

Brazilian Syndicated Ownership: Is This A Condo-Hotel?

Brazil's condominium hotels are quite different from the U.S. products that have achieved so much attention in recent years. The Brazil product, popularly referred to as an "aparthotel," traces its roots to the 1970s, when hyper-inflation in Brazil made attractive investment in a real estate product with continually adjusting rents. The growth of the prod-

uct was later sustained by the relative unavailability of debt capital. Clearly, the most significant differences between the U.S. condo-hotel and its Brazil counterpart result from the absence of the anomalies found in the United States as a result of U.S. securities laws. For example, aparthotel units are sold as investment products. Operating pro formas are permitted to be part of the offering materials. Additionally, owner use can be restricted in aparthotels with "hotel" zoning. Note that there are residentially zoned aparthotels in which owner occupancy has become an issue based on recent case law. Conversely, a commercially zoned aparthotel can be structured to either allow or restrict owner occupancy, as desired by the developer.

Aparthotel unit purchasers are generally required to participate in on-site rental programs. Revenues from all units, as well as other profit centers are pooled.

While Brazil's condominiums are statutorily defined (distinguish the civil code condominium, which is outside the scope of this article and is not used for aparthotels), it is not subject to a variety of restrictions found in many U.S. jurisdictions that are of great concern to branded hotel operators and developers, including statutorily established procedures for budget approvals, assessment methodology and tenure of third-party management agreements.

Organizationally, the aparthotel relies on Brazil's commercial code, dating to 1850, and its "special partnership" vehicle (updated with new civil code), which provides for a single "trading" or "ostensible" partner with broad apparent authority enabling it to bind the condominium, and multiple "investment" or "hidden" partners, similar to limited

partners in the United States. The special partnership structure provides flexibility that allows a balancing of investor and hotel operator interests.

While it has been customary for the hotel operator to act as an ostensive partner, new regimes have been noted that utilize an independent third party to act as the ostensive partner and enter into a separate hotel management agreement with a third-party hotel operator. Unlike the U.S. condo-hotel, the developer does not typically maintain involvement in the operational side of an aparthotel.

Matters addressed in the organizational documents of the special partnership should include the funding of operating shortfalls and capital expenditures to maintain compliance with the hotel operating agreement, as well as major decisions requiring investment partner approval. Through the special partnership organizational documents, the rights and obligations of hidden partners must be established in a manner that balances the marketability of condominium units and partnership interests with the need of the hotel operator to maintain brand standards. Unlike in the United States, this balancing is unfettered by the overlay of poorly defined and frequently impractical legal constraints.

This article is intended as merely an introduction to a product whose family relationship with the U.S. condo-hotel belies its important differences. This is not intended to provide legal advice, and knowledgeable legal counsel should be consulted before engaging in transactions in this area. ■

Contributed by José Ernesto Marino Neto, president and founder, BSH International, São Paulo, and Andrew Robins, partner, Proskauer Rose, New York City.

Among the noteworthy apart-hotels in São Paulo is the Sonesta São Paulo.



uct was later sustained by the relative unavailability of debt capital.

Clearly, the most significant differences between the U.S. condo-hotel and its Brazil counterpart result from the absence of the anomalies found in