

ADR in the aviation sector – a first review

CAP 1602

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Executive summary

“... the future of consumer complaints handling in aviation lies not in the Civil Aviation Authority (CAA) handling individuals’ complaints, but in this important work being done by private alternative dispute resolution (ADR) schemes...”¹

Empowering consumers is a strategic priority for the CAA. This includes ensuring that consumers have access to effective mechanisms to resolve their complaints. Historically, the CAA was the main body to which consumers could refer their complaints if they could not resolve them directly with the business. However, due to restrictions in the legal framework, the CAA had no powers to enforce its decision in the case of individual complaints. The European ADR Directive² was published in May 2013 and implemented into UK law³ in late 2015. Recognising the limits of the then existing framework, the CAA saw this as an opportunity to make significant improvements to how consumer complaints are handled in the sector and to provide consumers with a quicker, cheaper and more effective alternative than going to court.

Although it is not mandatory for businesses in the UK to use ADR to resolve consumer disputes, the take-up of ADR by airlines has been very good. Following lengthy consultation with airlines, including workshops with them and the ADR providers, the introduction by the CAA of a direct charge on airlines for handling escalated complaints, and recognition by airlines that ADR could bring benefits to their businesses in terms of more efficient complaint handling and improved customer loyalty, virtually all of the major UK airlines have now signed up to a CAA approved ADR provider, with many foreign airlines also signing up to ADR (either in the UK or in other European countries). Nearly 10,000 complaints have been received by CAA approved ADR providers since its inception.

Acknowledging another of the CAA’s strategic priorities, we have recently expanded the scope of ADR to include complaints from disabled passengers and passengers with reduced mobility in relation to accessibility issues at the airport. Although take-up of ADR in this area is still at an early stage, we are pleased to see that some of the UK’s largest

- ¹ CAP 1286 - Consumer complaints handling and ADR: CAA policy statement and notice of approval criteria for applicant ADR bodies www.caa.co.uk/cap1286
- ² 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) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>.
- ³ The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended by) The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015. A consolidated set of Regulations is provided on our website here: <http://www.caa.co.uk/Commercial-industry/Airlines/Alternative-dispute-resolution/>

airports have signed up with CAA approved ADR providers. In fact, 76% of disabled passengers and those with reduced mobility travelling through a UK airport are now covered by an ADR scheme.

A key feature of ADR in the aviation sector is the requirement, introduced by the CAA, that the decisions of the CAA approved ADR providers, once accepted by the consumer, are binding on the business. This is clearly a significant improvement on the previous situation where, as referred to above, the CAA could only make non-binding recommendations in respect of individual complaints. The introduction by the CAA of binding decisions, combined with its rigorous oversight of the UK ADR providers in terms of their independence and impartiality, is ensuring that the regime established by the CAA is delivering on consumers' expectations for ADR, notably that ADR providers have "[...] 'teeth' that can definitely bring about a clear, binding decision at the end" and that decisions are "[...] based on what is fair and reasonable, taking into account both sides of the story".⁴

In terms of the outcomes achieved by consumers through ADR, the average rate at which consumers have had their complaints upheld (in full or in part) by the CAA approved ADR providers is 79%. Although ADR is still developing in the sector, and although these headline figures should be treated with a degree of caution, we are pleased to see that the CAA approved ADR providers are acting systematically to uphold the claims of aviation consumers where justified. Further, feedback from consumers on their experience of the ADR process shows high levels of satisfaction. For example, 77% of respondents to one of the ADR provider's surveys found the decisions to be either "extremely" or "very clear", and 81% of respondents found it "moderately, "very" or "extremely" easy to have their case decided.

A contentious issue at the time that the CAA was developing its policy on ADR was whether consumers should pay a fee to use ADR. Our consumer research showed that consumers overwhelmingly supported free access to ADR. However, many airlines were of the view that charging consumers to use ADR would discourage spurious and poorly prepared claims. We chose, therefore, to allow ADR providers to charge a nominal fee of up to £25 per (unsuccessful) complaint, but we committed to keep the practice of charging consumers to use ADR under review. Analysis of the data on the types of complaints that the CAA approved ADR providers are refusing to handle suggests that the consumer fee may not be necessary to deter spurious complaints. Although further work needs to be done in this area, in particular to better understand the types of complaints that the ADR providers are not handling, in the CAA's view there is a prima facie case for reducing the maximum amount of the consumer fee or removing it entirely. We will continue to assess the impact of the consumer fee and will review this aspect of the policy by the end of 2018.

⁴ See the CAA's consumer research on ADR, which is set out in Appendix A of CAP1257, "Reforming consumer complaints handling - Consultation on the CAA's draft policy"

http://publicapps.caa.co.uk/docs/33/CAP1257_ADR_draft_policy_statement_for_consultation.pdf

As set out in more detail later in this report, our review has identified a number of other areas for further work by the CAA over the next year and beyond. One such area is transparency. We have become aware recently of a small number of instances where consumers are not being properly signposted to ADR at the point that the business rejects their complaint. A priority for us this year will therefore be to ensure that airlines and airports provide consumers with the appropriate information on ADR at the appropriate time. Also in relation to transparency, although a significant majority of the complaints that reach ADR are settled in favour of the consumer, there have been a few instances where consumers have questioned the independence and impartiality of the ADR provider, in particular where the ADR provider has ruled against the consumer. In order to try to address this perception, we intend to consider whether to enable the publication of data on the numbers of complaints received for each airline and the rate at which decisions are made in favour of the consumer. Further, we will look at whether there is any additional information which could be published about the independence and impartiality of the CAA approved ADR providers.

A small number of operational issues have also come to light over the previous twelve months. For the most part these have been technical issues, for example points of detail around the relevant scope of the ADR schemes, the correct interpretation of the law, etc, which we have been able to resolve directly with the ADR providers. More recently we became aware of an issue of late payment of claims. Having looked into the issue, and having discussed the matter with the parties involved, we have been assured that the situation is now resolved. However, we will continue to monitor this issue and we have asked the CAA approved ADR providers to report to us quarterly on any outstanding payments that they are aware of.

Overall, we are pleased with how this initial period of full operation of ADR in the aviation sector has gone. Unfortunately, we have seen a slow down recently in the number of businesses volunteering to participate in ADR. The CAA's objective in relation to ADR is for full coverage across the sector, and it is therefore disappointing that a number of large airlines such as Jet2, Emirates, and Aer Lingus (which between them carry over 16 million passengers to and from the UK) have failed to sign up to ADR. There is therefore a strengthening case for making participation in ADR mandatory across the sector. Achieving mandatory participation would require primary legislation and therefore it is a decision for Government. The Department for Transport expects to publish its draft proposals for a new aviation strategy, which we expect to consider consumer issues including ADR. Although we will continue our efforts to promote full participation in voluntary ADR, we will also work closely with Government on its aviation strategy and the issue of voluntary versus mandatory participation in ADR.

In the meantime, we will continue to build on the successes achieved so far through further expanding and enhancing ADR and ensuring that it is delivering improved outcomes for consumers. We hope that all those concerned with aviation and the consumer experience find this report of interest.



Tim Johnson, **Director of Policy**

Chapter 1

The CAA's role in complaint handling

Historically, passenger complaints in the UK were handled by the AUC (Airport Transport Users Council), which had since the 1970s acted as the CAA's consumer 'watchdog'. The AUC had two functions: first, to act as an advocate for consumers' interests; and second, to resolve passenger complaints. The numbers of complaints submitted to the AUC prior to 2005 were around 500-1,000 per year. However, when EC Regulation 261/2004⁵ came into force (which provided for compensation for passengers for denied boarding and flight cancellations), complaint volumes increased to between 5,000 and 6,000 per year and remained consistently at this level until the Eyjafjallajökull volcanic eruption in 2010. This event significantly impacted air travel and, in that year, the number of complaints submitted by consumers to the AUC jumped to nearly 12,000.

The consumer advocacy role of the AUC was taken over by the CAA's Consumer Panel in 2011. At the same time, complaint handling was brought in-house into the CAA's newly-formed Passenger Advice and Complaints Team (PACT). Following the Eyjafjallajökull volcanic eruption, complaint volumes returned to a level of around 6,000-7,000 per year. However, in 2012 the European Court of Justice made a significant ruling in the case of *Tui/Nelson*, which extended the rules on financial compensation in EC Regulation 261/2004 to long delays.⁶ As a direct result of this ruling, complaint volumes in 2013 jumped to nearly 27,000 per year, which put a significant strain on the CAA's complaint handling capability and started to expose a number of structural weaknesses in how the CAA was set up to handle individual passenger complaints.

In relation to this latter point, although the CAA is a national enforcer for consumer protection legislation in the aviation sector, in particular in relation EC Regulation 261/2004, its role in handling individual complaints was not clear – in fact, there is no explicit statutory requirement for the CAA to mediate or resolve individual consumer complaints and, as a result, the CAA has no legal powers to enforce its decisions in respect of individual passenger complaints. As the volumes of complaints increased over the years, especially following the *Tui/Nelson* ruling, so did their complexity, in particular in relation to whether a technical fault with an aircraft should be considered to be an 'extraordinary circumstance' and therefore exempt from compensation.⁷ The propensity of

⁵ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004R0261&from=EN>

⁶ Joint cases [Nelson \(C-581/10\)](#) and [TUI Travel \(C-629/10\)](#). This confirmed the earlier ruling of the European Court of Justice in [Sturgeon](#).

⁷ The issue was subsequently clarified in the 2014 *Jet2 v Huzar* Court of Appeal case.

airlines to vigorously defend compensation claims using the 'extraordinary circumstance' exemption exposed the CAA's inability to issue binding rulings in what was an admittedly complex and difficult area.

Compounding this issue was the compatibility of the CAA's complaint handling role with that of its consumer enforcement role. Our role as an enforcer of consumer protection legislation requires us to address systematic issues of non-compliance and concerns the general applicability of consumer protection legislation to the typical issues encountered by consumers. And indeed the CAA has been active in this area.⁸ In contrast, in its complaint handling role, the CAA was being required to apply the law to a myriad of different individual circumstances and in which, often, the facts of the case were not clear or there was legitimate uncertainty in the application of the law to the specific set of facts. The confusion between these two roles in the eyes of the public had created an expectation that the CAA would take enforcement action in relation to each individual consumer complaint where, in its complaint handling role, it had found against the airline. In this context it is worth noting that regulators in the UK do not generally handle individual consumer complaints. For example, in financial services, the Financial Conduct Authority co-exists with the Financial Ombudsman;⁹ in energy, Ofgem directs consumers to the Energy Ombudsman;¹⁰ and Ofcom signposts complaints to CISAS (CEDR) or Ombudsman Services for telecoms complaints.¹¹

A further weaknesses in how the CAA was set up to handle individual passenger complaints related to its charging framework. Given that the CAA's role in complaint handling was not fully clear, and given that, historically, complaint volumes had been low, its charging framework had not been designed in a way to encourage airlines to get their own complaint handling 'right first time'. In particular, airlines were not charged on a per complaint basis and were instead funding PACT as part of the CAA's overall charging regime whereby costs fall most heavily on UK airlines. As such, the costs incurred by the CAA in handling complaints were not being passed on to the airlines which the complaints were about. This reduced the incentive on airlines to handle complaints effectively and thereby avoid consumers escalating their complaints to the CAA. Further, as the costs were primarily falling onto UK airlines, this was resulting in non-UK airlines receiving a

⁸ We have published a number of reports on airline compliance and subsequent enforcement action: www.caa.co.uk/cap1227; www.caa.co.uk/cap1275; www.caa.co.uk/cap1305; www.caa.co.uk/cap1500; <http://www.caa.co.uk/News/Ryanair-faces-CAA-enforcement-action-for-breach-of-consumer-law/>; <http://www.caa.co.uk/News/CAA-action-leads-to-airlines-changing-policies-and-means-passengers-will-get-better-support-in-the-future/>; <http://www.caa.co.uk/News/Five-major-airlines-face-enforcement-action-for-denying-passengers-compensation-for-delayed-flights/?catid=4294967496>.

⁹ <https://www.fca.org.uk/consumers/how-complain>; <http://www.financial-ombudsman.org.uk/>.

¹⁰ <https://www.ofgem.gov.uk/consumers/household-gas-and-electricity-guide/complain-about-your-gas-or-electricity-bill-or-supplier>; <https://www.ombudsman-services.org/sectors/energy/complain-now>

¹¹ <https://www.ofcom.org.uk/phones-telecoms-and-internet/how-to-report-a-complaint/dispute-resolution>; <https://www.cedr.com/cisas/>; <https://www.ombudsman-services.org/sectors/communications>

'free ride', which again distorted incentives. A 'user pays' model of covering CAA complaint handling costs was preferred.

The implementation into UK law of the European ADR Directive in 2015 provided the CAA with an opportunity to address the structural weaknesses in how the CAA was set up to handle individual passenger complaints and, ultimately, to make significant improvements to how consumer complaints are handled in the sector by providing consumers with a quicker, cheaper and more effective alternative to going to court. The development of ADR in the aviation sector is covered in the next section.

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Chapter 2

The development of ADR in the aviation sector

The CAA's ADR policy

Following consultation, in April 2015 the CAA published its initial policy statement regarding the new ADR framework which we intended to establish as a response to the European ADR Directive and UK ADR Regulation.¹² As set out in the consultation, the CAA's vision was simple. In the first instance we wanted airlines to have strong incentives to handle complaints properly in-house. And if this was not happening, we wanted consumers to have access to independent, impartial and low-cost dispute resolution arrangements that would offer consumers an easier alternative to court action.

Recognising that private ADR had been the norm for many years in major consumer service sectors such as financial services, telecoms and energy, we wanted aviation consumers to also benefit from the simple, swift and effective approach to dispute resolution that ADR brings. We felt that a system of private ADR, which is to say a scheme set up and directly funded by the aviation industry but with clear and independent governance and regulatory oversight by the CAA, would be the best way to bring about the improvements needed to achieve the CAA's vision.

The European Directive on ADR provided a legal framework for such an arrangement, along with specific information tools to encourage clarity and transparency. However, the Directive did not make it mandatory that businesses should participate in ADR, a feature which was carried forward into the UK implementing legislation. A major focus of our policy was therefore on creating the conditions within which voluntary ADR could develop and thrive. This meant that, in developing our policy, we had to find a compromise between what consumers and their representatives wanted versus what the airline industry was prepared to accept in order for it to participate voluntarily in ADR.

Our research with aviation consumers found that they were open to an independent, neutral body providing ADR, but that they preferred a model where consumers would receive a clear, concrete resolution to their complaint and where the ADR provider had the ability to enforce that decision (that is, decisions that would be legally binding on the company, not the consumer who could still go to court).¹³ As set out earlier, this feedback aligned with our own experience of handling individual consumer complaints and was an issue on which we were not prepared to compromise. Therefore, although a number of

¹² CAP 1257 – ADR draft policy statement for consultation, www.caa.co.uk/cap1257 and CAP 1285 - Summary of consultation responses, www.caa.co.uk/cap1285

¹³ See CAP 1257 Appendix A