



HOSPITALITY PRACTICE

# WHAT WE OFFER

# **Acquisition of Land**

- Due diligence reviews, covering transactional, financial, environmental, tax and compliance related issues
- Verification of title to the land and drafting and negotiation of sale deeds, lease deeds or development rights agreements or other conveyance deeds

# **Construction & Development of Hotel**

Drafting, negotiation and execution of documentation including:

- Construction contracts, architect's contracts, interior design consultancy contracts and other contracts for the appointment of experts for the development phase; and
- Equipment supply and other agreements with sub-contractors and vendors

# **Structuring of Investment**

- Designing and implementing tax efficient structures to identify tax exposures and the most optimal tax structure
- Risk analysis of project documentation, covering legal, structuring, commercial and tax issues
- Drafting, negotiation and execution of documentation including joint venture agreements, investment agreements, shareholders' agreements, private equity documentation and other equity and/or quasi-equity funding documentation

# **Operator & Brand Selection**

Drafting, negotiation and execution of documentation including:

- Hotel management agreements, technical services agreements, franchise agreements, marketing and publicity agreements for the provision of services by brand-owners for development of the
- Trademark license agreements for the license of trademarks and service marks by brand-owners

# Title to land Land ceilings and floor space index restrictions Delay in approvals High costs of acquisitions in certain states owing to stamp duty and registration Acquisition of Land Delay in construction Numerous regulatory approvals required Increasing costs **Construction &** Development of the Hotel Structuring of Investment • Due diligence issues Financing Delay in obtaining consents from third parties including lenders and third parties Operator & Brand **Competition thresholds** Selection Finding balance in respect of the rights of the owner Requirement of non-disturbance agreements

Issues around exclusivity

Choice between manage-

ment agreements and

franchise agreements

# **Financing**

Short loan terms with

Heavily leveraged assets

Comfort usually sought from

promoter/group companies

**Finalisation** 

of consultants

and service providers

Operation & Maintenance

high interest rates

Charge over hotel

property

**Financing** 

Exit

Limited exit rights

management test

Valuation issues

for foreign investors

available to the owner

**Enforcement of performance** 

Restrictions on assured return

- Drafting, negotiation and execution of documentation including facility agreements and security documents such as guarantees and documents of charge and lien
- Assistance in refinancing the project

• Flexibility under the hotel

owner or manager

Protection of data in

Evolving tax regime with

Disputes amongst lessors,

owners and managers

respect of guests

high GST rates

Increasing claims

under consumer

protection, food

laws

safety and criminal

management agreements in terms of selection by

Drafting of resolution plans and assistance

# Finalisation of consultants & service providers

• Drafting, negotiation and execution of documentation with consultants and other entities for provisions of pre-opening and post opening services

### **Operation & Maintenance** Security of guests

- Advice on compliance processes under all applicable laws, for example, labour law, corporate law, indirect tax laws and developmental and/or environmental
- Advice on issues faced in the day-to-day operations of the hotels, including on account of the COVID-19 pandemic
- Assistance in further investments into the hotel
- Resolution of disputes, either through the conciliation process or through arbitration

# Exit

- Structuring of the exit in the most tax efficient manner
- Drafting, negotiation and execution of documentation including share sale and share purchase agreements

# HOTEL MANAGEMENT AGREEMENTS: THE BALANCING ACT

Hotel Management Agreements (HMA's) are a peculiar form of contract involving a complex array of documentation – the operations agreement, the license agreement, the technical specifications agreement and the centralized services agreements. Managing hotels and leisure facilities inevitably lead to a complex range of commercial and legal issues. To the extent possible, it is important to ensure that the HMA comprehensively provides the terms governing the relationship between the owner and the manager so as to ensure a smooth partnership between the owner, and manager. A few of the issues that invariably come up are:

# The Equilibrium

Owners, despite having the most skin in the game, have very little say in how their asset is to be managed.

Managers often come to the table with their standard form of contract containing little room for variance.

From the outset, there is a gap of understanding between the manager and the owner as regards industry standards of practice and the terms underlying the all-encompassing HMA.

# Rights of a Manager

On account of them being the chief financiers of the hotel project, owners usually want to be assured of a return on investment, and accordingly, actively seek certain restrictions to be placed on the rights of the manager.

Limitations on the rights of the manager are typically in terms of financial expenditure beyond a certain threshold, entering into agreements with third parties beyond a certain term, and so on. Often, these limitations are superficial, and are agreed to by the manager with large caveats.

Limitations ought to be balanced such that the manager is not unduly restricted from doing what he is best at – operating hotels.

## **Control Right to Owners**

Hotel asset owners seek greater inclusion in the management of the hotel through approval rights under the HMA. Such approval rights may be over certain line items in the annual plan, capital expenditure, monthly meetings with the general manager to review the performance of the hotel, and so forth.

Managers do not shy away from the inclusion of a 'non-interference' provision in the HMAs, restricting the owner from interfering in the managers operation of the hotel.

It is important that both parties have meaningful rights under the HMA that are exercised with the interest of the hotel in mind.

# **Non Disturbance Agreements**

An increasing number of HMAs require the owner to obtain an NDA from the lenders of the owner so as to bind the lender in the event of default by the manager or owner to take over the hotel. The middleman in this scenario, the owner, wants for nothing more than to be able to construct, build, equip and operate the hotel.

Managers insist on NDAs as they would like to have control over any potential transferee of the hotel; while the goal of the lender is simple – for borrowers to fulfil their obligations under the loan documentations and pay off at maturity.

It is important to appoint an advisor to harmonise the interests of all the parties.

## **Employee Relationships**

Barring a few key personnel, the owner typically has little to no say in the recruitment and retention of employees. In reality the hotel employees are engaged by the owner of the hotel.

Under the HMA, one of the functions of the manager is to recruit and train all employees of the hotel and also set the human resource policy in all respects. The manager directs and controls the employees in the performance of their duties in relation to the hotel. The wide role of the manager in this regard would cause one to believe that employees of the hotel are employees of the manager.

Accordingly, the owner is responsible for the employees in the performance of their functions and duties in course of their employment and may be held vicariously liable in certain scenarios.

## **Ownership of Guest Data**

During the operating term, the data is shared between the manager and owner, however on termination; it is typical for the HMA to stipulate that the operator retains ownership of guest data. Managers prefer to keep ownership of guest data to themselves, even to the exclusion of the owner.

In light of the fact that the value of guest data has gained prominence through the years, owners and managers often dispute as to who would have the right to guest data as per the HMA.

### **Transfer Restrictions**

HMAs typically have restrictions on the ability of the owner to transfer the hotel. Indirect transfers by way of transfer of interest in the owner entity are also prohibited. There are restrictions from transferring interest to certain persons who are prohibited under foreign laws or even to persons that, in the opinion of the managers are undesirable.

Consent of the manager for acquisition of a substantial stake may therefore be a prerequisite to a hotel investment or acquisition transaction.

Understandably, developers and owners have reservations signing up to such restrictions as their ability to exit is hampered by such wide and often subject restrictions.

## **Exit Rights**

There are limited exit rights available to the owner under any HMA. One rarely comes across an HMA where the owner may terminate for convenience or on sale of the hotel.

Other exit rights available to the owner include a failure of the performance test by the manager. The provision of the performance test itself is riddled with so many terms and conditions that we are yet to see a termination on this basis.

It is crucial that owners and managers negotiate language that is meaningful on a going-forward basis to ensure the optimum performance of the hotel and maximum accountability of the parties involved.

#### **Dispute Resolution**

- The standard approach in HMA's across various hotel operators is to have a two-pronged approach in respect of dispute resolution (a) have disputes resolved either by arbitration; or (b) by determination by an expert in the hospitality sector. However, certain operator's do opt for resolution of all disputes by arbitration.
- Arbitration being one of the preferred dispute resolution mechanisms, certain factors must be considered
  while drafting an arbitration clause in an HMA. The mode of arbitration, whether institutional or ad hoc, the
  method of selection and number of arbitrators, the rules governing the arbitration, the enforcement of
  awards should be carefully considered.

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# ABOUT ECONOMIC LAWS PRACTICE

Established in 2001 with the aim of bringing together a diverse set of professionals to deliver effective solutions for clients, Economic Laws Practice (ELP) is today a leading full-service law firm in India with more than 200 professionals — lawyers, chartered accountants, cost accountants, company secretaries, sector experts and economists — assisting clients on transactional, advisory, litigation, regulatory and tax matters.

ELP was recently featured as among the top 10 law firms in India in the RSG India Report 2019 and several of our practices are rated as Tier 1 by leading agencies in India and globally. ELP has an extensive client base across multiple industry sectors with clients from Fortune 500 companies, public sector undertakings, multinationals, Indian corporate power houses and startups. We work closely with leading global law firms in the United Kingdom, the United States, the Middle East and Asia-Pacific region, giving us the ability to provide real-time support on cross-border concerns. ELP is the India representative for the Taxand global network- the world's largest network of independent tax organizations (Taxand represents leading tax firms across 50 global jurisdictions) allowing us to offer a wider portfolio of services to our global clients.

ELP is actively engaged and collaborates with governments, regulators, legislators, businesses and industry associations to achieve positive and sustainable long-term conditions.

# **Client Testimonials**

### "

The firm has an extended range of practice areas with lawyers in each "well versed in the subject matter that they deal with" and adept at "managing large scale work." They have a strong "commercial sense" and are considered "quite unlike other law firms operating in this sphere." One client commented that the lawyers at ELP "feel passionate about the cases they deal with and their understanding of the operational aspects of capital markets also holds them in good stead."

- RSG India Report



The team is conscientious, hard-working and very responsive. They are also tactful in dealing with stakeholders. They have a good breadth of resources for dealing with market issues.

- Chambers Asia Pacific



[A client] considers Economic Laws Practice to be among the best firms in India due to its personalized attention and strategizing.

- India Business Law Journal

#### "

Economic Laws Practice was started in 2001, but has most definitely become "one of the most exciting firms to look out for", comments a peer.

- Asialaw Profiles

# OUR AWARDS AND RECOGNITIONS





#### Law Firm of the Year for:

- Taxation
- International Trade
- Policy & Regulation



One of the world's top specialist arbitration firms, and amongst the only three firms in India that have been recognized and recommended for arbitration expertise.

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2022 RANKINGS

#### **Highly Recommended for:**

- Banking & Finance
- Capital Markets
- Corporate & M&A
- Energy
- Infrastructure
- Private Equity
- Project Finance
- Restructuring & Insolvency
- Telecommunications
- Transport



## **Top Tier Firm in India for:**

- Tax
- WTO/ International Trade

#### Ranked for:

- Banking & Finance
- Competition & Antitrust
- Dispute Resolution
- Projects, Infrastructure & Energy
- Private Equity
- Corporate & M&A

#### **Spotlight Table:**

International Cross Border Capabilities



#### **Top Tier Firm in India for:**

- Dispute Resolution
- Projects and Energy
- Tax
- WTO/ International Trade
- Antitrust & Competition
- Corporate and M&A

### **Highly Recommended for:**

- Banking and Finance
- Capital Markets
- Investment Funds
- Real Estate and Construction
- TMT



ASIALAW PROFILE RANKINGS 2022

#### **Outstanding Firm for**

Tax

# **Highly Recommended for:**

- Banking & Finance
- Competition & Antitrust
- Dispute Resolution
- Energy & Natural Resources
- Projects & Infrastructure
- Regulatory
- Restructuring & Insolvency

# Recommended for:

Capital

### **Recognized for:**

Real Estate

## **Notable for:**

- Investment Funds
- Financial Services
- Technology & Telecommuni cations



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