



Brazil - Hotel Management Agreements

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By:

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General

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

Yes, although there are still quite a lot of independent hotels self-owned and operated.

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

Common alternatives to HMAs in Brazil are: (i) lease agreements, (ii) franchise; or, (iii) brand licensing.

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 concerning Brazilian properties are generally governed by Brazilian Law.

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

Payments for services provided and licensing of intellectual property rights (royalties) are subject to different taxation based on whether the beneficiary is a resident or non-resident in Brazil.

In case of administrative and technical services provided by foreign parties, the tax burden may reach almost 50 percent of the amount due (net of taxes), but only a portion refers to taxes (income and service taxes) to be withheld from the non-resident and gross-up clauses are accepted.

The deduction of certain royalties (ie, trademark) is subject to limitations even (i) in transactions between non-related parties and (ii) if transfer pricing rules do not apply.

Term and Termination

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

Terms of 15 to 25 years with one or more renewal periods are frequent, but there is no mandatory contract period standard.

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

The terms are usually fixed with specific early termination possibilities established in the contract. Eg performance termination, breach of contract, condemnation, bankruptcy, etc.

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

Liquidated damages and penalties for early termination are established in many cases. In others, the contract leaves damages to be established by the arbitrator / judge, as applicable. The values vary on a case by case basis.

8. What is the usual position in respect of renewal?

One or more renewal periods of five to ten years are habitual.

Fees

9. Is there a standard fee structure for HMAs (e.g. base + incentive)?

HMAs customarily include a base fee upon gross revenues and an incentive fee upon adjusted gross operating profits.

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

Technical service fees, international chain services (marketing, reservation, etc), software, and trademark royalties are typical in HMAs with international brands.

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

FF&E reserve requirements are standard.

Performance and Operations

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

Long-term profitability with maintenance of the brand standards are common requirements.

13. What performance measures are commonly used in your jurisdiction?

A percentage of the (i) budgeted operating profit or (ii) RevPAR of a competitive set.

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

Not for the operator. Guarantees are typically required for the owner, especially with regards to trademark marketing licenses and construction works.

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

Owners are generally the employers of hotel personnel - but selected, trained and supervised by operator - except for the general manager and other key position, which frequently are manager's officers or employees. Owners may also have approval rights with regards to key hotel personnel.

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?

Territory restriction clauses may be established for a certain term.

17. Who is responsible for insurance?

The owner is ordinarily required to contract insurance for the hotel property and operation. In some cases, manager may offer Owner the option to participate in an operational insurance program, at the owner's cost.

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

HMAs do not grant in rem rights.

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

HMAs are not recordable at the relevant Real Estate Registry Office.

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

NDA clauses are commonly required, but are not subject to registration and do not bind third parties.

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

Technical Services Agreements for planning, equipping, design for construction/refurbishing, Trademark Licenses and International Brand Services Agreements.

Transfers and Assignments

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

It is common that the contract establishes that (i) transfers must be approved by operator for asset (except in case of condo-hotel sales) and limit certain share deals; and (ii) HMA transfers with the hotel. Right of first refusal is granted in some cases. Considering that under Brazilian Law the HMA is not subject to registration at the real estate registry office and does not bind third parties, it is recommended to insert an obligation for the owner to assure the HMA assignment.

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?

The operator's consent is usually required for asset (except in case of condo-hotel sales) and certain share deals. Requirements that HMA transfers with the hotel are also common.

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

Right of first refusal clauses are verified in some cases.

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

Such provisions are not common.

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