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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

OBSERVATIONS

of Governments on Articles 13 to 25
of the preliminary draft Convention

(Secretariat memorandum)

Rome, November 1977

INTRODUCTION

On the occasion of its 1st session, held in Rome from 28 March to 1 April 1977, the Committee of Governmental Experts for the examination of the preliminary draft Convention on the Hotelkeeper's Contract proceeded to a first reading of Articles 1 to 12 of the draft. The text of the revised version of these articles is to be found in Annex III to the Report of that session, contained in Study XII - Doc. 21.

With a view to facilitating the task of the Committee at its 2nd session when it will consider Articles 13 to 25 of the draft as reproduced in Study XII - Doc. 14, the Secretariat has prepared the present document which sets out the observations so far received of the various Governments on these articles.

Article 13

AUSTRIA

"In connexion with Article 13, the introduction of a limitation of liability should be considered also in cases of damage resulting in the death of, or injury to, the guest. Provision might for example be made as in certain conventions of the Economic Commission for Europe for Contracting States to fix certain limitations of liability; these should not however be allowed to descend below a certain minimum amount."

DENMARK (1)

"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."

INDIA

"Liability of hotelkeeper would be limited to sub-para 1 (b) in case of accident for the period commencing from arrival of hotel guest. para. 3 : would be limited to food and drinks consumed in the hotel only."

(1) The Danish observations on this and other articles were formulated by the Central Organization of Hotel - and Restaurant - keepers in Denmark.

SWITZERLAND

Re paragraph 3: "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. "

Article 14

SWITZERLAND

"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."

Article 15

CUBA (1)

Re para. 3 : "The draft should not have regard to "so many times" the charge for the accommodation but rather stipulate an amount corresponding to the loss in accordance with the prices in force in the hotelkeeper's country."

DENMARK

"The extent of the liability of the hotelkeeper seems unreasonably large."

INDIA

"Liability of the hotelkeeper in case of theft accepted provided claim not preferred through insurance company."

IRAQ

"The space in para. 3 of Article 15 should be filled by "full compensation for the loss"."

SWITZERLAND

"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."

(1) The Cuban observations on this and other articles were formulated by the National Institute for Tourism.

IRAQ

".... powers of local laws and regulations, which determine the residence of both parties, should be observed in emerging complaints referred to in para. (b) of the above-mentioned article."

Article 23

IRAQ

".... we ask that the power of laws and regulations implemented in the place where the hotel is situated govern the dispute between the two contracting parties."

Article 24

AUSTRIA

"In Article 24, paragraph 1 the phrase in square brackets should be maintained so as to permit stipulations which are more favourable to the guest."

Article 25

CUBA

Re Paragraph 1 (c) : See the remarks on Article 15, paragraph 3.

U n i d r o i t

INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

COMITE D'EXPERTS GOUVERNEMENTAUX

POUR L'EXAMEN DE L'AVANT-PROJET DE CONVENTION SUR

LE CONTRAT D'HOTELLERIE

OBSERVATIONS

des Gouvernements sur les articles 13 à 25

de l'avant-projet de Convention

Rome, novembre 1977