

Council on General Affairs and Policy – March 2020

| | | |
|---------------------------|--|-------------------------------|
| Document | Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/> | Prel. Doc. 1 of February 2020 |
| Title | Report of the Experts' Group on the Cooperation and Access to Justice for International Tourists (Tourism and Visitors Project) | |
| Author | Chair of the Experts' Group Consultant Permanent Bureau | |
| Agenda item | Item III.1 | |
| Mandate(s) | <ul style="list-style-type: none"> • Prel. Doc. No 3 of October 2018 (for CGAP 2019) • C&Rs Nos 14-17 of CGAP 2019 | |
| Objective | To report on the progress made in relation to the Tourism Project, including on the outcomes of the Meeting of the Experts' Group and the outcomes of a further study, prepared by an external consultant | |
| Action to be taken | For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/> | |
| Annexes | <ul style="list-style-type: none"> • Annex I: Aide Memoire (incl. C&Rs and next steps) of the Meeting of the Experts' Group on the Protection of Tourists, prepared by the Chair of the Experts' Group, The Hague, 3-6 September 2019 • Annex II: Study of the Consultant on the desirability and feasibility of further work on the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists | |
| Related documents | <ul style="list-style-type: none"> • Prel. Doc. No 13 of CGAP 2014 and C&R No 7 of CGAP 2014 • Prel. Doc. No 2 of CGAP 2015 and C&R No 8 of CGAP 2015 • C&R No 19 of CGAP 2016 • Prel. Doc. No 3 of CGAP 2017 and C&Rs Nos 12-13 of CGAP 2017 • Prel. Doc. No 3 of CGAP 2018 and C&Rs Nos 8-11 of GAP 2018 • Prel. Doc. No 3 of CGAP 2019 and C&Rs Nos 14-17 of CGAP 2019 | |

I. Introduction

1. The history of the Tourism Project since its first consideration by the HCCH in 2013, until the first Meeting of the Experts' Group on the Co-operation and Access to Justice for International Tourists (EG) in 2018, is set out elsewhere.¹ This Preliminary Document builds upon that, chronicling the developments since the 2019 meeting of the Council on General Affairs and Policy (CGAP).

II. Development since the 2019 Meeting of CGAP

2. At its 2019 Meeting, CGAP welcomed the 2018 Aide Memoire of the EG.² It also welcomed the Final Report on the Desirability and Feasibility of Further Work which had been prepared by the Consultant, Mr Guinchard.³ Furthermore, CGAP requested the Permanent Bureau (PB) to make arrangements for a further EG meeting in 2019.

3. CGAP asked the EG to identify potential (legally binding) instruments regarding problems that international tourists encounter. Moreover, it requested the PB to seek prior to the meeting the views of Members on the questions to be addressed by the EG, while Members were invited to submit their questions, comments and / or additional issues. Finally, CGAP recognised the ability of the PB to commission, under certain circumstances, further work, including through a consultant, to assist in identifying any further options.⁴

4. The developments pertaining to the Tourism Project between the CGAP Meeting in March 2019 and the second Meeting of the EG in September 2019 are included in the *Aide Memoire of the Meeting of the Experts' Group on the Protection of Tourists* (Aide Memoire) (Annex I). The Aide Memoire was prepared by the Chair of the Experts' Group, Mr Andre Stemmet, Counsellor (Legal) of the South African Embassy to the Kingdom of the Netherlands.⁵ It records the topics discussed, the balance of the discussions held, the next steps and the timeline for further work leading up the 2020 CGAP Meeting.

5. The EG resolved to include into this timeline seeking the assistance of an external consultant. To guide this process, the Experts developed a detailed, three-pronged brief as well as a detailed schedule to ensure the timely submission of the commissioned report. This schedule included a consultation period for Experts to comment on an initial draft. The final draft was set to be due on 17 January 2020. The EG issued according instructions to the PB.

6. After a short, merit-based, competitive selection process conducted by the PB, Dr Nino Sievi was selected as consultant. He met each milestone of the schedule and submitted the final *Report on International Instruments and Principles Relevant to the Tourism Project as well as Possible Grounds of Jurisdiction for Matters Relating to International Tourists* (Annex II).

¹ See in particular Prel. Doc. No 13 for CGAP 2014; Prel. Doc. No 2 for CGAP 2015; Prel. Doc. No 3 for CGAP 2017; Prel. Doc. No 3 for CGAP 2018; and Prel. Doc. No 3 for CGAP 2019.

² Aide Memoire of the Meeting of the Experts' Group on the Co-operation and Access to Justice for International Tourists, prepared by the Chair of the Experts' Group in August 2018. Annex I to Prel. Doc. No 3 for CGAP 2019.

³ E. Guinchard, Study on the desirability and feasibility of further work on the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists, Final Report, March 2018. Annex II to Prel. Doc. No 3 for CGAP 2019.

⁴ The PB's ability enlivened based on the advice of the EG that it would consider it necessary to retain a consultant. In giving that advice, the EG needed to consider whether the work could be completed in time for inclusion in the EG report so as to enable CGAP 2020 to take a decision on the future of the Project. The balance of the voluntary contribution made by the Government of Brazil were to be used for the retention of the consultant.

⁵ The meeting of the EG took place in The Hague from 3 to 6 September 2019.

III. Conclusion

7. CGAP is asked to note that the EG endorsed, and recommended that CGAP consider, the present Aide Memoire prepared by the Chair based on the deliberations during the EG meeting, as well as the Consultant's report.

8. Furthermore, CGAP is invited to discuss any next steps in relation to the Tourism Project, potentially cognisant of the consultant's suggestion to consider online dispute resolution mechanisms in conjunction with so-called LegalTech.

ANNEXES

**Aide Memoire of the Meeting of the Experts' Group on the Protection of Tourists
Prepared by the Chair of the Experts' Group
The Hague, 3-6 September 2019**

I. Introduction

1. At its meeting of 13 to 15 March 2018, the Council on General Affairs and Policy (CGAP) of the Hague Conference on Private International Law (HCCH) mandated the Permanent Bureau (PB) to prepare a meeting of a representative Experts' Group (EG) on the Co-operation and Access to Justice for International Tourists (paras 8-11 of the Conclusions and Recommendations (C&Rs) of CGAP 2018). At its meeting of 5 to 8 March 2019, CGAP further requested the Experts' Group "to consider whether the HCCH could contribute solutions to any of [the problems encountered by international tourists]. If so, CGAP requested the Experts' Group to identify a range of options, whether legally binding or not, to address these problems" (para. 15 C&Rs of CGAP 2019).
2. The first meeting of the EG took place from 28 to 31 August 2018 (see the Aide Memoire prepared by the Chair of that Meeting, Ambassador Bucheli, Annex I to Prel. Doc. No 3 of October 2018). The second meeting took place from 3 to 6 September 2019 and was attended by experts from Argentina, Brazil, Canada, Chile, the People's Republic of China, Ecuador, the European Union, France, Mexico, the Philippines, the Russian Federation, Serbia, Switzerland, South Africa, the United Kingdom, and the United States of America.
3. The EG benefitted from comments submitted prior to the meeting by several States and stakeholders.
4. The EG elected André Stemmet, Counsellor (Legal) of the South African Embassy to the Kingdom of the Netherlands, as Chairperson.

II. Deliberations

a. Definition of "International Tourist / Visitor"

5. Experts discussed the scope of a possible definition of "international tourist / visitor". The definition used by the UNWTO was taken as a departure point. There was broad agreement that the nationality requirements in this definition could be removed and that habitual residence would suffice to establish a link with a country of origin (departure). There was also consensus that the definition would only apply to natural persons and would require travel across international boundaries. Most Experts were of the view that the definition should not include a minimum length of stay of an international tourist / visitor in the visited country; as to a maximum duration of the stay, the possibility of establishing a new habitual residence (and thus ceasing to be an international tourist / visitor) should be taken into account.
6. Some Experts recalled that the exercise of defining the term "international tourist / visitor" would depend on the scope of the problem, as well as any potential solution to address it. Experts also deliberated on whether an open definition should be considered, or whether the definition should be linked to specific activities and exclude travellers for business purposes. Experts also considered whether persons with a specific residence status in the visited country should be excluded from the definition.

b. Problems experienced by international tourists / visitors – challenges encountered: consideration of quantitative and qualitative data

7. Certain Experts shared quantitative and qualitative data regarding the problems and difficulties encountered by international tourists / visitors in their country, as well as case law to illustrate the nature of some of the problems and the relationship thereof with the rise in tourism over the last few decades. It was also noted that data available on problems and difficulties of international tourists /

visitors was scarce. Some Experts took this scarcity as being an indicator of the absence of problems and difficulties, while others interpreted it as resulting from a gap in effective access to justice.

8. Presentations were also done on national and regional systems currently in use, or being developed, to address problems experienced by tourists. Experts noted that there is an increasing trend among tourists to no longer use travel agents for arranging trips, but rather make arrangements online independently. It was also observed by some Experts that as tourism to and from developing countries is increasing, such countries have a greater need for an international system to address issues relating to access of justice for tourists than developed countries, where systems have been in place for some time. A number of Experts voiced the belief that market forces will incentivise countries to improve tourist protection, and that there was therefore no need for an international system. However, Experts noted a lack of evidence to substantiate that an increase in tourism necessarily implies an increase in problems experienced. Some Experts expressed the view that the dissemination of information may have a positive effect in limiting the problems being experienced by international tourists / visitors. Some Experts were of the view that certain problems encountered by international tourists / visitors would be better addressed by measures at the national level, such as the abolition of the security of costs. Other Experts were of the view that because of this procedural challenge, international cooperation established under a binding instrument is needed.

c. Can the HCCH contribute solutions to any of these problems, with a focus on the kind of instrument, if any, that would be suitable?

9. It was noted that many difficulties encountered by international tourists / visitors did not require access to justice, and that the dissatisfaction of such tourists was not necessarily an indicator of problems. The Experts concluded that if a mechanism to address claims by international tourists / visitors were developed, a threshold element should be included so that only claims with merit would be covered. Some Experts also highlighted the risk of abuse of the mechanism through fictitious claims by tourists and the need to guarantee due process rights of service providers.

10. Some Experts were of the view that any potential international instrument would have added value for the access to justice by tourists and would build on four pillars: non-discrimination between tourists and residents of the visited country; prevention of damages by enhancing the provision to tourists of information on their rights; a network for information-sharing between the authorities of participating States; and access to justice in a broad sense, that is, as well as gaining access to the formal court system, also being able to access alternative dispute resolution mechanisms.

11. While some Experts were of the view that a legally binding instrument, in the format of a free-standing HCCH Convention, would have the required legal force to form the basis of an effective protection regime, others noted that a legally binding instrument, including a Protocol to the 1980 HCCH Access to Justice Convention, would be premature or would not achieve the goals sought. Some Experts were sceptical as to whether any form of international instrument was required at all, and whether there would consequently be a role for the HCCH. However, some Experts intimated that they could support the development of Guidelines on Best Practice, a set of Principles or a Handbook on the implementation of the provisions of the 1980 and other HCCH Conventions that may be applicable to international tourists / visitors. The development of a Model Law obtained only limited support.

12. Some Experts noted that any international instrument should be inter-State in nature and should focus on the problems and difficulties of international tourists / visitors and not on how to regulate service providers in the tourism industry. Other Experts highlighted that the role of service providers may also be considered, in particular in relation to the establishment of an ADR regime or ODR system.

13. Some Experts were of the view that further work on a possible international instrument on the protection of tourists fell under the remit of the HCCH and expressed a preference for a binding instrument. Others were of the view that the HCCH is not the appropriate forum and noted that if the project were to proceed, it should be limited to developing Guidelines on Best Practice, a set of

Principles or a Handbook on the implementation of the provisions of the 1980 and other HCCH Conventions that may be applicable to international tourists / visitors.

d. Possible outsourcing of work to a Consultant

14. Experts considered that the assistance of a Consultant may be desirable and concluded that the Consultant's report should be drawn up as soon as possible in order to ensure a timely submission to the CGAP meeting of March 2020 (at the latest in early January 2020). The Experts agreed that the mandate of the Consultant should be as follows:

The Consultant shall:

- *describe and evaluate the applicability of existing HCCH Conventions (in particular Access to Justice, Service, Evidence and Judgments), and, time permitting, relevant international instruments, to matters relating to the protection of international tourists / visitors;*
- *map out any additional essential principles that would be relevant with respect to the HCCH mandate and that could further enhance and operationalise the protection of international tourists / visitors, taking into consideration the advantages and challenges of any options, including those discussed by the Experts; and*
- *describe and evaluate, if time permits, possible grounds of jurisdiction for matters relating to the protection of international tourists / visitors and their possible relevance to the Judgments Project of the HCCH in general.*

15. The Consultant's draft report will be made available to Experts for their consideration and input before it is finalised and submitted to CGAP.

III. Conclusions and Recommendations and next steps

16. The Experts' Group considered that the first draft report by the Consultant should be distributed to Experts, if possible, by Friday 15 November 2019, for input by 13 December 2019. The final Report should be ready for circulation to Members by Friday 17 January 2020 for consideration by CGAP in March 2020. In addition to the Report, the Experts' Group noted that the Chair of the Meeting will present an oral update to CGAP in 2020.

17. The Experts' Group endorsed, and recommended that CGAP considers, the present Aide Memoire prepared by the Chair based on the deliberations during the meeting of the Experts' Group, as well as the Consultant's report.

18. The Experts expressed their gratitude to the Government of Brazil for its continued support of the Tourism Project and the Permanent Bureau for the preparation of the meeting of the Experts' Group.

Annex II

**Report on International Instruments and Principles Relevant to
the Tourism Project as well as Possible Grounds of
Jurisdiction for Matters Relating to International Tourists**

17 January 2020

Dr Nino Sievi
Lex Futura AG
Zurich, Switzerland
nino.sievi@lexfutura.ch



| | |
|--|----------|
| I. Executive Summary | 5 |
| II. Introduction | 6 |
| A. Background and Scope of the Report | 6 |
| B. Structure of the Report | 6 |
| C. Definition of Tourist Adopted in this Report | 7 |
| D. Summary of Issues Encountered by International Tourists | 7 |
| III. Applicability of Existing HCCH Conventions | 8 |
| A. HCCH Conventions Deemed Irrelevant to the Tourism Project | 8 |
| B. Convention on the Service Abroad of Judicial and Extrajudicial Documents (1965) | 10 |
| 1. Description of Content and Status | 10 |
| 2. Scope of Application | 11 |
| 3. Relevance to Protection of Tourists | 12 |
| 4. Interim Conclusion | 12 |
| C. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) | 12 |
| 1. Description of Content and Status | 12 |
| 2. Scope of Application | 13 |
| 3. Relevance to Protection of Tourists | 13 |
| 4. Interim Conclusion | 14 |
| D. Convention on International Access to Justice (1980) | 14 |
| 1. Description of Content and Status | 14 |
| 2. Scope of Application | 15 |
| 3. Relevance to Protection of Tourists | 16 |
| 4. Comparison with the Brazilian Proposal's Provisions on Access to Legal Aid and the Cautio Judicatum Solvi | 17 |
| 5. Interim Conclusion | 20 |
| E. Convention on Civil Procedure (1954) | 20 |
| F. Convention on the Recognition and Enforcement of Foreign Judgments (2019) | 21 |
| 1. Description of Content and Status | 21 |
| 2. Scope of Application | 21 |
| 3. Relevance to Protection of Tourists | 21 |
| 4. Interim Conclusion | 22 |
| G. Convention on Choice of Court Agreements (2005) | 22 |
| H. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) | 23 |
| I. Convention on the Recognition and Enforcement of Foreign Judgments (1971) | 24 |
| J. Conclusion | 24 |



| | |
|---|-----------|
| IV. Applicability of Other International Instruments | 26 |
| A. Acuerdo Interinstitucional de Entendimiento entre los Organismos de Defensa del Consumidor de los Estados Parte del Mercosur para la Defensa del Consumidor Visitante (2005) | 26 |
| B. UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers (Draft) | 26 |
| C. Acuerdo sobre el Beneficio de Litigar sin Gastos y Asistencia Jurídica Gratuita entre los Estados Partes del Mercosur (2000) | 27 |
| D. Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993) | 27 |
| E. Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999) | 28 |
| F. European Agreement on the Transmission of Applications for Legal Aid (1977) | 30 |
| G. International Convention on Travel Contracts (1970) | 31 |
| H. Convention on the Liability of Hotel-keepers concerning the Property of their Guests (1962) | 32 |
| I. Convention on the Contract for the International Carriage of Passengers and Luggage by Road (1973) | 32 |
| J. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) | 33 |
| K. Instruments in EU Law | 34 |
| 1. EC Directive No. 2002/8 to Improve Access to Justice in Cross-Border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for such Disputes | 34 |
| 2. EC Regulation No. 261/2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights | 35 |
| 3. EC Regulation No. 1896/2006 Creating a European order for payment procedure | 36 |
| 4. EC Regulation No. 861/2007 Establishing a European Small Claims Procedure (as Amended by EU Regulation No. 2015/2421) | 38 |
| 5. EU Regulation No. 181/2011 Concerning the Rights of Passengers in Bus and Coach Transport | 39 |
| 6. EU Directive No. 2013/11 on Alternative Dispute Resolution for Consumer Disputes | 40 |
| 7. EU Regulation No. 2013/524 on Online Dispute Resolution for Consumer Disputes | 41 |
| 8. EU Directive No. 2015/2302 on package travel and linked travel arrangements | 42 |
| 9. Interim Conclusion on EU Instruments | 43 |
| L. Conclusion | 43 |
| V. Essential Principles of Relevance to the Tourism Project | 44 |
| A. Identification of Principles | 44 |
| 1. Relevant Principles from Previous Deliberations and Reports | 44 |
| 2. Further Principles to be considered | 45 |
| B. Assessment of the Principles | 47 |
| 1. Access to Justice | 47 |



| | |
|---|-----------|
| 2. Alternative Dispute Resolution (ADR) | 48 |
| 3. Online Dispute Resolution (ODR) | 50 |
| 4. Proper information on tourists' rights and remedies | 55 |
| 5. Small Claim Procedures | 56 |
| 6. Government funded specialised agencies designed to assist tourists | 58 |
| 7. Cooperation mechanisms to facilitate resolution of complaints | 59 |
| 8. LegalTech | 59 |
| C. Conclusion | 60 |
| VI. Grounds of Jurisdiction | 62 |
| A. Relevance of Jurisdiction Regime for Protection of Tourists | 62 |
| B. Grounds of Jurisdiction under EU Regulation No. 1215/2012 | 62 |
| C. Grounds of Jurisdiction under International Conventions | 65 |
| 1. Lugano Convention | 65 |
| 2. Protocolo de Santa María sobre Jurisdicción Internacional en Materia de Relaciones de Consumo (1996) | 66 |
| 3. Summary of Conventions already covered in Chapter IV. | 67 |
| 4. Basis of jurisdiction under Judgments Convention | 67 |
| D. Conclusion | 68 |
| VII. Concluding Remarks | 70 |



I. EXECUTIVE SUMMARY

- ¹ This report is divided into four main parts: (i) HCCH Conventions' contribution to protection of tourists; (ii) applicability of other international conventions to protection of tourists; (iii) essential principles relevant to a new convention on tourist protection; and (iv) bases of jurisdiction for tourists' claims against foreign service providers.
- ² The findings of the report can be summarized as follows:

 - (i) The HCCH Conventions contribute to the protection of tourists by setting in place a legal framework for conducting cross-border litigation. In particular, the Evidence Convention and the Service Convention are of importance in this respect. Further, the Access to Justice Convention protects a tourist who pursues a claim in a foreign forum against discrimination in respect to legal aid and security for costs.
 - (ii) There are many international conventions addressing various issues relevant to the protection of tourists (e.g. airline transport, hotel-keeper's liability). However, the number of States having ratified these conventions is often very limited. This severely limits the scope of application of these instruments and thus also the protection provided to tourists.
 - (iii) Considering the scope of the HCCH's mandate, the report identifies online dispute resolution (ODR) and LegalTech as the two principles with the biggest potential impact for the protection of international tourists. In turn, the principle of non-discriminatory access to legal aid seems to be less apt to improve tourists' situation, as most tourists will be considered too wealthy in order to qualify for legal aid (regardless of any discrimination).
 - (iv) Certain conventions provide for special jurisdictional rules enabling tourists to file a claim against a foreign service provider in their home jurisdiction. However, these special rules do usually not cover all potential claims of a tourist. Further, home jurisdiction is of little value if an eventual judgment can later not be enforced in the service provider's jurisdiction. In this regard, also the Judgments Convention fails to provide the required support to tourists.
- ³ The report concludes that the main issues faced by tourists could be best addressed by the implementation of ODR in combination with LegalTech. Considering the scope of the HCCH's mandate, future work on the Tourism Project could focus on providing the required legal framework or a common set of standards (maybe also in the form of a soft law instrument) for ODR platforms to emerge and be operated effectively in the area of tourist protection.



II. INTRODUCTION

A. *Background and Scope of the Report*

⁴ At the Experts' Group Meeting of 3-6 September 2019, the Experts decided to engage an external consultant to prepare a report covering the following topics:

- Description and evaluation of the applicability of existing HCCH Conventions (in particular, Access to Justice, Service, Evidence and Judgments Conventions), and relevant international instruments, to matters relating to the protection of international tourists;
- Outline of any additional essential principles that are relevant to the HCCH's mandate and could further enhance as well as operationalise the protection of international tourists, taking into consideration the advantages and challenges of any options, including those discussed by the Experts; and
- Description and evaluation of possible grounds of jurisdiction for matters relating to the protection of international tourists and their possible relevance to the Judgments Project of the HCCH in general.¹

⁵ A first draft of this report was sent for commenting to the Experts on 15 November 2019. Subsequently, the report was amended to reflect the feedback received. The author would like to express his gratitude to the experts of Argentina, Brazil, Canada, the EU, France, Israel, Switzerland, the United Kingdom and the United States for their valuable input which has been duly considered in the drafting of the final version of this report.

B. *Structure of the Report*

⁶ The report will first assess the applicability of existing HCCH Conventions to issues relating to the protection of tourists (**Chapter III.**). Thereafter, the applicability of other international instruments will be examined (**Chapter IV.**). Further, the report will outline essential principles relevant to the protection of international tourists and whether their implementation in a new convention is covered by the scope of the HCCH's mandate (**Chapter V.**). Finally, possible grounds of jurisdiction for a tourist's claim against a service provider will be analysed (**Chapter VI.**).

¹ Aide Mémoire of the Meeting of the Experts' Group on the Protection of Tourists prepared by the Chair of the Experts' Group on 3-6 September 2019, N 14.



C. Definition of Tourist Adopted in this Report

⁷ This report will follow the definition of "tourist" already adopted by Prof. Guinchard in his report.² This means that the UNWTO definition of tourist³ will be followed, with the caveat that, unless otherwise stated, a tourist is a natural person who does not have his place of habitual residence in the State visited.

D. Summary of Issues Encountered by International Tourists

⁸ One of the purposes of this report is to analyse the extent to which existing international instruments already contribute to the protection of international tourists. In order to conduct such assessment, it is necessary to first outline the issues typically encountered by an international tourist against which protection is required.

⁹ The report of Prof. Guinchard identifies the following main issues for international tourists:

- a. No access to legal aid;
- b. *Cautio judicatum solvi* (security for costs);
- c. Absence of (sufficient and adequate) information regarding a tourist's rights and legal remedies;
- d. Requirement of physical presence for conciliation and mediation;
- e. Lack of small claims courts or procedures (tailored to cross-border cases);
- f. Inadmissibility of commencing or continuing proceedings from abroad;
- g. Lack of administrative or governmentally funded body dedicated to helping tourists in relation to access to justice or ADR; and
- h. Lack of cross-border cooperation mechanism between consumer protection bodies.⁴

² Guinchard, Study on the desirability and feasibility of further work on the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists, Annex III to Prel. Doc. No 3 of October 2018, available at www.hcch.net, N 15.

³ See Guinchard (FN 2), N 8: "*A traveller is defined as 'someone who moves between different geographic locations for any purpose and any duration'. Visitors are a subset of travellers as a 'visitor is a traveller taking a trip to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited'. Tourists are a subset of visitors as a visitor is 'classified as a tourist (or overnight visitor) if his/her trip includes an overnight stay'.*"

⁴ Guinchard (FN 2), N 105-113. Also see Prel. Doc. No 3 of February 2018, available at www.hcch.net, N 7.



III. APPLICABILITY OF EXISTING HCCH CONVENTIONS

¹⁰ In this chapter, the potential application of existing HCCH Conventions to matters relating to the protection of international tourists will be assessed. First, the HCCH Conventions that were considered but deemed irrelevant to the protection of international tourists will be listed (**Chapter A.**). Thereafter, the potential applicability of the so-called core conventions will be examined in detail (**Chapters B.-D.**). Finally, the less prominent HCCH Conventions that might enhance the protection of international tourists will be briefly addressed (**Chapters E.-I.**).

A. *HCCH Conventions Deemed Irrelevant to the Tourism Project*

¹¹ The following HCCH Conventions have been deemed irrelevant to the Tourism Project:

- Convention of 15 June 1955 on the law applicable to international sales of goods;
- Convention of 15 June 1955 relating to the settlement of the conflicts between the law of nationality and the law of domicile;
- Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions;
- Convention of 24 October 1956 on the law applicable to maintenance obligations towards children;
- Convention of 15 April 1958 on the law governing transfer of title in international sales of goods;
- Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods;
- Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children;
- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants;
- Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions;
- Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions;
- Convention of 25 November 1965 on the Choice of Court;



- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
- Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters;
- Convention of 4 May 1971 on the Law Applicable to Traffic Accidents;
- Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons;
- Convention of 2 October 1973 on the Law Applicable to Products Liability;
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations;
- Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes;
- Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages;
- Convention of 14 March 1978 on the Law Applicable to Agency;
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;
- Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition;
- Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods;
- Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons;
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;



- Convention of 13 January 2000 on the International Protection of Adults;
- Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary;
- Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

B. *Convention on the Service Abroad of Judicial and Extrajudicial Documents (1965)*

1. *Description of Content and Status*

12 The Convention on the Service Abroad of Judicial and Extrajudicial Documents of 1965 (**Service Convention**) provides for the channels of transmission to be used when a judicial or extrajudicial document is to be transmitted from one State party to another State party for service in the latter. Under the main channel of transmission provided for by the convention, the authority or judicial officer competent under the law of the requesting State (State where the document to be served originates) transmits the document to be served to the Central Authority of the requested State (State where the service is to occur).⁵

13 The Service Convention has been ratified so far by 75 States.⁶ The framework provided by the Service Convention is both efficient and effective – statistical data shows that 75% of requests are executed within 2 months.⁷

14 The Service Convention has tangible benefits not only for defendants⁸ but also for plaintiffs.

15 From a plaintiff's perspective, proper service under the Service Convention might become relevant for the enforcement of a judgment in a foreign jurisdiction. Particularly in relation to a default judgment, the defendant may invoke that it has not been properly served with the claim form.⁹ However, if service has been properly

⁵ Arts. 3-6 of the Service Convention.

⁶ Status table of the Service Convention, available at www.hcch.net.

⁷ Outline of the Service Convention, available at www.hcch.net.

⁸ See Arts. 15 et seq. of the Service Convention.

⁹ Markus, *Internationales Zivilprozessrecht*, Berne 2014, N 1717 and 1747 et seqq. See e.g. Art. 27(2)(a) of the Swiss Federal Act on International Private Law: "A decision rendered abroad shall not be recognized if one party proves that it was not duly summoned according to the law of its domicile or according to the law of its ordinary residence unless it made an appearance in the proceedings without reservation." Also see Art. 9(c) of the 2005 Hague Convention on Choice of Court Agreements.

executed under the Service Convention such argument will typically fail (provided that the case falls within the scope of application of the Service Convention).¹⁰

¹⁶ In certain jurisdictions, a plaintiff – when applying for enforcement of a foreign judgment – must even without specific objection by the defendant provide a document proving proper service of the document instituting the proceedings.¹¹ In this regard, the certificate of service issued under article 6 of the Service Convention serves the plaintiff as evidentiary document.¹²

¹⁷ Hence, the Service Convention gives a plaintiff some certainty concerning the later enforcement of a judgment in a foreign jurisdiction. The Service Convention thereby contributes to a system that allows a plaintiff to start legal proceedings in its home jurisdiction against a foreign defendant and later enforce the judgment in that foreign jurisdiction.

2. Scope of Application

¹⁸ The Convention applies where: (i) a judicial or extrajudicial document is (ii) to be transmitted from one State party to another, for service in the latter, (iii) the address of the person to be served is known, and (iv) the document to be served relates to a civil or commercial matter.¹³ In contrast, the plaintiff's and defendant's nationality as well as their domicile are irrelevant to the applicability of the convention.¹⁴

¹⁹ If all the requirements are met, the transmission channels provided for under the Service Convention must be applied (the convention is exclusive).¹⁵ However, the Service Convention does not derogate from other bilateral or multilateral treaties to which contracting States are party.¹⁶ In the European Union, EC Regulation No. 1393/2007¹⁷ is of relevance in this regard.

¹⁰ See e.g. Hartley/Dogauchi, Explanatory Report on Convention of 30 June 2005 on Choice of Court Agreements, N 187; Decision of the Swiss Federal Tribunal of 6 April 2009, No. 5A_703/2007, published in BGE 135 III 623, N 2.2.

¹¹ See e.g. Art. 12(1)(b) of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (in relation to judgments given by default).

¹² See Decision of the German Supreme Court (BGH) of 13 November 2001, No. VI ZB 9/01, N 17, stating that the certificate of service under the Service Convention carries the increased evidentiary weight as per Art. 418(1) of the German Code on Civil Procedure.

¹³ Outline of the Service Convention, available at www.hcch.net.

¹⁴ Kren Kostkiewicz/Rodriguez, *Internationale Rechtshilfe in Zivilsachen, einschliesslich der Übereinkommen zum internationalen Kinderschutz*, Berne 2013, N 252.

¹⁵ Outline of the Service Convention, available at www.hcch.net.

¹⁶ Art. 25 of the Service Convention. Also see the special provisions in Arts. 22-24 of the Service Convention in relation to the Hague Conventions on Civil Procedure of 1905 and 1954

¹⁷ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).



3. Relevance to Protection of Tourists

20 The Service Convention does not contain any provision that would hinder its application to cases involving international tourists. For example, if a tourist files a claim in its home jurisdiction (which is a contracting State of the Service Convention) against a foreign service provider the Service Convention governs the service of the claim form (if the service address is in another contracting State).

21 A tourist is often not able to commence or pursue a legal case in a foreign jurisdiction (due to inadmissibility of commencing or continuing legal proceedings from abroad).¹⁸ This issue can be avoided if tourists are given the option of launching and pursuing legal proceedings in their home jurisdiction (where they are physically present).¹⁹ In this regard, the Service Convention strengthens the protection of tourists, as it enables a tourist to start legal proceedings in its home jurisdiction while ensuring that the enforcement of an eventual judgment will not fail due to lack of proper service.²⁰

4. Interim Conclusion

22 The Service Convention applies to cross-border disputes involving tourists in the same way it does to other disputes. It furthers the protection of international tourist to the extent that it enables a tourist to start legal proceedings in its home jurisdiction while ensuring that enforcement of a later judgment will not fail due to lack of proper service.

C. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970)

1. Description of Content and Status

23 The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (**Evidence Convention**) establishes methods of co-operation for the taking of evidence abroad in civil or commercial matters between State parties.²¹

24 The first chapter of the Evidence Convention permits a judicial authority of one contracting State to request, by means of a letter of request, a competent authority of another contracting State to obtain evidence which is intended for use in judicial proceedings in the requesting State. The second chapter deals with the authorisation of diplomatic or consular agents and commissioners to take evidence, which may be subject to the prior permission of the appropriate authority

¹⁸ See hereinabove N 9.f.

¹⁹ As concerns the issue of jurisdiction, see herein below N 253 et seqq.

²⁰ See hereinabove N 15 et seqq.

²¹ Outline of the Evidence Convention, available at www.hcch.net.



of the State in which the evidence is to be taken.²² Further, the Evidence Convention also contains a special provision on pre-trial discovery.²³

²⁵ To date, 62 States have ratified the Evidence Convention.²⁴ In its recent reviews, the Special Commissions have confirmed the continuing global interest in this convention and reaffirmed its practical utility.²⁵

²⁶ The Evidence Convention is of great importance to proceedings brought in a jurisdiction in which not all of the evidence can be directly administered, e.g. a witness domiciled in a foreign country.²⁶ It allows a court to also have evidence from abroad administered. Thereby it enables a plaintiff to bring a claim in its home jurisdiction, although the majority (or even all) of the relevant evidence is located abroad.

2. Scope of Application

²⁷ The Evidence Convention applies where: (i) a judicial authority (or a diplomatic officer or consular agent) of a contracting State (ii) seeks to obtain evidence (iii) in another contracting State (iv) in relation to a civil or commercial matter.²⁷ In contrast, the plaintiff's and defendant's nationality as well as their domicile are irrelevant to the applicability of the convention.

²⁸ The Evidence Convention does not derogate from other bilateral or multilateral treaties to which contracting States are party.²⁸ In the European Union, EC Regulation No. 1206/2001²⁹ is of relevance in this regard.

3. Relevance to Protection of Tourists

²⁹ The Evidence Convention does not contain any provision that would hinder its application to cases involving international tourists. For example, if a tourist files a claim in its home jurisdiction (which is a contracting State of the Evidence Convention) against a foreign service provider the Evidence Convention governs the obtaining of evidence in the jurisdiction of the service provider.

³⁰ Similarly to the Service Convention, the Evidence Convention addresses the inability of a tourist to pursue a legal case in a foreign jurisdiction (due to

²² States may exclude, in whole or in part, the application of chapter II.

²³ Art. 23 of the Evidence Convention.

²⁴ Status table of the Evidence Convention, available at www.hcch.net.

²⁵ Outline of the Evidence Convention, available at www.hcch.net.

²⁶ See Walter/Domej, *International Zivilprozessrecht der Schweiz*, 5th ed., p. 398.

²⁷ See Kren Kostkiewicz/Rodriguez (FN 14), N 423 et seqq.

²⁸ Art. 32 of the Evidence Convention. Also see the special provisions in Arts. 29-31 of the Evidence Convention in relation to the Hague Conventions on Civil Procedure of 1905 and 1954.

²⁹ Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.



inadmissibility of commencing or continuing legal proceedings from abroad).³⁰ As stated above, this issue can be avoided if the tourist is given the option of launching and pursuing legal proceedings in its home jurisdiction.³¹

³¹ One of the major issues faced when pursuing a legal case in a cross-border context is the obtaining of evidence located abroad. Typically, in a case between a tourist and a service provider, most (if not all) evidence is located in the jurisdiction of the service provider, where the service has been carried out. In this regard, the Evidence Convention strengthens the protection of tourists, as it enables a tourist to start legal proceedings in its home jurisdiction even though the majority (or even all) of the relevant evidence is located in a foreign jurisdiction.³²

4. Interim Conclusion

³² The Evidence Convention applies to cross-border disputes involving tourists the same way it does to other disputes. It enhances the protection of international tourist to the extent that it enables a tourist to start and pursue legal proceedings in its home jurisdiction, although the majority (or even all) of the relevant evidence is located in a foreign jurisdiction.

D. **Convention on International Access to Justice (1980)**

1. Description of Content and Status

³³ The Convention on International Access to Justice of 1980 (**Access to Justice Convention**) facilitates, for any nationals or residents of a State party access to justice in all the other State parties. The Convention's purpose is not to harmonize domestic laws, but rather to ensure that the mere status as an alien or the absence of residence or domicile in a State is not grounds for discrimination with regard to access to justice in that State.³³

³⁴ The Access to Justice Convention covers amongst others the following areas:³⁴

- a. Legal aid: Nationals or residents³⁵ of a contracting State are entitled to legal aid on the same conditions as if they were themselves nationals or residents in that State.³⁶ The same applies to legal advice, as long as the person seeking advice is present in the State where advice is sought.³⁷

³⁰ See hereinabove N 9.f.

³¹ As concerns the issue of jurisdiction, see herein below N 253 et seqq.

³² See hereinabove N 15 et seqq.

³³ Outline of the Access to Justice Convention, available at www.hcch.net.

³⁴ For a general description, see Möller, Explanatory Report on the Access to Justice Convention, 1983, available at www.hcch.net, p. 28 et seq.

³⁵ I.e. persons having, or formally having had, their habitual residence in a contracting State.

³⁶ Art. 1 of the Access to Justice Convention.

³⁷ Art. 2 of the Access to Justice Convention.



Further, the convention foresees an expeditious and economical method for transmission between contracting States of applications for legal aid.³⁸

- b. Security for costs: Nationals or residents of a Contracting State shall not be subject to security for costs or for court fees by reason only of their foreign nationality or residence.³⁹
- c. Enforceability of orders for costs: The convention establishes an economical procedure for the enforcement of orders for costs issued in one contracting State against any party exempted from providing a security under the convention.⁴⁰

³⁵ To date, 28 States have ratified the Access to Justice Convention.⁴¹

2. Scope of Application

³⁶ The Access to Justice Convention applies in the above-mentioned areas, provided that (i) the plaintiff is a national of or habitually resident in a contracting State and that (ii) the court seized by the plaintiff is located in another contracting State. The convention's scope of application *ratione personae* is further widened by extending the protection of the convention to persons who are neither nationals of nor habitually resident in any contracting State but who formerly had their habitual residence in a contracting State. Such cases are, however, only covered if the cause of action arose out of their former habitual residence in that State⁴² and the court proceedings are to be or have been commenced in that jurisdiction.

³⁷ In relation to legal aid, when strictly following the wording of Art. 1, the Access to Court Convention's scope of application *ratione materiae* is limited to court proceedings. However, under Art. 2 access to "legal advice" shall be provided under the same circumstances as legal aid under Art. 1. The Access to Justice Convention does not contain a definition of "legal advice". Yet, the explanatory report of the Access to Justice Convention states that the term is normally understood as "*assistance in legal matters outside of or prior to court proceedings*".⁴³ Hence, there is definitely room to argue that legal aid in out of court proceedings (e.g. conciliation or mediation) is – via Art. 2 – also covered by the Access to Justice Convention.⁴⁴ However, the additional requirement of Art. 2 – i.e. being physically

³⁸ Arts. 3-13 of the Access to Justice Convention.

³⁹ Art. 14 of the Access to Justice Convention.

⁴⁰ Arts. 15-17 of the Access to Justice Convention.

⁴¹ Status table of the Access to Justice Convention, available at www.hcch.net.

⁴² Art. 1(2) of the Access to Justice Convention. For an example, see Möller (FN 34), p. 33.

⁴³ Möller (FN 34), p. 34.

⁴⁴ Due to constraints of time, no specific research has been conducted into the individual contracting States' practice in this regard.



present in the State where the advice is sought – must in such circumstances also be fulfilled.

3. Relevance to Protection of Tourists

38 The Access to Justice Convention does not contain any provision that would hinder its application to cases involving international tourists. For example, if a tourist who is resident in a contracting State files a claim against a service provider in the latter's jurisdiction, which is also a contracting State, the protection of the Access to Justice Convention will apply.

39 In contrast to the Service Convention and the Evidence Convention, the Access to Justice Convention does not address the scenario in which a tourist tries to file his claim in its home jurisdiction. Rather, it concerns the scenario of a tourist attempting to file suit in the jurisdiction of the service provider. In this regard, the Access to Justice Convention directly addresses the issues identified hereinabove in N 9.a (access to legal aid) and 9.b (*cautio judicatum solvi*).

40 While the Access to Justice Convention does not guarantee a certain standard in relation to access to legal aid or the *cautio judicatum solvi*, it ensures that a plaintiff will not be discriminated against in these matters due to its foreign citizenship or residence.⁴⁵ Considering that several national civil procedure laws foresee that a *cautio judicatum solvi* may be ordered or that legal aid may be denied solely due to a plaintiff's foreign citizenship or residence,⁴⁶ the protection granted by the Access to Justice Convention must not be underestimated.

41 Hence, as concerns legal aid and the *cautio judicatum solvi*, the Access to Justice Convention provides considerable protection to tourists. A tourist suing in a foreign jurisdiction will not be subject to any discrimination due to its foreign citizenship or residence in matters of legal aid or *cautio judicatum solvi*.

42 However, as concerns the protection of tourists outside of court proceedings, the Access to Justice Convention fails to provide any real protection to an international tourist. While the Access to Justice Convention foresees access to "legal advice" outside of court proceedings,⁴⁷ such access is predicated on the applicant being physically present in the contracting State where advice is sought. Given a

⁴⁵ See Outline of the Access to Justice Convention, available at www.hcch.net. "The Convention's purpose is not to harmonize domestic laws, but rather to ensure that the mere status as an alien or the absence of residence or domicile in a State are not grounds for discrimination with regard to access to justice in that State."

⁴⁶ See e.g. Art. 99(1)(a) of the Swiss Code on Civil Procedure, § 110(1) of the German Code on Civil Procedure, Rule 25.13(2)(a)(i) of the Civil Procedure Rules of England & Wales, Art. 83 of the Brazilian Code on Civil Procedure. For further examples, see Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 25 October 1980 on International Access to Justice, available at www.hcch.net, p. 14 et seqq.

⁴⁷ See hereinabove N 34a.

tourist's typical lack of physical presence in the visited country,⁴⁸ this provision is unapt to provide effective protection to a tourist.

⁴³ Finally, the Access to Justice Convention also addresses the issue identified above in N 9.f (inadmissibility of commencing or continuing proceedings from abroad). The convention facilitates the process of obtaining legal aid in foreign proceedings by enabling a tourist to file its application for legal aid with its local authority (i.e. the transmitting authority), which shall even assist the tourist in making the application and then transmit it to the foreign Central Authority.⁴⁹ Once a tourist is granted legal aid in a foreign jurisdiction commencing and continuing proceedings (while being abroad) becomes much less burdensome, as the cost burden of instructing a lawyer in the foreign jurisdiction is lightened.

4. Comparison with the Brazilian Proposal's Provisions on Access to Legal Aid and the *Cautio Judicatum Solvi*

⁴⁴ Although the Access to Justice Convention already addresses the issues of legal aid and *cautio judicatum solvi*, the draft version of the Convention on Co-operation and Access to Justice Concerning International Tourists⁵⁰ provided by Brazil (**Brazilian Proposal**) contains provisions pertaining to these exact issues.⁵¹

⁴⁵ In particular, Art. 7(1) of the Brazilian Proposal provides (amongst others⁵²) that tourists⁵³ shall be given access to legal aid on the same conditions as if they themselves were nationals of, or habitually resident in, that State.⁵⁴ Furthermore, pursuant to Art. 8(1) of the Brazilian Proposal, nationals or residents of a contracting State shall not be subject to security for costs or for court fees by reason only of their foreign nationality or residence.⁵⁵

⁴⁶ In contrast to the Access to Justice Convention, the Brazilian Proposal addresses legal aid and the *cautio judicatum solvi* not only in respect of court proceedings,

⁴⁸ See hereinabove N 9.d.

⁴⁹ Arts. 5 et seq. of the Access to Justice Convention.

⁵⁰ Draft Convention on Co-operation and Access to Justice Concerning International Tourists of November 2014, Prel. Doc. No 2 of January 2015, available at www.hcch.net.

⁵¹ See Arts. 7 et seq. of the Brazilian Proposal.

⁵² The provisions speak in a more general manner of "access to court proceedings".

⁵³ Defined as "a person habitually resident in or national of a Contracting State taking a trip to a main destination in another Contracting State for less than a year, for any main purpose (business, conferences, leisure or other personal purpose), other than to be employed by a resident entity in the country or place visited, and who to that end purchases or undertakes to purchase a tourism service, or is a beneficiary or transferee of such a purchase, [or who purchases or undertakes to purchase consumer products or is a beneficiary or transferee of such a purchase in the Contracting State visited]" (Art. 2(a) of the Brazilian Proposal).

⁵⁴ Art. 7(2) of the Brazilian Proposal extends this protection to "legal advice", thus mirroring the Access to Justice Convention in this respect (see hereinabove N 34a).

⁵⁵ Art. 8(2) of the Brazilian Proposal sets in place a straightforward procedure for the enforcement of orders for costs, thereby again mirroring the Access to Justice Convention (see hereinabove N 34c).



but also in relation to "alternative procedures";⁵⁶ respectively, it makes such assistance not dependent upon the applicant being physically present in that State.⁵⁷ Such "alternative procedures" are defined as "*any procedure, other than court proceedings, for the settlement of disputes, such as conciliation, mediation or arbitration, including complaint procedures for the protection of consumers' interest.*"⁵⁸ In this regard, the Brazilian Proposal enhances the protection of international tourists compared to the Access to Justice Convention.

47 Yet, there is a significant overlap between the Access to Justice Convention and the Brazilian Proposal when it comes to access to legal aid and the *cautio iudicatum solvi* in the context of court proceedings.⁵⁹ In regard to access to justice in court proceedings, the Brazilian Proposal does not add anything to the protection of tourists already granted under the Access to Justice Convention.

48 At first sight, it seems unusual for two conventions to cover the same issues (in the same manner). However, one must keep in mind that the envisaged scope of application of the Brazilian Proposal is much narrower than the Access to Justice Convention. The latter applies regardless of a person's characteristics, whereas the former applies only to persons qualifying as "tourists" in the sense of that convention.⁶⁰

49 While the Access to Justice Convention permits contracting States to make certain reservations,⁶¹ none of these reservations would enable a Contracting State to restrict the application of the convention to a specific category of persons (such as tourists).⁶² In this sense, the Brazilian Proposal provides States with the new option of giving tourists (non-discriminatory) access to legal aid and liberate them from the *cautio iudicatum solvi*, while at the same time leaving those barriers to access to justice in place for other persons (that might be less in need of additional protection).

50 It is notable that the Access to Justice Convention has significantly less contracting States (28) than the Service Convention (75) or the Evidence Convention

⁵⁶ See Art. 7(1) and 8(1) of the Brazilian Proposal. The *cautio iudicatum solvi* can also be of relevance outside of court proceedings, e.g. in arbitration proceedings, see Berger, Security for Costs: Trends and Developments in Swiss Arbitral Case Law, ASA Bulletin 2010, p. 7 et seqq. In contrast, the issue of *cautio iudicatum solvi* seems to be of less relevance in mediation or conciliation proceedings.

⁵⁷ See hereinabove N 42.

⁵⁸ Art. 2(d) of the Brazilian Proposal.

⁵⁹ In this regard, Art. 10 of the Brazilian Proposal states the following: "*The Contracting States which are also Parties to the Hague Convention of 25 October 1980 on International Access to Justice shall, to the extent possible, coordinate their cooperation under both Conventions, and ensure that both instruments are applied in a complementary manner.*"

⁶⁰ For the definition of tourist under the Brazilian Proposal, see hereinabove FN 53.

⁶¹ Art. 28 of the Access to Justice Convention.

⁶² See Art. 28(4) of the Access to Justice Convention: "*No other reservation shall be permitted.*"

(62). When studying the responses to the questionnaires relating to the Access to Justice Convention,⁶³ the lacking option of reducing the Access to Justice Convention's scope of application to certain categories of persons is not mentioned as one of the reasons for not ratifying the Access to Justice Convention.

51 Rather the following reasons are being put forth against the ratification of the Access to Justice Convention, amongst others:

- a. The legal system of the State in question does already provide for non-discriminatory access to legal aid and does not prescribe the ordering of a security for costs (*cautio judicatum solvi*) against foreign parties.⁶⁴
- b. Legal aid is the responsibility of the federal entities within the State in question.⁶⁵
- c. The subject matter of the Convention falls within the scope of the EU's exclusive competence. Thus, the State in question lacks the required power to ratify the Convention.⁶⁶

52 Considering that these reasons could be equally put forth against ratification of the Brazilian Proposal, there is a risk that an inclusion of the provisions on access to legal aid and the *cautio judicatum solvi* will hamper the spreading of a future convention on tourist matters. This is an issue that should be thoroughly considered in the drafting process of the Tourist Convention.

53 As an alternative to including provisions on access to legal aid and the *cautio judicatum solvi* in a future convention on tourist matters, the adoption of a protocol to the Access to Justice Convention extending the protection of that convention to "alternative procedures" could be considered. The Special Commission has already in February 2009 mentioned the possibility of enhancing legal assistance under the Access to Justice Convention in certain categories of cases.⁶⁷ It must be noted that an extension of the Access to Justice Convention only increases

⁶³ See Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 25 October 1980 on International Access to Justice, available at www.hcch.net; Synopsis of Responses to the Questionnaire of September 2008 relating to the Hague Convention of 25 October 1980 on International Access to Justice, available at www.hcch.net.

⁶⁴ Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 25 October 1980 on International Access to Justice, p. 10 et seq.

⁶⁵ Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 25 October 1980 on International Access to Justice, p. 10 and 12.

⁶⁶ Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 25 October 1980 on International Access to Justice, p. 13.

⁶⁷ Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions (2 to 12 February 2009), available at www.hcch.net, N 65: "Subject to further consideration by the Council on General Affairs and Policy of the Hague Conference, the SC suggests that further consideration be given to the possibility of preparing a feasibility study on the provision of enhanced legal assistance in particular categories of cases, such as small and / or uncontested claims."



the protection in as far as national laws actually provide for legal aid in extra-judicial proceedings.⁶⁸

5. Interim Conclusion

54 The Access to Justice Convention contributes to the protection of international tourists by directly addressing the issues identified hereinabove in N 9.a (access to legal aid) and N 9.b (*cautio judicatum solvi*). However, the protection is limited to court proceedings. The Access to Justice Convention does not address out of court proceedings in an adequate way to safeguard the interests of an international tourist.

55 While the Brazilian Proposal extends the protection to "alternative procedures" – thus also covering out-of-court proceedings –, inclusion of the proposed provisions on access to legal aid and the *cautio judicatum solvi* might keep a significant number of States from ratifying a future convention on tourist matters. Extension of the protection to "alternative procedures" might therefore be better achieved via a protocol to the Access to Justice Convention.

56 Finally, the Access to Justice Convention also addresses the issue identified above in N 9.f (inadmissibility of commencing or continuing proceedings from abroad).

E. Convention on Civil Procedure (1954)

57 The Convention on Civil Procedure of 1954 (**Civil Procedure Convention**) contains provisions on the service of judicial documents, on the taking of evidence and on access to justice.

58 In contrast to the Service Convention, the Evidence Convention and the Access to Justice Convention, the Civil Procedure Convention did not yet foresee a Central Authority. This is one of the main points of difference between the conventions.

59 In total, 49 States have ratified the Civil Procedure Convention. Due to the prevalence of the other above-mentioned conventions,⁶⁹ the Civil Procedure Convention plays a less prominent role in today's legal practice.

60 Regarding the provisions on service of judicial documents, the obtaining of evidence and access to justice, the Civil Procedure Convention adds to the protection of tourists in the same way as the Service Convention⁷⁰, the Evidence

⁶⁸ For an overview on legal aid in extra-judicial proceedings, see Guinchard (FN 2), N 88 et seqq.

⁶⁹ See Art. 22 of the Service Convention, Art. 29 of the Evidence Convention and Art. 22 of the Access to Justice Convention.

⁷⁰ See hereinabove N 20 et seq.



Convention⁷¹ and the Access to Justice Convention⁷². However, it does so in a less efficient manner (due to the absence of Central Authorities). Further, in relation to the service of (extra-) judicial documents and the obtaining of evidence, it has a less far-reaching effect than the Service Convention and the Evidence Convention due to the lower number of contracting States.

61 Interestingly, when considering the number of contracting States, the Civil Procedure Convention seems to face less resistance than the Access to Justice Convention, although it also features provisions on access to legal aid and the *cautio judicatum solvi*.⁷³ This might relativize the risks outlined hereinabove in N 52.

62 Overall, the Civil Procedure Convention contributes to the protection of tourists in a similar (although less efficient) way as the Service Convention, the Evidence Convention and the Access to Justice Convention. However, in today's legal practice, the Civil Procedure Convention plays a less significant role due to its replacement by the mentioned conventions.

F. Convention on the Recognition and Enforcement of Foreign Judgments (2019)

1. Description of Content and Status

63 The Convention on the Recognition and Enforcement of Foreign Judgments of 2019 (**Judgments Convention**) governs the recognition and enforcement of a judgment given by a court of a contracting State in another contracting State.

64 To date, the convention has only been signed by Uruguay⁷⁴ and has therefore not yet entered into force.⁷⁵

2. Scope of Application

65 The Judgments Convention applies to (i) the enforcement and recognition of judgments (ii) given by a court of a Contracting State (iii) in civil or commercial matters (iv) that are not excluded under Art. 2 of the convention. Notably, matters relating to consumers are not excluded under Art. 2 of the Judgments Convention.⁷⁶

3. Relevance to Protection of Tourists

66 The Judgments Convention does not contain any provisions that would hinder its application to cases involving international tourists (once entered into force). For

⁷¹ See hereinabove N 29 et seqq.

⁷² See hereinabove N 38 et seqq.

⁷³ See hereinabove N 50 et seq.

⁷⁴ Status table of the Judgments Convention, available at www.hcch.net.

⁷⁵ Art. 28(1) of the Judgments Convention.

⁷⁶ See Guinchard (FN 2), p. lxxv.

example, if a tourist obtains a judgment against a service provider in its home jurisdiction (being in a contracting State), the enforcement of such judgment in another contracting State (e.g. the jurisdiction where the service provider is domiciled) would be governed by the Judgments Convention.

67 The Judgments Convention thus provides a framework for tourists to sue a service provider in their home jurisdiction and later enforce the judgment in the service provider's jurisdiction. In this regard, it could address the issue identified hereinabove in N 9.f. (inadmissibility of commencing or continuing proceedings from abroad) by enabling a tourist to sue in its home jurisdiction and later enforce the judgment in the jurisdiction of the service provider.

68 However, a judgment is only eligible for recognition and enforcement under the Judgments Convention if the originating court had jurisdiction for the case under that convention, meaning that the originating court must be able to rely on one of the bases for jurisdiction listed in Art. 5 of the convention.⁷⁷ In relation to typical tourist case scenarios, i.e. service provider based abroad and main activity having taken place abroad, there is no evident basis for jurisdiction under the mentioned article 5.⁷⁸

69 Hence, it is unlikely that the Judgments Convention will enable a tourist to sue in its home jurisdiction and then later enforce the judgment in the foreign service provider's jurisdiction.⁷⁹

4. Interim Conclusion

70 The Judgments Convention (even once entered into force) will not significantly contribute to the protection of tourists.

G. Convention on Choice of Court Agreements (2005)

71 The Convention on Choice of Court Agreements of 2005 (**Choice of Court Convention**) aims at ensuring the effectiveness of choice of court agreements between parties to international commercial transactions and the later enforcement of judgments based on such agreements.

72 While the Choice of Court Convention was finalized in 2005, it only entered into force on 1 October 2015. Recently, this convention has started to gain some

⁷⁷ However, if a judgment is not eligible for enforcement under the Judgments Convention, it may still be recognized or enforced under national law. The convention does not prevent the recognition and enforcement of judgments under national law (Art. 15 of the Judgments Convention).

⁷⁸ Art.5(1)(d) of the Judgments Convention (jurisdiction based on branch or agency) would probably provide a basis for jurisdiction against a foreign travel agency with offices in the country of the tourist. However, the use of travel agencies is in rapid decline, see Guinchard (FN 2), p. xvi.

⁷⁹ Exceptions must be made, for example, for a submission to jurisdiction by the service provider, see Art. 5(1)(f) of Judgments Convention.



momentum attracting several new contracting States. To date, 32 States have ratified the convention.⁸⁰

73 As concerns its contribution to the protection of tourists, the same comments as made hereinabove in N 67 et seq. apply. However, it seems rather unlikely that a choice of court agreement would be drafted in a way to enable a tourist to sue in its home jurisdiction. After all, it is usually the service provider that drafts the agreements (if any) to be signed by the tourist, often using a standard template. It seems counterintuitive for such agreements to incorporate a jurisdiction clause in the tourist's favour.

74 Further, the scope of application of the Choice of Court Convention is severely limited in relation to tourists. Art. 2(1)(a) of the convention excludes any consumer matters from its scope of application.⁸¹ Hence, the protection granted by the convention extends to business travellers only.

75 Overall, the contribution of the Choice of Court Convention to the protection of tourists is rather limited due to its narrow scope of application. In addition, it seems unlikely that service providers will draft choice of court agreements in a way to enable a business traveller to sue in its home jurisdiction.

H. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961)

76 The Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 1961 (**Apostille Convention**) facilitates the circulation of public documents executed in one contracting State and to be produced in another. It replaces the cumbersome and often costly formalities of a full legalisation process (chain certification) with the mere issuance of an apostille.⁸²

77 To date, 117 States have ratified the Apostille Convention.⁸³

78 The Apostille Convention applies to public documents which have been executed in the territory of one contracting State and which have to be produced in the territory of another contracting State.⁸⁴ The term "public documents" includes *inter alia* notarial acts. The convention does not contain any provisions that would bar its application to international tourists.

79 While the Apostille Convention does not directly address any of the issues faced by tourists as outlined hereinabove in N 9, it can nonetheless support a tourist in

⁸⁰ Status table of the Choice of Court Convention, available at www.hcch.net.

⁸¹ For explanations on this ground of exclusion, see Brand/Herrup, *The 2005 Hague Convention on Choice of Courts Agreement, Commentary and Documents*, 2008, p. 55.

⁸² See outline of the Apostille Convention, available at www.hcch.net.

⁸³ Status table of the Apostille Convention, available at www.hcch.net.

⁸⁴ Art. 1(1) of the Apostille Convention.



pursuing a legal claim in the service provider's jurisdiction. In particular, notarial acts certifying the authenticity of signatures might become relevant in relation to proving damages, e.g. doctor's report on extent of injury. The Apostille Handbook explicitly mentions apostilled public documents' use in foreign litigation.⁸⁵

⁸⁰ Overall, the Apostille Convention contributes to the protection of international tourists by enabling them to fully use documents issued in their home jurisdiction in foreign court proceedings against a service provider. However, it does not address any of the specific issues identified hereinabove in N 9.

I. Convention on the Recognition and Enforcement of Foreign Judgments (1971)

⁸¹ The Convention on the Recognition and Enforcement of Foreign Judgments of 1971 governs the recognition and enforcement of a judgment rendered by a court of a contracting State in another contracting State.

⁸² To date, the convention has only been ratified by five States which significantly limits its scope of application.⁸⁶

⁸³ As concerns the convention's contribution to the protection of international tourists, the comments made in relation to the Judgments Convention apply.⁸⁷ Due to the limited bases for jurisdiction contained in Art. 10 of the convention, it is rare that the Convention on the Recognition and Enforcement of Foreign Judgments of 1971 enables a tourist to sue a service provider in its home jurisdiction and then enforce the judgment in the foreign service provider's jurisdiction. In addition, enforcement under this convention requires a supplementary agreement between the contracting State from which the judgment originates and the State in which the judgment shall be enforced.⁸⁸

⁸⁴ Overall, the Convention on the Recognition and Enforcement of Foreign Judgments of 1971 does not significantly contribute to the protection of tourists.

J. Conclusion

⁸⁵ Several HCCH Conventions contribute to the protection of tourists in a rather general way (e.g. Evidence Convention, Service Convention). They provide the required legal framework for efficiently conducting a cross-border civil litigation case. This supports tourists in suing a foreign service provider in their home

⁸⁵ Apostille Handbook, A Practical Handbook on the Practical Operation of the Apostille Convention, available at www.hcch.net, N 6 and p. xxi.

⁸⁶ Status table of the Convention on the Recognition and Enforcement of Foreign Judgments of 1971, available at www.hcch.net.

⁸⁷ See hereinabove N 66 et seqq.

⁸⁸ Art. 21 of the Convention on the Recognition and Enforcement of Foreign Judgments of 1971.



jurisdiction. To this extent, these conventions address the issue identified hereinabove in N 9.f (inadmissibility of commencing or continuing proceedings from abroad).

- ⁸⁶ However, two other aspects crucially important to a tourist wishing to sue a service provider in its home jurisdiction are not or not sufficiently addressed by the existing HCCH Conventions. On the one hand, none of the existing HCCH Conventions provides for rules of jurisdiction that would permit a tourist to file suit against a foreign service provider in its home jurisdiction.⁸⁹ On the other hand, the existing HCCH Conventions address the enforcement of an eventual judgment in a manner not sufficiently protecting tourists wishing to sue in their home jurisdiction and later enforce the judgments against the service provider in a foreign jurisdiction.
- ⁸⁷ Finally, the Access to Justice Convention addresses the issues identified hereinabove in N 9.a (access to legal aid) and N 9.b (*cautio judicatum solvi*). However, it fails to adequately address tourist's access to legal aid in out-of-court procedures (e.g. mediation). While the Brazilian Proposal aims at closing this gap, it is worth considering addressing out-of-court procedures in a protocol to the Access to Justice Convention.

⁸⁹ For more details on jurisdiction, see herein below N 253 et seqq.



IV. APPLICABILITY OF OTHER INTERNATIONAL INSTRUMENTS

⁸⁸ In this chapter the applicability of international conventions to the protection of tourists will be examined (**Chapters A.-J.**). This will only cover multilateral conventions; bilateral treaties will not be considered. Further, human rights conventions will not be addressed specifically.⁹⁰ In turn, the contribution of EU law instruments to the protection of tourists will be analysed (**Chapter K.**).

A. *Acuerdo Interinstitucional de Entendimiento entre los Organismos de Defensa del Consumidor de los Estados Parte del Mercosur para la Defensa del Consumidor Visitante (2005)*

⁸⁹ Prof. Guinchard has already elaborated in his report on the Acuerdo Interinstitucional de Entendimiento entre los Organismos de Defensa del Consumidor de los Estados Parte del Mercosur para la Defensa del Consumidor Visitante of 2005 (**Mercosur 2005 Convention**) as well as the joint experts committee on the protection of visitors and consumers established in 2012.⁹¹ Reference can be made to his comments.

B. *UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers (Draft)*

⁹⁰ The main objectives of the UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers (**UNWTO Convention**) are, first, to establish uniform rules to ensure and promote an appropriate degree of protection of tourists and, second, to clarify the rights and obligations of tourism service providers ensuring a fair balance between the responsibility of the State private sector and tourists.⁹²

⁹¹ The UNWTO Convention has not yet been finalized.⁹³ Interestingly, the convention was not on the agenda of the UNWTO Executive Council's latest sessions.⁹⁴

⁹⁰ These conventions have already been covered by Prof. Guinchard in his report (see Guinchard (FN 2), N 43 et seq.).

⁹¹ Guinchard (FN 2), N 47 and 132 et seq.

⁹² Report of the Secretary General, 20 July 2017, Doc. A/22/10(i)(c), available at http://cf.cdn.unwto.org/sites/all/files/pdf/a22_10_i_c_unwto_convention_on_the_protection_of_tourists_en_0.pdf, N 4.

⁹³ Latest draft version available at http://cf.cdn.unwto.org/sites/all/files/pdf/a22_10_i_c_unwto_convention_on_the_protection_of_tourists_en_0.pdf. For more details on the content of the UNWTO Convention, see Guinchard (FN 2), N 156 et seq.

⁹⁴ See agendas of the 108-111th sessions of the Executive Council, available at <http://lmd.unwto.org/content/executive-council-sessions>.



⁹² Prof. Guinchard has already explained in detail that there is no overlap between the current draft version of the UNWTO Convention and the Tourism Project. Full reference can be made to his report.⁹⁵

C. *Acuerdo sobre el Beneficio de Litigar sin Gastos y Asistencia Jurídica Gratuita entre los Estados Partes del Mercosur (2000)*

⁹³ Under the Acuerdo sobre el Beneficio de Litigar sin Gastos y Asistencia Jurídica Gratuita entre los Estados Partes del Mercosur of 2000 (**Mercosur 2000 Convention**)⁹⁶ nationals and habitual residents of each State party have access to cost-free litigation and legal aid in the other States parties under the same conditions as their nationals and habitual residents.⁹⁷ The Mercosur 2000 Convention further provides that cost-free litigation granted in a State party can extend to proceedings in other State parties, for example in the taking of evidence abroad⁹⁸ or the enforcement of a judgment.⁹⁹

⁹⁴ By easing access to court in a foreign jurisdiction, the Mercosur 2000 Convention contributes to the protection of international tourists. It addresses the issues identified hereinabove in N 9.a (access to legal aid) and N 9.b (*cautio judicatum solvi*).¹⁰⁰

D. *Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993)*

⁹⁵ The Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 1993 (**Minsk Convention**)¹⁰¹ filled the empty legal space after the dissolution of the Soviet Union in 1991. The system of judicial relationship between the former Soviet republics had to be built anew on a new international legal basis. The CIS Member States concluded a comprehensive instrument designed to solve the problem – the Minsk Convention.

⁹⁶ The Convention was signed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine. It entered into force on 19 May 1994. The Convention is, however, not restricted to the CIS

⁹⁵ Guinchard (FN 2), N 164.

⁹⁶ Text of the convention is available at <https://legislativo.parlamento.gub.uy/temporales/7797317.PDF>.

⁹⁷ Art. 1 of the Mercosur 2000 Convention.

⁹⁸ Art. 4 of the Mercosur 2000 Convention.

⁹⁹ Art. 7 of the Mercosur 2000 Convention.

¹⁰⁰ See in this regard the comments already made hereinabove in N 40 et seq.

¹⁰¹ English translation of the convention is available at <http://cisarbitration.com/wp-content/uploads/2017/02/Minsk-Convention-on-Legal-Assistance-and-Legal-Relations-in-Civil-Family-and-Criminal-Matters-english.pdf>.

Member States. Pursuant to Article 86, other States may join the Minsk Convention. Azerbaijan and Georgia acceded to the Convention in 1996.

- 97 The Minsk Convention contains provisions on access to justice, taking of evidence abroad¹⁰² and service of documents.¹⁰³ Further, the convention deals with issues of jurisdiction¹⁰⁴ as well as recognition and enforcement of judgments.¹⁰⁵ The convention's regime on enforcement of judgments appears quite liberal which could serve a tourist in enforcing a judgment obtained in its home jurisdiction against a foreign service provider. However, the provisions on jurisdiction do not contain any terms that would enable a tourist to sue a service provider in its home jurisdiction.
- 98 In 1997, the CIS Member States (except Turkmenistan) signed the Protocol to the Minsk Convention. The Protocol simplified and liberalised the regime of relations between the judicial authorities of the contracting States. Besides the central authorities, other authorities of the contracting States became empowered to collaborate directly with their counterparts in other contracting Parties. This innovation made it possible to simplify and expedite the procedure for transmission of documents and improve the organization of judicial assistance within the framework of the convention.¹⁰⁶
- 99 The Minsk Convention provides a framework in which to conduct cross-border proceedings. In this respect, the convention enhances the protection of international tourists in a similar way as the Service Convention and the Evidence Convention.¹⁰⁷ However, it does not specifically address other issues faced by international tourists as listed hereinabove in N 9.

E. Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999)

- 100 The Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (**Montreal Convention**)¹⁰⁸ aims at strengthening the protection of consumers in international carriage by air. It provides for equitable compensation based on the principle of restitution. It was drawn up in order to modernize and consolidate the Warsaw Convention for the Unification of Certain

¹⁰² Arts. 6 et seqq. of the Minsk Convention.

¹⁰³ Arts. 10 et seqq. of the Minsk Convention.

¹⁰⁴ Arts. 20 et seqq. of the Minsk Convention.

¹⁰⁵ Arts. 51 et seqq. of the Minsk Convention.

¹⁰⁶ The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, Information Document submitted by the Delegation of the Russian Federation, Information Doc. No. 1 of April 2005, available at <https://www.hcch.net/de/publications-and-studies/details4/?pid=3514&dtid=35>, p. 5 et seq.

¹⁰⁷ See hereinabove N 20 et seq. and 29 et seqq.

¹⁰⁸ Text of the convention is available at <https://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/portrait.pdf>.



Rules relating to International Carriage of 1929 as well as the thereto related protocols.¹⁰⁹

¹⁰¹ The Montreal Convention entered into force on 4 November 2003. To date, 136 States have ratified the convention.¹¹⁰

¹⁰² The Montreal Convention applies to international carriage of persons, baggage or cargo performed by aircraft.¹¹¹ It establishes common rules for airlines to follow on international flights between contracting States. The convention contains provisions on the documentation of carriage¹¹², the rights and duties ensuing from the contract of carriage,¹¹³ the enforcement of those rights,¹¹⁴ the carriers' liability (for injury, damage to cargo and delay) as well as the extent of compensation for damage.¹¹⁵

¹⁰³ Further, the Montreal Convention comprises rules on jurisdiction.¹¹⁶ It provides that the claimant has the option of bringing an action for damages arising in the territory of one of the contracting States before the competent court at one of the following four places:

- a. where the carrier is domiciled, usually the place of incorporation;
- b. where the carrier has its principal place of business;
- c. where the carrier has an establishment by which the contract has been made, usually where the air waybill is issued (likely to be the place of departure); or
- d. the place of destination, usually designated in the air waybill.¹¹⁷

¹⁰⁴ In view of the last two bases for jurisdiction, it is likely that a suit can be brought either in the place of departure or destination. However, the parties to the contract

¹⁰⁹ However, the Warsaw Convention for the Unification of Certain Rules relating to International Carriage of 1929 and the thereto-related protocols remain applicable in certain scenarios, see Report by the UNCTAD secretariat, Carriage of Good by Air: A Guide to the International Legal Framework, Doc. No. UNCTAD/SDTE/TLB/2006/1, available at https://unctad.org/en/Docs/sdtetlb20061_en.pdf, N 40 et seqq.

¹¹⁰ See status form provided by the International Civil Aviation Organization (ICAO), available at https://www.icao.int/secretariat/legal/List%20of%20Parties/Mt199_EN.pdf.

¹¹¹ Art. 1 of the Montreal Convention.

¹¹² Arts. 3-11 of the Montreal Convention.

¹¹³ Arts. 12 et seq. of the Montreal Convention.

¹¹⁴ Art. 13 of the Montreal Convention.

¹¹⁵ Arts. 17-32 of the Montreal Convention. For a detailed analysis of these provisions, see Koning, Liability in Air Carriage, Carriage of Cargo under the Warsaw and Montreal Convention, Air & Space Law, Vol. XXXIII/4-5, p. 318 et seqq.

¹¹⁶ Arts. 33 et seq. of the Montreal Convention.

¹¹⁷ See Report by the UNCTAD secretariat (FN 109), N 193.



of carriage are free to agree on arbitration and thus take the dispute outside of the court systems.¹¹⁸

- 105 Overall, the Montreal Convention establishes fixed standards of protection for international tourists in relation to air travel. Tourists benefit from guaranteed rights in relation to their luggage and any delays of the aircraft. Further, the convention provides a jurisdiction regime that makes it likely that a tourist may file suit against a carrier in its home jurisdiction – being either the place of departure or destination of the journey.

F. European Agreement on the Transmission of Applications for Legal Aid (1977)

- 106 The European Agreement on the Transmission of Applications for Legal Aid of 1977 (**European Legal Aid Treaty**)¹¹⁹ was drawn up by the Council of Europe. It establishes a system under which an application for legal aid may be submitted in the home jurisdiction of the applicant, although proceedings will be conducted in a foreign jurisdiction. The European Legal Aid Treaty was supplemented by a protocol concluded in Moscow on 4 October 2001.¹²⁰

- 107 Art. 1 of the European Legal Aid Treaty provides the following:

"Every person who has his habitual residence in the territory of one of the Contracting Parties and who wishes to apply for legal aid in civil, commercial or administrative matters in the territory of another Contracting Party may submit his application in the State where he is habitually resident. That State shall transmit the application to the other State."

- 108 Each contracting State has designated a transmitting authority to forward the application for legal aid directly to the foreign central authority,¹²¹ which then forwards the application to the competent body to rule upon the application.¹²² These services are all free of charge to the applicant.¹²³

¹¹⁸ See Art. 34 of the Montreal Convention.

¹¹⁹ Text of the treaty is available at <https://rm.coe.int/1680077322>.

¹²⁰ Text of the protocol is available at <https://www.coe.int/de/web/conventions/full-list/-/conventions/rms/0900001680080624>.

¹²¹ The transmitting authority also supports the applicant and ensures that all required documents are enclosed to the application (see Art. 3 of the European Legal Aid Treaty).

¹²² Art. 2 of the European Legal Aid Treaty.

¹²³ Art. 5 of the European Legal Aid Treaty.



- 109 To date, the European Legal Aid Treaty has been ratified by 33 States.¹²⁴ In the European Union, the EC Directive No. 2002/8 has rendered the treaty largely obsolete.¹²⁵
- 110 It is important to note that the treaty does not contain any provisions that would guarantee a certain minimum standard as concerns the availability of legal aid. It solely aims at facilitating the filing of an application for legal aid by a foreign litigant.¹²⁶
- 111 Despite its limited scope, the European Legal Aid Treaty strengthens the protection of international tourists, as it facilitates the steps which must be taken by a tourist of limited means in order to obtain legal aid in a foreign contracting State. It suffices for that person to apply to the transmitting authority designated in the country in which the applicant resides. That authority will be able to provide any information that he/she may require for the presentation of the request.
- 112 In this regard, the European Legal Aid Treaty addresses the issues identified in N 9.a (legal aid) and N 9.f (inadmissibility of commencing or continuing proceedings from abroad). Once a tourist is granted legal aid in a foreign jurisdiction and has been assigned a lawyer,¹²⁷ commencing and continuing proceedings (while being abroad) becomes much less burdensome.

G. *International Convention on Travel Contracts (1970)*

- 113 The International Convention on Travel Contracts of 1970 (**CCV**)¹²⁸ is a set of uniform rules governing travel contracts involving travel agents (or their intermediaries).
- 114 The CCV entered into force on 21 February 1976. To date, only six States have ratified the convention.¹²⁹

¹²⁴ See status table of the European Legal Aid Treaty, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/092/signatures?p_auth=aO8ge6g7.

¹²⁵ See Art. 20(a) of the EC Directive No. 2002/8, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003L0008>.

¹²⁶ See Explanatory Report to the European Agreement on the Transmission of Applications for Legal Aid, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c96ea>, N 6.

¹²⁷ See on this point Art. 3(1) of the Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid (FN 120), which provides that the requested contracting State shall ensure that lawyers appointed to represent an applicant communicate with the applicant in a language readily understood by him/her, or at least that costs of translations are covered by legal aid.

¹²⁸ Text of the convention is available at <https://www.unidroit.org/instruments/transport/ccv>.

¹²⁹ See status table of the CCV, available at <https://www.unidroit.org/status-ccv-1970>.



¹¹⁵ Considering the declining relevance of travel agents in the tourism industry¹³⁰ as well as the low number of contracting States, the contribution of this convention to the protection of international tourists is rather limited.

H. Convention on the Liability of Hotel-keepers concerning the Property of their Guests (1962)

¹¹⁶ The Convention on the Liability of Hotel-keepers concerning the Property of their Guests of 1962 (**Hotel-keeper Convention**)¹³¹ sets out provisions on hotel-keepers' liability for the property of their guests that each contracting State includes into its national law. Nonetheless, contracting States are free to impose greater liabilities on hotel-keepers.¹³²

¹¹⁷ The Hotel-keeper Convention entered into force on 15 February 1967. To date, 17 States have ratified the convention.¹³³

¹¹⁸ The convention contributes to the protection of international tourists, as it sets forth minimum standards that the national law must conform to. However, it does not facilitate the enforcement of those rules (e.g. by providing for a special place of jurisdiction). Therefore, it fails to address any of the issues identified hereinabove in N 9.

I. Convention on the Contract for the International Carriage of Passengers and Luggage by Road (1973)

¹¹⁹ The Convention on the Contract for the International Carriage of Passengers and Luggage by Road of 1973 (**CVR**)¹³⁴ standardizes the conditions governing contracts for the international carriage of passengers and luggage by road.¹³⁵ The convention applies if the place of destination or departure, or both, are located in a contracting State.¹³⁶

¹³⁰ Guinchard (FN 2), p. xvi.

¹³¹ Text of the convention is available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b648> and the text of the Annex at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006b6a8>.

¹³² Art. 1(2) of the Hotel-keepers Convention.

¹³³ See status table of the Hotel-keeper Convention, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/041/signatures?p_auth=qjbqqgF0.

¹³⁴ Text of the convention is available at https://www.unece.org/fileadmin/DAM/trans/conventn/CVR_e.pdf.

¹³⁵ The Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway of 1976 (**CVN**, text available at https://treaties.un.org/doc/Treaties/1976/02/19760206%2007-56%20AM/Ch_XI_D_2.pdf) contains rules similar to the CVR, but directed towards the carriage by inland waterway. However, the CVN has only been ratified by Russia (status table available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-2&chapter=11&clang=_en).

¹³⁶ Art. 1(1) of the CVR.



¹²⁰ The CVR entered into force on 12 April 1994. To date, 9 States have ratified the convention.¹³⁷

¹²¹ Apart from provisions on liability of the carrier and damages,¹³⁸ the CVR also contains a provision on jurisdiction. Pursuant to its article 21, *inter alia* the courts at the place of departure and of destination have jurisdiction to hear a claim arising out of carriage by road under the CVR.

¹²² In sum, the CVR establishes a set of fixed standards of protection for international tourists in relation to cross-border road travelling. Particularly, tourists have guaranteed rights in relation to their luggage. Further, the convention provides a jurisdiction regime that makes it likely that a tourist can file suit in its home jurisdiction – being either the place of departure or destination of the journey. However, considering the declining importance of cross-border road transport and the low number of contracting States, the CVR is only of limited relevance to the overall protection of international tourists.

J. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

¹²³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (**New York Convention**)¹³⁹ requires courts of contracting States to give effect to private agreements to arbitrate and to recognize and enforce arbitral awards made in other contracting States. To date, 161 States have ratified the New York Convention.

¹²⁴ If a tourist and a service provider have agreed on an arbitration clause, the New York Convention ensures the enforceability of such agreement as well as a later arbitral award. To this extent, it could be said that the New York Convention addresses the issue identified in N 9.f hereinabove (inadmissibility of commencing or continuing proceedings from abroad).

¹²⁵ However, it is questionable whether many agreements that a tourist concludes with service providers contain an arbitration clause. Further, in some jurisdiction, arbitration agreements are deemed invalid and void in consumer cases.¹⁴⁰ Accordingly, courts in such jurisdiction will neither enforce the arbitration agreement nor any subsequent arbitral award.¹⁴¹ However, the attitude of these jurisdictions

¹³⁷ See status table of the CVR, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-B-26&chapter=11&lang=en.

¹³⁸ In particular, damage to luggage (Art. 14 of the CVR).

¹³⁹ The text of the convention is available at <http://www.newyorkconvention.org/english>.

¹⁴⁰ Born, *International Arbitration: Law and Practice*, 2012, p. 84 et seq.

¹⁴¹ See Arts. II(3) and V(1)(a) of the New York Convention.

towards arbitration agreements that are concluded *after* a dispute has arisen seems more relaxed.

- 126 Overall, the potential contribution of the New York Convention to the protection of tourists can be quite significant. However, it requires that service providers consent to have their disputes with tourists adjudicated in arbitration; and, that such agreements are deemed valid and enforceable.

K. Instruments in EU Law

- 127 Tourists within the EU are covered by a multitude of EU law instruments, mainly in the area of consumer protection. They take the form of directives and regulations.

1. *EC Directive No. 2002/8 to Improve Access to Justice in Cross-Border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for such Disputes*

- 128 The EC Directive No. 2002/8¹⁴² obliges EU Member States to implement certain minimum rules on legal aid for cross-border disputes into their domestic legislation.

- 129 In contrast to the Access to Justice Convention, the EC Directive No. 2002/8 does not only protect the foreign applicant against discrimination, but entitles the applicant to receive appropriate legal aid if the conditions set forth in the directive are fulfilled.¹⁴³ This includes pre-litigation advice with a view to reaching a settlement and extra-judicial proceedings.¹⁴⁴

- 130 The directive sets forth the conditions under which legal aid is to be granted.¹⁴⁵ The conditions relate to the financial resources of the applicant as well as to the substance of the claim put forth.¹⁴⁶

- 131 As to the procedure of applying for legal aid, the directive foresees the option of filing the application with an authority of the Member State in which the applicant is domiciled or habitually resident. This authority will then transmit the application to the competent authority in the Member State in which the court is located.¹⁴⁷

¹⁴² The text of the directive is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0008&from=EN>.

¹⁴³ Art. 3(1) of the EC Directive No. 2002/8.

¹⁴⁴ Arts. 3(2)(a) and 10 of the EC Directive No. 2002/8.

¹⁴⁵ However, there seem to exist differing interpretations of these provisions by courts in Member States hindering an actual uniform application of the conditions (see European Parliament resolution of 11 June 2013 on improving access to justice: legal aid in cross-border civil and commercial disputes, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013IP0240>).

¹⁴⁶ Arts. 5 et seq. of the EC Directive No. 2002/8.

¹⁴⁷ Art. 13(1)(a) of the EC Directive No. 2002/8.



132 Overall, the Directive No. 2002/8 provides international tourists who are resident in an EU Member State with a guarantee as to legal aid standards in other Member States. Further, such tourists benefit from the option of filing the application for legal aid with the authority in their home jurisdiction.

133 Thus, the directive directly addresses the issue identified hereinabove in N 9.a. However, the protection is limited to residents of EU Member States.

2. *EC Regulation No. 261/2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights*

134 The EC Regulation No. 261/2004¹⁴⁸ ensures a high level of protection for airline passengers. It establishes minimum rights for passengers when they are denied boarding and when their flight is cancelled or delayed.¹⁴⁹

135 The regulation applies, first of all, to passengers departing from an airport located in a Member State.¹⁵⁰ Further, the regulation also applies to passenger departing from an airport outside of the EU if the two following conditions are fulfilled:¹⁵¹

- a. the passenger did not receive any benefits or compensation and was not given assistance in the State from which the aircraft departed; and
- b. the operating air carrier of the flight concerned is a "Community Carrier" which is defined as an air carrier with a valid operating licence granted by a Member State.¹⁵²

136 For understanding the latter scenario of application, an example provided on the European Commission's website is helpful:

"Thomas is travelling to Ireland with an Aer Lingus flight from Newark Airport in the USA. He has just learned that his flight has been cancelled. He has rights under the Regulation. Contrast his situation with that of Tina who is travelling from the same airport to Ireland with an

¹⁴⁸ Text of the regulation is available at https://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC_1&format=PDF.

¹⁴⁹ Art. 1(1) of the EC Regulation No. 261/2004.

¹⁵⁰ Art. 3(1) of the EC Regulation No. 261/2004.

¹⁵¹ Art. 3(2) of the EC Regulation No. 261/2004.

¹⁵² Art. 2(c) of the EC Regulation No. 261/2004. A list of Community Carriers registered in a certain Member State can usually be found on the website of the respective national aviation authority (e.g. for the UK: <https://www.caa.co.uk/Commercial-industry/Airlines/Licensing/Licence-types/Airline-licence-holders/>, for Bulgaria: <https://www.caa.bg/en/category/600/list-air-carriers-valid-operating-licence-community-air-carrier>).



*American airline which is not a Community carrier. She does not have rights under the Regulation."*¹⁵³

137 In contrast to the Montreal Convention, the EC Regulation No. 261/2004 offers passengers redress not for their damages *stricto sensu*, but rather for the inconvenience caused by a flight disruption. The regulation provides passengers with guaranteed rights as to compensation and care.¹⁵⁴ The latter includes free of charge meals, hotel accommodation and airport transport. Further, operating air carriers are obliged to provide their passengers with sufficient information on their rights.¹⁵⁵

138 Overall, the EC Regulation No. 261/2004 provides airline passengers with strong protection against any flight disruption. In this regard, the regulation strengthens the protection of international tourists. Considering the scope of application, also non-EU residents may benefit from this protection. With its provision on information duties, the regulation directly addresses the issue identified hereinabove in N 9.c (absence of sufficient and adequate information regarding rights and legal remedies).

3. EC Regulation No. 1896/2006 Creating a European order for payment procedure

139 EC Regulation No. 1896/2006¹⁵⁶ establishes a European payment order, a simplified procedure for cross-border-monetary claims which are uncontested by the defendant. The procedure is largely based on the use of standard forms.¹⁵⁷

140 To start the procedure, Form A must be completed, giving all the details of the parties and the nature and amount of the claim. The court will examine the application. If all conditions are fulfilled, the court will issue the payment order within 30 days. The order must then be served on the defendant by the court. The defendant can either pay the amount of the claim or contest the claim.

141 Any statement of opposition must be filed within 30 days. If opposition is filed, the case may, subject to the claimant's choice, either be (i) transferred to the normal civil law courts to be dealt with under national law or the European Small Claims Procedure, or (ii) discontinued.

142 On the other hand, if no opposition is filed, the payment order will become automatically enforceable. A payment order which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member

¹⁵³ Frequently Asked Questions on Air Passenger Rights, available at https://ec.europa.eu/ireland/services/air-travel_en.

¹⁵⁴ Arts. 8 et seq. of the EC Regulation No. 261/2004.

¹⁵⁵ Art. 14 of the EC Regulation No. 261/2004.

¹⁵⁶ The text of the regulation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1896>.

¹⁵⁷ Recital No. 11 of the EC Regulation No. 1896/2006.



States without the need for a declaration of enforceability and without any possibility of opposing its recognition.¹⁵⁸ The claimant must simply submit a copy of the order, and if necessary a translation, to the enforcement authorities of the Member State where the order needs to be enforced. Enforcement takes place in accordance with the national rules and procedures of the Member State where the payment order is being enforced.

- 143 The scope of application of the regulation is defined in its article 2. There is nothing hindering its application to tourism cases. Also tourists resident outside the EU can make use of the payment order procedure, as long as the service provider is domiciled/seated within the EU.¹⁵⁹
- 144 The combination of the simplified procedure and the use of standard forms enables a tourist to pursue an uncontested claim without the need to rely on legal representation. The "e-justice" website provides tourists with very helpful information in this regard, e.g. for finding the competent courts/authorities.¹⁶⁰ However, the contribution to tourists' protection is limited to cases, in which the tourist's claim is not contested by the service provider.
- 145 While the regulation foresees a simplified procedure for the collection of uncontested claims in a cross-border setting, it does not provide any special grounds for jurisdiction (except for claims filed against a consumer). Rather, it refers for questions of jurisdiction to the applicable Brussels regime.¹⁶¹ As will be demonstrated below,¹⁶² the Brussels regime at times (but not always) ensures that a consumer (as which most tourists will qualify, apart from business travellers) may file suit in its home jurisdiction. This does further increase the protection of a tourist seeking to enforce its claim against a foreign service provider via the European payment order procedure.
- 146 Overall, the EC Regulation No. 1896/2006 contributes to the protection of tourists by addressing the issues identified hereinabove in N 9.e (lack of small claims courts or procedures, tailored to cross-border cases) and N 9.f (inadmissibility of commencing or continuing proceedings from abroad).

¹⁵⁸ Art. 19 of the EC Regulation No. 1896/2006.

¹⁵⁹ See definition of cross-border cases in Art. 3(1) of the EC Regulation No. 1896/2006. However, it might be difficult in these scenarios to find a court with jurisdiction outside of the service provider's Member State.

¹⁶⁰ See https://e-justice.europa.eu/content_european_payment_order-353-en.do?clang=en.

¹⁶¹ See Art. 6(2) of the EC Regulation No. 1896/2006.

¹⁶² See below N 259.

4. *EC Regulation No. 861/2007 Establishing a European Small Claims Procedure (as Amended by EU Regulation No. 2015/2421)*

¹⁴⁷ EC Regulation No. 861/2007¹⁶³ establishes a special procedure for small claims that is available to litigants as an alternative to the procedures existing under the domestic laws of the Member States.

¹⁴⁸ The regulation applies in all EU Member States except for Denmark. It only governs cases in which at least one of the parties is domiciled or habitually resident in a Member State other than that of the court or tribunal seised with the claim.¹⁶⁴ There are also scenarios in which a non-EU resident may proceed under the small claim procedure:

*"Given the definition of 'cross-border', and having regard to the effect of the jurisdiction provisions in the Brussels I Regulation, in certain circumstances a claimant domiciled or habitually resident in a non-EU Member State may be able to make use of the ESCP against a defendant who is domiciled or habitually resident within the EU. This would be the case where the defendant is domiciled or habitually resident in a Member State other than that of the competent court since then that party is not in the same State as the court since this meets the conditions of Article 3.1."*¹⁶⁵

¹⁴⁹ The small claims procedure is, however, limited to claims of maximum EUR 5'000.¹⁶⁶ In addition, certain subject matters are excluded from the regulation's scope of application, but none of the exclusions concern matters relevant to the protection of tourists.

¹⁵⁰ Pursuing a claim via the small claims procedure is attractive to litigants, as a judgment obtained in that procedure is recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition. Further, standard forms are available on the EU's "e-Justice"-website¹⁶⁷ enabling litigants to proceed without a lawyer. However, the claim form must be submitted in the language of the court seized which could put in place certain language barriers.¹⁶⁸

¹⁶³ The text of the regulation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0861&from=EN>.

¹⁶⁴ Arts. 2(1) and 3(1) of the EC Regulation No. 861/2007.

¹⁶⁵ Practice guide for the application of the European Small Claims Procedure, available https://e-justice.europa.eu/content_small_claims-42-en.do, N 2.2.2.1.

¹⁶⁶ Art. 2(1) of the EC Regulation No. 861/2007 as amended by Art. 1 of the EU Regulation No. 2015/2421.

¹⁶⁷ https://e-justice.europa.eu/content_small_claims_forms-177-en.do?clang=en.

¹⁶⁸ Art. 6.1 of the EC Regulation No. 861/2007. Yet, due note should be taken of a claimant's option to seek assistance in filling out the claim form (see Art. 11 of the EC Regulation No. 861/2007).



- 151 The proceedings under the regulation are heavily simplified. The court takes initiative in establishing the facts,¹⁶⁹ procedure is generally in writing,¹⁷⁰ if a hearing becomes necessary, courts are encouraged to use IT communication such as video conferencing,¹⁷¹ and the court is to follow a tight time schedule.¹⁷²
- 152 Although EC Regulation No. 861/2007 establishes a special procedure, domestic civil procedure law still remains relevant. The regulation makes it clear that except as provided in the regulation the proceedings are to be governed by the procedural law of the Member State in which the procedure is conducted. Further, the regulation makes specific provision for domestic law to apply at certain stages of the procedure; for example, whether or not there is an appeal from a judgment under the small claims procedure, the costs of filing a claim in the small claim procedure or the situation where a counter-claim exceeds the financial limit of the small claims procedure.¹⁷³
- 153 Overall, the EC Regulation No. 861/2007 provides a simplified procedure under which a claimant can swiftly enforce its claim against a foreign debtor. Thereby it contributes to the protection of international tourists by directly addressing the issue identified hereinabove in N 9.e (lack of small claims courts or procedures tailored to cross-border cases) and by encouraging courts to hold the hearing via teleconferencing also the issue in N 9.f (inadmissibility of commencing or continuing proceedings from abroad). However, the rather low claim limit of EUR 5'000 restricts the impact of the regulation. In addition, non-EU residents are only able to take advantage of the small claim procedure in very limited circumstances.

5. *EU Regulation No. 181/2011 Concerning the Rights of Passengers in Bus and Coach Transport*

- 154 EU Regulation No. 181/2011 concerning the rights of passengers in bus and coach transport¹⁷⁴ applies to bus travel starting in one EU Member State and with a scheduled distance of 250 km or more.¹⁷⁵ Residency of the passenger in (another) EU Member State is, in turn, not required.
- 155 The regulation contains provisions on compensation for personal injury to passengers and damage to luggage,¹⁷⁶ guaranteed rights in case of cancellation or

¹⁶⁹ See Arts. 4.4., 7.1 and 9.1 of the EC Regulation No. 861/2007.

¹⁷⁰ Art. 5.1 of the EC Regulation No. 861/2007.

¹⁷¹ Arts. 8 and 9.1 of the EC Regulation No. 861/2007.

¹⁷² Art. 7(1) of the EC Regulation No. 861/2007.

¹⁷³ Practice guide for the application of the European Small Claims Procedure, available https://e-justice.europa.eu/content_small_claims-42-en.do, N 2.5.1 and 3.3.

¹⁷⁴ Text of the regulation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0181&from=DE>.

¹⁷⁵ Art. 2(1) of the EU Regulation No. 181/2011.

¹⁷⁶ Art. 7 of the EU Regulation No. 181/2011.



delay of the bus service¹⁷⁷ and duties of information.¹⁷⁸ Furthermore, EU Member States are required to designate an official body for the enforcement of the regulation in order to ensure compliance with the regulation. Any passenger may submit a complaint to this body about an alleged infringement of the regulation.¹⁷⁹

¹⁵⁶ Overall and similarly to the EC Regulation No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, the EU Regulation No. 181/2011 provides bus passengers with guaranteed rights. In this regard, the regulation contributes to the protection of international tourists. Also a non-EU resident can take advantage of these guaranteed rights when travelling via bus in the EU. With its provisions on information duties, the regulation directly addresses the issue identified hereinabove in N 9.c (absence of sufficient and adequate information regarding rights and legal remedies).

6. *EU Directive No. 2013/11 on Alternative Dispute Resolution for Consumer Disputes*

¹⁵⁷ The EU Directive No. 2013/11¹⁸⁰ requires Member States to implement certain rules into their national legislation that enables consumers to submit complaints against traders to entities offering alternative dispute resolution procedures.

¹⁵⁸ Art. 2 of the directive defines the scope of application as follows:

"This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution."

¹⁵⁹ Thus, only EU residents are covered by the directive meaning that only EU-internal tourists will be able to take advantage of the protection granted under the directive. Further, the term "consumer" only includes persons who are acting for purposes which are outside their trade, business, craft or profession.¹⁸¹ Accordingly, business travellers will not benefit from the protection of the directive.

¹⁷⁷ Art. 19 of the EU Regulation No. 181/2011.

¹⁷⁸ Arts. 20 and 25 of the EU Regulation No. 181/2011.

¹⁷⁹ Art. 28(3) of the EU Regulation No. 181/2011.

¹⁸⁰ Text of the directive is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011&from=DE>.

¹⁸¹ Art. 4(1)(a) of the EU Directive No. 2013/11.



- 160 Importantly for cross-border cases, the directive requires the Member States to ensure that consumers can obtain assistance to access the ADR entity operating in another Member State which is competent to deal with their cross-border dispute.¹⁸² Further, Member States must ensure that traders inform consumers about the ADR entity (or entities) by which those traders are covered.¹⁸³
- 161 Finally, the EU Directive No. 2013/11 also foresees that Member States ensure cooperation between ADR entities and national authorities.¹⁸⁴ This includes, in particular, the exchange of information on practices in specific business sectors about which consumers have repeatedly lodged complaints.
- 162 Overall, the directive sets in place a system guaranteeing the availability of ADR providers for cross-border disputes. This enables tourists – who are EU residents – to file complaints against a foreign service provider with an ADR entity. In this regard, the directive directly addresses the issues identified hereinabove in N 9.c (absence of sufficient and adequate information regarding rights and legal remedies), N 9.g (lack of administrative or governmentally funded body dedicated to helping tourists in relation to access to justice or ADR) and N 9.h (lack of cross-border cooperation mechanism between consumer protection bodies).

7. EU Regulation No. 2013/524 on Online Dispute Resolution for Consumer Disputes

- 163 The EU Regulation No. 2013/524¹⁸⁵ provides for the establishment of a European ODR platform facilitating the out-of-court resolution of disputes between consumers and traders online. As to the content of the regulation, reference can be made to Prof. Guinchard's report.¹⁸⁶
- 164 The regulation has a rather limited scope of application. It only covers out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the EU and a trader established in the EU.¹⁸⁷ The term "online sales or service contract" refers to the ordering of goods or services by a consumer on the website where such goods or services were offered.¹⁸⁸
- 165 Despite the limited scope of application, the regulation is of relevance for the protection of tourists, as many tourists today book their holiday (at least partly) on

¹⁸² Art. 14 of the EU Directive No. 2013/11.

¹⁸³ Art. 13 of the EU Directive No. 2013/11.

¹⁸⁴ Recital nos. 52 and 54 as well as Arts. 16 et seq. of the EU Directive No. 2013/11.

¹⁸⁵ Text of the regulation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0524&from=DE>.

¹⁸⁶ Guinchard (FN 2), N 114 et seqq.

¹⁸⁷ Art. 2(1) of the EU Regulation No. 2013/524.

¹⁸⁸ Art. 4(1)(e) of the EU Regulation No. 2013/524.



the internet, e.g. hotel accommodation, guided tours or transport.¹⁸⁹ In this regard, the regulation addresses the issue identified hereinabove in N 9.d (requirement of physical presence for conciliation and mediation). However, non-EU residents will not be able to take advantage of the regulation.

8. EU Directive No. 2015/2302 on package travel and linked travel arrangements

¹⁶⁶ The EU Directive No. 2015/2302¹⁹⁰ sets forth certain provisions in respect of contracts between travellers and traders relating to package travel and linked travel arrangements to be implemented by EU Member States into their national legislation.

¹⁶⁷ The directive applies to packages offered for sale or sold by traders to travellers and to linked travel arrangements. The term "package" refers (amongst others) to a combination of two different types of services for the purpose of the same trip offered at a total price.¹⁹¹ Business travel is, however, excluded from the directive's scope of application.¹⁹²

¹⁶⁸ Importantly, the term "traveller" is not restricted to EU residents.¹⁹³ Thus, the protection offered by the directive does also extend to tourists who are non-EU residents. Equally, the directive does not contain any provisions that would limit its scope of application to travels taking place within the territory of the EU.¹⁹⁴

¹⁶⁹ EU Directive No. 2015/2302 contains provisions on pre- and post-contractual information duties,¹⁹⁵ amendments to travel packages before the start of the package,¹⁹⁶ rights of termination and withdrawal,¹⁹⁷ responsibility for performance of the package,¹⁹⁸ price reduction and damages,¹⁹⁹ as well as protection in case of the organiser's insolvency.²⁰⁰ However, certain issues typical to package travels have been left unaddressed, e.g. no provisions on protection of third parties.²⁰¹

¹⁸⁹ See Guinchard (FN 2), N 33 and 115.

¹⁹⁰ Text of the directive is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2302&from=DE>.

¹⁹¹ Art. 3(2)(b)(ii) of the EU Directive No. 2015/2302.

¹⁹² Art. 1(2)(c) of the EU Directive No. 2015/2302.

¹⁹³ See Art. 3(6) of the EU Directive No. 2015/2302.

¹⁹⁴ Solely Art. 17 restricts the scope of the insolvency protection to organisers established in the territory of the respective EU Member State.

¹⁹⁵ Arts. 5 et seqq. of the EU Directive No. 2015/2302.

¹⁹⁶ Arts. 9 et seqq. of the EU Directive No. 2015/2302.

¹⁹⁷ Art. 12 of the EU Directive No. 2015/2302.

¹⁹⁸ Art. 13 of the EU Directive No. 2015/2302.

¹⁹⁹ Art. 14 of the EU Directive No. 2015/2302.

²⁰⁰ Arts. 17 et seqq. of the EU Directive No. 2015/2302.

²⁰¹ See Guinchard (FN 2), FN 54.



170 Overall, the directive foresees many provisions that strengthen the protection of international tourists, but without directly addressing any of the issues outlined above in N 9. This protection also extends to non-EU residents.

9. *Interim Conclusion on EU Instruments*

171 The combination of EU Directives and EU Regulations addressing issues of substantive as well as procedural law provide international tourists with strong protection in the EU. However, some of this protection does not extend to non-EU residents, meaning that tourists coming from outside the EU are granted less protection.

172 The instruments in place in the EU are not fully transferable onto the Tourism Project. The mandate of the HCCH is, of course, much narrower. In particular, the directives effecting a harmonization of the substantive rights of a tourist fall beyond the scope of the HCCH's mandate.

L. Conclusion

173 There are many international conventions addressing various issues relevant to the protection of tourists (e.g. airline transportation, hotel-keeper's liability, access to courts). Some issues typically encountered by tourists are addressed in these conventions; but certainly not all.

174 Many conventions have failed to gain wide ratification (except for the Montreal Convention). The low number of contracting States severely limits the scope of application of these instruments and thus also the protection provided to tourists.

175 The instruments in place in the EU provide for a strong protection of tourists' rights. However, such protection does often not extend to tourists from outside the EU. Further, considering the HCCH's limited mandate, many EU instruments would not be transferable into a new HCCH convention.



V. ESSENTIAL PRINCIPLES OF RELEVANCE TO THE TOURISM PROJECT

¹⁷⁶ The report shall map out essential principles that are of relevance with respect to the HCCH's mandate and that could further enhance and operationalise the protection of international tourists. The principles will be assessed as to their compatibility with the HCCH's mandate and their (dis-)advantages.

A. *Identification of Principles*

¹⁷⁷ In order to carry out the required analysis, first the principles already touched upon in the course of the previous work on the Tourism Project must be identified. Further, an examination as to additional principles must be conducted.

1. *Relevant Principles from Previous Deliberations and Reports*

¹⁷⁸ The following principles have already been touched upon in the previous work of the Experts and Prof. Guinchard:

- a. Access to courts: Free tourist from obstacles in relation to legal aid and the *cautio judicatum solvi*. This shall be mainly achieved by ensuring that there is no discrimination between tourists and residents of the visited country.²⁰² Further, access to justice should be understood in a broad sense, that is, as well as gaining access to the formal court system, also being able to access alternative dispute resolution mechanisms.²⁰³
- b. Proper information on tourists' rights and remedies: Tourists' protection shall be enhanced by the provision of understandable information on their rights.²⁰⁴ It has been noted that even where information is available on tourists' rights, including in multiples languages, tourists do not seem to be specifically made aware of their rights and legal remedies.²⁰⁵
- c. Government-funded specialised agencies designed to assist tourists: Agencies dealing with tourists and consumers might not be able to provide immediate help, *inter alia* due to language barriers. Thus, some

²⁰² Aide Mémoire of the Meeting of the Experts' Group on the Protection of Tourists prepared by the Chair of the Experts' Group on 3-6 September 2019, N 10.

²⁰³ Aide Mémoire, of the Meeting of the Experts' Group on the Protection of Tourists Prepared by the Chair of the Experts' Group on 3-6 September 2019, N 10.

²⁰⁴ Aide Mémoire of the Meeting of the Experts' Group on the Co-operation and Access to Justice for International Tourists prepared by the Chair of the Experts' Group on 28-31 August 2018, N 19; Aide Mémoire, of the Meeting of the Experts' Group on the Protection of Tourists Prepared by the Chair of the Experts' Group on 3-6 September 2019, N 10.

²⁰⁵ Guinchard (FN 2), N 106.



experts suggested that, where they do not exist, government-funded specialised agencies designed to assist tourists would be required.²⁰⁶

- d. Cooperation mechanisms to facilitate resolution of complaints: A new convention could provide for a co-operation mechanism among suitable bodies facilitating the resolution of complaints.²⁰⁷
- e. Small claim procedures: Simplified procedures designed to deal with disputes of small amounts could enhance protection of tourists.²⁰⁸
- f. Online Dispute Resolution (ODR): The resolution of disputes via an online platform could address the issue of the tourist's lacking physical presence in the country of destination.²⁰⁹ In this regard, the Experts highlighted that the role of service providers may be considered in relation to the establishment of an ODR system.²¹⁰
- g. Access to ADR: Alternative forms of dispute resolution, such as mediation or conciliation, should be accessible to tourists to put forth their complaints against a service provider.²¹¹ In this regard, the Experts highlighted that the role of service providers may be considered in relation to the establishment of an ADR regime.²¹²

2. Further Principles to be considered

¹⁷⁹ As demonstrated by the above list, the Experts have so far already considered a large number of principles that could guide the establishment of a new convention on the protection of international tourists.

¹⁸⁰ In an attempt to identify additional principles, information on further instruments and organisations have been considered, in particular:

²⁰⁶ Aide Mémoire of the Meeting of the Experts' Group on the Co-operation and Access to Justice for International Tourists prepared by the Chair of the Experts' Group on 28-31 August 2018, N 10.

²⁰⁷ Aide Mémoire of the Meeting of the Experts' Group on the Co-operation and Access to Justice for International Tourists prepared by the Chair of the Experts' Group on 28-31 August 2018, N 19.

²⁰⁸ See Guinchard (FN 2), N 67 et seqq.; Aide Mémoire of the Meeting of the Experts' Group on the Co-operation and Access to Justice for International Tourists prepared by the Chair of the Experts' Group on 28-31 August 2018, N 9.

²⁰⁹ See Guinchard (FN 2), N 65 and 114 et seqq.; Aide Mémoire of the Meeting of the Experts' Group on the Co-operation and Access to Justice for International Tourists prepared by the Chair of the Experts' Group on 28-31 August 2018, N 9.

²¹⁰ Aide Mémoire, of the Meeting of the Experts' Group on the Protection of Tourists Prepared by the Chair of the Experts' Group on 3-6 September 2019, N 12.

²¹¹ See Guinchard (FN 2), N 63 et seqq.

²¹² Aide Mémoire, of the Meeting of the Experts' Group on the Protection of Tourists Prepared by the Chair of the Experts' Group on 3-6 September 2019, N 12.



- a. Mercosur joint experts committee on the protection of visitors and consumers (2012);²¹³
- b. The ASADIP (Asociación Americana de Derecho Internacional Privado) Principles on transnational access to justice (Principios ASADIP sobre el acceso transnacional a la justicia);²¹⁴
- c. UN Guidelines on Consumer Protection;²¹⁵ and
- d. Hague Declaration of the Inter-Parliamentary Conference on Tourism (1989).²¹⁶

181 They do, however, not give rise to any additional principles in relation to the protection of international tourists. Rather, these instruments can be used to concretize and further develop the principles already identified above.

182 Yet, one principle that has apparently so far not received any significant attention is the use of technology in the legal service industry: so-called LegalTech. The use of LegalTech can serve to ease access to justice, especially for small amount disputes.²¹⁷

183 Finally, for the sake of clarity, it is noted that the principle of cooperation among judicial authorities will not be addressed specifically. It is inherent in all work of the Hague Conference that there is some form of cooperation among judicial authorities from different jurisdiction. Without such cooperation (e.g. in matters of evidence or enforcement), no form of efficient and effective cross-border dispute resolution would be possible. Naturally, also any future work on the Tourism Project will have to take into account the general principle of cooperation.

²¹³ For more information, see Guinchard (FN 1), FN 313.

²¹⁴ For more information on these principles, see Guinchard (FN 1), FN 313.

²¹⁵ Text of the guidelines available at https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf. See N 5(e) and 5(f) of the guidelines regarding information on rights and availability of effective consumer dispute resolution. Further, N 78 specifically refers to tourism: "*Member States should ensure that their consumer protection policies are adequate to address the marketing and provision of goods and services related to tourism, including, but not limited to, travel, traveller accommodation and timeshares. Member States should, in particular, address the cross-border challenges raised by such activity, including enforcement cooperation and information-sharing with other Member States, and should also cooperate with the relevant stakeholders in the tourism-travel sector.*"

²¹⁶ Text of the declaration is available at <https://www.univeur.org/cuebc/downloads/PDF%20carte/68.%20The%20Hague.PDF>. See in particular principle no. VII: "*To implement, in accordance with the procedures specific to the systems of law of each country, legal provisions in the field of tourist protection, including in particular the ability for tourists to seek effective legal remedy from the national courts in the event of acts harmful to their persons, or property, and in particular the most grievous acts, such as terrorism.*"

²¹⁷ See e.g. The use of technology to widen access to justice, Opportunity overview for the Legal Access Challenge, April 2019, available at <https://legalaccesschallenge.org/insights/the-use-of-technology-to-widen-access-to-justice/>.



B. Assessment of the Principles

184 The principles identified hereinabove will now be assessed as to what extent their implementation is compatible with the HCCH's mandate. *Pro memoria*: The HCCH's purpose is the progressive unification of the rules of private international law.²¹⁸

185 Further, their (dis-)advantages for the protection of tourists will be examined.

1. Access to Justice

186 Ensuring that tourists have non-discriminatory access to legal aid and will not be ordered to pay a security for costs is well within the scope of the HCCH's mandate. This is demonstrated by the Access to Justice Convention that covers these very topics.²¹⁹

187 The principle holds the following advantages for the protection of tourist:

- a. Reduction of obstacles a tourist faces in foreign court proceedings;
- b. Proven track record of implementation of the principle, as evidenced by the Access to Justice Convention; and
- c. The gap currently left by the Access to Justice Convention (limited applicability to out-of-court proceedings)²²⁰ could be closed with a new convention or a protocol to the Access to Justice Convention; thus, there is some flexibility when it comes to the implementation of the principle.²²¹

188 The implementation of this principle might have the following disadvantages:

- a. Based on the experience with the Access to Justice Convention, there is a risk that States will be reluctant to ratify a convention implementing this principle;²²² and
- b. The principle of non-discrimination does not mean that a tourist will actually receive legal aid (or be liberated from the *cautio judicatum solvi*). This still depends on the national civil procedure law and whether the conditions set forth in there are fulfilled.

²¹⁸ Art. 1 of the Statute of the Hague Conference on Private International Law, available at www.hcch.net.

²¹⁹ See hereinabove N 33 et seqq.

²²⁰ See hereinabove N 37.

²²¹ In regard to the option of a protocol, see Aide Mémoire, of the Meeting of the Experts' Group on the Protection of Tourists Prepared by the Chair of the Experts' Group on 3-6 September 2019, N 18.

²²² See hereinabove N 50 and N 61.

- 189 In respect to legal aid, it is important to note that under most national civil procedure laws plaintiffs only qualify for legal aid if they lack the required financial resources for court proceedings.²²³ The interpretation of this requirement has led in certain jurisdiction to the so-called "justice gap", meaning that many people in the middle class are too wealthy to qualify for legal aid, but too poor to pay the average lawyers' fees.²²⁴ Further, certain jurisdiction do not foresee any legal aid for out-of-court proceedings.²²⁵
- 190 Many international tourists belong to the middle class (or higher).²²⁶ Hence, international tourists are typically at risk of falling into the justice gap. Accordingly, even if a non-discrimination principle is implemented, it will effectively not improve the position of the typical international tourist.
- 191 To sum up, the implementation of the principle would only improve international tourists' protection in a limited way. In turn, the inclusion of such principle in a new convention holds the risk of keeping States from ratifying it. Therefore, it seems advisable to address access to justice in a protocol to the Access to Justice Convention, instead of including the principle in a new convention. This way, the principle can be implemented independently from a new convention without risking any negative drawbacks for the future work on the Tourism Project.

2. Alternative Dispute Resolution (ADR)

- 192 Increasing the access of tourists to ADR (such as mediation and conciliation) in order to put forth their complaints against a service provider is perfectly in line with the UN Guidelines on Consumer Protection:

²²³ See Guinchard (FN 2), N 43 and 95 et seqq.

²²⁴ The issue has received wide attention in the media: Fraser, Middle-class injustice: Too wealthy for legal aid, too pinched for 'average' lawyers' fees, available at <https://www.cbc.ca/news/canada/legal-aid-middle-class-1.3476870>; Frank, How Rising Inequality Has Widened the Justice Gap, New York Times, 31 August 2018, available at <https://www.nytimes.com/2018/08/31/business/rising-inequality-widened-justice-gap.html>; Fasnacht, Just "what is" the Justice Gap?, available at <https://floridajusticetechnologycenter.org/just-what-is-the-justice-gap/>; Schläfli, Bei Zivilprozessen zahlt es sich aus, arm zu sein, Solothurner Zeitung, 27 July 2016, available at <https://www.solothurnerzeitung.ch/solothurn/kanton-solothurn/bei-zivilprozessen-zahlt-es-sich-aus-arm-zu-sein-130447884>.

²²⁵ See Guinchard (FN 2), N 94.

²²⁶ See Choudhry/Lew, The New Tourism: the Growth of a New Middle Class and the Expansion of World Tourism, available at <https://people.trentu.ca/~blew/newTourism.pdf>; World Travel & Tourism Council, Domestic Tourism Importance and Economic Impact, available at <https://www.wttc.org/-/media/files/reports/2018/domestic-tourism--importance--economic-impact-dec-18.pdf>, N 1; COMCEC Tourism Outlook 2018, available at <http://www.sbb.gov.tr/wp-content/uploads/2019/06/Tourism-Outlook-2018.pdf>, p. 6; all identifying a growing middle-class as key driver for tourism sector.



"Access to dispute resolution and redress mechanisms, including alternative dispute resolution, should be enhanced, particularly in cross-border disputes."²²⁷

- 193 The main advantages of ADR and increased access to it are as follows:
- a. Costs of ADR procedures are typically lower than the costs of court proceedings;
 - b. ADR procedures are typically faster than court proceedings;
 - c. ADR procedures are less formal, meaning that a tourist is able to participate in such procedures without needing to instruct a lawyer.
- 194 The disadvantages of ADR can be summed up as follows:
- a. Often the participation in an ADR procedure requires physical presence which is particularly an issue for tourists²²⁸;
 - b. The result of a mediation or conciliation usually is a settlement agreement among the participants. The enforcement of a settlement agreement occurs the same way as any other contract, meaning that generally full court proceedings will be required. Thus, mediation or conciliation does not result in an enforceable title like a judgment. This issue has recently been addressed by the UN Convention on International Settlement Agreements Resulting from Mediation (**Singapore Convention**).²²⁹ However, this convention does not apply to the typical dispute a tourist faces.²³⁰
- 195 Increasing access of tourists to ADR procedures surely is a principle worth pursuing in view of the above-mentioned advantages. However, it is questionable to which extent such principle could be implemented in the future work on the Tourism Project considering the scope of the HCCH's mandate. In particular, establishing an ADR system would be beyond the scope of that mandate.²³¹
- 196 However, rules on the enforcement of settlement agreement concluded within the frame of an ADR procedure would fall within the scope of the HCCH's mandate.

²²⁷ UN Guidelines on Consumer Protection (FN 215), N 39.

²²⁸ See hereinabove N 9.d.

²²⁹ Text of the *convention is available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf.*

²³⁰ See Art. 1(2)(a) of the Singapore Convention: "*This Convention does not apply to settlement agreements concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes.*"

²³¹ In this regard, experts have already pointed to the role of external service providers in relation to the establishment of an ADR regime (see hereinabove N 178g).



This would enable future work on the Tourism Project to address the disadvantage of lacking enforceability of ADR procedures.

197 As concerns the issue of lacking physical presence of a tourist in the country of destination, online dispute resolution might provide a solution. This will be addressed in the next chapter.²³²

198 To conclude, the principle of increasing access to ADR for tourist should be considered in the future work on the Tourism Convention. In compliance with the HCCH's mandate, the focus should be put on rules addressing the enforcement of agreements or decisions reached via ADR.

3. Online Dispute Resolution (ODR)

199 The resolution of disputes via an online platform primarily involves negotiation, mediation or arbitration, or a combination of all three. Further to simply providing a platform, ODR can also entail the application of innovative techniques and online technologies to the dispute resolution process.

200 In recent years, several initiatives have shown the potential of ODR.²³³ For example, the Supreme People's Court of China has established three (State-run) internet courts in Hangzhou, Beijing and Guangzhou which are major hubs for e-commerce.²³⁴ The litigation process is conducted solely online, including the service of legal documents, the presentation of evidence, and the actual trial itself which, to comply with principles of trial in person and direct speech principle, rely on an online video system.²³⁵ The average duration of these online trials in Hangzhou in 2017/18 was 28 minutes and the average processing period from filing to trial and conclusion was 38 days.²³⁶

201 Another example is the dispute resolution process implemented by eBay (the online auction company).²³⁷ The eBay Resolution Center was created with the

²³² See herein below N 199 et seqq.

²³³ The United Nations Commission on International Trade Law has already considered possible future work on online dispute resolution in 2010-2016. The relevant documentation is available at https://uncitral.un.org/en/working_groups/3/online_dispute.

²³⁴ Du/Yu, China Established Three Internet Courts to Try Internet-Related Cases Online: Inside China's Internet Courts, available at <https://www.chinajusticeobserver.com/insights/china-establishes-three-internet-courts-to-try-internet-related-cases-online.html>.

²³⁵ Ruehl, China's innovative Internet Courts and their use of blockchain backed evidence, available at <http://conflictoflaws.net/2019/chinas-innovative-internet-courts-and-their-use-of-blockchain-backed-evidence/>.

²³⁶ Du/Yu (FN 234), N 2.

²³⁷ See in general Del Luca/Rule/Rimpfel, eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers, Yearbook on Arbitration and Mediation 2014, available at <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1060&context=arbitrationlawreview>, p. 204 et seqq.; Rule, Designing a Global Online Dispute Resolution System: Lessons Learned from eBay, University of St. Thomas Law Journal 2017, available at



aim of addressing the typical disputes arising out of purchases within eBay's marketplaces, which usually average about USD 70-100 in value. The eBay platform currently handles over 60 million e-commerce disputes annually through a process that enables parties to resolve their problems amicably through direct communication via a free web-based forum^{238,239} Should that process fail, eBay offers a resolution service whereby both parties present their arguments and an eBay member of staff determines a binding outcome under its Money Back Guarantee. The eBay system can serve as an example of best practices in limiting the types of claims and amount of recovery to place parameters to create a low-value framework to facilitate fast-track, fair, and low-cost ODR.²⁴⁰ Today, certain governments consider integrating eBay-style online courts into their domestic legal system.²⁴¹

202 Within the EU, the EU Regulation No. 2013/524 provides for the establishment of a European ODR platform facilitating the out-of-court resolution of disputes between consumers and traders online.²⁴² Under said regulation, online traders are required to provide a link to the ODR platform on their website. If a consumer has an unresolved problem, they are able to notify the trader via the ODR platform. Thereafter, the consumer and the trader may refer the problem to an approved dispute resolution body.²⁴³ However, the trader does not have any obligation to engage in the procedure via the ODR platform.²⁴⁴

203 Most recently, another State-run initiative has become public. the Mercosur adopted the "Plan de Acción para Desarrollo y Convergencia de Plataformas Digitales para Solución de Conflictos de Consumo en los Estados Partes" (Action Plan for the Development and Convergence of Digital Platforms for the Solution of Consumer Conflicts in the States Parties).²⁴⁵ The objective of the plan will be to develop and connect all national digital platforms aimed at resolving disputes between businesses and consumers.

<https://pdfs.semanticscholar.org/059c/f1ef054a7307e33ee45021c111448f2d0f53.pdf>, p. 354 et seq.

²³⁸ eBay uses the services of SquareTrade for this.

²³⁹ See <https://pages.ebay.com/services/buyandsell/disputeres.html>.

²⁴⁰ Del Luca/Rule/Rimpfel (FN 237), p. 206.

²⁴¹ See e.g. eBay-Style online court could resolve smaller claims, available at <https://www.bbc.com/news/uk-31483099>; The rise of the online courtroom, available at <https://www.raconteur.net/risk-management/the-rise-of-the-online-courtroom>.

²⁴² See hereinabove N 163 et seq.

²⁴³ Art. 10(b) of the EU Regulation No. 524/2013 provides that generally the parties' physical presence will not be required for conducting the ADR procedure.

²⁴⁴ See Hobs/Lanzkron, *EU Online Dispute Resolution – All Bark and No Bite?*, <https://www.twobirds.com/en/news/articles/2017/global/eu-online-dispute-resolution-all-bark-and-no-bite>.

²⁴⁵ See the website of Argentina's foreign affairs bureau, <https://www.cancilleria.gob.ar/es/actualidad/noticias/comunicado-conjunto-de-los-presidentes-de-los-estados-partes-del-mercosur>.



- 204 Further, the UNCITRAL Working Group III has carried out quite detailed work on online dispute resolution between 2010 and 2016.²⁴⁶
- 205 Initially, the Working Group envisaged developing a set of procedural rules for ODR.²⁴⁷ At one point, a three-tiered ODR procedure was discussed, which would start with negotiations between the parties and, if unsuccessful, it would be followed by mediation. The final stage would entail arbitration.
- 206 The Working Group, however, faced difficulties in agreeing on the nature of the final phase. In particular, disagreement arose on the question whether arbitration were to be binding on the parties. Crucially, the legal validity of pre-dispute consumer arbitration agreements is treated differently in various jurisdictions. The EU, for example, restricts the validity of such agreements in EC Directive No. 93/13 on unfair terms in consumer contracts and in EU Directive No. 2013/11 on alternative dispute resolution for consumer disputes.
- 207 The Working Group considered developing two different tracks, one ending in a binding arbitration phase and the other one concluding with a non-binding recommendation by a neutral. However, in the end, no consensus could be reached.²⁴⁸
- 208 Eventually, UNCITRAL redefined the mandate of the Working Group. The work finally yielded in the UNCITRAL Technical Notes on Online Dispute Resolution.²⁴⁹ The purpose of the technical notes is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.²⁵⁰ They are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.²⁵¹
- 209 The UNCITRAL Technical Notes on Online Dispute Resolution summarize the advantages of ODR aptly as the following:

"One such mechanism is online dispute resolution ('ODR'), which can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards,

²⁴⁶ The relevant documentation is available at https://uncitral.un.org/en/working_groups/3/online_dispute.

²⁴⁷ UN Doc A/CN.9/WG.III/WP.105, available at <https://undocs.org/en/A/CN.9/WG.III/WP.105>, N 2.

²⁴⁸ For an overview of the drafting process, see Lederer, The UNCITRAL Technical Notes on Online Dispute Resolution – Paper Tiger or Game Changer?, available at <http://arbitrationblog.kluwerarbitration.com/2018/01/11/new-found-emphasis-institutional-arbitration-india/>.

²⁴⁹ Text of the technical note is available at http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.

²⁵⁰ N 3 of the UNCITRAL Technical Notes on Online Dispute Resolution.

²⁵¹ N 5 of the UNCITRAL Technical Notes on Online Dispute Resolution.



*negotiation, conciliation, mediation, facilitated settlement, arbitration and others), and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries."*²⁵²

210 The main advantages of ODR in relation to the issues outlined hereinabove in N 9 can be summed up as follows²⁵³:

- a. The costs for the user are very low, as the simplified procedure does generally not require the engagement of a lawyer; and
- b. The procedure is accessible from abroad, as no physical presence is required.

211 The main disadvantage of ODR is the lacking enforcement mechanism.²⁵⁴ ODR is usually combined with negotiation or mediation which do not end in an enforceable decision.²⁵⁵ Even when combining ODR with arbitration, the issue remains that many jurisdictions consider consumer cases non-arbitrable and would thus not enforce such arbitral award in tourism matters.²⁵⁶

212 The issue of arbitrability was also a crucial factor hindering the work of UNCITRAL. For the future work on the Tourism Project, it will have to be examined whether this obstacle could be overcome by limiting the scope of a future legal instrument to tourism matters. In view of the inaptness of traditional court proceedings to deal with tourist claims, there could be less opposition to arbitration compared to domestic consumer cases. Further, future work could focus on ODR as an additional alternative to court proceedings (thus leaving the tourist always the option of taking a dispute to State courts). This might be considered more in compliance with the rules on arbitrability of consumer disputes in certain jurisdiction.²⁵⁷

213 Implementing ODR in the context of the Tourism Project would thus certainly not be without obstacles. In addition to the issue just described, further obstacles encountered with ODR have been listed by Dr Pablo Cortes in an online paper:

²⁵² N 2 of the UNCITRAL Technical Notes on Online Dispute Resolution.

²⁵³ For a more general analysis of the use of technology in consumer dispute resolution, see Susskind, *Online Courts and the Future of Justice*, Oxford 2019.

²⁵⁴ In relation to unfounded criticism of ODR, see Rose, *Susskind hits back at online court critics*, available at <https://www.legalfutures.co.uk/latest-news/susskind-hits-back-at-online-court-critics>.

²⁵⁵ See hereinabove N 194b.

²⁵⁶ Poudret/Besson, *Comparative Law of International Arbitration*, 2nd ed., N 366.

²⁵⁷ See e.g. Art. 1 of the EU Directive No. 2013/11: "*The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of*



"What are the hurdles for the growth of ODR in the consumer context?"

- *Lack of awareness: Most consumers and traders have not heard of ODR.*
- *Traders do not have incentives for using external ODR. When consumers propose traders to use ODR (e.g. ECODIR) they often refuse as they perceive it as biased entity (i.e. a consumer tool).*
- *Private and for profit ODR providers are mistrusted. The funding of ODR providers by traders may raise issues related to the independence and impartiality of ODR services.*
- *It is difficult to designing ODR processes that consider asymmetric relationships taking into account the needs of repeat-players versus one-time-users.*
- *Applying consumer law and procedural standards to low value disputes*
- *Costs and red-tape: Investment in ODR may not justify economies of scale.*
- *Added cross-border challenges:*
 - *Language barriers*
 - *Complexity of conflict of laws*
 - *Costs*
 - *Enforcement²⁵⁸*

²¹⁴ Considering the HCCH's mandate, the setting up of an ODR platform would certainly go beyond its scope. The focus should rather be put on creating the

the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures." or Art. 1(q) of the EC Directive No. 93/13: "[...] excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."

²⁵⁸ Cortés, What should the ideal ODR system for e-commerce consumers look like? The Hidden World of Consumer ADR: Redress and Behaviour, available at https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf.



required international legal framework or instruments for an ODR platform to be set up and effectively operated by other public or private organizations.

215 In this respect, the enforcement of agreements or decisions reached via an ODR platform could be addressed.²⁵⁹ The current framework of the New York Convention seems inapt (or at least incomplete) to govern ODR.²⁶⁰ The UNCITRAL Working Group III has, for example, considered options of private enforcement in this context.²⁶¹

216 Another option could be the setting up of a soft law instrument establishing certain minimum procedural standards for an ODR procedure in tourism matters. National tourism organizations could build upon such soft law and certify specific ODR providers complying with these minimum standards. Of course, an overlap with the UNCITRAL Technical Notes on Online Dispute Resolution would have to be avoided.

217 Considering ODR's aptness to govern cross-border small claims, this principle should – despite its obstacles – be further considered in future work on the Tourism Project. A new convention or soft law instrument providing the required legal framework could assist tourism organizations in setting up ODR platforms (or certify existing platforms) serving tourists to resolve their disputes online.²⁶²

218 Further, the implementation of ODR could also be combined with the cooperation mechanisms foreseen in the Brazilian Proposal.²⁶³ This might further enhance the use of ODR in tourist cases, as the lack of awareness of ODR among consumers is a significant obstacle in implementing ODR.²⁶⁴

4. Proper information on tourists' rights and remedies

219 Tourists' protection shall be enhanced by the provision of understandable information on their rights and remedies. The Brazilian Proposal foresees in its article 3(1) that each contracting State provides general information to tourists regarding access to alternative procedures and relevant court proceedings.

²⁵⁹ In this regard, there would be no overlap with the work already undertaken by the UN in the area of online dispute resolution. The work of the UN rather focuses on setting out general principles to be implemented in an ODR procedure. See Draft outcome document reflecting elements and principles of an ODR process, 22 December 2015, available at <https://undocs.org/en/a/cn.9/wg.iii/wp.140>.

²⁶⁰ See in detail Seqart/Matthews, Online Arbitration of Cross-border, Business to Consumer Disputes, University of Miami Law Review 2002, available at <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1500&context=umlr>, p. 1111 et seqq.

²⁶¹ See UN Doc. A/CN.9/WG.III/WP.124, available at <https://undocs.org/en/A/CN.9/WG.III/WP.124>.

²⁶² An exemplary list of current ODR providers can be found on www.odr.info/provider-list.

²⁶³ E.g. Art. 4(2) of the Brazilian Proposal.

²⁶⁴ See hereinabove N 213.



- 220 The advantage of furnishing tourists with proper information is obvious. Without awareness of their rights, remedies and recourse to ADR, tourists are less likely to pursue a claim against a service provider. This principle has therefore been implemented in many of the instruments discussed above by putting a duty upon the service providers to furnish their customers with the required information.²⁶⁵
- 221 While the provision of proper information would certainly enhance protection of tourists, it is hard to see how this principle could be brought in line with the HCCH's mandate that focuses on the unification of the rules of private international law. In particular, the existence and the extent of service providers' information duties form part of substantive law and falls thus outside the HCCH's mandate.
- 222 Further, it seems questionable whether placing a duty on the contracting States to provide adequate information – as currently foreseen in the Brazilian Proposal – falls within the HCCH's mandate. At least, the various HCCH Conventions mentioned above do not contain any such provisions. However, one could argue that fostering awareness of the rules applicable and the options available regarding cross-border disputes promotes (at least indirectly) the unification of international private law. This issue could also be avoided by opting for a soft law instrument.
- 223 Thus, when including this principle in a new convention due attention must be paid to remaining within the scope of the HCCH's mandate.

5. Small Claim Procedures

- 224 Today, many legal systems have a simplified procedure in place that is designed to deal with disputes of small amounts. Most prominently, the EU has established a small claim procedure.²⁶⁶ In England and Wales, claims for less than GBP 10'000 are allocated to the small claims track. The case is then heard in a less formal procedure.²⁶⁷
- 225 The main advantages of small claim procedures are as follows:

- a. Lower court costs;
- b. Informal procedure allowing a litigant to appear without a lawyer;

²⁶⁵ See hereinabove N 137, 155 and 169.

²⁶⁶ See hereinabove N 147 et seqq. In respect to issues with the implementation of the EU's small claims procedure, see Guinchard (FN 2), N 124 et seqq.

²⁶⁷ See Part 27 of the Civil Procedure Rules, available at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27>. See Rule No. 27.8 on the conduct of the hearing: "(1) The court may adopt any method of proceeding at a hearing that it considers to be fair. (2) Hearings will be informal. (3) The strict rules of evidence do not apply. (4) The court need not take evidence on oath. (5) The court may limit cross-examination. (6) The court must give reasons for its decision."



- c. Shorter duration of proceedings.

226 The disadvantages of the principle are:

- a. Requirement of physical presence of the claimant at the hearing (although certain small claim procedures foresee that they should generally be conducted without an oral hearing or in case of a hearing via videoconference²⁶⁸);
- b. The proceedings are usually conducted in the official language of the respective court, which often will be a barrier for a tourist²⁶⁹;
- c. The small claim procedures are usually limited to certain amounts in dispute (e.g. EUR 5'000 for the EU small claims procedure) meaning that certain claims of tourists might fall outside of these procedures' scope.

227 It is questionable whether implementation of this principle would still be covered by the scope of the HCCH's mandate. Small claim procedures are generally allocated to a jurisdiction's civil procedure law.²⁷⁰ The unification or harmonization of national civil procedure laws beyond international private law is outside the HCCH's mandate.²⁷¹

228 However, in so far as the principle shall be implemented in order to facilitate access to small claim procedures already existing under a national law, there should be no conflict with the HCCH's mandate. In this regard, the Special Commission even noted the following in relation to the Access to Justice Convention:

*"Subject to further consideration by the Council on General Affairs and Policy of the Hague Conference, the SC suggests that further consideration be given to the possibility of preparing a feasibility study on the provision of enhanced legal assistance in particular categories of cases, such as small and / or uncontested claims."*²⁷²

229 Thus, a mechanism under which litigants would be assisted in making use of a small claim procedure in a foreign jurisdiction (e.g. by exchange between Central Authorities) is covered by the scope of the HCCH's mandate.

²⁶⁸ See hereinabove N 151.

²⁶⁹ See hereinabove N 150.

²⁷⁰ See in this regard recital no. 4 ("*[...] establish common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims.*") and recital no. 7 ("*Many Member States have introduced simplified civil procedures for small claims [...].*") of the EC Regulation No. 861/2007.

²⁷¹ See e.g. Art. 13 of the Judgments Convention explicitly providing that the procedure for enforcing a judgment is generally governed by the national law of the requested State.

²⁷² Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions, 2 to 12 February 2009, available at www.hcch.net, N 65.

230 To sum up, small claim procedures hold many advantages for tourists pursuing a claim against a service provider. However, in view of the HCCH's mandate, implementation of this principle should focus on giving tourists effective access to already existing small claim procedures, rather than establishing a completely new cross-border small claim procedure.

6. Government funded specialised agencies designed to assist tourists

231 Agencies dealing with tourists and consumers might not be able to provide immediate help, *inter alia* due to language barriers. Thus, it was suggested that, where they do not exist, government-funded specialised agencies designed to assist tourists should be established.

232 The issue of immediate help to tourists is expressly addressed in the current draft version of the UNWTO Convention. Art. 2 of the UNWTO Convention foresees a duty of the host State to assist tourists in emergency situations. However, it must be noted that only very basic assistance (e.g. shelter, food, visa requirements, transportation) is covered by this provision.

233 The implementation of this principle should focus on easing tourists' access to justice (court or ADR) in a cross-border setting. This could be interpreted as falling within the scope of the HCCH's mandate – although questionable.²⁷³

234 A permanent body in a host country dedicated to assisting tourists in filing their claims with the competent court or ADR-body would certainly strengthen a tourist's protection.²⁷⁴ A similar approach was chosen under the Access to Justice Convention, under which a transmitting authority shall assist an applicant for legal aid with their application.²⁷⁵

235 This seems, indeed, to be the direction in which the Brazilian Proposal is heading. The Brazilian Proposal foresees that every contracting State designates a competent authority to which a tourist may present a complaint concerning issues relating to tourism service.²⁷⁶ The competent authority shall then refer the tourist to the appropriate institution that provides legal advice or ADR procedures or to the relevant court.²⁷⁷

²⁷³ In relation to the provision of information, see hereinabove N 222.

²⁷⁴ See Guinchard (FN 2), N 134 et seqq. explaining the ECC-Net in place in the EU. Although, the ECC-Net is not specifically designed to help tourists, but rather in a more general manner to support consumers.

²⁷⁵ Art. 6 of the Access to Justice Convention: "*The transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application.*"

²⁷⁶ Art. 4 of the Brazilian Proposal.

²⁷⁷ Art. 6 of the Brazilian Proposal.



236 A disadvantage of this principle would in turn be the costs incurred by the establishment and maintenance of a permanent government body.

237 To conclude, when implementing this principle in future work on the Tourism Project due attention must be paid to remaining within the scope of the HCCH's mandate and avoiding any overlap with the UNWTO Convention.

7. Cooperation mechanisms to facilitate resolution of complaints

238 The resolution of complaints could be facilitated by introducing a co-operation mechanism among suitable bodies. The Brazilian Proposal foresees that every contracting State designates a central authority which is (amongst others) to assist a returning tourist in continuing or starting a complaint procedure in the visited country.²⁷⁸

239 Central authorities tasked with supporting parties in cross-border dispute resolution is well within the scope of the HCCH's mandate, as demonstrated by very similar provisions in the Access to Justice Convention.²⁷⁹

240 The principle has the following advantages:

- a. It supports a tourist in overcoming the language and distance barrier; and
- b. A tourist seems to be more likely to pursue a complaint when having access to a local authority.²⁸⁰

241 The disadvantage of the principle lies in the costs that arise by the establishment and maintenance of a permanent government body, such as Central Authorities.²⁸¹

242 Overall, implementation of the principle would be within the scope of the HCCH's mandate and would enhance tourists' access to complaint procedures.

8. LegalTech

243 In recent years, the use of technology in delivering legal services (**LegalTech**) has significantly risen in popularity. In relation to consumer protection, LegalTech has had considerable success in the area of airline passenger rights. There are many online providers that enable passenger to draft the required claim letters

²⁷⁸ Art. 5(2)(c) of the Brazilian Proposal.

²⁷⁹ Art. 6 of the Access to Justice Convention.

²⁸⁰ This is an assumption based on common sense, not on empirical data.

²⁸¹ See Guinchard (FN 2), N 144 pointing out that the allocation of costs has not been addressed in the Brazilian Proposal.



themselves via an online input mask or to instruct a company to pursue their claim.²⁸²

244 The use of LegalTech can lower the costs of legal services significantly for consumers. It is no secret that in most legal cases the lawyer's fees place the heaviest burden upon a consumer and present the biggest obstacle in pursuing a claim. As established hereinabove in N 188b, legal aid is unlikely to cure this defect in tourists' cases. In turn, LegalTech might do the trick.²⁸³ However, it is also important to note that the use of LegalTech (or at least their regulatory status) is controversial in certain jurisdictions.²⁸⁴

245 Of course, setting up LegalTech tools is far beyond the HCCH's mandate. However, the emergence of such tools seems to be heavily fostered by the unification of legal rules. The calculation is simple: The more people that are covered by a set of rules, the more potential customers for the LegalTech tool and the more data (i.e. court cases) to feed the LegalTech tool.

246 The unification of the substantive legal rules that govern the contracts of a tourist is not within the scope of the HCCH. However, when it comes to unifying certain procedural aspects the HCCH has a role to play.

247 Overall, it seems that a combination of ODR and LegalTech could truly help tourists in pursuing their claims at an affordable price. Future work on the Tourism Project could focus on providing the required harmonization or unification of the legal framework (on an international private law level) for such platforms and tools to emerge.

C. Conclusion

248 When comparing the individual principles with each other, it seems that the biggest potential impact for the protection of tourists can be expected from ODR (in combination with LegalTech). Proper implementation of this principle could truly enable tourists to overcome the biggest obstacles they face when pursuing a

²⁸² See e.g. <https://www.flightright.com/about-us>: "We have programmed our own database that includes more than 80 million data records that are updated daily: strikes, weather information, new court decisions and flight data from across Europe. It recognises within a matter of seconds whether a passenger is entitled to, compensation. The only part of the database that the customer sees is the compensation calculator input mask. As soon as we receive the passenger's authorisation, we start working on enforcing the claim against the airline." See also <https://www.legalfly.eu/infos/your-rights> or <https://www.skylegal.eu/aboutus.php>.

²⁸³ See Pesochinska, Leveraging Legal Technology to Improve Access to Justice, available at <http://www.legalexecutiveinstitute.com/leveraging-legal-tech-access-to-justice/>; Hand, Reviving Access to Justice with Legal Technology, available at <https://www.justis.com/reviving-access-to-justice-with-legal-technology/>.

²⁸⁴ See LegalTech On Trial – Regional German Bar 'Wins Ban' On Contract Platforms, available at <https://www.artificiallawyer.com/2019/10/10/legaltech-on-trial-regional-german-bar-wins-ban-on-contract-platforms/>.



cross-border claim against a foreign service provider (i.e. lack of physical presence in the country of travel and cost of legal representation).

- 249 ODR works best in combination with LegalTech. An example for this is CyberSettle.²⁸⁵ It is an ODR platform that uses a blind-bidding negotiation to settle insurance and commercial disputes. Contending parties submit confidential offers and demands online. Cybersettle then compares the parties' submissions to determine if they are in range of a mutually-acceptable settlement. If not, it prompts the parties to submit their next offer. Neither party sees the other party's offer or demands (double-blind) unless and until a settlement is reached.
- 250 The HCCH's mandate does, however, not cover the setting up of such ODR platforms or LegalTech tools. Therefore, future work on the Tourism Project should rather focus on providing the required legal framework or a common set of standards for such platforms and tools to emerge and be operated effectively in the area of tourist protection.
- 251 For example, future work could be directed towards a convention (or a soft law instrument) setting forth the minimum procedural standards for an ODR procedure in tourism matters. Further, points to be included could be the provision of information in regard to available ODR procedures or the tourists' assistance in the use of an ODR procedure. Finally, the enforcement of an agreement or decision obtained via an ODR procedure complying with these minimum standards could be addressed.
- 252 The positive effect of ODR in combination with LegalTech could be further enhanced by also implementing certain principles contained in the Brazilian Proposal. In particular, the considerations on cooperation mechanism in relation to providing information on available ADR (or ODR) procedures should be considered in this context (while respecting the scope of the HCCH's mandate).

²⁸⁵ See <http://www.cybersettle.com/>.

VI. GROUNDS OF JURISDICTION

253 In this chapter, the potential grounds of jurisdiction for a tourist's claim against a service provider will be assessed under the EU Regulation No. 1215/2012 (**Chapter B.**) and various international conventions, including the Judgments Convention (**Chapter C.**). However, first the relevance of jurisdiction for the protection of tourists will be quickly explained (**Chapter A.**).

A. *Relevance of Jurisdiction Regime for Protection of Tourists*

254 One of the issues faced by tourists pursuing a claim against a service provider is the lack of physical presence in the country of travel and the inadmissibility of commencing and/or pursuing a claim from abroad.²⁸⁶ This issue would be entirely cured if a tourist had the option of commencing and pursuing its claim in its home jurisdiction.

255 The typical bases of jurisdiction, i.e. domicile of the defendant and place of performance of the contract, will usually not give a tourist the option of suing in its home jurisdiction, as the service provider is domiciled abroad and the contract (e.g. hotel accommodation, guided tour etc.) has been performed abroad. Thus, a special basis of jurisdiction is required. A potential connecting factor could be that tourists often qualify as consumers in the sense of international instruments.

B. *Grounds of Jurisdiction under EU Regulation No. 1215/2012*

256 In the European Union, courts assess their jurisdiction in civil and commercial matters under the EU Regulation No. 1215/2012.²⁸⁷

257 The general rule is to be found in article 4 of the regulation:

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

258 Thus, generally, a tourist may sue a service provider domiciled in a Member State only in that Member State. There are several provisions in the regulation that provide for "special jurisdiction".²⁸⁸ While for contractual claims none of the provisions on special jurisdiction would typically provide a ground of jurisdiction at the tourist's domicile, there is room in certain cases (depending on the

²⁸⁶ See hereinabove N 9.d and N 9.f.

²⁸⁷ Text of the regulation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN>.

²⁸⁸ Arts. 7-9 of the EU Regulation No.1215/2012.



circumstances of the individual case) for a tourist to bring a claim based on torts in the courts of its home jurisdiction.²⁸⁹

²⁵⁹ More importantly, the EU Regulation No. 1215/2012 contains special provisions on claims brought by consumers.²⁹⁰ Article 18(1) gives consumers the right to bring proceedings against the other party in the courts where they are domiciled, which can be done regardless of the other party's domicile.²⁹¹ Thus, a tourist resident in an EU Member State could file suit in that Member State against the service provider even if that service provider were domiciled outside of the EU.²⁹²

²⁶⁰ The scope of application of these special provisions is limited to contracts fulfilling one of the following requirements:

- a. Contract for sale of goods on instalment credit terms;
- b. Contract for a loan repayable in instalments credit terms; or
- c. Contract concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.²⁹³

²⁶¹ The last option might, in particular, be fulfilled by online advertisement of the seller (e.g. on its website). It must be apparent from such website and the trader's overall activities that it has manifested its intention to conclude contracts with consumers domiciled in one or more foreign EU Member States.²⁹⁴ The European Court of Justice has provided a non-exhaustive list of relevant factors:

- the international nature of the activities;
- description of itineraries from other Member States to the place where the trader is established;
- use of language or a currency not generally used in the Member State in which the trader is established;
- mention of a telephone with an international code;

²⁸⁹ See ECJ, C-21/76, 30 November 1976, *Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A.* stating that the place of loss may serve as the basis of jurisdiction. However, the loss (e.g. injury) will typically occur in the country of travel. Thus, only in rare cases there will be a ground for jurisdiction in the tourist's home jurisdiction.

²⁹⁰ Arts. 17-19 of the EU Regulation No.1215/2012.

²⁹¹ See Art. 6 of the EU Regulation No. 1215/2012 which provides that Article 18(1) functions as an exception to the general principle, pursuant to which the regulation only applies if the defendant is domiciled in a Member State.

²⁹² However, the courts in the service provider's (foreign) jurisdiction would not be bound by the regulation when it comes to the enforcement of the judgment.

²⁹³ Art. 17(1)(a)-(c) of the EU Regulation No.1215/2012.

²⁹⁴ Cheshire/North/Fawcett, *Private International Law*, 15th ed., p. 294.

- use of a top-level domain name other than that of the Member State in which the trader is established or of a neural top-level domain.²⁹⁵

262 In turn, the mere accessibility of the trader's website in a Member State will not lead to the applicability of the special provisions on consumer jurisdiction.²⁹⁶ Equally, the mentioning of an e-mail address, geographical address, telephone number without an international code, or the use of a language or a currency generally used in the Member State of the trader is not sufficient.²⁹⁷

263 To sum up, many service providers in the tourism sector use their website to target tourists when they are booking their vacation (e.g. airlines, tour operators, hotels). In these instances, the special consumer jurisdiction of the regulation will apply. However, other contracts that a consumer concludes while being abroad are not covered by these special provisions on jurisdiction.²⁹⁸

264 The applicability of the special provisions on consumer jurisdiction is further restricted by the requirement that the contract must have been concluded "*for a purpose which can be regarded as being outside his trade or profession*". Thus, the contract must satisfy the consumer's own needs in terms of private consumption.²⁹⁹ Where a contract is concluded for purposes partly within and partly outside a trade, the special provisions on consumer jurisdiction apply if the business purpose is negligible.³⁰⁰ In terms of tourists, this means that business travel is not covered by the special provisions on consumer jurisdiction.

265 Finally, the special provisions on consumer jurisdiction do not apply to contracts of transport.³⁰¹ An exception is only made for contracts which for an inclusive price provide for a combination of travel and accommodation.³⁰²

266 To sum up, the EU Regulation No. 1215/2012 provides for a place of jurisdiction at the consumer's domicile. This gives tourists the option of pursuing a claim against a service provider in their home jurisdiction. However, this basis of jurisdiction suffers from two significant limitations: i) it only applies to service providers using their websites (or other channels) to target tourists when they are booking their vacation, but not to other contracts concluded during a stay abroad and ii) business travel is excluded.

²⁹⁵ ECJ, C-585/08 and C-144/09, 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller*.

²⁹⁶ Cheshire/North/Fawcett (FN 294), p. 294.

²⁹⁷ ECJ, C-585/08 and C-144/09, 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller*.

²⁹⁸ See Schlosser, EU-Zivilprozessrecht, 3rd ed., Art. 15 N 8.

²⁹⁹ ECJ, C- 269/95, 3 July 1997, *Francesco Benincasa v Dentalkit Srl*.

³⁰⁰ See ECJ, C-464/01, 20 January 2005, *Johann Gruber v Bay Wa AG*.

³⁰¹ For contracts of transport, see herein below N 276 regarding the special rules on jurisdiction under the Montreal Convention and the CVR.

³⁰² Art. 17(3) of the EU Regulation No. 1215/2012.

C. Grounds of Jurisdiction under International Conventions

1. Lugano Convention

267 The Lugano Convention contains rules that are similar to the EU Regulation No. 1215/2012.³⁰³ The following States are bound by the Lugano Convention: European Community, Denmark, Iceland, Norway and Switzerland.³⁰⁴

268 The general place of jurisdiction is at the place of the defendant's domicile.³⁰⁵ But there are exceptions to this rule.³⁰⁶

269 The special rules on jurisdiction for consumer cases foresee a place of jurisdiction at the consumer's domicile.³⁰⁷ However – and in contrast to the EU Regulation No. 1215/2012 –, a consumer can base jurisdiction for its claim on the Lugano Convention only if the service provider is domiciled in a State bound by the Lugano Convention.³⁰⁸ Thus, the Lugano Convention does not provide a consumer with home jurisdiction for its suit against a service provider domiciled outside the States bound by the Lugano Convention.³⁰⁹

270 The applicability of the special jurisdiction rules on consumers is restricted in the same way as under the EU Regulation No. 1215/2012.³¹⁰ The contract concluded must fall within one of the categories listed in article 15(1) of the convention.³¹¹ Thus, other contracts that a tourist concludes while being abroad as well as business travel are not covered by these special provisions on jurisdiction. Further, transport contracts (with the exception of package travel) are excluded.³¹²

³⁰³ Text of the convention is available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN). The Lugano Convention was modelled on the EC Regulation No. 44/2001 which was later revised by the EU Regulation No. 1215/2012. This last revision has, however, not yet been mirrored by the Lugano Convention.

³⁰⁴ See status table of the convention, available at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=7481>.

³⁰⁵ Art. 2 of the Lugano Convention.

³⁰⁶ See Arts. 5 et seqq. of the Lugano Convention.

³⁰⁷ Arts. 15-17 of the Lugano Convention.

³⁰⁸ See Art. 4 of the Lugano Convention, which – in contrast to Art. 6 of the EU Regulation No. 1215/2012 – does not provide that the special rules on consumer jurisdiction function as an exception to the principle that the convention only applies if the defendant is domiciled in a State bound by the convention. Also see Hartley, *Choice-of-Court Agreements under the European and International Instruments*, Oxford 2013, N 13.58.

³⁰⁹ However, Art. 15(2) of the Lugano Convention slightly mitigates this issue by providing the following: "*Where a consumer enters into a contract with a party who is not domiciled in the State bound by this Convention but has a branch, agency or other establishment in one of the States bound by this Convention, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.*" See also Hartley (FN 308), N 13.21 et seqq.

³¹⁰ See hereinabove N 260 et seqq.

³¹¹ See for more details, Hartley (FN 308), N 13.59 et seqq.

³¹² Art. 15(3) of the Lugano Convention.

- 271 To sum up, the Lugano Convention provides a tourist with home jurisdiction for its suit against a service provider. However, this provision only applies if the service provider is domiciled in a State bound by the convention. Further, the same limitations as under the EU Regulation No. 1215/2012 are placed on the applicability of these special rules on consumer jurisdiction.
2. *Protocolo de Santa María sobre Jurisdicción Internacional en Materia de Relaciones de Consumo (1996)*
- 272 The Protocolo de Santa María sobre Jurisdicción Internacional en Materia de Relaciones de Consumo of 1996³¹³ (**Santa Maria Protocol**) provides for rules on international jurisdiction in matters of consumer contracts.
- 273 The Santa Maria Protocol's scope of application only includes certain consumer contracts.³¹⁴ The limitations are somewhat similar to the EU Regulation No. 1215/2012. Thus, many contracts typically concluded by a tourist would be covered by the rules of the Santa Maria Protocol. Considering the rather wide definition of consumer under the protocol, business travel might also be covered.³¹⁵
- 274 Where the protocol applies the general rule is that the courts at the consumer's domicile have jurisdiction.³¹⁶ Further, the consumer may bring its claim also in several alternative forums (e.g. place of performance of the contract).³¹⁷
- 275 However, the Santa Maria Protocol has never entered into force, as its entry into force was conditioned upon the ratification of the Reglamento Común MERCOSUR para la Defensa del Consumidor³¹⁸ which has never followed.³¹⁹

³¹³ Text of the protocol is available at https://www.oas.org/dil/esp/cidip_viii_propuestas_protocolo_de_santamaria_argentina.pdf.

³¹⁴ Art. 1(1) and 1(2) of the Santa Maria Protocol.

³¹⁵ See rule (a) of the Annex to the Santa Maria Protocol: "*Consumidor: Es toda persona física o jurídica que adquiere o utiliza productos o servicios como destinatario final en una relación de consumo o en función de ella. Equipáranse a consumidores las demás personas, determinables o no, expuestas a las relaciones de consumo. No se considera consumidor o usuario aquel que, sin constituirse en destinatario final, adquiere, almacena, utiliza o consume productos o servicios con el fin de integrarlos en procesos de producción, transformación, comercialización o prestación a terceros.*"

³¹⁶ Art. 4 of the Santa Maria Protocol.

³¹⁷ Art. 5 of the Santa Maria Protocol.

³¹⁸ Art. 18 of the Santa Maria Protocol: "*La tramitación de la aprobación del presente Protocolo en el ámbito de cada uno de los Estados Partes, con las adecuaciones que fueren necesarias, sólo podrá iniciarse después de la aprobación del "Reglamento Común MERCOSUR para la Defensa del Consumidor" en su totalidad, incluídos sus anexos, si los tuviere, por el Consejo del Mercado Común.*"

³¹⁹ De Aguirre/Alzogaray, Consumidor Turista y su Protección Internacional en el Uruguay de Hoy, in: A Proteção Internacional Do Consumidor Turista E Visitante, available at <https://www.justica.gov.br/seus-direitos/consumidor/Anexos/a-protecao-internacional-do-consumidor-turista-e-visitante-2014.pdf>, p. 315: "*Por último corresponde recordar que el Protocolo de Santa María,*



3. Summary of Conventions already covered in Chapter IV.

²⁷⁶ As has been elaborated above, some international conventions pertaining to the protection of tourist contain rules on jurisdiction. Namely:

- a. The **Minsk Convention**³²⁰ provides generally for jurisdiction of the court at the defendant's domicile.³²¹ While there are certain exceptions to this principle, there are none which would be specifically relevant to a tourist's suit against a service provider.³²²
- b. According to Art. 21 of the **CVR**, a tourist may file its claim against a service provider (amongst others) with the court at the place of departure or of destination.³²³ Thus, in most cases, a tourist will be able to file suit with the courts in its home jurisdiction.
- c. The **Montreal Convention** contains rules of jurisdiction which in most cases enable a tourist to file suit against a service provider in its home jurisdiction.³²⁴

However, the Montreal Convention does – in contrast to the Lugano Convention, the EU Regulation No. 1215/2012 and the CVR³²⁵ – not contain any rules on the enforcement and recognition of foreign judgments. The advantage of home jurisdiction will be short-lived if the eventual judgment cannot be enforced in the defendant's jurisdiction. Yet, this might be less of an issue when litigating against air transport companies because some of their assets (e.g. aircrafts) will usually be (temporarily) located in the tourist's jurisdiction giving the opportunity to request an attachment order for these assets.

4. Basis of jurisdiction under Judgments Convention

²⁷⁷ As explained above,³²⁶ a judgment is only eligible for recognition and enforcement under the Judgments Convention if one of the bases for jurisdiction of the originating court contained in Art. 5 of the convention is fulfilled. In relation to

no ha podido entrar en vigor dado que su aprobación por los Estados ha sido condicionada, de acuerdo al art. 18, a la aprobación por el CMC del denominado Reglamento Común del Mercosur para la Defensa del Consumidor, la que por diferencias entre los Estados no ha podido concretarse; razón por la cual correspondería plantear la eliminación de esta disposición que se ha transformado en un obstáculo para la aprobación del Acuerdo." See also Filho/Lixinski/Giupponi, The Law of MERCOSUR, Bloomsbury Publ. 2010, p. 344.

³²⁰ See hereinabove N 95 et seqq.

³²¹ Art. 20(1) of the Minsk Convention.

³²² See Art. 20(2)-(3) of the Minsk Convention.

³²³ See hereinabove N 121 et seqq.

³²⁴ See hereinabove N 103 et seqq.

³²⁵ Art. 21(3) of the CVR.

³²⁶ See hereinabove N 68 et seq.



typical tourist scenarios, there is no evident basis for jurisdiction under this provision that would allow for enforcement of a judgment obtained by a tourist in its home jurisdiction.

278 In particular, Art. 5(1) of the Judgments Convention does not foresee a special basis of jurisdiction for consumer cases. Rather the opposite is true, considering Art. 5(2) of the Judgments Convention that restricts the available bases of jurisdiction for the enforcement of a judgment against a consumer. However, this provision only concerns the enforcement of a judgment against a consumer, not the enforcement requested by a consumer.

279 To sum up, the Judgments Convention does not create the required enforcement regime for a tourist to sue in its home jurisdiction and then enforce such judgment in the service provider's jurisdiction.

D. Conclusion

280 If tourists have the option of suing a service provider in their home jurisdiction, many of the issues typically faced by a tourist as outlined above in N 9 would disappear. There are several international conventions that enable a tourist to bring suit in its home jurisdiction in certain circumstances. However, it is important to note that the benefit of home jurisdiction is of little value if the eventual judgment is not enforceable in the service provider's jurisdiction.

281 The inclusion of jurisdiction rules in a new convention that would enable a tourist to bring suit in its home jurisdiction could cause significant controversy.³²⁷ This is evidenced by earlier conventions. For example, the 2005 Hague Convention on Choice of Court Agreements does not apply to consumer cases.³²⁸ Although not excluding consumer cases from its scope of application, the Judgments Convention abstains from providing a special basis of jurisdiction relating to consumer cases.³²⁹ In this context, it is worth keeping in mind that the Lugano Convention as well as the EU Regulation No. 1215/2012 contain several limitations when it comes to the special rules on consumer jurisdiction, also limiting their applicability in relation to claims of tourists.

³²⁷ Filho/Lixinski/Giupponi (FN 319), p. 344, stating in relation to the Santa Maria Protocol: "*Perhaps the subject, special rules on consumer jurisdiction, is a particularly controversial issue, as the decade-long work of the Hague Convention on General Jurisdiction and Choice of Forum Clauses may indicate, because in the end, the 2005 Hague Convention excluded the special consumer forum from its scope in order to reach consensus.*"

³²⁸ Art. 2(1)(a) of the 2005 Hague Convention on Choice of Court Agreements.

³²⁹ See Art. 5(1) Judgments Convention. Art. 5(2) Judgments Convention further restricts the available bases of jurisdiction for the enforcement of a judgment against a consumer.



²⁸² Finally, it is worth noting that the Council has already confirmed that the Permanent Bureau shall continue its work on the Jurisdiction Project.³³⁰ A meeting of the experts is scheduled for 18 to 21 February 2020. The scope of the Jurisdiction Project is still quite open.³³¹ Thus, it might be worth considering whether issues of jurisdiction would be better addressed within the Jurisdiction Project; and thus left excluded from the Tourism Project.

³³⁰ Conclusions and Recommendations of the Council on General Affairs and Policy, 5 to 8 March 2019, available at www.hcch.net, N 5

³³¹ See description of the Jurisdiction Project on the HCCH website, available at <https://www.hcch.net/de/projects/legislative-projects/jurisdiction-project>: "[...] the question of jurisdiction: on which grounds should the parties to a civil or commercial dispute be able to seise the courts of a certain State; on which grounds can a State exercise jurisdiction in civil and commercial matters; how can harmonised rules in this area reduce the risk of parallel litigation in multiple States?".



VII. CONCLUDING REMARKS

- 283 The analysis of existing HCCH Conventions and other international instruments has shown that, while these conventions address certain issues typically faced by tourists, there are still many issues left unaddressed. Further, the territorial scope of application of the conventions is often limited due to the low number of contracting States.
- 284 Thus, the current international legal framework leaves a significant gap in relation to the protection of tourists. Most significantly, the requirement of physical presence to conduct ADR and/or court proceedings as well as the burden placed on a tourist by having to instruct a (foreign) lawyer are not addressed in an adequate manner.
- 285 While installing a jurisdictional system enabling a tourist to sue a service provider in its home jurisdiction would certainly address these issues, this approach has two major drawbacks: (i) there will likely be significant resistance against such jurisdictional rules which could limit the number of ratifying states and (ii) home jurisdiction is of little value if an eventual judgments cannot be enforced in the service provider's jurisdiction.
- 286 Furthermore, ensuring that tourists will not be discriminated against in relation to legal aid is unlikely to increase their access to foreign courts or ADR providers. As the majority of tourists forms part of the middle class, they are likely to fall into the justice gap, against which principles of non-discrimination do not protect.
- 287 The analysis of the various principles has shown that the two main issues faced by tourists could be most effectively addressed by the implementation of online dispute resolution (ODR) in combination with LegalTech. Considering the scope of the HCCH's mandate, the focus should be put on providing the required legal framework for ODR platforms or LegalTech tools. In particular, the enforceability of agreements and decisions reached via ODR must be ensured. Further, an instrument setting forth certain minimum standards could also be an option.
- 288 To conclude, future work on the Tourism Project should focus on providing the required legal framework for ODR platforms (and LegalTech tools) to emerge and operate effectively in the area of tourist protection. This can be complemented by certain principles included in the Brazilian Proposal, such as a cooperation mechanism ensuring that tourists are properly informed about the available ODR options.