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SOME REFLECTIONS ON THE DRAFT UNIDROIT CONVENTION ON THE HOTELKEEPER'S CONTRACT

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SUMMARY: 1. *Background to the draft Unidroit Convention on the hotelkeeper's contract;* 2. *General considerations;* 3. *The concept of the hotelkeeper's contract and the scope of the draft Convention ratione materiae;* 4. *Territorial scope of application and party autonomy;* 5. *The problem of cancellation;* 6. *The hotelkeeper's liability for death and personal injuries;* 7. *The hotelkeeper's liability for damage to property;* 8. *The future of the draft Convention.*

This Essay in honour of Professor Jorge Barrera Graf would be incomplete if the author were not to pay tribute, albeit briefly, to one of the principal architects of the unification of private law in the course of the last twenty years or so. It was, in this connection, a happy coincidence that 1968 saw both the election of Professor Barrera Graf as the first Mexican member of the Governing Council of the International Institute for the Unification of Private Law (Unidroit), and the holding of the first plenary session of the United Nations Commission on International Trade Law (UNCITRAL). Thereafter, his services to both organisations, as well as to many others operating both at universal and at regional level and to which other contributors to these Essays will not fail to draw attention, have conferred distinction not only on Professor Barrera himself but also on the country which he has represented and it should therefore have come as no surprise when in January 1988 Mexico became the first State Party to all three of what may be termed the triptych of the second generation of conventions dealing with the international sale of goods, namely the 1974 New York Convention on the Limitation Period in the International Sale of Goods,[1] the 1980 United Nations Convention on Con-

* While the author is the Secretary-General of the International Institute for the Unification of Private Law (Unidroit), this Essay is offered in a personal capacity and the views expressed therein should not be taken as reflecting those of the Organisation.

[1] The Mexican accession to the New York Convention on 21 January 1988 will have the effect of bringing that Convention into force as from 1 August 1988.

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tracts for the International Sale of Goods (the Vienna Sales Convention) and the 1983 Unidroit Convention on Agency in the International Sale of Goods (the Geneva Agency Convention).

Professor Barrera's many friends and colleagues who have had the privilege of working with him over the years in the framework of Unidroit and elsewhere cannot but hope that they will in the future be able to count on his unsmerring dedication to the cause of unification in other areas of the law, such as that with which this paper is concerned.

1. *Background to the draft Unidroit Convention on the hotelkeeper's contract*

The first attempt to bring about some degree of unification in the law governing the relations between hotelkeepers and their guests dates back to 1932[2] when Unidroit was requested by the International Hotel Alliance to examine the possibility of working out draft uniform provisions concerning the liability of innkeepers for the loss of, or damage to, goods brought to inns by guests. This démarche led to the setting up of a Unidroit working committee which drew up a preliminary draft uniform law respecting the liability of innkeepers for goods brought to inns by guests.[3] Approved by the Unidroit Governing Council in 1934, the draft was transmitted to Governments through the League of Nations of which the Institute was, at that time, one of the auxiliary organs.

Further progress was interrupted by the Second World War and to all practical purposes the renewal of interest in the subject may be situated in 1955 when the Council of Europe requested Unidroit to forward to it the draft with a view to achieving unification in the field among its own member States. The efforts of the Council of Europe ultimately resulted in the opening to signature in Paris on 17 December 1962 of the Convention on the Liability of Hotel-Keepers concerning the Property of their Guests, hereinafter referred to as "the Council of Europe Convention",[4] which in large measure followed the path traced by the original Unidroit draft.

[2] Set up in 1926, the Institute became fully operational in 1928.

[3] S.d.N. —U.D.P. 1934— Et. XII, Doc. 6.

[4] For the text of the Convention and the Annex thereto, see Unification of Law, Yearbook 1962, pp. 97-105. The Convention entered into force on 15 February 1967 and at present binds nine States, namely Belgium, Cyprus, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg; Malta and the United Kingdom. It has also been signed by Austria, Greece, the Netherlands and Turkey.

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The next step towards the unification of rules governing the relations between hotelkeepers and their guests came in a rather indirect manner with the decision of the Unidroit Governing Council in 1966 to proceed to the preparation of uniform rules concerning travel organizers and travel intermediaries and to entrust this task to a special working committee. From the outset the committee recognized that travel contracts embraced a number of elements, including transportation, accommodation and other services inherent in the sojourn, its task being rendered even more delicate by the absence in most States of national rules concerning private law relations between the travel organizer or intermediary and his client.[5]

Since it appeared impossible to elaborate 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 appropriate in relation to 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 various national laws which for the most part considered it only within the framework of the general lew of contract. This state of affairs caused some concern to the Unidroit working committee, concern echoed at the Brussels Diplomatic Conference at which the International Convention on Travel Contracts (CCV) was adopted on 23 April 1970[6] and whose Final Act contained the following 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 holtekeeper'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 a basis for the European Convention in this field, and that

[5] See especially the documentation concerning the arrangements and agreements in question in Pierre COUVRAT, Les agences de voyages en droit français, Paris, 1967.

[6] Cf. the official publication by the Kingdom of Belgium, Ministry of Foreign Affairs and External Trade, Diplomatic Conference on the Travel Contract (CCV) (in English and French), Brussels, April 1970, ed. Goemaere, Brussels, 1971.

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the general elaboration of uniform provisions on the hotelkeeper's contract appears in the UNIDROIT work programme,

Expresses 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".

In pursuance of this Recommendation, the Governing Council and the General Assembly of Unidroit accorded priority to the question of the elaboration of uniform rules on the hotelkeeper's contract and to this end a new working committee was set up. The committee, chaired by the Austrian member of the Governing Council, Mr Roland Loewe, held two sessions in March 1974 and January 1975 in the course of which it examined a comparative law study on the hotelkeeper's contract prepared by the Unidroit Secretariat [7] and adopted a preliminary draft Convention on the hotelkeeper's contract,[8] the point of departure for which was a set of draft articles elaborated by the Secretariat on the basis of directives laid down by the committee at its first session.

The text drawn up by the working committee was considered by the Governing Council at its 54th session in April 1975 and at its 55th session in September 1976 at which a decision was taken to set up a committee of governmental experts for the examination of the preliminary draft Convention on the Hotelkeeper's Contract. The committee of governmental experts held four sessions in Rome between March 1977 and October 1978 under the chairmanship of the French member of the Unidroit Governing Council, Mr Jean-Pierre Plantard, and it was at its fourth session that the committee approved the draft Convention on the Hotelkeeper's Contract.[9]

Consultations were then entered into between the Secretariat of the Institute and a number of member States which had shown particular interest in the work, with a view to securing the convening by one of those States of a diplomatic Conference for the adoption of the

[7] Study XII - Doc. 9, UNIDROIT 1974. This study is reproduced in the Uniform Law Review, 1975, II, p. 143 *et seq.*

[8] Study XII - Doc. 14, UNIDROIT 1976. The text, together with an explanatory report prepared by the Unidroit Secretariat, is reproduced in the Uniform Law Review, 1976, II, p. 159 *et seq.*

[9] For the report on that session see Study XII - Doc. 49, UNIDROIT 1978. The text of the draft Convention, together with an explanatory report prepared by the Unidroit Secretariat, is reproduced in the Uniform Law Review, 1978, II, p. 31 *et seq.*

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draft Convention. It soon became apparent however that the firm opposition of the hotelkeeping profession to some of its provisions, as well as the existence of doubts in certain governmental circles as to whether the draft when considered as a whole did not perhaps tilt the balance too far in favour of the guest, made it unlikely that any of the Governments approached would be prepared to host a diplomatic Conference for the adoption of the text in the form in which it had been approved by the committee of governmental experts.

Unfortunately, these developments took place at a time when Unidroit was actively engaged in work on a number of other subjects such as agency in the international sale of goods,[10] the liability of operators of transport terminals,[11] civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels,[12] the leasing contract and the factoring contract[13] and it was only in the context of the Work Programme for the triennial period 1984 to 1986 that the Governing Council of the Institute resumed consideration of the future of the draft. Its discussions led the Council to decide at its 65th session that the Secretariat should prepare a revised text of the draft Convention in the light in particular of certain suggestions made by members of the Council and of the Regulations of the International Hotel Association (IHA),[14] while at the same time seeking to harmonise as far as possible the relevant provisions of the draft with those of the Council of Europe Convention.[15] This text has been duly prepared by the Secretariat and will, together with a commentary on the proposed changes, be submitted to a sub-committee of the Governing Council for consideration inmediately prior to the 67th session of the Council to be held in Rome from 14 to 17 June 1988.

[10] A Convention on Agency on the International Sale of Goods was opened to signature on 17 March 1983 at a diplomatic Conference convened by the Swiss Government in Geneva. For the Acts and Proceedings of that Conference, see the Uniform Law Review, 1983.

[11] A draft Convention on this subject elaborated by a Unidroit study group was transmitted for finalisation to UNCITRAL in 1984.

[12] A draft Convention worked out by a Unidroit committee of governmental experts was transmitted in 1986 to the Economic Commission for Europe of the United Nations with a view to work being completed on it in the framework of that body.

[13] Draft Conventions on international factoring and international financial leasing will be submitted for adoption by a diplomatic Conference to be convened in Ottawa by the Canadian Government from 9 to 28 May 1988.

[14] The Regulations, which have no binding force, were adopted by the IHA Council in Kathmandu on 2 November 1981.

[15] See Report on the 65th session of the Governing Council, p. 15 *et seq.*

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2. *General considerations*

In elaborating the draft Convention, both the working committee and the committee of governmental experts had particular regard to the rules of national law governing various aspects of the hotelkeeper/guest relationship. Indeed, in the vast majority of States with a civil law tradition, it is normal to find provisions of the Civil Code or Code of Obligations dealing with the liability of the hotelkeeper for damage to, or loss of, his guest's property and, in many cases, also with the hotelkeeper's right to detain such property. Similarly, in a large number of Common Law jurisdictions, specific statutory provisions have been enacted either confirming or amending preexisting rules of Common Law converning the hotelkeeper's lien and his liability for property brought to the hotel, while provisions are also to be found dealing with his duty as to the safety of his guests.[16] Moreover, even where the conceptual approach to a particular problem differs from one group of States to another, for example in the field of liability for property brought to a hotel, the differences in practice are not always as great as might al first sight appear and certainly they caused no serious hindrance to the preparation of the 1934 Unidroit draft and the Council of Europe Convention of 1962.

On the other hand, the almost complete lack of specific provisions concerning a number of fundamental issues such as the commencement and termination of the contract between the hotelkeeper and his guest and the legal significance to be attributed to the advance booking of accommodation leads to a reference to the applicable general law with the attendant divergencies between the laws of differents States or groups of States. Since the draft Convention seeks to fill these lacunae as well as to harmonise those aspects of the relations between hotelkeepers and guests which are already regulated by a number of national laws, its substantive scope is much wider than that of the Conuncil of Europe Convention and, unlike that instrument which was worked out within a regional framekork, the future Convention is intended to apply on a worldwide level.

From the outset of the work one of the principal problems facing the authors of the draft Convention lay in determining the approach to be followed in regulating relations between the hotelkeeper and the guest. On the one hand a number of governmetal delegations stres-

[16] Ethiopia: Civil Code, Article 2658; Ireland: Hotel Proprietors Act, 1963, Section 4.

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sed the underlying contractual relations between the hotelkeeper and the guest and this analysis finds confirmation in the title of the draft Convention and in the fact that Article 1, paragraph 1 sets out a definition of the hotelkeeper's contract for the purposes of the application of the future instrument. This approach represents the development of a trend already to be seen at the 1970 Brussels Diplomatic Conference on the Travel Contract at which the trem "hotelkeeper's contract" appears to have been officially used for the first time at international level and would also seem to constitute an innovation from the standpoint of the national law of many States for it is to date only in the Civil Code of Ethiopia of 1960 that a fully developed body of rules concerning the legal relationship between hotelkeeper and guest is to be found.[17]

As against this "contractual" analysis of the relations between hotelkeepers and guest, a number of governmental delegations, es pecially those representing Common Law countries, considered that a more fruitful approach might be to formulate rules based on the concept of the status relationships between the hotelkeeper and the guest and to rely upon the contract only in connection with matters expressly arising out of agreement between the parties. This view was urged with particular force once the decision had been taken to include within the ambit of the future Convention relations between a hotelkeeper and a guest arising from a contract concluded between a hotelkeeper and a party other than the guest, such as a travel organizer, (Article 1, paragraphs 2 and 3 of the draft). In consequence, a considerable number of references to the hotelkeeper's contract in the draft were deleted and the text of the draft Convention approved by the committee of governmental experts may be seen as representing a compromise between the differing conceptual approaches.

The draft Convention is divided into six chapters, namely Definition and scope of application (Articles 1 and 2), Conclusion and performance of the contract (Articles 3 to 10), Liability of the hotelkeeper for death and personal injuries (Article 11), Liability of the hotelkeeper for damage to property (Articles 12 to 18), Miscellaneous provisions (Articles 19 to 21) and Final clauses (Articles 22 to 29).

It is not the intention of the author to proceed to an article by article analysis of the draft Convention, in which connection reference

[17] Title XVI, Contracts for the Performance of Services, Chapter 6 - Contracts of Innkeepers, Articles 2653-2671.

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may be made to the commentary[18] prepared by him in his capacity as secretary to the committee of governmental experts. Rather, attention will be focused on a number of aspects of the draft which may be seen as giving rise to difficulties of a technical caracter that were perhaps not immediately apparent in 1978 or which, because of the strong opposition to them which has been encountered in professional circles, could be reconsidered with a view to possible revision of some provisions of the draft Convention.

3. *The concept of the hotelkeeper's contract and the scope of the draft Convention ratione materiae*

The elements which permit the delimitation of the scope of application of the draft Convention *ratione materiae* are to be found principally in Article 1, paragraph 1 of which reads as follows:

"For the purposes of this Convention a "hotelkeeper's contract" means any contract by which a person —the hotelkeeper—, acting on a regular business basis, undertakes for reward to provide the guest with temporary accommodation and ancillary services in an establishment under his supervision."

Given the fact that, as already mentioned above, the concept of the hotelkeeper's contract is, on the international plane at least, a relatively novel one and that some of its aspects clearly differentiate it from the more classical schemata of sale or transport contracts, it may perhaps be useful to dwell briefly on the language of Article 1, paragraph 1.

The first feature of the provision is that it establishes the core obligation of the hotelkeeper towards his guests,[19] namely the pro-

[18] That commentary, hereafter referred to as the "Explanatory Report", is to be found in the Uniform Law Review, 1978, II, p. 57 *et seq.*

[19] Although the draft contains no definition of a hotelkeeper, a guest or a hotel, each of these could be defined by a rearrangement of the word order of the paragraph. It might however be that paragraph 1 is overloaded and that the concern of some at the absence of definitions of the hotelkeeper and the guest could be met and greater clarity achieved, if it were to be split into three separate paragraphs along the following lines:

1. "Hotelkeeper's contract" means any contract whereby one person undertakes for reward to provide another with temporary accommodation and ancillary services in an establishment under his supervision.
2. "Hotelkeeper" means any person acting on a regular business basis who undertakes to perform the contract defined in paragraph 1 of this article.
3. "Guest" means any person who benefits from an undertaking defined in paragraph 1 of this article."

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vision of accommodation, but while this undertaking is essential for the existence of a hotelkeeper's contract, it is not of itself sufficient since it is also necessary that the hotelkeeper provide certain indispensable services such as water and electric light and the cleaning of the room in which the sleeping accommodation is made available. Such services are however extremely varied, depending very much on the terms of the contract and on the category of the establishment offering the accommodation and the authors of the draft have therefore limited themselves to speaking of "ancillary services" without additional explanation.

Further conditions are laid down in the definition of the hotelkeeper's contract that are intended to exclude from the application of the draft Convention certain situations which might otherwise be considered to meet the requirement that an undertaking has been given by the hotelkeeper to provide accommodation and ancillary services. The first of these is that he is "acting on a regular business basis" for it was felt that it would not be justified to place upon individuals, very often of modest means, who let out a room or two in their houses during the tourist season the same liabilities as those incumbent upon the proprietors of large establishments. The accommodation must also be provided "for reward", thus excluding the provision of accommodation gratuitously or to members of hotel staff who occupy accommodation on the premises of the establishment under the terms of their contract of employment.

Another restriction established by paragraph 1 es that the draft Convention applies only to the provision of "temporary" accommodation, a term that is admittedly vague but which, in the opinion of some delegations, permits a distinction to be drawn between a hotelkeeper's contract and a lease and it was supported by others on the ground that it would serve a useful purpose in differentiating the normal case of a guest who takes up accommodation for a fairly short period of time from that of a person who virtually becomes resident in the hotel, enjoying services not normally provided to guests. Lastly, paragraph 1 stipulates that the establishment in which the accommodation is made available to the guest should be under the supervision of the hotelkeeper and this excludes, for example, accommodation in residences or bungalows forming part of a tourist complex over which the proprietor exercises no supervision.[20]

[20] Still further exclusions are contemplated by Article 20(a) which provides that "accommodation" shall not include accommodation provided on a vehicle being

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While the difficulties which might be experienced with the definition of a hotelkeeper's contract are perhaps essentially presentational, apart from some policy decisions to include or exclude certain categories of accommodation, more serious problems are encountered when paragraph 1 of Article 1 es read in conjunction with paragraphs 2 and 3 of that article which provide respectively that "[t]he hotelkeeper's contract may be concluden between the hotelkeeper and the guest or between the hotelkeeper and a party other than the guest" and that "[e]xcept when this Convention provides otherwise, it shall apply only to relations between the hotelkeeper and the guest".

The basic difficulty is that while many contracts for the provision of accommodation are concluded directly by the guest or on his behalf through a travel agent, especially by businessmen spending a short period in what are imprecisely but frequently termed "commercial hotels", the unparalleled development of international tourism has led to many contracts being concluded between hotelkeepers and travel organizers who book a block of rooms well in advance of their occupation for tourists whose identity is of total indifference both to the hotelkeeper and to the travel organizer, the prime concern of the latter being that he sells the number of package tours offered by him and that of the hotelkeeper that he receive payment from his contractual partner, the travel organizer, for the cost of the accommodation and ancillary services to be provided to the members of the group. There are in other words no contractual relations between the hotelkeeper and the guest althoug the travel organizer and the guest are bound by the travel contract and the hotelkeeper and the travel organizer by what is, for the purposes of the draft Convention, a hotelkeeper's contract within the definition of Article 1, paragraph 1.

Notwithstanding the view unanimously expressed by a small working party of the committee of governmental experts which met immediately prior to the final session of that committee that there was no legal incompatibility between the CCV and the draft Convention on the hotelkeeper's contract,[21] it is far from certain that the wording

operated as such in any mode of transport, thus avoiding any clash with international transport law Conventions and by Article 24, paragraph 1 (a), sub-paragraphs (i) and (ii) according to which States may disapply the Convention by way of a reservation when the accommodation is made available by a non-profit making establishment or by one whose primary aim is not the provision of accommodation, as to which see paragraphs 171 to 175 of the Explanatory Report.

[21] The fact remains however that the extent to which a person may recover compensation for damage suffered by him could in certain circumstances be different according to whether he were to sue the travel organizer under the CCV or the

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of Article 1, paragraph 2 may not give rise to problems in relation to Chapter II of the draft Convention, Conclusion and performance of the contract,[22] as the following examples drawn from certain of its provisions will illustrate.

a. Article 3

Paragraph 2 provides that a hotelkeeper's contract "need not be evidenced by writing and shall not be subject to any requirements as to form". Similar language is to be found in a number of recent international conventions such as Article 11 of the Vienna Sales Convention and Article 10 of the Geneva Agency Convention as also in the IHA's International Hotel Regulations, Article 2 of the first Part of which provides as follows: "The contract is not subject to any prescription as to form. It is concluded when one party accepts the offer of the other party". It should however be noted that provision does not apply if the hotelkeeper's contract is concluded with a "travel agent" to whom the regulations of the IHA/UFTAA International Hotel Convention would apply.[23] Indeed, it is a well known fact that contracts concluded between hotelkeepers and travel organizers within the framework of organized travel contracts are invariably made in or evidenced by writing and in these circumstances it migh be appropriate for the application of the provision to be expressly restricted to those contracts concluded between hotelkeepers and guests. Clarification on this point is all the more necessary for while some delegations to the committee of governmental experts considered that since Article 3 made no reference to relations between hotelkeepers and parties to the hotelkeeper's contract other than a guest, in would only be applicable to relations between hotelkeepers and guests and that its scope was therefore limited to contracts concluden between them, others

hotelkeeper under the future Convention on the hotelkeeper's contract. Moreover. the drafting of Article 15 of the CCV is such that it may not always be clear whether the liability of the travel organizer to the traveller for defective performance of the hotelkeerper's contract would in the final analysis fall to be determined by the hotelkeeper's Convention but in any event such considerations would be irrevelant to the question of the hotelkeeper's liability to which the latter instrument principally addresses itself.

[22] This would not seem to be the case with Chapters III, Liability of the hotelkeeper for death and personal injuries and IV, Liability of the hotelkeeper for damage to property, given the duties owel by the hotelkeeper to the guest in most legal systems independently of contract and deriving from the status relations existing between them.

[23] See below, note (38).

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were of the opinion that Article 3 would be applicable to hotelkeepers' contracts concluded by a hotelkeeper with a party other than a guest.

b. Article 5

How far should this article, which is concerned with the liability of the hotelkeeper to the guest for damage actually suffered by the latter when the hotelkeeper fails to provide the accommodation and services agreed under the hotelkeeper's contract, apply when the guest has no contractual relations with the hotelkeeper? If the contract has been concluded with the hotelkeeper by a travel organizer who is not acting as an agent of the guest, or indeed of the hotelkeeper, it would normally be against the travel organizer that the guest would turn in the event of the hotelkeeper failing to provide the agreed accommodation. It is however possible that the organizer may be unable to meet his liability towards the guest and in such circumstances a case could perhaps be made out for granting a direct action to the guest against a hotelkeeper who has received payment of sums due from the travel organizer under the travel contract. Suppose however that the hotelkeeper has not received payment, either in whole or in part, from the travel organizer and has in consequence concluded a subsequent agreement with another travel organizer. If the meaning of paragraph 1 of Article 5 is that the hotelkeeper would in such a case be liable to the guest for what is in effect the first travel organizer's failure to perform, this would seem to be a most curious result.

In the circumstances it might be appropriate for the application of Article 5 to be restricted to those situations where contractual relations exist between the hotelkeeper and the guest, unless it were to be felt that special provision should be made for cases where the guest cannot obtain redress from the travel organizer and where the hotelkeeper has himself received the sums due under the travel contract by providing the guest with a direct remedy against the hotelkeeper for unjust enrichment.

c. Article 8

This article, the language of which may need to be reconsidered, constitutes a *force majeure* clause in that paragraph 1 provides that the hotelkeeper's contract "shall be terminated before or during the occupation of the accommodation by the guest and without payment

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of damages when, as a consequence of an unavoidable and irresistible event which cannot be imputed to the party who invokes it, it is impossible for the hotelkeeper to provide, or for the guest to occupy, the said accommodation". The problem here is that in cases where no contract exists between the hotelkeeper and the guest it is difficult to see how it can be terminated by the guest. Admittedly there is, by virtue of the provisions of Article 1, paragraphs 1 and 2, a "hotelkeeper's contract" which has been concluded between the hotelkeeper and the travel organizer and there will of course be circumstances in which this contract may be terminated by one of the parties thereto, but to speak of termination of such a contract by the guest seems to be particularly inappropriate from a conceptual standpoint. It is therefore submitted that the application of Article 8 should be restricted to those situations where the guest is a party to the hotelkeeper's contract with the consequence that the respective rights and duties of hotelkeepers, travel organizers and guests will, in the circumstances contemplated by that article, be determined when the guest is not a party to the hotelkeeper's contract by reference to the contractual arrangements between the travel organizer and the guest and between the hotelkeeper and the travel organizer as well as to any provisions of the applicable national law of a mandatory character.

d. Article 9

The effect of this article is to ensure that when a hotelkeeper requests, and receives, from the guest a sum of money in advance, it shall be considered to be an advance payment towards the price of the accommodation and the ancillary services to be provided under the hotelkeeper's contract with the consequence that the hotelkeeper is under a duty to return it to the extent that it exceeds the amount due to him under the terms of the Convention.[24] The use of the words

[24] The committee thus rejected the rule pertaining in some legal systems to the effect that a sum paid to a hotelkeeper in advance is considered to be a forfeitable deposit so that if the guest does not occupy the accommodation, the hotelkeeper may retain the sum *in toto*. Although there was some support for this solution, or at least one which would permit the hotelkeeper to treat the advance payment as a forfeitable deposit if the parties so agreed, the majority of delegations were opposed to such a rule which they saw as permitting the hotelkeeper to avoid the application of the limits laid down in Article 6 in respect of the compensation payable by the guest, for example by requesting that the whole of the sum payable under the hotelkeeper's contract be paid in advance, not to mention cases where the hotelkeeper relets the accommodation to another guest, thus suffering no loss at all. In the

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"from the guest" in the first line of Article 9 as approved by the committee of governmental experts is perhaps sufficient indication that it was intended that the provision should not apply to contracts concluded with hotelkeepers by travel organizers and may be seen as an illustration of the unease of the authors of the draft Convention as regards the global application of the provisions of Chapter II not only to contracts concluded with a hotelkeeper by the guest himself or by a person acting as his agent in the strict sense of the term, but also to contracts concluded by hotelkeepers with travel organizers.

e. *Article 10*

This article is concerned with the hotelkeeper's right of retention and possibly of sale of property of commercial value brought to the premises of the hotel by a guest as a guarantee for, or in satisfaction of, payment of the cost of the accommodation and services actually provided by the hotelkeeper.[25] Here again there is however some degree of ambiguity in the scope of the provision as it not entirely clear from the opening language of the first paragraph of the article whether the reference to "a party other than the guest" excludes from the application of Article 10 not only the provision of accommodation under an organized travel contract but also those cases where it is procured for the guest by another person acting on his behalf. The latter view would seem to correspond to the intention of the committee and to the extent that it will be proposed hereafter that contracts concluded directly by the guest and those concluded by another person acting on his behalf should in all other respects be subjected to the same rules, it might perhaps be desirable to indicate in Article 10 the distinc-

event however of any revision of the draft Convention one might possibly consider introducing a derogation to the general rule laid down in Article 9, namely recognition of a practice widespread in some parts of the world which treats an advance payment of the price of one day's accommodation and services as a non-refundable deposit, a payment which is indeed in some countries often regarded as a condition for the hotelkeeper accepting the reservation.

[25] In other words the hotelkeeper is not authorised by Article 10 to retain, and eventually to sell, the guest's property in respect of claims arising for example from the guest's decision to relinquish the accommodation before the expiry of the period stipulated in the contract. Paragraph 1 of Article 10 in point of fact provides that "[e]xcept in cases where the sum payable to the hotelkeeper is due from a party other than the guest, the hotelkeeper shall, as a guarantee for payment of the charge for the accommodation and services actually provided by him, have the right to detain any property of commercial value brought to the premises of the hotel by a guest".

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tion between such contracts on the one hand and contracts concluded by travel organizers on the other.[26]

The preceding observations should not be seen as a criticism of the concept of the hotelkeeper's contract or of its incorporation for the first time in as international convention. What is rather being suggested is the need for a rethinking of the extent to which the provisions of Chapter II should apply, even with some limited exceptions, to the relations between hotelkeepers and guests arising out of contracts to which the guest is not a party. Similarly, and this principally to avoid possible complications, one might also contemplate totally disapplying the provisions of the Convention to relations between the hotelkeeper and a person other than the guest.[27] If such an approach were to be adopted one could imagine the deletion of the present paragraphs 2 and 3 of Article 1, and the inclusion of a new article which could be worded along the following lines:

1. This Convention applies to any hotelkeeper's contract concluded between a hotelkeeper and a guest.
2. With the exception of the provisions of Chapter II, it also applies to any hotelkeeper's contract concluded between a hotelkeeper and a person other than a guest.
3. It is concerned only with relations between a hotelkeeper and a guest.

[26] This article has not been the subject of criticism since the approval of the draft Convention by the committee of governmental experts and it should moreover be noted that the text has served as a basis first for Article 5 of Unidroit's preliminary draft Convention on operators of transport terminals (OTT's) and then for what is now Article 10 of UNCITRAL's draft articles of uniform rules on the liability of operators of transport terminals. To the extent therefore that some of the adaptations in this later work of the original Article 10 of the hotelkeepers's draft may be regarded as constituting improvements on that text, one could envisage incorporating in a revised version of that article some of the language contained in the UNCITRAL draft.

[27] In point of fact, the one genuine exception to the principle that the draft Convention applies only to relations between a hotelkeeper and a guest is that to be found in Article 6, paragraph 6, the deletion of which is suggested below in section 5 of this paper, it being open to question whether the language of Article 21, paragraph 2, which provides that the hotelkeeper may, in his relations with parties other than the guest, agree to derogate from the provisions of the Convention provided that his liability towards the guest is not affected thereby, indeed constitutes an exception to the general rule.

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4. *Territorial scope of application and party autonomy*

Whereas Article 1 is concerned with the material or substantive scope of application of the future instrument, Article 2 deals with the geographical scope which is determined, in this instance, by a territorial link with the State upon whose territory the hotel providing the accommodation is situated. The Convention, therefore, will be applicable only when the State in question is a Contracting Party to it. Once this condition is satisfield, the Convention would, under the terms of Article 2, be applicable to the hotelkeeper's contract irrespective of the presence or otherwise of any international element. Out of deference however to some delegations which favoured the introduction of such an element so as to avoid the application of the future instrument to purely national hotelkeeper's contracts the committee of governmental experts decided to introduce a reservation clause, contained in Article 24, paragraph 1(b), to the effect that the Convention "shall only apply when the hotel is situated on the territory of a State other than that in which the guest has his habitual residence". Those delegations considered that nothing in the provision would prevent States which wished to have a unifield system of rules governing the hotelkeeper's contract from doing so and to the objection that the inclusion of the provision would create two different categories of guest in the States which availed themselves of the reservation, namely those whose relations with the hotelkeeper were regulated by the future Convention and those whose position was governed by national law, a situation which might even arise with regard to guests staying in a hotel under the same organised travel contract, it was replied that it was not unprecedented for apparently similar categories of persons to be treated differently and by way of example it was recalled that it was perfectly possible for travellers in the same railway carriage in Europe to be subject to different liability régimes.[28]

The point was also made by one delegation that its country was not a unitary State and that from a political standpoint it might be preferable for it to accept the Convention subject to the reservation clause in sub-paragraph (*b*) with a view to progressive unification subsequently which would then permit the withdrawal of the reser-

[28] See, to this effect, the provisions of Article 3 of the Uniform Rules concerning the contract for international carriage of passengers and luggage by rail (CIV) which constitute APPENDIX A to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980.

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vation, and although some delegations expressed regret at the setback to the unification of law which the reservation represented, the committee agreed to its inclusion.

With respect however, the line of reasoning developed above would seem to imply that federal States could have a particular interest in the exclusion of purely national hotelkeeping contracts whereas in fact the reluctance to apply the terms of the future Convention to all cases in which accommodation is provided on the territory of a Contracting State[29] was shared by a number of unitary States, Moreover, the committee sought to take account of the constitutional difficulties facing certain federal States which might wish to allow for the progressive application of the Convention to their various territorial units by the inclusion of Article 25, paragraph 1 of which provides as follows:

> If a State has two or more territorial units in which different systems of law apply to matters respecting the hotelkeeper's contract, it may at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.[30]

It is therefore submitted that the question at issue is really a policy one which depends on the willingness of States to treat the future Convention as a genuine uniform law. In view of the practice which dates back over many decades in the fields of commercial law and transport law of seeking to regulate only international relations,[31] leaving it to each State to determine whether it wishes to apply the provisions of an international Convention to domestic relations also,[32] it may be counted a partial success for the unification process that the content of Article 24, paragraph 1 (b) of the draft Convention has, so

[29] Subject always of course to the existence of a hotelkeeper's contract as defined in Article 1.

[30] Similarly worded provisions are to be found in many modern international Conventions and reference may in particular be made to Article XIV of the Washington Convention of 26 October 1973 providing a Uniform Law on the Form of an International Will. Canada acceded to that Convention on 24 January 1977 in respect of Manitoba and Newfoundland and has subsequently extended its application to Ontario, Alberta and Sakatchewan.

[31] Notable exceptions are the Geneva Conventions of 7 June 1930 providing a uniform law on bills of exchange and promissory notes and of 19 March 1931 providing a uniform law on cheques.

[32] This has been the case for example with a number of States Parties to the Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air.

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far at least, assumed only the status of a reservation clause. Even so it might still be appropriate to reflect on whether the considerations which have led the authors of Conventions dealing essentially with commercial contracts to distinguish between international and national relations are really of relevance to uniform rules, one of the essential aspects of which is the protection of consumers in the broadest sense. In this connection it may be recalled that no such distinction was drawn in the 1962 Council of Europe Convention which, it has however to be admitted, was narrower both as to its scope of application and in respect of the circle of States responsible for its elaboration.[33]

As indicated above, the sole connecting factor provided in Article 2 for the application of the draft Convention is that of the territorial link, namely that the premises on which the accommodation is to be provided are situated in a Contracting State. In other words the authors have not included a provision to be found in many recent instruments such as the Vienna Sales Convention (Article I, paragraph 1(b)) the effect of which is to provide an alternative ground for the application of the Convention, namely that the law applicable to the relations dealt with is that of a Contracting State, when the principal criterion, that the parties have their places of business in different Contracting States, has not been satisfied. The purpose of the provision is to allow a wider scope of application of the Convention than would otherwise be the case and in particular it pays due regard to the notion of party autonomy since the parties themselves might choose as the law to govern their contractual relations that of a State which is a Party to the Convention.

Such considerations would not however seem to be relevant here since, at least as regards contracts concluded by a hotelkeeper with a guest or with a person acting as a simple intermediary on the latter's behalf, it is difficult to imagine many situations in which the parties would stipulate the law to govern their relations and in the absence of any such stipulation the applicable law would in any event almost invariably be that of the hotelkeeper who effects the performance characteristic of the contract —"la prestation charactéristique"— although the Convention would already by applicable whenever the hotel was situated in a Contracting State.

[33] It may however be recalled that Article 40, paragraph 1(a) of the CCV Convention permits Contracting States to restrict its application to "international travel agency contracts to be performed totally or partially within a State other than the State in which the contract was made or from which the traveller departed".

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One could however envisage a situation, perhaps unlikely but nevertheless conceivable, where a hotelkeeper in a State not a Party to the prospective Convention on the hotelkeeper's contract might conclude a contract for the provision of accommodation with a travel organizer situated in a Contracting State stipulating *inter alia* that the law governing that contract should be that of the travel organizer's place of business. Since, under the present wording of Article 1, paragraph 1, such a contract would be considered to be a hotelkeeper's contract, and even though the Convention would not apply to the relations between the hotelkeeper and the travel organizer, it could be argued that since the law applicable to the hotelkeeper's contract would be that of a Contracting State then, if the additional connecting factor were to be added, the Convention would govern the relations between the hotelkeeper and the guest. Such a result would seem to be rather curious and indeed the reasoning on which it is based might be rejected by the courts but it does at least suggest that in view of the very broad definition of the hotelkeeper's contract in Article 1, paragraph 1 it might be preferable to retain the single connecting factor of the territorial link.[34]

While it is unlikely, as mentioned above, that party autonomy would be exercised with a view to bringing about the application of the Convention in cases where it would otherwise not apply, one could much more easily visualize contractual stipulations purporting to exclude its operation, The committee of governmental experts was aware of this possibility and it is for this reason that paragraph 1 of Article 21 invalidates any agreement to which the guest is a party to the extent that it derogates from the provisions of the Convention in a manner detrimental to the guest and that paragraph 2, while allowing the hotelkeeper in his relations with parties other than the guest to derogate from the provisions of the Convention, does not permit such derogations if they would affect the hotelkeeper's liability towards the guest. Although these provisions were contested by the representatives of the hotelkeeping profession in the committee of governmental experts (see paragraph 164 of the Explanatory Report) and have subsequently been the subject of criticism in the written comments on the draft

[34] The solution would thus be similar to that reached in Article 2, paragraph 1 of the CCV Convention which reads as follows: "This Convention shall apply to any travel contract concluded by a travel organizer or intermediary, where his principal place of business or, failing any such place of business, his habitual residence, or the place of business through which the travel contract has been concluded, is located in a Contracting State".

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Convention submitted by the IHA to the Unidroit Secretariat on the ground that they are one-sided in operation and unfair, they are far from revolutionary. While it is true that commercial law Conventions such as the Vienna Sales Convention (Article 6) and the Geneva Agency Convention (Article 5) allow for the exclusion of their application and accord a wide measure of freedom to the parties to derogate from their provisions, the CCV Convention (Article 31, paragraph 1), as well as a number of instruments in the transport law field, severly restrict party autonomy in the interest of those considered to be in an economically weaker position.[35]

Finally, it should be noted that paragraph 3 of Article 21 renders ineffective any stipulation in an agreement between the hotelkeeper and the guest concluded before the dispute arises which confers jurisdiction on a court or provides for recourse to arbitration. As indicated in paragraph 166 of the Explanatory Report, this additional inroad on party autonomy is designed to prevent the hotelkeeper concluding an agreement excluding the application of the future Convention, in cases where it would otherwise be applicable, by conferring jurisdiction on a court which might not apply the provisions of the Convention or by providing for an arbitration procedure which, once again, might involve the non-application of the provisions of the Convention. Nothing however prevents such agreements being stipulated after the occurrence of the event giving rise to the dispute, since it was considered by the majority of delegations to the committee of governmental experts that the guest would by then be fully aware of the facts and would not therefore need special protection.

5. *The problem of cancellation*

To the extent that paragraph 1 of Article 6 of the draft Convention provides that a guest who "for the whole or any part of the period stipulated, fails to occupy the accommodation agreed under the hotelkeeper's contract, shall be liable for any damage actually suffered as a consequence theoreof by the hotelkeeper",[36] it does little more

[35] See, for example, Article 32 of the Warsaw Convention for the unification of certain rules relating to international carriage by air, Article 41 of the Convention of 19 May 1956 on the contract for the international carriage of goods by road (CMR) and Article 18 of the Athens Convention of 13 December 1974 relating to the carriage of passengers and their luggage by sea.

[36] Paragraph 2 of the article requires the hotelkeeper to take all reasonable steps to mitigate his damage, for example by reletting the accommodation as soon as he

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than reflect a general rule of contract law and, were the article to have done no more than that, it would not have attracted the positive barrage of criticism which has been directed against it by hotelkeepers. The concern of the profession relates to paragraphs 3 to 5 of the article which establish a somewhat complicated mechanism the effect of which may be summed up as follows:

a) to limit the compensation payable by the guest to the hotelkeeper for damage suffered by the latter under the terms of Article 6 to a maximum of 75% of the price of the accommodation and ancillary services provided for in the contract in regard of the first two days of the stay and to 40% of the price for the next five days, and to relieve the guest of any obligation to pay compensation in respect of any subsequent day (paragraph 3);

b) to deprive the hotelkeeper of any right to compensation when he has been informed of the cancellation of the reservation not later than midday on the day on which the accommodation was to be occupied, for a stay not exceeding two days, two days before the date of occupation for a stay of from three to seven days, and seven days before that date in respect of a stay exceeding seven days (paragraph 4);

c) to deprive the hotelkeeper of any right to compensation from a guest relinquishing the accommodation before the termination of the contract if the hotelkeeper has been informed of the guest's intention to relinquish the accommodation not later than midday on the day of departure for a contract which has no more than two days to run, two days before the date of departure for a contract which has from three to seven days to run, and seven days before that date if the contract has more than seven days to run (paragraph 5).

Although vigorous opposition to these provisions was voiced in the committee of governmental experts by the repesentatives of the hotelkeeping profession, a majority of governmental experts favoured the principle of limiting, or in some cases excluding, the guest's liability in the event of his failing to occupy the accommodation, partly because in practice hotelkeepers rarely claim the full amount due from the guest in respect of the period covered by the contract, partly because the existence of such a limitation would encourage the hotelkeeper to avoid loss by reletting the accommodation and last, but not

becomes aware of the guest's no-show or of his intention to leave the hotel before the expiry of the time for which the accommodation was booked.

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least, because the rule met the growing demand for consumer protection.[37]

There can be little doubt that although criticism has been expressed by the hotelkeeping profession of other provisions of the draft Convention, it is paragraphs 3 to 5 of Article 6 which have to a large extent determined its opposition to the draft as a whole. The objections have been set out in detail in observations formally submitted to the Unidroit Secretariat by the International Hotel Association in the following language:

— the effect of paragraph 3 (...) could be to entitle the hotelkeeper to compensation which would not meet his loss in full, thereby encouraging clients to reserve hotel accommodation with no serious intention of occupying it and to break their contracts at will;
— the provisions of paragraph 4 fail to take account of the fact that over 90% of clients make reservations in city hotels and 100% in resort hotels, a situation which would render it impossible for hotels to relet accommodation (especially whenever large groups whose accommodation had not been reserved by a travel organizer are involved) if the provisions on cancellation contained in paragraph 4 were to be maintained; the result would be that hotels could no longer operate profitably in the absence of resort to heavy overbooking, especially in city hotels, by accepting reservations for many more rooms than they could provide —as many as the average number of rooms cancelled under the terms set out in sub-paragraphs (a) to (c) of paragraph 4— with the unavoidable consequence that on days with fewer than average cancellations not all clients who had reserved accommodation would obtain it;
— a situation would thus be created in which the client's certainty of enjoying the accommodation he had reserved would be seriously diminished while the hotelkeeper would be exposed to the risk of having to pay compensation under Article 5;
— while the objections to the provisions of paragraph 4 also apply to those of paragraph 5, the position of the hotelkeeper would here be even worse since no client wishing to spend his vacation in a certain hotel would be willing to be put on a waiting list and to obtain accommodation only in the event of the premature departure of guests who had concluded hotel contracts for a number of weeks; it would therefore be well-nigh impossible for the hotelkeeper to make up the loss caused by such premature departure;
— the combined effect of the provisions of Article 6, paragraphs 3 to 5 would be to give a unilateral right of withdrawal to one party

[37] See Explanatory Report, paragraph 60.

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which would be in contradiction with fundamental principles of equity.

It is evident that in the event of work being resumed on the draft Convention the provisions of Article 6 and in particular those of paragraphs 3 to 5 will be one of the central items of discussion and that the final decision to be taken by Governments would reflect general policy considerations. From a purely technical point of view however there would seem to be two principal alternatives to the existing text. The first of these would lie in retaining the existing structure of Article 6, namely affirmation of the guest's liability for breach of contract and of the hotelkeeper's duty to take reasonable steps to mitigate his loss, application of a maximum limit on the compensation due by the guest and recognition of the guest's right of unilateral withdrawal in certain cases. In this connection it is interesting to note that, notwithstanding the criticism of paragraphs 3 and 4 by the IHA, Articles 39 to 42 and 51 to 55 of the IHA/UFTAA Convention [38] do indeed contemplate the possibility of reservations being cancelled by the travel agent without payment of compensation or with compensation restricted to a certain amount. The minimum period of notice necessary to avoid payment of compensation in respect of individual contracts is 30 days before the date of arrival in high season in what are described in Article 39 as "mainly tourist type hotels" and the maximum compensation due for each client whose reservation is cancelled is the equivalent of the cost of services ordered for a three nights stay for stays of three nights or over in high season irrespective of the type of hotel. The IHA/UFTAA Convention is, however, more severe in respect of the travel agent in cases of premature departure or no-show where the hotelkeeper is in principle entitled to compensation for the damage actually suffered (Article 42). There would therefore seem to be some possibility of adapting the provisions of at least paragraphs 3 and 4 of Article 6 of the Unidroit draft by the introduction of higher limits on compensation and/or longer periods before the commencement of which notice of cancellation must be given. A similar approach

[38] I.e. the International Hotel Convention relative to contracts between hoteliers and travel agents, the most recent version of which was concluded in 1979 between the IHA and the Universal Federation of Travel Agents' Associations (UFTAA). The purpose of the Convention was to lay down standard rules to be applied by hotelkeepers and travel agents in their mutual relations. Although this Convention was denounced by the IHA with effect from 14 June 1987, it does represent a codification of existing practice and is likely to constitute a point of reference in the future.

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might be adopted in connection with paragraph 5 although here the precedent of the IHA/UFTAA Convention and the hostility with which paragraph 5 has been greeted in hotelkeeping circles, even greater than that directed at paragraphs 3 and 4, suggest that its inclusion might remain a stumbling-block to the widespread adoption of any prospective Convention in the face of opposition from the profession.

An alternative solution would lie in the deletion of paragraphs 3, 4 and 5. This could perhaps be justified by the consideration that the relations between travel organizers and hotelkeepers are of a commercial character, frequently involving large sums of money, so that the stipulation in their contracts of detailed rules governing cancellation of reservations will in many cases avoid recourse to legal proceedings. In those cases however to which the Unidroit Convention would normally apply it is only in a minority of situations that failure by the guest to occupy the accommodation could be expected to result in litigation since the cost of legal proceedings would most certainly act as a deterrent to either party to resort to them. The loss will then as a rule lie where it falls in the sense that a guest will not usually sue a hotelkeeper who refuses to return an advance payment on the ground that it exceeds damage actually suffered by the hotelkeeper as a result of the guest's failure to occupy the accommodation while the hotelkeeper, even when no advance payment has been made, will be unlikely to sue the guest for damages.

Moreover, it could be argued that in their present form the provisions of paragraphs 3 to 5 are unsatisfactory in that the same rules on cancellation apply to very different factual situations. Thus cancellation of a reservation by a person of one room for two weeks in December in a large hotel in New York City would be treated in the same way as one for the same length of time for three rooms to be occupied by a family of six in a small, remotely situated establishment during the tourist season. This example, albeit an extreme one, illustrates various considerations, such as the number of guests covered by the contract, the type of hotel (commercial or tourist), whether the period in question is in high or low season, all of which will affect the likelihood of the hotelkeeper's succeeding in reletting the accommodation, which may in turn have influenced the amount requested by him by way of advance payment. To obtain greater flexibility in the aplication of the provisions of paragraphs 3 to 5 to widely varying situations it would therefore seem to be necessary to draw the distinc-

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tions suggested above between different categories of establishments and between high and low season, and to have regard to the number of persons covered by the contract. This would however call for a still more complicated text and possibly the introduction of further definitions which were studiously avoided by the committee of governmental experts on account of the drafting problems they would have entailed.[39]

It should also be borne in mind in this connection that paragraph 3, with the exception of the last sentence of sub-paragraph (b) which describes the circumstances in which no damages shall be payable by the guest, does not dispense the judge in the event of litigation from the need to determine the actual damage suffered by the hotelkeeper since the sums mentioned represent the maximum compensation payable and do not constitute a pre-assessment of damages. On the other hand the exclusion of any liability on the part of the guest in certain circumstances clearly would serve to avoid legal proceedings and, if it were thought necessary to include some provision safeguarding the guest who notifies the hotelkeeper in advance of his cancellation of the reservation, a new paragraph 3 could be introduced which would provide that the guest would not be required to compensate the hotelkeeper for failure to occupy the accommodation if the hotelkeeper were, for example, informed of such cancellation 14 or 21 days before the date of arrival or before the commencement of such shorter period as might have been agreed by the parties. Such a solution might provide a basis for a compromise between the more radical approaches of deleting paragraphs 3 to 5 or for maintaining them, albeit in an amended form.

Finally in connection with Article 6, it should be noted that paragraph 6 constitutes an exception to the general rule laid down in Article 1, paragraph 3 to the effect that the draft Convention applies only to relations between the hotelkeeper and the guest by providing that Article 6 "shall apply to relations between a hotelkeeper and a party to the hotelkeeper's contract other than the guest unless the parties to the contract have otherwise agreed". The origins of this rule and the main arguments developed in favour of and against its retention are set out in detail in paragraphs 66 to 70 of the Explanatory Report. It may perhaps however be in order to recall that one of the advantages which was seen in including the provision, although a proposal for its deletion met with considerable support in the com-

[39] See paragraph 61 of the Explanatory Report.

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mittee of governmental experts, was that it would make it quite clear that paragraphs 1 to 5 apply in principle only in relation to contracts concluded between hotelkeepers and guests. As has been pointed out however in paragraph 57 of the Explanatory Report, the wording of paragraphs 1 and 6 when read together is ambiguous on this point and one could perhaps envisage the deletion of paragraph 6 whatever the fate of the other provisions of Article 6.

6. *The hotelkeeper's liability for death and personal injuries*

The single article contained in Chapter III, Article 11, constitutes the first attempt at international level to unify the rules governing the hotelkeeper's liability for death of and personal injury to guests and it has to be admitted that the success is only partial for while the committee of governmental experts rejected the idea of imposing strict liability on the hotelkeeper (other than in the case of his liability under paragraph 2 fort loss or damage resulting from death or personal injuries caused by the consumption of food or drink provided to the guest) [40] and thus accepted the principle of fault liability, it failed to reach agreement on the question of the burden of proof. Space does not permit a detailed recapitulation here of the arguments advanced by the proponents of the presumed fault solution and by those who favoured placing on the guest the burden of proving that the hotelkeeper had failed to exercise the care which the circumstances called for [41] but it must remain a matter for regret that it did not prove possible for the committee to achieve a greater degree of unification. Reconsideration of the draft Convention may perhaps indicate that over the past ten years there has been an evolution in caselaw or *doctrine* in a number of countries which might permit a less ambiguous form of wording to be adopted although it may be, as some members of the committee of governmental experts suggested, that it does not greatly matter upon whom the burden of proof is placed since a court faced with conflicting evidence adduced by the parties will in practice reach its decision in favour of one or the other on the balance of the evidence available.

Article 11 has been the subjet of criticism by the IHA which, according to its interpretation, holds the hotelkeeper responsible for any

[40] For the reasons for this decision, see paragraphs 108 to 111 of the Explanatory Report.

[41] See in particular paragraphs 102 and 103 of the Explanatory Report.

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personal injuries to a guest occurring while he is staying at the hotel, and requires him to pay compensation for such injuries, regardless of whether they were caused by the hotelkeeper or by any other person, thereby extending the strict liability of the hotelkeeper in relation to goods. In particular, the IHA has expressed concern that the combined effect of paragraphs 1 and 4[42] of Article 11 could have far-reaching consequences in that the hotelkeeper might be liable for injuries to a client inflicted by a criminal entering the hotel without the hotelkeeper's assent or even by force.

With respect, these criticisms of the draft would seem to betray a certain misunderstanding of Article 11, paragraphs 1 and 4 since liability in respect of injury suffered by a guest as a result of the act or omission of a third party will not be incurred by the hotelkeeper under paragraph 1 if the injury "was caused by an event which a hotelkeeper, exercising the care which the circumstances called for, could not have avoided and the consequences of which he could not have prevented".[43]

Criticism has also been voiced in hotelkeeping circles at the tenor of paragraph 2, a suggestion having been made that it should be for the guest to prove that the food or drink was in fact unfit for human consumption, in which connection it may be recalled that the committee of governmental experts considered that it would be much more difficult for the guest to prove the unfitness of the food or drink than for the hotelkeeper to prove the contrary. More persuasive is however the argument that there is no reason for distinguishing the hotelkeeper's liability in respect of the provision of food or drink from that of a restaurateur, an argument which might perhaps militate in favour of an amendment of paragraph 2 which could contemplate a compromise solution based on the presumed fault of the hotelkeeper.

7. *The hotelkeeper's liability for damage to property*

In working out the provisions of Chapter IV (Articles 12 to 18) of the draft Convention), the committee of governmental experts was

[42] Paragraph 4 provides that in cases where the hotelkeeper is liable under the provisions of the article and the loss or damage results in part from the fault of a party other then the guest, the hotelkeeper shall nevertheless be required to compensate the guest in full.

[43] It should moreover be recalled that paragraph 5 of Article 11 preserves any rights of recourse the hotelkeeper may have against a party other than the guest.

[44] Subject to the possibility for Contracting States under Article 24, paragraph 1(c) to set the limits of liability at higher levels than those referred to in Articles 13 and 14 or to set no limits at all.

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able to draw on the experience of the authors of the original Unidroit draft and of the Council of Europe Convention while the general structure of Chapter IV of the draft also reflects by and large the provisions of a number of national legislations.

The basic approach may perhaps be summed up by setting out the general principles contained in Chapter IV, namely:

— the strict liability of the hotelkeeper for any damage to, or destruction or loss of, property brought to the premises of the hotel, or of which he takes charge outside the premises of the hotel, during and for a reasonable period before and after the time when the guest is entitled to accommodation (Article 12), subject to a limitation on liability which shall not exceed, in respect of any single event, one hundred times the charge for the accommodation (Article 14)[44] and the conversion of the strict liability into one based on fault if the guest fails to inform the hotelkeeper as soon as is reasonably possible of any damage suffered by him as a result of damage to, or destruction or loss of, the property (Article 18);

— an obligation on the hotelkeeper to receive securities, money and valuable articles for safe custody, which he may refuse only if they are dangerous or cumbersome, coupled with a regime of unlimited liability in respect of property which he has refused to accept for safe custody in controvention of his duty to do so, and with a limitation on liability in respect of any single event as regards property which he does receive for safe custody equivalent to 500 or 1,000 times the charge for the accommodation,[45] on condition that the guest has been duly notifield of the limitation prior to the deposit (Article 13);

— the loss of the hotelkeeper's right to limit his liability when the damage or destruction or loss has been caused by his negligence or by his wilful act or omission or that of any person for whom he is responsible (Article 16);

— the exoneration of the hotelkeeper from liability under Article 12 to the extent that damage, destruction or loss is due (a) to the negligence or to the wilful act or omission of the guest, of any person accompanying him or in his employment or of any person visiting him,

[45] For a full discussion of the considerations which led to the formulation of this article see paragraphs 124 to 136 of the Explanatory Report and in particular paragraph 133 as regards the multiples of 500 or 1,000 times the charge for the accommodation suggested by the committee of governmental experts as alternatives for the limitation of the hotelkeeper's liability.

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(b) to an unavoidable and irresistible event which cannot be imputed to him or (c) to the nature of the property (Article 17).

Broadly speaking the authors of the Unidroit draft of 1978 have sought, if not to ensure a total correspondence between its provisions and those of the Council of Europe Convention, then at least to avoid any fundamental incompatibility between the two instruments and in this connection it is important to bear in mind the fact that although Article 1, paragraph 1 of the 1962 Convention requires each Contracting State to undertake that its national law shall conform with the rules set out in the Annex,[46] these rules are to be considered as establishing only a minimum liability for hotelkeepers as Article 1, paragraph 2 of the Convention specifically provides that "[e]ach Contracting Party shall nevertheless remain free to impose greater liabilities on hotel-keepers". This provision is evidently of fundamental importance since, to the extent that the Unidroit draft does depart from the Council of Europe Convention, it would seem that it is only insofar as it might impose a less severe liability on the hotelkeeper that it may be regarded as being incompatible with it.

In attempting therefore to determine whether the provisions of the draft Unidroit Convention as they concern the liability of the hotelkeeper in relation to damage to, or loss or destruction of, property could cause problems to those States which are already Parties to the Council of Europe Convention it might be useful to draw up an inventory of the principal differences between the two texts, ignoring a certain rearrangement of the provisions in the later text as well as minor drafting points. Those differences may be summarised as follows:

(a) Unlike Article 1, paragraph 1 of the Annex to the 1962 Convention, Article 12 of the Unidroit draft would impose liability on the hotelkeeper in respect of the property of a guest who, although he does not have sleeping accommodation put at his disposal, is entitled to accommodation, as would be the case in the event of an overbooking by the hotelkeeper.

(b) Whereas Article 13, paragraph 1 of the Unidroit draft permits the hotelkeeper to refuse to accept for safekeeping securities, money and valuable articles only if they are dangerous or cumbersome, Article 2, paragraph 2 of the Annex to the Council of Europe Convention allows for an additional ground of refusal, namely that, having regard to the size or standing of the hotel, the article is of excessive value.

[46] It is in fact in the Annex that the principal substantive provisions of the Convention are to be found.

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(c) As mentioned above, according to Article 13, paragraph 3 of the Unidroit draft, the hotelkeeper may, with regard to property which he receives for safe custody, limit his liability, in respect of any single event, to a sum equal to 500 or 1,000 times the charge for the accommodation (minimum or maximum multiples suggested by the governmental expert committee) on condition that the guest has been duly notified thereof prior to the deposit. Article 2, paragraph 1(a) of the Annex to the Council of Europe Convention on the other hand provides for unlimited liability in such cases although it must be recalled that Article 2(d) of that Convention gives Contracting Parties the option of permitting the hotelkeeper, by an agreement with the guest signed by him and containing no other terms, to limit his liability to an amount which is not "less than that provided in the relevant legislation enacted in pursuance of this Convention", always provided that neither "intent or fault tantamount to intent is involved".

(d) Whereas the Council of Europe Convention offers an alternative means of calculating the hotelkeeper's liability for loss or damage (3,000 gold francs in accordance with Article 1, paragraph 3 of the Annex or at least 100 times the daily charge for the accommodation pursuant to Article 2(a) of the Convention itself). Article 14 of the Unidroit draft provides that "[t]he liability of the hotelkeeper for property other than that received by him for safe custody shall not exceed, in respect of any single event, one hundred times the charge for the accommodation".

(e) Unlike Article 2(b) of the 1962 Convention which permits States to introduce a limitation per article, which is to be not less than half the overall limit of the hotelkeeper's liability under Article 2(a) of the Convention or Article 1, paragraph 3 of the Annex, the Unidroit draft establishes no per article limitation.

(f) Article 7 of the Annex to the 1962 Convention specifically provides that the provisions of the Annex shall not apply to vehicles, any property left with a vehicle, or live animals, although Article 2(e) offers Contracting Parties the option of applying the rules contained in the Annex to vehicles property left with them and live animals "or to regulate the hotel-keeper's liability in this respect in any other way". A different approach is adopted in the Unidroit draft in that Article 20(b) excludes live animals from the application of the Convention while vehicles and property left with a vehicle are covered by it unless a State declares pursuant to Article 24, paragraph 1(d) that "it will not apply the provisions of Article 12 to 18 to vehicles

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or any property left with a vehicle or attach conditions to such application".

The IHA has in its written observations to Unidroit expressed a decided preference for the provisions of the 1962 Convention as opposed to those to be found in Articles 12 to 18 of the Unidroit draft, its principal objections relating to the amount of the limitation proposed in respect of property deposited for safe custody (Article 13, paragraph 3), the absence of a fixed-sum limitation as an alternative in Article 14, the absence of any provision permitting the hotelkeeper to refuse to accept property of excessive value for safe custody and the inclusion of vehicles and property left with them within the Convention. Similarly, the IHA takes exception to Article 24, paragraph 1(c) of the Unidroit draft which permits States to set limits of liability at higher levels than those referred to in Articles 13 to 14 or to set no limits at all.

Without in any way wishing to take issue on these various criticisms of the Unidroit draft it must be pointed out that they do not seem to take into consideration on the one hand Article 1, paragraph 2 of the Council of Europe Convention which goes much further than does Article 24, paragraph 1(c) of the Unidroit draft in permitting Contracting Parties to impose greater liabilities on hotelkeepers, and on the other the fact that Article 2(d) of the 1962 Convention, which permits a limitation of the hotelkeeper's liability in respect of property deposited with him, will only come into play if a State has introduced such a rule in its national legislation for otherwise the rule contained in Article 2, paragraph 1(a) of the Annex will apply. On this present point it might therefore be in the interest of the profession to accept a relatively high limit of liability of the kind contemplated in Article 13, paragraph 3 of the Unidroit draft rather than to run the risk of an unlimited liability.

Given, however, the fact that the Council of Europe Convention has already been accepted by nine States it might well be advisable to consider the possibility of returning in respect of some matters to the solutions to be found in it and in particular those relieving the hotelkeeper from the obligation to accept for safe custody articles of excessive value, granting him a limitation of liability per article and excluding, in principle, his liability in respect of vehicles and property left with them (points (b), (e) and (f) raised by the IHA).

On the other hand, there could be serious doubts as to the wisdom of reintroducing a fixed sum liability. The speed with which limitation

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amounts, whether expressed in gold or in some alternative value such as special drawing rights, have become outdated has led to calls for the revision of a number of international instruments and to the devising of more or less automatic revision mechanisms. It is this which makes a single limitation fixed by reference to a multiple of the charge for the accommodation as provided for in Articles 13 and 14 of the Unidroit draft so attractive as the progressive increase in the cost of the accommodation would already reflect inflationary tendencies, including the increase in the value of property brought to hotels by guests. Whether however the multiples currently proposed in the Unidroit draft are still to be considered appropriate today could evidently be the subject of further discussion.

8. *The future of the draft Convention*

How then to assess the prospects for the draft Convention? Worked out by a committee of experts which saw representation by twenty-nine States, the Council of Europe, the International Hotel Association, the Universal Federation of Travel Agents Associations and the International Organization of Consumers Unions, it certainly represents a genuine attempt to regulate at international level an area of increasing economic importance. That some of the draft rules, especially those contained in Article 6, should have caused concern to the profession is understandable for apart from the criticisms expressed, and not just by the hotelkeepers themselves, of the provisions of that article, anyone who has been involved for some time in the unification process is well aware of the inherent suspicion of professional categories when changes are proposed to long-standing rules and practices, albeit sometimes minor changes. We are moreover living in an age in which one of the watchwords in many countries is "deregulation" and one may therefore legitimately wonder whether in such a climate there is room for a new international convention in the field of what is more and more becoming known as the law of tourism, even if hotelkeepers are called upon in some parts of the world to cater more particularly for the needs of businessmen.

An old English adage states that "the proof of the pudding is in the eating" and it may well be that if the 1978 Unidroit draft proved indigestible in some quarters a revised version might be more palatable. But even then some body, a study group or a committee of governmental experts or both, will have to devise the new recipe and again the question may be posed, "Is it worth the trouble"?

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Well, there are grounds for thinking so. On 1 July 1983 the Standing Committee of the Parliamentary Assembly of the Council of Europe adopted Recommendation 967 on the liability of hotel-keepers, in the last paragraph of which the Assembly recommended to the Committee of Ministers of that organisation that it "invite the governments of the member states to give their full support to the work being undertaken in Unidroit relating to an international convention on the hotel-keeper's contract and take the necessary steps to ensure that an international diplomatic conference to settle this convention should be convened at an early date."

Even more illuminating is the Explanatory Memorandum on the Recommendation in which the rapporteur, the Luxembourg parliamentarian Mr Georges Margue, states the following:

> The Legal Affairs Committee and the Parliamentary Assembly are ... faced with a choice. Should they encourage further ratifications of the Council of Europe convention, which has the advantage of already being in force between a large number of member states, or should they encourage the rapid adoption of the UNIDROIT draft convention, which is much more complex than the Council of Europe convention? The question of the civil law relationships between hotel-keepers and travellers is extremely important nowadays as travel has become commonplace for large sections of the public. International regulations to standardise legislation on the subject are highly desirable and it is for that reason that it is proposed to recommend that the Committee of Ministers invite the governments of the member states to give their full support to the work being undertaken in Unidroit relating to an international convention on the hotelkeepers' contract and take the necessary steps to ensure that an international diplomatic conference to settle this convention should be convened at an early date.[47]

[47] Council of Europe, Parliamentary Assembly, Doc. 5080. Report on the liability of hotel-keepers, paragraph 11. In a paper entitled "A Uniform Approach to Legal Aspects of Travel and Tourism Abroad" delivered to the Unidroit Congress on Uniform Law in Practice in September 1987, the Acts and Proceedings of which will be published in 1988, Professor John Sherry, who was one of the United States delegates to the fourth and final session of the Unidroit committee of governmental experts, likewise drew attention to the importance and originality of the draft Unidroit Convention which he describes as "a significant move toward practical as well as theoretical synthesis in an area heretofore not receiving the international focus the subject deserves". The draft has also received detailed consideration from the standpoint especially of United States law in an article published by Professor Sherry in conjunction with Mr Thomas Ramsey and Mr Rodney Gould, both of whom were also members of the United States delegation to the committee of go-

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Yet if there is support for the pursuance of work on the 1978 draft Convention, it should not be forgotten that its origins date back to 1970 and to the CCV Convention which has proved a disappointment in terms of ratification.[48] Here too, however, there are important developments since as recently as 21 March 1988, a proposal for a Council Directive on package travel, including package holidays and package tours[49] was submitted by the Commission of the European Communities.

And here perhaps this paper comes full circle. In the introduction, tribute was paid to the contribution of Professor Barrera Graf to the development of the modern conventions governing international sale contracts but it is widely admitted that many of those conventions rely heavily on the efforts deployed by Unidroit over many decades which led to the adoption of the 1964 Hague Conventions relating to a Uniform Law on the Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods. It may perhaps be the case that the 1934 Unidroit draft and the 1962 Council of Europe Convention, as well as the CCV Convention, and possibly the proposed Community directive on package travel, will lead to heightened recognition of the ever-growing importance of international tourism[50] and the elaboration of instruments aimed at the whole international community, thus going beyond the purely regional unification which has hitherto been achieved or contemplated in Western Europe.

vernmental experts; cf. The UNIDROIT Draft Convention on the Hotelkeeper's Contract. A Major Attempt to Unify the Law Governing Innkeeper - Guest Liability, in *Cornell International Law Journal,* 13 (Winter 1980) p. 33 *et seq.*

[48] There are at present only seven States Parties to the Convention, which entered into force on 24 February 1976, namely: Argentina, Belgium, Benin, Cameroun, Republic of China, Italy and Togo.

[49] Doc. Com. (88) 41 Final - SYN 122 of 21 March 1988.

[50] Illustrated by the foundation in Madrid in 1975 of the World Tourism Organization, which groups together over 100 member States, to facilitate and improve travel between and within member countries and with a view to contributing to economic expansion, international understanding, peace and prosperity.

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