

9-1-2003

# ADR and international aviation disputes between states — Part 1

Vernon Nase

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## Recommended Citation

Nase, Vernon (2003) "ADR and international aviation disputes between states — Part 1," *ADR Bulletin*: Vol. 6: No. 5, Article 1.  
Available at: <http://epublications.bond.edu.au/adr/vol6/iss5/1>

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# ADR

bulletin

The monthly newsletter on dispute resolution

Information contained in this newsletter is current as at September 2003

Volume 6 Number 5

New frontiers for ADR

## ADR and international aviation disputes between states — Part 1

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The purpose of this article is to explore recourse to alternative or additional dispute resolution techniques in aviation disputes between states.

The settlement of international aviation disputes generally takes place under the multiple umbrellas of the *Convention on International Civil Aviation* (the Chicago Convention)<sup>1</sup> and multilateral and bilateral agreements between states, including bilateral air services agreements.<sup>2</sup>

Wherever a framework for trade exists, the potential for conflict arises. In no other industry is this assertion more obvious than that of international transport by air, where government regulation has traditionally been severe and all encompassing and trade relations are based on a web of bilateral agreements rather than one homogenous multilateral treaty.<sup>3</sup>

Aviation disputes may be classified as either (1) commercial, that is arising out of the application and interpretation of bilateral agreements, or (2) non-commercial, that is, between states and involving interpretation of obligations under the Chicago Convention.

### Role of the United States in liberalising the marketplace

In analysing this topic it is not possible to ignore the role of the United States, the world's largest aviation market, if only because of its dominance in the marketplace and its capacity to exert unilateral pressure on other states.

Prior to 1970 aviation disputes were relatively few and far between.<sup>4</sup> During the first 30 years of international aviation the aviation industry, both domestically and internationally, was subsidised and regulated to such a degree that disputes rarely occurred. Several pieces of legislation successfully deregulated the US's domestic aviation market and prompted it to seek deregulation internationally.<sup>5</sup>

Bermuda I, a bilateral air services agreement, transacted in 1946 between the United States and Great Britain, provided the model for most bilateral air services agreements that the US subsequently negotiated.<sup>6</sup> While most states sought to apply these agreements conservatively by designating only one carrier per route, in most cases the Carter administration used them to designate many new carriers for routes. This approach (1) allowed existing operators to expand their routes; and (2) facilitated the opening of markets to many new operators.<sup>7</sup> Maniatis reports that at this time the Civil Aeronautics Board (CAB), predecessor to the Federal Aviation Authority (FAA), adopted a divide and conquer approach. First it negotiated an agreement with the Netherlands and Belgium that provided access to the US markets for Dutch and Belgian carriers in exchange for unfettered access to their markets for US carriers. Then, to avoid imminent Brussels and Amsterdam domination of air routes from the US other European countries were virtually forced to sign liberal agreements with the United States. US deregulation policy at that time has been described as being pursued with 'messianic fervour',<sup>8</sup> a policy that forced reluctant states<sup>9</sup> to adopt open skies policies.



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While deregulation leads to identifiable benefits for the travelling public,<sup>10</sup> it is not surprising, given the fact that states were dragged into deregulation somewhat reluctantly, that many more disputes have occurred in the post-1970s era than during the pre-1970s period.

**Non-commercial aviation disputes**

Non-commercial air transport disputes generally involve the application and interpretation of the Chicago Convention with Articles 9 (prohibited zones) and 15 (airport and similar charges) generating inter-state disputes.<sup>11</sup> Maniatis suggests that conflicts involving Article 15 of the Chicago Convention often result from revenue generating actions,<sup>12</sup> with the state whose designated airline is subjected to increased charges objecting on the grounds that they are discriminatory. Sometimes these kinds of disputes have political differences at their core.<sup>13</sup>

**Commercial aviation disputes**

Major commercial aviation disputes revolve around the bilateral air transport agreements which themselves incorporate provisions from the Chicago Convention. While many of these agreements are very similar in important respects, there may be differences in how they handle dispute resolution. Back in 1952 'the Secretariat of the International Civil Aviation Organisation (ICAO) analysed over two hundred such agreements and classified them according to their provisions on dispute settlement'.<sup>14</sup> While some failed to address dispute resolution at all, others provided for recognition of the competence of an arbitral tribunal or provided for the exclusive competence of the ICAO in the event of a dispute.<sup>15</sup> Subsequently, in 1962, the eminent scholar Bin Cheng found that 'almost all contained dispute settlement provisions, principally providing for arbitration.'<sup>16</sup>

The Bermuda II Agreement, which is the current Air Services Agreement between the US and the UK, provides an example of dispute resolution under

a bilateral agreement structure.<sup>17</sup> In the event of a disagreement it provides for

- (1) formal consultations or
- (2) if formal consultations fail, arbitration by a tribunal of three arbitrators.

If arbitrators are not appointed then either party may request the President of the International Court of Justice (ICJ) to make such appointment. The approach embodied in the Agreement is one of negotiation and if that fails, arbitration.

**Parties to aviation disputes: states carrying the interests of national carriers**

Although the formal parties to disputes relating to bilateral agreements may be two states, it is quite possible that the dispute may have initially existed between an airline of one state (a private entity) and an airport authority, which possesses appropriate regulatory powers, including power to increase airport fees. Where informal settlement attempts fail, the airline involved may request that its government involve itself in the dispute. In this way what begins as a private dispute becomes an inter-state dispute, 'a dispute between sovereign authorities'.<sup>18</sup>

Whether or not that dispute is resolved according to the procedures laid down in Bermuda type bilateral agreements is very much in the hands of the disputing states. In practice, states may resort to a number of approaches. In the absence of a universal mandatory approach they may, for example, resort to using (1) unilateral coercive means; or (2) political means; or (3) legal means to resolve the dispute.<sup>19</sup>

Arguably, some states demonstrate a preference for political/diplomatic means of settlement. This tends to preserve the relative power relationship between the parties to a dispute and is often preferred by the more powerful states<sup>20</sup> because it advances their interests.

Where unilateral or political means of resolution are not employed, states may engage in a variety of dispute resolution techniques when faced with bilateral aviation disputes.

## Negotiation

Negotiation is the most commonly used dispute resolution technique. Notably, states are placed under an obligation to negotiate by the Chicago Convention's Article 84,<sup>21</sup> which requires them to do so prior to commencing judicial proceedings before the ICAO Council. In point of fact, most bilateral air transport agreements also expressly stipulate that the parties should first negotiate before taking the next step. A characteristic of negotiation is that it is restricted to the parties involved in the dispute. There is no recourse to either a third party neutral or a third party at all.

The apparent disadvantage of negotiation is that it can prove to be very time consuming with parties becoming bogged down in entrenched positions. Where parties wish to achieve the optimum outcome there is also a temptation for negotiators to exaggerate and overstate positions. Further, the large volume of trade disputes and the detail associated with each dispute renders protracted negotiation between states an impractical and expensive approach for each dispute.<sup>22</sup> Where states are involved on behalf of carriers, and negotiations do not go well, there is also the possibility of certain disputes (eg, airport access<sup>23</sup> or additional charges placed on flag designated carriers) widening to encompass the broader bilateral relationship between the two states.

## Fact-finding

Fact-finding provides a preliminary mechanism for the subsequent resolution of disputes using other dispute resolution techniques.<sup>24</sup> Fact-finding, through Commissions of Inquiry, paves the way for such resolution by correctly identifying the relevant facts in dispute.

A standard approach for employing fact-finding is for the parties to the dispute to agree on the formation and composition of a panel of individuals whose role it is to make enquiries to identify the relevant facts surrounding the dispute or incident. This panel does not make recommendations or suggestions, it merely identifies the salient facts. The notion is that this

process speeds up the resolution process with the facts no longer subject to dispute.

While accident investigation of an aircraft disaster, under Article 26<sup>25</sup> of the Chicago Convention, may be conducted by the state where the disaster took place, or the state of registry of the aircraft if the disaster did not occur within a particular state's territory, there is at least one major example of ICAO becoming involved in a major air crash by way of completing not one but, eventually, two fact-finding enquiries into the event. I refer to the infamous incident in which a Soviet jet fighter shot down a Korean Airlines flight (KE007) over the Sea of Japan in 1983. Against the backdrop of a situation where the Republic of Korea could not avail itself of Article 26 to launch an investigation because 'the Soviet Union insisted that the aircraft had invaded, and was shot down inside Soviet airspace,' ICAO initiated its own investigation.<sup>26</sup> While the ICAO role in relation to Article 26 is limited to laying out the procedure to be followed by the contracting state taking jurisdiction, in the light of this dispute, the ICAO Council adopted a resolution empowering the Secretary-General 'to institute an investigation to determine the facts and technical aspects'<sup>27</sup> associated with the KAL flight and its destruction. The ICAO Council, in empowering the Secretary-General to investigate, relied on Article 55(e) of the Chicago Convention which permits ICAO investigation to take place where there is an 'avoidable obstacle to the development of international air navigation'.<sup>28</sup>

Due to the uncooperativeness of Soviet authorities, the 1983 ICAO investigation has been described by Tompkins and Harakas<sup>29</sup> as ' cursory at best and deficient in many respects'.<sup>30</sup> Critical evidence was not available to the ICAO, such as wreckage lost at sea and cockpit and control tower voice recordings. Although the Secretary-General's investigative team presented two possible explanations for the course deviation taken by Flight KE007, each of the two scenarios presented in the 1983 report, despite being ostensibly findings of fact, lacked the certainty

that could only be provided by the missing data.

A feature of the ICAO investigation was that, although ICAO possesses the authority to mandate that parties to the Chicago Convention empower the investigative process, ICAO has no such investigative procedures of its own. For example, it lacked the power to subpoena documents, require individuals to testify or obtain state compliance. The novel situation encountered in this instance was not a situation envisaged by the founders of ICAO or the drafters of the Chicago Convention.<sup>31</sup>

Subsequently the ICAO Council referred the Secretary-General's report to the Air Navigation Commission (ANC), 'the highest technical body of ICAO'.<sup>32</sup> The subsequent report prepared by the ANC noted the 'incomplete and contradictory elements'<sup>33</sup> of the 1983 report, its reliance on 'unverified facts and assumptions',<sup>34</sup> especially relating to its flight path, and the ANC failed to endorse the findings of the 1983 report. As a consequence the ICAO Council did not adopt the 1983 report of the Secretary-General.<sup>35</sup>

Although ICAO never adopted the 1983 report, the disintegration of the old Soviet Union led to the eventual availability of the Cockpit Voice Recorder (CVR) and DFDR tapes. On the recommendation of representatives of the Republic of Korea, the Russian Federation, the United States of America and Japan, and on receipt of the original CVR and DFDR tapes ICAO undertook, in 1992, to complete its investigation into the crash of Flight KE007.<sup>36</sup>

The 1993 ICAO report that resulted, given its access to evidence concealed in 1983, did contain findings of fact relating to this air crash.<sup>37</sup> Tompkins and Harakas remained critical of aspects of the 1993 report, suggesting that assumptions were still made in it that were not explained. Given the essential fact-finding brief, it would seem necessary for any assumptions made to be supported by findings of fact.<sup>38</sup>

Arguably, from a structural point of view, the KE007 fact-finding investigations of ICAO lay bare more deficiencies, in the processes and

procedures surrounding these investigations, than strengths. How then, can the system be improved? Or should ICAO not take up the challenge of such investigations? Is there a need to empower some other body in like circumstances?

Given that ICAO may again meet a similar challenge a minimum reform would be for member states to confer full authority on ICAO to 'search out all of the relevant factors'<sup>39</sup> so that the complete record is scrutinised and provides a sound basis for fact-finding. An argument could be mounted that the Chicago Convention ought to be amended to decree the mandatory cooperation of states involved in the disaster, placing upon them the obligation to invest the ICAO investigative team with such powers.

Another related lesson to be learned is that international politics do not mix well with meaningful aircraft accident investigation, which has as its goal the search for the ultimate truth so as to prevent, as far as humanly possible, a recurrence.<sup>40</sup>

Although even the ICAO Council has lamented the sluggish movement of states when it comes to reform of the Chicago Convention<sup>41</sup> the need for reform to deal better with KE007-like circumstances remains.

### Good offices

Good offices has been characterised<sup>42</sup> as a moderately valuable ADR technique that is sometimes employed by, among others, ICAO. It involves the use of a third party to improve communication between the parties. The third party may, for example, encourage the parties to the dispute to communicate in a more constructive manner than they had prior to the third party's involvement. Generally, this role has occurred where there is a clear need to improve communication prior to engaging in mediation or negotiation to resolve the dispute.

While ICAO has been infrequently involved in the settlement of 'commercial disputes between states trading in air services'<sup>43</sup> it has exercised its good offices on a number of occasions in the context of disputes falling under the umbrella of the Chicago Convention. First, where

ICAO is performing its judicial role in respect of a dispute its own Rules of Procedure for Settlement of Differences (Article 14) permit it to provide its good offices to states in dispute to expedite settlement.<sup>44</sup> Despite the fact that ICAO has only exercised its good offices on three occasions in this judicial context it has received credit for using its good offices, along with mediation, to bring India and Pakistan to the point where settlement of their 1952 dispute regarding the erection of a 'prohibited zone' took place.<sup>45</sup>

Maniatis suggests<sup>46</sup> that Articles 54(j) and 54(k) of the Chicago Convention<sup>47</sup> may provide a basis for ICAO exercising its good offices where there is a dispute between two member states of ICAO.

### Mediation

Mediation has been variously described as (1) a process in which 'the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs'<sup>48</sup> and as (2) a structured negotiation in which a neutral third party, the mediator, uses a number of techniques to assist the parties to the dispute to frame their own agreement to resolve the dispute'.<sup>49</sup>

Court-ordered or court-annexed mediation in the context of private international air law disputes, most often between individuals (passengers) and airlines, occurs in a number of common law jurisdictions. Court ordered mediation has been defined as 'a process by which disputants pursuant to an order of the court engage the assistance of a neutral accredited mediator to help them resolve their dispute by negotiated agreement without adjudication'.<sup>50</sup>

As mentioned above, along with negotiation, mediation played a role in the settlement of the 1952 India-Pakistan dispute. As mediation is generally voluntarily entered into by states it is indicative of a desire to resolve the impasse or differences between states. It complements negotiations in particular and may be 'needs based' (ie it focuses on the real needs of each party to the dispute as

against 'positional based' negotiation) and the parties themselves play a pivotal role in shaping a resolution as against having a solution imposed upon them by an arbitral tribunal or third party expert.

There are different types of mediation with the following types most likely to draw scrutiny in the context of international aviation disputes:

- (1) facilitative mediation, where the dispute is defined in terms of the parties' underlying interests;<sup>51</sup>
- (2) settlement mediation (or 'compromise mediation') in which a 'high status' mediator determines the parties' 'bottom line' and attempts to achieve compromise; and
- (3) evaluative mediation, where the mediator provides additional information and advice to the parties in attempting to influence the parties in their negotiations through the use of his/her professional expertise.

Advantages of mediation include:

- (1) speedy settlement of disputes with reduced costs;
- (2) flexibility in the shaping of a settlement, that is not found in litigation;
- (3) elimination of the chance of an unacceptable and unpredictable result;<sup>52</sup>
- (4) avoidance of public disclosure of private information;
- (5) facilitation of a real understanding of the 'other' party's position and promotion of a reasonable compromise in structuring an agreement for resolution of the matter in dispute;
- (6) retention by the parties of some control over the process which, of itself, promotes ownership over the process; and
- (7) elimination of the opportunities for coercion and nullification of power imbalances between the parties.<sup>53</sup>

It has been argued that there are five elements that are common to all forms of mediation. They are (1) its voluntariness, (2) its confidential nature, (3) that it involves negotiation to reach a consensus, (4) its involvement of a neutral third party, and (5) that the mediator acts as a facilitator, encouraging the parties to reach

agreement but not adjudicating on the dispute.<sup>54</sup>

While mediation has been widely adopted in many situations and by many legal systems and is generally seen as a valuable additional means of seeking a speedy and cost effective resolution to disputes, it has been infrequently employed in the 'big picture' aviation disputes. Is there then a need to build in a mediation phase prior to ICAO or ICJ involvement? Such an early dispute procedure would match those practised in a number of common law jurisdictions<sup>55</sup> where court annexed or court referred mediation is widely practised.

Because ultimately the success of mediation is based on the voluntariness of states<sup>56</sup> it will only ever be practically activated where states are prepared to compromise.<sup>57</sup> If state parties are not really prepared to submit their dispute to mediation, that is, to accept the process, then the mediator will make the appropriate recommendation and the dispute will rapidly move to the next stage. At present asking the question, 'Will you submit the dispute to mediation?' is not built into the 'big picture' systems or conventions.

While mediation is an extremely valuable tool, it is by no means a panacea to all aviation disputes, in particular aviation disputes between states. It should be acknowledged that mediation is least effective where:

- (1) there is intense hostility and distrust between parties to the dispute;
- (2) the parties refuse to assume responsibility for a negotiated resolution; or
- (3) there is an extreme power imbalance.<sup>58</sup>

Where extreme hostility exists between the parties this severely limits the possibilities for rational and honest discussion between them. In order for a mediation to lead to an acceptable outcome there is a clear need for parties to assume responsibility for an acceptable outcome.<sup>59</sup>

## Conciliation

Conciliation has been defined as 'a method of alternative dispute resolution in which a third party

attempts to facilitate an agreed resolution of a dispute in accordance with relevant legal principles,<sup>60</sup> and as a process in which a conciliation commission 'proceeds to the impartial examination of the dispute and attempts to define the terms of settlement susceptible to being accepted by them'.<sup>61</sup>

A conciliation commission actively enquires into the facts of the dispute and advances proposals for its resolution. Although conciliation has occasionally been employed in the context of Chicago Convention disputes its use has been infrequent. However, in 1958 conciliation was selected as the settlement option for an incident in which France diverted an aircraft carrying leaders of the Algerian revolt. The aircraft was, at the time of interception, flying in international airspace (and, thus, subject to the provisions of the Chicago Convention) en route from Morocco to Tunis. Maniatis observes that conciliation 'plays a greater role in politically motivated disputes'.<sup>62</sup> Despite its acceptability as a dispute settlement mechanism in 'big picture' disputes with political content, conciliation, nevertheless, has certain drawbacks that make it less appealing in a commercial context, such as its costliness and its 'time-consuming formal process'.<sup>63</sup> While conciliation may have had a very limited role in resolving aviation law disputes it still enjoys significant support in the trade law context of complex, multiparty disputes with the United Nations Commission on International Trade Law (UNCITRAL) recently producing a Model Law on International Commercial Conciliation.<sup>64</sup>

One feature of the UNCITRAL Model Law on Conciliation is its preservation of confidentiality at the request of parties in respect of sensitive information provided to the Conciliation Commission through its Articles (*Disclosure of Information*) and (*Confidentiality*). ●

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## Endnotes

1. The United Nations organ responsible for oversight of its implementation and the carrying out of discrete functions under the Chicago Convention is the International Civil Aviation Organisation (ICAO), signed on 7 December 1944 (187 countries have now signed the convention). This convention requires contracting countries to adopt laws in conformity with the principles of air law established by it.

2. Balfour, J, 'Arbitration in Aviation: The Ultimate Remedy?' in International Bureau of the Permanent Court of Arbitration (ed), *Arbitration in Air, Space and Telecommunications Law*, Kluwer Law International, The Hague, 2002 at 81 [Balfour]; Maniatis, D, 'Conflict in the Skies: The Settlement of International Aviation Disputes' (1995) 20 (2) *Annals of Air and Space Law* 167 at 170 [Maniatis]. See Diederiks-Verschuur, I H Ph, 'Settlement of Disputes in Aviation and Space', *The Use of Air and Outer Space: Cooperation and Competition*, Kluwer, The Hague, 1998 at 231 [Diederiks-Verschuur].

3. Maniatis, note 94 at 168.

4. Ibid at 173.

5. Ibid at 174. See *Air Cargo Deregulation Act of 1977* (US) and *Airline Deregulation Act 1978* (US). The *International Air Transportation Competition Act 1980* (US) introduced greater flexibility in pricing structures for international markets while promoting competition.

6. Maniatis, note 94 at 175, records that the US subsequently signed in excess of 75 bilateral air services agreements with a wide range of countries based on the Bermuda model.

7. Ibid at 175.

8. Ibid at 178 quoting from Knut Hammarskjöld's *A Review of US International Aviation Policy, Hearings Before the House Committee on Public Works and Transportation*, 97th Congress, 1st and 2nd Sess 755 (1981-1982) at 26.

9. Ibid. The extent of opposition to US policy was evident when CAB indicated its intention to revoke IATA's antitrust immunity which caused 46 states, ICAO, and international organisations to protest. See also Dempsey, Paul, *Deregulation*,



*Discrimination and Dispute Resolution in International Aviation*, D C L Thesis, Institute of Air and Space Law, McGill University, 1986 [Unpublished] at 26.

10. Benefits such as lower prices, unrestricted capacity and elimination of unfair competitive practices.

11. Maniatis, note 94 at 180.

12. Ibid.

13. Ibid.

14. Balfour, note 94 at 87. See also ICAO Doc. C-WP/1171(1952).

15. Ibid.

16. Ibid at 88.

17. Full title of Bermuda II is the *Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Relating to Air Services Between their Respective Territories*, July 23, 1977, 28 UST 5367, TIAS No 8641.

18. Maniatis, note 94 at 182-3.

19. Ibid at 185.

20. Ibid at 186. Maniatis argues that this use of political power serves to 'subvert the interests of the weaker nation'. Maniatis quotes tellingly from Magdelenat, J, 'The Story of the Life and Death of the CAB Show Cause Order' (1980) 2 *Journal of Air Law* 83 at 83 who cites the truism that 'when US Aviation sneezes the entire aviation world catches the flu'.

21. Article 84 (*Settlement of Disputes*) in part reads: 'If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.'

22. Maniatis, note 94 at 189.

23. Ibid.

24. See Article 33 of the *United Nations Charter* which recognises the legitimacy of fact-finding as a means of dispute resolution.

25. See *Chicago Convention*, Article 26 (*Investigation of accidents*).

26. Tompkins, G N and Harakas, A J, 'ICAO and Aviation Accident Investigation - Lessons to be Learned From The Korean Air Lines 007 Investigation' (1994) XIX:II *Annals of Air and Space Law* 375 at 377 [Tompkins & Harakas].

27. Ibid at 379 citing from the

Resolution adopted by ICAO Council.

28. Article 55(e) of the Chicago Convention 1944.

29. George M Tompkins and Andrew Harakas are leading aviation attorneys in the United States, Harakas with the leading Los Angeles based firm, Condon and Forsythe.

30. Tompkins & Harakas, note 117 at 380.

31. This power and procedural void to this day has not been addressed, for example, through amendment of any of the Aviation Conventions.

32. See Appendix 2 and Articles 56 and 57 of the Chicago Convention 1944 which define the composition of the ANC and its role, the ANC being entrusted with the 'examination, co-ordination and planning' of ICAO's work in the air navigation area.

33. Tompkins & Harakas, note 117 at 385.

34. Ibid at 386.

35. It is ironic that the 1983 report was focussed on civil litigation against the air carrier in the US and that it formed part of the basis for jury verdicts of wilful misconduct in breach of Article 25 of the Warsaw Convention on the part of KAL.

Tompkins & Harakas, note 117 at 386 note that had it been a US NTSB Report it would not have constituted admissible evidence in these cases.

36. Ibid at 390.

37. Ibid at 391. Tompkins & Harakas' article contains a summary of 10 major findings of fact coming from the ICAO fact-finding report.

38. Tompkins & Harakas, note 117 at 393, note that the former Soviet Union's action in shooting down KE007 was 'in contravention of its solemn commitments undertaken as a contracting state to the Chicago Convention'.

39. Ibid at 394.

40. Ibid.

41. International Civil Aviation Organisation, 'Slow Progress of Ratification of International Air Law Instruments, Including Amendments to the Convention on International Civil Aviation', 32nd Assembly, Montreal, *International Civil Aviation Organisation*, 1998 (Agenda Item 35).

42. Maniatis, note 94 at 191.

43. Ibid at 191.

44. Ibid.

45. Ibid at 191-2.

46. Ibid at 192. See also Maniatis' footnote reference to Milde M, 'Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)', in Bockstiegel KH (ed), *Settlement of Space Law Disputes: Studies in Air and Space Law*, K. Heymans, Munich, 1980 at 87-92.

47. Chicago Convention 1944 Articles 54(j) and 54(k).

48. Folberg, J and Taylor, A, *Mediation - A Comprehensive Guide to Resolving Disputes without Litigation*, Jossey-Bass, San Francisco, 1984.

49. Cotter, S (ed) *Dispute Resolution Methods*, Martinus Nijhoff, London, 1994 at 35.

50. Report of the ADR Division of the Litigation Reform Commission, *An Alternative Dispute Resolution System for Queensland*, Brisbane, 22 June 1992, para 2.6

51. Arguably, facilitative mediation is mediation in the purest sense because it preserves the impartiality of the third party mediator and focuses on the interests and needs of parties without intervention.

52. This is in contrast with a jury decision, which, from the point of view of defence lawyers, always holds the possibility of what might be considered a perverse decision.

53. Dubuc, C E, 'Committee Perspective: Alternative Dispute Resolution Committee: Aviation Disaster and Attribution: Resolving Cases without Trial', (2001) 43(7) *For the Defence*. [Dubuc]

54. Ibid.

55. See, for example, the position in Queensland, Australia, where the relevant legislation for all levels of courts provides for mediation or case appraisal. See *Supreme Court of Queensland Act 1991 Pt 8*, *District Court Act 1967*, *Magistrates Courts Act 1921* and the *Uniform Civil Procedure Rules Pt 4*, s 319(1).

56. That is, to both submit to mediation and to accept the mediated result.

57. Maniatis, note 94 at 193.

58. Alexander, note 5 at 25

59. Ibid.

60. Nygh, P E and Butt, P (eds), *Butterworths Concise Australian Legal Dictionary*, 2nd ed, Butterworths, Sydney, 1998 at 83. Note that in Australia conciliation is distinguished from mediation because of the input of the conciliator into the substance of the resulting agreement.

61. Maniatis, note 94 at 193.

62. *Ibid* at 194.

63. *Ibid*.

64. United Nations Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law on its Thirty-fifth Session*, New York, 17-28 June

2002, Annex 1; *UNCITRAL Model Law on International Commercial Conciliation 2002*. See especially Article 6(4): *Conduct of conciliation* which provides that 'The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute'.