U N I D R O I T

INTERNATIONAL INSTITUTE FOR THE UNIFICATION [illegible] PRIVATE LAW

R E P O R T

on the Hotelkeeper's contract

prepared by the Secretariat with the assistance of Mr. [illegible] Vanderpenren
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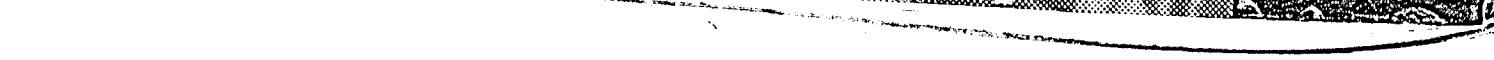

HISTORICAL INTRODUCTION

1. In 1932, the International Institute for the Unification of Private Law (UNIDROIT) was requested by the International Hotel Alliance (IHA), to examine the possibility of working out draft uniform provisions concerning the liability of innkeepers for the loss of, or injury to, goods brought to inns by guests. Being of the opinion that the question was of real interest, the Institute drafted and submitted to the IHA a preliminary report (1) which was examined by the latter at Graz in May 1933. Following the deliberations of the Central Committee of the IHA in Graz, a questionnaire concerning the matter was sent to the national hotel associations (2). On the basis of the replies received (3), a second questionnaire was sent out (4). In the light of this information, as well as the documentation at the disposal of the Institute, a meeting was held in Rome from 3-5 October 1934 (5) of a Working Committee of the Institute, whose members (6) drew up a preliminary draft uniform law respecting the liability of innkeepers for goods brought to inns by guests (7). This preliminary draft was approved on 5 October 1934 by the Governing Council and published in 1935. The draft was transmitted to Governments through the League of Nations, of which the Institute was, at that time, one of the auxiliary organs. On the basis of the observations made by Governments, the Institute was preparing a revision of the preliminary draft in collaboration with the IHA (VIIth Congress, Baden-Baden 1938), when the second world war broke out and it became necessary to suspend the work of unification in this field. The draft was republished in 1948 in the first volume of UNIFICATION OF LAW (pp.168-171).

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(1) S.d.N. - U.D.P. 1932 - Et. XII, Doc. 1.

(2) S.d.N. - U.D.P. 1933 - Et. XII, Doc. 2.

(3) S.d.N. - U.D.P. 1933 - Et. XII, Doc. 3.

(4) S.d.N. - U.D.P. 1934 - Et. XII, Doc. 4.

(5) S.d.N. - U.D.P. 1934 - Et. XII, Doc. 5.

(6) Chairman: H.E. M. d'Amelio, President of the Institute; Members: Sir Cecil J.B. Hurst (Great Britain); M. Capitant (France) (Member of the Governing Council of the Institute); C. Pinchetti (IHA); H. Seiler (Swiss Hotels Association). For the Secretariat of the Institute; MM. H. Ficker, C. Baldoni and S. Cerulli Irelli.

(7) S.d.N. - U.D.P. 1934 - Et. XII, Doc. 6.

2. In 1955, the Council of Europe requested UNIDROIT, within the framework of the cooperation which had been established between the two organisations, to send to it, inter alia, the draft, in the hope that it might be possible to achieve unification in this field. After lengthy work by the competent bodies of the Council of Europe, the Convention on the Liability of Hotelkeepers concerning the Property of their Guests (hereafter referred to as "the Council of Europe Convention") (1), based on the above mentioned UNIDROIT preliminary draft, was opened to signature in Paris on 17 December 1962. It has been ratified by Belgium, France, the Federal Republic of Germany, Ireland, Malta and the United Kingdom, and signed by Austria, Italy, Luxembourg, the Netherlands and Turkey (2).

3. The subject matter of the Convention and its Annex is the liability of the hotelkeeper for "any damage to or destruction or loss of property brought to the hotel by any guest who stays at the hotel and has sleeping accommodation put at his disposal" (Annex, Article 1, paragraph 1).

4. Ten years later, the Governing Council of UNIDROIT decided to begin work on the drawing up of uniform rules concerning travel organisers and travel intermediaries (that is to say economic operators whose activities fall under the traditional, if, from a legal standpoint, not entirely correct appellation of "travel agencies") which led to the signature at Brussels on 23 April 1970, of the International Convention on Travel Contracts (CCV) (3). The Governing Council had entrusted a special Working Committee with the elaboration of the rules.

5. From the outset of its work, the Working Committee set up by the Governing Council had noted that the future travel contract would necessarily cover, as a whole, a number of factors, including transportation, accommodation and other facilities inherent in the sojourn and the services relating thereto. The work of the Committee was rendered even more delicate by the fact that the field of application

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(1) Cf. UNIFICATION OF LAW, Yearbook 1962, pp. 96-105.

(2) The Convention entered into force on 15 February 1967.

(3) Cf. The official publication by the Kingdom of Belgium, Ministry of Foreign Affairs and External Trade, Diplomatic Conference on the Travel Contract (CCV) (in English and French), Brussels, April 1970, ed. Goemare, Brussels, 1971.

of the Convention would cover both international and national travel, by reason in particular of the absence in most States of national rules concerning private law relations between the travel "agent" (organiser or intermediary) and his client (1).

6. It appeared impossible to make a draft Convention governing not only the travel contract itself, but also the many separate services covered by it. Therefore the regulation of those services was left to the international conventions relating to them, if any, or to national law. This seemed to be a good solution for transportation services, most of which had been made the subject of international rules.

7. However, apart from the Council of Europe Convention, the scope of which is limited, accommodation was left to the national law which considered it only within the framework of the general law of contract with, as a final recourse, the decision of a judge, often to be found at the other end of the world. This unsatisfactory situation can only partly be eliminated by purely private arrangements between travel agents and hotelkeeprs.

8. The Working Committee of UNIDROIT realised therefore the inadvisability of leaving as a matter of principle to national laws, their uncertainty and often their silence, all that part of the travel contract which related to accommodation. An echo of the concern of the Committee was later heard in 1970 at the above mentioned Diplomatic Conference at Brussels. In its Final Act, the Conference made the following Recommendation:

"Recommendation no.3

The Diplomatic Conference on the Travel Contract (CCV) meeting in Brussels in 1970,

Having noted that during the Convention drafting procedure, the insufficiency if not the total lack of uniform international rules governing the hotelkeeper's liability was stressed,

Having taken into consideration the fact that the International Institute for the Unification of Private Law (UNIDROIT) had already elaborated a draft uniform law on hotelkeeper's liability, with respect to personal belongings brought by travellers, draft that was used as a basis for the European

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(1) See especially the documentation concerning the arrangements and agreements in question in Pierre COUVRAT, Les Agences de voyages en droit français, Paris 1967.

Convention in this field, the general elaboration of the uniform provisions on the hotelkeeper's contract, appears in the UNIDROIT work programme,

Expresses the wish that the International Institute for the Unification of Private Law (UNIDROIT), will undertake, as soon as possible, the elaboration of uniform provisions relative to hotelkeeper's contracts, to be subsequently submitted to the Governments for examination and eventual approval."

9. In conformity with the wish expressed by the Brussels Diplomatic Conference, the Governing Council and the General Assembly of UNIDROIT gave special priority to the question of the elaboration of general uniform rules on the hotelkeeper's contract.

10. The present report has been prepared by the Secretariat of UNIDROIT with the assistance of Mr. W. Vanderperren, Head of the Legal Service of the Belgian Ministry of Communications and Rapporteur to the Working Committee on the hotelkeeper's contract.

GENERAL INTRODUCTION

11. One of the principal difficulties in analysing the hotelkeeper's contract and in elaborating uniform law provisions concerning it lies in the fact that, on the international level, the term "hotelkeeper's contract" appears to have been officially used for the first time only at the Diplomatic Conference on the Travel Contract (CCV) which met at Brussels in April 1970 (1). The situation is scarcely different in national law, however, for although attempts have been made by writers in certain countries to identify the various elements which might go to make up such a contract, it is to date only in the Civil Code of Ethiopia of 1960 that a fully developed body of rules concerning the legal relationship between hotelkeeper and guest is to be found (2).

12. This is, of course, not to say that there are not aspects of the relationship which have been regulated by law. Indeed the contrary is true as in the vast majority of States with a civil law tradition it is normal to find provisions of the Civil Code or Code of Obligations dealing with the liability of the hotelkeeper for damage to, or loss of, his guests' property and in many cases also with the hotelkeeper's lien and rules concerning prescription. Similarly, in a large number of common law jurisdictions, specific statutory provisions have been enacted either confirming or amending pre-existing rules of common law concerning the hotelkeeper's lien and his liability for objects brought to the hotel, while provisions are also to be found dealing with his duty as to the safety of his guests (3).

13. Moreover, even where the conceptual approach to a particular problem differs from one group of States to another, for example in the field of liability for objects brought to a hotel (4), the differences in practice are not always as great as might at first sight appear and certainly they have not in any way caused serious hindrance to the

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(1) See paragraph 8 above.

(2) Title XVI, Contracts for the Performance of Services, Chapter 6 - Contracts of Innkeepers, Articles 2653-2671.

(3) Ethiopia: Civil Code, Article 2658; Ireland: Hotel Proprietors Act, 1963, Section 4.

(4) See below, Chapter IV.

preparation of the uniform law texts, namely the UNIDROIT draft Uniform Law respecting the Liability of Innkeepers of 1934 (hereafter referred to as "the UNIDROIT draft") and the Council of Europe Convention of 1962.

14. Nevertheless, the area of the general subject under discussion is far wider than the few aspects which have been mentioned in the preceding paragraphs, while in relation even to these, a number of problems exist which have not been settled at the international level. For example, in connection with the liability of the hotelkeeper for injuries to his guests, the problem of whether an action sounds in contract or in tort, or possibly both, is a delicate one which touches upon the very foundations of the theory of civil liability, the implications of which, with regard to questions such as proof, prescription and the foreseeability of damage, can be of very real importance in deciding of a given case.

15. Then again, the almost complete lack of specific provisions concerning a number of fundamental contractual issues such as the commencement, termination and resiliation of the contract between the hotelkeeper and his guest and the legal significance to be attributed to the advance booking of accommodation leads to a renvoi to the general law of contract with the attendant divergencies between the laws of different States or groups of States.

16. Again, the difference between the contract binding a hotelkeeper and his guests on the one hand, and contracts of lease on the other, is not always clear and, to the extent that certain national systems have established a distinction, the solutions tend to vary. This problem is, of course, closely allied to that of defining who is a hotelkeeper and who a guest for the purposes of determining their respective rights and duties under the future uniform law.

17. Broadly speaking, the various points mentioned above will be the object of the more detailed analysis to follow in this report. Moreover, without in any way wishing to suggest any limitation of the scope of the future uniform law to cases involving an "international" element, the fact must not be overlooked that one of the principal considerations militating in favour of an attempt, on an international level, to find satisfactory solutions to the problem under discussion, is the vast increase in tourism, in particular of an international character. For this reason, it would not seem out of place to mention, if only briefly, certain questions which might be relevant to the object of this study, for example those concerning jurisdiction and the possibility of arbitration.

18. It should be stressed that while this report is based on an examination of the most extensive documentation which the Rapporteur and the Secretariat have been able to assemble and examine, the law of some fifty or more States, attention will be concentrated for the most part on the general orientations discernible rather than on a detailed comparative analysis of each State's legislation. Finally, it will be apparent that certain aspects of the relationship between the hotelkeeper and his guests touch upon fundamental questions relating to the law of contract and of torts, in which case general indications only will be given of the various approaches since detailed discussion would call for a report of inordinate length.

19. The general chapters of the report are the following:

I. Scope of a draft uniform law.

II. Basic contractual problems.

III. The respective general obligations of hotelkeeper and guest.

IV. The liability of the hotelkeeper relating to his guests' property.

V. The liability of the hotelkeeper for injury to his guests.

VI. Rights of the hotelkeeper in relation to property brought to the hotel by his guests.

VII. Miscellaneous questions.

VIII. Brief summary of the principal questions mentioned in the report.

20. The division of the report into these chapters has been made for the sake of convenience and clarity of exposition but this is in no way intended to prejudge the structure of, or order of provisions in, any future draft.

I SCOPE OF A DRAFT UNIFORM LAW

21. From the outset of this study, four fundamental problems have to be examined which, although they will be dealt with separately, are interrelated and any conclusions which may be reached will necessarily have to take account of this fact. The four problems concern the definition of a hotel (or hotelkeeper) and of a guest, the legal nature of the relationship between them and the field of application of the future law.

(a) Definition of "hotel" and "hotelkeeper"

22. It is symptomatic of the difficulty of defining these two terms that neither the UNIDROIT draft nor the Council of Europe Convention make any attempt to do so, the question being left to be regulated by national law.

23. However, on a national level also, the difficulties persist and it is significant to note that the report in the United Kingdom of the Law Reform Committee concerning Innkeepers' Liability for Property of Travellers, Guests and Residents (1) considered that "if the distinction between inns and such establishments as residential hotels is to be retained ..... it would be satisfactory to provide some easily recognisable basis for the distinction, but we have not found it possible to do this" (2). It should also be recalled in this context that the report of the Law Reform Committee was concerned only with the problem of liability for objects brought to a hotel and that the difficulty of formulating a working definition applicable to the whole complex of private law relations between the hotelkeeper and his guests is considerably greater.

24. In fact, a study of the law of a large number of countries reveals that definitions of the term "hotel" have very often been framed either for administrative purposes (3) or with a view to regulating some,

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(1) Cmnd. 9161, May 1954.

(2) Ibid, Paragraph 11.

(3) Thus in many countries the quality and the extent of the services offered are highly relevant to the category and appellation to be accorded to the establishment concerned, for example whether it is to be classed as a hotel or a "pension". Similarly, the denomination may be important for tax purposes or for the granting of licences.

but not all, of the aspects of the hotelkeeper/g[illegible]. This latter approach is not without its dangers in [illegible] English law is taken, it will be seen that the [illegible] of 1956 provides a definition of the term "hotel" [illegible] dealing with liability for damage to, or loss of, [illegible] guests and it remains an open question whether the [illegible] common law meaning of the term "inn" (2) is still relevant to [illegible] whether in a given case a hotelkeeper may exercise his right of lien.

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(1) For example, Ireland, the Hotel Proprietors Act, [illegible]; Malta, Act no.XII of 1967 on the Hotel Industry; British Columbia, the Innkeepers Act, 1948; Alberta, the Innkeepers Act, [illegible]; Uganda, Act to consolidate the Law in relation to Hotels, [illegible] and Puerto Rico, the Innkeepers Act of 1956 which, in Section 1, contains the following detailed definitions of hotel and innkeeper:

"(a) "Hotel" - shall mean a place of shelter operated for profit, providing protection for person and property, and shall include a building, or group of buildings under a common management, to which the public is impliedly invited, where all who conduct themselves properly, and who are able and ready to pay for their lodging, are received, if there is accommodation for them, and who, while there, are supplied lodging and meals, and such lodging, service, and other attentions as the establishment may afford, at the rate established by the hotel. The term shall include any establishment having fifteen (15) or more bedrooms, and, without limitation of the foregoing, shall include hotels, apartment hotels, inns, guest cottages, rooming houses, lodging houses, and any other establishment by whatever name known or advertised, offering lodging and meals to the public. The fact that meals are offered in a restaurant or café conducted upon the hotel premises by a person other than the innkeeper, shall not preclude the establishment from being considered a hotel.

"(b) "Innkeeper" - shall mean any person, firm, corporation or other type of business organisation, engaged for profit, in the operation of a hotel, and as herein used, shall include the officers, agents and employees of such person, firm, corporation, or other type of business organisation, unless the context otherwise requires."

(2) Throughout this report, it has been considered preferable to use the terms "hotel" and "hotelkeepers" rather than "inn" and "innkeepers", although the latter will be used where a reference to the law of particular countries seems to require it.

25. In the continental systems where the hotelkeeper's liability for the property of his guests and his rights in respect of such property are normally dealt with in the Civil Code, the Codes do not attempt to define the term and it is clear that definitions or rules framed for administrative purposes should not be applied indiscriminately to the private law situation (1). In consequence, and assuming that a future uniform law might contain a definition of the terms "hotel" and/or "hotelkeeper" for the purposes of the uniform law, an attempt will be made to identify some of the elements which are common to most systems and which might be embodied in such a definition.

26. The essential element would seem to be that accommodation is offered to guests and, for many jurisdictions, that this, and other services which may be made available, are provided for all comers subject to the condition that such persons are in a fit state to be received and appear able and willing to pay a reasonable sum for the services and facilities provided (2). The requirement of the establishment being open to all comers is particularly important in the common

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(1) See FRANZI, under "Albergo" in "Enciclopedia del Diritto", 1958, Vol.I, p.963 at p.972 and GERI, "La responsabilità civile dell'albergatore", 1972, p.23.

(2) See, for example, the draft "Act respecting Hotelkeepers and Lodging-House Keepers", Section 2 (b), approved by the Conference of Commissioners of Uniformity of Legislation in Canada, Proceedings of the forty-fourth annual meeting, 1962; the United Kingdom Hotel Proprietors Act 1963, Section 1 (1); Alberta, the Innkeepers Act, 1955, Section 1 a (b). See also for the United States of America, WILLISTON, Contracts, (Third ed.), 1967, Vol. 9, p.1023 and for Belgium, DE PAGE, Traité élémentaire de droit civil belge, 1941, Vol. V, p.234.

law jurisdictions (1) where it is, for example, used as a test to distinguish hotels, within the meaning of the 1956 Act mentioned above, from similar establishments such as residence hotels or boarding houses where the proprietor has a discretion in accepting or refusing clients. It must be admitted that the distinction is not always easy to draw but it does have the merit of excluding cases where private individuals make available one or several rooms in their own homes to occasional guests.

27. On the other hand, however, what of the practice of systematically providing such accommodation, with or without food, for the whole of the tourist season? This solution is more difficult as the "professional" element which appears to be regarded as being important in some continental systems (2) is present to a certain degree. It would, however, seem possible in practice usually to decide the issue by reference to a number of factors including whether the person offering accommodation in fact held out that it would be available to all comers, the number of guests received and the services provided.

28. A further question which may be raised is whether, for an establishment to be regarded as a hotel, it is necessary that it should provide food and drink for guests. The wording of the relevant legislation in the United Kingdom suggests an affirmative reply (3)

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(1) For both a general discussion of the question and a close analysis of legislation and case law in France, see COUTURIER Le Contrat d'Hôtellerie, doctoral thesis submitted to the Faculty of Law and Economic Sciences at the University of Dijon on 30 November 1967 (hereafter referred to as "COUTURIER , "Thèse",) pp.165-211. It would appear from the author's exhaustive study that broadly speaking a greater discretion is permitted in France than in common law countries to hotelkeepers in refusing to accept guests, this being largely a consequence of the principle of the freedom accorded to trade and industry.

(2) See GERI, op. cit., p.22 et seq. and KOHN, Manual of German Law, 1968, Vol. 1, p.148.

(3) Hotel Proprietors Act, 1956, Section 1 (3). The position would also seem to be the same in a number of United States jurisdictions, see WILLISTON, op. cit., Vol.9, pp.1023-1024.

but, although the application of the test might be an element in border-line cases, this appears not to be a commonly held view and if the provision of accommodation is to be regarded as the essential element in the relationship between hotelkeeper and guest it is not easy to see why the provision of food and drink should be regarded as a determining factor.

29. Before leaving the question of the definition of a hotel, a mention should be made of certain provisions in the Civil Codes of a number of European and Latin-American States and also the case law of both civil law and common law jurisdictions relating to establishments which, for the purpose of placing the same responsibility for the property of clients upon their proprietors as upon hotelkeepers, have been assimilated to hotels. This question will be touched upon later in this report (1) but for the time being it is sufficient to state merely that such enterprises can only be regarded as falling within the scope of a future uniform law to the extent that they possess the characteristics already outlined above as being indispensable for an establishment to be considered as a hotel.

30. In conclusion then, it may be suggested that if it is considered desirable from a practical point of view, and feasible from a drafting one, to include a definition of the terms "hotel" and/or "hotelkeeper" in the future uniform law, the following elements should be considered as of particular importance:

(i) the provision of accommodation by the hotelkeeper;

and (ii) the holding out by the hotelkeeper that he is prepared to provide such accommodation for all persons desirous of making normal use of the facilities of the establishment, who are willing to pay the hotelkeeper's charges and who are in a fit state to be received (2).

(b) Definition of "guest"

31. Although a number of problems exist in this connection similar to those discussed in the previous section, the difficulties are reduced to the extent that if a satisfactory definition of a hotel

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(1) See below, paragraph 84.

(2) Subject, of course, to the availability of rooms and the compliance of the guest with the necessary administrative formalities if any (e.g. presentation of documents proving his identity).

can be found, the category of persons who may be regarded as guests is already, subject to further limitations, logically circumscribed to those who have recourse to such an establishment. The considerations set out in the following paragraphs will therefore proceed on that assumption.

32. As was the case with the situation discussed under (a), there is no definition of a guest to be found in the international attempts at unification already made and the same is largely true for national law (1). However, certain indications are to be found although, here again, they normally relate to only one or several of the aspects of the relationship between hotelkeeper and guest and more particularly to the liability of the former for the objects brought to his establishment by the latter. Thus it is apparent from Article 1 of the Annex to the Council of Europe Convention that for the strict liability of the hotelkeeper to be invoked, it is necessary for the plaintiff to show that sleeping accommodation has been put at his disposal, and similar inferences may be drawn from the law of a large number of States (2). While this seems to be the preponderant view, it is not unanimously held, and it would appear to be the case that in some States a person who merely takes refreshment in a hotel may be regarded as being a "guest" for the strict liability of the hotelkeeper vis-à-vis

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(1) However, the Puerto Rico Innkeepers Act of 1956, which deals with the liability of the innkeeper for his guests' property which is brought to the hotel and with his lien over such property, provides in Section 13 (d) that for the purposes of the Act, "(d) "Guest" - shall include not only those individuals who are registered at the hotel and to whom bedrooms are assigned, but for the purpose of this act, (1) tenant (independently as to the form of lease contract, if any, (2) any person entering the premises of a hotel with the intent of being a guest, whether or not he becomes said guest, and (3) any person found in the premises of a hotel with the purpose of enjoying the facilities provided for recreation and amusement, such as restaurants, swimming pools, bars, stores and similar establishments."

(2) For example: United Kingdom, Hotel Proprietors Act, 1956, Section 2 (a); Ireland, Hotel Proprietors Act, 1963, Section 5 (1); Belgium, Loi relative à la responsabilité des hôteliers du 4 juillet 1972, Article 1952 of the Civil Code as amended; France, Civil Code, Article 1952; Chile, Civil Code, Article 2241; Lebanon, Code of Obligations, Article 641; Mexico, Civil Code, Article 2535.

his property to exist (1). It might, however, be argued that in such cases the hotelkeeper is liable, not qua hotelkeeper, but on the same grounds as the restaurateur, namely that the legislator has decided that the reliance of the client upon the vigilance of the proprietor of the establishment to ensure the safe-keeping of his property is necessitated by the nature of the services offered. Be this as it may, one should not lose sight of the fact that the one basic service offered by the hotelkeeper is accommodation. If, in a given relationship between him and another person, this element is lacking, he may well be responsible for damage or loss incurred, but not on the basis of his special status as hotelkeeper. Conversely, proprietors of other establishments may find themselves assimilated to the hotelkeeper for certain purposes but this evidently does not extend to all aspects of their relationship with their clients.

33. Situations may well arise, however, in which a person who takes accommodation in a hotel may cease to be a "guest" or may not have been one from the outset. For example, the Civil Code of Ethiopia provides that "where the lodging is provided for a month or more, there shall be a contract of letting and not an innkeeper's contract"(2). The question is not normally regulated however in such a clearcut fashion and it is doubtful whether such a rule of thumb will always correspond to the realities of the situation. Thus there is authority in England for the view that whether a person has ceased to be a traveller is "a question of fact, and mere length of residence is not decisive of the matter, because there may be circumstances which show that the length of the stay does not prevent the guest being a traveller, as, for instance, where it arises from illness." (3)

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(1) See, for example, WILLISTON, op. cit., pp.1027-1028. FRAGOLI, op. cit., p.972 expresses the opinion that it is not necessary for the guest to book a room for the night in a hotel, it being enough, for a hotelkeeper's contract to arise, for him to do so even for a few hours only.

(2) Article 2653 (2).

(3) Lamond v. Richard [1897] 1 Q.B. 541, at p.546. The term "traveller" and its counterparts on the continent were, in the past, sometimes construed as excluding persons with their habitual residence in the same town or city as the hotel. The preponderance of modern opinion is, however, against this view. See FRAGOLI, op. cit., p.972; DE PAGE, op. cit., Vol.V, p.237; HALSBURY, Laws of England (3rd ed.) 1957, Vol.21, pp.447-8; PEREZ SERANO, El Contrato de Hospedaje, 1930, pp.161-3. The position seems to be doubtful in French law, see COUTURIER, "Thèse", pp.400-401.

Conversely, the intention of the parties may be such that from the outset it is possible to infer that the client is to be regarded as a boarder or a lessee but this can only be dependant on the facts of the case (1).

34. At this juncture it is apparent that whatever may be the interests of attempting to ensure uniformity, the problem under discussion is essentially one of fact rather than law and that in consequence it may not be easy to produce a definition of the term "guest" which could take account of all the situations which arise in practice. It may indeed be the case that the most which can be done is to regard as a "guest" a person who accepts the offer of accommodation on a temporary basis made by the keeper of a hotel (even though he does not in fact occupy a room), such a solution depending of course on the possibility of defining the concept of a hotel. The question of definition is, however, one of the utmost importance and it is submitted that, notwithstanding the difficulties inherent in the attempt to define such terms as "hotelkeeper" and "guest" for the purpose of the application of the future uniform law, such an attempt should be made.

(c) <u>The nature of the relationship between hotelkeeper and guest</u>

35. Hitherto in this report, the term "hotelkeeper's contract" has been used sparingly. The reasons for this are the following. In the first place, certain of the obligations placed upon the hotelkeeper are imposed by law by reason of his status and, as far as many common-law jurisdictions are concerned, arise independently of the existence of any contract (2). Secondly, few States have embodied in their

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(1) For the view that the hotelkeeper's contract may exist even when the client takes up permanent residence in a hotel, see FRAGOLI, op. cit., p.972.

(2) This view has been consistently upheld by the courts; in this sense, see HALSBURY, op. cit., Vol.21, pp.451-2, and WILLISTON, op. cit., pp.1030-1031.

statute law a precise definition of the contract (1), and in most States, apart from certain specific rules relating to hotelkeepers, recourse must be had to the general law of contract for the solution of the various problems which arise.

36. Thirdly, the question has also been discussed as to whether the hotelkeeper's contract is a unitary contract or whether it is no more than a label attached to a plurality of contracts (2). Finally, in certain cases in which a guest has suffered damage, he may well be able to sustain an action in tort in addition to, or in substitution for, his action in contract (3).

37. All these considerations indicate the need for caution in speaking of the "hotelkeeper's contract" as a generally recognised specific legal entity. However, on the other hand, they can in no way be regarded as evidence for denying the existence of such a contract.

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(1) Exceptions are Ethiopia, Civil Code, Article 2653: "(1) An innkeeper's contract is a contract whereby a person who exercises the occupation of innkeeper undertakes to lodge a client during one or several nights"; Guatemala, Civil Code, Article 2077 where the contract arises when "a person binds himself to provide lodging to another, at an agreed price, irrespective of whether food is included", and Mexico, Civil Code, Article 2666 "There is a hotelkeeper's contract when one person provides lodging for another, for an agreed price, whether or not including food, and other expenses incurred by the guest according to the agreement." FRAGALI, op. cit., P.964, defines the hotelkeeper's contract as one in which the hotelkeeper binds himself to provide his guest, against payment, lodging, and in some cases in addition food, together with such services as are necessary to ensure the guest's comfort in premises organised for the purposes of providing paid hospitality.

(2) See GERI, op. cit., PP.11-15 and COUTURIER, "Thèse", pp.114-157, where the view is developed that the hotelkeeper's contract is a specific, autonomous contract of a sui generis character.

(3) See Chapter V below.

It would be difficult to think of a legal system in which the offer by a hotelkeeper of accommodation and the acceptance of that offer by a person prepared to pay the stipulated charges would not give rise to a contract. If a definition of the term "hotel", similar to that suggested above (1), could be agreed upon, it might similarly be possible to isolate the essential element of the "hotel-keeper's contract". The fact that the hotelkeeper may offer to his guests other services, or even impose upon them the acceptance of terms to offer as a term of the contract, for example, payment for certain goods in the hotel, does not affect the fundamental obligation of the hotelkeeper but merely creates a more complex set of relations and obligations between the parties. Then again, the fact that the strict liability which lies at the basis of the responsibility put upon the hotelkeeper for his guests' property is regarded in some systems as arising from a deposit of necessity and in others from the special status of the hotelkeeper, need not be considered as excluding the possibility of treating such liability as flowing from a term of the contract implied by law. Liability for injury to guests, although often pleaded before the courts on a tortious (extra-contractual) basis only, and often is, regarded as founding an action in contract, the choice, where it is possible to exercise it, being left to the plaintiff who may have an interest in selecting one or the other on account of differing rules relating to burden of proof and calculation of damages (2).

38. The considerations set out in the preceding paragraph are intended not to demonstrate that the concept of a specific contractual relationship between the hotelkeeper and his guests already exists in the positive law of a large number of States, but that from a purely legal point of view an analysis in contractual terms is feasible, although such an analysis does not necessarily exclude the possibility of the breach of certain obligations by the hotelkeeper being treated as tortious.

39. What is, therefore, contended is that the specific legislative rules to be found in most States concerning certain aspects of the hotelkeeper's relationship with his guests indicate that this relationship is a special one of a fiduciary nature and in consequence an approach to it from a contractual angle which takes account of these peculiar features suggest that it can quite legitimately be considered as a contract sui generis.

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(1) See paragraph 30 above.
(2) See paragraph 109 below.

40. The contractual approach may, however, give rise to certain difficulties when an action is being brought against the hotelkeeper by a person who is not, strictly speaking, a party to the contract, such as a member of the family or friend of a person who has paid for the accommodation. In civil law systems the difficulty may be overcome by the concept of an implied agency, or by that of a contract stipulated in favour of third parties (1); but this is not so easy in a number of common law jurisdictions where the requirement of consideration and the doctrine of privity of contract could easily create obstacles to such solutions. The problem is in fact less grave than might appear as the commonest grounds for such actions will be for loss of, or damage to, goods, where the hotelkeeper's liability is imposed by law independently of the existence of a special contract, and for personal injuries in which case an action will be available in tort (2). The converse situation arises in respect of the hotelkeeper's lien. The difficulties should not be exaggerated but nevertheless their existence ought not be completely overlooked.

(d) Field of application of the future uniform law

41. Although the value of unification often lies in the fact that it obviates the application of conflict of law rules, its prime function rests in ensuring uniformity and thus legal certainty and in the present context there would seem to be little justification for restricting the application of the future rules to international cases. In the first place, there could be considerable difficulties in determining the necessary international connecting factor. Should this be supplied by the fact that the terms of the contract are concluded in one country and the contract concluded in another, or should the nationality, domicil or residence of the guest be considered decisive? Apart from the legal difficulties involved there would seem to be no objective grounds for distinguishing between guests living in the country where the hotel is situated and guests of foreign nationality, resident or domiciled abroad, when considering the reciprocal rights and duties of hotelkeepers and guests. Furthermore, the international element in the hotel industry is now so large that the desire to preserve national

(1) See FRAGALI, op. cit., pp.975-6.

(2) In the English case of Lockett v. A.M. Charles Ltd. [1938] 4 All E.R. 170, a wife successfully claimed in contract for pain and suffering caused to her by food poisoning in a hotel restaurant.

law for purely national transactions, which is to be seen in such fields as the sale of goods where the bulk of such transactions are national, would not seem to be a relevant consideration. Similarly, the absence of national legislation dealing specifically with a number of the issues dealt with in this report, may well prove to be an encouragement to accept the provisions of a uniform law, always providing of course that such provisions obtain general support. It is therefore proposed that, for the purposes of the application of the future uniform law, no such limitation should be introduced.

II. BASIC CONTRACTUAL PROBLEMS

42. This chapter will deal with a heterogeneous group of questions which defy any rigid form of classification but which may be treated together for the sake of convenience. The first of such questions is that of the formation of the contract.

43. To a large extent this problem is one to be settled by the national law of each State insofar as questions such as capacity, offer and acceptance (1), the intention to create legal relations, and other general contractual requirements are concerned. However, as has already been suggested, certain special characteristics of the relationship between hotelkeeper and guest indicate the desirability of treating it as constituting a contract sui generis and already at the stage of formation some specific points should be mentioned.

44. In the first place, the obligation placed in many States upon hotelkeepers to accept all comers (2) has sometimes been construed as meaning that a request by a client for accommodation is to be interpreted as an acceptance of the hotelkeeper's standing offer. Such an approach to the question has the merit of providing a fairly clear guide as to the time at which the contract is concluded. Nevertheless it overlooks the fact that in many cases a client may wish to examine the rooms available before deciding to take one and may indeed find them unsuitable. Again, he may make a counter offer, promising to remain for a certain period of time in the hope of reducing the per diem charge. These various considerations suggest that the time at which the contract is concluded depends largely upon the facts of each case and that little purpose is to be served by attempting to lay down fixed principles of law. The essential fact is the agreement of the parties on the terms of the contract and for this reason it is difficult to accept the theory, which has little support, that mere entry into a hotel is sufficient for the contractual relationship to arise (3). Indeed the acceptance of the view would create a number of problems such as the validity of notices purporting to limit the liability of the hotelkeeper.

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(1) Including the specific problems relating to the formation of contracts concluded by post, telephone or telex.

(2) See paragraphs 26, 27 and 30 above.

(3) See the discussion on this question in FRAGALI, op. cit., p.973.

45. It may be thought just that the hotelkeeper be considered to be liable <u>qua</u> hotelkeeper for objects brought into a hotel by a prospective client even if no contract is ultimately concluded between the parties but it would not seem necessary to base this liability on the existence of a contract inferred from mere entry into the hotel (1).

46. Even more delicate than these problems however are those which arise when the contract is concluded not at the hotel itself but by an advance booking or, as it is sometimes termed, a reservation (2). One of the reasons for this is the fact that superimposed upon the strictly legal relationship between the parties are a series of trade usages and conventions, the precise status of which it is not always easy to determine.

47. As a starting point, however, it is necessary to attempt to elucidate the legal nature of an advance booking. Although the idea has been mooted that such a booking is a kind of pre-contract or that it is simply an act relating to the execution of the contract, the widely held view is that it is an element in the formation of a contract (3). Thus a strict application of the common law doctrine of offer and acceptance as requirements for the existence of a valid contract might lead to the adoption of the view that a request by letter to reserve a room in a hotel for a certain day is an offer and that in the absence of a reply from the hotel within a reasonable time and the offer may be regarded as having lapsed; yet trade usage seems to indicate that the hotelkeeper is not always required to reply (4) and that the client may yet be bound. Does this then mean that to explain the situation we are forced back on the theory that the offer is made by the hotelkeeper to the public at large and that the request by the prospective client is an acceptance thereof? Were it the case that a hotelkeeper who does not reply to a request for the reservation of a room is obliged either to provide accommodation in his own establishment or to find suitable

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(1) For the question as to when the hotelkeeper's liability begins, see below, paragraphs 85-88.

(2) For a lengthy discussion of the legal character of reservations and the rôle of "arrhes" in French law, see COUTURIER, "Thèse", pp.213-42.

(3) FRAGALI, op. cit., p.975 rejects the view that a reservation is no more than an option.

(4) FRAGALI, op. cit., p.975. In some cases, however, it seems that the hotelkeeper must reply, as for example when the booking is made by telegram with a pre-paid reply coupon.

and equivalent accommodation elsewhere, one might be tempted to reply in the affirmative but this proposition is not firmly established and the paucity of legislative enactments and case-law in most States seems to leave the question open. On purely equitable grounds, a possible solution might be that, providing the prospective client indicates a clear intention to be bound by a contract with the hotelkeeper, if necessary accompanied by the sending of a deposit, the failure of the latter to reply, assuming that there is sufficient time available for him to do so, should be considered as indicating his willingness to provide accommodation and that the prospective client can only cancel the reservation in the same conditions as when the hotelkeeper had expressly confirmed it.

48. The more usual case is that in which a contract between the parties in the sense of an express indication to be bound by both of them, for example exchange of letters or telephone conversation, exists. Here, many of the conceptual difficulties alluded to in the preceding paragraph are absent. It is however submitted that there is considerable justification for adopting the same practical solutions to the problems common to both situations. These are, in particular, attempts by the guest to cancel the reservation, failure on his part to arrive on the specified day and failure by the hotelkeeper to provide the accommodation agreed upon.

49. From a legal point of view based on general contractual principles it is apparent that a client who has engaged rooms and who attempts to cancel the reservation or who does not arrive on the fixed day must indemnify the hotelkeeper for any loss he incurs. However, two riders must be attached to this statement. On the one hand, the hotelkeeper must not be permitted to enrich himself unjustly as, for example, would be the case if he were subsequently to relet the same room (1).

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(1) See, for example, Ethiopia, Civil Code, Article 2660:
"(1) A client who has engaged a room for a specified day and who has received from the innkeeper notice that the room has been reserved for him shall pay the price of the room for a day, even where, on account of force majeure, he has not occupied it.
(2) He shall not be relieved of this obligation unless he has notified the innkeeper in due time that he has renounced to contract and the innkeeper, after receiving notice, was able to let a third person the room that had been reserved."

On the other, legal and administrative provisions (1), standard terms of contracts and conventions passed between hotelkeepers and travel agents (2) often mitigate the eventual liability of the person who has made the reservation.

50. Here again, it is difficult to lay down fixed rules, for the factual situations which arise are infinitely varied and questions such as force majeure preventing the client from taking up the room and the failure of the hotelkeeper to relet when the client has announced his intention to cancel the reservation or has failed to take it up on the specified day must also be considered if it is intended to make provision for some general rules in the future uniform law.

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(1) Ethiopia, Civil Code, Article 2660, paragraph (3) provides that "unless otherwise provided, compensation shall be due for one day only, notwithstanding that the room had been reserved for several days and payment agreed by the week or month." In Spain, if communication of the cancellation of the reservation does not reach the hotelkeeper seven days before the date fixed for occupation of the room, he may retain the deposit already paid: Orden de 28 de marzo de 1966 sobre régimen de precios y reservas en la industria hotelera, Article 11 (3).

(2) The IHA/FIAV Convention of 1970, replacing that of 1963, is applicable to contracts made with travel agents in respect either of individuals or groups and, inter alia, lays down rules governing reservations and cancellations. Cancellation, without indemnity, is permitted by the agency as regards an individual booking (i.e. one to ten persons enjoying the same services in the hotel) if notice is given within the same period as required for direct clients when the hotel is situated in a town, and a fortnight in advance for a seasonal hotel, this period being increased to one month during the high season. For groups, notice of cancellation msut be made fourteen days in advance for partial cancellation amounting to less than 50% of the group and 21 days in advance for more than 50%. The indemnification rules laid down for individuals if cancellation is not made in time provide for a minimum of one day's charges for town hotels and three days for seasonal hotels, and for groups, a lump sum fixed in advance or, in the absence of such an agreement, two thirds of the value of the total reservation cancelled.

This is, itself, an important issue and the existence [illegible] rules and conventions between hotelkeepers and travel agents [illegible] be overlooked when a decision is taken on the question (1).

51. On the other hand, there is far less authority available concerning the situation in which the hotelkeeper who has accepted a reservation either seeks to cancel it or, on the arrival of the guest, is unable to provide the accommodation requested (2). Without legal provisions lay down the obligation for the hotelkeeper to provide equivalent accommodation (3) and the IHA/FIAV convention indicates that the

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(1) COUVRAT, in "Les Agences de Voyages en droit français" 19[illegible], p.89, cites a case before the Court of Appeal of Pau [illegible] 29 February 1960, Gaz. Pal. 1960, I-317, in which the Court extended the conditions agreed by FIAV and IHA to members of an association who had not adhered to the convention between FIAV and IHA. The facts of the case were that a group of travel agents had booked rooms in a hotel with the possibility of cancellation and had paid a large sum of "arrhes". They then cancelled the reservation within the time-limit permitted by the FIAV/IHA convention and sought to recover the sum paid to the hotelkeeper. In a decision of 3 May 1965 the Commercial Chamber of the Court of Cassation recalled that the Court of Appeal of Pau had reached the conclusion that the parties had not intended to displace the custom of the hotel industry that "arrhes" were nothing more than a deposit so that reimbursement should be required if, as in the case in point, the cancellation had been made within the limit prescribed by the FIAV/IHA convention. (The decision of the Court of Cassation is discussed by COUTURIER, "Liège", at p.239 et seq.).

(2) LACAN, Guide juridique et pratique de l'Hôtelier et du Voyageur, 1926, p.257, cites a decision of the Tribunal de Commerce de la Seine of 25 March 1924 in which a hotelkeeper, who had reserved a room for a client, then informed him some three weeks before the date fixed for occupation that he could no longer accept any obligation to provide it, was held liable for 4,000 francs damages.

(3) Lebanon: Decret N°15598 du 21 Septembre 1970 fixant les conditions générales de création et d'exploitation des établissements touristiques, Annexe 4, Article 9; Spain, Orden de 29 de marzo de 1966 sobre régimen de precios y reservas en la industria hotelera, Article 11 (5).

hotelkeeper may in such cases be liable to indemnify the [illegible], the principal difficulty lies in establishing a method of calculation of damages and it may prove difficult at an international level to lay down general rules for factual situations which will vary enormously from case to case. Indeed, it may well be necessary to leave such calculation to the national judge while affirming the principle of the liability of the hotelkeeper in such cases.

III. [illegible] OTHER OBLIGATIONS OF HOTELKEEPERS

52. As has been indicated above (1) the essential [illegible] of any hotelkeeper's contract is that accommodation is provided [illegible] guest and this must be considered to be the principal obligation [illegible] the hotelkeeper (2). Failure to satisfy this obligation [illegible] regarded as a fundamental breach of the contract. However, [illegible] may also provide for other services to be enjoyed by the guest, such as, for example, provision of meals, sporting facilities [illegible] assistance. Now, while such services are clearly accessory to the principal one of accommodation, failure to provide them may [illegible] constitute a breach justifying repudiation by the guest. Whether or not this is so in any given case must depend upon the facts and, since most contracts between hotelkeepers and their guests are [illegible] orally, questions of proof will assume particular importance (3). The basic consideration is whether the guest would not have entered into the contract had he known that such services were not available in the hotel. In such cases failure on his part to make adequate enquiries before entering into the contract will not justify repudiation.

53. The same is, of course, true when difficulties arise concerning not so much the services provided, but rather the nature of the accommodation offered. If a guest has specifically requested a room with a view overlooking the sea or one which does not give on to a road with dense traffic and the hotelkeeper has agreed to provide such a room, the guest cannot be obliged to accept accommodation which does not measure up to the requirements stipulated, but he must accept it if the differences between the room be requested and that which he is offered are of only secondary importance (4).

54. Assuming, however, that the guest has not laid down any specific conditions for accepting accommodation, there are still certain basic obligations which the hotelkeeper must fulfil in addition to

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(1) See paragraph 26 above.

(2) For a detailed discussion of French law concerning the obligations of the hotelkeeper mentioned in this part of the Report, see COUTURIER, "Thèse", pp.268-340.

(3) See below, paragraph 128.

(4) PEREZ SERRANO, op. cit., p.182 and LACOM, op. cit., p.259.

providing such accommodation, for example the cleaning of the room and the availability of sanitary facilities in the hotel (1). In addition, it may also be the case that compliance with certain administrative requirements such as those relating to hygiene and sanitary regulations may also be relevant to the purely private law relationship between the parties (2).

55. Any further attempt at identifying the specific obligations of the hotelkeeper, apart from those relating to the personal safety and property of his guests (3), would not seem to be a fruitful exercise since they vary to such a large extent according to the nature of the establishment and the contractual terms agreed upon by the parties.

56. The obligations of the guest, on the other hand, are more easy to define. Of these, the principal one is payment for the services and facilities the use of which he enjoys. Here again, of course, the terms of the contract are of particular relevance. It is of no avail to a guest to claim that he should not pay for meals which he has not taken in the hotel when the parties had expressly agreed that he should pay for full or half "pension". Similarly, there are certain services for which it is customary that the guest should pay, such as outside telephone calls or use of laundry facilities, when it is not apparent from the contract that they are included within the price paid for the accommodation.

57. As to the other obligations of the guest, they have been well described by PEREZ SERRANO, when he says that they are highly varied and that they are generally of a less pronounced legal character, to the extent that some of them mentioned by writers belong rather to the sphere of good manners and the behaviour to be expected in normal social intercourse. Others, however, derive directly from the contract, nor are there lacking those which represent duties imposed by administrative authorities or which emanate simply from the internal regulations

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(1) See PEREZ SERRANO, op. cit., pp.183-191 and FRAGALI, op. cit., pp.976-7. Broadly speaking, these services are those which are necessary for the tranquil enjoyment by the guest of the accommodation put at his disposal.

(2) GERI, op. cit., pp.50-51 and FRAGALI, op. cit., p.998.

(3) See Chapter V below.

of the establishment (1). He mentions in particular the [illegible] accommodation for the purposes intended, compliance with the internal regulations of the hotel, inscription in the hotel register, liability for damage caused within the hotel and the duty not to make noise (2).

58. More difficult problems arise, however, in connection with the duration of the contract. It is a generally accepted rule that when accommodation is booked for an indeterminate period the contract will be renewed tacitly on a daily basis if neither party informs the other before a fixed time, normally 12 a.m., of his intention to put an end to it (3). In these circumstances, moreover, the problems associated with the unilateral repudiation of the contract by one side or the other are less acute as neither party is, in any event, required to give more than a few hours notice.

59. Where the principal difficulties are to be encountered is, however, when the parties have agreed to a contract for a fixed period and one of them wishes to put an end to it before then. From the hotelkeeper's point of view, continued refusal by the guest to comply with the internal rules of the establishment such as by disturbing the tranquility of other guests, use of the accommodation provided for purposes other than those agreed by the parties, threats to public health when the guest is infected by one of certain contagious diseases and, when payment at fixed periods by the guest throughout the duration of the contract has been agreed upon, non-payment, may all be considered to be reasons justifying his putting an end to the contract. Such a list is clearly not exhaustive and if a general provision on this point were to be framed in a future uniform law it would be necessary to avoid limiting the rights of the hotelkeeper, while at the same time insisting upon them being exercised reasonably.

60. The same is true for the guest. It would seem to be unjust that the consideration that the principal element of the contract is that of providing accommodation be interpreted as meaning that it is only when the hotelkeeper fails to carry out his obligation in this respect that the client may repudiate the contract. Thus, if circumstances

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(1) PEREZ SERRANO, op. cit., pp.272-3.
(2) Ibid., p.275 where he doubts whether this last named duty is really a legal one.
(3) This rule is explicitly stated in Article 2655 of the Civil Code of Ethiopia.

exist in the establishment which indicate that the proposed presence of the guest may afford him reasonable grounds to entertain fears for his personal safety (e.g. danger of contracting a contagious disease) or for his property, it would seem only reasonable for him to be permitted to repudiate the contract without being required to indemnify the hotelkeeper. Similarly, failure by the hotelkeeper to provide certain services which the guest had considered, and had so informed the hotelkeeper, to be conditions of accepting accommodation would also appear to justify repudiation by the guest on the grounds that a vital term of the contract was affected. Again, the view is generally held that death of the guest puts an end to the contract, although this will not necessarily be so as regards members of his family present in the hotel with him (1).

61. Assuming, therefore, that in given circumstances both the hotelkeeper and the guest should be permitted to repudiate the contract and, in view of the fiduciary character of the relationship this would seem to be justifiable, the question also arises as to whether in addition to a right to repudiate there should also be a right of indemnity. Here, at least as regards the right of the hotelkeeper to repudiate for fault of the guest, the situation is similar to that where the latter has reserved accommodation and then failed to take it up (2). Thus, the FIAV/IHA rules mentioned above concerning the relationship between travel agents and hotelkeepers lay down similar rules for cancellation of the reservation and for the departure of the guest before the expiry of the period for which accommodation was reserved (3). Only a detailed examination of each specific ground of repudiation can, it is submitted, indicate whether the application to the two situations of the same rules of a future uniform law would be desirable.

62. Finally, as regards an indemnity to be paid to the guest by the hotelkeeper for breach of contract justifying repudiation during the execution of the contract, the same difficulties arise in the calculation of damages as when the hotelkeeper informs the prospective

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(1) FRAGALI, op. cit., pp.198-9, where he suggests that an indemnity may be due to the hotelkeeper in such case, for example for the cost of disinfecting the room.

(2) See paragraphs 47-49 above.

(3) See paragraph 50 above and note (2) thereto.

guest prior to his arrival at the hotel that he will be unable to provide the accommodation which he had agreed to provide, the facts of the case will be the determining factor in ascertaining whether the guest has indeed suffered any economic loss or physical or mental injury or distress (1) deriving from the breach of contract. In any event, he must not be unjustly enriched at the expense of the hotelkeeper, as the latter must not be allowed to do so by the application of severe penalty clauses.

(1) In the recent English case of Jarvis v. Swan's Tours Ltd., /1973/, I Q.B. 233, the Court of Appeal stated, per curiam, that in a proper case, including a contract for a holiday, damages could be recovered for mental distress and vexation. The case was itself concerned with a contract between a client and a tour operator, but the principle would seem capable of extension to contracts with hotelkeepers.

IV THE LIABILITY OF THE HOTELKEEPER RELATING TO [illegible] GUESTS' PROPERTY

63. It is, without question, this aspect of the relationship between hotelkeepers and their guests which has in the past been regarded as being the most suitable for unification, as is testified by the efforts which resulted in the preparation in 1936 of the UNIDROIT draft and the Council of Europe Convention. Equally, on the national level, legislative provisions are to be found regulating the question in most States, either in the form of special laws or as articles of the Civil Code.

64. The reasons for the particular interest aroused by the subject are not difficult to find. In the first place the special liability placed by Roman Law on nautae, caupones and stabularii (1) is well known, and the solutions reached by Roman Law were justified, on the one hand by the consideration that the traveller, being obliged to rely to a large extent on the vigilance of the hotelkeeper for the safeguarding of his property and personal security, was in need of special protection, and on the other by the widespread mistrust of hotelkeepers as a class. These two explanations of the heavy liability placed upon that class continued to be advanced until comparatively modern times and if the first is still substantially valid, the latter has become a matter of history. More and more often today the concept of the professional risk undertaken by the hotelkeeper is considered to be the foundation of his exceptional liability.

65. In consequence, at both a national level, where the need became increasingly felt to alleviate to a certain degree the "tremendous liability" (2) weighing upon hotelkeepers, and on the international level, where the widespread increase in tourism called for an attempt at unification of the law on the matter, there has been considerable legislative activity. Moreover, if the case law of a representative group of States is examined, it will be seen that this aspect of the relationship between hotelkeepers and their guests has been one of the most frequent subjects of litigation.

66. While, however, the special liability attaching to hotelkeepers for loss of, or damage to, the property brought to the hotel by their guests has been recognised by most legal systems, the legal basis has varied. Thus, while the majority of the systems inspired by Roman law have conceived the liability as a contractual one and have considered

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(1) For a discussion of the Roman law, see COUTURIER, "Thèse", pp.30-44.

(2) Robins & Co. v. Gray [1895] 2 Q.B.501, 503-05 per Lord Estes, M.R.

it as, or have assimilated it to, that arising out of a deposit of necessity (1), the common law countries have generally taken the view that "the duties, liabilities and rights of innkeepers with respect to goods brought to inns by guests or founded, not upon bailment or pledge, or contract, but upon the custom of the realm with respect to innkeepers" (2). This difference in conceptual approach will not, however, be examined here in detail as it does not appear to have given rise to any serious difficulties during the elaboration of either the UNIDROIT draft or the Council of Europe Convention.

67. The principal obstacle to unification is to be found rather in the distinction to be found between those systems which favour the concept of the "limited liability" and those that of "unlimited liability" of the hotelkeeper. These expressions are hallowed by usage and, for the sake of convenience, will be used throughout this report. It should, however, be pointed out that the limitation referred to is not one on the degree of care required of the hotelkeeper but rather of the amount of compensation which he may be called upon to pay.

68. The system of limited liability is one which has been gradually introduced into the majority of Western European States and in North America (3) and lies at the very basis of the UNIDROIT draft and

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(1) For example, Belgium, Civil Code, Article 1952; France, Civil Code, Article 1952; Luxembourg, Civil Code, Article 1952; Spain, Civil Code, Article 1783; Argentine, Civil Code, Article 2227; Brazil, Civil Code, Article 1284; Chile, Civil Code, Article 2241; Philippines, Civil Code, Article 1998.

(2) Robins & Co. v. Gray /1895/ 2 Q.B.501, 503-05, per Lord Esher, M.R.

(3) In addition to its acceptance in most of the jurisdictions of the United States of America, it has been adopted by, inter alia, the following States: Austria, Civil Code, Article 970 a; Belgium, Civil Code, Article 1952; France, Civil Code, Article 1953; Federal Republic of Germany, Civil Code, Article 701; Greece, Civil Code, Article 853; Ireland, Hotel Proprietors Act 1963, Section 7 (1); Italy, Civil Code, Article 1784; Luxembourg, Civil Code, Article 1953; Poland, Civil Code, Article 844; Switzerland, Code of Obligations, Article 487; United Kingdom, Hotel Proprietors Act, 1956, Section 2 (3); Mexico, Civil Code, Article 2535; Ethiopia, Civil Code, Article 2664; Uganda, Act to consolidate the Law in relation to Hotels 1965, Section 4 (1) and Puerto Rico, Innkeepers Act, 1956, Sections 2 and 3.

the Council of Europe Convention. It is also to be [illegible] Draft Act respecting Hotelkeepers and Lodging-House Keepers [illegible] adopted and recommended for enactment by the Conference of [illegible] on Uniformity of Legislation in Canada at their forty-[illegible] annual meeting in 1962. Broadly speaking, the structure of the conventional limited liability is based on the following principles:

(i) the liability of the hotelkeeper for any loss, damage or destruction or loss of, property brought to the hotel by a guest who has sleeping accommodation put at his disposal, a [illegible] limitation of the compensation paid either to a maximum fixed sum or a variable maximum sum calculated by multiplying the price, per night, of the room occupied by the guest by a fixed coefficient;

(ii) the unlimited liability of the hotelkeeper in cases where:

(a) the property has been deposited with him [illegible];
(b) he has refused, without reasonable grounds, property offered to him for safe custody (2);
(c) the damage, destruction or loss of the property is caused by a wilful act or omission or negligence on his part, or on the part of any person for whose actions he is responsible;

(iii) the exoneration from liability of the hotelkeeper when the damage, destruction or loss is due:

(a) to the guest or any person accompanying him or in his employment, or any person visiting him;
(b) to an unforeseeable and irresistible act of nature or an act of war;
(c) to the nature of the property.

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(1) The Council of Europe Convention, Annex, Article 2, paragraph 3, and certain national jurisdictions, provide that a hotelkeeper shall have the right to require that the article shall be in a fastened or sealed container.

(2) Reasonable grounds are, for example, where the property is dangerous or, having regard to the size or standing of the hotel, it is of excessive value or cumbersome, Council of Europe Convention, Annex, Article 2, paragraph 2. The Ethiopian Civil Code also provides in Article 2657 that the hotelkeeper cannot claim additional payment for looking after his guests' luggage. A similar provision is contained in Article 1286 of the Brazilian Civil Code.

69. ... as to permit a comparison of the ... limited liability with that of unlimited liability, these various ... will now be examined in more detail.

70. Generally speaking, the one significant ... between the two systems lies in the fact that the theory of ... ted liability (1) makes no allowance for fixing the maximum compensation ... victim. As mentioned above, and as will be seen from ... tion of the points discussed under (ii) and (iii) in paragraph ... above, there is substantial concordance between the two systems ... the standards of care imposed upon the hotelkeeper and the ... has been said, "statutes limiting the innkeeper's liability ... usually construed to apply to the liability of the innkeeper as an insurer of his guests' goods and chattels and do not limit his liability ... the lack of due care and diligence he owes to the guest as to property generally". (2).

71. Turning then to the limitation of the compensation payable, two different systems have been used. The first of these ... obtained in both Article 1 of the UNIDROIT draft and Article ... of the Annex to the Council of Europe Convention. In the latter case, the limitation ... to an equivalent of 3,000 gold francs, this being taken to refer to a unit of sixty-five and a half milligrammes of gold of ... fineness nine hundred. Moreover, since during the preparation of the Convention, a number of States argued in favour of the variable limit, it is provided in Article 2 (a) of the Convention that Contracting Parties have the option of limiting the liability of the hotelkeeper to at least one hundred times the daily charge for the room (3).

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(1) Among States which have retained the system of unlimited liability, are Argentina, Civil Code, Article 2230; Brazil, Civil Code, Articles 1264 and 1285; Chile, Civil Code, Article 2265 et seq.; Cuba, Civil Code, Articles 1783 and 1784; El Salvador, Civil Code, Article 2079; Panama, Civil Code, Articles 1476 and 1477; Philippines, Civil Code, Article 1998 et seq.; Spain, Civil Code, Articles 1783 and 1784.

(2) Hoffman v. Louis D. Miller & Co., Inc. 83 RI, 115 A 2d 3,689.

(3) This solution has been adopted by Belgium in the reform of the relevant provisions of its Civil Code when ratifying the Council of Europe Convention; see Article 1952 of the Civil Code, in fine and also by France in the law of 24 December 1975 amending Articles 1952-1954 of the Civil Code concerning hotelkeepers' liability.

72. There are arguments to be advanced in favour of both systems. As regards the fixed sum solution, it clearly has the merit of simplicity and, at least until recently, once the conversion into the national currency has been effected, the amount would be known in advance. Many of these advantages have, however, become relative owing to the recent monetary developments (1). On the other hand, the advocates of the fixed sum solution can point to the complexity of its rival since the precise sum may vary, not only according to the category of the hotel and to the nature of the room itself, but also according to the time of the year and the length of the stay in the hotel as when special terms are agreed for a guaranteed lengthy sojourn. Moreover, it is argued that complications will arise when it is not possible to identify with certainty the price of the room, as for example when a global price includes half or full "pension" and, finally, that in many cases, the method of calculation may give a figure which will be substantially lower than the fixed sum.

73. In favour of the "cost of the room" solution, the principal argument advanced is that it is more equitable for both the hotels and for their guests. A small hotel would thus be required to pay out lower sums than a luxury hotel and due regard would also be given to the standing of the clients since those frequenting luxury hotels could reasonably be expected to be in possession of articles of greater value. Furthermore, it is suggested that when an object has been brought to a hotel by several persons, this method of calculation also simplifies the solution of the dispute since the maximum compensation would be one hundred times the cost of the accommodation, whereas with the fixed sum system, which is based on the person of the guest, the question might well arise as to whether the object was brought to the hotel by one or more of them. Finally, as to the objections that the calculation based on the price of the room would be too complicated, it is pointed out that such prices are normally posted up in the hotel or officially established and that even when other services are provided, it is possible to make the necessary calculation.

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(1) See the document "Gold clauses in international conventions; problems raised by the present monetary crisis", UNIDROIT, Etudes LVII, Doc.1 Rev. U.D.P. 1973.

74. Prior to the recent monetary crisis, it would have been difficult to make a reasoned choice between the two systems, but with frequent devaluations and revaluations accompanied by the ever fluctuating price of gold, it is submitted that the "cost of the room" solution may, in present circumstances, be regarded as preferable. Even so, a possible compromise may be found in the hybrid system in force in the Federal Republic of Germany. Thus, Article 702 of the Civil Code provides that the basic method of calculation shall be one hundred times the price of one day spent in the hotel but stipulates a minimum of one thousand, and a maximum of 6,000 DM. In the case of money, negotiable instruments and valuables, the upper limit is only one thousand five hundred DM. This provision is also of particular interest in that it maintains a distinction between certain types of property which should be handed over to the hotelkeeper or an authorised servant for deposit, failing which the guest is, to a certain extent, penalised. This is the counterpart of the obligation placed on hotelkeepers to accept securities, money and valuable articles (1). A similar device is to be found in Article 2 (b) of the Council of Europe Convention which permits a Contracting Party to limit the liability in respect of any one object to an amount which is not less than the equivalent of one thousand five hundred gold francs or of a minimum of fifty times the daily charge of the room. Here, there is no specific reference to valuables or securities but it is legitimate to assume that the intention of the drafters was to penalise guests who failed to effect a deposit of objects of a certain value.

75. In connection with the mechanism of limiting the amount of compensation payable by the hotelkeeper, mention should also be made of the rule which exists in a number of jurisdictions to the effect that the hotelkeeper cannot benefit from the limitation unless he has posted up in a place where it can conveniently be read by guests at the entrance to the hotel, or at or near the reception desk, a notice setting out the basic terms of the relevant statutory provisions (2). Although an article giving effect to this rule was contained in the UNIDROIT draft (3), no corresponding one is to be found in the Council of Europe

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(1) See, for example, the Council of Europe Convention, Annex, Article 2, paragraph 2.

(2) For example, United Kingdom, Hotel Proprietors Act 1956, Section 2 (3), in fine; Ireland, Hotel Proprietors Act, 1963, Section 7 (3); New Brunswick, Innkeepers Act, 1952, Section 4.

(3) Article 9.

Convention. It should, however, be recalled that whereas the UNIDROIT draft was one of a uniform law, the instrument prepared by the Council of Europe aims rather at laying down minimum standards and that Article 1, paragraph 2, of the Convention, which provides that "each Contracting Party shall nevertheless remain free to impose greater liabilities on hotelkeepers" seems to be capable of being construed as including the possibility of a State's wishing to retain, or introduce into its legislation, the rule concerning the necessity of giving notice of the limitation.

76. One of the factors operating to reduce the practical effects of the distinction between the concepts of limited and unlimited liability is to be found in the fact that, as mentioned above (1), there are three cases in which, as a general rule, even those systems which recognise the concept of limited liability, hold the hotelkeeper liable in full. There remain, however, certain subtle distinctions. For while the principle of unlimited liability may, at first sight, appear to be more favourable to the guest, a number of States which have maintained it, and especially those in Latin America, have laid down detailed provisions in their civil codes requiring certain formalities to be complied with if the hotelkeeper is to be held liable. Thus, in some cases, it is necessary for the guest to inform the hotelkeeper or one of his servants of the presence of the particular object in the hotel (2) or even to show it on request, especially when the objects are of value not normally carried by a person of the quality of the guest (3) and, in respect of money, securities and valuables, actually to deposit them (4). Again, some systems stipulate that guests must observe the precautions which may be suggested to them by the hotelkeeper or his servants with regard to the custody of, or vigilance over, their property (5) while a

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(1) See above, paragraph 66.

(2) Mexico, Civil Code, Article 2535; Guatemala, Civil Code, Article 2079.

(3) Argentina, Civil Code, Article 2235; Chile, Civil Code, Article 2245; Columbia, Civil Code, Article 2269; El Salvador, Civil Code, Article 2002; Nicaragua, Civil Code, Article 3510; Uruguay, Civil Code, Article 2281.

(4) Guatemala, Civil Code, Article 2079.

(5) Cuba, Civil Code, Articles 1783 and 1784; Guatemala, Civil Code, Article 2079; Honduras, Civil Code, Article 1965; Panama, Civil Code, Article 1476; Spain, Civil Code, Article 1783 and 1784.

distinction has also been established in some States between the situation in which the guest makes an actual deposit of his goods and that in which he keeps them in his possession. In the former case the hotelkeeper is liable for loss or damage caused by himself or his servants and by all persons visiting the hotel. While in the latter he is not liable if the damage is caused by persons visiting the guest (1).

77. It will be noted that a considerable number of the formalities mentioned above relate directly or indirectly to the question of proving the introduction into the hotel of the property of the guest and thus to a large extent spell out a fact which normally remains implicit in those systems which have adopted the concept of limited liability, namely, that in the absence of deposit, it is far from easy for a guest to prove the loss of an object in a hotel, as opposed to its being merely damaged there. These detailed provisions also seem designed to afford adequate protection to hotelkeepers against fraudulent claims by guests, protection which is all the more necessary when the liability of the hotelkeeper is unlimited.

78. As regards the cases in which the hotelkeeper is totally exonerated from liability, the three situations mentioned above in connection with the principle of limited liability (2) are generally regulated in the same way by those legal systems which recognise no such limitation. Three additional cases of exemption from liability may be mentioned which, however, cut across that distinction, namely when the objects are lost or destroyed as a result of entry into the hotel effected by armed force (3) where, in the case of valuables,

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(1) Chile, Civil Code, Articles 2241-3; Columbia, Civil Code, Article 2265-7; El Salvador, Civil Code, Articles 1998-2000; Nicaragua, Civil Code, Articles 3506-8; Uruguay, Civil Code, Articles 2277-9.

(2) See above, paragraph 68.

(3) This ground of exoneration exists in a number of civil codes and was preserved in Article 1954 (b) of the Belgian Civil Code when the Council of Europe Convention was ratified, although the reform of Article 1954 of the French Civil Code has seen its disappearance. Nevertheless the new provision retains the exoneration for theft resulting from force majeure.

there has been no deposit and their loss or destruction cannot be attributed to the fault of the hotelkeeper or his servants (1) and when the guest assumes exclusive control of the accommodation occupied (2).

79. In connection with the rule that the hotelkeeper is not liable when loss is due to the guest or any person accompanying him or in his employment or visiting him, it should be pointed out that both the UNIDROIT draft and the Council of Europe Convention avoided using the term "fault" since its use might create difficulties or even confusion as to the precise nature or degree of fault necessary. It was considered better to leave the question to the interpretation of the national courts.

80. It will thus become apparent that the differences between the two theories are in practice far less than might first be thought. If preference is to be accorded to that of the limited liability of the hotelkeeper on the broad lines set out in paragraph 66 above, it is because it is this system which, being firmly based on the notion of the professional risk of the hotelkeeper, has inspired the vast majority of modern laws on the subject, has formed the basis of attempts at universal, regional and even national unification and, by the emphasis laid on deposit, has led to an increasing use by guests of the facilities for safekeeping of their goods provided by hotels.

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(1) Austria, Civil Code, Article 970 (a); Greece, Civil Code, Article 835; Luxembourg, Civil Code, Article 1953 and Poland, Civil Code, Article 844.

(2) Uniform Law prepared by the Canadian Commissioners, Section 8 (b).

81. While, however, one of the principal hindrances to unification would disappear with the wide acceptance of the limited liability concept, a number of problems arise independently of this factor. The first of these concerns the exemption from the general rules governing the liability of the hotelkeeper for loss or destruction of, or damage to, his guests' motor vehicles, objects contained therein, and live animals. Both the UNIDROIT draft and the Council of Europe Convention (1) contain this exemption, it being justified in the case of vehicles primarily on the grounds that "the maximum limit of liability would have had to be increased considerably and secondly, because it did not seem desirable that hotel garages should be governed by rules different from those governing other garages"(2).

82. However in positive law, there are wide differences (3) and this is borne out by the fact that Article 2 (e) of the Council of Europe Convention leaves the option to Contracting Parties to apply the rules in the Annex to vehicles, property left with them and live animals, or to regulate the hotelkeepers' liability in this respect

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(1) Respectively Article 7 of the UNIDROIT draft and Article 7 of the Annex to the Council of Europe Convention.

(2) Report on the UNIDROIT draft Uniform Law, L.C.N. 1965 - U.L.L. - Draft II, p.21.

(3) To mention only certain States which have introduced statutory provisions, the following exclude vehicles, property contained in them and animals from the special liability attaching to hotelkeepers: Belgium, Civil Code, Article 1954 quater; Federal Republic of Germany, Civil Code, Article 701 (4); Puerto Rico, Innkeepers Liability Act, 1956, Section 5 (motor vehicles and property contained therein, unless damage caused by wilful act) and the United Kingdom, Hotel Proprietors Act, 1956, Section 2 (2). The special rules relating to the liability of hotelkeepers are, however, applied in these cases by Ethiopia, Civil Code, Article 2670, paragraph 2; Guatemala, Civil Code, Article 2084; Ireland, Hotel Proprietors Act, 1963, Section 5 (2) and (3) (motor vehicles and property contained therein, if the hotelkeeper or authorised servant has knowledge of their presence) and Article 7 (2) - non applicability of the limitation on compensation); Philippines, Civil Code, Article 1999. The new French law of 24 December 1973 modifying Articles 1952-1954 of the Civil Code excludes live animals from the application of Articles 1952 and 1953 but expressly provides for the liability of hotelkeepers for damage to, or loss of, property contained in vehicles on premises under their control being limited to fifty times the daily charge for the room.

in any other way." Once again, it should be pointed out that the Council of Europe Convention in effect is not a uniform law but rather a code of minimum standards, and differences may exist in the law of those States which have ratified it. In these circumstances it will be necessary for a new review of this question to be undertaken. While on the one hand, however, it may be argued that motor vehicles are insured against theft, they are not normally the subject of comprehensive insurance and if a vehicle or property inside it is damaged while in the custody of a hotel, garage or car park without any fault on the part of its owner, it is not at first sight easy to see why the hotelkeeper should not be liable for such damage or why the owner, even if the vehicle is insured against such damage, should run the risk of an increase in his insurance premium for claiming in such cases.

93. As regards live animals, the question is somewhat different. Here the hotelkeeper is less likely to have taken actual custody of them. There might, however, be a case for holding him liable if the loss or injury is due to his own wilful misconduct or that of his servant, provided that the burden of proof is placed on the guest.

94. As has already been mentioned (1), a number of States have assimilated to the position of hotelkeepers certain persons offering services to the public which require those who take advantage of them to rely upon the vigilance of the operator of the establishment to

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(1) See paragraph 89 above.

safeguard their property (1). This is, it is submitted, [illegible] to discuss the justification of such an assimilation, [illegible] questions which fall outside the scope of the relationship between hotelkeeper and guest. Moreover, this assimilation has [illegible] limited to the liability of persons exercising certain [illegible] in relation to the property of those availing themselves of the services provided and will often have no relevance in connection with other matters dealt with in this report. It is therefore [illegible] that the question of assimilation should be left entirely to [illegible] system and should not be dealt with in the content of a [illegible] law on the hotelkeeper's contract.

85. There has already been discussion in this report of the notion of a "guest" (2) and on the time at which the contract between the hotelkeeper and his guest arises (3), while an allusion has also been made to the relationship between the existence of a contract and the liability of the hotelkeeper for the property brought [illegible] (4). If no contract is in fact concluded, it would seem difficult to justify logically the mere entry of a person into a hotel with the intention of requesting accommodation as rendering the hotelkeeper liable [illegible] hotelkeeper, for damage to, or destruction or loss of, [illegible]'s

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(1) For example, Italy, Civil Code, Article 1786 assimilates to the [illegible] who operate sanatoriums, places of public entertainment, bathing establishments, boarding houses, restaurants, sleeping cars and the like; also the Civil Codes of Chile, Article 2[illegible]; Colombia, Article 2272; El Salvador, Article 2205; Nicaragua, Article [illegible] and Uruguay, Article 2281 assimilate the operators of restaurants, cafés, billiard halls and bathing establishments; the Ethiopian Civil Code, Article 2671, extends the relevant provisions of the chapter on the innkeeper's contract to the management of medical institutions, convalescent homes, public places of entertainment, bathing establishments, boarding houses, restaurants, shops, cars, public stables and other establishments of a similar nature. Contra, Argentina, Civil Code, Article 2[illegible] and Mexico, Article 2538 (unless there is an actual deposit).

(2) See paragraphs 31-34 above.

(3) See paragraphs 44-48 above.

(4) See paragraph 45 above.

property, although the hotelkeeper could be liable [illegible] guilty of wilful misconduct. However, even [illegible] exists, difficulties may arise as to when the [illegible] begins. The question was discussed at length in the [illegible] UNIDROIT draft uniform law which contains the following which is worth quoting in full:

"Article 4 provides that liability under the Convention law commences with the arrival of the guest's goods [illegible] and ceases when the goods leave the hotel.

On the first point, the Institute rejected the solution adopted by German law and Swiss judicial decisions, whereby the liability under the Innkeeper's contract commences as soon as the goods come into the hands of the hotel staff or of persons variously to be deemed, according to circumstances, to have been entrusted by the Innkeeper with the reception of guests' goods at the station, and has followed instead the system of the Roman and Anglo-Saxon laws. The latter was chosen for the following reasons.

Primarily because, from the time the goods are received at the station until they arrive at the Inn, the staff of the Inn are not engaged in what is typically the business of the Inn. Fundamentally the goods during that time are the subject of a contract of carriage, which is not necessarily even related to the Innkeeper's contract, since it often happens that the guest, although intending to stay at a certain hotel, ultimately decides not to resort thereto.

Secondly, because it would not have been easy to get countries which do not recognise the theory of constructive rights to accept the principle of the Innkeeper's liability in respect of goods handed over at the station to persons who may variously be deemed, according to circumstances, to have been entrusted with the reception of the goods of the guest.

Moreover, it should be observed that except in this last case, there is not much practical difference between the German and Swiss system and the system followed by the Roman and Anglo-Saxon laws, since, corresponding to the unlimited liability of the contract of carriage of the Roman laws, and of the bailment of the Anglo-Saxon laws, there is the unlimited liability of the Innkeeper in German law whenever the loss is caused by the fault of the servant, as happens in the majority of cases. It goes without saying that countries are free to extend the scope of the uniform law to cases not expressly contemplated by that law.

The principle embodied in the Article also applies to goods despatched by the guest in advance, provided that the latter in fact reports to the hotel. Strictly speaking, where the guest takes lodging in the hotel, there is no Innkeeper's contract, but it seemed desirable to apply the same rule to this, because of the accessory character of the deposit of luggage sent in advance, a deposit which is linked up with the [illegible] contract which subsequently ensues. But if the guest [illegible] does not resort to the Inn, such a deposit as the subject of an entirely separate contract, and there is no reason for exempting it from the rules governing the contract of deposit." (1)

36. Article 6 of the draft expressly provides that "the provisions of the present law apply from the time of the arrival of the goods at the inn, except where a guest has dispatched goods in advance and does not stay at the inn himself" (2). Now it may be inferred from a joint reading of this provision and the report that when a guest enters a hotel with his property to seek lodging, the hotelkeeper is liable as from the moment the property enters the hotel, assuming a contract is concluded. This assumption is based on the statement in the report that in the case of luggage sent in advance the hotelkeeper's liability arises as from its arrival in the hotel, even though the "innkeeper's contract .... subsequently ensues". There would seem to be no grounds for distinguishing the two cases on this reasoning, although the reasoning itself is suspect inasmuch as there almost certainly will be a hotelkeeper's contract already in existence when luggage is sent in advance, as a reservation has already been made.

37. Article 1, paragraphs 1 and 2 of the Annex to the Council of Europe Convention explicitly requires that sleeping accommodation be placed at the disposal of the guest in order for the liability of the hotelkeeper to arise and paragraph 2 contains a definition of the property brought to the hotel, in respect of which such liability exists, as being any property:

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(1) L.O.N. 1935 - U.P.I. - Draft II, pp.19 and 20.

(2) For almost identical wording, see Article 2670, Paragraph 1 of the Ethiopian Civil Code.

"(a) which is at the hotel during the time [illegible] for the accommodation at his disposal;

(b) of which the hotelkeeper or a person for [illegible] is responsible takes charge outside the hotel during the period for which the guest has the accommodation at his disposal;

or (c) of which the hotelkeeper or a person for [illegible] is responsible takes charge whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the accommodation at his disposal."

88. It will readily be seen that sub-paragraph (c) is drafted in such a way as to be capable of being interpreted as covering not only property brought into a hotel by a person requesting and obtaining accommodation, prior to the conclusion of the contract, but also the specific problem the solution of which by Germany and Switzerland had been rejected by the MILLIKOFF draft (1). This interpretation is confirmed by the fact that Article 2 (c) of the Convention permits the Contracting Parties to "adopt the rule laid down in paragraph 2 of Article 1 of the Annex only in respect of property which is at the hotel", which in effect allows them to exclude from the scope of the Convention the second, but not the first, of the two situations mentioned in this paragraph of the report. It is therefore apparent that in the framing of a future uniform law it will be essential to examine closely this problem. If the possibility of permitting future Contracting Parties to make reservations is to be excluded, then it may well prove necessary to adopt a more restrictive text leaving States free to extend the liability of a hotelkeeper to situations such as those where his servants take charge of the guest's property outside the hotel, as for example at a railway station or airport.

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(1) MILLIKOFF, op. cit., Vol.3, p.1029 cites authority for the view that "when a porter engaged by a hotel solicits custom at a railway station and receives baggage from one who thereupon takes a vehicle to which he is directed by the porter, for transportation to the inn, the relation of the guest begins when the baggage is delivered to the porter."

89. As regards the time at which the liability of the hotelkeeper ends, the UNIDROIT draft settles for that at which the guest actually leaves the hotel (1) whereas the Council of Europe draft, without specifically dealing with the question, suggests in Article 2 (c) of Article 1 of the Annex that the hotelkeeper remains liable for a reasonable period "following the time when the guest has ceased to have accommodation at his disposal (2). This provision seems to be somewhat contradictory in that, on the basis of the original UNIDROIT draft, a guest might cease to have accommodation put at his disposal. To expect the hotelkeeper to remain liable qua hotelkeeper for an indefinite period after the departure of the guest seems highly inequitable (3). However, difficulties may also arise in the interpretation of the term "reasonable period" as used in the Council of Europe draft and indeed, in the United Kingdom statute, it is specifically stated that the loss or damage must occur "during the period commencing with the midnight immediately preceding, and ending with the midnight immediately following, a period for which the traveller was a guest at the hotel and expressly or impliedly to use the accommodation so engaged" (4). Whether it would be possible, however, to obtain general agreement on such a strict interpretation might be a moot point and recourse may be necessary to a solution such as that contained in the Council of Europe Convention which will permit a certain latitude to States in fixing the duration of the hotelkeeper's special liability.

90. Mention should be made at this stage of a provision found in Article 4 of the UNIDROIT draft, Article 5 of the Annex to the Council of Europe Convention and in many national legal systems (5). Although

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(1) Article 6.

(2) For full citation, see paragraph 87 above.

(3) Unless a specific contract of deposit is concluded.

(4) Hotel Proprietor's Act, 1956, Section 2 (1) (b).

(5) For example, Ethiopia, Civil Code, Article 2668; Federal Republic of Germany, Civil Code, Article 703; Greece, Civil Code, Article 836; Switzerland, Code of Obligations, Article 489 and Poland, Civil Code, Article 847.

variously worded, the effect of these provisions is that the guest will not be entitled to invoke the special liability of the hotelkeeper if, after discovering the damage to, or destruction or loss of, his property, he fails to inform the hotelkeeper without undue delay. The rationale of this rule is to be found in the report on the UNIDROIT draft where it is stated that "this rule, which is intended to secure good faith, was adopted for the reason that, unless the innkeeper is notified without due delay of the damage, he is not in a position to control its consequences, and also because a guest has no valid reason for not notifying the loss of or injury to his goods, once he has knowledge of it" (1). It should, however, be recalled that it is often expressly stated in the relevant provisions and , if not, must be inferred, that the rule does not apply when the property has been deposited with the hotelkeeper, and when the damage or loss has occurred due to his wilful act or omission or negligence, or that of persons for whose actions he is responsible. The justification for these exceptions is clear. In the first case, when the guest requests the return of the property which has been deposited and either the hotelkeeper or his servant is unable to produce it, there is sufficient notice, while in the second, it would seem inacceptable that the hotelkeeper could escape liability for wilful misconduct or negligence by invoking the rule against the guest.

91. Finally, it is necessary to examine the extent to which the hotelkeeper may exclude or limit his liability for the loss or destruction of, or damage to, his guests' property. This is, without question, one of the most important aspects of the general problem under consideration and, before discussing the various solutions which have been adopted, a few preliminary remarks should be made.

92. In the first place, the hotelkeeper's contract is, in certain respects, a contract of adhesion and, especially during the "high season", the hotelkeeper is almost invariably in a stronger position than the traveller seeking accommodation. Secondly, travellers are very often foreigners whose linguistic knowledge may not permit them to understand documents which they are required to sign, over and above the formality of registering with the hotel. Thirdly, many States have

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(1) L.O.N. 1935 - U.D.P. - Draft II, p.19.

already imposed statutory limitations upon the liability of hotelkeepers. These considerations are highly relevant to the different mechanisms whereby hotelkeepers have sought to limit or even exclude their liability, which will now be examined in the light of the approach to the problem by the international texts and by national law.

93. At the outset, references must be made to the distinction, discussed above in detail, between those States which have adopted the limited liability concept and those which have retained that of the unlimited liability of the hotelkeeper. While there is substantial agreement that a hotelkeeper cannot exclude or limit his liability unilaterally (1), the differences between the two systems emerge with regard to the question of the validity of agreements between the parties to exclude or diminish liability. The need to alleviate the full effect of the absence of any limit upon the compensation payable by the hotelkeeper for damage to, or loss of, his guests' property has been felt in all countries where the hotel industry has assumed a certain importance and, not surprisingly, many States which have not introduced statutory provisions to relieve hotelkeepers of their liability within certain fixed limits have felt it necessary to affirm the freedom of the parties to do so of their own free will. Hence the provisions in a number of Latin American civil codes expressly permitting the conclusion of agreements (2), sometimes subject to their being in writing (3), limiting or excluding the liability of the hotelkeeper. This approach to the problem is open to criticism on a number of grounds. First, it may permit total exoneration of the hotelkeeper so that a guest, who is in no way at fault himself, can recover nothing. Secondly, it ignores the relative strength of the parties, since the guest may well have no option but to concur, and thirdly it equally fails to take account of the fact that, for linguistic reasons, he may have no real idea of what he is signing.

94. The situation is different in those systems where statutory limitations have been placed upon the compensation payable by hotelkeepers, although here again two different approaches are distinguishable.

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(1) See COUTURIER in Juris Classeur de droit civil, "Dépôt", articles 1949-1954, paragraphs 137-141.
(2) Chile, Civil Code, Article 2004; Guatemala, Civil Code, Article 2081; Nicaragua, Civil Code, Article 3512.
(3) Uruguay, Civil Code, Article 2283.

On the one hand, any attempt to exclude the liability of the hotelkeeper completely, to permit him to limit the compensation payable in those cases where it has been provided by statute that the limitation shall not apply or, in cases where it is applicable, to reduce it, is considered to be completely without effect (1). In other words, the whole structure of the limited liability principle is to be regarded as laying down imperative rules of law. On the other hand, the hotelkeeper may be permitted, in certain cases where the statutory limitation does not apply, to limit the compensation payable as though it were applicable. Thus, while Article 6 of the Annex to the Council of Europe Convention provides that "any notice or agreement purporting to exclude or diminish the hotelkeeper's liability given or made before the damage, destruction or loss has occurred shall be null and void", Article 2 (d) of the Convention gives to States the option of permitting the hotelkeeper to limit by agreement the compensation payable to an amount not less than that provided in the relevant legislation enacted in pursuance of the Convention (2), although the property has been deposited with him or he has refused to receive property which he is bound to receive for safe custody or even when he or his servants have been in some way responsible for the loss, provided that neither "intent or fault tantamount to intent is involved" (3). In other words, he can limit his liability even in cases where he has been negligent (4).

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(1) Argentina, Civil Code, Article 2232; Belgium, Civil Code, Article 1954 ter; Ethiopia, Civil Code, Article 2669; Italy, Civil Code, Article 1784; Mexico, Civil Code, Article 2537; Philippines, Civil Code, Article 2003 and France, Civil Code, Article 1953 (2) following the modification contained in the law of 24 December 1973.

(2) I.e. the limit of 3,000 gold francs.

(3) The agreement must be signed by the guest and contain no other term.

(4) Article 702 (a) of the German Civil Code permits a reduction of liability to the statutory limit when agreed to by the guest in writing, but it will not be effective when the damage or loss has been caused by the hotelkeeper or his staff or when it occurs to property which he was obliged to accept in deposit but refused.

95. From the foregoing, it would seem that a first step to any unification of the rules governing the validity of such exemption clauses depends upon a wider acceptance of the principle of limiting the maximum compensation payable by hotelkeepers in respect of the property of their guests. Even then it is still necessary to reach some general agreement on the circumstances which might justify permitting the hotelkeeper to diminish his liability in cases where it would otherwise be unlimited. In actual fact, such justification will be difficult to find for the reason that the legislator must, in the first place, be presumed to have had good reason for maintaining the unlimited liability of the hotelkeeper in certain cases and that the notion of an express contract between the parties displacing this rule is, in present-day circumstances and particularly in the light of the considerations mentioned in paragraph 90 above, usually nothing more than a pure fiction bearing little relation to the doctrine of freedom of contract.

96. From a more general standpoint, the principal question which seems to pose itself is that of the extent to which future uniform rules should, as regards the liability of the hotelkeeper for his guests' goods, conform with the principles laid down in the Council of Europe Convention. In view of the economic and touristic importance of the States which have ratified that instrument, the basic similarity of its provisions and the law of a number of other States, and the fact that it represents one of the most modern approaches to the problems involved, a strong case could be made out for the incorporation of the rules of that Convention, with perhaps some minor modifications, in a future uniform law.

97. It will be furthermore recalled that the Council of Europe Convention itself permits Contracting Parties to apply rules other than those contained in the Annex in certain strictly defined situations. A similar solution might be envisaged in the Convention accompanying the future uniform law to the extent that certain States might not wish to adopt in full the new rules, either because they contain some modifications of the Council of Europe Convention or because they feel themselves unable to accept certain provisions already contained in that instrument itself. In any event, the principles laid down in the Convention would seem to represent a reasonable point of departure for future attempts at unification and, in the light of the considerations set forth in this section of the report, this working hypothesis is strongly recommended.

V THE LIABILITY OF THE HOTELKEEPER FOR INJURY TO HIS GUESTS

98. This aspect of the relationship between hotelkeepers and their guests is, without doubt, the most delicate. In the first place few States have introduced specific legal provisions concerning the question (1), a fact which is scarcely surprising in view of the innumerable circumstances in which a guest may suffer injury during the course of a stay in a hotel. Secondly, the problem to which reference has already been made, namely whether there exists in positive law a hotelkeeper's contract or whether the relationship is founded on a number of different contracts (2), assumes considerable importance in this context, while thirdly, the choice which often presents itself to the victim of whether to sue in contract or in tort has militated against the elaboration of a coherent body of principles.

99. The combined effect of these considerations is to render extremely difficult a clear and logical exposition of the substantive problems involved. However, it would seem possible to detect certain differences in the approach adopted in positive law to those cases where injury has been caused to the guest by the state of the premises and those in which he has suffered injury through food or drink served to him in the hotel. The two cases will be examined separately, first from the contractual and then briefly from the tortious angle, after which an attempt will be made to draw certain conclusions.

(a) The situation in contract

100. As regards injury suffered by the guest owing to a defect in the premises, the general tendency seems to be to require that there has been some fault on the part of the hotelkeeper. Thus in French law the prevailing view would appear to be that in general the hotelkeeper, while being under an "obligation de sécurité", must prove that he has shown due prudence and diligence so as to ensure the safety of his guests ("obligation de moyens"), although in some specific cases, as when the guest is attacked in his room or when a mirror or chandelier

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(1) Ethiopia, Civil Code, Article 2658 and Ireland, Hotel Proprietors Act, 1963, Section 4 (1).

(2) See above paragraph 36.

falls on his head, then the liability of the hotelkeeper is strict (1). The American case law comes down in favour of treating the obligation of the hotelkeeper as being limited to the "exercise of reasonable care for the safety, comfort and entertainment of his visitor" (2). Broadly speaking, a similar result is obtained in both English and Irish Law. As regards the former, the Occupiers' Liability Act of 1957 provides that where persons enter or use premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty owed by the latter in respect of dangers due to the state of the premises or to things done or omitted to be done on them, so far as it depends on an implied term of the contract, is the common duty of care (3), which is defined as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there" (4). In Irish Law, a specific provision exists, namely Article 4 (1) of the Hotel Proprietors Act of 1963 in which it is laid down that "where a person is received as a guest at a hotel, whether or not under special contract, the proprietor of the hotel is under a duty to take reasonable care of the person of the guest and to ensure that, for the purpose of personal use by the guest, the premises are as safe as reasonable care and skill can make them" (5).

101. A similar result would appear to be reached in Italian Law, either on the basis of the general principles of the law of contract or, if the contractual liability of the hotelkeeper is founded on a specific contract, for example that of a lease, on that basis. Thus, although Article 1218 of the Italian Civil Code concerning non-performance of obligations, provides that "the debtor who does not exactly render due

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(1) MAZEAUD et TUNC, Traité Théorique et Pratique de la Responsabilité Civile, 6th edition, 1965, Vol. 1, pp.209-11. See also COUTURIER, "Thèse", pp.311-344.

(2) Clancy v. Barker, 131 F 161, 65 CCA 469, cited by WILLISTON, op. cit., Vol. 9, p.1041.

(3) Section 5 (1).

(4) Section 2 (2).

(5) Sub-section 2 of Article 4 provides that this duty is independent of any liability of the proprietor as occupier of the premises.

performance is liable for damages unless he proves that [illegible] or delay was due to impossibility of performance for a cause not imputable to him", thereby suggesting that it is not sufficient for the debtor to show that he had exercised due care and diligence. The prevailing view in both case law and doctrine is that in cases not involving custody of goods and where damages are sought, reference should also be made to Article 1176 of the Code which states that "in performing the obligation the debtor shall observe the diligence of a good paterfamilias" (1). In other words, if the debtor can prove absence of fault, he will be exonerated. An application of these rules to the case of a guest suffering injury in a hotel would lead to substantially the same result as in the countries already mentioned above, as would also be the case if a contract of lease were to be informed and the guest to suffer injury through some defect in the premises (2).

102. While an examination of the relevant provisions of the Austrian Civil Code (3) and the Swiss Code of Obligations (4) suggests that similar solutions would be reached, the situation under the law of the Federal Republic of Germany would seem to present certain differences. It is clear that Article 538 of the Civil Code (guarantee of the lessor for defects of the premises leased) is applicable to the hotelkeeper/guest relationship and both the case law and the writers are unanimous in holding that the provision covers the so-called "Mangelfolgeschaden", for example where a guest suffers injury in a hotel due to its defective state (5). The hotelkeeper is thus liable, independently of fault, for such injury and not only to the guest but also to the members of his family accompanying him (6).

103. A similar solution is to be found in the Civil Code of Ethiopia, Article 2693 (1) of which provides that "the innkeeper shall warrant to the client that the rooms engaged by him and those parts of

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(1) For a detailed discussion, see GIORGIANI, "L'inadempimento", 1952, p.188 et seq.
(2) Italian Civil Code, Article 1578.
(3) Austrian Civil Code, Articles 922 et seq. and 1295 et seq.
(4) Swiss Code of Obligations, Articles 254 and 255 (contract of lease.
(5) RG 2/7/1915, RG 87, 128; RG 30/3/1942, RG 169, 84. BGH 1/4/1963, NJW 1963, 1449.
(6) In application of the doctrine of the so-called "Vertrage mit Schutzwirkung gegenüber Dritte", of which the contract of lease is one example.

the hotel used in common are habitable, healthy and [illegible], sole grounds for his being relieved of his liabilit[illegible] damage is due to force majeure or the client's fault (1).

104. As regards injury caused by food or drink, [illegible] towards holding the hotelkeeper contractually liable [illegible] any fault on his part appears to have gained more ground. [illegible] to the provision contained in Article 2658 (2) of the [illegible] Code to the effect that where the hotelkeeper provide[illegible] food or drink, "he shall also warrant that they are [illegible] less" (2), there are judicial decisions in England (3), France (4) and the United States (5) suggesting that the victim need not pr[illegible] gence on the part of the hotelkeeper in order to recover, al[illegible] would perhaps be hasty, especially as regards England and [illegible], to assume that they represent a definitive statement of [illegible] Federal Republic of Germany, an analysis of the legal si[illegible] of a contract of sale raises the question as to how the hotelkeeper may be held contractually liable for damage deriving from a defect in the thing sold (Mangelfolgeschaden). There are two possibilities, either it may be argued that the guarantee for the promised qualities (Articles 459 and 480 II of the Civil Code) covers such damage (6) - with the result that the hotelkeeper will be liable independently of fault, or the view may be held that this is at most a case of "positive Vertragsverletzung" so that it will first be necessary to decide whether, on the basis of Article 242 of the Code, the hotelkeeper has a social duty ("Sorgfaltspflicht") to ensure that the food supplied to guests is free from defects and then to prove that in the concrete case he has not shown the required diligence in carrying out this specific duty.

105. As regards Austrian and Swiss law, however, the situation is clear. Here it is absolutely necessary for there to be fault on the part of the vendor (hotelkeeper) if he is to be held liable, in Austrian

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(1) Article 2658 (3).
(2) Article 2653 (3) is also applicable in such cases.
(3) Lockett v. A.M. Charles Ltd., [1938] 4 All. E.R. p.170.
(4) Cour d'Appel de Poitiers, 16 December 1970, J.P. 1971, I-264.
(5) See cases cited by WILLISTON, op. cit., Vol.8, pp.651-60.
(6) The weight of doctrine favours the view that it does, but the case law seems to indicate the contrary, see [illegible] 1962, 308.

law by an application of Articles 992 et seq. of the Civil Code combined with Article 932 (1) and in Swiss law by a combination of Article 208 (1) of the Code of Obligations with sub-paragraphs (2) and (3) of the same Article and Article 197 et seq.

(b) The situation in tort

106. Generally speaking, the situation in tort is less complicated than in contract, for the basic rule that the victim, if he is to recover, must prove both the damage suffered and the fault (or intention) of the alleged tortfeasor, is central to all systems whether common law or civil law. There are however certain exceptions and it is these which should be mentioned in connection with the relationship between the hotelkeeper and his guests. Thus in some States (2), the doctrine of "le gardien des choses" imposes in effect a strict liability and the application of the doctrine to the case of injury suffered by a guest in a hotel might produce substantially different results from those were he to sue in contract, for here it would not be sufficient for the hotelkeeper to show that he has used due diligence but rather he must prove the existence of force majeure, a fortuitous event, the intervention of third parties or the imprudence of the victim himself (3). Again, the collapse of a building causing injury may give rise to a reversal of the normal rules governing the burden of proof in tortious claims so that the hotelkeeper must prove that the collapse was not due to a defect in maintenance or construction (4).

107. The foregoing remarks have been concerned more specifically with the situation in tort in respect of injury caused to a guest by defects in the premises themselves, and as a general rule the requirement that the guest should prove negligence or wilful misconduct on

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(1) These articles concern the guarantee against defects of a thing handed over against payment.

(2) France, Civil Code, Article 1384; Italy, Civil Code, Article 2051.

(3) In both France and Italy the burden of proof is placed on the person in whose custody the object is.

(4) Italy, Civil Code, Article 2053; Austria, Civil Code, Article 1319 and Federal Republic of Germany, Civil Code, Article 836: also France, Civil Code, Article 1386, but here it is for the victim to prove the defect in construction or maintenance, Civ., 16 July 1903, D.P. 1904. I-83 and similarly Switzerland, Code of Obligation, Article 58.

the part of the hotelkeeper applies also to cases where he has suffered injury as a consequence of consuming food or drink. As is, however, well-known, the dividing line between contract and tort often becomes blurred and an example of this is to be found in the United States where it seems that the strict liability attaching in contract to a hotelkeeper when he serves food or drink causing injury to a guest arises equally when a victim sues in tort on a warranty that the food is fit for human consumption, without any allegation of either fault or negligence (1).

108. Notwithstanding these exceptions, however, the basic distinction between contractual and tortious claims lies in the fact that in respect of the former it is the hotelkeeper who must prove that he has shown due diligence in ensuring the safety of his guests while in the latter it is for the guest to prove the negligence or wilful misconduct of the hotelkeeper. If this is the principal distinction, it is however not the only one, since not only do differences exist with regard to the calculation of damages based on the concept of foreseeability (2) but also different rules often apply in contract and tort with regard to prescription.

109. Last but not least, the fact should not be overlooked that the extent to which a victim may chose to sue in contract or in tort differs widely. By way of example, the considerable degree of freedom allowed in the United States of America (3) may be contrasted with the situation pertaining in France where the victim, if he is in a contractual relationship with the person causing the damage, must bring an action in contract, not one in tort for negligence or for liability arising from the fact of being in charge of an object (4).

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(1) See WILLISTON, op. cit., Vol.8, p.654 et seq. for illustrations of the conflicting case law.

(2) Thus in many States the rule exists that, whereas in contract damages for injuries are limited to those which the defendant had reason to foresee when the contract was made, in tort he may be required to pay for injuries caused by his conduct which he had no reason to foresee when the conduct occurred.

(3) See CORBIN on Contracts (1964), Vol. V, p.116.

(4) See MAZEAUD et TUNC, op. cit., Vol. I, pp.237-259 and especially p.246.

110. In the light of the foregoing, it is readily apparent that the difficulties of unification in the field of the hotelkeeper's liability for the property of his guests must seem trivial when set beside these concerning his liability for personal injury. The examples given in the preceding paragraphs illustrate the extent to which the contract/tort dichotomy, as well as the innumerable sources of injury, complicate the task of preparing uniform rules. However, they illustrate an even more important fact, namely that it is only if the notion of a unified hotelkeeper's contract, similar in conception, if not in substance, to those already worked out for the various modes of transport, is retained and that if a reasoned appraisal of the risks involved for the guest is conducted, that any useful advance can be made.

111. Such an appraisal must take account, above all, of the difference in nature of the principal groups of situations in which a guest may be injured, for example, fire, collapse of a building, defective state of fittings, lack of warning of possible dangers, negligence of the hotelkeeper's servants, injury being caused by a fellow guest or a person completely extraneous to the hotel, consumption of food or drink etc. That the positive law of States already indicates differing solutions in respect of some of these situations already suggests that it may not be possible to regulate these different situations in the same way. It may therefore be necessary to introduce different rules concerning the burden of proof or the relevance of fault on the part of the hotelkeeper to deal with the various situations. It is submitted that only when decisions have been taken on these points will it be possible to examine certain other questions, such as the feasibility and desirability of fixing a maximum limit of compensation payable in the absence of fault on the part of the hotelkeeper and the validity of agreements purporting to exclude his liability or to limit the compensation he might be called upon to pay.

VI RIGHTS OF THE HOTELKEEPER IN RELATION TO PROPERTY BROUGHT TO THE HOTEL BY HIS GUESTS (1)

112. References to the right of the hotelkeeper to detain property brought to the hotel by guests in the event of non-payment by the latter for lodging, food and drink which they have consumed may be traced back as far as the fifteenth and sixteenth centuries (2) and have today an established place in most legal systems. Historically, the rights under consideration may be regarded as a counterbalance to two particular features of the status of the hotelkeeper, namely his duty to accept allcomers and his special liability with regard to the safekeeping of the property of his guests. These justifications are, however, as real today, for even though in many States the absolute liability attaching to the hotelkeeper has been attenuated to a certain extent, it nevertheless places a heavy burden upon him, while in addition he is still at risk as regards the solvency of his guests since it is normally at the end of the stay that payment will be requested.

113. It is regrettable that hitherto there has been no attempt at an international level (3) to regulate the content and exercise of the rights of the hotelkeeper in this context for a number of divergencies, for the most part more important perhaps in theory than in practice, exist between different systems. Thus while the majority of the common law States have followed the English notion of the hotelkeeper's lien over the guest's property (4), some of the civil law States have

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(1) The criminal law aspects of failure by the guest to pay a bill for lodging or food are not dealt with in this study which is concerned with questions of private law. For a detailed discussion of the French law relating to the offence of "grivèlerie", see COUTURIER, "Thèse", pp.490-97.

(2) For example, Article 193 of the "Coutume de Paris", 1510, and references in the English Year Books going back as far as 1465, cited by HOGAN, "The Innkeeper's Lien at Common Law", 1956, 8 Hastings L.J. 33 et seq.

(3) The matter is, however, dealt with in detail in Sections 9 and 10 of the draft Act prepared by the Conference of Commissioners on Uniformity of Legislation in Canada.

(4) For example Ireland, Hotel Proprietors Act, 1963, Section 8; Uganda, Act to consolidate the Law in relation to Hotels, Section 6 as well as the Australian States and most of the Canadian Provinces and the United States of America.

founded the rights of the hotelkeeper on the basis of a legal pledge (1), others grant him a right of retention (2) while yet others have made provision for giving him a preferred claim without making any reference to a right of retention (3).

114. Notwithstanding these distinctions, the results achieved are broadly speaking the same for even in some of those States whose legal texts make no specific provision for a right of the hotelkeeper to detain his guests' property, the case law and doctrine seem to favour implying it is a means of ensuring the effectiveness of the preferred claim (4).

115. Nevertheless, the right of retention by itself is more in the nature of a shield than a sword since the interest of the hotelkeeper lies essentially in recovering the money owed to him by the guest for the services rendered, and here again most systems have, in one way or another, provided that the hotelkeeper may set in motion a procedure leading to the sale of the property, thereby allowing him to recoup the amount due to him from the proceeds of the sale.

116. From the foregoing, it is possible to reach the conclusion that the principal prerequisites enabling the hotelkeeper effectively to enjoy the protection accorded him in most legal systems are the right of retention and the availability of a speedy and inexpensive procedure permitting the sale of the property concerned. As regards the first of these requirements, there would seem to be little difficulty in achieving unification, although it might prove less easy to calculate exactly what

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(1) For example, Ethiopia, Civil Code, Article 2662, the Federal Republic of Germany, Civil Code, Article 704, Greece, Civil Code, Article 838 and Poland, Civil Code, Article 850.

(2) For example, Austria, Civil Code, Article 970 (c), Philippines, Civil Code, Article 2004 and Switzerland, Code of Obligations, Article 491.

(3) Belgium, Law of 16 December 1851, Article 20, 6°, France, Civil Code, Article 2102, 5°, Italy, Civil Code, Article 2760; Spain, Civil Code, Article 1922, 5°. Articles 2082 and 2669 of the Guatemalan and Mexican Civil Codes respectively make provision for both the right of retention and the preferred claim.

(4) For example, France, see COUTURIER, in Juris Classeur de droit civil, "Dépot", Articles 1949-54, paragraph 177.

ranking should be accorded to a preferred claim of the hotelkeeper vis-à-vis those of other creditors. In connection with the sale of the property, it should again be possible to reach agreement on the need for a satisfactory procedure to be provided, but it may well be necessary and indeed desirable to leave the details of such a procedure to be determined by national law in view of the diversity of legal systems, especially as regards the degree of judicial intervention in the proceedings.

117. Assuming that these basic questions can be regulated satisfactorily, there nevertheless remain a number of points in respect of which divergencies of a minor character exist. For example, in some States there is a specific provision in the relevant legislation to the effect that the hotelkeeper's rights arise in relation to non-payment not only for lodging, food and services but also to advances made by him to the guest (1), while in others, the rights do not cover such advances (2).

118. Then again, differences are to be found in connection with the property which may be subject to the lien, pledge or preferred claim. Thus some systems provide that vehicles, property contained therein and animals are not subject to detention (3) while in others no distinction is made between them and other types of property. There seems however to be general agreement that the person of the guest and the clothes he is actually wearing are exempt from such detention (4).

119. A further difficulty arises in connection with the situation where the property brought to the hotel by the guest does not belong to him. In a number of States, the rights of the hotelkeeper do not extend to such property unless either at the time of its introduction in the hotel (5) or at the time of its being received by the hotelkeeper (6), the guest made known to him the fact that the property was not his. Moreover, it would seem to be the case that even in respect of stolen or lost property brought to the hotel by the guest, the hotelkeeper

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(1) Federal Republic of Germany, Civil Code, Article 704.
(2) For the United Kingdom, see Chesham Automobile Supply Co. v. Beresford Hotel (Birchington) Ltd. /1913/, 29 T.L.R. 584.
(3) For example, the United Kingdom, see HALSBURY, op. cit., pp.463-4.
(4) See HALSBURY, ibid., p.463 and COUTURIER, "Thèse", p.483.
(5) Thus Italy, Civil Code, Article 2760.
(6) United Kingdom, see HALSBURY, op. cit., p.465 and Ireland, Hotel Proprietors Act, Section 3 (2).

can assert his lien against the true owner as well as the guest, provided that he is ignorant of the rights of the owner at the time he receives the property in the hotel (1).

120. There is also wide support for the view that the special rights of the hotelkeeper over his guests' property are extinguished if he agrees to the property being taken out of the hotel or its annexes, or out of his custody. If, however, the property is removed against his will or without his knowledge, he can usually recover it although in some States there are doubts as to whether he can recover if the property brought by the guest does not belong to him and it is the true owner who is responsible for the removal of it from the hotel (2).

121. As regards the obligations of the hotelkeeper in respect of property detained by him, he is required in a number of jurisdictions to exercise due care as regards the preservation of the goods but no more than he would in respect of his own goods of the same kind (3).

122. From the foregoing, it will be seen that despite certain differences of a conceptual character concerning the nature of the rights which the hotelkeeper may exercise over the property of his guests, there is nevertheless a wide measure of agreement among the legal systems as to the ends to be achieved. It would appear that hotelkeepers on the whole attach great importance to these rights and that the legislators regard their position with considerable sympathy. This being so,

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(1) United Kingdom, see HALSBURY, op. cit., p.465. In France, there are differing views on the question. COUTURIER, "Thèse", p.483 and PLANIOL, "Traité pratique de droit civil français", 2nd edition, 1953, Vol. XII, p.194 suggest that in such cases the true owner can recover the property from the hotelkeeper. See, contra, the cases cited in DALLOZ, Code Civil, 1972-73 edition, p.1114, note 3.

(2) See COUTURIER, in Juris Classeur de droit civil, "Dépôt", Articles 1949-54, paragraph 178 in fine.

(3) See HALSBURY, op. cit., p.466.

there ought to be little difficulty in drawing up an acceptable set of rules on the matter. Before leaving this question, however, reference should be made to a recent American decision (1) which represents an important innovation. The court in effect held that the innkeeper's lien law of California is an unconstitutional violation of the requirement of due process because it fails to provide for notice and a hearing antecedent to the seizure of the guests' property. Such a requirement would clearly deprive the lien of much of its effectiveness for, in respect of those States which normally require no judicial intervention prior to sale, it could involve innumerable procedural delays (2). This is all the more unsatisfactory since the sum of money involved is frequently small. It may well be that the decision will prove to be an isolated one and that it does not foreshadow any general development in the United States. Should this, however, not be the case, we may well witness a certain fragmentation of the existing quasi unanimity of the theory and practice concerning the hotelkeeper's rights in respect of his guests' property.

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(1) Klim v. Jones, 315 F. Supp. 109 (N.D.Cal. 1970). In this case, the guests' belongings, including his tools and means of personal identification, were locked by the hotelkeeper in the room occupied by the guest until such time as he paid allegedly due rent. The guest consequently suffered the loss of employment opportunities.

(2) The case is discussed by PRINCI in the Cincinnati Law Review, 1970, Vol. 39, pp.815-819.

VII MISCELLANEOUS QUESTIONS

(a) Prescription

123. The preceding chapters of this report have already indicated the highly complex character of the relationship between hotelkeepers and their guests and so it is scarcely surprising that this complexity should be translated into the rules governing prescription. As a general rule, the legislators have limited themselves to laying down special rules with respect to one situation only, namely that concerning the bringing of an action by a hotelkeeper against a guest for payment of lodging and food supplied by him, and here considerable differences are to be noted. While Belgium, France, Italy and Luxembourg (1) have opted for a short period of only six months, Argentina (2) has fixed the limit at one year, the Federal Republic of Germany, Mexico and Poland (3) at two years, Spain (4) at three and Switzerland (5) at five years. In respect of those States which have not laid down any special rules in the matter, the period is sometimes longer still.

124. In the light of these widely differing periods of prescription (6), it may be wondered whether it will prove possible to reach general agreement on a given period or whether it may not prove necessary to leave the question to be decided by national law. An attempt at unification would clearly be desirable but it is, perhaps, less essential than in cases where actions brought by the guest are concerned, for whereas in the latter situation there is no reason to suppose that a tourist in a foreign country is familiar with the limitation period in force, the hotelkeeper must be presumed to be aware of it. If, however, it is deemed both desirable and possible to bring about a measure of

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(1) Articles 2271, 2271, 2955 and 2271 of the respective Civil Codes.
(2) Civil Code, Article 4035 (1).
(3) Articles 196 (4), 1161 III and 851 of the respective Civil Codes.
(4) Civil Code, Article 1967 IV.
(5) Code of Obligations, Article 128 (2).
(6) A further consideration which ought not to be overlooked is the nature of the "presumptive prescription", known in some continental countries such as France and Italy, which may be displaced by the normal rules of prescription in certain circumstances. See, for example, France, Civil Code, Article 2275 and Italy, Civil Code, Articles 2959-61.

unification in this field it may be suggested that in an age when international travel is continually increasing, the six-month limitation period may be unduly brief if the hotelkeeper is to enforce his rights against a client who has returned home to the other side of the world. Might not a period of one year be a more equitable solution for all the parties concerned (1)?

125. Turning to the converse situation, namely where it is the guest who has suffered damage either to his property or his person, the situation is more complicated for here not only does the question of prescription normally fall to be determined by the general law but moreover the possibility of an action being brought either in contract or tort arises. Furthermore, in those States which do not recognise the unity of the hotelkeeper's contract but view it rather as a complex of a number of contracts, it may be necessary to refer to the rules relating to one or more specific contracts according to the source of the damage. It is thus apparent that a detailed examination of the law even of a small representative group of States would entail a study going far beyond the bounds of this report. It has therefore been considered wise not to enter into such a detailed comparative study but rather merely to indicate the difficulties involved. It is, however, it is considered useful and indeed feasible to insert in a future uniform law general rules governing the limitation of actions brought by guests against hotelkeepers for damage to their person or property, a more fruitful source of inspiration than the general provisions of national law may well prove to be found in the relevant provisions of the CCV (2) and the international transport conventions, the drafters of which have succeeded in obtaining uniform rules relating to prescription.

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(1) It is similarly arguable that a relatively short limitation period should be envisaged for actions brought by the hotelkeeper or guest for damage suffered by failure of the guest to take up accommodation reserved for him or of the hotelkeeper to provide accommodation he had agreed to provide.

(2) It will be recalled that the limitation periods laid down in Article 30 of the CCV are two years for death, wounding or other bodily or mental injury (para. 1), three years when wounding or bodily or mental injury result in death of a traveller at a date subsequent to the date of termination of the service (para. 2) and one year for other actions (para. 3).

(b) Jurisdiction and Arbitration

126. That these two questions have been grouped together here is not for doctrinal reasons but rather because they are mentioned only pro memoria, since a decision on whether any clauses concerning them should be contained in the future uniform law will depend to such a large extent on the shape and content of such a law, not to mention its sphere of application. Without in any way prejudging any decisions of principle however, it would at first sight seem that the appropriate forum for the bringing of actions would be that of the place where the hotel is situated, while as to arbitration, it would appear to be highly desirable that a provision similar to that contained in Article 29 of the CCV should be contemplated, namely that any contract containing a clause conferring jurisdiction on an arbitral tribunal should stipulate that the tribunal apply the terms of the future uniform law.

(c) Questions concerning proof

127. This report has been concerned primarily with questions of substantive law and although allusions have been made from time to time to the burden of proof, there has been no systematic treatment of the question of proof in general. The principal reason for this is that in many cases a number of options are open as regards the substantive law itself and that it will therefore be necessary first to clarify these questions before embarking upon a detailed examination of issues concerning proof. However, reference may briefly be made to two areas of the subject which may give rise to difficulty.

128. In the first place, the contract between the hotelkeeper and the guest is generally speaking concluded orally rather than in writing, although of course general conditions or standard forms are often implied into it. It would be interesting to know to what extent there is a trend, if any, towards written contracts and the difficulties which would be experienced by the hotel profession from a practical point of view if some sort of standard written contract were to be envisaged.

129. Secondly, and perhaps more important, practice varies widely as to the issue of receipts by hotelkeepers for property deposited with them. Such receipts would constitute an important element of proof when property is lost or damaged. It might well be worthwhile contemplating a provision in the future uniform law covering this problem which might also deal with the question of whether the guest should be called upon to make a declaration as to the value of the property deposited if it exceeds a certain sum.

VIII BRIEF SUMMARY OF THE PRINCIPAL QUESTIONS MENTIONED IN THE REPORT

130. With a view to facilitating the work of the Committee, the following list of points which have been dealt with in the report has been prepared. It does not claim to be exhaustive and will concentrate more on general questions which are of importance in connection with the drafting of a uniform law than on matters of detail.

1. To what extent is a uniform law on the hotelkeeper's contract necessary or useful?

2. Should the uniform law contain definitions of the terms, "hotel", "hotelkeeper" and "guest" and, if so, what are the criteria to be applied?

3. Are these definitions sufficient, or necessary, to permit a definition of the "hotelkeeper's contract"?

4. Should the uniform law cover all contracts between hotelkeepers and guests, or should it be restricted to those of an "international character"? If the latter solution is adopted, how should the "international character" be defined?

5. At what time is the contract between the parties concluded?

6. What requirements are necessary for an "advance booking" or "reservation" to be considered as creating contractual relations between the parties?

7. Do such contractual relations differ in any way as to their nature or legal consequences from those created when the parties conclude a contract inter praesentes? In either case, should the contract be in writing?

8. In which circumstances, if any, may either of the parties withdraw from the contract while it is still of an executory character?

9. Should the future uniform law contain specific provisions concerning the obligations of the guest and, if so, what are these obligations?

10. In the event of non-payment by the guest for lodging or food and drink, or of any other breach of his obligations to the hotelkeeper, what rights should be accorded to the latter over the guest's property in the hotel?

11. Independently of the obligations of the hotelkeeper with regard to the security of the guest and his property, should the future uniform law specify any other obligations on his part?

12. Which circumstances, if any, should justify either party putting an end to the contract prematurely without being called upon to indemnify the other?

13. What rules should govern the liability of the hotelkeeper for damage to, or deterioration or loss of, his guests' property?

14. In particular, should the compensation payable be limited and, if so, in which circumstances, and on what basis of calculation?

15. In which cases should the hotelkeeper be exonerated from liability?

16. Should special rules govern any particular type of property?

17. When does the hotelkeeper's liability qua hotelkeeper arise in respect of his guests' property and when does it cease?

18. To what extent, if any, should the hotelkeeper be free to diminish or exclude by contract his liability in respect of his guests' property?

19. With respect to the liability of the hotelkeeper for death, injury or mental harm caused to the guest, should he, in principle, be held strictly liable or liable only for fault? Whichever of the solutions is chosen, should any exceptions be admitted in favour of the other?

20. Should a provision be introduced into a future uniform law placing a limit upon the compensation payable by the hotelkeeper in cases where the death or injury has occurred without any fault on his part?

21. Are there circumstances in which the hotelkeeper should be permitted by contract to exclude or diminish his eventual liability in respect of death of, or injury to, his guests?

22. Should the future uniform law contain provisions concerning limitation of actions (extinctive prescription) and, if so, what period, or periods, should be established?

23. Ought the future uniform law to lay down rules governing the question of

(a) jurisdiction,

(b) arbitration?

24. Which questions should be dealt with by the future uniform law in addition to those listed above?

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