



Belgium - Hotel Management Agreements

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General

1. Are Hotel Management Agreements (HMAs) common in your jurisdiction?

Yes.

2. 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, variable or a combination of both), operates the hotel on his behalf (as operator), and not on the account of the owner. It is important to note, however, that the mandatory application of the Belgian act of 1953 on commercial leases creates a number of difficulties. Said 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, 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 27 years, i.e. 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 operator under a HMA.

3. 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.

4. Are there any significant or unusual points to note in respect of tax on HMA payments in your 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

5. Is there a standard contract period of an HMA?

Unlike the situation of 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, said contract period is often of 20 years, sometimes 15 years.

6. 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 favour 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 similar hotels in the same geographic area.

7. 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 (e.g. location, brand, scale).

8. 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 10 years. If the HMA contains a clause giving the operator the right to request a renewal of the agreement, said clause also provides that the operator must exercise its option at a certain time prior to the end of the initial contract term. HMAs may also provide for one or more automatic renewal periods (the duration of which is usually 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 then current period.

Fees

9. Is there a standard fee structure for HMAs (e.g. 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 guarantee 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.

10. 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 reservation 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.

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

Virtually all HMA 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, HMA 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

12. 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 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, the owner has the right to terminate the HMA.

13. What performance measures are commonly used in your 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.

14. Is an operator or owner guarantee common in your jurisdiction?

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

15. 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 a HMA, all employees are employees of the owner, except for the top management rendering supervisory services in connection with the operation of the hotel. Said supervisory services are provided by the operator at its expenses.

16. Is it usual to have a non-compete clause, e.g. 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.

17. 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 adequately the requirements of the chain in terms of insurance coverage.

18. Does the HMA give rights in real estate in your jurisdiction?

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

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

No.

20. 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 HMA contain a NDA.

21. What other agreements usually sit alongside an HMA in your 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

22. 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 said 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.

23. When a managed hotel is sold (either asset or share deal), is it usual in your 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.

24. 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.

25. Is it usual to include provisions which enable the sale of the property with vacant possession i.e. without the brand?

No.

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