

Study XII- Doc. 10
UNIDROIT 1974
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING COMMITTEE ON THE HOTELKEEPER'S CONTRACT

R E P O R T

of the Secretariat of UNIDROIT
on the session held in Rome from 4 to 8 March 1974

Rome, April 1974

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INTRODUCTION

1. The Working Committee on the Hotelkeeper's contract met from 4 to 8 March 1974 at the Headquarters of UNIDROIT in Rome under the chairmanship of Mr. Roland LOEWE. The list of participants is annexed to the present report (APPENDIX II).

2. The Working Committee was seized of a Report on the Hotelkeeper's contract, prepared by the Secretariat of UNIDROIT (Study XII, Doc. 9, UNIDROIT 1974), Chapter VIII of which contains a list of questions which might be discussed by the Committee.

3. After a brief introductory statement concerning the above-mentioned Secretariat Report by Mr. Evans (Secretariat of UNIDROIT), Mr. Loewe proposed that the Working Committee should devote its meeting essentially to an examination of the twenty-four questions contained in Chapter VIII of that Report. The Committee agreed to this proposal.

4. Appendix I to the present report contains a statement of the Chairman summarising the results of the discussions, which was approved by the Working Committee, while the report itself contains a more detailed account of those discussions.

3. After a brief introductory statement concerning the above-mentioned Secretariat Report by Mr. Evans (Secretariat of UNIDROIT), Mr. Loewe proposed that the Working Committee should devote its meeting essentially to an examination of the twenty-four questions contained in Chapter VIII of that Report. The Committee agreed to this proposal and, after completing this examination instructed the Secretariat to prepare a set of preliminary draft provisions on the hotelkeeper's contract for study at the next session of the Committee.

Part I - Consideration by the Committee of the list of questions prepared by the Secretariat

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

5. Mr. Dalton stated that he had carried out consultations at a federal level with the principal interests in the United States, including hotelkeepers, and that while it would not be accurate to say that they considered a uniform law on the hotelkeeper's contract necessary, they certainly considered it very useful. He also recalled that in the United States the laws relating to hotelkeepers were state rather than federal laws and he felt that the knowledge that work was being done at an international level might encourage the states to bring their laws up to date.

6. Mr. Lemontey said that from the consultations he had carried out with his national authorities, he had understood that certain hesitations were felt concerning the elaboration of special uniform rules on the hotelkeeper's contract. These hesitations sprang essentially from a reluctance to increase the tendency to break up French private law in favour of a multiplication of particular rules concerning professional activities. At present, the only special rules in French law relating to the hotelkeeper's contract were those dealing with the liability of the hotelkeeper for goods brought to the hotel guests. He also expressed the view that the real importance of a future uniform law on the hotelkeeper's contract would lie in its application not so much to individual, but rather to collective tourism, where both from the practical and the legal standpoint, the difficulties were considerably greater.

7. In particular he felt that another problem should not be lost sight of, namely that of relations between travel agents and hotelkeepers in which there was often a marked international element, by reason of which problems of private international law could arise. In addition, there was difficulty in many cases in determining the law to be applied. He added that, if there was any doubt about whether the terms of reference of the Working Committee covered it, a request might be made to the Governing Council for an extension of the terms of reference.

8. Mr. Vetrano also stressed the need for regulating relations between hotelkeepers and agents.

9. In this connection, Mr. Hennebicq (Deputy Secretary General of UNIDROIT) recalled that the 1970 Convention on the travel contract (CCV) was cast in the form of a diptych the two parts of which concerned two types of services, those relating to transport and to accommodation procured by the travel organiser. Under the CCV, the organiser was, in respect of the former, liable towards the traveller as if he were a carrier, that is to say - as a rule - in accordance with the international Conventions. As to the latter services, the organiser was liable, under the CCV, as if he were a hotelkeeper; it follows that in the absence of uniform international rules, his liability would depend upon the very different national laws which, for the most part, do not provide specific rules on the hotelkeeper's contract. It was for this reason that the Diplomatic Conference on the CCV had adopted a recommendation requesting UNIDROIT to elaborate uniform rules on the contract.

10. The Chairman also expressed the view that there was a certain utility in drawing up uniform rules on the hotelkeeper's contract. In particular, and in connection with Mr. Lemontey's remarks concerning the fragmentation of private law, he pointed out that the rules contained in civil codes were in effect compilations of rules concerning questions which were considered important at the time. Account had, however, to be taken of certain economic explosions. The history of the law of transport was a prime example and the rules relating thereto were now completely independent of the civil code in most countries.

11. In reply to a question posed by Mr. Eörsi as to the extent to which the future international instrument on the hotelkeeper's contract should be self-regulating and the possibility of including in it a provision similar to Article 17 of the Uniform Law on the International Sale of Goods (ULIS), which provides that "Questions concerning matters governed by the present law which are not expressly settled therein shall be settled in conformity with the general principles on which the present law is based", the Chairman considered that it would be somewhat utopian to contemplate the introduction of such a provision in the future instrument, all the more so since there was considerable criticism of Article 17 in the context of the revision in UNCITRAL of ULIS. In his view, it was not wise to seek to draw up an instrument which could answer all the possible questions which might arise.

12. While appreciating these arguments, Mr. David nevertheless pleaded in favour of an instrument which would settle in detail a number of problems, in respect of which the national law of most states was uncertain. He stressed the need for finding specific solutions to these problems if the future international instrument were to be successful. At present, the vast majority of disputes arising out of the hotelkeeper's contract were never settled, in part because of the relatively small sums involved and in part because of the complicated and uncertain legal position. In addition, he pointed out that there was a wide divergence in the solutions reached by the courts of different countries and a general tendency to find against a foreigner who had brought an action abroad.

13. Moreover insurance played only a minimal role in the context. With regard to those cases which did come before the courts or which were settled by arbitration or conciliation, the sums involved were usually quite large and as a rule concerned relations between hotelkeepers and agents rather than individual contracts.

14. The Chairman noted that the members of the Committee were broadly speaking in favour of envisaging rules on the problems which arise between hotelkeepers and travel agents acting on their own behalf.

15. In addition, in connection with this general question, no. 1, Mr. Matteucci (Secretary General of UNIDROIT) raised the question as to whether the future rules on the hotelkeeper's contract should take the form of a uniform law or a model law.

16. The Chairman expressed some hesitations about the solution which would consist in the adoption of a model law and the Committee agreed that the matter could only be discussed once the content of the future rules had been worked out.

Questions nos. 2 and 3

- (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"?

17. In introducing these two questions, Mr. Evans recalled that neither previous attempts at unification in connection with the liability of the hotelkeeper for goods brought by guests to his hotel nor the vast majority of national laws had, other than for administrative or fiscal purposes, sought to define the terms "hotel", "hotelkeeper" or "guest". The range of establishments offering accommodation to guests and the differences in the quality and extent of ancillary services offered by them were so great that the question of finding satisfactory definitions would clearly be a complicated one. If a definition of "hotelkeeper" could be arrived at, then logically this ought at the same time to permit a definition of who was a guest. He thought, however, that although there would always be border-line cases, some sort of definition would be necessary to delimit the sphere of application of the future international instrument and suggested that the two principal elements necessary for a hotelkeeper's contract to arise, which the Committee might bear in mind during its discussions, were the offer of accommodation by the hotelkeeper for reward and the fact that the latter was in fact providing the accommodation as a professional activity.

18. The Chairman wondered whether it might not be more practical to define not the parties to the contract but rather the nature of the contractual relations to which the future international instrument would apply. These relations could, for example, be defined as any contract by which a person undertakes, for reward and on a professional basis, to provide another person with accommodation in an establishment, as well as ancillary services (for instance food, drink, cleaning). If such a definition were to be adopted for the purposes of the future instrument, then definitions of terms such as "hotel", "hotelkeeper", or "guest" would be unnecessary. By way of clarification, he added that it should also be stipulated that the contract could be concluded either by or on behalf of the guest.

19. Mr. Dalton expressed sympathy with the approach suggested by the Chairman. Consultations in the United States had also led to the conclusion that it was not necessary to define the various terms mentioned but rather to seek a functional definition of the contract.

20. Mr. David alluded to the difficulties which arose from the fact that it was more and more common for accommodation to be provided outside a hotel. Such accommodation was often accompanied by the classic ancillary services and in such circumstances he felt that it might be covered by the

future instrument. There would, of course, be border-line cases, especially when the services were provided for a particularly long period but these situations were not of particular importance.

21. Mr. Matteucci attached importance to the custody of the keeper over the premises which he considered to be an element having a direct bearing on the existence of the hotelkeeper's contract.

22. In this context, Mr. Dalton mentioned that his preliminary consultations in the United States had also touched upon accommodation which was provided subject to a special agreement, for example the long-term lease, and it was generally considered that such cases should be excluded.

23. With regard to the ancillary services offered, Mr. Plantard (Deputy Secretary General of UNIDROIT) wondered whether the inclusion among them of the provision of food and drink ought not to lead the Committee to consider extending the field of application of the future international instrument to cover the relationship of restaurateur and client.

24. The Chairman replied in the negative as the essential element of accommodation was lacking. Mr. Eorsi agreed with this view, although Mr. Lemontey preferred to reserve his position.

25. As to the ancillary services to be contemplated by the future instrument, Mr. Lemontey suggested that they should be those related to the contract, while Mr. David pointed out that some services might have no relation whatsoever with the accommodation provided.

26. While recognising the difficulties which might arise in this connection, the Chairman expressed some hesitations about adopting the criterion of the services being related to the contract to provide accommodation. For example, a guest who had not contracted to take meals in the hotel (half or full pension) might nevertheless have occasion to use the hotel's restaurant; would the provision of food and drink, in these circumstances, be an ancillary service? He preferred to establish the general principle that the contract comprised accommodation and ancillary services such as food, drink and cleaning. As regards other services, the extent to which they should be deemed to form part of the hotelkeeper's contract might be elucidated by the bill presented to the client.

27. The Committee assented to this suggestion.

28. Turning to the status of the hotelkeeper, the Chairman raised the question of whether it should not be stated in the future instrument that the services be offered on a professional basis and for reward. As regards the notion of reward, he recalled that in the transport conventions, it covered not only money but any other advantage procured to the carrier. As for the "professional" character of the establishment, such a criterion would exclude rooms let out in private houses.

29. Mr. Dalton agreed that whether one were to speak of hire and reward or compensation, it was necessary for there to be consideration. If the accommodation were provided gratuitously or to an employee of the hotel, then there would be no hotelkeeper's contract. As to the requirement of the accommodation being provided on a professional basis, his consultations in the United States had indicated that such an element be retained. One might, for example, restrict the class of hotelkeepers, for the purposes of the future instrument, to persons principally engaged in providing accommodation.

30. The other members of the Committee also expressed their support for the inclusion of the two elements of reward and the professional basis on which the services were offered.

31. In reply to a question by Mr. Matteucci who raised the issue of whether establishments run for the benefit of members of clubs or associations should be covered by the future instrument, the Chairman admitted that no definition could solve all cases and he considered that it would have to be left to a judge to determine whether he was faced with a true hotelkeeper's contract or with a situation in which an association rented out accommodation to its members.

32. The Chairman also raised a third question for the attention of the Committee, namely whether there should be any limit to the duration of the hotelkeeper's contract. The relevant article of the Ethiopian Civil Code fixed it at one month, after which the contract would become one of letting. Personally he doubted whether it was opportune to state a fixed period and considered that if any limit were to be applied, it might be better to frame the provision in general terms.

33. Mr. Lemontey considered this to be an important question. He was doubtful as to whether there was any need to introduce a time factor, the question normally being one of fact. He wondered whether the problem might not be overcome by using the criterion of the client being a "voyageur", the term used in the French text of the Council of Europe Convention.

34. In reply, the Chairman expressed doubt as to whether the term "voyageur" would be satisfactory. There could be many cases in which a person would move into a hotel in the town in which he normally resided for a brief period and it would be very difficult to qualify such a person as a "voyageur" or traveller. Two different questions were really under discussion, one of meaning and the other of pure terminology.

35. Mr. Eorsi thought that the time factor was irrelevant as long as a guest received the same services as those normally made available by a hotel-keeper to his guests. If this test were to be applied, neither could he see any reason for requiring that the guest be a traveller.

36. Mr. Dalton similarly preferred to avoid using the term "traveller" and although he was not certain as to whether the insertion of a time factor was necessary, he considered that if one were to be adopted, then it should emphasise the temporary character of the stay in the hotel.

37. The Chairman stated that he could, for the moment, accept the word "temporary" in connection with the time factor.

38. Mr. Plantard said that he was unable to see why a person who stayed for a short period in a hotel should be treated any differently from one who spent a longer period there. In view of the housing crisis which had hit many countries, in particular in the large cities, considerable numbers of people had taken up residence in hotels. Were such people not to enjoy the protection of the future instrument even if they received exactly the same services as the temporary visitor to the hotel ?

39. Mr. David expressed a certain sympathy with this view. In his opinion the time factor was of no importance on condition that the guest enjoyed the same services as the usual ones provided in the hotelkeeper/guest relationship in the establishment concerned.

40. The Chairman recognised that the discussions had indicated that the time was not yet ripe to reach any definite conclusions on this point. He therefore suggested that the Secretariat, when preparing the draft articles, should submit alternative texts, the first based on the notion of a temporary stay, and the second along the lines suggested by Mr. David.

41. After the question had been raised as to whether the future instrument should contain any provision concerning wagon lits or accommodation provided by other modes of transport, the Committee unanimously decided that in order to delimit clearly its field of application, situations such as accommodation in wagon-lits, couchettes or cabins in ships or inland navigation vessels should be expressly excluded because of the particular character of the rules contained in the transport conventions.

Question no. 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 ?

42. In introducing this question, the Chairman stated that there were essentially two different solutions which might be adopted, either the future instrument would cover all relations, which represented his own preference, or else a distinction would be drawn between national and international relations and one of these two would have to be defined. If the second solution were to be adopted then there were three different mechanisms which might be employed:

- (a) the instrument might have a global application but the States would have the faculty of reserving national relations to be governed by their internal law;
- (b) the instrument might apply to international relations only but States would have the faculty of extending its application to cover internal relations;
- (c) the instrument might exclude from its field of application any relations considered to be internal.

43. In conclusion, he reminded the Committee of the difficulties which had frequently arisen in other contexts of attempting to define the "national" or "international" character of given relations.

44. Mr. Lemontey also preferred that the future instrument should apply to all situations, subject of course to the rules to be adopted. If, however, an attempt were to be made to define an international element, then it would be necessary to exclude all contracts inter praesentes which would fall to be regulated by the local law. The international element might exist when a double test was satisfied, namely that the parties were of different nationalities and that a contract to reserve accommodation originated abroad.

45. The Chairman feared that such a solution could have arbitrary consequences. It might be a question of pure chance whether a guest who regularly stayed at a hotel in a foreign country booked the room for his next stay while at the hotel itself or only after returning home. In addition, he felt that the habitual residence of the guest should be added to the other two criteria mentioned by Mr. Lemontey.

46. Mr. Lenonty agreed to this suggestion, but stated that he considered that the only really important cases of international hotelkeeper's contracts were those concluded with agents.

47. Mr. Eörsi was in agreement with the previous speakers that the most perfect and rational system would be to cover both national and international relations but he feared that such a global solution might reduce the number of ratifications of the future instrument. Many countries, he thought, might be reluctant to change their internal law in the interests of unification. Still further difficulties could arise if the uniform law were to apply to national relations as there might be a clash between certain of its provisions and the general principles of law of the country concerned.

48. Mr. Dalton found himself largely in agreement with the observations of Mr. Eörsi. Moreover he alluded to the added difficulties in a federal State such as his own where many of the states might be prepared to accept a future uniform law for international contracts but unwilling to modify the law for persons living in the state itself. He also, therefore, favoured a provision in the future international instrument permitting its non-application to national contracts.

49. Recognising that a difference of opinion existed on the question and that in such circumstances it would be necessary to adopt the less far-reaching solution, the Chairman proposed that the future instrument should apply to all hotelkeeper's contracts but that States should have the possibility of availing themselves of a reservation allowing them to restrict the application of the instrument to hotelkeeper's contracts of an international character.

50. He further suggested that such contracts should include all those concluded between a hotelkeeper and a person of foreign nationality or one whose habitual residence was not on the territory of the State where the establishment providing the services was situated.

51. The Committee agreed to these proposals.

Questions nos. 5, 6 and 7

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 praesentem ?

In either case, should the contract be in writing ?

52. The Committee agreed unanimously that the question of the time at which the contract is concluded between the hotelkeeper and the guest was one of the most important points to be discussed by them and that the matter should be the subject of detailed rules in the future international instrument.

53. Mr. Lemontey considered that the instrument would be worthless if it did not deal with the conclusion of the contract. In his opinion, however, what was in issue were not the general rules concerning contracts concluded by correspondence but rather the specific nature of the consequences arising from the conclusion of the hotelkeeper's contract. Imperative rules of law should therefore be drawn up to decide at what moment the obligations of the parties come into being.

54. Mr. Eörsi expressed complete agreement with the observations of Mr. Lemontey. He recognised that the elaboration of special detailed rules might prove difficult but they were, in his view, essential. In particular, it would be quite unacceptable to maintain that the contractual relations between the parties begin only when the hotel room is placed at the guest's disposal.

55. Mr. David also insisted on the importance of determining the time at which the contract is concluded. With regard to the reservation of accommodation in advance, he maintained that it was absolutely necessary that the guest should have placed at his disposal the room promised to him by the hotelkeeper. At present, the rule followed in practice was that if the hotelkeeper confirmed the reservation then the room must be kept for the guest on the appointed day. The certainty of the contract depended on the parties being obliged to observe their contractual undertakings. If this were not the case then the consequence would be the permanent danger of the phenomenon of overbooking.

56. He also drew attention to a peculiar characteristic of the obligations undertaken by the parties to the hotelkeeper's contract. Once a reservation has been confirmed by the hotelkeeper he is bound to keep the room for the guest, whereas the guest may always withdraw from the contract, subject to his having, in certain circumstances, to indemnify the hotelkeeper in the event of the latter's suffering financial loss by being unable to relet the room, the amount of compensation due, if any, being calculated in accordance with the time at which the guest informs the hotelkeeper of his intention not to take up the accommodation. In this connection, Mr. David also referred to the practice of some hotelkeepers requiring, as a measure of security in advance, the payment of a deposit by the guest as a condition of the hotelkeeper's confirming the reservation.

57. As regards contracts concluded inter praesentes, he could see no difficulties; the time of the conclusion of the contract was that at which the parties agreed on its terms.

58. In the light of the preceding discussions, the Chairman made observations on three specific points. In the first place, he recalled that a sort of "sliding scale" of compensation, similar to that employed in the hotel profession, had been envisaged in the draft International Convention on the travel contract, in the event of the traveller cancelling all or part of the travel contract and thereby causing loss of profit to the travel organiser. . . This scheme had, however, been replaced at the Diplomatic Conference leaving the question of compensation to be decided in accordance with the domestic law or the provisions of the contract.

59. Secondly, he attached importance to interpreting the silence of the hotelkeeper in reply to a request for a reservation or alternatively of the guest with respect to a counter-offer. In his view any future rules should take account of this problem.

60. Finally, while recognising that the payment of a deposit was a supplementary guarantee for the hotelkeeper and an element which strengthened the likelihood of each party fulfilling his contractual obligations, he would be strongly opposed to the future international instrument providing that the payment of a deposit be considered as a condition of the conclusion of the contract, as this could create great practical difficulties for the guest, especially when reserving accommodation in a foreign country.

61. In reply to those remarks, Mr. David in the first place drew the attention of the Committee to the Hotel Convention between the International Hotel Association (IHA) and the Universal Federation of Travel Agent's Associations (UFTAA) relative to contracts between Hoteliers and Travel Agents (C. Hot. 70) which contained the "sliding scale" system of compensation payable in the event of cancellation. Broadly speaking, no compensation was payable for cancellation before a certain time, thereafter the compensation being determined according to the time before the arrival date at which notice was given and the extent of the cancellation in respect of groups (complete or partial).

62. With regard to the question of the interpretation of the silence of one of the parties, he stated that the present situation was as follows: in general, if the hotelkeeper did not reply to a request for a reservation, this was to be interpreted as a negative reply. In the event of the failure of the guest to reply to a counter-offer, this was taken as being positive for the latter could usually cancel the contract.

63. He could however accept the theory that the failure of a hotelkeeper to reply to a request for a reservation should be interpreted as an acceptance with respect to individual guests. He considered however that for groups confirmation by the hotelkeeper, or alternatively by the agent, should be required for the contract to be concluded.

64. The question of deposits was, however, more difficult. On the one hand, it provides a certain security for the hotelkeeper in that it represents a guarantee for indemnity in the event of no-show but on the other it causes the hotelkeeper to lose considerable time in book-keeping. If the hotelkeeper could be certain that guests were aware of their obligation to cancel when they no longer wished to take up accommodation then the deposit might be dispensed with, but only in respect of individuals. Its importance was far in connection with group bookings where large sums were often involved.

65. At the request of Mr. Eörsi, the Committee instructed the Secretariat, when preparing the draft articles on the hotelkeeper's contract, to insert the general principle that silence on the part of the hotelkeeper or the client in reply to a request for a reservation or a counter-offer should be interpreted in a positive sense, while at the same time paying due regard to the possibility that the wording of the correspondence between the parties might impose a different solution.

66. In conclusion, in connection with this group of questions, the Committee was unanimously of the opinion that there was no justification, based either on practice or on other considerations, for requiring that the hotelkeeper's contract be concluded in writing.

Question no. 8 - In which circumstances, if any, may either of the parties withdraw from the contract while it is still of an executory character ?

67. At the outset of the discussion on this question, a clear distinction was drawn between two situations which might otherwise prove to be a source of confusion. The first of these related to the grounds on which a hotelkeeper might refuse to enter into a contract with a prospective guest while the second, which Mr. Evans indicated had been that which the Secretariat had in mind when drafting question no. 8, concerned the possibility for either of the parties to withdraw from the contract before he had begun to fulfil his obligations under its terms.

68. With regard to the first of these two questions, the Committee, while recognising its importance, was generally speaking agreed that it was one not entirely falling within the sphere of private law and that in consequence it should not be dealt with in the framework of the future international instrument.

69. As to the second question, the Committee considered that there were three cases in which the parties could be freed from their contractual obligations:

- (a) in the case of force majeure;
- (b) in the event of anticipatory breach;
- (c) in the event of unilateral breach by the guest.

70. Broadly speaking, the members of the Committee agreed that the hotelkeeper should be freed from his obligations when a case of force majeure intervened. On the other hand, there was some discussion as to whether the guest should be permitted to withdraw from the contract in similar circumstances. On the one hand, Mr. Eorsi and Mr. Lemontey were of the opinion that force majeure should be a factor liberating both parties from their obligations. The Chairman, on the other, wondered whether the difference in the obligations assumed by the two parties might not justify a distinction being drawn. He pointed out that once the hotelkeeper had accepted a reservation, there was in principle no possibility for him to withdraw from the contract whereas, up to a certain point in time at least, the guest could withdraw without being called upon to pay compensation. In his opinion this balancing of interests, rather than the greater difficulties to be encountered by the hotelkeeper than the guest in disproving an allegation of force majeure, could be invoked in favour of the solution which he had suggested and which had, moreover, been adopted in the Ethiopian Civil Code. He stated, however, that he would not insist on this point if the general feeling of the Committee favoured applying the same rules in respect of force majeure to both the hotelkeeper and the guest.

71. With regard to the definition of force majeure, attention was drawn by Mr. David to the fact that the concept was understood in very different ways in different countries. He considered therefore that no attempt should be made to deal in detail with the various examples of force majeure but that rather general terms should be employed, details being left to be settled by national law.

72. Mr. Dalton supported an observation made by Mr. Matteucci to the effect that force majeure should be understood in a limited sense. There might well be circumstances in which a guest would be unable to take up accommodation, as for example when an aircraft taking him to his destination was fog-bound, which could not, in his view, be regarded as a case of force majeure. He thought however, that the death of the guest would be a case in which the hotelkeeper could not insist on compensation being paid if he subsequently failed to relet the room.

73. Mr. Eorsi agreed that the definition of force majeure should be restrictive.

74. Finally, Mr. David suggested that if one of the parties were prevented by a case of force majeure from carrying out his contractual obligations, a new obligation would arise to inform the other party of such circumstances.

75. The Committee was of the opinion that in addition to the case of force majeure (a), there were other circumstances in which the parties might be permitted to withdraw from the contract, contemplated by (b) and (c), the essential difference between these two cases being that whereas under (b) the party wishing to withdraw from the contract might, in appropriate circumstances, be entitled to claim damages if the other party were at fault, the situation envisaged under (c) related only to the wish of the guest to withdraw from the contract, in which case he might himself be called upon to pay equitable compensation to the hotelkeeper.

76. With regard to (b), the situation was essentially that of the so-called "anticipatory breach" and the wording adopted by the Committee was substantially similar to that employed in Article 10 of the Uniform Law on Sale (ULIS).

77. In the course of the discussions on this question, certain clarifications were made. Thus the Chairman expressed the view that a party could not invoke this justification for withdrawing from the contract if he had known or should have known, at the time of entering into the contract, of the circumstances on which he subsequently relied for failing to carry out his own contractual obligations.

78. In addition, Mr. David stated that while the principle seemed to be acceptable as regards individual bookings, where the client could not have imputed to him knowledge of certain facts, the situation was different with regard to contracts concluded by travel agents who must be deemed to have knowledge of these facts.

79. With regard to the possibility of the hotelkeeper seeking to withdraw from the contract, he felt, as did Mr. Dalton, that it would not be sufficient for him to claim that he had anticipated that the guest, if an individual, or the guests, if it was a question of a group, would be of a different standing. This was in essence a commercial problem and, as he had failed to take adequate precautions when the reservation was made, he would have to learn to be more careful in the future. This represented an essential difference between contracts concluded by correspondence and those concluded inter praesentes.

80. The Committee accepted that there might well be reasons, apart from those discussed under (a) and (b), which might lead the guest to withdraw from the contract he had concluded with the hotelkeeper. Such cases, contemplated under (c), would often be based on the personal convenience of the guest and in these circumstances the normal rules would apply concerning cancellation of the contract, namely that the time of the notification of the cancellation would determine the amount, if any, of the compensation to be paid to the hotelkeeper.

81. In consequence, it agreed to the following formulation by the Chairman of the three situations in which the parties might withdraw from the contract while it was still of an executory character:

- (a) in the case of force majeure without involving the payment of damages, it being understood however that the notion of force majeure be taken in a relatively strict sense;
- (b) when the party wishing to withdraw from the contract has learnt after the conclusion of the contract, of circumstances affecting the performance by the other party of his obligation which would have prevented a reasonable person from entering into the contract had he had knowledge of these circumstances beforehand, it being understood that damages are only due by the other party when that party is at fault;
- (c) when the guest wishes to withdraw from the contract for other reasons, on condition that he pays equitable compensation to the hotelkeeper, regard being had to the time at which he informs the hotelkeeper of his intention.

Question no. 9 -- Should the future uniform law contain provisions concerning the obligations of the guest and, if so, what are these obligations ?

82. In connection with this question, the Chairman mentioned that the two principal obligations of the guest were to pay the price of the services enjoyed by him and to behave in a normal way having regard to the establishment in question. Otherwise he did not think that the guest's obligations should be specified in detail in the future international instrument.

83. Mr. David stated that he would supply the Secretariat with the International Hotel Regulations which might assist the latter when preparing the draft provision on the question of the normal behaviour of the guest.

84. Mr. Lemontey agreed with the Chairman that the future instrument should not contain detailed provisions on these questions and further recalled that certain obligations of the guest, such as the duty in many countries to satisfy police regulations by producing a document proving identity, fell within the province of administrative law rather than private law.

85. Mr. David raised a question concerning the obligation of the guest to vacate the room at the time of termination of the hotelkeeper's contract. If there were no such obligation then serious difficulties might arise for the profession, especially in connection with group bookings, as hotelkeepers might find themselves in the position of not being able to provide accommodation to guests who had reserved for a certain day if the guest already occupying the accommodation wished to prolong his stay. This was, he pointed out, a problem in some countries, such as the United States, and gave rise to overbooking.

86. In Mr. Lemontey's view, this problem raised another important question, namely the duration of the hotelkeeper's contract. If the parties agreed in the contract that the services should be provided for a certain period and the guest then wished to remain longer, a new contract would arise. He might however wish to leave before the end of the contract. In these circumstances it was necessary to decide whether the period agreed upon at the outset was imperative or merely indicative.

87. The Chairman expressed the view that if a guest were to leave before the date on which the contract was due to expire, then, if the hotelkeeper were unable to relet the room, the guest would be liable to pay compensation.

88. With a view to bringing some degree of certainty to bear on the question, he made a number of suggestions concerning the length of the hotelkeeper's contract which corresponded very largely to the existing practice which had been outlined by Mr. David:

- (a) that the contract is in principle for a fixed period but that it may be renewed expressly or tacitly by the parties;
- (b) that tacit renewal comes about if the other party has not given notice of the termination of the contract before a certain hour, for example, midday;
- (c) that if the contract gives no indication as to its length, then it is considered, in principle, to have been concluded for one day;
- (d) that the guest has the duty to evacuate the room at the time of the termination of the hotelkeeper's contract.

89. The Committee agreed to these suggestions.

Question no. 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 ?

90. Referring to the research undertaken by the Secretariat and the conclusions reached on this point in its report, Mr. Evans stated that the right of retention or other similar rights over the guest's property were known in most legal systems so that there did not seem to be substantial difficulties in achieving a degree of unification in this field. Similarly, many States had introduced speedy procedures permitting the hotelkeeper to obtain the sale of the goods on which the rights bear, although here it might not be opportune to interfere with these national procedural laws.

91. He pointed out in conclusion, that there had recently been some very interesting developments in the United States in connection with the rights of the hotelkeeper over his guest's property and wondered whether Mr. Dalton might not be able to give some information on these developments additional to that contained in the Secretariat's report.

92. Mr. Dalton in the first place recalled that rules governing the hotelkeeper's lien were a matter of state law and that in two recent cases concerning the construction of state laws, the courts had held that under the Constitution it was necessary that the guest should have prior notice and the opportunity of a hearing before the seizure of his property. In a subsequent case, the Supreme Court had commented favourably on the two decisions. He hoped therefore that any provision in a future international instrument would reserve the procedural provisions of the local law.

93. Mr. Matteucci considered that in cases of an international character it might be difficult to establish appropriate connecting factors. He thought therefore that the provision in the future instrument should be limited to placing upon States an obligation to apply the speediest procedure available under their law.

94. Mr. David stated that in practice the exercise by the hotelkeeper of his right of retention rarely permitted him to recover the full amount of the sums owing to him as the goods detained were normally used and of little second hand value. The importance of the right lay rather in the pressure which it permitted the hotelkeeper to exercise over guests who refused to pay bills when presented to them or who, after leaving the hotel without paying, asked for their belongings to be sent on to them.

95. The Chairman, while sympathising with the preoccupations of Mr. Dalton and recognising that provisions in the future instrument would have to take account of the American law on the subject, nevertheless felt that the requirement that the guest should have the possibility of a hearing before the seizure of his property greatly reduced the security offered to the hotel-keeper as he would in effect no longer have a right to detain his guest's goods but merely a security. In most cases, moreover, the persons against whom the hotelkeeper would wish to exercise his right of retention would be dishonest people who would take advantage of any procedural obstructions to the exercise of that right to disappear from the hotel with their property.

96. Turning to the question of the debts owed to the hotelkeeper by the guest in respect of which the right might be exercised, he suggested that it should only apply as regards the amount due for services rendered as provided for by the hotelkeeper's contract, such as the price of the accommodation and of ancillary services if these were provided for in the contract. He considered, on the other hand, that in no case should the right apply to claims for damages (e.g. damage to the hotel property caused by the guest).

97. Mr. David, Mr. Eörsi and Mr. Lemontey all expressed their agreement with this proposal, Mr. Lemontey adding that the right should only be exercisable with regard to services which had already been provided. Thus if a guest left the hotel before the end of the contractual period, the hotelkeeper could not detain his property in connection with sums due for the services which would have been provided had the guest not left at the time he did.

98. After Mr. Evans had pointed out that some legal systems contained special provisions concerning the question of whether the right of the hotelkeeper should extend to advances of money made to the guest, Mr. David stated that while this sometimes occurred, it was infrequent and was in any event quite outside the scope of the hotelkeeper's contract. In his view, therefore, it should not be dealt with in the future international instrument. The Chairman agreed with this view.

99. With regard to objects upon which the hotelkeeper's right bears, the Committee agreed in principle that these objects should be those for which the hotelkeeper is liable. There was however considerable discussion concerning two particular types of property, namely goods of which the guest is not the owner and motor vehicles.

100. With respect to the former category, the Chairman considered that it would be advisable to leave this question to be determined by national law, for a decision as to whether the hotelkeeper could exercise his right over such property would depend upon whether the right was or was not a real right and in his view complicated questions such as these should not be tackled within the framework of the future international instrument.

101. Mr. Eorsi agreed with the Chairman and added that even if agreement could be reached on the nature of the right, a special rule concerning stolen property or other goods of which the guest was not the owner would scarcely be necessary as only very rarely would an owner of stolen goods be able to trace them to the hotel.

102. In connection with the question of whether the hotelkeeper's right should extend to motor vehicles, there was a certain division of opinion in the Committee. On the one hand, Mr. Lemontey thought that it was necessary to consider it in conjunction with the liability of the hotelkeeper for property over which he had assumed the obligation of safe custody. In his view the hotelkeeper would have a privileged claim over motor vehicles and objects left therewith brought to the hotel by guests, on condition that he had undertaken the custody of the vehicle.

103. The Chairman, however, was of the opinion that motor vehicles should be excluded from the exercise of the hotelkeeper's right to detain his guest's property and this for a number of reasons. In the first place, highly complex problems which had already been alluded to could arise when the vehicle was not owned by the guest, for example when it was subject to a hire purchase agreement, on hire or had been stolen, and it had already been agreed by the Committee that in such cases the nature of the rights of the hotelkeeper should be regulated by national law.

104. Secondly, there was a risk of confusing the hotelkeeper's contract and the garage contract and of the former even becoming accessory to the latter. Thirdly, it would often in practice be extremely difficult to determine whether the hotelkeeper had in fact agreed to take custody of the vehicle, while finally it should be recalled that as a general rule the value of a motor vehicle would be considerably higher than the hotel bill and it would seem exaggerated to permit the hotelkeeper to detain the vehicle for payment of a very small sum.

105. Mr. Dalton agreed with the views expressed by the Chairman and stated that his consultations in the United States with interested circles had indicated a similar desire to exclude motor vehicles from the application of the future international instrument.

106. The Committee agreed provisionally that motor vehicles should not be included among the property in respect of which the hotelkeeper's right to detain his guest's property should be exercisable. (See also question 16 below).

Question no. 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 ?

107. The discussion by the Committee on this question to a certain extent overlapped with that of question no. 12. Generally speaking, the Committee agreed that it would not be advisable to enter into too much detail with regard to the hotelkeeper's obligations other than those relating to the security of the guest and his property and considered that it would be sufficient to employ a somewhat general formula stating that the hotelkeeper should provide the services promised and behave towards his guest in such a manner as can be expected from a normal hotelkeeper, due regard being had to the category of his hotel.

108. The Chairman felt that such a formula would cover a number of more or less specific points which had been raised during the discussions such as the respect of the tranquil enjoyment by the guest of the services provided by the hotelkeeper and of his right to privacy. He also agreed with the point made by Mr. David that the obligations here contemplated were not of a strict character but that the hotelkeeper had to take all possible steps to ensure that he fulfilled them ("obligation de moyens" rather than an "obligation de résultat").

Question no. 12 - Which circumstances, if any, should justify either party putting an end to the contract prematurely without being called upon to indemnify the other ?

109. In connection with this question, the Committee considered that it was closely related to question no. 8 and that by and large the same rules should apply to the premature interruption of the performance of the contract as to the freeing of the parties from their contractual obligations while the contract was still executory. The three cases in which the Committee considered that parties could interrupt the performance of the contract prematurely were the following :

- a) in the case of force majeure and without payment of damages, it being understood that the notion of force majeure be taken in a relatively strict sense;
- b) when circumstances affecting the performance of his obligations by one of the parties arise which would have prevented a reasonable person from concluding the contract had he known about them beforehand, it being understood that damages are only due by the other party when that party is at fault.
- c) when the guest wishes to interrupt the contract for other reasons, on condition that he pays equitable compensation to the hotelkeeper, regard being had if necessary to the time at which he informs the hotelkeeper of his intention.

110. For the most part, the observations made by the members of the Committee in connection with question 8 are applicable, mutatis mutandis, to question 12. It should, however, be pointed out that the discussions on question 12 went beyond its somewhat limited wording (i.e. to cases where one party could interrupt the performance of the contract without having to indemnify the other party in that the rules contemplated under (c) envisage cases where the guest may be called upon to pay compensation to the hotelkeeper.

111. In connection with the use of the words "if necessary" in (c), which were not present in the corresponding situation considered in relation to question 8, it was recognised that whereas in the latter case, the Committee had envisaged the application of some form of sliding scale to determine whether damages were payable by the guest, the circumstances here did not seem to admit of the same solution. The time at which the guest informed the hotelkeeper of his intention to leave the hotel night therefore be an element in determining whether compensation was payable. While Mr. Hennebique appreciated this distinction he wondered whether the words "if necessary" were themselves strictly necessary.

112. Finally, allusion was made by Mr. David to the fact that the rules suggested were particularly welcome in that they would permit a hotelkeeper to put an end to a contract of allotment when it was apparent that the agent with whom he had contracted was, while taking advantage of the favourable terms on which the contract had been concluded, not fulfilling his obligation to send groups to the hotel throughout the whole contractual period. In the context of this question he also suggested that the future international instrument should contain a provision permitting the hotelkeeper to insert in the contract a clause permitting him to place the guest in alternative and equivalent accommodation when this proved necessary.

LIABILITY FOR PROPERTY OF THE GUEST

Question no. 13 - What rules should govern the liability of the hotelkeeper for damage to, or deterioration or loss of, his guests' property ?

113. Preliminary to the discussion of the substantive rules on this question, Mr. Lemontey evoked the possibility of a conflict between, on the one hand, the European Convention on the Liability of Hotelkeepers concerning the Property of their Guests, elaborated within the framework of the Council of Europe, and opened to signature in Paris on 17 December 1962 and, on the other, the future international instrument. This Convention, accompanied by an Annex which was half way between a uniform law and a model law, contains a series of minimum rules with the possibility for Contracting States to make reservations on a number of points. It had already been ratified by a number of member States of the Council and ratification was contemplated by others.

114. In his view, the future instrument ought not to contain rules which would make participation in it incompatible with the participation in the European Convention of the Contracting States thereto. The future instrument might therefore lay down stricter rules governing the liability of hotelkeepers for the property of the guests but not less stringent ones. If, however, there were to be grounds of incompatibility between the instruments, then the possibility might be considered for Contracting States to the European Convention to make certain reservations.

115. The Chairman stated that he agreed with most of what had been said by Mr. Lemontey. He hesitated however about the possibility of States being permitted not to accept certain parts of the future instrument. Such a solution was, of course, possible but not ideal. In his view, however, if there were to be substantial divergencies between the Council of Europe Convention and a future instrument, this would mean that there had been a considerable shift in balance in the relationship between the guest and the hotelkeeper and that there would be a risk that many States, other than Contracting Parties, to the European Convention, whose law made provision for solutions very similar to those contained in that Convention, might not accept the new instrument.

116. Mr. Plantard informed the Committee that the Council of Europe had been invited to send an observer to its meeting but that regrettably it had been unable to do so. All steps would, however, be taken to keep the Council of Europe fully informed of future developments.

117. Mr. Eorsi stated that he was prepared to give full consideration to the Council of Europe Convention although he could not, as a matter of principle, accept that a regional unification could dictate solutions to be

adopted on a universal level. If there were to be any incompatibility between the two instruments, however, he suggested that it might be possible to permit Contracting Parties to the Council of Europe Convention to apply its provisions as between themselves.

118. The Chairman, while admitting this possibility, suggested that the most satisfactory procedure would be to proceed to an examination of the different substantive issues, without entering into too much detail, with a view to seeking solutions which would obtain the widest possible degree of participation and then to compare these with the rules contained in the Council of Europe Convention which, he recalled, were substantially similar to those of most States throughout the world.

119. The Committee agreed to this procedure (see also paragraph 142).

Question no. 14 - In particular, should the compensation be limited and, if so, in which circumstances, and on what basis of calculation ?

120. The Committee was unanimously of the opinion that the basic principle of the limited, rather than the unlimited, liability of the hotelkeeper should be retained, subject to his liability being unlimited in the classic cases recognised by both the European Convention and most national legal systems, namely where the property which was lost, damaged or destroyed had been deposited with him, where he had refused, without reasonable grounds, property offered to him for safe custody and where the occurrence took place through a wilful act, omission or negligence on his part, or on the part of any person for whose actions he was responsible.

121. With regard to the basis of calculating the limit to be placed upon the hotelkeeper's liability, the Chairman recalled that the report prepared by the Secretariat had discussed in detail the advantages and disadvantages of the two methods which might be employed, namely on the one hand a fixed sum expressed in terms of gold francs, and on the other a sum related to the cost of the room. Personally, he favoured the latter system for no-one could, at the time of the elaboration of the Council of Europe Convention in 1962, have foreseen the inflation, increase in the value of gold and the wild fluctuations which had recently been witnessed. Still further confusion was caused by the differences in the value of gold on the official and on the free markets. The arbitrary consequences had been visible to all in connection with the transport conventions. In his own country, the fixed sum solution had been adopted but inflation had rendered the limits derisory and he hoped that it would be possible to effect a change to the solution based on the price of the room.

122. Mr. Lemontey stated that in the recent amendments to the French Civil Code the original draft had been modified during its passage through Parliament so as to substitute the price of the room solution for that based on a fixed sum.

123. Mr. Hennebique recalled that UNIDROIT was at present undertaking a study on gold clauses in international conventions but that it would take some time before it was completed and relevant conclusions drawn.

124. Mr. David informed the Committee that at the present time the hotel profession favoured the solution based on the cost of the room. On the other hand, it considered that one hundred times the price of the room, as laid down in the Council of Europe Convention, was excessive; fifty times would seem to be more appropriate and would also have the advantage of encouraging guests to use deposit facilities.

125. The Chairman also considered that for small hotels one hundred times the cost of the room might impose hardship and he could accept a system of fifty times that price provided that this should not be less than a fixed sum which might be established.

126. Mr. Hennebicq suggested that the existence of a limitation upon the hotelkeeper's liability would permit them to insure themselves and that in these circumstances there would be no appreciable difference for the hotelkeeper in laying down a limit based on fifty or one hundred times the cost of the room.

127. The Chairman was not fully convinced by these arguments and Mr. David pointed out that they would carry much loss force in developing countries.

128. Mr. Dalton, on the other hand, was unsure as to whether the limits laid down in the Council of Europe Convention might not be too low by United States standards. Also, in connection with Article 2 of that instrument, he pointed out that there was a body of opinion in the United States to the effect that some upper limit might be laid down for goods which had been deposited and that the hotelkeeper might be entitled to refuse certain objects of excessively high value.

129. Mr. Hennebicq suggested that the possibility for the hotelkeeper to limit his liability in respect of goods deposited with him already existed in Article 2 (d) of the European Convention.

130. While Mr. David considered that it might be prudent not to lay down a fixed sum, the Chairman expressed the fear that if such a limit were to be established, it might prove to be too low for large hotels and too high for small ones. This was a question of detail which could be examined later.

131. Finally, in this context, the suggestion was made that it might be advisable to reexamine the question dealt with in Article 1, paragraph 2 (b) of the Annex to the European Convention concerning objects placed in the custody of a person for whom the hotelkeeper is responsible but outside the premises of the hotel.

Question no. 15 - In which cases should the hotelkeeper be exonerated from liability ?

132. This question was not discussed in detail by the Committee but there was broad agreement that the cases recognised by most national legal systems and by the European Convention should be retained. The situations listed in Article 3 of the Annex to the European Convention are where the damage, destruction or loss is due to the guest or any person accompanying him or in his employment, or any person visiting him; to an unforeseeable and irresistible act of nature or an act of war; to the nature of the property.

Question no. 16 - Should special rules govern any particular type of property ?

133. Discussion on this question was essentially concerned with whether the hotelkeeper's special liability might also attach to motor vehicles and property left with them.

134. In the main, the members of the Committee were opposed to the assimilation of motor vehicles to other types of property. The Chairman recalled that the Annex to the European Convention had excluded them although Article 2 of the Convention itself gave States the possibility of applying the rules in the Annex to motor vehicles and property left with them.

135. As had been the case with the right of the hotelkeeper to detain his guest's property, he feared that difficulties might arise if there were to be a confusion of the hotelkeeper's contract and the garage contract. He therefore hesitated to include motor vehicles although he did not agree with the reason advanced by Mr. Forsi for excluding them, namely that the guest would in any event be adequately protected by insurance.

136. Mr. David intimated that the hotel profession was reticent to assume a special liability for vehicles, even when stored in a hotel garage, in view of the difficulty for hotelkeepers to prove that damage suffered by such vehicles had not been caused by their servants. If liability were to be placed on the hotelkeeper, it should be a liability based on fault and not strict liability. He stated, however, that he could accept the application of the general rules governing hotelkeeper's liability in respect of objects left in a locked car in the custody of the hotelkeeper.

137. After Mr. Dalton had also stated that the interested circles in his country were in favour of excluding motor vehicles from the normal rules governing hotelkeeper's liability.

138. The Committee provisionally adopted the solution of excluding vehicles and property left with them from the scope of the future instrument.

139. In addition, Mr. Hennebicq suggested that the problem of live animals, which has been regulated by the European Convention in the same way as that of motor vehicles, should not be overlooked and might be discussed at the next session.

Question no. 17 - When does the hotelkeeper's liability qua hotelkeeper arise in respect of his guests' property and when does it cease ?

140. The Committee did not consider this question in detail during the course of its discussions, reserving it for its second session, although Mr. Eörsi expressed considerable hesitation concerning the possibility, contemplated by the European Convention, of the hotelkeeper's being held liable in respect of damage to property situated outside the hotel.

Question no. 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 ?

141. The Committee agreed that in no circumstances should the hotelkeeper be allowed either by contract or by notice completely to exclude his liability. As to the question of his being able to reduce his liability in cases where it would otherwise be unlimited, to a level not below the statutory limit provided for, as was the case with the European Convention, the Chairman suggested that the question might be reexamined with a view to curtailing the hotelkeeper's power to reduce his liability.

142. After completing its examination of questions nos. 13 to 18, the Committee agreed that, subject to the points of detail which had emerged during its discussions (see paragraphs 128, 131 and 140), the future work on the subject should be largely inspired by the basic principles of the European Convention of 1962.

LIABILITY FOR INSURY TO THE GUEST

Question no. 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 ?

In introducing this question, Mr. Evans stated that this was the area of the law relating to the hotelkeeper's contract which had caused the Secretariat the greatest difficulty in preparing its report. In the first place, few States had introduced specific rules governing the matter so that in consequence the general principles of contract or tort law were often applicable and even within the same State the application of these principles could lead to different results.

Nevertheless the general rule in most jurisdictions seemed to be that some kind of fault by the hotelkeeper must be shown to have existed for him to be liable to his guest for physical injury. The situation was not, however,

quite the same in respect of injury caused by the consumption of food and drink and a number of States seemed to require a higher standard of care from the hotelkeeper amounting in some cases to imposing a strict liability upon him.

145. In short, this was one of the most difficult questions faced by the Committee in view not only of the varied solutions adopted by States but also of the vast number of factual situations in which the guest might suffer injury. In these circumstances it might prove to be undesirable, or even impossible, to apply the same rule to all of these factual situations so that a mixed system of fault liability and strict liability should perhaps be contemplated.

146. Mr. Eorsi agreed that it might be difficult to find some overall system. In the law of his country, and that of a number of other socialist States, there existed certain basic principles from which it would be difficult to make any derogations for the special case of the hotelkeeper's contract. Among these principles were the presumed fault of the defendant in both contract and tort and a strict liability for activities considered to be dangerous. While it was true that the activity of running a hotel was not dangerous per se, there might well be circumstances in which a strict liability would be imposed upon the hotelkeeper in the event of injury to the guest, as for example, if the latter were injured by a badly installed electric point.

147. Many States, he felt, might be unwilling to make exceptions to the basic principles of their national law and although reactions would depend very much on the content of the rules to be proposed on this matter in the future international instrument, he considered that agreement might be much easier to obtain if, as he had already urged, the scope of the instrument were to be limited to international relations.

148. The Chairman recalled that considerable difficulties had arisen in the framework of the Brussels Convention on the travel contract on the question of whether the agent was liable for injury caused to the traveller arising out of his relations with the hotelkeeper. It was therefore essential in the present context to attempt to formulate rules which would enjoy a wide acceptance.

149. He also noted that there was a growing tendency towards special rules for different professional categories and he did not think that his authorities would oppose such a development in connection with the hotelkeeper's contract.

150. Personally, he could see three main possibilities of determining the hotelkeeper's liability for death of, or injury to, his guests. The first would be that the guest would have to prove the fault of the hotelkeeper while the second would be to impose a strict liability on the latter. Neither of these solutions commended themselves to him, the first being too unfavourable to the guest, while the second would cause undue hardship for

the hotelkeeper. He therefore advocated the adoption of the third solution whereby, once the guest had established the causal link between the services rendered, or not rendered, by the hotelkeeper and the injury suffered by him, the hotelkeeper would be liable unless he could prove that he had acted with all the diligence which could reasonably be expected of him in order to avoid the injury. The system was, in other words, that of presumed fault with the burden of proof reversed. There might of course, however, be exceptional situation in which either the first or second solution might be more opportune.

151. Mr. Lemontey stated that he was substantially in agreement with what had been said by the Chairman. The situation under French law had been described in the Secretariat report. The obligation of the hotelkeeper was one to use the necessary prudence and diligence to ensure the safety of his guest (obligation de sécurité) but it did not involve strict liability. It was, in other words, an "obligation de moyens" and not an "obligation de résultat". As a general principle therefore he could accept the system of presumed fault with the burden of proof reversed which would be more favourable to the guest than the existing situation under French law but he would be unable to accept a general principle of strict liability.

152. As regards the point made by Mr. Eorsi, he personally favoured an application of the future international instrument to all relations, whether national or international, but in any event considered it indispensable for the instrument to contain some rules on the hotelkeeper's liability for injury to his guests. If these were lacking, the instrument would be deprived of most of its value.

153. Mr. Eorsi also said that he could in principle support the proposal made by the Chairman, which corresponded very closely to Hungarian law.

154. Mr. Dalton, while recognising that the liability question was central to the future international instrument, agreed with Mr. Eorsi that for many countries acceptance of the instrument would be facilitated were it to apply to international relations only. This was especially true of federal States such as his own where there were some differences between states concerning the detailed application of rules governing liability.

155. As regards the presumed fault solution, he considered that it might broadly speaking be acceptable but due regard would have to be paid to certain special situations.

156. Mr. David expressed some hesitations regarding the presumed fault principle. It was, he thought, rather difficult to expect the hotelkeeper to prove that there had been no fault on his part and he would have preferred a system whereby the burden of proof rested on the guest to show that the hotelkeeper had not done all that was necessary to secure his safety. There were, after all, he recalled, situations in which the guest was himself responsible for the injury suffered by him.

157. With regard to the cases in which strict liability might be imposed upon the hotelkeeper, Mr. Eorsi suggested that such liability might be contemplated in cases where the guest had been injured through defective electrical appliances and also where he suffered injury as a consequence of consuming food and drink served by the hotelkeeper.

158. The Chairman also considered that strict liability might be imposed in the latter case, the hotelkeeper being left, where appropriate, with a recourse action against his supplier.

159. Both Mr. Dalton and Mr. Lemontey also favoured a stricter liability in connection with food and drink served to guests. Mr. Dalton pointed out that this higher standard already existed in the United States where the hotelkeeper warranted that food and drink were fit for human consumption while Mr. Lemontey indicated that the solution was similar to that which had been adopted in Article 2658 (2) of the Ethiopian Civil Code. In his view, this was the only case in which the strict liability of the hotelkeeper should, however, be contemplated.

160. Finally, the Committee considered that in all the cases envisaged under question no. 19, the hotelkeeper should be allowed to exonerate himself in the event of force majeure or the fault of the victim, the question of contributory negligence to be examined by the Secretariat when preparing the draft articles.

Question no. 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 ?

161. Referring to the transport conventions, and in particular to the CVN, Mr. Lemontey stated that he could accept a provision in the future international instrument permitting States, if they so wished, to impose a ceiling for compensation but that he would be opposed to any system which made such a ceiling obligatory for all Contracting States.

162. In this context, the Chairman recalled the CVR under which a State could chose between three different solutions, a ceiling of 250,000 gold francs, a higher limit or no limit at all. The relevant provision, Article 13, paragraph 1 also lays down connecting factors to determine the law of which State shall apply for the determination of the total amount of compensation.

163. Mr. Eorsi stated that he was, in principle, against any form of limitation but that he might be able to accept it with regard to non-material damage, compensation in respect of which varied considerably from one State to another.

164. Both Mr. Dalton and Mr. Lemontey however opposed any specific limitation in respect of non-material damage, the latter pointing out that it would be difficult to lay down a special rule regarding hotelkeepers different from that applicable in other cases. In his view, questions concerning the scope of the injury to be compensated should be dealt with by national law.

165. The Chairman also felt that in view of the present state of the law of a number of countries it would be impossible to accept a solution providing for a limitation in respect of non-material damage or even excluding altogether compensation for such damage. While he would himself have preferred some form of limitation, along the lines contained in the various transport conventions to which allusion had been made, he could provisionally accept the majority position, all the more so as in most conventions the minimum was so high that it was rarely reached and because of the fluctuations in the value of gold which had earlier been discussed. He suggested however that the question might be taken up again later with special reference to the solutions adopted on the subject in the Additional Convention to the CIV where Contracting States have the possibility of fixing a limitation not lower than a certain amount.

166. Mr. David also thought that some ceiling might be desirable with a view to increasing the number of ratifications by developing States. Nevertheless, the problem was one which might be settled by insurance.

167. With regard to the law which should determine the scope of the injury in respect of which compensation should be payable, for example non-material damage, the Chairman considered that it would be desirable to avoid the risk of conflict of law situations arising and suggested that the law

applicable should be that of the place where the hotel was situated. In formulating a provision on this question inspiration might be taken from Article 12 of the CVR.

168. Mr. David agreed that such a solution would be in the interests of simplicity. There might, he remarked, be some difficulties in connection with contracts between hotelkeepers and travel agents as the latter might seek to invoke their own national law but here again he favoured the solution suggested by the Chairman as agencies were in a much better position to be acquainted with the law of the country where the hotel was situated than the hotelkeeper with the law of their country.

169. Mr. Lemontey also agreed with the Chairman's proposal but thought that it might be worth considering the possibility of leaving the parties the possibility of choosing a law other than that of the place of the hotel. In this connection the Chairman feared that such an exception might, however, leave the door open to abuse.

170. In conclusion, the Committee preferred not to include in the future international instrument a provision limiting the compensation due by the hotelkeeper in the case of death of, or personal or any other bodily or mental harm to, the guest.

Question no. 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 ?

171. The Committee was unanimous in excluding any possibility for the hotelkeeper to exonerate himself wholly or in part from his liability for physical or mental injuries.

Question no. 22 - Should the future uniform law contain provisions concerning limitation of actions (extinctive prescription) and, if so, what period, or periods, should be established ?

172. The Committee considered it to be indispensable for the future international instrument to contain provisions on prescription.

173. The Chairman recalled that as regards actions concerning damage to, or loss of, property, the limitation periods were normally short. In addition, the European Convention contained, in Article 5 of the Annex, the rule that the guest should, on pain of losing the benefits of its provisions, inform the hotelkeeper without undue delay of loss or damage to his property. With regard to injury to persons, however, he considered that the period of prescription should be longer. A possible solution might be to provide for a period of five years after the termination of the services in the hotel or three years after the guest had become aware of the injury. In all other actions arising out of the hotelkeeper's contract, the period should be only one year.

174. While agreeing in principle with the one year period proposed by the Chairman although wondering whether it might not be a little short in cases where a plaintiff was suing in another country, Mr. Dalton felt some hesitations about the dual formula suggested by him in connection with personal injury actions and in particular the criterion of the knowledge of the victim of the injury. Personally, he considered that it would be better to adopt a single period of, say, three or four years after the termination of the services, as was envisaged in the UNCITRAL draft Convention on prescription.

175. Mr. Eorsi, Mr. Lemontey and Mr. Hennebicq expressed similar doubts concerning the advisability of adopting the period commencing with the knowledge of the victim of the injuries as this might introduce uncertainties.

176. Mr. David, for his part, stressed the importance of the rule requiring notification to the hotelkeeper of damage to, or loss of, property, as soon as possible after the event and preferably during the guest's stay at the hotel.

177. Mr. Matteucci observed that if the scope of the future international instrument were to be limited to international relations then there would be the risk of a distinction between the rules of prescription applicable to actions arising out of hotelkeeper's contracts according as to whether they were national or international.

178. The Chairman expressed sympathy with this observation but considered that it would be highly regrettable if the future instrument were not to contain international rules governing prescription. He therefore suggested that subject to possible reconsideration of the question after a decision had been reached concerning the field of application of the convention, it might be taken as agreed that the future instrument should contain rules on prescription, that the period should run as from the termination of the contract, that is to say when the guest finally left the hotel, and that the periods of limitation of actions should be between 3 and 5 years for physical

190. Mr. David, on the other hand, favoured a jurisdictional clause specifying that the forum should be that of the place where the services were provided and not, in the case of hotel chains, the seat of the chain. As regards the question of arbitration, he stated that attempts were being made to encourage recourse to arbitration where travel agents were involved in a dispute with hotelkeepers and expressed the view that the future international instrument should not exclude the possibility of arbitration when contracts were concluded between hotelkeepers and associations or commercial entities.

191. Mr. Lemontey stated that he could accept such a provision as regards the contracts mentioned by Mr. David but not when individuals were involved even when the arbitration agreement was stipulated after the dispute had arisen.

192. The Chairman expressed the view, which was generally accepted by the Committee, that any clause permitting arbitration should provide that the arbitrators must apply the rules of the future international instrument to questions of substance. If arbitration agreements between hotelkeepers and individuals were to be permitted, it could only be if they were stipulated after the dispute had arisen.

Question no. 24 - Which questions should be dealt with by the future uniform law in addition to those listed above ?

193. The Committee took a stand on two specific questions. In the first place it considered that it would be useful to include in the future international instrument a provision inspired by Article 3 of the CMR on the liability of the hotelkeeper for acts or omissions of his agents and servants acting within the scope of their employment.

194. Secondly, it suggested that all questions relating to recourse actions which one of the parties to the hotelkeeper's contract could undertake against a third party should remain outside the field of application of the future international instrument.

PART II - Future work

195. Mr. Dalton and Mr. Lemontey expressed the hope that a Committee of Governmental Experts should be convened as soon as possible with a view to proceeding to the preparation of an international instrument on the hotelkeeper's contract.

196. It was, however, agreed that such a Committee could usefully be convened only when a set of draft articles could be submitted for discussion. On the suggestion of the Chairman, the Committee instructed the Secretariat to prepare preliminary draft provisions on the hotelkeeper's contract which would be examined by it at a further session to be held in Rome at the headquarters of UNIDROIT from 7 to 11 January 1975. Subject to the agreement of the Governing Council of UNIDROIT, the text which resulted from that meeting would then be submitted to a Committee of Governmental Experts.

Statement of the Chairman
summarising the results of the discussions (°)

The Working Committee on the hotelkeeper's contract held its first session at Rome from 4 to 8 March 1974 at the Headquarters of UNIDROIT.

The Working Committee was seized of a report by the Secretariat on the hotelkeeper's contract (Study XII - Doc. 9 UNIDROIT 1974) and, more particularly, in Chapter VIII of the report, of a list of questions which might be discussed by it.

As to question no. 1

The Working Committee agreed to the usefulness of drawing up an international instrument containing uniform rules on the hotelkeeper's contract. Some members stressed the desirability of envisaging rules on the problems which arise between hotelkeepers and travel agents acting on their own behalf. The Committee was of the opinion that these problems should be considered, but probably in a different instrument.

As to questions nos. 2 and 3

As regards definitions, the Working Committee was of the opinion that it was unnecessary to define the terms "hotel", "hotelkeeper" and "guest" but that it was on the other hand indispensable clearly to identify the contractual relations to which the future international instrument would apply.

These relations could be defined as any contract by which a person (whether a legal or a natural person) undertakes, for reward and on a professional basis, to provide another person with accommodation in an establishment under his custody as well as ancillary services (for instance, food, drink, cleaning).

So as to avoid the application of the future international instrument to situations which, in particular because of the length of time during which the services are furnished, would seem to deserve different treatment from that to be provided for in the said instrument, one might contemplate introducing into the above-mentioned definition either the idea of temporary accommodation or that of services which differ from the usual ones in the hotelkeeper/guest relationship in the establishment concerned.

(°) This statement was approved by the Working Committee.

In order clearly to delimit the field of application of the said international instrument, the Committee was of the opinion that certain situations such as accommodation in wagon-lits, couchettes or cabins in ships or inland navigation vessels should be expressly excluded.

As to question no. 4

The Working Committee was of the opinion that it would be preferable for the future international instrument to have the widest field of application possible. It was however conscious of the fact that the application of the rules contained in that instrument to purely internal relations could present difficulties for certain States. It was therefore necessary for such States to have the possibility of availing themselves of a reservation allowing them to restrict the application of the instrument to hotelkeeper's contracts of an international character. This category should include all contracts concluded between a hotelkeeper and a person of foreign nationality or one whose habitual residence is not on the territory of the State where the establishment providing the services is situated.

As to questions nos. 5, 6 and 7

The Committee agreed that an international instrument on the hotelkeeper's contract should include the question of the conclusion of this contract and even give detailed rules on the subject.

As for contracts concluded "inter praesentes", it seemed that no problems should arise in this field except perhaps as regards proof.

As far as other contracts are concerned, the problems which could arise are linked with reservations made by correspondence by the guest himself or on his behalf. In this connection, it would be desirable to check the conditions in which the absence of an answer on the part of the hotelkeeper or on the part of the guest can be interpreted as being an acceptance of the offer or of a counter offer. The Committee considered that, in principle, silence should be taken as an acceptance.

Regarding the question of deposits, it thought it would be undesirable to consider including in the future international instrument a provision which could be interpreted as meaning that the payment of a deposit is compulsory. It was, however, agreed that the hotelkeeper is always at liberty to require a deposit as a condition of the conclusion of the contract.

As to the necessity of the hotelkeeper's contract being concluded in writing, the Committee gave a negative reply to this question.

As to question no. 8

The Committee considered that the parties could be freed from their contractual obligations in three circumstances:

- a) in the case of force majeure without involving the payment of damages, it being understood however that the notion of force majeure be taken in a relatively strict sense;
- b) when the party wishing to withdraw from the contract has learnt, after the conclusion of the contract, of circumstances affecting the performance by the other party of his obligation which would have prevented a reasonable person from entering into the contract had he had knowledge of these circumstances beforehand, it being understood that damages are only due by the other party when that party is at fault.
- c) when the guest wishes to withdraw from the contract for other reasons, on condition that he pays equitable compensation to the hotelkeeper, regard being had to the time at which he informs the hotelkeeper of his intention.

As to question no. 9

The Committee was of the opinion that the future uniform law should not contain specific provisions on the obligations of the guest except perhaps as regards the assertion of the latter's obligation to pay the price and to behave in a normal way having regard to the establishment in question.

During the discussions on this question, the problem of the length of the contract and the evacuation of the room was posed. Concerning the length of the hotelkeeper's contract, the Committee considered that in principle it is concluded for a fixed period but that it can be the subject of express or tacit renewal; tacit renewal comes about if the other party is not given notice of the termination of the contract before a certain hour, for example, midday. It also considered that when the hotelkeeper's contract gives no indication as to its length, it is in principle concluded for one day. The Committee furthermore considered that the guest has the duty to evacuate the room at the time of the termination of the hotelkeeper's contract.

As to question no. 10

As regards the right of the hotelkeeper to detain his guest's property, the Committee unanimously decided to leave aside all questions relating to the nature of this right (e.g. real rights or contractual rights).

It considered that the right of the hotelkeeper over his guest's property should apply as regards the amount due for services rendered as provided for by the hotelkeeper's contract (price of the room, price of ancillary services if these are provided for in the contract) but in no case does this right apply to amounts due for damages.

As for the objects upon which this right bears, the Committee agreed in principle that these objects should be those for which the hotelkeeper is liable.

In view of the answer given to question no. 16, the right of the hotelkeeper to detain his guest's property should not extend to the guest's motor vehicle and to the objects left therewith.

As for the formalities necessary for implementing the right of the hotelkeeper to detain his guest's property and the sale of the goods connected with this right, reference should be made to local law.

As to question no. 11

To this question, the Committee replied that the future uniform law should oblige the hotelkeeper to provide the services promised and to behave towards his guests in such a manner as can be expected from a normal hotelkeeper due regard being had to the category of his hotel.

As to question no. 12

The Committee considered that the parties can interrupt the performance of the contract prematurely:

- a) in the case of force majeure and without payment of damages, it being understood that the notion of force majeure be taken in a relatively strict sense;
- b) when circumstances affecting the performance of his obligations by one of the parties arise which would have prevented a reasonable person from concluding the contract had he known about them beforehand, it being understood that damages are only due by the other party when that party is at fault.
- c) when the guest wishes to interrupt the contract for other reasons, on condition that he pays equitable compensation to the hotelkeeper, regard being had if necessary to the time at which he informs the hotelkeeper of his intention.

As to questions nos. 13 to 18

Concerning the rules which should govern the liability of the hotelkeeper for damage to, or deterioration or loss of, his guest's property, the Committee agreed that future work on the subject should be largely inspired by the basic principles of the European Convention on the Liability of Hotelkeepers concerning the Property of their Guests (Paris, 17 December 1962).

However, certain members drew attention to the fact that some details should be re-examined. These include, in particular, objects placed in the custody of a person for whom the hotelkeeper is responsible but placed outside the premises of the hotel (Annex to the above-mentioned Convention, Art. 1, par. 2, letter b)); the obligation to receive very valuable property for safe custody. This latter obligation should perhaps be defined more strictly than has been done in Article 2 paragraph 2 of the above-mentioned Annex.

The Working Committee agreed to the desirability of attentively reconsidering the limitations of liability provided for in the above-mentioned Convention and its Annex for the reason that, on the one hand, an evaluation in gold francs of the amount of the limitation of the compensation due has become very uncertain and that, on the other, the calculation of one hundred times the price of the room could lead to excessively high amounts for certain categories of hotels.

The Working Committee unanimously agreed that everything should be done to ensure that participation in the future international instrument should not be incompatible with participation in the above-mentioned European Convention.

In answer to question no. 16 in particular, the Working Committee held the opinion that, as was done in article 7 of the Annex of the European Convention, the liability of the hotelkeeper for the motor vehicles of his guests and the objects left therewith should be excluded from the sphere of application of the future international instrument.

As to question no. 19

As regards the liability of the hotelkeeper in the event of death of, or personal injury or any other bodily or mental harm to his guest, the Working Committee was of the opinion that the guest or persons entitled to indemnity should establish the causal link between the services rendered by the hotelkeeper or not rendered by him and the injury. Once this causal link has been established, the hotelkeeper will be liable unless he proves that he acted with all the diligence which could reasonably be expected of him in order to avoid the injury. However, such proof would not exonerate him in the event of injury caused by food or drink provided by the hotelkeeper to his guest: he could only exonerate himself therefore in the event of force majeure or the fault of the victim.

As to question no. 20

The Working Committee preferred not to include a provision limiting the compensation due by the hotelkeeper in the case of death of, or personal injury or any other bodily or mental harm to, the guest in the future uniform law. However, it considered that this question could be re-examined later on in the light of the solutions adopted on the subject in the Additional Convention to the CIV and in the CVR whereby Contracting States have the possibility of fixing a limitation not lower than a certain amount.

As to question no. 21

The Committee was unanimous as regards excluding any possibility for the hotelkeeper to exonerate himself wholly or in part from his liability for physical or mental injuries.

As to question no. 22

As for extinctive prescription, the Committee considered it indispensable that the future international instrument contain provisions on the subject. As far as limitation periods are concerned, it considered that a longer period (from 3 to 5 years) should be foreseen for physical or mental injury than those provided for other actions brought either by the hotelkeeper or by the guest (e.g. one year). The period of limitation should start from the moment the guest leaves the hotel.

The interruption or suspension of the limitation period should be governed by the domestic law of the place where the hotel is situated. However, it could be useful to provide a uniform rule on suspension during the period of negotiation between the parties; a provision incorporating such a rule could be based on similar provisions to be found in the road and rail conventions.

As to question no. 23

As to jurisdiction and other procedural questions, the Working Committee was of the opinion that rules concerning them might be proposed, but that the attempt might be abandoned if it were found to be the case that States would have difficulties in adopting them.

As to the content and form of such rules, which might cover jurisdiction, execution and recognition of judgements and security for costs, article 31 of the CMR might be taken as a model.

The fora to be admitted would be the place where the services are rendered and that of the place where the defendant has his principal place of business or his habitual residence. The question of whether other fora (for example, the place of conclusion of the contract), should be agreed upon and if so, in what circumstances, should be examined later in more detail.

In connection with arbitration, any clause assigning competence to an arbitral tribunal stipulated before the event giving rise to compensation should be forbidden in relations between the hotelkeeper and the individual guest. It might be permitted in relations between the hotelkeeper and travel agencies or other entities on condition, however, that the clause provides that the arbitrators must apply the rules of the future international instrument to questions of substance.

As to question no. 24

1. The Committee considered that it would be useful to include in the future international instrument a provision inspired by article 3 of the CMR on the liability of the hotelkeeper for acts or omissions of his agents and servants acting within the scope of their employment.

2. The Committee considered that all questions relating to recourse actions which one of the parties to the hotelkeeper's contract could undertake against a third party should remain outside the field of application of the future international instrument.

The Working Committee decided that a further session should be held in Rome at the headquarters of UNIDROIT, from 7 to 11 January 1975, on the occasion of which it will examine preliminary draft provisions on the hotelkeeper's contract which will be drawn up by the Secretariat.

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