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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 third session of the Committee

held in Rome from 17 to 21 April 1978

Rome, May 1978

The third 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 17 to 21 April 1978.

The session was opened at 10.10 a.m. by the President of UNIDROIT, Mr. Mario MATTEUCCI, who extended a warm welcome to the participants representing 18 member States of the Institute, 2 non-member States, the Council of Europe and various Organisations concerned with the interests of the hotelkeeping profession, travel agents and consumers (see ANNEX I).

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

Item 2 on the agenda - Applicability of the future instrument on the hotelkeeper's contract to contracts concluded between tour organisers and hotelkeepers and its relations with the 1970 International Convention on the Travel Contract (CCV).

In introducing this item on the agenda, the Chairman reminded the Committee that the question of the applicability of the draft Convention under consideration to certain relations between guests and hotelkeepers arising under contracts concluded between the latter and tour organisers had already been referred to in the course of the first two sessions of the Committee. He also recalled that while it had been the intention of the Study Group which had prepared the preliminary draft Convention on the hotelkeeper's contract to include within its scope of application those contracts concluded between hotelkeepers and guests through a travel agent acting as a simple intermediary, the Group had on the other hand wished to exclude contracts between hotelkeepers and travel organisers acting in their own name. He noted in addition that he had been informed by the Secretariat that at its last session the Governing Council of the Institute had been requested by one of its members to give consideration to the extent to which there might be some connection between the hotelkeeper's draft and the CCV of 1970, a subject on which the Secretariat had already prepared a paper (Study XII - Doc. 33) for the present session.

At the request of the Chairman, the Secretary to the Committee outlined the paper prepared by the Secretariat of the Institute and then stated that the Governing Council had, at its recent session, briefly discussed the implications for each other of the CCV and the future instrument on the hotelkeeper's contract and in conclusion agreed that the Committee of Governmental Experts should be free to consider all the different problems associated with the hotelkeeper's contract, even those which seemed to fall outside its strict terms of reference, while requesting that it be kept informed of any developments which might take place.

In the light of this information, the Committee proceeded to a detailed discussion of the desirability and feasibility of dealing in the future Convention on the hotelkeeper's contract with the various aspects of the relations between guests and hotelkeepers arising under contracts concluded between the latter and travel organisers acting in their own name. It was however understood that in any event the Convention would cover hotelkeeper's contracts concluded with guests through a travel agency, acting as a simple intermediary, although there was some doubt as to the position of group bookings where one of the guests acted as principal.

On one point there was a general consensus of opinion among both governmental delegations and the observers representing the different professional interests, namely that the provisions of the future Convention governing the liability of the hotelkeeper for injury to the person of the guest or for damage to or loss of his property should apply irrespective of whether he had concluded the contract with the hotelkeeper himself or whether it had been concluded by a tour organiser acting in his own name. Such a solution, it was noted, would coincide with that obtaining under the 1962 Council of Europe Convention on the Liability of Hotelkeepers concerning the Property of their Guests. There was, however, a divergence of views as to the extent to which the Convention should govern the compensation payable by tour organisers to hotelkeepers in the event of cancellation.

One opinion was that the future instrument should apply to all cases of cancellation and in support of this contention it was argued that to exclude completely organised tour contracts would greatly restrict the interest of the Convention for many countries, especially developing countries, where tourism is for the most part carried out on the basis of organised package travel and where the hotelkeeper is frequently the economically weaker party. Secondly, it was suggested that to exclude contracts concluded on such a basis from the application of Article 7 of the draft would involve relying on existing practice which effectively meant on the consequences of the respective economic bargaining power of tour organisers and hotelkeepers, whose contractual relations are only in a minority of cases governed by the Hotel Convention relative to Contracts between Hoteliers and Travel Agents concluded between the International Hotel Association (IHA) and the Universal Federation of Travel Agents Associations (UFTAA). Minimum rules at least should therefore be laid down in the draft regarding such contracts. Further, several representatives expressed concern at the possibility of draconian terms being imposed on guests by means of stringent clauses contained in the agreement between the hotelkeeper and the tour organiser which were subsequently reproduced in the contract between the tour organiser and the guest.

Moreover, one representative considered that to the extent that attempts had been made throughout the draft to delete references to its contractual basis, it already covered relations arising out of organised tour contracts including the rules governing cancellation contained in Article 7 of the draft which did not specify whether compensation in the event of no-show should be paid by the guest or by the tour organiser. This provision at present allowed for contracting out in respect of individual hotelkeeper's contracts and even if this possibility were subsequently to be removed in relation to such contracts, it could always be retained for contracts concluded between hotelkeepers and tour organisers. Other representatives, however, doubted whether this interpretation of Article 7 could be sustained and one of them suggested that a set of provisions analogous to those contained in Article 7 for individual contracts should be worked out, perhaps along the lines of Article 41 of the IHA/UFTAA Convention, in respect of contracts concluded with hotelkeepers by tour organisers. It was also suggested that the revised wording of Article 4 excluded the draft's being held applicable to contracts concluded between tour organisers and hotelkeepers.

A majority of delegations, however, supported by the representatives of the hotelkeeping and travel agency professions, considered that there were serious objections to the future Convention's laying down directly or indirectly rules governing compensation for the cancellation of reservations of accommodation made by tour organisers. In the first place, the professional organisations insisted on the need for drawing a clear distinction in this context between on the one hand contracts concluded between hotelkeepers and guests, which were essentially consumer contracts, and on the other contracts of a purely commercial character between hotelkeepers and tour organisers the nature of which would vary considerably and in respect of which they argued in favour of the maximum freedom of contract. In this connection it was noted that in many cases such contracts form part of a series of agreements concluded between the tour organiser and other operators (e.g. carriers) in the framework of the contract binding the tour organiser and the traveller. Secondly, a number of representatives drew attention to the fact that the extension of the scope of Articles 6 and 7 to cover relations arising under contracts between tour organisers and hotelkeepers might result in the possibility of a hotelkeeper being able to sue not only the tour organiser but also the guest for no-show by the latter so that the guest would be open to action by both the hotelkeeper and the tour organiser, which seemed to be objectionable on principle and also in the guest's having a double right of action in the event of his not being given the accommodation stipulated under the contract, that is to say against both the tour organiser under the CCV

or under national law, and against the hotelkeeper under the future instrument. A further objection to the draft's covering cases of cancellation by tour organisers and overbooking by hotelkeepers with the result that they cannot honour their contracts with tour organisers was that either this would result in the need for lengthy negotiations if special rules were to be worked out to cover liability in such cases or alternatively that it would upset the balance created by Articles 6 and 7 of the draft, which had been elaborated with individual hotelkeeper's contracts in mind, if an attempt were to be made to solve the problem in the context of those articles as drafted. Another representative expressed the view that such an extension of the scope of application of the draft Convention would render it more complex and thus less acceptable to States; in this connection he also recalled the limited degree of acceptance of the CCV.

After lengthy consideration of the problems involved it was ultimately decided that the compensation payable by hotelkeepers to tour organisers and vice versa in the event of breach of their obligations to each other should fall outside the scope of the future Convention and thus be left to the exercise of their contractual freedom, and this all the more so since it was not clear that hotelkeepers and tour organisers could derogate from the provisions of Article 7 if the words "in the absence of agreement to the contrary", at present in square brackets, were to be deleted. Relations between hotelkeepers and tour organisers would thus continue to be governed by private professional agreements pending the possible conclusion of an intergovernmental international convention. On the other hand it was unanimously agreed that the existing freedom of contract should not be permitted to prejudice the rights of the guest by reducing the hotelkeeper's liability towards him under the future Convention and in consequence a new paragraph 2 was added to Article 24 under the terms of which "The hotelkeeper may, in his relations with parties other than the guest, agree to derogate from the provisions of this Convention provided that his liability towards the guest is not affected thereby"; it was further understood that this wording would cover not only contracts concluded between hotelkeepers and tour organisers but also those in which the contract was concluded on behalf of the individual by a non-professional such as an embassy acting on behalf of a national delegation from its own country visiting another State.

Item 3 on the agenda - Conclusion of the first reading of the preliminary draft Convention on the hotelkeeper's contract

Article 19

1.- The hotelkeeper shall have the right to detain property brought to the hotel by a guest when the latter does not pay the price of the accommodation and of any ancillary services.

2.- The hotelkeeper may, after sending prior notice in good time to the address which the guest has indicated and in accordance with the law of the place where the hotel is situated, cause to be sold the property detained by him up to the amount necessary to satisfy his claim against the guest and retain the proceeds of the sale up to that amount.

3.- Any third party rights which may exist in property brought to the hotel by the guest shall remain in force, notwithstanding the exercise of the right of detention by the hotelkeeper.

4.- The hotelkeeper may not exercise the right of detention referred to in paragraph I of the present article, when the guest provides a sufficient guarantee for the sum claimed or deposits an equivalent sum in the hands of a third party.

Although the Committee was unanimously in favour of retaining Article 19, it was generally felt that there were certain deficiencies in its drafting. As regards paragraph 1, the principal objection was that since the decision had now been taken to cover certain aspects of the relations between guests and hotelkeepers arising under contracts concluded between tour organisers and hotelkeepers, it might now seem that the hotelkeeper would be entitled to detain property brought to the hotel by a guest if the tour organiser did not pay to the hotelkeeper the cost of the accommodation and ancillary services enjoyed by the guest under the contract. The Committee considered that the hotelkeeper should not be entitled to exercise his right of detention in such cases and it was therefore agreed that the first paragraph of the article should be prefaced by the following words: "Except in cases where the sum payable to the hotelkeeper is due from a person other than the guest". In this context it was however noted that a difficulty might arise when a guest, staying in a hotel under an organised travel contract, availed himself of certain services not contemplated by that contract, for example by taking extra meals. In the view of most members of the Committee the hotelkeeper should be entitled to detain the

guest's property for payment of such extras as the latter was a guest within the meaning of Article 1 of the draft Convention and the sum was payable by him to the hotelkeeper and not by the tour organiser. One representative however considered that since the accommodation was to be paid for by the tour operator, the extra meals consumed by the guest did not fall within the framework of a hotelkeeper's contract but rather under a contract for the provision of food which did not as such come within the scope of the Convention. Another representative suggested that the difficulty might be solved by recourse to Article 20 of the draft where the position of certain persons was assimilated to that of guests. It was therefore agreed that the matter should be given further consideration in the light of the second reading of the draft articles.

A second difficulty related to the nature of the hotelkeeper's right of detention. On the one hand some representatives saw it only as providing the hotelkeeper with a guarantee for payment while others considered that it offered him a means of bringing pressure to bear on the guest to extract payment. This point was thought by some to be more than theoretical in that the character of the right of detention would to a certain degree determine the types of property which might be detained by the hotelkeeper. Thus on the one hand some representatives felt that to the extent that the right of detention was merely a guarantee for payment, it should apply only to property which can be sold and thus could not extend to such items as the guest's passport or his travellers cheques which were not capable of being sold. They also assimilated such objects to the clothes the guest is actually wearing as their detention would effectively amount to the detention of the guest himself. On the other hand it was argued that even such objects as passports and other personal documents might be detained by a hotelkeeper as a way of putting pressure on the guest to settle his bill. It was ultimately decided to try to meet both points of view by expressly stating in the text of the provision that the property may be detained by the hotelkeeper "as a guarantee for payment of the charge for the accommodation and for any other ancillary services supplied by him" and that in addition that property must be of commercial value. It was also agreed that the right of detention should not apply to sums advanced by the hotelkeeper to third persons on behalf of the guest, for example goods brought to the hotel by tradesmen at his request.

Another question raised was whether it should be stated in the text that the hotelkeeper's right of detention ought to extend only up to such property as is necessary to realise the sum owed by the guest. In this connection it was pointed out on the one hand that in many cases the hotelkeeper could have no idea of how much the property was worth until it had been officially valued and on the other that he might not even know what the property was at the time of its detention, for example the contents of

a locked trunk. For these reasons it was agreed not to deal with the point specifically in the text although it was felt that the reference in the amended version to a guarantee for payment would indicate that the hotelkeeper should not exercise his right abusively by detaining property of value obviously far in excess of the sum due to him.

Finally, there was some discussion of the difficulties which might arise in connection with property owned by third parties. Here it was decided that there should be no explicit restriction of the exercise of the right of detention to property owned by the guest himself so that even a car hired by him, perhaps through the hotel itself, could in principle be detained by the hotelkeeper. Questions regarding third party rights would therefore be dealt with in paragraph 3 of the article to the extent that the future Convention was intended to deal with them.

As to paragraph 2 (now paragraph 3 of the article) there was general agreement that the hotelkeeper should be entitled to have the property detained by him sold but only up to the amount necessary to satisfy his claim. In this connection the words "against the guest" which had originally followed the word "claim" were deleted, firstly because the new introductory phrase in paragraph 1 of the article made it clear that the right of detention may only be exercised in respect of sums due by the guest himself and secondly so as to leave it to national law to determine the meaning of the word "claim", although it was the understanding of many members of the Committee that it covered not only interest on the debt but also any expenses to which the hotelkeeper had been put in making the arrangements for the sale and which would not necessarily be interpreted as falling within the meaning of the term "claim against the guest".

There was also general agreement that the reference to the law of the place where the hotel was situated as governing the procedures and conditions of the sale englobed the repayment to the owner of the property of the surplus proceeds realised and that it was unnecessary to specify that the law referred to was the internal law of the jurisdiction in question to the exclusion of its conflicts of law rules as such procedural matters were always regulated by the law of the forum.

Some difficulty was however experienced by a representative with the requirement proposed by one delegation that the hotelkeeper should give "adequate and timely notice" of the sale. The intention of this wording was to ensure that the hotelkeeper should take all possible steps to inform the owner of the property, whether the guest or a third party, of the sale and insofar as it was considered that mere publishing in a local paper of

notice of the sale would be inadequate if the guest had already left the country in which the hotel was situated and had returned to his home at the other end of the world, the above-mentioned representative, while accepting the wording proposed as satisfying the majority of the Committee, stated that in his own country no such formalities as those alluded to existed and that it would be necessary to change the law in order to meet the requirements which seemed to be contained in the concept of "adequate and timely notice".

Considerable discussion centred around paragraph 3, now paragraph 4, of Article 19. After it had been recalled that the Study Group which had first prepared the preliminary draft Convention had intended in paragraph 3 merely to safeguard such third party rights as might be recognised by the competent court over property detained by the hotelkeeper, one representative suggested that it be reformulated to read "The law of the place where the hotel is situated shall determine those effects which third party rights may have on the hotelkeeper's right of detention." He considered that this wording had the merit of laying down a choice of law rule which would further the interests of unification and which would at the same time fully reflect the intention of the authors of the first draft.

A number of objections were however raised to that formulation. In the first place it was argued that it was ambiguous to the extent that it did not make it clear whether the substantive law of the country concerned was envisaged or whether conflicts rules were also contemplated. Secondly, and to the extent that the former was the intention, the effect of the proposed provision would be not only to permit courts to assign priorities in respect of property subject to different interests abroad but also to determine the very existence of such rights. It was also suggested that this would benefit the hotelkeeper who would be more familiar with the law of the forum. If however it were to be the case that the proposal were to be taken in a wider sense as including a reference to conflict rules, then it did little to bring about harmonisation. In consequence some representatives felt that paragraph 3 might be deleted as at the most dangerous and at the least as otiose.

Other delegations favoured the retention of paragraph 3 on the grounds that its deletion would leave a vacuum and imply that the hotelkeeper might detain property in all cases whereas in some jurisdictions he could not do so if he had knowledge that the property belonged to a person other than the guest. A certain merit was also seen in the proposed new version of the provision although it was considered that it should govern not only the hotelkeeper's right of detention but also his right of sale. Further it was argued that this wording did not authorise the judge of the forum to determine the existence of rights in property brought to the hotel from abroad

as had been alleged but merely, once the existence of such rights had been proved, to determine their effect, if any, on the hotelkeeper's rights of detention and sale. In other words it simply laid down a choice of law rule regarding priorities although one representative could have accepted a more radical solution whereby the law of the forum would also have determined the existence of third party rights.

Finally, after further lengthy discussion, the Committee agreed to carry forward to the second reading two alternative versions of the paragraph, the difference between them lying in the fact that one in effect left it open for a court to apply its conflicts of law rules in determining questions of priority while the other provided that questions of priority should be governed by the domestic law of the place where the hotel was situated.

Although the Committee was not called upon to express a preference as between the two alternatives, it was found that the latter caused difficulties to some representatives and it was therefore agreed to place it in square brackets.

Broadly speaking, the Committee accepted the general principles set out in paragraph 4 of the article, subject however to three amendments. In the first place it was agreed that the reference to the sum being deposited with a third party should be developed further in the sense that such a third party should be mutually acceptable to the hotelkeeper and to the guest and secondly that provision should also be made for deposit with an official institution as such a procedure was possible under the law of a certain number of countries. Lastly it was pointed out that the deposit or guarantee might be provided by a third party with an interest in the property detained and so as to cover this eventuality it was decided to delete the reference to the guest and to leave open the question of who should make the deposit or provide the guarantee.

In the light of these discussions the Committee adopted the following text of Article 19 on first reading:

"1. Except in cases where the sum payable to the hotelkeeper is due from a person other than the guest, the hotelkeeper shall, as a guarantee for payment of the charge for the accommodation or for any other ancillary services supplied by him, have the right to detain any property of commercial value brought to the premises of the hotel by a guest.

2. The hotelkeeper shall not, however, be entitled to detain such property if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution.

3. The hotelkeeper may, after giving adequate and timely notice, cause to be sold the property detained by him up to the amount necessary to satisfy his claim. The conditions and procedures of the sale shall be governed by the law of the place in which the hotel is situated.

4. The provisions of this article shall not affect the rights of which any third party might avail himself over the property brought to the premises of the hotel by the guest, or over the proceeds of the sale thereof.

/4. The internal law of the place where the hotel is situated shall determine the effects which third party rights may have on the hotelkeeper's rights of detention and sale and on the proceeds of such sale./"

/Article 22

1. In all legal proceedings arising out of a hotelkeeper's contract under this Convention the plaintiff may bring an action in a court or tribunal of a Contracting Party designated by agreement between the parties or

(a) in any court or tribunal of the State within whose territory is situated the hotel where the accommodation and the services were provided or,

(b) in any court or tribunal of a State within whose territory the defendant has his principal place of business, is habitually resident, or has the place of business through which the hotelkeeper's contract was concluded, and in no other court or tribunal.

2. Where, in respect of a claim to which paragraph 1 of this article applies, an action is pending before a court or tribunal competent under that paragraph or where in respect of such a claim judgment has been entered by such a court or tribunal, no new action shall be started on the same grounds between the same parties unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the State in which the fresh proceedings are brought.

3. Where in respect of a claim to which paragraph 1 of this article applies a judgment entered by a court or a tribunal of a Contracting State competent under that paragraph has become enforceable in that State, such judgments shall become enforceable in each of the other Contracting States as soon as the formalities required in the State concerned have been complied with. The merits of the case shall not be re-opened.

4. The provisions of the preceding paragraph shall apply to judgments after trial, judgments by default and settlements confirmed by an order of the court, but shall not apply to interim judgments or to awards of damages in addition to costs against a plaintiff who fails wholly or partly in his action.

5. Security of costs of proceedings arising out of hotelkeepers' contracts under this Convention shall not be required from nationals of Contracting States who have their residence or a place of business in one of those States./

In introducing the discussion of this article, the Chairman recalled that already within the framework of the Study Group, there had been a certain division of opinion concerning the desirability of including a provision along the lines of Article 22 in the future instrument and that this was demonstrated by the fact that the whole article had been placed within square brackets.

Reluctance to deal with questions of jurisdiction and enforcement was expressed by a large number of representatives, some on the grounds that such matters were normally left to regulation by bilateral agreements, others that the hotelkeeper's contract did not justify special treatment in this connection and yet others that difficulties might arise for memeber States of the European Economic Community with regard to the relationship between on the one hand Article 22 of the draft Convention and on the other Article 57 of the EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters together with Article 24 of the preliminary draft Convention on the accession of the new member States to the 1968 Convention. It was further printed out that the related CCV Convention contained no article analogous to Article 22.

Some support was, however, forthcoming for the retention of the article, or at least part of it. Thus one representative considered that it would be desirable to retain Article 22, but only if all the paragraphs were to be accepted as a whole. Another representative who stressed the need for harmonisation in this context expressed interest in paragraph 1, although he considered that the grounds of jurisdiction should be modified, while another argued in favour of the future instrument's containing provisions on enforcement which would be necessary for his State to enforce judgments given under the terms of the Convention, in view of the limited number of bilateral agreements it had concluded on the enforcement of judgments.

While it was agreed to follow the majority view and to delete Artic 22, subject to a full explanation of its removal being given in the explanatory report on the draft, concern was nevertheless expressed at the possibility of a binding consent jurisdiction stipulated in an agreement concluded between the hotelkeeper and the guest prejudicing the interests of the latter. It was therefore decided to introduce a provision in Article 24 to cover such eventualities to the extent that the agreement was entered into prior to the event causing the damage (see below, page 15), although one representative felt that agreements on jurisdiction concluded after the damage arose could likewise be prejudicial to the guest.

Article 23

1. The period of limitation for actions arising out of the death of, or personal injury or any other bodily or mental harm to, a guest shall be three years.

2. The period of limitation for actions arising out of a hotelkeeper's contract under this Convention other than those referred to in paragraph 1 of this article shall in all cases be one year.

3. The period of limitation shall begin to run from the time the guest leaves the hotel or, if he does not take up the accommodation as agreed under the contract, from the time he should have left the hotel.

4. A written claim by a party to the contract shall suspend the period of limitation until the date on which the other party rejects the claim by notification in writing and returns any documents handed to him in support of the claim. If a part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim which is still in dispute. The burden of proof of the receipt of the claim or of the reply and of the return of the documents shall rest with the party relying upon those facts. Further claims having the same object shall not suspend the running of the period of limitation unless the other party agrees to consider them.

5. Subject to the provisions of the preceding paragraph, the extension of the period of limitation shall be governed by the provisions of the law of the court or tribunal seized of the case not including the rules relating to conflict of laws. That law shall also govern the fresh accrual of rights of action.

With the exception of one representative, who pleaded in support of the maintenance of Article 23 in the interests of unification of law, there was general agreement that the article should be deleted as there seemed to be little justification for applying to hotelkeeper's contracts rules other than the general ones applicable under statutes of limitation. Various representatives expressed their concern with different paragraphs of the article and reference was made in particular to the fact that there were differences between it and the corresponding provisions of 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, especially as regards paragraph 3 of the preliminary draft Convention. It was also noted that provisions on limitation of actions were of more importance in Conventions dealing with business relations where it was necessary to establish the security of commercial transactions within a short period.

In these circumstances, the Committee decided to delete Article 23, once again on the understanding that reference would be made in the explanatory report on the future instrument to the reasons which had led to the Committee not to include a provision on limitation of actions therein.

Article 24

1. Any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void /in so far as it would be detrimental to the guest/. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

2. Any clause assigning to an arbitral tribunal a jurisdiction which is stipulated before the event that caused the damage shall be null and void.

To a large extent the discussion of this article was bound up with the Committee's consideration of the degree to which the future instrument on the hotelkeeper's contract should govern relations arising under contracts concluded between hotelkeepers and tour organisers (see above, pages 1 to 4) and it was in the light of the decisions taken in that context that the new paragraph 2 was added to Article 24 (see below, page 15, for the text) and the scope of paragraph 1 restricted to contracts concluded between hotelkeepers and guests.

However the Committee also considered at length the two original paragraphs of the article and in particular the desirability of retaining the phrase in square brackets in paragraph 1. Although some representatives and observers were of the opinion that the phrase introduced a rule which was unfair to hotelkeepers, more concern was expressed regarding the difficulties of interpretation to which it might give rise in practice in situations where, for example, the guest bargained away certain rights guaranteed to him under the Convention in exchange for financial benefits offered him by the hotelkeeper, such as a reduction in the normal charge for the accommodation or the provision free of charge of certain ancillary services. Another representative wondered whether the possibility of the parties agreeing to a jurisdiction which might be more favourable to one or to the other might not also fall within the compass of paragraph 1 of Article 24, while yet another feared that the provision as worded might nullify the effect of certain of the reservation clauses contained in Article 25 such as paragraph 1 (e) thereof, although he was subsequently reassured on this score.

One suggestion designed to clarify the matter was that a list of the provisions from which it should be impossible to derogate by contract should be included in Article 24, although it was recognised that the merits of such a proposal could be fully evaluated only after the second reading of the draft had been completed and decisions taken on the possibility of contracting out at present offered by certain articles.

The Committee considered, however, that the words "directly or indirectly", which seemed to be equivalent to the notion of "expressedly or impliedly", added nothing to the text and it was therefore decided that they should be deleted.

Another aspect of paragraph 1 which gave rise to discussion was the second sentence which provided that the nullity of stipulations derogating from the provisions of the Convention shall not involve the nullity of the other provisions of the contract. In this connection one representative suggested that this rule should be qualified in the sense that if the contract would not have been concluded in the absence of the clauses held to be null and void, then the whole contract should be held to be null and void. Although some support was advanced for this proposal, another representative expressed the utmost concern pointing out that this would permit hotelkeepers who had included derogations from the Convention in standard form contracts to maintain afterwards that they would never have concluded the contract had the clauses derogating from the Convention not been inserted in the contract. To this objection it was urged that such arguments would receive short shrift from judges but another representative also expressed hesitations regarding the introduction of such a provision for although the principle contained therein was well-known to his own legal system its justification was much greater in commercial than in consumer contracts.

In consequence it was agreed not to introduce the concept into paragraph 1 of Article 24 but to leave it to national law to apply its general principles in such cases and, so as to leave this possibility open, paragraph 1 of Article 24 was redrafted to read as follows: "Any agreement to which the guest is a party shall be void to the extent that it derogates from the provisions of this Convention in a manner detrimental to the guest."

Turning to paragraph 2 (now paragraph 3 of the article), the Committee noted that in view of its decision not to include in the future Convention provisions concerning jurisdiction, the scope of the paragraph should be extended to cover jurisdictional clauses in agreements between guests and hotelkeepers stipulated before the event causing the damage as the practical effect of such clauses might be to exclude the application of the Convention by conferring jurisdiction on courts in non-contracting States. It was in addition decided that such clauses should not be considered to be "null and void" but rather not accorded effect, so as to take account of the general principles of contract law obtaining in certain countries where nullity is considered to be a defect in formation. On the other hand the Committee was unanimous in deciding that the future Convention should not seek to regulate in any way the effects of arbitration or jurisdictional clauses contained in agreements between hotelkeepers and tour organisers whether concluded before or after the event causing the damage.

In the light of these decisions, the Committee provisionally adopted a revised version of Article 24 couched in the following terms :

"1. Any agreement to which the guest is a party shall be void to the extent that it derogates from the provisions of this Convention in a manner detrimental to the guest.

2. The hotelkeeper may, in his relations with parties other than the guest, agree to derogate from the provisions of this Convention provided that his liability towards the guest is not affected thereby.

3. No stipulation in an agreement between the hotelkeeper and the guest concluded before the dispute arose which confers jurisdiction on a court or provides for recourse to arbitration shall be accorded effect."

Miscellaneous questions

The Chairman recalled that at the last session of the Committee one delegation had stressed the need for the inclusion in the future instrument of a "federal clause", perhaps along the lines of that contained in the 1973 Washington Convention on the form of an international will. While recognising

that such a provision was necessary for a number of States on constitutional grounds, he did not consider it useful to discuss it in detail at this stage and the Committee agreed with his suggestion that the precise drafting of such a clause should be left to the Secretariat which would, for the next session of the Committee, prepare a set of draft final clauses which might form the basis of those to be submitted to a Diplomatic Conference for the adoption of the draft Convention.

He also noted, with a view to the second reading of the draft articles, an observation by the representatives of the hotelkeeping profession that the present draft contained no provision laying down an obligation on the guest to pay the price of the accommodation and ancillary services provided under the hotelkeeper's contract.

Item 4 on the agenda - Possible introduction of a reservation clause permitting States to exclude certain categories of establishments providing accommodation from the scope of application of the preliminary draft Convention on the hotelkeeper's contract

In introducing this item on the agenda, the Chairman recalled that in the course of the first reading of the preliminary draft Convention, a number of delegations had suggested that various types of establishment offering accommodation should be excluded from its field of application but, as time had not permitted a full discussion of the matter, the Secretariat had been entrusted with the preparation of a draft article to cover the point, a draft which was contained in the paper Study XII - Doc. 32. The solution proposed by the Secretariat, or rather the solutions, as two alternatives were offered for consideration, lay in adding another paragraph to the article on reservations, Articles 25. The first alternative would permit States not to apply the Convention when accommodation was furnished to the guest in certain generally defined types of establishment while the second contained a much broader formula allowing States to not to apply the terms of the Convention to categories of establishments to be determined by the State itself. In conclusion he suggested that a third possibility might lie in retaining the first alternative in principle, while making provision for States availing themselves of the reservation to add a list of those categories of establishment which they deemed to fall within the more precisely defined categories.

Only one representative pleaded in favour of the outright omission of a reservation clause on this subject. The majority of the members of the Committee supported its inclusion however, either because they considered that their Governments might well avail themselves of it or because, while not themselves insisting on its retention, they could accept it to the extent that other delegations deemed it indispensable.

As to the two alternatives suggested by the Secretariat, it was unanimously agreed that the first was preferable since the second gave far too much latitude to States to enter reservations and might even open the way to sweeping derogations to Article 1. The Committee then proceeded to a detailed consideration of the first alternative proposed by the Secretariat which permitted States not to apply the Convention when the accommodation was furnished to the guest in:

(a) a non-profit making establishment;

(b) an establishment whose primary aim is not the provision of accommodation or

(c) an establishment which is not open to all-comers.

Broadly speaking, the Committee favoured the retention of sub-paragraphs (a) and (b). Little difficulty was experienced with the former, examples of establishments covered by it which were cited being those run by voluntary organisations, religious houses and certain youth hostels although it was pointed out in this connection that one should look to the character of the establishment rather than the organisation running it, for while it was clear that a Salvation Army hostel providing temporary accommodation for the needy would fall within sub-paragraph (a), Salvation Army hotels operating in large cities on a commercial basis for the purpose of raising funds for the Army would not.

More difficulty was experienced in connection with sub-paragraph (b). Reference was made in particular to university halls of residence which let out accommodation during vacations and to hotels providing facilities such as thermal cures. As to the first situation, there was a general feeling that the terms of the Convention should apply although in the second it was felt that all would depend on the facts of the case. The criterion would seem to be whether the services provided were ancillary to the accommodation, as would be the case with a luxury hotel in a spa town with a resident doctor to supervise the taking of thermal cures, or whether the accommodation was ancillary to another purpose for which the guest was in the establishment, for example clinics and hospitals.

There was, however, a sharp division of opinion in connection with sub-paragraph (c). Some representatives called for its deletion on a number of grounds. In the first place it was suggested that it could give rise to abuse in that an astute hotelkeeper might seek to avoid the application of the Convention by charging a nominal membership fee and thus claiming that his hotel was a private club, although it was replied that in such cases it would be easy for a judge to examine whether or not the establishment was indeed a bonâ-fide club. A second objection was that the term "all-comers"

in the English text recalled the status of the innkeeper in a large number of Common-Law countries where it was employed as part of the definition of hotels and that it might thus be used by such countries to limit the applicability of the future Convention to those establishments which are at present defined as hotels. Thirdly it was suggested that the term might give rise to difficulties at a Diplomatic Conference for the adoption of the Convention and that it might be interpreted by some countries which had not so far participated in the drafting of the Convention as touching upon the problem of discrimination by the hotelkeeper against certain categories of prospective guests. Finally, it was noted that some types of establishment which the provision was meant to cover such as holiday or rest homes for employees of the State or of private firms would in any case fall under sub-paragraph (a) to the extent that they were subsidised and not run on a profit-making basis.

Other representatives saw some value however in the retention of the sub-paragraph, either in its present wording, which one representative considered to be particularly suited to the legislation at present in force in his own country, or with some amendment, one form of words which was suggested being that access to the establishment should be strictly limited to special categories of persons.

Ultimately, however, it was decided to retain the provision with its present wording in square brackets, a final decision to be taken on it during the second reading.

In addition, the Secretariat was requested to redraft the whole provision so as to make it possible for States to submit a list of the categories of establishment which they considered to fall within the language of the various sub-paragraphs, the provision of such a list being optional rather than compulsory, in view principally of the administrative difficulties which would be involved for States whenever they might wish to modify such a list in the light of new developments in the hotelkeeping industry.

Item 5 on the agenda - Second reading of the preliminary draft Convention on the hotelkeeper's contract

In view of the discussions which had taken place on the applicability of the future instrument to relations arising out of contracts between hotelkeepers and tour organisers and the time devoted to concluding the first reading of the preliminary draft articles, the Committee was unable to make any substantial progress with the second reading. In the context, however, of its examination of item 4 on the agenda, reference was made to the use of the term "professional" in Article 1. The upshot was a lengthy debate on the subject which in effect amounted to the beginning of the second reading of that provision and which saw one amendment to the text which had been provisionally approved by the Committee on first reading.

The point raised by one representative was that the term "professional" might give the impression that only those who had the status of professional hotelkeepers would be covered by the future Convention, thus excluding all persons who regularly let out accommodation, for example rooms in their own homes, while themselves carrying out another professional activity. He therefore suggested that the term "on a professional basis" be replaced by the words "on a regular basis". Another representative also proposed the substitution of a different formula for the word "professional" which he considered to be too vague and which in any event overlapped with the concept of the accommodation being provided "for reward".

Other representatives however argued in favour of its retention and considered that it should be left to judges to interpret it in accordance with their own national law. One in particular expressed concern at the proposal to delete the word "professional" and requested clarification as to whether what was intended was to make the drafting of Article 1 more precise or rather to extend the scope of application of the future Convention beyond that which had originally been envisaged so as to cover all boarding house situations, even those for example of retired persons supplementing their income by taking in the odd boarder for short periods at various times of the year. If this were to be the case then he had the strongest objections and would propose that concepts such as hotel, hotelkeeper and guest, which had not hitherto been defined in the draft, should be defined so as to avoid the extension of the notion of hotelkeeper to persons who had never been regarded as such in the past and who would thereby be obliged, for example, to install sophisticated equipment for the safekeeping of property and to take out large insurance premiums. As a compromise solution, however, he could accept the replacement of the term "professional" by some such phrase as "by way of normal trade or business".

After further discussion, during which some representatives suggested varying formulae to overcome what in essence seemed to be a problem of drafting rather than substance, it was finally decided to replace the phrase "on a professional basis" by the words "on a regular business basis".

A number of amendments to Article 1 were also submitted in writing in the course of the session but in view of the time available it was not possible to discuss them. It was therefore agreed to reconsider them at the next session of the Committee at which the whole of the article would be reviewed in the context of a full second reading of the preliminary draft articles.

Item 6 on the agenda - Other business

(a) Setting up of a small working party to examine the relationship between the CCV and the future Convention on the hotelkeeper's contract

One representative who had proposed the setting up of the working party recalled that throughout the discussion of the Committee he had insisted that the future Convention on the hotelkeeper's contract might well fail to solve all the problems connected with international travel, not least on account of the questions of definition involved. The Diplomatic Conference which had seen the opening to signature of the CCV had also recommended that UNIDROIT study the preparation of an international Convention governing the hotelkeeper's contract and he deeply regretted the fact that the first three sessions of the Committee had seen no examination of the possible inter-relationship between the CCV and the future hotelkeeper's Convention. A matter of particular importance was that of the liability régimes laid down by the two instruments and the limitations on liability contemplated by them. The CCV had hitherto received a somewhat lukewarm reception but its recent acceptance by Italy, a tourism-orientated country par excellence, increased its relevance and he therefore urged that a meeting of interested countries be held to consider the extent to which the two instruments were inter-related. The conclusions of such a meeting would be helpful not only to those countries which had already ratified the CCV but also to those which were seeking some guidelines with regard to possible ratification. His proposal, he insisted, was not to revise the CCV but rather to view the whole tourist/travel agent/tour organiser/hotelkeeper complex from a global standpoint which could only lead to a greater understanding of both the CCV and the draft Convention on the hotelkeeper's contract. Such a general review might create a stimulus to more States to ratify the CCV or at least indicate the need for certain changes in that Convention.

The various representatives who took the floor, while agreeing that it was not within the competence of the Committee to proceed to a revision of the CCV, nevertheless recognised the close relationship existing between that instrument and the draft Convention on the hotelkeeper's contract. They were, therefore, prepared to envisage the convening of a small working party to examine the question, on condition that the completion of the work on the hotelkeeper's contract should not be retarded thereby.

In the light of these observations, it was agreed that a small working party, the precise composition of which should be determined by the President of the Institute after consultation with the interested States and Organisations, should meet immediately before the next session of the Committee so that it might report its findings to the latter.

(b) Date and place of the next session of the Committee

The Committee agreed that its fourth and final session should be held in Rome at the headquarters of the Institute from 23 to 31 October 1978, on which occasion the second reading of the draft would be completed, and for which the Secretariat should prepare a list of problems in respect of the substance of which the Committee had not so far taken a decision.

ANNEXE I

ANNEX I

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ANNEX II

A G E N D A

1. Approval of the draft agenda

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

3. Completion of the first reading of the preliminary draft Convention on the hotelkeeper's contract

4. Possible introduction of a reservation clause permitting States to exclude certain categories of establishments providing accommodation from the scope of application of the preliminary draft Convention on the hotelkeeper's contract

5. Second reading of the preliminary draft Convention on the hotelkeeper's contract

6. Othe business

   (a) Setting up of a small working party to examine the relationship between the CCV and the future Convention on the hotelkeeper's contract

   (b) Date and place of the next session of the Committee.