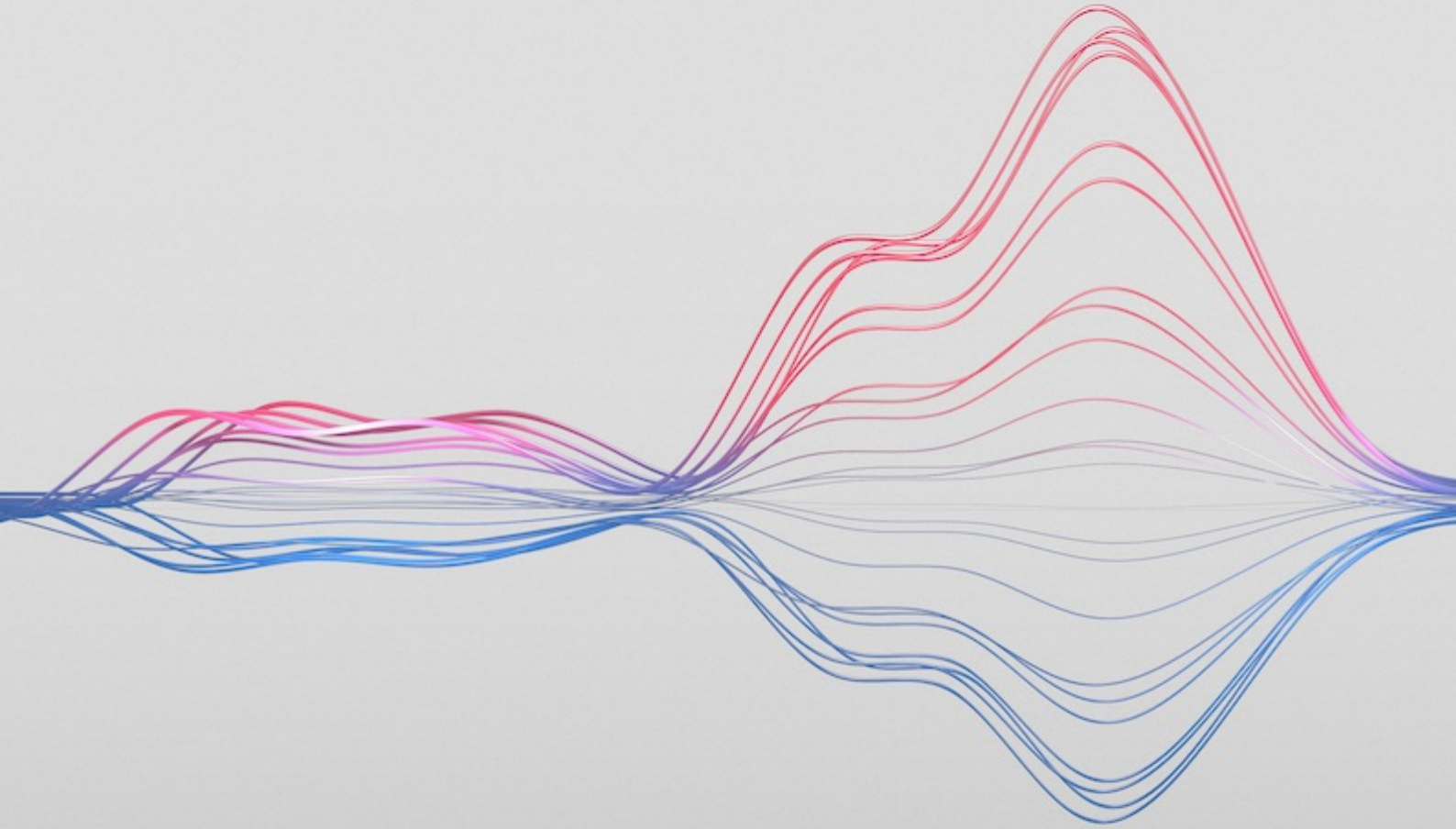
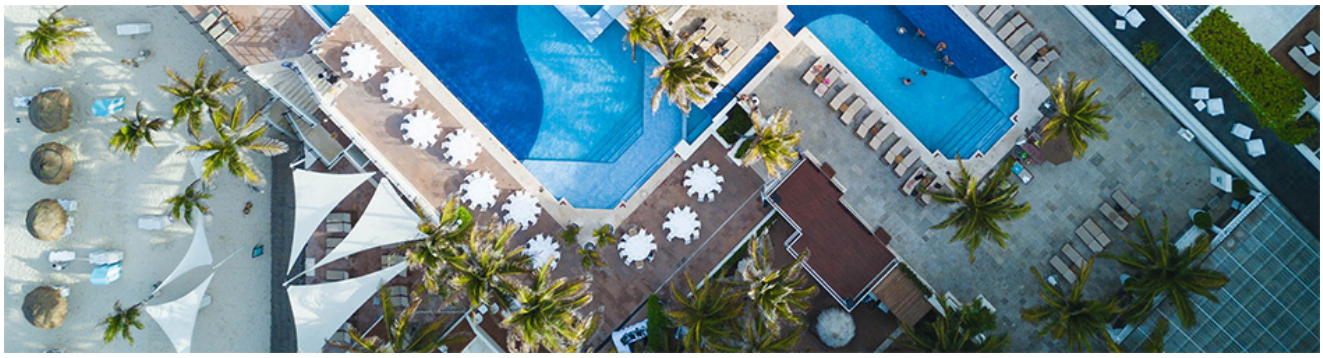
NORWAY

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

Norway

Last modified 09 February 2021

General

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

No. There are very few examples of HMAs in Norway. The Norwegian market is still dominated by lease agreements.

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

Leases are most commonly used, and mostly preferred by property owners due to the stable and predictable income that they guarantee (if they include minimum rent). In addition, banks financing the acquisition or construction of hotel properties also prefer lease agreements with minimum rent. HMAs are seen as riskier, and many Norwegian players do not see a commercial benefit in HMAs and prefer to take the safe option.

Furthermore, there are some combinations of leases (with the property owner) and franchise (with the owner of specific brands).

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?

Since there are very few HMAs in Norway, it is difficult to state what is "common" or usual. Some HMAs in Norway with international chains as operators are governed by English law. Between Norwegian operators and Norwegian property owners, Norwegian law would usually apply.

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

From a tax perspective there are no particularities with regard to an HMA, but this largely depends on corporate structures and applicable law.

Term and termination

Is there a standard contract period of an HMA?

No. We have experienced that some of them are limited to short contract periods but with extensive rights of renewal, or they are long, but with extensive rights of termination, depending on the position of the parties.

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

The norm is for an HMA term to be fixed. Early exit and similar options are often included in HMAs that we have reviewed. But with the limited number of HMAs in Norway, it is not possible to say what is "usually" the situation.

HMAs often contain a performance clause according to which the operator is obligated to reach specific (financial) results with the hotel operation in each financial year. If the operator does not reach the agreed (financial) results in a defined period of time, the owner is usually entitled to terminate the HMA. Also see Performance measures.

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

HMAs usually do not include any specific provisions with regard to liquidated damages or fees for an early termination. However, if a party is entitled to terminate the HMA because the other party violates its contractual obligations, the terminating party is entitled to claim damages for lost profits etc. according to Norwegian law.

What is the usual position in respect of renewal?

This depends on whether the fixed term is short or long. A short fixed term usually includes renewal clauses. In contracts with longer fixed terms, renewal clauses depend on the negotiations.

Fees

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

Fee structures vary between operators. We often see that a base management fee is included in addition to an incentive fee.

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

Besides the base management fee and the incentive fee, we have seen fees that relate to contributions to accounting and reservation systems and to marketing efforts.

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

The obligation on the owner related to an FF&E Reserve varies in HMA agreements. Contributions and how it is operated can depend on who the operator is, the age of the hotel, standing etc.

Performance and operations

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

The parties often agree in the HMA that the operator must operate the hotel in compliance with its operational manual and standard operating procedures. Performance clauses are also commonly used and, in some instances, detailed description of the relevant concept is included in the HMA.

What performance measures are commonly used in the jurisdiction?

Reporting obligations and a performance test is fairly standard (together with a termination right for failure to meet such a test), but the type and nature can vary depending on the operator, nature of the hotel, location, etc. A standard performance test could consider achievement against budget and/or against a competitive set of local or similar hotels related to and related to financial results, vacancy, RevPAR, EBITDA etc.

Is an operator or owner guarantee common in the jurisdiction?

For some branded operators, an operator guarantee would be unusual.

For ordinary lease agreements, a guarantee is usually included as part of the main terms.

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

The operator would normally be the employer, but it could be either, and in some situations both parties are involved in the selection of key employees.

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

Non-compete clauses are quite common.

Who is responsible for insurance?

The owner is usually responsible for the cost of property insurance. The operator may be responsible for operational insurances.

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

Not in itself. However, the HMA might be registered as an encumbrance on the relevant real estate so that a purchaser of the property has to respect the HMA.

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

No. It does not need to be recorded. However, it can be recorded and will enjoy increased protection if recorded.

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 situation. In general, it is difficult to achieve satisfying financing in Norway based on properties with an HMA, even with an NDA.

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

There could be a number of different agreements depending on the operator and situation, these include:

- (Brand) License Agreement
- Central Services Agreement
- Technical Services Agreement – on a new building or redevelopment
- Central Reservation Services Agreement.

In case of a project development or a refurbishment, the operator might provide certain planning, equipping, design and opening services to the owner for a technical services fee under a technical services agreement (TSA). The most important goal of the TSA is to ensure that when development/refurbishment is completed, the hotel will comply with the brand standards of the relevant hotel chain and be operationally efficient.

Transfers and assignments

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

Usually, there are no general limitations or restrictions for the sale of the hotel from the property owner. If the owner disposes of the hotel, the HMA is usually transferred to the purchaser. Please note that the operator is typically entitled to terminate the HMA if the purchaser is a competitor or operator. Is it uncommon that the operator has any other rights, such as a pre-emptive right, that can limit the possibility for a transaction related to the hotel property as such, since such clauses would limit the possibility for financing of the acquisition, construction or simply the ownership of the hotel.

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?

This depends. In the case of a share deal, the operator's approval is not necessarily required since the parties in the HMA would remain unchanged. In the case of an asset deal, the operator's approval is necessary for the transfer of the HMA to the buyer, unless specified in the HMA that the HMA is related to the property regardless of the ownership to the property. For leases (that are most commonly used in Norway), the principle is that the lease can be transferred to a new landowner as part of an asset deal regardless of the tenant's approval.

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

Although we have seen such clauses in standard international HMA agreements presented as part of negotiations, it is not common to include right of first refusals in agreements in Norway for neither HMAs nor leases. If any such rights exceptionally are included, right of first offer is more common that rights of first refusal.

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

Some owners want exit clauses if certain performance clauses are not met, see Term and Performance measures. Exit clauses are without the brand and exit fees. A standard HMA will not provide for other possibilities for sale without the brand without an exit fee.

Key contacts

Magnus Lutnæs
Partner, Head of Real Estate
DLA Piper
T 47 24 13 15 00
magnus.lutnas@dlapiper.com
View bio

Disclaimer