

Study XII - Doc. 11

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

PRELIMINARY DRAFT ARTICLES

ON THE HOTELKEEPER'S CONTRACT

accompanied by an

ARTICLE BY ARTICLE COMMENTARY

Rome, October 1974

Short titles of Conventions

- Add. Con. C.I.V. - Additional Convention to the International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 February 1961, relating to the Liability of the Railway for Death of, and Personal Injury to, Passengers (Berne, 26 February 1966)
- CCV - International Convention on the Travel Contract, (Brussels, 23 April 1970)
- CMR - Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956)
- CVR - Convention on the Contract for the International Carriage of Passengers and Luggage by Road (Geneva, 1 March 1973)
- draft CVN - draft Convention on the Contract for the Carriage of Passengers and Luggage by Inland Waterway, adopted by the Governing Council of UNIDROIT at its 52nd session, Rome, 19 and 20 April 1973.
- UNIDROIT draft - Draft Uniform Law respecting the Liability of Innkeepers for the Loss or of Injury to Goods brought to their Inns by Guests, approved by the Governing Council of UNIDROIT on 5 October 1934
- C.E. Convention - Convention on the Liability of Hotel-keepers concerning the Property of their Guests (Paris, 17 December 1962)
- Draft Convention Agency - Draft Convention on the Contract of Agency for forwarding Agents relating to International Carriage of Goods, approved by the Governing Council of UNIDROIT at its 46th session: for the text see Unification of Law, 1966, pp. 413-457.
- C. Hot. 70 - Hotel Convention between the International Hotel Association (IHA) and the Universal Federation of Travel Agents' Association (UFTAA) relative to contracts between Hoteliers and Travel Agents, 1970

I. INTRODUCTION

1. On the occasion of its first meeting, held in Rome at the headquarters of UNIDROIT from 4 - 8 March 1974, the Working Committee on the Hotelkeeper's contract instructed the Secretariat to propose, for study at the second meeting of the Committee, a set of preliminary draft articles on the hotelkeeper's contract (Study XII - Doc. 10, UNIDROIT 1974, paras. 3 and 196).

2. The articles, which have been prepared in accordance with these instructions and on the basis of the discussions which took place at the first meeting of the Working Committee, are reproduced in Part II of this document, while Part III consists of an article by article commentary upon them, also prepared by the Secretariat of UNIDROIT, which is intended to facilitate the work of the Committee.

3. By way of general comment it should be recalled that at its first meeting the Working Committee deferred any decision as to whether the draft articles should take the form of a Convention or that of a uniform law. The Secretariat has therefore throughout the draft articles used both terms but in the course of the explanatory note, it has, for the sake of greater simplicity and of course without any prejudice to the ultimate decision to be taken on the matter, referred to the future instrument by the more general term "convention".

4. Similarly, at its first meeting, the Working Committee entered into some discussion on the question of whether the future instrument should govern not only contractual relations between hotelkeepers and individual guests but also contracts between hotelkeepers and travel agents acting on their own behalf. Although some members stressed the desirability of envisaging rules on the problems which arise in this latter context and the Committee was of the opinion that these problems should be considered, it was nevertheless felt that they should probably be treated in a different instrument (see Study XII - Doc. 10, UNIDROIT 1974, Appendix I, page 1). In consequence, the draft articles prepared by the Secretariat do not seek to regulate such contracts.

5. As regards the structure and content of the draft, the Secretariat has, where appropriate, taken inspiration from a number of existing conventions, in particular those relating to tourism and transport and the Council of Europe Convention on hotelkeeper's liability based on a UNEDROIT draft. So as to facilitate reference, the Secretariat has indicated after each article the model, if any, on which it is wholly or partly based.

6. Two other comments should also be made. In the first place, a number of articles are submitted to the Working Committee in the form of alternatives or with phrases in square brackets which indicate either that the Working Committee had not taken a firm decision of principle on the matter or that it had not been the object of detailed discussion by the Committee. Secondly, Article 28 makes provision for a number of reservations which States might wish to make at the time of signing, ratifying or acceding to the future instrument and the four paragraphs of the article are designed to indicate those points in respect of which there was not agreement at the first meeting of the Working Committee.

7. In conclusion, the Secretariat considered that it would be premature at this stage to submit to the Working Committee the provisions of a draft Convention or draft final clauses until the nature of the future instrument is more clearly defined.

II. PRELIMINARY DRAFT ARTICLES ON THE HOTELKEEPER'S CONTRACT

Article 1

Alternative I

1. For the purposes of this Convention (law) a "hotelkeeper's contract" means a contract by which a person - the hotelkeeper - undertakes, for reward and on a professional basis, to provide another person - the guest - with temporary accommodation in an establishment under his custody, as well as ancillary services.
/Any person who enters a hotel with the intention of requesting accommodation shall be assimilated to a guest/.

Alternative II

1. For the purposes of this Convention (law):

(a) "Hotelkeeper's contract" means a contract by which a person undertakes to provide another person with temporary accommodation in an establishment under his custody, as well as ancillary services.

(b) "Hotelkeeper" means any person /whether a natural or a legal person/ who, for reward and on a professional basis, accepts the undertaking defined under (a).

(c) "Guest" means any person who, in the performance of a hotelkeeper's contract, benefits from the undertaking defined under (a) whether the contract is concluded or the price paid by himself or by another person for him. /Any person who enters a hotel with the intention of requesting accommodation shall be assimilated to a guest/.

(d) "Price" means any remuneration in cash, in kind or in the form of direct or indirect benefits of any kind whatsoever.

(CCV - Article 1)

2. This Convention (law) shall not apply to any contract by which accommodation is provided on a vehicle operating in any mode of transport.

Article 2

This Convention (law) shall apply to any hotelkeeper's contract, where the hotel in which the accommodation is to be provided is situated on the territory of a Contracting State.

Article 3

1. A hotelkeeper's contract may be concluded orally or in writing.
2. In any dispute relating to the hotelkeeper's contract it shall be for the plaintiff to prove the existence of the contract.

Article 4

1. A hotelkeeper's contract shall be deemed to have been concluded whenever the guest has engaged accommodation for a specified day and the hotelkeeper has informed him that such accommodation has been reserved for him.
2. Unless proved otherwise, a hotelkeeper's contract shall be deemed to have been concluded when the hotelkeeper, having received a written request for accommodation by the guest, does not inform him within a reasonable time that he has not the accommodation available.

Alternative I

3. Whenever a guest has received from the hotelkeeper a counter-offer in reply to his written request for accommodation and does not inform the hotelkeeper within a reasonable time of his rejection of the counter-offer, or of a new offer, a hotelkeeper's contract shall be deemed to have been concluded in accordance with the terms of the counter-offer.

Alternative II

3. Whenever a guest has received from the hotelkeeper a counter-offer in reply to his written request for accommodation and does not inform the hotelkeeper within a reasonable time of his rejection of the counter-offer, or of a new offer, a hotelkeeper's contract shall not be deemed to have been concluded.

4. In his counter-offer, the hotelkeeper shall inform the guest that if the latter does not reply to the counter-offer within a reasonable time, such failure to reply shall be deemed to be an acceptance of the counter-offer.
4. In his counter-offer, the hotelkeeper shall inform the guest that if the latter does not reply to the counter-offer within a reasonable time, such failure to reply shall be deemed to be a rejection of the counter-offer.

Article 5

1. A hotelkeeper's contract may be concluded for a determined or an indeterminate period.
2. If a hotelkeeper's contract is concluded for an indeterminate period, its duration shall be deemed to be one day, subject to tacit renewal by the parties. Such renewal shall be deemed to have taken place when neither the hotelkeeper nor the guest has expressed before midday /or such other time as provided for in the contract / his intention not to extend the contract.
3. The hotelkeeper may require that the guest vacate the accommodation occupied by him on the termination of the hotelkeeper's contract.

Article 6

Either the hotelkeeper or the guest may cancel the contract before or during the performance of his obligations thereunder, and without payment of compensation to the other party, when performance of such obligations is rendered impossible by /force majeure/ / an unforeseeable and irresistible act of nature or an act of war /.

Article 7

Alternative II

Alternative I

1. Either the hotelkeeper or the guest may cancel the contract before or during the performance of his obligations there-
1. Either the hotelkeeper or the guest may cancel the contract before or during the performance of his obligations there-

formance of his obligations thereunder, when circumstances manifest themselves affecting the performance by the other party of his obligations which would have prevented a reasonable person from entering into the contract had he had knowledge of these circumstances beforehand.

under, when circumstances of exceptional character manifest themselves of which he could not have known at the time of the conclusion of the contract, and which, had they been known to him at that time, would have given him valid ground not to conclude the contract.

(CCV - Article 10, par .1)

2. In cases provided for in paragraph 1, compensation shall be payable to the party cancelling the contract only when the other party is at fault.

Article 8

1. Subject to the provisions of Articles 6 and 7, the guest may cancel the contract before the performance of his obligations thereunder provided he compensates the hotelkeeper for damage caused by such cancellation. Compensation for such loss shall be limited to the price of one-night's accommodation in the case of a contract for an indeterminate period, and to ten percent of the price of the accommodation in the case of a contract for a determined period, unless the parties have otherwise agreed by contract.

2. The compensation for loss referred to in paragraph 1 shall not be payable when the hotelkeeper has been notified of the cancellation at least fifteen days before the date on which, under the terms of the contract, the accommodation would have been placed at the guest's disposal.

Article 9

Subject to the provision of Articles 6 and 7, the guest may cancel the contract during the performance of his obligations thereunder, provided he compensates the hotelkeeper for any damage caused by such cancellation, regard being had, if necessary, to the time at which he informs the hotelkeeper of his intention.

Article 10

For the purposes of this Convention (law), the hotelkeeper shall be responsible for the acts and omissions of his agents and servants and of all other persons of whose services he makes use for the performance of the obligations which are incumbent upon him by virtue of the hotelkeeper's contract when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.

(CMR, Article 3; CVR, Article 4; CCV, Articles 12 and 21; draft CWN, Article 2).

Article 11

In the performance of his obligations under the hotelkeeper's contract, the hotelkeeper shall provide the services contemplated under the contract concluded with the guest and his conduct shall conform to the normal conduct of a hotelkeeper, regard being had to the category of the hotel.

Article 12

1. The hotelkeeper shall be liable for loss or damage resulting from the death of, or personal injury or any other bodily or mental harm to, a guest caused by an accident occurring at the hotel:

a) during the time when the guest has accommodation at his disposal

b) during a reasonable time preceding or following the time when the

guest has accommodation at his disposal.

(Add. Con. CIV, Article 2, para. 1; CVR, Article 11, para. 1; draft CWN, Article 3, para. 1).

Article 11

Article 11

2. The hotelkeeper shall be relieved of this liability if the accident was caused by circumstances which a hotelkeeper, using the diligence which the particular facts of the case called for, could not have avoided and the consequences of which he was unable to prevent.

(CVR, Article 11, para. 2;
draft CVN, Article 8, para. 2).

3. Notwithstanding the provisions of paragraph 2 of this article, when food or drink is provided by the hotelkeeper, he shall be liable for loss or damage resulting from the death of, or personal injury or any other bodily or mental harm to, the guest, by reason of the sole fact that they were caused by the provision of such food or drink, unless such loss or damage is due to force majeure [an unforeseeable and irresistible act of nature].

Article 12

1. The hotelkeeper shall be relieved wholly or in part of his liability under Article 12 of this Convention to the extent that loss or damage results from the wrongful act or neglect of the guest or from conduct of the guest not conforming to the normal conduct of a guest.

(Add. Con. CIV, Article 2, para. 3; CVR, Article 17, para. 1; draft CVN, Article 16, para. 1).

2. When the hotelkeeper is liable for loss or damage under the terms of Article 12 of the present Convention but a third party has contributed thereto by his acts or omissions, the hotelkeeper shall be liable for the whole of such loss or damage, without prejudice to any right of recourse he may have against such third party.

(Add. Con. CIV, Article 2, para. 4; CVR, Article 17, para. 2; draft CVN, Article 16, para. 2).

Article 14

The court or tribunal seized of the case shall determine in accordance with the national law of the place where the said court or tribunal is situated, including the rules relating to conflict of laws, the extent of the injury giving rise to compensation as a result of the death of, or personal injury or any other bodily or mental harm to, the guest, as well as what persons are entitled to compensation for such injury.

(CVR, Article 12).

Article 15

1. A hotelkeeper shall be liable for any damage to or destruction or loss of property brought to the hotel by any guest who stays at the hotel and has sleeping accommodation put at his disposal.

(C.E. Convention, Annex, Article 1, para. 1).

2. Any property

(a) which is at the hotel during the time when the guest has the accommodation at his disposal;

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

(c) of which the hotelkeeper takes charge [whether] at the hotel

[or outside it] during a reasonable period preceding or following the time when the guest has the accommodation at his disposal;

shall be deemed to be property brought to the hotel.

(C.E. Convention, Annex, Article 1, para. 2).

- 3; The liability shall be limited to the equivalent of at least 50 times the daily charge for the room.

Article 16

1. The liability of a hotelkeeper shall be unlimited:

- (a) where the property has been deposited with him;
- (b) where he has refused to receive property which he is bound to receive for safe custody.

(C.E. Convention, Annex, Article 2, para. 1).

2. A hotelkeeper shall be bound to receive securities, money and valuable articles; he may only refuse to receive such property if it is dangerous or if, having regard to the size or standing of the hotel, it is of excessive value or cumbersome.

(C.E. Convention, Annex, Article 2, para. 2).

3. A hotelkeeper shall have the right to require that the article shall be in a fastened or sealed container.

(C.E. Convention, Annex, Article 2, para. 3).

Article 17

1. A hotelkeeper shall not be liable in so far as the damage, destruction or loss is due:

- (a) to the guest or any person accompanying him or in his employment or any person visiting him;

- (b) to [force majeure] [an unforeseeable and irresistible act of nature or an act of war];

- (c) to the nature of the article.

(C.E. Convention, Annex, Article 3).

Article 18

The hotelkeeper shall be liable and shall not have the benefit of the limitation on his liability laid down in paragraph 3 of Article 15, where the damage, destruction or loss is caused by a wilful act or omission or negligence on his part or on the part of any person for whom he is responsible under Article 10.

(C.E. Convention, Annex, Article 4).

Article 19

Except in any case to which Article 18 applies, the guest shall cease to be entitled to the benefit of these provisions if after discovering the damage, destruction or loss he does not inform the hotelkeeper without undue delay.

(C.E. Convention, Annex, Article 5).

Article 20

1. The hotelkeeper shall have the right to detain any property brought to the hotel by a guest when the latter does not pay the price of the accommodation and of any ancillary services for which provision is made in the contract.

2. The hotelkeeper may, after giving reasonable notice to the guest, and in accordance with the law of the place where the hotel is situated, cause to be sold the property detained by him up to the amount necessary to satisfy his claim against the guest and retain the proceeds of the sale up to that amount.

3. A dispute as to whether debts are due by the guest to the hotelkeeper shall not permit the hotelkeeper to detain property brought to the hotel by the guest where he has been provided by the guest with a good and valid guarantor of the required sum or where deposit of an equivalent sum is made in the hands of a third party.

(Draft Convention Agency, Article 9: in fine).

Article 21

The provisions of Articles 18 to 20 of this Convention (law) shall not apply to vehicles, any property left with a vehicle, or animals.

(C.E. Convention, Annex, Article 7).

Article 22

Where the loss or damage caused by non-performance, in whole or in part, of an obligation under this Convention (law) gives rise to an extra-contractual claim, the hotelkeeper may avail himself of the provisions of this Convention (law) which exclude his liability or which set or limit the compensation payable by him.

(CCV, Article 25).

Article 23

Where the extra-contractual liability of one of the persons for whom the hotelkeeper is responsible under Article 10 is at issue, such person may also avail himself of the provisions of this Convention (law) which exclude the liability of the hotelkeeper or which set or limit the compensation payable by him; the total amount of compensation payable shall in no circumstances exceed the limits established under this Convention (law).

(CCV, Article 26).

Article 24

1. In the performance of his obligations under the hotelkeeper's contract, the guest shall pay the price for the accommodation and ancillary services as provided for in the contract and any other such ancillary services provided by the hotelkeeper at his request.

2. The guest shall also observe the internal regulations of the hotel [as brought to his notice] and his conduct shall conform to the normal conduct of a guest, regard being had to the category of the hotel.

Article 25

1. In all legal proceedings arising out of a hotelkeeper's contract under this Convention (law) the plaintiff may bring an action in a court or tribunal of a Contracting Party designated by agreement between the parties or

- (a) in any court or tribunal of the State within whose territory is situated the hotel where the accommodation and the services were provided or,
- (b) if he is the hotelkeeper, any court or tribunal of the State within whose territory the guest has his principal place of business or his habitual residence,

and in no other court or tribunal.

2. Where in respect of a claim to which paragraph 1 of this article applies an action is pending before a court or tribunal competent under this paragraph or where in respect of such a claim judgment has been entered by such a court or tribunal, no new action shall be started on the same grounds between the same parties unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the State in which the fresh proceedings are brought.

(CMR, Article 31, para. 2; CVR, Article 21, para. 2; draft CVN, Article 19, para. 2).

3. Where in respect of a claim to which paragraph 1 of this article applies a judgment entered by a court or a tribunal of a Contracting State competent under that paragraph has become enforceable in that State, such judgments shall become enforceable in each of the other Contracting States

as soon as the formalities required in the State concerned have been complied with. The merits of the case shall not be re-opened.

(CER, Article 31, para. 3; CWR, Article 21, para. 3; draft CWN, Article 19, para. 3).

4. The provisions of the preceding paragraph shall apply to judgments after trial, judgments by default and settlements confirmed by an order of the court, but shall not apply to interim judgments or to awards of damages in addition to costs against a plaintiff who fails wholly or partly in his action.

(CER, Article 31, para. 4; CWR, Article 21, para. 4; draft CWN, Article 19, para. 4).

5. Security for costs of proceedings arising out of hotelkeepers' contracts under this Convention (law) shall not be required from nationals of Contracting States who have their residence or a place of business in one of these States.

(CER, Article 31, para. 5; CWR, Article 21, para. 5; draft CWN, Article 19, para. 5).

Article 26

1. The period of limitation for actions arising out of the death of, or personal injury or any other bodily or mental harm to, a guest shall be three years.

2. The period of limitation for actions arising out of a hotelkeeper's contract under this Convention (law) other than those referred to in paragraph 1 of this article shall in all cases be one year.

3. The period of limitation shall begin to run from the time the guest leaves the hotel or, if he does not take up the accommodation as agreed under the contract, from the time he should have left the hotel.

4. A written claim by a party to the contract shall suspend the period of limitation until the date on which the other party rejects the claim by notification in writing and returns any documents handed to him in support of the claim. If a part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim which is still in dispute. The burden of proof of the receipt of the claim or of the reply and of the return of the documents shall rest with the party relying upon those facts. Further claims having the same object shall not suspend the running of the period of limitation unless the other party agrees to consider them.

(CMR, Article 32, para. 2; CVR, Article 22, para. 3; draft CVN, Article 20, para. 3).

5. Subject to the provisions of the preceding paragraph, the extension of the period of limitation shall be governed by the provisions of the law of the court or tribunal seized of the case not including the rules relating to conflict of laws. That law shall also govern the fresh accrual of rights of action.

(CVR, Article 22, para. 4; draft CVN, Article 20, para. 4).

Article 27

1. Any stipulation which would directly or indirectly derogate from the provisions of this Convention (law) shall be null and void in so far as it would be detrimental to the guest⁻. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

(CMR, Article 41, para.1; CVR, Article 23, para. 1; CCV, Article 31, Para. 1; draft CVN, Article 21, para.1).

2. Any clause assigning to an arbitral tribunal a jurisdiction which is stipulated before the event that caused the damage shall be null

and void.

(CVR, Article 23, para. 3; Draft CVR, Article 21, para. 3).

Article 23

(to be inserted in the final clauses of the Convention)

Any State may, at the time of signature, ratification or accession to this Convention, declare by notice addressed to that:

(a) this Convention (law) shall apply only to hotelkeeper's contracts concluded between a hotelkeeper and a person who is not a national of, or whose principal place of business or habitual residence is not on the territory of, the State where the accommodation and services are to be provided under the contract;

(b) the rule laid down in paragraph 2 of Article 15 shall apply only in respect of property which is at the hotel;

(C.E. Convention, Article 2, para. (c)).

(c) notwithstanding the provisions of paragraph 3 of Article 15, the hotelkeeper's liability in respect of any one article shall be limited to a minimum of 25 times the daily charge for the room;

(C.E. Convention, Article 2, para. (b)).

(d) notwithstanding the provisions of Article 21, the rules laid down in Articles 15 to 20 shall apply to vehicles, property left with them and live animals.

(C.E. Convention, Article 2, para. (e)).

III. ARTICLE BY ARTICLE COMMENTARY ON THE DRAFT

Article 1

Two alternatives are submitted to the Working Committee for the drafting of paragraph 1.

Alternative 1 (which follows very closely the definition of the hotelkeeper's contract proposed at the first meeting of the Working Committee, confines itself to defining that contract. The Committee was of the opinion that any attempt to define the term "hotel" would meet with little success, considering the wide differences in the character of establishments offering accommodation to the public at large and that similar difficulties would arise if an attempt were made to define the notion of a "hotelkeeper".

The essential element of the hotelkeeper's contract, and without which no such contract can exist, is the hotelkeeper's undertaking to provide the guest with accommodation so that a person merely availing himself of the ancillary services provided, such as the hotel restaurant, or visiting someone staying in the hotel, cannot be considered to be a "guest" for the purposes of the Convention. Moreover, a number of situations which might at first sight seem to satisfy this requirement have been excluded by the Working Committee from the field of application of the future instrument.

The first of these is that of the individual who lets out a room or two of his own home during the tourist season. This is a particularly common practice in a number of countries and plays an important part in the general context of international tourism. It was, however, felt that it would be unjust to place upon individuals, very often of modest means, the liabilities incumbent upon the proprietor of a large establishment and for this reason the requirement of the hotelkeeper's acting on a professional basis has been included alongside that of reward which, it may be incidentally added, excludes from the field of application of the Convention, the relations between a hotelkeeper and members of the staff

who occupy accommodation on the premises of the hotel.

A second category of establishments is excluded from the field of application of the future instrument by virtue of the requirement that the establishment in which accommodation is provided to the guest should be under the supervision of the hotelkeeper. The instrument is not therefore intended to apply to the engagement by the guest of accommodation in, for example, residences or bungalows forming part of a tourist complex if, as is generally the case, the proprietor exercises no supervision.

Thirdly, the draft articles apply only to temporary accommodation. On this point, the Working Committee, while rejecting the requirement still to be found, at least in theory, in some national legislations to the effect that the guest be a traveller, nevertheless considered that a distinction should be drawn between the normal case of the hotel guest who takes up accommodation for a fairly short period of time and the person who virtually becomes permanently resident in the hotel and may enjoy services which are not normally provided for guests. As to the length of time corresponding to the notion of "temporary", the Committee deemed it inadvisable to lay down any fixed period, considering that this question should be resolved by national law, but stressing that the Convention could not cover any contract which constituted an agreement to lease the premises.

As regards the ancillary services to which reference is made in paragraph 1 of the article, the Working Committee considered that these were extremely varied and that, apart from some basic services, such as the cleaning of the room, the provision of water and electric light etc., they would depend very much on the terms of the contract and the category of the particular establishment. In any event, there was general agreement that while the provision of food and drink might, as it so often is, be a term of the contract, it should not be considered an indispensable element.

In conclusion, some words must be said in connection with the last sentence in square brackets which envisages a situation not discussed

by the Working Committee. The suggestion that a person entering a hotel with the intention of requesting accommodation should be assimilated to a "guest" even though no hotelkeeper's contract may ensue, is made for practical reasons. As the draft articles are at present conceived, a person who has concluded a hotelkeeper's contract by means of a reservation but to whom the hotelkeeper, under the terms of Article 7, refuses to provide accommodation when he presents himself at the hotel, can invoke the provisions of the Convention concerning the liability of the hotelkeeper in the event of his suffering personal injury or his property being stolen or damaged on the premises before the hotelkeeper takes his decision. Such a person would thus be in a more favourable position than one who had not reserved accommodation but who, having been attracted by the hotel's sign, entered and suffered the same damage. Another example may be given; only one room remains vacant in a hotel while two persons who are queuing at the reception desk both suffer the same damage. The first, who is in the process of concluding a hotelkeeper's contract, would enjoy the protection of the Convention, but would it be equitable to deny such protection to the second who would be unable to conclude a contract because of lack of available rooms? The Secretariat, faced with these two situations, has considered it advisable to bring the question to the attention of the Working Committee and to propose, in square brackets, a text which might serve as a basis for discussion on that matter at the next session.

While the structure of Alternative II varies considerably from that of Alternative I and follows closely that of Article 1 of the CCV, it should be noted that the definitions of "hotelkeeper" and "guest" are drafted merely in function of that of the "hotelkeeper's contract" proposed at the first meeting of the Working Committee.

Three points should however be noted. In the first place, the definition in paragraph 1. (b) makes explicit the fact that the "hotelkeeper"

may be either a natural or a legal person. Secondly the word "guest" in paragraph 1 (c) specifies, as does the definition in nr. 7 of Article 1 of the CCV, that the contract may be concluded for the price paid by another person for him. The Secretariat considered that it might be useful to employ this terminology to establish the field of application of the future instrument to cases where the reservation has been reserved by a third party e.g. a travel agent for the guest, always provided of course that the agent was not acting on his own behalf (see paragraph 4 above of the introduction to the present note). Finally, paragraph 1 (d) reproduces nr. 4 of Article 1 of the CCV which contemplated, for example, the case of an employer organising a study tour for his management personnel; hotelkeepers' contracts concluded in this way would be subject to the future instrument by reason of the indirect benefit the employer would derive from extending the experience of his staff.

Paragraph 2 excludes from the field of application of the future instrument any contract by which accommodation is provided on a vehicle operating in any mode of transport and refers for example, to waggon-lits; rail or bus couchettes, or cabins in ships or inland navigation vessels. The provision is so worded as to avoid excluding from the field of application of the Convention "floating hotels" such as former transatlantic liners or boat-houses which are moored close to land.

Article 2

While Article 1 is concerned with the material or substantive field of application of the future instrument, Article 2 deals with the geographical scope which is determined, in this instance, by the territorial links with the State upon whose territory the hotel providing the accommodation is situated. The Convention will be applicable only when the State in question is a Contracting Party to it. Once this condition is satisfied, the Convention will, under the terms of Article 2, be applicable to the

hotelkeeper's contract irrespective of the presence or otherwise of an international element such as the nationality or habitual residence of the guest who is a party to the hotelkeeper's contract.

Nevertheless, on the occasion of the first meeting of the Working Committee, opinion was evenly divided on the question of whether some international element should also be required so as to avoid the application of the future instrument to purely internal hotelkeepers' contracts. In consequence, the Secretariat has inserted in Article 23, paragraph (a), a provision whereby any State may, at the time of signature, ratification or accession to the Convention, declare that it "shall apply only to hotelkeeper's contracts concluded between a hotelkeeper and a person who is not a national of, or whose principal place of business or habitual residence is not on the territory, of the State where the accommodation and services are to be provided under the contract". The wording of this reservation clause is based on the passage figuring in the Statement of the Chairman summarising the results of the discussions of the first meeting of the Working Committee (Study XII - Doc. 10, UNIDROIT 1974, Appendix I, page 2).

Article 3

This article is the first of a series of provisions concerning the conclusion and duration of the hotelkeeper's contract. Paragraph 1 recognises that a large number of such contracts are concluded orally and the Working Committee considered that it would be in the interests neither of the hotelkeeping profession nor of the public to insist upon any extra formalities. It is however apparent that difficulties of proof may well arise in the absence of any document such as the tickets, luggage vouchers and travel documents which evidence the existence of a contract in the transport conventions and the CCV. For this reason, the Secretariat considered that it might be useful, although probably not essential, to include an express provision, i.e. paragraph 2, to the effect that when any dispute

arises relating to the hotelkeeper's contract, it shall be for the plaintiff to prove the existence of the contract.

Article 4

This article is concerned with the steps which must be taken by the hotelkeeper and the guest for a hotelkeeper's contract to be concluded.

Paragraph 1 deals with the normal case in which the guest has requested accommodation and the hotelkeeper has informed him that such accommodation has been reserved for him. Problems however arise when the guest receives no reply to a written request for accommodation and the difficulties are exacerbated by the fact that in practice one hotelkeeper may consider his failure to reply as indicating that he accepts the guest's offer and another that he rejects it.

For this reason, the Working Committee, without wishing to interfere with the application of each national legislation's rules governing offer and acceptance, considered that a general rule should be laid down.

In consequence, paragraph 2 provides that a hotelkeeper's contract shall be deemed to have been concluded when the hotelkeeper fails within a reasonable time to reply to a written request for accommodation. As is customary with the use of the term "reasonable", it will be necessary for judges applying the future Convention to examine all the pertinent facts so as to determine whether the reasonable time has been exceeded and of capital importance will be, for example, the mode of communication employed by the person requesting accommodation (for example letter or telegram), and the length of time between the hotelkeeper's receipt of the request and the day on which the guest wishes to take up the accommodation.

It should further be pointed out that paragraph 2, while intended to give a degree of certainty to a situation which in practice is confused, is a rule of interpretation, namely of the silence of the hotelkeeper, and in consequence the opening words of paragraph 2 "unless proved

otherwise" permit the rule to be displaced when the intention of the parties is shown to exclude its application as, for example, if the guest were to reserve accommodation for a certain day on condition of confirmation by the hotelkeeper or where a hotelkeeper were, for instance, to transmit to a guest, via a third person staying at the hotel, a message to the effect that lack of accommodation prevented him acceding to a request for accommodation for a specific period.

The situation contemplated in paragraph 3 represents the converse of that dealt with in the preceding paragraph, in the sense that it is the silence of the guest which falls to be interpreted. The case may well arise in practice that a hotelkeeper, having received a request for accommodation, replies that he has not accommodation available of the precise character asked for but that he can offer an alternative. Should the guest's silence be interpreted as a tacit acceptance of the counter-offer? With a view to placing the parties upon as equal a footing as possible, the answer would be in the affirmative so that the hotelkeeper will not find himself in the situation of reserving accommodation for a guest who fails to appear, and who has no right of recourse against such a guest for any loss he incurs. This solution is adopted in Alternative I of paragraph 3.

On the other hand it could be argued that it would be placing too heavy a burden on the guest to expect him to reply to an offer which he had not necessarily solicited and to bind him by a contract the terms of which could be substantially different from those he had envisaged when requesting the accommodation. Furthermore, to the argument that the equality of the parties should be fully respected in this context, it might be objected that the hotelkeeper is a professional and the guest, in his relations with the former, a simple individual so that there is already an inequality in the contractual status of the parties. The Secretariat has therefore prepared an Alternative II in paragraph 3 to the effect that no hotelkeeper's contract shall be deemed to have been concluded when the guest

fails to reply to the hotelkeeper's counter-offer or new offer within a reasonable time.

Finally, the Secretariat has also prepared two alternative versions for paragraph 4 corresponding to Alternatives I and II of paragraph 3. Both alternatives impose (1) on the hotelkeeper a duty of "notice". In other words, the hotelkeeper must, in his counter-offer or new offer, warn the guest that failure by the latter to reply within a reasonable time will, according to Alternative I, be deemed to be an acceptance and under Alternative II, a rejection. The essential purpose of the provision, whichever alternative is chosen, is to permit the hotelkeeper to bring some pressure upon the guest to take a decision as to whether or not he will take up the accommodation. In this way, the client will, on the one hand, be spared disagreeable surprises while on the other the hotelkeeper will not be obliged to keep accommodation available for an unduly long time pending the guest's decision as to whether or not he will accept the counter-offer or new offer.

Article 5

This article is concerned essentially with the length of the hotelkeeper's contract and in effect contains a number of rules which are constantly observed in practice and which have also been incorporated into the only comprehensive national legislation governing the hotelkeeper's contract, namely the Ethiopian Civil Code (Articles 2654 and 2655).

- (1) It should be noted that the purpose of paragraph 4 is in no way that of permitting the hotelkeeper, with a view to avoiding misunderstandings, to inform the client of the possible consequences of his failure to reply. It is rather a formal obligation grounded on the desire to protect the guest: as the latter is not normally a member of the profession, he must be duly warned of the possible legal significance - acceptance or rejection, according to the alternative chosen - of his silence. The Secretariat has drafted the formula in such a way as to satisfy the requirement of "notice", which is to be given in analogous situations, and which is to be found in a certain number of legal systems.

Paragraph 1 recognises that although many hotelkeepers' contracts are concluded for a specific period, it is common for a guest to indicate, at the time of the conclusion of the contract, only the approximate date of his departure, which might be anticipated or delayed. In these circumstances, the Working Committee took the view that a contract for an indeterminate period should be considered as having been concluded for one day only, subject to tacit renewal by the parties when neither of them has expressed before midday, which in many countries is the hour chosen, or possibly any such other time provided for in the contract, his intention not to extend the contract. These rules are contained in paragraph 2 of the article.

Finally, paragraph 3 provides that the hotelkeeper may require the guest to vacate the accommodation occupied by him on termination of the hotelkeeper's contract. The aim of this provision is to avoid the difficulties which could arise for the hotel profession, especially in connection with group bookings, if guests were permitted to insist on occupying accommodation after the expiry of the contract on the basis of a new contract to the detriment of the other guests or groups who had reserved that accommodation for a specific day. This is a problem which exists in practice and gives rise to the phenomenon of overbooking.

Article 6

This is the first of a number of articles concerning the circumstances in which the parties may cancel the contract before or during the performance of their obligations thereunder. The particular situation envisaged in this article is the case of force majeure, which is to be interpreted in a strict sense. It should be recalled that while this term has a well defined sense in most civil law systems, considerable difficulties have been experienced by those drafting international treaties when called upon to render it in the English language. For this reason, the Secretariat has suggested an alternative in the English text of Article 6,

namely the simple retention of the term in French or the use of the phrase "an unforeseeable and irremediable act of nature or of war" which is only one of the many translations which have been made of the term but which has the advantage of having been employed in the 1962 Council of Europe Convention on the Liability of Hotelkeepers concerning the Property of their Guests.

As regards the effects of the cancellation of the contract for reasons of force majeure, the Working Committee was unanimously of the opinion that the universally observed rule should apply that non-performance on that ground does not entail the payment of compensation to the other party.

Article 7

The purpose of this article is to permit either the guest or the hotelkeeper to cancel the contract before or during performance when circumstances arise which would have prevented a reasonable person from entering into the contract had he had knowledge of these circumstances beforehand. It should be noted that the essential difference between the two alternatives for paragraph 1 is that Alternative I, based on a proposal made during the first meeting of the Working Committee, is somewhat narrower in scope than Alternative II, based on Article 10, paragraph 1 of the CCV, in that it limits the right to cancel the contract to cases where the circumstances arising "affect the performance by the other party of his obligations". Thus a decision by a guest to cancel in advance or to cut short a stay in a hotel in a city where there had been a major outbreak of a dangerous and contagious disease would not seem to be covered by the work of Alternative I but would be covered by Alternative II.

As examples of circumstances which might justify cancellation under both alternatives, one might cite the case of the hotelkeeper who is the proprietor of a luxury or exclusive establishment and who, although he has concluded a contract by correspondence or by telephone, refuses to

provide the accommodation agreed upon with the guest on account of the latter's demeanour, or of a guest who likewise having concluded a contract by correspondence or telephone, arrives in a hotel and finds it infested with insects or so noisy as to make it impossible for guests to enjoy tranquillity.

Unlike the case of force majeure, dealt with in Article 6, the Committee was of the opinion that there might be situations in which the party cancelling the contract should be entitled to compensation. Paragraph 2 of Article 7 (identical in the alternative texts) therefore makes provision for the payment of such compensation when the other party has been at fault as, for example, in the performance of his obligations under the contract or where he has deliberately misled the person cancelling the contract as to some material fact relating to the performance of those obligations with the consequence that the other person has suffered damage or loss thereby.

Article 8

Unlike Articles 6 and 7, which are concerned with the right of both the guest and the hotelkeeper to cancel the contract for certain reasons before or during performance, this article deals only with cancellation by the guest before the performance of his obligations under the contract. This general principle, as set forth in paragraph 1, is accompanied by the obligation for the guest to compensate the hotelkeeper for any prejudice caused to him by the cancellation. The fact that the benefit of this provision is limited to the guest is explicable on the grounds that the hotelkeeper, except for the situations provided for in Articles 6 and 7, is never authorised to cancel the hotelkeeper's contract once he has concluded it. Established practice, on the other hand, accords the right of cancellation to the guest, without his being required to pay compensation, provided he has given sufficient notice to the hotelkeeper: this rule, set forth in paragraph 2, constitutes an exception to the general principle

affirmed in the preceding paragraph.

In making suggestions (between brackets) for the amount of compensation payable and the time limits within which the guest should notify the hotelkeeper of the cancellation, the Secretariat has taken into account the Hotel Convention between the International Hotel Association (IHA) and the Universal Federation of Travel Agents Associations (UFTAA) relative to contracts between Hoteliers and Travel Agents (C. No. 70), and has drawn a distinction between contracts for a determined period, where compensation equivalent to ten percent of the price of the accommodation is suggested as a basis for discussion, and the price of one night's accommodation in the case of a contract for an indeterminate period which, under Article 5, paragraph 2 of these draft articles, is deemed to be concluded on a daily basis subject to renewal. In this context, it should be stressed that the hotelkeeper will be entitled to compensation only if he suffers a real loss. In consequence there will be no such entitlement if he relets a room which has not been taken by the guest.

Finally, in connection with Article 8, it should be pointed out that the words appearing in square brackets at the end of paragraph 1 "unless the parties have otherwise agreed by contract", have been inserted to safeguard the possibility for the parties to determine themselves the amount of compensation payable in the event of "no show" by the guest, in accordance with certain existing practices. Similarly, it preserves the right of the hotelkeeper to retain a deposit paid by the guest, although the Working Committee was opposed to the inclusion in the future instrument of a provision which could be interpreted as meaning that the payment of a deposit by the guest should be compulsory, all questions concerning deposits thus being left to the national law and/or agreement between the parties.

Article 9

Broadly speaking, Article 9 corresponds to Article 8 in conception and content, dealing as it does with the cancellation of the hotelkeeper's contract by the guest during, rather than before, performance of his obligations thereunder in circumstances other than those provided for in Articles 6 and 7.

When discussing the compensation which might be payable by the guest to the hotelkeeper for any loss occasioned by such cancellation, the Working Committee recognised that, whereas in the situation contemplated by Article 8 the circumstances might admit of some sort of sliding scale to determine in advance whether, and if so, how much, compensation should be paid to the hotelkeeper, here the same solution was not possible as the guest could already be at the hotel. It therefore decided that reference should be made, if necessary, to the time at which the guest informs the hotelkeeper of his intention to cancel the contract in order to determine whether any compensation should be payable.

Article 10

Article 10 lists the persons for whom the hotelkeeper is liable. This provision is similar to one inserted in most of the texts prepared by UNIDROIT and is modelled upon Article 4 of the CVR.

Article 11

This provision lays down the obligations of the hotelkeeper other than those relating to the security of the guest and of his property. When considering this question at its first session, the Working Committee felt that it would not be advisable to enter into detail with regard to the obligations mentioned in Article 11 which are intended to cover, inter alia, the tranquil enjoyment by the guest of the services provided by the hotelkeeper and his right to privacy, as well as the performance of the services

provided for in the contract concluded between the hotelkeeper and the guest.

Articles 12, 13 and 14

Articles 12 to 14 deal with the liability of the hotelkeeper for death of, or personal injury to, a guest.

Article 12

Article 12 concerns one of the most difficult aspects of the hotelkeeper's contract, namely the liability of the hotelkeeper for "loss or damage resulting from the death of, or personal injury or any other bodily or mental harm to, a guest caused by an accident occurring at the hotel".

While the wording of the French text of this provision follows that used in the CWR, the Add. Conv. CIV and the draft CWR, the English text is based on that used in the last two where the term "personal injury" has been preferred to "wounding" which has certain criminal law connotations.

As regards the nature of the liability of the hotelkeeper, the Working Committee considered three possibilities. 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 upon him. It was felt that the first solution would be too unfavourable to the guest as it might in practice be extremely difficult to prove the hotelkeeper's fault, while the second solution could cause undue hardship to the hotelkeeper. The third solution was therefore adopted according to which the hotelkeeper would be liable once the guest had established the causal link between the services rendered, or not rendered, by the hotelkeeper and the injury suffered by him, unless the hotelkeeper 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 chosen is, in other words, that of presumed fault with the burden of proof reversed, which is to be found in, for example, Article

2, paragraphs 1 and 2 of the Add. Con. CIV, Article 11, paragraphs 1 and 2 of the CVR, and Article 8, paragraphs 1 and 2 of the draft CVM.

In connection with the spatial and temporal requirements if the hotelkeeper is to be liable under the terms of the Convention, it should first be pointed out that the accident must occur "at the hotel", that is to say on premises under the supervision of the hotelkeeper. Were then an accident causing injury to a guest to occur during the transport of the guest in a hotel bus from the hotel to an airport or to a beach, then any liability of the hotelkeeper would fall to be determined by reference to the appropriate rules governing the contract of carriage of passengers by road.

With regard to the temporal factor, that is to say that the liability of the hotelkeeper may arise under the Convention only during the period when, in accordance with paragraph 1 (a) and (b), the guest has accommodation at his disposal or during a reasonable time preceding or following the time when the guest has accommodation at his disposal, these provisions are based on the rules contained in Article 15, paragraph 2 (a) and (c) of the draft articles concerning the liability of the hotelkeeper for property brought to the hotel, which are themselves inspired by the corresponding provisions of the Annex to the C.E. Conventions.

While paragraph 1 (a) is self-explanatory, paragraph 1 (b) is intended to cover cases such as, for example, where the guest is injured on arriving at the hotel but before the accommodation has been assigned to him or where, after the expiry of the contract, he is injured when returning to collect luggage.

It should finally be added that if the phrase in square brackets at the end of paragraph 1 of Article 1 of the draft articles is retained, then also persons entering the hotel with a view to requesting accommodation but who do not ultimately obtain it, would be protected by the provisions of Articles 12 and 13.

The Secretariat has prepared two alternative versions for paragraph 2 of Article 12 which, it may be added, is the first of a number of provisions whereby the hotelkeeper may avoid the liability which would normally be incumbent upon him under paragraph 1. The first alternative is based on, inter alia, Article 11, paragraph 2 of the CVR, and represents a sort of "relative" concept of force majeure. Alternative II, however, states the principle in a stricter form and has been suggested by the Secretariat so as to retain a parallel with Article 17, paragraph (b), concerning force majeure as a defence for damage to property, for it might seem shocking to some that a stricter rule of liability should apply to hotelkeepers in respect of property, (Article 17 (b)), than of persons (Article 12, paragraph 2, Alternative I).

The provisions of paragraph 3 of this article constitute an exception to the general rule laid down in Article 12, paragraphs 1 and 2, in the sense that the liability imposed upon the hotelkeeper for injury suffered as a result of food or drink consumed by the guest at the hotel is a "strict" liability. In consequence it is not sufficient for the hotelkeeper to show that although he used the diligence which the particular facts of the case called for, the accident could not have been avoided or its consequences prevented.

The precise drafting of paragraph 3 is however to a certain extent dependant on that of paragraph 2, hence the phrases in square brackets in paragraph 3. If Alternative I of paragraph 2 is retained with the concept of a mitigated "force majeure", then it would be necessary to delete the square brackets around the last phrase. If, however, the second alternative in paragraph 2 is preferred, with the result that the stricter form of force majeure is applicable, then the phrases in square brackets would become redundant and should be deleted.

In proposing the system of strict liability, the Working Committee noted that the law of a number of States seemed to require a higher standard of care in connection with the provision of food and drink

with respect to the other possible causes of physical injury, and that under Article 2650, paragraph 2 of the Ethiopian Civil Code, it is specifically stated that the hotelkeeper, "where he provides the client with food and drink, (...) shall also warrant that they are sound and harmless".

Nevertheless, the Committee considered that the hotelkeeper should, in certain situations, be able to avoid liability under paragraph 3 of this article as he would in other cases where the guest had suffered injury on the premises of the hotel. These grounds are set out in Article 13.

Article 13

The provisions of this article correspond exactly to those contained in paragraphs 1 and 2 of Article 17 of the CVR and are in line with Article 2, paragraphs 3 and 4 of the Add. Con. CIV.

In connection with the use of the terms "wrongful act or neglect" it was pointed out in the explanatory report on the CVR (doc. ECE/TRANS/5, para. 90) that "it would perhaps have sufficed to speak of abnormal conduct without mentioning "wrongful act or neglect" as well, because the first concept encompasses the second, and it is possible to question the propriety of speaking of "wrongful act or neglect" when the person concerned is the very person the loss or damage caused to whom has brought up the problem of liability, because no one can have a legal obligation towards himself. But it was thought that there would be no impropriety in using a mode of expression which, while at first sight open to criticism according to strict principles, conformed to the usage and was more directly intelligible". In the light of these explanations and considering the fact that Article 17 of the CVR represents the most recent expression of the will of States on this question, it has been considered opportune by the Secretariat to follow the model of that Convention.

As regards the meaning of the term "normal conduct of a guest", the Working Committee envisaged such situations as a guest descending a flight of unlit stairs rather than using a lift which had been provided,

or entering parts of the hotel to which guests would not normally have recourse, such as the kitchen. The assessment of the normality or otherwise of the guest's conduct must however depend upon the facts of the particular case and the Working Committee considered it wise to avoid the listing of criteria which could in no way claim to be exhaustive.

The aim of Paragraph 2 is to avoid the necessity of the guest having to bring actions against persons whom it may be difficult, or even impossible, to identify. Thus, for example, if a guest falls ill as a result of being provided by the hotelkeeper with contaminated food or drink, it would be unreasonable to expect him, especially if he were a foreigner, to enter into long and complicated legal proceedings against the effective supplier of that food or drink. The hotelkeeper will therefore, under the terms of Article 12 paragraph 3 discussed above, be liable in full to the guest although paragraph 2 of Article 13 takes it clear that this liability in no way prejudices any right of recourse which the hotelkeeper might have against a third party, in the case in point, his supplier of food or drink.

Article 14

This provision is modelled on Article 12 of the CWR for in this context, as in that of the CWR, it does not seem possible, in view of the marked differences between national systems of law, to reach agreement on unification in connection with the nature and extent of the loss or damage in the event of the death of, or injury to, the guest, and the determination of the persons entitled.

It should also be noted that the article reserves the possible application of the rules relating to the conflict of laws of the State of the forum, which might prove to be a valuable safeguard to litigants suing abroad when the law of the forum would not, for example, recognise in purely internal cases a head of damage, such as non-material damage, which was recognised by the national law of the victim. The award of damages in such

cases might therefore be permitted by virtue of the inclusion of the reference to the conflict of law rules of the State of the forum.

Articles 15 to 19

Articles 15 to 19 deal with the liability of the hotelkeeper for damage to, or destruction or loss of, property brought to the hotel by guests and are largely modelled on the provisions contained in the Annex to the Council of Europe Convention on the Liability of Hotel-Keepers concerning the Property of their Guests which was opened to signature in Paris on 17 December 1962 and entered into force on 15 February 1967. As recalled above, this international instrument was itself inspired by the UNIDROIT draft uniform law respecting the liability of innkeepers for goods brought to inns by guests, which was approved by the Governing Council of UNIDROIT on 5 October 1934 and is reproduced in the League of Nations document S.d.N. - U.D.P. 1934 - Et. XII, Doc. 6 as well as in the first volume of UNIFICATION OF LAW, Rome, 1948, (pp. 168 to 171). By way of general comment, it should be recalled that the Working Committee at its 1st session unanimously agreed that everything should be done to ensure that participation in the future international instrument should not be incompatible with participation in the Council of Europe Convention.

Article 15

The Working Committee was unanimously of the view that the system of limiting the liability of the hotelkeeper, except in certain cases to be discussed later, and which had been adopted in both the UNIDROIT draft and the Council of Europe Convention, should be retained for the future instrument. The Committee moreover noted that the placing of a limit upon the compensation payable by a hotelkeeper for any damage to, or destruction or loss of, property brought to the hotel by the guest is a feature of a large majority of legislations throughout the world, based as it is upon the need which has become felt to alleviate the extremely severe liability placed on hotelkeepers from Roman law until the present day.

Paragraph 1 of the article lays down the liability of the hotelkeeper in respect of property brought to the hotel by any guest who stays there and has accommodation put at his disposal. It should be noted that once the guest has proved that his property was brought to the hotel, it is for the hotelkeeper to establish on the grounds exonerating him from the liability.

A person merely visiting a guest or entering the premises for business reasons or for the purpose of attending a conference cannot avail himself of the special protection afforded to guests with the consequence that the ordinary law will apply, which will as a rule afford him less protection than the Convention.

The only doubt which may arise as to the persons who may invoke the provisions of Articles 15 to 19 concerns those who enter the hotel with a view to requesting accommodation, a point which may be settled in the context of the decision to be taken regarding Article 1 of the present draft articles.

While paragraph 1 of this article follows the wording of the corresponding paragraph of Article 1 of the Annex to the C.E. Convention paragraph 2, concerning the property in respect of which the hotelkeeper may be liable, differs from the C.E. Convention in that a number of phrases have been placed in square brackets. The reason for this is that while the Working Committee agreed to the formulation of sub-paragraph (a) and to the extension of the rule contained therein to a reasonable period preceding or following the time when the guest has the accommodation at his disposal, there was some opposition to the hotelkeeper's liability extending to property of which the hotelkeeper has taken charge outside the hotel. The problem in particular relates to the solution adopted by German law and Swiss judicial decisions, whereby the liability under the hotelkeeper's contract commences as soon as the property comes into the hands of the hotel staff or of persons variously to be deemed, according to circumstances, to have been entrusted by the hotelkeeper with the reception of guests.

property at, for example, the airport or railway station.

In the context of the C.E. Convention, the difficulty was overcome by including the more extensive rule in Article 1, paragraph 2 (b) and (c) of the Annex, while providing in Article 2 (c) of the Convention itself that each Contracting party retains the option "to adopt the rule laid down in paragraph 2 of Article 1 of the Annex only in respect of property which is at the hotel".

A similar solution could, of course, be adopted in connection with the future instrument if agreement cannot be reached on the question. For the present, the Secretariat has merely attempted to pose the problem by placing the whole of paragraph 2 (b) and the words "whether" and "or outside it" in paragraph (c) in square brackets and by including in Article 28 (b) a provision similar to that contained in Article 2 (c) of the C.E. Convention mentioned above.

Paragraph 3 of Article 15 provides that the hotelkeeper's liability shall be limited to the equivalent of a multiplication of the daily charge for the room, which has provisionally, (hence the brackets), been fixed at 50 times that charge.

The Working Committee considered the question of the limit of compensation in great detail and recalled in particular that the C.E. Convention had left to Contracting States the option of limiting liability to the equivalent of 3,000 gold francs, one unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred, (Article 1 of the Annex, paragraphs 3 and 4) or the equivalent of at least one hundred times the daily charge for the room (Article 2 (a) of the Convention). While recognising the advantage of a fixed sum and the fact that there might in some cases be complicated calculations necessary to work out the price of the room (as when an inclusive price for full pension is charged), the Working Committee nevertheless considered that a sum related to the cost of the room was preferable. In particular it was felt that,

at the time of the elaboration of the C.E. Convention - 1952 - it was impossible to foresee the inflation, increase in the value of gold and the wild fluctuations which have recently been witnessed. Still further confusion was caused by the differences in the value of gold on the official and on the free markets. Moreover, the arbitrary consequences had been made visible to all in connection with the transport conventions where the limitation sum was expressed in terms of units of gold.

There was, however, some feeling in the Committee that the amount of one hundred times the cost of the room might be excessive, and that of fifty times the cost has been proposed as a basis for further discussion.

Before leaving this article, reference should also be made to the provision contained in Article 28 (c) of the draft articles which permits Contracting States to limit the hotelkeeper's liability in respect of any one article to "a minimum of 25 times the daily charge for the room".

This question was not the subject of lengthy discussion by the Working Committee but has been inserted by the Secretariat for consideration. The provision is based on Article 2 (b) of the C.E. Convention which contains a similar optional limitation, the limit for compensation in respect of one article being half that of the total limit envisaged in Article 1, paragraph 3 of the Annex, that is to say 1,500 gold francs or a minimum of 50 times the daily charge for the room, which explains the provisional sum of 25 times the charge for the room contained in Article 28 (c) of the present draft articles.

Article 16

This provision, which is identical to that contained in Article 2 of the Annex to the C.E. Convention, lays down two exceptions to the principle of limited liability as set out in Article 15 of the preliminary draft and which are to be found in all current systems of law.

The first case of the unlimited liability of the hotelkeeper, described in paragraph 1 (a), concerns property which has been deposited with him or a person for whom he is responsible under Article 10. This is a case of voluntary deposit and it is natural that the hotelkeeper should be liable in full, in accordance with the generally accepted rules governing such contracts. The provision applies to all articles entrusted to the hotelkeeper notwithstanding the fact that he was, under paragraph 2 of this article, entitled to refuse to accept them.

The exception to the principle of limited liability contained in sub-paragraph (b) of Article 16 is a necessary complement to that rule for were the hotelkeeper at liberty to refuse to accept the deposit of property, the guest would have no security against the loss of, or damage to, property the value of which exceeds the maximum limit of compensation.

On the other hand, while paragraph 2 of the article obliges the hotelkeeper to receive securities, money and valuable articles, it would be unjust to compel him to accept certain kinds of property and the same paragraph also provides that he may refuse dangerous articles or property which, regard being had to the size or standing of the hotel, is of excessive value or cumbersome.

Finally, paragraph 3 reflects a precaution often taken in practice by hotelkeepers who require that articles of particular value shall be deposited with them in a sealed or fastened container.

Article 17

This article deals with the situations where the hotelkeeper is exempted from all liability. Paragraph (a), concerning the case where the damage or loss is due to the guest, a person accompanying him or in his employment or any person visiting him, and paragraph (b) where it is caused by force majeure, merely reproduce rules which are common to all systems of law.

Paragraph (c), on the other hand, is to be found in the Annex to the C.E. Convention (Article 3, paragraph (c)) although there is no corresponding provision in the UNIDROIT draft and a specific provision in this sense is lacking in the law of many States. However, such a provision which has its counterpart in many transport law Conventions, is a useful one for the hotelkeeper can scarcely be held liable for the loss or deterioration of, for example, highly inflammable or perishable goods which the guest has introduced into the hotel. Finally, it should be added that the hotelkeeper may be able to avoid liability under the provisions of Article 17 even in respect of property which has been deposited with him under Article 16 since the latter article must be interpreted as meaning that the hotelkeeper's liability shall be unlimited only when such liability actually exists.

Article 18

This provision corresponds to Article 4 of the Annex to the C.E. Convention and to Article 2 (a) of the UNIDROIT draft which are themselves based on a principle to be found in all legal systems, for where the guest can establish that the damage, destruction or loss is caused by a wilful act or omission or negligence of the hotelkeeper, it is evident that the latter cannot invoke any limitation of his liability since that limitation applies only in cases which may be classified as cases of professional risk. It goes without saying that such act or omission or negligence of the hotelkeeper or the persons for whom he is responsible under Article 10 must be proved by the guest. If the guest fails to adduce such proof then the principle of limited liability set out in Article 15 will, failing the application of Articles 16 or 17, be applicable.

The Secretariat has however noted that whereas the French text of Article 4 of the Annex to the C.E. Convention has followed Article 2 (a) of the UNIDROIT draft, in retaining the term "faute", the English term

"fault" employed in the UNIDROIT draft has been replaced in the later text by the words "wilful act, omission or negligence". The Working Committee may perhaps wish to consider at its second meeting whether there is now sufficient concordance in meaning of the English and French texts of Article 18 due to the change in the English terminology introduced into the 1962 Convention.

Finally, it should be pointed out that the Working Committee did not favour the introduction into the draft articles of a provision similar to that contained in Article 2 (d) of the C.E. Convention which permits States to adopt a rule whereby the hotelkeeper may, in cases where property has been deposited with him or where there has been fault on his part, reduce his liability by an agreement with the guest signed by him and containing no other terms, to an amount which is not less than the limitation figure provided for in the relevant legislation enacted in pursuance of the Convention on condition however that the case is one where neither intent nor fault tantamount to intent of the hotelkeeper is involved.

Article 19

This article is modelled upon Article 5 of the Annex to the C.E. Convention which is itself inspired by Article 4 of the UNIDROIT draft and upon the provisions to be found in many national legal systems. Its effect is that the guest will not be entitled to invoke the special liability of the hotelkeeper if, after discovering the damage to, or destruction or loss of, his property, he fails to inform the hotelkeeper without undue delay. The rationale of this rule is to be found in the report on the UNIDROIT draft where it is stated that "This rule, which is intended to secure good faith, was adopted for the reason that, unless the Innkeeper is notified without due delay of the damage, he is not in a position to control its consequences and also because a guest has no valid reason for not notifying the loss of or injury to his goods, once he has knowledge of it" (doc. L.O.N 1935 - U.D.P. - Draft II, p. 19).

The reference to Article 19 is to introduce an exception to the general rule contained in this Article 19 for it would be unacceptable that the hotelkeeper should be able to invoke the rule against the guest in cases where he has been guilty of a wilful act or omission or negligence. He will, therefore, be liable in full in such cases, subject of course to his fault being proved by the guest.

Article 20

Article 20 sets forth in paragraph 1 the right of the hotelkeeper to detain property brought to the hotel by a guest in the event of non-payment by the latter for accommodation and for other ancillary services actually provided before the detention, a definite decision still having to be taken by the Committee as to whether the ancillary services in respect of which the right may be exercised must have been provided for in the contract; hence the phrase in square brackets in paragraph 1.

Historically, the right under consideration may be regarded as a counterbalance to two particular features of the status of the hotelkeeper, namely his duty to accept all comers and his special liability with regard to the safekeeping of the property of his guests. These justifications are, however, as real today, for even though in many States the almost absolute liability of the hotelkeeper has been attenuated to a certain extent, a heavy burden nevertheless remains upon him, while he is in addition still at risk as regards the solvency of his guests as it is in many cases only at the end of the guest's stay that payment will be requested.

In considering this widely diffused right of the hotelkeeper, the Working Committee recognised that the legal mechanism often varies from one system of law to another. Thus while the majority of the common law States had followed the English notion of the hotelkeeper's lien over the guest's property brought to the hotel, some of the civil law States had founded the rights of the hotelkeeper on the basis of a legal pledge,

while others granted him a right of detention and yet others made provision for giving him a preferred claim without making any reference to the right of detention. The Committee felt, therefore, that the simplest solution would be to adopt a general formulation of the right of detention which would not enter into detail and thereby avoid embarrassing any legal systems whose law contained special provisions, especially those of a procedural character.

The Working Committee considered however that the right of detention should not apply to services which, although contemplated under the contract, had not been provided, as when the guest left the hotel before the end of the contractual period. Similarly the hotelkeeper cannot exercise the right in connection with amounts due by the guest for damages, for example, hotel property damaged by the guest.

Paragraph 2, like paragraph 1, contains a general principle to be found in most national legal systems, namely that the hotelkeeper may, after giving reasonable notice to the guest, cause to be sold as much of the property over which he has exercised his right of detention as is necessary for him to satisfy his claim against the guest. Here again, the Committee considered that there were quite considerable divergencies in the law of States regarding the detailed procedure to be followed and that it was in the interests of unification to lay down a rule capable of gaining general support while leaving intact the peculiarities of national law, rather than to attempt to find a common denominator which might render the article more difficult to accept.

Paragraph 3, which is suggested by the Secretariat, seeks to regulate a point which was not discussed by the Working Committee at its first session; hence the brackets. The situation envisaged is that the guest, while contesting the claim made by the hotelkeeper, is prepared to provide a good and valid guarantor of the sum claimed or to deposit an equivalent sum in the hands of a third party. In these circumstances it

would seem legitimate that the hotelkeeper should not be permitted to exercise his right of detention. The wording of Article 21, paragraph 3 is based on that contained in Article 9 of the draft Convention on the Contract of Agency for Forwarding Agents relating to International Carriage of Goods (UNIFICATION OF LAW, YEARBOOK, 1966, page 421): see also Article 10 of the CVR on the notion of adequate security.

Article 21

In so far as this provision relates to Articles 15 to 20 of the preliminary draft its source is to be found in the corresponding provisions of the UNIEROIT draft (Article 7) and the Annex to the C.E. Convention (Article 7). However, there are wide variations to be found in national legal systems on the question of treating vehicles, property left therewith and live animals differently from other property.

The Working Committee at its first session provisionally favoured the exclusion of vehicles from the scope of application of Articles 15 to 20 of the future international instrument, although there was some hesitation concerning property left in a locked car under the supervision of the hotelkeeper. The exclusion was, however, felt to be justified, in particular on the grounds that confusion might arise between the hotelkeeper's contract and the garage contract and that it would not seem desirable that hotel garages should be governed by rules different from those governing other garages. In addition, there might be problems in conceiving the application of the special liability attaching to hotelkeepers to vehicles, even when stored in a hotel garage, in view particularly of the difficulty for hotelkeepers to prove that damage suffered by such vehicles had not been caused by their servants.

Although the working Committee did not discuss the question of live animals in any detail, the Secretariat has included them in Article 21 alongside vehicles and property left with a vehicle in a desire to

maintain a parallelism with Article 7 of the Annex to the C.E. Convention.

It has also concluded a special provision in Article 28(d) corresponding to Article 2(e) of the C.E. Convention, whereby Contracting Parties may opt to apply the rules laid down in Articles 15 to 20 to vehicles, property left with them and live animals.

The effect of the application of Article 21 to Article 20 is that the hotelkeeper's right to detain the property brought to the hotel by his guests shall not extend to vehicles, property left with them or live animals. It goes without saying that the use of the above reservation contained in Article 28 (d) would bring about exactly the opposite result.

As regards motor vehicles in particular, the risk of confusing the hotelkeeper's contract and the garage contract, already alluded to, was considered by the Committee to be pertinent as was the difficulty of determining whether the hotelkeeper had in fact agreed to take custody of the vehicle, while the Working Committee also noted that the value of a motor vehicle would as a rule be considerably higher than a hotel bill and that it would seem exaggerated to permit the hotelkeeper to detain the vehicle for payment of a small sum.

A further difficulty would arise if vehicles were to be subject to the hotelkeeper's right of retention; this is part of a larger problem, namely that of property brought to the hotel by a guest which does not belong to him, for vehicles might very often be subject to a hire-purchase agreement and therefore the person in possession might not be the owner. With regard to this general problem, the Working Committee was of the opinion that any decision as to whether such property could be subject to the hotelkeeper's right of detention would depend upon whether the right was or was not a right "in rem", which ought to be settled by the national law applicable to the given case. As agreement was thus reached to leave this general problem outside the scope of the future Convention, subject to the

possibility of a reservation under Article 23 (a), the Committee considered that this was an additional reason militating in favour of the exclusion of vehicles from the scope of these provisions and a provisional decision was consequently taken in that sense.

Article 22

This provision deals with extra-contractual claims and its presence is justified by the fact that the law of a certain number of States permits the bringing of both an extra-contractual action and one founded on the contract itself. Similar provisions are to be found in many uniform law conventions (see Article 24, paragraph 1 of the Warsaw Convention, Article 12 of the Add. Con. CIV, Article 28 of the CMR, Article 25 of the CCV) where they have been introduced so as to avoid the victim defeating the intention of the Convention by obtaining through an extra-contractual action that which the Convention does not give him or gives him only in part on the basis of the contract.

Article 23

This article, which logically follows the preceding provision, concerns the extra-contractual liability of persons for whom the hotelkeeper is responsible and with regard to whom the position is still more delicate since they have not, as a rule, concluded any contract with the guest who is a victim of their tortious conduct. The *raison d'être* of the provision is above all a social one for the desire has been, in the many conventions where it has been introduced in one form or another, to avoid the situation arising where the victim could obtain unlimited compensation from an impetunious servant, which he could not have obtained in the framework of the limited liability of the employer with whom he had originally concluded the contract. Reference may thus be made to Article 25 A of the Warsaw Convention, amended at the Hague, Article 28 of the CMR, Article 26 of the CCV and Article 12 of the Add. Con. CIV.

Article 24

This article, which specifies the obligation of the guest, is the counterpart to Article 11, which deals with the general obligations of the hotelkeeper.

The Working Committee considered that reference should be made to the principal obligation of the guest, which is to pay the price for the accommodation and the ancillary services, whether provision is made for them in the contract or whether they are provided at the request of the guest. This obligation is spelt out in paragraph 1 of the article which is inspired by the wording used in Article 11 to refer to the performance of the hotelkeeper's obligations.

Similarly, paragraph 2 requires that the behavior of the guest should conform to the normal conduct of a guest, regard being had to the category of the hotel. In addition, however, it seemed advisable to refer to the observance by the guest of the internal regulations of the hotel which are normally brought to his notice, even if only after the conclusion of the contract as when, for example, he finds them posted up in his room. On the other hand, it may be doubted whether specific rules of the house which are not brought to the attention of the guest and which impose upon him a standard of conduct going beyond that referred to in the second limb of paragraph 2, should be considered binding upon him and whether non-observance of them should, where appropriate, justify cancellation of the contract by the hotelkeeper during its performance. In order to bring this specific point to the attention of the Working Committee, the Secretariat has placed the words "as brought to his notice" in square brackets.

Article 25

This provision is concerned with the fora in which an action arising out of a hotelkeeper's contract may be brought.

Paragraph 1 considers three possible fora, other than in which no court or tribunal may be seized. The first of these fora is that of the State on the territory of which the hotel where the accommodation and services provided is situated. The second is that of the State on whose territory the guest has his principal place of business or habitual residence; this forum is available only to the hotelkeeper/plant who may have recourse to it when he considers that it would be easier for him to obtain execution of the judgment in his favour. Finally, as in the case with a number of other uniform law Conventions, the preliminary draft offers a third forum, namely courts or tribunals chosen by common agreement of the parties; it is however provided that this "forum prorogatum" will only be acceptable when the parties stipulate that the court or tribunal shall be that of a Contracting State, thereby avoiding the application of the Convention being defeated by the choice of courts in non-Contracting States. So as to avoid any misunderstanding it should further be added that the third forum cannot be invoked at the expense of the two others: in other words, an agreement between the parties on the choice of forum cannot be pleaded by a defendant against a decision of the plaintiff to have recourse to the fora mentioned under (a) or (b), which are provided by the Convention so as to ensure greater protection for the economically weaker party.

The remaining paragraphs of Article 25 follow Article 21 of the CWR and Article 31 of the CME as well as Article 19 of the draft CWR. Paragraph 2 is concerned with exceptions pendente lite and res judicata and permits them only when the action is the same one. As is explained in the report on the preparatory work on the CWR (doc. ECE/TRANS/5, para. 103) it may happen that the injured party will, in respect of the same accident, institute different proceedings against the same defendant, seeking compensation for loss or damage of different kinds (medical, hospital expenses, pretium doloris; etc.) and the proceedings might be brought before different courts or tribunals. In some situations, the institution

of proceedings relating to separate claims before different courts or tribunals might be more advantageous to the claimant and at the same time acceptable to the defendant.

Paragraph 3 provides for the enforcement in other Contracting States of any executory judgment entered by the court or tribunal of a Contracting State which is competent by virtue of paragraph 1 and also declares that the merits of the case shall not be re-opened. The judgments to which paragraph 3 does or does not apply are listed in paragraph 4.

Finally, paragraph 5 reproduces a provision increasingly to be found in the transport law conventions to the effect that security for costs of proceedings (*cautio judicatum solvi*) shall not be required from nationals of Contracting States or persons who have their residence or a place of business in one of those States.

Article 26

Article 26 governs the period of limitation for legal proceedings arising out of the hotelkeeper's contract and applies to extra-contractual actions as well as contractual actions. It is essentially based on Article 22 of the CWR but with some modifications.

While the Working Committee was agreed that a period of one year was adequate for actions other than those arising out of the death of, or personal injury or any other bodily or mental harm to, a guest, it felt that this category of actions deserved a longer period of limitation and provisionally three years has been retained in paragraph 1 as the appropriate limit, whereas a one-year period is set in paragraph 2 for all other actions.

By virtue of paragraph 3, the period of limitation shall run from the time the guest leaves the hotel, or if he does not take up the accommodation as agreed under the contract, from the time he should have left the hotel. In adopting this solution, the Working Committee decided not to incorporate in the preliminary draft supplementary provisions simi-

lar to those contained in Article 22, paragraph 1, second sentence of the CVR permitting a longer period of limitation in the event of death or personal injury where the person who had suffered the injury (or his representation) had or should have had knowledge of the injury only at a time subsequent to the accident. The Committee felt that if the notion of "knowledge" of the victim were to be taken into consideration, an element of uncertainty might be introduced into the delicate question of prescription.

The Committee did not, however, examine in detail the question of whether, in the event of the death of the victim subsequent to the termination of the services under the hotelkeeper's contract, the period of limitation might not begin to run, as under Article 30, paragraph 1 of the CCV, on the date of such death, subject to a limitation period being fixed which would begin to run as from the date contemplated for the termination of those services.

Paragraphs 4 and 5 are traditional provisions to be found in most transport law Conventions. By expressly contemplating the possibility that negotiations between the parties - which often result in a compromise agreement thereby avoiding a lawsuit - will have the effect of suspending the period of limitation, these provisions avoid a plaintiff who fears the application of a brief period of limitation always having to bring an action, and also frustrate the manoeuvres to which an unscrupulous contractor might have recourse by seeking to delay until the expiry of the limitation period. Under the terms of paragraph 4, the effect of a written claim will be to suspend the period of limitation. The basic principle is that such suspension ends and the period of limitation begins to run again as from the time when the other party rejects the claim in writing and returns the documents handed over to him in support of the claim. The other party will therefore have every interest in acting speedily so as to set in motion once more the machinery of prescription.

As to the régime to be applied to the extension of limitation periods and the fresh accrual of rights of action, regard being had to the controversies which exist in the different legal systems in connection with the limitation of rights of action, it is provided in paragraph 5 - as in many other Conventions, for example Article 22, paragraph 4 of the CVR - that extension and accrual shall be governed by the lex fori, to the exclusion of the conflict of laws rules of that law.

Article 27

This provision is largely based on Article 23 of the CVR and Article 41 of the OMR. It should however be noted that the phrase in square brackets in paragraph 1, inserted by the Secretariat to bring the point to the attention of the Working Committee, has the effect of allowing the hotelkeeper, by agreement with the guest, to increase his liability, a system similar to that adopted in the sea and air Conventions but excluded in the road Conventions with a view to protecting small haulage companies. In consequence, the hotelkeeper could increase the ceiling of his liability as provided for in Article 15, paragraph 3 of the present preliminary draft. Whatever the decision taken on the phrase added in square brackets, it goes without saying that the hotelkeeper is never permitted to reduce his liability under the Convention with respect to injury to the person or property of his guest, or in any way to limit his liability in the event of death or personal injury.

Paragraph 2 follows a number of conventions, the most recent example of which is Article 23, paragraph 3 of the CVR, in declaring null and void any clause assigning to an arbitral tribunal a jurisdiction which is stipulated before the event which caused the damage. The justification in the transport conventions - as in the present case - is that while no objection can be made to arbitration agreements between parties who are both merchants and who have the same degree of economic strength, such agreements could be extremely unjust if inserted in agreements stipulated between a member of a professional category and an individual such

as a passenger or hotel guest. It goes without saying that there can be no suspicion concerning such agreements when concluded after the event causing the damage, since in such cases the guest is fully aware of the facts and is in no need of further assistance.

Article 28

This provision which, if adopted, would be inserted in the final clauses of the future international instrument, groups together a number of matters in respect of which the discussions of the first session of the Working Committee indicated that some Contracting States might wish to make reservations.

The substance of the various paragraphs has been discussed above in connection with the articles with regard to which the reservation might be made:

- Paragraph (a) - Article 2, page 21 above.
- Paragraph (b) - Article 15, para. 2, page 37 above.
- Paragraph (c) - Article 15, para. 3, page 38 above.
- Paragraph (d) - Article 21, page 45 above.

Etude XII - Doc. 11
UNIDROIT 1974
(Original: anglais)

U n i d r o i t

INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

COMITE D'ETUDE SUR LE CONTRAT D'HÔTELLERIE

AVANT-PROJET PRELIMINAIRE DE DISPOSITIONS

SUR LE CONTRAT D'HÔTELLERIE

avec

COMMENTAIRE ARTICLE PAR ARTICLE

Rome, octobre 1974