



Germany - Hotel Management Agreements

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General

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

HMAs, as well as “hybrid” agreements with lease and management elements, are increasingly used. However, the German market is still dominated by lease agreements.

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

The alternative to HMAs, lease agreements, are used and mostly preferred by property owners due to the stable and predictable income that they guarantee. In addition, banks financing the acquisition of hotel properties also prefer lease agreements. HMAs are seen as riskier, and many German players do not see a commercial benefit in HMAs and prefer to take the safe option. German open-ended funds are often not entitled to conclude HMAs due to regulatory restrictions.

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?

Usually HMAs concerning properties located in Germany are covered by German law.

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

From a tax perspective there are no particularities with regard to an HMA.

Term and Termination

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

A typical term would be 15 years.

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

Yes, usually the term is fixed. Each party is entitled to terminate the HMA if the other party violates its obligations under the HMA.

HMA's 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 two or more consecutive years, the owner is usually entitled to terminate the HMA.

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

HMA's 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 German civil law.

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

Usually, no option rights in favour of a party in order to prolong the term of the HMA exists. The parties have to agree on a prolongation of the contractual term.

Fees

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

We often see a base management fee and an incentive fee. The base management fee is at a level of 2–4 percent of the gross revenue and the incentive fee amounts usually to 8–12 percent of the GOP. Sometimes parties agree on certain incentive management fees which are applicable when a certain turnover is exceeded.

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

Besides the base management fee and the incentive fee, other agreed fees usually relate to contributions to accounting and reservation systems and to marketing efforts.

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

The owner often has to set aside funds amounting to 3–5 percent of the gross revenue per annum. Sometimes parties agree on 1 percent at the beginning of the contractual period rising to 5 percent after 10 years.

Performance and Operations

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

The parties usually agree in the HMA that the operator must operate the hotel in compliance with its operational manual and standard operating procedures.

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

Reporting obligations are common in HMA's. In addition, performance clauses combined with a termination right in cases of poor performance are often included in HMA's.

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

A operator guarantee is common in German HMA's.

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

Staff are employed by the owner, but usually engaged and discharged by the operator on behalf of and for the accounts of the owner. The operator also selects and trains the staff. However, the owner is often involved in the selection of the general manager of the hotel.

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.

17. Who is responsible for insurance?

The owner is usually responsible for the insurance.

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

No, there are no rights given.

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?

This is fairly unusual in Germany.

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

In case of a project development or a refurbishment, the operator provides 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 and be operationally efficient.

Transfers and Assignments

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

If the owner disposes the hotel, the HMA is usually transferred to the purchaser. The operator is typically entitled to terminate the HMA if the purchaser is a competitor or operator. Is it uncommon that the operator has a pre-emptive right.

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?

In the case of a share deal, usually the operators approval is required for the transfer of an HMA to the buyer. In the case of an asset deal, the operator's approval is mandatory for the transfer of the HMA to the buyer.

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

A right of first refusal is uncommon in German HMAs.

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

More recently this has been sought by owners. A standard HMA will not provide for this and if it is ever given, there is usually an exit fee.

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