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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

R E P O R T

of the Secretariat of UNIDROIT  
on the second session of the Committee  
held in Rome from 12 to 16 December 1977

Rome, January 1978



The second 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 12 to 16 December 1977.

The session was opened at 10.00 a.m. by the President of UNIDROIT, Mr. Mario MATTEUCCI, who extended a warm welcome to the participants representing 17 member States of the Institute, 2 non-member States, the Council of Europe and 2 Organizations concerned with the interests of the hotelkeeping industry (see ANNEX I).

On a proposal by the Chairman, Mr. J.P. PLANTARD (France), the Committee adopted the draft agenda prepared by the Secretariat of UNIDROIT which is reproduced in ANNEX II hereto.

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

In response to the Chairman's request for general observations regarding the preliminary draft Convention, a number of representatives recalled that sooner or later the important problem of the application of the future rules on the hotelkeeper's contract to contracts concluded between hotelkeepers and tour organizers would have to be faced. In addition, reference was made to the question raised during the first session of the Committee, namely whether certain types of establishment providing accommodation should be excluded from the application of the future instrument and whether perhaps distinctions should be drawn between various categories of establishments providing accommodation. In accordance with a proposal by the Chairman, it was agreed that these questions should be taken up once the first reading of the draft articles had been completed.

The Committee then proceeded to an article by article examination of the provisions of the preliminary draft Convention which it had not considered at its first session.

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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 ANNEX III hereto.

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.

In introducing the discussion on this article, one representative requested that the words "by the guest" be deleted in line 2 as it was quite possible that the contract be concluded by the hotelkeeper with another party such as a hotel booking agency or a tour organizer. Secondly, he noted that the provision, as worded, seemed to contemplate not only cases of a deposit having been paid but also of a mere agreement to pay it having been concluded. Such drafting would in his country confer procedural advantages on a hotelkeeper who might sue on a liquidable debt. He therefore proposed that the wording of the provision be tightened up so as to cover only the situation where the deposit had actually been paid. In other cases the hotelkeeper would have to rely on the provisions of the Convention permitting recovery by him. In conclusion, he pointed out that as a result of the use of the words "unless the parties have otherwise agreed by contract" there might be a conflict with Article 7 which in principle limited the liability of the guest and in no case permitted the hotelkeeper to recover more than the damage suffered by him. In his own country a part payment could be forfeited and an agreement to that effect would not be struck down as containing a penalty clause. He therefore proposed that Article 11 be amended in such a way that any deposit received by the hotelkeeper should be returned by him to the guest to the extent that it exceeded the amount due to the hotelkeeper under the terms of the Convention.

While a number of representatives expressed themselves to be generally speaking in sympathy with this approach, arguments were also advanced in support of a solution which would be more favourable to the hotelkeeper. In the first place it was argued that there was no apparent reason why a guest who had not paid a deposit which he had agreed to pay should be in a better position than one who had in fact paid, while it was also suggested that the removal of the possibility for the deposit being forfeited in toto amounted to saying that a deposit was not really a deposit at all. It was further pointed out that the phenomenon of overbooking was almost exclusively due to the incidence of cases of 'no-show' on the part of guests and it was in consequence proposed that the future instrument should contain a provision permitting the hotelkeeper to require that the guest pay a deposit. The importance of such a rule was stressed in particular by one representative who insisted on the weak position of hotelkeepers, especially in developing countries, who are almost entirely dependant on the package tour trade and

who stand to suffer considerable loss in the event of a tour organizer failing to meet his commitments. It was also suggested that their position was still further weakened by the limits on liability contained in Article 7 of the draft.

In reply to these arguments it was first pointed out that failure to refer in the text of the future instrument to the legal consequences of the guest's not paying a deposit which he had agreed to pay would not imply that he was under no obligation to make such payment and certainly would not relieve him of his duty to compensate the hotelkeeper for damage suffered by him under the terms of the Convention. Secondly the possibility for the hotelkeeper to require the guest to pay a deposit would not in practice alter the existing situation in cases where the contracting partner of the hotelkeeper, for example a tour organizer, is in a stronger economic position and refuses to pay the deposit. The hotelkeeper may already make such a request but to turn this into a right did not correspond with existing commercial practice, even if such a rule were to be limited to residential, as opposed to commercial, hotels or to group as against individual bookings. Thirdly, one representative suggested that in view of the fact that to the extent that relations between the hotelkeeper and the guest are not regulated by the draft they are left to freedom of contract, the introduction of a provision to the effect that the hotelkeeper may require the guest to pay a deposit might, by a process of a contrario reasoning, be regarded in the light of Article 24, paragraph 1, as at presently worded, as limiting the hotelkeeper's freedom of contract to make stipulations in his own favour.

It was, however, generally admitted that the principal point at issue in connexion with Article 11 was the extent to which an advance payment by the guest towards the price of the accommodation and ancillary services to be provided under the contract might be considered to be a forfeitable deposit, as is presently the case in some countries. In view of the difference of opinion within the Committee on this point and the realization that the question was inextricably linked to Article 7 of the preliminary draft Convention, the Committee decided that for the time being the words "in the absence of agreement to the contrary" should remain in the text in square brackets and that any reference to the concept of deposit should be avoided in view of its special connotations in some jurisdictions. It was further agreed that the implications of Article 11, however drafted, should be fully borne in mind on the occasion of the second reading of Article 7, especially when the possibilities of contracting out at present contained in square brackets in that article were considered. One representative mentioned in this connexion that if the words in square brackets in Article 11 were to be retained this might raise some problems with regard to penalty clauses in consumer contracts which were governed by national law.

In the course of further debate on Article 11, a number of points were raised. In the first place it was suggested that it might be preferable to refer not only to the "provisions of the Convention" but also to those of the contract although this might already be implied. Another representative drew attention to the possibility for the hotelkeeper, by reletting a room, to mitigate his damage, while others alluded to the possibility of introducing in Article 11 a percentage limitation similar to that contained in Article 7 with a view to making the concept of the forfeitable deposit loss objectionable.

### 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.

In connexion with paragraph 1, one representative proposed that the expression "and any other bodily or mental harm" be deleted since the term "personal injury" was perfectly clear while the present text risked causing confusion. To this, it was replied that the formula, which appeared in a number of European surface transport Conventions, had been employed to take account of the difficulties experienced by courts with regard to the interpretation of the term "blessures corporelles" in the French text of the Warsaw Convention since it was not absolutely certain that that expression covered certain cases of nervous shock or mental harm suffered by the victim. After discussion it was agreed to refer in the French text to "lésions de toutes natures" and in the English text to "any personal injuries".

A second difficulty with the text arose with regard to the temporal scope of Article 13. Some representatives considered that the expression "during the time when the guest has the accommodation at his disposal" was too vague while others felt that the same criticism could be made of paragraph 1 (b) and one representative suggested that the hotelkeeper should be liable for a reasonable period before the arrival of the guest at the hotel and after his leaving the room. Other representatives were of the opinion that the period contemplated by paragraph 1 (b) was too long while yet others considered the provision to be unnecessary and thought that the question of the hotelkeeper's liability in pre- and post- contractual situations could be adequately dealt with by the law of the forum. Another view was that since Article 20 (a) already dealt with an analogous case, it might be preferable to delete the provisions in both Article 13 and Article 15 concerning the period of the hotelkeeper's liability qua hotelkeeper and to regulate the whole question in Article 20. Subsequently, however, the drafting Committee encountered certain difficulties in reformulating Article 15 along these lines and it became apparent that if it were desired to maintain a certain parallelism with the corresponding provision in Article 15, it would be necessary to deal with the question of the hotelkeeper's liability for death and personal injury before and after the occupation of the room by the guest in Article 13 itself. Since it was not possible in the course of the meeting to redraft Article 13 as prepared by the drafting Committee in such a way as to take account of the reinstatement of the idea contained in paragraph 1 (b) of the article, the Committee requested the Secretariat to propose a form of words to cover the point. The Secretariat proposal is contained in square brackets in Article 13 as reproduced in ANNEX III hereto.

A third point concerning the drafting of the paragraph related to the precise meaning of the term "premises of the hotel". One representative in particular wished to know whether it was intended to cover, for example, the hotel 'bus to and from the airport, or a nearby golf course to which the guest had access on special terms by virtue of his having engaged accommodation at the hotel. In reply it was suggested that the hotelkeeper would be liable for death or personal injury only in respect of damage caused at a place under his supervision such as a hotel swimming pool or a private beach reserved to guests. Such an interpretation would thus exclude golf courses and similar facilities. As to the question of travel in hotel 'buses, attention was drawn to paragraph 70 of the Explanatory Report where it is stated that "were the 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". One representative however expressed concern at the possibility that a hotelkeeper might not be liable under the provision as drafted, for example where the guest takes his meals under a contract for

full board and lodging with the hotelkeeper, not on the premises of the hotel itself, but in a nearby restaurant under a standing arrangement between the hotelkeeper and the restaurateur.

One final drafting point concerning paragraph 1 related to the use of the word "accident". It was suggested that the word was inappropriate to cover certain situations, for example the guest's contracting a disease, and in consequence it was replaced by the word "event".

As regards paragraph 2, lengthy discussion centred around the liability régime to which the hotelkeeper should be subjected. On the one hand certain representatives considered that the effect of the provision, which enshrined the principle of presumed fault with the burden of proof reversed, in effect made the hotelkeeper an insurer of the guest's safety. Such a rule, they maintained, would involve a considerable extension of the hotelkeeper's liability for personal injuries in their own countries and, to the extent that an action brought by the guest against the hotelkeeper could be regarded as founded in tort, then conceptual difficulties also arose. The introduction of such a principle, it was further argued, would have the effect of raising very considerably the insurance premiums payable by hotelkeepers and it was therefore proposed that the burden of proving that the hotelkeeper had not met the requisite standard of care be placed on the guest. It was also stressed that the position of the hotelkeeper could not be equated to that of a carrier and that even in the carriage Conventions the presumed liability of the carrier was accompanied by provisions limiting his liability in the event of death or personal injury to the passenger. If it was accepted that the liability of a hotelkeeper was more akin to that of an occupier, then the inequitableness of presuming him to be liable in all cases became all the more apparent.

Other representatives stated that the formulation of the hotelkeeper's liability by the UNIDROIT Working Committee coincided with the position at present obtaining in their own jurisdictions and that any move in the direction of requiring the guest to prove fault on the part of the hotelkeeper would represent a step backwards which it would be difficult for them to contemplate in this age of ever-increasing awareness of the need to provide adequate protection for consumers. In this context, reference was also made to the provisions of the Council of Europe's Convention on Products Liability in regard to Personal Injury and Death and it was suggested that attempts should be made to avoid any incompatibility between the future Convention on the hotelkeeper's contract on the one hand and the Council of Europe Convention and the draft directive of the European Economic Community on the other. Furthermore, it was stressed by more than one representative that, with respect to the bringing of evidence, it would in most cases be easier for the hotelkeeper, who was thoroughly familiar with his premises, than for the guest to discharge the burden of proof, especially in cases where the symptoms of damage began to appear some time after the guest had left the hotel.



Another representative considered that it did not greatly matter upon whom the burden of proof was placed since in any event a court would almost certainly be faced with conflicting evidence brought by the guest and the hotelkeeper, and would decide in favour of one or the other on the balance of such evidence. As to the question of the effect of the proposed liability régime on insurance premiums it was urged that further information on this issue be sought for the next meeting.

In conclusion, the Committee decided that it was necessary to adopt some kind of compromise solution and, as a result, the new version of Article 13, paragraph 1, which represents a fusion of the former paragraphs 1 and 2, leaves the question of the burden of proof open. Each jurisdiction would thus be permitted to place the burden on either the guest or the hotelkeeper in accordance with its prevailing law and practice.

With regard to paragraph 3, now paragraph 2, of Article 13, which laid down what was in effect virtually a strict liability for damage caused by food or drink served by the hotelkeeper, there was general support for the provision, although one representative felt that the chances of its being acceptable to hotelkeepers in his country would to a certain degree depend on its being recast in a way which would have less psychological impact upon them. Another representative expressed concern at the possibility of the hotelkeeper being liable for injury suffered by a guest with an unusual allergy and in consequence proposed that the provision be modified so as to restrict the liability of the hotelkeeper to those cases where the injury was caused by the guest's consuming food or drink which was not wholesome or which was unfit for human consumption and which had not been described with sufficient clarity to warn a guest with special dietary problems to avoid that food or drink. A third representative suggested that the hotelkeeper's strict liability should not apply in cases where the food was consumed outside the hotel, for example packed lunches, as the food so provided might be contaminated after it had left the hotel, while another considered that it would be excessive to hold the hotelkeeper liable in certain extreme cases involving intervention by a third party, for example one guest poisoning another. To this difficulty it was replied that in such a case the poisoned element of the food or drink had not been provided by the hotelkeeper so that he would not be liable under Article 13, paragraph 2, although another representative expressed doubts regarding this interpretation since in his view the problem involved complicated questions of causation.

The wide-ranging discussions which ensued also involved reference to the various defences contemplated under Article 14 of the preliminary draft Convention but it was generally recognized that the principal point at issue was that of the extent to which the hotelkeeper should be liable for injury suffered by the guest when he proved allergic to the food or drink

actually provided by the hotelkeeper. So as to avoid the hotelkeeper's being liable in such cases it was agreed that in principle the hotelkeeper will not be liable if he can establish that the food or drink was fit for human consumption and that it provided the safety which a guest is reasonably entitled to expect, having regard to the description and presentation. Although this wording proved to be generally acceptable, it was noted by one representative that it left something to be desired in terms of uniformity as what a guest "was reasonably entitled to expect" would differ considerably from one part of the world to another. Another representative expressed concern that there might be some incompatibility between the provision and the provisions of the European Convention on Products Liability in regard to Personal Injury and Death and he wondered whether some improvement might not be made to the text by redrafting the last phrase to read "having regard to all the circumstances including its description and presentation" which would have the added advantage of corresponding more closely to the wording of paragraph (b) of Article 2 of the Council of Europe Convention in which the term "defect" is defined.

Finally, it was decided that it should be specified that the food or drink must actually be consumed by the guest so as to avoid the possibility of the provision being held to apply in such cases as his being scalded by a waiter tipping hot soup over him.

#### 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.

Broadly speaking the Committee accepted the underlying philosophy behind the provisions of this article, although some representatives expressed hesitations which will be mentioned below. Nevertheless there was widespread belief that the drafting of the article left much to be desired and in particular the following objections were raised:

1. that paragraph 1 might in some cases wholly relieve the hotel-keeper of liability in cases where the guest had only contributed to the damage;
2. that to the extent that the hotelkeeper might be relieved wholly of liability under paragraph 1, his liability would already be excluded under the former paragraph 2, now paragraph 1, of Article 13;
3. that paragraph 1 might be interpreted as not covering cases of volenti non fit injuria or voluntary assumption of risk to the extent that it should be regarded as a contributory negligence clause;
4. that the reference to "wrongful act or neglect of the guest" was unclear and open to widely different interpretations;
5. that on the present drafting of paragraph 2, it read more like a provision on joint tortfeasors which it was not meant to be;
6. that it would be preferable, in view of the different bases of liability contemplated by the new paragraphs 1 and 2 of Article 13, to set out the defences in respect of each paragraph separately;
7. that there might be a contradiction between paragraph 2 of Article 14 and the provisions of Article 13 imposing a strict liability on the hotelkeeper for damage resulting from the consumption by the guest of food and drink provided by the hotelkeeper.

It was therefore agreed that there should be a complete redraft of Article 14 to take account of these objections. This new drafting is reproduced in ANNEX III hereto but nevertheless some criticisms were levelled against it which will be discussed at the second reading. The first of these was mentioned by one representative who stated that legislation had been introduced in his country which had considerably cut down the possibility of damages being reduced in civil claims for death or personal injury on the grounds of contributory negligence. In effect it was now usually required that the plaintiff should have been grossly negligent and although the final position of his authorities could only be determined in the light of subsequent possible amendments of Article 14, he already thought it advisable to mention the possibility of a reservation being entered on the provision.

Two more points were raised by one representative. In the first place he considered that the reference in the French text to the "faute du client" rather than the "fait du client" might render the hotelkeeper liable in cases where the guest could scarcely be regarded as having committed a fault, for example a madman jumping from a hotel bedroom, while in the second

he expressed grave misgivings concerning the rules governing recourse actions since he felt that cases might arise, especially as regards the provision of food and drink, in which the hotelkeeper might be held liable although a third party was totally at fault.

Finally, one representative wished it to be made quite clear that the effect of paragraph 1 should not be to deprive the guest of a remedy when he suffered injury attempting to rescue another person in circumstances in which the hotelkeeper would be liable for the damage suffered by the latter.

#### 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.

In introducing this article, the Chairman recalled that Articles 15 to 18 were modelled very closely on the 1962 Council of Europe Convention on the Liability of Hotel-keepers concerning the Property of their Guests which was at present in force between six States, and that the Working Committee which had prepared the UNIDROIT draft had taken all possible steps to avoid any incompatibility between the two instruments which might have the effect of rendering it difficult for parties to the Council of Europe Convention to accept the UNIDROIT Convention. This preoccupation was reiterated by the representative of the Council of Europe who, however, reminded the members of the Committee that the Council of Europe Convention in effect laid down minimum standards and that already under its terms Contracting Parties thereto could impose a more severe liability on hotelkeepers than that provided for under the Convention itself.

The Committee made a number of drafting amendments to Article 15. In particular, it was decided to simplify the drafting of paragraphs 1 and 2 and to telescope them into a single paragraph. The Committee also decided to harmonize the language used in the provision with that employed in other articles of the draft Convention by speaking of "the premises of the hotel".

Although a representative of the hotelkeeping profession suggested that difficulties arose in connexion with obtaining insurance cover in his country to the extent that hotelkeepers may be held liable for property left in vehicles outside the premises of the hotel, it was pointed out that such liability would only arise when the hotelkeeper actually took charge of the vehicle. It was moreover recalled that, following the lines of the Council of Europe Convention, Article 20 (b) of the draft adopted by the UNIDROIT Working Committee provided that for the purposes of Articles 13 to 19 of the Convention the expression "property brought to the hotel by the guest" should not include, inter alia, vehicles and any property left with a vehicle, while Article 25 (b) stipulated that States might enter a reservation to the effect that the rule laid down in Article 15, paragraph 2 should only apply in respect of property actually at the hotel.

Both these provisions were considered in the course of the discussion on Article 15 and the Committee decided to delete Article 25 (b) as no Governmental representatives spoke in favour of its retention. There was also a majority in favour of removing the exclusion regarding motor vehicles and property left with them but one representative, alluding to the remarkable growth of motels in his country in recent years, pleaded for its being maintained as otherwise motelkeepers would be exposed to the risk of enormous damages being awarded against them. In consequence it was decided to delete sub-paragraph (b) of Article 20 but to permit States to enter a reservation under Article 25 to the effect that Articles 15 to 18 of the Convention shall not apply to vehicles or any property left with them. It was further agreed that it would be necessary to reexamine the applicability of the future instrument to vehicles and property left in them in the context of Article 19.

In connexion with paragraph 3 of the text adopted by the UNIDROIT Working Committee, it was agreed that the precise limits on liability should be agreed later, either at a subsequent meeting of the Committee itself or at the Diplomatic Conference for the adoption of the future instrument. It was, however, noted that unlike the Council of Europe Convention, the UNIDROIT text made no provision either for a fixed-sum liability, whether expressed in terms of gold, special drawing rights or some other unit of account, or for a limitation for any single item of property. It was decided that these two points would be discussed during the second reading of the draft with a view to determining whether they should be dealt with and, if so, the appropriate place in the draft for so doing.

In addition, the Committee felt that the reference to "the daily charge for the accommodation" was somewhat vague. It was therefore decided to state explicitly in the text that the charge was exclusive of taxes, service charges and additional services (thus, for example, excluding the cost of food and drink provided under a contract for board and lodging) although even then it was pointed out that some difficulties could arise when, for instance, the accommodation was provided in the context of an inclusive package tour along with other services such as transport. To this, representatives of the hotelkeeping profession replied that in all cases there would be a basic price for the room, although this would not always be posted up, which could serve as a point of reference for determining the hotelkeeper's limit of liability. The existence of such a price would, moreover, ensure uniformity for in some establishments, especially in developing countries where most hotel bookings are made on behalf of groups, the agreed charge for the accommodation might vary in accordance with the number of rooms let. In these circumstances one representative proposed that the Committee consider the possibility of amending the article on the occasion of the second reading by the addition of a reference to the charge usually made for the accommodation.

In conclusion the Committee agreed that the limit on liability should be calculated by reference to the total charge of the accommodation, for while the provision expressly stipulated that all the occupants of the accommodation should be considered as a single guest so that there could be no question of multiplying the limitation figure by the number of occupants of the room, on the other hand it was to be understood that if a large family took a suite of rooms, or more than one room, then the limit on liability would be calculated in accordance with the total charge for the accommodation and not just the room in which the lost or damaged property was situated.

#### 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.

Subject to minor drafting amendments, the Committee approved the text of paragraph 1 (b) of Article 16 separately from the rest of the article and placed it in a new Article 15 bis so that Article 16 would be concerned only with the consequences of the deposit of, or failure to deposit, valuables.

As to the remainder of the article, one representative expressed the most serious reservations concerning the unlimited liability of the hotelkeeper in cases of deposit with him of valuables. He considered that the provision, as it stood, had the effect of converting the hotelkeeper into a banker and he therefore proposed a new approach to the problem which would, on the one hand, attempt to create a balance of interests between the parties and on the other take account of the capacity of the insurance market and its reactions to a proposal for unlimited liability in an age when hotels were increasingly exposed to the rapidly increasing growth in crime. The essence of his proposal was that while the hotelkeeper should be under an obligation to provide facilities for the safekeeping of money, securities, jewelry and other valuables belonging to the guest, a concomitant obligation should be imposed on the guest to deposit such property with the hotelkeeper, failing which the latter would not be liable for the loss of, or damage to, such property provided that notice of the availability of the deposit facilities and of the consequences of the failure to deposit were displayed in a prominent position in the accommodation of the guest and in the public rooms of the hotel. In addition it was proposed that the hotel might set a limit upon liability for damage to, or loss of, property deposited with it, the existence and amount of which limitation should be brought to the attention of the guest in the above-mentioned notice. Finally, it was recommended that a provision be inserted permitting the hotelkeeper to examine any valuables at the time of deposit so as to determine the accuracy of the guest's description thereof.

Some representatives voiced sympathy with the philosophy underlying these proposals and in particular the attempt to make guests more aware of the need for them to exercise care when travelling with valuable articles, but nevertheless a considerable number of reservations were expressed. In the first place some representatives found it inconceivable that the hotelkeeper should be exempt from liability if he personally, or a member

of his family, were responsible for the damage to, or loss of, valuables which the guest had failed to deposit with him. Others suggested that property of a valuable nature such as a watch or a ring which would not normally be deposited with the hotelkeeper but rather worn by the guest might in certain circumstances be stolen from the guest when he or she was, for example, in a room adjacent to that in which the theft was committed, and they too were reluctant to see the hotelkeeper automatically relieved of liability in such cases. Again, it was pointed out that the possibility of a limitation amount being pleaded even when the property had been deposited with the guest ran contrary to the Council of Europe Convention and that it would be very difficult for some States which had already ratified that instrument to accept it. If it were desired to avoid the hotelkeeper being liable for articles of exceptionally high value, it was suggested that rather than laying down a limitation on his liability it would be preferable to place a limit on the value of articles which he was obliged to accept. Finally, it was noted that the proposal as it stood would of necessity require a definition of valuables of which there was at present none in the UNIDROIT draft.

In view of the far-reaching nature of the proposals, which called for further study, the Committee decided for the time being to include in square brackets in Article 25 the suggested provisions on the consequences of the guest's failure to deposit valuables with the hotelkeeper and the latter's right to limit his liability in the event of their being deposited. Nevertheless it accepted the principle of the hotelkeeper's being entitled to examine the property tendered to him for safe custody and introduced a provision to that effect in paragraph 3 of Article 16.

In connexion with paragraph 1 of the article as prepared by the UNIDROIT Working Committee, one representative expressed very considerable misgivings about the possibility of the hotelkeeper's being able to refuse property on the grounds of its being of excessive value and he was not satisfied by a suggestion that some objective criterion was provided by the fact that it would be for the court to determine whether the hotelkeeper had acted properly in refusing to accept property for safe custody when called upon to decide whether his liability should be unlimited under sub-paragraph (c) of Article 1. It was therefore decided to delete the reference to the hotelkeeper's right to refuse property of excessive value, all the more so since a representative of the hotelkeeping profession informed the Committee that it was not the practice of hotelkeepers to refuse to accept articles for deposit on account of their value. In consequence the hotelkeeper's right to reject property was restricted to valuables which were dangerous or cumbersome. The Committee also considered that it would be more logical to invert the order of paragraphs 1 and 2 of Article 16 as amended.



Finally, with respect to paragraph 3 of the article, one representative expressed dissent from the general opinion that the hotelkeeper should be responsible for providing a fastened or sealed container for property deposited with him, which was based on the view that such a measure would be taken essentially in the interests of the hotelkeeper rather than those of the guest. He therefore proposed that more detailed attention be paid to the question in the course of the second reading of Article 16.

#### 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.

The Committee agreed to the proposal made by one representative that since the provision was one dealing with cases of joint liability it would be preferable to replace the expression "in so far as" by the term "to the extent that" in the introductory words of the article.

In connexion with sub-paragraph (a), the words "the negligence or to a wilful act or omission of" were added to maintain a parallelism with the other articles where a similar concept is expressed, while in sub-paragraph (b) the words "an unforeseeable and irresistible event" were substituted for "force majeure" so as to ensure concordance with the language employed in Article 9 revised. In reply to one English-speaking representative who announced a strong preference for the use of the term "force majeure", it was noted that no decision had been taken on the matter and that the debate would be resumed on the occasion of the second reading of Article 9. In this context the representative of the Council of Europe recommended that if any change were to be made in the terminology which had been employed in the corresponding provision of the Council of Europe Convention on the Liability of Hotelkeepers concerning the Property of their Guests, then it should be made clear in the Explanatory Report on the future instrument that no difference in meaning was intended.

Finally, with regard to sub-paragraph (c), one representative wondered whether the wording was not ambiguous. If it was intended to cover dangerous objects or cases of inherent vice this should be done expressly. After another representative had indicated the many types of case contemplated by the provision however, he withdrew his proposal and the sub-paragraph was adopted without amendment.

#### 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.

One representative expressed very considerable reservations on this article which he regarded as being tantamount to a provision on prescription in that it deprived the guest of a right of action. Furthermore, he noted that it seemed to apply only to claims in respect of damage to, or loss of, property and although this type of provision might be common in transport law Conventions he repeated his conviction that many aspects of the hotelkeeper's contract could not be equated with contracts of carriage. He therefore proposed the deletion of Article 18.

To this it was replied that the article was not a provision on prescription. Such a provision would totally bar the claimant's right of recovery whereas all Article 18 sought to do was to reverse the burden of proof incumbent on the hotelkeeper under Article 15. The guest, if he were to recover, would have to prove some fault on the part of the hotelkeeper, but if he succeeded then the hotelkeeper's liability would be unlimited in accordance with Article 15 bis (formerly Article 16, paragraph 1 (b)). From a practical point of view, moreover, the provision was valuable in that early report of loss would permit the hotelkeeper to undertake an enquiry or call in the police as soon as possible and thus increase the chances of recovering the property. It was evident that such considerations were not relevant to personal injury cases and indeed an extension of the terms of Article 18 to cover them would be highly undesirable as it would upset the compromise solution contained in the revised version of paragraph 1 of Article 13 by casting the burden of proof of fault on the guest in those cases where notice had not been given.

Another representative was of the opinion that the expression "without undue delay" was vague and imprecise and he considered that it should be replaced by the words "immediately after its discovery". Other representatives however felt that this would place too heavy a burden on the guest and as a compromise solution proposed that the notice should be given to the hotelkeeper "as soon as is reasonably possible".

This formula proved ultimately to be acceptable to the whole Committee as also did the introduction of a reference to the "premises of the hotel" so as to secure uniformity of language with other provisions of the preliminary draft. In conclusion, an attempt was made to improve the drafting of Article 18 in order to make it clear that the intention of the provision was in no way to deprive the guest of his right of action against the hotelkeeper.

#### 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.

There was a sharp division of opinion within the Committee on the utility of maintaining sub-paragraph (a). On the one hand it was argued that the hotelkeeper should be under the same obligations to potential guests seeking accommodation as to guests on the premises by virtue of a contract since it was in the economic interest of the hotelkeeper to encourage would-be clients. Another representative suggested that a further reason for retaining the provision lay in the fact that since the draft Convention provided for limitations on the hotelkeeper's liability in certain circumstances, cases might arise in which a potential guest would be in a better position than the guest himself unless sub-paragraph (a) were retained. One representative, furthermore, proposed extending the application of the provision to cover persons visiting the guest.

Other representatives however saw difficulties inherent in the provision. In the first place it was suggested that it was open to abuse as the plaintiff might never have had any intention of requesting accommodation and only alleged this after the occurrence of the event causing the damage. Secondly, it was asked on what basis the limitation amount related to the charge for the accommodation could be calculated when a fortiori this provision was designed to meet precisely those cases where the guest never obtained accommodation. A further representative argued in favour of the deletion of the provision on the grounds that it confused contractual and extracontractual situations. In the light of this cleavage of opinion the Committee decided to leave sub-paragraph (a) in square brackets and to take a final decision on its fate on the occasion of the second reading.

In view of the Committee's decision to include vehicles and property left with them within the scope of the future instrument (see page 11 above), sub-paragraph (b) was amended so that it would now apply to live animals only.

As regards sub-paragraph (c), one representative expressed concern as to whether it was sufficiently clear that the hotelkeeper would be liable, subject of course to the possibility of his being able to bring a recourse action, for the acts and omissions of independent contractors. He received assurances on this score, particular reference being made to paragraph 127 of the Explanatory Report. One representative indeed considered that it was precisely to provide for the hotelkeeper's liability for independent contractors that the provision had been inserted in the draft in the first place.

Another representative suggested that the reference to the obligations incumbent on the hotelkeeper by virtue of his contract was unnecessarily restrictive and he considered that it would be sufficient to refer to "his obligations" without further qualification. The Committee agreed to this amendment.

Most difficulty was, however, experienced in connexion with the requirement that, for the hotelkeeper to be liable, his agents, servants or other persons for whose services he makes use for the performance of his obligations should be acting within the scope of their employment. Some representatives considered the limitation to be unduly favourable to the hotelkeeper while others thought that it might give rise to serious problems of interpretation. In consequence it was decided that the phrase "when such agents, servants or other persons are acting within the scope of their employment" should be placed in square brackets pending the taking of a final decision on its retention at the second reading.

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.

A number of representatives stated that they had difficulty with this provision. Attention was drawn especially to the problem of overlapping between the instrument at present under consideration on the one hand and, on the other, the Council of Europe Convention on Products Liability in regard to Personal Injury and Death and the draft Directive of the European Economic Community on products liability. It was in particular suggested that provisions of the Council of Europe Convention on products liability might be more favourable to the plaintiff in cases where Article 21 of the preliminary draft Convention under review excluded liability for damage resulting from death or personal injuries and the view was put forward that if Article 21 were to be maintained, then a saving provision should be introduced for the above-mentioned Council of Europe instrument and perhaps for national law concerning products liability. Failure to take account of possible incompatibility between the two instruments, it was argued, might reduce the number of ratifications of the future instrument on the hotelkeeper's contract. As an eventual way round the difficulty one representative suggested that Article 21 be limited in its application to damage to property.

Other representatives were concerned with the possibility of the provision's being used to prevent the invoking of equitable remedies available in common law systems while yet others expressed support for the general principle contained in Article 21 and argued in favour of its retention.

While it was agreed that time did not permit a full discussion of the merits of the provision it was nevertheless decided that the term "extra-contractual claim" was too vague and, without prejudice to the ultimate fate of the article, that phrase was replaced by the expression "claim based on another ground of action". It was, in addition, decided that in view of the considerable criticism levelled against it, Article 21 should be placed in square brackets.

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 .....

A wide range of opinions was expressed in connexion with sub-paragraph (a) of paragraph 1. On the one hand some representatives suggested that it was difficult to see why States should wish to draw a distinction between residents and non-residents while another indicated that such an innovation would involve a considerable change in commercial practice. Furthermore it was argued that the provision added to the growing list of permitted reservations and constituted an obstacle to unification.

Other representatives however suggested that the presence of such a reservation clause would facilitate ratification of the future instrument by their Governments and attention was drawn to parallel provisions in the transport law Conventions. An intermediate position was adopted by one representative who, while not in principle favouring the provision, nevertheless considered that it should be retained until all the other provisions of the draft Convention had been settled and its value to the various States was more precisely ascertainable.

This proposal was accepted by the Committee which, however, agreed to a drafting amendment designed to eliminate the reference to contracts concluded between the hotelkeeper and the guest and to substitute this by a reference to the relations between them. It was indeed quite possible that the guest might be resident in a country other than that of the location of the hotel whereas a tour organizer or hotel booking agency contracting on his behalf might have its principal place of business in the latter country.

After the Chairman had noted that no delegations had manifested support for the retention of sub-paragraph (b) it was decided to delete the provision. In this context it was observed that such a step would create no difficulties with regard to the Council of Europe Convention on hotelkeeper's liability as it removed a possible restriction on that liability.

The Committee admitted the principle underlying sub-paragraph (c), now sub-paragraph (b), but in view of the possible need to accommodate those States which had ratified the Council of Europe Convention and accepted a fixed-sum liability it was decided to delete the words following the square brackets pending a more detailed examination of the whole question of limitation of liability in respect of property claims. In addition, the sub-paragraph was modified to take account of the drafting changes which had been made to Article 15 itself.

As has been indicated above (see pages 11 and 14 of the present report) three new sub-paragraphs have been added to this article to take account on the one hand of the decision that the rules laid down in Articles 15 to 18 should in principle apply to vehicles and to property left in them and on the other of the United States proposals for the introduction of reservations to the provisions contained in Article 16.

The Chairman regretted that the Committee had been unable at this session to complete the first reading of the draft articles, with the result that this reading would continue into the third session and encompass Articles 19, 22, 23 and 24. In addition, there would be an examination of a draft "Federal State" clause submitted by one representative and based on Article 14 of the 1973 Washington Convention providing a Uniform Law on the Form of an International Will.

Attention would also have to be paid to two problems outstanding from the first reading, namely (i) the possibility of introducing a reservation clause excluding certain types of establishment providing accommodation from the application of the future instrument and (ii) the desirability of extending its application to contracts concluded between hotelkeepers and tour organizers. He noted that one representative had attached considerable importance to this latter question and had submitted a paper which Governments might wish to study before the next session of the Committee. He also requested the Secretariat to prepare a draft article on the possibility of excluding certain categories of establishments from the scope of application

of the future Convention and welcomed an offer by it to prepare a paper on the relations between the instrument and the 1970 International Convention on the Travel Contract (CCV) which had entered into force in 1976. Finally, the Chairman recalled an observation by one English-speaking representative to the effect that in his country domestic legislation sought to avoid the use of masculine personal pronouns and his wish that this problem might be considered by the Committee in the course of the second reading.

The Committee agreed to these various proposals by the Chairman and also endorsed a suggestion that observers representing tour organizers and consumer interests should be invited to attend the next session.

Item 3 on the agenda - Other business

The Committee decided that its third session should be held in Rome at the headquarters of the Institute from 17 to 21 April 1978.



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A G E N D A

1. Approval of the draft agenda.
2. Continuation of the examination of the preliminary draft Convention on the hotelkeeper's contract.
3. Other business.



REVISED DRAFT ARTICLESArticle 11

If the hotelkeeper receives a sum of money in advance, it shall be considered to be an advance payment toward the price of the accommodation and ancillary services to be provided under the contract. The hotelkeeper shall /in the absence of agreement to the contrary/ return it to the extent that it exceeds the amount due to him under the terms of the present Convention.

Article 13

1. The hotelkeeper shall be liable for loss or damage resulting from the death of, or any personal injuries to, a guest caused by an event occurring on the premises of the hotel /during or within a reasonable period before or after the time when the guest has the accommodation at his disposal,/ unless that event was caused by circumstances which a hotelkeeper, exercising 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.

2. Notwithstanding the provisions of paragraph 1, when food or drink is provided, the hotelkeeper shall be liable for loss or damage resulting from the death of, or any personal injuries to, the guest caused by its consumption unless the hotelkeeper establishes that the food or drink was fit for human consumption and provided the safety which a guest was reasonably entitled to expect, having regard to its description and presentation.

Article 14

For the purposes of the application of Article 13<sup>(oo)</sup>:

(a) the hotelkeeper shall be relieved wholly or in part of liability where the loss or damage results wholly or in part from the negligence or from a wilful act or omission of the guest;

(b) subject to the provisions of Article 20 (c), the hotelkeeper shall be relieved of liability where loss or damage results wholly from the negligence or from a wilful act or omission of a third party;

(c) the hotelkeeper shall be liable where the loss or damage results in part from the negligence or from a wilful act or omission of a third party, but without prejudice to any right of recourse he may have against such third party.

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(°) The words in square brackets have been added by the Secretariat at the request of the Committee although the latter has yet to pronounce upon the precise drafting.

(°°) This introductory phrase has been added by the Secretariat to meet the wish of the Committee that it be clearly understood that the provisions of Article 14 apply only to the liability for death or personal injuries dealt with in Article 13.

Article 15

1. The hotelkeeper shall be liable for any damage to, or destruction or loss of, property brought to the premises of the hotel, or of which he takes charge outside the premises of the hotel, during and for a reasonable period before and after the time when the guest has the accommodation at his disposal.

2. The liability referred to in the present article shall not exceed        /        times the daily charge for the accommodation, exclusive of taxes, service charges and additional services. If the accommodation is occupied by several persons, the calculation shall be made by taking account of the total charge for the accommodation and by considering all the occupants as a single guest.

Article 15<sup>bis</sup>

The liability referred to in Article 15 shall be unlimited where the damage, destruction or loss is caused by the negligence or by a wilful act or omission of the hotelkeeper or of any person for whom he is responsible.

Article 16

1. The hotelkeeper shall be bound to receive securities, money and other valuables for safe custody; he may refuse such property only if it is dangerous or cumbersome.

2. In cases where the property has been deposited with the hotelkeeper or where he has refused to receive property which he is bound to receive for safe custody, his liability shall be unlimited.

3. The hotelkeeper shall be entitled to examine the property which is tendered to him for safe custody and to require that it shall be put in a fastened or sealed container.

Article 17

The hotelkeeper shall not be liable to the extent that damage, destruction or loss is due:

(a) to the negligence or to a wilful act or omission of the guest, or of any person accompanying him or in his employment, or any person visiting him;



- (b) /to an unforeseeable and irresistible event/<sup>(°)</sup>;
- (c) to the nature of the property.

Article 18

In the event of damage to, or destruction or loss of, property brought to the premises of the hotel or of which the hotelkeeper has taken charge, the guest shall inform the hotelkeeper thereof as soon as is reasonably possible, failing which he must base his action on the provisions of Article 15<sup>bis</sup>.

Article 20

For the application of the present Convention:

/(a) any person who enters a hotel with the intention of requesting accommodation shall be treated as a guest<sup>/</sup>

(b) the expression "property brought to the premises of the hotel" shall not include 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 his obligations /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 a claim based on another ground of action, 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.<sup>/</sup>

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(°) It was decided temporarily to adopt the same phraseology in this provision as in the revised Article 9 although the delegation of the United States of America expressed the wish that after further discussion the term "force majeure" be employed.

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 relations between a hotelkeeper and a guest 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) it will set the amount of the limit of liability referred to in paragraph 2 of Article 15 at a higher sum than        /        /;

(c) articles 15 to 18 shall not apply to vehicles or any property left with a vehicle;

       / (d) the hotelkeeper shall not be liable for any damage to, or for the loss of, valuables which a guest has not deposited with the hotel for safe-keeping provided that a notice of the availability of the facilities and of the consequences of failure to deposit are displayed in a prominent position in the accommodation of the guest and in the public rooms of the hotel. / (°)

       / (e) that the hotelkeeper may set a limit of               / times the daily charge for the accommodation, exclusive of taxes, service charges and additional services upon liability for damage to, or loss of, valuables deposited by the guest, provided that the existence and amount of such limitation are duly brought to the notice of the guest. / (°)

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

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(°) Texts proposed by the delegation of the United States of America on the substance of which no final decisions have been taken by the Committee.

