

ROMANIA

Hotel Management Agreements



Introduction



One cannot discuss the evolution of hotel management agreements (HMAs) without first talking about the separation of hotel ownership and hotel operations; a transformation of the major chains' business models, more commonly known as an "asset light" strategy. Today the form taken by hotel operators in HMAs is an important factor in the effective working of the market in hotel investment. DLA Piper's Hospitality and Leisure Sector Group has negotiated HMAs for a myriad of different clients across the H&L landscape (owners, investors, operators (both branded and white label) and lenders) in all of the world's key jurisdictions.

Many consider hotel management agreements to be borne out of a modified lease for the Hong Kong Hilton back in 1963, and the main terms included in it underpin most HMAs to this day. All major chains today have, to one degree or another, expanded nationally and internationally through a combination of franchise and management, and all have their own "form" or template agreements. In summary, over the last few years, we have found that trends that started as a result of the financial crisis of the last decade have continued to develop. In many markets the advent of recession made operators more risk averse. Traditionally HMAs were a means to limit operators' exposure to fixed rental payments when revenues were dropping. In less developed markets, even with a degree of economic recovery, operators have continued to use HMAs in this way. In more developed markets, such as Spain and the United Kingdom, we have seen increased complexity in agreements, a symptom of owners becoming more knowledgeable and seeking more control and input on the operation of their hotel, although owners continue to take the lion's share of commercial risk in developments.

Another important factor, as with any real estate investment, is the attitude of those who are providing the money, be it equity or debt. Leases were the traditional mainstay of hotel developments and indeed Germany remains a country where hotel deals are commonly based around leases. However, as investors have started to see the increased returns from ownership, the boom in arrangements like ground leases and other market changes is essential to have an understanding of investors and be able to work with them in a scenario of increasingly complex legal arrangements.

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Romania

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General

Are Hotel Management Agreements (HMAs) common in the jurisdiction?

Yes.

If not HMAs, what are the alternatives / what is commonly used?

As well as HMAs, owners choose hotel franchise/long lease agreements.

Is it common or usual for the HMA to be governed by (i) local laws; (ii) the laws of one of the parties' country of incorporation; or (iii) an alternative jurisdiction?

HMAs in Romania are usually governed by English law.

Are there any significant or unusual points to note in respect of tax on HMA payments in the jurisdiction?

No.

Term and termination

Is there a standard contract period of an HMA?

HMAs for branded operators tend to be for long periods (10-20 years).

Is the term usually fixed? Are early exit or similar options included (contractual or implied)?

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Yes, usually the term of an HMA is fixed. However, the HMA may be terminated early by the owner/operator in case of breaches of the other party's material obligations – such breaches are usually expressly mentioned in the HMA.

The owner may also have the right to terminate the HMA early for material underperformance compared to a competitive set of hotels of the same size/type.

Is it usual to include fees / liquidated damages for early termination?

Exit fees for early termination (break option), other than due to operator default, are common. The level of fees can vary widely depending on a number of issues (eg location, brand, scale).

What is the usual position in respect of renewal?

This varies between different operators. Usually HMAs will be extendable in tranches of five or ten years. This can be mutually agreed or automatically if neither party notifies the other party of the contrary.

Fees

Is there a standard fee structure for HMAs (eg base + incentive)?

Fee structures vary between operators. The standard is a base fee calculated on revenues and an incentive fee based on profits.

What other fees and charges are there (such as royalties, accounting, marketing, license fees, etc.)?

Sales and marketing costs, accounting charges, purchasing costs, and license/franchise fees. These are often set as a percentage of rooms' revenue, and typically range from 1-3% of gross room revenue.

Are owners typically required to set aside funds for fixtures and fittings?

An FF&E Reserve is very common – it usually varies between 2-5% of the total revenue.

Performance and operations

What is the usual standard imposed on an operator in respect of the operation of the hotel?

Contractual performance standards vary between operators, type of hotel etc. Some HMAs do not contain specific standards (because fee structures often mean owner and operator interests are aligned), while others impose the operations standards of the brand.

What performance measures are commonly used in the jurisdiction?

The performance test used in our jurisdiction is that of measuring the GOP (Gross Operating Profit) achieved for an operating year with the pre-agreed percentage of GOP. In practice, there are other performance tests used, such as AGOP (Adjusted GOP) or EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization).

Is an operator or owner guarantee common in the jurisdiction?

For branded operators, an operator guarantee would be unusual. However, this may vary on a case-by-case basis.

What is the usual position in respect of employees? With whom does the liability for the employees sit?

All hotel employees (except for the hotel general manager or other executive personnel indicated by the operator) are employed by the owner.

Is it usual to have a non-compete clause, eg that no other property with that brand can open within a certain radius?

Non-competes are common and usually negotiated.

Who is responsible for insurance?

The owner is responsible for the cost of property insurance and the operator may put operational insurances in place.

Does the HMA give rights in real estate in the jurisdiction?

No.

Does the HMA need to be recorded against the property, if this is possible in the jurisdiction?

No.

Where financing is taken, is it standard to obtain a Non-Disturbance Agreement (NDA) as part of a management or lease agreement?

This depends on the bank and the operator/owner.

What other agreements usually sit alongside an HMA in the jurisdiction?

There could be a number of different agreements depending on the operator (eg (Brand) License Agreement, Central Services Agreement, Technical Services Agreement).

Transfers and assignments

What are the standard rights / restrictions in respect of transfer / sale of the hotel?

Transfer rights under HMAs can vary widely. Commonly, operators will require consent to change ownership of the hotel. There may be restrictions on transfers to competitors.

When a managed hotel is sold (either asset or share deal), is it usual in the jurisdiction that either the Operator's consent is required for the sale, or that the hotel may only be sold if the HMA transfers with the hotel?

Yes, usually the sale / transfer / assignment or disposal of the hotel require the operator's prior written approval.

Do HMAs commonly include a right of first refusal for the operator to purchase the hotel?

This varies on a case-by-case basis.

Is it usual to include provisions which enable the sale of the property with vacant possession ie without the brand?

Usually HMAs do not provide for this.

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