

UNIDROIT 1978
Study XII - Doc. 33
(Original: English)

U n i d r o i t

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

Applicability of the future instrument on the
hotelkeeper's contract to contracts concluded
between travel organizers and hotelkeepers and
and its relations with the 1970 International
Convention on the Travel Contract (CCV)

(Secretariat memorandum)

Rome, January 1978

I. INTRODUCTION

At its first 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 considered in the context of its discussions on Article 1 of the preliminary draft articles the question of the applicability of the future Convention to contracts concluded between hotelkeepers and travel organizers.

On this occasion, 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,⁽¹⁾ there was no such exclusion in any article of the draft. It was considered that this point was one of the utmost importance and one that 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 travel 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 that in those circumstances it might be necessary to introduce some special rules to cover them, for example in connexion with cancellations of reservations.

(1) In effect, paragraph 28 of the explanatory report (Etude XII, Doc. 14, UNIDROIT 1976, page 195), indicates that the Working Committee which prepared the preliminary draft Convention considered that while the future Convention could apply whenever accommodation was reserved by a third party e.g. a travel agent acting for the guest, always provided that the agent is not acting on his own behalf, it did not seek to regulate the relationship between hotelkeepers and guests when the services are provided under the terms of a travel contract.

In view of the failure of the Committee of Governmental Experts at its second session in December 1977 to complete its first reading of the preliminary draft Convention it was not possible to revert to the problem of contracts concluded between hotelkeepers and travel organizers. Nevertheless the representative of the United States of America, in a statement subsequently reproduced in a paper submitted to the Committee, stressed the importance of the question in the following terms: (1)

" An issue of major interest to the United States, and which was the subject of limited discussion at the UNIDROIT meeting in March, is whether third parties who participate in the formation of the hotelkeeper-guest relationship, such as travel agents and tour operators, be given rights under or have duties imposed upon them by the Convention. Implicit in the issue are numerous problems of definition. For example, what is a tour operator, a tour organizer, a travel agent? Coupled with problems of definition are difficulties implicit in shifting relationships, for example, the movement of a travel agent to the category of tour organizer in dealing with successive clients. Also complex are the positions of a travel wholesaler or that of transportation companies (air-lines) that own or control hotels. The Government of the United States is concerned whether an attempt to deal with the rights and obligations arising out of the interrelationships of guest-travel agent-travel wholesaler-tour organizer-transportation companies-hotels is not so complicated that the exercise would raise so many problems that it might result in frustrating the efforts to properly establish the relationship between a guest and a hotelkeeper. A major problem is the lack of uniformity of legal rules as applied to these relationships by national laws. It is the position of the Government of the United States that the current Convention be limited to relationships between the guest and the hotelkeeper, with references being made to intermediaries whenever necessary to clarify that interposition of an intermediary does not affect the basic relationship.

However, the issues relating to third-party participation do not dissipate by excluding them from the current Convention. Extensive work has already been accomplished by UNIDROIT in the tour operator and travel agency area by the 1970 Convention on the Travel Agency Contract. In recent years there have been new trends and developments in the international travel business which obviously have a direct impact on matters relating to the hotel-guest relationship. Therefore, the Government of the United States recommends that UNIDROIT consider, after the hotelkeeper's contract has been brought to some acceptable form, a review of the Travel Agent's Convention, in light of the relationships which it would have with the Hotelkeepers Convention."

In these circumstances, the Secretariat of the Institute offered to prepare a paper on the relations between the future instrument on the hotelkeeper's contract on the one hand and the 1970 International Convention on the Travel Contract (CCV) on the other and it is in conformity with this undertaking that the present considerations are submitted.

(1) Study XII - Doc. 27, UNIDROIT 1977, pp. 1 and 2.

II RELATIONSHIP BETWEEN THE HOTELKEEPER'S CONTRACT AND THE TRAVEL CONTRACT

The close relationship between the hotelkeeper's contract and the travel contract within the context of UNIDROIT's efforts towards the unification of the most important aspects of international tourism is illustrated by the fact that the present work on the hotelkeeper's contract may be traced back through the elaboration of the 1970 International Convention on the Travel Contract (CCV) to the Institute's initial preliminary draft uniform law respecting the liability of innkeepers for goods brought to inns by guests which itself led to the conclusion within the Council of Europe of the 1962 European Convention on the Liability of Hotelkeepers concerning the Property of their Guests.

A few years after the opening to signature of that Convention, the Governing Council of UNIDROIT decided to begin work on the drawing up of uniform rules concerning travel organizers and travel intermediaries (that is to say economic operators whose activities fall under the traditional, if, from a legal standpoint, not entirely correct appellation of "travel agencies") which led to the signature at Brussels on 23 April 1970 of the CCV.

From the outset of its work, the Working Committee set up by the Governing Council to prepare rules in that connexion had noted that the future travel contract would necessarily cover, as a whole, a number of factors, including transportation, accommodation and other facilities inherent in the sojourn and the services relating thereto.

Since it appeared impossible to make a draft Convention governing not only the travel contract itself, but also the many separate services covered by it, the regulation of those services was left to the international conventions relating to them, if any, or to national law. This seemed to be a good solution for transportation services, most of which had been made the subject of international rules, but apart from the Council of Europe Convention, the scope of which is limited, accommodation was left to the national law which considered it only within the framework of the general law of contract with, as a final recourse, the decision of a judge, often to be found at the other end of the world, an unsatisfactory situation which can only partly be eliminated by purely private arrangements between travel agents and hotelkeepers.

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

"Recommendation no. 3

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

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

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

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

It was in conformity with the wish expressed by the Brussels Diplomatic Conference that the Governing Council and the General Assembly of UNIDROIT gave special priority to the question of the elaboration of general uniform rules on the hotelkeeper's contract and that a decision was taken to set up a Working Committee to prepare rules on this subject which has led to the present state of work at inter-governmental level.

The close connexion between the hotelkeeper's contract and the travel contract is readily apparent from the foregoing and although the CCV is concerned with the contract between the travel organizer and the traveller so that its provisions do not apply directly either to relations between the hotelkeeper and the travel organizer⁽¹⁾ or to those between the hotelkeeper and guests occupying accommodation under an organized travel contract,⁽²⁾ there are nevertheless situations in which actions may be brought directly under the CCV by the guest against the person furnishing the accommodation contemplated by the organized travel contract. In effect, Article 14 provides that: "where the travel organizer himself provides transportation, accommodation or other services connected with the performance of the journey or sojourn, he shall be liable for any loss or damage caused to the traveller in accordance with the rules governing such services."

(1) These are to a large extent regulated by the Hotel Convention between the International Hotel Association and Universal Federation of Travel Agents Associations.

(2) Article 1, paragraph 2 defines an organized travel contract as "any contract whereby a person undertakes in his own name to provide for an inclusive price, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto."

This provision does not cause any difficulty as regards the coexistence of the CCV and a future international instrument on the hotelkeeper's contract in that it merely provides that the travel organizer shall be treated as a hotelkeeper when he himself provides the accommodation and naturally in those States which ratify any future international Convention on the hotelkeeper's contract the rules contained in that instrument would be applicable at least to international hotelkeeper's contracts. (1)

The more common type of case is however dealt with in Article 15, paragraph 1 which establishes the rule that "where the travel organizer entrusts to a third party the provision of transportation, accommodation or other services connected with the performance of the journey or sojourn, he shall be liable for any loss or damage caused to the traveller as a result of total or partial failure to perform such services, in accordance with the rules governing such services. The travel organizer shall be liable in accordance with the same rules for any loss or damage caused to the traveller during the performance of the services, unless the travel organizer proves that he has acted as a diligent travel organizer in the choice of the person or persons performing the service." Paragraph 2 further lays down that "where the rules referred to in paragraph 1 do not provide for a limitation of liability, compensation payable by the travel organizer shall be set in accordance with Article 13, paragraph 2." (2)

In these situations it will be noted that the travel organizer will again be subject to the rules governing the hotelkeeper's liability, in cases where he is himself liable, although he might in certain circumstances be able to plead the limitation of liability provided for under Article 13, paragraph 2 of the CCV even though the liability of the hotelkeeper himself would have been unlimited. This discrepancy, however, in no way affects the traveller's right to bring an action against the hotelkeeper in tort since Article 28 of the CCV provides that "the provisions of this Convention shall not prejudice the traveller's rights and actions against third parties." It is, however, possible to imagine cases, admittedly perhaps rare in practice, in which the absence of contractual relations between the hotelkeeper and the traveller occupying accommodation under an organized travel contract would prevent the latter from recovering from the hotelkeeper whose liability was unlimited with the consequence that the traveller would have to be satisfied with the limited damages which could be awarded against the travel organizer. Such a possibility however, would still exist independently of the CCV and would be remedied only in the context of a revision of that Convention, as proposed by the United States of America, or by extending the field of application of the preliminary draft Convention on the hotelkeeper's contract to cover accommodation provided under organized travel contracts. If the latter resolution were to be adopted then thought would have to be given to the re-formulation of the title of the instrument since in these cases there is no contractual relationship between the hotelkeeper and the traveller.

(1) That is to say if the reservation at present permitted by Article 25, paragraph 1 (a) of the preliminary draft Convention is to be maintained.

(2) This provision limits the liability of the travel organizer to 50.000 gold francs (poincaré) for personal injuries, 2.000 for damage to property and 5.000 for any other damage although Contracting Parties are permitted to set limits for contracts concluded through places of business located in their territory.

In addition, attention should be paid to the extent that the preliminary draft Convention should cover the possibility of actions being brought by the hotelkeeper against a guest occupying accommodation under an organized travel contract. For example the guest causes damage to property on the premises of the hotel; he withdraws from his contract with the travel organizer who in turn breaks his contract with the hotelkeeper. These situations are of course not covered by the CCV nor is there any provision corresponding to Article 28 concerning the rights and actions of third parties against the traveller. There would however seem to be no objection of principle to dealing with the first two examples mentioned above in the context of the preliminary draft Convention although it may well be that questions involving no-show by guests who would occupy accommodation under an organized travel contract should be settled as between the organizer and the traveller under the CCV or a revised version thereof, and any damage suffered in consequence by the hotelkeeper being dealt with in accordance with the contract between the travel organizer and the hotelkeeper.

In the light of the foregoing the Committee may, if it decides in principle in favour of the inclusion in the preliminary draft of provisions governing the relations between hotelkeeper's and guests occupying accommodation under an organized travel contract, then consider in the course of the second reading which aspects of such relations should be treated therein.

III POSSIBLE REVISION OF THE INTERNATIONAL CONVENTION ON THE TRAVEL CONTRACT (CCV)

If the interpretation of the Secretariat of the relevant provisions of the CCV is correct, then the present drafting of the instrument would seem to create no difficulties as regards its co-existence with a future Convention on the hotelkeeper's contract. Apart from these legal considerations, however, any risk of a clash between the two instruments is much reduced by the poor reception given to the CCV since its opening to signature. It ultimately entered into force in 1976, since which the number of Contracting Parties has remained at six: Argentina, Belgium (the nation which hosted that Conference of adoption), Benin, Cameroun, the Republic of China (Taiwan) and Togo. The chances of its becoming widely accepted would seem to be minimal and indeed an extremely negative approach to the Convention was adopted by a large majority of West European States at a special meeting organized some years ago by the Council of Europe.

As regards the possibility of a revision of the CCV, it should in the first place be recalled that Article 42 provides that:

"Any Contracting State may, five years after the coming into force of this Convention, as provided in Article 36, paragraph 1, request that a Conference be convened in order to consider proposed amendments to this Convention.

Any Contracting State wishing to avail itself of this right, shall notify the Belgian Government which, provided that one third of the Contracting States be in agreement, shall convene the Conference within twelve months thereafter".

If it is intended to set in motion this procedure, which could not be fully implemented before 1981 under the terms of the CCV, then it would be advisable to contemplate already the convening of a Committee of Governmental Experts to consider which provisions of the CCV are in need of revision with a view to up-dating it and to rendering it more acceptable to States. Perhaps already on the occasion of the third session of the Committee of Governmental Experts on the hotelkeeper's contract, States might wish to indicate their first reactions to the United States proposal in this connexion so as to permit the Secretariat to prepare a background paper on the subject for the Governing Council at one of its future sessions.