

Explanatory Note on proposed revisions to CAP1324

Post-decision review process

Feedback from stakeholders has prompted the CAA to consider the issue of ADR post-decision review processes, specifically the possibility for the introduction of a facility for an independent review of ADR decisions for future reference and learnings. It is a requirement of the CAA that decisions made by the ADR bodies are binding on the trader if accepted by the consumer, and therefore such a facility could not be an opportunity to overturn ADR decisions. However, in the CAA's view there may be benefit in affording airlines a 'right of reply' to ADR decisions, effectively treating such decisions as 'sample cases' for further discussion with other relevant parties, for example legal experts, groups representing consumers, and others.

The CAA has reviewed the ADR Regulations to understand whether they permit ADR bodies to introduce such a facility. In the CAA's view, nothing in the ADR Regulations prohibits ADR bodies from adopting processes for reviewing their decisions for the purpose of enhancing their expertise in handling future aviation consumer disputes. As such, therefore, ADR bodies already have the flexibility to offer such facilities to any airline seeking to participate in one of the schemes.

The CAA acknowledges however that this option is not made explicit in its policy and it is therefore proposing to make it clearer to ADR bodies, airlines and airports that this opportunity exists. Please refer to the new paragraphs 14.9 and 14.10 of the draft CAP1324.

Complex and novel issues raised by complaints

The CAA has also received feedback in relation to passenger complaints which involve complex and novel issues. It has been put to the CAA that, on very rare occasions, an individual passenger complaint will raise an issue that is genuinely complex and novel in terms of its broader applicability. Such cases might involve circumstances that have not previously occurred, and/or where there is no established case law or clear principles for determining the outcome of the case. In such cases, the normal ADR process may not be the most effective way to deal with the novel and complex issue underlying the complaint.

In the CAA's view, the ADR bodies approved by the CAA to operate in the aviation sector are sufficiently expert in the relevant law and in dispute resolution to handle such cases. However, where such cases have broader applicability, the CAA sees merit in having a process where complex and novel issues can be considered on a broader basis outside of the normal process for handling the individual complaint.

In the CAA's view, an alternative approach that incorporates the views of the CAA, as well as those of the airline, the ADR body and the passenger, may be more appropriate for dealing with such complex and novel issues. In the CAA's view, such complex and novel issues are most likely to be technical and/or legal in nature and relate principally to the operational aspects of the flight in question rather than the individual circumstances of the passenger. Therefore, although it is proposed that the passenger will be given the opportunity to provide the CAA with their views alongside the airline and the ADR body, the CAA does not consider that there is a need for a separate body to be involved in the process to advocate for the passenger's interests.

For those complex and novel cases where a consensus cannot be reached between the CAA and the airline in question, the CAA's proposal sets out a clear route to resolve the issue through the courts. Section 18 and Annex G (and the list of issues considered not to be complex and novel¹ referred to in Annex G) of the draft CAP1324 set out the CAA's proposal for this alternative approach for dealing with complex and novel issues which arise through claims for compensation under Article 7 of Regulation EC261/2004. It is not a requirement of the CAA that all CAA-approved ADR entities must offer a scheme which allows complex and novel issues raised by complaints to be considered outside of the normal ADR process. However, if CAA-approved ADR entities choose to offer a scheme which includes this option, they and the relevant member airlines must comply with the requirements set out in the proposed Section 18 and Annex G, which must be incorporated into the relevant scheme rules.

The CAA is mindful that, in its role as a competent authority under the ADR Regulations, it has sought to establish a framework for ADR which ensures that the vast majority of consumer aviation complaints can be dealt with simply, quickly and effectively. Consideration of the issues underlying complex and novel cases will necessarily take longer than the time allowed under normal ADR timescales. The CAA is therefore keen to ensure that, where CAA-approved ADR bodies adopt processes for dealing with passenger complaints which raise complex and novel issues, such processes do not unduly hinder the effectiveness of the ADR bodies. In the CAA's view, only one or two complaints each year would be likely to be considered complex and novel in the context of this proposal. If airlines were to seek to have more than one or two cases a year assessed as complex and novel under the proposed new approach, the CAA would look at the reasons behind this and whether the proposed approach was working. The CAA is also mindful that one of the CAA-approved ADR bodies might choose to adopt the process for dealing with complex and novel issues, but the other might not. In any event, the CAA is proposing that the approach is trialled for two years after its introduction, with a review after this period on how the approach is working in practice.

Trust account arrangement for paying consumer awards

It is currently not permitted for payments by airlines and airports to consumers to pass through the ADR body's accounts. This is to ensure that any such monies are ringfenced from the general funds / working capital of the ADR body. In practice, this has restricted the ability of the ADR entity to pay awards (e.g. compensation) directly to the consumer on behalf of the trader. In principle, such an arrangement could be beneficial for consumers in that it could reduce the number of transactions between the consumer, ADR entity and trader, which in turn could reduce the risk of errors and speed up payment to the consumer.

In order to enable this facility, whilst at the same time appropriately ringfencing the funds intended to be used to pay consumer awards, in section 19 of the draft

¹ The CAA would like to make clear that this list is a list of issues which it considers not to be complex and novel, in that the issues are relatively commonplace in passenger complaints and/ or where the issues are the subject of established case law or clear principles for determining the outcome of the case. This list is not intended to be taken as a list of complaints types which the CAA considers to fall within the definition of 'extraordinary circumstances' (or not) under Regulation EC 261/2004. Whether a flight cancellation delay was due to extraordinary circumstances requires consideration of the facts relevant to the operation of the flight in question.

CAP1324² the CAA has set out a number of requirements for establishing a trust account arrangement, which includes a standard form trust deed. Subject to meeting these requirements, CAA-approved ADR entities may now hold funds on behalf of a scheme member for the purpose of paying consumer awards. The standard form trust deed is available on request.

Handling claims on a flight basis

The vast majority of aviation consumer complaints concern claims for financial compensation under Article 7 of Regulation 261/2004. The main factors in assessing such claims relate to the operation of the flight (and in particular whether the cancellation or long delay was the result of extraordinary circumstances) rather than the circumstances of the individual passenger.

In light of this, section 20 of the draft CAP1324 is proposing to make explicit the option for ADR entities to establish procedures for ensuring consistency in decision-making in relation to claims for financial compensation under Article 7 of Regulation 261/2004. This can include establishing procedures for handling such claims on a flight basis rather than a claim basis. However, the CAA would like to note that, where individual passenger claims (or elements of such claims) require consideration of specific circumstances of the individual passenger (for example in relation to compensation claims for lost baggage, out-of-pocket expenses, etc), then these claims, or their relevant elements, will need to be handled by ADR bodies on an individual basis.

Non-regulated ADR schemes

Under the ADR Regulations, CAA-approved ADR bodies must comply with a set of requirements for them to be approved by the CAA. This does not prohibit organisations from offering dispute resolution services to airlines and airports which do not meet the requirements of the ADR Regulations and are not approved by the CAA. There is therefore the possibility for 'non-regulated' dispute resolution schemes to coexist with ADR schemes approved by the CAA under the ADR Regulations (i.e. 'regulated' schemes). It is also possible for the CAA-approved ADR bodies to offer both regulated and non-regulated schemes. There is therefore the potential for confusion, in particular amongst consumers seeking to access dispute resolution services.

In order to address this issue, section 21 of CAP1324 sets out a number of requirements to ensure that consumers are provided with information on the different schemes operated by the CAA-approved ADR body, whether the schemes are regulated or non-regulated, the scheme rules that apply in each case and, in the case of non-regulated schemes, the options available to consumers if they are not satisfied with the decision of the ADR body.

² And consequential changes to paragraph 4.10 and Annex A (see numbered items 27 and 38).