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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 Central Organization of Hotel- and Restaurant-keepers in
DENMARK
on
the preliminary draft Convention

Rome, April 1977

By a letter dated 1 April 1977, the Danish Embassy in Rome brought to the attention of the Secretariat of UNIDROIT the following observations on the preliminary draft Convention on the Hotelkeeper's Contract of the Central Organization of Hotel - and Restaurant-keepers in Denmark.

Article 4, paragraph 2

The hotelkeeper would have to give a written reply in order to be able to prove that he has not failed to reply.

Article 6

The term "force majeure" should be precisely defined.

Article 7

The wording of both paragraphs 1 and 2 is ambiguous and could be interpreted in a number of ways. The sequence: "which would have prevented a reasonable person from entering into the contract" is especially vague and inaccurate.

Article 8, paragraph 1

The last clause gives the guest access to present unlimited claims for damages including damages resulting from pain and suffering. This kind of compensation should be specified.

Article 9, paragraph 1

(a) seems unreasonable, instead damages should in such cases be specified as 100% of the price of the accommodation.

Article 13

The wording leaves room for various interpretations. For instance the liability of the hotelkeeper for loss or damage resulting from mental harm caused by an accident occurring on the premises of the hotel seems rather problematic.

Paragraph 3 seems unrealistic because it would imply that a hotelkeeper would be responsible for damage resulting from providing fresh food towards which a guest might be allergic. The responsibility of the hotelkeeper could only be defined as providing food made from fresh goods.

The first session of UNIDROIT's Committee of Governmental Experts for the examination of the preliminary draft Convention on the hotelkeeper's contract was held in Rome at the headquarters of the Institute from 28 March to 1 April 1977.

The session was opened at 10.30 a.m. by the President of UNIDROIT, Mr. Mario MATTEUCCI, who extended a warm welcome to the participants representing 18 member States of the Institute, 2 non-member States and 2 Organizations concerned with the interests of the hotelkeeping industry (see APPENDIX I).

On a proposal of the Representative of Switzerland, seconded by the Representative of Austria, the Committee unanimously elected as its Chairman Mr. J. P. PLANTARD (France).

On a proposal by the Chairman, the Committee adopted the draft agenda prepared by the Secretariat of UNIDROIT which is reproduced in APPENDIX II hereto.

Item 2 on the agenda - Examination of the preliminary draft Convention on the hotelkeeper's contract. (1)

In opening discussion on this item the Chairman recalled that the mandate to work out uniform provisions on the hotelkeeper's contract dated back to the Brussels Diplomatic Conference of 1970 at which the International Convention on the Travel Contract (CCV) had been adopted. He stated that as regards his own authorities they had not yet taken a final stand as regards their attitude to the preliminary draft Convention. On the one hand it seemed to present advantages in that it offered increased legal protection to the consumer, in this case the guest, but on the other it continued the trend which had for some time been observable of establishing special rules for individual sets of contractual relations, which was detrimental to the general principles of the law of contract and which could complicate still further the task of practising lawyers.

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- (1) Rather than producing a lengthy minute of the discussions, the Secretariat has limited itself to indicating the points raised, views expressed and proposals for amendment to each article. For the sake of the reader's convenience, the summary of the discussions on each article is preceded by the text drawn up by the Working Committee while the new texts provisionally approved by the Committee are reproduced in APPENDIX III hereto.

By way of general comment, the Representative of Ireland stated that his own country had ratified the Council of Europe Convention of 1962 on the Liability of Hotel-keepers concerning the Property of their Guests and enquired why that instrument was apparently considered to be inadequate. He could see that there might perhaps be some case for reconsidering provisions dealing with limitation of liability but requested guidance on why it was felt necessary to elaborate an entirely new Convention.

In reply, the Chairman stated that there were essentially two reasons for this initiative. In the first place the Council of Europe Convention was a regional instrument which had been prepared in the context of a restricted group of States, while secondly it was limited in its subject-matter to the problems associated with the liability of the hotel-keeper in respect of property brought to the hotel and thus did not cover such important questions as, for example, personal injuries, the formation of the contract, jurisdiction etc. He reassured the Representative of Ireland however that in the preparation of the preliminary draft Convention which was now before the Committee, the Working Committee chaired by Professor Loewe had made every effort to avoid any incompatibility between the provisions of the two instruments.

After noting that no other delegation wished to make any general comments on the draft Convention the Chairman proposed that the Committee commence an article by article examination of it.

The Committee agreed to this proposal. (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.

(1) In addition to Study XII - Doc. 14, containing the text of the preliminary draft Convention prepared by the Working Committee and the explanatory report drawn up the Secretariat, the Committee also had before it the documents listed in APPENDIX IV hereto.

In view of the lengthy discussion which centred on this article and the variety of points raised in connexion with it, the Secretariat has summarized separately, where possible, the views put forward in respect of the different aspects of the provision.

- (a) The concept of the "hotelkeeper's contract" as the basis of the future Convention.

While certain delegations found this approach to be quite acceptable, other representatives from Common Law systems considered that it would be better to deal with the matter through an analysis of the respective rights and obligations of the hotelkeeper and the guest. Such an approach would, they submitted, focus attention on the essential points to be regulated by the future instrument and at the same time make it possible to overcome a number of difficulties which might arise with the use of the term "parties", especially if the future Convention were to cover contracts between hotelkeepers and tour organizers contracting as principals in their own right. As a result of these observations certain modifications were made to later articles in the draft.

- (b) The applicability of the future Convention to contracts concluded between hotelkeepers and tour organizers.

A number of representatives drew attention to the fact that although the explanatory report stated that the draft was not intended to apply to contracts of this nature, there was no such exclusion in any article of the draft. This point was one of the utmost importance and could not be settled merely by a reference in the commentary, in particular bearing in mind that in a number of States no, or only very limited, reference to the "travaux préparatoires" is permitted. On the substance of the question, there seemed to be general, though provisional, support for the view that the Convention should apply irrespective of whether the guest had contracted directly with the hotelkeeper or whether the contract had been concluded by a tour organizer or other operator acting as principal and it was agreed that delegates should raise the matter with their national authorities so that at the next session of the Committee it would be possible to take a decision on the issue and to decide which, if any, articles would have to be amended to take account of a decision to extend the application of the draft to contracts other than those originally contemplated by the Working Committee. Finally, in this context, one representative pointed out that even if the scope of the future instrument were to be limited to contracts concluded by the guest acting as principal, there might still be cases in which the booking might be a group booking and in those circumstances it might be necessary to introduce some special rules to cover them, for example in connexion with cancellations of reservations.

(c) Definition of the hotelkeeper.

A number of representatives noted that the article contained no definition of the term "hotel", which was however indirectly defined by the definition of a hotelkeeper as one who "undertakes, for reward and on a professional basis" to provide another person with accommodation and ancillary services. While there was no appreciable degree of support for a suggestion to the effect that the term "hotel" be defined by reference to different types of establishment such as hotel, pension, motel, etc., a number of delegates were of the opinion that various types of establishment offering accommodation against payment should be excluded. Among those mentioned were youth hostels, voluntary organizations, university halls of residence, holiday homes provided by firms for their employees and religious houses. With a view to overcoming this difficulty it was suggested that provision might be made in Article 25 for States to enter a reservation in respect of the application of the future Convention to certain categories of establishments offering accommodation and, in the hope of coming to a decision at the next session of the Committee, it was agreed that delegations should give thought to the possibility of excluding from the scope of application of the draft the following:

- i. non-profit making establishments (such as those run by voluntary organizations, religious houses and certain youth hostels);
- ii. establishments whose primary aim is not the provision of accommodation (for example university halls of residence, firms providing holiday homes, hospitals and clinics);
- iii. establishments which are not open to all comers (such as convents, youth hostels, clubs etc.).

One delegation considered that caution should be exercised before taking any decision to exclude completely specific types of accommodation from the application of the future Convention and that it might be necessary only to exclude the application to them of certain provisions. Moreover, the exclusion of certain establishments might have undesirable consequences from the point of view of limitation of liability.

Finally, in connexion with the definition of "hotelkeeper", one representative whose Government had already ratified the Council of Europe Convention stated that his country would have difficulty in accepting a new instrument if the nomenclature of "hotelkeeper", employed in national legislation to give effect to the Council of Europe Convention, were not to be retained.

(d) Definition of the guest.

Difficulties of two different kinds were alluded to by various delegations in this connexion. On the one hand it was pointed out that the term "client" in the French text was less precise than its English equivalent "guest". It was, however, decided to retain it, partly because the alternatives of "hôte" and "voyageur" were unsatisfactory and partly because it is apparent from the wording of Article 1 that the hotelkeeper undertakes to supply the guest (client) with accommodation, a form of wording which would exclude the possibility of the word "client" being understood to cover a tour organizer in the event of a contract being concluded between such a person and the hotelkeeper.

The other problem was raised by the representative of one of the Common Law countries who noted that although the draft was founded on the notion of the hotelkeeper's contract, it was quite likely that a guest (wife or children for example of the person who had concluded the contract) might have no contractual relations with the hotelkeeper. This was in his view an additional reason for breaking away from the notion of contract and concentrating on the status relations of the hotelkeeper and the guest.

(e) The duty to provide accommodation and ancillary services.

Several delegations insisted that this provision must be taken to mean that a hotelkeeper's contract cannot arise if the guest is provided only with certain ancillary services, for example a meal in a hotel restaurant, without being provided with accommodation. In addition it was agreed that the ancillary services to which the provision refers are those basic ones such as the provision of light, water etc. which are indispensable for the performance of the contract to provide accommodation.

(f) The requirements that the accommodation be temporary and that the establishment in which it is provided remains under the supervision of the hotelkeeper.

Some members of the Committee considered that if the main purpose of the requirement that the accommodation be temporary was to distinguish a hotelkeeper's contract from a contract to lease premises then it was unnecessary in view of the added requirement that the establishment remain under the supervision of the hotelkeeper. It was nevertheless decided to retain the reference to the accommodation being temporary out of deference to the wishes of several delegations whose representatives considered that it would assist them in distinguishing a hotelkeeper's contract from other contracts under their national law.

The Committee thus provisionally adopted paragraph 1 of Article 1 without any amendments.

At the suggestion of two delegations, the English text of paragraph 2 was amended by the substitution for the word "operating" of the phrase "being operated as such", which would stress still further the intention to exclude from the sphere of application of the future instrument accommodation in vehicles whose primary function remained that of carriage.

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.

While noting that this provision is linked to the reservation permitted under Article 25, paragraph 1 (a) of the draft, the Committee limited its attention to Article 2. In the light of the foregoing discussion in the context of Article 1 on the desirability of defining more precisely in the future instrument the term "hotel" or of giving a list of the types of establishment to be covered by the draft, the Committee decided to replace the word "hotel" by "premises" and to consider, throughout the draft, the desirability of using one or the other of these two terms according to the circumstances.

Article 3

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

In the course of a brief discussion on this article, it was pointed out that the difference in presentation of the English and French texts, which had been taken over from the corresponding article of the 1964 Uniform Law on the International Sale of Goods, did not imply any difference in meaning. Indeed the same texts had, subject to a few very slight drafting amendments, been retained in the new version of the law on sales currently under preparation by UNCITRAL.

One representative considered however that some difficulties might arise for his country in connexion with the absence of any requirement as regards writing, as there were proposals being made there that contracts involving sums in excess of a certain amount should be evidenced in writing. This was, however, only a proposal and he did not think that serious difficulties would be likely to arise in this context in view of the large proportion of hotelkeeper's contracts concluded by telephone. Finally he stated that he would revert to the question of the need for writing in respect of certain articles, such as Articles 9 and 11, which permitted the parties to contract out of provisions contained therein.

Article 3 was provisionally adopted without any change.

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.

There was general support for the principle enunciated in paragraph 1, subject to the addition of a reference to the ancillary services and of the word "requested" after "accommodation and ancillary services" so as to indicate that there must be agreement on the precise terms of the contract and to avoid any possibility of the guest's being bound by a counter-offer from the hotelkeeper proposing different terms. In addition the words "for a specified day" were deleted on the grounds that they were at the least superfluous and might even be dangerous if a hotelkeeper interpreted as meaning that a contract was not concluded if a hotelkeeper accepted an offer by a guest to take up accommodation, for example, "on about the 1st of May" or "near the end of April".

Paragraph 2 was, on the other hand, the subject of lengthy debate. It was in the first place recalled that the principle according to which the hotelkeeper is presumed to have accepted the guest's offer if he does not reply had been justified on the grounds that in practice a hotelkeeper often does not reply to a regular guest's request for a room unless he has none available, secondly because such a rule would contribute to unification, thirdly because it would give certainty to the guest that accommodation has been reserved for him and, finally, from a theoretical standpoint, in that it is possible to analyze the hotelkeeper's contract

as one in which a standing offer is made by the hotelkeeper to provide accommodation, subject to availability, to the public at large which is accepted by the guest when he requests accommodation.

This approach was however rejected by a very large number of delegations for a variety of reasons which may be summed up as follows:

- i. The theoretical justification of the rule set out in paragraph 2 did not seem to be a natural way of interpreting the acts of the parties which constitute offer and acceptance inasmuch as it would permit the conclusion of a contract the precise terms of which might be unknown to the hotelkeeper, and might allow a guest to obtain accommodation by fraudulent means (as for example where he falsely claims to have requested accommodation at a fashionable resort in high season and seeks to force the hotelkeeper to provide him with alternative accommodation).
- ii. Assuming therefore that it is the guest who makes the offer, the principle of tacit acceptance is an exception to rather than a rule of general contract law and as such should be invoked only in special cases (for example in the interests of consumer protection).
- iii. It is difficult to see how the rule set out in paragraph 2 could be regarded as increasing certainty or of working in favour of consumer protection as many guests, not receiving a reply, would make alternative arrangements with another hotelkeeper which, in accordance with paragraph 2, would mean that they might be bound by two hotelkeeper's contracts.
- iv. Even allowing for the fact that the hotelkeeper is a professional and therefore in some respects in a stronger position than the guest (although not always, as for instance when he is dealing with a large tour organizer), it is difficult to see why the rule contained in paragraph 4 should not operate in reverse so that the failure of the guest to reply to a counter-offer of the hotelkeeper should not also be interpreted as tacit acceptance.
- v. The principle of tacit acceptance by the hotelkeeper might well serve the interests of unification by laying down a rule of general application but to the extent that it raised fundamental questions of offer and acceptance in the law of contract which are solved in different ways in different legal systems, it might have the effect of discouraging acceptance of the future Convention on the hotelkeeper's contract.
- vi. The rule would be virtually inapplicable or would work to the prejudice of the hotelkeeper in cases where the request was made by post at very short notice. Certain suggestions for some kind of compromise solution along the lines of introducing the requirement that the hotelkeeper should reply within a reasonable time if he does not wish the contract

to be concluded by tacit acceptance were also rejected, partly because of the difficulties of interpreting the notion of "a reasonable time", and partly because of the fears of certain delegations of the administrative burdens which might be placed on small establishments if they were to have to reply to every request for accommodation.

In consequence the Committee decided to delete paragraph 2 of Article 4 and to amend paragraph 1 so as to establish the converse principle, namely that a hotelkeeper's contract is concluded only when the hotelkeeper has expressly agreed to furnish the guest with the accommodation and ancillary services requested by him.

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.

While the Committee was generally speaking satisfied with the mechanism laid down in Article 5, a number of criticisms and suggestions for improvement of the text approved by the Working Committee were made. These may be summed up as follows:

i. It was necessary to refer to the explanatory report and not in any way clear from the text itself that a request for accommodation for "four or five days" or for "six to eight weeks" was to be taken as giving rise to an offer to take up accommodation for four days or six weeks. It was

therefore proposed that the text refer specifically to the earliest date or shortest period defined in the request. Similarly no definition was given of periods such as a week or a month and it was suggested that they be defined in the text. In this connexion one representative considered that in the case of a request for accommodation of the type of "six to eight weeks" the mean should be taken while as regards terms such as "one month" he referred to the definitions contained in the Council of Europe Convention on Time Limits.

ii. The Committee did not consider it necessary to retain the provisions whereby the date for termination of contracts concluded for an approximate period of time could be fixed by the hotelkeeper three days in advance and by the guest one day in advance of such date. Once the determined period for which the contract was deemed to be concluded had expired it was for the guest and the hotelkeeper to decide whether the guest should continue to occupy the accommodation on the basis of a further contract for a determined period or on a day to day basis under a contract for an indeterminate period.

iii. Some delegations objected to the use of the word "renewal" in the context of paragraph 2 as it was possible that a guest who first occupied accommodation under a contract concluded by someone other than himself, for instance a tour organizer, might wish to remain after the expiry of that contract. If he then concluded the contract directly with the hotelkeeper it would be incorrect to speak of a renewal of the contract. It was furthermore pointed out that, whereas paragraph 2 made provision for the guest to continue to occupy the accommodation on a day to day basis under a contract for an indeterminate period, the article was silent as to the possibility for a guest accommodated under a contract for a determined period to do so.

iv. The Committee also deemed it superfluous to define a contract for an indeterminate period as being one whose duration is for one day. It maintained the rule that the guest shall continue to enjoy the right to occupy the accommodation in such cases however where neither he nor the hotelkeeper has given notice before midday or any other reasonable time provided for in the contract or in the regulations of the hotel.

v. In view of certain remarks which were made about the hotelkeeping practice of allowing guests occupying accommodation to do so after the expiry of the contract with the consequence that later guests were unable to take up the accommodation which they had reserved, it was agreed that the new drafting of Article 5 should make it clear that a guest who continues to occupy accommodation originally occupied by him on the basis of a contract for a determined period may only do so on the basis of a new contract (see the wording of the new paragraph 2).

vi. Finally it was agreed that the former paragraph 3 of Article 5, which deals with the hour at which the guest must vacate the accommodation, would be more appropriately placed with the other provisions regarding the obligations of the guest and it was therefore moved to the new Article 8 of which it constitutes paragraph 2. The Committee also agreed to amend the provision so that it no longer lays down the rule that the accommodation must be vacated

by 2 p.m. unless the contract or the regulations of the hotel stipulate otherwise, but rather make the 2 p.m. rule a residuary one in the event of the absence or unreasonableness of provisions in the hotelkeeper's contract or the regulations of the hotel.

The new text of Article 5 as provisionally adopted by the Committee is contained in APPENDIX III hereto.

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.

Broadly speaking the members of the Committee were in favour of the retention of this provision although they considered that its position in the draft should be changed and that it should be placed after the series of articles dealing with the respective rights and obligations of the hotelkeeper and the guest. There was, however, lengthy debate as to whether the term force majeure should be retained in the English text. One delegate argued strenuously in favour of so doing as he recalled that it was in harmony with the language of the 1962 Council of Europe Convention on hotelkeeper's liability which formed the basis of his country's present legislation in this field. He would therefore have considerable misgivings about introducing a different form of wording into this draft. There was on the other hand a certain body of opinion which favoured speaking in the French text of "un événement imprévisible et insurmontable", which has been rendered in the English version by the words "an unforeseeable and irresistible event". It was however agreed that this question would not be finally decided until the second reading of the draft at a later session.

Another delegate drew attention to the introductory wording of Article 6 which seemed to exclude the possibility of a tour organizer invoking the provisions of Article 6 in an appropriate case, always assuming that contracts of this kind will be covered by the future instrument, inasmuch as the power to cancel the contract is given only to the hotelkeeper and the guest. This same delegate further observed that in such a case the guest would not even be a party to the contract so that the reference to the "other party" in line 3 could not be taken as referring to him. To obviate this difficulty it was decided to reformulate the wording of the article as follows: "The contract may be cancelled before or during the occupation of the accommodation by the guest and without payment of damages ...".

The Committee also considered whether in cases of objective impossibility for the hotelkeeper or the guest to perform the contract, provision should be made for notification. Although a final decision was not taken on this matter it was pointed out that any requirement of notification would be necessary only in cases where the event giving rise to the cancellation of the contract arose before the guest had actually taken up the accommodation.

Finally, it was suggested that the Secretariat, when revising the explanatory report, might possibly indicate some of the situations which it was intended to cover in Article 6 (now Article 9 in the new draft contained in APPENDIX III hereto).

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 7 was the subject of considerable criticism which may be summed up as follows:

i. It was felt that from a purely presentational point of view it was unsatisfactory to deal with the obligations of both the guest and the hotelkeeper in the same article, thus following a sort of parallelism with the former Article 6. Such an approach led to complexity and obscurity in drafting.

ii. By insisting, as the Working Committee had done, on the approach whereby the obligations of the guest and hotelkeeper were in effect defined only indirectly by referring to the situation in which the other person would be justified in rescinding the contract for reasons of subjective impossibility, the contractual as opposed to the status relations of the parties were once again given undue prominence.

iii. Some delegations found the phrase "affecting the performance by the other party of his obligations" to be particularly obscure.

iv. Some delegations also expressed concern about the fact that paragraph 2 of the article was introducing the concept of liability for fault and, to the extent that the provision was concerned with breach of contractual obligations, they found this formula to be unacceptable.

v. Certain delegations found the examples of the situations referred to by the Secretariat in its commentary on this provision to be not very convincing.

In consequence the Committee decided that a new approach should be adopted. On the one hand, the respective rights and obligations of the guest and the hotelkeeper should, except for the provision on force majeure, be dealt with in separate articles whereas, on the other, cases of partial failure by the hotelkeeper to perform his obligations under the contract contemplated by Article 7 (for instance providing accommodation inferior to that agreed to in the contract) and cases of total, failure to perform (providing the guest with no accommodation whatsoever as a result of overbooking) dealt with in Article 8 should be covered by a single article indicating the consequences of the hotelkeeper's failure to perform his obligations (1).

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.

The Committee agreed that the hotelkeeper who fails to provide the guest with accommodation promised by him under the terms of the contract because he has overbooked should be liable to the guest for damage sustained as a result. While being opposed to the introduction into the text of criteria for limiting the damage in respect of which the hotelkeeper should be held liable, such as foreseeable or direct damage, the majority nevertheless considered that the guest should under no circumstances be entitled to recover punitive damages and the new Article 6, which also covers cases of partial failure to perform, excludes the possibility of punitive damages being awarded by speaking of damage "actually suffered" by the guest. It was however considered wiser to leave the question of the award of damages for non-material damage to be determined by each legal system according to its own general principles.

(1) See also the discussion on Article 8.

On a second point, the Committee was of the opinion that the requirement that the hotelkeeper should "make every effort to ensure that the guest is provided with at least equivalent accommodation" was not sufficiently stringent and it accordingly decided that the hotelkeeper should ensure that the guest is able to conclude a contract on terms equivalent to those included in the original contract. The new draft, which provides that the hotelkeeper shall be relieved of liability if he satisfies the above-mentioned requirement, has the added advantage of indicating that as from the conclusion of the new contract, presumably with a different hotelkeeper, the first hotelkeeper is no longer liable, except for any reasonable expense entailed for the guest by the substitution.

The Committee also considered that the second paragraph of Article 8 as drafted by the Working Committee was inequitable if the prevailing interpretation to the effect that the guest could refuse equivalent accommodation and bring an action against the hotelkeeper for damages was the correct one.

The new Article 6 prepared during the session by a Drafting Committee thus deals with the situation formerly covered by Article 7 of partial failure to perform and also that contemplated by Article 8 of overbooking. It should in addition be noted that the new paragraph 2 of Article 6, making provision for the hotelkeeper to be relieved of liability if the guest is enabled to conclude a contract on equivalent terms, applies therefore also to cases of partial failure to perform (for example where the hotelkeeper fails to provide a room with a view overlooking the sea as promised).

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 $\frac{\quad}{\quad}$ 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 $\frac{\quad}{\quad}$ 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.

While the representatives of the hotelkeeping interests argued against the limitation of the liability of the guest for which provision had been made by the Working Committee under the provisions of Articles 9 and 10 of the draft, a large majority of the delegations of the States represented at the session viewed such a limitation with favour. The two main reasons advanced were that such a principle met the growing demand for consumer protection and that, in many cases, notwithstanding the fact that the future instrument provided for recovery by the hotelkeeper only in cases where he had actually suffered loss, a guest would in effect be prepared to pay the compensation due under the Convention even though the hotelkeeper might by reletting the room in question suffer less damage than that for which he would be compensated, or even none at all.

The second question of principle raised in connexion with these two articles was that of whether it should be possible for the guest and the hotelkeeper to agree to alter the limits provided for in the draft. In this context it was pointed out that according to the circumstances either the guest or the hotelkeeper (contracting with a large tour organizer) might be the economically weaker party and in consequence the Committee decided to leave until a later session the taking of a final decision on whether the possibility should be left to the parties to contract out of the provisions of the Convention and, if so, whether such an agreement should be in writing. The phrase "in the absence of agreement to the contrary" was therefore left in square brackets, it being understood that the Secretariat would enquire further into the precise terms and status of the existing arrangements under international agreements between hotelkeepers' and travel agents' organizations.

The Committee was, however, unanimous in finding that the definition in Article 9, paragraph 1 (a) of a contract for an indeterminate period was nothing more than a repetition of the definition in Article 5 and a new approach was adopted whereby a distinction was provisionally adopted between contracts for periods of two days or less, between three and seven days and more than seven days. It was stressed that these periods were purely indicative as were the percentage figures and that it was merely the general mechanism which had been provisionally adopted. Similarly, the periods within which the guest, by giving notice of his intention not to occupy the accommodation or to relinquish it before the end of the contractual period, might be relieved of his obligation to pay compensation to the hotelkeeper, to which reference is made in the new Article 7, are also to be considered as simply providing a basis for discussion at future meetings of the Committee and as in no way indicating any measure of agreement of the different delegations.

At the request of one delegation, a provision was also introduced requiring that the hotelkeeper should endeavour to mitigate any damage suffered by him, which in practice puts an obligation upon him to attempt, within reasonable limits, to relet accommodation which has not been taken up or which has been relinquished by a guest in breach of his contractual obligations. This provision (the new Article 7, paragraph 2) corresponds to the implied requirement that the guest mitigate damage suffered by him in that he may only recover damages under the new Article 6, paragraph 2 in respect of reasonable expense incurred for him by the substitution of the accommodation contemplated under the original contract.

It should, finally, be noted, that the new Article 7 is so worded as to leave it open whether the guest, or a tour organizer contracting on his behalf, should be liable under its provisions.

Article 12

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

Although the Committee did not have time to enter into an exhaustive examination of this article, there was nevertheless general agreement that the obligation of the guest to observe any reasonable regulations of the hotel should be transposed to an article grouping together the obligations of the guest and this without deciding whether such regulations are to be regarded as forming part of the contract or rather as "by-laws". Detailed consideration of the precise meaning of the term "notice" and the possibility of introducing any language requirements was deferred until a later session of the Committee.

Item 3 on the agenda - Other business

The Committee decided that its second session should be held at the headquarters of the Institute in Rome from 1. to 16 December 1977.

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APPENDIX II

A G E N D A

1. Election of the Chairman
2. Examination of the preliminary draft Convention on the hotelkeeper's contract
3. Other business.

REVISED DRAFT ARTICLES

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 being operated as such in any mode of transport.

Article 2

This Convention shall apply to any hotelkeeper's contract, where the premises in which the accommodation is to be provided are 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

A hotelkeeper's contract is concluded as from the time when the hotelkeeper expressly agrees to furnish the guest with the accommodation and ancillary services requested.

Article 5

1. A hotelkeeper's contract may be concluded for a determined or an indeterminate period.

2. If a hotelkeeper's contract is concluded for a determined period, the guest may continue to occupy the accommodation on the basis of a new contract.

3. A contract concluded for a period of time defined approximately shall be deemed to be concluded for a determined period. The termination date of such a contract shall be determined by reference to the earliest date or shortest time mentioned in the period defined. For the purpose of this provision approximate references to a week are to be taken as seven days and to a month as twenty-eight days.

4. If a hotelkeeper's contract is concluded for an indeterminate period, the hotelkeeper or the guest may terminate it by expressing his intention in this regard to the other before midday, or such other reasonable time as may be provided by the hotelkeeper's contract or the internal regulations of the hotel.

Article 6

1. The hotelkeeper shall provide the guest with the accommodation and ancillary services requested; to the extent that he fails to do so, he shall be liable for the damage actually suffered by the guest.

2. He shall however be relieved of liability to the extent that he ensures that the guest is enabled to conclude a contract on terms equivalent to those included in the original contract. The reasonable expense which this substitution entails for the guest shall be met by the hotelkeeper.

Article 7

1. The hotelkeeper shall be entitled to compensation for any damage actually suffered by him on account of the guest's failure to occupy the accommodation requested for the whole or any part of the period stipulated.

2. The hotelkeeper shall take reasonable steps to mitigate the damage suffered by him.

3. In the absence of agreement to the contrary, compensation payable to the hotelkeeper under this article shall not exceed:

(a) [75] percent of the price of the accommodation and the ancillary services provided for in the contract in respect of the first [two days], and

(b) [40] percent of the price of the accommodation and the ancillary services provided for in the contract in respect of the following [five days], no compensation being payable in respect of any subsequent days.

4. In the absence of agreement to the contrary, no compensation shall be payable if the hotelkeeper has been informed of the cancellation of the reservation:

(a) for a stay not exceeding two days, not later than midday on the day on which the accommodation was to be occupied;

(b) for a stay of from three to seven days, not later than two days before the date on which the accommodation was to be occupied;

(c) for a stay exceeding seven days, not later than three days before the date on which the accommodation was to be occupied.

5. In the application of the provisions of this article to cases in which the guest relinquishes the accommodation before the termination date of the contract, the requirement of notice under paragraph 4 shall be determined by reference to the date on which the guest relinquishes the accommodation.

Article 8

1. The guest shall observe such reasonable regulations of the hotel as are duly brought to his notice.

2. The guest may be required to vacate the accommodation occupied by him on the day of the termination of the hotelkeeper's contract at such reasonable time as is provided by that contract or by the regulations of the hotel. If no such time is specified, the guest may occupy the accommodation up to 2 p.m.

Article 9

The contract may be cancelled before or during the occupation of the accommodation by the guest and without payment of damages when, as a consequence of an unforeseeable and irresistible event, it is impossible for the hotelkeeper to provide, or for the guest to occupy, the said accommodation.

APPENDIX IV

LIST OF DOCUMENTS DISTRIBUTED DURING THE SESSION

- Study XII - Doc. 13 -- Observations of members of the Governing Council
on the preliminary draft Convention on the Hotel-
keeper's Contract (Secretariat Memorandum)
- Study XII - Doc. 15 - Observations of the Austrian Government
- Study XII - Doc. 16 - Observations of the Swiss Delegation
- Study XII - Doc. 17 -- Observations of the Spanish Delegation
- Study XII - Doc. 18 - Observations of the Government of Morocco
- Study XII - Doc. 19 - Observations of the Government of India.