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Global Hospitality & Leisure Update

UK Immigration Update

A major overhaul of the UK employment law relating to the use of immigrant labour is having a significant impact on Britain's hospitality and leisure industry. The new system makes it easier to hire foreign nationals in the UK but puts a far greater responsibility on employers to conduct relevant checks and maintain up-to-date records. Please click here for the full UK Immigration Update.

UK Immigration Update

A major overhaul of the UK employment law relating to the use of migrant labour is having a significant effect on Britain's hospitality and leisure industry. According to the British Hospitality Association, there are 1.5 million people employed in the industry in the UK. It is estimated 23% of those working in this sector were born abroad. Accordingly, there will be very few employers in this sector who remain unaffected.

The Government is pursuing a three pronged strategy:

- increased penalties for offenders;
- more vigorous enforcement of the laws relating to the employment of migrant labour; and
- the introduction of a new points-based system for skilled workers.

Increased penalties for offenders

Employers convicted of negligently hiring illegal workers will now be faced with a fine of up to £10,000 per illegal worker. If they hire an illegal immigrant knowingly, they could face an unlimited fine and up to two years imprisonment.

Since the new law came into effect last year the largest fine has been £30,000. It was imposed on an Indian takeaway employing several illegal workers.

More vigorous enforcement of the law

In 2007 only 15 business were caught hiring illegal immigrants. By the end of November 2008 there had been well over 500 prosecutions.

It is particularly important to note that employers who outsource their checking process to a third party may not escape liability if they are found to be employing illegal workers despite doing so unknowingly.

New points based system

The most significant change being introduced is a new points-based system for skilled workers. This is based on an Australian model and replaces the work permit scheme previously in force.

The new system requires employers to obtain a licence issued by the UK Border Agency to offer jobs to skilled workers. Licensed employers will be able to issue a foreign worker with a certificate of sponsorship if it can be shown that the skilled role could not be filled from the resident workforce. Employers will need to have advertised the position for a minimum of two weeks before being able to issue the certificate. Employees will also need to have attained a certain number of points for qualifications, earnings and English skills.

Exemptions to certain of these requirements are available for intra-company transfers and shortage occupations. Despite the recognised shortage of skilled workers in the industry, in particular chefs, currently no hospitality and leisure related jobs are listed as shortage occupations.

Summary

The new law has been designed to make it easier for employers to hire foreign nationals as it removes the lengthy work permit application process. However, it also puts a far greater responsibility on employers to conduct relevant checks, keep accurate and up to date records and report any changes in migrant workers' circumstances. Employers who fail to do so risk having their licence downgraded or even revoked completely.

As a result of the increased responsibility on employers, coupled with the new criminal and civil penalties which apply, employers are advised to have a dedicated and trained member of their HR team to deal with all their immigration needs and duties.

More information on the new points based system and employment issues generally is available from our London Employment Group's website:

http://www.mayerbrown.com/london/index.asp?nid=1565

UK Minimum Wage

The UK Government has launched a consultation on proposed amendments to the minimum wage legislation. Please click on the following link for further details: UK minimum wage and tips.

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Currently, where tips and gratuities are given directly to workers by customers and are retained by the workers without any other party being involved, they cannot count towards national minimum wage payments. Where service charges, tips, gratuities and cover charges, are paid by the employer to the worker via the payroll then the tip can count towards national minimum wage pay (currently £5.73 per hour for adults).

The Government proposes to amend the legislation so that tips can never count towards payment of the minimum wage. It will also require restaurants to make it clear how they distribute tips so that customers know where their money is going.

Consumer Protection and Hotel Exchange Rate

In 2008, ***Shaw v. Marriott International, Inc.*** ended a trilogy of "house exchange rate" cases where hotel companies were charged with consumer fraud and unjust enrichment when they used the official exchange rates when quoting room rates on their website with a less favourable exchange rate when calculating the ultimate price that guests pay on checking-out. For further details of these cases, please see the following link: Consumer Protection and Hotel Exchange Rates.

Consumer Protection and Hotel Exchange Rates

In 2008, Shaw v. Marriott International, Inc. ended (but without a definitive conclusion) a trilogy of "house exchange rate" cases where hotel companies were charged with consumer fraud and unjust enrichment when they used official exchange rates when quoting room rates on their website but a less favourable exchange rate when calculating the ultimate price that guests paid on checking out. Although the damage sought for each case was relatively small - US$1,500 or treble the disparity in prices - the intention of the plaintiffs in each case was to form a class action suit that would involve and benefit every guest who had ever experienced such a discrepancy.

The Result

In all three cases the Guest Plaintiff's arguments were rejected by the courts. The facts and the basis for the judgment in each varied marginally.

In Shaw v. Hyatt International Corporation the discrepancy between the US dollar exchange rate published on Hyatt's website and that actually paid by Mr Shaw on checking out of the Ararat Park Hyatt Moscow Hotel was 14%. Mr Shaw made the booking on his computer in London however the action was brought in Illinois where Hyatt has its corporate offices. The Court of Appeals for the Seventh Circuit was unable to find a sufficient nexus between the transaction and Illinois as Hyatt are registered as a Delaware corporation. They also found that as a contract had been formed between Hyatt and Mr Shaw the consumer fraud legislation would not apply.

In Bykov v. Radisson Hotels International, Inc. and Others Mr Bykov had asked an employee to make the reservation. The Minnesota District Court gave a summary judgment that, as the plaintiff had not made the booking himself and it was ultimately charged to his company, he lacked standing. This was affirmed by the Court of Appeals for the Eighth Circuit.

In Shaw v. Marriott International, Inc. Mr Shaw pursued his action in the D.C. courts. The facts were similar to the Hyatt case except Marriott had made no representation on its website that the exchange rate was merely an approximation. Nonetheless the D.C. District Court found that Mr Shaw and his companions had made the transaction on a business trip and hence they were not afforded the protection of the District of Columbia's Consumer Protection Procedures Act.

The Implications

Although in all three cases the hotel company escaped liability they did so on the grounds either that the relevant legislation did not apply or on the disqualification of the plaintiffs. It is not impossible to envisage that a court interpreting different consumer legislation would come to a different conclusion.

There are several steps that hotel operators may wish to consider to minimise their exposure to this type of claim:

- ensure that the basis of the exchange rate used in the reservation website is the same (or as is close as is practically possible) as the basis of the exchange rate used by the hotel;
- where there are likely to be exchange rate fluctuations and it is impossible to guarantee the rate of currency conversion this should be made clear on the website at the time of quoting the rate or when the guest makes a reservation over the phone. Consider whether the system should allow the guest to "fix the rate" at the time of booking either by payment or simply accepting a currency exchange rate; and

- when negotiating with third party hotel booking sites ensure that they bear as much of the risk as possible of any discrepancy between the price they quote and the actual price the guest will need to pay.

Finally, these cases also highlight the complexity of determining which jurisdiction should govern claims against hotels and hotel companies. This is particularly apparent where bookings are made over the internet. None of these cases satisfactorily resolved this issue and, accordingly, all parties will need to consider carefully how to draft their jurisdiction clauses.

Terrorism: the implications for hotel management agreements of events outside owners' and operators' control

Terrorist events outside the control of an owner or operator present significant issues of risk allocation for both parties under hotel management agreements. The attached link identifies those provisions in hotel management agreements to which both owners and operators should pay particular attention when negotiating agreements in today's environment.

Terrorism – the implications for hotel management agreements of events outside owners' and operators' control

Terrorist events outside the control of either an owner or operator present significant issues of risk allocation in hotel management agreements for both parties.

There needs to be legal certainty and fairness in how risk is apportioned between owner and operator. This particularly applies to significant provisions that deal with repair and restoration of the hotel, appropriation or forced alteration of a hotel, force majeure, guest liability, and insurance.

Repair and restoration of a hotel

Where a terrorist event has significantly damaged a hotel one of the key questions a hotel owner will likely ask is, "Should I restore my damaged hotel or would it be better to start afresh with an entirely new class of property?" He or she may, however, be contractually bound to the operator to reinstate the hotel and accordingly have no opportunity to exercise his preference.

Under a management agreement the obligation on the owner to reinstate the hotel usually depends on the extent of the damage. Only if the costs of repair exceed a specified threshold, will the owner have the right to terminate the management agreement and start again.

What is useful from an owner's perspective is to have another, lower, threshold which is applicable when the damage is not covered by insurance. The determination of both thresholds is a matter for the owner and operator to negotiate. Clearly having a low threshold, particularly for damage not covered by insurance, is very important for every owner.

Appropriation and forced alteration of a hotel

Although not directly relevant to terrorist events there is always a possibility that a hotel becomes appropriated by a government or an army. In such a situation an owner will generally have the right to terminate the management agreement if the hotel is taken for a long period of time, often 12 months.

If the length of "appropriation" is shorter than the specified period, the owner will normally be obliged to repair and reinstate the hotel after the "appropriation" unless there is an excessive cost of repair, as discussed above.

There is also a question as to whether the term of the contract should be extended in such circumstances by the period of "appropriation".

In Hangzhou, China, there were reports late last year that the local authorities might impose an order on the Shangri-La to remove the top few stories of its hotel to meet new height restrictions as part of Hangzhou's drive to attain UNESCO heritage status. This would amount to a partial appropriation and should also be dealt with in the management agreement by providing a right to terminate if the appropriation makes it commercially or practically impossible to operate the hotel.

Force majeure

Force majeure is normally regarded as a boilerplate provision. Yet in the aftermath of a terrorist attack (or other major incident) it can become key to the operation of the whole agreement.

Following a terrorist attack hotels in a city, country or even region may experience difficult trading conditions. Hotel operators may well struggle to meet their performance tests. Whether this will trigger performance termination will depend on how the force majeure clause is drafted.

Equally there may be hotel operators who continue to miss performance targets well after recovery. From an owner's perspective it will be important that such an operator is not able to use a force majeure clause to excuse poor performance. From the operator's perspective it is critical that it does not fail the performance test for reasons unrelated to its performance.

Force majeure provisions might be used by either owner or operator and drafting need not favour one or the other. It is, however, important to ensure that there is complete clarity on what is included and when it will apply.

Liability towards guests

Hotel guests who are victims of terrorist attach may bring claims of negligence against hotels who have suffered attacks. However, who is responsible to cover such claims, particularly where there is a gap in insurance coverage?

In general, hotel ownership entails becoming liable to the possibility of very large personal injury claims. This liability may be direct. The operator will usually insist that the owner indemnifies them for most, if not all, risks.

Given the extent of possible claims, owners are advised to ensure they negotiate indemnity clauses to be fairly balanced with reasonable carve-outs of the indemnity they give operators and ideally with some form of reciprocal indemnity from the operator to the owner. Indemnities in relation to the negligence of the general manager and other key staff are particularly worth fighting for (although these are usually capped).

It is also preferable that owner and operator work together to ensure that reasonable care standards are met. This may include implementing appropriate security policies, providing crisis management training to all employees and regular reviews of how the hotel itself may be made more secure.

Insurance

Where there is a terrorist attack, the question of terrorism insurance becomes fundamental.

In the absence of terrorist insurance, liabilities are likely to be borne entirely by the owner unless the hotel is located in a country where the government will step in to meet liabilities or provide other financial support.

In deciding the type and extent of insurance necessary it is always useful for the owner and operator to work together with their respective insurance brokers to work out a common ground. During the negotiation of the management agreements key issues are often who bears the cost of the insurance, what happens if one party invalidates the insurance and what is the situation if a specific type of insurance isn't available in a particular market .

Conclusion

Ultimately even the most comprehensive and well drafted hotel management agreement cannot prevent terrorists attacking hotels or hotels being affected by other force majeure events. What a fair and well thought out contract will do is provide protection for the interests of owners and operators and provide sufficient clarity to help both parties move forward in the aftermath.

The Hotel Cipriani Case – using your name in different EU countries

This alert, issued by the Intellectual Property Group in London, relates to the trade mark dispute between the owners of the Hotel Cipriani in Venice and the operators of the Cipriani restaurant in London. This is of interest in terms of:

when the use of your own name is a defence to trade mark infringement (here, both businesses had connections with members of the Cipriani family);

whether applying for an EU-wide trade mark, when you know another business uses that mark within the EU, amounts to "bad faith" so as to invalidate your trade mark; and

whether businesses such as hotels, which are located outside the UK but take bookings from UK customers, can sue in the UK under the law of passing off.

See http://www.mayerbrown.com/publications/article.asp?id=6081&nid=6 for a full report of this case.

Mayer Brown's Global Hospitality and Leisure Group – a year in review

2008 was a year of integration between Mayer Brown and JSM following the combination of the two firms in January 2008. For the legacy hospitality and leisure groups, that meant a year of exciting interaction between our 21 offices to create a generally global hospitality and leisure group.

The process of integration has also been hugely rewarding because of the work put into share knowledge, market intelligence and deal experience so that we can provide real global capabilities for clients requiring that. This strength being underlined by our appointment in 2008 to Jumeriah's world wide panel.

The global group was busy with work as well. Despite the difficult trading conditions in 2008, the global group was still involved in a significant volume of hotel related work across the Americas, Asia Pacific and EMEA, acting on approximately 150 hospitality and leisure related matters, including sales, purchases, financing, development, management agreements (including helping with template agreements), litigation, arbitration and fractional ownership. We even drafted passenger and sales contracts for a luxury train!

For more information please see our website: www.mayerbrown.com.

Mayer Brown's Global Hospitality and Leisure Group – the Year Ahead

It is unnecessary to emphasise the point that 2009 will not see the kind of explosive growth witnessed throughout the hospitality and leisure industry in the recent past. The ongoing global financial crisis is already affecting existing hotels' profitability and the lack of credit is a major potential (if not an actual) impediment to growth, especially for the operators with an "asset right" approach and significant development pipelines. However, it seems to us that some things are unlikely to change. See attached for our view on these fundamentals.

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Market Forces

The fundamental demand for hospitality and leisure services globally will continue to increase as the pool of "consumers" expands.

Markets in Asia, Africa and South America remain undersupplied with hotel rooms. This is particularly the case in the budget and medium priced hotel sector and is often greatest in the second tier cities. Indeed in some key markets the RevPar for this sector is heading upwards as travel budgets tighten whilst the luxury sector is being hit hard.

Markets in Europe and North America where the sector is more developed may see less significant long-term growth. It will nonetheless be subject to ongoing changes and development as new consumers, owners and financiers enter and reshape the market.

In the UK, the top budget hotel brands have continued to expand and fight for market share. Travelodge, for example, has launched a £150m investment scheme to expand its property portfolio in Scotland and has stated that it is looking to acquire properties from hoteliers looking to withdraw from the market due to the current economic conditions. The strategy is part of Travelodge's plans to acquire 4,000 plus rooms a year and a further 70,000 rooms by 2020.

Apportionment of Risk and Reward - the need for balanced agreements

Well drafted contracts between owners, financiers and operators which distribute risk and profit fairly between each will continue to be essential for a successful hotel project.

The idea that the only really important clauses in hotel agreements were those that dealt with fees and charges has been demonstrated to be wrong. It is just as important to have a contract that provides as fair a compromise as possible on performance tests, termination upon sale or redevelopment, force majeure, dispute resolution, non-disturbance agreements and many other issues.

Globalisation and Consolidation

An already global industry will become more so. Different regions may be at different stages of development and the pace generally will slow relative to the explosive growth of recent years. However, development will continue and as prices fall and credit becomes more readily available there are likely to be more acquisitions in the hotel sector. Mayer Brown is confident the need for advice on development and acquisitions from counsel with experience in the sector will be as important as ever.

International Hotel Investment Forum, Berlin – 9-11 March 2009

We look forward to seeing you in Berlin at the annual IHIF conference in March. There will be 7 members of the Global Hospitality and Leisure Group attending. If we have not already been in touch with you to meet up whilst we are at the conference and you would like to meet up with any of us, please let us know.

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