

7. HOTELS

Hotel Business in Ukraine: Some Legal Aspects

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1. Development Preconditions

The main incentive of the hotel development during the last couple of years is Ukraine's participation in the European Football Championship, which is to be held in 2012. The preparation of Ukraine for this event seems to be of the highest priority for the current government. Already in 2007 the Ukrainian Parliament issued the Law "On Organization and Holding of the Final Part of the 2012 European Football Championship in Ukraine". According to the State Program developed in order to implement the aforesaid Law, it is planned to construct (reconstruct) around 37,569 rooms (wherefrom 20,763 in Kyiv). Pursuant to the requirements of the UEFA, 34 new or reconstructed hotels have to be finished by 2012.

It is worth noting that the hotel development is preconditioned not only by the desire to hold the European Football Championship in 2012 but also by some objective criteria. Currently, there are approximately two hotel rooms per one thousand inhabitants in Ukraine, whereas in the European Union this figure is estimated to be within the range of 14 -18 rooms.

2. Hotel development for 2012

One of the crucial issues of the hotel development is the approval procedure of the design documents, which, on the average, can take from six to eighteen months. Partially, the bureaucratic and financial burdens have been minimised by the preferences set forth in the Law "On Organization and Holding of the Final Part of the 2012 Eu-

ropean Football Championship in Ukraine". Once the building is included into the list of the objects to be developed for the football event in 2012, the developer would enjoy the following advantages:

- Responsible state bodies are obliged to consider on a first-priority basis and approve design documents necessary for construction;
- The compulsory state expertise of the design documents shall be also performed within the shortest period of time;
- The construction permit shall be issued within 20 days, once all necessary documents have been submitted;
- Developers are released from the obligatory infrastructure participation fee (for hotels can be up to 10% of the construction costs, for more information, please refer to the Brochure of BEITEN BURKHARDT "Real Estate Law in Ukraine", edition 2009).

Certain additional advantages relating to the priority land reservation for hotel projects are stipulated by the Land Code.

3. Tax Vacation

In July 2010 Ukrainian Parliament adopted the Law which foresees exemption of three to five star hotels from the corporate profit tax for the next ten years, under the condition, however, that the hotels are commissioned before September 1st, 2012. The tax vacation itself begins on January 1st, 2011, respectively allowing hotels to apply for the tax exemption. Subject to ex-

emption are rather wide understood hotel services which include so-called main services (hosting and food) as well as other services which are usually not included in the standard room price (SPA, Fitness etc.).

Judging from the wording of the respective provisions relating to the corporate profit tax exemption, specifically: “tax exemption for enterprises providing services in hotels of ...”, one should conclude that the tax exemption shall not apply only in the instances when profit is received directly by the hotel owners; the aforesaid exemption should be also applicable with respect to the enterprises which in effect provide hotel services (e.g. under lease or property management agreements).

To mention is that the same provisions have been implemented in the new Tax Code, already adopted by the Ukrainian Parliament but still not signed by the President.

4. Certification

There is no special law in Ukraine governing the hotel businesses. The definition of the hotel is given in the Law “On Tourism”, since the hotel business is considered to be a part of the tourist sector. According to this Law, the hotel is “an enterprise of any legal form and any ownership consisting of six or more rooms and providing hotel accommodation relating to a temporary stay with an obligatory servicing”. Thus, “hotel service” means the enterprise’s operations to host the consumer by providing a hotel room (place) for temporary stay and other hotel services.

Hotels are classified into five categories. The classification procedure is established by the Resolution of Government dated July 29th, 2009. The certification is to be performed by a committee formed out of the representatives of different state bodies. Assignment of the respective “star” to a hotel is formalized in the certificate having a term of validity not exceeding three

years; as to the hotels having their own certified quality management system, the term of validity of the aforesaid certificate may not exceed five years. The procedure of the star certification may not exceed 30 days. The certification requirements are stipulated by the State Standards “Hotel Services. Certification of Hotels”, which have been in force since 2004.

Before a hotel is assigned the respective classification category, it has to undergo a compulsory state certification aimed at establishing the fact whether it complies with the applicable legal requirements and standards. The result of the compulsory certification shall be formalised due to issuance of the Compliance Certificate. The Compliance Certificate can be issued a maximum period of time comprising five years. The Compliance Certificate for hotels, which have their own quality management system, can be issued without validity limitation, subject, however, to maintenance of a valid certificate of the quality management system. The compulsory certification procedure may not exceed 60 days.

Certification of a hotel with the respective star category should be considered, of course, as non-compulsory. This was expressly stated in the previous edition of the Rules “On Compulsory Certification of Services Relating to the Temporary Stay”. According to the new edition of the Rules dated June 17th, 2010, it is not completely clear whether the star certification shall be obligatory. The new wording was very likely affected by the fact that the government has to comply with the UEFA requirements relating to the certified three to five star hotels. Hence, it should be expected that the certification authority will perform the star certification at all times when it performs the compulsory certification. Given the fact that the aforesaid corporate profit tax vacation is linked to the classification of the hotel as three, four or five star hotel, the initiation of the aforesaid certification should be also in the interests of hotels.

5. Operation

Historically, the hotel operation was structured in Ukraine through a lease agreement (usually, for municipal or private hotels) or through a property management agreement (typical for the state owned hotels). Hence, operation agreements, based on which international operators are ready to enter the Ukrainian market, are rather an unknown legal tool for Ukrainian owners and developers. In spite of cultural differences and difficulties during the negotiations over the operation contracts, there are many legal peculiarities which make such negotiations and agreements even more stressful.

International operators almost unexceptionally insist on having their draft agreements; they have successfully tested them in different regions within different legal backgrounds. It is very common that such agreement is governed by the US or UK laws. Given the fact that the most provisions of an operator's agreement are set out rather as services, there should be no problem to agree on the choice of law, subject, however, to the fact that one of the parties (operator) is a foreign legal entity (not under the Ukrainian law). If the operator is acting through a legal entity established in Ukraine, the choice of the applicable law will be impossible, if the owner of the building is also a Ukrainian legal entity or an individual. Organisation of the hotel operation without having an established legal entity in Ukraine causes a number of practical difficulties mainly related to employment, tax and customs peculiarities. Should the operator just hold a representative office, the choice of law is again open, though, from a tax point

of view, however, this structure will be not the most advantageous.

Even if the choice of law is open, there may still be certain operation provisions which parties cannot simply take over to the operation agreement. This relates in particular to those provisions which can be interpreted as property management. The property management agreements have to comply with the applicable Civil Code provisions, especially about their form, which means notarisation and state registration. Under the Ukrainian international private law, the rights which undergo state registration shall be defined based on the law of the country, where the real estate is registered; this means that the property management agreements/provisions can be governed only by the Ukrainian law.

Unlike the choice of applicable law, arbitration clauses for the International Commercial Court (ICC) at the Ukrainian Chamber of Commerce and Industry may be validly agreed even if both parties are Ukrainian legal entities with one of them being a company with foreign investments. It should be emphasized that in the instances when both parties to the hotel operation agreement are Ukrainian legal entities, the choice of the international arbitration other than ICC at the Ukrainian Chamber of Commerce and Industry, will be not valid.

As a result, the imperative provisions of the international private law have significant influence on the structuring of the hotel operation activity in Ukraine as well as on the contents of standard operation agreements.