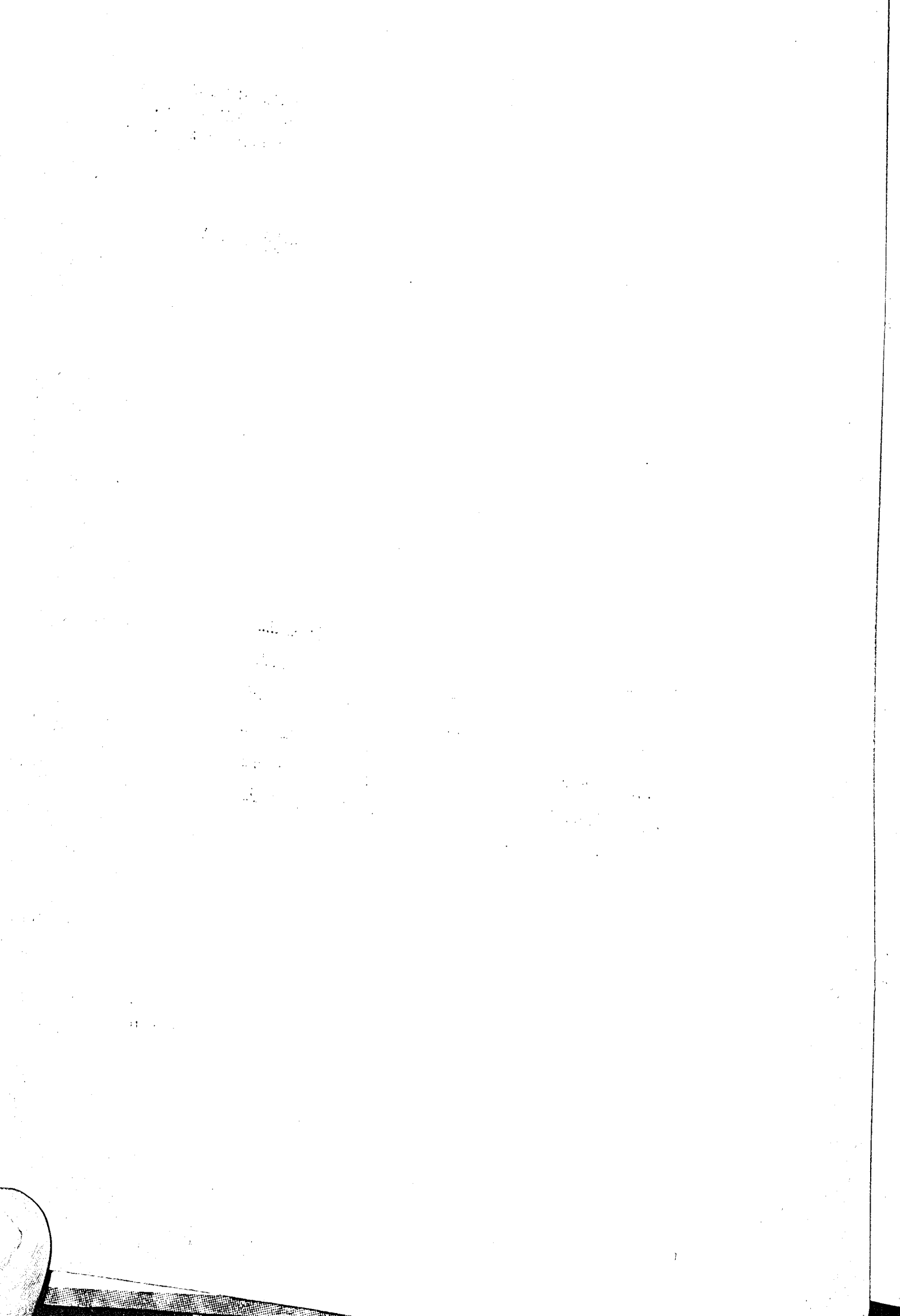
UNIDROIT 1978
Study XII - Doc. 34
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Observations of the Secretariat of the Council of Europe on the preliminary draft Convention on the hotelkeeper's contract as revised at the second session of the Committee of Governmental Experts for the examination of the preliminary draft Convention on the hotelkeeper's contract.

Rome, March 1978



General Observations

1. The Secretariat of the Council of Europe follows with great interest the work carried out within UNIDROIT with a view to preparing a Convention on the hotelkeeper's contract and hopes that this work will soon be brought to a successful end. In this connection it should also be mentioned that the Consultative Assembly of the Council of Europe, which is composed of parliamentarians from the twenty member States of the Council, on 8 July 1977 adopted Recommendation 810 (1977) on European co-operation in the field of tourism. In this Recommendation the Assembly recommended the Committee of Ministers to invite the governments of member States inter alia, to speed up the conclusion by UNIDROIT of the draft Convention.

2. This matter is of immediate concern to the Council of Europe particularly because of the existence of the 1962 Convention on the liability of hotelkeepers concerning the property of their guests. This Convention - which in itself is based on a UNIDROIT draft - came into force on 15 February 1967 and has until now been ratified by six States (Belgium, France, the Federal Republic of Germany, Ireland, Malta and the United Kingdom) and been signed by six further States (Austria, Greece, Italy, Luxembourg, the Netherlands and Turkey). Moreover, the United Kingdom has extended the application of the Convention to the Isle of Man, Jersey, the Bailiwick of Guernsey and Gibraltar. In other words, the Convention is now in force with regard to a number of European States which have a highly developed hotel industry and are among the major "tourist-exporting" countries in the world.

3. The Council of Europe Secretariat is most grateful for the efforts which were made by the Working Committee which drew up the preliminary draft Convention on the hotelkeeper's contract to ensure that participation in the future Convention should not be incompatible with participation in the 1962 Convention. It has also noted with pleasure that similar understanding for this problem has been shown by the Committee of governmental experts at its first reading of those provisions in the preliminary draft Convention which are based on the 1962 Convention. The purpose of the present observations is therefore primarily to emphasise the desirability of ensuring maximum harmonisation between the 1962 Convention and the draft Convention.

Article 11

4. This article deals with the situation in which the hotelkeeper has received a sum of money in advance and his obligation to return it. If the words "in the absence of agreement to the contrary" which are now in square brackets were to be retained, this may, as was pointed out at the Committee's second session, bring into operation rules concerning penalty clauses in national law. In this connection, reference may be made to Resolution (78) 3 relating to penal clauses in civil law which was adopted by the Committee of Ministers of the Council of Europe on 18 January 1978 with a view to the harmonisation of the rules governing such clauses. Under the Resolution governments of member States are also invited to consider the extent to which the principles set out in the Appendix to the Resolution can be applied, subject to any necessary modifications, to other clauses which have the same aim or effect as penal clauses. The explanatory memorandum refers in this connection, inter alia, to deposits. In accordance with this Resolution the court should have the power to reduce the sum stipulated when it is manifestly excessive. It is clear that such a power (which already exists under the laws of many States) may be important for example in order to protect the interests of the consumer. The question, therefore, arises whether this situation should be dealt with at least in the explanatory report. It should, however, be noted that the above-mentioned Resolution also states that its provisions shall be without prejudice to rules relating to any particular type of contract owing to its special nature. It may, therefore, be argued that the hotelkeeper's contract could be such an exception.

Article 13

5. Paragraph 2 of this article as revised deals with the hotelkeeper's liability for death or personal injuries caused by the provision of food or drink. As was pointed out at the Committee's second session this provision may overlap with the field of application of another Council of Europe Convention, namely the 1977 European Convention on products liability in regard to personal injury and death, to the extent the hotelkeeper may be a "producer" within the meaning of Article 2b or deemed to be a producer in the cases referred to in Article 3 of that Convention. This Convention which has not yet entered into force has until now been signed by Austria, Belgium, France and Luxembourg.

6. It is clear that the rule in Article 13, paragraph 2, of the preliminary draft Convention, as it is now formulated, is not entirely consistent with the provisions of the 1977 Convention (or the draft directive on the same subject of the European Economic Community). Reference should in particular be made to Article 10 of the 1977 Convention which prevents Contracting Parties from adopting rules derogating from the Convention, even if these rules are more favourable to the victim. Any incompatibility between the

two Conventions would be undesirable and should be avoided. It would seem that the problem might be solved either by bringing the text of Article 13, paragraph 3, of the preliminary draft Convention more closely into line with the 1977 Convention or by inserting a provision in Article 21 in order to safeguard the application of any other international instruments dealing with the specific question of products liability.

Article 15

7. This and the subsequent articles dealing with the hotelkeeper's liability in respect of the property of the guest are based on the corresponding provisions of the 1962 Council of Europe Convention. A detailed comparison between the two texts reveals however a number of differences. First of all the structure of the rules is different but this is inevitable as the draft articles are intended to form part of a comprehensive instrument also dealing with other aspects of the relationships between the hotelkeeper and the guest. Moreover, there are a number of other differences which can be regarded as matters of drafting which do not seem to affect the substance. It would appear, however, that it is not desirable to change the text unless it is really necessary, if the two Conventions are to co-exist as differences in the language used may give the impression that there is also a change of substance. This may partly be avoided by making appropriate comments in the explanatory report.

8. It should also be observed that the draft articles contain a number of clarifications on points where the 1962 Convention is silent (eg as to how the charge for the room should be calculated). Generally speaking this should not pose any problems. The same applies to those draft provisions which extend the liability imposed on the hotelkeeper under the 1962 Convention as that Convention only lays down "minimum rules" and allows the liability to be increased. Thus, for example, the 1962 Convention refers to "property which is at the hotel" while the revised Article 15 (paragraph 1) of the preliminary draft refers to "property brought to the premises of the hotel" which undoubtedly has wider scope than the previous expression.

9. It is, however, the limit of liability as defined in Article 15, paragraph 2 of the revised draft Articles which causes the most serious difficulty in relation to the 1962 Convention. It is recalled that, under the 1962 Convention the limit can either be expressed as a fixed sum (3,000 gold francs or 1,500 gold francs in respect of any one article) or as a multiple of the daily charge of the room (100 times or 50 times in respect of any one article). No final decision has as yet been taken by the governmental Committee as to the precise limits of liability to be used in the UNIDROIT

Convention. If the two Conventions are to exist side by side in the future, it is of course essential that the limit is not fixed at a lower level than in the 1962 Convention or, at least, that parties to the 1962 Convention can continue to apply the limits of liability provided for in that Convention. This means that there must be scope for both a fixed-sum liability expressed in gold francs and for a liability limit based on a multiple of the daily charge of the room. As it stands the draft makes no allowance for a fixed sum solution which is in fact the main rule under the 1962 Convention and the system adopted under the law of several of the Contracting Parties. It is, therefore, highly desirable that, unless the draft provisions are amended so as to conform with the 1962 Convention, the new Convention expressly provides that the limit of liability laid down in the Convention should apply without prejudice to the applicable provisions in other international treaties imposing a greater liability on hotelkeepers. Alternatively, the new Convention ought to provide for the possibility of making a reservation allowing the Parties to the 1962 Convention to maintain the limits laid down in that Convention.

Article 16

10. The draft provision does not seem to present any problems in relation to the 1962 Convention. It should, however, be emphasised that any limitations on the liability of the hotelkeeper under this article, as proposed at the Committee's second session, would render the text incompatible with the provisions of the 1962 Convention. There is on the other hand no objection to a provision being inserted in Article 25 with a view to permitting a reservation to be made on this point.

Article 17

11. With reference to the discussions at the second session it is recommended that the explanatory report should make it clear that the minor changes in the terminology used in this provision as compared with the corresponding provision in the 1962 Convention do not imply any change of substance.

Article 18

12. Although the terms of this provision now differ from the corresponding provisions in Article 5 of the Annex to the 1962 Convention they do not seem to limit the hotelkeeper's liability or otherwise give rise to any particular problems as regards the interrelationship between the two texts.

Article 20

13. It is observed with regard to paragraph (b) that there seems to be no disadvantage from the point of view of future co-existence between the two instruments concerned if the term "property brought to the premises of the hotel" were also to include vehicles and property left with a vehicle as agreed at the Committee's second session. This is expressly envisaged under Article 2(e) of the 1962 Convention.

14. As regards paragraph (c) it should be noted that Article 4 of the 1962 Convention refers to the acts or omissions on the part of the hotelkeeper or "on the part of any person for whose actions he is responsible". The determination of such persons was, however, to be made in accordance with national law.

Article 21

15. Reference is made to the comments made in paragraph 5 above and in the report on the Committee's second session concerning the possible overlapping between the European Convention on products liability in regard to personal injury and death and the desirability of introducing a clause safeguarding a right of action based on products liability.

Article 25

16. As regards the provisions under (b) - (e) reference is made to the comments made above concerning reservations to the draft Convention and to the need to ensure that participation in the new Convention will not be incompatible with participation in the 1962 Council of Europe Convention on the liability of hotelkeepers concerning the property of their guests or, to the extent there might be overlapping, in the 1977 European Convention on products liability in regard to personal injury and death.