

## HOTEL GUEST'S PRIVACY PROTECTION IN TOURISM BUSINESS LAW

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### ABSTRACT

In the tourism business law, especially in the hotel-keeper's contract (direct, agency, allotment), the hotel-keeper assumes certain obligations to the guests, among which, in the last twenty years, the protection of the guest's privacy is particularly emphasized. The subject of the paper is hotel guest's privacy protection in the Croatian and comparative tourism business law.

The paper is structured in a way that it analyzes, through the laws of Croatia, France, Italy, Germany, UK and USA, the hotel-keeper's: 1) duties on guest's privacy protection (1. respect of the guest room privacy, 2. registration of the guest under the false name, 3. non-receiving certain guests or persons, 4. discretion of the hotel staff) and 2) contractual liability for non-proprietary damage to violation of guest's privacy (a. the intrusion of staff in the guest room, b. the release of persons in the guest room, c. recording, wiretapping or spying and d. giving third parties information about the guest).

Croatian law does not yet recognize the institute of guest's privacy protection as the comparative law of Euro-Continental and Anglo-American legal system (between which there are differences in relation to the institute). The conclusion is the need of adopting unified source at the international law and the European Union's law level, about hotel-keeper's obligation to protect the guest's privacy.

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## 1. INTRODUCTION

Modern tourism business law is facing lately a new institute: an obligation to protect the privacy of the guest during his stay at the hotel. The obligation to protect guest's privacy arises from the direct hotel-keeper contract and all other tourism law contracts concluded between the hotel-keeper and the guest. Hotel guest's right to privacy is especially developed in the laws of the USA and Germany, and evolved from the obligation to take care of guest person. Protection of guest's privacy is an expression of respect for the guest person, its dignity and psychophysical integrity. Category of privacy protection includes guest's safety, amenity, comfort and respect of his personality and reputation.

Croatian law regulates contracts between the hotel-keeper and the guest mainly in Special customary practice in the catering industry (1995). It regulates only two situations in which the hotel-keeper is obliged to take care about the person guest (Gorenc & Šmid, 1999, 22): 1) in the event of his illness (custom 47.) or 2) death (custom 48.). Croatian law, therefore, does not yet recognizes the institute of hotel guest's privacy. However, although no legislation or theory recognizes it, the hotel-keeper's obligation to care on person guest may, subsequently, in Croatian law also, include protection of guest's privacy.

Laws of the European continental circuit, accept the institute in a different manner. German law had adopted it by several court decisions and a number of theoretical backgrounds, where the obligation to protect the guest's secret and privacy is especially emphasized (Donhauser, 2004, 108). French law recognizes the institute only fragmentary under the obligation to keep the guest's security (Louveau, 1995, 46), which implies the respect of the house rules (*les règles de prudence*) about guest's intimacy (Moret, 1973, 663). Italian law introduced the institute through the Privacy Act in 2003. (Codice della privacy 196/2003), by which is formed the body (*Il Garante*) that protects the privacy of any consumer's data regarding their personal information (Nobbio, 2006, 380-381).

In the Anglo-American legal circle, knowledge of the institute is different. In the USA law, the same is strongly developed in the legislation and precedents of common law. Therefore legal theory (Sherry, 1993, 198-205) devoted large space to it. In the UK law it exists (Boella & Panett, 1999, 143) in the context of duty of reasonable care towards the Occupier's Liability Act (1957/84) and the guest's personal data protection according to the Data Protection Act (1984/98).

In the European law the only act that touches the guest's privacy is the Directive on Data Protection (CE 1995/46) from 1995, while in the field of international law there is no unified source on privacy protection of the guest.

The subject of the paper is analysis of the hotel guest's privacy protection in the Croatian and comparative tourism business law. Two fundamental questions are raised: 1. How does the hotel-keeper fulfil the contractual obligation of the guest's privacy protection? 2. How can the hotel-keeper violate this obligation and for what damages in this case is he liable to the guest?

## **2. HOTEL-KEEPER'S DUTIES ON HOTEL GUEST'S PRIVACY PROTECTION**

The basic rule of the hotel guest's privacy protection is that the hotel-keeper must do everything to fulfil the obligation. In comparative law four most frequent hotel-keeper's duties for guest's privacy protection have profiled: 1) respect of the guest room privacy, 2) guest's registration under the false name, 3) non-receiving certain guests or persons and 4) discretion of the hotel staff. For violation of the same duties, a hotel-keeper is responsible for the guest's damage.

### **2.1. Respect of the guest room privacy**

Respect of the guest room privacy is a hotel-keeper's fundamental duty in the execution of the guest's privacy protection. The same includes a guest's right to enjoy the room without interference, undesirable guests and hotel staff intrusion.

The German law goes furthest in respect of guest room privacy, explaining that by using of accommodation the guest turns a room from the public to the private facility, where is free to set his pictures or souvenirs (Mundt, 2006, 218).

French law protects the guest room privacy through hotel-keeper's duty to oversee and respect the guest's intimacy. Within this rule, the guest's intimacy shall be strongest respected during his stay in the room (Moret, 1973, 663-700).

The UK law, on two verdict basis, interprets the duty to respect guest's room privacy: 1) guest has to feel reasonably safe in the room (Maclenan vs. Segar, 1917, 2 KB 325), 2) hotel-keeper has to conduct as a „good neighbour“ towards the guest in the room (Donoghue vs. Stevenson, 1932, HL ER 562).

In the USA law, respect for guest room privacy means (Jefferies, 1983, 13): 1) guest's peaceful possession of the room, 2) not allowing unregistered and unauthor-

ized third parties to gain access to his room and 3) entrance to the guest room only for routine housekeeping and in the case of an emergency. Hotel-keeper may enter a guest room only when it is necessary or proper (*DeWolf vs. Ford*, 1908, 193 NY 397), with “reasonable attention” (Sherry, 1993, 197).

## 2.2. Registration of the guest under the false name

Despite the fact that the guest in all laws, by the registration, must report his true personal data (name, address), sometimes it is necessary, for the protection of guest privacy, to allow the guest’s registration under the false name.

The German law is the only one that recognizes such hotel-keeper’s duty (Dettmer & Hausman, 2006, 164-165). Protection of the guest’s name is a special hotelier’s duty when the guest is a popular person (Mundt, 2006, 218).

The USA law does not recognize the registration under the false name, but it is forbidden only in case of criminal inquiry obstruction (*Goodwin*, 1987, 423).

Other laws do not regulate this duty, but it is the usual hotel’s practice to report the real name to the authorities, and give the false guest’s name to the thirds.

## 2.3. Non-receiving certain guests or persons

For the protection of guest’s privacy, hotel-keeper has the right not to accept or expel some guests or persons from the hotel. The same duty applies to: 1) not allowing the person to enter the guest room without the guest’s consent and 2) not accepting or expelling guests who might disturb the privacy of other guests.

In German law such hotel-keeper’s duty has derived from the guest’s right to enjoy the hotel without interference and undesirable guests (Mundt, 2006, 218).

French law interprets that the hotel-keeper may, under the duty to oversee and respect the guest’s intimacy, expel or refuse certain persons (Moret, 1973, 674).

From “absolute right to privacy“ and „reasonably safe“ principles, the UK law derives the right to deny accommodation to certain persons (Jones, 2005, 346).

In the USA law, this hotel-keeper’s obligation is best addressed in syntagm that hotel-keeper must allow the guest a „peaceful possession“, and not receive unauthorized and unregistered persons. The hotel-keeper was obliged to expel a drunken guest from the hotel, because he yelled all night long and disturbed other guests’ peaceful possession (*USA vs. Rambo*, 1986, CA 789 F2d 1289).

## 2.4. Discretion of the hotel staff

The privacy of hotel guest can most often be breached by the hotel staff. Therefore is the discretion of the hotel-keeper's staff, in the context of the guest's privacy protection, a special hotel-keeper's obligation. It consists of: 1) careful entrance of the hotel staff into the guest room, 2) prohibiting disclosure of information or data about the guest, and 3) keeping the guest's secrets.

In German law the hotel-keeper is required to keep a secret that he had heard, seen, found out or witnessed in relation to the guest (e.g. about the guest's mistress). Hotel-keeper must pay attention that his staff act discreetly when entering the guest room and using the information or data about the guests on the internet, fax, mail, phone, SMS, posters, etc. (Hinterhuber et al., 2004, 47).

In Italian law, hotel staff is obliged to discreetly protect guest's private data through limited access to the cupboard at the reception desk, inserted passwords on their computers, guest's data inaccessibility by the unauthorized persons, avoiding loud pronouncing of the guest room number at key delivery and not revealing the guest's name, address and room number (Nobbio, 2006, 381).

In the USA law, the discretion of the staff refers to routine housekeeping and respect for guest's privacy in extraordinary situations: the staff has no right to intrude the guest room if he clearly indicated the "do not disturb" sign (McKee vs. Sheraton, 1959, US 268 F2d 669), when searching for stolen things (People vs. Minervini, 1971, 20 Cal. App. 3d 832, 98) or due to suspicion that the guest will not pay for hotel services (People vs. Lerhinan, 1982, 455 N.Y.S. 2d 822), but can enter and call the police in case of noise or behaviour that interferes with the privacy of other guests (People vs. Gallmon, 1967, 19 NY 2d 389).

## 3. HOTEL-KEEPER'S CONTRACTUAL LIABILITY FOR NON-PROPRIETARY DAMAGE TO VIOLATION OF HOTEL GUEST'S PRIVACY

Violation of the guest's privacy implies the hotel-keeper's contractual liability for guest's non-proprietary damage by the principle of presumed guilt. By breach of his privacy the guest may suffer numerous forms of non-proprietary damage: a) injuries of feelings (anxiety, discomfort, dissatisfaction, frustration, disappointment) b) fall vacation and c) mental pain and suffering. Most common breaches of the guest's privacy protection obligation are: 1) the intrusion of staff in the guest room, 2) the release of persons in the guest room, 3) recording, wiretapping or spying and 4) giving third parties information about the guest.

### **3.1. The intrusion of staff in the guest room**

The hardest violations of the guest's privacy are the intrusions of staff into the room. The prevention of such intrusions using tags indicating that guest is in the room and does not want to be disturbed represents common practice worldwide.

In German law an intrusion of staff into the room is treated as contractual non-proprietary damage (Braschos, 1979, 39). In one sentence (BGH ZR 103/07), the German Federal Court found that guests, to whom it is constantly intruded into the room, have suffered non-proprietary damage due to fall vacation.

In UK law, due to unauthorized and negligent staff intrusion into the guest room, hotel-keeper is liable for anxiety (*Salmon vs. Seafarer Restaurants*, 1983, HCJ ER 729) and fall vacation (*Rose vs. Plenty*, 1976, CA ER 97).

In the USA law, hotel-keeper is liable for the hotel staff intrusion into the guest room, except in five eligible cases (Cournoyer et al., 2004, 332): 1. normal maintenance, 2. imminent danger, 3. non-payment, 4. room service and 5. the rental period has expired. U.S. Supreme Court (*Stoner vs. California*, 1964, 376 US 483) founded that staff should not enter the room without guest's consent, nor has the authority to permit the police room search without a search warrant.

### **3.2. The release of persons in the guest room**

The hotel-keeper will violate the guest's privacy if he allows the entrance of any person without the guest's explicit permission into his room.

In the German law, hotel-keeper will violate the guest's privacy if he breaches his right to enjoy the hotel without letting third parties into the guest room.

In the USA law, the hotel-keeper is liable for guest's non-proprietary damage due to breaching his duty of not allowing the guest's visits by unregistered and unauthorized persons. U.S. courts have made decisions (*Campbell vs. Womack*, 1977, La. App. 35 So2d 96; *Thetford vs. Clanton*, 1992, Al. 605 So.2d 835) that hotel-keeper is liable for guest's dissatisfaction if he gives the key of the guest room to guest's spouse or husband, if the guest did not mark them as his visitors.

### **3.3. Recording, wiretapping or spying**

The hotel-keeper will violate the guest's privacy if he, in any way, makes unauthorized records, spies or wiretappes the guest in the hotel. Such violation of

privacy is usually difficult to detect, and when it is discovered, the guest feels very uncomfortable and frustrating.

In Italian law, a special body (Il Garante per la protezione dei dati personali) formed in the Codice della privacy (196/2003) interprets (decision from 29.04.2004.) that the hotel-keeper violates privacy of the guest if he had made unauthorized records of him (Ghisoni, 2007, 65).

According to the decisions of the U.S. judiciary, hotel-keeper is liable for guest's non-proprietary damage (discomfort) due to breach of his privacy caused by wire-tapping of the guest's phone call (People vs. Blair, 1979, 25 Cal 3d 640) or spying of the guest in the room through the „peepholes” (Carter Vs. Innisfree Hotel, 1995, Ala. 661 So2d 1174). Moreover, even in the case of knowledge of criminal acts (People vs. Soles, 1977, 68 Cal. App. 3d 418), a hotel-keeper can not send recorded conversations to the police without a search warrant.

### **3.4. Giving third parties information about the guest**

Giving third parties information (personal data, name, address, room number, credit card number) about the guest, represents the violation of guest's privacy and hotel-keeper's liability for non-proprietary damage.

In the Italian law, il Garante, with three decisions, determines that hotel-keeper makes a violation of guest's privacy when: 1) he does not return or delete all of the guest's data (Falletti, 2008, 186) at his disposal (decision 12.07.2004.), 2) profiles and stores guest's customs (decision 09.03.2006. - vietato profilare le abitudini dei clienti in modo illecito) and 3) explores and saves the guest's touristic interests (decision 31.01.2008. - vietato “spiare” i gusti dei clienti).

In European law, Directive 1995/46 generally regulates handling of personal data, that could be used by the authorities without the guest's consent only due to the matter of national security, defence, public safety, criminal procedures, financial and monetary process of inspection supervision, and protection and rights of others persons (article 12). In any other case, the hotel-keeper will be liable for the information (data) about the guests that reached third party.

In the German law the hotel-keeper made such violation when releasing the entire schedule of the rock star visiting his hotels (Born & Dreyer, 2002, 115), so non-proprietary damage for discomfort had to be compensated to that singer, who had to replace the hotel due to the invasion of fans.

In UK law, hotel-keeper is liable by Data Protection Act (1984/98) for misuse or unauthorized use of guest's personal data (Boella & Panett, 1999, 328).

In the USA law, such hotel-keeper's liability exists if the front-desk personnel announce the number of the guest room (Goodwin & Gaston, 1992, 377).

#### 4. CONCLUSION

Protection of guest's privacy is a modern achievement in the tourism business law. The same implies hotel-keeper's obligation to protect the guest's safety, amenity, comfort, reputation and personality during his stay at the hotel.

Comparative analysis stated that hotel-keeper's obligation of guest's privacy protection usually represents four types of his special duties: 1) respect of the privacy of the guest room, 2) guest's registration under the false name, 3) non-receiving certain guests or persons and 4) discretion of the hotel staff.

Violation of the guest's privacy protection obligation implies the hotel-keeper's liability for guest's non-proprietary damage by the principle of presumed guilt. The most common breaches of the guest's privacy are: 1) the invasion of staff in the guest room, 2) the release of persons in the guest room, 3) recording, wiretapping or spying and 4) giving third parties information about the guest.

Due to breach of his privacy the guest may suffer numerous forms of non-proprietary damage: a) anxiety (e.g. due to leakage of confidential data on internet) b) discomfort (e.g. due to intrusion of the staff in the bathroom while showering) c) dissatisfaction (e.g. due to sending of third parties in his room) d) frustration (e.g. for information about the phone tapping), e) disappointment (e.g. the wife is let, without consent, into the guest room), f) fall vacation (e.g. due to frequent intrusions of drunken staff in the guest room) and e) various types of mental pain and suffering (e.g. due to indiscrete behaviour of the staff).

Croatian law does not recognize the institute of hotel guest's privacy. However, the obligation to care about the person guest, as well as a broad term, may include this institute, but no legislative or theoretical source contain the rule about hotel-keeper's obligation for the guest's privacy protection. Therefore, in accordance with applicable examples of comparative laws, the provisions on the hotel-keeper's obligation for the guest's privacy protection and its liability under the principle of presumed guilt for non-proprietary damage for breach of such contractual obligations should be included into the Croatian law.



Comparative law is few steps ahead of the Croatian law regarding the development of the institute. While in the laws of USA and Germany the institute is strongly developed in legislation and case law, and in Italy and in the UK it has the original dimension (Code of privacy, Data Protection Act), the law of France recognizes it only generally, without special legislation.

On the multilateral forums level, European law contains only one harmonized sources (Directive 1995/46) on data protection, while in the field of international law there is no unified source in terms of the contract between the hotel-keeper and the guest, let alone in terms of guest's privacy protection in such contract.

The conclusion is the need of adopting unified source at the international law and the European Union's law level, about hotel-keeper's obligation to protect the guest's privacy in various types of tourism business contracts (primary of the hotel-keeper's contract) concluded between the hotel-keeper and the guest.

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