

Alternative Dispute Resolution

Airline workshop

Civil Aviation Authority

30 September 2014

Background to the Study

- The European Union Directive 2013/11/EU on Alternative Dispute Resolution (ADR) for consumer disputes requires that, by July 2015, Member States must:
 - Facilitate access by consumers to an ADR entity
 - Designate a Competent Authority to oversee and approve each ADR entity
- The Department for Business, Innovation and Skills undertook consultation on the UK implementation of ADR earlier this year. It considered that the ADR body should:
 - Be “privately funded, often through businesses paying membership fees or case fees”
 - Provide “impartiality ensured through appropriate governance and structural arrangements”

CAA Objectives

- The CAA believes that some form of independent dispute resolution outside the justice system is an essential element of consumer protection in the aviation sector:
 - The CAA's Passenger Advice and Complaints Team (PACT) currently operates a complaints handling service and provides information about passenger rights
 - The CAA's preference is for the aviation industry to take ownership of complaint handling by establishing a privately funded ADR body to meet consumers' needs
 - This body should have the active participation of a significant majority of the industry
 - The CAA would then become the Competent Authority for the aviation ADR body and would then expect to end the PACT service
- The CAA therefore needs to understand:
 - The nature of the ADR arrangements
 - The likelihood of privately funded ADR arrangements being set up by the aviation industry
 - The proportion of the airline community in the UK which is likely to participate in ADR
- To facilitate this, it has commissioned:
 - Research into aviation consumers' perceptions of and requirements for ADR
 - Facilitated dialogue with the airline industry (this Study)

Study Objectives and Process

- Steer Davies Gleave was commissioned by the CAA to undertake facilitated dialogue with the aviation industry in the UK
- The objectives included:
 - Explaining the ADR Directive and outlining the consumer research results
 - Understanding the views of individual airlines on complaint handling and ADR
 - Ensuring that any scheme developed by the industry is attractive to consumers
- Briefing packs were provided to and interviews were held with:
 - BATA (meeting also attended by 8 UK airlines and a representative from BAR UK)
 - 4 UK airlines in bilateral discussions
 - 6 non-UK airlines in bilateral discussions
- The objective of today's workshop is to “play back” the responses we have received and to make suggestions for a way forward where there was less alignment between airlines, or where there were CAA or consumer concerns

What happens next...

- We will collate feedback from the discussion at this workshop
- You are invited to make further submissions to Steer Davies Gleave in writing by **Friday 10th October**
- All feedback will be considered in our Final Report to the CAA.
- PLEASE NOTE:
 - The outcome of this study is advice to the CAA, to help inform its strategic policy on complaints handling in the sector
 - **The establishment of ADR is the down to the industry:**
 - If the CAA has confidence that credible arrangements will be established, it will seek to become the Competent Authority for those arrangements and end its own complaint handling role
 - **There is a tight timeline for this process:**
 - The CAA is looking for formal commitment to ADR from airlines by the end of October (see slide at end)

Overview of the Facilitated Dialogue

- Both through BATA and individually, we found airlines enthusiastic to consider ADR and to provide feedback on the questions we raised
- There was considerable support for the concept of ADR and participation in an ADR scheme, subject to appropriate arrangements being put in place:
 - All UK airlines interviewed were supportive of ADR, feeling that it was a fair approach and could bring both reputational and financial benefits (by helping to avoid litigation)
 - Non-UK airlines' views were more mixed, with several supportive in principle but some sceptical, with a number of concerns raised about such a body's effectiveness
- There was a large measure of agreement about many aspects of a potential ADR scheme
- Airlines disagreed on certain points relating to how the scheme should function, but in many cases these were points of detail rather than matters of principle
- Airlines' views were generally compatible with the CAA's expectations for how an ADR body should function, although issues remain in a few areas

Review of airline comments

- In the following slides, we address in turn a number of aspects of how the ADR scheme would function. We identify:
 - Where there appears to be general consensus between the airlines (if not unanimity)
 - Where we found areas of disagreement between airlines or where we think important consumer expectations may not be met by the airlines' preferred approach
 - Steer Davies Gleave's suggestions for moving forward where there are areas of non-alignment within the airline community, or between the airlines and consumers' needs
- The aspects of the ADR scheme considered in the following slides are:
 - Structure and scope of the ADR body
 - The customer experience of using the ADR body
 - Range of complaints considered by the ADR body
 - Nature of decisions taken by ADR body (either/or vs. compromise decision)
 - Provision of information by the ADR
 - Whether decisions should be binding and on whom
 - Involvement of claims management companies
 - Funding of the ADR body
 - Governance of the ADR body
 - Future of CAA's PACT service

Structure and scope of the ADR body

Areas of Consensus

- There should be a single ADR body for aviation in the UK
- An EU-wide body might be desirable in principle but in practice only a national body was feasible at this stage
- Membership of the ADR should be voluntary
- The CAA should be the Competent Authority

Issues identified

- A few airlines felt multiple ADR entities would give them a choice of provider, allowing them to choose the most advantageous scheme
- An airline suggested participation by other industry players, e.g. airports, would be beneficial to avoid secondary actions in recovering costs
- State funding was suggested as an option ensuring greater neutrality

SDG Suggestions

- We consider that the Consensus views are appropriate and should be adopted

The customer experience of using the ADR body

Areas of Consensus

- There should be a modest fee for consumers in order to discourage frivolous claims - this would be refundable if the claim was successful
- The consumer fee should be lower than cost of going to court
- The range of costs mentioned was £25-£50
- Information on the ADR process would be displayed on airlines' websites but not form part of the booking flow nor be displayed on boarding passes or other passenger documents
- ADR should be a remote process for both parties (no need to attend a hearing in person)

Issues identified

- Consumers are strongly opposed to paying any fee for ADR, even if it is refundable
- Ombudsman services in the UK are traditionally free for consumers
- Court costs for small claims can be as low as £25 if claiming online
- The CAA would prefer a free service; if there is a fee it should be as low as possible

SDG Suggestions

- We consider that a fee of £25 would be appropriate and that it should be refundable if the consumer won their case. The £25 should apply *per claim* rather than *per person*, e.g. for a family of four claiming EC 261 compensation, fee should be £25, not £100
- Repayment of the £25 fee should be automatic if the consumer's complaint is upheld
- The consumer should be advised in advance of paying the fee if the claim was unlikely to be upheld, e.g. because the ADR body had already established that EC 261 Extraordinary Circumstances applied to the flight in question

Range of complaints considered

Areas of Consensus

- The ADR should consider consumer claims where there is a legal right for compensation

Issues identified

- Most airlines preferred to exclude claims not relating to legal rights only (EC 261, EC 1107, Montreal Convention) and/or a claim for financial compensation. However, some preferred to leave it open to alternatives such as flight vouchers , goodwill payments and loyalty miles.
- One airline suggested that it should only cover EC 261, at least initially, as this would cover the majority of cases and therefore be the most cost effective
- The CAA requires that both statutory rights to compensation and breach of contract be covered by the scope of the ADR body

SDG Suggestions

- The ADR body should deal with complaints regarding statutory rights to compensation and breach of contract up to a maximum level (e.g. the small claims court limit £10,000)
- The complaints procedure for the customer should require the ADR body to decide on the eligibility of the complaint before payment of the consumer fee (e.g. through pre-screening (“triage”) of the consumer’s complaint)

Nature of decisions taken by ADR (either/or vs. compromise)

Areas of Consensus

- There was no consensus among airlines on this issue

Issues identified

- Airlines had different views about whether decisions needed to be 100% for or against the consumer or whether “compromise decisions” could be taken
- Compromises might be suggested by the ADR for a number of reasons: the evidence was unclear or due to different interpretations of consumer entitlements. Some airlines were willing to consider compromise solutions only relating to unclear evidence, while others rejected them in all cases.
- Some airlines felt compromise solutions formed part of their customer service offer, so were only acceptable if voluntary

SDG Suggestions

- In cases where there are predefined levels of compensation (e.g. EC 261), the ADR body should decide for one party or the other based on case law
- Where predefined levels of compensation do not apply (e.g. reimbursement of expenses) the ADR body should issue its decision based on its assessment of the available evidence and reasonableness of the claim
- Where there is no legal precedent in UK case law for the particular matter at issue, the ADR body should not hear the case but refer it to the courts

Provision of information by the ADR

Areas of Consensus

- The ADR body should provide relevant information to consumers in advance of a formal complaint

Issues identified

- There was concern that publishing detailed statistics could prejudice the ADR process, or discourage consumers from using it (e.g. if the probability of success appeared low)
- Some argued strongly that statistics may compromise the neutrality of the ADR body and that courts do not do this as every case is individual
- It was suggested that the instead of probability of success, the ADR body could provide customer satisfaction survey results e.g. how well the customer thought the complaint was handled
- The Directive requires ADR bodies to publish high-level information annually

SDG Suggestions

- The ADR body should provide guidance to the consumer on their rights in relation to disputes with airlines including delays, cancellations and other problems, with an explanation of when EC 261 compensation applies
- The information to be published needs to be carefully considered in order to comply with the Directive and meet CAA requirements without disadvantaging participating airlines or misleading consumers
- A published customer satisfaction survey would help demonstrate the value of the service

Whether decisions should be binding and on whom

Areas of Consensus

- The customer should not have to accept the decision of the ADR body (not unanimous)
- However, if the customer does accept the ADR decision, they should then be unable to pursue the case in the courts

Issues identified

- UK airlines were content with decisions being binding on airlines but not on consumers
- Most non-UK airlines felt strongly that equal treatment of airlines and consumers was essential. Of these, most preferred that both could go to court.
- The consumer research showed that consumers would have greater trust in ADR processes if they retained the option of going to court
- The CAA considers that decisions of the ADR body must be binding on the airlines

SDG Suggestions

- In order to ensure that ADR is more attractive to consumers than going to court, ADR decisions should be binding on airlines, while allowing consumers to continue to have recourse to the courts if they are unhappy with the ADR decision:
 - In practice we consider that the decisions of a properly established ADR body should be of a similar quality to those issued by PACT, which airlines appear to find acceptable
 - Evidence from Ombudsman Services, the FOS and SOP suggests that in the vast majority of cases, consumers accept the ADR body's decision, even if it didn't go in their favour

Involvement of claims management companies (CMCs)

Areas of Consensus

- Airlines expressed clear opposition to CMC involvement in ADR. A number of airlines said that these now bring the majority of claims and that they adopt a “scattergun” approach, not fully verifying claims before submitting them. This leads to a material financial impact for airlines.

Issues identified

- Exclusion of CMCs may be difficult to enforce, because claimants have a right to use representatives if they choose. Some claimants might not be capable of making a complaint without help.
- It should be possible to reduce the impact of CMCs by designing scheme rules that increase both their transaction costs and the risks of claimants 'dropping out'

SDG Suggestions

- A key objective for designing the ADR scheme is that it must be made more attractive to consumers than using a CMC to submit a legal claim, in terms of both cost and process
- Formal exclusion of CMCs would be difficult, but ADR procedures and information provision to consumers should be able to reduce CMC involvement in ADR cases (e.g. only accept CMC claims if signed consent can be provided that the consumer has been made aware of the option to pursue their claim themselves)

Funding of the ADR body

Areas of Consensus

- Broad agreement that the bulk of costs should be charged on a per case basis (although some airlines preferred a fixed fee)

Issues identified

- There were different views on whether there should be an annual fee or not and how this would be structured if it existed
- Concern that per case funding could incentivise the ADR to induce the customer to make complaints even when these had no chance of succeeding (e.g. EC 261 did not apply)
- Funding by other industry players (such as airports) was suggested, which might help to avoid knock-on compensation claims
- Funding by the state was suggested, on the basis that the courts are state funded, and that this would help to ensure neutrality
- The CAA agrees with BIS that the industry should fund the scheme, but that the funding structure is a matter for the industry to determine, so long as the scheme rules (which are subject to the approval of the Competent Authority) are satisfactory

SDG Suggestions

- The majority of funding should be on a per-case basis.
- There is a case for an annual fee to cover general administration costs and, potentially, the cost of information provision for consumers at the stage before a formal claim is made.
- It may be appropriate to scale the annual fee in relation to the airline's footprint in the UK

Governance of the ADR body

Areas of Consensus

- The ADR body needs to have access to experts with industry knowledge

Issues identified

- Some airlines suggested a pool of retired industry personnel should be made available
- Some airlines were unclear as to how to comply with Article 6(5), which requires that the oversight body must be composed of an equal number of representatives of consumer organisations and of representatives of the trader
- The CAA will need to approve the scheme rules and be assured that the ADR has sufficient capacity to handle the volume of claims it is likely to receive. The process of procurement and governance is otherwise a matter for the industry.

SDG Suggestions

- Airlines should only contract with ADR service providers who comply with the Directive
- We agree with the logic of ensuring access to industry personnel but care must be taken that this does not compromise the independence of the body – ADR providers have experience of managing similar concerns in other sectors
- Significant thought and care needs to be given to designing management structures that allow the funding airlines to have an input whilst keeping compliance with the requirements for equal representation. Examples are available from other sectors e.g. the Water UK ADR scheme.

Future of CAA's PACT service

Areas of Consensus

- If the CAA becomes the Competent Authority for an aviation ADR, then it should cease its complaints handling function, as this would represent a conflict of interest

Issues identified

- Some airlines questioned whether the CAA's role in providing information to consumers in relation to their rights and making complaints could not continue, even if PACT ceased to handle individual consumer complaints
- The CAA has not currently made a decision on whether to continue either its complaint handling or information provision functions

SDG Suggestions

- We agree that if an ADR is established with CAA as the Competent Authority, then it makes sense for the CAA to cease its complaint handling function
- If the ADR is also able to provide a satisfactory information provision function for consumers, then there would be no reason for CAA also to maintain that function either

Next Steps

- Please let Steer Davies Gleave have any feedback by **Friday, 10th October**
 - Please send to peter.wiener@sdgworld.net
 - We will incorporate this in our Report to the CAA.
- Following today's workshop, if the airline community in the UK decides that it is in its interests to establish an ADR scheme and wishes to see an efficient and effective transition to new complaint handling arrangements that are publicly endorsed by the regulator, it should:
 - Collectively agree on the nature of the scheme and how it will be procured; and
 - At the earliest possible opportunity (and **by no later than 27 October**), inform the CAA of the scheme's high level rules and demonstrate to the CAA that a significant majority of the sector is committed to participating in the scheme by the end of the 2015-16 fiscal year.
- Following confirmation of airlines' intentions, the CAA will present its complaints handling policy to the CAA Board on 19 November, with a formal consultation to be published in December.
- Procurement of the ADR service would need to take place in early 2015

Questions

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