

<b>Title</b>	<b>Report on the Tourists and Visitors (ODR) Project</b>
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<b>Author</b>	PB Chair of the Experts' Group on the Tourists and Visitors (ODR) Project
<b>Agenda Item</b>	Item III.1
<b>Mandate(s)</b>	C&D No 4 of CGAP 2020
<b>Objective</b>	To report on the Tourists and Visitors (ODR) Project and convey the conclusions and recommendations of the third meeting of the Experts' Group (5-9 October 2020)
<b>Action to be Taken</b>	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action/Completion <input type="checkbox"/> For Information <input type="checkbox"/>
<b>Annexes</b>	Annex I: <i>Aide-mémoire</i> of the third meeting of the Experts' Group on the Tourists and Visitors (ODR) Project Annex II: list of participants of the third meeting of the Experts' Group on the Tourists and Visitors (ODR) Project Annex III: Draft Outline – Practical Guide to Access to Justice for International Tourists and Visitors, with a Focus on ODR Annex IV: IFTTA Contribution
<b>Related Documents</b>	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; Prel. Doc. No 3 for CGAP 2019; and Prel. Doc. No 1 for CGAP 2020

# Report on the Tourists and Visitors (ODR) Project

## I. Introduction

- 1 From 5 to 9 October 2020, the Experts' Group on the Tourists and Visitors (ODR) Project (EG) met via videoconference. This third meeting of the EG was attended by 35 experts, representing 14 Member States, one Regional Economic Integration Organisation and four Observers, as well as members of the Permanent Bureau (PB) of the HCCH. The list of participants is included as Annex II.
- 2 At its 2020 meeting, the Council on General Affairs and Policy (CGAP) invited the convening of this third meeting of the EG with a focus on determining the necessity, desirability and feasibility of a soft law instrument on matters relating to online dispute resolution. The EG was asked to report to CGAP at its 2021 meeting.<sup>1</sup>
- 3 The *aide-mémoire* of the Chair is included as Annex I and provides an overview of the deliberations of the EG, including consideration of further work.

## II. Conclusions and Recommendations

- 4 The EG concluded that the development of a "Guide" may provide useful assistance to tourists and visitors in pursuing claims. The Guide would explain how existing HCCH Conventions and Principles may be relevant to the resolution of claims by international tourists and visitors (including general references to other relevant instruments); and list and describe, without any value judgment, ODR platforms that may be used by international tourists and visitors, by providing factual information, on the basis of specific features identified by the EG, that could assist tourists and visitors in assessing which platform may suit their needs.
- 5 The EG invited the PB to prepare, subject to available resources, a detailed outline of such a "Guide" and to circulate it to the members of the EG for comments, in advance of CGAP 2021.
- 6 The EG invites CGAP to take note of the *aide-mémoire* contained in Annex I and endorse the PB's development of the Guide per the Chair's oral report.

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<sup>1</sup> See C&D No 4 of CGAP 2020.

## **ANNEXES**

## **Annex I – Aide-mémoire of the third meeting of the Experts’ Group on the Tourists and Visitors (ODR) Project**

### **I. Introduction**

- 1 At its meeting of 3 to 6 March 2020, the Council on General Affairs and Policy (CGAP) of the HCCH mandated the Permanent Bureau (PB) to convene an additional meeting of the Experts’ Group on the Tourists and Visitors Project (EG) (para. 4 of the Conclusions and Decisions (C&D) of CGAP 2020). CGAP “encouraged the Experts’ Group to focus its work, at least initially, on the necessity, desirability, and feasibility of a soft law instrument on matters relating to online dispute resolution.”
- 2 The first meeting of the EG took place from 28 to 30 August 2018 and the second meeting from 3 to 6 September 2019, in The Hague. The third meeting was held virtually from 5 to 9 October 2020, arranged by the PB in The Hague. The EG recognised Andre Stemmet, Counsellor (Legal) of the South African Embassy to the Kingdom of the Netherlands, as its continuing Chairperson. Experts from Argentina, Brazil, Canada, Chile, the People’s Republic of China, Costa Rica, Ecuador, the European Union, France, Greece, Mexico, Serbia, South Africa, Switzerland, the United Kingdom, the United States of America and Venezuela participated, with the International Association of Consumer Law, the International Forum of Travel and Tourism Advocates, the Leisure Industries Section of the International Bar Association and the United Nations Commission on International Trade Law (UNCITRAL) participating as observers.
- 3 The EG benefitted from comments submitted prior to the meeting by several States. The deliberations also benefitted from the “Report on International Instruments and Principles Relevant to the Tourism Project as well as Possible Ground of Jurisdiction for Matters Relating to International Tourists” that was prepared by the consultant, Dr Nino Sievi.

### **II. Deliberations**

#### **1. Summary of objectives and scope: Preliminary discussion on the mandate of the EG and the anticipated outcome of the meeting**

- 4 The experts agreed that the third meeting of the EG should clearly centre its deliberations on the mandate given by CGAP 2020, including a discussion of the necessity and desirability – in addition to feasibility – of a new instrument in this area. It was noted that the terminology of “Online Dispute Resolution” (ODR) could embrace a range of practices, and it would be important for the Experts’ Group Meeting (EGM) to clarify what this term means for the purposes of its discussion. It would also be important to have a better understanding of the specific issues and problems of international tourists. The Chair affirmed that the EGM should consider the necessity, desirability, and feasibility of a soft law instrument concerning ODR matters related to tourists / visitors, with a view to making a clear set of recommendations to CGAP 2021.

#### **2. Recent developments in various jurisdictions relevant to access to justice / protection of tourists and visitors**

- 5 The Chair clarified that an assessment on necessity could result from the contributions of the experts in relation to notable recent cross-border cases in their respective jurisdictions and in regional and international jurisdictions, and the volume of such cases where such data exists or was accessible; and from any additional observations as to gaps in existing instruments.
- 6 A number of experts noted trends in data that were related to the current COVID-19 pandemic (*e.g.*, an increase in particular types of online or general consumer claims related to travel / tourist-

related services). Other experts however indicated either that no data regarding consumer disputes was available in their jurisdictions or that there were very few such cases.

- 7 Experts further made observations with respect to gaps in existing instruments, as had also been described in the previous consultant's reports. In particular, it was highlighted by some experts that there was often an information gap resulting in a general need for the dissemination of basic information to tourists / visitors as to their rights and the dispute resolution services available to them. It was also noted by some experts that foreign tourists / visitors often would not have the same access to dispute resolution mechanisms (access to justice) as those residing in a given country, and / or may face barriers with respect to establishing jurisdiction and determining the applicable law for their claim in an accessible venue, in particular in relation to small claims / micro-damages. Moreover, as presented in some statistics shared by a few experts at the meeting, it could take long periods for even smaller claims to be resolved using the judicial system; for example, up to nine years for tourism-related claims for several hundred US dollars. In one jurisdiction, consumer disputes – including those related to tourism – could be settled using an online platform on average in less than a week by using an online platform. The great advantages of “digitalisation” in this area were highlighted.
- 8 Some experts set forth the view that existing mechanisms may be adequate, and were not convinced of the necessity / desirability of a new international dispute resolution-related instrument, based in particular on other ways that many tourists / visitors may already be able to resolve their claims (*e.g.*, through travel insurance or credit card guarantees). It was also noted by an expert that there was no reason why litigation by tourists / visitors should be advantaged, *e.g.*, by dispute settlement mechanisms free of charge, and that the problems of access to justice identified in relation to tourists / visitors were not tourism-specific, but the same for all micro-claims, which would advocate for a holistic approach of all consumer disputes. Others however were of the view that the focus should be on international tourists only. Some experts noted the need to consider tourists / visitors in particularly vulnerable situations, *e.g.*, those travelling for family reasons.

### **3. Existing ODR and Alternative Dispute Resolution (ADR) systems**

- 9 In this segment, Dr James Ding, Commissioner of the Inclusive Dispute Avoidance and Resolution Office of the Department of Justice of the Hong Kong SAR of the People's Republic of China, gave an overview of the Department's COVID-19 ODR Scheme, as well as the APEC Collaborative Framework for ODR of Cross-Border Business-to-Business Disputes. A presentation on “Legal Tech” and its possible application in the context of ODR was also made by the consultant.
- 10 Experts commented on the desirability of some key attributes of existing ODR business-to-consumer systems and ADR business-to-consumer systems, based on two charts on existing systems and their attributes developed by the PB, as well as the APEC Collaborative Framework, the COVID-19 ODR Scheme of the Hong Kong SAR, the Brazilian “consumidor.gov.br” platform for the online resolution of consumer disputes, and other systems. An expert also shared that the European Consumer Centres Network (ECC-Net) was currently at the early stages of an exploration of expanding the service to third countries based on reciprocal arrangements. Some experts referred to the several examples of existing mechanisms and available ODR platforms as evidence of the limited necessity of additional instruments, while others expressed concerns about the lack of interoperability or of minimum common standards across platforms, regions and systems, and how that constitutes an obstacle for tourists / visitors to access justice.
- 11 The Chair summarised, in a non-exhaustive fashion, the features of a number of the existing ODR systems as highlighted by some experts, which might be taken into account if it was decided that

a new instrument in this area would be developed. It was noted by some experts that the information gap for tourists / visitors, even if various relevant schemes exist and are working well, could be important to address. A number of experts noted that any system of ODR principles / norms in this area should also include attributes such as accessibility (including in relation to language, disability, information access, time zones), should not “stop at national boundaries” nor should it discriminate between nationals and non-nationals. Another attribute identified as important by some experts was the possibility of clearly identifying a procedure that would be applicable to any ODR system, and, in particular, how it would work in practice. One example, proposed in the UNCITRAL Technical Notes, would be a tiered, time-limited pattern of first negotiation, then mediation (if necessary), and then arbitration (if necessary), although this method may not be universal. It was considered key by a number of experts that any system should be voluntary and by agreement, thereby avoiding or resolving issues of jurisdiction, applicable law and enforcement. It was further noted by some experts that it should primarily deal with contractual disputes between traders and tourists / visitors. In the case of the APEC Collaborative Framework, it was clarified that the resulting award would be eligible for recognition and enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, preference was expressed by some experts for any system or ODR principles / norms that were efficient and self-executing in terms of how the outcome would be enforced. It was noted by some experts that it would likely be desirable to put a limit on the value of relevant claims. The consultant noted that an increase in the levels of similarity among different systems / platforms across various jurisdictions would be helpful in facilitating access to justice for international tourists, and such similarity could also give an impetus to the development of legal tech in this field. Finally, some experts were of the view that any system should lead to a final resolution of the dispute. Other experts emphasised that some consumer rights, including having recourse to a court-based solution, could not be disposed of through ODR. In the end, some experts recalled that while these attributes might be *desirable* for a new instrument, it still remained to be decided whether it was *necessary* and *feasible* that the HCCH does work in this area.

#### 4. Consideration of a soft law instrument on matters relating to ODR

- 12 Experts proceeded to consider whether existing soft law instruments, and in particular the UNCITRAL Technical Notes on ODR, are relevant and sufficient as frameworks / guidelines for the on-line resolution of cross-border disputes affecting tourists / visitors. The expert from Serbia also presented information on a new online ADR / ODR dispute resolution system, with seven participating nations in the Balkan region. Users may select their mediator online, and the system also employs facilitative AI.
- 13 Mr Jae Sung Lee of UNCITRAL presented an overview of the substance of the Technical Notes and a short history of their development. UNCITRAL's work on an ODR project was deemed necessary given the sharp increase of online cross-border transactions. He explained that the mandate of the UNCITRAL working group was changed in the course of the development of the Notes, in order to develop a non-binding descriptive document rather than another type of instrument, because of the challenges raised by the diversity of consumer laws in various jurisdictions. The Notes are intended for use “in disputes arising from cross-border low value sales or service contracts concluded using electronic communications” (para. 5). The Notes have been taken up by some arbitration bodies, and served as a good basis on which to elaborate the APEC Collaborative Framework and the COVID-19 ODR Scheme of the Hong Kong SAR, as reported by Dr James Ding. It was noted by a number of experts that the Notes were not sufficient in the instant case and would have to be supplemented at the international level to fill a range of gaps to ensure a framework for potential cross-border ODR mechanism(s) in relation to tourists / visitors. Several other experts

noted that the difficulties that had been experienced by UNCITRAL in this area highlighted the challenges there would be for the HCCH to agree on a soft law instrument on tourism covering issues such as minimum standards.

- 14 The EG then discussed possible matters that could be addressed in a soft law instrument relating to ODR under the auspices of the HCCH. An expert from Brazil shared a presentation on a range of possible desirable features including, for example, that an instrument: should avoid issues of jurisdiction, applicable law and enforcement, but follow a model of voluntary agreement and incentives for enforcement; should include minimum procedural standards; would apply to tourists / visitors specifically, and not embrace all consumers; should be supplemented with guidelines for best practices in international cooperation in this area, also involving a possible international network of national contact points; should address business-to-consumer contractual disputes (and exclude business-to-business disputes); should ensure fair, transparent, impartial treatment of all tourists / visitors, and address language and other barriers to access; and other suggestions.
- 15 Some experts noted that a soft law instrument with minimum common standards may help to increase the similarity of standards among systems, improving predictability, and enhancing regularised access to justice for tourists / visitors from around the world. Furthermore, the different existing platforms globally could be connected by a web of designated contact points (*e.g.*, the designation of existing authorities) in each country, which could also fill the information gap. It was clarified that there should be no duplication or cost implications of, *e.g.*, developing an international ODR system / platform *per se*. An expert noted that only the development of a legal framework and the designation of contact points were being suggested.
- 16 Other experts raised issues of the necessity and feasibility of developing a soft law instrument under the auspices of the HCCH, and an expert suggested that one option might be the development of a Guide to Good Practice in this area aimed in particular at tourists / visitors themselves, with two components. First, a mapping exercise of existing HCCH Conventions and how they might apply to resolution of claims by tourists / visitors. Second, a mapping of existing ODR resources which may be available to tourists / visitors presently, and their various relevant features. The PB noted that while ODR for cross-border disputes of a civil and commercial nature would fall squarely within the mandate of the HCCH, the Organisation has little experience in ODR to date, so such a Guide with comments on a list of pre-established features of the platforms could build further knowledge in this area. A number of experts agreed that such a Guide could be helpful.
- 17 The consultant, based on his previous analysis of the limited utility of these Conventions to meet the practical needs of tourists / visitors, raised doubts as to the helpfulness of information on the HCCH Conventions for tourists / visitors, as non-lawyers. He suggested that a “central directory” on ODR, as proposed in a second part of the Guide might, however, be very helpful, in particular in overcoming the existing information gap in particular. Other experts reaffirmed that basic explanations in layperson terms on existing Conventions would be useful, noting that it could help promote the adoption of HCCH instruments by States; they also reaffirmed their view that providing tourists / visitors with basic explanations on the fundamental characteristics of ODR platforms would help them to overcome the challenges of cross-border disputes and thus serve the goal of ensuring adequate access to justice for international tourists.

## 5. Consideration of further work

- 18 The Chair noted that it would not be necessary for the experts to examine the merits of a binding versus a non-binding instrument, as it had been decided to proceed with a non-binding instrument, if further work was to be undertaken. Rather, he posed the following questions to the EG:



I. Is there consensus to develop an HCCH soft law instrument designed to set standards for ODR Platforms in relation to claims by tourists / visitors? And if so, which type of claims should the instrument cover, and what are the best practices / standards in relation to these claims. The nature of such an instrument could be HCCH Principles or a Model Law, depending on the addressee (Legislator or Operator).

II. Is there consensus to develop a “Practical Handbook / Guide” (name TBD) consisting of two parts: (a) to explain, in layperson’s terms, how existing HCCH Conventions and Principles may assist tourists / visitors with their claims; (b) to identify relevant ODR platforms and commenting on their relevant features in relation to claims by tourists / visitors?

- 19 The Chair noted that while option II. may not strictly meet the standard of a soft law instrument, it may nonetheless provide useful practical guidance to international tourists / visitors, and in this way serve to enhance their protection and access to justice.
- 20 The majority of experts expressed the view that, in light of the discussion of the previous days, and of past meetings of the EG, it would be most feasible and fruitful to proceed with the second option, given the lack of consensus to proceed with the first option.
- 21 The experts proceeded to discuss in more detail what would be included in such a “Practical Handbook / Guide”, aimed at tourists / visitors, and in particular providing them with useful information on existing systems to facilitate their access to justice in cross-border disputes. Some experts acknowledged that while the first section of a “Practical Handbook / Guide” on “regular” legal instruments in this area should focus on HCCH instruments, it could include a mention of regional instruments, if these were to be considered helpful for certain tourists / visitors (as already mapped in Dr Sievi’s report). A number of experts suggested that both private and governmentally provided ODR systems should be included, while others noted that private ODR mechanisms might be most relevant and appropriate for this exercise. If a mandate is given by CGAP to develop this tool, the PB would seek to collaborate with other international organisations working in the field of tourism protection, as well as relevant industry / NGO groups.
- 22 With respect to the possible features of the ODR systems that could be taken into consideration when listing ODR platforms in such a “Practical Handbook / Guide”, the Chair summarised the main features, as drawn from the discussion of the EGM over the previous days (in no order of priority, and notwithstanding further drafting improvements / refinements in the description / categorisation of such features):
  - Accessibility (*e.g.*, technical requirements, language, disability, information access, time zones / internationally accessible)
  - Transparency and fairness of system (*e.g.*, qualifications of the neutral, possibility to have outcome reviewed, etc.)
  - Non-discrimination between nationals and non-nationals (*e.g.*, requirements for authentication, etc.)
  - Indication of procedure, and, in particular, how it would work in practice (*e.g.*, cost, time frames of procedure; system use of AI; whether it follows a tiered, time-limited pattern of first negotiation, then mediation (if necessary), and then arbitration (if necessary))
  - Voluntary and by agreement, thereby avoiding or resolving issues of jurisdiction, applicable law and enforcement
  - Scope of contractual claims (and possibly others)



- Value of claims
- Execution and enforcement of the outcome
- Indication of whether they lead to a final resolution of the dispute
- Indication on information ethics (including on data protection)
- What law would be applicable to the resolution of the dispute
- Oversight, good governance of the system and rates of compliance with the dispute outcomes

23 Some experts noted that the use of an ODR system should not have the effect of depriving tourists and visitors of their non-disposable rights, including their right to have recourse to a court-based / formal justice solution. An expert suggested that the “Practical Handbook / Guide” could provide useful and accessible definitions of arbitration, mediation and conciliation, and another expert shared the view that it should avoid encouraging tourists to make complaints that could be considered “frivolous” and therefore potentially injurious to smaller traders. Several experts made the point that such features (as described above) should not be seen to set up minimum standards for any platforms or to imply a value judgment about the various ODR systems or their features. The Chair confirmed that factually listing the nature of these features would not imply an endorsement in any form. The Secretary General further clarified this understanding and that the objective would be to provide value-neutral information to tourists / visitors with respect to as many (diverse) systems around the world as possible that could be helpful to them in solving cross-border disputes, building on the list of ODR systems already identified in the Charts prepared by the PB for the EGM. He further noted that the concern raised that such a list of ODR systems may quickly become outdated was an important point, and there would have to be further thought invested to find ways to keep such an inventory updated. The Secretary General noted that, however, from an institutional perspective, the engagement of the HCCH with information on global ODR platforms and sponsoring organisations will build knowledge at the HCCH related to ODR and may open doors to cooperation with such organisations in this field.

24 With respect to documentation which might be helpful for the 2021 meeting of CGAP, in order to take a decision on this proposal, the EG invited the PB, subject to available resources, to develop a draft outline of such a “Practical Handbook / Guide” (*e.g.*, a table of contents for an eventual instrument), aimed at facilitating access to justice for international tourists / visitors. The draft outline would be first circulated to members of the EG for comment in advance of the PB sharing the document with CGAP 2021.

## 6. Conclusions and recommendation to CGAP

25 The EG did not reach a conclusive consensus on “the necessity, desirability, and feasibility of developing a soft law instrument on matters relating to online dispute resolution” of claims by international tourists and visitors. It did, however, conclude that the development of a “Guide” may provide useful assistance to tourists and visitors in pursuing such claims. The “Guide” would consist of two parts. The first part would explain, in layperson's terms, how existing HCCH Conventions and Principles may be relevant to the resolution of claims by international tourists and visitors (general references to other relevant instruments may be included). The second part would list and describe, without any value judgment, ODR platforms that may be used by international tourists and visitors, by providing factual information, on the basis of specific features identified by the EG, that could assist tourists and visitors in assessing which platform may suit their needs.

- 26 The EG invited the PB to prepare, subject to available resources, a detailed outline of such a “Guide” and to circulate it to the members of the EG for comments, in advance of CGAP 2021. Updated information on the status of the work of the PB in this regard will form part of the Chair’s report to CGAP 2021, in order for the latter to make an informed decision.

## Annex II – Meeting Attendance

<b>Members</b>	<b>Argentina</b>	Juan José Cerdeira	Professor of Private International Law	Universidad de Buenos Aires
	<b>Brazil</b>	Tatiana Cardoso Squeff	Professor of the Postgraduate Program in Law and Associate Professor of International Law	Federal University of Uberlândia, Brazil
		Alexandre Carneiro Pereira	Coordinator of Institutional Relations	National Consumer Secretariat, Ministry of Justice and Security
		Fabiana Arazini Garcia Kanadoglu	Head of the Division for International Legal Cooperation	Ministério das Relações Exteriores
		João Grandino Rodas	Professor of Private International Law	University of Sao Paolo
		Cláudia Lima Marques	Professor of PIL	Universidade Federal Do Rio Grande Do Sul
		Luiz Otávio Ortigão de Sampaio	Counsellor	Embassy of Brazil
	<b>Canada</b>	Manon Dostie	Section du droit privé international, Secteur du droit public	Department of Justice Canada
		Valérie Simard	Counsel	Department of Justice Canada
	<b>Chile</b>	Sebastián Leonardo Canales Angulo	Second Secretary	Embassy of the Republic of Chile
		Macarena Movillo	Legal Officer	Under-Secretariat of Tourism of Chile
	<b>China, People's Republic of</b>	James Ding	Commissioner of Inclusive Dispute Avoidance and Resolution Office	Department of Justice
	<b>Costa Rica</b>	Rosibel Ureña Cubillo	Coordinadora del Subproceso de Asesoría Legal	Costa Rica Tourism Board
	<b>Ecuador</b>	Karla Amador	Specialist tourism	Ministry of Tourism of Ecuador

	<b>European Union</b>	Patrizia De Luca	Co-operation, Civil Justice Unit A.1	European Commission
		Margarita Tuch	Information Systems Officer - Management of the ODR platform	European Commission
	<b>Greece</b>	Evaggelia Evaggelia Lebidara	Officer in the Department of Policy, Institutional Relations and Administrative Cooperation	Ministry of Development and Investment Greece
	<b>Mexico</b>	Alejandro León-Vargas	Second Secretary, Legal Adviser	Embassy of the United Mexican States
		Rafael Regla Aguirre	Head of the Department for Bilateral Affairs	Federal Consumer Protection Agency
		Álvaro Villegas Soto	Director for Conciliation and Special Programs	Federal Consumer Protection Agency
	<b>Serbia</b>	Ivana Dedijer	Head of Group for European Integration and Management of EU and other International Projects	Ministry of Trade, Tourism and Telecommunications of the Republic of Serbia
	<b>South Africa</b>	Pieter André Stemmet (Chair of the EG)	Legal Counsellor	Embassy of the Republic of South Africa
	<b>Switzerland</b>	Niklaus Meier	Chef (en jobsharing) de l'Unité droit international privé	Office Fédéral de la Justice (OFJ)
	<b>United Kingdom</b>	Eral Knight	Head of European and Private International Law Team	Ministry of Justice
		Maillie McQuaid	Policy Officer European Civil and Private International Law	Ministry of Justice
	<b>United States of America</b>	Katerina Ossenova	Trial Attorney, Office of International Judicial Assistance	Department of Justice
		Shubha Sastry	Assistant Legal Advisor	Office of Private International Law

	Venezuela	Eudys Almeida Gaona	Director of Multilateral Treaties of the Legal Consultancy	Ministry of People's Power for Foreign Relations
Observers	IACL	Prof. Dan Wei	Associate Dean of Faculty of Law of the University of Macau	International Association of Consumer Law (IACL)
	IBA	Elias Hayek	Co-Chair of Leisure Industries Section, International Bar Association	Leisure Industries Section (IBA)
	IFTTA	Andrej Micovic	Membership Secretary	International Forum of Travel and Tourism Advocates (IFTTA)
	UNCITRAL	Jae Sung Lee	Legal Officer	United Nations Commission on International Trade Law
		(Alternate) Issey Park	Junior Professional Officer	United Nations Commission on International Trade Law
HCCH	Permanent Bureau	João Ribeiro-Bidaoui	First Secretary	HCCH
		Maja Groff	Senior Legal Officer	HCCH
Invited expert	Lex Futura AG	Nino Sievi	Lawyer	Lex Futura AG

## Annex III – Draft Outline – Practical Guide to Access to Justice for International Tourists and Visitors, with a Focus on ODR

[Please note that this **Draft Outline** is of indicative nature, produced with the sole purpose of informing deliberations at the 2021 meeting of the CGAP. It does not represent a definitive Guide format / outline version, nor include all possible instruments or systems which may be considered in such a Guide.]

### Presentation

The Guide will provide international tourists and visitors with information pertinent to the resolution of cross-border disputes and to their access to justice for legal issues which they may encounter, with the exclusion of issues related to criminal law. It will provide information about how HCCH Conventions, other selected international and regional instruments, as well as ODR platforms, may help to resolve substantive cross-border civil or commercial claims or other consumer complaints.

The Guide will be designed to assist tourists and visitors, as well as consumer protection and tourist organisations, through the provision of information on a range of existing tools and methods which may contribute to their improved access to justice in cross-border circumstances. It will not provide legal advice, indicate a preference for any dispute resolution method over another, nor recommend any specific platform.

Given that these instruments and platforms can evolve quickly, the Guide is intended to be available in an electronic format to allow the inventory to remain up to date. Consumer protection and tourist organisations, as well as the ODR platforms indexed in the Guide, will be encouraged to ensure that the relevant information is kept up to date with the purpose of reducing to a minimum any allocation of resources by the Permanent Bureau (PB) to such process.

The Guide will include links to official national or supranational systems, aiming also to build cooperation between international organisations dealing with international tourism.

#### A. Identification of main barriers to access to justice for international tourists and visitors

The Guide will include a summary of common barriers to access to justice encountered by international tourists and visitors, derived from the consultants' reports<sup>1</sup> and from meetings of the HCCH Experts' Group. These include, for example: an information gap, particularly given language and legal system diversity; discrimination in accessing legal aid and security of court costs; an inability to use mediation or conciliation beyond the stay in the visited country; an inability to initiate (or continue) court proceedings beyond the stay in the visited country; unavailability of small claims procedures suited to problems commonly encountered; and, issues of delay and / or cumbersome court procedures.

#### B. Definitions

This section will be developed as needed, with the aim of facilitating a layperson's understanding and use of the Guide. Suggested definitions include: tourist and visitor, consumer, civil or commercial claims,

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<sup>1</sup> See Prel. Doc. No 3 for CGAP 2019, "Report of the Experts' Group on the Co-operation and Access to Justice for International Tourists (Tourism Project)" (including Dr 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 2019 ("Guinchard Report") at Annex III); Prel. Doc. No 1 for CGAP 2020, "Report of the Experts' Group on the Cooperation and Access to Justice for International Tourists (Tourism and Visitors Project)" (including Dr N. Sievi, "Report on International Instruments and Principles Relevant to the Tourism Project as well as Possible Grounds of Jurisdiction for Matters Relating to International Tourists", Final Report, January 2020 ("Sievi Report")); and Prel. Doc. No 1 for CGAP 2021, "Report on the Tourists and Visitors (ODR) Project", all documents are available on the Secure Portal of the HCCH website under "Working / Experts Groups" then "Experts' Group on the Tourists and Visitors (ODR) Project".

litigation, arbitration, mediation, conciliation, online dispute resolution (ODR), alternative dispute resolution (ADR).

## **Part One: Existing HCCH Conventions and other international and regional instruments**

This part will explain, in layperson's terms and by using illustrative examples, how existing HCCH Conventions and other selected international and regional instruments may be relevant to the resolution of claims by international tourists and visitors. The relevant legal instruments will be considered in the light of the illustrative examples. While the Conventions and instruments are listed chronologically below, the order and categorisation will be revisited based on the examples and / or other information, with a goal of maximum accessibility / practical utility of information to users of the Guide.

### **A. HCCH Conventions**

An introduction will explain navigation of the HCCH website to understand when a Convention is in force between Contracting Parties and how it may be relevant to a given situation. It will also include a disclaimer about the nature of the Conventions: for example, that it may be advisable for individuals to seek legal assistance to utilise the Conventions, and that HCCH Conventions rely upon the respective jurisdictions of Contracting Parties and are only as efficient as the individual system allows. Where relevant, there will be extra information about the role of Central and Competent Authorities in facilitating the practical operation of the Convention including the possibility of their use in ODR proceedings.

#### **1. 1961 Apostille Convention**

120 Contracting Parties, accessible to x% of the world's population, representing y% of global GDP.

Facilitates the use of public documents abroad by establishing authenticity of a public document issued by a Contracting Party.

#### **2. 1965 Service Convention**

78 Contracting Parties, accessible to x% of the world's population, representing y% of global GDP.

Facilitates transmission of judicial or extrajudicial documents that need to be served abroad.

#### **3. 1970 Evidence Convention**

63 Contracting Parties, accessible to x% of the world's population, representing y% of global GDP.

Facilitates the taking of evidence abroad in civil or commercial matters.

#### **4. 1971 Traffic Accidents Convention**

21 Contracting Parties, accessible to x% of the world's population, representing y% of global GDP.

Provides clear, precise and easily applicable rules to determine what law applies to traffic accidents.

#### **5. 1980 Access to Justice Convention**

28 Contracting Parties, accessible to x% of the world's population, representing y% of global GDP.

Provides a framework to ensure a tourist or visitor filing a suit abroad would not be discriminated against with respect to legal aid, including the provision of legal advice, security for costs, copies of entries and decisions, and physical detention and safe conduct.



## 6. 2005 Choice of Court Convention

32 Contracting Parties, accessible to 8.4% of the world's population, representing 22% of global GDP.

Enables the effectiveness of dispute resolution clauses (exclusive choice of court agreements) included in agreements signed by business travellers, allowing legal certainty about the court hearing the dispute and predictability on recognition and enforcement of resulting judgments.

## 7. 2019 Judgments Convention

No Contracting Parties (two signatories)

Allows a judgment obtained in one jurisdiction to be enforced abroad.

## B. Other International Instruments

### 1. Hard Law

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

[number of Contracting Parties]

Requires courts of Contracting States to give effect to private agreements to arbitrate and to recognise and enforce arbitral awards. Requires service provider consent to resolve disputes with tourists through arbitration.

#### b. *International Convention on Travel Contracts (1970)*

[number of Contracting Parties]

Establishes uniform provisions for travel contracts involving travel agents. It determines the general obligations of parties to a travel contract including content and liability for travel organisers and travellers. This includes provisions on compensation.

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

[number of Contracting Parties]

Standardises the conditions governing contracts for the international carriage of passengers and luggage by road. This includes provisions on liability and jurisdiction.

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

[number of Contracting Parties]

Strengthens protection of consumers in international air travel, including persons, baggage and cargo. It establishes common rules for airlines on international flights between Contracting States. This includes provisions on the documentation of carriage, rights and duties from the contract of carriage, enforcement of rights, carriers' liability, the extent of compensation, and jurisdiction.

**1. Soft Law****1. UNWTO Global Code of Ethics for Tourism (1999)**

Non-binding guidelines aimed at guiding tourism stakeholders towards a responsible and sustainable development of tourism worldwide. Through its 10 Articles, the code aims to maximise the sector's benefits while minimising its potentially negative impact on the environment, cultural heritage and societies across the globe.

**2. UN Guidelines on Consumer Protection (Revision of 2015)**

A set of principles setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems. The Guidelines are intended to assist interested UN Member States in formulating and enforcing domestic and regional laws, rules and regulations as well as promoting international enforcement cooperation, and encourage the sharing of experiences in consumer protection.

A binding instrument, the *UNWTO Convention on Tourism Ethics* was adopted in 2019 by the 23rd session of the UNWTO General Assembly (Resolution A/RES/722(XXIII)) follows the same principles. It is not yet in force.

**C. Regional Instruments****1. Europe<sup>2</sup>****a. Council of Europe Convention on the Liability of Hotel-keepers concerning the Property of their Guests (1962)**

[number of Contracting Parties]

Sets minimum standards for the national law of Contracting States for hotel-keepers' liability for the property of their guests.

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

[number of Contracting Parties]

An application for legal aid may be submitted in the home jurisdiction for proceedings conducted in a foreign jurisdiction.

**c. Instruments of the European Union**

[short descriptions to be included under each]

- Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.
- Regulation No 261/2004/EC Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights.
- Regulation (EC) No 1896/2006 Creating a European order for payment procedure.
- Regulation (EC) No 861/2007 Establishing a European Small Claims Procedure (as Amended by EU Regulation No 2015/2421).
- Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

<sup>2</sup> Information sheets on EU, national and international procedures are available on the e-Justice website: < [https://e-justice.europa.eu/content\\_information\\_on\\_national\\_law\\_information\\_sheets-439-en.do](https://e-justice.europa.eu/content_information_on_national_law_information_sheets-439-en.do) >.

- Regulation (EU) No 181/2011 Concerning the Rights of Passengers in Bus and Coach Transport.
- Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- Regulation (EU) No 524/2013 on Online Dispute Resolution for Consumer Disputes.
- Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) (to be applied as from 1 July 2022)
- Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) (to be applied as from 1 July 2022)
- Directive No 2002/8/EC to Improve Access to Justice in Cross-Border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for such Disputes.
- Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts
- Directive No 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes.
- Directive No 2015/2302/EU on package travel and linked travel arrangements.
- Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (ECC-Net).

## 2. Americas

### a. *Agreement on the Benefit of Litigation Without Costs and Free Legal Aid between States Party to MERCOSUR (2000)*<sup>3</sup>

[number of Contracting Parties]

Eases access to courts in foreign jurisdictions by giving nationals and habitual residents of each State Party access to cost-free litigation and legal aid in other States Parties under the same conditions as those available to their own nationals and habitual residents. It further provides that cost-free litigation granted in one State Party can be extended to proceedings in other States Parties (*e.g.*, for the taking of evidence abroad or the enforcement of a judgment).

### b. *Inter-institutional Agreement of Understanding between Consumer Protection Agencies of States Party to MERCOSUR for the Protection of Consumer Visitors (2005)*<sup>4</sup>

[number of Contracting Parties]

Protects consumers who are temporarily in another State. Includes obligations to provide relevant information to tourists and enable a prompt resolution of difficulties faced by tourists. Allows complaints to be lodged with the agency located in the tourist's home State, which will then act on his or her behalf in dealing with the complaint with the agency located in the service provider's State.

<sup>3</sup> Unofficial translation by the PB of the original in Spanish "*Acuerdo sobre el Beneficio de Litigar sin Gastos y Asistencia Jurídica Gratuita entre los Estados Partes del Mercosur (2000)*".

<sup>4</sup> Unofficial translation provided by the PB of the original in Spanish "*Acuerdo Interinstitucional de Entendimiento entre los Organismos de Defensa del Consumidor de los Estados Parte del Mercosur para la Defensa del Consumidor Visitante (2005)*".

**c. Mercosur Agreement on The Law Applicable to International Consumer Contracts (2017)<sup>5</sup>**

[number of Contracting Parties]

Provides consumer protection by adopting common rules on the law applicable law to international consumer contracts, and contracts between suppliers / providers of goods or services and consumers in the region. This includes provisions on travel agencies and time-share arrangements.

**3. Eurasia, Asia, Africa and Oceania (TBC)****a. Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993)**

[number of Contracting Parties]

Provides a framework in which to conduct cross-border proceedings including provisions on access to justice, the taking of evidence abroad, and service of documents. It also deals with matters of jurisdiction and recognition and enforcement of judgments.

**Part Two: Existing ODR platforms**

This part – in a non-exhaustive fashion – will identify existing ODR platforms, describing their specific features in order to assist tourists and visitors in assessing which platform may suit their needs. A number of ODR platforms were identified in preparation for the third meeting of the Experts' Group and can be found on the HCCH Secure Portal.<sup>6</sup> HCCH Members are encouraged to inform the PB about other existing ODR platforms relevant to international tourists and visitors. This request will be issued again in the course of the development of the Guide.

The inclusion of an ODR platform on this list should not be taken as an indication of the HCCH's endorsement of the platform. It is intended as a repository of information only.

The various platforms will be categorised according to geographic scope. If possible, there will also be a filter for other features of the system, such as value of the claim, language, and time frames for dispute resolution.

The Experts' Group suggested that the following features be included in the description of the platforms (in no order of priority):

- Accessibility (*e.g.*, technical requirements, language, disability, information access, time zones / internationally accessible).
- Transparency and fairness of system (*e.g.*, qualifications of the neutral, possibility to have outcome reviewed, etc.).
- Non-discrimination between nationals and non-nationals (*e.g.*, requirements for authentication, etc.).

<sup>5</sup> Unofficial translation provided by a Brazilian expert of the original in Spanish "*Acuerdo del Mercosur sobre derecho aplicable en materia de contratos internacionales de consumo (2017)*".

<sup>6</sup> See Chart I on Existing Online Dispute Resolution (ODR) Systems and Chart II on Existing Consumer / Tourist (Alternative) Dispute Resolution (ADR or "regular") Systems. This includes, in no particular order, Chinese Internet Courts in Hangzhou, Beijing and Guangzhou; EU Online Dispute Resolution; Concilianet Gobierno de México; eBay Resolution Centre; Airbnb Online Resolution Centre; Cybersettle; The British Columbia Civil Resolution Tribunal (CRT); Youstice; Tyler's Modria® online dispute resolution solution; APEC Collaborative Framework for ODR of Cross-Border Business to Business Disputes; European Consumer Centres Network (ECC-Net); Korea Tourist Complaint Center; Korea Consumer Agency (KCA); Tourist Defender Office (*Defensoría del Turista*), Buenos Aires, Argentina; and *Grupo de protección al Turista* (Tourist Protection Group), Colombia.

- Indication of procedure, and, in particular, how it would work in practice (*e.g.*, cost, time frames of procedure; system use of AI; whether it follows a tiered, time-limited pattern of first negotiation, then mediation (if necessary), and then arbitration (if necessary)).
- Voluntary and by agreement, thereby avoiding or resolving issues of jurisdiction, applicable law and enforcement.
- Scope of contractual claims (and possibly others).
- Value of claims.
- Execution and enforcement of the outcome.
- Indication of whether the platforms lead to a final resolution of the dispute.
- Indication on information ethics (including on data protection).
- What law would be applicable to the resolution of the dispute.
- Oversight, good governance of the system and rates of compliance with the dispute outcomes.

These features will be included under various descriptive categories (see below). As the Guide is developed, these categories may be subject to change. If the Guide is created in an electronic format, the information could appear based on a filtering function for selected categories. If there is a preference for a hard copy Guide, it may also be included in a table format.

An example template and an example description of a specific platform is provided below.

## ▪ Example Template

# [TITLE/NAME OF PLATFORM]

["Visit the website" button, including link]

*Information tabs:*

Overview	Criteria	Accessibility	Process	Legal questions	Enforcement
----------	----------	---------------	---------	-----------------	-------------

## Overview

*Snapshot description of the system; and*

*Information on:*

- Sponsoring entity.
- Who maintains and funds the platform.
- Indication on information ethics (including data protection).

## Criteria

*Information on:*

- Parties eligible to use the platform.
- Dispute criteria and limitations on claim value.
- Scope of contractual claims addressed (and other claims, if applicable).
- Example(s) of who may make use of the instrument.

## Accessibility

*Information on:*

- Short description of the system technology.
- Technical requirements, language, disability access, information access, time zones / international accessibility.
- Non-discrimination between nationals and non-nationals (*e.g.*, requirements for authentication, etc.).
- Expense to users.

## Process

*Information on:*

- Indication of procedure, and, in particular, how it would work in practice (*e.g.*, time frames of procedure; system use of AI; whether it follows a tiered, time-limited pattern of first negotiation, then mediation (if necessary), and then arbitration (if necessary)).
- Transparency and fairness of system (*e.g.*, qualifications of the neutral, possibility to have outcome reviewed, etc.).
- Speed and efficacy of procedure.

## Legal questions

*Information on:*

- Enabling legal framework / rules.
- Jurisdiction (including whether voluntary and by agreement, thereby avoiding or resolving issues of jurisdiction, applicable law and enforcement).
- What law is applicable to the resolution of the dispute.

## Enforcement

*Information on:*

- Method of execution and enforcement of the outcome.
- Whether use of the platform leads to a final resolution of the dispute.
- Oversight, good governance of the system and rates of compliance with dispute outcomes.

# EU Online Dispute Resolution Platform

[Visit the Website](#)

Overview	Criteria	Accessibility	Process	Legal questions	Enforcement
----------	----------	---------------	---------	-----------------	-------------

## Overview

This platform assists consumers resolve complaints about goods or services purchased online in the EU or in Norway, Iceland or Liechtenstein.

The **sponsoring entity** is the **European Union**. The platform is **maintained and funded** by the **European Commission**.

The platform has a legal basis in the ODR Regulation and is covered by the EU **General Data Protection Regulation** (GDPR) and the **Internal Data Protection Regulation** (IDPR).

## Criteria

The platform may be used by **consumers and traders for the disputes originating from online purchases**. ‘Consumer’ means any natural person who is acting for purposes which are outside his or her trade, business, craft or profession. ‘Trader’ means any natural person, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his or her name or on his or her behalf, for purposes relating to his or her trade, business, craft or profession.

Disputes may concern:

- **Solely online transactions** (sales or service contract where the trader, or the trader’s intermediary, has offered goods or services on a website or by other electronic means and the consumer has ordered such goods or services on that website or by other electronic means).

- **Contractual obligations stemming from online sales or service contracts** between a consumer resident in the EU, Norway, Iceland or Liechtenstein, and a trader established in the EU, Norway, Iceland or Liechtenstein.

Consumers can only be the **recipient** of a complaint if they reside in a country where national legislation envisages the use of ADR in business-to-consumer disputes (currently Belgium, Germany, Luxembourg or Poland)

For example, this platform could be used by a tourist who booked a holiday online and has a complaint against the online trader, if both the tourist and the trader are resident in the EU, Norway, Iceland or Liechtenstein.

## Accessibility

The platform is **free of charge**. Dispute resolution bodies may charge a fee.

The platform may only be used if both the tourist and the trader are resident in the EU, Norway, Iceland or Liechtenstein.

The platform takes the form of an interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court. **Account registration** is required to be able to create or receive complaints (it is possible for a consumer to submit a complaint without an account and create an account once the trader replies). Submission and notifications will occur through the online platform.

There are three routes for problem-solving:



- 1 Find a solution with the trader directly (contacting the trader through the platform, which is particularly useful if the trader is open to dialogue).
- 2 Find a solution through a dispute resolution body (an approved dispute resolution body; each body has its own rules and procedures).
- 3 Use a different dispute resolution tool outside of the platform (when the parties are unable to agree on a dispute resolution body within a certain time frame or if the trader ignores the complaint).

If the trader does not agree to continue with the complaint, the platform will direct the consumer to alternative means of dispute resolution.

Dispute resolution bodies available on the platform have been approved by the national competent authorities for quality standards relating to fairness, efficiency and quality.

The platform is available in **all EU languages, Icelandic and Norwegian**. An **automatic translation tool** is also available. The parties may request that the outcome of dispute is translated professionally free of charge. More advanced and technical translations may be required, at the parties' own expense.

## Process

The dispute resolution (ADR) body will be selected by the parties through the system. Information on fees, geographical coverage and procedures are available on each ADR body.

The dispute resolution body may **request documents** and **organise meetings** via the platform. They will also upload the **outcome** to the platform.

The parties have **30 days** to agree on an ADR body. After that, the ADR body has **90 days** to deliver an outcome, extendable for complex cases.

There is a national contact point in every EU country, Norway, Iceland and Liechtenstein to assist with any issues.

## Legal questions

The platform is established by [Regulation \(EU\) No 524/2013 of the European Parliament and of the Council of 21 May 2013](#) on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (**Regulation on consumer ODR**).

The trader must agree to **accept** the complaint. If they refuse, the complaint will be closed under this platform.

## Enforcement

The outcome is **not always binding**; it will depend on the type of ADR body chosen. The parties are informed if the outcome is binding or not. The procedure for appeal and review of the ADR outcomes is a matter of national legislation and is outside the remit of the ODR platform.



# IFTTA

## THE INTERNATIONAL FORUM OF TRAVEL AND TOURISM ADVOCATES

*Sodalem esse societatis quae dedicetur ad  
Exercitatio legis ut producat iter peregrationemque*

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To: Dr. Christophe Bernasconi  
Secretary General  
The Hague Conference on Private International Law  
Churchillplein 6b 2517 JW - The Hague – Netherlands

Cc: Mr. Ignacio Goicoechea  
Latin American Regional Office

18 December 2020

Per e-mail: [secretariat@hcch.net](mailto:secretariat@hcch.net)

Dear Dr. Bernasconi,

Reference is made to IFTTA's letter dated 17 August 2020.

Attached please find IFTTA's contribution to the HCCH in relation to the Protection of International Tourists (Tourism Project) Converted to Tourists and Visitors (ODR) Project.

The Report constitutes of an introduction and four (4) contributions by:

- (1) Sheila Sanches which is entitled "*ODR and LegalTech as tools to enhance the access to justice: an overview*",
- (2) Josep Maria Bech Serrat which is entitled "*Towards HCCH Guidelines on Cooperation and Access to Justice for International Tourists? A Critical Assessment of the Current Approach*",
- (3) Andrej Micovic which is entitled "*Legal Tech and ODR in the Light of the Development of Practical Handbook/Guide under the Auspices of HCCH*", and
- (4) Uta Stenzel which is entitled "*Consumer Conciliation in the Travel Sector- the Conciliation Body for Public Transport (SDEP) – the German Experience.*"

It would be a great honour should the HCCH Council on General Affairs and Policy, will have a chance to review it, and possibly incorporate IFTTA's findings by March 2021.

I thank you for your kind attention and look forward for a reply strengthening our cooperation.

Dr. jur. Jacqueline Tanti Dougall B.A., LL.D  
President

C.c. Prof. Dr. jur. Klaus Tonner  
Dr. jur. Maria Goretti Sanches Lima, LL.M

IFTTA's Contribution to HCCH  
in relation to the protection of international tourists  
(Tourism Project)  
Converted to

Tourists & Visitors (ODR) Project

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**Background**

On 23<sup>rd</sup> June 2020, IFTTA's President, Jacqueline Tanti-Dougall, received a letter from HCCH referring to the previous correspondence between officers regarding IFTTA's participation at the Experts' Group meeting of October 2020.

The Council on General Affairs and Policy (CGAP) of the HCCH, at its 2019 meeting, welcomed a first expert Report entitled *Study on the desirability and feasibility of further work on the Proposal of a draft Convention on Co-operation and Access to Justice for International Tourists*, prepared by Mr Emmanuel Guinchard, and requested that the Permanent Bureau (PB) arrange a further Experts' Group meeting in 2019. CGAP asked the Experts' Group to identify potential (legally binding) instruments addressing problems that international tourists commonly encounter.

As a result of the Experts' Group meeting in September 2019, a second external consultant, Mr Nino Sievi, was invited to conduct further research on the subject, which resulted in a *Report on International Instruments and Principles Relevant to the Tourism Project as well as Possible Grounds of Jurisdiction for Matters Relating to International Tourists*, which was presented at the CGAP meeting of March 2020.

On 10<sup>th</sup> July 2020, IFTTA's President replied to the Secretary General of HCCH acknowledging the opportunity to be acquainted with HCCH's work and informing that Andrej Micovic had been selected to participate in the EG. In addition, in furtherance of cooperation between the two organizations, HCCH was informed that IFTTA had commenced an internal consultancy process with members targeting that a Report with the findings would be submitted to HCCH up to December 2020.

**General Remarks**

Having regard to the fact that IFTTA fosters debates on legal aspects of travel and tourism, the involvement of HCCH in relation to the project of protection of international tourists, is of high importance to IFTTA.

As befits a body of lawyers that specialises in Travel and Tourism Law around the world, IFTTA has great interest to take part in the activities of non-governmental international organizations such as HCCH and UNWTO. Having regard to the latter, a formal agreement is running since 2008.

In many respects, due note should be taken as the proposal submitted to HCCH in 2013 has undergone a significant change related to its initial objective meaning that the focus now is on producing a guide rather than a draft convention. On the other hand, UNWTO has revamped its project, which was initiated in 2011 and had been suspended in 2017-2020. Over the years there have been considerable changes to the initial scope of UNWTO's project that is now focussing on Emergency situations rather than developing into a comprehensive Code of Protection of Tourists.



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**IFTTA**

IFTTA's Contribution to HCCH  
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All in all, IFTTA has appreciated being involved in those international activities lead by HCCH and UNWTO contributing the extensive knowledge and expertise on legal issues in relation to travel and tourism. Expertise can be harnessed through special commissions led by leading bodies, such as HCCH and UNWTO.

***IFTTA's contribution to HCCH***

As announced, IFTTA has opened an internal consultation process with members, where responses, including dissenting opinions and alternative approaches were considered, in respect of dispute resolution in travel and tourism. Two contributions were tailored specially to be delivered to HCCH. Whilst one was authored in 2016, the author asked to include her article with the other contributions as the content is related to the workings of conciliation body for public transport. We must point out that the internal process of consultation did not follow the outcomes from the EG meeting, where the initial proposal was changed from a draft convention to a guide. Even so, they are all valuable contributions.

***Sheila Sanchez: "ODR and LegalTech as tools to enhance the access to justice: an overview"***

Article tailored to facilitate the cooperation with HCCH.

Regardless binding or soft law instruments, the author approaches the subject of ODR and LegalTech. She emphasizes the latter into three categories according to their functionality. Firstly, technologies that facilitate access to, and processing of data such as cloud storage and cybersecurity solutions, which allow remote access to information. Secondly, technologies that constitute support tools. Thirdly, technologies that assist or replace legal advice, including contract automation, e-discovery and document review tools, blockchain and smart contracts.

***Josep Maria Bech Serrat: "Towards HCCH Guidelines on Cooperation and Access to Justice for International Tourists? A Critical Assessment of the Current Approach"***

Article tailored to facilitate the cooperation with HCCH.

The author emphasizes the need for soft-law rules, similar to what was argued in relation to the revised UN Guidelines for Consumer Protection 2015 (hereafter 2015 UNGCP), where tourism was covered, and the approach of International Group of Experts on Consumer Protection Law and Policy (IGE). The Guidelines might have a high impact on policy making as soft law or non-binding recommendations rather than a binding international convention.



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**Andrej Mićović: Legal Tech and ODR in the Light of the Development of Practical Handbook/Guide under the Auspices of HCCH**

The subject of the contribution is related to the benefits and challenges of Legal Tech in relation to ODR, as well as to the accessibility requirements, as a *conditio sine qua non* for ensuring access to justice for international tourists.

**Uta Stenzel:** "Consumer Conciliation in the Travel Sector – the Conciliation Body for Public Transport (SOEP) – the German Experience."

Article published in IFTTA Law Review 1-2016.

The SOEP is recognized by the German Federal Government as a consumer conciliation body under the Consumer Dispute Settlement Act (VSBG). It also stands out with the EU. The SOEP increased over the last years. Conciliation now covers disputes in regard to travel by train, bus and ships, flights, and package tours (tour operator and travel agents). A list of the members of the Sepang more information at the website:

<https://soep-online.de/en/> Members' list at: [https://soep-online.de/wp-content/uploads/2020/09/30.09.2020.soe\\_p\\_Mitgliederliste.pdf](https://soep-online.de/wp-content/uploads/2020/09/30.09.2020.soe_p_Mitgliederliste.pdf)

**It is noteworthy that IFTTA remains neutral with regard to authors opinions and institutional affiliations.**

**Final Note**

No matter how many authors are on the cover, every project is the work of many hands. Acknowledgment is made for the internal Committee of IFTTA formed by: John Downes (Scotland), Doug Crozier (Canada), Andrej Micovic (Serbia) and Maria Goretti Sanches Lima (Brazil). They gave generously of their time to manage, comment, read and proofread the whole work.

The Committee drives special thanks to Dov Kolani (Co-Founder of IFTTA and Emeritus) who called IFTTA's attention to HCCH's project. Likewise, expressing of gratitude to the current President Jacqueline Tanti-Dougal whose leadership is supportively outstanding.



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**IFTTA**

# **ODR and LegalTech as tools to enhance the access to justice: an overview**

*Sheila Sanches*

## **1. Introduction**

In the current context, several circumstances justify the Hague Conference on Private International Law's focus on developing an instrument that will enhance the mechanisms of access to justice for international tourists. In recent decades, the growth of international travel, the increase of emerging destinations and the use of digital technologies for the procurement of tourism services are factors that favour the emergence of disputes. However, the increase in tourism exchanges has not necessarily been correlated with an increase in mechanisms and tools to protect tourists. At the international level, the rules in this area do not guarantee 100% effective protection of the tourist, nor effective access to justice, and there are many situations in which, given the obstacles, tourists do not take legal action in defence of their rights as consumers.

Guinchard's report<sup>1</sup> highlights the most common constraints on dispute resolution by international tourists. On the one hand, the inability to access mediation and conciliation processes in some countries, since they require the physical presence of the tourist, in addition to the language barriers present on many cases. Therefore, in many situations, these procedures are not accessible for this type of conflict, despite the fact that by their nature they would be more suitable than many of the court procedures.

On the other hand, the current situation generated by the Covid-19 pandemic has made even more evident the difficulties that many international tourists face in obtaining the corresponding refunds from airlines or hotel companies, in filing claims with online service providers or in accessing pre-legal proceedings, to mention just a few examples. In this context, effective complaint mechanisms for international tourists, for example through the service providers' website, are essential and a preliminary step to avoid legal disputes.

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<sup>1</sup> 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.

For all of the above reasons and taking into consideration the current scenario, it is essential to work on an international instrument that will strengthen access to justice for international tourists and that will contribute to improving cooperation between States in this area.

## **2. Instruments to promote effective access to justice for international tourists**

It is widely accepted that access to justice means having access to the courts free of obstacles, without unreasonable delays, and without excessive formal requirements. The instruments and mechanisms that shape the judicial system must facilitate the obtaining of a prompt and effective response to the issue raised, so that the effective exercise of this right is guaranteed. In the case of international tourists, it is important to avoid obstacles related to legal assistance and the application of *cautio judicatum solvi*, that is, to avoid as much as possible discrimination in access to justice between tourists and residents of the country in question. In addition, and as an essential prerequisite for ensuring access to justice, it is necessary for tourists to have clear, accurate and multilingual information on their rights and the means of defence available to them. At the same time, incorporating low-cost procedures for disputes in which international tourists may find themselves could help to guarantee and protect their rights.

According to the Sievi's Report<sup>2</sup>, for international tourists the precepts of the Convention on International Access to Justice provide that tourists can access legal aid without discrimination and that they are not required to pay a security for costs. However, this Convention itself has a gap in the applicability of extra-judicial procedures, which is limited. In this report, the advantages and disadvantages of including this principle as part of the Tourism Project are highlighted. On the one hand, it is a general principle whose application tends to reduce the obstacles that a tourist may face and whose application already has a favourable trajectory due to the Convention on Access to Justice. On the other hand, it is a principle that, faced with a deepening of international harmonization, runs the risk that States will be reluctant to ratify it, nor is it possible to guarantee that tourists will be freed from *cautio judicatum solvi*, since this depends on the civil law of each State. Given the above-mentioned drawbacks, the Sievi's Report recommends developing

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<sup>2</sup> Sievi, Nino. 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.



this principle as part of a protocol to the Convention on Access to Justice, so as to minimize the obstacles that might be encountered in the negotiation of the Tourism Project<sup>3</sup>. In this sense, the feasibility of the Tourism Project should be assessed if it includes a more in-depth and specific development on this principle, while other regulatory strategies should be considered, such as a modification to the Convention on International Access to Justice, which would cover the current shortcomings and reinforce the guarantees to international tourists.

Another area where consensus should be reached is on the interpretation of the scope of access to justice. Along these lines, there are proposals that advocate for a broad interpretation. That is, that it should include not only access to the judicial system but also to alternative dispute resolution mechanisms. This position is highly recommendable on the one hand, because it helps to avoid discrimination between residents and tourists; and on the other hand, because it offers unquestionable benefits in comparison with judicial procedures.

With regard to alternative means of dispute resolution available to international tourists, it would also be advisable to strengthen the development and dissemination of Online Disputes Resolution, even if the disputes have not originated in the online environment. These instruments, insofar as they overcome geographical and time barriers, can contribute to the protection of international tourists and be much more effective in responding to complaints in this area. This is why they are increasingly gaining acceptance and legitimacy as a tool for resolving low-intensity disputes, regardless of where they originated.

The ODRs are considered a tool for optimal access to justice for consumers and contribute to the development of efficient solutions that improve the exercise of this right. Among their distinctive elements are, on the one hand, that they allow for remote communication, and on the other hand, the advantages offered by the so-called intelligence of the machine. Intelligent Online Dispute Resolution Services offer online applications that enhance the jurisdictional function. They tend to be easy, intuitive and practical and, as they integrate elements of artificial intelligence for the interpretation of data -big data- they increase the

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<sup>3</sup> Tourists and Visitors (ODR) Project. Preliminary Documents for the attention of the Council on General Affairs and Policy of the Conference. Available at: <https://www.hcch.net/es/projects/legislative-projects/protection-of-tourists>.

efficiency of conflict resolution. They are usually an easy, safe and economical way to solve conflicts and therefore, they promote consumer confidence. Among the various platforms that offer these services it is possible to access negotiation, mediation, arbitration or a hybrid of these processes and they could even allow the transfer of the file to the corresponding court if that were the case. These procedures are voluntary and must respect the principles of independence, impartiality, transparency, fairness, effectiveness, accountability and efficiency. Several studies on their implementation show that they can cover a variety of forms and approaches, which can be advantageous in terms of respecting the legal and cultural diversity of different contexts.

An examination of the main obstacles faced by international tourists allows us to affirm with many advantages that ODR can offer in ensuring effective access to justice. On the one hand, they are less costly, simplified procedures that sometimes do not require the intervention of lawyers, are accessible from abroad and can even be carried out asynchronously. However, as noted in the Sievi Report, their implementation is not without difficulties. Perhaps one of the most significant is the lack of enforcement mechanisms for the agreement adopted. It should be added that, in some jurisdictions, consumer issues do not fall within the remit of alternative dispute resolution<sup>4</sup>. Moreover, these are procedures that require greater empowerment and awareness of the parties, that their configuration be attractive, secure and generate confidence both for tourists and service providers, that national jurisdictions recognize them as valid for consumer disputes, among others. However, given their ability to respond more effectively to the current shortcomings of international tourists with regard to access to justice, they should be a subject of analysis and priority work. In this sense, a good development of ODR must be based on the following essential elements: trust, fairness and security. In turn, the quality of the ODR should be supervised, for which the obtaining of a certification mark could be envisaged.

Along with the ODRs, there are a series of tools, including the so-called LegalTech, which directly affect the right of access to justice, and therefore are of interest to the Tourism Project. There are already regional initiatives - see the European e-Justice Strategy 2019-2023 - which are committed to a digital approach by default, focused on the consumer, by making available tools that are easy to use and that guarantee their autonomy.

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<sup>4</sup> For example, in Spain membership of alternative dispute resolution bodies is voluntary for companies.

The wide range of technologies that contribute to improving work in the legal field are usually classified into three categories according to their functionality. Firstly, there are those technologies that facilitate access to and processing of data, such as cloud storage and cybersecurity solutions, which allow remote access to information. Secondly, technologies that constitute support tools. This group includes those that allow more efficient management of files and other matters, back-office and internal management systems. Thirdly, there are technologies that assist or replace legal advice, including contract automation, e-discovery and document review tools, blockchain and smart contracts.

This set of technologies incorporated into ODRs can be very useful in resolving international tourist disputes. For example, chatbots can assist tourists and guide them to find the information they are looking for or offer them legal advice in the early stages of the dispute. Predictive justice tools encourage the identification of potential outcomes and solutions arising from a procedure through mathematical means, facilitating the production of statistics and probabilities regarding the resolution of a conflict and thus contributing to legal certainty. The tools that make up the Computational law, on the other hand, allow for the automation of all parts of the legal reasoning and decision-making process, so that their application to ODRs would favour online dispute resolution, given a certain degree of decision automation. Machine learning technologies, supported by artificial intelligence, allow the machine to learn, without being programmed to do so. This would bring significant benefits to ODR platforms that already apply them. More specifically, deep learning tools, a subcategory of machine learning, allow the limitations of artificial intelligence to be overcome.

However, the implementation of these tools is not without its challenges. The primary objective should be to achieve optimum benefit for the consumer, which is why advances in their implementation must consider the needs that are being generated and how these technologies can contribute to satisfying those needs. At the same time, in parallel with the work for their incorporation, the issues relating to the processing and protection of personal data must be considered, ensuring the confidentiality of the same. In this sense, it could be useful to adopt the risk-based approach, following the principles of data protection from the design and protection of data by default. In this way, it is guaranteed

that privacy is integrated from the moment of conception of any technological innovation and that any application used in the field of justice, protects personal data by default.

Another challenge to consider is the concerns regarding technical security and the protection of the right to privacy. It is also essential to guarantee the principle of transparency of justice and to this end it is important that citizens know how these technologies are designed and used. In addition, the functioning of the systems that allow the analysis of massive data of legal nature, with the aim of guaranteeing the necessary neutrality of the treatments carried out thanks to algorithms.

### **3. How could the Hague Conference on Private International Law contribute to improving effective access to justice for international tourists?**

There are a number of areas in which the Hague Conference on Private International Law could help to improve effective access to justice for international tourists. Possibly one of the main actions it can take is the development of a binding instrument or a soft law instrument, which would harmonise the legal framework within which ODR platforms are created, developed and provide their services. Also, to formulate minimum standards for an ADR procedure available to international tourists. At the same time, to establish rules for the correct and effective provision of information on available procedures. Finally, to address minimum standards to ensure the enforcement of agreements obtained through ODR procedures.

With regard to which type of legal instrument would be most appropriate for these purposes, there are positions in favour of both a binding instrument and a soft law instrument. Each has advantages and disadvantages, and the strategy should therefore provide for an instrument that is acceptable to many and guarantees rapid entry into force.

A further important area of action for the Conference is in relation to training. In this regard, the Secretariat could promote and organize conferences and seminars aimed at training and awareness in the application of ODR with the support of LegalTech tools for disputes involving international tourists.

In addition, and in line with the work of the Tourism Project, given the broad experience of the Conference as a centre for international judicial and administrative cooperation in the field of private international law, it could promote mechanisms for international cooperation and/or strengthen existing ones in order to meet the current needs of international tourists with regard to effective access to justice. Among the cooperation actions to be promoted would be the exchange of information regarding the RDOs available to international tourists.

Regardless of whether a binding instrument or a soft law instrument is implemented, it is essential that the Conference continue its work in this area and advance in the progressive unification of the rules that should govern the use of ODR and LegalTech by international tourists. In this way, beyond the effective normative result that this project can achieve, it will serve as an inspiration for the legal systems of member and non-member states and for international legal development in this area. To this end, it is essential that it finds internationally recognized approaches and studies the countless examples and good practices that exist in this regard.

Last but not least, the Conference has a relevant role as a reference for information on Private International Law issues. In this sense, it would be highly recommended that it promotes studies, compilation of best practices and legal information about the application of ODR in conjunction with LegalTech tools.

# **Towards HCCH Guidelines on Cooperation and Access to Justice for International Tourists? A Critical Assessment of the Current Approach**

Josep Maria Bech Serrat\*

## **Introduction**

There is an ongoing debate at the international level regarding a possible future Convention on Cooperation and Access to Justice for International Tourists (Tourism Project). It originated in 2013 at HCCH – Hague Conference on Private International Law— from a proposal of the Government of Brazil to undertake work in this area (Brazilian Proposal).

The International Forum of Travel and Tourism (IFTTA), as HCCH's observer on Tourism Project, was required to deliver a position paper to the meeting of the Council of General Affairs and Policy (CGAP) in 2021.

In light of the diverse membership of IFTTA, this international organization made a comprehensive compilation of texts to be delivered it along with a report to seek a desire for coherence. IFTTA-HCCH Committee collected the articles, compiled, proofread them and made a final report.

This is my contribution to the project and expresses only my opinion. The final report concerning a possible future Convention that was delivered by Emmanuel Guinchard on 3 February of 2018 (Guinchard's report) and Chapters V and VI of the Report of the Experts' Group on the Cooperation and Access to Justice for International Tourists prepared by Nino Sievi (Sievi's report) were taken into account.

Before making a brief assessment of the issues, this contribution shows a discrepancy in relation to the legal instrument to be used for its regulation.

## **I. Setting the scene: the need to adopt guidelines instead of international conventions**

Today international protection of tourists mostly lies at the interstices of law and I consider that there is no legal basis for making an exception to this scene as for the cooperation and access to justice. The traditional method where the countries have to agree to share competence when it comes to judicial cooperation in civil matters causes big problems. An increasing international mass tourism in emerging destinations which are not always well equipped to inform, to assist and help the tourists to have access to justice, ADR and other channels to solve their problems quick and inexpensively, is challenging the current law<sup>1</sup>. Nevertheless, national autonomy is strong, a national policy to protect foreign consumers is uncertain and any first hard law international

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<sup>1</sup> C. LIMA MARQUES, 'International Protection of Consumers as a Global or a Regional Policy', *Journal of Consumer Policy*, 43, 2020, pp. 65-67.

instrument on the issue with global remit aimed at harmonizing procedural laws will have limited effectiveness.

From my point of view, there is a need for soft-law rules under the auspices of the HCCH instead, similar to what was argued in relation to the revised UN Guidelines for Consumer Protection 2015 (hereafter 2015 UNGCP), where tourism was covered<sup>2</sup>, and the approach of International Group of Experts on Consumer Protection Law and Policy (IGE)<sup>3</sup>. The Guidelines might have a high impact on policy making as soft law or non-binding recommendations rather than a binding international convention<sup>4</sup>.

If the expected impact of the Tourism Project is to raise the level of tourist protection worldwide, it is important that their breadth be comprehensive and their recommendations flexible enough. Binding conventions, on the contrary, are limited by nature, as Chapters III and IV of the Sievi's report show. Regarding this, HCCH Conventions have failed to gain wide ratification<sup>5</sup> and contain a very fragmented regulation. Some crucial aspects to a tourist wishing to sue a service provider in its home jurisdiction are not or not sufficiently addressed<sup>6</sup>. Significant problems of recognition and enforcement arose (e.g., in some jurisdiction, arbitration agreements are deemed invalid and void in consumer cases making the New York Convention ineffective)<sup>7</sup>. International conventions in the field of tourism do not regulate the issue. In consequence, time has come to adopting Guidelines on cooperation and access to justice for international tourists under the institutional machinery of the HCCH.

A wide and cautious mandate similar to that contained in Guideline 97 UNGCP when the IGE was entrusted by the General Assembly could be appropriate<sup>8</sup>. Thus, representatives from government officials in tourism policy and enforcement agencies, tourist associations and academia should participate. The consensus rule of the actors would mitigate the geopolitical power struggles that are common in international relations.

Beyond the Guidelines, of course international governance referring to the exercise of power overall should play a key role on the cooperation and access to justice for international tourist, particularly as regards openness, participation, accountability, effectiveness and coherence<sup>9</sup>. An innovative mode of governance should allow for the overcoming of the legislative competences that are not clearly identifiable. Cooperation should be maximized among different levels and different actors at the lowest cost about preferences and institutions to make the most effective rules.

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<sup>2</sup> Guideline 78 of 2015 UNGCP.

<sup>3</sup> Another opinion considers that the subjected matter contained in the Draft Convention on cooperation and access to justice concerning international tourists submitted by Brazil to HCCH (hereafter Brazilian Proposal) is much more prone to binding commitments than the Consumer Protection Guidelines. A. IZAGUERRI VILA, 'International Consumer Protection at the United Nations: Towards Global Governance?', *Journal of Consumer Policy*, 43, 2020, pp. 91-103.

<sup>4</sup> Cf. Part 6 of the Guinchard's report. The document comes to conclusion that the Tourism Project is compatible with the mandate of the HCCH when the suggested instrument is a Convention.

<sup>5</sup> Sievi's report, N. 174.

<sup>6</sup> Ibid, N. 86.

<sup>7</sup> Ibid, N. 125.

<sup>8</sup> The only global consensus on consumer protection is a non-binding one: the UN Guidelines on Consumer Protection. LIMA MARQUES, 'International Protection of Consumers as a Global or a Regional Policy', cit., p.60. The new focus on good business practices of the text was considered as a significant step towards self-regulation as a way to improve consumer protection. I. BENÓHR, 'The United Nations Guidelines for Consumer Protection: Legal Implications and New Frontiers', *Journal of Consumer Policy*, 43, 2020, pp. 110 and 117-118.

<sup>9</sup> As for the concept of governance, I. SAMMUT, 'Governance and the Transformation of European Private Law', *European Review of Private Law*, 2, 2020, pp. 276-277.



Chapter V of Sievi's report identified a number of issues that are of relevance with respect to the HCCH's mandate and that could further enhance and operationalise the protection of international tourists. Indeed, what were described as "relevant principles from previous deliberations and reports" in the Sievi's report –and enumerated in N 178— actually are not principles but relevant issues for the protection of international tourists that were regulated in some existing HCCH Conventions, international conventions to the protection of tourists and EU law instruments.

The Sievi's report issues are fit for the purpose of creating HCCH Guidelines on Cooperation and Access to Justice for International Tourists and, therefore, they will be assessed in section II.1 of this contribution: a) access to justice; b) information; c) assistance; d) cooperation mechanisms; e) small claims procedures; f) access to alternative dispute resolution (ADR) and online dispute resolution (ODR).

This contribution considers that both access to courts in the visited country and access to alternative dispute resolution (ADR) should be covered by HCCH Guidelines in a new approach. There is room for improvement in both court and out-of-court proceedings when they are made available to international tourists. As a consequence, subsection a) on access to justice and e) on small claims procedure will be addressed to access to courts and judicial proceeding, whereas subsections b) on information c) on assistance and d) on cooperation mechanisms will deal with both court and out-of-court proceedings, and section f) will focus only on alternative dispute resolution (ADR) and online dispute resolution (ODR).

## **II. Making the assessment**

### **1. Essential issues of relevance to the Tourism Project**

#### **a) Access to justice**

Ensuring that tourists have non-discriminatory access to legal aid and will not be ordered to pay a security for costs is essential for the protection of international tourists in court proceedings when a claim is filed in the visited country. Advantages will be eliminating obstacles a tourist faces<sup>10</sup>.

Nevertheless, national procedure civil law will have a strong impact on the issue, i.e., on providing legal aid or releasing the tourist from the *cautio judicatum solvi*.

For that reason, the issue of access to justice –as all the issues that are assessed in this contribution— should be merely established as a common guideline to be translated into national policy, combined with periodic monitoring, evaluation and peer review organized as mutual learning processes. It should also be accompanied by indicators and benchmarks as a means of comparing best practices among national legal systems.

Having considered that States will be reluctant to ratify a convention implementing this principle<sup>11</sup>, the Sievi's report comes to conclusion that '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'. According to the same report, '[t]his way,

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<sup>10</sup> Sievi's report, N. 187.

<sup>11</sup> Ibid, N. 188a.

the principle can be implemented independently from a new convention without risking any negative drawbacks for the future work on the Tourism Project<sup>12</sup>. I consider that HCCH recommendations on the issue would be welcome without prejudice to the feasibility of a protocol to the Access to Justice Convention.

### **b) Information**

Although providing the tourist with information on their rights and remedies would be a very relevant guideline, this information will differ depending on the national or regional law that is applicable to the case. Therefore, the issue will be very difficult to be applied into practice even for competent authorities in home jurisdiction of the tourist.

It would be a reasonable alternative to focus on the information on access to justice, i.e., court proceeding in the visited country<sup>13</sup>, and out-of-court proceeding only. Unawareness of tourists of their rights and legal remedies was regarded as a key finding relevant to desirability of the Tourism Project in the Guinchard's report<sup>14</sup>. Differently, I consider that providing information on rights and remedies would be an excessive goal. Providing the tourist with information should entail offering assistance in respect of her case and not producing information overload nor failing to inform market participants adequately.

Moreover, the entire model of information should be aimed at the so-called average international tourist as well as groups of tourists who are particularly vulnerable, e.g., illiterate tourists.

Information should be provided to tourist through a durable medium despite the progress made by new technologies, so as to receive a higher level of protection. Unlike precontractual information to be provided by the travel industry before concluding the contract, the personalisation of information on the on access to justice and out-of-court proceeding with the help of Big Data might form part of the approach<sup>15</sup>.

### **c) Assistance**

Some HCCH guidelines should be on providing assistance of the tourist at the country of destination once a dispute arises between the tourist and a travel service provider. The scope of the assistance, some standards to be performed and the competent authority to assist should be established.

A permanent body in a host country dedicated to assisting tourists in filing their claims with the competent court in the visited country, as established in the Brazilian Proposal<sup>16</sup>, would certainly strengthen a tourist protection. Likewise, assistance from the visited country would be welcome if the tourist is planning to file a claim to courts after returning to home, or she is allowed to file a claim through the Internet through an

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<sup>12</sup> Ibid, N. 191.

<sup>13</sup> The duty to inform tourists also about their right to file a complaint to a Court of Law was provided in Art. 3 of the Brazilian Proposal.

<sup>14</sup> Cf. Guinchard's report, N. 7 and pp. 28-31.

<sup>15</sup> J.M. BECH SERRAT, 'Commentary on Art. 5', in ESHTÉ (Ed.), *Collective Commentary about the New Package Travel Directive*, Estoril, forthcoming.

<sup>16</sup> Arts. 4 and 6 of the Brazilian Proposal.

ADR/ODR mechanism<sup>17</sup>. Such assistance should include cost-free information on competent authorities at the destination and consular assistance so as to collect evidence without delay.

The standards to performance should be mainly oriented to save the tourist time in the management of the claim, since very often tourists do not enforce their rights simply to avoid wasting time on their vacation.

A creation of Government-funded specialised agencies designed to assist tourists could be excessively costly. Regarding this, the current network of tourist offices perhaps could be used to provide such assistance if a programme training was executed. This way national divergencies in the ADR administration would be reduced<sup>18</sup>.

I consider that frivolous claims should be excluded from assistance, although the tourist never should be charged a fee for the costs incurred due to such assistance.

This information should be distinguished from the obligation to provide assistance to the tourist in difficulty that was imposed on the travel industry in some countries<sup>19</sup>.

#### **d) Cooperation mechanisms**

Cooperation mechanisms to assist a tourist in continuing or starting a complaint procedure in the visited country would be a useful HCCH recommended practice.

As it was mentioned in Sievi's report<sup>20</sup>, cooperation supports a tourist in overcoming the language and distance barrier; and a tourist seems to be more likely to pursue a complaint when having access to a local authority. Central authorities tasked with supporting parties in cross-border dispute resolution would be very welcome if the assistance to the tourist is provided by staff who have sufficient legal training and adequate language skills.

Nevertheless, this contribution argues that the approach to assistance and cooperation adopted in Guinchard's and Sievi's reports might be too narrow, since they were mainly focused on court proceeding in the visited country after considering some HCCH Conventions on Cooperation and Access to Justice<sup>21</sup>. In my opinion, cooperation between States should be extended to out-of-court proceedings with the aim of enforcing HCCH recommended standards for access to ADR/ODR and procedural as they were described below<sup>22</sup>.

Cooperation is an important tool in relation to governance and involves consultation between the States to coordinate the converging of their national law and practices.

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<sup>17</sup> Below § II.1.f).

<sup>18</sup> Guinchard's report, p. 39.

<sup>19</sup> E.g., Art. 16 of the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, OJ L 326, 11.12.2015, p. 1-3. Cf. Art. 2 of the UNWTO Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers.

<sup>20</sup> Sievi's report, N. 240.

<sup>21</sup> The Convention on the Service Abroad of Judicial and Extrajudicial Documents of 1965, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970, the Convention on International Access to Justice of 1980, the Convention on Civil Procedure of 1954, the Convention on the Recognition and Enforcement of Foreign Judgments of 2019, the Convention on Choice of Court Agreements of 2005, the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 1961 and the Convention on the Recognition and Enforcement of Foreign Judgments of 1971. Sievi's report, N. 12-84 and 174.

<sup>22</sup> Below § II.1.f).

Unlike harmonization which takes place by a legal instrument, cooperation may take place through soft forms of integration such as informal agreements between States or through soft-law initiatives<sup>23</sup>.

Cooperation mechanisms would be a step further in comparison to assistance (lit. c) and duplications in this regard should be avoided. Obviously, although the cooperation would be more expensive, it can be perceived by the tourist as a competitive advantage of the visited country.

#### **e) Small claim procedures**

HCCH guidelines on small claim procedures should be crucial so as to protect tourists when travelling abroad<sup>24</sup>.

Simplified procedures designed to deal with disputes of small amounts should be promoted as alternative to ordinary procedures.

A heavily simplified procedure should be recommended by HCCH by using standard forms in writing to be submitted online by the tourist, enabling litigants to proceed without a lawyer nor a *cautio judicatum solvi*<sup>25</sup>, accepting oral hearings only in exceptional cases<sup>26</sup> and to be carried out through IT communication, i.e. videoconferencing, and establishing a tight time schedule.

Limiting the procedure to claims of a maximum of 5,000 DEG would probably be a reasonable recommendation, although I am not aware of available empirical data on the average amount of cross-border tourists' claims<sup>27</sup>. If the small claim procedure was aimed at enabling a tourist to sue a service provider in the visited country jurisdiction, the procedure could also be limited to a reasonable amount after taking the price of the travel services offered at destination into consideration.

Assistance as above described (lit. c) would be of interest when initiating small claim procedures, particularly when they are initiated without a lawyer, since there are some technicalities to be faced, i.e., in filling in the forms and determining which is the competent court and the applicable law<sup>28</sup>.

Those issues still governed by domestic civil procedure law should also be covered by the HCCH voluntary standards, e.g., whether or not there is an appeal from a judgment under the small claims procedure<sup>29</sup>, the costs of filing a claim in the small

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<sup>23</sup> SAMMUT, 'Governance and the Transformation of European Private Law', cit., p. 287.

<sup>24</sup> Arts. 2(1) and 3(1) of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereafter European Small Claims Procedure Regulation), OJ L 199, 31.7.2007, p. 1-22.

<sup>25</sup> A *cautio judicatum solvi* may be imposed on tourists in general judicial procedures in several countries. Guinchard's report, pp. 35-38.

<sup>26</sup> Arts. 5(1a) and 8 of European Small Claims Procedure Regulation. The use of distance communication technology for oral hearings should be promoted.

<sup>27</sup> An amount of 5,000 DEG was equivalent to 6,146.19 EUR on 26 June 2020. Small claims were limited to a maximum amount of 5,000 EUR in Art. 2(1) of the EC Small Claims Regulation No. 861/2007 as amended by Art. 1 of the EU Regulation No. 2015/2421. As for the reasons of EU Regulation No. 2015/2421 for having increased the ceiling to 5,000 DEG, Guinchard's report, p. 53.

<sup>28</sup> Art. 11 of European Small Claims Procedure Regulation. Ibid, pp. 55-56, with a critical assessment of the information provided through the European e-justice Portal (<https://e-justice.europa.eu/home.do?action=home&plang=en&init=true>, accessed: 25 July 2020).

<sup>29</sup> Art. 18 of European Small Claims Procedure Regulation.

claim procedure<sup>30</sup>, or the situation where a counter-claim exceeds the financial limit of the small claims procedure. National autonomy on these issues procedural civil law issues is strong. The States would be reluctant to share competence in the framework of an international convention regulating the issues and HCCH recommended practices can be useful in practice. The Sievi's report adopts an approach in the same line. Since the unification or harmonization of national civil procedure laws beyond international private law is outside the HCCH's mandate, the "principle" was regarded "to 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"<sup>31</sup>.

The scope of procedure should be extended to mostly of the relevant matters to protection of tourists, although some issues must be excluded, e.g., personal injuries.

The simplified procedure designed by following the HCCH guidelines should enable a tourist to enforce its claim against a foreign travel service provider without a need for a declaration of enforceability and without any possibility of opposing its recognition.

#### **f) Access to Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR)**

It is certainly clear that, if international tourists could only rely on formal courts, many disputes would remain unresolved. International tourists very often do not seek judicial protection because of the small value of the claim and formality of the courts. The hazard may increase by the scarcity of lawyers specialized in the travel law field<sup>32</sup>.

Travel and transportation businesses whom might have been expected to oppose this trend have started to support it on the basis that it offers an effective and low-cost mean of solving disputes with their customers<sup>33</sup>.

HCCH Guidelines on cooperation and access to justice for international tourists should include standards on access to ADR, such as mediation, conciliation or arbitration, to put forth complaints against a service provider. As it was stated in the Sievi's report, increasing the access of tourists to ADR in order to put forth their complaints against a service provider is perfectly in line with the 2015 UNGCP<sup>34</sup>.

Thus, it is suggested that an international public body such as United Nations World Tourism Organization (UNWTO) be appointed as operating a conciliation scheme since public bodies have stronger means of providing redress in tourism matters and could support international tourist ADR, the so-called regulatory redress<sup>35</sup>. Cooperation between countries could facilitate ADR to be operated by UNWTO at the cross-border level by creating network centres to be hosted either by national authorities in the field of tourism or by tourist associations in charge of informing tourists about their rights

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<sup>30</sup> Assistance also should be aimed at providing the tourist with information on court costs and the methods of payment. Art. 15a(2) of European Small Claims Procedure Regulation. For a comment of this rule, Guinchard's report, p. 54.

<sup>31</sup> Sievi's report, N. 227-229.

<sup>32</sup> U. STENZEL, 'Consumer Conciliation in the Travel Sector – the Conciliation Body for Public Transport (SOEP) – the German Experience', IFTTA Law Review, 1, 2016, p. 6.

<sup>33</sup> Ibid.

<sup>34</sup> Sievi's report, N. 192.

<sup>35</sup> UNWTO expressed interest in the Draft Convention on Cooperation and Access to Justice for International Tourists that was presented at the HCCH's 2018 Meeting of the Council on General Affairs and Policy and was formally accepted as HCCH's observer on Tourism Project.

and providing assistance for complaint handling<sup>36</sup>. An international institution appointed as a conciliator mechanism should be preferred to obliging the countries to ensure that local entities exist and national consumer ADR procedures fulfil certain requirements, which would mean a highly diverse situation of ADR would prevail worldwide.

HCCH Guidelines on cooperation and access to justice for international tourists might include standards on access to a specific UNWTO conciliation procedure for international tourism, and HCCH could also be permanently involved in its monitoring and certification<sup>37</sup>.

It is submitted that a ADR scheme should only be available for international tourist claims, i.e., available if a tourist files a claim against a foreign travel service provider, being mostly funded by the travel industry, offering voluntary conciliation in civil matters to solve disputes and without a monetary threshold being set<sup>38</sup>. The UNWTO conciliation procedure should be as easy and quick as possible by following these criteria – largely following the German scheme for public transport (*Schlichtungsstelle für den öffentlichen Personenverkehr*, SÖP<sup>39</sup>)—:

- 1) A complaint to UNWTO should only be accepted if an international tourist is not satisfied about a response of a travel business to a previous complaint.
- 2) In a first step, a UNWTO conciliator should forward the complaint to the travel business to give him an opportunity for a statement and response. At this stage the travel business should be allowed to accept the claim and fulfil the demand of the tourist.
- 3) A UNWTO conciliator should legally examine the case once the travel business has rejected the claim.
- 4) The UNWTO conciliator should be provided with evidence, documents and opinions given by experts, if any, by the parties.
- 5) The parties should be given an opportunity to express their views on the arguments, evidence, documents, and facts put forward by the other party and on any opinions given by experts.
- 6) The conciliator should write a legal opinion concluding with a recommendation, giving the parties an opportunity to solve the dispute in an amicable way.
- 7) If both sides, the international tourist and the travel business agree to the recommendation resulting from the legal opinion written by the UNWTO conciliator, the recommendation itself should become a settlement agreement, binding the parties. Then the dispute would be solved.

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<sup>36</sup> Compare with the ECC Net, a cooperation project at the EU level, [https://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/european\\_consumer\\_centre\\_network/index\\_en.htm](https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/european_consumer_centre_network/index_en.htm), accessed: 14 July 2020. BENÖHR, 'The United Nations Guidelines for Consumer Protection: Legal Implications and New Frontiers', cit., p. 115.

<sup>37</sup> Guinchard's report, N. 15, concluded that the work by HCCH and UNWTO in this area would be complementary.

<sup>38</sup> Cf. Art. 2(1) of the EC Small Claims Regulation No. 861/2007 as amended by Art. 1 of the EU Regulation No. 2015/2421.

<sup>39</sup> <https://soep-online.de/das-schlichtungsverfahren/>, accessed: 22 July 2020.



The scope of the scheme should be exclusively formed by travel law issues, i.e., disputes where concerning rights to be freely dispose of. A list method indicating which disputes can be submitted could be useful<sup>40</sup>.

Tourist awareness is essential for the effectiveness of any ADR, especially in the case of cross-border transactions, so that UNWTO should ensure that businesses inform tourists about the conciliation scheme available to her, when those businesses commit to use this procedure to resolve disputes. Consumer organisations and professional associations also should contribute to raise awareness if they receive complaint of international tourists.

A voluntary character of the ADR scheme should be maintained and the fundamental right of the parties to an effective remedy before a tribunal and fair trial as declared in Art. 47 CFREU, should prevail.

The non-obligatory nature of a UNWTO conciliation nature should be compatible with making the outcome binding, except if either side, i.e., either the business travel or the international tourist, rejects the decision of the conciliator<sup>41</sup>. Then the parties should still have the right to file a case with the court. This would be in line with the Sievi's report when the text says that leaving the tourist always the option of taking a dispute to State courts might be considered more in compliance with the rules on arbitrability of consumer disputes in certain jurisdiction<sup>42</sup>. Moreover, a judicial review would be excluded with a non-binding outcome of the conciliation procedure.

As travel industry may be reluctant to participate, HCCH recommendations might include a provision suggesting to the competent national authorities and professional associations the adoption of incentives and sanctions to encouraging business to participate in the UNWTO conciliation procedure.

What is crucial in this context is that the existing mandatory tourist rights should not be deviated from the decision<sup>43</sup>. A number of mandatory and specific protective substantive travel law provisions will often apply, whether national or international, and Art. 6 of the Rome I Regulation should be observed when determining the law that applies to the case. A rigorous and expert analysis of the legal and factual issues by the conciliator should be needed. This implies that an extreme expertise of the persons in charge of ADR, i.e., UNWTO conciliators, must be guaranteed. For that reason, participating in training programmes hosted by academia as a prerequisite to obtain a conciliation qualification and for a knowledge update may be needed. Providing the same or even a higher expertise that come with a court process would be a key issue for the success of the proposed conciliation scheme.

A public value of international tourist protection should also mean promoting more transparency to the detriment to the classic feature of confidentiality. Thus, the creation

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<sup>40</sup> As for arbitrability of consumer disputes, Y. FARAH and L.V.P. DE OLIVEIRA, 'Releasing the Potential for a Value-Based Consumer Arbitration under the Consumer ADR Directive', *European Review of Private Law*, 2016, p. 122.

<sup>41</sup> § Binungswirkung, <https://soep-online.de/das-schlichtungsverfahren/>, accessed: 22 July 2020.

<sup>42</sup> Sievi's report, N. 212. The report concludes that future work could focus on ODR as an additional alternative to court proceedings.

<sup>43</sup> Where the ADR procedures leads to a binding decision, Art. 11 para. 1 of the ADR Directive requires the Member State to ensure that the consumer shall not be deprived of the protection of the applicable mandatory law.

of an online data base with details written in English of all UNWTO conciliation cases, including an exhaustive description of the facts, evidence, opinions given by experts, the legal opinion written by a conciliator and whether the recommendation was accepted or rejected by the parties, would increase trust in international tourists.

The UNWTO conciliation procedure for international tourism would be suitable for collective claims and the approach of Guideline 40 of the 2015 UNGCP should be followed.

Another general principle of fairness should be making the UNWTO conciliation procedure available free of charge or at a nominal fee for tourists. They should bear only their own costs, e. g., postage, photocopying, or the attorney's costs in case a tourist uses a lawyer<sup>44</sup>. Costs of ADR procedures are typically lower than the costs of court proceedings. However, the translation of documents will be quite common, amounting a high cost in comparison with the small value of the claim. Such a translation should be free for tourists and should be borne by the business if there is a legal basis for a claim<sup>45</sup>. This way travel businesses should be promoted to accept the claim and fulfil the demand of the tourist before an examination of the case by the UNWTO conciliator and equality of arms would be guaranteed. The same would be valid as for the costs of producing evidences of experts, yet they are less common than in other professions (e.g., in the building construction).

The conciliation procedure also should be faster than filing a lawsuit with the court. A legal opinion of the UNWTO conciliator should be made available to the parties within three months running from submitting the claim, although the more complex cases could take six months, e.g., a collective claim. Speed should result to some extent from the features of conciliation, an ADR scheme that is faster than arbitration, and some aspects of the procedure, e.g., there will be no meeting of the parties or face-to-face hearing as such.

Moreover, this contribution argues that the conciliation procedure be available exclusively through the Internet. An electronic system is what can contribute most to the speed of the procedure. The tourist often finds herself in a position of added vulnerability due to their short-term stay, if it is assumed that she is either unable to enforce their rights in the visited country or have to content themselves with less than they are entitled to. It was argued in the Guinchard's report that physical presence was required by law in some countries<sup>46</sup>, coming to conclusion that inability to use mediation/conciliation beyond the stay in the visited country was a key finding relevant to desirability of the Tourism Project. On the contrary, I suggest that UNWTO conciliation procedure be an exception and lead the way for a better future. Tourist vulnerability will be considerably reduced by using new technologies. If the proceedings must not be carried in the visited country, difficulties will basically be on receiving a first legal assistance in the short length of stay, if required, and collecting evidence at destination, e.g., taking photos of the hotel premises. Inconvenience resulting from cultural and language constraints are mitigated if the tourist is allowed to

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<sup>44</sup> STENZEL, 'Consumer Conciliation in the Travel Sector – the Conciliation Body for Public Transport (SOEP) – the German Experience', cit., p. 6.

<sup>45</sup> Below § II.2.

<sup>46</sup> Bosnia Herzegovina, Brazil (for most PROCONS), Chile, Croatia, the Dominican Republic, France, Greece, Japan, Korea, Macao (SAR, China), Mali, Moldova, Morocco, Philippines, Seychelles, Uruguay and Vietnam. Guinchard's report, N. 7 and p. 32.



file a claim through the Internet after returning to home. To this extent, an effort to make modern communication technologies worldwide available should be made.

A UNWTO online conciliation procedure for international tourism disputes may be very useful because parties are established in different countries, given the fact that monetary value of claims arising from travel contracts is often too low to justify a court procedure in another country. Online dispute resolution might provide a solution to the issue of lacking physical presence of the tourist in the country of destinations, as it was argued in the Sievi's report, since the procedure would be accessible from abroad<sup>47</sup>.

An ODR platform for international tourist will face linguistic challenges. The workings of the ECC-Net was taken into consideration as a model for the current Tourism Project, where both tourist and business are able to use the language of their country of origin, the European Centres then liaising between themselves in their preferred language<sup>48</sup>. Nevertheless, it is doubtful that the same model can be worldwide extended to a UNWTO online conciliation procedure for international tourists.

Obviously, a barrier resulting from enforcement will not be totally overcome, as it was noted in Sievi's report<sup>49</sup>. Conciliation does not result in an enforceable title like a judgment and there is a lack of rules of procedure and uniform conditions to enforce a settlement agreement at international level for tourists<sup>50</sup>. Regarding this, perhaps an application of private enforcement mechanisms should be explored<sup>51</sup>.

Some States may be reluctant to accept an international convention and, as it was noted in the Sievi's report, establishing an ADR system would be beyond the scope of that HCCH's mandate<sup>52</sup>. Nevertheless, creating a UNWTO conciliation procedure based on standards recommended HCCH is feasible and mostly of the States, travel businesses, associations, and tourists would probably be very interested in receiving practice recommendations on ADR quality requirements from HCCH. The option of 'the setting up of a soft law instrument establishing certain minimum procedural standards for an ODR procedure in tourism matters' was already mentioned in the Sievi's report, yet national tourism organizations were appointed in this document to build upon such soft law and certify specific ODR providers complying with these minimum standards<sup>53</sup>.

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<sup>47</sup> Sievi's report, N. 197 and 210.

<sup>48</sup> Guinchard's report, pp. 51-52. [https://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/european\\_consumer\\_centre\\_network/index\\_en.htm](https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/european_consumer_centre_network/index_en.htm), accessed: 24 July 2020.

<sup>49</sup> Sievi's report, N. 194 b.

<sup>50</sup> The issue was addressed by the UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), [https://uncitral.un.org/sites/uncitral.un.org/files/singapore\\_convention\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf), accessed: 17 July 2020. Rules on the enforcement of settlement agreement concluded within the frame of an ADR procedure was considered as falling within the scope of the HCCH's mandate in Sievi's report, N. 196.

<sup>51</sup> In the same vein, *ibid*, N. 215, mentioned the document 'Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms' of the UNCITRAL Working Group III of 18-22 November 2013 was mentioned, available at <https://undocs.org/en/A/CN.9/WG.III/WP.124>, accessed 17 July 2020.

<sup>52</sup> Sievi's report, N. 195.

<sup>53</sup> *Ibid*, N. 216.

## **2. A further “principle” to be considered: the translation costs of the documents**

All the above analysed issues have a common shortcoming: the high cost of translating the documents into the language of a court, a mediator, a conciliator or an arbitrator, being a problem in both judicial and out-of-court proceedings.

Such translation costs in comparison to the potential claim amount may be really high, e.g., a Spanish passenger claims an amount of 1,100 DEG against a Russian airline due to a loss of baggage under Art 18(1) of the Montreal Convention and a court in Madrid requires to her an official translation of the documents that costs 650 DEG, including the baggage irregularity report, correspondence, among other documents. It constitutes one of the most important barriers to international tourists. National courts are relentless when it comes to require a sworn translation of the documents involved in the proceedings so as to preserve the procedural guarantees of defendant. Obviously, that expense will be recovered by the tourist if the defendant is ordered to pay court costs. However, the simple risk of having to pay translation costs discourage tourists from claiming.

In my opinion the issue should be addressed by the HCCH Guidelines on cooperation and access to justice for International tourists and it was not duly considered in the Sievi’s report.

Certainly, the report says that “the claim form must be submitted in the language of the court seized which could put in place certain language barriers” in relation to small claim procedures<sup>54</sup>. Art. 6.1 of the EC Regulation No. 861/2007 was mentioned but the problem was mitigated when linking it to a claimant’s option to seek assistance in filling out the claim form as provided in Art. 11 of the EC Regulation No. 861/2007. However it is unclear that providing assistance in filling out the claim form will be interpreted as translating the documents into the language of the court and it is far from what was provided in Art. 4 of the Brazilian Proposal, i.e., where a multilingual complaints-model form was created to facilitate the communication between the tourist and the consumer agency of the country visited.

A HCCH recommended practice promoting government funding translation of those documents that are required to be translated by a court, a mediator, a conciliator or an arbitrator in non-frivolous claims of international tourists could contribute to improve significantly the protection. Translation costs should also be borne by the business if there is a legal basis for a claim. A standard establishing that assistance in filling out the claim form will cover, where appropriate, translation costs of the attached documents to the claim would also be welcome.

Likewise, lawyers appointed to represent a tourist in an application for legal aid submitted in the home jurisdiction, when proceedings are conducted in a foreign jurisdiction, should be skilled in a language readily understandable for the tourist, or at least that costs of translations should be covered by legal aid.

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<sup>54</sup> Ibid, N. 150 and 226.

## **TOURISTS AND VISITORS (ODR) PROJECT**

### **Legal Tech and ODR in the Light of the Development of Practical Handbook/Guide under the Auspices of HCCH**

Andrej Mićović\*

#### **Introduction**

The third meeting of the Experts' Group on the Tourists and Visitors (ODR) Project was held virtually from 5 to 9 October 2020, arranged by the PB in The Hague. The EG recognized Andre Stemmet, Counsellor (Legal) of the South African Embassy to the Kingdom of the Netherlands, as its continuing Chairperson. Experts from Argentina, Brazil, Canada, Chile, the People's Republic of China, Costa Rica, Ecuador, the European Union, France, Greece, Mexico, Serbia, South Africa, Switzerland, the United Kingdom, the United States of America and Venezuela participated, with the International Association of Consumer Law, the International Forum of Travel and Tourism Advocates, the Leisure Industries Section of the International Bar Association and the United Nations Commission on International Trade Law (UNCITRAL) participating as observers.

The EG did not reach a conclusive consensus on "the necessity, desirability, and feasibility of developing a soft law instrument on matters relating to online dispute resolution" of claims by international tourists and visitors. It did, however, conclude that the development of a "Guide" may provide useful assistance to tourists and visitors in pursuing such claims. The "Guide" would consist of two parts. The first part would explain, in layperson's terms, how existing HCCH Conventions and Principles may be relevant to the resolution of claims by international tourists and visitors (general references to other relevant instruments may be included). The second part would list and describe, without any value judgment, ODR platforms that may be used by international tourists and visitors, by providing factual information, on the basis of specific features identified by the EG, that could assist tourists and visitors in assessing which

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platform may suit their needs. The EG invited the PB to prepare, subject to available resources, a detailed outline of such a “Guide” and to circulate it to the members of the EG for comments, in advance of CGAP 2021.<sup>1</sup>

This contribution is prepared as part of the commitment of The International Forum of Travel and Tourism (IFTTA), as HCCH’s observer on Tourists and Visitors (ODR) Project, to deliver a report in advance to the meeting of the Council of General Affairs and Policy (CGAP) in 2021.

The subject of the contribution is related to the benefits and challenges of Legal Tech in relation to ODR, as well as to the accessibility requirements, as a *conditio sine qua non* for ensuring access to justice for international tourists.

### **Benefits and Challenges of Legal Tech in Relation to ODR**

Sievi’s report identifies online dispute resolution (ODR) and Legal Tech<sup>2</sup> as the two principles with the biggest potential impact for the protection of international tourists. The use of technology in the legal service industry (so-called Legal Tech), can serve not only to ease access to justice, but also to ensure accessibility of ODR mechanisms. Unification of legal rules on ODR can be seen as a hardware and Legal Tech tools as a software in achieving the higher level of the protection of international tourists as consumers.

In order to ensure efficient *ex ante* and *ex post* consumer protection, a variety of ODR systems employ artificial intelligence (AI) for dispute resolution processes, often included under the general policy trend of “Legal Tech”. If incorporated into the ODR platform, Legal Tech tools may have positive effect in the:

- **conflict prevention** - a tool that automatically breaks down and classifies the types of complaints received in the ODR platform can be a valuable asset for regulators and traders allowing them to improve trading standards and avoid future disputes;

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<sup>1</sup> Aide Memoire of the third meeting of the Experts’ Group on the Tourists and Visitors (ODR) Project, prepared by the Chair of the Experts’ Group The Hague / Online 5 to 9 October 2020.

<sup>2</sup> The term Legal Tech can be defined as use of technology and software with a goal to provide legal services more efficiently. See: Sievi, N., *Legal Tech and Resolution of Tourists’ Claims*, Third Meeting of the Experts’ Group on the Tourists and Visitors (ODR) Project, 5-9 October 2020.

- **online negotiation** - two basic models of online negotiation can be distinguished: *assisted negotiation* (categorizing disputes and matching them with solutions adopted by parties in similar past disputes) and *automated negotiation* or *blind-bidding* (used in situations in which both parties agree on the facts and liabilities, but disagree on the calculation of the loss or the type of remedy). Automated negotiation uses software that allows users to analyse their bargaining positions through evaluation and prioritization of offers and counter offers. Such offers are kept hidden during the negotiation, and are only disclosed when these offers match or enter into a pre-established range - hence the name 'blind-bidding'.
- **case management for the approved ADR/ODR entities** – the case management function should offer a one-stop shop for consumers and traders, so that they will not need to use a different web interface for each ADR/ODR process.
- **monitoring and enforcement activities** - the information contained in the ODR platform, if appropriately shared, could improve the enforcement role of regulators, assisting them to identify patterns of market failure and traders' bad practice as well as to ensure a quick response to fraudulent cross-border activity.<sup>3</sup>

The Committee on Legal Affairs and Human Rights of the Council of Europe recognizes that innovative use of modern information and communications technology (ICT) within courts on the one hand, and ODR procedures on the other, can play a role in overcoming existing barriers to individuals' access to justice.<sup>4</sup> Member States are thus encouraged to promote and further develop ODR mechanisms as part of their obligations stipulated in various sectoral directives. Thus, Art. 14 of Timeshare Directive 2008/122/EU stipulates that Member States should take the necessary measures in order to establish and develop an out-of-court complaints and redress procedures for the settlement of consumer disputes. Also, in order to effectively protect tourism service users, both Package Travel Directive 2015/2302/EU and Timeshare Directive 2008/122/EU oblige traders and their branch organizations to inform consumers of the

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<sup>3</sup> Cortes, P. (2015). A new regulatory framework for extra-judicial consumer redress: Where we are and how to move forward. *Legal Studies*, 35(1), pp. 127-131.

<sup>4</sup> See: Committee on Legal Affairs and Human Rights, Access to justice and the Internet: potential and challenges, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22245&lang=en>

availability of such procedures, i.e., availability of ADR mechanisms pursuant to Directive 2013/11/EU and ODR platforms pursuant to Regulation (EU) No 524/2013.<sup>5</sup>

Apart from the benefits of ICT tools and Legal Tech in relation to ODR (facilitating individuals' access to justice, enabling rapid and efficient settlement of consumer disputes, at a lower cost and in a less conflictual manner than conventional litigation, affording more flexibility in the choice of procedures used and solutions offered), the committee notes that ODR procedures may come with certain challenges, including technical issues, inequalities in individuals' access to online resources, privacy issues and problems regarding enforcement of decisions.

Similarly, institutional reports and legal doctrine identify the lack of awareness of ADR and ODR mechanisms and the lack of incentives for their use as the most important hindrances to their growth.<sup>6</sup> At the EU level, the ADR Directive attempts to mitigate this by requiring traders to inform consumers about ADR entities which are competent to resolve consumers' complaints, and the ODR Regulation requires online traders to provide a link to the ODR platform. At the global level, development of Practical Handbook/Guide under the auspices of HCCH will certainly have positive effect in mitigating lack of awareness of international tourists on the existing ODR mechanisms in different legal jurisdictions. However, a key element that is missing from the European redress system but that is crucial to its success is the development of incentives in order to ensure parties' participation in an ADR/ODR process, the early settlement of complaints and compliance with final outcomes.

The list of possible incentives that might be taken into an account has been already provided and analyzed in the legal doctrine and is given below in a summarized manner:<sup>7</sup>

**A. INCENTIVES TO PARTICIPATE IN AN ODR PROCESS.** – Parties' participation in the ADR/ODR process greatly depends on the associated costs and the level of trust parties have in the overall ODR process.

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<sup>5</sup> Within the EU, tourism-related disputes can be resolved by the dispute resolution bodies of general competence (Belgium, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovenia, Spain and Romania) or special competence bodies dealing with package travel, stand-alone services (Belgium, Denmark, France and Luxembourg), travel contracts (Austria, Germany), air passenger rights (Norway, Bulgaria, Germany, Italy), and time-sharing (Spain, Portugal). See: Alternative Dispute Resolution in the Air Passenger Rights Sector, <http://cecluxembourg.lu/wp-content/uploads/2015/04/ADR-APR-2015-FINAL.pdf>

<sup>6</sup> European Commission, Communication on Alternative Dispute Resolution for Consumer Disputes in the Single Market COM(2011) 791, p. 2, 6; Cortes, P., pp. 131.

<sup>7</sup> Cortes, P., pp. 132-140.

- **COST-EFFECTIVE AND ECONOMICALLY JUSTIFIABLE ODR PROCESS** – Parties shall be incentivized to participate at the ODR mechanisms by ensuring free or low-cost process to consumers and by indicating economic benefits for traders (e.g. trader’s participation in ODR process limits the number of chargebacks issued against him which can ultimately affect the interest rates that the trader pays per transaction; efficient resolution of consumer disputes enhances the consumers’ confidence in the fairness of the marketplace and consequently increases the commercial activity of traders, etc.);
- **CREATION OF GLOBALLY RECOGNIZABLE AND REPUTABLE TRUSTMARK** – The role of the trustmark is to assist consumers in recognising reliable traders and ADR entities by setting conditions for displaying (e.g. high rate of resolved disputes) and withdrawal of a trustmark (non-compliance with the adopted standards by ADR/ODR entities; traders’ refusal to participate in the ADR proceedings or to comply with final outcomes) and designating public institution that will be monitoring compliance with the adopted standards.

## **B. INCENTIVES TO SETTLE COMPLAINTS:**

- **AN EFFECTIVE AUTOMATED NEGOTIATION TOOL** – Creation of this tool enables most disputes to be resolved in its base, before progressing into the next stage(s), i.e., without the intervention of neutral third parties towards facilitation of settlements and imposition of decisions (e.g. UNCITRAL adopted pyramid shaped ODR scheme).
- **REDUCTION OF CASE FEES AS A MEANS OF REWARDING PARTIES WHO SETTLE COMPLAINTS EARLY** – The purpose of this incentive is to encourage parties to settle meritorious complaints before they progress to procedures in which a third party is appointed and case fees are requested.
- **COST PENALTIES** - Cost sanctions may be used for encouraging parties to settle their disputes when appropriate, instead of employing more costly adjudicative models (e.g. in case of consumer complaints against members of the Association for British Travel Agents (ABTA), the CEDR Solve Consumer Arbitration Scheme provides that when the consumer-complainant is awarded less than was previously offered by the trader, the consumer would be ordered to pay an amount that is equal to the registration fee).
- **MULTI-TIERED DISPUTE RESOLUTION PROCESSES** - A multi-tiered ODR process can be used as a model for the future ODR mechanism under the auspices of HCCH, as it is implemented in the majority of consumer disputes. In fact, not only is this already the model employed by many ombudsmen in Europe but it is also the approach being proposed by UNICTRAL for the resolution of e-commerce disputes.
- **THE PUBLICATION OF ADJUDICATED DECISIONS** – The publication of decisions would have at least three important roles: first, to bring transparency to a process in which the parties do not contest on an equal footing, and in which traders are repeat players while consumers are inexperienced users; secondly,

to help to establish a body of model cases, facilitating legal certainty and the predictability of outcomes; and, thirdly, to act as an incentive for respondents to settle reasonable complaints.

### C. INCENTIVES FOR OUT-OF-COURT COMPLIANCE OF OUTCOMES:

- **FEEDBACKS IN REVIEW WEBSITES** - Feedbacks in review websites have become a very useful mechanism for incentivising parties to participate in the dispute resolution process and reach the settlement which would be the basis for removal of the negative consumer posts and reviews or announcement of the out-of-court settlement against the consumer's review. In order to avoid the consumer blackmailing traders, it will be necessary to include some tools, such as cease-and-desist letters to ensure the filtering of vexatious reviews, as well as blockchain technology to make review site more trustworthy. Moreover, a trader should be able to invite the consumer to initiate a claim in the ODR platform. If the consumer refuses to do so within an adequate period of time, then the negative posting should be automatically deleted or followed by a post that records the consumer's refusal to participate in the dispute resolution process.
- **COOPERATION WITH SEARCH ENGINES** - The ODR platform and review sites could also cooperate with the search engines to rank down traders who have a high number of unresolved complaints or that have not complied with final outcomes. Although search engines are committed to neutrality, and so they would be reluctant to change their own settings, search engines could incorporate filters with this option, allowing users to decide whether to refine their browses.
- **'NAME AND SHAME' TECHNIQUES AND BLACKLISTS** - A number of ADR and ODR schemes already use 'naming and shaming' as an incentive for compliance and to warn consumers (e.g. the Internet Ombudsman in Austria publishes a Watchlist of traders that have generated multiple consumer complaints; the Swedish National Board for Consumer Disputes also makes available to the public its decisions for 'naming and shaming' traders for non-compliance; the Better Business Bureau (BBB), which rates traders in Canada and the USA taking into an account compliance of the trader with the outcomes).
- **ONLINE INTERMEDIARIES** - Intermediaries may be effective in encouraging compliance (**escrow companies** can hold the money related to the transaction; **payment providers**, such as credit card companies (i.e. Visa, MasterCard and American Express) and other online payment intermediaries (i.e. PayPal) can reverse payments in compliance with outcomes, moving sums in dispute from the seller's account to the buyer's; **online regulators** such as ICANN could potentially play a key role in blocking traders that engage in criminal activities through the cancellation of domain names when required by public enforcement bodies. These intermediaries can therefore play useful roles in ensuring quick enforcement without the need for judicial intervention.



## Legal Tech and Accessibility

ODR platform needs to be user-friendly and accessible to all, including vulnerable consumers. The same applies to Practical Handbook/Guide. Two broad categories of consumer vulnerability can be distinguished: „market-specific vulnerability“, which derives from the specific context of particular markets, and can affect a broad range of consumers within those markets; „vulnerability associated with personal characteristics“ such as physical disability, poor mental health or low incomes, which may result in individuals with those characteristics facing particularly severe, persistent problems across markets.<sup>8</sup>

When it comes to the latter one, three major documents have guided the understanding and promotion of accessibility<sup>9</sup> within the United Nations policy framework to date: The World Programme of Action concerning Disabled Persons, The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities and The UN Convention on the Rights of Persons with Disabilities (UN CRPD).<sup>10</sup> Together, these three documents require that Governments and the international community recognize the importance of accessibility in ensuring the equalization of opportunities for persons with disabilities by empowering them to “live independently and participate fully in all aspects of life”. The documents give particular attention to accessibility in the physical environment, as well as access to information and

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<sup>8</sup> See: Consumer vulnerability: challenges and potential solutions, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/782542/CMA-Vulnerable\\_People\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782542/CMA-Vulnerable_People_Accessible.pdf)

<sup>9</sup> In broader terms, accessibility can be defined as the provision of flexibility to accommodate each user’s needs and preferences. When used with the specific reference to persons with disabilities, accessibility refers to any place, space, item or service, whether physical or virtual, that is easily approached, reached, entered, exited, interacted with, understood or otherwise used by persons of varying disabilities, is determined to be accessible. Accessibility within the context of the United Nations is not only an inherent right of persons with disabilities, but a means of ensuring that persons with disabilities are able to exercise all rights and fundamental freedoms and are empowered to participate fully in society on equal terms with all others. See: United Nations, Accessibility and Development – Mainstreaming disability in the post-2015 development agenda, 2013, [https://www.un.org/disabilities/documents/accessibility\\_and\\_development.pdf](https://www.un.org/disabilities/documents/accessibility_and_development.pdf), p. 3.

<sup>10</sup> UN CRPD includes obligations for digital accessibility, i.e., requires signatories to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet (Art. 9), includes the obligation of accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions (Art. 21); ensures effective access to justice for persons with disabilities (Art. 13).

communication, and affirm the importance of access to public services such as transportation, education and health care, among others.<sup>11</sup>

Following the adoption of the UN CRPD which the EU signed in 2007 and ratified in 2010, the EU has adopted the European Disability Strategy 2010-2020 and various disability-related rules in the field of transport, public procurement, electronic communications, networks and services etc.<sup>12</sup> To this date, the most important pieces of legislation in this field are Web Accessibility Directive 2016/2102/EU (containing provisions on the publication of information in accessible formats) and European Accessibility Act 2019/882/EU.

Taking into an account a correlation between aging and disabilities, digital accessibility requirements are particularly important for vulnerable categories of international tourists, since travel activity is a primary activity for older retirees. It is therefore essential for them to be able to obtain reliable information from the Internet, which serves as the main source for consuming tourist information.<sup>13</sup>

Making ICT more accessible and better usable can be done through a combination of three approaches: **1. design for all or universal design** which is defined in the UN Convention on the Rights of People with Disabilities as the *design of products, environments, programs and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design*; **2. assistive technology** which is defined by the European standardization organization CEN as *a piece of equipment, product system, hardware, software or service that is used to increase, maintain or improve functional capabilities of individuals with disabilities*; **3. accessible intelligent environment**, which is an environment that is adaptive

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<sup>11</sup> United Nations, Accessibility and Development..., [https://www.un.org/disabilities/documents/accessibility\\_and\\_development.pdf](https://www.un.org/disabilities/documents/accessibility_and_development.pdf), p. 4.

<sup>12</sup> Broderick, A., Ferri, D., *International and European Disability Law and Policy*, Cambridge University Press, Cambridge, United Kingdom 2019, p. 3-4.

<sup>13</sup> See: Trinidad Dominguez Vila et al., (2018). Website accessibility in the tourism industry: an analysis of official national tourism organization websites around the world, *DISABILITY & REHABILITATION*, Vol. 40, Issue 24, p. 2895, 2903.

and adapting to the user (which is typically realized by intelligence in the living space of the user).<sup>14</sup>

While accessibility is a civil and human right of persons with disabilities, accessible ODR platforms and accessible Practical Handbook/Guide containing information about existing ODR platforms, do not provide benefits only to people with disabilities. Accessibility may be essential for some individuals, but many accessibility design features will be helpful and useful for everyone.<sup>15</sup>

### **Concluding Remarks and Recommendations**

Development of the Practical Handbook/Guide can be seen as an important milestone in pursuing the ultimate goal – adoption of soft law / hard law ODR instrument. Meanwhile, Practical Handbook/Guide might be the good way to mitigate the lack of awareness of the existing ADR/ODR mechanisms and to ensure access to justice to international tourists by providing them information about relevant out-of-court dispute resolution mechanisms at one place. In my personal opinion, without differentiating reliable ADR/ODR platforms (that are complying with mandatory/non-mandatory standards) from non-reliable (e.g. listed on national blacklists) and ensuring regular update, informative list will have not only limited effect but could also be misleading.

In the context of the development of the Practical Handbook/Guide, it might be good idea to include the information on the overall percentage rate of the traders' participation in the ODR process and percentage rate of their compliance with the final outcomes as particular feature of the existing ODR systems worldwide.

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<sup>14</sup> Timmers, P. (2009). Update on e-inclusion and e-accessibility policy at european level. *Journal of Legal Technology Risk Management*, 4(1), pp. 26-27.

<sup>15</sup> Larson, D. (2019). Digital accessibility and disability accommodations in online dispute resolution: Odr for everyone. *Ohio State Journal on Dispute Resolution*, 34(3), p. 437.

Due to its scope and nature, Practical Handbook/Guide cannot tackle the problems regarding enforcement of decisions, but it could however provide international tourists with the comparative information about the incentives that are applied in different legal jurisdictions.

Finally, it is essential that webpage containing Practical Handbook/Guide and Guide itself complies with the accessibility requirements, so that vulnerable consumers can have access to the information on the particular (accessibility) features of the existing ODR platforms.

on board the plane, he tried to slash his wrists and engaged in a fist fight with the law enforcement officers who were accompanying him. The officers restrained him and subsequently, he sued the air carrier for battery and false imprisonment. In this case, the Court held that the plaintiff's claims were barred by the *Tokyo Convention*, since the actions taken on board to restrain plaintiff were deemed reasonable.

Therefore, the aircraft commander, the crew members, the passengers and in-flight security officers are given immunity from law suits filed by the alleged offender against whom they would have acted. Such protection was given in order to encourage whosoever to curtail any wrongful acts in the interest of safety and security when confined to the limited space on board the aircraft.

In conclusion, air safety and security commence on the ground. Airlines must encourage ground employees to detect and report unruly passenger behaviour at check-in, in lounges and at boarding gates in order to apply a zero tolerance approach, especially when considering the safety and security threat posed by a disruptive passenger, where 'any passenger who poses any threat should not be treated lightly'.<sup>26</sup>

<sup>26</sup> Statement made by the author at the *2nd International Conference on Disruptive Airline Passenger Behaviour* held in London between the 10th–11th June 2014; as reported by the United Kingdom Independent of 10 June 2014 <http://www.independent.co.uk/travel/news-and-advice/aviation-community-demands-action-on-alcohol-to-combat-increase-in-air-rage-9524252.html>.

## Consumer Conciliation in the Travel Sector – the Conciliation Body for Public Transport (SOEP) – the German Experience

Dr. Uta Stenzel, Germany<sup>1</sup>

In travel law cases usually the amount in dispute is small. Often, the monetary risk of bringing a lawsuit in the courts trumps the desire for compensation. The hazard may increase by the scarcity of lawyers specialized in the travel law field. To overcome these disadvantages, alternative procedures for settling disputes out-of-court are being discussed worldwide. This development is promoted, not only by consumer organizations, but also by governments who wish to protect the interests of travelling consumers. Travel and transportation companies who might have been expected to oppose this trend have started to support it on the basis that it offers an effective and low-cost mean of solving disputes with their customers.

This article provides a short overview of the German experience in this area. It focusses on the work of the German Conciliation Body for Public Transport, SOEP.<sup>2</sup> This body has been successfully solving disputes out-of-court between passengers and transportation companies since 2009.

### 1. Development of SOEP into an intermodal conciliation body

“Alternative disputes resolution” (ADR) is manifold. It is a collective term to describe a range of processes for settling disputes outside of the courts. Depending on the engagement of the parties, these can include mediation, conciliation, or arbitration. Usually, ADR processes are cheaper, faster and also more flexible than filing a lawsuit with the court.

In December 2009, SOEP started to offer voluntary conciliation to solve disputes between train companies and their customers. Within a short time SOEP became recognized by the different public transportation sectors and consumers as

providing an effective ADR scheme for transportation and passenger rights law disputes. In June 2010 it was notified by the European Commission as fulfilling Recommendation 98/257/EC for alternative dispute resolution of consumer disputes.<sup>3</sup> It further received official recognitions as a conciliation body by the German government.<sup>4</sup>

Nowadays, SOEP covers complaints not only regarding trains, but also coaches, ships, and airplanes,<sup>5</sup> including short distance public transport (i. e., city train or bus, metro).<sup>6</sup> It has developed into an intermodal conciliation body as well, and follows a service-oriented and practical approach. At present, SOEP conciliates disputes for about 250 companies from all public transportation sectors.<sup>7</sup> One of the advantages of intermodal conciliation is that all consumer complaints involv-

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<sup>2</sup> Schlichtungsstelle für den öffentlichen Personenverkehr, sÖp, Berlin, [www.soeponline.de](http://www.soeponline.de).

<sup>3</sup> See [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/national-out-of-court-bodies/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/national-out-of-court-bodies/index_en.htm) (retrieved on 08/02/2016); 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, Official Journal L 115, 17/04/1998, p. 31–34. The Recommendation states seven principles to be guaranteed as a minimum in ADR schemes: independence, transparency, adversarial, effectiveness, legality, liberty, representation, Art. I–VII.

<sup>4</sup> Ship: March 2013; Coaches: October 2013; Flight: November 2014.

<sup>5</sup> Since 2013.

<sup>6</sup> Since 2011/2012.

<sup>7</sup> Status as of February 2016.

ing different modes of transport (e.g., if the traveler takes a train to the airport in order to travel onward by plane) may be dealt with SOEP – instead of the consumer having to send separate requests to each transport mode.

SOEP is privately organized. The conciliation process is financed by the transportation companies, who are members of SOEP.<sup>8</sup> For travelers, as the complainant, the conciliation is free. They bear only their own costs, e.g., postage, photocopying, or in case they use a lawyer the attorney's costs.

Despite being funded by the travel industry, SOEP operates impartially. All the conciliators are fully qualified lawyers. They act independently when reaching a decision, and are bound only by the applicable laws and regulations. The head of SOEP is a former president and judge of a Provincial High Court and Court of Appeal (Oberlandesgericht) in Germany.

A recent study by the University of Oxford focusing on the impact and legitimacy of ombudsmen in Europe indicates that 95 % of consumers who have used the services of SOEP were very or somewhat satisfied with the outcome. 96 % of consumers would very likely or likely recommend SOEP to others.<sup>9</sup> This shows a very high level of consumer satisfaction regarding the conciliation process applied by SOEP.

## 2. Conciliation procedure of SOEP

ADR has many aspects. There is no “German system” as such. Depending on the kind of conflict and relations of the opposing parties, different forms of ADR may be appropriate. The conciliation procedure applied by SOEP is as follows:

- If the consumer has sent his complaint to the transportation company, but is not satisfied about its response, he may send his complaint to SOEP.
- In a first step, SOEP will forward the complaint to the transportation company to give them the opportunity for a statement and response. At this stage the company can accept the claim and fulfill the demand of the consumer.
- If the transportation company rejects the claim, the second step follows: The conciliator of SOEP will legally examine the case on the basis of the facts provided by the parties and the applicable law. There will be no meeting of the parties or face-to-face hearing as such.
- The conciliator writes a legal opinion concluding with a recommendation, which gives the parties the opportunity to solve the dispute in an amicable way.
- The parties are free to accept or reject the recommendation. With acceptance or rejection the conciliation process is finished.
- If both sides, the consumer as complainant and the transportation company as respondent, agree to it, the recommendation itself becomes a contract, binding the parties. The dispute is solved.
- The decision of the conciliator is not legally binding if either side rejects it. Then the parties still have the right to file a case with the court.

- The percentage of acceptance regarding the recommendations provided by SOEP is high. About 85 % of the cases SOEP receives (all transportation sectors) are settled this way: 91 % of the cases in the flight sector, 82 % of the train sector and 85 % of the coach and bus sector.<sup>10</sup>

## 3. Time for a standardized globally dispute resolution mechanism between travelers and companies?

The way ADR operates, its techniques and mechanisms, is hugely influenced by the culture and legal tradition of each state. To apply a global ADR mechanism within the near future might therefore be difficult. The development and success of ADR depends also on the willingness and cooperation of the parties involved, i.e., travel and transportation industry and tourists / travelers.

IFTTA, as an international lawyers' organization with members all over the world, has supported the idea of a global disputes resolution mechanism for the travel industry for many years. It has initiated a World Travel Dispute Center (WTDC) to train both attorneys and travel industry professionals in ADR techniques and to build a worldwide network of mediators and arbitrators.<sup>11</sup> However, it has not proved as successful as desired mostly due to the lack of interest of the larger organizations in the travel industry such as cruise and hotel business. It appears that unless legal systems mandate the use of ADR techniques, it will be difficult to enforce the use of this system. Currently, for IFTTA, it may be more advisable to partner with another ADR provider with WTDC being the host for tourism disputes.

Therefore, at present, it seems more useful, rather than developing a global or uniform dispute resolution mechanism, firstly, to spread awareness among travelers and the travel industry of the benefits of solving disputes outside of the courts by means of ADR and, secondly, to emphasize that there should be a high level of legal and professional standards among legal professionals involved in conciliation. Central to both these aims should be a far better dissemination of information about the advantages of ADR.

European Union law strongly supports the wider use of ADR processes and mechanism in all EU member states and across the different business sectors and branches, not only

<sup>8</sup> For list of members, see SOEP (“Die Schlichtungsstelle – Der Trägerverein”), [www.soep-online.de](http://www.soep-online.de).

<sup>9</sup> Creutzfeldt, Trusting the middle-man: Impact and legitimacy of ombudsmen in Europe, Vertrauen in außergerichtliche Streitbeilegung – Fallbeispiel: söp\_Schlichtungsstelle für den öffentlichen Personenverkehr e. V., July 2015, [www.law.ox.ac.uk/sites/files/oxlaw/oxford\\_bericht\\_teil\\_soep.pdf](http://www.law.ox.ac.uk/sites/files/oxlaw/oxford_bericht_teil_soep.pdf); [www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe/project-reports](http://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe/project-reports) (retrieved on 08/02/2016).

<sup>10</sup> Figures for 2015; for detailed information see SOEP – Annual reports (“söp – Jahresberichte”), [www.soep-online.de](http://www.soep-online.de).

<sup>11</sup> See <http://iftta.org/world-travel-dispute-center> (retrieved on 08/02/2016).



regarding transportation or travel. Among relevant EU laws which promote ADR, and which allow scope for different techniques and conciliation concepts to be applied, are the Mediation Directive,<sup>12</sup> the Directive on consumer Alternative Dispute Resolution,<sup>13</sup> and the Regulation on consumer Online Dispute Resolution.<sup>14</sup> Regarding package travel, the recently enacted new European “Package Tour” Directive,<sup>15</sup> still to be implemented by the EU member states into national legislation, explicitly considers ADR as a means to settle disputes between travel companies and travelers out-of-court.<sup>16</sup>

Under German law, since November 2013, consumer air passengers have a right of access to ADR. This means an airline cannot refuse conciliation if the consumer request this.<sup>17</sup> Disputes between consumers and air companies, that are not members of SOEP, are settled by the regulatory Conciliation Body for Flight Transportation of the Federal Office of Justice.<sup>18</sup> For disputes arising from travel by train, coaches, and ship, conciliation is still voluntary.

#### 4. Advantages of conciliation for traveler and companies

Consumer ADR tries to fill the gap between the complaint management of the transportation or travel company and filing a lawsuit with the court.

Practice shows that consumers who send their complaint to the transportation company do not always receive a response or the responses provided are standardized letters, without a connection to the specific issue and concerns of the traveler. As a result, the complaining consumer does not feel taken seriously by the company and becomes annoyed and frustrated.

Obviously, travel companies can improve their complaint management, but to fulfill this depends on their efforts. The experience of SOEP in providing an ADR service is that travel companies are forced to take consumer complaints seriously. Getting an appropriate response from the travel company is a strong desire of consumers. For some travelers this is even more important than receiving monetary compensation or damages. The feedbacks SOEP receives show that travelers are thankful that their arguments were heard and the cases were legally examined in a professional way by an independent specialized lawyer.

Another point is, as mentioned in the beginning, that the amounts of money which travel law cases often deal with, are comparatively small, for example compensation for a delay or damaged luggage. Here, the cost of a lawsuit will typically exceed the amount which the traveler claims. It might even be difficult to find an attorney. The risk and efforts are not very encouraging to the consumer to file a lawsuit.

As a consequence, after receiving no or a non-satisfactory response from the travel company, the traveler will not go further and file a claim with the court to vindicate his rights, but will endure the unsatisfactory result. In this way consumers are effectively forced to waive their legal rights. Here,

conciliation processes are suitable to help consumers to claim their rights on an affordable and less difficult basis. Thus, conciliation enables or facilitates access to the law. It grants a compensatory legal protection.

However, the advantages are not only with the consumer, but also with the travel or transportation company. Compared to a lawsuit in front of a court, ADR provides a more flexible way to settle a conflict. By solving the dispute out-of-court, the customer may even regain trust in the travel company and it may help to improve the company's reputation.

<sup>12</sup> Directive 2008/52 / EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Mediation Directive), Official Journal L 136, 24/05/2008, p. 3–8.

<sup>13</sup> Directive 2013/11 / EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22 / EC (Directive on consumer ADR), Official Journal L 165, 18/06/2013, p. 63–79.

<sup>14</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22 / EC (Regulation on consumer ODR), Official Journal L 165, 18/06/2013, p. 1–12.

<sup>15</sup> Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83 / EU of the European Parliament and of the Council and repealing Council Directive 90/314 / EEC, Official Journal L 326, 11/12/2015, p. 1–33.

<sup>16</sup> Art. 7 (2) (g) Content of the package travel contract and documents to be supplied before the start of the package: “*information on available in-house complaint handling procedures and on alternative dispute resolution (‘ADR’) mechanisms pursuant to Directive 2013/11 / EU of the European Parliament and of the Council, and, where applicable, on the ADR entity by which the trader is covered and on the online dispute resolution platform pursuant to Regulation (EU) No 524/2013 of the European Parliament and of the Council*”.

<sup>17</sup> Gesetz zur Schlichtung im Luftverkehr, “Aviation Conciliation Law” of 11 June 2013, BGBl. I 2013 No. 29, 20/6 / 2013, p. 1545; in force since 1st of November 2013.

<sup>18</sup> Behördliche Schlichtungsstelle Luftverkehr beim Bundesamt für Justiz; for more information see [https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Luftverkehr/Schlichtungsstelle\\_node.html](https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Luftverkehr/Schlichtungsstelle_node.html) (retrieved on 8/2/2016).

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