Dispute resolution in the aviation

There will always be disputes between stakeholders in the aviation industry. ERA's Legal Counsel Sean Gates looks at the advantages and disadvantages of the options available to achieve a resolution, and suggests a possible new alternative system

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The scope for disputes between the myriad participants in the aviation industry is considerable; though hardly surprising, given the number of actors working together in close proximity to each other and to high-value assets. When those disputes arise, be it between an airline and a handler, airport and refueller, lessor and lessee – the list is potentially endless – a means must be found to resolve the dispute.

The default was always recourse to the courts. Courts within Europe will bring an adequate level of competence to hearing and resolving disputes arising where they have jurisdiction. Having said that, of course, there are differences in competence, efficiency and cost and in most courts, the disputes are heard and resolved in public.

Alternatives to courts

A substantial industry has grown to identify alternatives to the judicial system which are loosely grouped together under the heading of alternative dispute resolution (ADR). ADR comprises principally mediation and arbitration. Mediation will involve the appointment of a third party with training and/or experience in assisting disputants to resolve their conflict. The mediator will manage the discussions between the parties; analyse the issues; and seek to point out to both parties the strengths and weaknesses of their cases and the desirability of resolving all or some of them by agreement. Mediation has the significant advantages that it can be quick; highly confidential; and can resolve difficulties between parties who might otherwise wish to continue in business together but might find it difficult after the abrasive experience of litigation. Parties to a successful mediation extol its virtues. However, it must be said that if the mediation is not successful, the parties will come away feeling that they wasted time and money since the mediator does not have the ability to impose a settlement and, absent agreement, the dispute continues.

Arbitration is the other principal alternative to litigation. There are a variety of arbitration systems commonly used in the aviation world. The IATA Standard Arbitration Clause can be found in many aviation industry contracts. Aircraft purchasing and leasing contracts are often subject to the arbitration procedure of the International Chamber of Commerce (ICC). There are, in addition, a number of other arbitration bodies each with different rules of more or less complexity and cost.

Advantages of arbitration

The principal virtues of arbitration will be its confidentiality and, at least potentially, the speed with which arbitration can resolve disputes by comparison to some of the slower legal systems in Europe. In any contract, the parties can have a choice of the law they wish to apply, though often

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the dominant party will be able to impose its will. The IATA Arbitration Clause has been criticised because, to some extent, it leaves the question of law and jurisdiction as a matter to be decided after commencement of the process, which adds to its unpredictability. The parties have to pay the arbitrators. The higher the quality of the arbitrator – usually a lawyer or judge – inevitably the more expensive he or she will be, and over and above this, the arbitral organisation will seek to levy its own charges. When one adds these costs to the costs of the lawyers that each party will likely instruct, an arbitration can become significantly more expensive than the traditional litigation system. An additional factor that can arise is that under the laws of a number of countries within Europe, the procedure to be adopted in an arbitration is to be decided according to where the arbitration is to take place even though the substantive law governing the dispute may be the law of another country. So, for example, an ICC arbitration will customarily have its default seat in Paris so that French procedural law will apply.

Production of documents

Procedural law can be of great significance. One of the major differences between the common law and civil law systems is that in common law countries, the laws of discovery of documents require that the parties must produce all documents in their possession relevant to the issues in the action. This can include discovery of electronic communications. In a recent example of an arbitration, a manufacturer was required to produce all documents and electronic records in its possession relating to the design and manufacture of the avionic systems and information about issues that had been experienced in relation to that piece of equipment from the time of its original development, including all email correspondence within the company and between the company and the users of the equipment. The exercise

involved interrogating not only the systems within the organisation, but also each laptop of every user who might have been involved and have any records. The data easily ran into terabytes. That had then to be searched and analysed using companies employing proprietary algorithms to identify possibly relevant material. The cost of the exercise was significant although the value of the dispute ran to hundreds of millions of dollars. Certainly, in the UK the court will be prepared to make orders which are proportional to the value in dispute but nevertheless this exercise can be daunting. By contrast, the civil law system vastly limits the amount of information that can be required and the system by which it is obtained is much more conservative. This can be attractive for organisations with large repositories of data but unsatisfactory for the Davids attacking Goliaths whose only means of gathering information to support their case may well be the discovery system.

Combined system

To achieve the benefits of confidentiality, speed and the reduction of costs on the one hand, and the potential for retention of business relationships on the other, there would seem to be room in the aviation industry to consider a form of combined mediation/arbitration where participants agree to put their disputes on a confidential basis before one of their peers, supported, where necessary, by legal and other experts, and required by persuasion or decision but without excessive formality to resolve disputes. If, for example, all of the members of an aviation organisation were to come together and agree that each of them would be prepared to participate as a dispute mediator in respect of disputes between each of the other members; on a strictly confidential basis with a fixed and hopefully modest charge, then the benefits of ADR with a special aviation flavour might be achieved at a significant cost saving and to the disappointment only of the lawyers who might otherwise be engaged in the dispute! The parties involved in the ADR would have the benefit of experience of how similar companies work and the experience to distinguish between truth, exaggeration and deception informed by that experience which could cut through much of the fog that usually accompanies litigation. The scheme ought to include representatives of as many sectors in the industry as possible so as to widen its scope and appeal.

In the meantime, since this system would, if adopted, take time and effort to create and market, where contracts are drawn containing a dispute resolution clause, the parties should review the ADR choices using not only commercial but also practical litigation expertise to determine the most appropriate choices. ■

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