"Maryland, Make Room for More Hotel Managers: Will *IHG v Tishman* Mobilize a Mass Migration of Hotel Managers to Maryland or is the Maryland Statute Applied Therein Unconstitutional?"

Gisela M. Munoz[1], *Stearns Weaver Miller Weissler Alhadeff & Sitterson*, P.A., Miami, Florida[2]

For many years, Maryland law has been favorable to hotel managers, and some of the largest, most well-known, hotel management companies have chosen to have their management agreements governed by the laws of Maryland. Today, the question is whether more management companies will want a nexus to that state in order to provide that Maryland law governs their management agreements, in the wake of the decision in *IHG Management (Maryland) LLC v West 44th Street Hotel LLC and Tishman Asset Corporation*, 163 A.D.3d 413 (New York App. Div. 1st Dep't 2018) (available at https://scholar.google.com/scholar_case?case=11215461093729306693&q=163+AD3d+413&hl=en&as_sdt=40006) ("***Tishman***"), where a Maryland statute played the key role. So will this result in a mass migration of hotel management companies to Maryland? It would not be surprising, given the strong protection against termination of management agreements provided by that decision and the attention that case has received in the industry, particularly due to its prominent parties and the hotel's prominent location in Times Square.

Perhaps *Tishman*'s impact will not be so dramatic in that practical sense. In the legal sense, however, the brief *Tishman* decision has highlighted a striking issue in that Maryland statute, which may make that long-standing statute unconstitutional, in violation of the Thirteenth Amendment's prohibition on involuntary servitude. By way of background, the relevant part of the statute provides for "specific performance for . . . termination of an operating agreement notwithstanding the existence of an agency relationship between the parties to the operating agreement." MD. CODE ANN., Commercial Law § 23-102(b) (2019) (available at http://mgaleg.maryland.gov/webmga/frmStatutesText.aspx?article=gcl&section=23-102&ext=html&session=2019RS&tab=subject5).

The owner in the *Tishman* case, West 44th Street Hotel LLC ("**Owner**"), used well-established precedent, including *FHR TB, LLC v TB Isle Resort, LP*, 865 F. Supp. 2d 1172 (S.D. Fla. 2011) (available at https://scholar.google.com/scholar_case?case=2979377835100483656&q=865+F.Supp.2d+1172&hl=en&as_sdt=40006) ("***Turnberry***"), to argue that hotel management agreements are personal services contracts, which may not be enforced by specific performance, in large part because such enforcement would violate the Thirteenth Amendment. Accordingly, Owner argued that

[1] This article is dedicated to my father, Tony Munoz, who passed away in 2019, just after completion of the initial submittal draft of this article. I would like to thank Silvia Anderson, my assistant, Jeanne Korman, my firm's librarian, and Giselle Sardiñas, 2020 University of Miami School of Law candidate who was a law clerk at my firm, for their assistance with the research for this article. I would also like to thank Daniel G.M. Marre, Esq., who, at the time of this publication, is the Chair of the ACREL Hotels, Resorts, and Hospitality Industry Committee and a Partner at Perkins Coie, for taking the time to review the initial submittal draft of this article and provide his insight.
[2] The views expressed in this article are solely the views of the author, not of the author's firm or any organization with which the author is affiliated. This article is for educational purposes only and does not contain legal advice.

the Maryland statute being used to grant a preliminary injunction to the manager, IHG Management (Maryland) LLC ("**IHG**"), during the pendency of the proceedings on the merits, was unconstitutional, that the preliminary injunction should not have been granted, and that, instead, Owner should have been allowed to terminate IHG immediately.

The *Tishman* court, however, ruled in favor of IHG. Despite the brief court order, the author has a few potential theories regarding the reason for the court's decision in favor of IHG in the face of the conflicting precedent regarding personal services contracts. One theory is that the court determined that the *Tishman* management agreement was not a personal services contract at all --- and, although not in line with the latest precedent that all hotel management agreements are personal services contracts, that position may be justifiable, as hereinafter discussed.

Even so, the *Tishman* court could still have found the Maryland statute unconstitutional on another basis. Pursuant to the *Turnberry* decision, every personal services contract is an agency agreement. Thus, by applying specific performance "notwithstanding the existence of an agency relationship," the Maryland statute applies specific performance notwithstanding personal services contracts, by definition. Since applying specific performance to personal services contracts violates the Thirteenth Amendment, the Maryland statute is, therefore, unconstitutional **on its face**. Accordingly, although *Turnberry* provided the precedent that all hotel management agreements are personal services contracts as a matter of law, if the *Tishman* court disagreed with that federal precedent and found that to be a question of fact, rather than law, the *Tishman* court still had another basis on which to find the Maryland statute unconstitutional, because *Turnberry* clarified another matter of law – that a personal services contract is a type of agency agreement. However, perhaps the reason the *Tishman* court did not address this second point from the *Turnberry* decision is because Owner does not seem to have expressly made this point, despite the fact that Owner relied on *Turnberry* in its memoranda of law and despite the fact that it seems particularly pertinent.[3]

Even if that second *Turnberry* position is now used in another case to find the Maryland statute unconstitutional on its face, the statute could easily be revised to add an exception that would make the statute constitutional, as we will see below. But that would entirely miss the point of the analysis in this article. Regardless of which legal construct currently applies to our particular management agreements (i.e., the Maryland statute/a similar statute vs. common law), the significant questions for consideration are: how did we get here; where are we going; and should we be going there? This article will take us on that journey, making our first sojourn with the well-known *Woolley v Embassy Suites, Inc.*, 227 Cal. App. 3d 1520 (1991) (available at https://scholar.google.com/scholar_case?case=14424225595182521090&q=227+Cal+App+3d+1520&hl=en&as_sdt=40006) ("***Woolley***") case and proceeding from there until we reach the *Tishman* decision.

[3] *Turnberry* did not address the constitutionality of the Maryland statute, however, because it did not involve that statute.

I. A Brief History of the Three Principal Common Law Structures Applying to Hotel Management Terminations

A. *Woolley*

1. Background

In *Woolley*, the owner delivered notices of default under nine hotel management agreements it had entered into with the manager, Embassy Suites, Inc. ("**Embassy**"). The owner then sued for declaratory relief that the agreements could be terminated. Embassy responded, seeking, and ultimately obtaining from the lower court, injunctive relief to stay the termination (i.e., remain as manager), until the default claims had been arbitrated pursuant to a provision in the management contracts. *See Woolley*, at 1525-1526.

2. Simple Agency

The appellate court, however, reversed the lower court, holding that the management relationship was an agency and that it is axiomatic to agency law that the owner, as principal, may always revoke the agency. Further, the *Woolley* court clarified that, by terminating Embassy prior to resolution of the arbitration, the owner was risking substantial damages for wrongful termination, if Embassy prevailed on the merits. *See Woolley*, at 1529-1530. Thus, *Woolley* stands for the concept that a principal has the power to terminate a simple agency, but if terminating wrongfully, then the principal will be liable for damages.

3. Agency Coupled with an Interest

The appellate court in *Woolley* also addressed the possibility that this was not a simple agency, but rather an "agency coupled with an interest," which would be irrevocable (i.e., not terminable at will) by the principal. The court determined that the agency in *Woolley* was not "coupled with an interest." The well-known hotel precedent has rarely, if ever, found that the manager has met the standard for agency coupled with an interest, which consists of having "a 'specific, present, and coexisting' beneficial interest in the subject matter of the agency." *Woolley*, at 1532 (internal citation omitted). The *Woolley* court held that monetary interests, such as management fees, were insufficient. It also found that Embassy's argument that it had an interest in the franchised "Embassy" name was irrelevant, given that the franchise agreements were severable from the management agreements and involved affiliates of Embassy.

4. Personal Services Contracts

Finally, the *Woolley* court was compelled to overturn the injunction because the management agreements constituted personal services contracts, for which specific performance is not available. The *Woolley* decision discussed several reasons why specific enforcement of personal services contracts is prohibited, including imposing on courts the difficult/inappropriate tasks of judging qualitative performances and of potentially reuniting parties in failed relationships, where trust and discretionary authority are necessary. **Moreover, the court expressed that applying specific performance to personal services "would also run contrary**

to the Thirteenth Amendment's prohibition against involuntary servitude." *Woolley*, at 1533 (internal citation omitted; emphasis added).

B. *Pacific Landmark*: More on Agency Coupled with an Interest

In *Pacific Landmark Hotel, Ltd. v Marriott Hotels, Inc.*, 19 Cal. App. 4th 615 (1993) (available at https://scholar.google.com/scholar_case?case=14775771175451360492&q=19+cal+app+4th+615&hl=en&as_sdt=40006) ("***Pacific Landmark***"), the owner delivered to the manager, Marriott Hotels, Inc. ("**Marriott**"), default and intent-to-terminate notices, followed by a termination letter. Marriott contested the termination and was able to persuade the lower court that it had an irrevocable agency coupled with an interest because the parties had entered into many agreements contemporaneously, even though the non-management agreements had been executed by affiliates, not by Marriott, itself. Accordingly, the trial court deemed the sixty-year management agreements irrevocable by the owner and, therefore, prohibited the owner's termination thereof. *See Pacific Landmark*, at 618-621.

In reversing the trial court, the appellate court first explained that intent to create an agency coupled with an interest was not enough. If such an interest does not actually exist in the same subject matter and is not properly coupled (i.e., contemporaneously with the management agreement transaction and in the same party as the management agent), then the agency is a mere revocable agency. *See Pacific Landmark*, at 624-626.[4]

Thus, the appellate court found that the lower court had impermissibly considered the Marriott affiliates' interests. Of note for contract drafting, the court also highlighted that the various agreements in the transaction each contained "entire agreement" clauses, rather than containing clauses that would have made the agreements interdependent. *See Pacific Landmark*, at 627-628.

C. The Turning Point: *Turnberry*

1. Background

If the Maryland statute were analyzed based on the foregoing precedent alone, then perhaps it could be held constitutional and applied to a particular management termination without issue, by finding that such management agreement is an agency, not a personal services, agreement. Thus, any constitutional protection afforded to personal services contracts would not apply at all, and the statute would override principles that apply to agency – which appears to be

[4] This court refers to a California codification of "this well-established rule that unless the power of an agent is coupled with an interest in the subject of the agency, the principal has the power to revoke the agency." *Pacific Landmark*, at 625. Thus, it is difficult to discern when the court is citing to common law or to the California statute; however, the court states that the California decisional law follows U.S. Supreme Court precedent from 1823 and that the statute follows the common law, and the court refers to precedent that relies on the Restatement of Agency. *See Pacific Landmark*, at 624-626; *see also* Restatement (Third) of Agency § 3.10(1) (2006) (stating the same principle of revocability).

the conclusion reached by the *Tishman* court. However, such a conclusion should have been impossible for the *Tishman* court, in light of the *Turnberry* decision – and particularly one key point therein that was seemingly not articulated by the hotel owner in the *Tishman* case.

In one of the more sensational hotel management terminations, the *Turnberry* owner undertook a surprise Sunday morning takeover of its hotel, expelling the manager, FHR TB, LLC ("**Fairmont**"), under escort of a private security team. The owner did not first send default notice and give Fairmont the opportunity to cure, as provided in its twenty-five year management agreement. Rather, the owner sent a termination notice after the takeover, stating that, because the agreement was expressly governed by NY law, the owner's termination was based on NY common law, which allows principals to terminate their agents at will. By now, the reader can surely predict that Fairmont sought a preliminary injunction, in order to be reinstated as the manager. *See Turnberry*, at 1177.

2. Possession of Property

The *Turnberry* court admits that Fairmont presents a sympathetic story about an owner that may have acted wrongly. Nevertheless, "the Court's limited, current agenda is to determine whether to recommend the entry of a preliminary injunction **which would oust Turnberry from its own property** . . . ." *Turnberry*, at 1178 (emphasis added for later reference). The court determined that a preliminary injunction could not be entered for the same reasons as in the cases discussed above.

3. And More on Agency Coupled with an Interest

Fairmont made arguments that it had an agency coupled with an interest, with which the *Turnberry* court easily dispensed, as follows. First, the court contradicted Fairmont, holding that a mere statement in an agreement, saying that it creates an agency coupled with an interest, does not create such an agency or interest. *See Turnberry*, at 1196. In addition, the court held that Fairmont's right to quiet enjoyment did not constitute such an interest, in that it was not a property interest, could be revoked at will, and was unlike a lease (which, incidentally, would likely have been a sufficient interest[5]). Further, the court reiterated the holdings of other courts in requiring present, vested interests and, therefore, found that the future rights of first refusal and first offer did not meet the standard, either. *See Turnberry*, at 1197. Finally, the court held that the option identified by Fairmont, that had been held by a Fairmont affiliate, was inapposite, since the interest in question must be held by the agent, itself. *See Turnberry*, at 1198-1199.

4. Personal Services Contracts: Two Points

The *Turnberry* court proceeded to hold that, even if Fairmont could establish agency coupled with an interest, an injunction would **still** be impermissible, because the management agreement was a personal services agreement that was not enforceable by specific performance. *See Turnberry*, at 1204-1206. Of note, the *Turnberry* decision held that **all** hotel management agreements are personal services contracts. By contrast, the *Woolley* decision had specifically

[5] *See Monterey Bay Military Housing, LLC v Pinnacle Monterey LLC*, 2015 WL 1548833 (N.D. Cal. 2015) (holding that a lease to the manager of part of the property being managed was sufficient).

focused on the types of skill, judgment, discretion, and trust required by the management agreements "here" (i.e., before the *Woolley* court) repeatedly. *Woolley*, at 1534, 1535. That said, the *Woolley* decision did cite to a treatise that seems to stand for the proposition that all management agreements (and other types of agreements) are personal services contracts, but that does not appear to have been the *Woolley* court's holding; rather, the *Woolley* court appears to have found solely that the management agreements at issue in the case before it were personal services contracts. Thus, the *Turnberry* decision went further than *Woolley* in holding that all hotel management agreements are personal services contracts as a matter of law.[6]

Moreover, and critically to our analysis of *Tishman* and the Maryland statute, the *Turnberry* court made that one key point, to which the *Tishman* Owner did not expressly refer: that personal services contracts constitute a type of agency agreement. *See Turnberry*, at 1205.

II. *Tishman* and the Maryland Statute

In *Tishman*, Owner and IHG entered into a forty year management agreement in 2008 regarding Owner's hotel in the heart of Times Square. In 2017, Owner sent IHG default notice, alleging several defaults that IHG later disputed by its own notice. Owner nonetheless proceeded by delivering to IHG a termination notice, based on IHG's failure to cure the alleged defaults and based on personal services and agency law theories. *See* Tishman Verified Complaint, Index No. 655914/2017, at paragraphs 1, 3, and 9-12.

IHG sought, and obtained from the lower court, a preliminary injunction, barring the termination of its management agreement, until determination of whether IHG had defaulted. Despite hotel managers' struggles to obtain/retain injunctions against such terminations in the precedent we have explored, the appellate court in *Tishman* upheld the preliminary injunction granted to IHG.

The *Tishman* court's divergent decision was based on the inclusion in that management agreement of a clause applying Maryland Commercial Law § 23-102(b), which provides that a court may order specific performance for an attempted or actual termination of a management agreement regardless of the existence of an agency relationship. In response to Owner's arguments that the Maryland statute was unconstitutional, the *Tishman* court held that "the Maryland statute is presumed constitutional and the presumption may be upset only by proof persuasive beyond a reasonable doubt, which is absent here . . . ." *Tishman*, at 414 (internal citation omitted).

In the memoranda of law regarding various motions in the case, Owner extensively argued the unconstitutionality of the Maryland statute, relying on the precedent mentioned in this article and other similar precedent. Those arguments did not suffice for the *Tishman* court to set

[6] The *Turnberry* court also analyzed the specific agreement before it, finding that it provided for the same type of personal services as the management agreements in the *Woolley* case, but it is clear that the court's holding is that all hotel management agreements are personal services contracts, and that general concept permeates the decision. *See generally Turnberry*, at 1205.

aside the presumption that the Maryland statute is constitutional. However, Owner did not expressly make the second point from the *Turnberry* decision that unequivocally supports Owner's argument that the Maryland statute is unconstitutional and that, if articulated, should have tipped the presumption of constitutionality in the other direction, as discussed below.

IHG's best argument, which was probably persuasive to the court,[7] was that the Maryland statute was not unconstitutional because not all hotel management agreements are personal services contracts (despite the holding to the contrary in *Turnberry*), for which specific performance is prohibited as against the Thirteenth Amendment. IHG then argued that its particular management agreement was not a personal services contract, but rather merely an agency agreement. Therefore, pursuant to the Maryland statute, the court could grant specific performance notwithstanding the existence of that agency relationship.

First, in light of *Turnberry* and other precedent, the foregoing should not have been persuasive, because *Turnberry* held, as a general matter, that, "Hotel management agreements are personal services contracts." *Turnberry*, at 1205. That said, one can imagine a couple of somewhat justifiable reasons why the *Tishman* court may have issued an order diverging from that precedent.[8] The reason that seems most likely is that the *Tishman* court disagreed with *Turnberry's* holding[9] that all hotel management agreements are personal services contracts as a matter of law, and may have felt that the question of whether a hotel management agreement constitutes a personal services contract is a question of fact on a case-by-case basis, instead, turning the clock back to *Woolley*, which concept may merit discussion. Thus, given that IHG extensively argued that its management agreement was not a personal services contract, but rather merely an agency agreement, the court may have been so persuaded.

However, setting that aside, according to the federal precedent in *Turnberry*, every personal services contract is a type of agency agreement. *See Turnberry*, at 1205 (holding that "the mere fact an agency contract (in general) can be specifically enforced if coupled with an interest does not necessarily mean that **the special type of agency contract here – a personal services contract** – is specifically enforceable") (emphasis added).[10] ***Accordingly, the Maryland statute, on its face, violates the Thirteenth Amendment, by stating that courts may order specific performance notwithstanding the existence of an agency relationship, since, by definition, those agency relationships would include personal services agreements, for which we have learned specific performance is prohibited as against the Thirteenth Amendment***. If

[7] Given the brevity of the court order, the author has made an educated guess as to the arguments in the relevant pleadings and memoranda of law that may have persuaded the court.

[8] An example of such a reason (there are others) that this article will not explore is the possibility that the court was persuaded by IHG's argument that there was no precedent on point **under Maryland law** (the law that was being applied to the dispute) as to hotel management agreements being personal services contracts. *See* Reply Memorandum of Law in Further Support of IHG Management (Maryland) LLC's Motion By Order to Show Cause for Temporary Restraining Order and Preliminary Injunction, Index No. 655914/2017, October 17, 2017, at p. 9 (Section I(A)).

[9] Principles of comity, including regarding matters that touch upon constitutional law, will not be analyzed or discussed in this article.

[10] The concept that all personal services contracts are a type of agency contract may merit further analysis and discussion, like many of the other concepts explored in this article, as further suggested in Section III; however, for the moment, this is the precedent.

Owner had raised this point, presumably the court would have been compelled to hold the statute unconstitutional on its face and should, therefore, have been compelled not to apply the statute.[11]

Clearly, the Maryland statute could be amended to carve out agency relationships that entail personal services. That easy correction would make the statute constitutional, but that is not the point of the analysis herein. Rather, the true point is whether the Maryland statute serves all parties best. For example, what if the tables were turned, and it were the hotel manager that wanted to terminate the management agreement, but the owner sought an injunction to cause the manager to remain in service for another twenty years? That question poses as good a segue as any to our next stop on this journey, where we will consider the impact of the Maryland statute and of allowing injunctive relief with respect to the termination or forced continuation of hotel management agreements.

III. Conclusion: Should Injunctions Apply to Termination/Forced Continuation of Hotel Management Agreements and Should the Maryland Statute Stand?

As noted in the example just mentioned, the author suspects that many readers will not find injunctive relief as palatable for hotel management agreements when the tables are turned – when the manager wants to terminate the agreement, and the owner wants an injunction to force the manager to remain until resolution of the dispute and, if resolved in the owner's favor, then for another twenty years. This is the essence of the Thirteenth Amendment involuntary servitude issue. Although the precedent analyzed herein applied the concept in reverse (i.e., where the manager was seeking an injunction **to prevent termination and remain in service**), when we shift the paradigm (i.e., to an owner attempting **to prevent termination and force continued service**), we can see more clearly why specific performance is not permitted for personal services agreements.

Agents have the power to renounce agency, like principals' power to revoke. *See* Restatement (Third) of Agency § 3.10(1) (2006). One can imagine, for example, a situation where the manager has lost faith in an owner that continuously disputes incentive fees or that fails to provide funds for the upkeep of the hotel. Suppose that manager prevails in the annual dispute resolution mechanism several times – i.e., incentive fees are found to have been earned or the maintenance/capital budget must be replenished by the owner, such that the conclusion is that the owner is wrongfully, willfully disputing those items. Then that manager may no longer trust, or wish to perform its services for, that owner, only to endure an annual combative process (not to mention difficulties all year long and brand standard issues, if the problem is upkeep), year-after-year. Why should that manager continue to serve that owner during the pendency of the dispute – or beyond, if the court finds the owner is not in default – when the manager no longer trusts the owner (and, in its business judgment, believes its brand is being damaged)?

Furthermore, courts have stated that the qualitative nature of personal services and the special skills involved should not be subject to court supervision and specific enforcement. The courts have also focused on the trust and discretionary authority granted to such a personal

[11] It is possible that this point was made by Owner and that the author missed it, in which case the *Tishman* court's decision seems unfathomable.

services "agent" as other reasons to avoid specific performance for such agreements. These other factors are compelling, at least in the context of termination/continuation of service where the other party is resisting same. By contrast, there could be a case without resistance, where, for example, the manager has defaulted, the owner is seeking judicial specific enforcement of a cure, and neither party is looking to terminate the relationship. Accordingly, the specific performance remedy in this situation might be appropriate. However, if the manager or owner were seeking termination because of a break-down in the relationship, then having the court step in to oversee corrective measures regarding these qualitative services that require trust and then forcing the manager to continue providing services, or the owner to continue receiving services, in each case for several more years, may not be appropriate.

Given the above factors (i.e., qualitative services, special skills, discretionary authority, and trust), many – if not all – hotel management agreements may fall into the category of personal services agreements. Further, when coupled with the usual long term of hotel management agreements, which can consist of an initial term of twenty years, the Thirteenth Amendment involuntary servitude concerns become graver.[12]

Some readers may react by arguing that the owners should simply negotiate a short term or a termination option. As a transactional lawyer, relying on contractually negotiated provisions seems a good solution, at a glance. However, one should consider that many hotel management companies have more negotiating leverage than owners,[13] and such short terms or termination options, even upon payment of a fee, may be impossible for many owners to obtain.[14] This contract law focus appears to be what the *Tishman* court intended in its decision. The first part of its holding stated that Owner's argument against specific enforcement "is inapposite since, among other things, the owner voluntarily negotiated for and signed the contract." *Tishman*, at 414 (internal citation omitted).

The *Tishman* court, and perhaps the Maryland legislature, seems to have intended to re-focus on contract law and move away from *Woolley* and its progeny, which relied on common law constructs in analyzing the relationship of hotel managers and owners. Again, that is attractive but has its issues, besides the possible disparity of bargaining power mentioned above, which particularly affects the often non-negotiable long term and lack of termination option precisely at issue here. For example, just because a contract exists does not mean that an agency/personal services relationship does not also exist. Moreover, it is difficult to overcome the premise that, whether a party voluntarily signs a contract applying a statute that violates the Thirteenth Amendment seems irrelevant, given that such a constitutional protection should not be contractually waivable. Accordingly, although using the contractual constructs has an initial appeal, after in-depth analysis, it may not be appropriate.

On yet another note, although management agreements are typically carefully drafted to provide that they do not create partnerships/joint ventures between the parties, an analogy to

[12] This is not to say that involuntary servitude for even one second is acceptable.
[13] The author would like to acknowledge that this is not always the case.
[14] While it is tempting simply to argue that the owner in such a case should walk away and find a manager with whom the owner has more parity of bargaining power, even if perhaps the overall "deal" is not as appealing, that is not always an option in every market; there may not be such a manager in the market in question.

such arrangements is fitting in the context of such long-term relationships where there is an agency with fiduciary duties (whether a mere agency or a personal services agency à la *Turnberry*). It is a fundamental principle in the partnership/joint venture arena that, once a default occurs or trust between the partners evaporates, the best resolution is likely an exit strategy for one of the partners, which is why partnership agreements often include exit clauses such as buy/sell provisions, rather than typical default clauses.[15]

Finally, the *Turnberry* court presents yet another interesting perspective, in that issuing an injunction to prevent an owner's termination actually ousts the owner from its own property to some extent, as noted in the quoted language in Section I.C.2. above. Had the owner entered into a lease, rather than a mere management agreement, then this ejection might be warranted, as the owner might arguably have granted an exclusive real property interest to the manager. However, a mere management agreement does not typically contain such an interest. Yet, while a court imposes a management agreement via an injunction that stays an owner's termination, that owner cannot take possession and manage/control its property; rather, the manager, whom the owner no longer trusts, remains on the owner's property, controlling it day-after-day, while the owner probably only retains some inspection rights.

As hotel lawyers, we straddle the real estate and corporate law realms, but in thinking about this issue, perhaps we should re-focus on this last real estate perspective, as well as the other points raised above, to determine whether it is appropriate for the Maryland statute to apply to termination (or forced continuation) of hotel management agreements – and even whether specific performance should ever apply to their termination.[16] Perhaps it would be best for all parties for the common law structures and constitutional protection discussed in *Woolley*, *Pacific Landmark*, and *Turnberry* to apply, together with the contractual provisions the parties are able to negotiate that do not run afoul of constitutional protections,[17] rather than the Maryland statute. The author does not purport to have all the answers, but strongly believes that these questions, as well as the potential consequences of the Maryland statute and future decisions like *Tishman*, including the potential logical extensions thereof, deserve – in fact, require – thoughtful and thorough analysis and discussion.

---

[15] Months after making this comparison, the author found that the Restatement (Third) of Agency similarly analogizes the power to revoke/renounce an agency to a partner's power under the Revised Uniform Partnership Act to call for dissolution of the partnership, which will either result in such dissolution or, if the other partners do not want dissolution, in the dissociation of the partner so calling. *See* Restatement (Third) of Agency § 3.10 cmt. b (2006).

[16] This goes to the question of whether all hotel management agreements are personal services agreements as held by *Turnberry*.

[17] I.e., if the owner and/or the manager are able to negotiate early termination options, then more power to them, but if a party is "cornered" into signing a contract providing for specific performance to prevent termination, for example, then that provision should not prevail over the constitutional protection against that, afforded by the Thirteenth Amendment – at least, not if that contract constitutes a personal services agreement. And, further, query whether the power of an owner/manager to revoke/renounce a simple agency should be contractually waivable? There is another way to make agencies irrevocable besides waivers: properly couple them with an interest. If they do not want their management agreements to be terminable at will, then, rather than seeking waivers, perhaps managers should take the risk necessary to couple their agencies with an interest, which requires a present, vested interest (e.g., lease of space at the hotel), held by the same manager party, and entered into concurrently with the management agreement.