

The Allotment Contract through the Hotel-keeper's General and Special Liability for Damage

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Abstract. The hotel-keeper is liable for any damage due to breach of the allotment contract. His liability is divided into two types: 1.) general liability - that derives from the agency hotel-keeper's contract and 2.) special liability - characteristic only for the allotment contract. His most important general liability is the liability for non-payment of the commission and his most common special liability is the liability for non-providing the allotment accommodation. The purpose of the paper is to analyze the hotel-keeper's contractual liability for non-payment of the commission and non-providing the allotment accommodation to the agency and its guests through a comparative analysis of the laws of Croatia, France, Germany, Italy, UK and USA at the EU and international level. The results of the paper are answers to given theoretical questions (damage to a double subjectivity, the types of damage and liabilities, and the comparative solutions) and the synthesis of the hotel-keeper's liability in the allotment contract analysis. This paper posits the need for an international convention that would regulate the allotment contract content, especially regarding the liabilities of the parties.

1. Introduction

According to the allotment contract, the hotel-keeper undertakes the duty to provide availability of certain number of beds or capacity in the agreed object to the travel agency, provide services to the travel agency's guests, and pay a certain commission to the travel agency. In exchange, the travel agency undertakes the obligation to make the bookings or notify the hotel-keeper about the impossibility to comply with the contractual terms and pay the cost of services, if the travel agency used the contracted accommodation.

Allotment contract is rarely regulated by (national or international) law. For this reason, it is also very rarely analyzed by the lawyers. Its content or part of the content is regulated usually by business practices. Allotment contract is actually a type of the agency hotel-keeper's contract with the specificity related to the bookings of specific capacity (certain number of beds or accommodation units) and the ability or inability to cancel the contract.

There are two types of allotment contract in the comparative law: 1) allotment contract with the (travel agency's) right of unilateral withdrawal from the contract (the real allotment contract), and 2) allotment contract with the guarantee charge (the allotment contract "full for empty").

In the Croatian law, the allotment contract is regulated by the Obligations Relations Act (Zakon o obveznim odnosima, hereinafter: ZOO) - articles 909-920 and to a lesser extent (Gorenc, 2002, 3-4) in the "special corpus of norms" (Šmid, 1998, 79-95) of the Customary Practice in catering industry (Posebne uzanice u ugostiteljstvu - hereinafter: PUU) - customs 95-102. The breach of the allotment contract makes the hotel-keeper liable for proprietary and non-proprietary damage. In Croatian law, allotment contract has the features of a mixed, consensual, billing and formal (VTS XII Pž-542/05-3 - 31.10.2006) contract.

In comparative law, allotment contract as a rule is not regulated in national laws, or in European or international regulations. It is mostly part of customary law or business practices, where it is also a subject to two codifications of business practices: 1) European ECTAA-HOTREC Code and 2) International IH&RA-UFTAA Code, which are a part of the so-called soft-law (Senden, 2004, 21; Snyder, 1994, 198).

Upon breach of the allotment contract, the hotel-keeper becomes liable for damage. Hotel-keeper's contractual liability for such violation is characterized by two tendencies of modern contractual law: 1) implementing the institute of contractual liability for non-proprietary damage and 2) codification of European and international practice for contracts between hotel-keepers and travel agencies.

In the Croatian law, the hotel-keeper's contractual liability in the allotment contract is based on two sources of law (ZOO and PUU). In the comparative law of the European countries, this liability is based on: 1) primary - in the provisions of the European codification of the business practices from the agency (allotment) contract of hotel services - ECTAA-HOTREC Code of Conduct (1996), 2) secondary - business practices of individual European countries on the allotment agreement of hotel services, 3) in rare legislative norms of the certain national rights of the individual EU countries and 4) in a few court decisions governing the hotel-keeper's liability in the allotment contract.

The subject of the paper is a comparative analysis of hotel-keeper's contractual liability in Croatia, France, Germany, Italy, UK and USA, as well as European Union law and international law, for the violation of two most significant obligations that are the subject of the allotment contract. This represents a contractual hotel-keeper's liability for damage resulting from violation of the obligation to pay the commission to the travel agency, and the violation of the obligation to provide the accommodation to allotment guests, or make available a certain number of hotel capacity to travel agency.

The purpose of this paper is to provide answers to theoretical questions that are imposed through the main thesis of the work:

1. To whom is the hotel-keeper liable for damages due to violation of obligations from the allotment contract?
2. What kinds of damages will the hotel-keeper compensate to the allotment contract creditors?
3. What types of hotel-keeper's contractual liabilities appear upon violation of obligations from the allotment contract?
4. Are the solutions on hotel-keeper's contractual liability for non-payment of commission to the travel agency and for not providing allotment accommodation sufficiently supported by scientific literature and case law?
5. Do the principles of stated contractual liability of the hotel-keeper differ from the comparative laws or are the solutions from comparative laws mainly similar?
6. What is the most obvious deficiency in the regulation of the allotment contract in comparative law?

2. Presumptions and types of hotel-keeper's contractual liability in the allotment contract

The particularity of the hotel-keeper's liability instituted in the allotment contract is the fact that the hotel-keeper can commit damage to the travel agency (as a contracting party in the allotment contract) as well as to its guest (as the user of the allotment contract); in that way, the hotel-keeper's contractual liability for damages in the allotment contract is focused on double subjectivity (Radolović, 2010, 15). In the Anglo-American law, this hotel-keeper's liability is based on the doctrine of *respondeat superior* (Sherry, 1993, 378-385).

Given the above facts, in case of damage, there is a specific situation. Namely, if the hotel-keeper commits the damage to the travel agency, he will reimburse the same on the allotment contract basis. However, if the hotel-keeper commits the damage to the allotment guest, there are two possibilities: a) hotel-keeper will indemnify the guest directly and b) the travel agency is liable to the guest for the hotel-keeper's damage done him (under the agency contract), which then has the recourse from the hotel-keeper.

In case of liability for breaching the allotment contract, hotel-keeper will reimburse total property and non-proprietary damage to the travel agency or its guest. The hotel-keeper's compensation of proprietary damage to guests and travel agency includes all references to damages (e.g., theft of guest's property by the hotel-keeper's employees) or loss of profits (e.g., unpaid commissions to the travel agency). The most significant contractual non-proprietary damages, which the agency as a legal person (Nass, 1962, 89) may suffer, include: 1) violation of reputation (e.g. not accommodate reputable agencies' guests because of overbooking) and 2) various types of anxiety, frustration and embarrassment (Klarić, 1995, 393).

The most common cases of non-proprietary damages that the guest may suffer from the allotment contract's breach include: 1) fall vacation (e.g., due to the slippery floor of the hotel, guest brakes a leg and comes home), 2) missing the goals of the guest's sojourn (e.g., a guest artist wanted to have a look at the cathedral, but was moved to a room without a view), 3) various types of discomfort, discontent and distress (e.g. the behaviour of staff, poor hotel food, the ceiling leaks, etc.), and 4) affective value of damaged property (e.g. because of moisture into the safe the valuables corrodes).

Hotel-keeper's liability is determined by two types of dual liability towards dual subject in the allotment contract, *i.e.* the general and specific hotel-keeper's liability. "General" hotel-keeper's liability in the allotment contract results from breaching the hotel-keeper's duty towards travel agency or the guest: payment of commission, giving accurate information on status, charging the same price for all guests, providing the services booked, providing accommodation to groups in accordance with the rooming list, etc. "Special" hotel-keeper's liability is a breach of specific allotment duties: 1) providing allotment accommodation, 2) providing the contracted quality of services, 3) not changing allotment's prices, 4) notifying the agencies about changes, etc.

This paper deals with the most important general contractual hotel-keeper's liability in the allotment contract - the liability for non-payment of the commission to the agency - and the most important specific contractual hotel-keeper's liability regarding the allotment contract responsibility - liability for not providing the allotment accommodation to the travel agency and allotment guests.

3. Hotel-keeper's contractual liability for damage due to commission non-payment to the travel agency

3.1. Croatia

In the Croatian law the hotel-keeper's liability from the allotment contract derives from the ZOO (articles 909-920) and PUU (customs 95-102). Based upon the number of guests which the agency sends under the contract of allotment, the hotel-keeper realizes financial gain. Therefore, the hotel-keeper is obliged to pay the reward or commission, and is liable for the violation of this obligation, as well as for the proprietary and non-proprietary damage suffered by the agency.

A travel agency operates exclusively for a commission (Gorenc & Pešutić, 2006, 23), where the amount is calculated in relation to prices of the hotel services (Šmid, 1977, 148). In Croatian law, the amount of the commission may be determined by: 1) primary - in the allotment contract or, if there are no such clauses in the contract, and 2) the so-called usual commission (custom 70.3 PUU): 5 %, if the agency is domestic tour-

operator, %, if the domestic agency is the mediator for the foreign agency's guests and 8 %, if the agency is a foreign tour-operator.

There are three most important institutes that are applied to the same hotel-keeper's liability in the allotment contract for payment of commission: 1) the amount of the usual fee (customs 102. and 70.3. PUU), 2) the obligation to pay commission for the extended stay of the guest (customs 102. and 70.4 PUU) and 3) the calculation of commission based upon the gross cost of services (customs 102. and 71.1. PUU). The method of calculation and payment of the commission can be executed in relation to gross or net amount of the requested and provided services (Gorenc & Šmid, 1999, 132). This is the price with the commission (gross) or without it (net). In that case the hotel-keeper cannot change the service prices without the consent of the agency (VTS XIII Pž-1708/03-3 - 10.10.2006).

The general rule of paying the commission to the travel agency in the allotment contract has two postulates: 1) the hotel-keeper is required to pay a commission on turnover (article 918.1 ZOO) and 2) the commission is determined as a percentage of the price of services (article 918.2. ZOO). Determination of the "allotment" commission is to be made in the following order (article 918.3. ZOO): 1. determined under the allotment contract, 2. established according to the general rules of the agency, and 3. according to business practices. There are two possible types of commission that the hotel-keeper can pay (custom 98.2. PUU): 1) a linear commission - calculated as a percentage of the price of services and 2) stimulating commission - determined in different percentages depending upon the booking of the accommodation.

Hotel-keeper will be liable to the agency for proprietary and non-proprietary damage under the principle of presumed guilt if: 1) he does not pay the commission to the agency, 2) he tries to persuade the guest to become his direct customer (custom 90. PUU) or 3) he arouses suspicion in the quality and/or reputation of the agency (custom 93. PUU). This hotel-keeper's behaviour is unacceptable because it causes bad agency's market position and business survival (Vukonić, 1998, 51-57). Hotel-keeper is not liable for damage when the contracted guest's stay is finished, and when the guest decides to stay at the hotel as a direct client; in that case, the agency is entitled to a commission only for the time the guest booked through the travel agency.

3.2 France

In the French law, the contractual hotel-keeper's liability for proprietary and non-proprietary damage due to violation of obligation to pay the travel agency commission (Commission) according to the allotment contract, primarily results from the provisions of the ECTAA-HOTREC Code, and subsequently from the French custom law. The French theory does not deal with this kind of liability. In French law, the commission is primarily determined by the allotment contract, while the usual fee the hotel-keeper pays to a travel agency amounts to 10%. In French jurisprudence, it is determined by one interesting decision (**La Cour de Cassation - Cass Comm, no. 19596 - 24.11.2009**) which ruled that the hotel-keeper must reimburse the proprietary damage to the agency amounting to lost commission if the hotel-keeper cancels the allotment contract concluded for an indefinite period of time, without notifying the travel agency.

3.3 Germany

In German law, the hotel-keeper's liability for proprietary and non-proprietary damage due to non-payment of the commission (*Kommission, Reisebüro-provision, Agenturprovision*) according to the allotment contract, arises from the provisions of ECTAA-HOTREC Code. Additionally, the German practice adopted three special features (Hänssler, 2008, 265): 1) the agreed commission is typically between 20% and 30% of the service price, 2) the commission is more often charged through the net (*Nettopreis*) than the gross price of services (*Bruttopreis*) and 3) there are four types of commission (**Althof, 2001, 260**) namely , the usual commission (*Basisprovision*) - 10% when it is not contracted, additional commission (*Zusatzprovision*) - by fulfillment of certain conditions, stimulating commission (*Staffelprovision*) - depending upon the realized bookings and the super-commission (*Superprovision*) - in a certain period of the season. In the German law, the hotel-keeper is

also liable to the guests for paying the illegal, so-called "kick-back" commission, that the hotel-keeper and the agency contract in advance (regardless of the price of services), and the hotel-keeper can freely charge the agency's guests any (high) price of hotel services.

3.4 Italy

In the Italian law, the hotel-keeper's contractual liability for proprietary and non-proprietary damage due to violation of the obligation to pay a commission to the travel agency (*Commissione*) is primarily deduced from the provisions of the ECTAA-HOTREC Code (**Castoldi, 2003, 149**). The Italian legal literature does not deal with the theoretical treatment of the Institute of hotel-keeper's contractual liability for non-payment of the commission to the travel agency according to the allotment contract. In the Italian case law, there is no specific amount of the agreed commission due to large seasonal oscillations and different touristic power of certain Italian regions. With one interesting decision, judicial practice of Italy characteristically determines that the hotel-keeper can pay the commission according to the allotment contract to the travel agency also in the way not contracted between them, if the same does not violate the rights of the tourist agency nor it decreases the amount of commission (*Corte di Cassazione - Cass Civ, I, no. 13658 - 04.06.2010*).

3.5 United Kingdom

The UK law also draws the rules on hotel-keeper's contractual liability for proprietary and non-proprietary damage due to violation of the obligation to pay a commission to the travel agency (*Commission*) in the allotment contract, from the provisions of the ECTAA-HOTREC Code (1996). In the British law, the common amount of the agency commission in a full season (**Chand, 2003, 176**) amounts to 12.5% of the total price of catering (allotment) services (**Boella & Pannett, 1999, 112**). There is no significant British precedent on hotel-keeper's liability for violating the obligation to pay commission in the allotment contract, nor significant theoretical analysis of such institute.

3.6 USA

In the USA law, the rules on hotel-keeper's contractual liability for proprietary and non-proprietary damage due to violation of the obligation to pay a commission to the travel agency (*Commission*) in the allotment contract are arising from common law and jurisprudence. With one decision of the Court of Appeal in Minnesota (*Cardinal Consulting vs. Circo Resorts, 1980.*), it has been stated that travel agencies are entitled to compensation of damage for loss of commission due to the unjustified cancellation of the allotment booking. The usual commission in the USA law varies from state to state and there is no specific amount of it (it is understandable that there are big differences in "allotment" commissions in Los Angeles and inside the U.S.).

3.7 European Union

At the level of European business practice, the hotel-keeper's liability due to violation of the obligation to pay a commission to the travel agency in the allotment contract derives from the provisions of articles 5-7 of the ECTAA-HOTREC Code of Conduct. There are obligations wherein the violation represents the hotel-keeper's liability for proprietary and non-proprietary damage such as: 1) the obligation not to change prices of services, 2) the obligation to pay a commission (*commission*) and to inform about its amount and 3) the obligation of restraining from persuading the guest to become a direct customer.

The hotel-keeper is liable to the travel agency for proprietary and non-proprietary damage if it changes the price of services in relation to the contract or price list without the consensus of the agency (article 5). The Hotel-keeper is not liable for damage to the travel agency only in three cases of unilateral changes in the prices of services (article 5): 1) in the long-term contracts, 2) in the changes necessary because of public taxes, VAT, exchange rates or similar, and 3) in the case of new taxes (other than the above) on non-concluded allotment contract (shall not affect confirmed reservations or contracts already concluded).

The Hotel-keeper's liability for proprietary and non-proprietary damage in the allotment contract exists even if he does not pay the commission or if he does not inform the travel agency about the amount of commission in time (article 6). The travel agency pays the service price minus the amount of commission, and when the guest pays the price of services directly (payment is made directly by client) the hotel-keeper must pay the travel agency commission within 30 days from the date of payment of services (article 6.4).

Written obligation to inform the travel agency about the commission amount includes (article 6.2.): 1) which services will be commissionable 2) statement whether the commission includes VAT, and 3) whether commissions are payable for any agreed extension of stay. The hotel-keeper will be liable for proprietary and non-proprietary damage to the agency resulting from any persuasion of the agency guest (refrain from soliciting the client to become a direct client) to become a direct client (article 7.2.). ECTAA-HOTREC Code defines one specificity: in the allotment contract the commission must be agreed upon (article 21.2.), while the agency hotel-keeper's contract establishes a common provision in the net commission amount of 10% (article 1. of the additional clauses).

3.8 International law

At the international law (business practice) level, the contractual liability for non-payment of agency commission is incorporated in several clauses (articles 13-14) of the International IH&RA-UFTAA Code of Practice. It is a contractual hotel-keeper's liability for proprietary and non-proprietary damage to the tourist agency due to violations of two contractual obligations: 1) the obligation to pay commission and 2) the obligation of a clear understanding of the commission.

The hotel-keeper is liable to the travel agency for proprietary and non-proprietary damage if he does not pay in full and on time the commission for paid allotment services (article 13). The rule of international business practice is that the travel agency alone pays the price of hotel services rendered minus the commission, unless explicitly agreed that the price will be paid directly by the allotment guest, in which case the hotel-keeper guarantees the payment of the commission to the travel (tourist) agency.

The IH&RA-UFTAA Code does not specify the period within which the hotel-keeper, in the allotment contract, must pay the commission to the travel agency in case the guests themselves pay directly the price of hotel (allotment) services. In case that the deadline is not contracted, the author assumes that the hotel-keeper should pay the commission immediately upon the request of the agency or in the subsequently contracted deadline. The hotel-keeper is liable for any damage arising from non-payment of the commission, which guest paid directly the price of confirmed services (article 13.d).

The hotel-keeper's liability for not giving all relevant information to the travel agency about an amount of commission includes compensation for proprietary and non-proprietary damage (art. 14). The commission is determined before or during the contract (article 14.1.). The hotel-keeper's constant obligation is to inform the agency about the commission amount. Data delivered by the hotel-keeper to the agency about the commission include (article 14.2.): 1) whether a commission will be paid and on which services, 2) the commission's rate and 3) commission payable on any extension of stay agreed.

On the international law (international business practices) level, there is a specificity related to contractual hotel-keeper's liability for non-payment of a commission to the travel agency in the allotment contract (article 14.2.). According to this provision, the hotel-keeper is required, in the allotment contract, to pay to the travel agency a commission for an extended guest stay in the hotel, as well (commissions are payable on any extension of stay agreed), if the travel agency guarantees payment for such extended stay (where the payment is guaranteed by the travel agent).

4. Hotel-keeper's contractual liability for damage due to non-providing the accommodation to the allotment guests in the allotment contract

4.1 Croatia

Special elementary hotel-keeper's obligation in the allotment contract is to put at disposal to travel agency (and its guests) certain objects (article 915. ZOO). The same obligation has been established even in the definition of contract of allotment (article 909. ZOO), according to which the hotel-keeper's liability is divided to making available two possible determinants of the concept of object: 1) a certain number of beds (beds in each unit) or 2) a number of accommodation units in a certain object (rooms, apartments, villas, camping units, etc.). In the context of these obligations under the allotment contract, the hotel-keeper cannot rent to its direct guests or other agency's guests certain objects that are subject to allotment contract with the specific agency, for the duration of the allotment contract (article 915.2. ZOO).

Because the agency can easily give up the booking of these objects and the hotel keeper can conclude an allotment contract with multiple agencies which leads to overbooking and violation of the stated hotel-keeper's duty, the prohibition of such actions is fully justified. Hotel-keepers often found justification in the fact that agencies are usually waiting for the last day to cancel a reservation or the contract, after which they have very little time to book the new guests. This was particularly a problem with large groups of agency guests outside the tourist season. Regardless of the given circumstances, the hotel-keeper will compensate the travel agency and its guests (customs 86. and 102. PUU) all suffered proprietary and non-proprietary damages if he violates the obligation of availability of the certain objects to the travel agency and its guests (Gorenc & Šmid, 1999, 153).

The right for the travel agencies to achieve commissions and other benefits from allotment contract are protected by the hotel-keeper's contractual liability for damage in violating the "firm's" commitment to make available the contracted facility under the contract of allotment.

The only theoretical problem deriving from allotment contract is the fact that travel agency can very easily give up the contract, in relatively short periods (custom 83. PUU) of 10, 14, 21 and 30 days, depending on characteristics of the canceled booking, prior to arrival to the hotel facility. For this reason these deadlines should be extended to at least a double extent in order to bring the hotel-keeper to a somewhat better position.

Hotel-keeper's liability for proprietary and non-proprietary damage to the agency for violation of the obligation to make available certain facilities is excluded if (custom 101.1. PUU) the travel agency did not timely (before the deadlines foreseen for the cancellation of the contract of allotment) sent a notice to the hotel-keeper about the usage of the facilities or rooming list. In this case, the hotel-keeper has a discretionary right to decide whether he will make available its facilities to the agency (custom 101.2. PUU); if his decision is positive, he will make available facilities defined in the contracted allotment agreement (custom 101.3. PUU), and if decides not to put the facilities available to the agency, he shall not suffer any damage.

4.2 France

In the French law, the hotel-keeper's liability to make available certain facilities is derived from the provisions of the ECTAA-HOTREC Code. It implies a certain number of quotas (*les contingents*) - objects that the hotel-keeper must make available to the travel agency (rooms, apartments, villas). French legal theory (Brière-Cuzin & others, 2002, 122) determines that this represents a fix hotel-keeper's obligation in the real allotment, until the expiration of the deadline for cancellation of the contract (*rétrocession*) and a fix hotel-keeper's liability under allotment "full for empty" for the entire duration of the contract.

In French law, the hotel-keeper is required to keep objects available until the contracted deadline or, if there is no contracted deadline, until the deadlines defined in the ECTAA-HOTREC Code. The most common violation of this obligation is due to overbooking (surbooking). The most common reasons why the overbooking happens under the allotment contract are (Gautheret & others, 2003, 148): 1) attempt to book the maximum capacity (la recherche de remplissage maximal des Hotels), 2) a large number of accommodation units remain un-booked due to the withdrawal of the agency (pourcentage de prestations rétrocedées), 3) a large number of cancellations of booked accommodation (pourcentage de prestations annulées), 4) a certain number of no-show guests (non-presentation) and 5) providing allotment accommodation over the actual hotel's capacity (accordent contingents des supérieurs à leur capacité réelle). In any case, the hotel-keeper will reimburse to the agency any suffered proprietary and non-proprietary damage if he does not put to a disposal allotment accommodation to a travel agency and its guests.

4.3 Germany

In the German law, hotel-keeper's liability for proprietary and non-proprietary damage resulting from violation of the obligation to make available certain objects to the travel agency derives from the ECTAA-HOTREC Code. According to the German legal theory (Hänssler, 2008, 265), a hotel-keeper in the allotment contract (in any agency hotel-keeper's contract), is obliged to make available a number of contingents (*Zimmer-contingent*) in a given period (*einem bestimmten Zeit*) to the agency. In normal allotment the same obligation lasts only to the extent to which the agency can give up the booking (*Zeitpunkt*), and in allotment "full for empty" constantly.

4.4 Italy

In the Italian law, the hotel-keeper's obligation in the allotment contract to make available certain objects is deduced from the provisions of the ECTAA-HOTREC Code. The same obligation implies a dual typology of objects that the hotel-keeper must make available to the travel agency: 1) larger number of rooms (*una pluralità di numero di camere*) or 2) the accommodation units (*unità abitative*). The Italian legal theory (Delfini & Morandi, 2010, 303) determines that it is conditional (*opzione*) (article 1331. *Codice Civile*) hotel-keeper's obligation in the real allotment (by the deadline - release) and a fixed hotel-keeper's obligation in allotment contract "full for empty" (which exists even when the facility is not booked at all).

Allotment contract is one sided obligation agreement wherein the hotel-keeper can dispose the accommodation not booked by the travel agency only after the deadline (release). One party (travel agency) has no obligations towards a hotel-keeper, while a hotel-keeper has an obligation to put at the agency's disposal all the contracted allotment accommodation. If the travel agency did not book it within the deadline (release), the hotel-keeper can do the booking himself. The hotel-keeper is required to keep objects available until the agreed deadline or, if there is no contracted deadline, until the deadlines defined in the ECTAA-HOTREC Code, without the possibility of withdrawal of the duty (article 1329.1. *Codice civile*). There is no other important decision of Italian courts regarding these hotel-keeper's liabilities in the allotment contract.

4.5 United Kingdom

In the UK law, the hotel-keeper's liability for the proprietary and non-proprietary damage due to violation of making available the certain objects to the travel agency derives from the ECTAA-HOTREC Code. The British literature (Medlik, 2003, 11; Beaver, 2005, 33) points out that the same hotel-keeper's obligation to the travel agency refers to making available, *until a given date*: 1) the specific number of hotel rooms or 2) a certain number (allotment) of beds. There is no significant judicial precedent on hotel-keeper's contractual liability for

non-disposing the allotment accommodation to the agency even in the UK law, nor the legal literature deals to a greater extent with the issues mentioned.

4.6 USA

In the USA law the hotel-keeper's contractual liability for proprietary and non-proprietary damage due to violation of making available certain objects according to the allotment contract to the travel agency derives from: 1) customs and usages of American business practices and 2) few interesting decisions (sentences) of American judiciary.

The general rule of the U.S. contract law is that the hotel-keeper in the allotment contract is obliged to put at disposal to the travel agency the following "allotment" objects: 1) specific number of hotel rooms or 2) a certain number of beds. (Dale & others, 2006, 243)

Depending on whether the regular allotment contract is made (with the possibility of a one-part termination of the contract) or allotment contract "full for empty" (the allotment contract with guarantee charges), making available of the facilities to the travel agency is permanent (the allotment contract "full for empty") or until a specified release date, after which is determined the percentage of facilities that remain at disposal.

In addition to the general rule, the mentioned hotel-keeper's liability in the allotment contract is determined by the two special rules: 1) the hotel-keeper is liable for proprietary and non-proprietary damage if he does not put at disposal the courtesy rooms (rooms for storage) to the allotment guests and 2) in cases where the placement of objects is not possible (usually due to overbooking) the hotel-keeper must find alternative accommodation for allotment guests (alternative accommodation), but will still be liable for any damage to the travel agency, regardless of whether he found an alternative accommodation, if he fails to notify the tourist agency on time.

American jurisprudence has, in applying these rules, two specific hotel-keeper's "qualified" liabilities (Cournoyer, Marshall & Morris, 2004, 107-110) for proprietary and non-proprietary damage due to breach of the obligation to make available certain facilities to the travel agency and its guests in the allotment contract: 1) liability for "damage to Goodwill" and 2) liability from the noncompetition agreement (noncompetition clause).

The hotel-keeper is contractually liable for non-proprietary damage for breach of the travel agency's reputation (damage to Goodwill) if he does not assure the allotment accommodation for a large group of guests and therefore leads the travel agency into danger of losing future business (Rainbow Travel Service Vs. Hilton Hotels, 1990.)

The hotel-keeper is also liable for the damage about the non-disposal of accommodation to the allotment guests, where he booked "their" allotment objects with the direct guests, contrary to the noncompetition clause in a particular area (agreements not to compete). There is no violation of the noncompetition clause by the hotel-keeper if a direct guest comes into the hotel alone (Kladis vs. Nick's Patio, 2000).

4.7 European Union

The hotel-keeper's contractual liability for proprietary and non-proprietary damage resulting from violation of obligations to make available certain facilities (allotment accommodation) to the travel agency and its guests in the allotment contract derives from the article 16 of the European ECTAA-HOTREC Code.

The general rule of the stated hotel-keeper's contractual liability in the allotment contract and its exclusions also derive from the article 16.2 of the ECTAA-HOTREC Code. The hotel-keeper can be excluded of any contractual liability for not providing the allotment accommodation to the travel agency and its allotment guest in three cases (article 16.2.): 1) the provision of allotment accommodation in the same or the nearest hotel of the same category, 2) notice to the travel agency or the allotment guests themselves prior to arrival at the hotel and 3) the return of displaced groups of allotment guests after the original hotel facilities become "available" again.

The above mentioned obligation to make available "allotment" facilities for the travel agency's disposal means: 1) that the hotel-keeper is obliged to make available to the travel agency a certain number of rooms (article 21.2.) and 2) that the hotel-keeper is not obliged to indemnify the damage to the group of the allotment guests in case of their transfer from the booked to another facility, except for the different regulation by national law (article 16.3).

If the hotel-keeper does not fulfill the obligation to make available a certain "number of rooms left at the disposal of the agency" in the allotment contract (or any other type of the agency hotel-keeper's contract), usually due to overbooking or force majeure, he will be liable to the agency and its allotment guests from the guest's group for proprietary and non-proprietary damage, under the principle of presumed guilt. The hotel-keeper cannot exclude his liability for damage due to overbooking or no show due to force majeure (article 22.1.).

On the other hand, hotel-keeper's contractual liability is excluded (no compensation will be due by the hotel), regardless of the fact that he transferred the group of guests into another object, provided he notified the travel agency on time (without the obligation to return the group to the original hotel).

4.8 International law

In the IH&RA-UFTAA Code, the hotel-keeper's liability in the allotment contract for proprietary and non-proprietary damage due to breach of the obligation to make available certain facilities to the agency from the allotment contract arises from the duties determined by the provisions of articles 25-28.

The hotel-keeper shall comply with all contractual requirements for each accepted reservation and put at the disposal of travel agency contracted accommodation for the allotment group of guests (article 25.a1.). If the hotel-keeper does not fulfill this obligation (article 25.a2.), the travel agency will reimburse him for the "loss actually suffered".

Nevertheless, the hotel-keeper will not be liable for breach of these obligations in four cases: 1) if he provides, at his own expense, adequate accommodation for guests at the nearest "equivalent" hotel (article 25.b1), 2) if he, at his own expense, before the arrival of the allotment guests, notifies them or the travel agency about the change of the original hotel with the new "substitute" hotel (article 25.b2.), 3) if he, at his own cost, after the conditions for return to the original booked hotel are met and guests want to come back, pays such transfer (article 25.b3.), and 4) if, in recognizing the impossibility of fulfilling the obligation due to force majeure, the hotel-keeper immediately notifies the agency (articles 26-27.). According to article 26 of the Code, exclusion of the hotel-keeper's liability exists in case of force majeure, even when it is a reason for the "multiple booking" (article 26.).

The disadvantages of provisions of the IH&RA-UFTAA Code, in relation to the hotel-keeper's obligation to make available certain facilities to the agency are: 1) not defining the type of accommodation facilities which will be made available and 2) non-content of the exculpation provisions of the hotel-keeper's contractual liability in case of unjustified transfer of allotment guests to another facility.

5. Conclusion

The hotel-keeper's liability for damage due to violation of the allotment contract perceives its most important concept due to the violation of commission payment to the travel agency and for failing to provide the contracted allotment accommodation. In addition to the analysis of the most important types of the hotel-keeper's contractual liability in the allotment contract, the paper seeks to answer all theoretical questions set in the introduction through the original conclusions, legal literature opinions and several examples of comparative jurisprudence.

For damage due to breach of the allotment contract, the hotel-keeper will be liable to the travel agency (as a contracting party of the allotment contract) and its guest (as a user of the allotment contract), which means that the hotel-keeper's liability for damage in the allotment contract is directed to a double subjectivity.

The hotel-keeper will compensate proprietary and non-proprietary damage to the agency and its guest. While the proprietary damage is related only to the compensation of the ordinary damage and lost profit, range of non-proprietary damage is very broad: for the agency it covers a breach of reputation and various types of anxiety, frustration or embarrassment, while to the allotment guest it covers a non-proprietary damage for fall vacation, non-fulfillment of the objectives of the tourist stay and the damage of the property with affective value.

The paper deals with the hotel-keeper's general liability in allotment contract, the agency hotel-keeper's contract (the hotel-keeper's contractual liability for violation of the obligation to pay commission to the travel agency) and the special hotel-keeper's liability in the allotment contract (hotel-keeper's liability for violation of the obligation to make available the allotment accommodation).

Comparative legal literature and judicial practice rarely concern with the allotment contract, let alone a hotel-keeper's contractual liability for proprietary and non-proprietary damage due to its breach. There are more reasons for such treatment of the allotment contract in the comparative law (the allotment contract is rarely determined by national laws as it is a contract between the professionals and it is constantly evolving, it is more interesting from an economic point of view, etc.)

Although the solution of comparative jurisprudence and the literature does not differ much in substance (especially because the solutions of the European and International Code), its major disadvantage in terms of regulation of the allotment contract in comparative law is the absence of a unified source of direct legal effect (Codes have not binding but dispositive legal effect).

The paper's conclusion is that it is necessary (the initiative have to come from the organizations engaged in unifying the law - UN, UNCITRAL, UNIDROIT) to adopt a Convention that would regulate the content of the allotment contract at the international level, in particular the hotel-keeper's and travel agency's contractual liability due to violation of the contract.

References

1. Althof, W. (2001). *Incoming Tourismus*, Oldenbourg Wissenschaftsverlag GmbH, Wien, München, 260'.
2. Beaver, A. (2005). *A dictionary of travel and tourism terminology*, 2nd Edition, CABI Publishing, Wallingford, Oxon, UK, 33.'
3. Boella, J. & Pannett, A. (1999). *Principles of Hospitality Law*, 2nd Edition, Cengage Learning EMEA, Brighton, London, 112.'
4. Brière-Cuzin, F. & others (2002). *Lexitour: Les 1700 mots des métiers do tourisme*, Editions Bréal, Paris, 122.'

5. Castoldi, G. (2003). *Accompagnatore turistico - L'esame scritto e orale di abilitazione alla professione*, 2. edizione, Ulrico Hoepli editore, Milano, 149.'
6. Chand, M. (2003). *Travel Agency Management: An Introductory Text*, Anmol Publications, London, New Delhi, 176.'
7. Cournoyer, N.G., Marshall, A.G., & Morris, K.L. (2004). *Hotel, Restaurant and Travel Law*, 6th Edition, Thomson Delmar Learning, New York, 107-110.'
8. Dale, G., Oliver, H., Marvell, A. & Jefferies, M. (2006). *Travel and Tourism*, Heinemann Educational Publishers, Oxford, New York, 243.'
9. Delfini, F. & Morandi, F. (2010). *I contratti del turismo, dello sport e della cultura*, Wolters Kluwer Italia, Milano, 303.'
10. Gautheret, G., Huet, A., Pischler, C. & Sultan, M.D. (2003). *Ventes et productions touristiques*, 2^e année, Editions Bréal, Paris, Rosny, 148.'
11. Gorenc, V. & Pešutić, A. (2006). *Razgraničenje organizatora i posrednika putovanja*, Zbornik Pravnog fakulteta Sveučilišta u Zagrebu, Volume 56, special number 7, Zagreb, 23.'
12. Gorenc, V. & Šmid, V. (1999). *Poslovno pravo u ugostiteljstvu i turizmu*, Školska knjiga, Zagreb, 132-153.'
13. Gorenc, V. (2002). *Ugovor o angažiranju ugostiteljskih kapaciteta (ugovor o alotmanu)*, Pravo i porezi, Volume 11, number 8, Zagreb, 3-4.'
14. Hänsler, K.H. (2008). *Management in der Hotellerie und Gastronomie: Betriebswirtschaftliche Grundlagen*, 7. Auflage, Oldenbourg Wissenschafts-verlag GmbH, München, 265.'
15. Klarić, P. (1995). *Nematerijalna šteta pravne osobe*, Zbornik Pravnog Fakulteta u Zagrebu, Volume 45, number 4/5, Zagreb, 393.'
16. Medlik, S. (2003). *Dictionary of travel, tourism and hospitality*, 3rd edition, Butterworth-Heinemann Publisher, Oxford, 11.'
17. Nass, G. (1962). *Person, Persönlichkeit und juristische Person*, Duncker & Humblot Verlag, Berlin, 89.'
18. Radolović, O. (2010). *Agencijski ugovor o hotelskim uslugama: ugovorna odgovornost ugostitelja u hrvatskoj, europskoj i međunarodnoj poslovnoj praksi, izvorni znanstveni rad*, Pravni vjesnik, časopis za pravne i društveno-humanističke znanosti Pravnog fakulteta Sveučilišta u Osijeku, Volume 26, number 2, Osijek, 15.'
19. Senden, L. (2004). *Soft law in European Community law*, Hart Publishing, Portland, Oregon in USA & Oxford in UK, 21.'
20. Sherry, J.E.H. (1993). *The Laws of Inkeepers*, 3rd Edition, Cornell University Press, Ithaca, New York, 378-385.'
21. Snyder, F. (1994). *Soft Law and Institutional Practice in the European Community*, in Stephen Martin, "The Construction of Europe. Essays in Honour of Emile Noël", Kluwer Academic Publishers, Deventer, 1994, 198.'
22. Šmid, V. (1977). *Putnička agencija i njeni ugovori s putnicima i davaocima usluga*, Savremena Administracija, Beograd, 148.'
23. Šmid, V. (1998). *Ugovor o alotmanu*, Zbornik radova Pravnog fakulteta u Mostaru, Volumen 11 (XI), unique number of the Year, Mostar, 79-95.'
24. The Decision of the *Court of Appeals of Indiana - 735 N.E.2d 1216 - Kladis vs. Nick's Patio* (2000).
25. The Decision of the Croatian High Commercial Court (*Visoki trgovački sud Republike Hrvatske*) - *VTS XIII Pž-1708/03-3* - 10.10.2006.
26. The Decision of the Croatian High Commercial Court (*Visoki trgovački sud Republike Hrvatske*) - *VTS XII Pž-542/05-3* - 31.10.2006.
27. The Decision of the French Supreme Court (*La Cour de Cassation*) - *Cass Comm, no. 19596* - 24.11.2009.
28. The Decision of the Italian Supreme Court (*Corte di Cassazione*) - *Cass Civ, I, no. 13658* - 04.06.2010.
29. The Decision of the *Minnesota Court of Appeals* - *Minn. 297 N.W.2d 260 - Cardinal Consulting vs. Circo Resorts* (1980).
30. The Decision of the *United States Court of Appeals* - *896 F.2d 1233, 10th Cir, Oklahoma - Rainbow Travel Service vs. Hilton Hotels* (1990).
31. Vukonić, B. (1998). *Turističke agencije*, Udžbenici Sveučilišta u Zagrebu, Mikrorad, Zagreb, 51-57.'