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Auteur	BP Président du Groupe d'experts sur le projet Touristes et visiteurs (RLL)
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Objectif	Faire rapport sur le projet « Touristes et visiteurs » (RLL) et transmettre les Conclusions et Recommandations de la troisième réunion du Groupe d'experts (du 5 au 9 octobre 2020).
Mesure à prendre	Pour décision <input checked="" type="checkbox"/> Pour approbation <input type="checkbox"/> Pour discussion <input type="checkbox"/> Pour action / achèvement <input type="checkbox"/> Pour information <input type="checkbox"/>
Annexes	Annexe I : Aide-mémoire de la troisième réunion du Groupe d'experts sur le projet Touristes et visiteurs (RLL) Annexe II : liste des participants à la troisième réunion du Groupe d'experts sur le projet Touristes et visiteurs (RLL) Annexe III : Avant-projet – Guide pratique sur l'accès à la justice pour les touristes et visiteurs internationaux, centré sur les RLL Annexe IV – Contribution du Forum international des avocats du voyage et du tourisme (IFTTA)
Document(s) connexe(s)	Doc. préл. No 13 du CAGP de 2014 ; Doc. préл. No 2 du CAGP de 2015 ; Doc. préл. No 3 du CAGP de 2017 ; Doc. préл. No 3 du CAGP de 2018 ; Doc. préл. No 3 du CAGP de 2019 et Doc. préл. No 1 du CAGP de 2020.

Rapport sur le projet Touristes et visiteurs (RLL)

I. Introduction

- 1 Du 6 au 9 octobre 2020, le Groupe d'experts sur le projet Touristes et visiteurs (RLL) s'est réuni par vidéoconférence. Ont pris part aux discussions de cette troisième réunion 35 experts, représentant 14 États membres, une Organisation régionale d'intégration économique et quatre observateurs, ainsi que des membres du Bureau Permanent (BP) de la HCCH. La liste des participants du Groupe figure à l'annexe II.
- 2 Lors de sa réunion de 2020, le Conseil sur les affaires générales et la politique (CAGP) a invité à la convocation de cette troisième réunion du Groupe d'experts en mettant l'accent sur la détermination de l'opportunité, de la nécessité et de la possibilité d'élaborer un instrument juridique non contraignant sur les questions relatives au règlement des litiges en ligne. Le Groupe d'experts a été invité à faire état de ses travaux au CAGP lors de sa réunion de 2021¹.
- 3 L'aide-mémoire du Président figure à l'annexe I et donne un aperçu des délibérations du Groupe d'experts, notamment de l'examen des travaux ultérieurs.

II. Conclusions et Recommandations

- 4 Le Groupe d'experts a conclu que l'élaboration d'un « Guide » pourrait constituer une aide utile aux touristes et aux visiteurs dans le cadre de leurs demandes. Le Guide expliquerait comment les Conventions et Principes de la HCCH existants peuvent être pertinents pour la résolution des demandes des touristes et visiteurs internationaux (notamment des références générales à d'autres instruments pertinents) ; il énumérerait et décrirait, sans aucun jugement de valeur, les plateformes de RLL qui peuvent être utilisées par les touristes et visiteurs internationaux, en fournissant des informations factuelles, sur la base de caractéristiques spécifiques identifiées par le Groupe d'experts, qui pourraient aider les touristes et visiteurs à évaluer quelle plateforme peut répondre à leurs besoins.
- 5 Le Groupe d'experts a invité le BP à préparer, sous réserve des ressources disponibles, un avant-projet détaillé de ce « Guide » et à le communiquer aux membres du Groupe d'experts pour commentaires en amont de la réunion du CAGP de 2021.
- 6 Le Groupe d'experts invite le CAGP à prendre note de l'aide-mémoire figurant à l'annexe I et à approuver l'élaboration du guide par le BP sur la base du rapport oral du Président.

¹ Voir C&D No 4 du CAGP de 2020.

ANNEXES

Annexe I - Aide-mémoire de la Troisième réunion du Groupe d'experts sur le projet Touristes et visiteurs (RLL)

I. Introduction

- 1 Lors de sa réunion du 3 au 6 mars 2020, le Conseil sur les affaires générales et la politique (CAGP) de la HCCCH a donné mandat au Bureau Permanent (BP) de convoquer une réunion supplémentaire du Groupe d'experts sur le projet Touristes et visiteurs (para. 4 des Conclusions et Décisions (C&D) du CAGP de 2020). Le CAGP « a encouragé le Groupe d'experts à concentrer ses travaux, au moins dans un premier temps, sur l'opportunité, la nécessité et la possibilité d'élaborer un instrument juridique non contraignant sur les questions relatives au règlement en ligne des litiges ».
- 2 La première réunion du Groupe d'experts s'est tenue du 28 au 30 août 2018 et la deuxième réunion du 3 au 6 septembre, toutes deux à La Haye. La troisième réunion, qui a été organisée par le BP à La Haye, s'est tenue en ligne du 5 au 9 octobre 2020. Le Groupe d'experts a désigné André Stemmet, Conseiller (juridique) de l'ambassade d'Afrique du Sud auprès du Royaume des Pays-Bas, en qualité de Président permanent. Des experts de l'Afrique du Sud, de l'Argentine, du Brésil, du Canada, du Chili, du Costa Rica, de l'Équateur, des États-Unis d'Amérique, de la France, de la Grèce, du Mexique, de la République populaire de Chine, du Royaume-Uni, de la Serbie, de la Suisse, de l'Union européenne et du Venezuela ont participé à la réunion. L'Association internationale de droit de la consommation, le Forum international des défenseurs du voyage et du tourisme, la section des secteurs des loisirs de l'Association internationale du barreau et la Commission des Nations Unies pour le droit commercial international (CNUDCI) ont également pris part aux discussions en qualité d'observateurs.
- 3 Le Groupe d'experts a bénéficié des commentaires de plusieurs États soumis en amont de la réunion. Les délibérations ont également bénéficié du « Rapport final sur les instruments et principes internationaux pertinents pour le projet Tourisme ainsi que sur les fondements possibles de la compétence pour les questions relatives aux touristes internationaux » qui a été préparé par le consultant, le Dr Nino Sievi.

II. Délibérations

- 1. Résumé des objectifs et du champ d'application : Discussion préliminaire sur le mandat du Groupe d'experts et issue escomptée de la réunion**
- 4 Les experts sont convenus qu'il convient que les délibérations de la troisième réunion du Groupe d'experts portent clairement sur le mandat donné par le CAGP de 2020, notamment sur la nécessité et l'opportunité – outre la possibilité – d'élaborer un nouvel instrument en la matière. Les experts ont fait remarquer que la notion de « règlement des litiges en ligne » (RLL) peuvent englober un ensemble de pratiques et qu'il convient dès lors que la réunion du Groupe d'experts précise les contours de cette notion aux fins de sa discussion. Il importe également de mieux comprendre les questions et les problèmes spécifiques rencontrés par les touristes internationaux. Le Président a fait valoir qu'il convient que la réunion du Groupe d'experts examine la nécessité, l'opportunité et la possibilité d'élaborer un instrument juridique non contraignant sur les questions de RLL liées aux touristes / visiteurs, en vue de formuler un ensemble clair de recommandations au CAGP de 2021.
- 2. Évolutions récentes dans divers États et territoires en matière d'accès à la justice / protection des touristes et des visiteurs**
- 5 Le Président a précisé qu'une évaluation de la nécessité d'élaborer un instrument juridique non contraignant pourrait être réalisée à partir des contributions des experts concernant les cas

transfrontières récents notables dans leurs États et territoires respectifs et dans les ressorts juridiques régionaux et internationaux et du nombre de ces cas pour lesquels ces données existent ou sont disponibles ; ainsi qu'à partir de toute observation supplémentaire concernant les lacunes des instruments existants.

- 6 Un certain nombre d'experts ont pris note des tendances dans les données liées à l'actuelle pandémie COVID-19 (par ex., une augmentation de certains types de demandes en ligne ou de demandes générales déposées par des consommateurs liées aux voyages / services touristiques). D'autres experts ont toutefois indiqué soit qu'aucune donnée concernant les litiges de consommation n'était disponible dans leurs ressorts juridiques, soit que ce type de litige était très rare.
- 7 En outre, les experts ont constaté des lacunes au sein des instruments existants, comme cela avait également été constaté par le consultant dans ses rapports précédents. Certains experts ont fait remarquer qu'il y avait souvent un manque d'information, d'où la nécessité de communiquer des informations de base aux touristes / visiteurs portant sur leurs droits et les services de règlement des litiges qui leur sont proposés. Certains experts ont également indiqué que les touristes / visiteurs étrangers ne disposaient pas la plupart du temps du même accès aux mécanismes de règlement des litiges (accès à la justice) que les personnes résidant dans un État donné, et / ou peuvent rencontrer des obstacles en ce qui concerne l'établissement de la compétence et la détermination de la loi applicable à leur demande dans un lieu accessible, en particulier en ce qui concerne les petits litiges / « micro-dommages ». Par ailleurs, comme le montrent certaines statistiques partagées par quelques experts lors de la réunion, il pourrait s'écouler un long moment avant que des litiges portant sur des montants encore plus faibles ne soient résolus par le système judiciaire ; par exemple, jusqu'à neuf ans pour les litiges liés au tourisme portant sur des montants qui s'élèvent à quelques centaines de dollars américains. Dans un ressort juridique, les litiges de consommation (notamment ceux liés au tourisme) pourraient être résolus en moyenne en moins d'une semaine en ayant recours à une plateforme en ligne. Les grands avantages découlant de la « numérisation » dans ce domaine ont été soulignés.
- 8 Certains experts sont d'avis que les mécanismes existants peuvent être adéquats et ne sont pas convaincus de la nécessité / de l'opportunité d'élaborer un nouvel instrument international portant sur la résolution des litiges, qui repose essentiellement sur d'autres moyens que de nombreux touristes / visiteurs peuvent déjà utiliser pour résoudre leurs demandes (par ex., par le biais d'une assurance voyage ou de garanties sur cartes de crédit). Un expert a également fait remarquer qu'il n'y avait aucune raison pour que les actions intentées par des touristes / visiteurs soient favorisées (par ex., par le biais des mécanismes de règlement des litiges gratuits) et que les problèmes d'accès à la justice identifiés rencontrés par les touristes / visiteurs n'étaient pas spécifiques au tourisme, mais bien les mêmes pour toutes les demandes mineures, ce qui inciterait à adopter une approche globale de tous les litiges de consommation. D'autres experts ont en revanche estimé que l'accent devait être mis uniquement sur les touristes internationaux. Certains ont souligné la nécessité de tenir compte des touristes / visiteurs se trouvant dans des situations particulièrement vulnérables, par ex., ceux qui voyagent pour des raisons familiales.

3. Systèmes existants de RLL et de règlement alternatif des différends (RAD)

- 9 Dans ce segment, le Dr James Ding, Commissaire de l'Inclusive Dispute Avoidance and Resolution Office du ministère de la Justice de la RAS de Hong Kong de la République populaire de Chine, a donné un aperçu du programme COVID-19 de RLL du ministère ainsi que du Cadre de collaboration de l'APEC pour le RLL des litiges transfrontières entre entreprises. Le consultant a également fait une présentation sur la « Legal Tech » et son application possible dans le contexte du RLL.

- 10 Les experts ont commenté l'opportunité de certaines caractéristiques fondamentales des systèmes de RLL entre entreprises et consommateurs et des systèmes de RAD entre entreprises et consommateurs sur la base de deux tableaux traitant des systèmes existants et de leurs caractéristiques préparés par le BP, ainsi que du Cadre de collaboration de l'APEC, du système COVID-19 de la RAS de Hong Kong, de la plateforme brésilienne « consumidor.gov.br » pour le règlement en ligne des litiges de consommation et d'autres systèmes. Un expert a également indiqué que le Réseau des centres européens des consommateurs (Réseau CEC) en était actuellement aux premiers stades d'une étude visant à étendre le service aux pays tiers sur la base d'accords réciproques. Certains experts ont fait mention des nombreux exemples de mécanismes existants et de plateformes RLL disponibles pour prouver que le fait d'élaborer des instruments supplémentaires n'était pas vraiment nécessaire tandis que d'autres ont exprimé leurs inquiétudes quant au manque d'interopérabilité ou de normes minimales communes entre ces plateformes, régions et systèmes, et à la manière dont cela constitue un obstacle à l'accès à la justice pour les touristes / visiteurs.
- 11 Le Président a résumé, de manière non exhaustive, les éléments constitutifs d'un certain nombre de systèmes RLL existants, tels que soulignés par certains experts, qui pourraient être pris en compte s'il était décidé d'élaborer un nouvel instrument en la matière. Certains experts ont fait remarquer qu'il pourrait être important de combler le manque d'informations pour les touristes / visiteurs quand bien même divers programmes pertinents existent et fonctionnent correctement. Un certain nombre d'experts ont indiqué qu'il convient qu'un système de principes / normes RLL en la matière inclue des caractéristiques telles que l'accessibilité (notamment en ce qui concerne la langue, le handicap, l'accès à l'information, les fuseaux horaires), « ne s'arrête pas aux frontières nationales » ni ne fasse de discrimination entre les ressortissants et les non ressortissants. Une autre caractéristique jugée importante par certains experts est la possibilité d'identifier clairement une procédure applicable à tous les systèmes de RLL et, en particulier, la manière dont cette possibilité fonctionnerait en pratique. Un exemple, proposé dans les Notes techniques de la CNUDCI, serait un modèle à plusieurs niveaux et à durée limitée de première négociation, puis de médiation (si nécessaire), et enfin d'arbitrage (si nécessaire), bien que cette méthode puisse ne pas être universelle. Un certain nombre d'experts ont estimé qu'il était essentiel que tout système soit volontaire et fasse l'objet d'un accord, ce qui permet d'éviter ou de régler les questions de compétence, de droit applicable et d'application. Certains experts ont en outre fait remarquer qu'il devrait principalement traiter des litiges contractuels entre les commerçants et les touristes / visiteurs. Dans le cas du Cadre de collaboration de l'APEC, il a été précisé que la sentence finale serait admissible à la reconnaissance et à l'exécution en vertu de la Convention des Nations Unies pour la reconnaissance et l'exécution des sentences arbitrales étrangères. Toutefois, certains experts ont exprimé leur préférence pour tout système ou principes / normes de RLL qui soient efficaces et d'application directe quant à la manière dont la décision serait exécutée. Certains experts ont fait remarquer qu'il serait probablement souhaitable de fixer une limite à la valeur des demandes pertinentes. Le consultant a indiqué qu'une augmentation des niveaux de similarité entre les différents systèmes / plateformes des divers ressorts juridiques serait utile afin de faciliter l'accès à la justice pour les touristes internationaux. Cette similarité pourrait également stimuler le développement de la « Legal Tech » dans ce domaine. Enfin, certains experts ont estimé que le système devrait conduire à un règlement définitif du litige. D'autres ont insisté sur le fait que certains droits des consommateurs, notamment le recours à une solution judiciaire, ne pouvaient être exercés par le biais du RLL. En définitive, certains experts ont rappelé que si ces caractéristiques peuvent être opportunes pour l'élaboration d'un nouvel instrument, il reste à décider s'il est nécessaire et possible que la HCCH œuvre en la matière.

4. Examen d'un instrument juridique non contraignant sur les questions relatives au RLL

- 12 Les experts ont ensuite cherché à savoir si les instruments juridiques non contraignants existants, et notamment les Notes techniques de la CNUDCI sur le RLL, sont pertinents et suffisants en tant que cadres / lignes directrices pour la résolution en ligne des litiges transfrontières qui touchent les touristes / visiteurs. L'expert de la Serbie a également présenté des informations sur un nouveau système de règlement des litiges en ligne qui compte sept nations dans la région des Balkans. Les utilisateurs peuvent choisir leur médiateur en ligne et le système utilise également l'intelligence artificielle.
- 13 M Jae Sung Lee, de la CNUDCI, a présenté un aperçu du contenu des Notes techniques ainsi qu'un bref historique de leur élaboration. Les travaux de la CNUDCI sur un projet de RLL ont été jugés nécessaires étant donné la forte augmentation des opérations transfrontières en ligne. Il a expliqué que le mandat du Groupe de travail de la CNUDCI a été modifié au cours de l'élaboration de l'Aide-mémoire afin d'élaborer un document descriptif non contraignant plutôt qu'un autre type d'instrument, et ce en raison des défis posés par la diversité des lois sur la consommation dans les différents ressorts juridiques. Les Notes sont destinées à être utilisées « dans le cadre de litiges découlant de contrats internationaux de vente ou de service qui portent sur de faibles montants et sont conclus au moyen de communications électroniques. » (para. 5). Ces notes ont été reprises par certains organes d'arbitrage et ont servi de base à l'élaboration du Cadre de collaboration de l'APEC et du système COVID-19 de RLL de la RAS de Hong Kong, comme l'a indiqué le Dr James Ding. Un certain nombre d'experts ont fait remarquer que les Notes n'étaient pas suffisantes dans le cas présent et qu'elles devraient être complétées au niveau international pour combler une série de lacunes et garantir un cadre pour le(s) mécanisme(s) potentiel(s) de RLL transfrontière(s) au profit des touristes / visiteurs. Plusieurs autres experts ont constaté que les difficultés rencontrées par la CNUDCI dans ce domaine mettaient en évidence les défis que la HCCH aurait à relever pour convenir d'un instrument juridique non contraignant relatif au tourisme et couvrant des questions telles que les normes minimales.
- 14 Le Groupe d'experts a ensuite discuté des questions qui pourraient être traitées dans un instrument juridique non contraignant relatif au RLL sous les auspices de la HCCH. Un expert du Brésil a fait une présentation sur une série de caractéristiques souhaitables possibles, y compris, par ex., qu'un instrument : devrait éviter d'aborder les questions de compétence, de droit applicable et d'application mais devrait suivre un modèle d'accord volontaire et de mesures visant à promouvoir l'exécution ; devrait inclure des normes procédurales minimales ; s'appliquerait spécifiquement aux touristes / visiteurs et ne s'appliquerait pas à tous les consommateurs ; devrait être complété par des lignes directrices des meilleures pratiques de coopération internationale dans ce domaine, impliquant également un éventuel réseau international de points de contact nationaux ; devrait traiter les litiges contractuels entre entreprises et consommateurs (et exclure les litiges entre entreprises) ; devrait garantir un traitement équitable, transparent et impartial de l'ensemble des touristes / visiteurs, et traiter les barrières linguistiques et autres obstacles à l'accès ; et d'autres suggestions.
- 15 Certains experts ont fait remarquer qu'un instrument juridique non contraignant comprenant des normes minimales communes pourrait contribuer à accroître la similitude des normes entre les systèmes, à améliorer la prévisibilité et à renforcer l'accès régularisé à la justice pour les touristes / visiteurs du monde entier. Par ailleurs, les différentes plateformes existantes au niveau mondial pourraient être reliées par un réseau de points de contact désignés (par ex., la désignation d'autorités existantes) dans chaque État, ce qui pourrait également combler le manque d'informations. Il a été précisé qu'il ne devrait pas y avoir de duplication ou d'implications financières, par ex. pour l'élaboration d'un système / d'une plateforme de RLL international(e) en

tant que tel. Un expert a indiqué que seules l'élaboration d'un cadre juridique et la désignation de points de contact étaient proposées.

- 16 D'autres experts ont soulevé des questions sur la nécessité et la possibilité d'élaborer un instrument juridique non contraignant sous les auspices de la HCCH. Un expert a proposé une option, à savoir l'élaboration d'un Guide de bonnes pratiques dans ce domaine destiné en particulier aux touristes / visiteurs eux-mêmes, avec deux composantes. Premièrement, une liste des Conventions de la HCCH existantes et la manière dont celles-ci pourraient s'appliquer à la résolution des litiges des touristes / visiteurs. Deuxièmement, une liste des ressources de RLL existantes qui sont actuellement disponibles pour les touristes / visiteurs et leurs différentes caractéristiques pertinentes. Le BP a noté que si le RLL pour les litiges transfrontières de nature civile et commerciale relève bien du mandat de la HCCH, l'Organisation dispose de peu d'expérience en matière de RLL à ce jour, par conséquent un tel Guide comprenant des commentaires sur une liste de caractéristiques préétablies des plateformes pourrait permettre d'approfondir les connaissances de la HCCH en la matière. Un certain nombre d'experts sont convenus qu'un tel Guide pourrait être utile.
- 17 Le consultant, sur la base de son analyse précédente de l'utilité limitée de ces Conventions pour répondre aux besoins pratiques des touristes / visiteurs, a émis des doutes quant à l'utilité des informations sur les Conventions de la HCCH pour les touristes / visiteurs, en tant que non-juristes. Il a proposé qu'un « répertoire central » sur le RLL, tel que proposé dans une deuxième partie du Guide, pourrait toutefois être très utile, notamment pour combler le manque d'information existant. D'autres experts ont réaffirmé qu'il serait utile de fournir des explications de base en termes simples sur les Conventions existantes, indiquant que cela pourrait contribuer à promouvoir l'adoption des instruments de la HCCH par les États. Ils ont également réaffirmé leur point de vue selon lequel le fait de fournir aux touristes / visiteurs des explications de base sur les caractéristiques fondamentales des plateformes de RLL les aiderait à relever les difficultés rencontrées lors de litiges transfrontières et servirait ainsi l'objectif visant à garantir un accès adéquat à la justice pour les touristes internationaux.

5. Examen des travaux ultérieurs

- 18 Le Président a indiqué qu'il ne serait pas nécessaire que les experts examinent les mérites d'un instrument contraignant par rapport à un instrument non contraignant, puisqu'il a été décidé de poursuivre avec un instrument non contraignant dans l'éventualité où des travaux supplémentaires devaient être menés. Au contraire, il a posé les questions suivantes au Groupe d'experts :
- I. Existe-t-il un consensus pour élaborer un instrument de droit souple de la HCCH destiné à fixer des normes pour les plateformes de RLL en ce qui concerne les demandes des touristes / visiteurs ? Le cas échéant, quel type de demandes l'instrument devrait-il couvrir et quelles sont les meilleures pratiques / normes en la matière ? La nature de cet instrument pourrait être des Principes de la HCCH ou une Loi type, selon le destinataire (législateur ou opérateur).
 - II. Existe-t-il un consensus pour élaborer un « Manuel pratique / Guide » (nom à déterminer) composé de deux parties : (a) afin d'expliquer, en termes simples, comment les Conventions et Principes de la HCCH existants peuvent aider les touristes / visiteurs dans leurs demandes ; (b) afin d'identifier les plateformes de RLL pertinentes et de commenter leurs caractéristiques pertinentes dans le cadre des demandes des touristes / visiteurs ?

- 19 Le Président a précisé que si l'option II ne répond pas strictement aux normes d'un instrument de droit couple, celle-ci peut néanmoins fournir des conseils pratiques utiles aux touristes / visiteurs internationaux et ainsi servir à améliorer leur protection et leur accès à la justice.
- 20 La plupart des experts ont estimé que, à la lumière des discussions des jours précédents et des réunions antérieures du Groupe d'experts, il serait plus réaliste et constructif de poursuivre avec la deuxième option étant donné l'absence de consensus sur la première option.
- 21 Les experts ont ensuite discuté plus avant des éléments à inclure dans un tel « Manuel pratique / Guide », destiné aux touristes / visiteurs, leur fournissant notamment des informations utiles sur les systèmes existants pour faciliter leur accès à la justice dans les litiges transfrontières. Certains experts ont reconnu que si la première partie d'un « Manuel pratique / Guide » sur les instruments juridiques « ordinaires » dans ce domaine devrait se concentrer sur les instruments de la HCCH, celle-ci pourrait inclure une mention des instruments régionaux, si ceux-ci devaient être considérés comme utiles pour certains touristes / visiteurs (comme cela a déjà été indiqué dans le rapport du Dr Sievi). Un certain nombre d'experts ont proposé d'inclure les systèmes de RLL privés et gouvernementaux tandis que d'autres ont indiqué que les mécanismes de RLL privés pourraient être plus pertinents et appropriés pour cet exercice. Si un mandat est donné par le CAGP pour élaborer cet outil, le BP cherchera à collaborer avec d'autres organisations internationales œuvrant dans le domaine de la protection du tourisme ainsi qu'avec les groupes industriels / ONG concernés.
- 22 En ce qui concerne les caractéristiques éventuelles des systèmes de RLL qui pourraient être prises en considération lors de l'énumération des plateformes de RLL dans un tel « Manuel pratique / Guide », le Président a résumé les principales caractéristiques, telles que tirées de la discussion de la réunion du Groupe d'experts au cours des jours précédents (sans ordre de priorité, et nonobstant d'autres améliorations rédactionnelles / améliorations dans la description / classification de ces caractéristiques) :
- Accessibilité (par ex., exigences techniques, langue, handicap, accès à l'information, fuseaux horaires / accessibilité internationale)
 - Transparence et équité du système (par ex., qualifications du neutre, possibilité de faire examiner la décision, etc.)
 - Non-discrimination entre les ressortissants et les non ressortissants (par ex., exigences d'authentification, etc.)
 - Indication de la procédure et, en particulier, de la manière dont celle-ci fonctionnerait en pratique (par ex., coûts, délais de la procédure ; recours à un système d'intelligence artificielle ; si la procédure suit un modèle à plusieurs niveaux et à durée limitée de première négociation, puis de médiation (si nécessaire), puis d'arbitrage (si nécessaire))
 - Volontaire et par accord, ce qui permet d'éviter ou de régler les questions de compétence, de droit applicable et d'exécution
 - Portée des demandes contractuelles (et éventuellement d'autres)
 - Valeur des demandes
 - Exécution et mise en œuvre de la décision
 - Indication du fait qu'ils conduisent ou non à une résolution définitive du litige
 - Indication sur l'éthique des informations (y compris sur la protection des données)

- Quelle loi serait applicable à la résolution du litige
 - Surveillance, bonne gouvernance du système et taux de conformité avec les décisions
- 23 Certains experts ont fait remarquer que l'utilisation d'un système de RLL ne devrait pas avoir pour effet de priver les touristes et les visiteurs de leurs droits non cessibles, y compris leur droit de recourir à une solution judiciaire / formelle. Un expert a proposé que le « Manuel pratique / Guide » fournit des définitions utiles et accessibles de l'arbitrage, de la médiation et de la conciliation. Un autre expert a estimé qu'il fallait éviter d'encourager les touristes à déposer des plaintes qui pourraient être considérées comme « fuites » et donc potentiellement préjudiciables aux petits commerçants. Plusieurs experts ont fait remarquer que ces caractéristiques (telles que décrites ci-dessus) ne devraient pas être considérées comme établissant des normes minimales pour aucune plateforme ou comme impliquant un jugement de valeur sur les différents systèmes de RLL ou leurs caractéristiques. Le Président a confirmé que l'énumération factuelle de la nature de ces caractéristiques n'impliquait pas une approbation sous quelque forme que ce soit. Le Secrétaire général a précisé que l'objectif serait de fournir aux touristes / visiteurs des informations sans valeur ajoutée sur le plus grand nombre possible de systèmes (divers) dans le monde qui pourraient leur être utiles pour résoudre des litiges transfrontières, en s'appuyant sur la liste des systèmes de RLL déjà identifiés dans les tableaux préparés par le BP pour la réunion du Groupe d'experts. Il a également ajouté que la préoccupation soulevée par le fait qu'une telle liste de systèmes de RLL pourrait rapidement devenir obsolète était un point important et qu'il faudrait investir davantage dans la réflexion pour trouver des moyens de tenir à jour un tel inventaire. Le Secrétaire général a toutefois indiqué que, d'un point de vue institutionnel, l'engagement de la HCCH en matière d'information sur les plateformes mondiales de RLL et les organisations de parrainage permettra à la HCCH d'acquérir des connaissances sur le RLL et pourrait ouvrir des portes à la coopération avec ces organisations dans ce domaine.
- 24 En ce qui concerne les documents qui pourraient être utiles pour la réunion de 2021 du CAGP, afin de prendre une décision sur cette proposition, le Groupe d'experts a invité le BP, sous réserve des ressources disponibles, à élaborer un avant-projet d'un tel « Manuel pratique / Guide » (par ex., une table des matières pour un éventuel instrument), visant à faciliter l'accès à la justice pour les touristes / visiteurs internationaux. L'avant-projet sera d'abord distribué aux membres du Groupe d'experts pour commentaires avant que le BP ne communique le document au CAGP de 2021.
- 6. Conclusions et recommandations adressées au CAGP**
- 25 Le Groupe d'experts n'est pas parvenu à un consensus définitif sur « l'opportunité, la nécessité et la possibilité d'élaborer un instrument juridique non contraignant sur les questions relatives au règlement des litiges en ligne » pour ce qui est des demandes des touristes et visiteurs internationaux. Il a cependant conclu que l'élaboration d'un « Guide » pourrait constituer une aide utile aux touristes et aux visiteurs dans le cadre de leurs demandes. Le « Guide » serait composé de deux parties. La première partie expliquerait, en termes simples, comment les Conventions et Principes existants de la HCCH peuvent être pertinents pour la résolution des demandes des touristes et visiteurs internationaux (des références générales à d'autres instruments pertinents pourront être incluses). La deuxième partie énumérerait et décrirait, sans aucun jugement de valeur, les plateformes de RLL qui peuvent être utilisées par les touristes et visiteurs internationaux, en fournissant des informations factuelles, sur la base de caractéristiques spécifiques identifiées par le Groupe d'experts, qui pourraient aider les touristes et visiteurs à évaluer quelle plateforme peut répondre à leurs besoins.

- 26 Le Groupe d'experts a invité le BP à préparer, sous réserve des ressources disponibles, un avant-projet détaillé de ce « Guide » et à le communiquer aux membres du Groupe d'experts pour commentaires en amont de la réunion du CAGP de 2021. Des informations actualisées sur l'état d'avancement des travaux du BP à cet égard feront partie du rapport du Président au CAGP de 2021, afin que ce dernier puisse prendre une décision éclairée.

Annexe II - Participation à la réunion

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

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

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

Annexe III - Avant-projet – Guide pratique sur l'accès à la justice pour les touristes et visiteurs internationaux, centré sur les RLL

[Veuillez noter que le présent **Avant-projet** est de nature indicative et a été élaboré dans l'unique but d'éclairer les délibérations de la réunion du CAGP de 2021. Il ne s'agit pas d'un Guide définitif et sa forme n'est pas définitive. Il n'inclut pas l'ensemble des instruments ou systèmes possibles qui peuvent être considérés dans un tel Guide.]

Présentation

Le Guide fournira aux touristes et visiteurs internationaux des informations pertinentes pour le règlement des litiges transfrontières et l'accès de ceux-ci à la justice pour les questions juridiques qu'ils peuvent rencontrer, à l'exclusion des questions de droit pénal. Il fournira des informations sur la manière dont les Conventions de la HCCH, d'autres instruments internationaux et régionaux sélectionnés, ainsi que les plateformes de RLL, peuvent aider à résoudre des demandes transfrontières de fond en matière civile ou commerciale ou d'autres demandes émanant de consommateurs.

Le Guide visera à aider les touristes et les visiteurs, ainsi que les organisations de protection des consommateurs et de tourisme, en leur fournissant des informations sur une série d'outils et de méthodes existants qui peuvent contribuer à améliorer l'accès à la justice dans les situations transfrontières. Il ne fournira pas de conseils juridiques, ne fera état d'aucune préférence pour une méthode de règlement des litiges par rapport à une autre, ni ne recommandera de plateforme en particulier.

Étant donné que ces instruments et plateformes sont susceptibles d'évoluer rapidement, le Guide est destiné à être disponible sous forme électronique, ce qui facilitera son actualisation. Les organisations de protection des consommateurs et de tourisme, ainsi que les plateformes de RLL indexées dans le Guide, seront encouragées à veiller à ce que les informations pertinentes soient à jour afin de réduire au minimum les ressources allouées par le Bureau Permanent (BP) à ce processus.

Le Guide comprendra des liens vers les systèmes nationaux ou supranationaux officiels, visant également à établir une coopération entre les organisations internationales traitant du tourisme international.

A. Identification des principaux obstacles à l'accès à la justice pour les touristes et les visiteurs internationaux

Le Guide comprendra un résumé des obstacles courants à l'accès à la justice rencontrés par les touristes et visiteurs internationaux, tiré des rapports des consultants¹ et des réunions du Groupe d'experts de la HCCH. Il s'agit, par exemple : d'un manque d'information, notamment en raison de la diversité des langues et des systèmes juridiques ; d'une discrimination dans l'accès à l'assistance judiciaire et à la sécurité des frais de justice ; de l'incapacité à recourir à la médiation ou à la conciliation après le séjour dans le pays visité ; de l'incapacité à engager (ou à poursuivre) une procédure judiciaire après le séjour dans le pays visité ; de l'indisponibilité de procédures de règlement des petits litiges adaptées aux

¹ Voir Doc. prél. No 3 du CAGP de 2019, « Rapport du Groupe d'experts sur la coopération et l'accès à la justice au profit des touristes internationaux (projet Tourisme) » (y compris l'« Étude sur l'opportunité et la possibilité de futurs travaux concernant la proposition d'un projet de Convention sur la coopération et l'accès à la justice au profit des touristes internationaux » du Dr. E. Guinchard, Rapport final, mars 2019 (« Rapport Guinchard ») à l'annexe III) ; Doc. prél. No 1 du CAGP de 2020, « Rapport du Groupe d'experts sur la coopération et l'accès à la justice au profit des touristes internationaux (projet Tourisme) » (y compris le « Rapport final sur les instruments et principes internationaux pertinents pour le projet Tourisme ainsi que sur les fondements possibles de la compétence pour les questions relatives aux touristes internationaux » du Dr. N. Sievi, Rapport final, janvier 2020 (« Rapport Sievi »)) ; et Doc. prél. No 1 du CAGP de 2021, « Rapport sur le projet touristes et visiteurs (RLL) », l'ensemble des documents sont disponibles sur le Portail sécurisé du site web de la HCCH sous les rubriques « Groupes de travail / d'experts » puis « Groupe d'experts sur le projet Touristes et visiteurs (RLL) ».

problèmes couramment rencontrés ; et des problèmes de retard et / ou de lourdeur des procédures judiciaires.

B. Définitions

La présente section sera élaborée, en termes simples, en fonction des besoins afin de faciliter la compréhension et l'utilisation du Guide. Les définitions proposées sont les suivantes : touristes et visiteurs, consommateur, demandes civiles ou commerciales, litige, arbitrage, médiation, conciliation, règlement des litiges en ligne (RLL), règlement alternatif des différends (RAD).

Première partie : Conventions de la HCCH et autres instruments internationaux et régionaux existants

La présente partie expliquera, en termes simples et à l'aide d'exemples, de quelle manière les Conventions existantes de la HCCH et d'autres instruments internationaux et régionaux sélectionnés peuvent être pertinents pour le règlement des demandes émanant des touristes et des visiteurs internationaux. Les instruments juridiques pertinents seront examinés à la lumière de ces exemples. Bien que les Conventions et instruments soient énumérés chronologiquement ci-après, l'ordre et la catégorisation seront revus sur la base des exemples et / ou d'autres informations, dans le but de maximiser l'accessibilité / l'utilité pratique des informations pour les utilisateurs du Guide.

A. Conventions de la HCCH

Une introduction expliquera comment naviguer sur le site web de la HCCH pour comprendre à quel moment une Convention est en vigueur entre les Parties contractantes et de quelle manière celle-ci peut être pertinente dans une situation donnée. Cela comprendra également un avertissement sur la nature des Conventions : par exemple, qu'il peut être conseillé aux particuliers de demander une assistance judiciaire pour recourir à ces Conventions ou que les Conventions de la HCCH dépendent des compétences respectives des Parties contractantes et ne sont efficaces que dans la mesure où le système individuel le permet. Le cas échéant, des informations supplémentaires seront fournies sur le rôle des Autorités centrales et compétentes pour faciliter le fonctionnement pratique de la Convention, y compris la possibilité de les utiliser dans le cadre de procédures de RLL.

1. Convention Apostille de 1961

120 Parties contractantes, accessible à x % de la population mondiale, représentant y % du PIB mondial.

Facilite l'utilisation des actes publics à l'étranger en établissant l'authenticité d'un acte public délivré par une Partie contractante.

2. Convention Notification de 1965

78 Parties contractantes, accessible à x % de la population mondiale, représentant y % du PIB mondial.

Facilite la transmission des actes judiciaires ou extrajudiciaires qui doivent être notifiés à l'étranger.

3. Convention Preuves de 1970

63 Parties contractantes, accessible à x % de la population mondiale, représentant y % du PIB mondial.

Facilite l'obtention de preuves à l'étranger en matière civile ou commerciale.

4. Convention Accidents de la circulation routière de 1971

21 Parties contractantes, accessible à x % de la population mondiale, représentant y % du PIB mondial.

Fournit des règles claires, précises et facilement applicables pour déterminer quelle loi s'applique aux accidents de la circulation routière.

5. Convention Accès à la justice de 1980

28 Parties contractantes, accessible à x % de la population mondiale, représentant y % du PIB mondial.

Fournit un cadre permettant de garantir qu'un touriste ou un visiteur déposant une plainte à l'étranger ne sera pas discriminé en matière d'assistance judiciaire, notamment en ce qui concerne la consultation juridique, la caution *judicatum solvi*, les copies d'actes et décisions, ainsi que la contrainte par corps et le sauf-conduit.

6. Convention Élection de for de 2005

32 Parties contractantes, accessible à 8,4 % de la population mondiale, représentant 22 % du PIB mondial.

Permet l'efficacité des clauses de règlement des litiges (accords exclusifs d'élection de for) incluses dans les accords signés par les voyageurs d'affaires, permettant la sécurité juridique en ce qui concerne le tribunal qui entend le litige et la prévisibilité sur la reconnaissance et l'exécution des jugements qui en résultent.

7. Convention Jugements de 2019

Aucune Partie contractante (deux signataires)

Permet l'exécution à l'étranger d'un jugement obtenu dans un État et territoire.

B. Autres instruments internationaux

1. Juridiquement contraignants

a. Convention des Nations Unies pour la reconnaissance et l'exécution des sentences arbitrales étrangères (1958)

[nombre de Parties contractantes]

Oblige les tribunaux des États contractants à donner effet aux accords d'arbitrage privé et à reconnaître et exécuter les sentences arbitrales. Exige le consentement du prestataire de services pour résoudre les litiges avec les touristes par le biais de l'arbitrage.

b. Convention internationale relative au contrat de voyage (1970)

[nombre de Parties contractantes]

Établit des dispositions uniformes pour les contrats de voyage impliquant des organisateurs de voyage. Elle détermine les obligations générales des parties à un contrat de voyage, y compris le contenu et la responsabilité des organisateurs de voyages et des voyageurs. Elle comprend des dispositions relatives à l'indemnisation.

c. Convention relative au contrat de transport international de voyageurs et de bagages par route (1973)

[nombre de Parties contractantes]

Standardise les conditions régissant les contrats de transport international de voyageurs et de bagages par route. Cela comprend des dispositions sur la responsabilité et la juridiction compétente.

d. Convention de Montréal pour l'unification de certaines règles relatives au transport aérien international (1999)

[nombre de Parties contractantes]

Renforce la protection des consommateurs dans les voyages aériens internationaux, y compris les personnes, les bagages et les marchandises. Elle établit des règles communes pour les compagnies aériennes sur les vols internationaux entre les États contractants. Cela comprend des dispositions sur les titres de transport, les droits et les devoirs découlant du contrat de transport, la possibilité de faire valoir ses droits, la responsabilité des transporteurs, l'étendue de l'indemnisation et la juridiction compétente.

2. Juridiquement non contraignants

1. Code mondial d'éthique du tourisme de l'OMT (1999)

Des lignes directrices non contraignantes visant à guider les acteurs du tourisme vers un développement responsable et durable du tourisme dans le monde entier. Avec ses 10 articles, le code vise à maximiser les bénéfices du secteur tout en minimisant son impact potentiellement négatif sur l'environnement, le patrimoine culturel et les sociétés à travers le monde.

e. Lignes directrices de l'ONU relatives à la protection du consommateur (révision de 2015)

Un ensemble de principes définissant les principales caractéristiques auxquelles doivent satisfaire la législation, les institutions chargées de la faire respecter et les systèmes de recours pour garantir la protection des consommateurs. Ces lignes directrices sont destinées à aider les États membres des Nations Unies intéressés à élaborer et à faire appliquer des lois, règles et règlements, de portée nationale et régionale, ainsi qu'à contribuer à la coopération internationale dans l'application des dispositions et à favoriser l'échange d'expériences en matière de protection des consommateurs.

Instrument juridiquement contraignant, la *Convention de l'OMT relative à l'éthique du tourisme* a été adoptée en 2019 par la 23^e session de l'Assemblée générale de l'OMT (Résolution A/RES/722(XXIII)) et suit les mêmes principes. Elle n'est pas encore entrée en vigueur.

C. Instruments régionaux

1. Europe²

1. Convention du Conseil de l'Europe sur la responsabilité des hôteliers quant aux objets apportés par les voyageurs (1962)

[nombre de Parties contractantes]

² Des fiches d'information sur les procédures européennes, nationales et internationales sont disponibles sur le site web de l'e-Justice : < https://e-justice.europa.eu/content_information_on_national_law_information_sheets-439-fr.do?init=true >.

Fixe des normes minimales pour le droit interne des États contractants en matière de responsabilité des hôteliers quant aux biens apportés par les voyageurs.

f. Accord européen sur la transmission des demandes d'assistance judiciaire (1977)

[nombre de Parties contractantes]

Une demande d'assistance judiciaire peut être présentée dans l'État et territoire d'origine pour une procédure menée dans un autre État et territoire.

g. Instruments de l'Union européenne

[descriptions succinctes à inclure sous chaque rubrique]

- Règlement (CE) No 1206/2001 relatif à la coopération entre les juridictions des États membres dans le domaine de l'obtention des preuves en matière civile ou commerciale
- Règlement (CE) No 261/2004 établissant des règles communes en matière d'indemnisation et d'assistance des passagers en cas de refus d'embarquement et d'annulation ou de retard important d'un vol
- Règlement (CE) No 1896/2006 instituant une procédure européenne d'injonction de payer
- Règlement (CE) n° 861/2007 instituant une procédure européenne de règlement des petits litiges (tel que modifié par le règlement de l'UE No 2015/2421)
- Règlement (CE) No 1393/2007 relatif à la signification et à la notification dans les États membres des actes judiciaires et extrajudiciaires en matière civile ou commerciale
- Règlement (UE) No 181/2011 concernant les droits des passagers dans le transport par autobus et autocar
- Règlement (UE) No 1215/2012 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale
- Règlement (UE) No 524/2013 relatif au règlement en ligne des litiges de consommation
- Règlement (UE) 2020/1783 du Parlement européen et du Conseil du 25 novembre 2020 relatif à la coopération entre les juridictions des États membres dans le domaine de l'obtention des preuves en matière civile ou commerciale (obtention de preuves) (refonte) (applicable à partir du premier juillet 2022)
- Règlement (UE) 2020/1784 du Parlement européen et du Conseil du 25 novembre 2020 relatif à la signification et à la notification dans les États membres des actes judiciaires et extrajudiciaires en matière civile et commerciale (signification ou notification des actes) (refonte) (applicable à partir du premier juillet 2022)
- Directive No 2002/8/CE visant à améliorer l'accès à la justice dans les affaires transfrontalières par l'établissement de règles minimales communes relatives à l'aide judiciaire accordée dans le cadre de telles affaires
- Directive 2008/122/CE du Parlement européen et du Conseil du 14 janvier 2009 relative à la protection des consommateurs en ce qui concerne certains aspects des contrats d'utilisation de biens à temps partagé, des contrats de produits de vacances à long terme et des contrats de revente et d'échange
- Directive No 2013/11/UE relative au règlement extrajudiciaire des litiges de consommation
- Directive No 2015/2302/UE relative aux voyages à forfait et aux prestations de voyage liées

- Résolution du Conseil du 25 mai 2000 relative à un réseau au niveau communautaire d'organes nationaux chargés du règlement extrajudiciaire des litiges de consommation (Réseau CEC)

1. Amériques

1. Accord sur le bénéfice de la gratuité des procédures judiciaires et de l'assistance judiciaire gratuite entre les États parties du Mercosur (2000)³

[nombre de Parties contractantes]

Facilite l'accès aux tribunaux des États et territoires étrangers en donnant aux ressortissants et aux résidents habituels de chaque État partie un accès gratuit aux procédures et à l'assistance judiciaire dans les autres États parties dans les mêmes conditions que celles dont bénéficient leurs propres ressortissants et résidents habituels. Il prévoit en outre que les procédures gratuites accordées dans un État partie peuvent être étendues aux procédures dans d'autres États parties (par ex., pour l'obtention de preuves à l'étranger ou l'exécution d'un jugement).

2. Accord interinstitutionnel d'entente entre les agences de protection des consommateurs des États parties au MERCOSUR pour la protection des consommateurs en visite (2005)⁴

[nombre de Parties contractantes]

Protège les consommateurs qui se trouvent temporairement dans un autre État. Comprend l'obligation de fournir des informations pertinentes aux touristes et de permettre une résolution rapide des difficultés rencontrées par les touristes. Permet de déposer des plaintes auprès de l'agence située dans l'État d'origine du touriste, qui agira alors en son nom en traitant la demande avec l'agence située dans l'État du prestataire de services.

3. Accord du Mercosur sur la loi applicable aux contrats internationaux de consommation (2017)⁵

[nombre de Parties contractantes]

Assure la protection des consommateurs en adoptant des règles communes sur la loi applicable aux contrats internationaux de consommation, et aux contrats entre les fournisseurs / prestataires de biens ou de services et les consommateurs de la région. Cela comprend des dispositions sur les agences de voyage et les accords de multipropriété.

2. Eurasie, Asie, Afrique et Océanie (à confirmer)

1. Convention de Minsk sur l'entraide judiciaire et les relations juridiques en matière civile, familiale et pénale (1993)

[nombre de Parties contractantes]

³ Traduction non officielle proposée par le BP de l'original en espagnol « Acuerdo sobre el Beneficio de Litigar sin Gastos y Asistencia Jurídica Gratuita entre los Estados Partes del Mercosur (2000) ».

⁴ Traduction non officielle proposée par le BP de l'original en espagnol « Acuerdo Interinstitucional de Entendimiento entre los Organismos de Defensa del Consumidor de los Estados Parte del Mercosur para la Defensa del Consumidor Visitante (2005) ».

⁵ Traduction non officielle proposée par le BP de l'original en espagnol « Acuerdo del Mercosur sobre derecho aplicable en materia de contratos internacionales de consumo (2017) ».

Fournit un cadre pour la conduite des procédures transfrontalières, notamment des dispositions sur l'accès à la justice, l'obtention de preuves à l'étranger et la notification de documents. Elle traite également des questions de compétence et de reconnaissance et d'exécution des jugements.

Deuxième partie : Plateformes de RLL existantes

Cette partie identifiera de manière non exhaustive les plateformes de RLL existantes, en décrivant leurs caractéristiques spécifiques afin d'aider les touristes et les visiteurs à évaluer quelle plateforme peut répondre à leurs besoins. Un certain nombre de plateformes de RLL ont été identifiées en amont de la troisième réunion du Groupe d'experts et peuvent être consultées sur le Portail sécurisé du site web de la HCCH⁶. Les Membres de la HCCH sont encouragés à informer le BP de l'existence d'autres plateformes de RLL qui seraient pertinentes pour les touristes et visiteurs internationaux. Cette demande sera réitérée au cours de l'élaboration du Guide.

L'ajout d'une plateforme de RLL dans cette liste ne doit pas être considéré comme signifiant que la HCCH a approuvé cette plateforme. Il s'agit uniquement d'un répertoire d'informations.

Les différentes plateformes seront classées en fonction de leur portée géographique. Dans la mesure du possible, un filtre sera également prévu pour d'autres caractéristiques du système, telles que le montant de la demande, la langue et les délais de règlement des litiges.

Le Groupe d'experts a proposé que les caractéristiques suivantes soient incluses dans la description des plateformes (sans ordre de priorité) :

- Accessibilité (par ex. exigences techniques, langue, handicap, accès à l'information, fuseaux horaires / accessibilité internationale).
- Transparence et équité du système (par ex., qualifications du neutre, possibilité de faire examiner la décision, etc.)
- Non-discrimination entre les ressortissants et les non ressortissants (par ex., exigences d'authentification, etc.).
- Indication de la procédure et, plus particulièrement, de la manière dont elle fonctionnerait dans la pratique (par ex., coût, délais de la procédure ; recours à un système d'intelligence artificielle ; si la procédure suit un modèle à plusieurs niveaux et à durée limitée de première négociation, puis de médiation (si nécessaire), et enfin d'arbitrage (si nécessaire)).
- Volontaire et par accord, ce qui permet d'éviter ou de régler les questions de compétence, de droit applicable et d'exécution.
- Portée des demandes contractuelles (et éventuellement d'autres).
- Montant des demandes.
- Exécution et mise en œuvre de la décision.
- Indiquer si les plateformes conduisent ou non à une résolution définitive du litige.
- Indication sur l'éthique des informations (y compris sur la protection des données).
- Quelle loi serait applicable à la résolution du litige.
- Surveillance, bonne gouvernance du système et taux de conformité avec les décisions.

⁶ Voir le graphique I sur les systèmes existants de règlement des litiges en ligne (RLL) et le graphique II sur les systèmes existants de règlement (alternatif) des différends (RAD ou « ordinaires ») des consommateurs / touristes. Il s'agit, sans ordre particulier, des tribunaux Internet chinois de Hangzhou, Pékin et Guangzhou ; du règlement des litiges en ligne de l'UE ; du *Conciliante Gobierno* de México ; du Centre de règlement d'eBay ; du Centre de règlement en ligne d'Airbnb ; de Cybersettle ; du Tribunal de résolution des litiges civils de Colombie-Britannique (CRT) ; de Youstice ; de la solution de règlement des litiges en ligne Tyler's Modria® ; du Cadre de collaboration de l'APEC pour le RLL des litiges transfrontières entre entreprises ; du Réseau des centres européens des consommateurs (Réseau CEC) ; du Centre des plaintes des touristes coréens ; de l'Agence des consommateurs coréens (KCA) ; de l'Office du défenseur du tourisme (*Defensoría del Turista*), Buenos Aires (Argentine) ; et du *Grupo de protección al Turista* (Groupe de protection du tourisme), Colombie.

Ces caractéristiques seront incluses dans diverses catégories descriptives (voir ci-dessous). Au fur et à mesure de l'élaboration du Guide, ces catégories pourront être modifiées. Si le Guide est créé dans un format électronique, les informations pourraient apparaître sur la base d'une fonction de filtrage pour certaines catégories. Si une préférence se fait pour un Guide en version papier, elles peuvent également être incluses sous forme de tableau.

Un exemple de modèle et un exemple de description d'une plateforme spécifique sont fournis ci-après

■ **Exemple de modèle**

[TITRE / NOM DE LA PLATEFORME]

[« Visitez le site web », avec le lien]

Onglets d'information :

Aperçu	Critères	Accessibilité	Processus	Questions juridiques	Exécution
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Aperçu

Description succincte du système ; et

Informations sur :

- Entité de parrainage.
- Qui gère et finance la plateforme.
- Indication sur l'éthique de l'information (protection des données).

Critères

Informations sur :

- Les parties éligibles pour avoir recours à la plateforme.
- Critères du litige et limites du montant des demandes.
- Portée des demandes contractuelles traitées (et autres demandes, le cas échéant).
- Exemple(s) de qui peut avoir recours à l'instrument.

Accessibilité

Informations sur :

- Brève description de la technologie utilisée par le système.
- Exigences techniques, langue, accès aux personnes handicapées, accès à l'information, fuseaux horaires / accessibilité internationale.
- Non-discrimination entre les ressortissants et les non ressortissants (par ex., exigences d'authentification, etc.).
- Frais pour les utilisateurs.

Processus

Informations sur :

- Indication de la procédure et, en particulier, de la manière dont celle-ci fonctionnerait en pratique (par ex., coûts, délais de la procédure ; recours à un système d'intelligence artificielle ; si la procédure suit un modèle à plusieurs niveaux et à durée limitée de première négociation, puis de médiation (si nécessaire), puis d'arbitrage (si nécessaire)).
- Transparence et équité du système (par ex., qualifications du neutre, possibilité de faire examiner la décision, etc.).
- Rapidité et efficacité de la procédure.

Questions juridiques

Informations sur :

- Cadre juridique / règles d'application.
- Compétence (y compris si celle-ci est volontaire et si elle fait l'objet d'un accord, ce qui permet d'éviter ou de régler les questions de compétence, de droit applicable et d'exécution).
- Quelle loi serait applicable à la résolution du litige.

Exécution

Informations sur :

- Méthode d'exécution et d'application de la décision.

- Si l'utilisation de la plateforme conduit à une résolution finale du litige.

Surveillance, bonne gouvernance du système et taux de conformité avec les décisions.

Plateforme de règlement en ligne des litiges de l'UE

[Visitez le site web](#)

Aperçu	Critères	Accessibilité	Processus	Questions juridiques	Exécution
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Aperçu

Cette plateforme aide les consommateurs à résoudre les demandes concernant des biens ou des services achetés en ligne dans l'UE ou en Norvège, en Islande ou au Liechtenstein.

L'**entité de parrainage** est l'**Union européenne**. La plateforme est **gérée et financée** par la **Commission européenne**.

La plateforme dispose d'une base juridique dans le Règlement de RLL et est couverte par le **Règlement général de l'UE sur la protection des données (RGPD)** et le **Règlement interne sur la protection des données (IDPR)**.

Critères

La plateforme peut être utilisée par les **consommateurs et les commerçants pour les litiges découlant d'achats en ligne**. Le terme « consommateur » désigne toute personne physique agissant à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale ou libérale. Le terme « professionnel » désigne toute personne physique, ou toute personne morale, qu'elle soit publique ou privée, qui agit, y compris par l'intermédiaire d'une personne agissant en son nom ou pour son compte, aux fins qui entrent dans le cadre de son activité commerciale, industrielle, artisanale ou libérale.

Les litiges peuvent concerter :

- **Transactions en ligne** (contrat de vente ou de service par lequel le professionnel, ou son intermédiaire, propose, sur un site internet ou par d'autres moyens électroniques, des biens ou des services que le consommateur commande sur le même site internet ou par d'autres moyens électroniques).
- **Obligations contractuelles découlant de contrats de vente ou de service en ligne** entre un consommateur résidant dans l'UE, en Norvège, en Islande ou au Liechtenstein, et un professionnel établi dans l'UE, en Norvège, en Islande ou au Liechtenstein.

Les consommateurs ne peuvent être **destinataires** d'une plainte que s'ils résident dans un État où le droit interne prévoit le recours au RAD dans les litiges entre entreprises et consommateurs (actuellement la Belgique, l'Allemagne, le Luxembourg ou la Pologne)

Par exemple, cette plateforme pourrait être utilisée par un touriste qui a réservé un voyage en ligne et qui dépose une plainte contre le professionnel en ligne, si le touriste et le professionnel résident tous deux dans l'UE, en Norvège, en Islande ou au Liechtenstein.

Accessibilité

La plateforme est **gratuite**. Les organismes de règlement des litiges sont susceptibles d'exiger des frais.

La plateforme ne peut être utilisée que si le touriste et le professionnel résident dans l'UE, en Norvège, en Islande ou au Liechtenstein.

La plateforme prend la forme d'un site web interactif offrant un point d'entrée unique aux consommateurs et aux professionnels qui cherchent à résoudre leurs litiges à l'amiable-. L'**enregistrement d'un compte** est nécessaire pour pouvoir créer ou recevoir des plaintes (il est possible pour un consommateur de déposer une plainte sans compte et de créer un compte une fois que le professionnel lui a répondu). La soumission et les notifications se feront par l'intermédiaire de la plateforme en ligne.

Il existe trois voies de résolution des problèmes :

- 1 Trouver une solution directement avec le professionnel (en contactant le professionnel par l'intermédiaire de la plateforme, ce qui est particulièrement utile si le professionnel est ouvert au dialogue).
- 2 Trouver une solution par l'intermédiaire d'un organisme de règlement des litiges (un organisme de règlement des litiges agréé ; chaque organisme possède ses propres règles et procédures).
- 3 Utiliser un autre outil de résolution des litiges en dehors de la plateforme (lorsque les parties ne parviennent pas à se mettre d'accord sur un organisme de résolution des litiges dans un certain délai ou si le professionnel ignore la plainte).

Si le professionnel n'accepte pas de donner suite à la plainte, la plateforme orientera le consommateur vers d'autres moyens de règlement des litiges.

Les organismes de règlement des litiges disponibles sur la plateforme ont été approuvés par les autorités nationales compétentes pour les normes de qualité relatives à l'équité, l'efficacité et la qualité.

La plateforme est disponible dans **toutes les langues de l'UE**, l'**islandais** et le **norvégien**. Un **outil de traduction automatique** est également disponible. Les parties peuvent demander que la décision soit traduite gratuitement par un professionnel. Des traductions plus avancées et techniques peuvent être requises, aux frais des parties.

Processus

L'organisme de règlement des litiges (RAD) sera choisi par les parties dans le système. Des informations sur les frais, la portée géographique et les procédures sont disponibles sur chaque organisme de règlement des litiges.

L'organisme de règlement des litiges peut **demander des documents** et **organiser des réunions** par l'intermédiaire de la plateforme. Il téléchargera également la **décision** sur la plateforme.

Les parties disposent de **30 jours** pour convenir d'un organisme de règlement extrajudiciaire des litiges. Ensuite, l'organisme de RAD dispose de **90 jours pour** rendre une décision, ce délai pouvant être prolongé pour les affaires complexes.

Il existe un point de contact national dans chaque État de l'UE, en Norvège, en Islande et au Liechtenstein, qui peut vous aider pour toute question.

Questions juridiques

La plateforme est établie par le [Règlement \(UE\) No 524/2013 du Parlement européen et du Conseil du 21 mai 2013](#) relatif au règlement en ligne des litiges de consommation et modifiant le règlement (CE) No 2006/2004 et la directive 2009/22/CE (**règlement relatif aux RLLC**).

Le professionnel doit **accepter** la plainte. S'il refuse, la plainte sera classée sous cette plateforme.

Exécution

La décision **n'est pas toujours juridiquement contraignante** ; cela dépendra du type d'organisme de RAD choisi. Les parties sont informées du caractère contraignant ou non de la décision. Les recours juridictionnels et administratifs des décisions rendues par un organisme de RAD relève du droit interne et n'est pas du ressort de la plateforme de RLL

Annexe IV – Contribution du Forum international des avocats du voyage et du tourisme (IFTTA)



IFTTA

THE INTERNATIONAL FORUM OF TRAVEL AND TOURISM ADVOCATES

*Sodalem esse societatis quae dedicetur ad
Exercitatio legis ut produceat iter peregrinationemque*

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Secretary General
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Churchillplein 6b 2517 JW - The Hague – Netherlands

Cc: Mr. Ignacio Goicoechea
Latin American Regional Office

18 December 2020

Per e-mail: secretariat@hcch.net

Dear Dr. Bernasconi,

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

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

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

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

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

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

J. Tanti Dougall

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

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

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



IFTTA The International
Forum of Travel and
Tourism Advocates

Tourists & Visitors (ODR) Project

Background

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

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

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

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

General Remarks

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

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

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

Mutual Support and Professionalism

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

IFTTA's contribution to HCCH

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

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

Article tailored to facilitate the cooperation with HCCH.

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

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

Article tailored to facilitate the cooperation with HCCH.

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

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

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

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

Article published in IFTTA Law Review 1-2016.

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

<https://soep-online.de/en/> Members' list at: https://soep-online.de/wp-content/uploads/2020/09/30.09.2020.soep_Mitgliederliste.pdf

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

Final Note

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

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

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IFTTA

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

Sheila Sanches

1. Introduction

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

Guinchard's report¹ highlights the most common constraints on dispute resolution by international tourists. On the one hand, the inability to access mediation and conciliation processes in some countries, since they require the physical presence of the tourist, in addition to the language barriers present on many cases. Therefore, in many situations, these procedures are not accessible for this type of conflict, despite the fact that by their nature they would be more suitable than many of the court procedures.

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

¹ E. Guinchard, Study on the desirability and feasibility of further work on the Proposal on a Draft Convention on Co-operation and Access to Justice for International Tourists, Final Report, March 2018. Annex II to Prel. Doc. No 3 for CGAP 2019.

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

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

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

According to the Sievi's Report², for international tourists the precepts of the Convention on International Access to Justice provide that tourists can access legal aid without discrimination and that they are not required to pay a security for costs. However, this Convention itself has a gap in the applicability of extra-judicial procedures, which is limited. In this report, the advantages and disadvantages of including this principle as part of the Tourism Project are highlighted. On the one hand, it is a general principle whose application tends to reduce the obstacles that a tourist may face and whose application already has a favourable trajectory due to the Convention on Access to Justice. On the other hand, it is a principle that, faced with a deepening of international harmonization, runs the risk that States will be reluctant to ratify it, nor is it possible to guarantee that tourists will be freed from *cautio judicatum solvi*, since this depends on the civil law of each State. Given the above-mentioned drawbacks, the Sievi's Report recommends developing

² Sievi, Nino. Report on International Instruments and Principles Relevant to the Tourism Project as well as Possible Grounds of Jurisdiction for Matters Relating to International Tourists. 17 January 2020.

this principle as part of a protocol to the Convention on Access to Justice, so as to minimize the obstacles that might be encountered in the negotiation of the Tourism Project³. In this sense, the feasibility of the Tourism Project should be assessed if it includes a more in-depth and specific development on this principle, while other regulatory strategies should be considered, such as a modification to the Convention on International Access to Justice, which would cover the current shortcomings and reinforce the guarantees to international tourists.

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

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

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

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

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

An examination of the main obstacles faced by international tourists allows us to affirm with many advantages that ODR can offer in ensuring effective access to justice. On the one hand, they are less costly, simplified procedures that sometimes do not require the intervention of lawyers, are accessible from abroad and can even be carried out asynchronously. However, as noted in the Sievi Report, their implementation is not without difficulties. Perhaps one of the most significant is the lack of enforcement mechanisms for the agreement adopted. It should be added that, in some jurisdictions, consumer issues do not fall within the remit of alternative dispute resolution⁴. Moreover, these are procedures that require greater empowerment and awareness of the parties, that their configuration be attractive, secure and generate confidence both for tourists and service providers, that national jurisdictions recognize them as valid for consumer disputes, among others. However, given their ability to respond more effectively to the current shortcomings of international tourists with regard to access to justice, they should be a subject of analysis and priority work. In this sense, a good development of ODR must be based on the following essential elements: trust, fairness and security. In turn, the quality of the ODR should be supervised, for which the obtaining of a certification mark could be envisaged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Josep Maria Bech Serrat*

Introduction

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

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

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

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

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

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

Today international protection of tourists mostly lies at the interstices of law and I consider that there is no legal basis for making an exception to this scene as for the cooperation and access to justice. The traditional method where the countries have to agree to share competence when it comes to judicial cooperation in civil matters causes big problems. An increasing international mass tourism in emerging destinations which are not always well equipped to inform, to assist and help the tourists to have access to justice, ADR and other channels to solve their problems quick and inexpensively, is challenging the current law¹. Nevertheless, national autonomy is strong, a national policy to protect foreign consumers is uncertain and any first hard law international

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

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

From my point of view, there is a need for soft-law rules under the auspices of the HCCH instead, similar to what was argued in relation to the revised UN Guidelines for Consumer Protection 2015 (hereafter 2015 UNGCP), where tourism was covered², and the approach of International Group of Experts on Consumer Protection Law and Policy (IGE)³. The Guidelines might have a high impact on policy making as soft law or non-binding recommendations rather than a binding international convention⁴.

If the expected impact of the Tourism Project is to raise the level of tourist protection worldwide, it is important that their breadth be comprehensive and their recommendations flexible enough. Binding conventions, on the contrary, are limited by nature, as Chapters III and IV of the Sievi's report show. Regarding this, HCCH Conventions have failed to gain wide ratification⁵ and contain a very fragmented regulation. Some crucial aspects to a tourist wishing to sue a service provider in its home jurisdiction are not or not sufficiently addressed⁶. Significant problems of recognition and enforcement arose (e.g., in some jurisdiction, arbitration agreements are deemed invalid and void in consumer cases making the New York Convention ineffective)⁷. International conventions in the field of tourism do not regulate the issue. In consequence, time has come to adopting Guidelines on cooperation and access to justice for international tourists under the institutional machinery of the HCCH.

A wide and cautious mandate similar to that contained in Guideline 97 UNGCP when the IGE was entrusted by the General Assembly could be appropriate⁸. Thus, representatives from government officials in tourism policy and enforcement agencies, tourist associations and academia should participate. The consensus rule of the actors would mitigate the geopolitical power struggles that are common in international relations.

Beyond the Guidelines, of course international governance referring to the exercise of power overall should play a key role on the cooperation and access to justice for international tourist, particularly as regards openness, participation, accountability, effectiveness and coherence⁹. An innovative mode of governance should allow for the overcoming of the legislative competences that are not clearly identifiable. Cooperation should be maximized among different levels and different actors at the lowest cost about preferences and institutions to make the most effective rules.

² Guideline 78 of 2015 UNGCP.

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

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

⁵ Sievi's report, N. 174.

⁶ Ibid, N. 86.

⁷ Ibid, N. 125.

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

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

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

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

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

II. Making the assessment

1. Essential issues of relevance to the Tourism Project

a) Access to justice

Ensuring that tourists have non-discriminatory access to legal aid and will not be ordered to pay a security for costs is essential for the protection of international tourists in court proceedings when a claim is filed in the visited country. Advantages will be eliminating obstacles a tourist faces¹⁰.

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

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

Having considered that States will be reluctant to ratify a convention implementing this principle¹¹, the Sievi's report comes to conclusion that 'it seems advisable to address access to justice in a protocol to the Access to Justice Convention, instead of including the principle in a new convention'. According to the same report, '[t]his way,

¹⁰ Sievi's report, N. 187.

¹¹ Ibid, N. 188a.

the principle can be implemented independently from a new convention without risking any negative drawbacks for the future work on the Tourism Project¹². I consider that HCCH recommendations on the issue would be welcome without prejudice to the feasibility of a protocol to the Access to Justice Convention.

b) Information

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

It would be a reasonable alternative to focus on the information on access to justice, i.e., court proceeding in the visited country¹³, and out-of-court proceeding only. Unawareness of tourists of their rights and legal remedies was regarded as a key finding relevant to desirability of the Tourism Project in the Guinchard's report¹⁴. Differently, I consider that providing information on rights and remedies would be an excessive goal. Providing the tourist with information should entail offering assistance in respect of her case and not producing information overload nor failing to inform market participants adequately.

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

Information should be provided to tourist through a durable medium despite the progress made by new technologies, so as to receive a higher level of protection. Unlike precontractual information to be provided by the travel industry before concluding the contract, the personalisation of information on the on access to justice and out-of-court proceeding with the help of Big Data might form part of the approach¹⁵.

c) Assistance

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

A permanent body in a host country dedicated to assisting tourists in filing their claims with the competent court in the visited country, as established in the Brazilian Proposal¹⁶, would certainly strengthen a tourist protection. Likewise, assistance from the visited country would be welcome if the tourist is planning to file a claim to courts after returning to home, or she is allowed to file a claim through the Internet through an

¹² Ibid, N. 191.

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

¹⁴ Cf. Guinchard's report, N. 7 and pp. 28-31.

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

¹⁶ Arts. 4 and 6 of the Brazilian Proposal.

ADR/ODR mechanism¹⁷. Such assistance should include cost-free information on competent authorities at the destination and consular assistance so as to collect evidence without delay.

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

A creation of Government-funded specialised agencies designed to assist tourists could be excessively costly. Regarding this, the current network of tourist offices perhaps could be used to provide such assistance if a programme training was executed. This way national divergencies in the ADR administration would be reduced¹⁸.

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

This information should be distinguished from the obligation to provide assistance to the tourist in difficulty that was imposed on the travel industry in some countries¹⁹.

d) Cooperation mechanisms

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

As it was mentioned in Sievi's report²⁰, cooperation supports a tourist in overcoming the language and distance barrier; and a tourist seems to be more likely to pursue a complaint when having access to a local authority. Central authorities tasked with supporting parties in cross-border dispute resolution would be very welcome if the assistance to the tourist is provided by staff who have sufficient legal training and adequate language skills.

Nevertheless, this contribution argues that the approach to assistance and cooperation adopted in Guinchard's and Sievi's reports might be too narrow, since they were mainly focused on court proceeding in the visited country after considering some HCCH Conventions on Cooperation and Access to Justice²¹. In my opinion, cooperation between States should be extended to out-of-court proceedings with the aim of enforcing HCCH recommended standards for access to ADR/ODR and procedural as they were described below²².

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

¹⁷ Below § II.1.f).

¹⁸ Guinchard's report, p. 39.

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

²⁰ Sievi's report, N. 240.

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

²² Below § II.1.f.

Unlike harmonization which takes place by a legal instrument, cooperation may take place through soft forms of integration such as informal agreements between States or through soft-law initiatives²³.

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

e) Small claim procedures

HCCH guidelines on small claim procedures should be crucial so as to protect tourists when travelling abroad²⁴.

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

A heavily simplified procedure should be recommended by HCCH by using standard forms in writing to be submitted online by the tourist, enabling litigants to proceed without a lawyer nor a *cautio judicatum solvi*²⁵, accepting oral hearings only in exceptional cases²⁶ and to be carried out through IT communication, i.e. videoconferencing, and establishing a tight time schedule.

Limiting the procedure to claims of a maximum of 5,000 DEG would probably be a reasonable recommendation, although I am not aware of available empirical data on the average amount of cross-border tourists' claims²⁷. If the small claim procedure was aimed at enabling a tourist to sue a service provider in the visited country jurisdiction, the procedure could also be limited to a reasonable amount after taking the price of the travel services offered at destination into consideration.

Assistance as above described (lit. c) would be of interest when initiating small claim procedures, particularly when they are initiated without a lawyer, since there are some technicalities to be faced, i.e., in filling in the forms and determining which is the competent court and the applicable law²⁸.

Those issues still governed by domestic civil procedure law should also be covered by the HCCH voluntary standards, e.g., whether or not there is an appeal from a judgment under the small claims procedure²⁹, the costs of filing a claim in the small

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

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

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

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

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

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

²⁹ Art. 18 of European Small Claims Procedure Regulation.

claim procedure³⁰, or the situation where a counter-claim exceeds the financial limit of the small claims procedure. National autonomy on these issues procedural civil law issues is strong. The States would be reluctant to share competence in the framework of an international convention regulating the issues and HCCH recommended practices can be useful in practice. The Sievi's report adopts an approach in the same line. Since the unification or harmonization of national civil procedure laws beyond international private law is outside the HCCH's mandate, the "principle" was regarded "to be implemented in order to facilitate access to small claim procedures already existing under a national law, there should be no conflict with the HCCH's mandate"³¹.

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

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

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

It is certainly clear that, if international tourists could only rely on formal courts, many disputes would remain unresolved. International tourists very often do not seek judicial protection because of the small value of the claim and formality of the courts. The hazard may increase by the scarcity of lawyers specialized in the travel law field³².

Travel and transportation businesses whom might have been expected to oppose this trend have started to support it on the basis that it offers an effective and low-cost mean of solving disputes with their customers³³.

HCCH Guidelines on cooperation and access to justice for international tourists should include standards on access to ADR, such as mediation, conciliation or arbitration, to put forth complaints against a service provider. As it was stated in the Sievi's report, increasing the access of tourists to ADR in order to put forth their complaints against a service provider is perfectly in line with the 2015 UNGCP³⁴.

Thus, it is suggested that an international public body such as United Nations World Tourism Organization (UNWTO) be appointed as operating a conciliation scheme since public bodies have stronger means of providing redress in tourism matters and could support international tourist ADR, the so-called regulatory redress³⁵. Cooperation between countries could facilitate ADR to be operated by UNWTO at the cross-border level by creating network centres to be hosted either by national authorities in the field of tourism or by tourist associations in charge of informing tourists about their rights

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

³¹ Sievi's report, N. 227-229.

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

³³ Ibid.

³⁴ Sievi's report, N. 192.

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

and providing assistance for complaint handling³⁶. An international institution appointed as a conciliator mechanism should be preferred to obliging the countries to ensure that local entities exist and national consumer ADR procedures fulfil certain requirements, which would mean a highly diverse situation of ADR would prevail worldwide.

HCCH Guidelines on cooperation and access to justice for international tourists might include standards on access to a specific UNWTO conciliation procedure for international tourism, and HCCH could also be permanently involved in its monitoring and certification³⁷.

It is submitted that a ADR scheme should only be available for international tourist claims, i.e., available if a tourist files a claim against a foreign travel service provider, being mostly funded by the travel industry, offering voluntary conciliation in civil matters to solve disputes and without a monetary threshold being set³⁸. The UNWTO conciliation procedure should be as easy and quick as possible by following these criteria – largely following the German scheme for public transport (*Schlichtungsstelle für den öffentlichen Personenverkehr, SÖP*³⁹)—:

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

³⁶ Compare with the ECC Net, a cooperation project at the EU level, https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/european_consumer_centre_network/index_en.htm, accessed: 14 July 2020. BENÖHR, ‘The United Nations Guidelines for Consumer Protection: Legal Implications and New Frontiers’, cit., p. 115.

³⁷ Guinchard’s report, N. 15, concluded that the work by HCCH and UNWTO in this area would be complementary.

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

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

The scope of the scheme should be exclusively formed by travel law issues, i.e., disputes where concerning rights to be freely dispose of. A list method indicating which disputes can be submitted could be useful⁴⁰.

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

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

The non-obligatory nature of a UNWTO conciliation nature should be compatible with making the outcome binding, except if either side, i.e., either the business travel or the international tourist, rejects the decision of the conciliator⁴¹. Then the parties should still have the right to file a case with the court. This would be in line with the Sievi's report when the text says that leaving the tourist always the option of taking a dispute to State courts might be considered more in compliance with the rules on arbitrability of consumer disputes in certain jurisdiction⁴². Moreover, a judicial review would be excluded with a non-binding outcome of the conciliation procedure.

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

What is crucial in this context is that the existing mandatory tourist rights should not be deviated from the decision⁴³. A number of mandatory and specific protective substantive travel law provisions will often apply, whether national or international, and Art. 6 of the Rome I Regulation should be observed when determining the law that applies to the case. A rigorous and expert analysis of the legal and factual issues by the conciliator should be needed. This implies that an extreme expertise of the persons in charge of ADR, i.e., UNWTO conciliators, must be guaranteed. For that reason, participating in training programmes hosted by academia as a prerequisite to obtain a conciliation qualification and for a knowledge update may be needed. Providing the same or even a higher expertise that come with a court process would be a key issue for the success of the proposed conciliation scheme.

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

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

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

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

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

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

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

Another general principle of fairness should be making the UNWTO conciliation procedure available free of charge or at a nominal fee for tourists. They should bear only their own costs, e. g., postage, photocopying, or the attorney's costs in case a tourist uses a lawyer⁴⁴. Costs of ADR procedures are typically lower than the costs of court proceedings. However, the translation of documents will be quite common, amounting a high cost in comparison with the small value of the claim. Such a translation should be free for tourists and should be borne by the business if there is a legal basis for a claim⁴⁵. This way travel businesses should be promoted to accept the claim and fulfil the demand of the tourist before an examination of the case by the UNWTO conciliator and equality of arms would be guaranteed. The same would be valid as for the costs of producing evidences of experts, yet they are less common than in other professions (e.g., in the building construction).

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

Moreover, this contribution argues that the conciliation procedure be available exclusively through the Internet. An electronic system is what can contribute most to the speed of the procedure. The tourist often finds herself in a position of added vulnerability due to their short-term stay, if it is assumed that she is either unable to enforce their rights in the visited country or have to content themselves with less than they are entitled to. It was argued in the Guinchard's report that physical presence was required by law in some countries⁴⁶, coming to conclusion that inability to use mediation/conciliation beyond the stay in the visited country was a key finding relevant to desirability of the Tourism Project. On the contrary, I suggest that UNWTO conciliation procedure be an exception and lead the way for a better future. Tourist vulnerability will be considerably reduced by using new technologies. If the proceedings must not be carried in the visited country, difficulties will basically be on receiving a first legal assistance in the short length of stay, if required, and collecting evidence at destination, e.g., taking photos of the hotel premises. Inconvenience resulting from cultural and language constraints are mitigated if the tourist is allowed to

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

⁴⁵ Below § II.2.

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

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

A UNWTO online conciliation procedure for international tourism disputes may be very useful because parties are established in different countries, given the fact that monetary value of claims arising from travel contracts is often too low to justify a court procedure in another country. Online dispute resolution might provide a solution to the issue of lacking physical presence of the tourist in the country of destinations, as it was argued in the Sievi's report, since the procedure would be accessible from abroad⁴⁷.

An ODR platform for international tourist will face linguistic challenges. The workings of the ECC-Net was taken into consideration as a model for the current Tourism Project, where both tourist and business are able to use the language of their country of origin, the European Centres then liaising between themselves in their preferred language⁴⁸. Nevertheless, it is doubtful that the same model can be worldwide extended to a UNWTO online conciliation procedure for international tourists.

Obviously, a barrier resulting from enforcement will not be totally overcome, as it was noted in Sievi's report⁴⁹. Conciliation does not result in an enforceable title like a judgment and there is a lack of rules of procedure and uniform conditions to enforce a settlement agreement at international level for tourists⁵⁰. Regarding this, perhaps an application of private enforcement mechanisms should be explored⁵¹.

Some States may be reluctant to accept an international convention and, as it was noted in the Sievi's report, establishing an ADR system would be beyond the scope of that HCCH's mandate⁵². Nevertheless, creating a UNWTO conciliation procedure based on standards recommended HCCH is feasible and mostly of the States, travel businesses, associations, and tourists would probably be very interested in receiving practice recommendations on ADR quality requirements from HCCH. The option of 'the setting up of a soft law instrument establishing certain minimum procedural standards for an ODR procedure in tourism matters' was already mentioned in the Sievi's report, yet national tourism organizations were appointed in this document to build upon such soft law and certify specific ODR providers complying with these minimum standards⁵³.

⁴⁷ Sievi's report, N. 197 and 210.

⁴⁸ Guinchard's report, pp. 51-52. https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/european_consumer_centre_network/index_en.htm, accessed: 24 July 2020.

⁴⁹ Sievi's report, N. 194 b.

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

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

⁵² Sievi's report, N. 195.

⁵³ Ibid, N. 216.

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

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

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

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

Certainly, the report says that “the claim form must be submitted in the language of the court seized which could put in place certain language barriers” in relation to small claim procedures⁵⁴. Art. 6.1 of the EC Regulation No. 861/2007 was mentioned but the problem was mitigated when linking it to a claimant’s option to seek assistance in filling out the claim form as provided in Art. 11 of the EC Regulation No. 861/2007. However it is unclear that providing assistance in filling out the claim form will be interpreted as translating the documents into the language of the court and it is far from what was provided in Art. 4 of the Brazilian Proposal, i.e., where a multilingual complaints-model form was created to facilitate the communication between the tourist and the consumer agency of the country visited.

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

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

⁵⁴ Ibid, N. 150 and 226.

TOURISTS AND VISITORS (ODR) PROJECT

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

Andrej Mićović*

Introduction

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

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

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platform may suit their needs. The EG invited the PB to prepare, subject to available resources, a detailed outline of such a “Guide” and to circulate it to the members of the EG for comments, in advance of CGAP 2021.¹

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

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

Benefits and Challenges of Legal Tech in Relation to ODR

Sievi’s report identifies online dispute resolution (ODR) and Legal Tech² as the two principles with the biggest potential impact for the protection of international tourists. The use of technology in the legal service industry (so-called Legal Tech), can serve not only to ease access to justice, but also to ensure accessibility of ODR mechanisms. Unification of legal rules on ODR can be seen as a hardware and Legal Tech tools as a software in achieving the higher level of the protection of international tourists as consumers.

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

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

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

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

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

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

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

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

availability of such procedures, i.e., availability of ADR mechanisms pursuant to Directive 2013/11/EU and ODR platforms pursuant to Regulation (EU) No 524/2013.⁵

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

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

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

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

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

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

⁷ Cortes, P., pp. 132-140.

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

B. INCENTIVES TO SETTLE COMPLAINTS:

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

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

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

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

Legal Tech and Accessibility

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

When it comes to the latter one, three major documents have guided the understanding and promotion of accessibility⁹ within the United Nations policy framework to date: The World Programme of Action concerning Disabled Persons, The United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities and The UN Convention on the Rights of Persons with Disabilities (UN CRPD).¹⁰ Together, these three documents require that Governments and the international community recognize the importance of accessibility in ensuring the equalization of opportunities for persons with disabilities by empowering them to “live independently and participate fully in all aspects of life”. The documents give particular attention to accessibility in the physical environment, as well as access to information and

⁸ See: Consumer vulnerability: challenges and potential solutions, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782542/CMA-Vulnerable_People_Accessible.pdf

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

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

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

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

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

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

¹¹ United Nations, Accessibility and Development..., https://www.un.org/disabilities/documents/accessibility_and_development.pdf, p. 4.

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

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

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

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

Concluding Remarks and Recommendations

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

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

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

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

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

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

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

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

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

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

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

Dr. Uta Stenzel, Germany¹

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

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

1. Development of SOEP into an intermodal conciliation body

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

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

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

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

¹ Dr. Uta Stenzel is a conciliator at the German Conciliation Body for Public Transport in Berlin.

² Schlichtungsstelle für den öffentlichen Personenverkehr, söp, Berlin, www.soep-online.de.

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

⁴ Ship: March 2013; Coaches: October 2013; Flight: November 2014.

⁵ Since 2013.

⁶ Since 2011/2012.

⁷ Status as of February 2016.

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

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

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

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

2. Conciliation procedure of SOEP

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

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

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

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

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

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

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

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

⁸ For list of members, see SOEP ("Die Schlichtungsstelle – Der Trägerverein"), www.soep-online.de.

⁹ Creutzfeldt, Trusting the middle-man: Impact and legitimacy of ombudsmen in Europe, Vertrauen in außergerichtliche Streitbeilegung – Fallbeispiel: sōp_Schlichtungsstelle für den öffentlichen Personenverkehr e. V., July 2015, www.law.ox.ac.uk/sites/files/oxlaw/oxford_bericht_teil_soep.pdf; www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe-project-reports (retrieved on 08/02/2016).

¹⁰ Figures for 2015; for detailed information see SOEP – Annual reports ("sōp – Jahresberichte"), www.soep-online.de.

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

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

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

4. Advantages of conciliation for traveler and companies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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