 'base' used for royalties and the manipulation of the 'base' computation to suppress royalty payments, a convoluted disputes clause can delay justice and resolution

Adapt Processes to Accommodate Each Party's Objectives





-  Performance Guarantees / Termination Rights / Penalties / Force Majeures & Exclusions
-  Consider Franchising instead of hotel management agreements
-  Use arbitration as a method of commercial resolution

Case Study 3

Desmond and Frank have recently worked on a case involving owner/operator where owner alleges operator management fees are unjustified notwithstanding management agreement not requiring supporting data for invoices due to management and other related fees being applied as a % to Gross Operating Profit and/or Total Revenues. Arbitration is considered 'final' so owner has attempted to circumvent the arbitration by filing in the Thai courts (common strategy) on 'different grounds'.



Understanding What Really Happens in a Dispute

-  The ICC publishes redacted Arbitral Awards - describing the dispute, facts, law and decisions (Reading these gives great insights)
-  Brand damage versus settling / imposing unfair terms and penalties
-  Owners 'freeing' their asset for future deals
- Taking care of employees - being human and understanding about impact of disputes on lives
-  Wasting costs on dispute management versus positive development of an asset/brand





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Thank You

