

Negotiating Triparty Hotel Agreements To Withstand Risk

By **Diana Ovsepian, Natasha Gunasekara Garber and Lucas Crosby** (May 1, 2025)

A perfect storm of rising interest rates, higher operating costs and unstable cash flows in the hospitality sector has dramatically increased the breadth of ownership defaults and foreclosure risks nationwide.

In this environment, more than ever, the importance of a tightly negotiated subordination, nondisturbance and attornment agreement, or SNDA, is vital for hotel operators and lenders, as more commercial real estate loans reach maturity with no viable path to satisfy loan extension tests or qualify for refinancing at economically feasible pricing.

This article will provide a brief overview of the structure and purpose of an SNDA, along with tips and considerations for negotiating an SNDA in connection with a hotel management agreement, or HMA.

Overview of SNDA Structure and Purpose

In the context of hotels, an SNDA is typically a triparty agreement between the hotel manager, hotel owner and hotel lender.

There are three main elements to the SNDA. The first element is subordination. There, the hotel manager agrees to subordinate many of its rights under the HMA to the hotel lender's rights under the loan documents.

The second is nondisturbance. Absent a default by the hotel manager under the HMA, the hotel manager may continue managing the hotel undisturbed by the lender during the term of the HMA and receive fees payable under the HMA, even though the lender has acquired ownership or control of the hotel by foreclosure or otherwise.

In the third and final element, attornment, the hotel manager will acknowledge that the lender may step into the shoes of the owner under the HMA, and the hotel manager will continue performing under the HMA, recognizing the lender as its new counterparty.

In each situation, the particular letters of the acronym SNDA that are of critical importance depend on the stakeholder party's position.

It is also important to note that all SNDA negotiations are affected by current market conditions. Either the hotel manager, property owner or lender may have the stronger bargaining position at any given time.[1]

Key Hotel Manager Considerations

In today's environment of economic uncertainty and changing market dynamics, the nondisturbance component of the SNDA has become an especially useful tool for the hotel



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manager to insulate cash flow from market instability.

One of the hotel manager's main goals in negotiating an SNDA is to protect its economic interest in and under the HMA, and, as a result, its negotiation strategy will focus on a few key considerations.

The first and most important is the uninterrupted ability to continue operating the hotel for the full term of the HMA, including any extension terms.[2] This is the nondisturbance component of the SNDA.

The reasoning is as follows: Why should a hotel manager lose a valuable asset, and its sole income stream, to a competitor, simply because of the property owner's loan default? After all, HMAs are long-term management contracts that function somewhat like annuities, creating streams of inflation-adjusted income over many years.

With many loans in the commercial real estate industry approaching maturity, hotel managers will want to secure these streams of income in the event that the owner of the hotel property defaults. After all, these contracts are the business model on which management companies now operate.

The present value of these income streams is a significant asset that can itself be leveraged as a driver of growth. Anything that might result in an early termination of this pivotal, and often singular, income stream, be it market trends, economic instability, a pandemic or otherwise, is a problem for the hotel manager.

Another consideration is to ensure that the property owner under the HMA — i.e., the party responsible for paying fees and various other amounts under the HMA — remains solvent after a foreclosure of the hotel or other exercise of remedies by the lender, and that the new property owner is an entity or individual that is otherwise acceptable to the hotel manager.

The hotel manager will also want to confirm that this new owner, and its substantial constituent investors, have not been indicted or convicted of criminal offenses, and are not on any government or sanctions lists that could jeopardize their ability to obtain the licenses necessary to operate the hotel.

These legal problems can also result in liquor licenses and gaming licenses being revoked.

The priority of the hotel manager in this scenario is to ensure that if a problematic subsequent owner acquires ownership or control of the hotel, such subsequent owner should not qualify as a permitted transferee under the HMA.

As a result, the hotel manager would have no obligation to attorn to such owner and may terminate the HMA.

In light of these considerations, the relevant language hotel managers and their counsel should push for in negotiating the SNDA might include some of the following concepts.

The first such concept is that the loan default, foreclosure or any other exercise of lender remedies will not disturb the hotel manager's rights under the HMA.

Additionally, as a bankruptcy consideration, the lender can take no action to terminate or support the termination of the HMA in bankruptcy.

The second such concept is that the purchaser of the hotel must be acceptable to the hotel manager — i.e., creditworthy, not a competitor of the hotel manager, and without any indictments or convictions for certain offenses — as a condition of the sale, and that the purchase by an unqualified party constitutes a breach of the HMA.

The third concept is that the party acquiring the hotel in a sale or foreclosure will automatically recognize and perform under the HMA for the remainder of its term. Note that for bankruptcy, the HMA should be preserved regardless of any purported termination or rejection in bankruptcy; if the HMA is rejected, then the new owner shall enter into a new HMA on the same terms.

The key takeaway for nondisturbance is the continuation of the HMA and the fees payable to the hotel manager thereunder.

The fourth concept hotel managers should negotiate toward is that the new owner will be liable for certain types of defaults by the prior owner, such as the failure to fund costs for a property improvement plan. If refused, hotel managers should reserve the right to exercise remedies under the HMA, including terminating the HMA and collecting the termination penalty.

With the growing popularity of short-term vacation rentals, it has become increasingly important to highlight the features that set hotels apart from most alternative accommodations. In order for hotel managers to use their expertise to shape a hotel guest's experience, they must negotiate these SNDAs in a way that preserves their control over certain aspects of the hotel.

For example, other helpful concepts include that the hotel manager may retain control over accounts with cash used for the operation of the hotel — including furniture, fixtures and equipment accounts, and that nonmaterial HMA amendments do not require lender consent.

With recently negotiated HMAs including specific environmental, social and governance goals, hotel managers must consider their ability to spend funds in order to meet any environmental or sustainability targets that may be built into HMAs.[3]

These sustainability projects are often continuous, and involve an investment of time and resources — hotel managers want to be able to see them through without being interrupted by a foreclosure.

Additionally, hotel managers may negotiate for a spring-back provision, which can give a hotel manager whose HMA was wrongfully terminated by the property owner the right to manage the hotel again when a subsequent owner acquires the hotel following a foreclosure.[4]

Key Lender Considerations

When things don't go according to plan, or sudden shifts in the market occur, lenders will want to make sure that each party's role in the event of a foreclosure is clearly defined.

A lender, in negotiating the SNDA, will therefore use the SNDA as an opportunity to protect its economic interest secured by the hotel property. Its negotiation strategy should focus more on retaining flexibility in exercising remedies and maximizing the value and cash flow of the hotel by ensuring the hotel is managed by a capable hotel manager.[5]

The lender and the lender's counsel should seek to include language in an SNDA that provides that the hotel manager's rights under the HMA are subordinate to the lender's lien on the property.[6] The lender should also retain control over all deposit accounts.[7]

Additionally, the hotel manager's consent should not be required for transfers of the hotel to a third party that satisfies certain financial and experience thresholds. The HMA should also provide that the lender itself, or certain affiliates of the lender, are preapproved by the hotel manager up front as acceptable owners.

In contrast to the hotel manager's position, a lender will want the new owner, upon foreclosure or other sale of the property, to have no liability for any prior owner's acts or omissions. When the lender steps into the HMA, it wants to ensure it is not assuming responsibility for the prior owner's failures.

The lender's logic is simple: The prior owner — not us — made the mistakes, or at least were on watch duty when the market shifted, and the hotel manager still has the right to recover against the prior owner under a breach of contract claim.

But, of course, the lender may have already foreclosed on the owner's interest in the hotel, the owner's accounts and related property, leaving the — likely — single-asset special purpose vehicle without two nickels to rub together.

Additionally, even if the lender has not foreclosed on the asset yet, since the lender is taking action under the SNDA, it is likely that the loan is distressed and the owner is in default under the loan documents.

This means that the lender likely has claims against the owner: claims that, after giving effect to the SNDA, have superior priority over many of the manager's claims arising from the HMA. Further, a hotel manager's remedies against the prior owner are neither certain nor necessarily immediately available.

Therefore, the lender should resist broad releases of continuing liability against the new owner.

Lenders should maximize the rights to replace the hotel manager or impose new terms and conditions on an existing hotel manager upon the exercise of loan remedies.

Finally, SNDAs typically contain provisions either limiting amendment or termination of the HMA without the lender's consent, or providing that any such amendment or termination effectuated without lender consent is not enforceable against the lender — i.e., the lender, as new owner, is free to treat the preamendment HMA as its operative document.

Key Hotel Owner Considerations

The third party to the SNDA, the hotel owner, aims to guard its economic interests in and under the loan secured by the hotel property. The focus of the owner should remain on maximizing their ability to obtain financing that is attractive for a purchasing, constructing, improving or other transaction involving the hotel.[8]

This ability to obtain financing is crucial as hotel owners seek to adapt to current trends in the hospitality industry, including by developing or adapting properties to enhance their environmental sustainability or technological capabilities.

In a new hotel development, HMAs, including form SNDAs, are typically prenegotiated and executed long before lenders enter the deal.

Therefore, hotel owners and their counsel must pay special attention to negotiating the mortgagee and subordination provisions in line with market standards, affording lenders the typical protections that are customary in sophisticated hotel lending deals.

Owners would do even better not to negotiate the SNDA at this early stage and instead agree to enter into a commercially reasonable SNDA acceptable to both the lender and the hotel manager, which neither increases the obligations and burdens of the parties nor decreases the benefit of their bargain under the HMA.[9]

There are additional considerations needed when a hotel owner files for bankruptcy. The SNDA is, in part, an agreement between a lender and a hotel manager. The hotel manager can still enforce provisions against the lender despite an owner's bankruptcy.

The hotel owner, however, will have additional powers in bankruptcy, including the ability to reject executory contracts, which can frustrate the hotel manager's ability to retain management rights to the property. In the event of a rejection, the hotel manager would have an unsecured claim for damages.

The hotel manager can also try to increase leverage in a bankruptcy proceeding by seeking certain concessions from the lender up front. For example, the lender agrees that if it controls — or its consent is required for — the bankruptcy sale process, the lender must cause the hotel manager to stay in possession.

Conclusion

In today's unpredictable economic environment, more than ever, parties to HMAs and SNDAs are appreciating the value in having clearly defined roles in case a foreclosure occurs. Influenced by high interest rates, shifting markets and other trends, the SNDA parties are seeking to ensure control over their ability to adapt to these changing dynamics.

While each situation can differ based on the parties, terms, and circumstances surrounding the SNDA and HMA, it is important to remember the underlying goals of each stakeholder when negotiating these agreements. The priorities of a lender will vary greatly from those of a hotel manager versus those of a hotel owner.

For lenders, subordination and attornment are of critical importance in the acronym SNDA; for hotel managers, nondisturbance is king; and for owners, financial flexibility is the goal.

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[1] Nelson F. Migdal, Hotel Law: Transactions, Management and Franchising 83 (2015).

[2] Jim Butler & Bob Braun, *The HMA & Franchise Agreement Handbook* 59 (3d ed. 2014), <https://www.hotellawyer.com/files/books/pdf/hma-handbook-3rd-ed-final.pdf>.

[3] JLL, *Green HMAs in Asia Pacific: The need to align interests on sustainability*, JLL Hotels and Hospitality (July 2023).

[4] Migdal, *supra* at 131.

[5] *Id.* at 58–60.

[6] *Id.* at 57.

[7] Josh Bowman, *What is an HMA SNDA to every hotel owner, operator and lender anyway?*, *NEW ENG. REAL ESTATE J.*, Sep. 18, 2015, at 1, <https://www.sherin.com/wp-content/uploads/2015/05/JMB-NEREJ-9-18-15-Reprint.pdf>.

[8] Butler & Braun, *supra*, at 61.

[9] Migdal, *supra*.