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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

OBSERVATIONS OF GOVERNMENTS AND OF INTERESTED ORGANISATIONS ON THE PRELIMINARY DRAFT CONVENTION ON THE HOTELKEEPER'S CONTRACT DRAWN UP BY A SUB-COMMITTEE OF THE GOVERNING COUNCIL

(Australia, Finland, German Democratic Republic, Federal Republic of Germany, Japan, Sweden, Switzerland, Bureau européen des unions des consommateurs, International Hotel Association)

Rome, July 1990

General Observations

Australia

"Australia is a federal state and the matters dealt with by the preliminary draft Convention are regulated by laws at the State and Territory level. The form and content of relevant laws differ significantly between individual Australian States and Territories.

The Australian Government is currently consulting with State and Territory governments to ascertain their views on the detailed provisions of the preliminary draft Convention and on the possible scope for and benefits from improved uniformity in this area, at both the national and international levels.

The Australian Government has also invited comments on the preliminary draft Convention from relevant private sector interests. Comments received to date from Australian industry associations are to the effect that an international Convention in this area is neither necessary nor practicable, and that the provisions of the preliminary draft unduly favour the interests of guests. We are awaiting comments from relevant consumer groups.

The Australian Government expects to be in a position to provide more detailed comments on the preliminary draft Convention once the above consultative processes are complete."

Finland

"The Ministry for Foreign Affairs of Finland has received the comments of the Ministry of Justice, based on the comments of the Consumer-Ombudsman; the Central Chamber of Commerce; the Hotel and Restaurant Council; the Hotel, Restaurant and Cafeteria Association and the Confederation of Finnish Industries, on the text of the preliminary draft Unidroit Convention on the Hotelkeeper's Contract.

All comments take a critical view of the draft Convention. The Consumer-Ombudsman is of the opinion that the draft Convention strongly favours hotelkeepers and includes provisions that cannot be considered acceptable with regard to clients, whereas representatives of industry and commerce regard the draft Convention as not acceptable with regard to hotelkeepers. Some comments also point out that the draft Convention in its present form might have competition-reducing effects on the hotel industry.

Therefore the Government of Finland is of the opinion that the draft Convention should be carefully considered, and revised where necessary. Detailed views on the draft Convention will be presented at the following session of the committee of governmental experts on the subject."

German Democratic Republic

"The Ministry for Trade has taken note of the text of the draft Convention on the Hotelkeeper's Contract as substantially revised by the sub-committee of the Governing Council. It has been ascertained that the purpose of the draft Convention, which is that of creating a balance between the interests of hotelkeepers and guests, has been accomplished by the sub-committee. We therefore approve in principle the draft Convention."

Switzerland

"The draft Convention is in the opinion of the competent Swiss authorities an excellent basis for discussion at the next session of the committee of governmental experts.

In comparison with the 1978 preliminary draft it constitutes a compromise solution which takes account of the different interests in a fair manner. This should permit a consensus to be reached.

The competent Swiss authorities have no detailed observations to make at this stage on the provisions of the preliminary draft."

Bureau européen des unions des consommateurs

"As currently the EEC are preparing a directive on package tours, [we are] of course highly interested in the topic of hotelkeepers' contracts. A first glance at your document revealed, that though there are some similar provisions in the directive and in the preliminary draft Convention, it seems that there also exist some discrepancies, which should maybe be highlighted. A most interesting study, [we] assume.

The problem of liability of hotelkeepers is a major one for consumers in this field. Therefore [we] hope that it will be possible for you to invite a representative of BEUC to the conference which will be organised in the autumn."

International Hotel Association

"I am instructed by the Council of the Association to write to you in connection with the proposed new text of an International Hotelkeepers

Convention which you have submitted to us.

This initiative has been fully discussed within this Association and we remain of the view that it is neither desirable nor practicable to attempt to reach agreement internationally on a new text. If any real difficulties in the area of the hotelkeeper's contract do exist, which we are inclined to doubt, they should be dealt with nationally and with due regard to local traditions and the structure of national law."(1)

Article 3

Japan

"According to Article 3 of the preliminary draft Convention, the Convention is to be applied to every hotelkeeper's contract whenever the hotel is within a Contracting State regardless of a guest's permanent residence. We are, however, of the view that the Convention should be applied only to international contracts in which the permanent residence of a guest is outside the Contracting State, since in the field of domestic contracts there exist customs and practices proper to each country. Therefore we are of the view that Article 3 of the proposed Convention should at least be formulated so as to leave room for a Contracting State to reserve its position."

Article 5

Federal Republic of Germany

"With respect to Article 5 the Federal Government has substantial doubts as to the necessity of such a rule. No difficulties have arisen to date as regards the interpretation of hotel reservations."

Article 7

Federal Republic of Germany

"The Federal Government has obtained the opinion of the associations of the hotelkeeping profession, of travel agents and of consumers. Central to the interest of all those whose opinion was sought is the rule in Article 7 concerning damages due to the hotelkeeper when a guest fails to occupy the

(1) The Secretariat received similar reactions from the American Hotel and Motel Association.

accommodation he has booked. In this respect it can be said that the proposed regulation, although more balanced than that of the Preliminary Draft of 1978, was criticized by all three groups, albeit for quite different reasons.

Basing themselves upon the principle *pacta sunt servanda*, the hotelkeepers firmly oppose a unilateral possibility for the guest to cancel his reservation and further consider the lump sum compensation provided for in Article 7(4) and (5) to be too low. They fear that the hotel profession would react to such a regulation by practising over-booking, which so far has not occurred in the Federal Republic of Germany. The Government of the Federal Republic definitely does not share these misgivings. It appears to be quite reasonable for the guest to be able to cancel his reservation within a reasonable period of time before the beginning of his stay without having to pay compensation. Whether the proposed period of 21 days (Article 7(3)) is sufficient for hotels in tourist centres to permit the reletting of the cancelled accommodation to another guest would, however, need to be further examined.

The association of travel agents on the contrary considers the period of time for cancellation laid down in Article 7(3) to be too long; it fears repercussions on the booking activity of travel agents, which in their contractual relations with hotels need shorter periods for cancellation. In the opinion of the Federal Government the draft in any case pays due regard to the particular situation of the travel organiser by means of the exception contained in Article 2(2). Whether a more extensive exception in favour of travel agents is required has still to be considered.

The consumer associations consider the cancellation charge provided for in Article 7(4) and (5) to be too high. This criticism is not shared by the Federal Government. The consumer associations further indicate that to date in the experience of the Federal Republic only "very seldom" is advantage taken of the possibility which, although not expressly regulated, exists in German law of claiming a cancellation fee when the guest has failed to occupy a hotel room he has booked. The consumer associations fear that an express and detailed regulation such as that proposed in Article 7 would lead to increased recourse to this possibility against the consumer. In the opinion of the Federal Government these misgivings should not be disregarded."

Sweden

"This article has been discussed a lot during the previous work on the draft. In the 1978 draft, this article might have been drafted in a way which tipped the balance of the scales unfairly against the hotelkeeper.

However, the new draft has tipped too much the other way. Article 7 in the new draft does not satisfy the demand for suitable consumer protection.

Under paragraph 3 a guest shall be relieved of his liability if the hotelkeeper is informed of the cancellation of the reservation not later than 21 days before the date on which the accommodation was to be occupied or before the commencement of any such shorter period as may be agreed by the parties to the hotelkeeper's contract. This paragraph is not acceptable. A much shorter period of time would be preferable.

In Sweden, as in some other countries, the liability of the guest is normally waived if the cancellation is made one day before the date on which the accommodation is to be occupied. For reservations made in "mainly tourist type hotels" cancellations should be made 14 days in advance, if the reservation is for a stay of three days or more.

A solution to these problems could be to have a one-day-cancellation-rule in Article 7, but to allow hotelkeepers to stipulate a longer cancellation-period in the individual contract (with an upper limit, which could be 14 days).

Thus, it is suggested that Article 7, paragraph 3 should read as follows: "A guest shall be relieved of liability under paragraph 1 if the hotelkeeper is informed of the cancellation of the reservation not later than midday on the day before the date on which the accommodation was to be occupied or not later than before the commencement of any such longer period of time, not exceeding fourteen days, as may be agreed by the parties to the hotelkeeper's contract."

In order to protect guests that have made reservations from unexpected rises in prices, one should perhaps include in the draft a paragraph under which the hotelkeeper should inform guests about such rises and which in such cases allows the guest to cancel his reservation without being liable to the hotelkeeper for any losses resulting therefrom. Such rules could be drafted as follows: "If, in accordance with the contract, the hotelkeeper changes the price of accommodation or other services agreed, he must immediately inform the guest of such changes. If the change is substantial, the guest may cancel the reservation. If such a cancellation is made, the guest is relieved of liability under paragraph 1."

Paragraph 4 of Article 7 has been changed in the new draft. The changes increase the burden on the guest. The limitation amount has been substantially increased. This is not acceptable. Especially when combined with the other changes in Article 7, this places much too heavy a burden on the guest.

Normally the guest should have to pay compensation for only one day, but should then pay the full price for that day. Only if stipulated in the individual contract, should the guest have to pay for more days. It is therefore suggested that paragraph 4 read as follows: "The amount of damages payable to the hotelkeeper under this article shall not exceed the price of the accommodation and ancillary services for the first day under the contract, unless otherwise stipulated in the contract." It is also suggested that a new paragraph 4 (a) should be introduced: "Whatever is stipulated in the contract, the amount of damages payable to the hotelkeeper under this article shall not exceed 40 percent of the price of the accommodation and ancillary services provided for in the contract."

If these proposals for changes in Article 7 are accepted, one could delete paragraph 5, which is unpractical and constitutes much too complex a system."

Article 10

Federal Republic of Germany

"The regulation of deposits paid by the guest contained in Article 10 is, in the opinion of the Federal Government, superfluous.

Article 11

Sweden

"The right to retain property in Article 11 seems to include "any property of commercial value" brought to the premises of the hotel by the guest. This seems to be a bit too far-reaching. The right to retain should only include typical travel equipment but not personal belongings which the guest normally carries on him as for example jewellery and wristwatches (not even if the guest has temporarily put such objects for example in a drawer in his hotelroom). And what about a fur coat? Should the right to retain really include that?"

Article 12

Federal Republic of Germany

"The rule contained in paragraph 4, according to which the hotelkeeper is liable also when the bodily injury suffered by the guest was "in part"

caused by a third party, has been criticized, with similar arguments, both by the hotel industry consulted and by the IHA (Commentary No. 44). This regulation is also in the opinion of the Federal Government neither necessary nor to the purpose. On the one hand it makes it appear as if the hotelkeeper should be liable for the actions of third parties, even when these are not his servants or agents. This would be in conflict with the general principles of civil law. On the other hand it is undisputed, and therefore no clarification is necessary, that, in the case of the hotelkeeper's failing in *his own* duty of care, he is liable, as he is when in addition to this the behaviour of a third party has contributed to the damage."

Article 15

Federal Republic of Germany

"With reference to the first sentence of paragraph 2, a variety of doubts were expressed as to the interpretation of the concept "highest daily charge for the accommodation". According to the Federal Government the calculation of the limits of liability should start out from the actual price the guest finds specified in his bill. However, in the case of a differentiation of the price (e.g. a reduction of the price for the second or the third week of the stay) the highest price (e.g. that of the first week) should provide the basis for the calculation. This interpretation of the provision should be ensured in a suitable manner."

Sweden

"The upper limit of the liability seems to be too low. One hundred times the charge for the accommodation would be preferable."

Article 17

Sweden

"On the grounds given by the Chairman of the sub-committee of the Governing Council this article should be deleted."