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**UNIDROIT**

INSTITUT INTERNATIONAL POUR L'UNIFICATION  
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OF PRIVATE LAW

**AVANT - PROJET DE CONVENTION**

**sur le contrat d'hôtellerie**

Texte arrêté par le Comité d'étude  
réuni par UNIDROIT

avec

**RAPPORT EXPLICATIF**

***PRELIMINARY DRAFT CONVENTION***

***on the Hotelkeeper's Contract***

*Text drawn up by the Working Committee  
convened by UNIDROIT*

with

***EXPLANATORY REPORT***

Rome, 1976

**PRELIMINARY DRAFT CONVENTION ON THE HOTELKEEPER'S  
CONTRACT (1)**

*Article 1*

1. — For the purposes of this Convention 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 and appropriate ancillary services in an establishment under his supervision.

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

*Article 2*

This Convention 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*

A hotelkeeper's contract need not be evidenced by writing and shall not be subject to any other requirements as to form.

*Article 4*

1. — A hotelkeeper's contract is concluded as from the time when the hotelkeeper accepts the request of the guest to furnish him with accommodation for a specified day.

2. — Failure by the hotelkeeper to reply to a request shall be considered as acceptance, unless the guest has expressly requested a reply.

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(1) Text drawn up by the Working Committee on the Hotelkeeper's Contract convened by UNIDROIT.

*Article 5*

1. — A hotelkeeper's contract may be concluded for a determined or an indeterminate period. A contract concluded for a period of time defined approximately shall be considered to be concluded for a determined period. In this case, the date for the termination of the contract may be fixed within the context of the period defined, by the guest at least one day in advance, and by the hotelkeeper at least three days in advance, of such date.

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 reasonable time as may be provided by the hotelkeeper's contract or the internal regulations of the hotel, his intention not to extend the contract.

3. — The hotelkeeper may require that the guest vacate the accommodation occupied by him on the day of the termination of the hotelkeeper's contract before 2 p. m. or at any other such reasonable time as may be provided by the hotelkeeper's contract or the internal regulations of the hotel.

*Article 6*

Either the hotelkeeper or the guest may cancel the contract before or during the occupation of the accommodation by the guest and without payment of compensation to the other party when, as a consequence of *force majeure*, it is impossible for the hotelkeeper to provide, or for the guest to use, the said accommodation.

*Article 7*

1. — Either the hotelkeeper or the guest may cancel the contract before or during the occupation of the accommodation when circumstances manifest themselves of which he could not have known at the time of the conclusion of the contract, 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.

2. — In cases provided for in paragraph 1, compensation shall be payable for damage caused by any party at fault.

#### *Article 8*

1. — The hotelkeeper who, for reasons other than those provided for in Articles 6 and 7, fails to provide accommodation in accordance with the contract, shall make every effort to ensure that the guest is provided with at least equivalent accommodation in the same locality and shall bear any additional costs which might result. If the hotelkeeper fails to provide such accommodation, he shall be liable for all damage suffered by the guest.

2. — The offer made to the guest by the hotelkeeper to obtain alternative accommodation for him shall not prevent the guest from availing himself of Article 7.

#### *Article 9*

1. — When the guest, in a situation other than those referred to in Articles 6 and 7, cancels the contract before occupying the accommodation, he shall compensate the hotelkeeper for any damage suffered by the latter. However, and unless the parties have otherwise agreed by contract,

(a) in the case of a contract concluded for an indeterminate period, such period shall be considered as covering no more than one day;

(b) in the case of a contract concluded for a determined period, damages shall not exceed [       ] percent of the price of the accommodation and the ancillary services provided for in the contract.

2. — Unless the parties have otherwise agreed by contract, the compensation for loss referred to in paragraph 1 shall not be payable when the hotelkeeper has been notified of the cancellation of the contract at least [       ] days before the date on which the accommodation would have been placed at the guest's disposal.

*Article 10*

1. — When the contract has been concluded for a determined period and the guest, in a situation other than those referred to in Articles 6 and 7, cancels the contract after occupying the accommodation, he shall compensate the hotelkeeper for any damage suffered by the latter. However, and unless the parties have otherwise agreed by contract, damages shall not exceed [        ] percent of the price of the accommodation and any ancillary services provided for in the contract for the period between the actual departure of the guest and the time when the contract would have expired but for the cancellation.

2. — Unless the parties have agreed otherwise by contract, the compensation for loss referred to in paragraph 1 shall not be payable when the hotelkeeper has been notified of the cancellation of the contract at least [        ] days before the departure of the guest.

*Article 11*

In the event of the parties having agreed that a deposit shall be paid by the guest, such deposit shall be considered, unless the parties have otherwise agreed by contract, to be an advance payment towards the price of the accommodation and ancillary services to be provided under the contract.

*Article 12*

The guest shall observe the internal regulations of the hotel as duly brought to his notice.

*Article 13*

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 on the premises of the hotel :

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

(b) during a reasonable period preceding or following the time when the guest has accommodation at his disposal.

2. — The hotelkeeper shall be relieved of this liability if he establishes that 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.

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, caused by the provision of such food or drink.

#### *Article 14*

1. — The hotelkeeper shall be relieved wholly or in part of his liability under Article 13 of this Convention to the extent that loss or damage results from the wrongful act or neglect of the guest.

2. — When the hotelkeeper is liable for loss or damage under the terms of Article 13 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.

#### *Article 15*

1. — The hotelkeeper shall be liable for any damage to, or destruction or loss of, property brought to the hotel by the guest.

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.

3. — The liability referred to in the present article shall be limited to [ ] times the daily charge for the accommodation. If the accommodation is occupied by several persons, the calculation shall be made by taking account of the total price of the accommodation and by considering all the occupants as a single guest.

*Article 16*

1. — The liability of the hotelkeeper shall be unlimited :

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

2. — The 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 standing or amenities of the hotel, it is of excessive value or cumbersome.

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

*Article 17*

The 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* ;
- (c) to the nature of the article.

*Article 18*

Except in any case to which Article 16, paragraph 1 (b) applies, the guest may not invoke the hotelkeeper's liability for any damage to, or destruction or loss of, property brought to the hotel if, after discovering

such damage, destruction or loss, he does not inform the hotelkeeper without undue delay.

#### *Article 19*

1. — The hotelkeeper shall have the right to detain property brought to the hotel by a guest when the latter does not pay the price of the accommodation and of any ancillary services.

2. — The hotelkeeper may, after sending prior notice in good time to the address which the guest has indicated 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. — Any third party rights which may exist in property brought to the hotel by the guest shall remain in force, notwithstanding the exercise of the right of detention by the hotelkeeper.

4. — The hotelkeeper may not exercise the right of detention referred to in paragraph 1 of the present article, when the guest provides a sufficient guarantee for the sum claimed or deposits an equivalent sum in the hands of a third party.

#### *Article 20*

For the application of Articles 13 to 19 of the present Convention :

[(a) any person who enters a hotel with the intention of requesting accommodation shall be assimilated to a guest ;]

(b) the expression « property brought to the hotel by the guest » shall not include vehicles, any property left with a vehicle, or live animals ;

(c) 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.



*Article 21*

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

*[Article 22*

1. — In all legal proceedings arising out of a hotelkeeper's contract under this Convention 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) in any court or tribunal of a State within whose territory the defendant has his principal place of business, is habitually resident, or has the place of business through which the hotelkeeper's contract was concluded, 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 that 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.

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.

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.

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

### *Article 23*

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 hotel-keeper's contract under this Convention 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.

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.

*Article 24*

1. — Any stipulation which would directly or indirectly derogate from the provisions of this Convention 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.

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.

*Article 25*

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

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

(a) this Convention shall apply only to hotelkeepers' contracts concluded between a hotelkeeper and a person 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) it will set the amount of the limit of liability referred to in paragraph 3 of Article 15 at a higher sum than [        ] times the daily charge for the accommodation.

2. — The declarations referred to in paragraph 1 of this article may be withdrawn at any time by notification addressed to . . . . .

## EXPLANATORY REPORT

*prepared by the Secretariat of UNIDROIT*

### I

#### HISTORICAL INTRODUCTION

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

2. — In 1955 the Council of Europe requested UNIDROIT, within the framework of the cooperation which had been established between the two organisations, to send to it, *inter alia*, the draft, in the hope that it might

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- (1) S.d.N. - U.D.P. 1932 - Et. XII, Doc. 1.
  - (2) S.d.N. - U.D.P. 1933 - Et. XII, Doc. 2.
  - (3) S.d.N. - U.D.P. 1933 - Et. XII, Doc. 3.
  - (4) S.d.N. - U.D.P. 1934 - Et. XII, Doc. 4.
  - (5) S.d.N. - U.D.P. 1934 - Et. XII, Doc. 5.
  - (6) S.d.N. - U.D.P. 1934 - Et. XII, Doc. 6.

be possible to achieve unification in this field. After lengthy work by the competent bodies of the Council of Europe, the Convention on the Liability of Hotel-keepers concerning the Property of their Guests (hereinafter referred to as « the Council of Europe Convention ») (7), based on the above-mentioned UNIDROIT preliminary draft, was opened to signature in Paris on 17 December 1962. It has been ratified by Belgium, France, the Federal Republic of Germany, Ireland, Malta and the United Kingdom, and signed by Austria, Italy, Luxembourg, the Netherlands and Turkey (8).

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

4. — Ten years later, the Governing Council of UNIDROIT decided to begin work on the drawing up of uniform rules concerning travel organisers and travel intermediaries (that is to say economic operators whose activities fall under the traditional, if, from a legal standpoint, not entirely correct appellation of « travel agencies ») which led to the signature at Brussels on 23 April 1970 of the International Convention on Travel Contracts (CCV) (9). The Governing Council had entrusted a special Working Committee with the elaboration of the rules.

5. — From the outset of its work, the Working Committee set up by the Governing Council had noted that the future travel contract would necessarily cover, as a whole, a number of factors, including transportation, accommodation and other facilities inherent in the sojourn and the services relating thereto. The work of the Committee was rendered even more delicate by the fact that the field of application of the Convention would cover both international and national travel, by reason in particular of the absence in most States of national rules concerning private law relations between the travel « agent » (organiser or intermediary) and his client (10).

6. — It appeared impossible to make a draft Convention governing not only the travel contract itself, but also the many separate services covered by it. Therefore the regulation of those services was left to the international con-

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

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

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

(10) See especially the documentation concerning the arrangements and agreements in question in Pierre COUV RAT, *Les agences de voyages en droit français*, Paris, 1967.

ventions relating to them, if any, or to national law. This seemed to be a good solution for transportation services, most of which had been made the subject of international rules.

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

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

*« Recommendation no. 3*

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

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

Having taken into consideration the fact that the International Institute for the Unification of Private Law (UNIDROIT) had already elaborated a draft uniform law on hotelkeeper's liability, with respect to personal belongings brought by travellers, draft that was used as a basis for the European Convention in this field, and that the general elaboration of uniform provisions on the hotelkeeper's contract appears in the UNIDROIT work programme,

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

9. — In conformity with the wish expressed by the Brussels Diplomatic Conference, the Governing Council and the General Assembly of UNIDROIT gave special priority to the question of the elaboration of general uniform rules on the hotelkeeper's contract and a decision was taken to set up a Working Committee to this end.

10. — This Committee, presided over by Mr. Roland LOEWE (Austria), member of the Governing Council of UNIDROIT, held two sessions at the

headquarters of the Institute in Rome. At the first, held from 4 to 8 March 1974, the Committee examined a comparative law study on the hotelkeeper's contract, prepared by the Secretariat of UNIDROIT (11). On the basis of the directives given by the Committee, contained in Appendix I to the Report of the session (12), the Secretariat drew up a set of draft articles on the hotelkeeper's contract, accompanied by an article-by-article commentary (13).

11. — At its second session, held from 7 to 11 January 1975, the Working Committee examined the draft articles and approved the text of the preliminary draft Convention set out *supra*.

## II

### GENERAL CONSIDERATIONS

12. — At the outset of its work, the Working Committee recognised the phenomenon, which has gathered force, in particular in recent years, of large movements of people for short periods, whether for tourism or for business journeys, which has itself been facilitated by the growth of communications and the striking advances made in transportation techniques. These factors had already led to the recognition of the need to regulate the travel contract not, as in the past, on the basis of fragmentary solutions for different legal or economic aspects of the problem, but rather as a single entity, and the result was the opening to signature in 1970 of the Brussels International Convention on the Travel Contract. The same factors militate in favour of seeking a harmonisation of existing rules governing various aspects of the contractual relations between hotelkeepers and their guests and of incorporating those rules in a single legal text, alongside rules governing other aspects of such relations which are either settled in national law by the application of general principles of the law of contract or about which there is legal uncertainty. In other words, the Committee fully recognised the particular character of the hotelkeeper's contract.

13. — One of the principal difficulties, however, in analysing the hotelkeeper's contract and in elaborating uniform law provisions concerning it, lies in the fact that, at the international level, the term « hotelkeeper's contract » appears to have been officially used for the first time only at the Diplomatic Conference on the Travel Contract (CCV) which met at Brussels in April 1970 (14). The situation is scarcely different in national law, however, for al-

(11) Study XII - Doc. 9, UNIDROIT 1974.

(12) Study XII - Doc. 10, UNIDROIT 1974.

(13) Study XII - Doc. 11, UNIDROIT 1974.

(14) See paragraph 8 *supra*.

though attempts have been made by writers in certain countries to identify the various elements which might go to make up such a contract, it is to date only in the Civil Code of Ethiopia of 1960 that a fully developed body of rules concerning the legal relationship between hotelkeeper and guest is to be found (15).

14. — The view was expressed by one member of the Committee that a more fruitful approach might be to formulate rules based upon the concept of the status relationships between the hotelkeeper and the guest and to rely upon the contract only in connection with matters expressly arising out of agreement between the two parties. Nevertheless, the Committee was in general of the opinion that the keystone of any successful attempt at harmonisation was a satisfactory working definition of the hotelkeeper's contract and it is upon such a definition that the whole structure of the preliminary draft Convention is built.

15. — There are, of course, certain aspects of the relationship which however have been regulated by national laws. Indeed, in the vast majority of States with a civil law tradition, it is normal to find provisions of the Civil Code or Code of Obligations dealing with the liability of the hotelkeeper for damage to, or loss of, his guests' property and, in many cases, also with the hotelkeeper's right to detain his guests' property in certain situations and with prescription. Similarly, in a large number of common law jurisdictions, specific statutory provisions have been enacted either confirming or amending pre-existing rules of common law concerning the hotelkeeper's lien and his liability for objects brought to the hotel, while provisions are also to be found dealing with his duty as to the safety of his guests (16). Moreover, even where the conceptual approach to a particular problem differs from one group of States to another, for example in the field of liability for objects brought to a hotel, the differences in practice are not always as great as might at first sight appear and certainly they have not in any way caused serious hindrance to the preparation of the uniform law texts referred to above, namely the UNIDROIT draft Uniform Law respecting the Liability of Innkeepers of 1934 (hereinafter referred to as « the UNIDROIT draft ») and the Council of Europe Convention of 1962.

16. — On the other hand, the almost complete lack of specific provisions concerning a number of fundamental contractual issues such as the commen-

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

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



cement, termination and resiliation of the contract between the hotelkeeper and his guest and the legal significance to be attributed to the advance booking of accommodation leads to a *renvoi* to the applicable general law with the attendant divergencies between the laws of different States or groups of States.

17. — Apart, therefore, from Article 1, dealing with the definition of the hotelkeeper's contract, and Article 2 which determines the scope of application of the preliminary draft Convention, the remaining articles are concerned with the elaboration of rules governing the contract itself which may be summarised as follows :

- Articles 3-5 : Formation and duration of the contract.
- Articles 6-10 : Cancellation of the contract and rules governing compensation in such cases.
- Article 11 : Deposits.
- Article 12 : Observance of the internal regulations of the hotel.
- Articles 13-14 : Hotelkeeper's liability for personal injury or death of the guest.
- Articles 15-18 : Hotelkeeper's liability for damage to, or destruction or loss of, property brought to the hotel by the guest.
- Article 19 : Hotelkeeper's right of detention of the guest's property.
- Article 20 : Miscellaneous provisions applicable to Articles 13 to 19.
- Article 21 : Extra-contractual liability.
- Articles 22-23 : Procedural provisions.
- Article 24 : Nullity of stipulations contrary to the provisions of the Convention, and arbitration.
- Article 25 : Declarations concerning the application of certain provisions of the Convention.

18. — These articles are discussed below in detail in Part III of the present report, but two further observations of a general character should be made. In the first place, the Working Committee considered the question of whether the rules on the hotelkeeper's contract should be cast in the form of a draft international Convention or of a draft model law. Although no strong views on the matter were expressed in favour of either solution by the members of the Working Committee, who considered that it was premature to enter upon a detailed discussion of the matter at this juncture, a preference was given to the form of a convention for two reasons. In the first place, it was recalled that the hotelkeeper's contract has many affinities with the travel contract and that the CCV is cast in the form of an international Convention. More important however, the constitutional procedures of certain States are such that it is easier for the content of a convention to be incorporated into municipal law than that of a model law, whether this be with respect to the original ratification of a Convention or to subsequent revisions of it.

19. — Secondly, the Working Committee considered that it would be premature at the present stage to draft the final clauses of the preliminary draft Convention because of the absence of a final decision on the form of the future instrument.

### III

#### ARTICLE BY ARTICLE COMMENTARY ON THE PRELIMINARY DRAFT CONVENTION

##### *Article 1*

20. — At an early stage in its work, the Working Committee reached the conclusion that any attempt to define the term « hotel », for the purposes of the future Convention, would meet with little success, considering the wide differences in the nomenclature and character of establishments offering accommodation to the public at large, not only from one country to another, but within any country itself. It was therefore considered desirable to avoid distinguishing between hotels, boarding houses, *pensions etc.* and rather to concentrate on a suitably worded definition of the hotelkeeper's contract which, while indicating the essential elements of the contract, would at the same time exclude from the field of application of the future instrument certain cases in which accommodation is provided by one person for another.

21. — As regards the essential elements of the hotelkeeper's contract, as defined in *paragraph 1* of Article 1, the most important 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. For practical reasons, however, one exception to the requirement of the hotelkeeper's undertaking to provide accommodation has been admitted in Article 20 (a) of the preliminary draft Convention which, for the purposes of Articles 13 to 19 of the Convention, assimilates to the position of a guest any person who enters the hotel with the intention of requesting accommodation. The justification and scope of this exception (which is placed in square brackets) are discussed in paragraphs 118 and 119 *infra*.

22. — While the principal element of the hotelkeeper's contract is thus the provision of accommodation, the Committee felt that this was not alone sufficient to create a relationship of hotelkeeper and guest for the purposes of the application of the future Convention and that it was necessary for some basic ancillary services to be provided such as the cleaning of the room and the provision of water and electric light *etc.* However, the ancillary services,

apart from the basic ones mentioned above, were deemed by the Committee to be extremely varied as they would depend very much on the terms of the contract and the category of the particular establishment. In consequence, it decided in favour of the neutral term « appropriate ancillary services », thereby leaving it to the parties to determine by contract what services should be provided thereunder.

23. — As regards the cases which might seem to satisfy the requirement that an undertaking has been given by the hotelkeeper to provide accommodation and appropriate ancillary services, but which the Working Committee considered it desirable to exclude from the application of the future instrument, four situations may be referred to.

24. — The first of these is that of the individual who lets out a room or two in 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.

25. — As is the case with the bulk of the transport law conventions, the preliminary draft also requires that the accommodation should be provided for reward. Thus the gratuitous provision of accommodation does not constitute a hotelkeeper's contract for the purposes of the future instrument; similarly, the draft does not apply to relations between a hotelkeeper and members of his staff who occupy accommodation on the premises of the hotel under the terms of their contract of employment.

26. — Thirdly, the preliminary draft applies only to a contract to provide « temporary accommodation ». While recognising the inherent vagueness of the term, which would be open to various interpretations in national law, the Working Committee considered that it was necessary to draw a distinction 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 who may enjoy services which are not normally provided for guests. The determination of the length of time corresponding to the notion of « temporary » would thus be left to national law, although the Committee stressed that the draft Convention could not apply to an agreement constituting a contract to lease the premises.

27. — Finally, a further restriction on the application, *ratione materiae*, of the preliminary draft is 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 provision to 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 thereover.

28. — In the course of its discussions on Article 1, the Committee considered whether certain further clarifications might not be added to the definition contained in paragraph 1 and, in particular, express indications, similar to those contained in Article 1 of the C.C.V., that the hotelkeeper may be either a natural or a legal person and that the future Convention will apply whether the contract is concluded or the price paid by himself or by another person for him. Ultimately, however, it decided that such additions were not strictly necessary, although it was clearly to be understood that the future Convention would apply whenever accommodation was reserved by a third party, e.g. a travel agent acting for the guest, always provided that the agent is not acting on his own behalf. Although some members of the Working Committee 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 (17). In consequence, the draft prepared by the Committee does not seek to regulate the relationship between hotelkeepers and guests when these are provided under the terms of a travel contract.

29. — Finally, the choice of the terms « guest » in English and « client » in French were considered by the Committee as making it quite clear that it was not the intention of the authors to retain the requirement still to be found, at least in theory, in some national legislations, to the effect that the guest must be a traveller (« voyageur »).

30. — *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 wagon-lits, rail or bus couchettes, or cabins in ships or inland navigation vessels. The provision is so worded as to include within the field of application of the future Convention « floating hotels », such as former transatlantic liners or boat-houses which are moored close to land.

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(17) Report of the First session, Study XII - Doc. 10, UNIDROIT 1974, Appendix 1, page 1.

*Article 2*

31. — 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 a territorial link with the State upon whose territory the hotel providing the accommodation is situated. The Convention, therefore, 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 habitual residence of the guest who is a party to the hotelkeeper's contract.

32. — Some members of the Working Committee, however, favoured requiring the presence of an international element so as to avoid the application of the future instrument to purely internal hotelkeepers' contracts, although there was some difficulty in determining what this element should be. Originally, the Committee envisaged the possibility for a State, under Article 25, paragraph 1 (a) of the preliminary draft, to declare that it would apply « only to hotelkeepers' 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. In other words, the future instrument would, for example, apply to a contract between, on the one hand, a hotelkeeper in Rome and, on the other, an American resident in New York or Venice or an Italian resident in New York, but not to an Italian resident in Venice.

33. — Objections were however made on two grounds to the introduction of nationality as a test for determining the applicability of the future Convention. One argument was based on principle, namely that nationality, while relevant to questions of personal status, should have no place as a connecting factor in the context of contractual relationships. The second, of a more practical character, was that hotelkeepers, while at present generally insisting upon guests providing an address on arrival at the hotel, less and less frequently require the guest to specify his nationality. The inclusion of nationality as a connecting factor would, therefore, while admittedly enlarging the future instrument's field of application in any State which might make a declaration under Article 25, paragraph 1 (a), place an added burden on the hotelkeeper who, unless he requested the guest to indicate his nationality, might be unsure as to whether, in any given case, he was entering into a hotelkeeper's contract to which the future Convention would apply. In the light of these objections, the Working Committee decided to delete the reference to the nationality of the guest in Article 25, paragraph 1 (a) thus leaving

the principal place of business or the habitual residence of the guest as the sole connecting factor for those States which might insist upon some international element being present for the future instrument to be applicable to hotelkeepers' contracts to be performed on their territory.

### *Article 3*

34. — This article is the first of a series of provisions concerning the conclusion and duration of the hotelkeeper's contract. It 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. As regards the wording of the provision, it corresponds to the first sentence of Article 15 of the 1964 Uniform law on the International Sale of Goods (ULIS), at present unchanged in the revision of that law currently underway in UNCITRAL. It goes without saying that in any dispute relating to the hotelkeeper's contract, it shall be for the plaintiff to prove the existence of the contract.

### *Article 4*

35. — This Article is concerned with fixing the time at which a hotelkeeper's contract is concluded and is one of the key articles of the preliminary draft Convention. *Paragraph 1* might at first sight seem to be self-evident inasmuch as it states a rule relating to offer and acceptance which applies to contracts in general in all legal systems. However, it should be recalled that many hotelkeeper's contracts are concluded by advance reservation and the Committee felt that it was important to state expressly the general principle contained in paragraph 1 so as to make it perfectly clear that when a guest has reserved accommodation in advance and the hotelkeeper accepts this reservation, both parties are bound to perform their obligations under the contract, subject to the provisions relating to cancellation contained in Articles 6 to 10.

36. — The situation is, however, more complicated 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.

37. — 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.

38. — *Paragraph 2*, therefore, provides that a hotelkeeper's failure to reply to a request for accommodation shall be considered to be an acceptance unless the guest has expressly requested a reply.

39. — The practical consequences of this rule may best be illustrated by the following examples :

(i) a guest requests a hotelkeeper to provide him with accommodation on a specified day and receives no reply : the hotelkeeper is bound to provide the guest with the requested accommodation and the guest may not invoke the silence of the hotelkeeper as a ground for not performing his side of the contract.

(ii) a guest requests a hotelkeeper to provide him with accommodation on a specified day and expressly requests a reply, thus enabling him to make alternative arrangements if necessary :

(a) in the event of the guest receiving a reply, whether negative or positive within a time-limit specified by him or, if he has not stipulated such a limit, then within a reasonable time of his making the request, regard being had to the means of communication employed by him and the time available to the hotelkeeper to reply between receipt of the request and the day on which the guest wishes to take up the accommodation, no problem arises ;

(b) in the event of the guest receiving no such reply, he is entitled to make alternative arrangements.

40. — Another situation was, however, envisaged by the Working Committee, namely whether any special rules should be included in the preliminary draft Convention concerning the interpretation of the silence of a guest to a counter-offer by the hotelkeeper in response to a request for accommodation by the former, a situation which might well arise in practice. Initially, the Committee, with a view to putting the parties upon as equal a footing as possible, considered the possibility of the guest's silence being interpreted as a tacit acceptance of the counter-offer and of a rule to this effect being introduced into the draft as a counterpart to that contained in paragraph 2.

41. — This solution was, however, ultimately rejected as it was felt 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 might 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 was 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. In addition, it is probable that

the hotelkeeper would be much more familiar with the provisions of a future Convention on the hotelkeeper's contract than the average guest and in consequence the former would be more likely to appreciate the legal consequences of his silence in response to a request than would the guest in respect of his failure to reply to a counter-offer.

#### *Article 5*

42. — *Paragraphs 1 and 2* of this article are concerned essentially with the duration of the hotelkeeper's contract.

43. — In effect, these paragraphs distinguish three types of factual situation. The first, which causes no difficulty, is where, at the time of the conclusion of the contract, the guest and the hotelkeeper have agreed upon the day on which the guest's occupation of the accommodation shall end. This is, perhaps, the most normal situation and is referred to in paragraph 1 as a contract for a determined period.

44. — The second situation, rarer in practice, is where the parties have stipulated no time-limit for the occupation of the accommodation or where a specified time-limit has been exceeded with the consent of the hotelkeeper. In such cases, the contract is considered to have been concluded, either *ab initio*, or from the expiry of the determined period, for an indeterminate period and its duration is, under *paragraph 2*, deemed to be one day, subject to tacit renewal by the parties. In other words, either the hotelkeeper or the guest may, before midday, or such other reasonable time as provided for in the hotelkeeper's contract or the internal regulations of the hotel, inform the other party of his intention not to extend the contract. The reference to the internal regulations of the hotel recognises the lack of uniformity between one country and another, and between one hotel and another, with regard to fixing the hour at which one party must inform the other of his intention not to extend the contract. On the other hand, the requirement that the time stipulated in the contract must be a reasonable one is dictated by the consideration that it will be linked to the hour at which the guest must vacate the room (see *paragraph 48 infra*), often one or two hours after the last time at which he may inform the hotelkeeper of his intention not to extend the contract, and that it would be unreasonable to require the guest to vacate the accommodation by, for example, 7 or 8 a. m.

45. — The third situation, envisaged in *paragraph 1*, is that of a contract concluded for an approximately defined period of time, as where a guest requests accommodation for « 4 or 5 days », « 2 to 3 weeks », or « about a month ». The Working Committee, while recognising that in most cases the parties would, at a fairly early stage during the guest's stay, agree upon a fixed term



for the contract so as to permit the hotelkeeper to plan ahead and thereby avoid either the danger of overbooking or having empty rooms, should the guest leave before the end of his projected stay, nevertheless considered that some rule should be laid down on the matter.

46. — Two principal solutions were considered. The first of these was to treat the contract as one for an indeterminate period so that either party could terminate the contract by giving one day's notice to the other under paragraph 2 of Article 5. This was, however, rejected by the Committee as it would permit either party, under a contract concluded for « about one month », to terminate after one day, which would give no security either to the guest or the hotelkeeper. It therefore adopted the alternative solution whereby the contract would be considered to be concluded for a determined period as is stated in the second sentence of paragraph 1. The Committee gave to this statement the following interpretation which might give guidance in case of doubt arising from the term « approximately ». The contract being considered to be concluded for a determined period, the latter will be calculated by taking the shortest period from among those contemplated in the approximately defined period. Thus a contract for « 4 or 5 days » or for « 2 to 3 weeks » would be considered to be one for a determined period for 4 days or 2 weeks and a contract for « about a month » as being for 28 days. Furthermore, by virtue of the third sentence of paragraph 1, either party may put an end to the contract on the basis of the period so defined or at any time thereafter, provided, in the case of the hotelkeeper, that he gives 3 days notice, and, in that of the guest, one day.

47. — Thus, for example, under a contract for « 2 to 3 weeks », which is considered to be a contract for a determined period of 14 days, the guest may, on the thirteenth day, inform the hotelkeeper of his intention to leave the hotel on the fourteenth, whereas the hotelkeeper, if he wishes to put an end to the contract, must so inform the guest on the eleventh day. If, however, in the example given above, the guest remains until the end of the third week, then in the absence of any specific provision in Article 5, paragraph 1, the general rules apply and, failing a stipulation between the parties as to its continuance for a further determined or approximately determined period, the contract will become one for an indeterminate period, renewable day by day.

48. — 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 twofold. First, it avoids 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, a problem which in some countries exists in practice and gives rise to the phenomenon of overbooking. The second purpose of the provision, which stipulates the time at which the guest may be required to vacate the accommodation, is clearly related to the last sentence of paragraph 2 of Article 5, the intention being that by virtue of the parallelism established between them, the guest should always be allowed a reasonable time, after the announcement by the hotelkeeper or by himself of the termination of the contract, to pack his belongings. The difference of two hours between the times stipulated in paragraph 2 and paragraph 3 should also serve as a guide to hotelkeepers when drawing up their internal regulations.

#### *Article 6*

49. — This is the first of a series of articles concerned directly or indirectly with the possibility for one or other of the parties to cancel the contract before or during the occupation of the accommodation by the guest. Article 6, which governs cases of *force majeure*, may be pleaded by either the hotelkeeper or the guest and this is the only ground of cancellation which, under the preliminary draft Convention, can never involve the payment of compensation, since it is a universally accepted rule that non-performance on this ground does not entail the payment of compensation to the other party.

50. — When drafting the English version of Article 6, the Working Committee recalled the considerable difficulties which have been experienced by those drafting international treaties when called upon to render the term *force majeure* in the English language. After giving lengthy consideration to the problem, it decided that because of the many different translations into English to be found in previous Conventions and the danger of divergencies arising between the English and French texts, it would be advisable to maintain the French term *force majeure* in the English text.

#### *Article 7*

51. — Like Article 6, Article 7, *paragraph 1* permits either the hotelkeeper or the guest to cancel the contract before or during the occupation of the accommodation by the guest. To be justified in so doing, however, he must satisfy three conditions namely :

(a) that circumstances manifest themselves of which he could not have known at the time of the conclusion of the contract ;

(b) that these circumstances affect the performance by the other party of his obligations ;

(c) that they would have prevented a reasonable person from entering into the contract, had he had knowledge of these circumstances beforehand.

52. — Examining these criteria first in the context of the guest wishing to cancel the contract, it is evident that the most important restriction is that mentioned under (b). For example, a guest who has reserved accommodation for his summer holidays and then, owing to unforeseeable circumstances arising at his place of work which make it impossible for him to absent himself from it, cancels the contract, might well be able to satisfy the requirements summarised under (a) and (c) above but clearly not that under (b) as the circumstances in no way affect the performance by the hotelkeeper of his obligations under the contract. The guest would, however, probably succeed when, for example, having concluded a contract by correspondence or telephone, he arrives in a hotel and finds it infested with insects or so noisy as to make it impossible for guests to enjoy a tranquil stay, always, of course, provided that he could not have known of the circumstances at the time of concluding the contract.

53. — As to the hotelkeeper, one might envisage cases justifying cancellation such as the proprietor of a well-known luxury hotel with an established clientèle refusing to provide accommodation agreed upon by correspondence or telephone on account of the guest's demeanour or where, during his stay at the hotel, the guest displays symptoms of a highly infectious disease. It is, however, obvious that border-line cases may exist in respect of either party's right to cancel the contract, but the Working Committee felt that the test of «reasonableness» contained in paragraph 1 was sufficiently objective in character while at the same time being flexible enough to leave the judge a certain discretion in assessing all the circumstances of the case.

54. — Unlike cases involving *force majeure* dealt with in Article 6, the Working Committee considered that there might be cases falling under Article 7, paragraph 1 where the party cancelling the contract might be entitled to compensation. Paragraph 2 therefore provides that in the event of a party being at fault, in a case contemplated under paragraph 1, he shall be liable to pay compensation for damage caused. An example would be where he has deliberately misled the person cancelling the contract as to some material fact relating to the performance of his own obligations with the consequence that the other person has suffered damage or loss thereby. In such cases, no limitation on the liability of either party is provided for in the preliminary draft Convention. Article 7 does not, however, lay down any rule concerning cases in which a party wrongfully cancels the contract by mistakenly relying on the provision of paragraph 1. In these circumstances, the liability of the hotelkeeper for such wrongful cancellation would, in principle, again be unlimited as nowhere does the preliminary draft Convention limit his liability in cases where he has been at fault; the guest would, however, in the same circumstances, be entitled to any possible limitation or exoneration of his liability

provided for in Articles 9 and 10 of the draft, as the exclusion from the application of those articles of situations referred to in Articles 6 and 7 must be taken to refer to cases where the guest was justified in cancelling the contract and therefore under no circumstances liable to pay damages to the hotelkeeper.

#### *Article 8*

55. — While, under the terms of Article 7, a guest may in certain circumstances be entitled to compensation when he has himself cancelled the contract, it does not cover the case where the hotelkeeper, without justification, cancels the contract. The most normal situation of this kind will be when the hotelkeeper has overbooked, and one member of the Working Committee suggested that the Convention would be incomplete unless provision was made for these cases. He moreover recalled that a practice exists whereby hotelkeepers who have overbooked attempt to provide suitable alternative accommodation for the guest. The Working Committee has, therefore, provided in Article 8, *paragraph 1* that in all cases, except those where the hotelkeeper is justified in cancelling the contract for the reasons provided for in Articles 6 and 7, he must make every effort to ensure that the guest is provided with at least equivalent accommodation in the same locality and that he shall bear any additional costs, as would, for example, be the case where the guest would be exposed to other extra costs such as those entailed by transportation of himself or his luggage from one hotel to another. Should the hotelkeeper fail to obtain such accommodation then he is liable to pay for all damage suffered by the guest.

56. — *Paragraph 2* of the article makes it clear that the guest may refuse to accept the offer of alternative accommodation provided by the hotelkeeper and bring an action for damages against him for compensation for loss suffered in cases to which Article 7 is applicable.

#### *Article 9*

57. — 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 the occupation of the accommodation by the guest, this article deals only with cancellation by the guest *before* such occupation. 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 situa-

tions provided for in Article 6 and 7, is never authorised to cancel the hotelkeeper's contract once he has concluded it. On the basis of established practice, and also 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. Hot. 70), the right of cancellation has been accorded to a guest, without his being required to pay compensation, in cases where he has given sufficient advance notice to the hotelkeeper: this rule, set forth in *paragraph 2*, constitutes an exception to the general principle affirmed in *paragraph 1*, although the Working Committee considered it premature, without further detailed examination of the situation in practice, to determine the precise time-limit within which the guest must notify the hotelkeeper of his intention not to take up the accommodation.

58. — Both practice and the above-mentioned IHA/UFTAA Convention similarly inspired the general principle underlying sub-paragraphs (a) and (b) of *paragraph 1* of Article 9 limiting the liability of the guest for damage caused to the hotelkeeper by his «no-show» to the price of the accommodation and the ancillary services provided under the contract for one day in the case of a contract for an indeterminate period and, in the case of a contract concluded for a determined period, to a percentage of the price, to be fixed at a later stage, of the accommodation and the ancillary services provided under the contract. As regards the ancillary services to be taken into consideration in the calculation, these would be reasonably clear in the case of a contract for full or half *pension*, although services contemplated such as the special installation of conference facilities in a hotel would not, in the opinion of the Working Committee, fall within the notion of «ancillary services» as they are not strictly related to the services normally provided under a hotelkeeper's contract.

59. — The Committee insisted that the hotelkeeper would be entitled to recover only such loss as he can prove actually to have sustained, the limits on liability set in *paragraph 1* being a maximum. In consequence he would not recover the cost of accommodation if he were to relet a room which had not been occupied by the guest in accordance with the terms of the contract. It nevertheless recognised the right of the parties to agree by contract to a variation of the limits of liability set out in sub-paragraphs (a) and (b), having regard in particular to the rules governing earnest money («arrhes») which apply in some countries (See also the commentary on Article 11, *infra*).

#### *Article 10*

60. — Broadly speaking, Article 10 corresponds to Article 9 in conception and content, dealing as it does with the cancellation of the hotelkeeper's contract.

per's contract by the guest *during*, rather than *before*, occupation of the accommodation in circumstances other than those provided for in Articles 6 and 7. The only difference to which reference need be made is that it is unnecessary in Article 10 to refer to the case of contracts concluded for an indeterminate period since, once the accommodation has been occupied by the guest, he is always free to cancel the contract, subject to the rules contained in Article 5, paragraph 2 of the preliminary draft Convention. Moreover, even should he cancel the contract after the time-limits referred to in that provision, he will be liable only for actual loss sustained by the hotelkeeper. In other words, if, in the case of a fully occupied hotel, the hotelkeeper relets the room vacated by the guest, the latter can, as under Article 9, at the most be liable only for the difference in the value of the ancillary services provided to the new guest and those from which he would have benefitted had his contract been prolonged for a further day.

#### *Article 11*

61. — 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, it accepted the view, upon which one member insisted, that the matter should not be entirely ignored. It therefore laid down in Article 11 the general principle that when a hotelkeeper's contract provides that the guest shall pay a deposit, it should be considered to represent an advance payment towards the price of the accommodation and ancillary services to be provided under the contract. While rejecting a rule which would have permitted the hotelkeeper in all cases to retain a deposit, or such part of it as would cover any compensation which might be payable to him by virtue of cancellation of the contract by the guest, as this would be contrary to the general principles of law of a number of States, the Committee nevertheless provided in Article 11 that the parties might by contract displace the general rule that the deposit should serve only as an advance payment. Such a contractual clause might, therefore, take the form of a penalty clause or preassessment of liquidated damages, the validity of which would fall to be determined by the courts of the State competent to hear an action in accordance with Article 22 of the preliminary draft.

#### *Article 12*

62. — This provision, which requires that the guest observe the internal regulations of the hotel as duly brought to his notice, is all that remains of a wider provision which the Working Committee had originally considered including in the draft, which also stipulated that the behaviour of the guest should

conform to the normal conduct of a guest, regard being had to the category of the hotel. This provision was, moreover, the counterpart of another one which laid a similar obligation on the hotelkeeper. Ultimately, however, the Committee decided that the obligation was extremely vague and that in any event the situation seemed to be adequately covered by Article 7, paragraph 1.

63. — The Committee considered it necessary, however, to retain the rule set out in Article 12 which, although couched in the form of an obligation upon the guest, in fact gives him a certain degree of protection. In effect, the internal regulations of the hotel constitute an example of general contractual conditions and, for them to be binding upon the guest, they must, under Article, 12 be duly brought to his notice. The Working Committee attached great importance to the term « duly » as it recognised that the rules governing notice vary considerably from one legal system to another and that any attempt to lay down detailed rules governing when and how notice should be given the guest might cause difficulties not only for certain States but also for existing practice, which is in a constant state of evolution.

64. — It may, however, be generally affirmed that for the internal regulations to be considered as being incorporated in the hotelkeeper's contract, they must be brought to the notice of the guest before the conclusion of the contract, which, however, would seem to be possible in the case of an advance reservation only when the hotelkeeper provides the guest with a copy of the rules before the conclusion of the contract or when the guest has already stayed at the hotel in question before. It might be argued that the guest should be deemed to have knowledge of the contents of such internal regulations of the hotel as are common to most establishments, as is the case with certain general conditions relating to commercial contracts, but in the latter situation such presumed knowledge is justified on the grounds that the contract is concluded between two businessmen and not, as is the case with the hotelkeeper's contract, between a professional and an individual. Furthermore, such a construction would seem to be excluded by the precise wording of Article 12 which specifically speaks of the regulations being *brought* to the notice of the guest.

65. — On the other hand, the mere fact that a guest has not had the regulations brought to his notice does not mean that he may break certain regulations with impunity. If, for example, he regularly plays a radio at a high volume in his room at all hours of the day and night, when the use of radios in rooms after a certain hour is prohibited by the regulations, the hotelkeeper would, independently thereof, always be able to rely upon the provisions of Article 7, paragraph 1.

66. — As to the way in which the regulations must be brought to the guest's notice, as for example by a booklet given to him on arrival or by their being posted up next to the reception desk in the hotel, the Committee preferred, for the reasons mentioned in paragraph 63 *supra* of the present report, not to lay down detailed rules, considering that in the final instance it would be for the national judge to interpret the term «duly» in accordance with his own law and practice. A similar view was taken by the Committee in connection with possible language requirements concerning the regulations, although one member was of the opinion that the hotelkeeper should not be bound to use any more than the national language or languages of the country concerned.

#### *Article 13*

67. — Article 13 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 on the premises of the hotel».

68. — While the wording of the French text of this provision follows that used in the CVR, the Add. Conv. CIV and the draft CVN, 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.

69. — 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. A 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. Conv. CIV, Article 11, paragraphs 1 and 2 of the CVR, and Article 8, paragraphs 1 and 2 of the draft CVN.

70. — In connection with the spatial requirement if the hotelkeeper is to be liable under the terms of the future instrument, 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.

71. — With regard to the temporal factor, that is to say that the liability of the hotelkeeper may, subject to the exception contained in Article 20 (a), 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 Convention 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 Council of Europe Convention.

72. — While *paragraph 1 (a)* is self-explanatory, *paragraph 1 (b)* is intended to cover cases such as 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, for example, injured when waiting on the premises of the hotel for a taxi to take him to an airport or station.

73. — *Paragraph 2* lays down the circumstances in which the hotelkeeper may avoid the liability which would normally be incumbent upon him under paragraph 1. The provision is modelled on Article 11, paragraph 2 of the CVR and Article 8, paragraph 2 of the draft CVN and the underlying principle is to be found in a number of transport law Conventions. There is, however, a slight variation in presentation, though not in substance, from the corresponding provision of the CVR in that it is expressly stated in paragraph 2 of Article 13 that the hotelkeeper must establish the existence of the circumstances exonerating him from liability.

74. — The point should, in addition, be made that the exoneration contained in this provision extends to certain situations in which the injury to the guest is caused by a third party as, for example, when one guest is attacked by another in circumstances which no reasonable hotelkeeper could have foreseen.

75. — The provisions of *paragraph 3* of this article constitute an exception to the general rule laid down in 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 the hotelkeeper cannot avoid liability by showing that even though he used the diligence which the particular facts of the case called for, the accident could not have been avoided or its consequences prevented. In addition, the Committee

decided against including the defence of *force majeure* in this context as it did not conceive of cases in which it could be applicable.

76. — 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 than with respect to the other possible causes of physical injury, and that under Article 2658, 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 ».

77. — In conclusion, the Committee rejected any attempt to qualify the state of the food or drink which caused the injury, for example by restricting the operation of paragraph 3 to cases when the food was unfit for human consumption, as it considered that such a rule might throw too heavy a burden of proof upon the guest.

#### *Article 14*

78. — The two paragraphs of this article are concerned respectively with the exoneration of the hotelkeeper, in whole, or in part, from his liability to the guest unless the latter has committed a wrongful act or been guilty of neglect, and with the extent of his liability when a third party has, through his own acts or omissions, contributed to the injury of the guest.

79. — Broadly speaking, the provisions of this article correspond 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. Conv. CIV, the one difference being the deletion, at the end of *paragraph 1*, of the reference, to be found in Article 17, paragraph 1 of the CVR, which of course speaks of the « passenger » to « conduct of the [guest] not conforming to the normal conduct of a [guest] ». In effect, the Committee considered the phrase to be superfluous inasmuch as any abnormal or careless conduct of a guest causing injury to him would be tantamount to a wrongful act or neglect on his part within the meaning of paragraph 1. In retaining this term « wrongful act or neglect » the Committee recalled the reasoning advanced in the explanatory report on the CVR (doc. ECE/TRANS/5, para. 90) where it is stated that « 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, the Committee considered it opportune to retain the words « wrongful act or neglect ».

80. — The actual circumstances in which a guest may be regarded as having been guilty of such conduct are many and various and the extent to which it may be considered as exonerating the hotelkeeper completely from liability or merely to be a contributory factor can only be determined by national law, whose rules will also be applicable in determining the reduction of compensation when the guest's conduct has contributed to his injury.

81. — The purpose 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 13, paragraph 3, discussed above, be liable in full to the guest although paragraph 2 of Article 14 makes 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.

82. — It should, in conclusion, be underlined that the provision is applicable only when the hotelkeeper is liable under the terms of Article 13, so that it in no way imposes liability upon him, in, for example, the case mentioned under paragraph 74 *supra*, where one guest, in totally unforeseeable circumstances, attacks another guest, thereby causing him physical injury.

#### *Articles 15 to 18*

83. — Articles 15 to 18 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. By way of general comment, it should be recalled that the Working Committee, at its two sessions, 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*

84. — The Working Committee was unanimously of the view that the general principle of holding the hotelkeeper liable for damage to property brought to the hotel by guests, but with a maximum limit on the compensation payable, and which had been adopted in both the UNIDROIT draft and the Council of Europe Convention, should be retained for the future instrument. In so doing, it 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 almost until the present day.

85. — *Paragraph 1* of the article therefore lays down the general rule that the hotelkeeper is liable in respect of property brought to the hotel by any guest. For the most part, the wording follows that of Article 1, paragraph 1 of the Annex to the C. E. Convention, although the last phrase of that text «who stays at the hotel and has sleeping accommodation put at his disposal», was considered to be superfluous as the requirement that sleeping accommodation be put at the disposal of the guest is an indispensable element of the hotelkeeper's contract under the terms of Article 1 of the preliminary draft Convention. It was also felt that it would be unwise to insist on the guest actually staying at the hotel, as might be inferred from the Council of Europe text, as situations could easily arise in which, although being prepared to pay the price of the accommodation, he might not physically occupy the room for part or even all of the time the accommodation was placed at his disposal.

86. — As is the case with a number of other minor differences between the text of the preliminary draft Convention and that of the C. E. Convention, the Working Committee considered that this apparent discrepancy should cause no difficulty to States which had already ratified the latter Convention since this expressly provides for the possibility for Contracting States to increase the liability of hotelkeepers over and above that contained in the Annex and, with one exception to be discussed below (see paragraph 93 *infra*), the provisions of the preliminary draft Convention do not provide for a lesser liability than that contemplated in the Annex to the C. E. Convention.

87. — Finally, in connection with paragraph 1, it will be noticed that it speaks of property « brought to the hotel », whereas Article 13, paragraph 1, concerning the hotelkeeper's liability for physical or mental injury to the guest, speaks of such harm being caused by an accident occurring « on the premises of the hotel ». In the opinion of the Working Committee, the two expressions were not to be deemed synonymous as it was intended to draw a distinction between the term « premises of the hotel » used in Article 13, paragraph 1, thus covering the case of a guest suffering injury caused by the defective state of, for example, a pavement in the hotel gardens, and the narrower term « brought to the hotel », employed in Article 15, paragraphs 1 and 2, which is intended to exclude the liability of the hotelkeeper for damage or loss of property left, for example, in the hotel gardens or near the swimming pool and in principle (except for the case provided for in Article 15, paragraph 2 (b)) not under the supervision of the hotelkeeper.

88. — The wording of *paragraph 2* is identical to that used in Article 1, paragraph 2 of the Annex to the C. E. Convention and it will be seen that, with the exception of sub-paragraph (b) and the extension of that provision in sub-paragraph (c), the provision is the counterpart of sub-paragraphs (a) and (b) of paragraph 1 of Article 13, discussed above, paras. 71 and 72.

89. — In effect, sub-paragraphs (b) and (c) contemplate the liability of the hotelkeeper in respect of property of which he takes charge outside the hotel and in this respect follow 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 the circumstances, to have been entrusted by the hotelkeeper with the reception of guests' property at, for example, an airport or railway station. Not all members of the Working Committee were, however, able to accept this extension of the hotelkeeper's liability and it was therefore decided, as had already been done in connection with the C. E. Convention where a similar difference of opinion had existed during its elaboration, to permit States to make a declaration, at the time of signature, ratification or accession to the future Convention, to the effect that « the rule laid down in paragraph 2 of Article 15 shall only apply in respect of property which is at the hotel » (see Article 25, paragraph 1 (b) of the preliminary draft Convention).

90. — *Paragraph 3* of Article 15 is concerned with the limitation of the liability of the hotelkeeper affirmed in paragraph 1.

91. — 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 — before 1962 — 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.

92. — There was some feeling in the Committee that the amount of one hundred times the cost of the room might be excessive, but it was also felt that it was premature to specify at this juncture the number of times the cost of the room to be adopted in calculating the limitation on liability.

93. — However, the Committee recognised that if the figure finally chosen were to be inferior to 100 times the cost of the room, this would cause grave obstacles in ratifying the future Convention for those States Parties to the Council of Europe Convention which had opted for the « 100 times » solution, although not for those which had adopted the fixed sum specified in that Convention as this sum would today in almost all cases be inferior to that applicable under the « 100 times solution ». To overcome this difficulty, the Working Committee made provision in Article 25, paragraph 1 (c) of the preliminary draft Convention for States to declare that they will « set the amount of the limit of liability referred to in paragraph 3 of Article 15 at a higher sum than [       ] times the daily charge for the accommodation ».

94. — Finally, in connection with paragraph 3, the Working Committee considered that it should be expressly stated that if the accommodation is occupied by several persons, the calculation of the limit of liability should be made by taking account of the total price of the accommodation and by considering all the occupants as a single guest. Thus, if the limitation figure is fixed at, for example, fifty times the daily cost of the room and the same room is occupied by a husband, wife and child, the hotelkeeper cannot be required to pay compensation exceeding fifty times the cost of the room in respect of all the property brought to the hotel by the three persons. This rule was considered necessary to avoid the situation arising, as it has done in

one State which has ratified the Council of Europe Convention and where the fixed sum theory was chosen, of a judge holding the limitation figure to be applicable in respect of a husband and wife separately, although they occupied the same room in the hotel, thus in effect doubling the limitation figure.

*Article 16*

95. — *Paragraph 1*, which lays down the three cases where, notwithstanding the general rule contained in Article 15, the hotelkeeper's liability is unlimited, corresponds to paragraph 1 of Article 2 and to Article 4 of the Annex to the C. E. Convention.

96. — The first case of the unlimited liability of the hotelkeeper, described in *paragraph 1 (a)*, concerns property which has been deposited with him by the guest. 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.

97. — *Paragraph 1 (b)* sets out a principle to be found in all legal systems which contain specific provisions concerning the liability of the hotelkeeper for property brought to the hotel, 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. In this context, it should be noted that in a desire to achieve parallelism with the French text of Article 4 of the Annex to the C. E. Convention, sub-paragraph (b) of the French version of the preliminary draft speaks of the « *faute* » of the hotelkeeper or of any person for whom he is responsible, whereas the English text, as in the C. E. Convention, speaks of the « wilful act or omission or negligence on his part (the hotelkeeper's) or on the part of any person for whom he is responsible ». In this connection, however, one member of the Working Committee pointed out that making the consequences of wilful conduct and negligence the same did not take into account the basic differences between these two concepts. It should be added that, although the question of the liability of the hotelkeeper for the acts and omissions of all persons of whose services he made use for the performance of his obligations under the hotelkeeper's contract is dealt with in Article 20 (c) of the preliminary draft Convention (see paragraphs 126 and 127 *infra*), the Working Committee considered that it was necessary to make a specific reference to such persons in paragraph 1 (b) of Article 16. The reason was that, as the general rule laid down in Article 15 is that the hotelkeeper's liability is limited and, by way of exception, unlimited when the hotelkeeper himself causes damage by a wilful act or omission or by negligence, it is necessary

to refer also to the wilful acts or omissions or negligence of those for whom he is responsible if it is intended that such acts should convert the limited liability of the hotelkeeper into an unlimited one.

98. — The third exception to the principle of limited liability, contained in *sub-paragraph (c)* of Article 16, is a necessary complement to that set out in *sub-paragraph (a)* 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.

99. — Thus, under *paragraph 2* of Article 16, the hotelkeeper is bound to receive securities, money and valuable articles, being entitled to refuse such property only when it is dangerous or if, having regard to the standing or the amenities of the hotel, it is of excessive value or cumbersome. This provision, which corresponds to paragraph 2 of Article 2 of the Annex to the C. E. Convention, was the subject of lengthy discussion in the Working Committee. One member drew particular attention to the possibility of a guest, who had deposited money with a hotelkeeper in a sealed envelope, subsequently claiming, if the envelope were lost, that it contained a higher sum than in fact it did. He therefore considered that it was desirable to make express provision for the hotelkeeper's right to control the nature and value of property deposited with him. Ultimately, however, the Committee decided not to retain this proposal: in the first place because such a change of wording might create difficulties for States which were already parties to the C. E. Convention but, more important, because it could be argued that the hotelkeeper's right of control is already implied in paragraph 2, to the extent that it permits him to refuse securities, money and valuable articles if they are dangerous or of excessive value or cumbersome. This right of refusal, it was maintained, necessarily implies the right of control.

100. — Two other specific points were raised concerning paragraph 2. In the first place, one member of the Committee doubted whether the English text of Article 2, paragraph 2 of the Annex to the C. E. Convention, which speaks of the « size or standing of the hotel », corresponds sufficiently closely to the French text which speaks of « l'importance » and « les conditions d'exploitation de l'hôtel ». The Committee therefore agreed that, while the French text of paragraph 2 in the preliminary draft Convention should conform to that of the Annex to the C. E. Convention, the English version should speak of the « standing or amenities of the hotel ».

101. — The second point related to the use of the word « cumbersome » in the English text, « encombrante » in the French. Here, however, the Committee considered that there was concordance between the two words, which,



in its opinion, conveyed the notion of the abnormal shape or size of the property in question.

102. — Finally, in connection with *paragraph 3*, which concerns the deposit of goods with the hotelkeeper in a fastened container and which is based on the corresponding paragraph of Article 2 of the Annex to the C. E. Convention, the Committee decided to add the word « put » before the words « in a fastened or sealed container », so as to make it clear that the hotelkeeper cannot insist on such a receptacle being provided by the guest in the event of his (the hotelkeeper) demanding that the requirement be satisfied.

#### *Article 17*

103. — The provision closely follows Article 3 of the Annex to the C. E. Convention and 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. It should, however, be noted that in accordance with the decision taken in connection with Article 6 of the preliminary draft Convention (see paras. 49 and 50 *supra*), the Committee substituted the term *force majeure* for « an unforeseeable and irresistible act of nature or an act of war », which had been retained in the Annex to the C. E. Convention. In the view of the Committee, however, this change of wording in no way implied a difference in meaning between the texts of the C. E. Convention and the preliminary draft Convention.

104. — *Paragraph (c)* 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 on the basis of Article 17 even in respect of property which has been deposited with him under Article 16.

#### *Article 18*

105. — 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 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 undue 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).

106. — The reference to Article 16, paragraph 1 (b) is to introduce an exception to the general rule contained in this Article for it would seem 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 19*

107. — Article 19 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.

108. — Historically, the right under consideration may be regarded as a counterbalance to two particular features of the status of the hotelkeeper, namely his duty, in some countries at least, to accept all comers and his special liability with regard to the safekeeping of the property of his guests.

109. — These justifications are, however, as real today, 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 for in many cases payment will be requested only at the end of the guest's stay.

110. — In considering this widely accepted 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.

111. — As regards the property which the hotelkeeper might detain, the Committee considered that, as is the case under national laws, he may not detain the clothes actually worn by the guest as this would be tantamount to detaining the guest himself. In addition, he may not, by virtue of Article 20 (b) of the preliminary draft Convention, detain any vehicle, property left with a vehicle or live animals brought to the hotel by the guest (see commentary on that provision, paragraphs 120 to 125 *infra*).

112. — Finally, the Working Committee also considered that the right of detention should not apply in respect of 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 damage, for example, hotel property damaged by the guest, or in respect of sums of money which he may exceptionally have advanced to the guest.

113. — *Paragraph 2*, like paragraph 1, contains a general principle to be found in most national legal systems, namely that the hotelkeeper may, after giving 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. It is therefore provided that the procedures to be followed in connection with the application of paragraph 2 shall be in accordance with the law of the place where the hotel is situated.

114. — Nevertheless, the Committee felt that some minimum protection should be afforded to the guest under the future instrument, which therefore requires that the hotelkeeper, before causing the property detained by him to be sold, must send prior notice in good time to the guest at the address indicated by the latter when registering at the hotel.

115. — *Paragraph 3* touches upon a difficult question, namely the effect, if any, upon third party rights in property brought by the guest to the hotel

and subsequently detained by the hotelkeeper in conformity with paragraph 1 of Article 19. The Committee considered that this problem should not be dealt with in detail in the context of the future instrument, not only on account of the large number of different third party rights which might exist in the property such as ownership, pledge, lien *etc.*, but also because the precise legal character and effects of the hotelkeeper's exercise of his right of detention vary considerably from one country to another. In consequence, the intention of paragraph 3 is that all questions concerning a possible conflict between the hotelkeeper's right of detention and any third party rights which might exist over the property detained shall be determined by the national law applicable in the given case.

116. — The purpose of *paragraph 4* is to exclude the exercise of the hotelkeeper's right of detention over property when the guest provides a sufficient guarantee for the sum claimed or deposits an equivalent sum in the hands of a third party. This constitutes a satisfactory solution in two different factual situations, namely when the guest, while not disputing the sum payable to the hotelkeeper, is unable to settle the bill, as might happen if he were robbed of all the cash he had on his person, or where, while disputing the bill presented to him by the hotelkeeper for the accommodation and services provided, he wishes to avoid the exercise of the right of detention, as could be the case of a commercial traveller whose samples have been seized by the hotelkeeper.

#### *Article 20*

117. — This article contains three miscellaneous provisions which have been grouped together for the sake of convenience as each of them is relevant to the application of some or all of Articles 13 to 19 of the preliminary draft Convention.

118. — *Paragraph (a)* assimilates to the position of a guest that of any person who enters a hotel with the intention of requesting accommodation, even though no hotelkeeper's contract is actually concluded. The provision has been included for reasons of common sense and equity. To cite two examples, 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 such refusal is communicated to him. Such a person would, in the absence of the provision contained in Article 20 (*a*), 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. A second example would be when 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 such protection would be denied to the second who would be unable to conclude a contract because of lack of available rooms.

119. — The Working Committee therefore agreed in principle to the assimilation contained in paragraph (a) although one member expressed serious doubts concerning it in view of the difficulty in some cases of proving the intention of the person entering the hotel actually to request accommodation. He feared in particular that a person who was taking advantage merely of the ancillary services provided by a hotel might, if he suffered injury to his person or loss of, or damage to, his property, then claim that he had entered the hotel with the intention of requesting accommodation, in order to benefit from the provisions of the future Convention concerning the liability of the hotelkeeper, which give greater protection to guests than to other persons. It was therefore decided to retain Article 20 (a) provisionally but to place it in square brackets so as to indicate that it had not obtained the unanimous approval of the Committee.

120. — *Paragraph (b)*, which provides that the term « property brought to the hotel by the guest » shall not include vehicles, any property left with a vehicle or live animals, is inspired by corresponding provisions in the UNIDROIT draft (Article 7) and the Annex to the C. E. Convention (Article 7).

121. — The exclusion of vehicles and property left with them was felt to be justified for a number of reasons. In the first place, it would often be difficult to decide in practice whether vehicles were parked on the premises of the hotel and whether they were actually under the supervision of the hotelkeeper. Secondly, it was felt that 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. Thirdly, it was thought 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.

122. — The objections to the application to motor vehicles of the special rules governing the hotelkeeper's liability for damage to property were considered as being likewise relevant in the context of the hotelkeeper's right of detention and it was moreover pointed out that as the value of a motor vehicle would as a rule be considerably higher than a hotel bill, it would seem exaggerated to permit the hotelkeeper to detain the vehicle for payment of a small sum.

123. — A further difficulty would arise if vehicles were to be subject to the hotelkeeper's right of detention : this is part of a larger problem (referred to in paragraph 115 *supra*), 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. As the Working Committee had already decided that this general question should not be dealt with in the framework of the future Convention, this was yet another reason for excluding vehicles and property left with them from its application.

124. — As to live animals, they were not the subject of any lengthy discussion by the Committee, but in view of the provisions of a number of national laws and of Article 7 to the Annex to the C. E. Convention which couple them with vehicles for the purposes of exclusion from the special rules governing the hotelkeeper's liability to his guests, it was decided to refer to them also in paragraph (b).

125. — The Committee, however, recalled that in a certain number of States the special liability of hotelkeepers for property brought to the hotel by guests extends also to those categories excluded by paragraph (b). It considered, however, that it was unnecessary to make special provision in Article 25 for such States to make a declaration reserving their national law on this subject, as had been done in the Council of Europe Convention, since there was nothing in the wording of paragraph (b) to limit the power of the national legislator to extend the application of any of Articles 15 to 19 of the future Convention to such property should it so wish.

126. — *Paragraph (c)* 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.

127. — During the discussions on this provision, some members of the Committee expressed doubts as to whether it was really necessary since it reproduced a rule governing contractual relations to be found in the law of almost all States and the preliminary draft Convention was concerned with contractual obligations. It was, however, argued on the other hand that a guest might prefer to institute an action in tort against a hotelkeeper and that in some States he might well fail if the act causing the damage to him had been committed by an independent contractor. It was therefore decided to retain Article 20 (c).

*Article 21*

128. — 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. Conv. 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. The rule is thus particularly important in transport conventions where the carrier is permitted to limit his liability under the contract even in cases where he has been negligent but where, under the general system of liability for negligence, he might be unable to invoke the limitation in an extra-contractual claim. This case could not arise however in connection with the present preliminary draft Convention as it nowhere makes provision for a limitation on the hotelkeeper's liability when he has been negligent. Nevertheless, there might be cases where, under Article 13, paragraph 2 of the present draft, the hotelkeeper could escape liability under the contract by proving that he had used the diligence which the particular facts of the case called for but where he would be liable independently of fault under a given national law if an extra-contractual claim were brought against him.

129. — In these circumstances, the Working Committee decided in favour of the retention of Article 21 although it considered it unnecessary to include a complementary provision, to be found in many transport law Conventions, concerning the extra-contractual liability of persons for whom the hotelkeeper is responsible. The *raison d'être* of such a provision is to avoid the situation arising where the victim could obtain unlimited compensation from an impecunious servant, with whom he has no contractual relations, which he could not have obtained in the framework of the limited liability for negligence of the employer with whom he had originally concluded the contract. It was however considered that such a case could not arise under the preliminary draft Convention as in no cases is the liability of the hotelkeeper himself limited in cases of negligence.

*Article 22*

130. — Broadly speaking, the provisions of this Article follow those contained in a series of transport Conventions and, in particular, Article 31, paragraph 2 of the GMR and Article 21, paragraph 2 of the CVR.

131. — *Paragraph 1* provides an exhaustive list of the fora in which an action arising out of a hotelkeeper's contract may be brought. The first is that of the State on the territory of which is situated the hotel where the accommodation and services are provided. The second is that of the State on whose territory the defendant has his principal place of business or is habitually resident, or has the place of business through which the hotelkeeper's contract was concluded, this last possibility being included to cover cases where the guest has concluded a contract with an agent of the hotelkeeper (not simply a travel agent) in a State other than that in which the hotel is situated. The third forum is that 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.

132. — *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 CVR (doc. ECE/TRANS/5, para. 108) 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.

133. — *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*.

134. — 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.



135. — Although in the course of the discussions on Article 22 some doubts were expressed as to whether the grounds of jurisdiction set out in paragraph 1 were not too narrow, the Committee reached general agreement on paragraphs 1 and 2. However the view was strongly urged by one member of the Committee that although the rules on recognition and enforcement contained in paragraph 3 might prove satisfactory within a strictly European framework, it was doubtful whether they could be adopted to meet the needs of other States; the deletion of paragraph 3 would logically lead to that of paragraph 4 which is an explanation of the cases in which paragraph 3 shall apply. He considered that enforcement on the basis of comity would, in certain non-European countries, cover most of the cases arising under the Convention.

136. — In these circumstances, the Committee considered that some doubts might also arise in connection with paragraph 5 concerning security for the costs of proceedings, the utility of which is indirectly linked to the possibility of obtaining enforcement under paragraph 3.

137. — If, moreover, a future Committee of Governmental Experts were to decide in favour of the deletion of paragraphs 3 to 5, so that only paragraphs 1 and 2 remained, then serious difficulties might arise as it would be possible for cases to occur where the defendant would have property only in a State or States where no action could be brought against him or where execution could not be levied.

138. — In consequence, the Working Committee decided that the whole of the article should be placed in square brackets and a decision taken on it at a later stage.

#### *Article 23*

139. — Article 23 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 CVR but with some modifications.

140. — 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.

141. — 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.

142. — The cases where the period shall run as from the time the guest leaves the hotel are those where he actually leaves before, at, or after the expiry of the hotelkeeper's contract as agreed between the parties. In addition, the Committee considered that in cases of the death of the guest occurring during his stay at the hotel, then the day of death should be considered to be the time when the guest leaves the hotel. The only situation in which the period of limitation will run as from the time when the guest should have left the hotel is when he fails to take up the accommodation.

143. — In adopting the general solution contained in this paragraph, the Working Committee decided not to incorporate in the preliminary draft supplementary provisions similar 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 representatives) 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.

144. — *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 co-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.

145. — 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 law rules of that law.

*Article 24*

146. — This provision is largely based on Article 23 of the CVR and Article 41 of the CMR. The phrase in square brackets in *paragraph 1* would, if ultimately adopted, have 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 rail Conventions in view of the need to give uniform fixed directives to the railway administrations and in the road Conventions with a view to protecting small haulage companies from the consequences which such a rule might have on their ability to compete with large enterprises. Similar arguments were advanced against the phrase in square brackets by certain members of the Working Committee in connection with its repercussions on hotelkeepers who might find themselves in a position of weakness *vis-à-vis* large travel agents. It was, in addition, suggested that in some cases it might be difficult to judge whether a given stipulation is favourable or detrimental to the guest and in consequence it was felt that a final decision should be taken on it at a later stage.

147. — It goes without saying, however, 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.

148. — *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. There is, however, no objection to 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 25*

149. — This Article, if adopted, would be inserted in the final clauses of the future international instrument. *Paragraph 1* groups together a number of matters in respect of which States, at the time of signature, ratification or

accession, might wish to make a declaration permitting derogation from the rules set out in the Convention.

150. — The substance of the various paragraphs has been discussed above in connection with the provisions in respect of which the declaration might be made :

Paragraph (a) — Article 2 (para. 32 and 33 *supra*).

Paragraph (b) — Article 15, paragraph 2 (para. 89 *supra*).

Paragraph (c) — Article 15, paragraph 3 (para. 93 *supra*).

151. — *Paragraph 2* can only be completed once a decision has been taken on the person or body exercising depositary functions under the future Convention, to whom, or to which, the notifications containing the declarations referred to in paragraph 1 must be addressed.