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THE UNIDROIT DRAFT CONVENTION ON THE HOTELKEEPER'S CONTRACT: A MAJOR ATTEMPT TO UNIFY THE LAW GOVERNING INNKEEPER- GUEST LIABILITY*

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On October 31, 1978, a UNIDROIT¹ Committee of Governmental Experts completed a draft of an international convention covering many aspects of the legal rights and obligations of travelers and hotelkeepers.² If

* This Article is the result of Mr. Ramsey's participation as U.S. Representative to all four sessions of the UNIDROIT Committee of Governmental Experts on the Hotelkeeper's Contract and Mr. Gould's and Professor Sherry's participation as members of the U.S. delegation to the final session. The authors wish to acknowledge with special thanks the assistance of Ms. Mary Jane Edelman, Cornell Law School class of 1979, in the preparation of Part I of this Article.

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1. The League of Nations founded the International Institute for the Unification of Private Law (UNIDROIT) in 1926. An intergovernmental organization, UNIDROIT's purpose is to harmonize and coordinate the private law of various nations. The Institute prepares drafts of laws, conventions, and agreements. UNIDROIT also engages in comparative private law studies, organizes conferences, and publishes works on international private law. Forty-three nations are currently members of UNIDROIT. Matteucci, *The History of UNIDROIT and the Methods of Unification*, in *THE UNIFICATION OF PRIVATE LAW AND LAW AND LEGAL LITERATURE IN ITALY* 4, 4-6 (1974).

2. The Committee of Governmental Experts on the Hotelkeeper's Contract included representatives from 26 countries (Austria, Belgium, Canada, Colombia, Cuba, Finland, France, German Democratic Republic, Greece, India, Ireland, Italy, Mexico, Nigeria, Norway, Portugal, Rumania, San Marino, Spain, South Africa, Sweden, Switzerland, Turkey, United King-

entered into force, the Draft Convention on the Hotelkeeper's Contract³ would substantially affect the innkeeper-guest relationship in those countries that adopt the Convention.⁴

International travel plays an important role in the economies of many nations.⁵ Each year, travelers spend billions of dollars abroad.⁶ A substantial portion of these expenditures goes for hotel accommodations. Presently, however, there exists no comprehensive system of transnational law that governs the rights and duties of the hotelkeeper and his guest in cases of personal injury, property damage or loss, or dishonored reservations.

The Draft Convention on the Hotelkeeper's Contract attempts to provide such a legal system. Part I of this Article will discuss the historical evolution of the Draft Convention. Part II will examine the remedies that the Convention provides for the injured traveler as well as the defenses available to the hotelkeeper. In Part III, the Article will analyze the remedies and defenses available when either the hotelkeeper or the guest dishonors a reservation. Finally, the Article will examine various means by which the Draft Convention could be implemented into U.S. law.

I

HISTORICAL BACKGROUND

The origins of the Draft Convention date to 1932, when the International Hotel Alliance (IHA) asked UNIDROIT to examine the possibility of drafting a uniform law on the liability of innkeepers for the loss of, or damage to, property brought to hotels by guests.⁷ This industry initiative

dom, United States, Vatican City). The Committee held four working sessions between March of 1977 and October of 1978. For the reports of the UNIDROIT Secretariat on the four working sessions, see [1977] 2 UNIDROIT PROCEEDINGS AND PAPERS, Study XII, Doc. 21; [1978] 2 UNIDROIT PROCEEDINGS AND PAPERS, Study XII, Doc. 21; *id.* Doc. 39; *id.* Doc. 49.

3. Draft Convention on the Hotelkeeper's Contract, UNIDROIT Study XII, Doc. 50 (1979) [hereinafter cited as Draft Convention] (on file at the *Cornell International Law Journal*).

4. The procedure for the adoption of a UNIDROIT draft convention varies. UNIDROIT may send the draft to other international organizations for their review and possible adoption. A more traditional approach involves the convening of a diplomatic conference. See *Examination of the Problems Relating to the Bringing into Force of the Drafts Prepared by the Institute*, [1978] 1 UNIDROIT PROCEEDINGS AND PAPERS, A.G. 29, Doc. 2. The Draft Convention will enter into force six months after ratification, acceptance, approval, or accession by five nations. Draft Convention, *supra* note 3, art. 23(1).

5. For example, international tourist receipts accounted for 7.4% of the 1975 gross national product of Austria and 5.1% of Japan's 1975 GNP. WORLD TOURISM ORGANIZATION, *ECONOMIC REVIEW OF WORLD TOURISM* 39 (1978).

6. Total international tourist receipts for 1976 were \$43.6 billion, a 12.4% increase over the previous year. *Id.* at 35.

7. Explanatory Report on the Preliminary Draft Convention on the Hotelkeeper's Contract, [1976] 2 UNIDROIT PROCEEDINGS AND PAPERS, Study XII, Doc. 14, app. II, at 1 [here-

led to a series of drafts and revisions.⁸ The advent of World War II suspended the work of unification and a publishable draft uniform law did not emerge until 1948.⁹

In 1955 the Council of Europe obtained the draft law from UNIDROIT in the hope that the Council could achieve unification in this area.¹⁰ After seven years of deliberation, the Council opened for signature the Convention on the Liability of Hotel-keepers Concerning the Property of Their Guests.¹¹

In early 1967 the Governing Council of UNIDROIT began another attempt to expand the protection afforded the international traveler—the drafting of a uniform law for travel organizers and intermediaries. Three factors prompted the decision to begin work on this new legal system—the complexity of the travel agency business,¹² the lack of statutory private law

inafter cited as 1976 Explanatory Report]. This report provides a historical background to UNIDROIT's work on the hotelkeeper's contract as well as an article-by-article analysis of the Preliminary Draft Convention.

8. UNIDROIT drafted and submitted a preliminary report to the IHA. The IHA then sent questionnaires to national hotel associations. Using the responses to these questionnaires, a UNIDROIT Working Committee prepared a preliminary draft uniform law on the liability of innkeepers for goods brought to inns by guests. The League of Nations, UNIDROIT's parent organization at the time, transmitted this draft to various governments. After receiving responses, the IHA began a revision of the preliminary draft. *Id.*

9. *Id.*

10. *Id.*

11. *Entered into force* Feb. 15, 1967, Europ. T.S. No. 41. The Convention provides that "[e]ach Contracting Party undertakes that . . . its national law shall conform with the rules on the liability of hotel-keepers concerning the property of their guests set out in the Annex. . . ." *Id.* art. 1(1). The Annex contains provisions that impose hotelkeeper liability of up to 3,000 francs for damage, destruction, or loss of property brought to the hotel by a guest (art. 1); unlimited liability for deposited property or property the hotelkeeper was bound to receive but had refused (art. 2); no hotelkeeper liability where damage or loss is due to the guest, his companions or visitors, or an "unforeseeable and irresistible" event (art. 3); unlimited hotelkeeper liability where the "wilful act or omission or negligence" of the hotelkeeper or his agent causes the damage or loss (art. 4); and a requirement that the guest promptly notify the hotelkeeper of damaged or lost property (art. 5). The Annex provisions invalidate exculpatory notices or agreements (art. 6); and exclude vehicles, property in vehicles, and live animals from coverage (art. 7). The Convention has been ratified by Belgium, France, the Federal Republic of Germany, Ireland, Malta, and the United Kingdom, and signed by Austria, Italy, Luxembourg, the Netherlands, and Turkey. 1976 Explanatory Report, *supra* note 7, at 1.

12. Explanatory Memorandum to the Preliminary Draft International Convention on the Travel Agency Contract (CCV), [1968] 2 UNIDROIT PROCEEDINGS AND PAPERS, Study XLVIII, Doc. 9, at 3-5. The role of the travel agent has evolved from an intermediary who obtains transportation tickets, reserves accommodations, and arranges sightseeing tours, to a planner and organizer of journeys. Previously, planned journeys only came about at the request of a particular client. Later, the industry began preparing them in advance and offering them to the public as "package tours." Some agents do not confine themselves to organization. Instead, they directly provide one or more of the services making up the "package," including plane charters, room rentals in the agent's hotel, and excursion tours in his buses.

concerning the travel organizer-traveler relationship,¹³ and the inconsistency of the case law on the subject.¹⁴ In 1970 UNIDROIT presented a draft uniform law to a Diplomatic Conference sponsored by Belgium. The result of that Conference is the International Convention on Travel Contracts (CCV).¹⁵

The CCV attempts to regulate the form and content of the "travel contract" entered into by travel organizers and travelers. It establishes standards governing such matters as cancellations and refunds,¹⁶ and provides rules regarding the liability of the travel organizer to the traveler for loss or damage suffered during the journey.¹⁷ The CCV also sets limits on the travel organizer's liability.¹⁸

Such diverse activities allow a travel agent to be both a principal supplier of services and an intermediary who brings a client together with other suppliers. *Id.* at 3.

13. "Contrary to what is happening as regards the status of the travel agent in public or administrative law, which is coming to be recognized in a growing number of countries, there exists no legislation, either national or international, in the sphere of private law specifically applicable to travel agencies." *Id.* at 5.

14. Elaboration of the inconsistencies is beyond the scope of this Article. The CCV Explanatory Memorandum, *supra* note 12, provides a helpful overview of the trends in case law in different legal systems regarding disputes in the travel agency business. *See also* Sherry, *The Travel Agent's Responsibility to the Travel Consumer: For Whom Does the Bell Toll?*, 17 CORNELL HOTEL AND RESTAURANT AD. Q. 49 (1976); Wohlmuth, *The Liability of Travel Agents: A Study in the Selection of Appropriate Legal Principles*, 40 TEMP. L.Q. 29 (1966).

In the United States, courts have decided questions pertaining to travel organizer/agent liability on different theories depending on the facts and circumstances of each case. In *Bucholtz v. Sirotkin Travel, Ltd.*, 74 Misc. 2d 180, 343 N.Y.S.2d 438 (Dist. Ct. 1973), *aff'd*, 80 Misc. 2d 333, 363 N.Y.S.2d 415 (App. T. 1974), the court found that a travel agent was the agent of the traveler and, accordingly, was bound to a fiduciary standard of care. Other U.S. courts, however, have held that travel agents are agents of travel service suppliers. *See, e.g.*, *E.A. McQuade Travel Agency, Inc. v. Domeck*, 190 So. 2d 3 (Fla. Dist. Ct. App. 1966) (travel agent liable for money paid for cruise tickets when agent's principal, a steamship line, went bankrupt). Some decisions have involved a close examination of the contractual relationship between the travel agent and service supplier. *See, e.g.*, *Crown Travel Service, Inc. v. Air Traffic Conference of America*, 270 F. Supp. 305 (D.N.J. 1967). Other courts view the travel agent as a broker acting on behalf of the client. *See Simpson v. Compagnie Nationale Air France*, 42 Ill. 2d 496, 248 N.E.2d 117 (1969). One commentator suggests that the travel agent may be an independent contractor. Wohlmuth, *supra*, at 51. Yet another approach is to view the travel agent as a "dual agent" acting simultaneously for the client and the supplier. *Id.* at 45-46. *See also* Letter from Paul S. Quinn to the Chairman, Advisory Committee of Private International Law (Oct. 3, 1977) (on file at the Department of State).

15. Convention Internationale relative au Contrat de Voyage (CCV), done April 23, 1970, reprinted in 9 INT'L LEGAL MATERIALS 699 (1970). Thus far only seven countries—Argentina, Belgium, Benin, Cameroun, the Republic of China (Taiwan), Italy, and Togo—have ratified or otherwise acceded to the CCV and the probability of its becoming widely accepted appears slight. Note for the Working Party to Examine the Relationship between the CCV and the Future Convention on the Hotelkeeper's Contract, [1978] 2 UNIDROIT PAPERS AND PROCEEDINGS, Study XII, Doc. 44, at 9 [hereinafter cited as Note for the Working Party].

16. CCV, *supra* note 15, arts. 9-11.

17. *Id.* arts. 12-15.

18. *Id.* art. 13.

The CCV, however, has thus far met with general international rejection.¹⁹ The rejection probably is due to certain substantive deficiencies of the CCV, such as inherent ambiguities,²⁰ declared objectives that lack corresponding provisions,²¹ and unreasonably low liability limits.²²

Even before the 1970 Diplomatic Conference on the CCV, the UNIDROIT Working Committee recognized the inadequacy of leaving that part of the travel contract regarding hotel accommodations to national laws.²³ The Diplomatic Conference reaffirmed this concern, underscoring the CCV's failure to provide international rules governing hotelkeeper liability and recommending that UNIDROIT undertake the elaboration of uniform provisions relative to the hotelkeeper's contract.²⁴

Responding to this recommendation, UNIDROIT's Governing Coun-

19. A large majority of Western European nations took an "extremely negative approach" to the CCV at a special meeting of the Council of Europe. Note for the Working Party, *supra* note 15, at 9.

20. For example, the CCV defines a travel organizer as "any person who habitually or regularly undertakes to perform [an 'organized travel contract'], whether or not such activity is his main business and whether or not he exercises such activity on a professional basis." CCV, *supra* note 15, art. 1(5). The Convention defines an "intermediary travel contract" as any contract "whereby a person undertakes to provide for another, for a price, either an organized travel contract or one or more separate services rendering possible a journey or sojourn." *Id.* art. 1(3). It appears that the travel organizer approximates a travel agent and a person who undertakes an "intermediary travel contract" is the equivalent of a tour operator. The CCV's terms do not coincide with customary industry usage, thus making application of the CCV difficult. In addition, the Convention provides no guidelines for determining when and how a travel agent's hybrid functions (supplier of services and agent of client) come within the terms of the CCV.

21. Reviewing the CCV, one member of the State Department's Study Group on the Hotelkeeper's Contract noted that the Convention had certain gaps, including insufficient requirements for full disclosure of conditions under which an organizer can cancel a tour, no right of cancellation for the traveler when the organizer makes material changes in the planned tour, and no ready mechanism for payment to travelers for items promised but not provided. Unpublished letter from Rodney E. Gould, Assistant Regional Director, F.T.C., to the Department of State (on file at the Department of State).

22. The CCV limits liability to 50,000 French francs for personal injury, 2,000 French francs for damage to property, and 5,000 French francs for other types of damage or loss. CCV, *supra* note 15, art. 13. See Kearney, *The United States and International Cooperation to Unify Private Law*, 5 CORNELL INT'L L.J. 1, 13-14 (1972).

23. 1976 Explanatory Report, *supra* note 7, at 2.

24. Recommendation no. 3 of the Diplomatic Conference's Final Act states:

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

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

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

cil and General Assembly gave special priority to the drafting of general uniform rules on the hotelkeeper's contract and established a Working Committee to study the problem. After the Working Committee submitted its 1976 Preliminary Draft Convention on the Hotelkeeper's Contract, UNIDROIT convened four sessions of the Committee of Governmental Experts to complete a revised draft.²⁵

The Committee of Governmental Experts confronted a fundamental problem—the selection of a conceptual basis for their attempt to regulate relations between the hotelkeeper and guest. Some delegations emphasized the contractual nature of the relationship.²⁶ This approach, however, left unanswered the questions of whether the contract is unitary or merely a label attached to a plurality of contracts, and whether the guest who suffers personal injury is able to sue in tort as well as contract.²⁷

Instead of a "contractual" analysis, the majority of common law delegations argued for rules based upon a "status" concept, with reliance upon contract theory only for disputes expressly covered by the agreement between the hotelkeeper and his guest.²⁸ This approach gained particular force after the Committee decided to include within the Draft Convention relations between a hotelkeeper and a guest arising out of a contract between the hotelkeeper and a third party, such as a travel organizer.²⁹ As a result, the Committee deleted a considerable number of references to the hotelkeeper's contract and the final text represents a compromise between the differing conceptual approaches.

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 [sic] possible, the elaboration of uniform provisions relative to hotelkeeper's contracts, to be subsequently submitted to the Governments for examination and eventual approval.

Id. at 3. This 1970 Diplomatic Conference appears to have been the first time the term "hotelkeeper's contract" was officially used on the international level. *Id.* at 4. On the national level, only the Civil Code of Ethiopia contains a fully developed statutory scheme that defines and regulates the legal relationship between hotelkeeper and guest. CIVIL CODE, arts. 2653-71 (Ethiopia).

25. See note 2 *supra*.

26. UNIDROIT, Explanatory Report of the Draft Convention on the Hotelkeeper's Contract, Study XII, Doc. 50, at 17 (1979) [hereinafter cited as 1979 Explanatory Report] (on file at the Cornell International Law Journal).

27. Report on the Hotelkeeper's Contract, [1974] 2 UNIDROIT PROCEEDINGS AND PAPERS, Study XII, Doc. 9, at 16 [hereinafter cited as 1974 Report on the Hotelkeeper's Contract].

28. 1979 Explanatory Report, *supra* note 26, at 17. See also J. SHERRY, THE LAWS OF INNKEEPERS 114 (1972).

29. 1979 Explanatory Report, *supra* note 26, at 17-18. See Draft Convention, *supra* note 3, art. 1(2), (3).

II

THE DRAFT CONVENTION

A. OBJECTIVES

The UNIDROIT Draft Convention on the Hotelkeeper's Contract may be viewed as a logical extension of the protection afforded by the Warsaw Convention,³⁰ which establishes and limits air carrier liability for loss of, or damage to, the person or property of the air passenger. Ordinarily, the international air carrier transports the traveler to a foreign country where the traveler obtains accommodations from a hotelkeeper. It follows that a uniform system of law similar to the Warsaw Convention should continue to protect the traveler. Absent a uniform system, the law of the nation where the guest makes his reservation or where he suffers injury determines the legal rights and duties of guest and hotelkeeper. In many cases, however, the situs of the contract or the injury is fortuitous.³¹ Moreover, the potential conflict of laws problem that may exist when the international traveler seeks legal redress against a hotelkeeper favors a comprehensive multinational agreement.

The intent of the Draft Convention is to benefit both parties involved in the hotelkeeper-guest relationship. It attempts to benefit the traveler by providing ascertainable and obtainable remedies for damages incurred during his hotel stay. It also endeavors to benefit the hotel industry by eliminating the barriers to international expansion created by conflicting, anachronistic laws that have not kept pace with developments in the travel field. Recently, international travel and related hotel stays have become commonplace for both business and personal visits, thereby enlarging the

30. *Done* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876. The Warsaw Convention limits air carrier liability for personal injury to passengers to \$75,000 unless the carrier and passenger agree to a higher limit of liability or the passenger can establish that the carrier has been guilty of wilful misconduct.

31. For example, New York law requires a British tourist who books a reservation in London for accommodations in New York and brings negotiable securities with him to deposit the securities in the hotel safe. N.Y. GEN. BUS. LAW § 200 (McKinney 1968). If he does not deposit the securities, he cannot recover for their loss so long as the innkeeper has posted the required statutory notices in the public rooms of the hotel. Furthermore, the loss for deposited valuables is limited to \$500. *Id.*

If the same British tourist, with the same negotiable securities, returns to a London hotel after booking his reservation in New York, the London hotelkeeper will be fully and absolutely liable for the loss of any property he accepts for deposit. Hotel Proprietors Act, 1956, 4 & 5 Eliz. 2, c. 62, § 2(3) (1956).

In this example, the traveler is identical, yet one legal system severely curtails his recovery for deposited property, while the other system insures him for full value for the same loss of the same property. Such a startlingly different recovery should not result simply because of the situs of the loss.

travel, tourism, and hotel industries. An opportunity exists for further international expansion, but how well the hotel industry exploits that opportunity may depend upon the degree to which nations are willing to set aside their local laws for a uniform legal system governing the hotelkeeper-guest relationship.

B. SCOPE OF THE CONVENTION

The relationship between hotelkeeper and guest is of a special fiduciary nature and, although clothed in a contractual mantle, must be considered as a contract *sui generis* that establishes peculiar rights and responsibilities.³² Therefore, it is not surprising that the drafters of the Convention on the Hotelkeeper's Contract sought to define precisely the nature of the contract. Article 1(1) of the Convention is the result of the drafters' search for a comprehensive, yet limited, definition. It states:

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.³³

Although it may appear redundant, the drafters deliberately inserted the reference to "a person-the hotelkeeper" to avoid the possibility that nations would attempt to define "hotelkeeper" according to their domestic laws and thereby exclude some persons who would otherwise come within the ambit of the Convention.³⁴ The drafters made no attempt to define the term "guest" in the Convention, although they did adopt the term "client" in the French version in order to eliminate the requirement that a person must be a traveler ("voyageur") to acquire guest status.³⁵

The requirement that the hotelkeeper provide the guest with accommodations is the most important of the requisites essential to the formation of the hotelkeeper's contract. This threshold requirement excludes from coverage people who avail themselves of the hotel's ancillary services, such as the hotel restaurant or bar. The Committee of Governmental Experts

32. See 1974 Report on the Hotelkeeper's Contract, *supra* note 27, at 26-30.

33. Draft Convention, *supra* note 3, art. 1(1).

34. 1979 Explanatory Report, *supra* note 26, at 19.

35. *Id.* at 20. Nor does the Convention actually define the term "hotel." The definition of "hotelkeeper" in article 1(1), however, implicitly characterizes a hotel as an establishment under the supervision of a person, the hotelkeeper, in which that person, acting on a regular business basis and for a profit, undertakes to provide guests with temporary accommodations and ancillary services. Since the accommodations must be temporary, the Convention would not apply to most apartment complexes. The Convention would also exclude from its coverage charitable institutions that provide services for their members on a nonprofit basis. Furthermore, the Convention explicitly excludes any accommodation "provided on a vehicle being operated as such in any mode of transport." Draft Convention, *supra* note 3, art. 20.

rejected an attempt to make an exception that would have provided coverage for persons who entered the hotel with the intention of requesting accommodations. The Committee felt that intention was too subjective an element to determine. Thus, the Convention relegates a potential guest whose person or property is harmed before he registers to a traditional tort action.³⁶

The drafters included several other requirements in the definition of the hotelkeeper's contract in order to restrict the scope of the Convention. For instance, the hotelkeeper must provide accommodations "on a regular business basis" before the Convention will control the hotelkeeper-guest relationship. This requirement exempts from the Convention individuals who let out rooms in their own homes during the tourist season. Since they are often of modest means, such individuals could not realistically be forced to assume the liabilities incumbent upon the full-time hotel owner.³⁷

The requirement that the hotelkeeper provide the accommodation "for reward" excludes gratuitous accommodations as well as those provided to a hotel staff member under an employment contract. The Committee rejected a proposal to substitute the French equivalent "for a charge" on the ground that it might, in certain jurisdictions, require that the hotelkeeper provide room (accommodations) and board (food and drink) before the parties become bound by the Convention.³⁸ In addition, the Committee of Governmental Experts included the term "temporary accommodation" to distinguish the hotelkeeper's contract from other forms of residential leases.³⁹ Finally, article 1 requires that the hotelkeeper actually supervise the provided accommodations before the Convention will apply. Thus, the hotelkeeper will escape liability for events occurring in any part of a tourist complex over which he exercises no control.⁴⁰

36. The majority of delegations, however, considered that the element of intention was too subjective as to be of any real value and that in the event of a person being killed on the premises of the hotel it might prove impossible to establish what intention he might have had. Moreover, it would also be difficult to calculate the limit of the hotelkeeper's liability in respect of loss of, or damage to, property, which is based on a multiple of the charge for accommodation . . . as one would not know which accommodation, if any, might have been assigned to the guest. Recourse would thus have to be had to some imprecise notion such as the charge for "average" accommodation in the establishment in question. It was, therefore, decided to exclude such cases from the scope of the future Convention and to leave the would-be guest to bring an action based on the normal principles of extra-contractual liability.

1979 Explanatory Report, *supra* note 26, at 20.

37. *Id.* at 21.

38. *Id.*

39. *Id.*

40. *Id.* at 22.

C. LIABILITIES AND REMEDIES

1. *Lost or Damaged Property*

Article 12 of the Draft Convention imposes strict liability on the hotelkeeper for damage, destruction, or loss of any property brought to the hotel by a guest.⁴¹ Articles 13 and 14, however, allow the hotelkeeper to limit his liability. For items deposited with the hotel by the guest, article 13 permits the hotelkeeper to limit his liability to an amount within the range of 500 to 1000 times the guest's daily room rate, as long as he notifies the guest of this limitation prior to the deposit.⁴² A hotelkeeper's refusal, however, to accept

41. The hotelkeeper shall be liable 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.

Draft Convention, *supra* note 3, art. 12.

42. 1. The hotelkeeper shall be bound to receive securities, money and valuable articles for safe custody; he may refuse them only if they are dangerous or cumbersome.

2. The hotelkeeper shall be entitled to examine the property which is tendered to him for safe custody and to require that it shall be put in a fastened or sealed container.

3. When the hotelkeeper receives property for safe custody he may limit his liability, in respect of any single event, to a sum equal to /500/1000/ times the charge for the accommodation, on condition that the guest has been duly notified thereof prior to the deposit.

4. The liability of the hotelkeeper shall be unlimited in cases where he has refused property which he is bound to receive for safe custody.

Draft Convention, *supra* note 3, art. 13. The 500 to 1000 multiple in the liability equation is subject to revision at any future diplomatic conference convened to consider the Draft Convention. *See* note 4 *supra*.

The article 13 liability limitation for deposited property is the major difference between the UNIDROIT Draft Convention and the earlier Council of Europe Convention on the Liability of Hotel-keepers Concerning the Property of Their Guests. *See* note 11 *supra* and accompanying text. National delegations made two principal arguments in favor of the retention of unlimited liability. First, they contended that unlimited liability for hotelkeepers for the loss of deposited property was already the law in many nations, especially those that had ratified the Council of Europe Convention. Second, with respect to the cost of insurance coverage, they argued that limited hotelkeeper liability for deposited valuables would not lower premiums since there was no corresponding limit for personal injury claims. 1979 Explanatory Report, *supra* note 26, at 52.

To counter these arguments, supporters of the liability limitation demonstrated that there are considerable differences between insurance premiums for personal injury protection and property damage or loss coverage. For instance, property damage or loss claims are far more frequent for hotelkeepers. Moreover, unlimited liability for personal injuries generally is predicated upon proof of fault, whereas courts impose strict liability for property losses. These differences would be reflected in varying insurance premiums. *Id.* at 53.

Supporters of the present article also pointed out that there were adequate safeguards built into the Draft Convention to warrant the adoption of article 13. First, the liability limit would apply only if the hotel gave adequate notice of the limit to the guest before the deposit. Second, the Convention's liability limit would be high enough to cover fully all claims that would be likely to occur. Third, liability would remain unlimited if the hotelkeeper's negligence caused the loss or damage. Finally, the hotelkeeper would retain the option not to limit his

property that he is bound to receive would remove the limitation and impose absolute liability.⁴³

Article 14 governs the loss or damage of valuables that the guest fails to deposit. In such cases, a lower ceiling on monetary recovery prevails—100 times the accommodation charge.⁴⁴ This limit of liability is lower than that provided in article 13 since the value of property that the guest deposits with the hotelkeeper is generally greater than the value of property the guest leaves in his room.⁴⁵

Articles 13 and 14 change existing law on the hotelkeeper's liability for lost or damaged property by establishing variable liability limits based on multiples of the highest daily charge paid by the guest for accommodations.⁴⁶ One of the attractive features of such a formula is that the ceilings

liability, which could happen with luxury class establishments. *Id.* The supporters of limited liability prevailed, subject to a condition under article 24(1)(c) allowing nations to enter a reservation allowing higher limits of liability, or even unlimited liability.

The Draft Convention does not require a guest to deposit all valuable property with the hotelkeeper for safekeeping in order to hold a nonnegligent hotelkeeper liable for its loss or damage. *See* Draft Convention, *supra* note 3, art. 14. The Committee of Governmental Experts concluded that a definition of "valuable property" would be too difficult to elaborate. 1979 Explanatory Report *supra* note 26, at 55. Nevertheless, nothing would preclude the hotelkeeper from contending that a failure to deposit valuable property constitutes guest negligence for the purposes of article 17(a). *Id.* *See* note 49 *infra* and accompanying text. Moreover, a failure to deposit, not caused or contributed to by the hotelkeeper or those for whom he is responsible, would automatically invoke the lower liability ceiling applicable to non-deposited property under article 14. *See* notes 44-45 *infra* and accompanying text.

43. Draft Convention, *supra* note 3, art. 13(4). In the absence of such a rule, the hotelkeeper could simply refuse to accept any property for deposit and thereby benefit from the lower limit of liability provided by Article 14 for nondeposited property. *See* notes 44-45 *infra* and accompanying text.

44. Article 14 states:

The 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.

Draft Convention, *supra* note 3, art. 14. The 100 multiple in the liability equation is subject to revision at any future diplomatic conference convened to consider the Draft Convention. *See* note 4 *supra*.

45. 1979 Explanatory Report, *supra* note 26, at 55.

46. Articles 13 and 14 are a significant departure from the existing law in many nations. For example, most U.S. jurisdictions set a fixed monetary limit on a guest's recovery for property he deposits for safekeeping, unless the hotel's negligence causes the loss. *See, e.g.,* CAL. CIV. CODE § 1859 (West 1954); ILL. REV. STAT. ch. 71 § 1 (1975); N.Y. GEN. BUS. LAW §§ 200-201 (McKinney 1968). If the loss is the result of the hotelkeeper's negligence or wilful misconduct, unlimited liability is imposed.

The United Kingdom places a fixed monetary ceiling upon the amount of recovery for nondeposited property, but follows the current continental practice of compelling the hotelkeeper to accept all property for deposit regardless of value and imposing unlimited liability for negligent losses of deposited property. Hotel Proprietors Act, 1956, 4 & 5 Eliz. 2, c. 62, § 2 (1956). This statutory practice follows common law doctrine, which makes the hotelkeeper an insurer of all guest property lost or damaged at the hotel. *See* Kalpakian v. Oklahoma Sheraton Corp., 398 F. 2d 243, 245 (10th Cir. 1968); *Miller v. Pine Bluff Hotel Co.*, 286 F. 2d 34, 36-

can fluctuate with the current value of goods and services and therefore keep pace with the cost of living. In addition, the variable ceilings differentiate between the luxury hotel owner, who charges higher daily rates, and the small hotel operator. The luxury hotel operator, whose clientele generally deposit large amounts of cash and other valuables, faces a higher liability ceiling than the small hotel owner. The lower room rate that the small hotelkeeper charges ensures that if a wealthy traveler deposits a large amount of valuables that become lost or damaged, the liability will not financially ruin the hotelkeeper. Thus, the Convention establishes equitable variable ceilings based on the hotelkeeper's and the guest's ability to pay.⁴⁷

Articles 16 and 17 of the Draft Convention also attempt to achieve an equitable balance between hotelkeeper and guest. Article 16 prevents the hotelkeeper from limiting his liability if his or his agent's negligence or wil-

37 (8th Cir. 1961); *Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647, 653 (Me. 1972); *Featherstone v. Dessert*, 173 Wash. 264, 267, 22 P.2d 1050, 1052 (1933).

Predicated on Roman law, the civil law also imposes strict liability on the hotelkeeper for the property losses of his guests. Roman law based the imposition of strict liability on the traveler's reliance on the vigilance of the hotelkeeper for the safeguarding of guest property and the general mistrust of all innkeepers. 1974 Report on the Hotelkeeper's Contract, *supra* note 27, at 31. For a discussion of the Roman law, see COUTURIER, *LE CONTRAT D'HOTELLERIE* 30-44 (1967). A majority of Western European civil law nations have adopted a system of limited innkeeper liability for lost or damaged guest property. *See, e.g.*, ALLGEMEINE BÜRGERLICHE GESETZBUCH [ABGB] § 970a (Aus.); CODE CIVIL §§ 1950-1952 (Bel.); CODE CIVIL [C.C.] § 1953 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] § 702 (W. Ger.); CODICE CIVILE [C.C.] § 1784 (Italy).

The basic difference between the common law and civil law in this area is the legal basis for imposing strict liability upon the hotelkeeper. The majority of civil law systems perceive the liability as a contractual one arising out of a deposit of necessity. 1974 Report on the Hotelkeeper's Contract, *supra* note 27, at 31. Common law jurisdictions, however, have generally taken the view that the custom of the realm forms the basis of the duties, liabilities, and rights of innkeepers with respect to guest property. *Hulett v. Swift*, 33 N.Y. 570, 570-75 (1865).

47. Admittedly, the present fixed ceilings adopted in many jurisdictions have the virtue of freezing liability at a low level for the entire hotel industry irrespective of the class or size of the hotel. *See* note 46 *supra* and statutes cited therein. Assuming, however, that the economies of scale prevail as the size and net income of a hotel increases, a low fixed-liability limit favors the large chain or luxury operator. For instance, one of the costs of doing business is the cost of defending and settling claims for lost or damaged guest property. Low liability ceilings give the chain or luxury operator a windfall at the expense of small hotel operators since he charges his guests much more yet often pays less for insurance and legal representation for each claim. In effect, legislation that adopts the low fixed-liability limit unjustifiably subsidizes the chain or luxury operator.

No one would decry the advantages of size in cost reduction and efficiency that any hotel operator has the right to obtain by competitive efforts. Legislation, however, should not perpetuate an otherwise legitimate advantage in the guise of protecting the hotel industry as a whole. The Draft Convention seeks to eliminate this subsidy to luxury or chain operators and to replace it with a more equitable method of determining the liability of the hotelkeeper for property losses.

ful act causes the damage, destruction, or loss.⁴⁸ Article 17, however, totally relieves the hotelkeeper of liability where the 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;
- (b) to an unavoidable and irresistible event which cannot be imputed to him;
- (c) to the nature of the property.⁴⁹

The strict liability imposed by article 12 relieves the guest from pleading and proving the hotelkeeper's negligence. Therefore, without article 17, the hotelkeeper would be an insurer liable for any loss within the hotel. Such a liability scheme would be unduly harsh, particularly when the negligent or wilful misconduct of the guest causes the loss.⁵⁰

2. Personal Injury

The Draft Convention covers another major area of liability—that of the hotelkeeper for the death or personal injury of his guest. Due to several practical and conceptual problems, the drafters of the Convention found it difficult to fashion a unified provision concerning personal injuries. The first problem confronting the drafters was the great variety of causes of guest injuries. Fire, defective fixtures, building collapse, lack of notice of dangerous conditions, contaminated food or drink, hotelkeeper or servant negligence or wilful misconduct, third party assault, or acts of other guests may cause personal injury during a hotel stay.

48. Article 16 reflects the prevailing majority rule in the United States for both deposited valuables and nondeposited property. See note 46 *supra*. The provision also comports with the equitable principle that a party at fault should not be able to use the law to escape or limit his liability.

49. Draft Convention, *supra* note 3, art. 17. These defenses correspond to the Anglo-American common law principles of contributory negligence, act of God, and act of the public enemy. See J. SHERRY, *supra* note 28, at 339-53.

50. Article 18 treats another aspect of the standard of conduct required of the guest. In order to enable the hotelkeeper to mitigate the damage to guest property or to recover lost property, the guest must notify the hotelkeeper of the damage or loss as soon as is reasonably possible. If the guest fails to give notice, the Draft Convention does not deprive him of his cause of action against the hotelkeeper, but does require the guest to prove hotelkeeper negligence in order to recover. The provision, however, does not apply when property is deposited with the hotelkeeper, or when the hotelkeeper's wilful misconduct or negligence causes the loss. 1974 Report on the Hotelkeeper's Contract, *supra* note 27, at 47. Article 18 is fashioned after article 5 of the Annex to the Council of Europe Convention, note 11 *supra*, and the concept itself may be found in many civil law legal systems. 1979 Explanatory Report, *supra* note 26, at 58. Most common law jurisdictions have not expressly adopted this concept, but a failure to notify the hotelkeeper would presumably fall within the parameters of contributory negligence or wilful misconduct of the guest, with resultant exoneration or liability reduction for the hotelkeeper.

Complicating the drafters' task was the fact that, depending on the cause of the injury, different nations impose different legal standards. For instance, both Germany⁵¹ and Ethiopia⁵² hold a hotelkeeper strictly liable for guest injuries caused by defects in the premises. The United Kingdom⁵³ and Italy,⁵⁴ however, allow the hotelkeeper to escape liability if he can establish that the defect arose despite his due diligence. Furthermore, different nations allow an injured guest to sue in tort, contract, or both,⁵⁵ thereby causing differing allocations of the burden of proof.⁵⁶

Conflicting approaches to the appropriate legal standards for guest injuries also occur within nations having a federal system. For example, most U.S. jurisdictions define the hotelkeeper's duty as one of reasonable care under the circumstances.⁵⁷ Several jurisdictions, however, require a higher degree of care in certain cases that may border on strict liability.⁵⁸

The rationale for requiring a high duty of care stems from the hotelkeeper's similarity to a common carrier. His public calling, his duty to accept "all-comers,"⁵⁹ and his exclusive control of the premises cause some courts to impose a heavy duty on the hotelkeeper to prevent personal injuries to a guest. Unlike liability for lost or damaged property,⁶⁰ however, states do not place a monetary limit on personal injury liability. Therefore, if courts implicitly apply strict liability, the hotelkeeper suffers the double hardship of unlimited and strict liabilities.

51. BGB § 538 (guarantee of the lessor of the leased premises).

52. CIVIL CODE § 2658(1).

53. Occupiers Liability Act, 1957, 5 & 6 Eliz. 2, c.31, § 5(1) (1957).

54. C.C. § 1176.

55. See 1974 Report on the Hotelkeeper's Contract, *supra* note 27, at 51-57.

56. If a nation that employs a reasonable care standard allows an injured guest to proceed under a breach of contract theory, the hotelkeeper will have the burden of proving his due diligence. Conversely, if the complaint sounds in tort, the guest will have to establish the hotelkeeper's negligence. *Id.* at 56.

57. See, e.g., *McFadden v. Bancroft Hotel Corp.*, 313 Mass. 56, 46 N.E.2d 573 (1943); *Barnes v. Hotel O. Henry Corp.*, 229 N.C. 730, 51 S.E.2d 180 (1949).

58. See, e.g., *Mrzlak v. Ettinger*, 25 Ill. App. 3d 706, 323 N.E.2d 796 (1975). *Mrzlak* involved a sexual assault and robbery by an assailant who allegedly climbed through a second-story window. The court held the defendants liable for negligence in failing to exercise a high degree of care in order to maintain the premises in a safe condition. The court refused to apply the ordinary care standard of slip-and-fall personal injury cases: "We believe the better result of law is that where an assault upon a guest by a third party is involved, the hotel is held to a high degree of care." *Id.* at 712, 323 N.E.2d at 800. See also *Nordman v. National Hotel Co.*, 425 F.2d 1103, 1107 (5th Cir. 1970); *Fortney v. Hotel Rancroft, Inc.*, 5 Ill. App. 2d 327, 335, 125 N.E.2d 544, 548 (1955).

59. Some foreign jurisdictions require that the hotel be open to everyone. 1979 Explanatory Report, *supra* note 26, at 65. U.S. jurisdictions recognize this rule as part of the common law. See, e.g., *Jacobson v. New York Racing Ass'n Inc.*, 33 N.Y.2d 144, 149, 305 N.E.2d 765, 767, 350 N.Y.S.2d 639, 642 (1973).

60. See note 46 *supra* and accompanying text.

To resolve these difficulties, article 11 of the Draft Convention incorporates the concepts of fault and reasonable care.⁶¹ Article 11 exonerates the hotelkeeper from liability if, in the exercise of reasonable care, he could not have prevented the consequences of the event causing the guest's injury.⁶² Article 11 does not require a total absence of negligence, and, in fact, may relieve the hotelkeeper of liability when his negligence is either unrelated to, or a remote cause of, the event causing the injury.⁶³ Thus, the Convention may curtail the current myriad of lawsuits involving assaults or other intentional wrongdoing committed by third parties.

The Draft Convention departs from the fault theory of liability for personal injuries in one area—the sale of unfit food or beverages to the guest. U.S. jurisdictions have, based on an implied warranty of fitness theory, imposed strict liability for injuries caused by foods and beverages sold for human consumption.⁶⁴ The Convention adopts this principle, but mitigates undue hardship by extending the comparative negligence doctrine to per-

61. The hotelkeeper shall be liable for loss or damage resulting from the death of, or any personal injuries to, a guest caused by an event occurring on the premises of the hotel or in any other place under the supervision of the hotelkeeper. However, he shall not be liable when the loss or damage 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.

Draft Convention, *supra* note 3, art. 11(1).

The reasonable care-avoidance standard adopted by article 11 should encourage both hotelkeeper and guest to exercise care in the performance of their interrelated responsibilities. If the law imposes a draconian liability upon the hotelkeeper, irrespective of fault, he has less incentive to exercise care and to expend funds to prevent injuries. Furthermore, to bar totally a guest who is guilty of the slightest degree of contributory fault from recovery does not foster respect for the law.

A reasonable care-avoidance standard is the preferred solution since it avoids a rigid, doctrinal approach to conflict resolution. This standard awards or denies recovery on the basis of the facts and circumstances of each case, thereby providing a more individualized and less impersonal method of resolving legal claims. Furthermore, the standard is a flexible one, adaptable to new situations.

62. The Draft Convention leaves the allocation of the burden of proof of fault to each jurisdiction's prevailing law, since there was considerable disagreement among the delegations on the issue. Some delegations wanted the burden on the guest, so as not to make the hotelkeeper an insurer of the guest's safety. Other delegations felt that placing the burden on the hotelkeeper coincided with the law in their own jurisdictions, and considered it a consumer protection device. These delegates also thought it would be easier for the hotelkeeper to collect the evidence for trial. A third group thought it did not matter who bore the burden of proof since both the hotelkeeper and guest would present conflicting evidence for the court to weigh and resolve in each case. 1979 Explanatory Report, *supra* note 26, at 45-46.

63. Courts that base their holdings of liability on the hotelkeeper's inadequate supervision of the premises often fail to address the further question of whether that inadequate supervision was the proximate cause of the injury. *See, e.g., Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969); *Mrzlak v. Ettinger*, 25 Ill. App. 3d 706, 323 N.E.2d 796 (1975); *Fortney v. Hotel Rancroft, Inc.*, 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955).

64. *See* U.C.C. § 2-314.

sonal injury actions brought under the warranty theory of liability governing food and beverage sales.⁶⁵ Normally, the warranty theory would prohibit a reduction in damages due to the fault of the guest since the theory excludes fault as a condition precedent for seller liability.⁶⁶ The Draft Convention, however, permits a court to deny or reduce damages if the guest is at fault.⁶⁷

In sum, the Draft Convention would change or clarify the laws of most jurisdictions in one or more of four major areas. First, by covering only those persons who actually stay at the hotel, the Draft Convention would eliminate the problem of determining when guest status arises.⁶⁸ Second, the Convention would limit hotelkeeper liability for the nonnegligent loss of deposited valuables. Third, the Draft Convention would impose a variable liability limit for lost or damaged property based upon a multiple of the guest's highest daily room charge. Fourth, the Convention would reaffirm the traditional view that negligence, not strict liability, is the appropriate legal standard for determining a hotelkeeper's responsibility for a guest's death or personal injury.

III

RESERVATION PRACTICES

A. THE PROBLEM

One of the most common problems travelers confront is the hotel industry practice of dishonoring a reservation due to overbooking.⁶⁹ There

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65. 2. The hotelkeeper shall be liable for any loss or damage resulting from death or any personal injuries caused by the consumption of food or drink provided to the guest, unless he establishes that such food or drink was fit for human consumption.
 3. In cases where the hotelkeeper is liable under the provisions of this article, the compensation due to the guest may be reduced to the extent that the loss or damage has been caused by the fault of the guest.

Draft Convention, *supra* note 3, art. 11(2), (3).

66. Some U.S. courts, however, have ruled that a person who knowingly eats or drinks patently unfit goods assumes the risk and may not recover for any resulting injury. *See, e.g.,* Bronson v. Club Comanche, Inc., 286 F. Supp. 21 (D.V.I. 1968); Young v. Coca-Cola Bottling Co., 109 R.I. 458, 287 A.2d 345 (1972).

67. Thus, for instance, the Draft Convention would relieve the hotelkeeper of liability when either a preexisting and unusual medical problem unknown to the hotelkeeper causes the illness, or the guest causes his own illness by an uncontrolled overindulgence. Strict liability would prevail, however, if the guest notified the hotelkeeper of his allergy or susceptibility to certain foods or beverages, and the hotelkeeper still served him such items. 1979 Explanatory Report, *supra* note 26, at 47.

68. For a discussion of the conflicting case law engendered by this problem, see J. SHERRY, *supra* note 28, at 120-56.

69. On April 13, 1976, the FTC announced the commencement of a comprehensive investigation of the travel business, including the lodging industry. The intent of the investigation

are a number of reasons why hotels overbook and subsequently dishonor reservations. First, some travelers make a reservation and neither cancel nor use it ("no-shows"). In most commercial markets, no-shows constitute from five to fifteen percent of the total hotel reservations on any given night.⁷⁰ Hotels generally have reasonably reliable records from which they can predict the number of no-shows for any particular evening and, accordingly, compensate by accepting extra reservations. Unfortunately, hotels sometimes miscalculate and fewer no-shows occur than anticipated, forcing hotels to deny lodging to travelers with reservations.

A second cause of hotel overbooking is "holdovers"—travelers who extend their stay beyond its scheduled duration. In some jurisdictions it is illegal for a hotel to evict a holdover,⁷¹ while in others it involves a civil process similar to that used by a landlord to evict a tenant.⁷² Other causes of overbooking include human or computer error, and simple greed on the part of the hotel.

B. CURRENT RESERVATION PRACTICES

With the exception of a Florida regulation⁷³ and a strict West German law, there appears to be no direct statutory or administrative law concern-

was to ascertain whether industry members were or had been violating the Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1976), by engaging in unfair methods of competition or unfair or deceptive acts or practices. During the investigation, the FTC found that hotel overbooking was the most serious problem facing travelers. *Federal Response to Consumer Fraud in the Travel Industry: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 407-08 (1979) [hereinafter cited as *Travel Industry Hearings*] (testimony of Rodney E. Gould). The American Society of Travel Agents shared this view. *Id.* at 287-88 (testimony of Nancy Stewart). The Commission's investigation was wholly unrelated to the efforts of the UNIDROIT Committee of Governmental Experts.

70. TRAVEL AGENT, Aug. 20, 1979, at 84.

71. See, e.g., N.Y. REAL PROP. ACTS. § 853 (McKinney 1979). *But cf.* *Neely v. Lott Hotels Co.*, 334 Ill. App. 91, 78 N.E.2d 659 (1948) (innkeeper may evict for failure to pay, and may use whatever reasonable force is necessary); *Sawyer v. Congress Square Hotel Co.*, 157 Me. 111, 170 A.2d 645 (1961) (guest not entitled to notice or legal process before eviction); *Poroznoff v. Alberti*, 161 N.J. Super. 414, 391 A.2d 984 (Dist. Ct. 1978) (innkeeper not required to resort to legal procedures when evicting guest).

72. See, e.g., CONN. GEN. STAT. ANN. § 47a-23 (West 1978). While holdovers without question exist, they may not be a major cause of dishonored reservations since the FTC found that in most instances the number of "early departures" (those who depart before the end of their scheduled stay) equals or exceeds the number of holdovers. *Travel Industry Hearings*, *supra* note 69, at 413 (statement of Rodney E. Gould).

73. 1. Overbooking by any public lodging establishment licensed by the Division is prohibited. Overbooking has occurred if and when an individual or party is deprived

ing hotel overbooking.⁷⁴ Industry custom controls virtually the entire area of reservation practices, and that custom differs from country to country, state to state, and hotel to hotel.

Traditional U.S. hotel industry custom was simply to overbook by an amount equal to the number of anticipated no-shows.⁷⁵ If it overestimated the number of no-shows, a U.S. hotel would merely turn away guests with reservations. Conversely, hotels made few attempts to collect damages for breach of contract by no-shows.⁷⁶

Recently, however, most major U.S. hotel chains have adopted a system that guarantees reservations for individual bookings. These chains guarantee the traveler an accommodation if he promises payment by use of a credit card and agrees to allow payment thereby if he neither uses nor cancels the reservation. This approach allows a hotel to forward a credit card payment slip to the issuing company in the event of a no-show.⁷⁷ The burden is then on the cardholder to stop the billing process or make payment. Hence, there is a very strong incentive for the traveler either to use the room or cancel.

of accommodations at a public lodging establishment when such individual or party has prepaid reservations for said accommodations.

2. In those cases where the public lodging establishment has overbooked, such establishment shall:

(a) Make every effort to find other comparable accommodations, and

(b) Upon demand of the guest, refund all monies deposited for such reservation whether deposited with the public lodging establishment or a travel or booking agent from whom such public lodging establishment took such reservation.

3. Violation of any of the provisions of this rule shall subject the violator to such disciplinary procedures as provided by the rules and statutes.

Rules of the Division of Hotels and Restaurants 7C-3.05, 3 FLA. RULES AND REGS. (Supp. 51).

In 1976, Hawaii established a two-year pilot project to study the feasibility of a central clearing office for hotel room reservations. This office would place victims of overbooking in another hotel. The Hawaii legislature extended the project for another year in 1978. 1976 Haw. Sess. Laws, act 102, *as amended by* 1978 Haw. Sess. Laws, act 236.

74. Under common law, the innkeeper has a duty to give accommodations to any guest willing to pay for them. Absent a contract, this duty does not apply when the hotel is fully booked. *Jackson v. Virginia Hot Springs Co.*, 209 F. 979, 979-80 (W.D. Va. 1913); *Browne v. Brandt*, [1902] 1 K.B. 696 (C.A.). Once a traveler makes a reservation, however, a contract is formed, and he may sue for its breach. *See, e.g., Thomas v. Pick Hotels Corp.*, 224 F.2d 664, 666 (10th Cir. 1955); *Dold v. Outrigger Hotel*, 54 Haw. 18, 21-22, 501 P.2d 368, 370-71 (1972). Courts have also ruled that travelers may sue on a tort theory for the distress caused by a dishonored reservation. *See, e.g., Dold v. Outrigger Hotel*, 54 Haw. 18, 22, 501 P.2d 368, 372 (1972); *Kellogg v. Commodore Hotel, Inc.*, 187 Misc. 319, 64 N.Y.S.2d 131 (1946). For a discussion of hotelkeeper's liability for dishonored reservations under contract theory, see Sherry, *Innkeeper's Liability for Failure to Honor Reservations*, 15 CORNELL HOTEL AND RESTAURANT AD. Q. 72 (1974).

75. *Travel Industry Hearings*, *supra* note 69, at 462-63 (testimony of Richard Benefield, American Hotel and Motel Association).

76. *Id.* at 461.

77. *Id.* at 477-78 (statement of David Sullivan, Holiday Inns).

In consideration for the traveler's guaranteed payment, the hotel assures, under the "free night" system, that it will either have a room for the traveler or will pay for his first night's accommodation at a comparable facility. In addition, the hotel bears all relevant incidental expenses, such as taxis and telephone calls to the home or office.⁷⁸

The free night system gives the hotel industry a monetary incentive not to overbook. It also provides some measure of liquidated damages for the inconvenience, disruption, lost time, and emotional distress imposed on guests whose reservations are dishonored. Hotels, however, sharply limit the free night system. They cover only those guests who voluntarily guarantee payment by credit card. Furthermore, hotels do not employ the system for guests who state they will arrive prior to 6:00 P.M. or for group reservations.

The prevailing practice in other countries differs drastically from that in the United States. For example, in Bermuda and other resort destinations, hotels require significant advance deposits to confirm reservations. Consequently, there is little intentional overbooking to compensate for no-shows. Similarly, within Western Europe, hotels frequently solicit prepayment or a deposit of the first day's rate.

Traditional industry practice in much of Europe and the Caribbean is for hotels to do little, if anything, for the traveler whose reservation they dishonor. Rarely does a European hotel pay for a traveler's hotel room elsewhere or even give him the difference between the rates at the original and the substituted hotel. The only exception is West Germany, where overbooking is illegal and significant monetary penalties are assessed against offending hotels.

In some socialist nations, such as the Soviet Union, the State processes hotel reservations. In the Soviet Union, reservations can rarely, if ever, be made at a specific hotel. Rather, the State takes a booking for a hotel of a particular class and houses the traveler in any one of a number of hotels. Since the traveler cannot reserve a room at a specific hotel, overbooking generally does not occur. Furthermore, the State usually requires a traveler to pay in advance, thereby curtailing no-shows.

C. THE UNIDROIT SOLUTION

1. *Overbooking*

Article 5 of the Draft Convention expressly makes the hotelkeeper liable for any damage the guest suffers because of the hotelkeeper's failure to

⁷⁸ *Id.* at 478.

provide the guest's reserved accommodations.⁷⁹ This is obviously a mere restatement of basic contract law. The drafters of the Convention, however, recognized that a traveler with a reservation who enters an overbooked hotel needs an instant remedy, not an action at law. Two factors compel the conclusion that an "on-the-site" remedy for the traveler is superior to monetary damages. First, the guest whom a hotel turns away is in obvious need of immediate substitute accommodations. Second, the probability that a traveler will file a claim in a distant forum for relatively minor damages is slight.

In an attempt to promote instant remedies, article 5(2) relieves the hotelkeeper of liability if, with the consent of the guest, he is able to procure an equivalent accommodation in the same locality.⁸⁰ The provision also requires the hotelkeeper to pay the guest's reasonable expenses, including transportation costs to the other hotel.

Nevertheless, there are two significant problems with article 5(2). First, the provision does not require any action by the hotelkeeper. Currently, some hotelkeepers simply direct the traveler to the nearest phone booth if no room is available.⁸¹ This practice can continue under the Convention, since the hotelkeeper can ignore article 5(2) and accept the very remote risk that the traveler will sue for monetary damages under article 5(1). Second, even if the Convention required the hotel to employ the article 5(2) remedy, it would provide less consumer relief than the current free-night system furnished by many U.S. hotel chains.⁸² While article 5(2) does not preclude more generous treatment by hotels, it certainly does nothing to encourage it. Implementation of the Convention into domestic law may therefore tend to eliminate or limit the use of the free-night approach.

By surveying existing law and hotel industry practice, however, a strong argument can be made that the on-site remedy of article 5(2) would be self-enforcing and nonillusory. Within the United States, hotels employ-

79. The hotelkeeper shall be liable to the guest for the damages actually suffered by him to the extent that he fails to provide the accommodation and services agreed under the hotelkeeper's contract.

Draft Convention, *supra* note 3, art. 5(1).

80. [The hotelkeeper] shall nevertheless be relieved of liability to the extent that, with the consent of his guest, he procures for him equivalent accommodation and services in the same locality. The hotelkeeper should also meet the reasonable expenses, including the cost of transport, which such substitution entails.

Draft Convention, *supra* note 3, art. 5(2).

81. Other hoteliers take a far more responsible attitude and arrange for alternative accommodations and pay the first night's charge at the substituted hotel. This method provides an approximate measure of liquidated damages for the inconvenience suffered by the traveler. Other hotels take a middle ground and provide the remedy envisioned by article 5(2)—payment of any additional expenses incurred by the accommodation change.

82. See notes 77-78 *supra* and accompanying text.

ing the free-night system tend to meet their commitments without court intervention or traveler protest. In countries where strong tourist boards exist, a telephone call to the board would probably suffice to force the hotel to comply with the requirement. This would be particularly true in a country such as Bermuda, where expulsion from the local tourist board effectively ends the hotel's ability to operate. In nations where the State operates the hotels, once the government has ratified the Convention, it is probable that the hotels would comply. Furthermore, some countries, including the United States, have consumer protection laws that prohibit unfair or deceptive acts or practices.⁸³ In egregious cases, nations could invoke these statutes against those hotels that wilfully overbook and fail to provide alternative, comparable accommodations.

Article 5's effect on hotelkeepers will vary dramatically depending upon their situs. If implemented, it would have little, if any, adverse effect on major U.S. hotelkeepers. Article 5, however, could accomplish some important results. In European and third world countries that cater to tourists, the impact could be significant if industry custom gravitates toward the use of the article 5(2) remedy as standard operating procedure. More importantly, article 5 would begin to codify the principle of immediate on-site relief.

2. *No-Shows and Early Departures*

Article 6(1) of the Draft Convention allows the hotelkeeper to recover certain damages from no-shows and from guests who prematurely terminate their occupancy ("early departures"). In both instances, the Convention limits the breaching party's liability to seventy-five percent of the accommodation rate, including ancillary services, for the first two days he fails to occupy the reserved room.⁸⁴ For the next five days of non-occupation, the liability is forty percent of the room rate and ancillary services.⁸⁵ In all circumstances, however, the hotelkeeper is under a duty to mitigate damages.⁸⁶

To avoid liability, a guest must cancel by noon of the first day of planned occupancy if his reservation is for two days or less.⁸⁷ If his reservation is for three to seven days, a no-show must cancel at least two days before the first scheduled day of his stay.⁸⁸ If the traveler wishes to cancel a

83. *See, e.g.*, 15 U.S.C. § 45(a)(1) (1976).

84. Draft Convention, *supra* note 3, art. 6(3)(a).

85. *Id.* art. 6(3)(b).

86. *Id.* art. 6(2). The liability percentages of article 6 are subject to revision at any future diplomatic conference convened to consider the Draft Convention. *See* note 4 *supra*.

87. Draft Convention, *supra* note 3, art. 6(4)(a).

88. *Id.* art. 6(4)(b).

reservation of more than a week, he must give the hotelkeeper seven days notice to escape liability.⁸⁹

Under existing law in almost all jurisdictions, the hotelkeeper can recover whatever damages he suffers because of a no-show. Under existing practice, however, a hotelkeeper almost never claims more than the deposit. In fact, except for resort hotels, cancellations received before 6:00 P.M. on the day of arrival terminate the relationship between traveler and hotelkeeper. Since this is not true under the Convention, the impact of article 6 could be appreciable.

Article 6's effect may be most pronounced when an advance deposit covers a large portion of the stay. Since it is likely that lawsuits will be infrequent, hotelkeepers will probably treat article 6's liability scheme as a formula for computing liquidated damages, much to the prejudice of the traveler. The article is also prejudicial to travelers who make reservations at hotels that frequently have vacancies since these hotels will generally not be able to mitigate their damages and the travelers will therefore often be liable to the full extent of article 6.

The potential for inequitable treatment in article 6, however, is not limited to travelers. The notification provision could impose an acute hardship on small property owners who rent by the week or month. For example, many small property owners offer accommodations in the summer season for two-week intervals. Bookings are made months in advance and there is little "walk-in" trade to fill vacancies. Under article 6, a guest could arrive, spend several days, and then announce that he will leave at the end of the first week. Due to article 6(5)(c), the hotelkeeper could not recoup any damages for the guest's cancellation of the second week of the booked stay.⁹⁰

Thus, article 6 is overly harsh on both business travelers, who frequently do not know exactly when they will vacate, and small property owners, who must book in advance for their entire season. In addition, it significantly increases the potential penalty for a traveler who cancels but not within the prescribed time frame.

Obviously, the hotel industry would benefit by the elimination or curtailment of no-shows. Consumers would also benefit, however, since no-

89. *Id.* art. 6(4)(c).

90. No damages shall be payable by 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:

. . . .
(c) seven days before the date of departure for a contract which has more than seven days to run.

Draft Convention, *supra* note 3, art. 6(5)(c).

shows cause hotels to overbook and subsequently dishonor reservations. To the extent that it discourages and penalizes no-shows, article 6 protects both consumers and hotels. However, those provisions of article 6 that deprive travelers of the right to depart prematurely and owners of the right to full damages when they cannot mitigate their losses appear unfair. Thus, in different circumstances, article 6 imposes hardships upon consumers and hotels.

Article 8 of the Draft Convention, however, could mitigate the hardships of article 6 in certain instances. Article 8 provides an impossibility defense that would exculpate the hotelkeeper from liability for failure to provide an accommodation, and the traveler from liability for failure to occupy a reserved room. For this defense to be available, the failure to perform would have to be "a consequence of an unavoidable and irresistible event which cannot be imputed to the party [who seeks to invoke article 8]."⁹¹ It is unclear whether this provision will have the same legal effect as traditional defenses such as force majeure, act of state, or act of war. The underlying concept appears to be that no liability will inure if an event totally beyond the control of the party, such as a snowstorm preventing the departure or the arrival of a guest, causes the breach of contract.⁹²

3. *Holdovers*

While it may be disputed,⁹³ hotels claim that guests who keep their accommodations after their scheduled date of departure are a major cause of overbooking and dishonored reservations.⁹⁴ As with overbooking and no-shows, relevant U.S. statutory law on holdovers is scant. Hawaii recently enacted a statute that treats a holdover much like a trespasser,⁹⁵ and Puerto Rico requires its police to remove physically holdovers upon

91. Draft Convention, *supra* note 3, art. 8(1).

92. Article 10 of the Draft Convention, however, creates potential difficulties for a guest who cannot establish a defense under article 8. It allows the hotelkeeper, as a guarantee of payment for accommodations and services actually provided, to detain "any property of commercial value" brought to the hotel by the guest. Draft Convention, *supra* note 3, art. 10(1). Article 10 could place a guest at a substantial disadvantage relative to the innkeeper in any dispute concerning the value or quality of the accommodations or services provided. Although subsection 2 of article 10 allows the guest to deposit the amount in dispute with a mutually acceptable third party or an official institution, it is unlikely to alter the balance of power in this type of dispute. U.S. courts would invalidate article 10 as a taking of property without due process. *See Johnson v. Riverside Hotel, Inc.*, 399 F. Supp. 1138 (S.D. Fla. 1975) (Florida statute authorizing seizure of guest's property without notice or hearing unconstitutional).

93. *See* note 72 *supra*.

94. *See Travel Industry Hearings*, *supra* note 69, at 460-61 (testimony of Richard Benefield, American Hotel and Motel Association).

95. HAWAII REV. STAT. § 486K-8 (Supp. 1978).

request by a hotelkeeper.⁹⁶ Even in these few states where immediate eviction is legal, few hotels physically remove holdovers.

The Convention's treatment of holdovers is an abrupt departure from U.S. hotel industry practice. Article 4 allows the hotel summarily to evict a guest upon the expiration of the contract. If the contract is for an indeterminate period, notification by noon permits the hotelkeeper to terminate the contract on the same day.⁹⁷

American hotels, fearing lawsuits, currently do not attempt to evict a holdover. It is unclear whether the implementation of article 4 into U.S. law would dissipate this fear and cause more physical evictions. Article 4 may, however, lead to increased attempts by U.S. hotelkeepers to persuade verbally a guest to vacate on the last day of his planned stay.

On an international scale, article 4 will have limited impact. Current European tradition allows hotelkeepers a great amount of flexibility in removing guests. In certain third world nations and in the Soviet Union, summary removals of holdovers are common.

Finally, article 21 would void any contract derogating from the provisions of the Convention to the detriment of the guest. The same article, however, would give the hotelkeeper contractual freedom to derogate from the Convention in his relations with other parties, such as travel organizers.⁹⁸ The inequality of bargaining power between hotelkeeper and guest is the basis for this distinction. Conversely, hotelkeepers and third parties generally negotiate contracts at arm's length and thus do not require the same restriction. Neither the Draft Convention nor the International Convention on Travel Contracts,⁹⁹ however, makes clear which convention would govern the *travel organizer's* liability to a guest for a hotelkeeper's failure to perform. Thus, a guest's recovery could differ depending on whether he was able to sue under the CCV or the more protective provisions of the Draft Convention. In all probability, however, the guest would have the choice.

96. P.R. LAWS ANN. tit. 10, §§ 719, 720 (1976).

97. Draft Convention, *supra* note 3, art. 4.

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

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

Draft Convention, *supra* note 3, art. 21.

99. See note 15 *supra* and accompanying text.

IV

IMPLEMENTATION OF THE DRAFT CONVENTION
INTO U.S. LAW

The Draft Convention may enter into force as a treaty subject to the advise and consent to ratification of the Senate¹⁰⁰ or as an executive agreement pursuant to federal legislation.¹⁰¹ If the executive branch were to submit the Draft Convention to the Senate, that body might require the enactment of implementing legislation prior to giving its advise and consent.¹⁰² The Supreme Court's decision in *Heart of Atlanta Motel, Inc. v. United States*¹⁰³ makes it clear that Congress, if it so desired, could use its interstate commerce power to implement the Draft Convention into U.S. law without violating the tenth amendment.¹⁰⁴ The Draft Convention, however, deals with the application of contract and tort principles to the hotelkeeper-guest relationship, an area traditionally controlled by state law. Therefore, Congress may decide to refrain from exercising its interstate commerce power.¹⁰⁵

Fortunately, the Draft Convention provides a certain amount of flexibility in its implementation provisions. For instance, article 24 allows a nation to limit the Convention's scope to the transnational traveler only.¹⁰⁶

100. "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. CONST. art. II, § 2.

101. See generally Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397 (1976-77).

102. In order to be self-executing, a treaty must manifest the intention that it shall be effective as domestic law at the time that it becomes binding upon the United States. See 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 302-16 (1970). Since the Draft Convention allows a nation to limit its ratification to transnational travelers or to certain territorial units within its borders, Draft Convention, *supra* note 3, arts. 24, 25, the Convention would not appear to have the mandatory nature necessary to be self-executing.

103. 379 U.S. 241 (1964).

104. In *Heart of Atlanta*, the Court upheld the constitutionality of the 1964 Civil Rights Act's prohibition of discrimination in places of public accommodation. The Act provides that "any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence" affects interstate commerce. 42 U.S.C. § 2000a (b),(c) (1976). The Court emphasized that Congress' power under the commerce clause, and not the fourteenth amendment, was the basis of its decision. 379 U.S. at 250.

105. "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." *Polish National Alliance v. NLRB*, 322 U.S. 643, 650 (1944).

106. Any State may, at the time of signature, ratification, acceptance, approval or accession, declare . . . that:

. . . .

(b) this 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. . . .

Congress may decide that the remedies provided by the Convention will induce more foreign visitors to seek legal redress for injuries and more hotelkeepers to settle these claims quickly. Congress could achieve this result by using its foreign commerce power¹⁰⁷ to implement the Convention as to international guests only, thereby preserving the states' traditional power over hotelkeeper liability to the domestic guest.¹⁰⁸

More importantly, article 25 of the Draft Convention relieves certain ratification problems for nations with a federal political system. Article 25(1) provides:

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.¹⁰⁹

With respect to possible U.S. commitment to the Draft Convention, article 25 allows the United States to avoid the problem of federal preemption. The United States could either ratify the Convention on behalf of all fifty states or only as to those states that enact enabling legislation.

Draft Convention, *supra* note 3, art. 24 (1)(b).

107. "The Congress shall have Power . . . To regulate Commerce with foreign Nations. . . ." U.S. CONST. art. I, § 8.

108. Under article 24, a dual system of law could exist between domestic and international guests. The early drafters of the Convention recognized this possibility. The Report of the Rapporteur to the Working Committee on the Hotelkeeper's Contract came out against provisions that would allow the creation of dual systems in those countries adopting the proposed uniform law:

Although the value of unification often lies in the fact that it obviates the application of conflict of law rules, its prime function rests in ensuring uniformity and thus legal certainty and in the present context there would seem to be little justification for restricting the application of the future rules to international cases. In the first place, there could be considerable difficulties in determining the necessary international connecting factor. Should this be supplied by the fact that the terms of the contract are executed in one country and the contract concluded in another, or should the nationality, domicile or residence of the guest be considered decisive? Apart from the legal difficulties involved there would seem to be no objective grounds for distinguishing between guests living in the country where the hotel is situated and guests of foreign nationality, resident or domiciled abroad, when considering the reciprocal rights and duties of hotelkeepers and guests. Furthermore, the international element in the hotel industry is now so large that the desire to preserve national law for purely national transactions, which is to be seen in such fields as the sale of goods where the bulk of such transactions are national, would not seem to be a relevant consideration. Similarly, the absence of national legislation dealing specifically with a number of the issues dealt with in this report, may well prove to be an encouragement to accept the provisions of a uniform law, always providing of course that such provisions obtain general support. It is therefore proposed that, for the purposes of the application of the future uniform law, no such limitation should be introduced.

1974 Report on the Hotelkeeper's Contract, *supra* note 27, at 18-19.

109. Draft Convention, *supra* note 3, art. 25(1).

A uniform law would be the most feasible method for implementation by all states. It would require the circulation of a draft model to either all the states or to representative organizations such as the Conference of Commissioners on Uniform State Laws. Each state would be free to decide whether to enact a uniform law modeled upon the Draft Convention. The United States could wait until all states had either adopted or expressed an intent to adopt the uniform law before ratifying the treaty. Thereafter, federal legislation would be necessary only to implement the Convention into the law of U.S. possessions and territories. The likelihood of unanimous state action, however, appears slight.

Fortunately, article 25 also affords the United States the opportunity to participate in the Convention on behalf of only one or more of its states. Again, a model uniform law could be circulated to the states for review. Some states, however, may choose not to participate. This state-by-state approach, while giving geographically scattered protection to guests and innkeepers, would allow those states that cater to the international tourist trade an opportunity to participate in the new transnational legal system without awaiting unanimous state endorsement.

If the Draft Convention is to attract sufficient interest in the United States to support ratification, the executive branch initially may have to accept it subject to the article 24(b) reservation, thereby limiting the Convention's application to the "international" hotelkeeper's contract. If a particular state was to accept the terms of the Draft Convention, it is possible that that state would ultimately choose to adopt the provisions of the Convention as to all guests, domestic and international. Such progressive action by the states could eventually allow the Federal Government to withdraw any reservation it may enter with its initial accession.

CONCLUSION

The Draft Convention on the Hotelkeeper's Contract has many beneficial provisions. Foremost among these is the elimination of the situs of the hotel or the contract as the determinative factor as to available remedies. Furthermore, by making the amount of recovery for lost or damaged property contingent on the accommodation rate of the particular hotel, the Convention protects both the guest and the small hotelkeeper from financial ruin. In the area of liability for personal injury, the Convention allows the guest to recover to the full extent of his injury, but adopts a reasonable care standard in order to prevent the imposition of an insurer's liability on the hotelkeeper. In dealing with dishonored reservations, the Convention, while favoring the hotelkeeper, provides more extensive remedies for the traveler than are currently available in most nations. Finally, the Conven-

tion's ratification provisions are flexible enough to allow U.S. implementation without conflict between states and the Federal Government.

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