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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS

FOR THE EXAMINATION OF THE PRELIMINARY DRAFT CONVENTION

ON THE HOTELKEEPER'S CONTRACT

O B S E R V A T I O N S

OF THE SWISS DELEGATION

on

the preliminary draft Convention

Rome, March 1977

I. Preliminary remark

Although we shall have to expect considerable opposition from the hotelkeepers who have already on several occasions refused the accession of Switzerland to the European Convention of 17 December 1962 on the Liability of Hotelkeepeepers concerning the Property of their Guests, we are in principle in favour of the idea of unifying the rules on the hotelkeeper's contract at an international level and feel that the preliminary draft drawn up by the UNIDROIT Working Committee is a good basis for discussion.

II. Observations concerning certain provisions of the preliminary draft

(Having received the text of Doc. 14 only very shortly before the end of the period fixed for the transmission of observations, the Swiss delegation has had to limit itself to a provisional examination of the proposed rules, hence the incomplete nature of the following observations. The delegation thus reserves the right to come back to points which it has not been able to deal with in the present document, during the discussions.)

re Article 1, paragraph 1 (Definition and field of application)

The "temporary" element introduced in the definition raises some problems as is could be interpreted or applied in practice very differently from one country to another. Moreover, while this element is of a certain importance as regards, in particular, the problems relating to the cancellation of the contract (Article 5 et seq. of the preliminary draft), it does not on the other hand play any part as regards the questions dealt with in Article 11 et seq., especially the rules on the liability of the hotelkeeper. In so far as it is a question of limiting the hotelkeeper's contract as against leases, it is not so much the length which is the determining factor but the extent of the guest/tenant's right to use the accommodation he is occupying as he wishes, or, from the point of view of the hotelkeeper/lessor, the degree of supervision he exercises over the accommodation. One can therefore, from the start, raise the question of the desirability of restricting the field of application of the Convention by a factor relating to the length of the duration of the contract. Another solution would be to take this element into consideration only in the context of the provisions on the termination of the contract while trying to define it in such a way as to avoid too great a divergency between the different national laws.

re Article 4, paragraph 2 (Tacit acceptance)

The question of whether the hotelkeeper's failure to reply to the guest's offer can be taken as an acceptance is a delicate one. Generally, tacit acceptance is rather an exception even though one could consider that the hotelkeeper, by offering his services to the public, creates a situation which could favour such a solution. Nevertheless, the rule adopted by the Working Committee would be difficult to apply when, for example, a reservation is made at such short notice that it is impossible for the hotelkeeper to reach the client to inform him of his refusal. Moreover, if, in such a case, the reason for the refusal is that the hotel is full, could one accept that a validly concluded contract be cancelled by the hotelkeeper's invoking force majeure (Article 6) ? Even if one is of this opinion, the solution seems to be a very complicated one. One would at least have to specify that tacit acceptance can only be accepted if the hotelkeeper has not refused the offer within a reasonable period of time". However, perhaps the best solution would be to require express acceptance as this would have the advantage of giving greater legal certainty to both parties concerned.

re Article 6 (Force majeure)

The concept of "force majeure" which forms the basis of this provision could create certain difficulties, not only because it has no exact equivalent in Anglo-Saxon law, but also because of the divergencies which exist between the different national laws and even within the literature on the subject in municipal law as regards its scope. As, in the framework of the provisions on the non-performance and the cancellation of the contract, we are dealing with a case of liability based on fault, one could perhaps consider a solution which would take account of the fact that "force majeure" basically means that the contracting party who finds himself in the impossibility to perform his obligations is not at fault. Besides, one can accept that an impossibility of this kind automatically extinguishes the obligation without it being necessary to require a formal cancellation of the contract. Thus Article 119, paragraph 1 of the Swiss "Code des Obligations" provides that:

> "The obligation becomes extinguished once performance becomes impossible owing to circumstances which are not ascribable to the debtor".

One can at this point even ask whether the rule laid down in Article 6 might not be left out completely as it is self-evident.

re Article 7 (Unforeseeable circumstances)

This provision would seem at first sight to be seeking to lay down the principle of the clause "rebus sic stantibus", which is already strange in the case of a contract which can be cancelled at short notice without any special reason (Article 5). But the requirement that the circumstances in question "affect the performance by the other party of his obligations" shows that in fact it is another situation which is envisaged: that of the non-performance or defective performance of the contract by one of the parties which render the performance of his obligations by the other party intolerable. If this is the kind of situation under consideration (and the examples given in paragraphs 52 and 53 of the Explanatory Report would seem to confirm this impression) then it is difficult to see what autonomous rôle Article 7 would be left to play as it would follow on automatically from the general rules on the non-performance of obligations that each of the parties may rescind the contract if the other party has not performed his obligations in accordance with the express or tacit agreement made. This would be the case both in the situation of the hotel being invaded by insects and in that of the guest contracting a contagious disease and the whole problem would then boil down to whether the contracting party, because of his being a hotelkeeper or in view of the particular wish giving rise to the circumstances may be considered to be at fault or not. If no fault can be imputed to him Article 6 applies; if on the contrary he must assume the liability for the situation which is inconsistent with the contract, Article 8 (for the hotelkeeper) or Articles 9 and 10 (as regards the guest) are applicable.

These considerations would seem to lead to the conclusion that Article 7 could be omitted without any unfavourable consequence ensuing for the rest of the rules governing the hotelkeeper's contract. If, on the contrary, one wishes to take account of what could be called a "subjective impossibility" as opposed to an "objective impossibility" (which would then fall under Article 6) one would have to discard the requirement mentioned under(b) of paragraph 51 of the Explanatory Report; this is however scarcely necessary, as was underlined at the beginning of the commentary on Article 7.

re Article 8, paragraph 2 (Refusal of an offer of alternative accommodation)

Here one may ask whether this provision is consistent with the principle of good faith which would require the guest to make an effort to minimize as far as possible the damage he has suffered to the extent that one could reasonably expect him to make the best of the situation. In the case of a lease, for example, Swiss case-law has deduced that the lessor is obliged to accept an "equivalent" tenant in exchange for the old tenant who is leaving the rented appartment before the expiry of the contract. This rule should in our opinion also apply to the situation envisaged under Ar Article 8, paragraph 2 of the preliminary draft. Moreover, the same idea could also be advanced in the context of Articles 9 and 10 if the guest who cancels the contract sends an "alternative guest" to the hotel in his place.

re Article 13, paragraph 3 (Strict liability for personal injury or death caused by food or drink)

In principle, the strict liability laid down in this provision corresponds to Swiss law if it is accepted that the hotelkeeper who provides food and drink is subject to the rules on the guarantee as regards defects in the goods in the same way as a seller or a producer. Indeed, Article 208 of the Swiss "Code des Obligations" provides that the seller must compensate the buyer for damages resulting directly from the delivery of defective goods, irrespective of any fault on his part. The only difference which would be introduced with the adoption of Article 13, paragraph 3 of the preliminary draft would concern the period of limitation, as the action against the seller on a guarantee is time barred one year after delivery (Article 210 of the Swiss "Code des Obligations") whereas Article 23, paragraph 1 of the preliminary draft provides for a period of three years from the time the guest leaves the hotel, in respect of physical or mental injury. It is to be feared that one of the main points of opposition of the hotelkeepers will be Article 13, paragraph 3 of the preliminary draft, as the applicability of the strict liability of the seller under a contract for the provision of food and drink has up to now never been retained either by caselaw or by "doctrine". Thus, most hotelkeepers do not consider themselves as falling under this régime of liability without fault and will defend themselves strenuously against the introduction of this "novelty", even if it is explained to them that they would have no hope of getting a better deal in the context of a system of liability for fault (with or without reversal of the burden of proof), in view of the severity with which courts normally judge fault.

However, it might perhaps be preferable somewhat to reduce the psychological impact of Article 13, paragraph 3 by presenting the principle of strict liability less openly. This could, for example, be done by a reference to the liability of the seller, which is extremely severe in most States as is shown by paragraph 76 of the Explanatory Report.

Another question which will simply be mentioned without our wishing or being able to answer it definitely at the present moment is the problem of the relationship between the liability of the hotelkeeper under Article 13, paragraph 3 of the preliminary draft and that of the producer of the food and drink in question, which might possibly be introduced on the basis of the European Convention of 27 January 1977 or of the Directive of the EEC adopted by the Commission on 23 July 1976.

re Article 14 (Grounds of exoneration).

With regard to paragraph 1 of this provision, one should consider whether it would not be more exact to speak of the "act or omission" of the guest and not only of his wrongful act or neglect, as it seems that the hotelkeeper should also be able to exonerate himself when the guest causes damage to himself by behaviour which could not be characterised as amounting to fault (such as that resulting from a lack of judgement) or if the act in question gives rise to strict liability on the part of the guest.

In this connexion, paragraph 2 of Article 14 is correctly formulated in the English version as it speaks of "acts or omissions" without specifying that this behaviour amounts to fault. We would however prefer an even shorter text which would only indicate that the third party "contributed" to the damage (without adding anything more). Moreover, the problem arises of what is the precise extent of this contribution. Indeed, the provision only seems to envisage the case of the co-liability of the hotelkeeper and a third party when the principle of joint and several liability applies. But what of cases in which the third party is the only one liable because his intervention "breaks the link in the chain of causation" on which the liability of the hotelkeeper was at first sight based? In such cases (to take a dramatic example: the guest is poisoned by his table companion who added a few drops of arsenic to his wine) the hotelkeeper should be completely exonerated and could not be required to compensate the guest (or his widow) on the pretext of joint and several liability. Thus the conditions of this joint and several liability should be specified in the text itself; merely mentioning the problem in the Explanatory Report (paragraph 82) is not sufficient. Finally, we wish to draw attention to the fact that the exoneration provided for under Article 14 seems only to apply to the case of the hotelkeeper being liable under Article 13, paragraph 3 as in respect of his "normal" liability which derives from paragraph 1 of the same provision, paragraph 2 allows him to exonerate himself, which automatically includes the possibility of invoking the grounds of exoneration provided for in Article 14. One might therefore wonder whether Article 13, paragraph 3 should not be moved to Article 14. Another solution would be to delete Article 14, since the grounds of exoneration of the victim or of a third party (as also that of "force majeure") and the principle of the joint and several liability of various persons who are liable, are recognised in all legal systems, or alternatively to maintain only the principle of joint and several liability in a general provision which would also apply to the situations covered by Article 15 et seq. of the preliminary draft.

re Article 15 et seq. (Liability for property brought to the hotel)

While in principle approving the general outline of this liability, we are very much aware of the difficulties we shall have in getting the Swiss hotelkeepers to agree to them as they are already opposed to the accession of our country to the Council of Europe Convention on the same subject. Our chances of success this time will certainly depend to a large extent on the ceiling of limitation to be fixed in Article 15, paragraph 3.

With regard more especially to Article 18, we would prefer a still strictle requirement that the guest should lose his rights "if he does not inform the hotelkeeper of the damage as soon as he discovers it" (see Article 489, paragraph 1 of the Swiss "Code des Obligations").

re Article 19, paragraph 3 (Rights of third parties in case of detention)

This provision does not seem to correspond to the explanation given under paragraph 115 of the Explanatory Report. Indeed, it categorically specifies that the rights of third parties may on no account be affected by the exercise of the right of detention by the hotelkeeper, whereas according to the Report it would merely appear to be a question of specifying that problems of this type shall be determined by the national law. It would therefore be preferable to express this idea directly and clearly rather than wrapping it up in the conditional by speaking of third party rights which "may" exist over the property in question.

re Article 20 (a) (Persons assimilated to a guest)

We share the doubts expressed as regards this provision, in paragraph 119 of the Explanatory Report. The subjective criterion of "the intention of requesting accommodation" could in fact encourage abuse. A possible solution could perhaps be that of assimilating to a guest only such persons as are in the hotel and who have already begun negotiations with a view to concluding a hotelkeeper's contract. In any case, it will not be possible to exclude border-line cases totally as it is, for example, just as difficult to explain why the guest should be better protected than a person who has come to visit him or is accompanying him (see Art. 17 (a)). It is to be noted in passing that the first example given in paragraph 118 of the Explanatory Report to illustrate the rule retained by the Working Committee (case of a guest who presents himself at the Reception desk after having made a reservation and who is injured or is robbed before the hotelkeeper has been able to inform him of his refusal) is a good illustration of the problem

that we have brought up when discussing the question of implied acceptance (re Article 4, paragraph 2). Finally, it should be noted that the extension of liability to a pre-contractual situation, as proposed under (a) of Article 20, naturally brings up the question of whether an analogous extension should not be provided for post-contractual situations as well, a point which does not seem to have been envisaged by the Working Committee. We are thinking in particular of the very frequent case in which the guest forgets some of his belongings in the hotel on leaving, or of the case in which the guest knowingly, and after having obtained the hotelkeeper's permission, leaves an object in the hotel after the expiry of the contract with the intention of returning to fetch it later on.