

### Council on General Affairs and Policy of the Conference – March 2018

<b>Document</b>	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 3 of February 2018
<b>Title</b>	Final report concerning a possible future Convention on Co-operation and Access to Justice for International Tourists (Tourism Project) (Part 5 missing)	
<b>Author</b>	Permanent Bureau Final Report prepared by Emmanuel Guinchard, Consultant	
<b>Agenda item</b>	Item III.3	
<b>Mandate(s)</b>	C&R No 7 of the 2014 Council on General Affairs and Policy C&R No 8 of the 2015 Council on General Affairs and Policy C&R No 19 of the 2016 Council on General Affairs and Policy C&R No 12-13 of the 2017 Council on General Affairs and Policy	
<b>Objective</b>	To report on the Project's progress by presenting the Consultant's Final Report	
<b>Action to be taken</b>	For Approval <input checked="" type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
<b>Annexes</b>	Annex 1: Final Report prepared by Emmanuel Guinchard Annex 2: Letter of Endorsement by the United Nations World Tourism Organization	
<b>Related documents</b>	n.a.	

## A. INTRODUCTION

1. The Project concerning a possible future Convention on Co-operation and Access to Justice for International Tourists (Tourism Project) originated from the proposal of the Government of Brazil to undertake work in this area (Brazilian Proposal). The Brazilian Proposal was submitted to the Council on General Affairs and Policy (Council) in 2013, together with an explanatory memorandum detailing the rationale for such an instrument.

2. In 2015, the Council decided that the Permanent Bureau (PB) should conduct a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into consideration, *inter alia*, the compatibility of the topic with the mandate of the Hague Conference on Private International Law (HCCH) and the work conducted in other fora.

## B. THE RATIONALE FOR THE TOURISM PROJECT

3. The Brazilian Proposal advocated that several factors would warrant work in this area. Factors include the growth of mass tourism and the increased participation of developing countries in tourism; changes in the profile of the tourist; the increasing complexity of tourist contracts; and the use of new technologies. As a result, a higher degree of protection of tourists is necessary. Such higher degree of protection is not available through the multitude of primarily soft law instruments, and some conventions that apply to specific types of contracts, that could apply to tourists. Thus, the Brazilian Proposal suggested to develop methods at a global level for the rapid and facilitated protection of international tourists, together with greater global co-operation among national consumer protection bodies. Moreover, it emphasised the need for measures to ensure that the protection of tourists applies without discrimination between national and foreign tourists, including granting access to courts in the country of origin, noting that such protections must apply without prejudice to the protections guaranteed to consumers. Finally, it was proposed to use existing authorities and instruments to facilitate *ex ante* claims, while also establishing ways in which such claims may still be brought after tourists have returned home, by enhancing international co-operation and mutual assistance and avoiding *ex post facto* cross-border litigation in consumer matters.

## C. THE HISTORY OF THE TOURISM PROJECT TO DATE

4. For the history of the Tourism Project until early 2017, Members may wish to refer to the Conclusions and Recommendations (C&R) of the 2014, 2015, 2016 and 2017 Meetings of the Council, together with the relevant Preliminary Documents.<sup>1</sup> At the 2017 Meeting of the Council, the consultant for the Tourism Project, Mr Emmanuel Guinchard (Consultant), presented a preliminary report, including some preliminary findings based on his research as well as on the first responses to the Questionnaires sent to Members and a large number of stakeholders.

5. Since then, the Consultant has seen the preliminary report through to its near finalisation in February 2018. This included further research, supported by the PB, on the subject matter; continuing the analysis of responses to the Questionnaires; the analysis of the work done by the United Nations World Tourism Organization (UNWTO), also based on extensive liaison with the UNWTO; and drafting. The resulting report "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) is attached as Annex I.<sup>2</sup> It should be acknowledged that to our regret, the Final Report is being delivered with substantive delay, from the timing requested by Council and the Permanent Bureau. Furthermore, please note that Part 5 of the Report is still being finalised by the Consultant and will be circulated shortly. The Consultant has requested the Permanent Bureau to convey his apologies for his delayed delivery of the Final Report.

<sup>1</sup> "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (8-10 April 2014)", C&R No 7, "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (24-26 March 2015)" C&R No 8, "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (15-17 March 2016)" C&R No 19, and "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (14-16 March 2017)" C&R No 12-13, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Governance" and "Council on General Affairs and Policy".

<sup>2</sup> This Annex is available in English only.

## D. THE FINAL REPORT

6. The Final Report addresses three main issues: the desirability of the Tourism Project (below at Section 1), its feasibility (below at Section 2), and any overlap and / or incompatibility with the work of the UNWTO (below at Section 3).

### 1. Desirability

7. The Final Report makes the following key findings relevant to desirability:

- **Information gap:** Tourists often seem unaware of their rights and legal remedies. There is a lack of express and systematic dissemination of relevant information and assistance. Even pro-active tourists may find it difficult to identify information. This information gap may lead to a denial of justice in practice.
- **Inability to use mediation / conciliation beyond the stay in the visited country:** Mediation / conciliation is generally regarded as the most appropriate / proportionate method to resolve small claims (arguably a major proportion of tourists' claims). This method seems often available in theory, however may be unavailable in practice for two main reasons. First, physical presence is required by law, and the use of distance communication tools to substitute physical presence is impossible, leading to an unavailability, or discontinuance, of mediation / conciliation, especially where the stay in the visited country is of insufficient length, or where a return, while available, would not be reasonable. Secondly, even where distance communication tools are available, other limitations such as language barriers may hamper appropriate resolution of the claim.
- **A persistence of obstacles to access to justice in cross-border matters,** in particular the *cautio judicatum solvi*.
- **Inability to initiate court proceedings beyond the stay in the visited country:** Court proceedings may not be available in cases where physical presence is required. Requiring physical presence has a disproportionate impact on tourists, and especially short-stay tourists. Difficulties are compounded notably by the information gap and language barriers.
- **Impossibility to continue court proceedings beyond the stay in the visited country:** Even if a tourist can initiate proceedings during the stay in the visited country, the potential length of judicial proceedings may prove prohibitive to gain appropriate access to justice. The issue is compounded in situations where proceedings are discontinued in the absence of physical presence at the hearing, and exacerbated where proceedings last longer than a stay permitted by visa conditions, in which case delay can be used strategically.
- **Unavailability of a small claims procedure tailored for cross-border cases:** Tailored small claims procedures appear particularly desirable in tourism related disputes, which are normally akin to typical consumer claims, in that they are of small value and of little complexity.
- **Absence of governmentally funded authorities in charge of helping tourists to access justice:** Most States do not have dedicated governmental agencies or bodies charged with assisting tourists to access justice, although some consumer agencies take on a comparable role. However, even where such bodies exist, they are often ill-equipped to assist appropriately, especially in light of time pressures and language barriers.
- **Absence of appropriate liaison mechanisms between authorities of the visited country and the country of the tourist:** Where tourists seek to complain to a (consumer) body after their return, then these bodies regularly have practical difficulties in liaising with the trader, whether in relation to the facts, or even to commence mediation / conciliation. Moreover, the complex enforcement of any settlement reached would prove a significant deterrent.

8. The Final Report concludes that there is currently no coherent regime that provides appropriate access to justice and that an international instrument designed to overcome the many current shortcomings in protecting tourists is desirable.

## **2. Feasibility**

9. The Final Report further concludes that further work on the Tourism Project is feasible, opining that the draft Convention developed by Brazil in November 2014, as submitted to Council as Annex I to Preliminary Document No 2 of 2015 (draft 2015 Convention),<sup>3</sup> would be a reasonable starting point to address the issues identified in the Final Report. These issues, which go well beyond those addressed by the *Hague Convention of 25 October 1980 on International Access to Justice*, would particularly benefit from co-operation mechanisms that address the structural issues identified in the Preliminary Report, and potential issues of trust in foreign institutions / bodies. A network of dedicated Central Authorities would allow for the cost-effective and efficient use of already existing resources, while not precluding a future evolution towards fully dedicated tourist support bodies.

10. The co-operation mechanism envisaged for the Tourism Project is modelled on the networks of Central Authorities which already operate efficiently and effectively under existing Hague Conventions.<sup>4</sup> These instruments provide daily specialised assistance and facilitate equal, non-discriminatory access to justice to many people and businesses alike. The HCCH has a long tradition and specific expertise in developing such networks as well as in devising innovative and harmonised international civil procedure and private international law solutions necessary to ensure their effectiveness and efficiency.

11. This said, as this particular aspect is not further developed in the Report, the PB would like to note that it is aware of the important cost implications associated with the establishment of such a mechanism.

## **3. Overlap or incompatibility with work in other fora**

12. The Consultant also analysed whether the Tourism Project may overlap, or is incompatible, with work being done in other fora. Relevant work is currently being undertaken by the UNWTO to develop the draft Convention on the Protection of Tourists and Rights and Obligations of Tourism Service Providers (draft UNWTO Convention) and its material scope of application. The Final Report identifies Assistance in Emergency Situations and Package Travel and Accommodation as topics covered by the draft UNWTO Convention, but concludes that that Convention does not cover specifically access to justice, save possibly in an ancillary way. Accordingly, the two projects do not overlap, but rather are complementary to each other.

13. This conclusion has been confirmed by the UNWTO which stated in a letter of endorsement dated 19 December 2017 that:

“[...] the HCCH Project complements work undertaken by the UNWTO in relation to both the UNWTO Convention and UNWTO Framework. We are also pleased to confirm that, considering their relevant scopes, there are currently no overlaps of the work undertaken by the UNWTO and the HCCH respectively”.

14. A copy of the UNWTO letter of endorsement is attached as Annex II.

<sup>3</sup> See “Proposal by the Government of Brazil on a draft convention on co-operation and access to justice for international tourists”, Prel. Doc. No 2 of January 2015 for the attention of the Council of April 2015 on General Affairs and Policy of the Conference, Annex I, available on the Hague Conference website (path indicated in note 1).

<sup>4</sup> Including for example the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*; the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*; and the *Convention of 25 October 1980 on International Access to Justice*.

**E. Conclusion**

15. The Consultant's Final Report concludes that work on the Tourism Project is desirable; is feasible; and that the work of the HCCH and UNWTO neither overlaps nor is it incompatible. To the contrary, the Final Report concludes that the work by the two organisations in this area would be complementary.

16. Members are asked to consider the findings of the Final Report, and, without prejudice to the contents of Part 5, still to be provided by the Consultant, the establishment of a representative Working Group, which will present its assessment on the possible next steps of the process to the Council on General Affairs and Policy.

## **A N N E X E S**

# 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

EMMANUEL GUINCHARD

## Executive summary

The final report consists in a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia, the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. The report starts with the growth of tourism as a major trade sector in the last decades and the fact that tourism is expected to continue to grow, with international tourist arrivals reaching 1.8 billion by 2030. Tourism-related expenditure follows the same trend. It is submitted that, almost inevitably, the probability of a larger number (in absolute terms) of dissatisfied tourists with the goods bought or the services provided will also increase, reinforcing the pressure on States to guarantee effective access to justice. The HCCH appears to be on the frontline of this development because all, or nearly all, key players in international tourism, whether in terms of arrivals / receipts or departures / expenditures, are either Member States or connected non-Member States. The profile of the new tourist contributes to the need for the Tourism Project on access to justice for tourists since many now travel without using the services of a travel agent or tour operator and therefore do not benefit from the sometimes associated safety net. In most circumstances, the tourist coming from abroad finds himself in a position of added vulnerability in comparison to the local consumer for reasons which include the short length of stay in the visited country and the ignorance of the local language, culture, laws and customs, and social geography. There is a growing institutional recognition of the need and specificity of tourist protection in civil matters.

Evidence collected up to 11 January 2018 demonstrates that the average tourist may face several difficulties in his access to justice. These may include:

- An information gap: Tourists often seem unaware of their rights and legal remedies. There is a lack of express and systematic dissemination of relevant information and assistance. Even pro-active tourists may find it difficult to identify information. This information gap may lead to a denial of justice in practice.
- An inability to use mediation / conciliation beyond the stay in the visited country: Mediation / conciliation is generally regarded as the most appropriate / proportionate method to resolve small claims (arguably a major proportion of tourists' claims). This method seems often available in theory, however may be unavailable in practice for two main reasons. First, physical presence is required by law, and the use of distance communication tools to substitute physical presence is impossible, leading to an unavailability, or discontinuance, of mediation / conciliation, especially where the stay in the visited country is of insufficient length, or where a return, while available, would not be reasonable. Secondly, even where distance communication tools are available, other limitations such as language barriers may hamper appropriate resolution of the claim.
- A persistence of obstacles to access to justice in cross-border matters, in particular the *cautio judicatum solvi*.
- An inability to initiate court proceedings beyond the stay in the visited country: Court proceedings may not be available in cases where physical presence is required. Requiring physical presence has a disproportionate impact on tourists, and especially short-stay tourists. Difficulties are compounded notably by the information gap and language barriers.
- An impossibility to continue court proceedings beyond the stay in the visited country: Even if a tourist can initiate proceedings during the stay in the visited country, the



potential length of judicial proceedings may prove prohibitive to gain appropriate access to justice. The issue is compounded in situation where proceedings are discontinued in the absence of physical presence at the hearing, and exacerbated where proceedings last longer than a stay permitted by visa conditions, in which case delay can be used strategically.

- The unavailability of a small claims procedure tailored for cross-border cases: Tailored small claims procedures appear particularly desirable in tourism related disputes, which are typically akin to typical consumer claims, in that they are of small value and of little complexity.
- The absence of a governmentally funded authorities in charge of helping tourists to access justice: Most States do not have dedicated governmental agencies or bodies charged with assisting tourists to access justice, although some consumer agencies take on a comparable role. However, even where such bodies exist, they are often ill-equipped to assist appropriately, especially in light of time pressures and language barriers.
- The absence of appropriate liaison mechanisms between authorities of the visited country and the country of the tourist: Where tourists seek to complain to a (consumer) body after their return, then these bodies regularly have practical difficulties in liaising with the trader, whether in relation to the facts, or even to commence mediation / conciliation. Moreover, the complex enforcement of any settlement reached would prove a significant deterrent.

The suggested Hague Convention on Cooperation and Access to Justice for International Tourists aims to address these difficulties by setting up an international cooperation mechanism between Central Authorities together with provisions on access to justice (in particular *cautio judicatum solvi* and legal aid). One of the key underlying ideas seems to be that the intervention of an Authority from the State of the trader should often be enough to convince him of the need to seriously take into account the complaint of the tourist from abroad, whilst at the same time offering him the possibility to understand this complaint in his own language. The tourist is for his part likely to know the contact details of his own relevant authority with whom he will be able to correspond in his own language. Any mediation attempt is made through the Authorities. The cooperation mechanism would also be of use in the event that the mediation attempt fails. This report is of the opinion that the mechanism set up by the suggested Hague Convention is fundamentally viable and has demonstrated its usefulness within the Mercosur and the EU (ECC-Net). The Tourism Project would build on these successes, albeit at global level. It may be added that a desire for more international cooperation on tourism matters has also been expressed at times by the ones most familiar with the practical issues faced by tourists / consumers. For example, in 2014, some members of the ECC-Net considered the issue of assistance for non-EU tourists and suggested a draft protocol to handle such requests from such tourists after liaising with their North American counterpart. This report however suggests some amendments and additions to the current suggested Hague Convention on Cooperation and Access to Justice for International Tourists. In particular, the definition of a tourist may have to be reconsidered in order to be more acceptable to a majority of Hague Members and a Guide could usefully complement the current text.

The suggested Hague Convention on Cooperation and Access to Justice for International Tourists would build on the Hague Conference's vast experience in building networks of Central Authorities in the field of international civil procedure. This report is of the opinion that the Tourism Project is compatible with the mandate of the Hague Conference on Private International Law.

The report finally focus on the compatibility of the Tourism Project with the work conducted in other fora, in particular the UNWTO. It appears that there does not seem to be a need to examine the work carried outside the UNWTO when examining the compatibility of the Tourism Project with the work conducted in other fora as a survey up to 11 January 2018 of the major global and regional organisations does not indicate any similar project to that of the Hague Conference. As for the UNWTO Framework Convention on Tourism Ethics (including its Optional Protocol) and the UNWTO current Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, they do not appear to overlap or be incompatible with the Tourism Project. On the contrary, the Tourism Project seems to complement the broader agenda of the UNWTO, in particular the desire to increase the confidence of tourists as consumers in tourism service providers highlighted notably in the preamble of the UNWTO Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, as well as the long-term objective of sustainable tourism. The productive working relationship established between the HCCH and the UNWTO following the contact made in early 2017 culminated in a letter of endorsement of the Tourism Project by the UNWTO in late 2017.

Overall, the Report thus expresses the view that the suggested Hague Convention on Cooperation and Access to Justice for International Tourists is both desirable and feasible, whilst being compatible with the mandate of the Hague Conference and work conducted in other fora.

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# Part 1. Introduction

## A. Background

At its meeting in 2013, the Council on General Affairs and Policy (Council) of the Hague Conference on Private International Law (HCCH) took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. It decided to add this topic to the Agenda.<sup>1</sup>

At its meeting in 2015, the Council decided that the Permanent Bureau shall conduct a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia, the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. The work was to be done by an expert, hired by the Permanent Bureau, and financed by Brazil.<sup>2</sup> A competitive, merits-based selection process led to the appointment of the author of this report on a part-time basis in November 2016.

## B. Purpose and Methodology

### Purpose

The final report consists in a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia, the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. It builds on the preliminary report of March 2017<sup>3</sup>. The final report intends to:

- 1) Identify the difficulties faced by tourists as they have been expressed in the evidence gathered up to 11 January 2018 included<sup>4</sup>;
- 2) Ascertain the feasibility of a possible future convention on co-operation and access to justice for international tourists, in particular the current Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists;
- 3) Reflect on the compatibility of a possible future convention on co-operation and access to justice for international tourists with the mandate of the Hague Conference;
- 4) Demonstrate that the Tourism Project does not compete with the work conducted in other fora.

It is worth mentioning that a particular focus of the provisional report was to assess whether any similar work to that conducted by the HCCH was carried out by the United Nations World Tourism Organization (UNWTO)<sup>5</sup>. In case of a positive answer, it would have been necessary

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<sup>1</sup> Conclusions and Recommendations (C&R) adopted by the 2013 Meeting of the Council on General Affairs and Policy, C&R Number 12, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>2</sup> C&R adopted by the 2015 Meeting of the Council on General Affairs and Policy, C&R Number 8, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>3</sup> We would like to thank members of the Permanent Bureau, notably Ignacio Goicoechea and Thomas John, for their input. The usual disclaimer applies, i.e. all errors are mine.

<sup>4</sup> Date of reception of the last response to the questionnaire for Hague Conference Members.

<sup>5</sup> On the UNWTO, see infra section 2.1.

to ascertain the degree of similarity. If this degree had been too high, there may have been an argument to discontinue the study. If the similarities had been moderate or low, it may have been worth ascertaining gaps in the work of the UNWTO that fall squarely within the mandate of the HCCH and which could have been considered pursuing. And of course, if there were to be no similarities, then work could pursue without constraint, however keeping in mind that pursuing complementarity with any instrument of the UNWTO may be desirable. This assessment can be found in Part 7 of the present Report. Hopefully, it should alleviate the fear of confusion, and possibly perceived redundancy, as expressed by some Members States at previous Council meetings and in their responses to the questionnaire<sup>6</sup>. In this respect, it should be pointed out that the relevant conclusion of the preliminary report has since been strengthened by a letter of endorsement of the Tourism Project by the UNWTO.

## Methodology

The methodology used involved a combination of traditional black letter law research and a socio-legal approach. The latter involved the creation of two sets of questionnaires following a close and fruitful collaboration with members of the Permanent Bureau (PB). One questionnaire was designed for the Members, the other for non-Members. The primary aim of these questionnaires was to assess the existence, and to understand, the nature and degree of the difficulties faced by tourists in terms of access to justice. These questionnaires, which put a wide range of questions covering pertinent topics, can be found in the Annex to this report. The Hague Conference set up a specific e-mail address ([tourism@hcch.nl](mailto:tourism@hcch.nl)) in respect of the Tourism Project and in particular in order to send questionnaires and receive answers.

The questionnaire for Members was circulated on 14 December 2016. On the same day, the questionnaire was also sent to connected non-Member States. On 16 January 2017, the same questionnaire was sent to the diplomatic missions of six States that are neither Members nor connected non-Member States, but which are important or emerging travel destinations<sup>7</sup>.

The questionnaire for non-Members that are not connected non Member-States was also circulated on 16 January 2017. In order to do so, the author of this report compiled a substantial list of contact details of bodies including:

- professionals of the tourism sector: associations of travel agents and tour operators; official tourism offices; tourist guides associations; bodies with a mixed membership;
- bodies protecting consumers' interests: ECC-Net, Consumer International (Headquarters), Governmental organisations members of Consumer International, non-governmental organisations members of Consumer International, other bodies;
- bodies dedicated to receiving complaints from tourists;
- members of the legal sector (tourism and travel lawyers; legal academics) and of the insurance sector.

Following the presentation of the Preliminary Report at the March 2017 Meeting of the Council, the questionnaires and / or reminders were sent or re-sent to selected addresses.

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<sup>6</sup> On the questionnaire, see *infra* Methodology.

<sup>7</sup> The six States are Cuba, Indonesia, Iran, the Seychelles, Thailand, and the United Arab Emirates.

For the purposes of the Final Report, only those responses that were received as of 11 January 2018<sup>8</sup> could be included. In practice, around 45 answers from Members and non-Members were received, analysed and included.

In addition to the above questionnaires, this report benefited from the evidence collected by the Regional Office for Latin America and the Caribbean of the HCCH. This Office collected information on access to justice in several Caribbean and Latin American States through the use of a short questionnaire in late 2016 and early 2017<sup>9</sup>. Furthermore, it conducted in May - June 2017 a survey among the Embassies of the Latin American countries accredited in Argentina in order to help identify potential typical complaints of tourists when consuming services and buying products abroad, the possible obstacles they may encounter when seeking legal redress and the support offered in this respect by the Embassies<sup>10</sup>.

### C. Structure of the study

The Report adopts the following structure. After a general introduction (this Part), Part 2 introduces key definitions, highlights the growing economic importance of tourism in the world and the subsequent increase in the probability of disputes involving tourists. It finally reports on existing relevant literature.

Part 3 addresses the particular vulnerability of the tourist and highlights the growing institutional recognition of the need and specificity of tourist protection in civil matters.

Part 4 conducts an identification of the difficulties faced by tourists as they appear from the evidence gathered notably through the questionnaires up to 11 January 2018 included. A conclusion is provided.

Part 5 discusses possible ways forward, depending on the identification of difficulties faced by tourists.

Part 6 examines the compatibility of the Tourism Project with the mandate of the Hague Conference.

Part 7 is dedicated to the assessment of the work conducted in other fora, more particularly the UNWTO projects in the general area of protection of tourists.

Finally, the questionnaires for Members and non-Members of, respectively, December 2016 and January 2017 are included as Annexes.

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<sup>8</sup> The task of the author of this report involved monitoring the specific e-mail address created for the purpose of this project and replying to any question which may be asked, whether from Members or non-Members. Queries raised included sending the questionnaires to the body effectively answering it within a Member State; explaining why members of (for example) the ECC-Net or the Tourism Department of the Ministry of a Member State were among the most qualified addressees to answer the questionnaire; advising on whether members of a professional association should answer in their individual capacity or draft an answer per country or answer as a whole; requesting a text from a Member which was supposed to be enclosed with the answer to the questionnaire; trying to explain to a Member why it had not received the questionnaire in the first place and sending it anew; etc.

<sup>9</sup> The questions asked related to the following three themes: legal aid for extrajudicial proceedings (for example for mediation or conciliation) in civil and commercial matters; legal aid in court proceedings in civil and commercial matters; and *cautio judicatum solvi*.

<sup>10</sup> The exact four questions asked may be found in Part 4.



## Part 2. Concepts, Statistics and Literature

### A. Tourists / Visitors / Travellers

#### UNWTO Definitions

The World Tourism Organization (UNWTO) is the United Nations agency responsible for the promotion of responsible, sustainable and universally accessible tourism. Its membership includes 158 countries, 6 Associate Members and 500 Affiliate Members representing the private sector, educational institutions, tourism associations and local tourism authorities. It is based in Madrid, Spain.

The UNWTO has elaborated detailed recommendations on the concepts of tourist / visitor / traveller for statistics purposes<sup>11</sup>. These recommendations are widely considered as reference guidelines by tourism administrations and industry. A traveller is defined as “someone who moves between different geographic locations for any purpose and any duration”<sup>12</sup>. Visitors are a subset of travellers as a “visitor is a traveller taking a trip to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited”<sup>13</sup>. Tourists are a subset of visitors<sup>14</sup> as a visitor is “classified as a tourist (or overnight visitor) if his/her trip includes an overnight stay”<sup>15</sup>. An important point is that the UNWTO definition of a tourist goes beyond the non-professional definition of a tourist, which tends to focus on leisure activities.

The UNWTO recommendations provides further calibrations<sup>16</sup>. For example, the existence of an employer-employee relationship “goes beyond the existence of a formal work contract between the provider of the labour service and a producer (businesses, government and non-profit institutions serving households) corresponding to a transaction between the traveller and a resident entity in the country visited”<sup>17</sup>. This criterion leads to the exclusion from the category of visitors of seasonal workers in agriculture, construction, hotels, restaurants and other services, with or without a formal work contract<sup>18</sup>. However, “if being employed and the payment received are only incidental to the trip, the traveller would still be a visitor (and the trip would still qualify as a tourism trip)”<sup>19</sup>.

Within Tourism, key tourism types have been identified. The UNWTO Committee on Tourism and Competitiveness recently agreed upon the definitions of the following tourism categories:

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<sup>11</sup> International Recommendations for Tourism Statistics 2008,  
[https://unstats.un.org/unsd/publication/Seriesm/SeriesM\\_83rev1e.pdf](https://unstats.un.org/unsd/publication/Seriesm/SeriesM_83rev1e.pdf).

<sup>12</sup> Paragraph 2.4.

<sup>13</sup> Paragraph 2.9.

<sup>14</sup> Consequently, the application to tourists of provisions on equal access to justice for migrant workers and nationals is excluded. For such a provision, see Article 19, Paragraph 7, European Social Charter of the Council of Europe, and the corresponding conclusions on matters such as *cautio judicatum solvi* or legal assistance adopted by the European Committee of Social Rights in the framework of the monitoring mechanism.

<sup>15</sup> Paragraph 2.13. The same paragraph adds that the same-day visitor is an excursionist.

<sup>16</sup> A clear picture of the classification of inbound travellers may be found in figure 2.1 on page 17.

<sup>17</sup> Paragraph 2.36.

<sup>18</sup> Paragraph 2.37.

<sup>19</sup> Paragraph 2.35.



Cultural Tourism, Ecotourism, Rural Tourism, Adventure Tourism, Health Tourism, Wellness Tourism, Medical Tourism, Business Tourism (related to the Meetings Industry), Gastronomy Tourism, Coastal, Maritime and Inland Water Tourism, Urban/City Tourism, Mountain Tourism, Education Tourism and Sports Tourism<sup>20</sup>.

### States practice

According to the Responses to the questionnaires for Member States and non-Member included, a majority of countries provide no legal definition for tourist and / or visitor. This is the case<sup>21</sup> for Argentina<sup>22</sup>, Bosnia and Herzegovina, Brazil, Chile, Mainland China (PRC), Croatia, the Czech Republic, France<sup>23</sup>, Germany, Hong-Kong (SAR, China)<sup>24</sup>, Japan, Korea<sup>25</sup>, Macao (SAR, China)<sup>26</sup>, Morocco, Paraguay, Seychelles, Switzerland, and the Greek response. However, several of these countries refer to the UNWTO definition of tourists for policy purposes. This is the case of Brazil, Chile, Germany, Macao (SAR, China) and Seychelles. In addition, Mali<sup>27</sup>, Moldova and Philippines refer to the UNWTO definition without clarifying whether it is a legal definition.

Others have adopted a legal definition<sup>28</sup> that matches the UNWTO definition. For example, according to the Bulgarian Tourism Act, a tourist is “a visitor whose stay is at least 24 hours thus staying at least one night at the visited destination and whose purpose of visit is tourism, relaxation, sport, medical procedures, business, visit of relatives and friends, pilgrimage, participation in cultural, congress, conference or other event”. Some exceptions — inspired by UNWTO recommendations — are provided such as refugees, diplomats, frontier workers, seasonal workers, people sent abroad by their company or their government as a place of work, people in transit and permanent immigrants. Similarly, in Venezuela, a Decree, which has the same value as the Organic Law for Tourism, defines, in Article 2,20, a tourist as “Any natural person who travels and stays overnight, for more than one night and less than six months, for

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- <sup>20</sup> UNWTO, Report of the Secretary-General, Implementation of the General Programme of Work for 2016-2017, 14 August 2017, submitted to the 106th session of the Executive Council in Chengdu, China (12 September 2017), document CE/106/3, Annex I, Report of the Committee on Tourism and Competitiveness, [http://cf.cdn.unwto.org/sites/all/files/pdf/ce106\\_03\\_implementation\\_of\\_the\\_general\\_programme\\_of\\_work\\_2016-2017\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/ce106_03_implementation_of_the_general_programme_of_work_2016-2017_en.pdf), p 9, spec. p. 10. A definition for each type of tourism is provided, knowing that Health Tourism is the umbrella term for Wellness Tourism and Medical Tourism, and that Business Tourism may be combined with any other form of tourism type during the same trip. Each of these tourism categories could give rise to further distinctions. For example, there are different kinds of medical tourism, raising different issues. According to I. Glenn Cohen, medical tourism could be divided by legal status of treatment (i.e. whether the medical services are legal in the patient’s home country and / or destination country, with a variety of possible situations); by payer type (patients paying out-of-pocket, patients whose medical tourism is covered by private insurers and patients whose medical tourism is covered by public insurers); and by direction of patient flow (Patients with passports. Medical Tourism, Law and Ethics, OUP, 2015, p. 2 ff.). The distinctions have links. For example, “Medical tourism for services illegal in the patient’s home country will almost always involve patients who are paying their own costs” (p.2).
- <sup>21</sup> This list has been drawn up on the assumption that a lack of answer to question 1 should be interpreted as the absence of a definition. Unless otherwise stated, the response has been made by the Member itself.
- <sup>22</sup> Responses from Professor Liliana Etel Rapallini and ASADIP Argentina (Professor Juan José Cerdeira).
- <sup>23</sup> France adds that a tourist is someone who travels for leisure.
- <sup>24</sup> There are however definitions of visitor, which are context-specific.
- <sup>25</sup> For the purposes of this report, a reference to Korea should be understood as a reference to South Korea.
- <sup>26</sup> The response from Macao precises that the notion of tourist may be extracted from the legislation in force: “any person who, individually or in groups, travels in the territory of the Macao SAR or abroad”.
- <sup>27</sup> Response from Association des Consommateurs du Mali (Mrs Coulibaly Salimata Diarra)
- <sup>28</sup> Spain does not provide for a uniform provision as tourism policy belongs to the regions (responses from ECC-Spain and FACUA-- *Asociación de Consumidores y Usuarios en Acción*).

the purpose of recreation, benefiting him/herself from any of the services provided by members of the national tourism system and whose visit is not remunerated in the place visited”. The same law provides that a visitor is “Any natural person who moves outside his or her usual environment for less than twenty-four hours, for leisure, recreation and other reasons, and whose activity is not remunerated in the place visited.”<sup>29</sup> Portugal seems to be in a comparable situation.<sup>30</sup> Vietnam’s definition does not refer to an overnight stay but resembles the UNWTO definition in other respects: “Tourist means a person who travels for tourism or other purposes combined with tourism, except those who go to study, work or practice their professions to get paid at a place of destination”. Uruguay seems to follow the UNWTO definition more loosely<sup>31</sup>.

Some countries such as Croatia define the traveller. France observes that a definition of traveller may be found in the new package travel directive.

Finally, some countries offer a definition that is distinct from that of the UNWTO. In Romania, a tourist seems to be a consumer which buys or benefits from a bundle of tourism services. In Cyprus, a tourist is “Any foreigner who resides in Cyprus for a period not exceeding one month”. In Israel, a tourist is “a person who entered Israel under a visitor's permit or a permit of transitory stay with an appropriate visa”.

### **Definition adopted in this report**

For the purpose of this Report, the UNWTO definition of tourists has been adopted with the important caveat that, unless otherwise stated, a tourist is a natural person who does not have his place of habitual residence in the State visited. We will come back on this point in Part 5 as we would like to suggest an amendment to the definition proposed in the current Brazilian proposal.

## **B. The growing economic importance of tourism in the world**

One of the UNWTO core activities is to regularly compile statistics on tourism. These statistics demonstrate that tourism is today a major — and still increasing — category of international trade in services and that tourism-related expenditure keeps growing.<sup>32</sup> It is submitted that, almost inevitably, the probability of a larger number (in absolute terms) of dissatisfied tourists will also increase, reinforcing the need to ensure that they have effective access to justice.

### **Overview**

According to the latest figures available, i.e. the figures for 2017, “International tourist arrivals have increased from 25 million globally in 1950”<sup>33</sup> to 1322 million in 2017, a growth of 7%, over 2016<sup>34</sup>. In this respect, the growth rate in 2017 was the highest ever since 2010.

<sup>29</sup> Response from Professor Claudia Madrid Martinez.

<sup>30</sup> Response from DECO (Consumers Association). The response from ECC-Portugal does not make any reference to ‘legislation’ or a ‘decree’.

<sup>31</sup> Article 4, Law No. 19.253, dated 28 August 2014: “Entiéndese por turismo, a los efectos de esta ley, el conjunto de actividades lícitas de esparcimiento, ocio, recreación, negocios u otros motivos, desarrolladas por personas o grupos de personas fuera del lugar de su residencia habitual, con las notas de temporalidad y voluntariedad, siendo turista la persona que desarrolla dichas actividades”.

<sup>32</sup> We are far away from the time where a few rich tourists precipitated major developments in private international law in some States such as the Bauffremont Princess or the Patino spouses.

<sup>33</sup> UNWTO Tourism Highlights, 2017 Edition, English version published in July 2017, <https://www.e-unwto.org/doi/pdf/10.18111/9789284419029>, p. 2. International tourists are defined as ‘overnight visitors’ (p. 3).

<sup>34</sup> UNWTO World Tourism Barometer, volume 16, Advance Release, January 2018, [http://cf.cdn.unwto.org/sites/all/files/pdf/unwto\\_barom18\\_01\\_january\\_excerpt.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/unwto_barom18_01_january_excerpt.pdf), p. 1. See also 2017

Likewise, worldwide international tourism receipts — understood as “[e]xpenditure by international visitors on accommodation, food and drink, entertainment, shopping and other goods and services in tourism destinations” — have surged from US\$ 2 billion in 1950 to US\$ 1220 billion in 2016<sup>35</sup>. They grew by 2.6% in real terms (taking into account exchange rate fluctuations and inflation) over 2015. In addition to these receipts, “international tourism also generated US\$ 216 billion in exports through international passenger transport services rendered to non-residents in 2016”<sup>36</sup>. In total, the economic value of tourism exports thus amounted to US\$ 1.4 trillion (US\$ 4 billion a day on average), that is 30% of the world’s services exports, or 7% of overall exports in goods and services<sup>37</sup>. “In fact, international tourism has grown faster than world merchandise trade for five consecutive years now. As a worldwide export category, tourism ranks third after chemicals and fuels, and ahead of automotive products and food. In many developing countries tourism is the top export category. For emerging economies as a whole, tourism represents 40% of services exports, well above the 30% world average”<sup>38</sup>.

Tourism now accounts for one in ten jobs and 10% of GDP (direct, indirect and induced)<sup>39</sup>. Its importance beyond economic value may also not be underestimated<sup>40</sup>.

### Key countries in 2016

The world top tourism spenders in 2016 were China (261.1 billion US dollars), the United States (123.6 billion), Germany (79.8 billion), the United Kingdom (63.6 billion), France (40.5 billion), Canada (29.1 billion), Republic of Korea (26.6 billion), Italy (25 billion), Australia (24.9 billion) and Hong Kong (China) (24.2 billion)<sup>41</sup>. All top ten countries are Member States of the HCCH.

In terms of international tourist arrivals, the leading countries were (in this order): France, United States of America, Spain, China, Italy, United Kingdom, Germany, Mexico, Thailand and Turkey<sup>42</sup>. All are Member States of the HCCH, except for Thailand, which is however a connected State (having ratified two Hague Conventions).

In terms of international tourism receipts, the top 10 countries were (in this order): United States of America, Spain, Thailand, China, France, Italy, United Kingdom, Germany, Hong

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*International Tourism Results: the highest in seven years*, UNWTO Press Release no 18003, 15 January 2018, <http://media.unwto.org/press-release/2018-01-15/2017-international-tourism-results-highest-seven-years>. All results in those two documents are based on preliminary data.

<sup>35</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 3 and p. 5. International tourism receipts are defined on page 5. The UNWTO World Tourism Barometer, volume 16, Advance Release, January 2018, does not provide the figures for 2017.

<sup>36</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 5.

<sup>37</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 6.

<sup>38</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 6.

<sup>39</sup> UNWTO 2017 Annual Report, op. cit., p. 3.

<sup>40</sup> On the social importance of tourism, the points made by Members of the UNWTO World Committee on Tourism Ethics in Madeira (Portugal) on 16 June 2007 are still valid: “Tourism has [...] has become the biggest export industry; It is highly labour intensive and one of the biggest employers – especially for women and young people; It consists of more small-, micro- and medium-sized businesses than any other economic sector; It impacts strongly on local farming, fishing, trading (to include handicrafts), and services and the construction industry; It is a key strategy towards poverty-reduction; It plays a critical role in conservation and sustainable development; and It builds bridges of mutual understanding and tolerance between peoples and nations and promotes world Peace” (<http://cf.cdn.unwto.org/sites/all/files/docpdf/madeira-message-2014.pdf>). The Declaration adds that “The impact of tourism goes well beyond its economic value ».

<sup>41</sup> UNWTO 2017 Annual Report, op. cit., p. 13.

<sup>42</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 6.

Kong (SAR, China) and Australia<sup>43</sup>. All are Member States of the HCCH, except for Thailand, which is however a connected State.

### **Diversity of tourism (2016)**

Travel for leisure accounted for just over half of all international tourist arrivals in 2016. Nearly 15% of all international tourists reported travelling for business purposes, and more than 25% travelled for other reasons such as visiting friends and relatives, religious reasons, or health treatment<sup>44</sup>. Most tourists visit destinations within their own region<sup>45</sup>.

### **Available data for 2017 and predictions for 2018**

According to the data currently available for 2017, international tourist arrivals reached 1322 million. “Led by Mediterranean destinations, Europe recorded extraordinary results for such a large and rather mature region, with 8% more international arrivals than in 2016. Africa consolidated its 2016 rebound with an 8% increase. Asia and the Pacific recorded 6% growth, the Middle East 5% and the Americas 3%”<sup>46</sup>.

In terms of international tourism expenditure, significant increases were provisionally reported during 2017 among the top ten source markets. In particular, China (+19%), the Republic of Korea (+11%), the United States and Canada (+9%) reported the fastest growth in international tourism expenditure. Expenditure from Germany, the United Kingdom, Australia, Hong Kong (China) and France grew between 2% and 5%. Moreover, very significant increases were recorded from Brazil (+33%) and Russia (+27%) after a few years of decline in tourism expenditure abroad<sup>47</sup>.

UNWTO projects for 2018 a continuation of the current strong momentum in international tourist arrivals worldwide, though at a more sustainable pace (4%-5%). The growth rate for 2017 and the prospective growth rate for 2018 are thus higher than the 3.8% average increase for the period 2010-2020 predicted by the UNWTO in its Tourism Towards 2030 long-term forecast<sup>48</sup>.

### **Conclusion**

Over the past six to seven decades, tourism has become one of the largest economic sectors in the world. It should continue to grow and the UNWTO forecasts international tourist arrivals to reach 1.8 billion by 2030.<sup>49</sup> Tourism-related expenditure follows the same trend. It is

<sup>43</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 6. In other words, “eight out of the Top 10 destinations appear on both lists [international tourist arrivals and international tourism receipts], despite showing marked differences in terms of the type of tourists they attract, as well as their average length of stay and their spending per trip and per night” (p. 6).

<sup>44</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 4. The purpose of visit for the remaining arrivals is unknown.

<sup>45</sup> UNWTO Tourism Highlights, 2017 Edition, op. cit., p. 12. This fact could have an impact on, for example, the languages offered by tourist assistance bodies and the understanding of their complaints cultures.

<sup>46</sup> UNWTO World Tourism Barometer, volume 16, Advance Release, op. cit., p. 1.

<sup>47</sup> See *Southern and Mediterranean Europe, North Africa and the Middle East drive tourism growth through October 2017*, UNWTO Press Release no 17134, 14 December 2017, <http://media.unwto.org/press-release/2017-12-14/southern-and-mediterranean-europe-north-africa-and-middle-east-drive-touris>.

<sup>48</sup> UNWTO World Tourism Barometer, volume 16, Advance Release, op. cit., p. 4.

<sup>49</sup> “We predict that 1.8 billion international tourists will travel across borders by 2030” said UNWTO Secretary-General, Taleb Rifai, opening the 105th meeting of the Executive Council of the World Tourism Organization in Madrid (Spain) on 11 May 2017 (*105th UNWTO Executive Council meeting concludes in Madrid*, UNWTO Press Release no 17063, 12 May 17, <http://media.unwto.org/press-release/2017-05-12/105th-unwto-executive-council-meeting-concludes-madrid>). Adde UNWTO Tourism Towards 2030, as per <http://cf.cdn.unwto.org/content/why-tourism>.

submitted that, almost inevitably, the probability of a larger number (in absolute terms) of dissatisfied tourists with the goods bought or the services provided will also increase, reinforcing the pressure on States to guarantee effective access to justice. The HCCH appears to be on the frontline of this development because all, or nearly all, key players in international tourism, whether in terms of arrivals / receipts or departures / expenditures, are either Member States or connected non-Member States. Therefore, it appears open to suggest that *prima facie*, there must be a strong interest in a proposal for a convention on the protection of tourists and more precisely their access to justice. Of course, some Members will necessarily have a stronger interest than others in the protection of their nationals / residents abroad, while some (not necessarily others) will have a strong interest in developing or keeping a favourable legal environment for international tourist arrivals. In any event, it seems reasonable to argue that all States, whether connected to the HCCH or not, stand to benefit from increased protection of tourists and access to justice for tourists.

### C. Existing literature

Given the economic and social importance of tourism, there are a multitude of tourism-related studies, focusing notably on the tourist as a consumer of services. They come from a variety of sources such as governments (*lato sensu*), academia (tourism studies), private companies or bodies.

The topics studied are themselves extremely diverse and include, besides those covered by the statistics mentioned above, the reasons for travelling abroad (whether on holidays or for a specific purpose such as health services) or for the attractiveness of popular countries of destination, the types of holidays taken and experiences sought, the profile of tourists in a specific destination or from a specific country, the key features of categories of tourists (such as senior tourists) in terms of preferences and behaviour, the profile of ‘repeat visitors’, the level of expectations according to the country of origin and social class, the attitude to complaints, the perception of tourism and tourist in countries of destination, etc.<sup>50</sup> However, it appears that there are, *comparatively*, hardly any specific study on the private international legal aspects of tourism protection in relation to access to justice<sup>51</sup>.

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<sup>50</sup> See for example B. Palacios Florencio, A. Revilla Camacho and F. J. Cossio Silvo, “Impact of the perceived importance of a hotel’s corporate responsibility on tourists’ complaints behaviour”, *Esic Market Economics and Business Journal*, vol. 46, issue 2, May-August 2015, p. 299 (empirical study carried out in Seville, Spain, and involving more than 600 tourists, nearly 80% of them Spanish according to the profile of the respondent on p. 309, which does not include the habitual residence among its criteria).

<sup>51</sup> J. J. Cerdeira, “Comentarios respecto al Proyecto de “Convención sobre cooperación y acceso a la justicia referente a turistas internacionales 2015” en la Conferencia de la Haya”, *Revista de Direito do Consumidor*, Publisher: Revista dos Tribunais, São Paulo (Brazil), May-June 2015, p. 439, <http://bdjur.stj.jus.br/jspui/handle/2011/94304>; W. S. Kaku, L. M. Giordani and A. Soares, “O consumidor turista nas organizações internacionais no continente americano e na UNWTO”, *Revista de Direito do Consumidor*, Jan.-Feb. 2015, p. 319; C. Latil, “L’exécution défectueuse du contrat de vente de voyages à forfait en droit international privé”, *Revue critique de droit international privé* 2017, p. 199; C. Lima Marques, “The Brazilian “Draft Convention on Co-operation in Respect of Tourists and Visitors Abroad” at the Hague Conference and the UN World Tourism Organization’s Draft Convention”, in J. Moreno Rodriguez and C. Lima Marques (ed.), “Los servicios en el Derecho Internacional Privado – jornadas de la ASADIP 2014”, ASADIP: Porto Alegre, Brazil, 2014, p. 823; C. Lima Marques, “The Need for a Global Cooperation Network to Protect Foreign Tourists/Consumers and the comeback of Private International Law”, in *The Permanent Bureau of the Hague Conference on Private International Law / Le Bureau Permanent de la Conférence de La Haye de droit international privé* (ed.), “A Commitment to Private International Law. Essays in honour of Hans van Loon / Un engagement au service du droit international privé. Mélanges en l’honneur de Hans van Loon”, Intersentia (Cambridge, UK), 2013, p. 311 ; C. Lima



The vast majority of tourism studies seem designed to provide relevant governmental and private organizations with the necessary information to attract and retain tourists. The existing studies are nevertheless indirectly useful to some extent. For example, a global trend is the decrease in the use of all-inclusive package travel. Observers have noticed a “rapid boom in low cost travel among a new generation of consumers who have never used a travel agent for their travel arrangements. Dynamic packaging, which enables consumers to build their own package of flights, accommodation, and a hire car, instead of having to book a predefined package, has further enhanced accessibility and flexibility for the consumer”<sup>52</sup>. European tourists prefer, in their majority, to purchase “their holidays outside of a package, whatever the length of their trip”<sup>53</sup>. More precise data is available for the most popular holiday, that is, the one lasting between 4 and 13 consecutive nights<sup>54</sup>: “a relative majority of the respondents

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Marques, « Los esfuerzos de ASADIP para incluir el tema de la protección del turista en la Agenda de trabajo de la Conferencia de la Laya y la Propuesta de "Convención de cooperación en materia de protección de los visitantes y turistas extranjeros" » in CEDEP (ed.), « Derecho internacional privado y Derecho de la integración: libro homenaje a Roberto Ruiz Díaz Labrano », Asunción, Paraguay, 2013, p. 293 ; C. Lima Marques, “Proposta brasileira de convenção sobre cooperação em respeito da proteção dos turistas e visitantes estrangeiros na Conferência de Haia de Direito Internacional Privado: por uma rede de cooperação global para proteger turistas estrangeiros / Brazilian proposal of a convention on cooperation in respect of the protection of tourists and foreign visitor in the Hague Conference on Private International Law: for a global network cooperation to protect the foreign tourists”, In: Ministério do Turismo and Ministério da Justiça (ed.), “A proteção internacional do consumidor turista e visitante”, Brasília, Brazil, 2014, p. 71 for the Portuguese version and p. 84 for the English version, available at <http://www.justica.gov.br/seus-direitos/consumidor/Anexos/a-protecao-internacional-do-consumidor-turista-e-visitante-2014.pdf>; S. Lopes da Silva, “A Proteção Do Consumidor Turista Estrangeiro No Mercosul: A Efetividade Do Acordo Interinstitucional Para A Prevenção E A Solução De Litígios”, Revista do CEPEJ, Salvador, vol. 19, Special Edition, Jan./Jun. 2016, p. 163; C. Madrid Martínez, “Servicios, turismo y la protección del consumidor: una mirada desde el derecho internacional privado interamericano”, in A. Sierralta, C. Lima Marques, J. A. Moreno Rodríguez (ed.), “Derecho internacional, mundialización y gobernanza. Jornadas de la ASADIP, Lima, Noviembre de 2012”, CEDEP and ASADIP, Asunción, Paraguay, 2012, p. 353, <https://sociedip.files.wordpress.com/2013/12/madrid-servicios-turismo-y-proteccion3b3n-del-consumidor-una-mirada.pdf>; M. G. Sanches Lima, “Consumer Traveller's vulnerabilities and travel and tourism contracts: comparative analysis: Brazil and Europe”, PhD. (‘Dissertation’), Rostock University, 2016 (this PhD. is currently unavailable to the public and we are grateful to the author for having given us access to selected parts of her work); M. G. Sanches Lima, “The Supranational Organizations’ initiatives aimed at protection of tourists. Why International Conventions are needed?”, in C. Lima Marques and D. Wei (ed.), “The future of international protection of consumers”, Porto Alegre, Brazil: PPGD/UFRGS, 2016, p. 94; A. Soares, “A tutela internacional do consumidor turista”, Revista de Direito do Consumidor, April-June 2012, p. 113; A. Soares, “International Tourist: a New Dimension of Consumer Protection”, in A. Sierralta, C. Lima Marques, J. A. Moreno Rodríguez (ed.), “Derecho internacional, mundialización y gobernanza. Jornadas de la ASADIP, Lima, Noviembre de 2012”, CEDEP and ASADIP, Asunción, Paraguay, 2012, p. 385 ; H. Valverde Santana and S. Martini Vial, “Proteção Internacional do Consumidor e Cooperação Interjurisdiccional”, Revista de Direito Internacional 2016, p. 397.

<sup>52</sup> Policy and Practice for Global Tourism, UNWTO, 2011, p. 18,

[https://www2.gwu.edu/~iits/Sustainable\\_Tourism\\_Online\\_Learning/Mullis/Policy\\_Practices\\_UNWTO\\_book\\_feb.pdf](https://www2.gwu.edu/~iits/Sustainable_Tourism_Online_Learning/Mullis/Policy_Practices_UNWTO_book_feb.pdf)

<sup>53</sup> European Commission, Flash Eurobarometer 432, “Preferences of Europeans towards tourism”, January / March 2016, p. 4, <https://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2016/surveyKy/2065>; see also p. 48: “overall, a majority of respondents prefer purchasing their holidays separately, outside of a package, while all-inclusive holidays are chosen by 20% of respondents or less”. The study was carried out at the request of the European Commission in the 28 Member States, as well as in Turkey, the Former Yugoslav Republic of Macedonia, Iceland, Montenegro and Moldova. More than 30 000 respondents were interviewed in their mother tongue over the phone.

<sup>54</sup> On the fact that it is the most popular, see Flash Eurobarometer 432, op. cit. p. 44, where it is stated that it is followed closely by short-stay trips, i.e. those lasting up to three consecutive nights.

(43%) had most often purchased tourist services separately. Just over a quarter of respondents mentioned other (not all-inclusive) types of package travel (26%), while just under a fifth of respondents (19%) had taken an all-inclusive holiday of this length” (idem, p. 53, where strong differences according to the country of residence are noticeable). For short-stay trips, “it appears that nearly half the respondents (48%) had most often purchased tourist services separately [...]. Just under a quarter had most often used other (not all-inclusive) types of package travel (24%), while just over one in ten respondents most often chose an all-inclusive holiday when taking short-stay trips (11%). Finally, almost one in five were unable to answer this question (17%), suggesting that it was a mix of these different solutions”<sup>55</sup>.

This type of information is important. When tourists do not buy a holiday package, it means that they may not benefit from the associated protection<sup>56</sup>, including in terms of redress procedures. For example, they may not be able to access the mediation or arbitration schemes that were established in their respective country to deal with complaints against a travel agent regarding a (bad) tourism experience. Indeed, when tourists buy a holiday package from a travel agent or tour operator who is a member of an association such as the Association of British Travel Agents, the ‘*Algemene Nederlandse Vereniging van Reisbureaus*’ (ANVR – Dutch Association of Travel Agents<sup>57</sup>) or the French ‘*SETO*’ (syndicate of tour-operators) and ‘*Les entreprises du voyage*’ (association of travel agents)<sup>58</sup>, they may access the dispute resolution scheme set up in their country by this association for complaints against their travel agent or tour operator regarding their tourist experience abroad, thus clearly increasing their chances of access to justice (*lato sensu*). Similar schemes are, at times, available outside the EU, for example in Hong-Kong (SAR, China)<sup>59</sup>. These schemes are useful, even if they may

<sup>55</sup> Flash Eurobarometer 432, op. cit., p. 48. Important differences according to the country of residence are again noticeable, with respondents in Denmark and the United Kingdom preferring to purchase tourist services separately, whilst respondents in Malta and Turkey being the most likely to have opted for all-inclusive arrangements: idem, p. 49.

<sup>56</sup> EU substantial law has since relatively long protected tourists who bought packages. However, the change of behaviour in the way tourists book their holidays led the EU to revise its 1990 Package Travel Directive (Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJEU, L 158, 23.6.1990, p. 59). In the future, starting 1<sup>st</sup> July 2018, 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 (OJEU, L 326, 11.12.2015, p. 1) will apply. The concept of ‘package’ is clearly broadened in Article 3 and it includes customised packages. However, it still applies to package travel only (and linked travel arrangements for insolvency purposes). On the (very different) situation of parties and third parties (indirect victims) to a package travel contract in case of defective performance in private international law, see recently C. Latil, “L’exécution défectueuse du contrat de vente de voyages à forfait en droit international privé”, *Revue critique de droit international privé* 2017, p. 199.

<sup>57</sup> In this hypothesis, the Dutch Foundation for Consumer Complaints Board Travel will have ‘jurisdiction’. We would like to thank here M. Gluth, Lecturer in Tourism Studies at Spenden University (Netherlands) for having translated to us the key points of the 2015 report of this body. These points are the following. In case of an issue, the tourist / consumer must complain immediately. If the issue cannot be solved in the visited country, he has to file a claim with the travel agent within a month upon return. If the issue can still not be solved, he has to forward his claim together with the response of the trader to the Board within 12 months (since July 2015; 3 months previously). Exceptional circumstances may be taken into account should this deadline not be abided by. In 2015, 459 complaints were dealt with. About 218 decisions were taken, with 113 complaints rejected and 83 held (fully or partly). Regarding the latter, the tourist received compensation which was on average 896 euros.

<sup>58</sup> In this hypothesis, Médiation Tourisme et Voyage will have ‘jurisdiction’.

<sup>59</sup> The Travel Industry Council of Hong Kong offers a two-stages mechanism for handling complaints in relation to the travel services provided by travel agents in Hong Kong. The procedures are available in

have some limitations. However, since many now travel without using the services of a travel agent or tour operator they do not benefit from this ‘safety net’<sup>60</sup>, hence increasing the need for the Tourism Project on access to justice for tourists.

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Chinese and English. The vast majority of the cases handled relate to outbound travel services (according to the response from Hong-Kong SAR, China, to the Tourism questionnaire).

<sup>60</sup> On the recent impact — within the European Union — of 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) on tourism services purchased online, see S. F. Álvarez de Sotomayor, “La resolución de litigios en línea aplicada a la comercialización de servicios turísticos”, *La Ley Union Europea* no 42, 30 November 2016. In accordance with Article 2.1 of the Regulation, the parties must be based in the European Union (consumer resident in the EU and trader established in the EU).



## Part 3. The particular vulnerability of the tourist

### A. Overview

If a local consumer is the weaker party to a contract with a local trader<sup>61</sup>, the tourist coming from abroad may be deemed the weakest party. This tourist often finds himself in a position of added vulnerability in comparison to the local consumer for reasons which include the short length of stay in the visited country and the ignorance of the local language, culture, laws and customs, and social geography. These last characteristics make the visited country particularly attractive for the one seeking a change of scenery. They also constitute major obstacles for the enforcement of his rights. The ignorance of the local culture, including legal culture, means that, in the vast majority of cases, the tourist may not know his rights under the local law, who are the consumer protection authorities (if any), where to get assistance, how to access justice, etc. The inability to communicate in the local language may even have the consequence that the tourist is unable to answer those questions, without mentioning misunderstandings. The short-term stay means that even if the tourist understands the local language, or has the required culture to understand his rights and how to enforce them, he will not have the time to do so in most circumstances. Having initiated a claim in the visited country, he will have to continue the proceedings from abroad, which is not always possible<sup>62</sup>.

There is empirical evidence that, due to their short-term stay, tourists are either unable to enforce their rights or have to content themselves with less than they are entitled to (and would probably get as local consumers). For example, in cases of jewellery fraud in Thailand (a major and rising touristic destination), at best tourists content themselves with a refund and forego any compensation whilst the authorities struggle with the evidence required to prosecute the offender in the absence of the victim and main witness. A vicious circle is thus created where tourists are both the prime targets of fraud given their vulnerabilities (“the foreign tourists are the prime targets because of their limited communication ability of local language and unfamiliar location”<sup>63</sup>) and the least able to enforce their rights, thereby creating few drawbacks for fraudsters: “the drawbacks from the tourists’ complaints were minimal because of their limited time in staying, and they only wanted their refunds without wasting time with litigation”<sup>64</sup>.

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<sup>61</sup> For reasons such as a lack of technical and legal knowledge, the impossibility to negotiate the contract (adhesion contracts), or the dominant position of the trader on the market.

<sup>62</sup> As it emerged from the evidence collected for the purpose of Part 4: see *infra*.

<sup>63</sup> P. Bukrapue, *Fraudulent activities against Foreign tourists in Thailand: A case study of Jewelry Business*, *International Journal of Criminal Justice Sciences*, 2015, vol. 10 (2), p. 165, <http://www.sascv.org/ijcjs/pdfs/puttidejijcjs2015vol10issue2.pdf>, spec. p. 166.

<sup>64</sup> P. Bukrapue, *op. cit.*, p. 168. No compensation and no prosecution seem to be the norm: “Time-constraint is another factor obstructing the officer from prosecuting the offenders. Usually, the tourist is only staying in Thailand of a brief period and already reserving ticket for the return flight. The litigation is time-consuming and it could disrupt the tourist’s traveling schedule and departure time. Most of them only wanted the refund before the departure without entering the judicial process” (p. 170).

## B. Growing institutional recognition of the need and specificity of tourist protection in civil matters

The particular vulnerability of the tourist has for long not been fully taken into consideration, probably in consideration of the low number of tourists overall, the fact that the tourist chooses to travel abroad and therefore deliberately accepts the associated risks, the requirement of a minimum of financial resources to travel (leading to the belief that the tourist is rich, or at least richer than the local consumer, thus offsetting his weaker position) and the fact that “the level of protection afforded to tourists as consumers is unlikely to motivate a tourist to travel to a destination that lacks other attributes required by the potential visitor. [...] consumer protection mechanisms act to prevent dissatisfaction by tourists, rather than create satisfaction”<sup>65</sup>. The massification of tourism, the wide diversification of the tourists’ profiles and the desire of countries to develop tourism are progressively leading to a reassessment of the situation as, for example, consumer protection for tourists helps to foster repeat visitation and influence “positive word of mouth and media publicity regarding a destination”<sup>66</sup>. This reassessment is perhaps more visible in criminal matters than in civil matters, with the apparition of tourist polices in many countries<sup>67</sup>, for example in Argentina<sup>68</sup>; Brazil<sup>69</sup>; Colombia<sup>70</sup>; Egypt<sup>71</sup>; El Salvador<sup>72</sup>; Greece<sup>73</sup>; India<sup>74</sup>; Kenya<sup>75</sup>; Korea; Lebanon<sup>76</sup>; Malaysia<sup>77</sup>; Nepal<sup>78</sup>; Peru<sup>79</sup>; Portugal<sup>80</sup>; Seychelles<sup>81</sup>; Korea<sup>82</sup>; Sri Lanka<sup>83</sup> and Thailand<sup>84</sup>. It seems that the needs of tourists in relation to criminal law are seen as more pressing than in civil matters<sup>85</sup>, despite the

<sup>65</sup> V. A. Greenwood and L. Dwyer, “Consumer protection legislation: A neglected determinant of destination competitiveness?”, *Journal of Hospitality and Tourism Management* 24 (2015), p. 1, spec. p. 2. Overall, the article “argues that consumer protection is an important determinant of destination competitiveness, albeit one that is not always explicitly identified” (p. 1).

<sup>66</sup> V. A. Greenwood and L. Dwyer, op. cit., p. 3.

<sup>67</sup> Several experiences have also been carried out, in particular during major entertainment events or holidays, such as inviting foreign police to assist local police in the protection of tourists from local criminals or in dealing with criminal activities from tourists, e.g. UK police in Spain or Chinese police in France.

<sup>68</sup> For example Buenos Aires, [http://www.metropolitana.gob.ar/?q=policia\\_turistica](http://www.metropolitana.gob.ar/?q=policia_turistica)

<sup>69</sup> For example in Rio, the Delegacia Especial de Apoio ao Turismo, see

<http://www.grupounicad.com.br/deat/home.htm>

<sup>70</sup> See <http://www.mincit.gov.co/minturismo/publicaciones.php?id=16382>

<sup>71</sup> See <http://www.moegypt.gov.eg/english/Departments+Sites/Tourism/CallUs/>

<sup>72</sup> See <http://politurelsalvador.com/>

<sup>73</sup> See infra Part 4.

<sup>74</sup> See Delhi, <https://delhitrafficpolice.nic.in/public-interface/tourist-police/>;

Goa, [http://www.goapolice.gov.in/other\\_units\\_police.php?id=16](http://www.goapolice.gov.in/other_units_police.php?id=16)

<sup>75</sup> See <http://www.kenyapolice.go.ke/2015-09-07-17-41-13/kenya-tourist-police-unit.html>

<sup>76</sup> See <http://mot.gov.lb/Contact>

<sup>77</sup> With a Tourist Police Counter in the Malaysia Tourism Centre in Kuala Lumpur notably, <http://www.matic.gov.my/en/services/facilities-at-matic>

<sup>78</sup> See [http://tourism.gov.np/en/category/tourism/tourist\\_police](http://tourism.gov.np/en/category/tourism/tourist_police)

<sup>79</sup> See [https://www.pnp.gob.pe/direcciones\\_policiales/dirture/turismo.html](https://www.pnp.gob.pe/direcciones_policiales/dirture/turismo.html)

<sup>80</sup> For example, Esquadra de Turismo de Lisboa,

[http://www.psp.pt/Pages/pesquisa\\_detalhe.aspx?menu=2&submenu=1&unidade=732](http://www.psp.pt/Pages/pesquisa_detalhe.aspx?menu=2&submenu=1&unidade=732).

<sup>81</sup> Response to question 19.

<sup>82</sup> See [http://english.visitkorea.or.kr/enu/TRV/TV\\_ENG\\_3\\_3.jsp](http://english.visitkorea.or.kr/enu/TRV/TV_ENG_3_3.jsp).

<sup>83</sup> See <http://www.police.lk/index.php/tourist-police>.

<sup>84</sup> For example, <http://samui-tourist-police.com/>; <http://www.phuket-tourist-police-volunteers.com/>.

<sup>85</sup> A further example is provided by Venezuela, where a tourist support body (*Servicio de Atención al Turista Internacional*) is scheduled to be set up, albeit exclusively for victims of criminal offences (C. Madrid Martínez, response to the NGO Questionnaire).

fact that the specific support needed by tourists which underlies the creation of a specialised police unit for tourists applies equally in the field of civil matters.

Nevertheless, in a growing number of countries, a dedicated tourist protection mechanism in civil matters has been created. It is an official acknowledgment of the need for tourist protection as well as its specificities due to the distinct weaknesses of tourists coming from abroad<sup>86</sup>. However, there are various degrees of dedication and protection. Some countries offer a dedicated tourist complaint body, whilst others set up hotlines or specific channels for complaints<sup>87</sup>. Overall, the picture remains patchy. Nevertheless, it could provide a fertile ground for a network mechanism between those like-minded bodies. It also demonstrates that the legal environment is more and more considered as a key determinant of the attractiveness and competitiveness of a country as a tourism destination<sup>88</sup>.

### **Existence of a dedicated tourist complaint body (centre, mediator or administration)**

The latest dedicated tourist complaint body seems to be the South Korean Tourist Complaint Center, which was opened by the official Korean Tourism Organisation (KTO) in mid-October 2016<sup>89</sup>. It offers to help the tourist experiencing “inconveniences while travelling in Korea”<sup>90</sup> through linguistic assistance in English, Chinese, Japanese, Malay, Thai and Vietnamese (with Russian, Arabic, and Indonesian apparently to come soon<sup>91</sup>), and a variety of channels (including online, phone, email)<sup>92</sup>. The aim is to create an “optimal tourism environment”<sup>93</sup> at a time where tourism in Korea is booming (according to the KTO, the number of international tourists to Korea doubled in 6 years<sup>94</sup>) and “increasing the number of foreign tourists who make

<sup>86</sup> For an official recognition of the specific vulnerability of tourists among consumers, see also Venezuelan law (C. Madrid Martínez, “Parte E. Relaciones de las empresas con sus clientes. Relaciones de consumo », in C. Madrid Martínez (ed.), « La empresa y sus negocios de carácter internacional », Caracas (Venezuela), Academia de Ciencias Políticas y Sociales, 2011, p. 139, spec. fn 12).

<sup>87</sup> The inexistence of a specific tourist complaint body does not necessarily imply that the particular needs of tourists are not addressed, provided that these needs are addressed elsewhere, for example by the recruitment of multilingual staff within the local consumer protection body.

<sup>88</sup> In the future, it cannot be excluded that the effective resolution of disputes involving tourists will constitute a distinct and explicit criterion of the competitiveness of a tourism destination. It is already included in all likelihood in several identified criteria such as “Sustainable tourism policy and regulations” or “Ethical and responsible tourism products and services”. However, an explicit recognition of the importance of the legal environment would facilitate the visibility of tourist protection mechanisms. For a list of factors which identify the competitiveness of a tourism destination, see UNWTO, Report of the Secretary-General, Part II: Programme of Work, (a) Implementation of the General Programme of Work 2016-2017, Annex I : Report of the Committee on Tourism and Competitiveness, 11 April 2017, submitted to the 105th session of the Executive Council in Madrid, Spain (10 – 12 May 2017), document CE/105/5(a), [http://cf.cdn.unwto.org/sites/all/files/pdf/ce105\\_05\\_a\\_implementation\\_of\\_the\\_general\\_programme\\_of\\_work\\_for\\_2016-2017\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/ce105_05_a_implementation_of_the_general_programme_of_work_for_2016-2017_en.pdf), p. 15.

<sup>89</sup> Monday 17 October 2016, as per the press release of the KTO ([http://english.visitkorea.or.kr/enu/AKR/FU\\_EN\\_15.jsp?cid=2434790](http://english.visitkorea.or.kr/enu/AKR/FU_EN_15.jsp?cid=2434790), 14 October 2016).

<sup>90</sup> See <https://www.touristcomplaint.or.kr/en/intro>. The press release of the KTO gave the examples of “a case of simple unkindness [or] a more serious issue like overcharging in a taxi or at a shop” ([http://english.visitkorea.or.kr/enu/AKR/FU\\_EN\\_15.jsp?cid=2434790](http://english.visitkorea.or.kr/enu/AKR/FU_EN_15.jsp?cid=2434790), 14 October 2016).

<sup>91</sup> “The national tourism organisation said the Tourist Complaint Center [...] will offer services in Russian, Malay, Arabic, Indonesian and Thai by next year” (Lee Jin-a, South China Morning Post, 9 November 2016, <http://www.scmp.com/news/asia/east-asia/article/2044365/korea-launches-website-foreign-tourist-complaints>). These new languages are not yet all reflected in the website of the Complaint Center as of 11 January 2018: see <https://www.touristcomplaint.or.kr/>. However, Malay, Thai and Vietnamese languages have indeed been added over the recent months.

<sup>92</sup> The website is mobile-friendly in order to provide timely assistance.

<sup>93</sup> See <https://www.touristcomplaint.or.kr/en/intro>

<sup>94</sup> From 7.5 million (2009) to 14 million (2015) <http://kto.visitkorea.or.kr/eng/overview/About/history.kto>.

a return visit to Korea is as important as increasing the number of foreign tourists who make their first visits to Korea”<sup>95</sup>. The Complaint Center does not deal with complaints where court proceedings have been instituted, are subject to the investigation of an authority, or are about companies based outside Korea. The Seoul Complaint Center offers cash compensation for foreign tourists who have been overcharged while in Seoul provided some conditions are fulfilled, in relation to time of stay (foreign tourists who may benefit from the scheme are those who do not stay more than one month), venue (cases must have occurred in Seoul's Special Tourist Zones and excludes overcharging by street vendors or for transportation in particular) and value (up to 500 000 won per person). The processing time is less than 30 days from the submission of the complaint<sup>96</sup>.

It may be worth to add that whilst the South Korean Tourist Complaint Center deals with complaints of tourists visiting Korea, the South Korean Consumer Agency (KCA) deals with complaints of Korean tourists who have returned from their trip abroad. In 2016, 569 such complaints were received<sup>97</sup>.

An example of a dedicated tourist mediator<sup>98</sup> (*Defensor del Turista*) may be found in the capital of Argentina (Buenos Aires), where a mediator specialises in dealing with tourist complaints, with the help of legal professionals, bilingual employees and professionals of the tourism sector<sup>99</sup>. Headquarters and several offices are spread throughout the capital, with a physical address (along with a google map), a phone number, and a specific e-mail address. An online form may also be found on the website<sup>100</sup>, which is available in several languages (Spanish, English (U.S.), Portuguese, French and German). Starting the week of the 6 February 2017, information about the tourism mediator is also available at the main airport of the country<sup>101</sup>. Information on the *Defensor del Turista* is also made available at another airport as well as at a key transit point towards Uruguay (*Buquebus*). Moreover, during the high season for tourism or in places where a major cultural or sport event is scheduled to take place, active promotion campaigns are carried out, including the distribution of leaflets in three languages (English, Portuguese and Spanish), for example in bars and restaurants<sup>102</sup>. Approximately 30 000 tourists, both from Argentina and abroad, have approached the dedicated tourist mediator for information.

Another example of a tourist mediator is the Tourism Service of the Austrian Federal Ministry for Science, Research and the Economy (*Bundesministerium für Wissenschaft, Forschung und Wirtschaft*). In contrast with the Buenos Aires *Defensor del Turista*, it operates at national level, and is less a physical person than an administration offering mediation services to

<sup>95</sup> An official at the KTO, as per Lee Jin-a, op. and loc. cit.

<sup>96</sup> See [http://english.visitseoul.net/essential-Info-article/Tourist-Complaint-Center\\_/18944#](http://english.visitseoul.net/essential-Info-article/Tourist-Complaint-Center_/18944#). There may be a slight ambiguity on the website as a period of 14 days is also mentioned: "Compensation limit. Up to 500,000 won per person. Processing Time: Less than 30 days from receipt of a complaint, to payment of compensation ※ Review and compensation processing per application will be completed less than 14 days from the date the application is submitted".

<sup>97</sup> Complaints for 'direct offline transactions abroad'. The protection of consumers buying overseas travel-related products is a current priority of the KCA: see for example KCA, "Consumers' Rights and Interests expected to be Promoted with the Improvement of Information Provision regarding Overseas Travel-related Products", Press Release, 4 January 2018.

<sup>98</sup> See [www.defensoriaturista.org.ar](http://www.defensoriaturista.org.ar).

<sup>99</sup> See <http://www.defensoriaturista.org.ar/institucional/>.

<sup>100</sup> See <http://www.defensoriaturista.org.ar/contacto/>.

<sup>101</sup> See <http://www.defensoriaturista.org.ar/la-defensoria-del-turista-portena-extiende-campana-difusion-al-aeropuerto-internacional-ministro-pistarini-ezeiza/>.

<sup>102</sup> Response of the *Defensor del Turista* to the questionnaire for NGO (question 11).

tourists. Indeed, the Tourism Service aims to be the “central contact point for tourists and partners in the tourism and leisure industries”. Tourists, both from Austria and abroad, as well as companies and authorities may turn to the Tourism Service for information. One of the services offered is “free and impartial mediation in conflicts between travellers and specific businesses of the tourism industry (as in cases of complaints about shortcomings)”<sup>103</sup>. A standard complaint form is downloadable online. Identification of the parties (including the number of travellers) is required as well as a presentation of the complaint, whether compensation has been offered (amount and nature, i.e. cash or voucher) and the adequate compensation according to the tourist. The form may be submitted through different channels: e-mail, fax and traditional post. A telephone number<sup>104</sup> is also provided.

In Colombia, a detailed administrative procedure<sup>105</sup> is in place to protect the dissatisfied tourist, who may, within 45 days, complain to a central authority—the *Grupo de Protección al Turista*—about the level of service offered by professionals such as hotels, travel agents, travel guides, car rentals companies, etc. He will have to provide the usual information: name and addresses of the parties as well as a document proving his identity and of course a description of the dispute along with relevant evidence. The complaint may only be submitted in writing, by post. No e-mail or phone number or online form is provided. The authority will investigate the case and, accordingly, impose or not, administrative sanctions, which may ultimately be challenged before the administrative courts after the exhaustion of internal recourses within the administration. It seems however that the procedure is geared towards tourists from the Spanish speaking zone as the relevant webpage is not accessible in any other language. No mediation / conciliation is on the agenda as it appears to be first of all an administrative procedure which aims primarily to sanction the service provider rather than compensate the tourist.

### **Existence of a dedicated tourist hotline or complaint channel**

Some countries offer permanent dedicated hotlines for tourists. For example in Peru, the National Exportation and Tourism Promotion Commission (PROMPERÚ) set up iPerú. This free service offers not only information to tourists, but also “Guidance and counselling when tourist services were not provided according to that offered by the operators, giving users the ideal channel to get their queries and dissatisfactions”.<sup>106</sup> It has offices spread throughout the country, a hotline available on a 24 hours basis, and an e-mail address is provided. The presentation of the service on the website is available in several languages, including French and German. However, it is not known if, in practice, the offices and the hotline offer the possibility to communicate in languages other than English and Spanish, which seem to be the primary languages. Crucially, there does not appear to be any information on the way complaints are handled. The fact that iPerú provides ‘guidance and counselling’ seems to imply

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<sup>103</sup> See <http://www.en.bmwfw.gv.at/Tourism/Seiten/TourismService.aspx>. Following the formation of a new government in Austria in mid-December 2017 and the appointment of a new minister in early January 2018, the name of the ministry changed, along with the web address (bmdw.gv.at). The above webpage which relates to the old ministry (bmwfw.gv.at) is therefore no longer valid. The Tourism Service is still mentioned when searching for Tourism on the website of the new ministry, albeit the (old) link provided does not work anymore. It remains to be seen whether this is a temporary glitch due to the transition, or a more permanent feature.

<sup>104</sup> Available from Monday to Friday, mornings exclusively. However, it is possible to agree on a different time “by telephone arrangement”. The number provided seems to be a normal land phone number, without any added charge.

<sup>105</sup> See [http://www.mincit.gov.co/minturismo/publicaciones/15846/proteccion\\_al\\_turista](http://www.mincit.gov.co/minturismo/publicaciones/15846/proteccion_al_turista).

<sup>106</sup> See <http://www.peru.travel/iperu.aspx#>



that no conciliation / mediation service between the international tourist and the local company complained about is offered.

Some countries offer temporary hotlines, notably at major events, with more or less success. For example, Switzerland offered in 2008 a hotline for Eurofoot. It was operated by the national consumer agency and was hardly used<sup>107</sup>.

In some circumstances, the experience gained from the operation of a tourist hotline seems to have led to the development of a complaint centre, as in Korea (which still operates the hotline in addition to the Complaint Center)<sup>108</sup>.

Several countries offer tourists the possibility to complain through dedicated media, thus testifying to their specific situation. However, there is no indication of any procedure or process following the submission of the complaint, or if advice to the tourist is offered. For example, the Lebanese National Tourism Authority<sup>109</sup> offers tourists the possibility to complain either by e-mail<sup>110</sup> or phone or through a hotline to the Tourist Control Department<sup>111</sup>. However, there does not appear to be any information on the way complaints are handled and the overall efficiency of the scheme. In India one finds a Travel Trade Division<sup>112</sup> in charge of, notably, “All matters concerning complaints received from tourists”. The contact details of relevant members of staff are provided (e-mails and telephone numbers). However, it is not entirely certain that the above division deals with individual complaints. At least there is no indication of any procedure or process in this respect, such as an e-mail address to send complaints to or an online form, the offer of conciliation / mediation, etc.

Finally, in some countries, it is made clear that the tourist may complain, but that his complaint will not be processed but merely forwarded to the relevant professional. An example is the following webpage of Tourism Thailand<sup>113</sup>. It warns the tourist about its very limited role: “Please note that as a forum of information intended to provide assistance to visitors, Tourism Thailand has no mandate to investigate individual consumer complaints, or jurisdiction over individual operators, industry bodies, government agencies, or regional tourism organizations regarding services or products. If you provide us with information regarding your complaint, we will forward your information to the relevant party and ask that they respond; we also suggest that you contact the service provider that you wish to complain about directly”. The added value of the service offered to tourists seems here quite limited, apart from the ‘official’ recording of the complaint.

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<sup>107</sup> Switzerland, answer to question 6.

<sup>108</sup> The 1330 Korea Travel Hotline which may be contacted by phone but also Skype.

<sup>109</sup> See [www.destinationlebanon.gov.lb](http://www.destinationlebanon.gov.lb).

<sup>110</sup> See [complaints@destinationlebanon.gov.lb](mailto:complaints@destinationlebanon.gov.lb).

<sup>111</sup> See <http://mot.gov.lb/Contact>. The name of the Department may feel less welcoming than probably intended.

<sup>112</sup> See <http://tourism.gov.in/travel-trade-division>.

<sup>113</sup> See <http://www.tourismthailand.org/Send-Complaint>.

## Part 4. Identifying difficulties faced by tourists

### A. The evidence gathered through questionnaires

#### 1. The evidence gathered through the Tourism Project questionnaires

The following is a summary of responses from Members (States and one REIO) and non-Member States of the Hague Conference to which a questionnaire was sent, as well as from NGOs to which a more elaborated questionnaire was sent<sup>114</sup>. It covers the most important countries / regions, whether in terms of inbound tourism, outbound tourism, receipts or spending (in particular China<sup>115</sup>, Europe<sup>116</sup> and the U.S.A.). Important Latin American countries (Argentina, Brazil, Chile, Dominican Republic, Paraguay, Uruguay and Venezuela) as well as important Asian countries (Japan, Korea, Philippines, and Vietnam) and touristic destinations in Africa (Mali, Morocco and Seychelles) and the Middle East (Israel) are also included. A very significant part of key tourism countries / regions is therefore covered, even if such summary does not pretend to offer a fully comprehensive view of the global current situation.

#### a. *In relation to Legal Standing / Sources of Law regarding Access to Justice*

##### **International Agreements** (including Regional Agreements)

The main international sources of law regarding access to justice are international instruments relating to human rights, typically and in chronological order:

— the 1948 Universal Declaration of Human Rights<sup>117</sup>, proclaimed by the General Assembly of the United Nations Organization<sup>118</sup> (Moldova, Portugal, Seychelles, Ukraine). Article 8 provides the right for everyone to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

— the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>119</sup>, to which all the EU Member States are parties but not the European Union itself, and to which Bosnia and Herzegovina, Moldova, Switzerland and Ukraine are also parties<sup>120</sup>. Article 6 ECHR guarantees the right to a fair trial, including the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

— the 1954 Hague Convention on Civil Procedure<sup>121</sup>, to which Israel, Moldova, Slovenia and Switzerland are parties.

— the 1966 International Covenant on Civil and Political Rights<sup>122</sup>, to which Japan, Lithuania, Moldova, Portugal, Seychelles and Vietnam are parties. Article 14.1 states that “All persons

<sup>114</sup> See Methodology in Part 1.

<sup>115</sup> Continental China, PRC to which one may add the responses from Hong-Kong and Macao, SARs, China.

<sup>116</sup> Europe refers to both the EU and its Member States as well as other European States, e.g. Bosnia Herzegovina, Moldova, Switzerland and Ukraine.

<sup>117</sup> See <http://www.un.org/universal-declaration-human-rights/index.html>

<sup>118</sup> This Declaration is considered as having customary value for several of its provisions.

<sup>119</sup> See [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>120</sup> Among the States who have answered the questionnaire. Far more States are parties to the ECHR.

<sup>121</sup> See <https://www.hcch.net/en/instruments/conventions/full-text/?cid=33>

<sup>122</sup> See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

shall be equal before the courts and tribunals”. This convention applies in Hong-Kong (SAR, China) and Macao (SAR, China) through respectively Articles 39 and 40 of their Basic Laws.

— 1969 American Convention on Human Rights (Pact of San Jose, Costa Rica)<sup>123</sup>. Article 8 on the right to a fair trial states, in paragraph 1, that “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature”. Brazil, Chile, the Dominican Republic and Paraguay are parties to this Convention<sup>124</sup>.

— the 1980 Hague Convention on International Access to Justice, to which Bosnia and Herzegovina, Brazil, Bulgaria, Croatia, Cyprus, the Czech Republic, France, Lithuania, Romania, Slovakia, Slovenia, Sweden and Switzerland are parties<sup>125</sup>.

Some States are preparing for (Ukraine), or considering the ratification of this convention (Mainland China (PRC), Germany, Uruguay and Vietnam). Interestingly, whilst not being a party to it, Moldova states that the “provisions of the Hague Convention 1980 on access to justice are respected by the courts in Moldova”<sup>126</sup>.

— the 2000 EU Charter on Fundamental Rights<sup>127</sup>, which became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. Article 47 on the right to an effective remedy and to a fair trial reads: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

Other international treaties with provisions relevant to access to justice include the 2006 Convention on the Rights of Persons with Disabilities<sup>128</sup>.

Bilateral conventions on judicial assistance are an important legal source (Mainland China (PRC), Slovenia, Uruguay, Ukraine)<sup>129</sup>.

<sup>123</sup> See [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)

<sup>124</sup> For other States parties:

[https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>125</sup> For the full list of contracting States, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=91>.

<sup>126</sup> Answer to question 20. A formal ratification may be advantageous to Moldovans who litigate in a 1980 Hague Convention contracting State.

<sup>127</sup> See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

<sup>128</sup> The Convention has been ratified by Switzerland, along with 173 other States (see <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>). Article 13 on access to justice requires States to “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations”. Disabled tourists may be considered as especially vulnerable.

<sup>129</sup> The Portuguese answer states that Portugal, whilst not a party to the 1980 Hague Convention on Access to Justice, is nevertheless “party to more than 20 international agreements related to tourism development”. It thus provides four examples of “international agreements, concluded after the year 2000, with provisions that protect tourists”. However, a consultation of the referred provisions on the website of the official journal of the Portuguese Republic (<https://dre.pt/home>) shows that, while clearly useful and of great interest, none of them aims to protect tourists in the meaning of access to justice and more generally the



Legislation enacted by Regional Organisations are also relevant, especially in the European Union, for example Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes<sup>130</sup>.

Generally speaking, these sources guarantee access to justice to tourists / foreigners in the same conditions as nationals. This statement may have to be qualified at times.

Last but not least, within Mercosur, a specific agreement on access to justice (*lato sensu*) for tourists was concluded<sup>131</sup>: the 2005 administrative cooperation agreement ("Acuerdo interinstitucional de entendimiento entre los organismos de defensa del consumidor de los Estados Parte del Mercosur para la defensa del Consumidor visitante"). The agreement is now combined with a joint experts committee on the protection of visitors and consumers established in 2012. According to Brazil, they “allow for more than 80% of the problems to be solved with the simple intervention of the national enforcement authorities, assuring more information to foreign tourists in his or her language, providing a formulary to fill the complains to the tourism industry about the rights of consumers and also encouraging the consumer movement and the national agencies to act on behalf of foreign and national tourists”.

### National legislation and case-law

The most important national source of law is the national / federal Constitution (Constitutions of Chile, Croatia and the Dominican Republic; Bulgarian Constitution; Articles 12(5) and 30 of the Constitution of Cyprus, Art. 19 Section 4 and Article 103 of the German Basic Law; Articles 35 and 41 of the Basic Law of Hong Kong (SAR, China) as well as the Hong Kong Bill of Rights; Basic Law of Israel; Article 32 of the Japanese Constitution; Article 30 of the Lithuanian Constitution; Articles 36 and 43 of the Basic Law of Macao (SAR, China); Article 20 of the Moldovan Constitution; Article 20 of the Portuguese Constitution; Article 27 of the Seychelles Constitution<sup>132</sup>; Article 23 of the Slovenian Constitution; Swedish Constitution; Article 29a of the Swiss Federal Constitution; Articles 8, 55 and 124 to 131 of the Ukrainian Constitution<sup>133</sup>; Articles 7, 72 and 332 of the Uruguayan Constitution; Constitution of the U.S.A.)

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Tourism Project here under consideration. For example, Article 5 of the agreement between Portugal and Bulgaria for Cooperation in the field of Tourism, which relates to “information to the consumer tourist”, reads: “The Contracting Parties, within the scope of their abilities, shall facilitate the exchange of tourism information with the aim to increase tourist flow, mostly by way of exchange of documentation, films, advertising materials and tourist advertising. The presentation and advertising materials with no commercial value shall be exempt from customs duties and other taxes on imports in compliance with the national legislation of the Contracting Parties”. Similarly, Article 6 of the agreement between Portugal and Russia, which is about a Travel advisory service, focus on immigration law and not consumer law (“The Parties shall inform the citizens travelling to either country on the legislation in force regulating the entry, stay and departure of foreigners”). Article 4 of the Agreement with Qatar, entitled ‘Payment Mechanism’, and Article 19 of the agreement with Mexico, entitled ‘Consumer protection on prices’, do not seem either to have a close relationship with the topic of the Tourism Project.

<sup>130</sup> See <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003L0008>

<sup>131</sup> Argentina, Brazil, Paraguay and Uruguay.

<sup>132</sup> Strictly speaking, the provision is less on access to justice than equal protection of the law without discrimination on any ground “except as is necessary in a democratic society”. Seychelles’ response to the questionnaire adds that the Constitution “makes no distinction between own citizen and tourist, regarding Article [...] 27”.

<sup>133</sup> According to Article 8 “applying to a court for the protection of constitutional rights and freedoms of a person and a citizen on the basis of the Constitution of Ukraine is guaranteed”. According to Article 55 “rights and freedoms of a person and a citizen are protected by a court” and reference is also made to the Verkhovna Rada Commissioner for Human Rights as well as the possibility to submit a constitutional

Private International Law Acts<sup>134</sup>, Code of Civil / Commercial Procedure (under various denominations<sup>135</sup>), laws on legal aid, tourism and consumer laws follow.

Generally speaking, these sources guarantee access to justice to tourists / foreigners in the same conditions as nationals<sup>136</sup>. This principle of non-discrimination applies in Cyprus, the Czech Republic, Germany, Israel, Japan, Moldova, Portugal<sup>137</sup>, Slovakia, Sweden, Switzerland, and Uruguay. However, the principle is at times qualified / the subject to reserves in the Constitution or Legislation (Dominican Republic; Moldova, Slovakia, Slovenia, Ukraine).

Restrictions tend to appear in Legal Aid Acts. For example, the Slovenian Legal Aid Act, which covers judicial proceedings (including constitutional proceedings and out-of-court settlements before authorised authorities), states in Article 10 that foreigners eligible for legal aid are “aliens holding a permit for permanent or temporary residence in the Republic of Slovenia and stateless persons residing legally in the Republic of Slovenia; other aliens, subject to the condition of reciprocity or under the conditions and in cases laid down in international treaties binding upon the Republic of Slovenia”<sup>138</sup>. Information on the existence of reciprocity is *prima facie* provided by the foreign country: “A foreign law inquiry shall be drawn up by the legal aid office and, accompanied by a translation, sent in accordance with applicable international treaties, or by the ministry responsible for justice via diplomatic channels, to the alien's country. In the proceedings for granting legal aid, a foreign country's notification concerning its legislation governing legal aid shall have the character of a public document pursuant to the act governing general administrative procedure”.

Exceptionally, the principle of non-discrimination may be doubtful. Article 5 of the Brazilian Federal Constitution guarantees constitutional fundamental rights and equality of legal treatment to Brazilians and foreign nationals *with residence* in Brazil. Traditionally, the principle of non-discrimination also applied to foreign tourists following Article 3 of the 1917 Civil Code, which guaranteed “equal rights on contracts and torts to foreign nationals and Brazilians”. However, this provision was precisely not reproduced in the 2012 Civil Code, creating an uncertainty as to the current legal situation of foreign tourists. The Brazilian response to the questionnaire states that the administrative entities protecting consumers (Procons) follow in practice the principle of non-discrimination, at least in theory<sup>139</sup>, “but under the new Civil Code and the new Civil Procedure code of 2015, the Brazilian judge must not any more give the same amount of protection to foreigners (residents or tourists in Brazil) as national consumers with regard to transactions or torts”, which leads to the following

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complaint. According to Article 124 – 131, “a law may determine an obligatory pre-trial settlement of a dispute”.

<sup>134</sup> For example, Swiss Loi fédérale sur le droit international privé.

<sup>135</sup> For example, Swedish Code of Judicial Procedure; Civil Procedural Code and Commercial Procedural Code of Ukraine.

<sup>136</sup> For example, the Japanese response states that Article 32 of the Constitution “provides for access to justice and it is considered that it applies to anyone includes a foreign national. Furthermore, we do not discriminate against a foreign national under our civil justice system”; the Swiss response precises that access to justice is guaranteed independently from both nationality and domicile.

<sup>137</sup> According to Article 15, §1 of the Portuguese Constitution, “foreigners and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens”.

<sup>138</sup> The scope of application *ratione personae* is important as legal aid may be granted in the form of an exemption from the payment of security deposits for the costs.

<sup>139</sup> The response later points out to practical difficulties such as the linguistic barrier and the fact that no member of staff may be speaking the language of the tourist.

conclusion: “we cannot affirm that what concern consumer protection laws and access to justice in Brazil the provisions applies to tourists in the same conditions as nationals”.

**b. In relation to Information**

— The vast majority of countries do not ensure that, as a matter of principle, tourists are specifically made aware of their rights and legal remedies, as well as of the available dispute resolution procedures (e.g. Bosnia-Herzegovina, Brazil, Chile, Dominican Republic, Mali, Morocco, Romania, Seychelles, Slovakia<sup>140</sup>, Spain, Ukraine, and the U.S.A.)<sup>141</sup>.

However, in a few States, tourists-focused information points or drives are set up at specific venues or times. For example, occasionally, some local Chilean agencies specifically inform tourists about their rights as consumers, albeit at a precise time slot, in a specific (and in all likelihood touristic) location and apparently exclusively in Spanish<sup>142</sup>. Similarly, during the 2014 World Cup, Brazilian Consumer and Tourism Agencies distributed the Tourist-Consumer Guide, an informative guide on tourists’ rights in English, Portuguese and Spanish. Information is available on a permanent basis in international airports (where Procons are based) and the frontiers with fellow Mercosur countries. Argentina and Korea have dedicated tourists support mechanisms on a permanent basis, where information is provided in a variety of languages<sup>143</sup>.

Moreover, in many States, Consumer Agencies or the Ministry of Justice provide information on the rights and legal remedies of consumers (e.g. Bosnia-Herzegovina, Brazil<sup>144</sup>, Germany, Hong-Kong (SAR, China), Macao (SAR, China), Morocco, Sweden, Switzerland), including tourists and at times on a pro-active basis<sup>145</sup> (Philippines<sup>146</sup>). In the EU as well as Iceland and Norway, the ECC-Net provides such information. The information is generally provided on websites, but other channels may be considered such as a hotline for a major sport event

<sup>140</sup> At least, there is no legal provision on such duty of information and the Ministry of Justice does not inform tourists on its own initiative. The policy of the Ministry in charge of the protection of consumers, if different from the MoJ, is unknown. Slovakia reserves the reply of the EU.

<sup>141</sup> One may perhaps add Japan to this list: Japan considered that the question on whether tourists are specifically made aware of their rights and legal remedies, as well as of the available dispute resolution procedures, is ‘non applicable’, thus not excluding that that tourists are not specifically made aware of their rights.

<sup>142</sup> “La Directora Regional, Paola Ahumada, recordó a los visitantes nacionales y extranjeros sus derechos al contratar servicios relacionados con el turismo, entre ellos, a recibir servicios de calidad, a la seguridad y a que se respeten las condiciones ofrecidas. Con el propósito de recordar a los turistas que están visitando la región sus derechos en materia de consumo, la Directora Regional del SERNAC de Coquimbo, Paola Ahumada, junto a funcionarios del Servicio entregaron a los veraneantes un folleto informativo denominado “Durante tus vacaciones, tus derechos te acompañan”. Durante la actividad, desarrollada durante la tarde del día de ayer en el sector “Cuatro Esquinas” de la Avenida del Mar de La Serena, la autoridad regional resaltó la importancia que los visitantes conozcan sus derechos y se atrevan a ejercerlos.[...] Agregó que los derechos de los consumidores son iguales, tanto para los consumidores nacionales como extranjeros, haciendo un llamado a las empresas a ser profesionales, pues es una forma de incentivar la actividad turística » (“Dirección Regional de Coquimbo entregó recomendaciones a los turistas”, 12 January 2018, <https://www.sernac.cl/direccion-regional-coquimbo-entrego-recomendaciones-turistas/>).

<sup>143</sup> See supra Part 3.

<sup>144</sup> Brazil states that the Consumer Protection Code will be available in Chinese, English, French and Spanish on the website of the Ministry of Justice.

<sup>145</sup> It may benefit tourists who happen to be in the country at this specific time.

<sup>146</sup> In the Philippines, the Government has a proactive attitude (i.e. information drives) on consumers rights in general, to the benefit of both local and foreign consumers, but a reactive attitude on remedies of foreign consumers (the Department of Tourism will assist a tourist who has sought help).

(Switzerland<sup>147</sup>). The information may not always be available in multiples languages<sup>148</sup>. For example, Germany states that the General Consumer Dispute Settlement Board provides information for consumers only in German. The Macao Consumer Council (Macao, SAR, China) stands out by the following practice: it disseminates information on rights and legal remedies, as well as of the available dispute resolution procedures through various channels (media, websites, posters, leaflets) within Macao but also by cooperating with overseas consumer associations and promotes the information in their respective regions/countries through their local publications or their official websites and social media<sup>149</sup>.

The National Tourism Organisation / Ministry or Police or the Trade Department / Agency may also provide information on rights and remedies (Mainland China (PRC), Cyprus, Greece<sup>150</sup>, Hong-Kong (SAR, China), Israel<sup>151</sup>, Macao (SAR, China)<sup>152</sup>, Mali and Paraguay<sup>153</sup>). Greece Tourism Police has carried out various projects enhancing tourists' experience. It notably has an ostensible presence at the main airports during the high season, offers an helpline on a 24h basis and in several languages (English, French and German), and created a multilingual Tourist Police Visitors' Help Office in Athens, in collaboration with the Hellenic Chamber of Hotels, in October 2015. The numbers confirm the strong interest of tourists, i.e. nearly 13 500 tourists in the first year of operation (2016) of the Help Office in

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<sup>147</sup> The hotline for the 2008 Eurofoot was hardly used.

<sup>148</sup> Israel states that the information provided to tourists is not available in multiple languages. However, a consultation of the website of the Israeli Ministry of Tourism ([https://www.gov.il/en/Departments/ministry\\_of\\_tourism](https://www.gov.il/en/Departments/ministry_of_tourism)) shows it is available in English and provides information on complaint procedures ([https://www.gov.il/en/service/review\\_and\\_complaints](https://www.gov.il/en/service/review_and_complaints)), more exactly the possibility to submit a complaint to an Ombudsman Coordinator by mail, fax or e-mail (a phone number is also available). Complaints are restricted to tour guides without a licence and violation of the "Duty of Disclosure" by tourist agents towards purchasers of tourist packages. It seems that the aim of the procedure is to fine the guide or agent rather than compensate the tourist. On the contrary, the official tourism portal of Israel (<https://info.goisrael.com/en>), available both in Hebrew and English, does not seem to provide any information on complaint procedures, at least on the English website. A 24/7 contact service is however available, by e-mail, phone or online chat.

<sup>149</sup> It is unknown if this international cooperation is reciprocal.

<sup>150</sup> Tourists may file a complaint to the Ministry of Tourism, which may lead to an administrative procedure designed to fine the company infringing the law rather than compensate the tourist.

<sup>151</sup> The Israeli Ministry of Tourism provides, online and in its brochures, information on the way tourists can lodge complaints. National tourism offices are also mentioned as a source of information for tourists, without it being clear that it includes information on (notably) dispute resolution procedures. The same Ministry maintains a hotline for tourists, which occasionally receives complaints by tourists against suppliers. In such cases, the Ministry assists the tourist by redirecting him to relevant bodies and agencies, or invites him to contact a local lawyer. In exceptional cases, the legal counsel of the Ministry may also answer general law-related queries. Israel adds that its Consumer Protection Authority has joined econsumer.gov, where a consumer can report an international scam. However, according to the automatic response to e-mails addressed to 'econsumerwb@ftc.gov' (the contact address given), econsumer.gov does not resolve individual complaints: "Although this website does not resolve individual complaints, the information you provide on the [www.econsumer.gov](http://www.econsumer.gov) complaint form is entered into a secure database that enforcement agencies in participating countries can use to investigate suspect practices, uncover new scam, and spot trends. You should not necessarily expect any enforcement agency to pursue your complaint on your behalf. Many government agencies bring enforcement actions to protect the public at large, but do not intervene on behalf of individual consumers".

<sup>152</sup> Including a 24-hour hotline in Cantonese, English, Japanese, Mandarin and Portuguese.

<sup>153</sup> In Paraguay, there are national tourism offices in touristic places or transit points. The fact that these offices are mentioned in the response to question 8 may imply that these offices provide tourists with information on their rights and remedies. However, it is not stated explicitly nor is the fact that these offices have a proactive attitude on this issue and do not wait for the tourist to come to them once a dispute has arisen. The level of legal proficiency of staff remains unknown.

Athens or nearly 25 000 tourists served by the airports branches from early May to the end of October 2016.

The Dominican Republic states that the tourist may access the required information in its consulates and embassies abroad.

Some States / REIO state that traders provide information to tourists about their rights and remedies as well as of the available dispute resolution procedures (EU and its Members, Moldova, Uruguay)

In a few States, even a pro-active tourist may find it difficult to collect relevant, detailed and updated information on access to justice (Seychelles<sup>154</sup> and perhaps Ukraine<sup>155</sup>).

— Most States<sup>156</sup> do not have any information available regarding nationals approaching consulates abroad seeking information on legal remedies and / or available consumers' complaint procedures in the visited country. This is the case for Mainland China (PRC), Cyprus, Bulgaria, the Dominican Republic, Israel, Lithuania, the Philippines, Portugal, Slovakia, Slovenia, Sweden, Ukraine<sup>157</sup>. The fact that a State does not have any information available regarding nationals approaching consulates abroad seeking information on legal remedies and / or available consumers' complaint procedures in the visited country does not mean there are no such nationals. For example, Bulgaria is one of those States. However, we learn from the Romanian answer that some Bulgarian tourists have complained to their consulate in Romania<sup>158</sup>.

Amongst those States which collected information for the purposes of the questionnaire, Switzerland states that there are no or very few requests from its citizens to its embassies or consulates regarding the protection of consumers abroad. On the contrary, Brazil, Moldova, Morocco, Seychelles, Uruguay and Vietnam explicitly stated that there are cases, with Bosnia Herzegovina, France and Germany implying it<sup>159</sup>. The responses for Greece stated that

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<sup>154</sup> The Seychelles note that information on access to justice is available, albeit mostly offline. The fundamental norm — the Constitution — may be found online, as well as limited other information (the latter not necessarily on governmental websites). In particular, there “is no official Government website dedicated to providing access to legal information in Seychelles”. The creation of a free online portal on case-law and legislation is underway (the Seychelles Legal Information Institute's project). The mostly offline availability of information on access to justice may make it difficult for tourists to access it, even if Seychelles has three official languages (English, French and Creole), which may widen the scope of tourists able to gather the information. However, the Seychelles wished to note that if the tourist has any enquiries the Seychelles tour operator will provide the required clarification. The level of legal proficiency of the tour operator remains nevertheless unknown.

<sup>155</sup> Ukraine provides information to tourists on immigration law and on threats to their personal security, the former being available in English. Information on consumer rights and remedies, especially in foreign languages and for tourists, is not mentioned in this State's response.

<sup>156</sup> More exactly, the entity which responded to the questionnaire.

<sup>157</sup> Several States did not answer the question or understood it differently (Croatia, Czech Republic, Japan and Romania). The EU did not answer this question, albeit for the simple fact that there are no EU consulates as such. On the coordination of Member States' consular services and support role of the EU, see Article 11 Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC.

<sup>158</sup> The Romanian answer also mentions nationals from Greece, Hungary and Turkey. These last two States have not responded to the questionnaire. However, Greece did and referred to Greek nationals, while abroad, contacting the Greek National Tourism Organization Office in the visited country about local complaint procedures. It did not mention Greek nationals contacting Greek consular services, for example in Romania.

<sup>159</sup> France and Germany do not compile statistics. However, their practice is to provide their nationals abroad (tourists) with a list of local lawyers, possibly speaking the language of the tourist, when they seek



nationals have not approached consulates or embassies abroad, albeit contacted, whilst abroad, their own National Tourism Organization. Similarly, Korean consumers have approached the Korea Consumer Agency for information or advice regarding cross-border transactions (i.e. transactions between a Korean consumer and a foreign business operator), which include purchases made while travelling abroad. Moreover, a few tourists from Bulgaria, Greece, Hungary and Turkey have complained to their consulates in Romania. Their number is said to be very limited. However, if Romania refers to formal complaints made by the foreign authorities (as seems to be the case) it may be that the actual number of less formal complaints made by tourists is higher.

We note that whether the help provided by the consulates is sufficient is difficult to ascertain and the answer may well vary on a case-by-case basis. In any case, consular assistance necessarily depends on the existence of a consulate abroad, which is not guaranteed, even for some major countries hard-pressed by their financial situation.

— Most responses to the NGO questionnaire considered that there was a need for better information of tourists on their rights and remedies (Argentina, Mali, Portugal<sup>160</sup>, Spain, Venezuela). For example, in Spain, according to Spanish Consumer organisation FACUA<sup>161</sup>, tourists suffer from a lack of information on their rights and legal remedies in the meaning that they are not, generally speaking, made aware of their rights and legal recourses, including ADR mechanisms<sup>162</sup>. Standard information for tourists does not include such information. FACUA adds that despite the fact that the right to information is a basic right of all consumers, local consumers are often ignorant of ADR mechanisms offered to them. Given the linguistic and cultural obstacles faced by tourists, it is therefore unlikely that they are better informed. FACUA observes that the webpages of the central and regional governments do not include information on the rights of tourists as consumers<sup>163</sup>. Tourist Information points do not generally provide for such information nor is their staff adequately trained in this respect<sup>164</sup>. FACUA notes that during the economic crisis, government- funded information campaign have decreased in a worrying way<sup>165</sup>. It calls for specific information campaign on the rights that tourists have as consumers<sup>166</sup>. By contrast, FACUA provides information on consumer rights and legal recourses without differentiating whether the consumer is a local or a tourist, and its website is available in several languages.

### ***c. In relation to Mediation, Conciliation and Arbitration***

Exceptionally, in some countries, mediation / conciliation is not yet specifically foreseen by legislation, as in Ukraine (knowing that a draft is under consideration)<sup>167</sup>. If it operates, it may therefore do so only in a very informal (and contractual) way. Where mediation / conciliation

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information / assistance in respect of local legal remedies and dispute resolution procedures. The mere drafting and availability of such a list shows that tourists do complain, even if no precise figures are available. A similar conclusion may be drawn from the Bosnia Herzegovinian answer, which stated that assistance is available, albeit without explicitly stating that its nationals are sometimes requesting information.

<sup>160</sup> With a divergence of responses between ECC Portugal and Consumer Association Deco.

<sup>161</sup> ECC Spain has a more nuanced opinion.

<sup>162</sup> FACUA, response to question 9.

<sup>163</sup> FACUA, response to question 15.

<sup>164</sup> FACUA, response to question 17.

<sup>165</sup> FACUA, response to question 10.

<sup>166</sup> FACUA, response to question 15.

<sup>167</sup> In Venezuela, there is no ADR mechanism available for consumer claims, but there is one for tourism.

is available<sup>168</sup>, which is the case in the vast majority of countries, tourists have access to it in the same conditions as national consumers<sup>169</sup>.

However, practice may differ as the law may at times require the physical presence of parties. This is the case in 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<sup>170</sup>. Nevertheless, many countries allow for the representation of a party by a legal representative. These countries are Bosnia Herzegovina, Chile, Croatia, the Dominican Republic, France, Macao (SAR, China), Moldova, Morocco, Seychelles, and Uruguay.

Moreover, mediation / conciliation may take place remotely, at least in some circumstances, through new communication technologies, in Argentina<sup>171</sup>, Brazil<sup>172</sup>, Mainland China, Croatia<sup>173</sup>, Czech Republic, France, Germany, Israel, Japan<sup>174</sup>, Lithuania, Paraguay<sup>175</sup>, Portugal, Romania, Seychelles<sup>176</sup>, Slovakia, Slovenia (EU ODR platform), Spain (Catalonia), Sweden. In some countries (Hong-Kong (SAR, China) and Switzerland), the physical presence of parties living abroad is not required; however, the use of new technologies enabling distance communication is not explicitly stated<sup>177</sup>.

On the contrary, modern communication technologies are not available in Bosnia Herzegovina, Chile, Dominican Republic, Korea, Philippines, Macao (SAR, China), Uruguay, and Vietnam.

#### ***d. In relation to Court Proceedings***

##### **On the existence of a small claims court or procedure**

There does not appear to be a specific small claims court or procedure in Bulgaria, Mali, Moldova and Ukraine<sup>178</sup>. On the contrary, a small claims court<sup>179</sup> or procedure exists in Argentina, Bosnia Herzegovina, Brazil<sup>180</sup>, Chile, Mainland China, Croatia, Cyprus, Czech

<sup>168</sup> If unsuccessful, it may be followed by arbitration in some countries.

<sup>169</sup> However, among tourists, a difference may be made. For example, the ODR platform available since 2016 in the EU is only available to tourists based in the EU: see part 4.C.1.

<sup>170</sup> However, in a specific case, the court may dispense a party from attending the hearing.

<sup>171</sup> At least in the case of the Mercosur Agreement on the assistance to tourists. One response to the questionnaire does not include such limitation.

<sup>172</sup> For Senacon's website for ADR, which is currently limited to the main national companies, to the exclusion of many local businesses and hotels

<sup>173</sup> In specific cases and within the scope of application of the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

<sup>174</sup> 'In some circumstances'.

<sup>175</sup> At least for the submission of the claim.

<sup>176</sup> 'In specific circumstances'.

<sup>177</sup> Save in the case of the Hong Kong International Arbitration Centre.

<sup>178</sup> Korea did not wish to answer Part 5 (on court proceedings) of the questionnaire. Seychelles refers to its Magistrate Court.

<sup>179</sup> We include the Justice of the Peace.

<sup>180</sup> On Small Claims Courts in Brazil, see P. Fonseca, « Développement et consolidation du droit de la consommation au Québec et au Brésil : une analyse comparée », PhD., Université du Québec à Montréal (Canada), 2014, p. 334 ff., who states that more than two thirds of claims before the small claims courts are consumer claims and elaborates on (notably) the wide powers of the judge, the need for both parties to attend a first hearing within 15 days from the submission of the claim in presence of a conciliator (who is a lawyer), the requirement for the claim to be of minor complexity, the absence of court fees and the need or not to have a lawyer depending on the amount at stake (20 minimal monthly salaries). Brazil and Brasilcon's responses to the questionnaires note that Small Claims Courts were at one time available 24 hours a day in international airports in Brazil. However, this is no longer the case. Nevertheless, PROCONS

Republic<sup>181</sup>, Dominican Republic, the EU, France, Germany, Greece, Hong-Kong (SAR, China), Israel, Japan, Lithuania, Macao (SAR, China), Morocco, the Philippines, Portugal, Romania, Slovenia, Spain<sup>182</sup>, Switzerland, Sweden, Uruguay, the USA and Venezuela. In the absence of a small claims court or procedure, simplified and summary proceedings may be found in Switzerland<sup>183</sup> and Vietnam<sup>184</sup>.

These small claims courts or procedures share some common features such as the fact that the assistance of a lawyer is not compulsory (e.g. Greece)<sup>185</sup> or may even be prohibited (Hong-Kong (SAR, China)). However, there are sharp differences too, starting with what is understood by ‘small’ claim. For example, a small claim covers claims up to 3000 euros in Cyprus or 8000 US dollars in Israel, albeit 600 euros in Germany or 422 US dollars in the Dominican Republic<sup>186</sup>.

Interestingly, the continental Chinese small claim procedure is not available for disputes involving foreign elements and therefore does not apply to foreign tourists. Similarly, the Brazilian small claims court deals with claims of little value but also complexity, a requirement which might be understood as excluding cases involving private international law. In practice, where cases with foreign elements are dealt with by small claims courts, they involve consumers domiciled in Brazil<sup>187</sup> and the Brazilian Consumer Code is applied. In any case, tourists from abroad hardly use the small claims courts as generally, they are not aware of it and, should they be, the hearing takes place fifteen days or one month later after the submission of the claim, by which most tourists have left the country.

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units are available in those airports for mediation / conciliation. On the small claims courts in airports, see notably M. G. Sanches Lima, “Consumer Traveller’s vulnerabilities and travel and tourism contracts: comparative analysis: Brazil and Europe”, PhD. (‘Dissertation’), Rostock University, 2016, p.91 ff.

<sup>181</sup> Only the European Small Claims Procedure is mentioned.

<sup>182</sup> Juicio verbal.

<sup>183</sup> Simplified and summary proceedings.

<sup>184</sup> Simplified procedure.

<sup>185</sup> Whilst the response for Chile states that “Any person can go to the local court, with a necessary assistance of a lawyer”, the SERNAC’s guide on the applicable procedure (<http://www.sernac.cl/guia-para-ejercer-su-derecho-a-denuncia/>) referred to in the same answer clearly states that a lawyer is not needed: “Recuerde que... Para presentar una denuncia y/o demanda ante un Juzgado Policía Local, Ud. *no requiere ser representado por un abogado*” (the italics are from us).

<sup>186</sup> The amount may vary within one single State: see W. Hau, “Zivilprozesse mit geringem Streitwert: Small claims courts, small claims tracks, small claims procedures”, *RabelsZ* 2017, vol. 81, p. 570, spec. p. 578 the example of the USA. For a comparative approach, see also D. P. Fernández Arroyo, “General Report. Consumer protection in international private relations”, in D. P. Fernández Arroyo (ed.), « Consumer Protection in International Private Relationships /La protection des consommateurs dans les relations privées internationales », CEDEP, Paraguay, 2010, p. 659, spec. p. 684 ff.

<sup>187</sup> Some cases relate to tourism, in particular cross-border time-sharing cases. The Brazilian Governmental response states that the consumer is typically invited to conclude the time-sharing contract in Brazil and that the payment is made through Brazilian credit card providers. The small claims Court applies the Brazilian Consumer Code. On time-sharing and consumer law from a Brazilian perspective (with reference to the cross-border contracts involving Brazil, Uruguay and Argentina), see C. Lima Marques, “Contratos de time-sharing e a proteção dos consumidores: crítica ao direito civil em tempos pós-modernos”, *Revista de Direito do Consumidor*, 1997, p. 64 (who observes that Brazilian case-law has considered the internationality of the contract as an added danger for the consumer, and protected him accordingly, in particular from a product information and linguistic angle); A. A. Soares, “O contrato de time-sharing e o direito do consumidor: um necessario dialogo das fontes”, in C. Lima Marques (ed.), “Diálogo Das Fontes - do Conflito À Coordenação de Normas do Direito Brasileiro”, Editora Revista Dos Tribunais, Sao Paulo (Brazil), 2012, p. 515.



### On whether proceedings may be commenced from abroad

In Brazil, Cyprus, Hong-Kong (China)<sup>188</sup>, Moldova, the Philippines, as well as probably in the Czech Republic<sup>189</sup>, one cannot commence proceedings from abroad<sup>190</sup>. In Uruguay, one may institute legal proceedings through a proxy; however, the physical appearance of the claimant at the preliminary hearing is in principle required, save in case of justified ground for non-appearance (if it is a case of force majeure, the hearing may be postponed once)<sup>191</sup>.

On the contrary, proceedings may be commenced from abroad in Bulgaria (through post), Chile (provided a valid mandate is given to a lawyer and in the understanding that modern communication technologies are not available), Germany, Greece (European small claims procedure and European payment order)<sup>192</sup>, Israel (for claims in the Small Claims Court, which can be submitted online), Lithuania (procedural documents may be submitted via electronic means), Macao (SAR, China), Paraguay (provided a local representative is appointed), Portugal (European small claims procedure)<sup>193</sup>, Romania, Slovenia (European small claims procedure)<sup>194</sup>, Sweden (at least as a matter of principle), Switzerland (with the interesting possibility for individuals based abroad to serve documents to any Swiss diplomatic or consular representation abroad), Ukraine (whilst the introduction of proceedings from abroad is not foreseen directly by the law, it is in fact possible to submit a claim by post from abroad), and in Vietnam (for a Vietnamese national based abroad).

Croatia and Seychelles understood the question differently and replied accordingly. Mainland China (PRC) considered the question as unclear. Bosnia Herzegovina, Morocco, Slovakia and Korea did not wish to answer the question relating to the possibility to commence proceedings from abroad. The EU did not answer either<sup>195</sup>.

<sup>188</sup> In particular, the response of Hong-Kong (China) states that commencement of proceedings in the Small Claim Tribunal is by filing a claim “by the claimant/ plaintiff in person or through an authorized representative at the registry of the Small Claim Tribunal. The claim cannot be filed by any other means such as post, fax or email”.

<sup>189</sup> The Czech Republic replied ‘non applicable’ to the following question: “Can you commence proceedings from abroad?”.

<sup>190</sup> Brazil added that in the Mercosur the Santa Maria Convention made this possible, but it is not into force

<sup>191</sup> See Article 340 Código General del Proceso on the preliminary hearing, notably Article 340.1 : “Las partes deberán comparecer a la audiencia en forma personal, salvo motivo fundado, a juicio del tribunal, que justifique la comparecencia por representante [...] Si por razones de fuerza mayor, debidamente acreditadas, una de las partes no pudiere comparecer, la audiencia podrá diferirse por una sola vez ». Article 340.2 draws the consequences of a non-appearance : « La inasistencia no justificada del actor a la audiencia preliminar se tendrá como desistimiento de su pretensión ». The Código General del Proceso is available on <https://www.impo.com.uy/bases/codigo-general-proceso/15982-1988>. It is unknown if the habitual residence abroad is considered as a justified ground for non-appearance in case-law. The response to the questionnaire by Uruguay seems to imply the contrary.

<sup>192</sup> It is not certain whether the same is true for domestic procedures.

<sup>193</sup> Portugal gave the sole example of the ESCP. However, in reality, the European Order for Payment is another procedure where proceedings may be started from abroad. Nevertheless, it is unknown whether the same is true for domestic procedures.

<sup>194</sup> The Slovenian response to the questionnaire does not explicitly state any other similar procedure where proceedings may be instituted from abroad. However, in reality, the European Order for Payment is another procedure where proceedings may be started from abroad. Nevertheless, it is unknown whether the same is true for domestic procedures.

<sup>195</sup> The question is irrelevant to the EU as such (i.e. distinct from its Member States) as the EU only knows two judicial procedures leading to a decision on the merits in civil and commercial matters: the ESCP and the EOP. There is currently no general judicial procedure at EU level even if it may be different in the future.

## On whether a *cautio judicatum solvi* may be imposed on tourists in general judicial procedures

Tourists have access to general judicial procedures (i.e. outside the small claims system, where available) in the same conditions as national consumers and there is no *cautio judicatum solvi* in Argentina, Bulgaria, Cyprus, the Czech Republic, France<sup>196</sup>, Greece, Lithuania (probably)<sup>197</sup>, Macao (SAR, China), Moldova, Morocco, the Philippines, Portugal, Romania, Seychelles, Slovakia, Spain, Sweden (in general), Ukraine, Uruguay<sup>198</sup> and Vietnam. Mainland China (PRC) abides by the principle of non-discrimination, albeit on condition of reciprocity. In the USA, it appears that tourists have access to judicial procedures in the same conditions as national consumers ‘generally speaking’.

Tourists have access to judicial procedures in the same conditions as national consumers, save for the existence of a *cautio judicatum solvi* in:

- Brazil. In Brazil, only the small claim procedure is available to tourists in the same conditions as residents. For other procedures, the 2015 Code of Civil Procedure imposes the *cautio judicatum solvi* for plaintiffs without residence in Brazil (either at the start or in the course of proceedings), provided that they do not have immovables of a sufficient value in Brazil<sup>199</sup>. Importantly, this applies whether they are Brazilian nationals or foreigners. The *cautio judicatum solvi* may be reevaluated in the course of proceedings<sup>200</sup>. Exceptions to the need of *cautio judicatum solvi* are provided, for example in case of a counter-claim or an international treaty prohibiting it<sup>201</sup>. The latter category includes bilateral conventions (with France and Italy) as well as a multilateral

<sup>196</sup> The *cautio judicatum solvi* does not exist in France since 1972.

<sup>197</sup> Lithuania states that tourists have access to general judicial procedures without explicitly mentioning the principle of non-discrimination in its answer to this question.

<sup>198</sup> The *cautio judicatum solvi* was repealed for non - resident litigants in 1989. On the condition of the foreign litigant in the Americas, Mercosur and Uruguay, see E. Tellechea Bergman, “La condición procesal del litigante foráneo. Necesidad de profundizar su tratamiento en el derecho internacional privado interamericano”, in “El acceso a la justicia en el derecho internacional privado. Jornadas de la ASADIP 2015”, CEDEP and ASADIP and Mizrahi & Pujol SA, Asuncion (Paraguay), p. 73 (the author seems rather pleased with the application of a relevant Protocol in Mercosur Members (p. 80), albeit calls for a systematisation at continental level in the light of the current piecemeal approach of the CIDIP Conventions (p. 83)). See, similarly, E. Tellechea Bergman, “Condición procesal del litigante foráneo en el derecho internacional privado interamericano, del Mercosur y Uruguay de fuente nacional”, Revista de la Secretaría del Tribunal Permanente de Revisión, no 6, 2015, p. 323, <http://dx.doi.org/10.16890/rstpr.a3.n6.323> (the same article has also been published in Ordine internazionale e diritti umani 2016 no 1, p. 52, [http://www.rivistaoidu.net/sites/default/files/4\\_Tellechea.pdf](http://www.rivistaoidu.net/sites/default/files/4_Tellechea.pdf)). See also L. E. Rapallini, “Excepción de falta de arraigo en procesos mercosureños », Revista de la Secretaría del Tribunal Permanente de Revisión, no 6, 2015, p. 337, <http://dx.doi.org/10.16890/rstpr.a3.n6.337>.

<sup>199</sup> Article 83, Código de Processo Civil ([http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm)): “O autor, brasileiro ou estrangeiro, que residir fora do Brasil ou deixar de residir no país ao longo da tramitação de processo prestará caução suficiente ao pagamento das custas e dos honorários de advogado da parte contrária nas ações que propuser, se não tiver no Brasil bens imóveis que lhes assegurem o pagamento”.

<sup>200</sup> Article 83 § 2, Código de Processo Civil: “Verificando-se no trâmite do processo que se desfaleceu a garantia, poderá o interessado exigir reforço da caução, justificando seu pedido com a indicação da depreciação do bem dado em garantia e a importância do reforço que pretende obter”.

<sup>201</sup> Article 83 § 1, Código de Processo Civil: “Não se exigirá a caução de que trata o caput: I - quando houver dispensa prevista em acordo ou tratado internacional de que o Brasil faz parte; II - na execução fundada em título extrajudicial e no cumprimento de sentença; III - na reconvenção”.

one binding on the Mercosur States, Bolivia and Chile and the 1980 Hague Convention on International Access to Justice;

- Croatia (see *infra*);
- Germany, where a *cautio judicatum solvi* is required from plaintiffs not habitually resident in the EU or the EEA on request of the defendant<sup>202</sup>, save where, for example, the plaintiff has sufficient assets in Germany<sup>203</sup>;
- Hong-Kong, where the *cautio judicatum solvi* may be required by the Court, on request from the defendant, from a plaintiff who is ordinarily residing outside the Hong Kong SAR, in such amount and in such form as the Court deems just<sup>204</sup>;
- Israel, where the *cautio judicatum solvi* may be required by the Court<sup>205</sup>;
- Japan, where the *cautio judicatum solvi* is required from the plaintiff non-domiciled in the country on the request of the defendant;
- Paraguay, where the *cautio judicatum solvi* may be required by the Court from a plaintiff who is domiciled abroad, in such amount and within such deadline as the Court deems just<sup>206</sup>. Exceptions are provided, for example where the claimant has sufficient property in the country or whether the jurisdiction of the Court may be considered as rather weak<sup>207</sup>;

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<sup>202</sup> Section 110 (1) ZPO, available in English on [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html). Section 111 allows for the defendant to demand the security deposit in the course of proceedings if the prerequisites for such an obligation to provide security arise only after the introduction of the claim. The Court has discretion to decide on the amount of the *cautio judicatum solvi* (section 112). The defendant may demand further security in the course of proceedings should it become necessary (section 112).

<sup>203</sup> Section 110 (2) ZPO provides for exceptions: “This obligation shall not be given:

1. Where, due to international treaties, no such security deposit may be demanded;
2. Where the decision as to the defendant’s reimbursement of the costs it has incurred in the proceedings would be enforced based on international treaties;
3. Where the plaintiff possesses real estate assets, or claims secured in rem, in Germany that suffice to cover the costs of the proceedings;
4. Where countercharges are brought;
5. Where proceedings have been brought in the courts based on public notice given by a court”.

<sup>204</sup> Hong-Kong’s response states that this is the case for actions commenced in the District Court and the Court of First Instance. However, it seems to be also the case for the Small Claim Tribunal as “Such application [from the defendant for a *cautio judicatum solvi*] is very rare”, albeit still existing.

<sup>205</sup> Israel’s response does not explicitly states that the plaintiff has to be foreign or based abroad, i.e. that there is a discrimination in the use of the *cautio judicatum solvi*. However, it seems to be the case in practice, even if the mechanism is of infrequent use: “The court is authorized to order the plaintiff to deposit a security to insure the future reimbursement the defendant’s costs of trial in case she loses. The security is usually deposited at the initial stages of trial. This mechanism is rarely used by the courts, and is usually restricted to foreign plaintiffs” (Talia Fisher and Issi Rosen-Zvi, Cost and Fee Allocation in Civil Procedure Report on Israel, [http://www-personal.umich.edu/~purzel/national\\_reports/Israel.pdf](http://www-personal.umich.edu/~purzel/national_reports/Israel.pdf)). Israel’s answer does not also precise, on this point, that it is a party to the Hague 1954 Convention on Civil Procedure.

<sup>206</sup> Codigo Processal Civil (<http://www.correoparaguay.gov.py/application/files/2814/7015/6328/Codigo-Procesal-Civil-1988.pdf>), Article 225: “Procederá la excepción de arraigo, por las responsabilidades inherentes a la demanda, si el demandante no tuviere domicilio en la República. El juez decidirá el monto y la clase de caución que deberá prestar el actor y determinará, prudencialmente, el plazo dentro del cual deberá hacerlo. Vencido éste sin que se hubiese dado cumplimiento a la resolución, se tendrá por no presentada la demanda ».

<sup>207</sup> Codigo Processal Civil, Article 226 : « No procederá la excepción de arraigo:

- Slovenia (see *infra*);
- Switzerland, where the *cautio judicatum solvi* is required from the plaintiff non-domiciled in the country on the request of the defendant, except where the 1980 Hague Convention on International Access to Justice applies<sup>208</sup>;
- and in Venezuela, where the *cautio judicatum solvi* applies in civil (as opposed to commercial) matters to persons without domicile nor sufficient assets in the country.

In Croatia and Slovenia too, international tourists may not have access to judicial procedures in the same conditions as national consumers, as a *cautio judicatum solvi* may be required against a foreign or stateless plaintiff with no permanent residence in Croatia / Slovenia<sup>209</sup>. The court has discretion regarding the amount of the *cautio judicatum solvi* and the time limit by which the security must be provided<sup>210</sup>. If the plaintiff does not abide by the decision of the court, it shall be deemed that the complaint has been withdrawn or that the plaintiff has waived his right to appeal if the request for security was not filed by the defendant until the appellate proceedings. Exceptions apply in the case of reciprocity, i.e. if, in the State the plaintiff comes from / is a citizen of, Croatian / Slovenian nationals are not obliged to provide security for costs. If there is a doubt of the existence of reciprocity, clarification is sought from the Ministry of Justice<sup>211</sup>. Whilst the Croatian and Slovenian answers do not state it explicitly, it is highly likely that the exception for other EU Member States-based tourists is included within the reciprocity exception since the case-law of the CJEU regarding the prohibition of *cautio judicatum solvi* within the EU applies to all EU States<sup>212</sup>.

Another exemption from the duty to provide security for costs apply in the cases of suits concerning promissory notes / bills of exchange or cheques, counter-suits or suits requesting issuance of a payment order<sup>213</sup>. Besides the exemptions *stricto sensu*, the (qualified) principle of non-discrimination regarding the *cautio judicatum solvi* may be found in The Hague Convention of 25 October 1980 on International Access to Justice<sup>214</sup>, to which both Croatia and Slovenia are parties. Slovenia adds that bilateral agreements providing for an exemption from *cautio judicatum solvi* (and free access to courts subject to reciprocity) are in force with

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- a) si el actor tuviere en la República bienes registrados, casa de comercio o establecimiento industrial, de valor suficiente como para cubrir las costas del juicio, según la apreciación del juez;
  - b) si la demanda fuere deducida como reconvencción, o por demandado vencido en juicio que autorice la promoción del proceso de conocimiento ordinario;
  - c) si la competencia de los jueces de la República procediere exclusivamente en virtud del fuero de atracción de los juicios universales;
  - d) si se hubiere pactado la competencia de los jueces de la República; y,
  - e) si el actor nacional ejerciere una función oficial en el extranjero”.

<sup>208</sup> The second exception to the principle of non-discrimination is the possibility for the Court to order the party domiciled abroad to elect a domicile in Switzerland for service of documents purposes.

<sup>209</sup> Temporary residence is also taken into account for the stateless person in Slovenia.

<sup>210</sup> As well as the payment method, at least in Croatia.

<sup>211</sup> And Ministry of Public Administration in the case of Croatia.

<sup>212</sup> In any case, this rule of EU Law supersedes domestic law.

<sup>213</sup> Other exceptions apply for example where the plaintiff has the right of asylum in Croatia / Slovenia or if the plaintiff's claim relates to his employment contract in Croatia / Slovenia. However, these exceptions do not relate to tourism as defined in this project.

<sup>214</sup> Article 14: “No security, bond or deposit of any kind may be required, by reason only of their foreign nationality or of their not being domiciled or resident in the State in which proceedings are commenced, from persons (including legal persons) habitually resident in a Contracting State who are plaintiffs or parties intervening in proceedings before the courts or tribunals of another Contracting State. The same rule shall apply to any payment required of plaintiffs or intervening parties as security for court fees”.

Bosnia and Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Algeria, Turkey and Russia.

Tourists do not have access to judicial procedures in the same conditions as national consumers in Mali, among others due to the existence of a *cautio judicatum solvi*.

Bosnia Herzegovina and Korea did not wish to answer whether tourists have access to general judicial procedures (i.e. outside the small claims system) in the same conditions as national consumers, and in particular whether there is a *cautio judicatum solvi*. The EU did not answer either<sup>215</sup>.

**e. In relation to Assistance**

In the vast majority of countries (or REIO), there does not appear to be an administrative or governmentally funded body specifically in charge of helping tourists in relation to access to justice or ADR (Bosnia Herzegovina, Brazil, Mainland China (PRC), Croatia, Dominican Republic, the EU, France, Japan, Lithuania, Macao (SAR, China), Mali, Morocco, Portugal, Romania, Seychelles, Slovenia, Sweden, Switzerland, Ukraine, U.S.A. and Vietnam)<sup>216</sup>. Exceptions are limited (e.g. Argentina and Korea)<sup>217</sup>. Tourism police may also provide some practical help to tourists (Greece and Seychelles). However, Consumers Agencies<sup>218</sup> exist in many countries<sup>219</sup> and assist tourists in the same conditions as nationals (e.g. Chile, Hong-Kong (SAR, China), Israel, Korea, Macao (SAR, China), Paraguay, Romania, Sweden and Switzerland). In EU Member States as well as Iceland and Norway, the European Consumer Centres Network (ECC-Net) provides help to consumers specifically in cross-border matters. The help provided by consumers agencies or the ECC-Net seems to focus mainly on alternative

<sup>215</sup> The question is irrelevant to the EU as such (i.e. distinct from its Member States) as the EU only knows two judicial procedures leading to a decision on the merits in civil and commercial matters: the ESCP and the EOP. There is currently no general judicial procedure at EU level even if it may be different in the future.

<sup>216</sup> Bosnia Herzegovina, Brazil (this State's own response to the Members questionnaire, in contrast to Brasilcon's response to the NGO questionnaire), Croatia and the EU declined to specifically answer Part IV on Assistance. However, it does not necessarily mean that there is no administrative or governmentally funded body specifically in charge of helping consumers (including tourists) in these countries and REIO, as such a body may be mentioned elsewhere in their response to the questionnaire, e.g. Procons in Brazil or the ECC-Net in the EU, including ECC-Croatia. It is likely that these Members intended to say that there is no administrative or governmentally funded body specifically in charge of helping tourists / foreign consumers rather than consumers in general. The existence of such tourists-focused bodies is not mentioned elsewhere in the responses to the questionnaire and this is consistent with the available relevant literature. Similarly, Japan, Philippines and Slovenia mentioned no administrative or governmentally funded body specifically in charge of helping tourists / foreign consumers / consumers in relation to access to justice or ADR in their country, whether the relevant question received a clear negative response (Japan and Slovenia) or there is a lack of information (Philippines). Since Slovenia has a European Consumer Centre and Japan has a Cross-border Consumer Center (Cross-border Consumer Center Japan (CCJ), operated by the National Consumer Affairs Center of Japan (NCAC)), it is likely that these States intended to say that there is no administrative or governmentally funded body specifically in charge of helping tourists / foreign consumers rather than consumers in general. The existence of such tourists-focused bodies is not mentioned elsewhere in the responses to the questionnaire and this is consistent with the available relevant literature.

<sup>217</sup> See supra Part 3.

<sup>218</sup> Including Consumer Dispute Resolution Bodies / Boards, which may be institutionally separate.

<sup>219</sup> Albeit not all, for example Mali and Morocco. In Mali, civil society has taken the initiative to set up assistance units in some courts on an experimental basis. No distinction according to nationality is made, but a lack of resources is highlighted.



dispute resolution<sup>220</sup>. It may at times go beyond, e.g. the Consumer Agency may be able to sanction the professional (Romania) or initiate a class action (Israel). Other bodies were also mentioned as providing assistance to tourists, primarily the National Tourism Organization / Ministry as in Mainland China (PRC), Cyprus, Dominican Republic, Korea, Paraguay and Uruguay; and Trade Departments / Agencies / Councils as in the Czech Republic or Hong-Kong (SAR, China). Other public bodies referred to include the Center for settlements and mediation at Sofia Courts in Bulgaria; or legal aid councils in Moldova, Slovakia and Ukraine.

Responses to the NGOs questionnaire often mentioned consumer NGOs, albeit either precised that they were not focusing on assisting tourists (U.S.A.)<sup>221</sup> despite being available to all consumers (Spain and Venezuela), or differed on whether they played an important role in assisting tourists (Portugal). A major Brazilian consumer NGO seems to have played its part in assisting tourists during the World Cup and Olympic Games in the country.

The modalities of the assistance offered (where applicable) seem to vary immensely, from the mere possibility in theory to get assistance to the availability of dedicated platforms, hotlines or other support mechanisms in several languages.

#### ***f. In relation to Assessment and Future***

Some States did not wish to answer any of the questions of Part VII Assessment and Future (Croatia, Greece, Korea, Morocco, Romania, Slovenia and Sweden). The Dominican Republic, the EU, Slovenia and Vietnam did not wish to answer question 19 on potential issues with respect to access to justice for tourists.

In relation to the latter, some States explicitly stated that there were none (or not serious enough: Germany), or indicated ‘non applicable’ / or reiterate the principle of equality between foreigners and nationals, seemingly implying the same (Bulgaria, Czech Republic, Lithuania<sup>222</sup>, Moldova, Japan). Cyprus declared that “there are no specific issues or problems concerning access to justice for tourists. Justice issues and conditions are the same for everybody (tourists and nationals, regardless of nationality)”, thus not excluding that there may be issues, albeit which do not relate to the application of the principle of non-discrimination between tourists and locals. The potential common issues were not identified. Portugal implicitly considered that there were no issues as access to justice is provided on a non-discriminatory basis and, from a practical point of view, ADR bodies with nationwide jurisdiction are available across the country. However, Portugal is committed to constantly monitor the suitability of existing mechanisms and it signaled its intention to consider changes should there be a need for them, notably in the light of the continuous increase in the number of tourists<sup>223</sup>.

Adopting a ‘neutral’ position, some States<sup>224</sup> considered they did not have the necessary information to answer this question (Paraguay, Slovakia and Ukraine). Uruguay stated that “the

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<sup>220</sup> The difference between out-of-court and judicial dispute resolution in respect of assistance to consumers (including tourists) is stressed by Switzerland.

<sup>221</sup> For a critical assessment of consumer protection in the U.S.A., see A. J. Schmitz, “Remedy Realities In Business-To-consumer Contracting”, *Arizona Law Review* 2016, p. 213, who considers that “Legal rights on the books have become meaningless for individuals living in the real world. This is especially true with respect to low-dollar claims”.

<sup>222</sup> This stems from its answer to question 20, not 19.

<sup>223</sup> “Portugal is working on continuous improvements not only in regard to access to justice procedures but also to respond to further tourists’ demands on this matter due to the continuous increase of tourists”.

<sup>224</sup> More exactly, the entity which actually answered the questionnaire and which at times referred the reader to another department.

most common cases of consumer tourist complaints are related to contracted services that may not be fully complied with or fulfilled in a defective manner”, without however stating explicitly that there was an issue with the way complaints are handled or their accessibility for tourists (or any other issue relating to the dispute *resolution mechanism*).

Several States considered there were or could be issues, by mentioning ways to improve the system (France, by providing information on access to justice for tourists in languages than French, and by increasing the availability and use of visio-conference); or indicating that reforms were underway (Bosnia Herzegovina<sup>225</sup>); or stating that they already deal with complaints regarding access to justice (Israel<sup>226</sup>). Brazil explicitly stated that there were issues and listed the main ones (lack of information, language barrier, lack of representation by the consumer administrative authority, lack of time and unsuitable rules on evidence):

*“a) The lack of information available for foreign tourists, with exception to Mercosur tourists;*

*b) The lack of languages knowledge by the administrative departments PROCONs to understand the problems of the tourists (a multilingual form as the proposed by the Draft Convention can be helpful);*

*c) The lack of authorization by the PROCON to represent the interests of tourists that have returned home;*

*d) The difficulties to access the justice (small courts and civil courts) in a quick way for international tourists (or foreign without domicile in Brazil);*

*e) The rules on evidence (Art. 12 and 13 of the Law of “Introdução”) are not shape for small claims, consumer issues and tourist protection”.*

Mainland China (PRC) did not explicitly state any issues, albeit considered that it is “necessary to strengthen the cooperation on the protection of the rights of international tourists”.

Chile stated that access to justice for tourists is hindered by sole use of Spanish in courts as well as the lack of compulsory mediation by the national consumer administration, or national tourism administration.

Hong-Kong (SAR, China) identifies two main issues: impracticability of litigation in the light of the small amount of money at stake and the short stay of tourists; risk of confusion (there is a variety of mechanisms to handle tourist complaints). Hong-Kong is considering online dispute resolution in order to address the first issue.

Macao (SAR, China) explained that the average short stay of tourists in Macao (less than 2 days) hinders tourists from accessing justice, despite the fast proceedings available through the Consumer Arbitration Centre (arbitration within 12 working days from the date of filing). It is considering online arbitration in order to address this issue.

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<sup>225</sup> Bosnia Herzegovina states that they “are currently working on the improvement of legislation in the field of tourism” without specifying if the said improvement focus on access to justice. However, as it is an answer specific to question 19, it may reasonably be considered that such is the case.

<sup>226</sup> «The Ministry of Tourism handles complaints of all types, including with respect to access to justice. No information is available specifically on questions regarding access to justice».



Philippines identified an issue with its laws, that is the necessity for parties to be physically present, whether in the course of alternative dispute resolution proceedings<sup>227</sup> or court procedures<sup>228</sup>. Rules of Court in the Philippines do not allow for the use of visio-conference regarding the presentation of evidence<sup>229</sup>. Consequently, proceedings may neither be started<sup>230</sup> from abroad, nor continued from there, since the physical absence of the tourist as plaintiff leads to the dismissal of the case<sup>231</sup>. Legal representation is not mentioned as an acceptable substitute and no reform allowing for the use of new technologies seems underway.

Many States stated that there were no planned or on-going reform (question 20), at times by recalling that they are already a party to the 1980 Hague Convention on international access to justice (or are abiding by it nonetheless), implicitly considering this Convention as a sufficient response for the time being to any potential access to justice issue the tourist may encounter (Bosnia Herzegovina, Czech Republic, Cyprus, France, Japan, Lithuania, Moldova, Paraguay, Philippines, Portugal, Seychelles, Slovenia, Switzerland).

Israel did not have the required information.

The EU (to which Slovakia referred) mentioned the UNWTO draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers<sup>232</sup>. Ukraine is preparing accession to the 1980 Hague Convention. Mainland China (PRC), Germany, Uruguay and Vietnam are examining whether they should access the 1980 Hague Convention. Brazil and Chile are reforming their Consumer Protection laws, which benefit tourists. Hong-Kong (SAR, China) is reforming its travel industry laws, which will benefit tourists. Brazil also initiated the Tourism Project here under consideration.

## **2. Evidence gathered through the questionnaire on Access to Justice in Latin American and Caribbean Countries**

The evidence which follows derives from the one collected by the Regional Office for Latin America and the Caribbean of the HCCH through the use of a short questionnaire on access to justice in late 2016 and early 2017. The aim was to investigate:

— whether free legal aid for extrajudicial proceedings (for example for mediation or conciliation) in civil and commercial matters for those who need it exists and if it is available to foreigners or non-habitual residents in the same conditions as nationals or residents;

— whether free legal aid in court proceedings in civil and commercial matters (for claimants or defendants) exists and if it is available to foreigners or non-habitual residents in the same conditions as nationals or residents;

— whether a *cautio judicatum solvi* is required from foreigners or those not habitually resident in the country in civil and commercial matters, i.e. security for costs as a condition for foreign (natural or legal) persons or those not habitually resident in the country to litigate in the jurisdiction (any exemption which may arise from an international agreement being disregarded).

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<sup>227</sup> Answer to question 10.

<sup>228</sup> Answer to question 17.

<sup>229</sup> Answer to question 10.

<sup>230</sup> Answer to question 13

<sup>231</sup> Answer to question 19.

<sup>232</sup> It stated that a “decision still has to be taken on the EU negotiating position”. The EU Commission has since confirmed it had a mandate to ratify the convention (UNWTO meeting, 28 March 2017).

A synthesis of the answers (together with some comments or additions) will be presented in turn.

**a. Legal aid for extrajudicial proceedings**

Free legal aid for extrajudicial proceedings (for example for mediation or conciliation) in civil and commercial matters for those who need it exists in Colombia, Costa Rica, Nicaragua, Uruguay and Venezuela.

In Colombia, this service benefits those who are in (economic) need as well as those who are disabled. It is available, in the same conditions as nationals, to foreigners or those not habitually resident in the country.

In Costa Rica, this free service is exclusively the clinical legal education programme of the University of Costa Rica and its House of Justice (*‘Casa de Justicia’*), where students under the supervision of a Professor assist users in the application of the Alternative Dispute Resolution Law. This service is *not* accessible in the same conditions as nationals to foreigners who are not habitually resident in Costa Rica. The explanation provided is that those persons would find it very hard to prove that they do not have the means to pay the legal fees on the open market.

In Nicaragua, this service benefits those who can prove that they are poor. It is available, in the same conditions as nationals, to foreigners or those not habitually resident in Nicaragua. However, the response for this country indicates that the cases where a foreigner or a person not habitually resident in Nicaragua benefits from the service are very rare (*‘muy raros casos’*) and that it is more difficult than for a national. In this respect, the response for Nicaragua does not seem to differ very much from that for Costa Rica as to the end result: foreigners who are not habitually resident in Nicaragua find it very hard to prove that they do not have the means to pay the legal fees on the open market and therefore in the vast majority of cases do not access the service.

In Uruguay, this service is available, in the same conditions as nationals, to foreigners or those not habitually resident in Uruguay. This results from the general principle laid down in Article 1 of Law 18.250 on Migration, which provides that migrants are entitled to access justice in the same conditions as nationals<sup>233</sup>). The response for Uruguay precises that even those who are not complying with immigration requirements are entitled to access justice: “La irregularidad migratoria en ningún caso impedirá que la persona extranjera tenga libre acceso a la justicia” (Article 9, Law 18.250).

In Venezuela, this free service, organised by the *‘Ley Orgánica de la Defensa Pública’*, is available, in the same conditions as nationals, to foreigners or those not habitually resident in the country.

Free legal aid for extrajudicial proceedings (for example for mediation or conciliation) in civil and commercial matters for those who need it does not exist in Bolivia and Cuba.

The Cuban response adds that foreigners and those who are not habitually resident in Cuba do not have access in the same conditions as nationals to services. Foreigners and Cubans who

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<sup>233</sup> “El Estado uruguayo reconoce como derecho inalienable de las personas migrantes y sus familiares sin perjuicio de su situación migratoria, el derecho [...] al debido proceso y acceso a la justicia, así como a la igualdad de derechos con los nacionales, sin distinción alguna por motivos de sexo, raza, color, idioma, religión o convicción, opinión política o de otra índole, origen nacional, étnico o social, nacionalidad, edad, situación económica, patrimonio, estado civil, nacimiento o cualquier otra condición” (the law may be found at <https://legislativo.parlamento.gub.uy/temporales/leytemp2446776.htm>).

have emigrated are only entitled to services if they pay (in the local currency). If they do not pay, there is no service ('No hay pago no hay servicios').

**b. Legal aid in court proceedings**

It exists in Colombia, Uruguay and Venezuela. In all three countries, it is available, in the same conditions as nationals, to foreigners or those not habitually resident in the country. Since in Colombia free legal aid is only available to the claimants who lack economic resources, foreigners or those not habitually resident in Colombia must also prove that they are not wealthy enough. The response for Venezuela observes that there is no condition to benefit from free legal aid but that a different question is the true availability of Public Defenders.

It exists in Costa Rica (it is provided, subject to proof of lack of economic resources (and, in the field of family law, of the unavailability of the Office of the Public Defender), by the clinical legal education programmes of the University of Costa Rica and, to a lesser extent, of the Latin University and the Free Law School), albeit is *not* accessible in the same conditions as nationals to foreigners who are not habitually resident in Costa Rica. The explanation provided is that those persons would find it very hard to prove that they do not have the means to pay the legal fees on the open market<sup>234</sup>. Similarly, it does exist in Nicaragua (it is provided to those who can prove that they are poor), albeit is *not* accessible in the same conditions as nationals to foreigners who are not habitually resident in Nicaragua. The explanation provided is that foreigners should seek consular assistance in the first instance and it is only in exceptional circumstances that they would be able to access the service.

It does not exist in Bolivia and Cuba. The response for Cuba adds that foreigners or Cubans living abroad need to pay, in local currency.

**c. Cautio judicatum solvi**

A *cautio judicatum solvi* is required from foreigners or those not habitually resident in the country in civil and commercial matters in Venezuela and, according to the response for Colombia, in this country too.

In Venezuela, the *cautio judicatum solvi* exists in civil matters (Article 36 Civil Code), albeit not in commercial matters where it is explicitly excluded by Article 1.102 Code of Commerce. The response for Venezuela adds that the constitutionality of Article 36 Civil Code is discussed as it limits access to justice and is moreover discriminatory. However, the latest case-law from the Constitutional Chamber of the Supreme Court (*Tribunal Supremo de Justicia*) reaffirmed the constitutionality of the provision. One may add that Article 36 focus on the domicile and not the nationality of the claimant (and of course that no *cautio judicatum solvi* is required where he has property in sufficient quantity in the country): "El demandante no domiciliado en Venezuela debe afianzar el pago de lo que pudiere ser juzgado y sentenciado, a no ser que posea en el país bienes en cantidad suficiente, y salvo lo que dispongan leyes especiales". The criterion used in Article 1.102 Code of Commerce is identical (domicile).

The response for Colombia to the question on the existence of a *cautio judicatum solvi* for foreigners or those not habitually resident in the country in civil and commercial matters is positive. However, it may be submitted that a response to the question strictly understood should rather be negative as the response for Colombia precises that the *cautio* is not requested

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<sup>234</sup> It remains unclear whether there is a non-rebuttable presumption that those living abroad have the means to pay the legal fees on the open market, with the consequence that they are systematically excluded from free legal aid, or if in exceptional circumstances they would be able to prove that they are in same dire economic situation as nationals accessing the service and consequently entitled to benefit from it.

because of the foreign nationality of the claimant: it may be requested from any claimant who requests protective measures on property belonging to the defendant in proceedings on the merits. One may add that no difference of treatment according to residence / domicile is foreseen either, that the *cautio* normally amounts to 20% of the claim, and that no *cautio* is required in case of a first instance favourable judgment (Article 590.2 Código General del Proceso<sup>235</sup>). The answer for Colombia also state that for protective measures at the enforcement stage the defendant may request the creditor to pay a deposit in order to secure the payment of any potential damages. Nationality is not taken into account. One may add that no reference to residence / domicile either is made in the relevant provision (Article 599 Código General del Proceso<sup>236</sup>).

A *cautio judicatum solvi* is not required from foreigners or those not habitually resident in the country in civil and commercial matters in Bolivia, Costa Rica, Cuba, Nicaragua, and Uruguay.

The response for Costa Rica indicates that if there is no such *cautio judicatum solvi* as the one referred to in the question, a *cautio judicatum solvi* may indeed be required, albeit not on the ground of the foreign nationality or residence of a party. The examples of maintenance and employment law are given. In a claim for maintenance, the debtor must provide a guarantee equivalent to 12 months of maintenance in order to be entitled to leave the country. The rules applies to any debtor, whether a national, a foreign national resident in Costa Rica or a foreign national living abroad. A similarly minded rule applies to the employer. The answer for Costa Rica emphasizes the fact that these requirements are not based on a nationality or domicile criterion but the will to protect the weaker party.

The response for Cuba adds in respect of this question, thus concluding the questionnaire, that in practice rights may be less forthcoming for foreigners or Cubans living abroad.

The answer for Uruguay precises that the mere circumstance that the debtor is domiciled abroad is not in itself a sufficient reason to believe that the rights of the claimant would be endangered in such manner as to justify the adoption of protective measures.

### **3. Survey among the Embassies of the Latin American countries accredited in Argentina on the difficulties encountered by tourists**

The Regional Office for Latin America and the Caribbean of the HCCH conducted in May - June 2017 a survey among the Embassies of the Latin American countries accredited in Argentina in order to help identify potential typical complaints of tourists when consuming services and buying products abroad, the possible obstacles they may encounter when seeking

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<sup>235</sup> Article 590.2 Código General del Proceso: “Para que sea decretada cualquiera de las anteriores medidas cautelares, el demandante deberá prestar caución equivalente al veinte por ciento (20%) del valor de las pretensiones estimadas en la demanda, para responder por las costas y perjuicios derivados de su práctica. Sin embargo, el juez, de oficio o a petición de parte, podrá aumentar o disminuir el monto de la caución cuando lo considere razonable, o fijar uno superior al momento de decretar la medida. No será necesario prestar caución para la práctica de embargos y secuestros después de la sentencia favorable de primera instancia”.

<sup>236</sup> Article 599 Código General del Proceso: “En los procesos ejecutivos, el ejecutado que proponga excepciones de mérito o el tercer afectado con la medida cautelar, podrán solicitarle al juez que ordene al ejecutante prestar caución hasta por el diez por ciento (10%) del valor actual de la ejecución para responder por los perjuicios que se causen con su práctica, so pena de levantamiento. La caución deberá prestarse dentro de los quince (15) días siguientes a la notificación del auto que la ordene. Contra la providencia anterior, no procede recurso de apelación. Para establecer el monto de la caución, el juez deberá tener en cuenta la clase de bienes sobre los que recae la medida cautelar practicada y la apariencia de buen derecho de las excepciones de mérito ».

legal redress and the support offered in this respect by the Embassies<sup>237</sup>. Responses from the Chilean and Costa Rican Consulates in Buenos Aires were received in June 2017.

The Chilean Consulate stated that it has not received any complaint from Chilean tourists about access to tourist protection mechanisms in Argentina. However, it has been dealing with cases where Argentinean traders confiscated the travel documents of Chilean citizens. The typical situation is where the Chilean tourist purchased a service (e.g. ate food) only to be told at the time of payment that no credit card is accepted. In one case, the Consulate tried to retrieve the documents with the help of the tourist police. The Consulate also stated that it frequently receives complaints from Argentinean tourists coming back from Chile and who would like to continue the complaint initiated in Chile. In those circumstances, the Consulate informs the Argentinean tourists that they must directly contact the Chilean traders.

The Costa Rican response based itself on the experience of the last three years. It declared that it received neither complaints from Costa Rican tourists regarding problems with services rendered or products purchased in Argentina (including those that were contracted at a distance before arriving), nor requests for help / information from Costa Rican tourists who, after returning home, would like to initiate or continue claims for services rendered or products acquired in Argentina. However, the Consulate had to deal with a difficulty for one of its nationals to access consumer protection mechanisms / justice in Argentina. The case was successfully solved thanks to the collaboration of the Argentinean Ministry of Tourism, which regulates the activity of travel agents. The Consulate also deals every year with complaints from Argentinean nationals who visited Costa Rica and who wish to initiate or continue a claim for defects in services received or products acquired during their stay in Costa Rica (two claims per year on average). The claims relate to the quality of hotels that does not match that presented on the Internet, and to tourist guides who are not duly registered with the authorities.

## **B. Overall assessment of the evidence gathered**

It appears that, despite some good will and innovative practices at times or venues, overall, the tourist faces several difficulties in his access to justice. These include the fact that he is often not specifically made aware of his rights and legal remedies (or explicitly and systematically told where to seek relevant information and assistance); that there is no specific tourist complaint body whilst the particular needs of tourists are not addressed elsewhere; that he may not be able to start or continue proceedings from abroad (his physical presence being required<sup>238</sup>); that small claims procedures / courts are often albeit not always available and where they are they are not normally designed for cross-border cases; and that should he complain to his local consumer body there is no cross-border cooperation mechanism with the fellow body (if existing) in the visited country, save in a few regions.

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<sup>237</sup> The four questions asked were: “1. ¿Han recibido reclamos de turistas nacionales de su país, respecto a problemas con servicios prestados o productos adquiridos en la Argentina (incluidos aquellos que hubieran contratado a distancia antes de llegar); en su caso, cuáles son los tipos de reclamo más frecuente?; 2. ¿Han recibido alguna queja de turistas de su nacionalidad por la dificultad de acceso a mecanismos de protección al turista, y/o al consumidor, y/o a la Justicia en la Argentina?; 3. ¿Han recibido solicitudes de colaboración/información de turistas de su nacionalidad, que luego de haber regresado a su país deseen iniciar o continuar reclamos por servicios prestados o productos adquiridos en la Argentina?; 4. ¿Han recibido quejas/reclamos de argentinos que estuvieron de visita en vuestro país, y que desean iniciar o continuar un reclamo por defectos en servicios recibidos o productos adquiridos durante su estadía en su país? ». The loss or theft of documents was explicitly excluded.

<sup>238</sup> Legal aid restrictions might also arise. See for example part 4.1.2.2.



— Even where information is available on tourists’ rights, including in multiples languages, tourists do not seem to be specifically made aware of their rights and legal remedies. They may therefore ignore the available dispute resolution procedures. One of the assumptions for consumers in general is the existence of an information asymmetry between the consumer and the service provider (for both legal and technical information). It is even truer for tourists: an international tourist is not the weaker party but the weakest. There are exceptions, for example the duty for the trader to provide information on ADR in the EU (subject notably to geographical limitations)<sup>239</sup> or the existence of a pro-active tourism police which informs tourists on consumer rights (and not only criminal proceedings) as in Greece or information drives at transit places (main international airport) such as Procons in Brazil or the Buenos Aires Mediator in Argentina. It seems however that the lack of dedicated information is often a major obstacle to access to justice for tourists. For example, in Brazil, tourists’ cases are few before the small claims court, because tourists are unaware of the existence of this court in the first place. If information on rights and remedies cannot be provided as such due to its volume, it would be desirable for contact details of bodies providing information or assistance to be more readily available to tourists, for example on a tourist map as in Hong-Kong. The practice of Macao Consumer Council to disseminate information through overseas consumer associations illustrate the benefit of international cooperation.

— The inexistence of a specific tourist complaint body does not necessarily imply that the particular needs of tourists are not addressed, provided however that these needs are addressed elsewhere, for example by the recruitment of multilingual staff within the local consumer protection body. Should this not be the case, the principle of non-discrimination may not be effective and a rather formal equality of treatment may prevail. In relation to linguistic capacities, a few countries clearly stand out, notably Sweden (18 languages) and Switzerland (4 languages). In the case of assistance provided by National Tourism Organisations or Ministries, the question arises as to whether the information provided is law-specific in the absence of a dedicated unit to handle complaints. A negative response appears to prevail in some countries<sup>240</sup>. In the case of Tourism Police, the question arises as to whether the information provided is civil law-specific (in contrast with criminal law).

— Consumer mediation / conciliation / arbitration may be unavailable beyond the stay in the visited country, thus impacting on tourists’ access to justice (*lato sensu*). ADR seems very often available in theory, as it is generally deemed the most appropriate / proportionate method to resolve small claims (arguably a major proportion of tourists’ claims). However, ADR may be unavailable in practice for a tourist. Two main causes may be identified. Firstly, the law in several countries seems to require the physical presence of parties. The impossibility to use distance communication tools as a substitute to this physical presence may lead to an absence (or discontinuance) of mediation / conciliation, and perhaps justice where the stay in the visited country is of insufficient length (even where fast proceedings are normally offered<sup>241</sup>) and that travel back to the visited country or court proceedings (where effectively available<sup>242</sup>) would not be justified by the amount at stake and the overall cost (notwithstanding other reasons such as time). In this respect, the possibility for the tourist to be represented by a legal representative

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<sup>239</sup> The EU Travel App may also be mentioned.

<sup>240</sup> For example, Spain: “los recursos informativos de carácter turístico, oficinas de turismo y otros, no incorporan información sobre sus derechos como consumidor ni de acceso a la justicia o procedimientos alternativos de resolución de conflictos. Los operadores turísticos no están formados ni informados al respecto” (FACUA).

<sup>241</sup> For example in Macao (SAR, China).

<sup>242</sup> I.e., in particular, where the physical presence of parties is not required or the use of representatives or distance communication tools available.

in the visited country enables him to continue proceedings, albeit means that he is precisely put in the position that consumer ADR (where available) was often designed to avoid in the case of local consumers: the compulsory character of legal representation. Secondly, where distance communication tools (including through a platform) are available for mediation / conciliation, limitations may apply, e.g. geographical or / and linguistic limitations<sup>243</sup>.

— In various countries, it is impossible to start proceedings from abroad. Although not specific to tourists in the meaning of this project, this rule has a particular impact on them, especially short-stay tourists (which seems the norm for most leisure-orientated tourism). In practice, it means that the tourist must initiate proceedings whilst in the visited country despite his often short-time stay and the fact that he is frequently not made aware of existing legal remedies / dispute resolution procedures in a language he understands. He therefore needs time to collect the right information, a major difficulty in the context of a very temporary stay. He also needs to be able to communicate with the local Court. Again, these difficulties are not specific to tourists but they are compounded by his peculiarities (notably the often short-time stay and linguistic barrier). This shortcoming is accepted by Hong-Kong (China), which prohibits the start of proceedings from abroad, including in the small claims court: “In practice, as most consumer disputes involve modest amount of money, and considering the time spent by tourists in the Hong Kong SAR, it would be impracticable and infeasible for aggrieved tourists to seek compensation by litigation. Besides, tourists may not be familiar with the legal procedures and the legislation of the Hong Kong SAR which may differ from that of the place or country where the tourist resides”. Hong-Kong sees as a solution the development of online dispute resolution: “To overcome the above difficulties, the Consumer Council supports the development of online dispute resolution which would potentially provide a simple, fast, flexible and effective option for resolution of disputes involving tourists even after they have returned to their home countries”. However, this solution<sup>244</sup> is not available yet, which means that tourists struggle to enforce their rights, even if non-judicial means may be available.

— An obstacle to access to justice in cross-border matters such as the *cautio judicatum solvi* persists and will impact on the tourist from abroad. In addition to the evidence collected through the responses to the questionnaires<sup>245</sup>, one may add the information collected a few years ago

<sup>243</sup> See *infra* part 4.C.1 for an example. We take this opportunity to note that some limitations are not specific to tourists or do not a priori impact more on tourists, albeit will still apply to them. In particular, budget constraints may mean that only a selection of cases will finally be dealt with by mediators / conciliators, which may impact on tourists. For example, in England and Wales, Lord Justice Briggs (Civil Courts Structure Review: Final Report, July 2016, paragraphs 2.14 et 2.15) states that there only around 15 mediators for the whole country and that therefore parties requesting a mediation are offered a single date (should they be unavailable, their case will be considered as unsuitable for mediation). As a result, in his interim report, LJ Briggs estimated that only a minority of mediation requests is met.

<sup>244</sup> It is unknown if the solution referred to by Hong-Kong is online dispute resolution in the often used meaning of online alternative dispute resolution or an online court. In both cases, the solution is still work in progress not only in this jurisdiction but elsewhere, whether it is the ODR platform of the EU (already available but with weaknesses, see *infra* 4.3) or an online Court (as the one under construction in the UK, the pilot having started on 31 July 2017, or scheduled in Morocco according to its answer to question 10 of the questionnaire (entire digitalisation of Courts by 2020)). The possibility of online courts, coupled with the draft convention of the current project and the future Hague Judgments Convention, could prove a powerful way to judicially enforce claims, notwithstanding the suitability of ADR for consumer claims. In favour of online solutions (no physical presence) to ‘existential’ problems of international litigation, see E. Vescovi, “El acceso a la justicia como principio fundamental del proceso, con especial referencia a los litigious internacionales en America”, in “El acceso a la justicia en el derecho internacional privado. Jornadas de la ASADIP 2015”, CEDEP and ASADIP and Mizrachi & Pujol SA, Asuncion (Paraguay), p. 123, where itinerant international courts are also mentioned.

<sup>245</sup> See *supra* Part 4.



by the Hague Conference in relation to the 1980 Convention on International Access to Justice. In particular, Belgium, Canada, Denmark, Germany, Hungary, Japan, Malaysia, Monaco, Norway, Russian Federation, United States of America stated that in judicial proceedings before their courts, the law or practice of their State imposes a security, bond or deposit upon foreign nationals or persons who are not resident or domiciled in their State (exemptions may apply, following notably international conventions, albeit these States are not parties to the 1980 Hague Convention on Access to Justice)<sup>246</sup>.

— Assuming the tourist initiates proceedings in the visited country, he does not always have access to a small claims procedure or court, i.e. a procedure or court designed for most consumer claims, which are of a small value and which would not be enforced by normal judicial proceedings, deemed to be excessively lengthy and costly for the consumer. However, the situation is here satisfactory (at least in theory) since most States have a small claims procedure or court or a simplified procedure. Nevertheless, with the exception of the European Small Claims Procedure, it seems that most small claims procedures are designed for domestic claims rather than cross-border ones. Moreover, in States such as Mainland China (PRC) and Brazil, there are restrictions negatively impacting on tourists.

— Assuming the tourist initiates proceedings in the visited country, and that he has access to a small claims procedure or Court (i.e. a procedure designed for most consumer claims, which are of a small value), he still faces the nearly inevitable length of judicial proceedings. Even particularly fast proceedings are often not sufficient in cases involving tourists from abroad. Brazil thus states that “Tourist’s cases [before the small claims court] are rare, because [notably] the hearing is fifteen days or one month later of the claim and the tourist cannot be present”, which leads to the dismissal of the case. Similarly, Rules of Court in the Philippines do not allow for the use of visio-conference regarding the presentation of evidence<sup>247</sup>. Consequently, proceedings may neither be started<sup>248</sup> from abroad, nor continued from there, since the physical absence of the tourist as plaintiff leads to the dismissal of the case<sup>249</sup>. Legal representation is not mentioned as an acceptable substitute and no reform allowing for the use of new technologies seems underway. Since by hypothesis the presence of the tourist in the country is temporary (especially leisure and business tourists), it is feared that in practice most

<sup>246</sup> Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 25 October 1980 on International Access to Justice (Access to Justice Convention) drawn up by the Permanent Bureau, revised edition as per July 2014, Information Document No 3 of May 2014 for the attention of the Special Commission of May 2014 on the practical operation of the Hague Service, Evidence and Access to Justice Conventions, p. 14 ff. The synopsis also mentioned Argentina. See however Article 2610 of the new *Código Civil y Comercial de la Nación* (in force since 1 August 2015; for a commentary, see L. Scotti, « El acceso a la justicia en el derecho internacional privado argentino: nuevas perspectivas en el Código Civil y Comercial de la Nación », *Red Sociales. Revista del Departamento de Ciencias Sociales*, 2016, Vol. 03, N° 06, p. 22, spec. p. 42 ff. on the setting aside of Article 348 of the Civil and Commercial Procedure Code in the light of case-law, <http://www.redsocialesunlu.net/wp-content/uploads/2016/10/RSOC017-002-Scotti-L.-2016.-El-acceso-a-la-justicia-en-el-derecho-internacional-privado-argentino.pdf>), which is entitled Equality of Treatment and explicitly states that “Ninguna caución o depósito, cualquiera sea su denominación, puede ser impuesto en razón de la calidad de ciudadano o residente permanente en otro Estado”. On Belgium, see the legislative proposal to abolish the *cautio judicatum solvi*, which did not succeed: *Chambre des Représentants de Belgique*, Proposition de loi modifiant le Code judiciaire en ce qui concerne la caution *judicatum solvi*, déposée par M. K. Waterschoot, 10 mai 2012, document 53 2184/001 (on the issue in general, see A. Decroës, « La caution de l'étranger demandeur : analyse critique au regard du principe de non-discrimination », in J. Ringelheim (ed.), « Le droit belge face à la diversité culturelle », Bruxelles, Bruylant, 2010, p. 455).

<sup>247</sup> Answer to question 10.

<sup>248</sup> Answer to question 13

<sup>249</sup> Answer to question 19.

will not be able to access justice. In countries where legal representation is possible, it enables the tourist to continue proceedings, albeit means that he is precisely put in the position that small claims procedures / courts were often designed to avoid in the case of local consumers: the compulsory character of legal representation.

— The tourist may not be able or willing to initiate or continue mediation or judicial proceedings in the visited country and may choose instead to complain to his home consumer protection body (where existing) for reasons of time, language, information but potentially also of trust. There is evidence of tourists complaining to their consumer bodies on their return<sup>250</sup>. This is the case in some EU Member States<sup>251</sup>, Japan, Hong-Kong and Korea. For example, Korean consumers have approached the Korea Consumer Agency for information or advice regarding cross-border transactions (i.e. transactions between a Korean consumer and a foreign business operator)<sup>252</sup>. Their number is in fact constantly rising, from around 1000 in 2011 to nearly 9000 in 2015. These cross-border transactions include purchases made while travelling abroad, even if online direct purchase (E-commerce) takes the biggest share.

The tourist's consumer protection agency may however have some serious practical difficulties in liaising with the trader, whether notably to investigate the facts or attempt a mediation / conciliation (it may not even have the mandate to do so). The enforcement of any settlement reached would prove a deterrent. An international cooperation network would be the solution but is only available in specific zones such as the EU or Mercosur, and again and importantly only for tourists based in the region (more local initiatives may also be noted, such as Hong-Kong consumer body liaising with its mainland Chinese fellow bodies). In order to try to 'compensate' for this lack of international cooperation, it is interesting to note that a few Argentineans nationals returning from tourism in Costa Rica regularly (albeit infrequently) seek the help of the Costa Rica consulate in Buenos Aires<sup>253</sup>. Those tourists are clearly looking

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<sup>250</sup> Or to their courts. On cases of liability for a product bought abroad by a tourist, see A. A. Soares, "Perspectivas sobre os aperfeiçoamentos das regras de proteção internacional do consumidor no Brasil, Argentina, Alemanha e União Europeia", in W. Menezes (ed.), *Direito internacional em expansão*, vol. IX, Anais do 14e Congresso Brasileiro de Direito Internacional, Arraes Editores, Belo Horizonte (Brazil), 2016, p. 340, spec. p. 344-345. It appears from this article that one of the criteria for success for the tourist would be whether he bought the product from a multinational company with a presence in both the visited country and his home country. In the absence of such a presence in his home country, the likelihood of being able to enforce any warranty appears much lower. One should here recall that the majority of companies in the tourism sector are SMEs: "the global tourism industry consists predominantly of small to medium sized firms" (V. A. Greenwood and L. Dwyer, "Consumer protection legislation: A neglected determinant of destination competitiveness?", *Journal of Hospitality and Tourism Management* 24 (2015), p. 1, spec. p. 6). See also "New technologies key for Europe's tourism leadership", UNWTO Press Release 17035, 24 March 2017, <http://media.unwto.org/press-release/2017-04-10/new-technologies-key-europe-s-tourism-leadership>: "Within the European Union, the tourism sector comprises 1.8 million enterprises, mostly small and medium-sized enterprises". In practice, given the low value of most consumer claims, litigation should probably be exceptional. For an example of such litigation, with the often associated difficulties, see the 19 December 2017 decision of the UK Supreme Court, *Four Seasons Holdings Incorporated (Appellant) v Brownlie (Respondent)*, [2017] UKSC 80 (on appeal from [2015] EWCA Civ 665), <https://www.supremecourt.uk/cases/uksc-2015-0175.html>, which was about a dramatic traffic accident whilst on holidays in Egypt.

<sup>251</sup> Interview of the Director of an ECC.

<sup>252</sup> See [crossborder@kca.go.kr](mailto:crossborder@kca.go.kr).

<sup>253</sup> The question (Hague Conference Regional Bureau in Buenos Aires): « 4. ¿Han recibido quejas/reclamos de argentinos que estuvieron de visita en vuestro país, y que desean iniciar o continuar un reclamo por defectos en servicios recibidos o productos adquiridos durante su estadía en su país? ». The answer (A. Bagnarello Romero, Consul General of Costa Rica in Argentina, 9 June 2017): "Sí, recibimos en promedio dos reclamos por año. Los reclamos se relacionan a la calidad de hoteles que no concuerdan con los

for the help of an official authority. Whilst of value in specific individual cases, it is unlikely that Consulates, despite all the good will in the world, may be adequately resourced and trained to deal with numerous cross-border consumer claims and replace the existence of an adequate and smooth liaison mechanism between consumer authorities of the visited country and the country of the tourist.

## C. Analysis of specific points

### 1. Analysis of the EU ODR Regulation

The EU Online Dispute Resolution (ODR) Regulation<sup>254</sup> was referred to in multiple responses to the Tourism questionnaires. It established a very innovative tool: the ODR platform, which opened to the public in February 2016. The ODR platform aims to facilitate the online resolution of disputes between consumers and traders over online transactions by referring the dispute to the relevant notified ADR body. An ADR body is notified to the European Commission by national authorities following a positive assessment of its compliance with minimum quality requirements (more than 300 ADR bodies have thus been registered). The mediation procedure may be conducted entirely online, with all relevant actors able to choose any of the EU official languages (as well as Norwegian and Icelandic since July 2017), thanks in particular to an automatic translation tool for free text communication. Deadlines are built into the system. A national ODR contact point provides one-to-one support to users of the ODR platform when necessary. Online traders are required to provide a link to the ODR platform on their own website. However, the first report on the ODR platform indicates that the compliance rate is only 30%<sup>255</sup>. The report also states that more than 24 000 complaints were submitted on the platform in its first year of operation, that the second most complained about sector was airline tickets (8.5%) and that one third of complaints related to a cross-border issue<sup>256</sup>. About 44% of the overall number of complaints was solved in successful bilateral negotiation between traders and consumers<sup>257</sup>.

The ODR platform has clearly benefited tourists. An example beyond disputes related to airline tickets has been provided by the European Commission: “A consumer from Luxembourg complained about a car rented online from a trader in Greece. The platform sent the complaint to the competent dispute resolution body in Greece. The dispute was amicably settled within

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contratados vía internet, así como con guías turísticos que nos están debidamente registrados ante las instancias de turismo de nuestro país ».

<sup>254</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).

<sup>255</sup> Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, Brussels, 13.12.2017 COM(2017) 744 final, [https://ec.europa.eu/info/sites/info/files/first\\_report\\_on\\_the\\_functioning\\_of\\_the\\_odr\\_platform.pdf](https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf), p. 4.

<sup>256</sup> Report on the functioning of the European Online Dispute Resolution platform, op. cit., p. 5-6.

<sup>257</sup> Report on the functioning of the European Online Dispute Resolution platform, op. cit., p. 7. However, the 44% includes “4% of complaints where the parties withdrew from ADR presumably because they had reached a settlement” (fn 10 p. 7), an assumption which may be debatable. It also includes “6% of traders that refused ADR and settled directly with the consumer” (idem). However, a part of the original sentence found on page 6 has here disappeared: “traders indicated that they made direct contact with the consumer and solved the issue or were planning to do so (around 6% of the overall submitted complaints)”. Planning to contact the consumer and solve the issue does not necessarily mean it has been done. In other words, the figure may be rather 34% than 44%, probably somewhere in between.

60 days. The trader fully reimbursed the additional expenses incurred by the consumer”<sup>258</sup>. The ODR platform is also beneficial to traders in the tourism industry, who avoid appearing before the courts of the domicile of the consumer and reduce costs<sup>259</sup>.

However, the ODR platform suffers from some limitations. These are primarily geographical. The ODR Regulation applies “to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union” (Article 2.1)<sup>260</sup>. Therefore, whilst useful for tourists within the EU, it is not available to tourists based outside the EU, save those based in Norway, Iceland and Lichtenstein (since 1 July 2017)<sup>261</sup>. Moreover, the platform is still not available for Romania and Spain as of 11 January 2018, despite the fact that Spain is a major touristic destination<sup>262</sup>.

The ODR platform also suffers from material limitations, i.e. online purchases only, whilst at least some tourists’ purchases would normally be made on site. Furthermore, the platform is not available in practice for all sectors, even if in theory it applies to tourism services<sup>263</sup>.

Finally, the ODR platform faces linguistic challenges. The consumer may complain in all EU languages. However, the ADR body may work exclusively in another language<sup>264</sup>. An automatic translation tool is indeed available, albeit with all the limitations inherent to such a software despite the subtleties of human interaction in a mediation / conciliation setting and legal context. The possibility for a national contact point to intervene may at best be a solution in some cases but is probably not designed to be a substitute for proper translation in the vast majority of cases. This may undermine the success of the ODR platform, especially in contrast with the workings of the ECC-Net<sup>265</sup> – a model for the current Tourism Project here under

<sup>258</sup> European Commission, “Buying online and solving disputes online: 24.000 consumers used new European platform in first year”, Press release, 24 March 2017, [http://europa.eu/rapid/press-release\\_IP-17-727\\_en.htm](http://europa.eu/rapid/press-release_IP-17-727_en.htm).

<sup>259</sup> See S. F. Álvarez de Sotomayor, “La resolución de litigios en línea aplicada a la comercialización de servicios turísticos”, La Ley Union Europea no 42, 30 November 2016, spec. p. p. 11 in limine (see also p. 12: “Los empresarios, especialmente las pequeñas y medianas empresas, no podrían asumir los costes derivados de litigar ante los tribunales de cualquier país del mundo por el mero hecho de disponer de una página web donde ofrecen la contratación de sus servicios turísticos. Siendo así, los sistemas de RLL resuelven dicha problemática”).

<sup>260</sup> Similarly, see Article 2.1 of the ADR Directive (also mentioned in multiple responses to the questionnaires): “This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union” (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)).

<sup>261</sup> Report on the functioning of the European Online Dispute Resolution platform, op. cit., p. 4. See also Council Decision (EU) 2016/1966 of 20 September 2016 on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning an amendment to Annex XIX (Consumer protection) to the EEA Agreement (Alternative Dispute Settlement System).

<sup>262</sup> “Dispute resolution bodies are currently not available on this site [...] in the following countries: Romania, Spain. As a consumer you might not be able to use this site to solve your dispute with traders in these countries” (<https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.show&lng=EN>).

<sup>263</sup> Dispute resolution bodies are currently not available on this site for some sectors” (<https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.show&lng=EN>).

<sup>264</sup> Example: the Austrian Schlichtung für Verbrauchergeschäfte – Mediation for consumer transactions only works in German, see its procedure on <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show>.

<sup>265</sup> The settlement rate of the ECC-Net in 2016 compares favourably with that of the ODR platform: 51.3% of complex cases (where more than one centre had to be involved) were resolved amicably by the ECC-Net in 2016 (in total, the European Consumer Centres received over 45 000 complaints: see Single Market

consideration – where both the tourist and the trader are able to use their mother tongues / the languages of their country of origin, the European Consumer Centres then liaising between themselves in their preferred language.

## 2. Analysis of the European Small Claims Procedure

The European Small Claims Procedure (ESCP)<sup>266</sup> has been referred to in multiple responses to the Tourism questionnaires as well as in the Brazilian proposal<sup>267</sup>. The ESCP aims to simplify and speed up litigation concerning small claims in cross-border cases whilst reducing costs. A small claim is a claim of a value initially not exceeding 2000 euros. A cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized<sup>268</sup>. Distinctive features of the ESCP include (notably) a harmonised and optional procedure, a short timeframe for every stage of the procedure, the systematic use of multilingual forms, and the abolition of the *exequatur*. The ESCP is unavailable in Denmark.

The ESCP has until now enjoyed a modest success<sup>269</sup>. In order to improve the current state of affairs, the ESCP has been reformed by Regulation 2015/2421<sup>270</sup>, which entered into force on 14 July 2017. An analysis of the new Regulation follows. It will argue that there are some welcomed developments, albeit that practical weaknesses persist. As a consequence, the ESCP,

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Scoreboard. European Consumer Centre Network (Reporting period: 01/2016 – 12/2016), [http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/european\\_consumer\\_centre\\_network/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/european_consumer_centre_network/index_en.htm), p. 3), in contrast with the 34% - 44% resolution rate of the ODR platform. In other words, a majority of complaints is solved amicably by the ECC-Net and a minority only by the ODR platform.

<sup>266</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. The European Order for Payment (Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure) has also been mentioned in some responses to the questionnaires. However, it seems to only really work in the countries adopting the Germanic model (notably Germany, Austria and Portugal, which by exception does not follow the Southern model), as they typify the non-documentary model of the EOP and are pioneers in the full electronic processing that this model enables. On the contrary, the EOP is not widely used in the countries that adopt the documentary model in their national legislation, primarily the countries of Southern Europe. Unfortunately, the point was not investigated in depth by the European legislator and Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure contributed virtually no changes to the EOP Regulation (save in relation to the ESCP). It is therefore doubtful the EOP can offer access to justice to the vast majority of tourists.

<sup>267</sup> Council on General Affairs and Policy of the Hague Conference on Private International Law of April 2013, Prel. Doc. No 11, April 2013, Proposal by the National Organ of the Government of Brazil, Draft Convention on Co-operation in respect of the Protection of Tourists and Visitors abroad and Explanatory Memorandum on the topic of Tourist Protection, Justification. See also Council on General Affairs and Policy of the Hague Conference on Private International Law of April 2014, Preliminary Document No 13.

<sup>268</sup> Therefore, the ESCP does not as such require the claimant, for example a tourist, to be based in the EU. That said, the ESCP must be read together with the applicable rules on international jurisdiction (e.g. the Brussels I bis Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) as the ESCP does not itself regulate international jurisdiction.

<sup>269</sup> See, predicting a limited success from a German perspective, A. Brokamp, “Das Europäische Verfahren für geringfügige Forderungen”, Mohr Siebeck, 2008, p. 149.

<sup>270</sup> Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure.



whilst clearly useful in some cases, may not be able to ensure full access to justice and there is scope for other improvements or mechanisms. Reciprocally, the experience of the ESCP may benefit any project aiming to address the issue of small claims from a cross-border perspective.

The first major change introduced by Regulation (EU) No. 2015/2421 is to raise the ceiling for the European Small Claims Procedure (ESCP) to 5000 euros. There were several arguments in favour of this amendment: the fact that the ESCP only involves cross-border claims; that in practice claimants must often consult a law professional; that the 2000 euros ceiling seemed low compared to the price of many goods and services; that the existence of an appeal procedure (possible if the forum Member State so wishes) appears disproportionate in light of the small amounts at stake; and – last but not least – that the very existence of the Regulation depends on such an amendment, given the small number of cross-border judicial claims for less than 2000 euros. This increase in the ceiling is even more necessary to preserve the ESCP's competitive advantage over national procedures that benefit from the abolition of *exequatur* within the framework of the Brussels I bis Regulation, thus stripping the ESCP of one of its major points of attraction, whereas the ceiling for claims under national procedures is sometimes higher and, in some Member States, has even been raised, as in the UK. Since 2013, the small claims procedure in England and Wales has been applicable, in principle, to claims up to 10 000 British pounds. The ESCP amendment is more than simply a matter of figures; it could transform the very nature of the ESCP, which was originally designed for consumers. Indeed, the higher ESCP ceiling means that small and medium-sized enterprises (SMEs) can also benefit from it; SMEs are the only parties to be expressly mentioned in recital 4 of Regulation No. 2015/2421 that raises the ceiling. As the ESCP is not legally reserved to consumers, this can only be commended, especially given the previous regulatory focus solely on the difficulties faced by consumers. Nevertheless, the authorities must ensure that the ESCP is not used against consumers, for most of the practical difficulties disappear when the creditor is a debt recovery specialist and/or law professional. In such cases, the creditor notably is familiar with the ESCP, understands international jurisdiction rules, and often speaks a foreign language. Therefore, the risk exists that if no appropriate remedy is found for these difficulties, the ESCP could be used more frequently *against* consumers than *for* them. Thus, the ESCP would resemble the small claims procedure in England and Wales, which served as its model in some ways and which certain observers have accused of being diverted from its initial purpose (namely, effectively enforcing consumers' rights)<sup>271</sup>.

Other changes merit our attention. Some of these may appear secondary but are in fact decisive. Thus, while the European e-Justice Portal contained information about court costs (in all likelihood communicated by the Member States themselves), this information did not always enable claimants to know exactly which costs they may incur, and also referred to the Member State's own legislation or websites, available only in its official language. Hence it was quite difficult to obtain comprehensive information on court costs, easily accessible to everyone and enabling potential claimants to make an informed decision about which procedure – national or European – was most suited to their claims. Was this intentional, or simply accidental? Granted, under the terms of Article 25 of the former ESCP, the Member States did not have to

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<sup>271</sup> In order to protect the weaker party, in the event that the ESCP Regulation would follow the Commission's 2013 proposal and raise the ceiling to 10 000 euros (a substantial sum for a typical consumer, who would be involved in a procedure where a lawyer is not required but the decision could be enforced without *exequatur*), it was suggested that there could be two ceilings: one for consumers, the other for professionals. See F. Cornette, « Analyse critique de la proposition de la Commission européenne en date du 19 nov. 2013 modifiant le règlement Petits Litiges », Les Petites Affiches, 17 Nov. 2014, p. 13. In the end, the ceiling of 5000 euros argues against such a distinction, but if this ceiling were raised further, the issue should be reconsidered.



provide this information despite its importance. The European legislator therefore amended this article so that the Member States must notify the Commission of the court costs for the European Small Claims Procedure, the calculation mode for these costs, and the means of payment accepted. This revised Article 25 must be interpreted in conjunction with the new Article 15a on court fees and methods of payment. Indeed, field 6.1 of Form A for lodging a European Small Claims Procedure, about the methods of payment for the application fee, offered several ways for the claimant to pay this fee: by credit card, bank transfer, direct debit from the claimant's bank account, or other means of payment (to be specified). However, the form also indicated: 'Please note that not all methods [of payment] are necessarily available at the court/tribunal to which you are sending your application. You should verify which methods of payment will be accepted by the court/tribunal. You can do this by contacting the court/tribunal concerned or by consulting the website of the European Judicial Network in Civil and Commercial Matters'. This portal did not always contain the required information and had often not been updated for several years, so the only feasible option appeared to be to contact the court directly. Yet a consumer that spoke only English or French or German, was likely to face serious difficulties communicating with a Greek or Polish court, for example, and likewise for citizens of Greece or Poland with claims in other countries<sup>272</sup>. Hence Regulation No. 2015/2421 introduces a new article (Article 15a), whose paragraph 2 states: 'The Member States shall ensure that the parties can pay the court fees by means of distance payment methods [...] by offering at least one of the following methods of payment: a) bank transfer; b) credit or debit card payment; or c) direct debit from the claimant's bank account.' This represents a change for Greece, where only cash payments were accepted, and for the UK (where the ESCP has been relatively successful), which only accepted cash and cheque payments<sup>273</sup>.

The new Regulation contains other important revisions, such as those in the new Article 18, relative to review of the judgment in exceptional cases. Firstly, this article sets a time limit of thirty days for applying for a review<sup>274</sup>, running 'from the day the defendant [is] effectively acquainted with the contents of the judgment and [is] able to react, at the latest from the date of the first enforcement measure having the effect of making the property of the defendant non-disposable in whole or in part.' Secondly, the two paragraphs of the former Article 18 have been changed. In the revised version, we note that, to obtain a review, the defendant must not have entered an appearance. The reference to Article 14 has been removed, as has the previous

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<sup>272</sup> The European Consumer Centre ("Procedure for Settling Small Claims and the European Order for Payment. Simplified Procedures Not So Simple in Practice", July 2011, p. 6, [www.euroinfo-kehl.eu/fr/evenements-et-publications/publications/](http://www.euroinfo-kehl.eu/fr/evenements-et-publications/publications/)), gives a similar example, based on Form A, field 5 EOP and the instructions for this field, given at the end of the form (this is actually the 'carbon copy' of ESCP Form A, field 6.1). In this case, French consumers initiating an EOP procedure before the Tribunal of Berlin Wedding are unable to correspond with the tribunal because they do not speak German. It is piquant to note that Regulation No. 2015/2421 revises the ESCP on this point, but actually does not reform the EOP Regulation.

<sup>273</sup> According to a report by Deloitte for the DG Justice, "Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation. Final report", 19 July 2013, Part I, p. xiii and p. 92. This report also states that the possibility for paying by cheque is sometimes more theoretical than real, given the number of consumers and SMEs that never use cheques (less than one cheque per capita, per annum for thirteen Member States) or almost never do (in six Member States), and therefore probably do not all have a chequebook (Part I, p. 92).

<sup>274</sup> The computation of deadlines becomes crucial, especially because the time limit in Article 18 cannot be extended. However, this computation is not entirely clear, even though it has been clarified in a few countries (such as Spain). For more details, see E. Guinchard, Commentary article by article of the European Small Claims Procedure, under Article 14, in P. Moreau (ed.) and J.F. Van Drooghenbroeck (coord.), « Jurisprudence du Code judiciaire commentée. Droit judiciaire européen », La Charte (Belgium), 2nd edition, 2016, p. 345 ff.

reference to the defendant being ‘without any fault’ and the express obligation for the defendant to act promptly. Next, Regulation No. 2015/2421 reflects the current trend for favouring alternative dispute resolution / means of settling disputes, as the new Article 23a bolsters the possibility for the parties to reach an agreement by facilitating the enforcement of such settlements. Lastly, the written nature of the ESCP is strengthened by limiting oral hearings; the court or tribunal, under the terms of the new Article 5.1a, “shall hold an oral hearing *only* if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests” (emphasis added). This is more restrictive than the former formulation, affecting the oral culture of some countries. The use of new technologies – strengthened in Regulation No. 2015/2421 with regard to the oral hearing (revision to Article 8) – is likely to reduce hearings in the physical presence of the parties in the long term.

Nevertheless, all the difficulties facing the ESCP have not been resolved. In particular, although assistance for the parties is reinforced by Article 11 (it is free of charge and now covers both practical assistance in filling in the forms and providing general information on the scope of application of the ESCP and competent courts<sup>275</sup>; in addition, information about the competent authorities or entities for providing this assistance must be made available at all competent courts/tribunals<sup>276</sup> and on relevant national websites), this may remain problematic if no additional means are allocated. Yet experience has shown that this is, in practice, a crucial point<sup>277</sup>. For example, consumers often struggle to complete the claim form, i.e. the very first form (form A), in relation to international jurisdiction, especially in an area directly related to tourism: air travel<sup>278</sup>.

Moreover, an assessment of the previous regime had revealed several important practical weaknesses, whether internal or external to the Regulation<sup>279</sup>. The latter included in particular the following:

- the declaration of some States regarding jurisdiction was erroneous, i.e. consumers were misled, a fortiori foreign consumers / tourists
- the declaration of some States regarding jurisdiction did not help as it listed all possible courts in the said country, i.e. consumers were lost, a fortiori foreign consumers / tourists
- the declaration of some States was not reflected in the material situation of their courts, e.g. the acceptance of electronic communication but the lack of e-mail addresses for

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<sup>275</sup> So as to be able to start a claim (or defend it). However, Article 11 does not of course require the Member States to provide for legal aid or for legal assistance in the form of a legal assessment of a specific case.

<sup>276</sup> This assumes that these courts/tribunals are familiar with the ESCP, which has not always been the case. Note that Article 4.5 has been revised to require the Member States to make the Claims Form available for claimants not only at competent courts/tribunals, but also on relevant national websites. This should help get around the problem of a court/tribunal that is unaware of the procedure (see also Article 11 itself on these sites).

<sup>277</sup> It has been asserted that the ESCP Regulation will only be useful for consumers, in legal and actual terms, if they receive both the information they require and assistance free of charge: N. Marchal Escalona, *a nueva iniciativa europea sobre la resolución de litigios de pequeña cuantía*, Revista Electrónica de Estudios Internacionales, no. 28, December 2014, pp. 39-40.

<sup>278</sup> European Consumer Centre, “Procedure for Settling Small Claims and the European Order for Payment. Simplified Procedures Not So Simple in Practice”, op. cit., p. 4, where the example of air travel is specifically given.

<sup>279</sup> E. Guinchard, « Le règlement des petits litiges: un premier bilan plutôt décevant », in J. Attard, M. Dupuis, M. Laugier, V. Sagaert, and D. Voinot (ed.), « Un recouvrement de créances sans frontières ? », Larcier, 2013, p. 65.

specific courts, i.e. consumers were misled (or not informed and unable to use the said electronic communication, particularly useful in cross-border contexts).

Unfortunately, some practical weaknesses remain. As of 11 January 2018, that is nearly 6 months after the entry into force of the revised ESCP Regulation, relevant information on the European e-justice Portal (which “strives to make your life easier by providing information on justice systems and improving access to justice throughout the EU, in 23 languages”<sup>280</sup>) is still not available for the following countries: Bulgaria, Spain, Latvia, Lithuania, Hungary and Slovenia<sup>281</sup>.

For those States which have communicated information to the European Commission, there remains a few issues. Firstly, the information may not be complete. For example, Greece has not indicated a method of payment for the court fees despite not only being obliged to do so under Article 25. 1 (f), but having precisely been identified as a country where a practical difficulty exists as to the method of payment since only cash was (and perhaps is) accepted. The absence of indication of the method of payment stands in sharp contrast with the new article 15a of the revised ESCP Regulation according to which Member States are now required to ensure that the parties can pay the court fees by means of distance payment methods by offering at least one of the following methods of payment: a) bank transfer; b) credit or debit card payment; or c) direct debit from the claimant’s bank account. The unavailability of information on how to pay court fees at distance may prove a severe obstacle to access justice for a tourist from abroad who returned home. This is all the more so since Greece stated, in respect of Article 25 1 (c) regarding authorities or organisations providing practical assistance, that no such authority has been established. Secondly, the information may not be helpful. For example, the Belgian declaration in respect of Article 25. 1 (i) ESCP continues to state that Belgium does not accept any language other than the official language or one of the official languages of the place of enforcement under Belgian national law. No further information is provided. It is arguable that the vast majority of tourists will not find this statement very helpful. Similarly, the declaration from the same State in respect of Article 25. 1 (a) regarding the competent courts lists all courts which may have jurisdiction without providing any further information: according to the Belgian Judicial Code, the courts that have subject-matter jurisdiction to give a judgment in the European Small Claims Procedure are the justice of the peace, the court of first instance and the commercial court. The likelihood that a tourist from abroad is able to understand which court has jurisdiction in his case is low. Nevertheless, some inaccuracies have been corrected. For example, the declaration of France in respect of Article 25. 1 (d) recognises that communication with the French courts with competence to handle claims lodged under the ESCP is by post only (i.e. electronic means are not available).

However, many pages are unfortunately not accessible in the vast majority of EU official languages. For example, the page on Poland is solely available in Polish, the page on Romania is solely available in Romanian, the page on Belgium is exclusively available in French and English, the one on the Czech Republic only in Czech and English, the one on Greece in Greek and English, etc. Access to justice is therefore not guaranteed for any tourist unable to understand those languages. He may find himself unable to know the practical modalities of the ESCP in the visited country, starting with basic information such as which court has jurisdiction or simply whether to start proceedings depending on the amount of court fees. He may consequently struggle to use the ESCP without having recourse, in particular, to a local

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<sup>280</sup> See <https://e-justice.europa.eu/home.do?action=home&plang=en&init=true>.

<sup>281</sup> See [https://e-justice.europa.eu/content\\_small\\_claims-354-en.do?init=true](https://e-justice.europa.eu/content_small_claims-354-en.do?init=true).

lawyer (despite the fact that legal representation is not compulsory in the ESCP). This is especially true where no assistance is offered by the State<sup>282</sup>.

These short comments do not constitute an exhaustive assessment of the new ESCP. They only intend to demonstrate that the ESCP, whilst useful and recently improved, is still impaired by weaknesses which impact on the practical operation of this cross-border procedure, especially for the tourist coming from abroad and even within the EU context. The experience of the ESCP highlights the necessity to provide clear, detailed and updated information to the tourist in a language he understands (preferably on a variety of supports). The suggested Hague Convention on Cooperation and Access to Justice for International Tourists precisely intends to offer practical assistance to the tourist. The experience of the ESCP could also benefit the Tourism Project on technical points such as the need to arrange payment from abroad in case of court fees without having to contact directly the relevant court.

## D. Conclusion

It appears that, despite some good will and innovative practices at times or venues, overall, the tourist faces several difficulties in his access to justice. These include the fact that he is often not specifically made aware of his rights and legal remedies (or explicitly and systematically told where to seek relevant information and assistance); that he may not be able to start or continue proceedings from abroad (his physical presence being required<sup>283</sup>); that small claims procedures / courts are often albeit not always available and where they are they are not normally designed for cross-border cases; and that should he complain to his local consumer body there is no cross-border cooperation mechanism with the fellow body (if existing) in the visited country, save in a few regions. Several States are aware of the specific difficulties faced by tourists and are exploring options<sup>284</sup>.

The mechanisms in place in regional organisations such as the EU are of clear benefit to tourists, as practice has proven. However, they are not themselves without weaknesses, including geographical limitations. A properly designed Hague Convention on Cooperation and Access to Justice for International Tourists could build on these mechanisms in order to ensure a fuller access to justice, whilst at the same time benefiting from their experience.

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<sup>282</sup> On the possibility for the European Consumer Centres to step in to help the consumer navigate through the ESCP, see the 2011 proposal of the European Consumer Centre (free individualised legal and linguistic assistance to any consumer) and its assessment in E. Guinchard, Commentary article by article of the European Small Claims Procedure, under Article 10, in G. de Leval (ed.) and J.F. Van Drooghenbroeck (coord.), « Jurisprudence du Code judiciaire commentée. Droit judiciaire européen », La Charte (Belgium), 1st edition, 2012.

<sup>283</sup> Legal aid restrictions might also arise.

<sup>284</sup> See Part 4.

## Part 5. Possible ways forward

### A. Going beyond the 1980 Hague Convention on access to justice

In the light of the previously identified issues in Part 4, it appears necessary to go beyond the Hague Convention of 25 October 1980 on International Access to Justice, which only addresses some of these issues, such as security for costs<sup>285</sup>. There does not appear to be a strong *legal* argument in favour of an independent convention or a mere protocol to the 1980 Hague Convention on Access to Justice, since in both cases it is assumed that the contents would be substantially the same<sup>286</sup> and of a similar binding nature. It is anticipated that States currently parties to the 1980 Access to Justice Convention<sup>287</sup> will use the same Central Authorities, for efficiency purposes. Extra-legal considerations (e.g. a fresh start for the 21st century through the drafting of a new convention on a topic which recently became one of the most important trade sector), as well long-term possible futures (e.g. could the mechanism set up for international tourists be extended one day to other categories of persons?), may however lead to one solution or another.

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<sup>285</sup> In this respect, the ASADIP (Asociación Americana de Derecho Internacional Privado) Principles on transnational access to justice (“Principios ASADIP sobre el acceso transnacional a la justicia (Transjus)”) deserve a mention. Those principles were approved by ASADIP at its meeting in Buenos Aires, Argentina, on 12 November 2016. They are available at <http://www.asadip.org/v2/wp-content/uploads/2016/10/TRANSJUS-texto-final.pdf>. The principles have been drafted after an analysis of the rules of the different Latin American States. The result was not always a convergence between the national systems, but rather a consensus among the drafters about rules that were fair and appropriate for the 21<sup>st</sup> century. One of the most relevant rule in relation to the Tourism Project is Article 2.1, which considers the *cautio judicatum solvi* as being incompatible with access to justice: “Los Estados otorgarán a los litigantes extranjeros o con residencia foránea los mismos derechos que le confieren a sus nacionales o residentes. No es compatible con el derecho de acceso a la justicia exigir cauciones o garantías a los ciudadanos extranjeros o residentes foráneos cuando dicha exigencia no tenga otro fundamento que la ciudadanía extranjera, el domicilio o residencia en el extranjero, o cumplir con reglas de reciprocidad ». Of direct relevance is equally Article 2.2: « La asistencia jurídica gratuita o subvencionada en favor de nacionales o residentes de un Estado se prestará a los extranjeros o residentes foráneos que se encuentren en las mismas condiciones que aquellos ». On the duty of international cooperation, its infringement being seen *prima facie* as a breach of the right to access justice, see Article 4.1; on the encouragement of direct communication between judges and authorities, via modern means of communication such as videoconference, provided that security of communication is guaranteed, see Article 4.6. Prior to the ASADIP principles, see also J. L. Ochoa Muñoz y C. Madrid Martínez, “Problemas de Acceso Transnacional a la Justicia en el Derecho Internacional Privado. Perspectiva Latinoamericana”, in *Curso de Derecho Internacional XLI 2014*, OEA, Washington, 2015, p. 281, [http://www.oas.org/es/sla/ddi/docs/publicaciones\\_digital\\_XLI\\_curso\\_derecho\\_internacional\\_2014\\_Javier\\_Ochoa\\_Claudia\\_Madrid.pdf](http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XLI_curso_derecho_internacional_2014_Javier_Ochoa_Claudia_Madrid.pdf), spec. p. 342 on the condition of the foreign litigant and the change of paradigm required (rather than imposing restrictions on access to justice such as the *cautio judicatum solvi*, “más bien establecer mecanismos gratuitos o subvencionados de asistencia judicial y el asesoramiento legal especializado para asuntos privados internacionales”); J. L. Ochoa Muñoz, “Algunas consideraciones sobre el acceso internacional a la justicia. Hacia un Derecho internacional privado al servicio de la justicia », in J. A. Moreno Rodríguez, C. Lima Marques and A. Brandão de Oliveira (ed.), « Los Servicios en el Derecho Internacional Privado. Jornadas de la ASADIP 2014 », ASADIP, Universidade Federal do Rio Grande do Sul (UFRGS), Porto Alegre, Brasil, 2014, p. 235.

<sup>286</sup> Should a protocol to the 1980 Hague Convention on Access to Justice be preferred, the provisions in Chapter IV of the current Brazilian draft convention should perhaps be deleted so as to avoid redundancy. Article 9.1 of the draft should similarly lose its relevancy.

<sup>287</sup> There are currently 28 contracting parties to this Convention, mostly European States.



## B. An assessment of the existing Draft convention put forward by Brazil

Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws<sup>288</sup> has been referred to as a potential model in the Brazilian proposal<sup>289</sup>. However, whilst clearly interesting from a network perspective and whilst important in practice, it may be felt that it is not the most appropriate EU model in contrast with the ECC-Net as Regulation 2006/2004 is more about ensuring compliance with consumer laws and the smooth functioning of the internal market as well as enhancing the protection of consumers' economic interests than dealing with individual consumer disputes. The Regulation has recently been amended<sup>290</sup> and improvements made, notably in relation to minimum powers of national authorities, coordinated investigation and enforcement mechanisms for widespread infringements as well as mutual assistance mechanism. However, it is felt the macro-economic and legal view taken by the Regulation is not the most relevant for tourists' disputes even if such enforcement is necessary and has an impact on deterring illegal behaviours from traders. The following will therefore exclusively present the Mercosur and ECC-Net models, referred to in the Brazilian proposal<sup>291</sup>.

### 1. Presentation of the Mercosur Agreement on Assistance to Tourists

“Mercosur<sup>292</sup> has created two instruments especially for the protection of tourists: an administrative cooperation agreement in 2005 - "Acuerdo interinstitucional de entendimiento entre los organismos de defensa del consumidor de los Estados Parte del Mercosur para la defensa del Consumidor visitante", and a joint experts committee on the protection of visitors and consumers in 2012. These two instruments are now combined, allowing for more than 80% of the problems to be solved with the simple intervention of the national enforcement authorities, assuring more information to foreign tourists in his or her language, providing a formulary to fill the complains to the tourism industry about the rights of consumers and also

<sup>288</sup> Consolidated text: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:02004R2006-20130708>.

<sup>289</sup> E.g. Council on General Affairs and Policy of the Hague Conference on Private International Law of April 2013, Prel. Doc. No 11, April 2013, Proposal by the National Organ of the Government of Brazil, Draft Convention on Co-operation in respect of the Protection of Tourists and Visitors abroad and Explanatory Memorandum on the topic of Tourist Protection, Justification, in limine.

<sup>290</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJEU L 345, 27.12.2017, p. 1. It will apply from 17 January 2020. Article 32 focus on international cooperation.

<sup>291</sup> Nevertheless, the possibility for the body assisting tourists (including on request from a fellow body abroad within the Tourism Project) to report an infringement of the applicable law to the national authority responsible for the enforcement of consumer protection law in the meaning of Regulation 2006/2004 and equivalent in other regions of the globe (i.e with the power to impose fines or other sanctions on the infringer), should be encouraged so that widespread infringements may be properly dealt with. Such collaboration may also have the virtue of encouraging the trader to consider more seriously the complaint of the tourist and amend accordingly its practices if need be.

<sup>292</sup> Brazil's response to the questionnaire. Mercosur was created by Argentina, Brazil, Paraguay and Uruguay. Venezuela and Bolivia have since joined. At times, Mercosur Members may be suspended, lately Venezuela in August 2017 (see <http://www.mercosur.int/innovaportal/v/8469/11/innova.front/decision-sobre-la-suspension-de-la-republica-bolivariana-de-venezuela-en-el-mercursosur>).



encouraging the consumer movement and the national agencies to act on behalf of foreign and national tourists”<sup>293</sup>.

The Agreement referred to by Brazil is relatively short<sup>294</sup>. Article 1 refers to the tourists from one contracting State visiting another contracting State who benefit from it. Article 2 details the objectives of the Agreement (in particular the protection of consumers who find themselves temporarily in another contracting State). Article 3 lays down the substantial duties of contracting States, such as the obligation to provide relevant information to tourists and enable a prompt resolution of the difficulties faced by tourists. The figure of 80% of complaints being solved by the simple intervention of the local authorities is equally found in literature<sup>295</sup>. The

<sup>293</sup> The experience of Brazil is interesting as it recently hosted major world-events such as the World Football Cup and the Olympic Games. The protection of the consumer has, in Brazil, constitutional value: Art. 5º, XXXII of the Federal Constitution of 1988. The main federal law is the ‘Código de Proteção e Defesa do Consumidor’ of 1990. Among three recent priorities of consumer protection policy, one finds Tourism. Interestingly, the topics were prioritized because they were found to be the most pressing real-life issues on the basis of consumer complaints, surveys and analysis of the information from the National Consumer Defence Information System (Sindec) which integrates the services performed by the Consumer Protection Authorities (Procons, with Procon standing for Procuradoria de Proteção e Defesa do Consumidor) from almost 400 Brazilian cities. In respect of Tourism, the starting point was to prevent and resolve consumer disputes during major events taking place in Brazil. To this end, coordinated actions between consumer protection agencies, the tourism, sports and private sectors appeared necessary. Local committees composed of the relevant representatives were thus created in the cities hosting major football events in 2013. National coordination was provided by the National Secretariat in charge of Consumer Protection, SENACON. The experience later benefited the organisation of world-leading events such as the World Football Cup of 2014 and the Olympic and Para-olympic Games of 2016. In particular, the World Cup saw the creation of the “Centro Integrado de Atenção ao Consumidor Turista”, composed of federal agencies, local authorities and market representatives and in charge of providing information and assistance to tourists, especially foreign tourists. It operated on a 24 hours /7 days basis for two months and was considered a clear success in the light of the few complaints received and the absence of major incidents despite a few occasions where the Center had to intervene. The planning carried out and the network operating model were deemed to explain in large part the success, with the tourist being the primary beneficiary: “Terminado o mundial constatou-se resultado muito positivo, considerando os poucos registros de reclamações, e nenhum problema grave, apenas algumas situações pontuais em que o Centro precisou atuar. O planejamento realizado, somando a todas as ações executadas previamente, e em conjunto, mostrou que a atuação em rede funciona e que o grande beneficiário é o turista” (J. Pereira da Silva and A. C. Muniz Cipriano, “Proteção e defesa do consumidor turista e visitante no Brasil”, *Revista de Direito do Consumidor*, Nov.-Dec. 2015, p. 321). The current objective is to institutionalise the protection of tourists beyond these events. For more details on the development and importance of consumer protection in the country of origin of the Tourism Project, see the well-informed article of J. Pereira da Silva and A. C. Muniz Cipriano, *op. cit.*

<sup>294</sup> The Agreement was concluded on 3 June 2004. For some recent commentaries, see J. S. Lopes da Silva, “A Proteção Do Consumidor Turista Estrangeiro No Mercosul: A Efetividade Do Acordo Interinstitucional Para A Prevenção E A Solução De Litígios”, *Revista do CEPEJ*, Salvador, vol. 19, Special Edition, Jan./Jun. 2016, p. 163. See also A. do Amaral Junior and L. Klein Vieira, “International Consumer Protection in Mercosul”, in C. Lima Marques and D. Wei (ed.), “The future of international protection of consumers”, Porto Alegre, Brazil: PPGD/UFRGS, 2016, p. 54, spec. p. 60.

<sup>295</sup> C. Lima Marques, « Los esfuerzos de ASADIP para incluir el tema de la protección del turista en la Agenda de trabajo de la Conferencia de la Laya y la Propuesta de "Convención de cooperación en materia de protección de los visitantes y turistas extranjeros" » in CEDEP (ed.), « Derecho internacional privado y Derecho de la integración: libro homenaje a Roberto Ruiz Díaz Labrano », Asunción, Paraguay, 2013, p. 293 : “aproximadamente 80% dos conflitos de consumo son solucionados por medio de una simples intervención por parte de las autoridades locales”; C. Lima Marques, “The Need for a Global Cooperation Network to Protect Foreign Tourists/Consumers and the comeback of Private International Law”, in *The Permanent Bureau of the Hague Conference on Private International Law / Le Bureau Permanent de la Conférence de La Haye de droit international privé* (ed.), “A Commitment to Private International Law. Essays in honour of Hans van Loon / Un engagement au service du droit international privé. Mélanges en

intervention of a local authority thus appears to substantially alleviate the vulnerability of the foreigner, especially on a temporary visit, and to ease communication between the tourist and the trader.

## 2. Presentation of the ECC-Net

The network of European Consumer Centres (ECC-Net) is a result of the merger in 2005 of the network for the extra-judicial settlement of consumer disputes (European Extra-Judicial Network or EEJ-Net) and the Network of Euroguichets. The latter derives from a 1992 EU pilot-project creating European Consumer Information Agencies, whilst the EEJ-Net was created in 2000. Information and out-of-court settlement of disputes were seen as priorities in order to establish confidence in cross-border transactions. Today, the ECC-Net comprises 30 centres, with one in each of the 28 EU Member States as well as one in Norway and one in Iceland<sup>296</sup>. Their aim is to provide information to consumers and to assist them in resolving cross-border complaints in an amicable manner. Consumers include tourists. However, both the tourist and the trader have to be based in the EU, Norway or Iceland. The operating procedure allows for the tourist to contact the European Consumer Centre of the country where he lives. He will receive free information on the applicable consumer law and remedies in respect of his case. Should the tourist go back to the ECC (e.g. the trader's reaction falls short of his legitimate expectations), the ECC will share the case and evidence with the ECC in the country of the trader. The latter will then contact the trader and attempt to resolve the case on the consumer's behalf. Communication will take place through the ECCs. It is important to note that the European Consumer Centres do not have enforcement powers<sup>297</sup>. The ECC-Net is jointly funded by the European Commission and States. In 2016, the European Consumer Centres had over 110 000 contacts from consumers and received over 45 000 complaints. 33% of those complaints concerned transport, with 20.5% of all complaints relating to air transport. 51.3% of complex cases (where more than one centre had to be involved) were resolved amicably<sup>298</sup>.

For the purposes of the Tourism Project, it is interesting to note that the specific situation of tourists from abroad was raised by some European Consumer Centres in 2014 (ECC-Ireland, -Sweden and -Czech Republic). A feasibility study report<sup>299</sup> was published and concluded that cooperation between similarly minded bodies could be a step forward in addressing the issues faced by those tourists in their access to justice. The report both demonstrates an awareness of the specific issues faced by tourists from abroad and the possibility to find a solution through cross-border cooperation, i.e. a "proposal for cooperation with the BBB [Better Business Bureaus, which notably provide assistance to consumers filing a complaint against businesses

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*l'honneur de Hans van Loon*", Intersentia (Cambridge, UK), 2013, p. 311: "more than 80% of the problems to be solved with the simple intervention of the national enforcement authorities by phone".

<sup>296</sup> In practice, a centre may be common to two countries.

<sup>297</sup> However, the network supports enforcement authorities by providing evidence. For example, in 2016, "they documented the main problems consumers had in the car rental sector. This built up evidence that fed into the dialogue between the Consumer Protection Cooperation Network (CPC) and the 5 biggest car rental companies" (Single Market Scoreboard. European Consumer Centre Network (Reporting period: 01/2016 – 12/2016), [http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/european\\_consumer\\_centre\\_network/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/european_consumer_centre_network/index_en.htm), p. 2).

<sup>298</sup> Single Market Scoreboard. European Consumer Centre Network (Reporting period: 01/2016 – 12/2016), op. cit., p. 3.

<sup>299</sup> European Consumer Centres Network, "Feasibility Study Report: Assistance for Non-EU Tourists (North America)", <https://www.eccireland.ie/wp-content/uploads/2015/06/Non-EU-Project-Report-2014.pdf>.

and which are located throughout the U.S.A., Canada and Mexico<sup>300</sup>] in the referral of tourism-related consumer complaints from Europe to North America and vice-versa”<sup>301</sup>. Thus, a strong interest in the proposal of a network between consumer centres of various countries in order to address consumer complaints from tourists living abroad (i.e. outside the original ‘jurisdiction’ of the consumer bodies) has already been expressed on both sides of the Atlantic in the context of this feasibility study: “Following further discussion over the summer period [2014], a proposal for collaboration between the BBBC [Better Business Bureaus Council, based in the U.S.A.] and ECC-Net was prepared by members of the Working Group. This was circulated to the European Commission for approval before being sent to the BBBC for their consideration. *The BBBC responded favourably to the proposal [...] The Council of the Better Business Bureau offers to commit itself to a 12-month pilot phase of shared complaint handling with ECC-Net*”<sup>302</sup>. The feasibility study focused on tourists from North America (Canada and USA). However, the problems identified are for a large part common to all tourists from abroad and the solution put forward may be extended world-wide. Unfortunately, it appears that the project never took off. Nevertheless, the report demonstrates that the need to take into account the specific situation of international tourists has been perceived by some of those directly in charge of assisting consumers including tourists in both the U.S.A. and Canada as well as the EU (and which may be the ones effectively discharging the duties of assisting tourists from abroad should the Tourism Project succeed)<sup>303</sup>.

Overall, the 2014 feasibility study report demonstrates that – seemingly independently from each other — several HCCH Members have (at least) explored the possibility to establish cooperation mechanisms between their entities and entities in other Members in order to provide assistance for tourists from abroad on a reciprocal basis. These Members include the EU with the 2014 project (besides the assistance to tourists in a cross-border context within the EU) and the Mercosur countries with the 2004 Agreement, to which one may add other liaison mechanisms, e.g. the ones established between the different regions of China (PRC)<sup>304</sup>.

### C. An assessment of the models put forward by the Brazilian proposal

The Hague Convention on Cooperation and Access to Justice for International Tourists suggested by Brazil builds on the experience of the network models it refers to and consequently offers a possible solution to the previously identified issues. More precisely, it aims to address several of the difficulties identified in Part 4 by (notably):

— imposing on contracting States the duty to provide tourists with information on their rights and legal remedies in the most appropriate venues and with special attention to the languages understood by the tourists (Article 3).

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<sup>300</sup> See <https://www.bbb.org/>. On complaints from consumers, see <https://www.bbb.org/consumer-complaints/file-a-complaint/get-started>.

<sup>301</sup> European Consumer Centres Network, “Feasibility Study Report: Assistance for Non-EU Tourists (North America)”, op. cit., p. 4.

<sup>302</sup> European Consumer Centres Network, “Feasibility Study Report: Assistance for Non-EU Tourists (North America)”, op. cit., p. 32 (the italics are from us).

<sup>303</sup> The European Commission has also been heavily involved in this feasibility study report: see European Consumer Centres Network, “Feasibility Study Report: Assistance for Non-EU Tourists (North America)”, op. cit., p. 32 and p. 34.

<sup>304</sup> See for example D. Wei, in the 2014 Discussion Interim Report of the Committee on the International Protection of Consumers, International Law Association, Washington Conference (2014), p 9, <http://www.ila-hq.org/index.php/committees>.

— facilitating mutual understanding through the use of standard complaint forms in multiple languages (Article 4)<sup>305</sup>.

— setting up an international cooperation mechanism between Central Authorities tasked with assisting tourists and coordinating actions within their State (Article 5). Assistance to tourists appears also to be a key feature of Article 6 on Competent Authorities, which must act promptly.

— guaranteeing equal access to justice, in particular in respect of *cautio judicatum solvi* and legal aid (Articles 7 and 8).

One of the key underlying ideas seems to be that the intervention of an Authority from the State of the trader should often be enough to convince him of the need to seriously take into account the complaint of the tourist from abroad, whilst at the same time offering him the possibility to understand this complaint in his own language. The tourist is for his part likely to know the contact details of his own relevant authority with whom he will be able to correspond in his own language and the draft Convention explicitly covers the possibility for the tourist to complain once back home (within a strict time limit). This report is of the opinion that the core cooperation mechanism set up by the suggested Hague Convention is fundamentally viable and has demonstrated its usefulness within the Mercosur and the EU (ECC-Net). The Tourism Project would build on these successes, albeit at global level. Nevertheless, amendments and additions could be considered in order to increase the feasibility of the Tourism Project and the practical efficiency of the Convention.

### 1. Suggested amendments

At times, the Brazilian draft Convention appears to go beyond the common experience of the models referred to. In particular, the definition of the tourist goes beyond the traditional definition of a consumer in a region such as the EU. The mention of a nationality criterion may also be at odds with the traditional habitual residence criterion found in existing Hague Convention.

The definition of a tourist would be necessary in a potential Hague Convention on Co-operation and Access to Justice for International Tourists, as it would contribute to the definition of its scope of application. The current proposal defines the international tourist as the person habitually resident in, or national of, a contracting State taking a trip to a main destination in another contracting State for less than a year, for any main purpose other than to be employed, and who to that end purchases or undertakes to purchase a tourism service (Article 2 a)). It is submitted that a debate could take place on the extension of this definition and that three amendments may be considered in the context of the Tourism Project.

Firstly, the reference to nationality<sup>306</sup> could usefully be removed<sup>307</sup>: even if the tourist understands the language of the visited country and knows where to complain because it is a country of which he is a national, he would strongly benefit from the international cooperation mechanism set up by the Tourism Project given his short time stay in the visited country. Moreover, the removal of the nationality criterion would be consistent with the Hague Conference usual practice.

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<sup>305</sup> Forms were originally prepared in Chinese, English, French, Hebrew, Italian, Japanese, Portuguese, Russian, and Spanish.

<sup>306</sup> Equally present in Article 1 a) of the draft Convention.

<sup>307</sup> We also note that the definition of ‘issues relating to tourism service’ could be clarified to the effect that issues relating to personal safety and security of the international tourist do not include criminal matters.

Secondly, it could be clarified whether the international tourist is a *natural* person only. Currently, there appears to be no explicit exclusion of a legal person. Thirdly, the existing definition explicitly includes tourists travelling for business purposes, which would constitute a likely point of contention in some jurisdictions. An extensive definition is not surprising in the light of Brazilian Law. The latter has a wider definition than some other States or group of States throughout the world, even if it is clearly not isolated in doing so within Latin America<sup>308</sup>. A presentation of Brazilian Law on the notion of consumer in English, including a translation of the legal definition found in the *Código de Defesa do Consumidor* has been provided by Brazil in the context of the Judgments Project. It notably states: “The wide range of potential consumers that are protected by this provision [Article 2 of the above Code] can be understood through the statement of Prof. Claudia Lima Marques [...]: ...*the one that puts an end to the production chain*...”<sup>309</sup>. The communication from Brazil then usefully states the differences with the definition of consumer agreed for the purposes of the 2005 Choice of Court Convention: “1. Legal entities; 2. Natural person acting on the purpose of a natural person not related to his family; 3. Natural person that benefits from or is harmed by the product or service and is not directly related to the supplier; 4. Natural person acting for professional purposes not directly related to the product or service provided”<sup>310</sup>. The Convention of 30 June 2005 on Choice of Court Agreements states in its Article 2 that it does not apply to exclusive choice of court agreements “a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party”. Members of the Hague Conference have therefore agreed, for the purposes of the 2005 Choice of Court Convention, that a consumer is a natural person acting primarily for personal, family or household purposes<sup>311</sup>. This definition may be

<sup>308</sup> See C. Madrid Martínez, « La protección internacional del consumidor, o de como el Derecho internacional privado puede influir en la conducta de los proveedores de bienes y servicios », in A. do Amaral Junior and L. Klein Vieira (ed.), « El Derecho internacional privado y sus desafíos en la actualidad », Grupo Editorial Ibañez, Bogotá (Colombia), 2016, p. 155, esp. Part I on the concept of consumer where the author contrasts the European position to the much wider definition found in Latin America (see footnotes 20 and 27 and corresponding texts), and Venezuela in particular. Previously, see C. Madrid Martínez, “Prestación de servicios bancarios a consumidores y determinación de la jurisdicción. Una mirada desde el sistema venezolano de Derecho internacional privado”, in « Los servicios en el Derecho internacional privado. Jornadas de la ASADIP 2014, Porto Alegre, 30-31 de octubre de 2014 », J.A Moreno Rodríguez and C. Lima Marques (dir.), (ASADIP, Programa de Pós-Graduação em Direito da Universidade Federal do Rio Grande do Sul), Porto Alegre, 2014, p. 603, spec. fn. 33 and text.

<sup>309</sup> Background to Working Document no 4 of 1 June 2016 on the need of “Consumer” definition presented by the delegation of Brazil, Information Document No 3 of June 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments, <https://assets.hcch.net/docs/eec804e8-b974-470e-92bc-dd593b96c12c.pdf>, fn 5, italics in the original.

<sup>310</sup> Background to Working Document no 4 of 1 June 2016 on the need of “Consumer” definition presented by the delegation of Brazil, op. cit., p. 4.

<sup>311</sup> The relevant Explanatory Report states the exclusion of Article 2 a) “covers an agreement between a consumer and a non-consumer, as well as one between two consumers” (Explanatory Report by T. Hartley and M. Dogauchi, <https://assets.hcch.net/upload/exp137final.pdf>, no 50. The authors add in footnote 74 that “Some agreements to which a natural person is a party are not excluded by Art. 2(1) a) – for example, commercial agreements where one party is a sole trader (an individual acting in the course of his business). Where the agreement is concluded by a legal person, it is not necessary for it to be acting in the course of business. Art. 2(1) a) would not exclude a choice of court agreement concluded by a government department or a charity”. On the definition of consumer in the 2005 Choice of Court Convention, see also M. Pertegas and I. Goicoechea, « Hague Conference », in D. P. Fernández Arroyo (ed.), « Consumer Protection in International Private Relationships /La protection des consommateurs dans les relations privées internationales », CEDEP, Paraguay, 2010, p. 612.



used as a starting point for the definition of the tourist (as a consumer of tourism services) in the Tourism Project. An argument in favour of an extension of the 2005 definition would be that, in the context of the 2005 Choice of Court Convention, consumer contracts constitute an exception to the application of the Convention. According to a widely accepted legal interpretation principle, an exception should be interpreted strictly. In the Tourism Project, tourist contracts are the norm, not the exception. However, it remains to be seen whether Members who have a narrower concept of consumer than Brazil have an appetite to challenge their own traditional definitions of a consumer. The current draft Tourism Convention may initially prove too ambitious in this respect. If the tourist is seen in the Tourism Project as a specific consumer deserving added protection, in many jurisdictions the definition of a consumer would exclude legal persons as well as natural persons travelling for business purposes when it comes to international jurisdiction rules or provisions on the applicable law or consumer centres. For example, ECC-France in its response to the questionnaire for non-Members pointed out that they “only deal with consumers so tourists for private purposes, not including business trips for example”. As the ECC-Net has been put forward as a potential model by Brazilian literature in respect of the Hague Conference project, the point matters. Consequently, the current definition of a tourist for the Tourism project may have to be narrowed down in order to increase the feasibility of the whole project. Should the three amendments here advocated for be adopted, it would lead to a definition close to that of the consumer in the 2015 United Nations Guidelines for Consumer Protection<sup>312</sup>: “For the purpose of these guidelines, the term “consumer” generally refers to a natural person, regardless of nationality, acting primarily for personal, family or household purposes”<sup>313</sup>.

In addition to the suggested amendment of the definition of an international tourist in the draft Convention, it may be observed that, whilst the ECC-Net (including the 2014 proposal for a pilot on assistance to non-EU tourists) focus primarily on administrative cooperation, the Brazilian proposal may go further. Whilst this would be clearly beneficial to international tourists, it may prove too ambitious as a first step. If the argument is that a majority of disputes are settled amicably following the intervention of a consumer protection body, it may go against extending the cooperation model beyond administrative cooperation. On the other hand, out-of-court conciliation and mediation do not operate in a vacuum and may see their own efficiency undermined where access to court is ineffective as the trader may be reluctant to engage in a conciliation / mediation if he knows that the likelihood of court action is low. The lack of will of the trader to engage may be discouraged through liaison with the national authority responsible for the enforcement of consumer protection law (i.e. with the power to impose fines or other sanctions on the infringer)<sup>314</sup>.

## 2. Suggested additions

It could be beneficial to elaborate on some of the provisions of the Brazilian proposal. The latter constitute an excellent and well-thought starting point, albeit perhaps at times lacking in

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<sup>312</sup> Adopted by UN General Assembly in resolution 70/186 of 22 December 2015, document A/RES/70/186, no 3, [http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf). See also Resolution no 1/2016 of the International Law Association, Committee on the international protection of consumers (77th Conference of the ILA, Johannesburg, South Africa, 7 - 11 August 2016), more precisely recommendation no 1, which envisages “consumers as natural persons acting outside of their professions or trade “.

<sup>313</sup> The Guidelines add immediately: “while recognizing that Member States may adopt differing definitions to address specific domestic needs”. The possibility for some States to extend the scope of the Tourism Project beyond the definition found in the Convention could constitute a compromise.

<sup>314</sup> Should this authority and the entity assisting tourists be separate.



details. The overall aim would be to make sure that the issues identified in Part 4 are all addressed and in a clear and practical manner. For example, it may appear necessary to clarify whether conciliation / mediation would be the default operating procedure in case of a complaint as it is generally deemed the most appropriate / proportionate method to resolve small claims (arguably a major proportion of tourists' claims). Similarly, the current draft does not address the sensitive question of the allocation of costs, starting with the costs of the Central Authority. The basic principle in existing Hague Conventions is that each Central Authority bears its own costs in applying the Convention. It may be helpful to explicitly state this principle in the Convention should Members decide not to depart from the traditional approach<sup>315</sup>. Furthermore, it could be advantageous to include provisions on matters such as notably data protection (the data protection issues arising from the transfer of personal data between countries should be clarified with a view to reaching a compromise between the facilitation of data sharing including evidence and personal details and the protection of other interests starting with the right to privacy), limitation periods (the tourist's claim to the relevant Central Authority or Competent Authority in the meaning of the Convention could suspend the applicable limitation period for court action so as to avoid prejudicing the tourist's legal position where the trader appears particularly slow to engage), or the legal regime applicable to settlements reached between the tourist and the trader in the application of the Convention (with a particular focus on the enforcement of such a settlement).

Some of the potentially useful details could be of a non-binding nature and in this respect a Guide complementing the current Convention could be of benefit to all involved. In particular, the relevant authorities must be properly staffed and equipped in order for the Convention to be effective. The Guide could set the minimum expectations and provide recommendations for the ideal authority<sup>316</sup>. Similarly, standard operating procedures such as case handling protocols could be drafted (e.g. complaint by the tourist, preliminary examination by the receiving authority, transmission to the authority of the visited State in case of complaint back home, contact with the trader by an authority of his State, follow-up, etc.). Should a working group be established, one of its initial tasks could be to list the issues whose inclusion in the Convention appears opportune and whether they would be classified as essential (to be included in the Convention) or non-essential albeit important (to be included in the Guide). One should perhaps here caution against a too extensive list so as not to derail the project from the cooperation mechanism at its core. Finally, besides the Special Commission mechanism used for other Hague Conventions, consideration could perhaps be given to a more permanent

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<sup>315</sup> In the 2014 ECC-Net draft pilot, the U.S. entity requested some of its costs to be borne by the other party: "The BBB requests the defrayal of the expenses incurred in altering its database to allow it to receive complaints from European tourists referred by ECC-Net and, further, to allow it to tag those complaints so that they can be retrieved for the purpose of reporting on the pilot project at the end of the trial period. The BBB will provide an estimate and breakdown of the costs involved which will be sent separately to the European Commission" (European Consumer Centres Network, "Feasibility Study Report: Assistance for Non-EU Tourists (North America)", <https://www.eccireland.ie/wp-content/uploads/2015/06/Non-EU-Project-Report-2014.pdf>, p. 35). Fundamentally, either the relevant body from the visited country bears its own costs as the tourist is protected because of a purchase related to the visited country, or the relevant body from the country of habitual residence of the tourist bears the cost of protection of his consumer abroad, or costs are split among the consumer centres. The above request of the American entity may explain why the pilot was never implemented.

<sup>316</sup> A starting point in this respect could be the 2003 Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Part I - Central Authority Practice, [https://assets.hcch.net/upload/abdguide\\_e.pdf](https://assets.hcch.net/upload/abdguide_e.pdf)), which contains among others recommendations in respect of the resources and powers of Central Authorities, the cooperation between these Authorities and the minimum level of essential equipment and materials for all Central Authorities.

liaison mechanism in order to better monitor and facilitate the implementation of the Convention.

## **D. Conclusion**

In the light of the issues identified in Part 4, it appears necessary to go beyond the Hague Convention of 25 October 1980 on International Access to Justice, which only addresses some of the difficulties faced by international tourists in their access to justice. The Hague Convention on Cooperation and Access to Justice for International Tourists suggested by Brazil envisages at its core a cooperation mechanism which appears fundamentally viable in the light of the Mercosur and EU experiences, where it has demonstrated its usefulness. It constitutes therefore an excellent starting point in order to resolve outstanding issues faced by international tourists. Nevertheless, some (non-limitative) amendments and additions may be suggested, such as a clarification of the definition of an international tourist or whether conciliation / mediation would be the default operating procedure in case of a complaint as it is generally deemed the most appropriate / proportionate method to resolve small claims. A thus enhanced draft Convention could be of interest to all stakeholders in the field of tourism: the tourists themselves, since it would enable them to enforce their rights; the traders as most companies in the tourism sector are SMEs and may therefore welcome the possibility of resolving claims outside courts as a matter of principle, thus reducing costs whilst improving confidence of tourists in their businesses with a view to sustainable growth; the States or R.E.I.O. since several have (at least) already explored the possibility to establish cooperation mechanisms between their entities and entities in other countries in order to provide assistance for tourists from abroad on a reciprocal basis<sup>317</sup>. In conclusion, we are of the opinion that the Tourism Project is feasible.

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<sup>317</sup> The exploration of such possibility demonstrates an awareness of both the specific difficulties faced by international tourists and the gaps in the protection currently offered. It also shows an appreciation of the cost-effectivity of a cross-border cooperation mechanism, which builds on existing structures within States / R.E.I.O., including at times already existing networks. Nevertheless, the application of the Convention (e.g. setting up and functioning of a Central authority, new tasks for existing Competent authorities) will necessarily entail some costs, even if savings may be made elsewhere (e.g. in terms of consular assistance) and costs potentially recouped (e.g. through direct financial benefit in terms of monetary recovery of tourists' claims, and indirect financial benefit through deterrence of illegal behaviour and the growth of tourism due to the increased confidence of tourists). In the context of the EU, it is estimated that the direct financial benefit accruing to consumers as a result of the ECCs' actions clearly outweighs the cost to the tax payer of supporting the ECCs. "The Network delivered direct financial benefits to consumers of at least 1.77 times its cost to the taxpayer during 2010. Additionally, there are significant non-quantifiable benefits associated with consumer detriment avoided and increased confidence in cross border shopping attributable to ECCs' activities" (DG Health And Consumers, "Evaluation of the European Consumer Centres Network (ECC-Net)", Final Report (submitted by CPEC), 14 February 2011, p. X and p. 75). The different projects providing assistance to international tourists demonstrate that the perception that the regulatory framework is an important factor in the attractiveness and competitiveness of a touristic destination is gaining ground.

## Part 6. Compatibility of the Tourism Project with the mandate of the HCCH

The mandate of the Hague Conference on Private International Law may be found in Article 1 of its Statute<sup>318</sup>: “The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law”. The Tourism Project relates to private international law and in particular access to justice for tourists through cross-border cooperation mechanisms. The Hague Conference seems particularly — if not the only international organisation — suited to the task:

— The Hague Conference is the only global international organisation in the field of private international law, with headquarters in The Hague (The Netherlands) and Regional Offices in Buenos Aires (Argentina) and Hong Kong (China). It has a very large and representative membership, including the main actors in terms of tourism destinations, earnings and spending<sup>319</sup>.

— The form of the here suggested instrument is a Convention. It therefore perfectly fits in the long-standing work of the Hague Conference in drafting conventions and protocols. It would not require an innovative methodology such as the one needed for the Hague Principles on Choice of Law in International Commercial Contracts.

— The Hague Conference has tremendous experience in drawing up international conventions in the field of international civil procedure and access to justice, with the first convention on the matter dating back to 1896 (*Convention du 14 novembre 1896 relative a la procédure civile*, with notably Articles 11 ff on *cautio judicatum solvi*). Today, 28 States are contracting parties to the Convention of 25 October 1980 on International Access to Justice. An important part of the suggested draft Tourism Convention very directly inspires itself from the existing contribution of the Hague Conference to access to justice.

— Many Hague Conference Members have now moved towards specifically dealing with consumer issues in private international law. In the past, the Hague Conference had attempted to deal with consumer contracts. In particular, in 1980, the Fourteenth Session adopted a text on the Law Applicable to Certain Consumer Sales (Explanatory Report by A.T. von Mehren). The expectation was that the draft would become a Convention or a part of a Convention. The project did not go through<sup>320</sup>. However, the *Zeitgeist* has arguably changed, as evidenced by the significantly growing existence of specific rules applicable to international jurisdiction or / and the applicable law in consumer matters throughout the world – up to the extremely recent Mercosur Agreement on the Law Applicable to International Consumer Contracts (with a

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<sup>318</sup> Statute of the Hague conference on private international law, entered into force on 15 July 1955 with amendments in 2007, <https://www.hcch.net/en/instruments/conventions/full-text/>.

<sup>319</sup> See supra Part 2, The growing economic importance of tourism in the world.

<sup>320</sup> On the text on the law applicable to consumer sales (history and contents, including the definition of consumer), see M. Pertegas and I. Goicoechea, « Hague Conference », in D. P. Fernández Arroyo (ed.), « Consumer Protection in International Private Relationships /La protection des consommateurs dans les relations privées internationales », CEDEP, Paraguay, 2010, p. 614 ff. In the same book, see also D. P. Fernández Arroyo, “General Report. Consumer protection in international private relations”, p. 659, spec. p. 667.

provision explicitly covering tourism)<sup>321</sup>. Many Hague Members such as Argentina<sup>322</sup>, Brazil<sup>323</sup>, China<sup>324</sup>, Japan<sup>325</sup> and Panama<sup>326</sup> have now enacted specific provisions on consumer contracts. This is without prejudice of the rather generous interpretation of the long-standing set of private international legal rules protecting the consumer which has prevailed in other Hague Members, as exemplified by the case-law of the CJEU in the EU on the Brussels regime<sup>327</sup>. The inclusion of consumer contracts in the current and well-advanced Hague Judgments Project testifies to this change of scenery<sup>328</sup>. The November 2017 Draft Judgments Convention does not exclude from its scope of application consumer contracts (see Article 2<sup>329</sup>). These are therefore included within the scope of application of the draft Convention. The Preliminary Explanatory Report thus states that, “unlike the 2005 Choice of Court Convention,

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<sup>321</sup> *Acuerdo del Mercosur sobre derecho aplicable en materia de contratos internacionales de consumo*, adopted in Brasilia (Brazil) on 20 December 2017 (MERCOSUR/CMC/DEC. N° 36/17, <http://www.mercosur.int/innovaportal/v/8585/11/innova.front/acuerdos-en-el-mercador>). Mercosur itself is not a Member of the Hague Conference. However, the Mercosur Members who adopted the Agreement are all members of the Hague Conference: Argentina, Brazil, Paraguay and Uruguay. According to its Article 9.1, the Agreement will enter in force 30 days after the deposit of the instrument of ratification by the second Mercosur Member. It is open to the adhesion of Associate Members of Mercosur. Article 2 provides for a comprehensive definition of the consumer: « Consumidor: significa toda persona física o jurídica que adquiere o utiliza productos o servicios en forma gratuita u onerosa como destinatario final, en una relación de consumo o como consecuencia o en función de ella ». Whilst Article 4 covers contracts concluded by a consumer in the State of his domicile, Article 5 deals with contracts concluded outside this State and is thus of particular interest. Article 6 focus on the choice of the applicable law. The Agreement also includes an article 7 specifically on Travel Contracts and Tourism (*Contratos de viaje y turismo*): “Los contratos de viaje cuyo cumplimiento tenga lugar fuera del Estado Parte del domicilio del consumidor, contratados en paquete o con servicios combinados, como grupo turístico o conjuntamente con otros servicios de hotelería y/o turismo, serán regulados por el derecho del domicilio del consumidor”. The Agreement also includes an article 8 specifically on time-sharing.

<sup>322</sup> Articles 2654 and 2655, new *Código Civil y Comercial de la Nación*, in force since 1 August 2015.

<sup>323</sup> Article 22 II, new Code of Civil Procedure (Law 13.105), in force since 18 March 2016.

<sup>324</sup> Article 42, Law of the People's Republic of China on Application of Law to Foreign-Related Civil Relations, in force since 1 April 2011.

<sup>325</sup> Article 3-4 (1), Act for the Partial Amendment of the Code of Civil Procedure and the Civil Interim Relief Act, in force since 1 April 2012. See also Article 11 of the Act on General Rules for Application of Laws, in force since 2007.

<sup>326</sup> Articles 8, 90 and 95, *Código de Derecho Internacional Privado* (Law n° 7, 8 May 2014), in force since 8 November 2014.

<sup>327</sup> It may be interesting to note that the Dominican Republic (a non-Member State of the Hague Conference) has now rules of private international law specific to consumers (Articles 13, 16.4 and 63, *Ley no 544-14 de Derecho Internacional Privado de la República Dominicana*, in force since 20 December 2014) and that one of the key reasons for this State to enact Law no 544-14 was the importance of tourism for this country (see the explanations given by J. C. Fernández Rozas, “Pourquoi la République Dominicaine a-t-elle besoin d'une loi de droit international privé?”, in J. C. Fernández Rozas (ed.), “Armonización del Derecho Internacional Privado en el Caribe. L'harmonisation du Droit International Privé dans le Caraïbe. Harmonization of Private International Law in the Caribbean. Estudios y Materiales Preparatorios y Proyecto de Ley Modelo Ohadac de Derecho Internacional Privado de 2014”, Madrid, Iprolex, 2015, p. 229. To the rise of rules of private international law specifically applicable to consumers, one may add the apparition of many authorities, networks and rules protecting consumers throughout the globe at domestic level. Some of these rules have been interpreted liberally, as exemplified by the case-law of the CJEU on Directive 93/13 on unfair terms in consumer contracts and civil procedure. In several countries, consumer protection has gained constitutional status, notably in Latin America.

<sup>328</sup> In addition, the Hague Conference has already adopted a Convention which clearly applies to consumers, even if they do not benefit from specific provisions: the Convention of 2 October 1973 on the Law Applicable to Products Liability. Eleven States are currently parties to this convention.

<sup>329</sup> The draft Convention is available at <https://assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf>.

the draft Convention applies to [...] consumer contracts”<sup>330</sup>. The Judgments Project has now entered its final phase and therefore the likelihood that consumer contracts are excluded from the draft Convention appears low. In dealing with tourists as consumers of tourism service, the Tourism Convention here suggested will further consolidate the experience of the Hague Conference in relation to consumer issues. It should be noted in this respect that the Tourism Project would not focus on any consumer, but a consumer who is international par excellence: the tourist coming from abroad.

— The Hague Conventions are often built on a cross-border cooperation mechanism between entities called ‘Central Authorities’<sup>331</sup>, a mechanism frequently seen as a ‘trademark’ of the Hague Conference. Examples include the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (73 Contracting States) and the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (98 Contracting Parties). These are highly successful and useful conventions, demonstrating on a daily basis the know-how of the Hague Conference. The Tourism Convention here suggested would follow this path and draw on the experience acquired throughout the years in the functioning of the Central Authorities network mechanism.

— The Hague Conference provides post-implementation support<sup>332</sup>. It enables to iron out any difficulty arising from the practical implementation of the Convention and to improve them on a regular basis. These services could serve well the Tourism Convention here suggested.

In conclusion, we are of the opinion that the Tourism Project is compatible with the mandate of the Hague Conference on Private International Law.

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<sup>330</sup> Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), Preliminary Document no 7 of October 2017, Judgments Convention: Preliminary Explanatory Report (Professors F. J. Garcimartín Alférez and G. Saumier), p. 8, <https://assets.hcch.net/docs/e1b5b4de-d68e-41f0-9ac4-6492345a5b0d.pdf>.

<sup>331</sup> In this respect, see notably G Droz, *Evolution du rôle des autorités administratives dans les conventions de droit international privé au cours du premier siècle de la Conférence de La Haye*, Etudes offertes à Pierre Bellet, Litec, 1991, p. 129.

<sup>332</sup> See for example the Services provided by the Permanent Bureau in relation to the 1980 and 1996 Conventions, Preliminary Document No 13 of September 2017, Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention (10-17 October 2017), <https://assets.hcch.net/docs/4abd647b-03a6-487a-b889-1d88a1a2b461.pdf>.



## Part 7. Compatibility of the Tourism Project with the work conducted in other fora

### On the UNWTO projects in the general area of protection of tourists

The UNWTO projects in the general area of protection of tourists originally arose out of “the need for greater protection for travellers in the event of serious disasters”, as highlighted by the severe disruption of the air traffic in Europe following the eruption of the Icelandic volcano in April 2010.<sup>333</sup> At “the height of the crisis, more than one million travellers over the world found themselves stranded far from their homes without the possibility of returning, for periods of up to ten days” and numerous tourists were completely neglected.<sup>334</sup> That same year, in June, the UNWTO Executive Council requested from the UNWTO Secretary-General “a draft document based on the principles of the Global Code of Ethics for tourism and/or any other existing international regulation concerning this issue”<sup>335</sup>. This document, entitled *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, was indeed presented a few months later at the 89<sup>th</sup> session of the Executive Council, in October 2010<sup>336</sup>. It notably recalled the existence of the Global Code of Ethics for Tourism adopted by the UNWTO General Assembly in 1999,<sup>337</sup> whilst pointing out its difficult implementation.

The Study went on to analyse the causes of this situation and identified, “**above all**, the non-binding nature of the GCET which makes governments wary of transposing its principles into national law, fearing that this would lead to distortions in competition and hurt the country's tourism and enterprises, as such implementation would not be generalized at the worldwide level”<sup>338</sup>. The idea would ultimately lead to the draft UNWTO Framework Convention on Tourism Ethics (formerly the draft Convention on Tourism Ethics), which started in 2015.

However, the Study then stated that, with the Icelandic volcano crisis, the UNWTO realised the very high level of confusion regarding the “attribution of responsibilities in terms of the obligation to assist tourists in situations of force majeure and regarding rights on compensation for damages they may have suffered”<sup>339</sup>. The solution advocated was a new binding instrument

<sup>333</sup> UNWTO, Decisions taken by the Executive Council at its eighty-eighth session, Puerto Iguazú, Argentina, 8 June 2010, document CE/88/DEC, [http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/088\\_dec.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/088_dec.pdf), p. 2.

<sup>334</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, presented at the 89<sup>th</sup> session of the Executive Council, Kish Island, Iran, 24-26 October 2010, document CE/89/8, August 2010, [http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089\\_08.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089_08.pdf), no 4.

<sup>335</sup> UNWTO, Decisions taken by the Executive Council at its eighty-eighth session, document CE/88/DEC, op. cit., p. 3.

<sup>336</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, document CE/89/8, op. cit.

<sup>337</sup> Resolution A/RES/406(XIII). The Code is available at <http://cf.cdn.unwto.org/sites/all/files/docpdf/gcetbrochureglobalcodeen.pdf>

<sup>338</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, op. cit. no 3 (expression in bold and underlined in original).

<sup>339</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, op. cit., no 4.



on the rights and obligations of tourists / consumers and travel organisers,<sup>340</sup> with its suggested scope to include package travel and accommodation (Annex II). This idea led to the UNWTO Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, which started in 2011.

Before embarking on the study of these two UNWTO Draft Conventions, it seems important to note that, in its Study, the UNWTO Secretariat listed in Annex I a list of instruments that, at the regional or world level, directly or indirectly, deal with the rights and obligations of tourists and tourist service providers. It observed that “this body of texts leaves important areas in the field of tourism without any regulation” (no 5). From the perspective of the Tourism Project, this is all the more true as none of the instruments listed focus on access to justice in a cross-border context at a global level. In other words, there does not seem to be a need to examine the work carried outside the UNWTO when examining the compatibility of the Tourism Project with the work conducted in other fora<sup>341</sup>. In this respect, it is noteworthy to point out that the United Nations have revised in 2015 their Guidelines for Consumer Protection, which now includes the following paragraph on tourism: “Member States should ensure that their consumer protection policies are adequate to address the marketing and provision of goods and services related to tourism, including, but not limited to, travel, traveller accommodation and timeshares. Member States should, in particular, address the cross-border challenges raised by such activity, including enforcement cooperation and information-sharing with other Member States, and should also cooperate with the relevant stakeholders in the tourism-travel sector”<sup>342</sup>.

These Guidelines constitute however a non-binding instrument in contrast with the Tourism Project. The United Nations also decided to establish under the revised 2015 United Nations Guidelines for Consumer Protection, and within the framework of the United Nations Conference on Trade and Development (UNCTAD), an Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy<sup>343</sup>. The functions of this new standing body are to provide a forum for consultations, undertake research, conduct voluntary peer reviews, collect information, provide technical assistance, monitor the application and implementation of the UNGCP, and periodically review the guidelines<sup>344</sup>. In other words, the IGE is not mandated to draft binding instruments (international conventions) such as the Tourism Project.

<sup>340</sup> UNWTO Secretariat, Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector, op. cit., no 8.

<sup>341</sup> For an examination of the work of different international organisations in the field of tourism (UN, UNWTO, WTO, UNESCO, OECD, etc.), albeit without encountering an equivalent to the Tourism Project, see A. Soares, “International Tourist: a New Dimension of Consumer Protection”, in A. Sierralta, C. Lima Marques, J. A. Moreno Rodríguez (ed.), “Derecho internacional, mundialización y gobernanza. Jornadas de la ASADIP, Lima, Noviembre de 2012”, CEDEP and ASADIP, Asunción, Paraguay, 2012, p. 385, spec. p. 391 ff. A review by the author of this report of the relevant websites led to the same conclusion. On this matter, see also A. Soares, “A tutela internacional do consumidor turista”, *Revista de Direito do Consumidor*, April-June 2012, p. 113, spec. p. 136 ff.; W. S. Kaku, L. M. Giordani and A. Soares, “O consumidor turista nas organizações internacionais no continente americano e na UNWTO”, *Revista de Direito do Consumidor*, Jan.-Feb. 2015, p. 319).

<sup>342</sup> 2015 United Nations Guidelines for Consumer Protection (adopted by UN General Assembly in resolution 70/186 of 22 December 2015, document A/RES/70/186), no 78, [http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf).

<sup>343</sup> 2015 United Nations Guidelines for Consumer Protection, op. cit., no 95 ff.

<sup>344</sup> Guidelines, no 97 : « The intergovernmental group of experts on consumer protection law and policy shall have the following functions: (a) To provide an annual forum and modalities for multilateral consultations, discussion and exchange of views between Member States on matters related to the guidelines, in particular their implementation and the experience arising therefrom; (b) To undertake studies and research periodically on consumer protection issues related to the guidelines based on a consensus and the interests of Member States and disseminate them with a view to increasing the exchange of experience and giving

## A. The UNWTO Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers

### The draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers (process)

After several years of negotiations, the Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers nears a final stage. The UNWTO General Assembly had requested its Secretary-General to present the final text of the (then termed) Convention on the Protection of Tourists and Tourism Service Providers at its Twenty-second session in 2017 for approval<sup>345</sup>. However, at the last working group meeting, which was held on 28 and 29 March 2017 at the headquarters of the UNWTO in Madrid (Spain), it appeared that further meetings would prove necessary in order to reach consensus on key issues of the Draft Convention still under discussion and that the latter would not be finalized for the Twenty-second session of the General Assembly. Nevertheless, it was expected that the Draft Convention would be finalised before the next UNWTO General Assembly in 2019. With the aim of not delaying the Tourism Project unnecessarily, the working group decided to request the General Assembly to grant a mandate to the Secretary-General to convene an International Treaty Conference at a later stage, preferably in 2018 for the approval and adoption of the Convention, so that whenever the draft text is finalized and approved by the working group it will be sent to all UNWTO Member States for their consideration and the UNWTO Secretariat will subsequently organize an international treaty conference for its final discussion and adoption. This suggested approach was endorsed by the UNWTO Executive Council at its 105th session in Madrid, Spain (10-12 May 2017)<sup>346</sup>.

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greater effectiveness to the guidelines; (c) To conduct voluntary peer reviews of national consumer protection policies of Member States, as implemented by consumer protection authorities; (d) To collect and disseminate information on matters relating to the overall attainment of the goals of the guidelines and to the appropriate steps Member States have taken at the national or regional levels to promote effective implementation of their objectives and principles; (e) To provide capacity-building and technical assistance to developing countries and economies in transition in formulating and enforcing consumer protection laws and policies; (f) To consider relevant studies, documentation and reports from relevant organizations of the United Nations system and other international organizations and networks, to exchange information on work programmes and topics for consultations and to identify work-sharing projects and cooperation in the provision of technical assistance; (g) To make appropriate reports and recommendations on the consumer protection policies of Member States, including the application and implementation of these guidelines; (h) To operate between and report to the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; (i) To conduct a periodic review of the guidelines, when mandated by the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; (j) To establish such procedures and methods of work as may be necessary to carry out its mandate». The IGE first met in October 2016 (see <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1060>). After a second meeting in July 2017, the IGE will hold its third session on 09 – 10 July 2018 (<http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1674>).

<sup>345</sup> UNWTO, Resolutions adopted by the General Assembly at its Twenty-first session, Medellin, Colombia, 17 September 2015, Resolution A/RES/654(XXI) on the report of the Secretary, Part I: Programme of Work, (d) Draft UNWTO Convention on the Protection of Tourists and Tourism Service Providers (4 August 2015, document A/21/8(I)(d)), [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_res\\_final\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_res_final_en_0.pdf).

<sup>346</sup> UNWTO, Report of the Secretary-General, Part I: Programme of work for 2016-2017, (c) UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, 20 July 2017, submitted to the Twenty-second session of the General Assembly, Chengdu, China (11-16 September 2017), document A/22/10(I)(c), no 9,

The Twenty-second session of the General Assembly, which took place in Chengdu, China (11-16 September 2017), granted the mandate: “The General Assembly, Having examined the report of the Secretary-General summarizing the recent activities carried out on the draft “UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers” together with the latest draft text of the said Convention, 1. Takes note of the significant progress made by the Working Group in the elaboration of the draft Convention [...] 3. Requests the Secretary-General to continue with the drafting of the Convention and encourages the Working Group to finalize a draft text with the Secretariat that could be submitted to all Member States; and 4. Grants a mandate to the Secretary-General to convene an International Treaty Conference before the next General Assembly for the negotiation and adoption of the Convention”<sup>347</sup>. Continuing the work on UNWTO Convention on the Protection of tourists and tourism service providers constitutes an explicit objective of the UNWTO programme of work for 2018-2019<sup>348</sup>.

A characteristic of the process is that the UNWTO was especially careful not to infringe on existing legal structures, either at the global or regional levels, and to minimize potential conflicts. It consequently liaised, among others, with world associations such as IATA (International Air Transport Association) on the subject of air transport or, on the subject of package travel, with the European Union at the time of revision of the original Package Travel Directive, in order to ensure precise consistency with the then upcoming proposal of the revised Package Travel Directive<sup>349</sup>. In the same spirit, a public consultation took place between August and November 2016.

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[http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_10\\_i\\_c\\_unwto\\_convention\\_on\\_the\\_protection\\_of\\_tourists\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_10_i_c_unwto_convention_on_the_protection_of_tourists_en_0.pdf). See also UNWTO, Implementation of the General Programme of Work for 2016-2017, 14 August 2017, report submitted to the 106th session of the Executive Council in Chengdu, China (12 September 2017), document CE/106/3, no 4, [http://cf.cdn.unwto.org/sites/all/files/pdf/ce106\\_03\\_implementation\\_of\\_the\\_general\\_programme\\_of\\_work\\_2016-2017\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/ce106_03_implementation_of_the_general_programme_of_work_2016-2017_en.pdf).

<sup>347</sup> Resolution A/RES/686(XXII) on the Report of the Secretary-General, Part I: Programme of work for 2016-2017, (c) UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 35.

<sup>348</sup> Report of the Secretary-General, Part II: Draft Programme of work and budget of the Organization for 2018-2019, 12 July 2017, submitted to the Twenty-second session of the General Assembly, Chengdu, China (11-16 September 2017), document A/22/10(II), p. 20, [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_10\\_ii\\_draft\\_programme\\_of\\_work\\_and\\_budget\\_for\\_2018-2019\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_10_ii_draft_programme_of_work_and_budget_for_2018-2019_en_0.pdf). This document was adopted by the General Assembly at its Twenty-second session by Resolution A/RES/688(XXII), [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 39.

<sup>349</sup> UNWTO, Report of the Secretary-General, Part I: Programme of Work, (d) Draft UNWTO Convention on the Protection of Tourists and Tourism Service Providers, 4 August 2015, submitted to the Twenty-first session of the General Assembly in Medellin, Colombia, 12 – 17 September 2015, document A/21/8(I)(d), no 5, [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_08\\_i\\_d\\_draft\\_unwto\\_convention\\_on\\_the\\_protection\\_of\\_tourists\\_and\\_tourism\\_service\\_providers\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_08_i_d_draft_unwto_convention_on_the_protection_of_tourists_and_tourism_service_providers_en.pdf). The UNWTO also asked for the official confirmation of the European Union’s competences on any issue covered by the draft Convention. In this regard, at the working group meeting of 28 March 2017, the European Commission confirmed its interest on the Convention, especially on Annex II and Annex III, and confirmed the approval of a mandate to start official negotiations on the Convention on behalf of the European Union (UNWTO, Report of the Secretary-General, Part I: Programme of work for 2016-2017, (c) UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, 20 July 2017, document A/22/10(I)(c), op. cit., no 8).

## **The draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers (contents)**

The title of the draft Convention changed overtime, reflecting evolving contents<sup>350</sup>, from Convention on the Protection of Tourists/Consumers and Travel Organizers to the current Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, through notably the Convention on the Protection of Tourists and Tourism Service Providers. The following analysis will be based on the latest publicly available draft<sup>351</sup>.

The preamble recalls in particular the need to increase legal certainty for tourists and tourism service providers and the desire to increase the confidence of tourists as consumers in tourism service providers<sup>352</sup>. The general part of the draft convention mostly contains provisions on its purpose and scope (notably the fact that it applies to States Parties, tourists, tourism service providers and tourism services), general principles (e.g. States may always grant a higher level of protection to tourists) and classical questions relating to the law of treaties (entry into force, amendment rules, denunciation, dispute settlement between States Parties through diplomatic channels or other means of peaceful settlement, etc.). Key definitions are also included in this part. In particular, the tourist is defined as “a person taking a trip which includes an overnight stay to a main destination outside his/her usual environment, for less than a year, for any main purpose (business, leisure or other personal purpose) other than to be employed by a resident entity in the country or place visited” (Article 3 (a)). The substance of the Convention is in reality included in Annexes, which form an integral part of the Convention (Article 5). When joining the Convention, a State Party shall accept at the minimum one Annex (Article 4).

There are three annexes. The first Annex focuses on Assistance in Emergency Situations<sup>353</sup> and details the applicable assistance obligations of States Parties (not private tourism service providers). Assistance to tourists includes all basic needs such as shelters, food, facilitating visa requirements, medicine and health care. States Parties have several duties such as facilitating the entry of official, medical and technical staff from the country of origin of the

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<sup>350</sup> For the perspective of a major actor in the tourism industry, which participated in the relevant UNWTO working group, see the European travel agents' and tour operators' associations (ECTAA)'s Activity Report 2015 – 2016, section 1.2 p. 4, <http://www.ectaa.org/files/cms/ad16-182-123.pdf>; Activity Report 2014 – 2015, section 1.3 p. 6 (<http://www.ectaa.org/files/cms/ad15-194-123.pdf>); it initially advocated against the expansion of scope of the draft convention beyond assistance and repatriation to tourists in case of force majeure situations).

<sup>351</sup> It may be found in UNWTO, Report of the Secretary-General, Part I: Programme of work for 2016-2017, (c) UNWTO Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, 20 July 2017, document A/22/10(I)(c), op. cit., Annex. No other draft version has been made publically available in the documents of the 106th and 107th Executive meetings, which took place respectively on 12 and 16 September 2017 in Chengdu, China. The next Executive meeting will take place in Spain in the first semester 2018. The documents of the meetings are available at <http://imd.unwto.org/content/executive-council-sessions>. On the evolution of the draft convention, see M. G. Sanches Lima, The Supranational Organizations' initiatives aimed at protection of tourists. Why International Conventions are needed?, in Claudia Lima Marques and Dan Wei (ed.), The future of international protection of consumers, Porto Alegre: PPGD/UFRGS, 2016, p. 94, spec. paragraph 4.3.1 p. 100 on the replacement of the expression force majeure situations by emergency situations. The author is Executive Vice-President of IFTTA (International Forum of Travel and Tourism Advocates), which worked closely with the UNWTO on this project.

<sup>352</sup> The latter may have contributed to the feeling of redundancy with the Tourism Project in some quarters as the Tourism Project proceeds from the same spirit, albeit on a different topic (access to justice).

<sup>353</sup> It may be worth mentioning that for the purposes of Annex I, any reference to a tourist constitutes at the same time a reference to a excursionist, which is defined as a person taking a trip which does not include an overnight stay to a main destination outside his/her usual environment (Article 1 (c) of Annex I).

tourist. They are invited to set up permanent professional crisis management services (recommended practice).

Annex II relates to Package Travel and includes provisions on pre-contractual and contractual information obligations, transfer of the package travel contract to another tourist, alteration of the price or other package travel contract terms, termination of the package travel contract before the start of the package, failure of performance or improper performance, assistance obligation to the tourist in difficulty (including in unavoidable and extraordinary circumstances), and protection in the event of the insolvency of the organiser.

Annex III on Accommodation<sup>354</sup> focuses mainly on (pre-contractual and contractual) information obligations, failure of performance or improper performance and assistance obligation in case of in case of unavoidable and extraordinary circumstances or emergency situations.

The annexes tend to be quite detailed and contain recommended practices based on current best practices. They will undoubtedly increase the protection of tourists and clarify the rights and obligations of tourism service providers.

However, no provision relates to access to justice (*lato sensu*) save in an ancillary way: “Recommended Practice 4.1 The package travel contract should include the following additional elements: [...] (d) Information [...] on alternative dispute resolution mechanisms” (Article 4 on Contractual information obligations, Annex II on Package Travel). It could help with the lack of information often faced by tourists. However, the impact of this provision would be limited to package travel, in the countries where the UNWTO Convention has been ratified and Annex II accepted, and where recommended practices are followed. Furthermore, it is not clear whether the duty to provide information on alternative dispute resolution mechanisms also implies setting them up in case they do not exist in the first place. In all likelihood, it does not cover the question of efficiency and quality of the said alternative dispute resolution mechanisms. Finally, the provision covers access to justice *lato sensu* (ADR) but does not address the lack of information regarding access to justice *stricto sensu*. Similarly, the draft Convention includes Recommended Practice 2.1: “States Parties should take the necessary measures to ensure that, before the conclusion of contract, the accommodation service provider provides the tourist in any appropriate form with the following [...] information: (c) In the case of distance contracts, where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the accommodation service provider is subject, and the methods for having access to it” (Article 2 on Pre-contractual information obligations, Annex III on Accommodation). However, the impact of this provision would (notably) be limited to a *pre-contractual* obligation<sup>355</sup>, in (distance) accommodation contracts, in the countries where the UNWTO Convention has been ratified and Annex III accepted, and where recommended practices are followed. Furthermore, it is

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<sup>354</sup> It may be worth noting that for the purposes of Annex III, “A person travelling for purposes related to his/her trade, craft, business or profession (business traveler) is considered as a tourist, unless the accommodation service is purchased on the basis of a general agreement for the arrangement of business travel between an accommodation service provider and another natural or legal person who is acting for purposes relating to his trade, business, craft or profession. Notwithstanding the foregoing, States Parties are entitled to adopt restrictive provisions for excluding business travelers from the scope of this Annex” (Annex III, Article 1, Standard 1.2). In other words, the definition of a tourist varies according to the issue at stake and flexibility is moreover offered to States Parties.

<sup>355</sup> In contrast with the provisions of Standard 2.1, Recommended Practice 2.1 not only shall not form an integral part of the contract (Standard 3.1) but it is not included, at least explicitly, in the information listed in Recommended Practice 3.1 on additional contractual information.



clear that the duty to provide information on alternative dispute resolution mechanisms only applies where such mechanisms exist (‘where applicable’) and therefore does not imply setting them up in case they do not exist in the first place. It also does not cover the question of efficiency and quality of the said alternative dispute resolution mechanisms. Finally, the provision covers — even if in an ancillary way — access to justice *lato sensu* (ADR), but does not address the lack of information regarding access to justice *stricto sensu*.

There are also provisions on the need to provide the tourist with information on *internal* complaint procedures (internal to the tourism service provider), i.e. Recommended practice 4.1 in Annex II on Package Travel<sup>356</sup> and Standard 2.1 (Article 2 on pre-contractual information obligations) in Annex III on Accommodation<sup>357</sup>.

## Conclusion

In brief, none of the provisions of the draft convention under consideration overlaps or is incompatible with the Tourism Project as currently expressed in the Brazilian proposal<sup>358</sup>. This should hopefully alleviate the concerns expressed in particular by one Member State<sup>359</sup> in relation to the Tourism Project. This Member State put forward arguments that show that these reserves are probably based on a misunderstanding, which is the multiplication of work on closely related topics in different fora and the confusion that could ensue. The work carried out by the HCCH does not seem to overlap, nor does it appear to be incompatible, with that of the UNWTO, especially the work referred to by that Member State, that is, the Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers. The projects are complementary<sup>360</sup>. Moreover, contact had been made in early 2017 between the two institutions in order to precisely rule out any possible overlap or incompatibility. The ensuing correspondence has been very encouraging and culminated in a letter of endorsement

<sup>356</sup> “The package travel contract should include the following additional elements: [...] (d) Information on available complaint procedures” (Article 4 on Contractual information obligations). On complaints and the relationship between the retailer and the organiser, see Recommended Practice 9.1, Article 9, Failure of performance or improper performance.

<sup>357</sup> Standard 2.1: “States Parties shall take the necessary measures to ensure that, before the conclusion of the contract, the accommodation service provider provides the tourist in a clear and comprehensible manner with adequate information on: [...] (g) The complaint handling policy”. Standard 3.1 adds that this information shall form an integral part of the contract and shall not be altered unless the contracting parties expressly agree otherwise.

<sup>358</sup> This conclusion is made on the basis of the latest publically available draft posted on the UNWTO website as of 1 January 2018. For an assessment of a previous version of the UNWTO draft Convention here considered, see C. Lima Marques, “The Brazilian “Draft Convention on Co-operation in Respect of Tourists and Visitors Abroad” at the Hague Conference and the UN World Tourism Organization’s Draft Convention”, in J. Moreno Rodriguez and C. Lima Marques (ed.), “Los servicios en el Derecho Internacional Privado – jornadas de la ASADIP 2014”, ASADIP: Porto Alegre, Brazil, 2014, p. 823, spec. II, who concludes that the Tourism Project complements the third version of the UNWTO draft Convention.

<sup>359</sup> Response to the questionnaire, in fine.

<sup>360</sup> The Member State also mentions the new EU travel package directive in order to support its reserves to the Tourism Project. It is submitted that this directive does not deal with access to justice, save in an ancillary manner (necessity to mention available recourses in the contract). A clear parallel exist here with the UNWTO draft Convention (Annex II) since the EU directive inspired the UNWTO draft convention. The equivalent of the Tourism Project in the EU would be the work carried out notably by the ECC-Net and related procedures such as the European Small Claims Procedure. They neither overlap nor are incompatible with the EU travel package directives but complement them in the field of access to justice. One should add that despite expressing strong reserves to the Tourism Project on the previously mentioned grounds, France recognises that some improvements could be useful, namely the accessibility of the information provided to tourists (which should be offered in languages other than French) and the development of visio-conferences for parties based abroad.



of the Tourism Project by the UNWTO. Here is the key extract in relation to the draft Convention on the Protection of Tourists and the Rights and Obligations of Tourism Service Providers: “UNWTO’s General Assembly has requested the Secretariat to develop a Draft Convention on the Protection of Tourists and the Rights and Obligations of Tourism Service Providers (UNWTO Convention) [...] Having considered the work of Hague Conference on Private International Law (HCCH) in relation to the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists (HCCH Project), I am pleased to confirm that the HCCH Project complements work undertaken by the UNWTO in relation to [...] the UNWTO Convention [...]. I am also pleased to confirm that, considering their relevant scopes, there are currently no overlaps of the work undertaken by the UNWTO and the HCCH respectively”<sup>361</sup>.

## **B. The UNWTO Framework Convention on Tourism Ethics**

### **The Global Code of Ethics for Tourism (presentation and implementation record)**

The UNWTO General Assembly adopted a Global Code of Ethics for Tourism in 1999<sup>362</sup>. It includes an article 8, entitled ‘Liberty of tourist movements’, whose paragraph 2 states that “Tourists and visitors [...] should benefit from prompt and easy access to local administrative [and] legal [...] services”. However, the Code is a non-binding instrument and its practical impact relies on the good-will of interested parties.

Surveys on the implementation of the Code have been carried out since 2000 in order to assess the degree of its implementation<sup>363</sup>. The 2004 survey — i.e. five years after the adoption of the Ethics Code — revealed that several UNWTO Member States had either incorporated the principles of the Code into their legislative texts or used them as a basis when establishing national laws and regulations. However, the outcome of the survey was also deemed to be disappointing, notably because the survey “failed to mobilize one third of the [UN]WTO member States and territories, some of them of considerable importance -current and prospective- in the international tourism scene”<sup>364</sup>. Furthermore, the participation of the private and operational sector was very poor<sup>365</sup>.

In 2010, a study from the UNWTO Secretariat did not prove more optimistic. It stated that too few professionals and even administrations were aware of the Code; that it had hardly been transposed into law; that its overall effectivity remained limited and that the dispute settlement mechanism it instituted was little-used<sup>366</sup>.

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<sup>361</sup> Letter from the UNWTO Secretary-General T. Rifai to the Hague Conference on Private International Law’s Secretary-General C. Bernasconi, dated 19 December 2017. Given its importance, the complete text of the letter may be found as an Annex to the Preliminary Document relating to this report.

<sup>362</sup> Resolution A/RES/406(XIII). The Code is available at <http://cf.cdn.unwto.org/sites/all/files/docpdf/gcetbrochureglobalcodeen.pdf>.

<sup>363</sup> The Implementation Reports on the Global Code of Ethics for Tourism are available at <http://ethics.unwto.org/en/content/implementation-reports-global-code-ethics-tourism>.

<sup>364</sup> Report on the WTO Survey on the Implementation of the Global Code of Ethics for Tourism, presented to the UNWTO General Assembly in 2005, document A/16/20 Add.1, <http://ethics.unwto.org/sites/all/files/docpdf/2005a-16-20add1.pdf>, p. 10. Moreover, several responding countries did not disseminate the Code nor planned to do so.

<sup>365</sup> *Ibid.*

<sup>366</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, presented at the 89<sup>th</sup> session of the Executive Council, Kish Island, Iran, 24-26 October 2010, document CE/89/8, August 2010, [http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089\\_08.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/lmd/ec/en/089_08.pdf), no 2.

The UNWTO has been working hard ever since on enhancing the implementation status of the Code of Ethics. For example, in 2011, it formulated a Private Sector Commitment to the Global Code of Ethics for Tourism, for the signature of private enterprises worldwide. In signing the commitment, companies pledge to uphold the Code and to report on its promotion and implementation to the World Committee on Tourism Ethics<sup>367</sup>. In reality, there is no obligation of results, only an obligation of conduct: the formula used in the template provided is that the “company / organization shall *endeavour* to adhere to the *principles* of the UNWTO Global Code of Ethics for Tourism”<sup>368</sup>. As of December 2017, 539 companies and associations from around the world have signed this ‘commitment’<sup>369</sup>. However, this is a self-proclaimed adhesion to the Code. In order to partially address the issue, the UNWTO and its World Committee on Tourism Ethics launched in 2016 the UNWTO Ethics Award, which recognizes companies committed to making their business more responsible and sustainable through the implementation of the Global Code of Ethics for Tourism<sup>370</sup>.

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- <sup>367</sup> Established in 2001 (UNWTO General Assembly resolution A/RES/438(XIV)) and reformed in 2011, the World Committee on Tourism Ethics is the body responsible for interpreting, applying and evaluating the provisions of the UNWTO Global Code of Ethics for Tourism (see UNWTO General Assembly resolution A/RES/607(XIX) of 2011, <http://cf.cdn.unwto.org/sites/all/files/docpdf/protocolofimplementationwcteres6072011en.pdf>). Its nine members are appointed in their personal capacity. The current composition of the Committee, following the decision taken by the Twenty-second session of the UNWTO General Assembly (Chengdu, China, 11-16 September 2017), may be found in resolution A/RES/706(XXII), [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 75 (see also *The mandate of the World Committee on Tourism Ethics renewed until 2021*, UNWTO Press Release no 17110, 28 September 2017, <http://media.unwto.org/press-release/2017-09-25/mandate-world-committee-tourism-ethics-renewed-until-2021>). The Committee is currently chaired by P. Lamy, previously the World Trade Organisation Director-General. Its permanent secretariat is in Rome, Italy. For an overview of the activities of the World Committee on Tourism Ethics, see Report of the World Committee on Tourism Ethics, presented to the Twenty-second session of the UNWTO General Assembly (Chengdu, China, 11-16 September 2017), document A/22/14 (8 August 2017), [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_14\\_report\\_of\\_the\\_world\\_committee\\_on\\_tourism\\_ethics\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_14_report_of_the_world_committee_on_tourism_ethics_en.pdf), p. 1-2, with the “Recommendations on the Responsible Use of Ratings and Reviews on Digital Platforms by the World Committee on Tourism Ethics” in Annex (p. 9 ff.). The corresponding resolution of the UNWTO General Assembly is Resolution A/RES/705(XXII), [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 73.
- <sup>368</sup> The italics are from us. A template of the Private Sector Commitment is available at <http://cf.cdn.unwto.org/sites/all/files/docpdf/commitmentgcetprivatesectoren.pdf>. It is noteworthy to point out that the template provided does not mention Article 8.2, only Articles 2, 3, 5, 6, and 9. This is understandable given the targeted public.
- <sup>369</sup> According to <http://ethics.unwto.org/content/private-sector-commitment-unwto-global-code-ethics-tourism>. For an illustration, see *Viajes El Corte Inglés commits to Global Code of Ethics for Tourism*, UNWTO Press Release no 17013, 3 February 2017, <http://media.unwto.org/press-release/2017-02-09/viajes-el-corte-ingles-commits-global-code-ethics-tourism>.
- <sup>370</sup> UNWTO, Press Release no 16050, 16 June 2016, <http://media.unwto.org/press-release/2016-06-16/unwto-and-world-committee-tourism-ethics-launch-unwto-ethics-award>. For the nominees, see *UNWTO announces the winners and finalists of the UNWTO Awards*, UNWTO Press Release no 17124, 27 November 2017, <http://media.unwto.org/press-release/2017-11-27/unwto-announces-winners-and-finalists-unwto-awards>; *Ilunion Hotels receives UNWTO Ethics Award*, UNWTO Press Release no 16095, 21 November 2016, <http://media.unwto.org/press-release/2016-11-21/ilunion-hotels-receives-unwto-ethics-award>. For a report on the Private Sector Commitment to the Global Code of Ethics for Tourism, see Report of the World Committee on Tourism Ethics, document A/22/14, op. cit., p. 3 ff., for example the Reporting on the implementation of the Code of Ethics by Companies p. 4 ff. See also the corresponding UNWTO General Assembly Resolution A/RES/705(XXII), [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 73.

## The UNWTO Framework Convention on Tourism Ethics (rationale and process)

Nevertheless, the non-binding character of the Code came to be seen as a core weakness. It was identified by the UNWTO Secretariat at the main cause for its poor implementation record: “**above all**, the non-binding nature of the [Code] which makes governments wary of transposing its principles into national law, fearing that this would lead to distortions in competition and hurt the country's tourism and enterprises, as such implementation would not be generalized at the worldwide level”<sup>371</sup>.

This analysis was shared by the UNWTO World Committee on Tourism Ethics and, consequently, the conversion of the Ethics Code into a binding instrument advocated: “The voluntary nature of the Code of Ethics itself is possibly one of the decisive factors explaining the so far moderate level of application of the ethical principles by NTAs [National Tourism Authorities], as well as the reluctance to report relevant implementation actions undertaken in this field. The World Committee on Tourism Ethics has therefore [...], in consultation with the UNWTO Secretariat, entrusted the Legal Adviser with the preparation of a proposal for converting the Code into a legally-binding international convention”<sup>372</sup>. This conclusion was reached by the said Committee at its meeting of 26-27 May 2015 and the text of a draft convention, along with an invitation to endorse it, was submitted to the UNWTO General Assembly at its Twenty-first session in September 2015<sup>373</sup>. The General Assembly decided the creation of a special Working Group to examine in depth the procedures and implications of adopting a draft UNWTO Convention on Tourism Ethics, and expressed the wish for a convention to be adopted at its Twenty-second session in 2017<sup>374</sup>. The latter took place in Chengdu, China, from 4 to 9 September 2017 and saw the adoption of the Framework Convention on Tourism Ethics: “The General Assembly, Having examined the draft UNWTO Framework Convention on Tourism Ethics [...] 4. Approves the English version of the Framework Convention on Tourism Ethics and the Optional Protocol to the Convention [...] and 5. Requests the Secretariat to take all necessary steps for the adoption of the Framework Convention on Tourism Ethics as approved by the General Assembly in all the [5] official

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<sup>371</sup> UNWTO Secretariat, *Study on tourist/consumer protection. Drafting of a new international legal instrument in the tourism sector*, document CE/89/8, op. cit., no 3 (expression in bold and underlined in original). See also UNWTO Secretary-General's Report on the World Committee on Tourism Ethics (Part II), presented to the Nineteenth session of the UNWTO General Assembly in October 2011 (document A/19/14 (II), August 2011, [http://cf.cdn.unwto.org/sites/all/files/pdf/a19\\_14\\_wcte\\_part\\_2\\_e.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a19_14_wcte_part_2_e.pdf)), no 5 in fine: “In the longer term, it might be convenient to reflect upon the possibility to adopt the Code under the form of a convention”.

<sup>372</sup> Report of the World Committee on Tourism Ethics, presented to the Twenty-first session of the UNWTO General Assembly in September 2015, Addendum 1, Implementation of the Global Code of Ethics for Tourism (document A/21/10 Add.1, 30 July 2015, <http://cf.cdn.unwto.org/sites/all/files/docpdf/a2110reportoftheworldcommitteeontourismethicsadd1en0.pdf>), no 13. This document reports on the survey carried out in 2014/15. No 13 concludes Part II on the implementation of the Ethics Code by UNWTO Member States. However, the transformation of the Ethics Code into a binding instrument should have consequences for the private sector, notably in the countries which rely on the private sector for the implementation of the Code (see no 8).

<sup>373</sup> Report of the World Committee on Tourism Ethics, presented to the Twenty-first session of the UNWTO General Assembly in September 2015 (document A/21/10, 30 July 2015, [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_10\\_report\\_of\\_the\\_world\\_committee\\_on\\_tourism\\_ethics\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_10_report_of_the_world_committee_on_tourism_ethics_en.pdf)), no 12 ff.

<sup>374</sup> Resolution A/RES/668(XXI), <http://cf.cdn.unwto.org/sites/all/files/docpdf/a2res667668669xxien.pdf>: “5. Expresses the wish that a convention can be adopted, after an in-depth consultation among the Member States, by the General Assembly during its twenty-second session in 2017”.

languages of the Organization”<sup>375</sup>. It may be noted that this is the first time that the UNWTO adopts an international convention in the framework of its General Assembly, which constitutes a landmark in the Organization’s history as the UNWTO remained the only UN specialized agency that had not developed a convention regulating matters within its field of expertise<sup>376</sup>.

### The UNWTO Framework Convention on Tourism Ethics (contents)

The publicly available UNWTO Framework Convention on Tourism Ethics<sup>377</sup> transcribes the nine substantial principles of the Ethics Code in its Articles 4 to 12, starting with Article 4 of the Framework Convention mirroring Article 1 of the Code and ending with Article 12 of the Framework Convention following Article 9 of the Code. The wording is often identical<sup>378</sup>. The Chair of the World Committee on Tourism Ethics confirmed on 6<sup>th</sup> March 2017 that the then draft Convention on Tourism Ethics only consisted in an ‘upgrade’ of the current Ethics Code to a traditional international convention, i.e. a binding instrument, and that what has already been agreed by the UNWTO Members with the Code of Ethics has not been changed<sup>379</sup>. Hence, Article 11 (2) of the Framework Convention states that “Tourists [...] should benefit from prompt and easy access to local administrative [and] legal [...] services”. There is no change in terms of contents in comparison to the existing Article 8.2 of the Ethics Code<sup>380</sup>. The

<sup>375</sup> UNWTO General Assembly, Twenty-second session, Chengdu, China (11 – 16 September 2017), Resolution A/RES/707(XXII), [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 77. Adde *Historical decision: approval of the UNWTO Framework Convention on Tourism Ethics*, UNWTO Press release no 17104, 15 September 17, <http://media.unwto.org/press-release/2017-09-15/historical-decision-approval-unwto-framework-convention-tourism-ethics> : “The member States of the World Tourism Organization (UNWTO) approved today an historical document - the UNWTO Framework Convention on Tourism Ethics”.

<sup>376</sup> Given the novelty of the exercise, ‘Special Guidelines for the consideration and possible adoption of the Framework Convention on Tourism Ethics by the 22nd session of the General Assembly’ were drafted. See UNWTO General Assembly, Twenty-second session, Chengdu, China (11 – 16 September 2017), Resolution A/RES/678(XXII), Approval of the Guidelines for the adoption of the draft UNWTO Framework Convention on Tourism Ethics and appointment of an ad hoc committee for the preparation of the final draft, [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 11. The guidelines may be found in Annex of document A/22/5 rev.1 (4 September 2017), presented to the Twenty-second session of the UNWTO General Assembly, [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_05\\_approval\\_of\\_the\\_guidelines\\_for\\_the\\_adoption\\_of\\_the\\_draft\\_convention\\_on\\_tourism\\_ethics\\_rev.1\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_05_approval_of_the_guidelines_for_the_adoption_of_the_draft_convention_on_tourism_ethics_rev.1_en.pdf), p. 4.

<sup>377</sup> UNWTO General Assembly, Twenty-second session, Chengdu, China (11 – 16 September 2017), Resolution A/RES/707(XXII), Annex, [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 80 ff. The Office of the Legal Counsel of UNWTO prepared an Explanatory Note on the ‘Adoption of the INWTO Framework Convention on Tourism Ethics and subsequent steps for its entry into force’, which may be found in document A/22/16 rev. 2 (23 August 2017), presented to the Twenty-second session of the UNWTO General Assembly, [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_16\\_approval\\_or\\_adoption\\_of\\_the\\_convention\\_on\\_tourism\\_ethics\\_rev.2\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_16_approval_or_adoption_of_the_convention_on_tourism_ethics_rev.2_en.pdf), p. 18 ff.

<sup>378</sup> At times, it slightly differs. Compare, for example, Article 4 (4) of the Framework Convention and Article 1.4 of the Ethics Code; the titles of Article 7 of the Framework Convention and of Article 4 of the Ethics Code; the wording of Article 9 (3) and (4) of the Framework Convention and of Article 6.3 and 6.4 of the Ethics Code; the wording of Article 10 (2) of the Framework Convention and of Article 7.2 of the Ethics Code; or the titles of Article 12 of the Framework Convention and of Article 9 of the Ethics Code. These changes have no foreseeable impact on the conclusion reached in this section.

<sup>379</sup> Interview of P. Lamy, Chair of the World Committee on Tourism Ethics, released on 6<sup>th</sup> March 2017 (the link is available in *UNWTO advances the conversion of the Code of Ethics into an international Convention*, UNWTO, Press release no 17026, 6 March 2017, <http://media.unwto.org/press-release/2017-02-23/unwto-advances-conversion-code-ethics-international-convention>, which makes a renvoi to <https://www.youtube.com/watch?v=p4RDiVGjKNQ>), at 1.36 and 1.45.

<sup>380</sup> The word ‘visitor’ disappeared. However, no practical impact is foreseen.



difference lies in the legal nature of the provision since Article 11 (2) of the Framework Convention will be legally binding on State Parties. Some innovation may be found in Articles 1 to 3 and Articles 13 ff. of the Framework Convention. However, no article elaborates specifically on Article 11 (2). Most articles relate to the World Committee on Tourism Ethics (mandate, composition, functioning, respectively Articles 13 to 15) or to the binding nature of the instrument (e.g. Articles 18 ff. on signature; ratification, acceptance, approval or accession; entry into force; amendment and denunciation; etc.). Articles 16 and 17 relate to the Conference of States Parties, which shall be the plenary body of the Framework Convention. Only Article 3 has any direct relation with Article 11 (2)<sup>381</sup>, as it considers the ‘Means of implementation’ of the Framework Convention. However, the wording leaves a wide margin of discretion to State Parties and does not impose on them any strong detailed legal obligation, let alone on access to justice. Article 3 is reproduced here for the convenience of the reader:

“(1) States Parties shall promote responsible, sustainable and universally accessible tourism by formulating policies that are consistent with the ethical principles in tourism set out in the Convention.

(2) States Parties shall respect and promote the ethical principles in tourism, especially through encouraging tourism enterprises and bodies to reflect these principles in their contractual instruments and make reference to them in their codes of conduct or professional rules.

(3) States Parties shall periodically submit a report to the World Committee on Tourism Ethics concerning any measures taken or envisaged for the implementation of this Convention.

(4) States Parties, which are also parties to the Optional Protocol to the Framework Convention on Tourism Ethics, shall promote among tourism enterprises and bodies the conciliation mechanism provided for in the Optional Protocol”<sup>382</sup>.

### **The Optional Protocol to the Framework Convention on Tourism Ethics**

The Optional Protocol to the Framework Convention on Tourism Ethics<sup>383</sup> supplements this convention by providing a process for the settlement of disputes in the tourism sector. It constitutes a separate and independent legal instrument open to the States Parties to the Framework Convention. Importantly, the text has substantially evolved over time. Its previous

<sup>381</sup> Article 1 focus on definitions.

<sup>382</sup> A previous version of Article 3 of the Framework Convention may be found in Article 10 of the draft Convention on Tourism Ethics, entitled ‘Obligations of the State Parties under the Present Convention’: “States Parties to the present Convention (a) expressly accept the principles embodied in the Global Code of Ethics for Tourism, and agree to use them as a basis when establishing their national laws and regulations and to publish and make them known as widely as possible, in particular by disseminating it among all the stakeholders in tourism development and inviting them to give it broad publicity; (b) encourage tourism enterprises and bodies to include the relevant provisions of the Convention in their contractual instruments or to make specific reference to them in their own domestic or professional rules and to report on them to the World Committee on Tourism Ethics; (c) pledge to periodically submit a report to the World Committee on Tourism Ethics concerning the implementation of the Convention”. The wording also left a wide margin of discretion to State Parties and did not impose on them any strong detailed legal obligation, let alone on access to justice. The draft Convention may be found in Report of the World Committee on Tourism Ethics, presented to the Twenty-first session of the UNWTO General Assembly in September 2015, Addendum 2, Draft UNWTO Convention on Tourism Ethics (document A/21/10 Add.2, 30 July 2015, [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_10\\_report\\_of\\_the\\_world\\_committee\\_on\\_tourism\\_ethics\\_ad\\_d2\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_10_report_of_the_world_committee_on_tourism_ethics_ad_d2_en_0.pdf)), p. 8 ff.

<sup>383</sup> UNWTO General Assembly, Twenty-second session, Chengdu, China (11 – 16 September 2017), Resolution A/RES/707(XXII), Annex, [http://cf.cdn.unwto.org/sites/all/files/pdf/a22\\_resolutions\\_en.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a22_resolutions_en.pdf), p. 93 ff.

version, entitled Optional Protocol on Conciliation mechanism for the settlement of disputes<sup>384</sup> and which complemented the draft Convention on Tourism Ethics, provided that “Any party to a dispute opposing two or several States Parties to the present Protocol, or a State Party and two or more stakeholders in tourism development or two or more stakeholders of tourism development having the nationality of a State Party or if the dispute concerns incidents having taken place on the territory of a State Party against each other and concerning the interpretation or application of the UNWTO Convention on Tourism Ethics, may refer it to the World Committee on Tourism Ethics” (provision (a)). Prima facie, a stakeholder in tourism development seemed to mean a member of the tourist industry and, consequently, the Protocol did not seem to apply to individual tourists in their access to justice. However, the Protocol elaborated on Article 10.3 of the Ethics Code and the Procedures for consultation and conciliation for the settlement of disputes concerning the application of the Code of Ethics for Tourism<sup>385</sup>. Provision no 1 of these procedures states that “In the event of a dispute concerning the interpretation or application of the Global Code of Ethics for Tourism, two or more stakeholders in tourism development may jointly submit the matter of such a dispute [...] to the World Committee on Tourism Ethics”. Interestingly, these procedures, in footnote 1, define the stakeholder in tourism development in the broadest way possible and it includes tourists: “For the purpose of the Code, the term “stakeholders in tourism development” includes: [...] travellers, including business travellers, and visitors to tourism destinations, sites and attractions”. The optional Protocol on Conciliation mechanism for the settlement of disputes did not contain such definition. Therefore, we did not know for sure if it would cover individual tourists. Nevertheless, since it used the same term this could not be excluded: disputes opposing “two or more stakeholders of tourism development having the nationality of a State Party” could perhaps include disputes between a tourist and a tourism services provider. The preliminary version of this report therefore reflected on the process foreseen by the Protocol for the resolution of disputes and expressed the view that the Tourism Project could complement the Protocol. It was also submitted that the Protocol proved very ambitious as the nine members of the World Committee on Tourism Ethics were expected to deal with any tourism-related dispute that may be referred to them from around the globe<sup>386</sup>.

The current Optional Protocol to the Framework Convention on Tourism Ethics clarifies the matter. Whilst its first provision states that the World Committee on Tourism Ethics “shall act as an independent and voluntary conciliation mechanism for any dispute that may arise among States Parties to the present Protocol, or stakeholders in tourism development, concerning the interpretation or application of the Convention”, its second provision narrows down the scope of application of the Protocol to “Any dispute between two or several States Parties to the present Protocol, or a State Party and one or more stakeholders” (provision 2). It therefore now excludes the referral to the World Committee on Tourism Ethics of a dispute between two stakeholders such as the dispute between a tourist and a tourism services provider<sup>387</sup> (unless

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<sup>384</sup> It may be found in Report of the World Committee on Tourism Ethics, presented to the Twenty-first session of the UNWTO General Assembly in September 2015, Addendum 2 (document A/21/10 Add.2, 30 July 2015, [http://cf.cdn.unwto.org/sites/all/files/pdf/a21\\_10\\_report\\_of\\_the\\_world\\_committee\\_on\\_tourism\\_ethics\\_ad\\_d2\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/a21_10_report_of_the_world_committee_on_tourism_ethics_ad_d2_en_0.pdf)), p. 20 ff.

<sup>385</sup> Adopted by the World Committee on Tourism Ethics in October 2004 (WCTE/DEC/4(II)) and endorsed by UNWTO General Assembly resolution A/RES/506(XVI) of December 2005, <http://cf.cdn.unwto.org/sites/all/files/docpdf/gcetpassportglobalcodeen.pdf>.

<sup>386</sup> For further details, see Council on General Affairs and Policy of the Conference – March 2017, Preliminary Document no 3 of March 2017, Annex, Preliminary Report, p. XX – XXII.

<sup>387</sup> A definition of ‘stakeholders in tourism development’ may today be found in Article 1 (e) of the Framework Convention on Tourism Ethics. It is similar to that found in footnote 1 of Procedures for



the provider is a State party to the Protocol<sup>388</sup>). The UNWTO Optional Protocol to the Framework Convention on Tourism Ethics and the Tourism Project therefore complement each other and do not overlap.

## Conclusion

The HCCH draft proposal appears to have the potential to complement and strengthen the tourist protection measures that are being developed by the UNWTO. Moreover, these measures could benefit from the long-standing and successful experience of the Organisation in drafting international conventions on cross-border matters and supporting their implementation<sup>389</sup>. It could complement the conversion of the Ethics Code into a binding instrument by elaborating on Article 11 (2) of the Framework Convention (Article 8.2 of the Ethics Code) in a truly meaningful — i.e. practical and tourist-friendly — way. Therefore, properly designed, the work of the Hague Conference on Co-operation and Access to Justice for International Tourists could complement the work of the UNWTO. It is worth mentioning that most countries members of the UNWTO Working Group on the Framework Convention on Tourism Ethics<sup>390</sup> are also Hague Conference Members and that none, in the response to the questionnaire for Members received up to 11 January 2018 included, raised the possibility of incompatibility or duplication with the Tourism Project<sup>391</sup>.

Moreover, contact had been made in early 2017 between the two institutions in order to precisely rule out any possible overlap or incompatibility. The ensuing correspondence has been very encouraging and culminated in a letter of endorsement of the Tourism Project by the UNWTO. Here is the key extract in relation to the Framework Convention on Tourism Ethics: “UNWTO’s General Assembly has requested the Secretariat to develop [...] the UNWTO Framework Convention on Tourism Ethics (UNWTO Framework). Having considered the work of Hague Conference on Private International Law (HCCH) in relation to the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists (HCCH Project), I am pleased to confirm that the HCCH Project complements work undertaken by the UNWTO in relation to [...] the UNWTO Framework. I am also pleased to confirm that, considering their relevant scopes, there are currently no overlaps of the work undertaken by the UNWTO and the HCCH respectively”<sup>392</sup>.

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consultation and conciliation for the settlement of disputes concerning the application of the Code of Ethics for Tourism.

<sup>388</sup> In that case, the remarks previously made in the Preliminary Report continue to apply.

<sup>389</sup> By contrast, the Framework Convention on Tourism Ethics is the first one concluded within UNWTO.  
<sup>390</sup> UNWTO, Report of the Secretary-General, Part II: General Programme of Work, (a) Implementation of the General Programme of Work 2016-2017, 18 August 2016, submitted to the 104<sup>th</sup> session of the Executive Council in Luxor, Egypt (30 October – 1 November 2016), document CE/104/5(a), Annex V Report of the Working Group on the UNWTO Convention on Tourism Ethics, [http://cf.cdn.unwto.org/sites/all/files/pdf/ce104\\_05\\_a\\_implementation\\_of\\_the\\_general\\_programme\\_of\\_work\\_2016-2017\\_en\\_0.pdf](http://cf.cdn.unwto.org/sites/all/files/pdf/ce104_05_a_implementation_of_the_general_programme_of_work_2016-2017_en_0.pdf): Chad, Democratic Republic of Congo, Morocco, Republic of Congo; Brazil, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Puerto Rico; Bhutan, China, Indonesia, Japan, Macao China, Philippines, Samoa, Sri Lanka, Thailand; Azerbaijan, Bulgaria, Cyprus, Flanders, the Former Yugoslav Republic of Macedonia, France, Greece, Hungary, Israel, Montenegro, Poland, Portugal, Russian Federation, Slovenia, Turkey; Egypt.

<sup>391</sup> The question was not asked explicitly but could be deemed to be included in Question 20 and on another UNWTO project a Member spontaneously raised the issue of possible duplication with the Tourism Project: see the word of caution issued by France in relation to the UNWTO draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers.

<sup>392</sup> Letter from the UNWTO Secretary-General T. Rifai to the Hague Conference on Private International Law’s Secretary-General C. Bernasconi, dated 19 December 2017. Given its importance, the complete text of the letter may be found as an Annex to the Preliminary Document relating to this report.

## C. Conclusion

The UNWTO Framework Convention on Tourism Ethics (including its Optional Protocol) and the UNWTO current Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers do not appear to overlap or be incompatible with the Tourism Project. On the contrary, the Tourism Project seems to complement the broader agenda of the UNWTO, in particular the desire to increase the confidence of tourists as consumers in tourism service providers highlighted notably in the preamble of the UNWTO Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, as well as the long-term objective of sustainable tourism<sup>393</sup>. The final text of the UNWTO Draft Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers is not yet available. However, the draft has now entered its final stage with the mandate to convene an International Treaty Conference before the 2019 UNWTO General Assembly for the negotiation and adoption of this Convention. It is therefore unlikely to be substantially amended in a way which impacts on the Tourism Project, especially in the light of the productive working relationship established between the HCCH and the UNWTO following the contact made in early 2017 and which culminated in the following letter of endorsement of the Hague Tourism Project by the UNWTO in late 2017: “UNWTO’s General Assembly has requested the Secretariat to develop a Draft Convention on the Protection of Tourists and the Rights and Obligations of Tourism Service Providers (UNWTO Convention) and the UNWTO Framework Convention on Tourism Ethics (UNWTO Framework). Having considered the work of Hague Conference on Private International Law (HCCH) in relation to the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists (HCCH Project), I am pleased to confirm that the HCCH Project complements work undertaken by the UNWTO in relation to both the UNWTO Convention and the UNWTO Framework. I am also pleased to confirm that, considering their relevant scopes, there are currently no overlaps of the work undertaken by the UNWTO and the HCCH respectively”<sup>394</sup>. Continued collaboration between the HCCH and the UNWTO is on the agenda, with a view to avoiding any waste of resources, and more generally to continue the successful working relationship between both international organisations for the benefit of their Members and tourists.

A definitive assessment of the Framework Convention, (including its Optional Protocol) and a near definitive assessment of the Convention on the Protection of Tourists and on the Rights and Obligations of Tourism Service Providers, in the light of the Tourism Project, together with the perspective of continued collaboration between both HCCH and the UNWTO, thus lead us to the conclusion that the Tourism Project neither overlaps nor is incompatible with the UNWTO work, but rather complements it. Given the inexistence (to our knowledge) of any other global forum where similar work is being considered, we can safely conclude that the Tourism Project is compatible with the work conducted in other fora.

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<sup>393</sup> We note that 2017 had been declared by the United Nations as the International Year of Sustainable Tourism for Development (see *International Year of Sustainable Tourism for Development 2017 kicks off*, UNWTO Press release no 17007, 19 January 17, <http://media.unwto.org/press-release/2017-01-19/international-year-sustainable-tourism-development-2017-kicks>).

<sup>394</sup> Extract from the Letter from the UNWTO Secretary-General T. Rifai to the Hague Conference on Private International Law’s Secretary-General C. Bernasconi, dated 19 December 2017. Given its importance, the complete text of the letter may be found as an Annex to the Preliminary Document relating to this report.

## **Part 8. Annexes**

Questionnaire of December 2016 relating to the Proposal concerning a Draft Convention on Co-operation and Access to Justice for International Tourists (Questionnaire for Members, Connected States and 5 other States)

Questionnaire of January 2017 relating to the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists (Questionnaire for non-Members)



Questionnaire of December 2016 relating to the Proposal concerning  
a Draft Convention on Co-operation and Access to Justice  
for International Tourists

## INTRODUCTION TO THE QUESTIONNAIRE

At its meeting of 9-11 April 2013, the Council on General Affairs and Policy (Council) of the Hague Conference on Private International Law (HCCH) took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. It decided to add this topic to the Agenda.<sup>395</sup>

At its meeting in 2015, the Council decided that the Permanent Bureau shall conduct a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. The work was to be done by an expert, hired by the Permanent Bureau, and financed by Brazil.<sup>396</sup>

Through a competitive, merits-based selection process, the Permanent Bureau hired the services of Mr Emmanuel Guinchard, a legal academic currently working in the United Kingdom who specialises in Private International Law and Comparative and International Civil Procedure.<sup>397</sup>

Mr Guinchard is currently conducting a preliminary background research on the topic of Co-operation and Access to Justice for International Tourists with a view to begin an assessment as to whether a new international treaty (i.e., a new Hague Convention) or other instrument should be developed in order to strengthen tourists' and visitors' access to justice.

The Permanent Bureau invites Members to answer the following questionnaire in order to obtain further information on legislation and to assess the need for and feasibility of an international instrument in this area. Your responses to this Questionnaire would be a valuable contribution to the current assessment.

The Permanent Bureau kindly requests that your answers be submitted (in either English or French) as soon as possible, but in any case by 28 February 2017. The responses to the Questionnaire will be analysed, and the findings are to be included, to the greatest extent possible, in the briefings submitted to the 2017 Meeting of the Council.

Responses should be sent by e-mail to M. Guinchard at <tourism@hcch.nl>,mailto: with the following heading and indication in the subject field: "Questionnaire on Co-operation and Access to Justice for International Tourists— [name of Member]." with the following heading and indication in the subject field: "Questionnaire on Co-operation and Access to Justice for International Tourists— [name of Member]."

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<sup>395</sup> Conclusions and Recommendations (C&R) adopted by the 2013 Meeting of the Council on General Affairs and Policy, C&R Number 12, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>396</sup> C&R adopted by the 2015 Meeting of the Council on General Affairs and Policy, C&R Number 8, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>397</sup> Some of Mr Guinchard's publications can be found at <<https://northumbria.academia.edu/emmanuelguinchard>>.



Should you wish to provide any additional information in respect of this questionnaire you are welcomed to do so, notably by attaching extra sheets, if necessary.

Should you have any questions about this Questionnaire, please do not hesitate to contact M. Guinchard, at <tourism@hcch.nl>.

We are grateful for your time and assistance on this important project.

## IDENTIFICATION

Name of Member:

For follow-up purposes:

Name and title of contact person:

Name of Authority / Office

Telephone number:

E-mail address:

## PUBLICATION OF RESPONSES

The Permanent Bureau intends to publish the responses to this questionnaire on the HCCH website. Your response will be published in this manner unless, and to the extent that, you explicitly object to your response being so published

## Part I Definition

1. What is the definition of a tourist<sup>398</sup> and / or visitor<sup>399</sup> in your legal system, if any?
2. What is the definition of a consumer in your legal system, if any?

## Part II Legislation

### **International Agreements** (including Regional Agreements)

3. Please briefly describe the main international source of law for access to justice<sup>400</sup> in your country (e.g. an international convention on human rights), if any, and whether it applies to tourists in the same conditions as nationals?
4. Is your country a party to an international agreement with provisions on the protection of tourists, and/or access to justice (applied to tourists in the same conditions as nationals e.g. the Hague 1980 Convention on Access to Justice)?

### National legislation and case-law

5. Please briefly indicate the main domestic source of law (including statute or case-law) for access to justice in your country (e.g. a constitutional provision) and whether it applies to tourists in the same condition as nationals?

## Part III Information

6. Are tourists, and more generally foreign consumers, specifically made aware of their rights and legal remedies, as well as of the available dispute resolution procedures (in particular

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<sup>398</sup> Unless otherwise specified, for the purpose of this Questionnaire, a ‘tourist’ is understood to be a non-national.

<sup>399</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to ‘tourist’ is understood to encompass a reference to visitor, including short- and long-term visitors.

<sup>400</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to ‘justice’ is understood to refer to ‘civil justice’ (as opposed to ‘criminal justice’).

the small claims procedure, consumer mediation / conciliation and consumer arbitration), and how?

7. Is this information available in multiples languages? If so, to which extent and in which languages?
8. Have your nationals approached your consulates abroad seeking information on legal remedies and / or available consumers' complaint procedures in the visited country? Do you have any figures or other information to share in this respect?

#### Part IV Mediation, conciliation and arbitration

9. Is mediation / conciliation / arbitration available for tourists and / or consumer claims in your country? Please briefly describe it (source of law, scope of application, compulsory or voluntary nature of mediation / arbitration, existence of a specific consumer mediation / arbitration scheme or not, funding / cost, legal representation, control by the courts, etc.) and state whether tourists have access to it in the same conditions as national consumers and whether it is available in cross-border disputes.
10. Is the physical presence of the parties required or modern communication technologies available?

#### Part V Court proceedings

11. Is there a small claims court and / or procedure in your country? If it is the case, please briefly describe it (source of law, composition, location, jurisdiction, etc.) and state whether tourists have access to it in the same conditions as national consumers.
12. Is there any court or procedure specifically dedicated to tourists or foreign consumers? If it is the case, please briefly describe it.
13. Can you commence proceedings from abroad?

14. Do tourists have access to general judicial procedures (i.e. outside the small claims system, where available) in the same conditions as national consumers? If not, please state where the differences lie (e.g. caution judicatum solvi)?
15. Is court-annexed mediation available in your country? Is it compulsory? Are tourists in the same situation as nationals in this respect (e.g. have access to free legal advice where necessary)?
16. Are tourists required to express themselves in the language of the court or does the court accept foreign languages and which one(s)?
17. Are hearings compulsory in your legal system, especially for small claims procedures? Should this be the case, may they be conducted, or continued to be conducted, from abroad, or is the physical presence of the tourist compulsory?

#### Part VI Assistance

18. Is there any administrative or governmentally funded body specifically in charge of helping tourists / foreign consumers / consumers in relation to access to justice or mediation / conciliation/ arbitration? Please describe it briefly.

#### Part VII Assessment and Future

19. In your experience, what are the main issues which arise in your jurisdiction with respect to access to justice for tourists? (i.e., what is being done well in your jurisdiction and what could be improved?)
20. Are there planned or on-going law reforms in the field of access to justice for tourists in your jurisdiction (including joining an international instrument, like the Hague 1980 Convention on Access to Justice)? If so, please describe them.



Questionnaire of January 2017 relating to the  
Proposal on a Draft Convention on Co-operation and  
Access to Justice for International Tourists



## INTRODUCTION TO THE QUESTIONNAIRE

At its meeting of 9-11 April 2013, the Council on General Affairs and Policy (Council) of the Hague Conference on Private International Law (HCCH, [www.hcch.net](http://www.hcch.net)) took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. It decided to add this topic to the Organisation's Work Programme.<sup>401</sup>

At its meeting in 2015, the Council decided that the Permanent Bureau shall conduct a study on the desirability and feasibility of further work in the area of co-operation in respect of protection of tourists and visitors abroad, taking into account, inter alia the compatibility of the topic with the mandate of the Hague Conference and work conducted in other fora. To produce the study, the Permanent Bureau was invited to hire an expert who would be financed by Brazil.<sup>402</sup>

Through a competitive, merits-based selection process, the Permanent Bureau hired Mr Emmanuel Guinchard, a legal academic currently working in the United Kingdom, who specialises in Private International Law and Comparative and International Civil Procedure.<sup>403</sup>

Mr Guinchard is currently conducting preliminary background research on the topic of Co-operation and Access to Justice for International Tourists, with a view to begin an assessment as to whether a new international treaty (i.e., a new Hague Convention), or other instrument, should be developed in order to strengthen tourists' and visitors' access to justice.

The Permanent Bureau has circulated a Questionnaire to Members of the Organisation in order to obtain further information on legislation and to assess the need for and feasibility of an international instrument in this area. The input of non-governmental organisations which might have experience in this field would also be very beneficial. Your responses to this Questionnaire, sharing any information you may have based on expertise you or your organisation may have, would be a valuable contribution to the current assessment.

The Permanent Bureau kindly requests that your answers be submitted (in either English or French) as soon as possible, but in any case by 28 February 2017. The responses to the Questionnaire will be analysed, and the findings are to be included, to the greatest extent possible, in the briefings submitted to the 2017 Meeting of the Council.

Responses should be sent by e-mail to M. Guinchard at <tourism@hcch.nl>,mailto: with the following heading and indication in the subject field: "[name of non-governmental organisation] — NGO Questionnaire on Co-operation and Access to Justice for International Tourists". with the following heading and indication in the subject field: "[name of non-

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<sup>401</sup> Conclusions and Recommendations (C&R) adopted by the 2013 Meeting of the Council on General Affairs and Policy, C&R No 12, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>402</sup> C&R adopted by the 2015 Meeting of the Council on General Affairs and Policy, C&R No 8, available at <<https://www.hcch.net/en/governance/council-on-general-affairs/archive/>>.

<sup>403</sup> Some of Mr Guinchard's publications can be found at <<https://northumbria.academia.edu/emmanuelguinchard>>.

governmental organisation] — NGO Questionnaire on Co-operation and Access to Justice for International Tourists”.

Should you wish to provide any additional information in respect of this questionnaire you are welcome to do so, notably by attaching extra sheets, if necessary.

Should you have any questions about this Questionnaire, please do not hesitate to contact M. Guinchard, at <tourism@hcch.nl>.

We are grateful for your time and assistance on this important project.

## IDENTIFICATION

Name of your organisation:

Country / Countries where based:

Website of organisation, if applicable:

For follow-up purposes:

Name and title of contact person:

Telephone number:

E-mail address:

## PUBLICATION OF RESPONSES

The Permanent Bureau intends to publish the responses to this questionnaire on the HCCH website. Your response will be published in this manner unless, and to the extent that, you explicitly object to your response being so published

## Part I — Definition

1. What is the definition of a tourist<sup>404</sup> and / or visitor<sup>405</sup> in your legal system, if any?
2. What is the definition of a consumer in your legal system, if any?

## Part II — Legislation

### **International Agreements** (including Regional Agreements)

3. Please briefly describe the main international source of law for access to justice<sup>406</sup> in your country (e.g. an international convention on human rights), if any, and whether it applies to tourists in the same conditions as nationals?
4. Is your country a party to an international agreement with provisions on the protection of tourists, and/or access to justice (applied to tourists in the same conditions as nationals e.g. the Hague 1980 Convention on Access to Justice)? If so, please describe the rationale for these provisions, their scope of application and contents and state, in your view / the view of your organisation, their main positive and negative features in theory and / or practice, as applicable. (Please attach another sheet, if necessary)
5. Is your country a party to an international agreement with provisions on the protection of, and access to justice for foreign consumers? If so, please describe the rationale for these provisions, their scope of application and contents and state, in your view / the view of your organisation, their main positive and negative features in theory and / or practice, as applicable. (Please attach another sheet, if necessary)

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<sup>404</sup> Unless otherwise specified, for the purpose of this Questionnaire, a ‘tourist’ is understood to be a non-national.

<sup>405</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to ‘tourist’ is understood to encompass a reference to visitor, including short- and long-term visitors.

<sup>406</sup> Unless otherwise specified, for the purpose of this Questionnaire, a reference to ‘justice’ is understood to refer to ‘civil justice’ (as opposed to ‘criminal justice’).

## National legislation and case-law

6. Please briefly indicate the main domestic source of law for access to justice in your country (e.g. a constitutional provision) and whether it applies to tourists in the same condition as nationals?
7. Please briefly describe access to justice for foreign consumers, in particular tourists, in your jurisdiction.
8. Does this regime differ from that of national consumers, whether in theory or practice?
9. Is there any specific legislation or case-law in relation to access to justice for tourists?

## Part III — Information

10. Are tourists, and more generally foreign consumers, specifically made aware of their rights and legal remedies, as well as of the available dispute resolution procedures (in particular the small claims procedure, consumer mediation / conciliation and consumer arbitration)?
11. How are consumers, and more specifically tourists, made aware of their rights and legal remedies, as well as of the available dispute resolution procedures? For example, are relevant brochures systematically distributed to tourists on their arrival in the country, be it at the border or at their hotel or elsewhere? Where a visa is required, and granted, is information on the rights and duties of consumers / tourists systematically included, along with information on legal remedies and contact details of relevant bodies? In which formats (e.g. paper, electronic) is this information made available? Is this information provided to tourists or simply made available, for example at the point of entry (e.g. an airport) or in tourist information centers or at hotels, etc. (i.e. is there proactive action in this respect)?
12. Is technical legal language used or is it drafted in everyday language?

13. How precise is the information given? Is it general information or detailed practical information with description of the procedure, guidelines on the identification of the court having jurisdiction (where applicable), contact details, amount of fees and ways to pay courts or mediators / conciliators or arbitrators fees (where applicable) and introduce a claim?
14. Is this information available in multiples languages? If so, to which extent and in which languages?
15. Would you say that there is a lack of available information? A lack of information directly and specifically provided to tourists?
16. Do you have any figures on how many tourists are aware of legal remedies and procedures in your country? Do you have any estimate? Do you have such figures for national consumers / consumers in general?
17. Are tourist information centres / tourism offices systematically equipped with information on legal remedies and procedures? If you are a tourist information centre / tourism office, how many tourists are you helping in this respect? Do you hear complaints from tourists / negative feedback about their stay? How often? How substantial do the complaints appear and what is your standard process in such a situation (e.g. provide a brochure informing the tourists about their rights and remedies)? Reverse, are you aware of complaints from the travel industry back home in relation to tourists (i.e. abuse of the complaints system)?
18. Are consumers organisations systematically equipped with information on legal remedies and procedures? How many tourists are they helping in this respect?

#### Part IV — Mediation, conciliation and arbitration

19. Is mediation / conciliation / arbitration available for consumer claims in your country? Please briefly describe it (source of law, scope of application, compulsory or voluntary nature of mediation / arbitration, existence of a specific consumer mediation / arbitration

scheme or not, funding / cost, legal representation, control by the courts, etc.) and state whether tourists have access to it in the same conditions as national consumers and whether it is available in cross-border disputes.

20. Is bicultural mediation / arbitration systematically offered in cross-border disputes? If not, is bilingual mediation / arbitration systematically offered in cross-border disputes where parties do not share the same language? If not, what is the language regime?
21. Is the physical presence of the parties required or modern communication technologies available?
22. Are mediators / arbitrators specifically regulated and trained in the handling of cross-border disputes?
23. Is there a mediation / arbitration scheme or body specific to tourism or associated sector (e.g. travel)? Please describe it briefly. Are they mostly helping tourists from their country who came back from their trip or are they also, and to what extent, helping foreign tourists still in the country or who just went back and are continuing proceedings started in the visited country? Are their services free to tourists and if not what are their costs for a claim of 1000 euros? 10 000 euros?
24. If you are an association of travel agents or tour operators, do you operate a mediation scheme for dissatisfied customers? Are the latter mostly resident in your country? How many complaints do you receive on average? How many are declared admissible? How many result in the satisfaction of the tourist? How many end up in litigation? What are the limitations of your mediation scheme, for example in terms of coverage or enforcement?
25. If you are a Complaint Board / Mediation board / Alternative Dispute Resolution entity, how many tourists are appearing before you? Are these tourists mostly resident in your country or abroad? What is the average value of the dispute and what are the most typical disputes about (e.g. hotel booking and services; shopping issues; etc.)? How many claims end with the satisfaction of the tourist? What are the limitations of your mediation scheme, for example in terms of coverage (e.g. do you have 'jurisdiction' for all claims relating to all the travel agents in your country? For all claims relating to any travel agent, wherever based? What of the tourists who do not use travel agents?) or enforcement?



26. Is there any assistance to tourists during the mediation / arbitration proceedings (for example by a consumer organization)?

## Part V — Court proceedings

27. Is there a small claims court in your country? If it is the case, please briefly describe it (source of law, composition, location, jurisdiction, etc.) and state whether tourists have access to it in the same conditions as national consumers.

28. Is there a small claims procedure in your country? If it is the case, please briefly describe it (source of law, scope of application, stages, legal representation, modern communication technology, etc.) and state whether tourists have access to it in the same conditions as national consumers and whether it is available in cross-border disputes.

29. Is there a specific cross-border small claims procedure? If it is the case, please briefly describe it (source of law, scope of application, stages, legal representation, modern communication technology, etc.) and state whether tourists have access to it in the same conditions as national consumers.

30. Is there any court or procedure specifically dedicated to tourists or foreign consumers? If it is the case, please briefly describe it.

31. Do tourists have access to general judicial procedures (i.e. outside the small claims system, where available) in the same conditions as national consumers? If not, please state where the differences lie (e.g. *cautio judicatum solvi*)?

32. Is court-annexed mediation available in your country? Is it compulsory? Are tourists in the same situation as nationals in this respect (e.g. have access to free legal advice where necessary)?

33. How many tourists are appearing before your courts, especially your small claims courts (where applicable)? Are they mostly claimants or defendants?
34. How many tourists are involved in small claims procedure in your country (where applicable)? What is the average value of their claim (where applicable) and what are the most typical disputes about (e.g. hotel booking and services; shopping issues; etc.)?
35. How many tourists are involved in general judicial procedures in your country? What is the average value of their claim (where applicable) and what are the most typical disputes about (e.g. traffic accident; hotel booking and services; shopping issues; etc.)? How many claims end with the satisfaction of the tourist?
36. Is there any specific case-law in relation to tourists?
37. Are forms, such as small claims procedure or court-annexed mediation forms, easily available? Please describe briefly how and where they are made available? Are such forms available in multiple languages and which ones?
38. Do courts provide assistance to tourists for filling in the forms and if so, how (notably in which languages) and to what extent?
39. Are tourists required to express themselves in the language of the court or does the court accept foreign languages and which one(s)? Are there any pilot court or procedure in this respect?
40. Is the court communicating in its own language or is it possible for the court to communicate in the national language of the tourist or a language understood by the tourist, and which language(s)?
41. If the tourist must express himself in the language of the court, or / and that the court will express itself in its national language(s), is translation / interpretation at every step of the procedure (claim, defense, evidence, hearing, decision notably) free to the tourist? Would such translation / interpretation be provided to someone habitually resident in your country? More generally is legal advice and/or legal aid for court proceedings available to a tourist

in the same conditions as for national consumers? Is there any public funding which is not accessible to tourists?

42. Are court proceedings free to tourists and if not what is the average cost for a claim of 1000 euros? 10 000 euros? Do these fees differ from similar domestic cases? May court fees be paid from abroad without having to specifically liaise with the court or pay extra charges other than bank fees?
43. Are lawyers' fees regulated in the same way for national and foreign clients? Are there differences in practice?
44. Are all civil procedures equally available both in domestic and cross-border cases? Do the costs differ depending on the domestic or cross-border nature of the case?
45. Are hearings compulsory in your legal system, especially for small claims procedures? Should this be the case, may they be conducted, or continued to be conducted, from abroad, or is the physical presence of the tourist compulsory? If hearings are not strictly speaking compulsory, are they often deemed necessary by the Court? If the physical presence of the tourist / foreign party is not compulsory strictly speaking, is it often deemed necessary by the Court?

## Part VI — Assistance

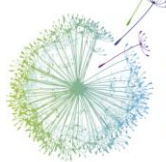
46. Is there any administrative or governmentally funded body specifically in charge of helping tourists / foreign consumers / consumers in relation to access to justice or mediation / conciliation/ arbitration? Please describe it briefly. In particular, what help are they exactly offering? Do they offer only information on available recourses (judicial procedures, arbitration, mediation / conciliation)? Do they offer mediation or conciliation services? Do they provide assistance in filling in court forms, identifying the relevant court, the payment of fees, contacting relevant bodies (courts, lawyers, bailiffs, etc.), etc.? Are they specifically tasked in assisting tourists / consumers in cross-border disputes? Are they well equipped and funded to do so? Are these bodies helping out tourists / consumers only where no judicial procedure has been initiated? Are their services free to tourists / consumers and if not what are their costs for a claim of 1000 euros? 10 000 euros?

47. Are there consumer NGOs in your country? How important are they? Do they provide help to tourists? How many tourists are they helping every year? How many claims are solved to the satisfaction of the tourist? What are consumer NGOs doing, for example do they content themselves with providing information to tourists? Do they assist them on a concrete basis, for example to fill the forms? Do they offer to act as mediators / conciliators with the other party? Are they entitled to assist the tourist in court as a friend (i.e. without legal representing the tourist)? Are their services free to the tourist? If not, what is the level of their fees for a claim of 1000 euros? 10 000 euros?
48. If you are a consumer NGO, how many tourists, *nationals of your country*, do you assist? How many *foreign* tourists do you assist? What are you doing on a concrete basis, for example do you provide information to tourists? Do you assist them in filling in the forms? Do you offer to act as mediators / conciliators with the other party? Are you entitled to assist the tourist in court as a friend (i.e. without legal representing the tourist)? Are your services free to the tourist from your country / from abroad? If not, what is the level of your fees for a claim of 1000 euros? 10 000 euros?
49. If your organization assists consumers, how many claims (for example insurance claims or credit card chargebacks) relate to tourism and what are the typical issues (e.g. traffic accident in the country visited; hotel booking and quality standards issues; shopping issues; etc.)? What is the average / median value of a claim? What is the preferred method of dealing with those claims (e.g. court proceedings or mediation) and where does it take place? What is the outcome?

## Part VII — Assessment and Future

50. In the experience of your organisation / in your professional experience, what are the main issues which arise in your jurisdiction with respect to access to justice for tourists? (i.e., what is being done well in your jurisdiction and what could be improved?)
51. In the experience of your organisation / in your professional experience, how many potential claims are never put forward by tourists because of the deterring effect of perceived (whether real or not) obstacles to justice? Could you provide figures or give an estimate?

52. Are there planned or on-going law reforms in the field of access to justice for tourists in your jurisdiction (including joining an international instrument, like the Hague 1980 Convention on Access to Justice)? If so, please describe them.
53. Are there planned or on-going law reforms which could impact on access to justice for tourists in your jurisdiction? If so, please briefly describe them.
54. Are there situations of which you are aware where a new international Convention or instrument may be helpful to facilitate access to justice to tourists?
55. Do you see any potential conflict with the current work of the UNWTO (United Nations World Tourism Organization)?



*The Secretary-General*

Mr. Christophe Bernasconi,  
Secretary General, Hague Conference on Private  
International Law

*Madrid, 19 December 2017*

Dear Mr. Bernasconi,

The World Tourism Organisation (UNWTO) is the UN Specialized Agency in charge of the promotion of responsible, sustainable and universally accessible tourism. UNWTO's General Assembly has requested the Secretariat to develop a Draft Convention on the Protection of Tourists and the Rights and Obligations of Tourism Service Providers (UNWTO Convention) and the UNWTO Framework Convention on Tourism Ethics (UNWTO Framework).

Having considered the work of Hague Conference on Private International Law (HCCH) in relation to the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists (HCCH Project), I am pleased to confirm that the HCCH Project complements work undertaken by the UNWTO in relation to both the UNWTO Convention and the UNWTO Framework. I am also pleased to confirm that, considering their relevant scopes, there are currently no overlaps of the work undertaken by the UNWTO and the HCCH respectively.

UNWTO has enjoyed the productive discussions with the HCCH in relation to this important work. Continued collaboration will be necessary to ensure that any incompatibility or overlaps, which could risk the waste of valuable limited resources, or which could complicate the international legal protective framework for tourists, can be avoided. Therefore, UNWTO is looking forward to the continuation of the exchanges with the HCCH in this area.

Finally, UNWTO notes with interest that the Final Report on the feasibility and desirability of a Draft Convention on Co-operation and Access to Justice for International Tourists will be presented to the HCCH's Member States at the HCCH's 2018 Meeting of the Council on General Affairs and Policy. In this regard, we would appreciate receiving further information on the agenda of the Meeting in order to consider UNWTO's attendance as an observer.

UNWTO is looking forward to continuing collaboration with the HCCH in relation to this important issue and is confident that, by working closely together, both Organisations can harness synergies that are of great benefit of their Members and the tourism sector as a whole.

Yours sincerely,

Taleb Rifai