

'Mixed use' hotel developments in emerging markets

By Stephen Kelly



With changes to the nature of hotel development, and the manner in which such developments are funded, developers, hotel owners and hotel operators face a new reality when developing, owning and operating in mixed-use buildings.

Traditionally hotel owners and operators have sought to own and operate hotels in 'stand-a-lone' buildings to ensure they have complete control over the building and the implementation of their brand standards. This generally saw hotel owners and operators seeking to avoid owning and operating within 'mixed-use' buildings that contain other uses (such as residential or office use) and shared facilities.

In recent times, there has been a noticeable shift towards the construction of hotels within larger mixed-use buildings and communities. This is particularly prevalent in emerging markets where there has been an emphasis on hotel resort-style mixed-use developments where funding has been supplemented from sales of the residential apartments. This shift now sees many hotel owners and operators facing ownership, management and operational issues that arise from being part of a larger mixed-use development and from jurisdiction-specific legislation that regulates such developments.

At the forefront of this legislation in most jurisdictions are laws and regulations that govern developments with 'multiple-ownership' and which create rights in favour of, and impose obligations on, owners and occupiers within mixed-use buildings. Often this legislation impacts on the ownership, management and operation of the mixed-use development which may be inconsistent with the objectives of the hotel owner and operator.

In many emerging markets these laws and regulations are in their infancy and do not adequately deal with the complexity of the developments. In this instance, the regulatory authorities are often looking to other mature markets for guidance as to how to govern these developments. This is particularly so where emerging markets are in close proximity to each other and another market may obtain a competitive advantage by regulating such developments in a more favourable manner that supports consumer confidence and makes it more attractive to invest in such market.

To overcome these management and operational concerns, a

common approach taken by many hotel owners and operators is to enter into contractual arrangements with the developer that provide for the hotel owner or operator to effectively manage and operate the whole of the development including the hotel. Although this may appear to satisfy the hotel owner's and operator's concerns, such contractual arrangements may however conflict with the current legislation (or importantly, proposed legislation) in the jurisdiction and may not be enforceable. The hotel owner and operator often take false comfort in these contractual arrangements not realising that the proposed management and operational arrangements may not be possible in the jurisdiction. As such, it is necessary for hotel owners and operators to consider jurisdiction-specific legislation (and proposed legislation) when considering owning and operating in each market, and in particular, how such legislation may impact upon its operational and management objectives.

Once the developer, hotel owner and operator have assessed the legislation and determined their ownership, management and operational rights and responsibilities in the context of such legislation, such rights and responsibilities need to be embedded in the contractual arrangements between the parties, the governance documentation for the development and the sales documentation for sales to third parties. Importantly, this involves ensuring that the hotel management agreements to be entered into between the developer, hotel owner and operator are tailored to the jurisdiction to ensure compliance and drafted to include provisions relevant to mixed-use developments. This generally requires amendment to the hotel operators' standard form hotel management agreements used in other jurisdictions to ensure that it complies with the local jurisdiction and adequately deals with issues relating to the mixed-use development.

Well structured mixed-use developments and carefully prepared contractual, governance and sales documentation that accords with international best practice and is appropriately tailored for the relevant jurisdiction will assist in ensuring that the parties are fully aware of their rights and responsibilities and may assist in avoiding future ownership, management and operational disputes.

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