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From the Chair

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Friends and colleagues,

With apologies to Michael Corleone, 'Just when I was out…they pulled me back in.' Just when I thought I had written my last article as Chair of the Leisure Industries Section of the IBA, I got 'pulled back in' by the Leisure Industries Newsletter Editor, David Grant, to write an encore article as my 'swan song.' With that in mind, let me begin with our incredibly successful programme in Dubai. Leisure Industries Officer, Constantine Boulougouris, started things off, very effectively I might add, with his participation at the well-attended Space Law session. Next, Leisure Industries Chair Elect, Brenda Pritchard, brilliantly moderated our day-long programme entitled: 'Desert to Dessert: Leisure Developments in MENA Nations and Beyond.' In addition, special kudos goes out to David Jacoby, Shiven Kundra, Gabrielle Patrick and Sabrina Fiorellino for their Herculean efforts in organising this programme and participating as well. I must also point out that this session was done in conjunction with the IBA Arab Regional Forum, the International Franchising Committee and the Real Estate Section.

As the Dubai Conference drew to a close, your Leisure Industry Section Officers hurried back to work to begin preparations for next year's Annual Conference in Dublin, 30 September–5 October 2012. Rest assured that the Leisure Industries Committee's new leadership will continue the tradition of interesting, topical sessions originating from the incredibly substantive and diverse talent that our section offers.

Furthermore, your former Chair has been conscripted into accepting a new position as the Chair of the Leisure Industries' first subcommittee, the Electronic Gaming and Online Leisure Group. Our Dublin panel promises to be extremely exciting as we will present a hacker, an e-banking representative, and an online gaming regulator to debate the most pressing issues in online gaming, virtual currency, gamification, piracy and cyber security – more details as we get closer to the conference.

I want to close by saying it has been a great pleasure and honour to act as Chair of the Leisure Industries Section and I look forward to working with many of you in the future as we expand the Leisure Industries Section and our new subcommittee. Have a peaceful and relaxing holiday season, as we say goodbye to 2011. All the best to you and your families and hopefully, we will see you in Dublin next year.

Sincerely,
John M Vernon (December 2011)

Protecting your hotel brand from online brandjacking

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The hotel industry's reliance on internet advertising makes it particularly vulnerable to online 'brandjacking' by both legitimate and illegitimate means. Using examples from an Australian perspective, the authors outline strategies to secure, maintain and enforce intellectual property rights in an online environment.

Brandjacking, the practice of 'hijacking' and trading off of the brand equity of a well-known company's brand, trade mark or other identifiers by diverting customers to a different product or service than the intended one of interest, has been made increasingly easy by the advent of the internet. The suite of techniques in a brandjacker's armoury include:

- using paid search engine schemes such as Google AdWords to bid up keyword searches on competitors' brands (deceptive keyword bidding) or using a competitor's brand as a trigger for the brandjacker's own advertisement;
- impersonating the well-known company on social networking sites to damage the brand's image or reputation;
- registering domain names containing a business name or trademarked brand name not owned by the registrant (cybersquatting) or which are misspellings or mistypings of such names (typosquatting);
- using the Uniform Dispute Resolution Policy (UDRP) process in bad faith to deprive a registered holder of a legitimate domain name (reverse domain name hijacking).

Unique challenges faced by the hotel industry

According to the Internet Advertising Bureau, the leisure travel industry spent US$1.2 billion in the first six months of the 2011 financial year on online advertising (up from US$841 million reported in 2010).

Given its trans-border nature, it is little wonder that the internet is a particularly suitable tool in any global marketing strategy. But it also poses unique challenges in the hotel industry, where the players not only compete with direct competitors, but also its own resellers for online business.

A recent study conducted by MarkMonitor examined online hotel bookings of five global hotel brands (ranging from economy to luxury) by scanning various e-commerce sites, consumer marketplaces and email campaigns promoting those brands. It also examined over 1.3 million search ads triggered by almost 4,000 keyword combinations containing the brands.

The study found that:

- approximately 580 million visits from highly-qualified travellers were diverted away from the hotels' own online booking sites to those of channel and marketing partners, and even to competitors.
- the major hotel brands studied lost an estimated US$2.2 billion a year worldwide, made up of:
  - over $1.9 billion of bookings lost to competitors.
  - approximately $270 million in unnecessary commission payments to channel and marketing partners.
- there were over 2,100 instances of cybersquatting domains or domains containing a trademarked brand name, generating about 57 million visits per year.

Some of the most common tactics that were used to divert online traffic in the hotel industry ranged from the legitimate to the not so legitimate, and included:

- paid search results for online travel agents and aggregators with landing pages promoting other nearby hotels;
- competitors bidding up keyword searches on other brands' names; and
- competitors using another hotel's property in its own advertising to 'bait and switch' customers.

Given the unique challenges facing the hotel industry, it is more important than ever to have a sophisticated brand protection strategy in place. The remainder of this article looks into the different ways hotels can protect their brands, with a particular focus on brand protection on the internet.

Know your rights – and their limitations

The legal rights conferred by the trade marks, business names and domain names registration regimes are not the same. It is important to understand the differences between them to ensure adequate brand protection. For example, in Australia:

- a business name registration does not confer any proprietary (exclusive) rights in the name and does not by itself allow an owner to stop others from using a similar business name. It is also a state-based regime, and the state business names registries do not cross-check the Trade Marks Register when assessing business name applications;
- trade mark registration confers exclusive rights and can prevent others from using the mark (or one that is deceptively similar to it in relation to the same or similar goods or services);
- domain name registration does not confer exclusive rights to a brand in all domains, and it is possible to register the same name in different domains. There are certain restrictions on registration of commercial domain names in the Australian (.com.au) domain – for example, registrants must be an Australian registered company, trading under an Australian state or territory registered business name, a foreign company licensed to trade in Australia or an owner or applicant of an Australian Registered Trade Mark.

It is also important to recognise the potential limitations of the law in the brandjacking sphere. For example, in Australia:

- to infringe a trade mark, the mark must be used 'as a trade mark' – that is, as a badge of origin which distinguishes a person's goods or services from another;
- to make out a claim for 'misleading and deceptive conduct' under the Australian Consumer Law, the conduct is required to be 'in trade or commerce'; and
- defamation actions are usually not available to large companies (although they may be available to individuals associated with the company, such as directors, officers or employees).

The above limitations mean that brandjacking activities aimed at damaging the reputation of a well-known brand, such as a negative blog or Facebook page may not be clearly actionable (in contrast to where the brandjacker is selling counterfeit goods or services, or the brandjacker's own goods or services). While actions for passing off and the tort of injurious falsehood may be available in certain instances, these claims are usually harder to establish.

Strategies for protecting your brand

Given the challenges discussed above, the following strategies may help companies vulnerable to online brandjacking to secure, maintain and enforce their intellectual property rights:

Monitor the marketplace regularly, keeping an eye on company, brand, domain names (in all domains) and trademarks. If necessary, firms offering monitoring services can be engaged to carry out regular surveys. Customers tend to be a useful source of information, so it is important to have procedures in place to deal with reports of infringement.

Renew your business name, trade mark and domain name registrations promptly. For example, cybersquatters monitor renewal dates for popular domain names in order take advantage of any delay in renewal by the owner. It is also important to keep contact information up-to-date to ensure that renewal notices are received.

Mark out your turf in social media. Cybersquatting has expanded from domain names into usernames or profiles in social media. Companies should consider registering profiles on Facebook, Twitter, YouTube and other popular social networking sites for their brands and trademarks. Social networking sites may also be used to enhance the brand or trade mark – for example:

- Twitter runs a 'Verified Accounts' programme to establish authenticity for well-known account users who deal with identity confusion regularly;
- Partnering with fan sites rather than seeking to shut them down may create a mutually beneficial relationship which builds up brand equity: as an example, Coca-Cola engaged with the persons responsible for the Coca-Cola Facebook page, which is now jointly administered by the original creators and representatives of the company;
- Social media may provide a forum to address customer complaints in real time and turn customers into brand advocates in the process. This is particularly important to the hotel industry where online reviews can be a major factor in attracting customers.

Know your dispute resolution procedures. For example:

- search 'bait and switch' tactics may be contrary to the relevant search engine's policies. For example, in Australia, Google will remove advertisements using a competitor's trade marks in the text or keywords of an advertisement (but note Google's AdWords Terms and Conditions differ between jurisdictions).
- Facebook, Twitter and YouTube have established intellectual property infringement notification and complaint procedures. Defamatory, offensive or infringing material may also be contrary to the host internet service provider's policies. These mechanisms are usually faster, cheaper and more effective than legal action.
- Australian domain names disputes may be resolved under the .au Dispute Resolution Policy (auDRP), an adaptation of the Uniform Dispute Resolution Policy (UDRP) administered by the World Intellectual Property Organisation, which provides a relatively inexpensive arbitration process for IP rights owners. One of the most important differences between the auDRP and the UDRP is that a dispute can be brought under the auDRP by the holder of any kind of name, not just a trade mark holder. This allows the holder of a 'business (or other) name' to bring a claim where the name has been registered or is being used in bad faith. That the name need only be registered or used in bad faith is also a significant departure from the UDRP, under which both registration and use in bad faith is required. Other alternatives to the auDRP process which may prove cheaper and quicker, include making complaints directly to the registrar or auDA (the industry body for the .au domain space) pursuant to particular auDA policies.

Act quickly to enforce your rights. Companies should ensure that they collect permanent evidence of the infringing or offending conduct as soon as possible, as online evidence may be removed before the proceedings come to hearing.

Notes

1 Internet Advertising Bureau, 'IAB Internet Advertising Revenue Report: 2011 First Six Months Results: September 2011', available at: **www.iab.net/media/file/IAB-HY-2011-Report-Final.pdf**.

2 MarkMonitor 'Brandjacking Index: Online Hotel Bookings' (Spring 2011), available at: **www.markmonitor.com/resources/brandjacking-index.php**.

The Thomas Cook/CGL/Midlands merger

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On 8th October 2010, Thomas Cook, the Co-operative Group Limited (CGL) and the Midlands Co-operative Society Limited (Midlands) agreed to form a joint venture to include all of CGL's, all of Midlands' and some of Thomas Cook's travel businesses. Thomas Cook would contribute its retail travel agency business, but not its tour operating business or its internet travel agency businesses. The principal overlap was therefore the main parties' travel agency stores, of which Thomas Cook had 780, CGL about 360 and Midlands over 100. Owing to the parties' size, the deal required clearance under merger control rules. This article describes and comments on the process of obtaining merger control clearance, and the substantive competition analysis.

Who should review the case?

EU or UK?

The first question was whether the EU should review the case, or the UK. The transaction initially fell to be notified in the European Union under Regulation 139/2004 (the EU merger control regulation or EUMR). This was because Thomas Cook would, as a result of the transaction, exercise decisive influence over both CGL and Midlands, and the parties' turnovers exceeded the applicable turnover thresholds.

One of the turnover thresholds states that if each of the parties to the transaction achieves more than two-thirds of their EU-wide turnover within one and the same Member State, then the EUMR will not apply. Thomas Cook did not achieve more than two-thirds in one Member State and so the case was initially to be notified to the EU Commission. The EU Commission received the parties' notification on 9 November 2010.

About three weeks after the parties' notification, the UK Office of Fair Trading applied to the EU Commission under Article 9 EUMR, for the case to be sent back to the UK for review under the Enterprise Act 2002 merger control rules. The basis for an 'Article 9(2) request' is that:

(a) a transaction threatens to affect significantly the competition in a market within the EU Member State making the request, which presents all the characteristics of a distinct market, or
(b) the transaction affects competition in a market within that Member State, which presents all the characteristics of a distinct market, and which does not constitute a substantial part of the common market.

The EU Commission's analysis was based primarily on (a). It concluded that the transaction would result in by far the largest travel group in the UK and the market leader for the distribution of holiday products. It would lead to high combined market shares of the parties, both nationally and regionally. It would remove the most important independent distributor for holiday products in the UK. Therefore, there was a real risk that the transaction would have a significant adverse effect on competition.

Most interestingly, Thomas Cook opposed the referral back to the UK, arguing essentially that the transaction would not have a significant effect on competition within the UK. Thomas Cook's strategy was clear: if the UK succeeded in having the case referred back to it, there was a very high chance that the OFT would refer the case to the UK's Competition Commission (CC) for a detailed (24-week) investigation, which would delay the transaction. By contrast, to win the argument on case referral before the EU would almost certainly lead to a first-phase clearance by the EU Commission.

Thomas Cook lost the argument and the case was sent back to the UK on 6th January 2011.

OFT or CC?

The second question was: would it be possible to obtain merger clearance before the OFT, or would a reference to the CC be necessary?

Normally, it is in the notifying party's interest to seek clearance in the first phase investigation, which in the UK is before the OFT. There are obvious advantages of speed, cost and regulatory certainty. This case was somewhat unusual.

The OFT had 45 working days from 6 January 2011 to take a decision on whether to refer the transaction to the CC. This was extended to allow the OFT to ask further questions (a power available to them in this case as a result of the fact that it was originally an EU case). The deadline was therefore 4 April 2011. Normally, if the OFT had concerns about a transaction's effect on competition, there would be discussions between the parties and the OFT about possible remedies (undertakings in lieu of a reference), issues meetings and case review meetings.

However it was clear to all concerned that the test for referring a case to the CC was met – that it 'is or may be the case' that the proposed transaction may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom. OFT guidance (based on case-law) states that the reference test will be met if the OFT has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will lessen competition substantially.

Consequently, on 14 February 2011 (about seven weeks before the expiry of the extended deadline), the parties requested a 'fast track reference' to the CC. The OFT stated in its reference decision that, '[t]he fast track procedure is intended to provide merging parties, in cases which may raise complex issues or clearly meet the threshold test for reference, with an opportunity to streamline the merger review process.' This is an exceptional procedure, which OFT guidance provides for. But it is odd that notifying parties would consider that extending the case by a further 24 weeks of detailed and costly review would be 'streamlining' the process, unless it was felt that nothing further could be achieved by arguing the merits of the case before the OFT.

The OFT referred the case to the CC on 2 March 2011. The parties' tactic of fast-tracking the reference was validated on 16 August 2011 when the CC cleared the transaction unconditionally.[1] It is not unusual for the CC to clear cases unconditionally after a reference by the OFT: in 2011 alone, the *STS/Butlers, Ratcliff/R&B* and *Streetcar/Zipcar* mergers were all cleared. Further, one should expect this to happen from time to time: the legal threshold for the OFT to refer a case is lower than the threshold for the CC to prohibit it (as it should be). Moreover, a complex case may involve a degree of sophisticated analysis which it is not possible for the OFT to conduct within its first-phase deadlines. But it is worth considering why complex cases could not be cleared unconditionally in the first phase.

Why was the case cleared?

The CC's analysis is, as ever, sophisticated and detailed, but the message is simple: the CC did not believe that the merger would lead to a substantial lessening of competition. The CC could not rule out price rises particularly at a local level, or customer foreclosure at a vertical level, but the price rises were not considered to be substantial, and the foreclosure not significant. To understand how the analysis works, it is necessary to start from first principles.

Competition is a 'process of rivalry between firms seeking to win customers' business over time by offering them a better deal.'[2] The elements of competitive rivalry include: price, output, quality, efficiency, or the introduction of new and better products. In essence, rivalry between firms to offer newer, better or cheaper products is beneficial to the consumer, and a merger that reduces this rivalry will be examined critically. The CC applies a test that a merger will give rise to a substantial lessening of competition (or SLC) when there is a significant effect on rivalry over time, and therefore a significant effect on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative.[3]

The CC examined how the merger would affect competition within the framework of defined markets. The CC identified the following markets:

1. The sale of overseas package holidays (including dynamic packages) via high street travel agents, in relation to the parties' overlapping activities.
2. The provision of overseas package holidays by tour operators, in relation to the parties' vertically-related businesses (Thomas Cook being active in the upstream provision of package holidays).

The CC noted how the parties' activities were affected within (1) above by constraints outside the market and segmentation within the market. The parties argued, and the Commission considered, the role of internet and telesales as constraints, as well the sales of other holiday products. The CC however concluded that no defensible choice of market definition would have led to a different result.

Similarly, for market (2), the CC left open the final definition of the market as no reasonable market definition would have led to a different result.

The CC also attempted to define the geographic scope of the market – whether local, regional or national – but concluded that the precise delineation was unnecessary as it would not affect the outcome.

The CC examined four theories of harm, the first two horizontal and the next two vertical:

1. Loss of rivalry in various local areas between travel agents for the sale of overseas package holidays;
2. Loss of rivalry nationally or regionally between travel agents for the sale of overseas package holidays;
3. The joint venture's travel agents favouring Thomas Cook's overseas package holidays; and
4. Thomas Cook limiting the access of other travel agents to its holidays.

In relation to the horizontal theories of harm, the CC compared the existing situation with the expected situation post-merger. The starting point was whether local competitive conditions were related to local or regional variation in prices or other aspects of the products or services offered to customers. If there were such a connection, then it was relevant to ask how this would change.

The CC found no evidence of local variation of non-price aspects in response to local competition, and found only a weak link between local competitive conditions and local variation in discounts. The CC therefore found that the joint venture was unlikely to be able to exploit local conditions in relation to discounts. In this, the internet and the possibility of entry into selected local areas were likely to be important constraints on the parties' conduct post-merger. Thus, whilst local price rises could not be ruled out, they were felt likely to be small, sporadic and eroded over time.

In relation to the national effect of the merger, the CC found that the incentives to raise prices or otherwise worsen the retail offer were likely to be weaker at national level than at local level. At regional level, the CC considered whether regional variation in prices or non-price aspects of the retail offer related to variation in competition between regions, or that, as a result of the joint venture, the main parties might change their regional offering. The CC found no evidence of such regional variation and concluded that this was unlikely to change.

In relation to vertical theories of harm, the CC assessed whether the joint venture had an incentive to favour Thomas Cook's package holidays. The CC concluded that the effect on competition would be negligible. First, all the stores within the joint venture were likely to favour the sale of Thomas Cook's holidays, to the same or lesser extent than Thomas Cook's own stores.

The CC found that there were very few upstream tour operators in the UK for whom CGL and Midlands were important resellers. Thus, if the joint venture adopted a strategy of foreclosing upstream providers of package holidays, the number of firms involved would be small.

The CC examined whether Thomas Cook's tour operator business would have an incentive to disadvantage third party resellers. The CC concluded that it was highly unlikely that the joint venture could create such an incentive if it did not exist. The CC noted that 93 per cent of the UK population was within the catchment area of a Thomas Cook store, and 94 per cent would be within the catchment area of one of the main parties' stores. Therefore the scope for effective foreclosure was not essentially enhanced by the joint venture.

Conclusion

The CC gave a clear approval to the joint venture despite not being able to exclude absolutely any price rises or foreclosure. The test of course is one of *substantial* lessening of competition, not 'any and all' lessening of competition. However, within the SLC parameters, the conclusions were clear. This vindicated the parties' strategy of expediting the referral from the OFT to the CC. Whether a future case on similar facts would proceed in the same way is now in doubt. The UK Government earlier this year consulted on reform to the competition regime,[4] proposals for which include the merger of the OFT and CC into a single Competition and Markets Authority and the streamlining of the timescales involved in merger procedures. It is to be hoped that any reform that is enacted in this direction would obviate the need for the complex jurisdictional process of this case.

The case also reinforces the importance within the merger regime of sophisticated analysis of evidence on economic effects. The gulf in analytical detail between the OFT's published Article 9 decision and the CC's final decision is wide. This is partly due to the CC having a longer timescale than the OFT, and the CC's need to reach a final decision on SLC, rather than a decision on whether to make a reference.

Not all within the industry will have approved of the outcome of this case. The CC noted one third party response from a tour operator which complained about the difficulty of entering the market, and that the loss of access to an independent travel agency group such as CGL would hinder new entrants competing against the 'big two' (Thomas Cook and TUI). The CC acknowledged this difficulty, noting also the barriers to entry caused by the need for ATOL bonding as well as distribution difficulties. It came to a conclusion that would appear harsh to smaller operators, that 'we would not be concerned by the exit of existing tour operators if we anticipated that any price rises would lead to entry of other effective competitors' and 'we note that there are a very large number of tour operators active in the UK … many of which are small, which provides an indication that economies of scale are unlikely to form a significant barrier to entry. We consider that expansion by existing tour operators to new destinations would not be difficult in a relatively short time frame.'[5] This supports the principle that competition law is intended to protect the consumer, rather than competition per se. It is not designed to protect any given firm, unless to do so will be beneficial to the consumer. For now, the challenge for smaller operators is to continue to compete and to evolve within a rapidly changing marketplace and difficult economic conditions.

Notes

1 Thomas Cook/Co-operative Group/Midlands Co-operative merger inquiry: A report on the anticipated travel business joint venture between Thomas Cook Group plc, the Co-operative Group Limited and the Midlands Co-operative Society Limited; 16 August 2011, 'CC Report'.
2 OFT 1254/CC2 (Merger Assessment Guidelines), paragraph 4.1.2.
3 *Ibid.*, paragraph 4.1.3
4 BIS: A Competition Regime for Growth: A Consultation on Options For Reform; March 2011. The consultation closed on 13 June 2011; at the time of writing, a Government response is still awaited.
5 CC Report, paragraph 12.28.

Conference report
IBA Annual Conference
30 October–4 November 2011, Dubai

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Thursday 3 November

From Desert to Dessert: Leisure Development in MENA Nations and Beyond

Joint session of the Leisure Industries Section with the Arab Regional Forum, the International Franchising Committee, the Leisure Industries Section and the Real Estate Committee.

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This interactive session began with an introduction to a novel hypothetical fact pattern in which global hotel operators were asked to respond to an RFP (Request for Proposal) to provide hotel services in two new-dedicated areas of Dubai, Dubai Fashion City and Dubai Green City. The three hotels chosen as finalists in the RFP included: Star of India Hotels, 'G' Brand of Globotel Hotels, and Luxe/Vert/Magnifique 'LVMHotels'. The fact pattern provided the foundation for the daylong session. Speakers and delegates commented directly on the scenario and also used it as a basis for discussion of wider issues. The scenario can also be found on the IBA website and will be referred to in later issues of the Newsletter.

Fact pattern

1. The concept

The Government of Dubai has announced two new major initiatives which it wishes to promote by the development of dedicated 'cities', along the lines of Dubai Internet City and Dubai Media City: Dubai Fashion City and Dubai Green City. As part of each, it is contemplated that there will be construction of appropriate office/laboratory/studio/showroom space and the construction of a showplace hotel. An RFP for the hotel portions of each project has been published. Although the RFP leaves those responding with considerable flexibility in many respects, the following elements are required:

(a) Fashion city hotel requirements

1. Must be developed in conjunction with a world class luxury designer of fashion-related items. The RFP does not specify whether the designer must have an equity interest, but requires that the designer have demonstrable creative input into the design and appearance of the hotel and agree to cross-promote the hotel and the designer.
2. Must incorporate a visible, physically distinctive feature evocative of fashion, for example an exterior catwalk.
3. Must have an affiliation of some sort with a globally or MENA regionally known existing hotel chain.
4. Must include retail space for world-class luxury goods equal to at least four footprint floors, which can be owned separately from the hotel or by the hotel owner.
5. Must arrange for inclusion of world-class restaurants under at least nominal supervision of globally famous chefs.

(b) Green city hotel requirements

1. Must meet LEED Platinum standards.
2. Must incorporate successful environmental best practices with regard to recycling, minimisation of water usage and carbon usage offset as employed already at other locations in MENA or comparable environmental areas (for example extreme heat).
3. Must incorporate a visible, physically distinctive feature demonstrating its eco-friendliness.
4. Must have ready access to the Dubai Metro Green Line under construction.
5. Must feature eco-friendly characteristics prominently in advertising and social media.

(c) Other considerations (both hotels)

In addition, for both hotels, bidders are invited to comment on the following considerations:

1. Will ownership of hotel rooms be permitted and, if so, on what basis? How will ownership of the retail component of Fashion City Hotel be structured?
2. Will financing be sharia-compliant and, if so, from what geographic areas will it be drawn? Will hotel operations be sharia-compliant? In each case, if the response is affirmative, how would this be accomplished?
3. What will be the nature of the affiliation between the property and the globally or regionally known chain? With respect to promotion of the property and maintenance of standards, will deviations from chain-wide standards be permitted/required?
4. What steps will be taken to promote the property particularly and its fashion or eco-friendly aspects using the internet and social media? What measures will be in place to assure accurate, appropriate references to the properties under relevant law and custom, and what law and custom will be considered?
5. What are the projected target markets (geographic, sector, other), their size and likely receptivity?

2. The contenders

Responses to the RFP have been winnowed down to three finalists, with disparate characteristics.

(a) The Star of India chain of luxury hotels

This Indian chain of luxury hotels with locations in many major cities in India and a few major cities elsewhere has among its plus points: a well-known

Indian fashion designer is associated with the bid; Star of India can provide all the capital needed for construction, so no borrowing would be required; its F&B department is familiar with halal dining requirements; historic linkages between India and Dubai and growth of upper and middle class tourism in India provide a market for which the hotel will have built-in appeal. On the downside, Star of India has no experience with the operation of owned unit facilities; its brand is neither truly global nor established in the MENA region; and none of its existing hotels are particularly noteworthy from an environmental perspective. For its physically distinctive components, Star of India proposes to build a state-of-the-art showroom/media production facility/runway complex to be cantilevered over Sheik Zayed Road for Fashion City Hotel and to have the exterior of The Green City Hotel resemble a huge tree.

(b) 'G' brand of Globotel chain

This edgy, high-end nameplate of a US-based global hotel chain has as its major plus points an existing relationship with a high-profile, somewhat risqué Italian fashion designer, who has provided design and decoration assistance at other 'G' hotels for guest rooms, public spaces, restaurants and spas. Moreover, 'G' hotels in New York, Paris, Milan and Tokyo have tie-ins to those cities' respective fashion weeks, and 'G' suggests that linkage will translate naturally to the Dubai locale and make it the go-to hotel for the fashion trade and fashionista wannabes. Existing Globotel hotels include owned units. Globotel franchises all of its 'G' hotels under terms strictly controlling design, operation of spa and athletic facilities and use of branded names, some of which have risqué double entendre meanings. Because the facility will be franchised, Globotel itself does not need financing and expects the franchisee to raise funds in the UAE and elsewhere and to address sharia compliance. Some existing 'G' hotels include high-end retail outlets on a rental basis. All 'G' hotels have water use minimisation plans in place and its newest hotel, in Miami's South Beach, recycles water for plant care, uses energy-efficient appliances and employs solar energy panels to generate about 10 per cent of its electrical needs. For its physically distinctive characteristics, Globotel proposes to have the Fashion City Hotel's roofline resemble an elegant chapeau and for the Green City Hotel to use green-tinted glass which makes some, but not optimal, reduction in heat absorption.

(c) Luxe/Vert/Magnifique Hotels

Luxe/Vert/Magnifique Hotels, or 'LVMHotels' for short, is a France-headquartered chain of roughly three dozen hotels which, as the name suggests, feature luxury and eco-friendliness. It operates hotels in Lebanon, Morocco, Saudi Arabia and Qatar, among other locations. Some are owned; others are franchised. Some are sharia-compliant; some are not. None of its existing hotels has significant retail space, but a 10 per cent shareholder of the firm is the chairman of the largest high-end mall developer in Europe. It has no existing tie-ins with fashion designers, but has no objection to initiating one. It has won many awards from various environmental groups for its green policies and for the achievements of its hotels in maximising recycling of resources and minimising energy and water use. It believes its hotels have a natural following among those concerned about the environment and it offers affinity discounts to members of certain green advocacy groups with several hundred thousand members collectively. It is flexible about enforcement of its branding requirements, but insists upon the right to terminate a franchisee who fails strictly to comply with its Green Leading Operating Principles (GLOP). Among other things, GLOP requires windows which can be opened and prohibits continuous operation of air conditioning units. In the chain's typical franchise agreement, failure to cure within 30 days following notice of a GLOP violation is cause for terminating the franchise, with the franchisee to receive a buy-out price to be determined by binding arbitration before the International Chamber of Commerce in Paris. For its physically distinctive characteristics, LVMHotels proposes to have a rooftop spa at Fashion City Hotel, a signature feature of which will be a five-story high-heeled shoe which, if a certain designer can be brought on board, will have a vibrant red underside. For Green City Hotel, the chain proposes to make the Metro entrance the main entrance, put many of the hotel facilities underground to minimise heat absorption and cooling costs and use a 'low-rise' (15 storey) approach, with limited exterior windows and built-in adjustable thermal shielding, to cut heat absorption and save energy which otherwise would be needed to power more and taller elevators and to circulate water to greater heights within the structure.

The session

The dynamic session not only provided for an interactive discussion, but the Session Chair and moderators also distributed 'Timbits' from Canadian franchise giant Tim Hortons and awarded one lucky session attendant with a weekend getaway at Starwood Hotels & Resort's, Grosvenor Hotel (voted top hotel in Dubai by travellers).

Morning Session Speakers

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The morning session covered the real estate and financing issues presented by expansion into Middle Eastern and North African (MENA) countries. The presentations covered a broad range of topics including Sharia compliance in financing and operation; real estate issues in ownership; segmented development and retail and condo operation; cross-border franchising, disclosure and financing issues; franchise operation; and termination and dispute resolution issues.

The morning session was divided into two parts. Each part included three presentations followed by a roundtable discussion after each of the three presentations.

Morning Session Part One

Speaker: Elias Hayek
Elias Hayek spoke about commercial leisure development issues from a MENA context.

Background

Most recently Dubai has been the beneficiary of an increase in arrivals from Africa and the Middle East. However, the MENA countries also have an increasing young population with associated low employment rates, which contributes to various forms of disturbance. Most notably, due to the recent Arab Spring, Gulf countries have become islands of relative stability in the region. As tourism has increased in these regions, there has been increase in development by hotels. In the UAE there are currently 55 new hotels in the process of development.

This recent surge in the Gulf countries can also be contrasted with the recent economic downturn in the Middle East. Although hotels did suffer financially, economically they stabilised in 2010/2011.

Commercial Consideration Issues

There are significant challenges in various countries, and in particular the UAE is rated 40th with respect to business contracts and business failures.

When participating in any commercial development project the following are the issues and considerations that need to be explored:

1. *The ease of doing business*: How easy is it to get commercial registration and business licences? In addition, if enforceability is an issue is it possible to have specific performance readily available as a remedy? It appears that money damages are the only remedies available in Dubai.
2. *Parties*: It is important to define who are the counter parties and how involved the government will be and whether they can be part of any legal action.
3. *Form of agreement*: The type of agreement that will be utilised including, management contracts or franchise agreements need to be determined. In Dubai, franchise agreements are not favoured. In addition, most hotel owners lack the resources to manage hotels successfully. This may lead the way to more hybrid-like franchise relationships.
4. *Permanent establishment*: If there is permanent establishment companies will be exposed to other tax considerations.
5. *Agency laws*: It is also important to explore specific laws relating to commercial agencies and local UAE residents.
6. *Foreign currency controls*: Due to regional instability there may be currency conversion issues.
7. *Trademark registrations*: It may be difficult or impractical to register marks that are essentially translated meanings of western logos.
8. *Employment laws*: There are complicated employee termination procedures and national workforce requirement laws that have to be followed.
9. *Mixed-use regulations*: Dubai has strata laws that must be further explored.
10. *Residential sales procedures*: These are different than in North America. US security laws will probably not be applicable.
11. *Purchasing arrangements*: It is important to review local sanction regimes.
12. *Financing*: This may be an issue and needs to be fully comprehended before starting any business venture in the MENA countries.
13. *Liability and insurance*: This is not provided for e.g. Jordan does not allow recovery for loss of profits unless there is a showing of gross misconduct.
14. *Damages*: It may be difficult to quantify damages i.e. actual damages v lost profit

Speaker: Brent Baldwin
Hadef & Partners
Brent Baldwin spoke about real estate issues in ownership, segmented development and retail and condo operation in Dubai.

Real estate issues in development
There are three main types of development in Dubai. It depends on whether the development will consist of master communities, residential developments or mixed-use developments.

An example of a master community in Dubai is Dubai Internet City. The issues that must be addressed at the planning stage in a master community are:

- Compliance with the bespoke master community declaration
- Completion of infrastructure within the community
- Design and development guidelines

The issues that must be addressed when constructing residential developments ie, condominium communities and villa communities include:

- Master community issues
- Whether the property will have freehold ownership or whether it will be jointly owned property
- Adherence to a particular owners' association

If there is a plan for mixed-use developments i.e. hotel/residential communities there are various issues, such as:

- Master community issues
- Whether the property will have freehold development
- The need to take into consideration residential development issues
- The need for approval of the structure and the management
- Ensuring that it does not interfere with brand
- Exploring financing options

For each of the three projects, it is important to also note any community structuring considerations. The place to begin should be the Dubai Real Estate Regulatory Authority.

Overall, the most important piece of advice is that flexibility is key.

Speaker: Gabrielle Patrick
Mutope-Johnson & Associates PLLC
Gabrielle Patrick discussed real estate issues in the North American Region.

The key issues for all project owners are:

- How do I make 'my' project a reality?
- How will the project be funded?
- How do I realise a return on investment (ROI)?

In addition, the hotel management agreement is also incredibly important. This is the single most important agreement between a hotel owner and operator. When entering into any agreement the following are sections of the contract that need to be defined:

- Classification of the stakeholders
- To ensure the state is fully aware of the project (the state's participation is paramount to the success of the project)
- To explore the purchaser's ownership – whether it will be freehold or leasehold/leasehold
- Although the laws may be silent on various issues due diligence is key.

Round Table Discussions

Table One. Chair: Elias Hayek

- In this particular scenario, G hotel would win.
- This is because Star of India Hotels is a novel player with not enough experience. Although they have capital they also have to be able to use it adequately with enough speed in a foreign market.
- In addition, LVMH is also not a contender hotel. At present, the market in Dubai would not currently lean towards an upscale entrant into the market. It is more focused at the upscale level. As a result, it would be a heavy cost per key investment.

Table Two. Chair: Brent Baldwin

- The group discussed developer and franchising issues.
- They discussed what freehold owners are getting for their money, including the types of common areas that exist within a facility.
- The discussion centred on government authority and education, including the process and submissions that need to be made to Dubai REA to sign off the development.
- The group concluded that there is still a lot of uncertainty with respect to local laws and the process for getting regulatory approval is key – everyone should be educated before finalising their purchase.

Table Three. Chair: Gabrielle Patrick

- The group concluded that there is a need for consumer protection.
- The group also discussed the various issues in the Caribbean and North America and in particular that if purchasers do not have sound protection they can be dragged into litigation.

Morning Session Part Two

Speaker: Moinuddin Malim

Moinuddin Malim discussed Sharia compliance, and financing the RFP.

Although there is a segment of the industry that would like Sharia compliance there are only three hotels that are currently Sharia compliant in the UAE.

Sharia is a body of laws and guidance that have been taken from the Quran and interpreted into how a practising Muslim should live his or her life. There are various levels of Sharia compliance, and individuals adhere to varying levels of Sharia law.

The main issue is how Sharia compliant does the hotel have to be?

The broad guidelines are as follows:

- Financing has to be done through Islamic banks
- There have to be separate floors for males and females and families
- Female floors can only allow female serving staff
- A dress code is enforced for staff and guests
- No alcohol can be served
- The hotel can only serve Halal food and no pork
- There are special considerations during the month of Ramadan for example No food during the day
- There have to be separate floors for men and women to sit and eat
- There can be no pools and spas for co-mingling
- There should be no nightclubs, pubs or bars
- Every room needs to have a prayer mat and a sign with the direction for daily prayer
- Segregated rooms for prayer areas must exist

The bottom line is that Islamic financing is not the issue. The real discussion centres on how Sharia compliant the hotel needs to be and whether it is an economically viable model.

Speaker: Harjeet Kaur

Harjeet Kaur discussed licensing/leasing requirements for hotels, restaurants and retail in the UAE.

There are different types of licence depending on whether the real estate is a hotel, restaurant or retail space.

Different documentation is required for each type of licence issued. Hotels have minimum requirements for approval, especially when there are restaurants and retail spaces included in the development. The only difference between restaurants and retail spaces is that in case of a restaurant, the municipality regulates planning and food control.

The most relevant leasing law to explore before engaging in any development project is Federal Law No 5 of 1985. It is applicable across all seven Emirates and deals with the basic principles of a lease. If the terms or conditions of a lease are not present, then a challenge can be brought against the lessor pursuant to this law.

In addition, each Emirate has introduced individual laws to regulate the tenant and landlord relationship. This is mainly to control rents and put a cap on the increases. These laws came about as a result of uncontrolled rent increases – for example landlords increasing rents by10–20 per cent every year.

Speaker: Marwan Mohd M Kiswani

Marwan Mohd M Kiswani discussed the challenges facing in-house teams in Dubai.

The role of in-house counsel is not limited to legal services but also requires measuring and assessing the value of the transaction. The in-house counsel is not just acting as an advisor but also a decision maker within the corporation.

There are two groups of in-house counsel in these types of situation. The first group represents the Dubai Government and the other group of in-house counsel are employed by the bidder's side.

Dubai Government in-house counsel

There are three major considerations for the Dubai Government in-house team. They are as follows:

- They have to define the applicable law
- They need to review the contract terms
- They need to advise the government if there are any restrictions in the law

They have to take into account the tax exemptions that may be available, the limitations on foreign investment, the requirements for establishing a business in one of the 'free zones' such as TECOM (the Dubai Technology and Media Free Zone) and of course the terms of the RFP

Bidders in-house counsel team

In-house counsel need to consider the various options such as leasing or buying the land on which to develop (the Dubai Government will sell a piece of land). They also need to explore franchise opportunities, related party transactions and the structures of the business. Advice from external lawyers should always be sought.

Round Table Discussions

Table One. Chair: Moinuddin Malim

- The group discussed the pros and cons of having a Sharia compliant hotel.
- There are two phases to this process: Sharia compliance at the pre-construction and post-construction stages.
- The group concluded that operators may find it difficult for a hotel to be fully Sharia compliant, especially when the bank and financiers become involved.
- Although technically it can be done there are very few examples of Sharia compliant hotels.

Table Two. Chair: Harjeet Kaur

- The group mainly discussed the minimum lease term, in particular whether any minimum lease terms exist.
- The group also discussed whether there is protection of tenant rights and concluded that there is generally protection for tenants.
- The group also discussed whether the lease agreement contains any Sharia compliant language, including the lease contract between the landlord and tenant. The group concluded that Sharia compliance is subject to the concerned party applying for approval.

Table Three. Chair: Marwan Mohd M. Kiswani

- All of the bidder's are not from UAE so to what extent does there need to be an involvement of a local lawyer?
- What type of experience and capability is needed for an in-house counsel to manage and supervise the transaction?
- It is important to consider that restrictions on work exist for in-house counsel in certain jurisdictions.
- It is important to consider the necessity of speaking Arabic to provide support to the local lawyers.

The afternoon session will be reported in the next issue of the Newsletter.