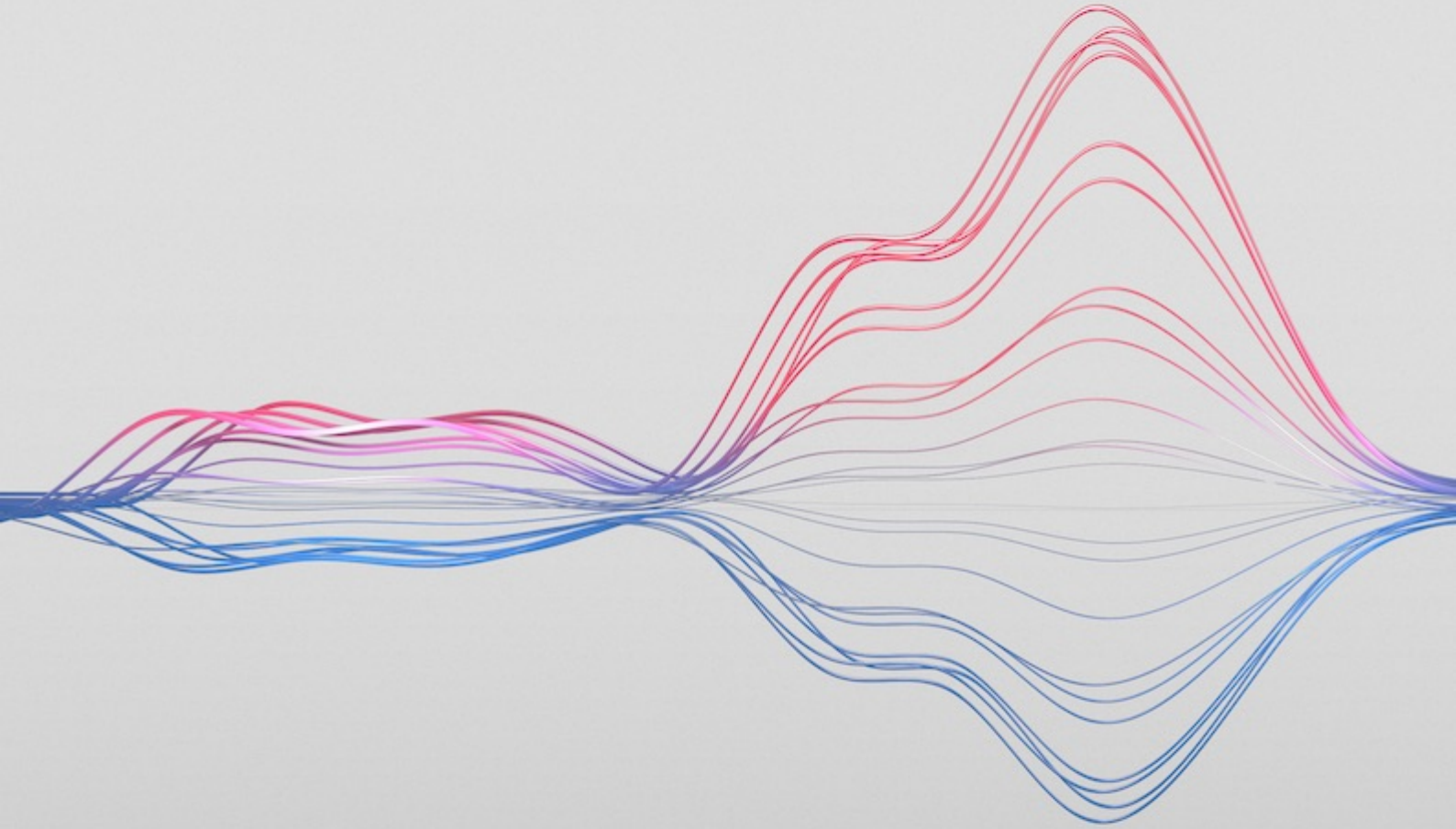
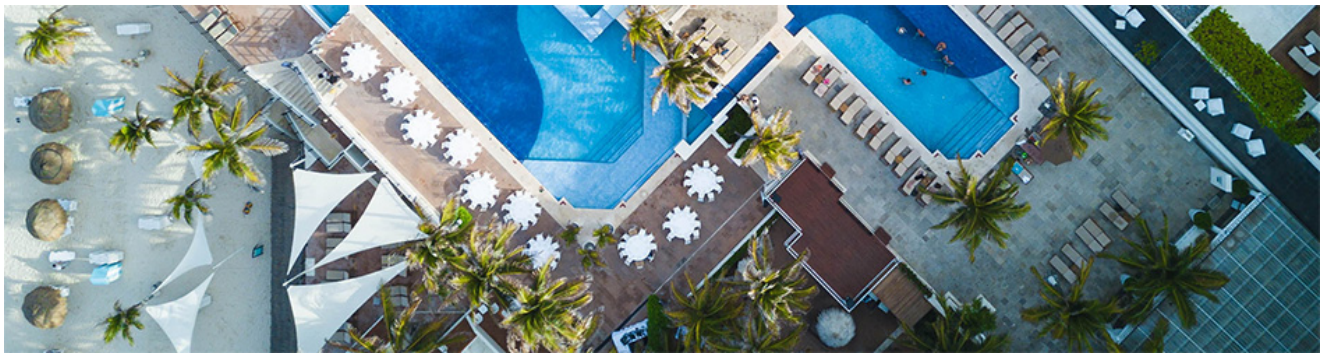
BELGIUM

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.

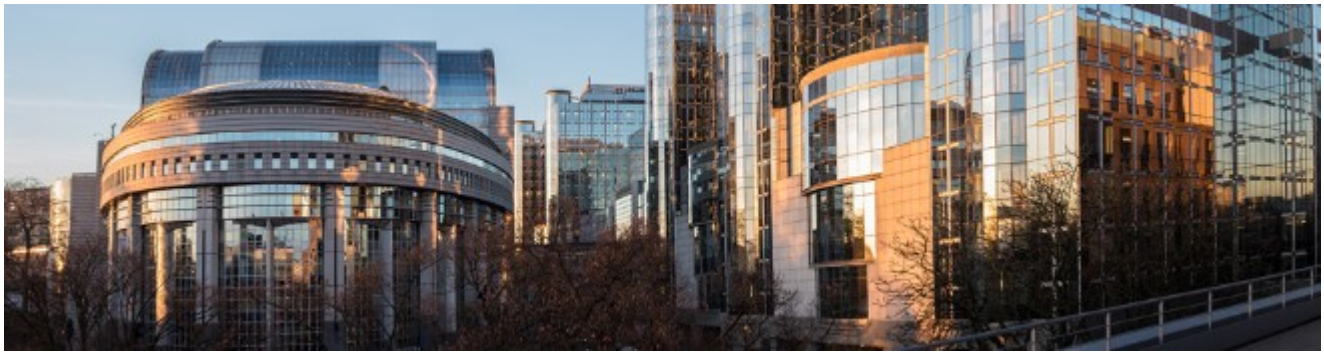
Key contacts

Matt Duncombe
Partner, Global Co-Chair,
Hospitality and Leisure
DLA Piper UK LLP
T +44 113 369 2948
matt.duncombe@dlapiper.com
View bio

Jo Owen
Partner, Global Co-Chair,
Hospitality and Leisure
DLA Piper UK LLP
T +44 207 796 6293
jo.owen@dlapiper.com
View bio

Harriet Lipkin
US Co-Chair, Hospitality and
Leisure
DLA Piper LLP (US)
T +1 202 799 4250
harriet.lipkin@dlapiper.com
View bio

Bradley Levy
US Co-Chair, Hospitality and
Leisure
DLA Piper LLP (US)
T +1 312 368 4093
bradley.levy@dlapiper.com
View bio



Belgium

Last modified 05 February 2021

General

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

Yes.

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

One alternative is a lease agreement whereby the business activity of the subject hotel(s) is carried out by a lessee who, in consideration for a rent (fixed or variable or a combination of both), operates the hotel on their behalf (as operator), and not on the account of the owner. It is important to note, however, that the mandatory application of the Belgian Commercial Lease Act of 1951 leases creates a number of difficulties. The act contains a number of mandatory provisions protecting lessees, including a right for the lessee to unilaterally terminate the lease at the end of each three-year period and a right for the lessee to request three renewals of the initial lease period which may not be shorter than nine years (each), giving the agreement a potential duration of 36 years. Moreover, commercial leases are not subject to VAT and, therefore, lessors are not permitted to deduct the VAT paid on construction works or on the acquisition price of the FF&E and operating equipment. For all these reasons, commercial lease agreements are extremely rare in the hotel industry.

The lease alternative is considered when the contract has a duration which exceeds 15 years, ie in cases where an emphyteutic lease can be concluded instead of a regular commercial lease and where the entire amount of VAT paid on the construction works and on the purchase price of the FF&E and operating equipment (if paid by the owner) has already been recuperated.

Another alternative is the system of franchised hotel(s). Hotel chains franchise one of their brands to hotel owners, who either operate their hotels themselves or operate the hotel through a third party acting as the operator under an HMA.

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 Belgium will commonly be governed by Belgian law. Disputes under an HMA in Belgium will commonly be settled by Belgian courts, but parties can agree to have those disputes settled by arbitration.

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

Under an HMA, the hotel chain operates the hotel in the name and on behalf of the owner. The owner is deemed to be the operator of the hotel and is therefore subject to VAT. As a result, the owner may deduct the VAT paid on the construction cost of the hotel and on the purchase price of the FF&E and operating equipment.

Term and termination

Is there a standard contract period of an HMA?

Unlike for commercial leases, there is no legal or standard minimum or maximum duration for an HMA. The duration of an HMA is set by agreement between parties and is specific to each particular case. Generally, the contract period tends to be long. In our experience, the contract period is usually between 15 and 25 years.

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

The term is usually fixed. No early exit or similar option is implied or imposed by law. Break options allowing early termination of the HMA after a certain period are allowed. It is customary to provide for a break-out option in favor of the owner if, during a certain period of time, the performance of the operator does not meet certain predefined criteria usually set by reference to the performance of other comparable hotels in the same geographic area.

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

Exit fees for early termination, 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?

The usual position in respect of renewal is to allow the operator to ask for the renewal of the HMA in order to continue operation of the hotel at the end of the initial term of the HMA. The extension is generally for a fixed term, usually between five and ten years. If the HMA contains a clause giving the operator the right to request a renewal of the agreement, the clause also provides that the operator must exercise its option at a certain time before the end of the initial contract term. HMAs may also provide for one or more automatic renewal periods (the duration of which is usually shorter and comprised between one and five years), unless one party gives prior notice to the other of its decision not to renew the HMA at the end of the current period.

Fees

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

Fee structures vary between operators. Commonly, management fees consist of a percentage of the hotel's gross annual revenues (base fee) and a percentage of the hotel's annual gross operating profit (incentive fee). The level of management fees tends to be standard, even if they may vary depending on the typology and characteristics of the hotel, notably its profitability, and the negotiating power of each owner. In some cases, the operator may guarantee the owner that the adjusted gross operating profit of the hotel will not be less than a certain minimum amount per year (over a certain number of years or over the entire duration of the HMA). In these cases, shortfalls are capped at a certain amount over the entire duration of the guaranteed period and the amount of the base fee is set at a higher percentage than in the case of a plain HMA without guaranteed results.

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

Everything done by the operator is done in the name and on behalf of the owner. Consequently, all expenses, debts, liabilities and taxes (including the real property taxes) relating to the operation of the hotel are to be borne by the owner.

In addition to the base management fee and the incentive management fee mentioned above, most HMAs provide that the owner shall pay to the operator a marketing and advertising contribution which is usually calculated on the basis of a certain percentage of the gross room revenue as well as a reservation fee which is usually set at a certain amount per room and per reservation for reservations made through the central reservation platform of the operator plus any amounts charged by other reservation systems used by the operator.

Moreover, some branded operators may require payment of royalty fees depending on the hotel's gross sales.

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

Virtually all HMAs provide that a percentage of the revenues will be set aside in a reserve fund account (the FF&E reserve account) and will therefore not be distributed to the owner. This reserve fund account is to be used for the purpose of replacing, renewing or improving FF&E. When the FF&E reserve funds are held in a bank account opened in the name of the owner, the funds in the FF&E reserve account are to be made available to the operator at first demand of the operator made in line with the capital expenditure budget.

In addition, HMAs usually provide that the owner shall establish a working capital reserve with sufficient funds to meet any projected or budgeted working capital shortfalls over any two-year period.

Performance and operations

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

The usual standard imposed on an operator is to achieve long-term profitability while maintaining brand standards. Although operators are usually granted a broad authority by the owners, review or approval by the owners can be compulsory in certain major areas, such as the annual operating and capital expenditure budgets.

As mentioned above, HMAs often provide that if, during a certain period, the performance of the operator does not meet certain predefined criteria usually set by reference to the performance of other comparable hotels in the same geographic area, the owner has the right to terminate the HMA.

What performance measures are commonly used in the jurisdiction?

The common measure of performance is based on occupancy rate, total revenues and GOP of the hotel, RevPAR (revenue per available room) and ADR (average daily rate) calculated in accordance with the Uniform System of Accounts.

Is an operator or owner guarantee common in the jurisdiction?

As mentioned above, in some cases, the operator may grant capped guaranteed results to the owner.

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

Commonly, when a hotel is operated under an HMA, all employees are employees of the owner, except for the top management rendering supervisory services in connection with the operation of the hotel. These supervisory services are provided by the operator at its expense.

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

Yes. However, when the HMA contains a clause granting minimum guaranteed results to the owner, the hotel operator is usually very reluctant and often refuses to grant a non-compete clause to the owner.

Who is responsible for insurance?

Everything done by the operator is done in the name and on behalf of the owner. Consequently, the costs of all insurances (including the hotel building and its contents) are borne by the owner, although paid through the hotel operation.

These insurance policies are usually to be provided by insurance companies approved by the operator. When the operator is an affiliate of a large hotel chain, the operator is often able to offer the owner the possibility to participate in an insurance program negotiated by the hotel chain for a number of hotels managed by the chain, which covers the requirements of the chain in terms of insurance coverage.

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

No (except possible right of first refusal in case of sale of the hotel, to be granted by the owner).

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?

Yes. Virtually all HMAs contain an NDA.

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

For new projects, a technical assistance agreement often sits alongside the HMA or is included therein.

In some cases, the operator may also agree to participate in the financing of the pre-opening budget and of the initial working capital.

Transfers and assignments

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

HMAs often provide that the transfer thereof by either the owner or the operator is not allowed without the prior consent of the other party. However, it is not uncommon to see clauses whereby the owner has the right to transfer ownership in the hotel to a third-party buyer provided that the third-party buyer is of good reputation, has a strong financial standing evidenced by a strong balance sheet and takes over all obligations of the owner under the HMA.

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?

Usually, HMAs provide that in case the hotel is sold, the HMA transfers with the hotel and the new third-party buyer must take over all rights and obligations of the owner under the HMA.

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

Not necessarily. Traditionally, hotel operators are asset light and have no interest in purchasing the hotel property. It may however happen that a hotel operator wishes to have a right of first refusal which will enable it to arrange for the transfer of the hotel to a third-party buyer of its choice.

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

No.

Key contacts

Joseph Spinks
Partner
DLA Piper UK LLP
T +32 2 500 15 56
joseph.spinks@dlapiper.com
View bio

Jean-Michel Detry
Of Counsel
DLA Piper UK LLP
T +32 (0)2 500 15 88
jean-michel.detry@dlapiper.com
View bio

Disclaimer