WORLDWIDE AIR TRANSPORT CONFERENCE: CHALLENGES AND OPPORTUNITIES OF LIBERALIZATION

Montreal, 24 to 29 March 2003

Agenda Item 2: Examination of key regulatory issues in liberalization
2.6: Dispute resolution

IMPROVING DISPUTE SETTLEMENT IN A LIBERALIZED ENVIRONMENT

(Presented by the Secretariat)

SUMMARY

This paper addresses the need for improvement to dispute settlement in a liberalized environment and proposes a mediation mechanism as an option, additional to the traditional consultation and arbitration processes, to resolve disputes in a more efficient and expeditious manner.

Suggested action by the Conference is in paragraph 6.1.

REFERENCES

Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport*
Doc 9644, *Report on the World-wide Air Transport Conference on International Air Transport Conference on International Air Transport Regulation: Present and Future*

1. INTRODUCTION

1.1 Liberalization, globalization and privatization in the air transport sector have brought about increased competition and new market forces that can potentially result in new and different kinds of disputes. In addition, the growing number of bilateral, especially "open skies", agreements as well as regional agreements have also necessitated new measures in dealing with disputes arising from such arrangements. Furthermore, disputes are likely to become of a multi-party nature, often involving a third party directly or indirectly affected by the subject of the dispute.

1.2 Dispute settlement mechanisms, primarily based on consultation and arbitration, already exist in air services agreements but these are not always equitable or efficient and a dispute settlement arrangement that builds confidence in a liberalized environment is essential to the acceptance and maintenance of that environment. This paper discusses an arrangement that is intermediate between consultation and arbitration, and is adaptable to a liberalized environment based on fair competition and the need for safeguards. The mechanism discussed is designed to be equitable, transparent, effective, expeditious and able to extend its coverage for use in a variety of disputes occurring at the bilateral and regional/plurilateral levels. Its purpose is to instill trust in liberalization, particularly for developing States.

2. PREVIOUS ICAO WORK

2.1 ICAO addressed dispute resolution at the 1994 World-wide Air Transport Conference (ATConf/4) which considered and referred to the Council, for further refinement, a proposal for a new dispute resolution mechanism in case of a disagreement between two parties to ensure sustained healthy competition. The Council recognized that, while many dispute settlement mechanisms existed in other commercial fields, it was appropriate for the aviation community to develop its own response mechanisms in a liberalizing environment and that it was clear that no single global mechanism could meet all needs and circumstances. The Council subsequently approved a dispute settlement mechanism developed by the Air Transport Regulation Panel (Recommendation ATRP/9-2) which was disseminated to States for their guidance (see Doc 9587). The mechanism was associated with a safeguard mechanism on unfair competitive behaviour (Recommendation ATRP/9-1) and was based on the use of a “High Level”meeting up to Ministerial level or a mediator or Panel. For the purpose of the mechanism, ICAO maintains a list of air transport experts nominated by States or international organizations which are willing to act as mediators or as members of a dispute resolution panel (see State letter SP 38/4.1-98/67 dated 14 August 1998).

2.2 At the 2000 Conference on the Economics of Airports and Air Navigation Services (ANSConf 2000), dispute resolution was also raised in the context of disputes concerning charges levied by airports (and/or air navigation service providers). The Conference addressed the need for the functional provision of a neutral body at the local level to preempt and resolve disputes before they enter the international arena. It recommended that the concept of a "first resort" mechanism for dealing with such disputes through the use of conciliation or mediation be included in *ICAO's Policies on Charges for Airports and Air Navigation Services*, and this has been done (Doc 9082/6).

2.3 The 33rd Session of the ICAO Assembly expressed its support for the convening of the Fifth Worldwide Air Transport Conference (ATConf/5) to address many of the pertinent and contemporary issues relating to liberalization. In this context, the Assembly noted the agenda for the Conference and the need to review dispute resolution with a view to developing a mechanism that is more effective and inspires greater confidence.

3. PROBLEMS AND DISCUSSION

3.1 In air transport, disputes are primarily governed by the dispute settlement mechanism in bilateral air services agreements between States. In general, the procedures for settling a dispute between parties to an agreement may be carried out in two stages: a) consultations or negotiations between the parties; and/or b) the dispute is submitted for a decision to an arbitration tribunal at the request of either party. Decisions reached under this latter stage of the mechanism are usually binding, as under the respective clause of the bilateral agreement, both parties have the obligation to enforce the decision.

3.2 While the majority of articles on dispute settlement in bilateral air services agreements include a formal arbitration procedure, most bilateral disputes are settled informally through consultations between the disputants, though often after an extended period of time. Arbitration has been used rarely, primarily due to its cost and procedural duration. Consequently, arbitration is considered inappropriate for settling disputes that require a quick remedial action such as disputes over alleged unfair competitive practices, for example concerning capacity and tariffs. Furthermore, the increasingly liberalized environment has created new types of related commercial activities with a growing potential for disputes as a result of anti-competitive practices. In this connection, it should be noted that current dispute mechanisms are not normally applied to disputes arising from unfair practices because such disputes may be dealt with through general national competition laws, where such laws exist. This raises a number of issues relating to the application of national laws to international air transport matters, differences in competition laws as well as the extent of possible conflicts in their application.

3.3 The emergence of a number of regional and plurilateral arrangements has also necessitated new approaches to dispute settlement. For example, the six-nation Asia-Pacific Economic Cooperation (APEC) plurilateral "open skies" agreement is the first agreement to significantly change the structure of the dispute settlement article and to provide for third party intervention in a dispute where interests of any member of the agreement are at stake.

3.4 It is worth noting that a limited number of disputes in the air transport service sector have been handled under other dispute mechanisms, such as the European Court of Justice (ECJ) and the United Nations Commission on International Trade Law (UNCITRAL). In the case of the World Trade Organization (WTO-OMC), disputes relating to only three ancillary air transport services are covered under the General Agreement on Trade in Services (GATS) and can be referred to the WTO-OMC mechanism. This mechanism is a formal process and it may take up to one year or more to resolve a trade dispute, and, in any case, referrals could only take place after the bilateral agreement mechanism has been exhausted. At present, only three services disputes, all unrelated to air transport coverage by the GATS, have been submitted to the WTO-OMC Dispute Settlement Body, which shows the limited applicability of the mechanism to the services sector thus far.

3.5 A relevant drawback associated with the present regulatory system for dispute settlement remains that the mechanism, based as it is on consultation, does not specify deadlines for the resolution of disputes and thereby permits parties to delay settlements even when deadlines are important. In this respect, it does not effectively provide for an expedited resolution of the dispute. Furthermore, if a party (or, *de facto*, a carrier designated by the party) has been subjected to some damage, it does not allow for an interim relief to that party impaired by the dispute. In particular, developing States may be at a particular disadvantage when faced with disputes arising from unfair practices to their carriers if these disputes cannot be resolved in a timely manner. Moreover, as bilateral, regional and plurilateral agreements have become of a multi-party nature, there is a need to render the dispute mechanism as transparent as possible so that all interested parties directly affected by the dispute have access to information which would allow them to make timely interventions. Lack of transparency in the dissemination of information may, therefore, have an adverse effect on third parties involved in a dispute settlement.

4. CONCLUSIONS

4.1 The Conference is invited to conclude that:

a) in a liberalized environment, different kinds of disputes may arise as a result of increased competition and new market forces and, therefore, there is a need for States to resolve such disputes in a more efficient and expeditious manner; and

b) States and the air transport industry need a dispute mechanism that:

1) instills trust and is supportive of safeguarded liberalization and participation by developing States;

2) is customized to the particular circumstances of international air transport operations and competitive activity;

3) ensures that the interests of third parties directly affected by a dispute can be taken into account; and

4) as regards interested parties directly affected by the dispute, is transparent and provides access to relevant information in a timely and efficient manner.

5. RECOMMENDED REGULATORY ARRANGEMENT

5.1 Building upon ICAO's previous work, the evolving dispute mechanisms and the drawbacks of the current system, the following proposed mechanism would provide for an intermediate level between the two stages of consultation and arbitration. Consistent with the “first resort” mechanism concept, this intermediate level calls for either a mediator or a dispute settlement panel to be used for the fact finding, including the determination of the substance of the dispute, or for providing a recommendation to remedy the dispute. It is based on clear time frames, implementation arrangements, interim measures and provision for third party involvement. The arrangement, currently recommended by ICAO in Recommendation ATRP/9-2 on which this proposed mechanism builds, has been expanded to potentially include disputes beyond unfair practices, for example, disputes related to market access issues in a less regulatory-controlled environment.

5.2 The mechanism does not affect the right of the parties to have access to other dispute resolution mechanisms, including those under general competition laws. Nor does it preclude the implementation of the formal arbitration process in an agreement. It should, however, be expected that the use of formal arbitration would become unwarranted if the parties to a dispute have chosen to use this arrangement as an effective alternative to resolve time-sensitive issues and the mediation has been successful. It is also compatible with use of the “High Level” meeting up to Ministerial level in previous ICAO guidance (Recommendation ATRP/9-2).

5.3 Transparency may be enhanced by means such as the ICAO Web site by making the following available: a) the list of air transport experts, maintained and updated periodically by ICAO, for use as mediators or members of dispute settlement panels; and b) notification of disputes including decisions relating to settlement of such disputes under the proposed mechanism, subject to the confidentiality requirements of the parties concerned.

5.4 The following regulatory arrangement, in the form of a draft model provision to be included in the article on dispute settlement, is therefore proposed for consideration by the Conference for Contracting States to use at their discretion in bilateral, regional or plurilateral air services agreements. This provision has also been inserted in the Template Air Services Agreements (see ATConf/5-WP/17):

"Dispute settlement"

...

x. Any dispute which cannot be resolved by consultations, may at the request of either [any] Party to the agreement be submitted to a mediator or a dispute settlement panel. Such a mediator or panel may be used for mediation, determination of the substance of the dispute or to recommend a remedy or resolution of the dispute.

x. The Parties shall agree in advance on the terms of reference of the mediator or of the panel, the guiding principles or criteria and the terms of access to the mediator or the panel. They shall also consider, if necessary, providing for an interim relief and the possibility for the participation of any Party that may be directly affected by the dispute, bearing in mind the objective and need for a simple, responsive and expeditious process.

x. A mediator or the members of a panel may be appointed from a roster of suitably qualified aviation experts maintained by ICAO. The selection of the expert or experts shall be completed within fifteen (15) days of receipt of the request for submission to a mediator or to a panel. If the Parties fail to agree on the selection of an expert or experts, the selection may be referred to the President of the Council of ICAO. Any expert used for this mechanism should be adequately qualified in the general subject matter of the dispute.

x. A mediation should be completed within sixty (60) days of engagement of the mediator or the panel and any determination including, if applicable, any recommendations, should be rendered within sixty (60) days of engagement of the expert or experts. The Parties may agree in advance that the mediator or the panel may grant interim relief to the complainant, if requested, in which case a determination shall be made initially.

x. The Parties shall cooperate in good faith to advance the mediation and to implement the decision or determination of the mediator or the panel, unless they otherwise agree in advance to be bound by decision or determination. If the Parties agree in advance to request only a determination of the facts, they shall use those facts for resolution of the dispute.

x. The costs of this mechanism shall be estimated upon initiation and apportioned equally, but with the possibility of re-apportionment under the final decision.

x. The mechanism is without prejudice to the continuing use of the consultation process, the subsequent use of arbitration, or Termination under Article _."

6. ACTION BY THE CONFERENCE

6.1 The Conference is invited to:

a) review and adopt the conclusions in paragraph 4.1; and

b) recommend the adoption of the model clause on dispute resolution in paragraph 5.4.

— END —