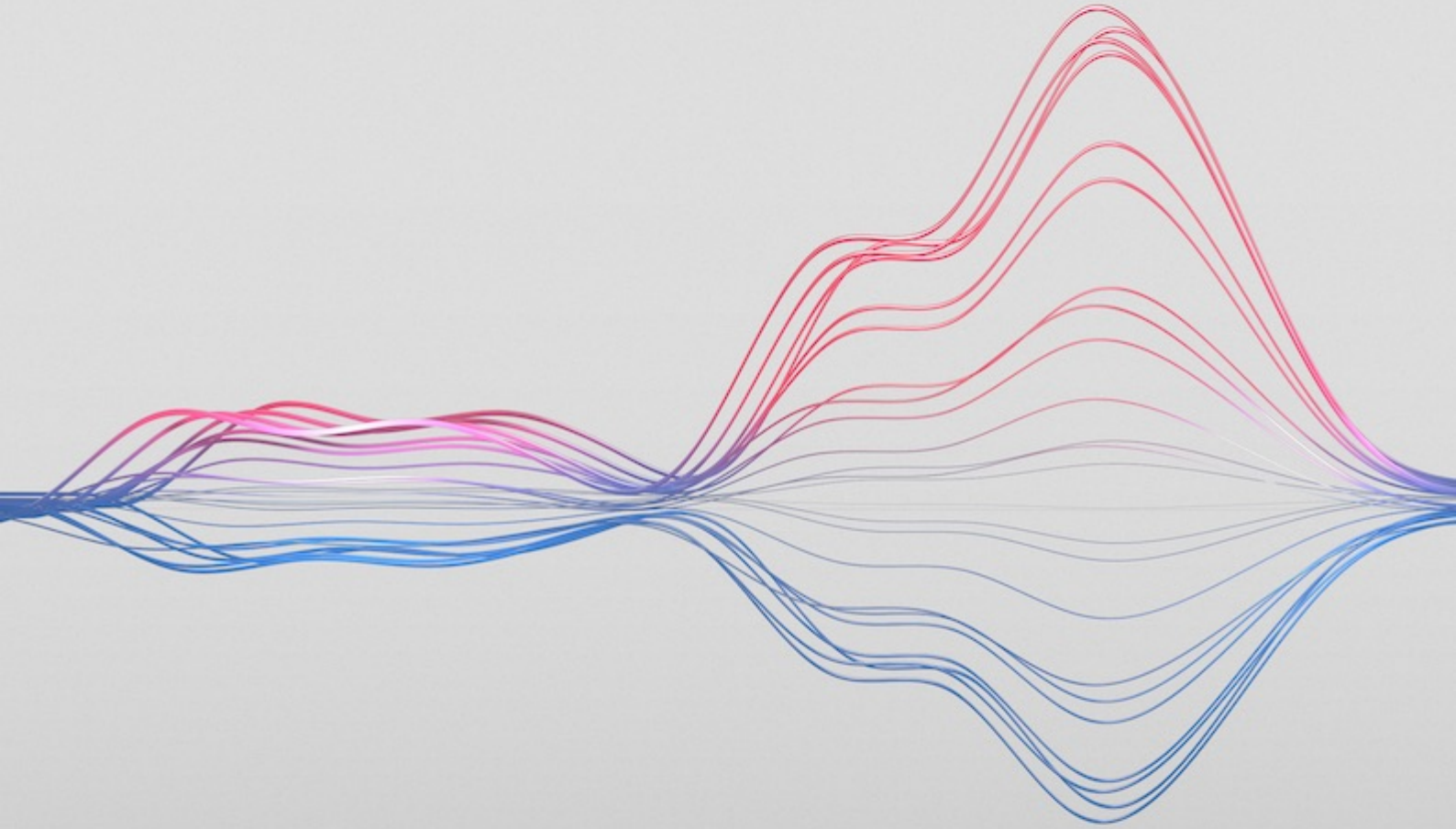
NETHERLANDS

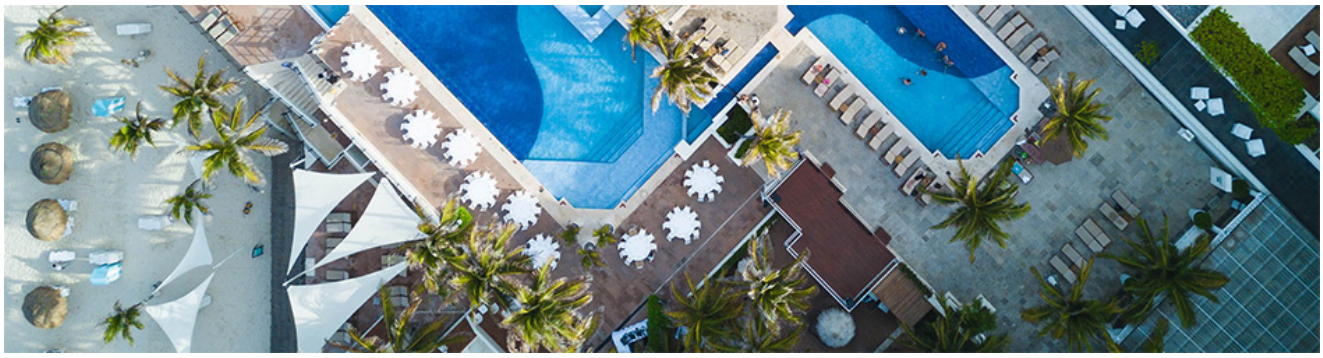
Hotel Management Agreements



DLA PIPER

DOWNLOADED: 24 APR 2024

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

Netherlands

Last modified 05 February 2021

General

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

HMAs are used across the Netherlands, usually in hotels that are operated under major brands such as Hilton, IHG and Marriot. Occasionally, a white label hotel may operate under an HMA.

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

A regular lease and increasingly hybrid leases with, for example, a (partly) revenue-based rent, FF&E Reserve, performance measurement and certain reporting obligations, are used. The market in the Netherlands – from a real estate investment perspective – still seems to be in favour of leases.

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?

The HMA is usually governed by Dutch law albeit that – occasionally – an HMA may be governed by UK or US law. Usually FCPA or UK Bribery law or similar extra-territorial anti-corruption laws are also applicable.

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

Both owners and operators will be aware of VAT and withholding issues on payments and the application (which will change) of taxation treaties.

Term and termination

Is there a standard contract period of an HMA?

Usually 20+ years.

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

The terms are usually fixed. Given the substantial investments in hotel operations, HMAs do not usually include early termination rights.

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

The norm is for an HMA term to be fixed. Where early termination is negotiated, for instance in the event of a sale, it is usually subject to exit fees.

What is the usual position in respect of renewal?

Usually the HMA includes (a) renewal term(s) of five years, sometimes upon mutual agreement between the parties, sometimes in the

form of renewal options to the benefit of the operator.

Fees

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

Fee structures vary between operators. Usually there is a base fee calculated on revenue combined with an incentive fee when certain profit hurdles are met.

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

- License fees
- Group services and benefit fees
- Hotel specific services
- Marketing contributions
- Reservation contribution
- IT services fee

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

An FF&E Reserve is the norm. It is usually established on a percentage of the revenue, which usually increases in the years after a hotel opens to the public. The FF&E Reserve is usually maximized at a certain percentage. Percentages of 4-5% are not uncommon in the Dutch market. The FF&E Reserve is usually kept in an FF&E Reserve account.

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. The operator is usually obliged to operate the hotel in accordance with a certain brand, brand standards and a certain hotel classification.

What performance measures are commonly used in the jurisdiction?

A performance test based on RevPAR against a competitive set (peer group).

Is an operator or owner guarantee common in the jurisdiction?

An operator or owner guarantee is not common. In the event of Opco-Propco structures, non-disturbance covenants are customary.

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

The owner will be the employer, except potentially for the general manager and, depending on the nature of the hotel, certain key staff members.

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 (even if sourced by the operator) and the operator may put operational insurance in place.

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

No. One could debate whether an HMA qualifies as a lease. But this is a theoretical discussion.

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, usually an NDA forms part of the HMA.

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

- License agreement
- Group services agreement
- IT and technical services agreement, etc.

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 any change in ownership of the hotel which is not unreasonably withheld. There may be restrictions on transfers to competitors, restrictions in relation to financial covenant strength and "reputation" tests.

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.

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

No.

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

A standard HMA will not provide for this, and if it is ever given there is usually an exit fee.

Key contacts

Rutger Oranje
Partner
DLA Piper Nederland N.V.
T +31 (0)20 5419 810
rutger.oranje@dlapiper.com
View bio

Leen van der Marel
Partner
DLA Piper Nederland N.V.
T +31 (0)20 5419 240
leen.vandermarel@dlapiper.com
View bio

Disclaimer

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com.

This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

This may qualify as 'Lawyer Advertising' requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Copyright © 2024 DLA Piper. All rights reserved.