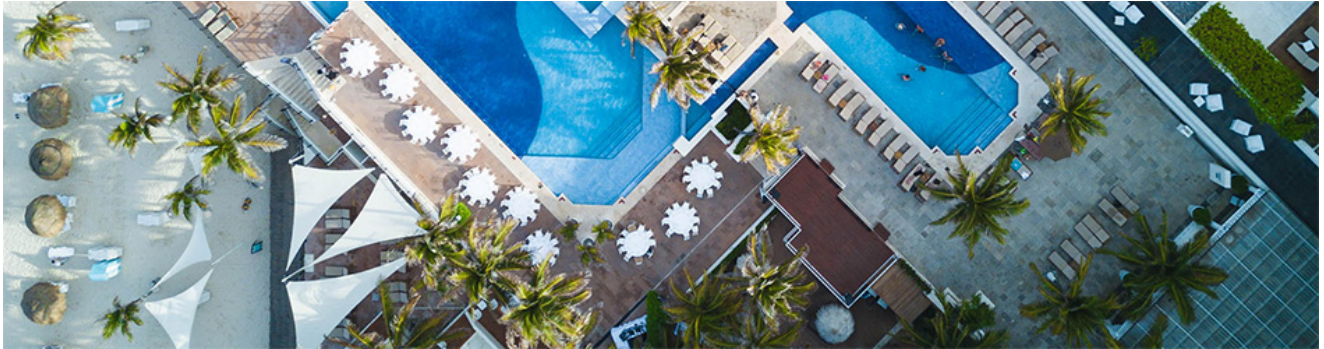


PORTUGAL

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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Portugal

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General

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

HMAs are often used in Portugal, either by managing companies or by high brand operators.

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

Lease is the obvious alternative. Most hotel operators resist taking a real estate interest, and the growth of corporate owners (and investment into them) with internal operating capacity has seen a growth in franchised hotels.

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 Portugal will commonly be governed by Portuguese law. It would be unusual for any other jurisdiction's laws to be used as the governing law.

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

There is no impact.

Term and termination

Is there a standard contract period of an HMA?

HMAs for branded operators tend to be longer in duration (15 to 20+ years), whereas average management agreements will usually be for shorter periods.

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. Where early termination or, for example, flip to franchise is negotiated, it may be subject to exit fees.

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?

This varies between different operators. Usually HMAs will be extendable in tranches of say five or ten years. This can be mutually agreed or at the operator's discretion.

Fees

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

Fee structures vary between operators. The standard is a base fee and a variable fee calculated on revenues.

Some branded operators may intersperse this with other fees.

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

Branded operators may require royalty fees and most require marketing contributions and other fees for certain centralized services, which may or may not be optional (eg accounting services).

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

Contributions and how they are operated can vary widely depending on practical matters associated with the hotel(s) (eg whether the hotel is part of a portfolio, the hotel's age, standing). Its payment may be on the owner's account or on the operator's account, depending on what is agreed.

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. Generally speaking, HMAs do not usually contain KPIs, SLAs or specific standards because fee structures often mean owner and operator interests are aligned.

What performance measures are commonly used in the jurisdiction?

They are not common except in cases of branded operators.

Is an operator or owner guarantee common in the jurisdiction?

For branded operators an operator guarantee would be unusual. Regarding owner guarantors, it will depend on the owner vehicle, if it owns the hotel (eg are there are Propco/Opco structures in place).

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

It depends on what is agreed between the parties.

The employer can either be the owner or the hotel operator. Usually is the hotel operator due to their standards and MO but parties may agree to have employees hired by the owner subject to the hotel operator's criteria and standards.

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 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 insurances in place (albeit this would be an operating expense).

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

It depends on what is agreed between the parties.

Where key money is granted or rights of first refusal on a sale etc, restrictions can be registered on the title of the hotel.

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

Not the HMA itself, but rights under the HMA may, as per the above.

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

It will depend on the bank and on the operator. Please note that there may be some legal restraints that may make it impossible to execute.

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

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

- (Brand) License Agreement
- Central Services Agreement
- Technical Services Agreement – on a new build or redevelopment
- Central Reservation
- Services Agreement
- Design 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 any change in ownership of the hotel. 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?

Traditionally this has been common in Portugal.

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.

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