ADR Bulletin
ADR Bulletin

Volume 6 | Number 6 Article 2

11-1-2003

ADR and international aviation disputes between states — Part 2

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ADR Bulletin

New frontiers for ADR

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Continued from (2003) 6(5) ADR 81

Arbitration

There is debate as to whether or not arbitration should be categorised as a legal means of settlement, as a quasi-legal means of settlement or as ADR. For instance, some commentators[1] characterise arbitration as a legal means of settlement where the decision rendered is binding on the parties.

Certainly, enforceability is an important issue. The National Alternative Dispute Resolution Advisory Council (NADRAC)[2] regards arbitration as a determinative process, which involves 'a third party investigating the dispute (which may include the hearing of formal evidence from the parties) and making a determination that is potentially enforceable as to its resolution.'[3] NADRAC makes the distinction between *internally enforceable processes* (by the person or agency making the determination) and *externally enforceable processes* (for example, through some external process such as actions in the courts for enforcement of a contract). NADRAC sees arbitration as generally falling within the latter category[4] Arbitration is then defined as being 'a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination'.[5]

NADRAC groups arbitration with expert determination, fast-track arbitration and private judging as being externally enforceable processes.[6] Fast-track arbitration is defined as 'a process in which the parties to a dispute present, at an early stage in the attempt to resolve the dispute, arguments and evidence to a neutral third party (the arbitrator) who makes a determination on the most important and most immediate issues in dispute.[7]

There is a need to distinguish between the use of arbitration in two contexts: that expressly provided by the Chicago Convention; and as provided under the myriad bilateral air services agreements between states.

Arbitration and the Chicago Convention

As previously referred to, the Chicago Convention[8] itself provides a unique procedure for the handling of disputes.

Article 84 provides a procedure for settlement of disputes between two or more contracting states relating to the interpretation and application of the Chicago Convention.[9] Under this provision the Council of the International Civil Aviation Organisation (ICAO) performs an adjudicative function. However, such decision by the ICAO Council may be appealed either to an ad hoc arbitral tribunal or the Permanent Court of International Justice (ICJ). Article 85 uniquely provides for this appeal.[10] If a member state involved in a dispute does not accept the Statute of the International Court of Justice and the contracting parties are unable to reach an agreement as to the choice of the arbitral tribunal, each of the disputing states names a single arbitrator from a list of arbitrators maintained by the ICAO Council. If the disputing parties cannot agree on someone from this list the President of ICAO chooses an 'umpire' from the list. The arbitrators and the umpire then constitute the arbitral tribunal hearing the appeal. Significantly, Article 84 decrees the binding nature of the decision of the ICJ or the arbitral tribunal. Because of the binding nature of this process it carries with it the advantage of traditional legal processes in the certainty of the result achieved. The decisions rendered are also likely to be rule based and so it serves to equalise power imbalances between states. There is a disadvantage in this equalising effect for the more powerful states that may not wish to lose their relative strength in negotiation. To further endorse the binding nature of the decision the Convention addresses the issue of enforcement in Article 88,[11] with the ICAO Assembly having the right to suspend the recalcitrant state's voting rights.

Balfour notes the silence of the Convention as to the procedure when both parties agree to ICJ jurisdiction but cannot agree on the forum.[12] He notes also the silence of the Convention on the issue of the scope of the appellate review; for example, whether or not new matters may be introduced.[13] These arguably minor issues point to the need for the 'system' to be further refined and developed.

Arbitration under bilateral air services agreements

Balfour reports[14] that a 1952 ICAO study of more than 200 such agreements revealed significant differences in their dispute resolution provisions.

> The Secretariat found ten major variants, ranging from agreements which recognised the exclusive competence of the ICAO Council, through agreements which recognised the competence of another arbitral tribunal, to those which contained no provisions concerning dispute resolution.[15]

Subsequently, a study by Buergenthal indicated a shift away from providing the ICAO Council with exclusive competence.[16] Bin Cheng, in his seminal study of air law,[17] indicates the significant role that arbitration plays under a range of bilateral air services agreements.[18]

The reality of the current structure is that there is, at ICAO level, a significant emphasis on the resolution of disputes through negotiation[19] prior to their reaching the point that arbitration is necessary.

Although arbitration is a favoured source of dispute resolution by virtue of its inclusion in the bilateral agreements, in practice it is used relatively infrequently. Thus far arbitration under the bilateral agreements has only been used five times, in the following disputes:

- 1963 – US/France
- 1965 – US/Italy
- 1978 – US/France
- 1981 – Belgium/Ireland
- 1992 – US/UK

Although arbitration is a favoured source of dispute resolution by virtue of its inclusion in the bilateral agreements, in practice it is used relatively infrequently.

The issue in the 1963 arbitration was whether or not a US carrier could rightfully operate between the US and Turkey via Paris and whether or not it could carry non-US originating or destined passengers between Paris and Turkey.[20] Specifically, the question to be resolved was did the words 'Near East' in the France/US Air Services Agreement of 1946 include Istanbul, Beirut and Tehran.

While each party appointed an arbitrator there was no agreement as to who should be the third arbitrator. A referral to the President of ICAO took place, in accordance with the procedure outlined in the bilateral agreement between the disputing parties, and the President of ICAO then appointed the third arbitrator who was Professor Robert Ago of Italy.

The final outcome of the arbitration was a unanimous decision that favoured the US on many, but not all, issues.[21] However, the path to this final decision was circuitous. It was initially ruled that the French were correct in arguing that the intention of the parties to the 1946 Agreement was not to include Istanbul and Tehran in the Near East. However, Professor Ago held that the US had acquired rights through 'uscapio', because of the belated protest and because France had allowed Pan Am to operate nonetheless. The arbitral tribunal ruled that Pan Am, the US carrier involved, could continue to fly to Turkey via Paris 'as a result of French consent to the service, confirmed by an exchange of notes'.[22]

The 1965 dispute between Italy and the US resulted from US attempts (again involving Pan Am) to operate an all-cargo service between the two countries. The Italian concern was for the position of its carrier, Alitalia, and its inability to cope with the increased competition represented by the all-cargo service.[23] The Italian view was that the bilateral agreement between the two countries, the US–Italy Air Transport Services Agreement 1948, did not permit such a service. Once again, negotiations in 1964 failed to resolve the disagreement.

In this instance the parties agreed on the third arbitrator.[24] The arbitration resulted in a favourable outcome for the United States with the tribunal considering 'that the Agreement was intended to govern all kinds of scheduled air transport between the two countries in a flexible manner and that the Bermuda Agreement does not contain any express provision excluding all-cargo services.'[25] However, after the then Civil Aeronautics Board (CAB) authorised a third carrier to provide an all-cargo service in 1966, Italy reacted by denouncing the bilateral agreement between the two countries. Only after 33 rounds of negotiation, during which strictly limited services between the two countries were maintained, was a new bilateral between the two states transacted.[26]

The 1978 dispute, between France and the US,[27] once again involved a Pan Am service, this time between San Francisco and Paris via London. Pan Am wanted to change gauge in London, that is, to change the type of aircraft in London, offloading B747 passengers onto a B727 aircraft for the final leg of the journey. France objected to this change of gauge[28] on the basis that it was contra the bilateral air services agreement between the two states. The US argued that it was permissible under the bilateral. At issue also was the US right to take retaliatory measures when France imposed a restriction on Pan Am's service.[29] In fact, France had seized Pan Am's B727 at Paris Orly Airport in May 1978. In subsequent events the US had threatened to suspend Air France's Los Angeles service in order to pressure France into arbitration proceedings to resolve the dispute.[30]

Once again, the outcome of the arbitration was favourable to the US with the tribunal holding that a change of gauge was permitted as long as the continuous service was maintained. It also held that retaliatory measures were justified, as long as they were proportionate.[31] Both parties to the dispute then requested the arbitral panel to clarify the meaning of the ruling. Was the confirmation of Pan Am traffic rights with (the French view) or without (the US view) limitation of the frequency of the services? The arbitrators' ruling was that this meant 'with capacity limitation', which resulted in the parties resuming negotiations. In delivering the decision, Dutch arbitrator Rifkind opined that 'all that is not prohibited is permitted' instead of 'all that is not permitted is prohibited'. It is ironic that, subsequent to this favourable decision, Pan Am did not take advantage by way of resuming its service until some years later. And when they did resume this service it was without change of gauge in London.[32]

This is not an example of arbitration operating at its most effective. At least

one commentator described the process as 'lengthy, cumbersome and expensive' and noted that the drafting of the *Arbitration Compromis* to refine the issues between the parties takes weeks.[33]

The 1981 dispute between Belgium and Ireland concerned interpretation of the capacity clauses in the bilateral air services agreement between the two countries, the issue being whether the Brussels-Dublin route was suffering from excess capacity 'and whether Sabena enjoyed fair and equal access to the market'.[34]

A single arbitrator, Mr Henry Winberg,[35] elected by the parties in accordance with the bilateral, conducted the arbitration and determined that there was excess capacity on the route, ordering Sabena to discontinue one weekly round trip service and Aer Lingus to discontinue two weekly round trips.[36] This was a very successful arbitration with both parties accepting the conclusions of the arbitrator.

The 1992 arbitration involved a dispute between the US and the UK, specifically that user charges imposed by the British Airports Authority on US airlines were in breach of the bilateral air services agreement between the two countries. In this instance, in accordance with the procedure outlined in the bilateral, each state nominated an arbitrator and then the arbitrators themselves agreed on the third arbitrator.[37] The decision of the arbitral tribunal was that the UK had 'infringed certain obligations under the bilateral in respect of airport charges'.[38]

Overview of use of arbitration procedure under the bilateral agreements

Although the bilateral agreements grasp at achieving a uniform approach, attested to by the prevalence of arbitration clauses, the use of arbitration tends to be the last recourse and variations in procedure for choosing the third arbitrator, for example, persist. Balfour writes of 'the great variety of models which appear, both in multilateral agreements and in bilateral agreements … This would seem to suggest that no particular preferable formula has yet evolved, and that there are certainly many options from which to choose.'[39]

There is an ongoing debate in respect of the role of arbitration in resolving disputes under the bilateral agreements. One view is that the bilateral agreements focus heavily on self-enforcement, which is achieved through consultation between aeronautical authorities. Where disputes escalate through the negotiation/consultation stage, states can act to terminate the bilateral agreement in question. A referral to arbitration, in the context of a particular dispute, may simply not occur.[40] The political dimension of bilateral air services agreements, in that they also represent an aspect of the relations between states, is ever present and appears to be the only explanation for overlooking the possibilities for arbitration in the context of many disputes.

> The route from the consultation phase to the point of termination of the agreement leaves, in fact, no room for arbitration … Mr Balfour explains this on the basis that states are reluctant to risk a breakdown in their relations.[41]

It would seem that the sensitive nature of the bilateral agreements stands in the path of more widespread use of arbitration. Although arbitration has been used infrequently under the bilateral agreements, it has demonstrably been successful in each case at fashioning an acceptable outcome.

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The 1981 Belgium/Ireland dispute exemplifies arbitration at its most effective in the context of bilateral air services agreements. Belgium argued over-capacity and for equal distribution of opportunities for capacity and the avoidance of undue effect on the other carrier's services, while Ireland argued that there was no over-capacity and that a reduction in capacity was against the public interest.[42] Given the respective positions of the parties, the subsequent arbitral award was timely, in that it was delivered within two months.

> The decision, which held that each airline should reduce its capacity with the least possible effect on the other's services, was based upon the concepts of passenger capacity and profitability of airline services. The issue of 'acceptable load factor' was dealt with on the basis of evidence of traffic potential. Thus, the decision did not limit future capacity or its distribution, but established platforms so that a balance could be achieved gradually.[43]

The outcome was, as Naveau asserts, extremely pragmatic.[44]

An issue of considerable importance is the role of ICAO. To date the arbitrations conducted under the bilateral agreements have mostly been on an ad hoc basis, which inevitably result in a lack of legal certainty in terms of their non-binding effect on subsequent ad hoc arbitral tribunals.[45]

While greater certainty would result if ICAO exercised its arbitration function under the bilateral agreements it has been quite reluctant to embrace this role, preferring to emphasise the political/diplomatic solution of disputes

through negotiation and its own brand of mediation.[46] Not all commentators agree that the approach of ICAO on this issue is the best one:

> The best interests of international civil aviation are not served by the Council's generally negative attitude towards the arbitral functions assigned to the ICAO by various multilateral and bilateral agreements. … The present practice, which puts a premium on negotiated settlements that often leave the underlying legal issues unresolved, is certainly far from satisfactory …[47]

Perhaps both ICAO and those who are critical of ICAO over its reluctance to use arbitration as a dispute resolution mechanism are right. Mediation, *properly used*, tends to structure a win-win outcome around the parties' willingness to compromise. The best arbitrations also achieve a pragmatic outcome, as the 1981 Belgium/Ireland arbitration demonstrates. Most significantly, as already noted, this arbitration involved but one arbitrator. Perhaps the diplomatic window dressing that is the three member panel approach needs to be dropped in favour of a one-person arbitration. Concurrently, the ideal of a uniform approach is not evident in practice.

Arbitration in the security conventions

All of the aviation security conventions, namely the Tokyo Convention of 1963, the Hague Convention of 1970, the Montreal Convention of 1971 and the Montreal Convention on Plastic Explosives of 1991, contain identical provisions making available dispute resolution through an arbitral procedure.[48] They provide for arbitration in the first instance. If the parties are unable to agree the matter is then referred to the ICJ. However, there is provision for a state to notify a reservation[49] to the effect that it does not consider itself bound by the 'arbitration' provision, which massively dilutes the impact of the provision.

At the risk of stereotyping the security conventions as ineffective instruments, it does appear that they all suffer from a lack of resolve on the part of states when it comes to enforcement. For example, the failure of all the conventions to mandate prosecution of offenders is their greatest single failing. All pay lip service to the need for tight security and the prosecution of those who commit offences against civil aviation, and yet states are unable to agree on effective enforcement provisions. In the wake of September 11, these conventions will inevitably receive close scrutiny. If there are amendments it is to be hoped that the issue of dispute resolution is not overlooked.

Dispute settlement in the European Union and World Trade Organisation

Dispute settlement procedures within the European Union have proved to be quite effective at the level of disputes between states. The judicial machinery within this supranational organisation is quite unique and the compulsory reference to the European Court of Justice, which performs a similar role to a constitutional court for the entire EU, provides clear direction to domestic courts in deciding cases.[50]

> [The] mix of consultative and mandatory adjudicative procedures, in the context of the EU, has proved exceptionally effective at bringing about the peaceful settlement of inter-state disputes.[51]

The World Trade Organisation can also point to a successful combination of procedures for settling disputes and provides a valuable model for study. Its combination of ADR and more formal steps provides opportunities for customising dispute resolution through ADR techniques. Annexe 2 of the WTO Agreement elaborates dispute settlement procedures that are available. It establishes a Dispute Settlement Body (DSB) to deal with disputes arising out of the WTO Agreement and its various Annexes. Article 4 of Annexe 1B, on Air Transport Services, provides for submission of disputes to the DSB if procedures in bilateral and multilateral agreements have been exhausted.[52] It also prohibits unilateral means of settlement, preferring instead to opt for a first step of negotiations and consultations with conciliation and mediation options available to disputants. As a backup it provides for a legal means of resolution through establishment of a panel that is empowered to make recommendations to resolve the dispute. The panel's report is then adopted by the DSB unless one of the parties appeals. This is heard by an appellate body, which again reports its finding to the DSB, which has overall control of the decision-making process in respect of resolving the dispute.[53]

Conclusions

This article has outlined the framework for ADR use in international aviation disputes between states that exists under both the Chicago Convention and the bilateral air services agreements. The existing system was put in place long before recent developments and use of ADR techniques became widespread.

In disputes between states we have noted a clear preference for political and diplomatic means of settlement, for negotiated settlement without recourse to a neutral third party. Nevertheless the ICAO Council possesses certain fact-finding and dispute resolution powers under Article 84 of the Chicago Convention. Further, ICAO's own rules of Procedure for Settlement of Differences, Article 14, permits it to exercise its good offices to expedite the settlement of differences between states.

Arbitration is perhaps the most frequently used form of ADR in the context of aviation related disputes between states and it is sanctioned under both Article 84 of the Chicago Convention and under the bilateral air services agreements between states. However, the requirement for three adjudicators to sit on the bench of arbitral tribunals is a wasteful exercise where each state involved in the dispute makes its own appointment. In effect, the decisive views then become those of the third, and only independent, panel member. Under these circumstances it may be argued that the state-appointed representatives are no longer necessary.

One of the few really successful arbitrations was in the Irish/Belgium dispute in the 1970s where the states parties chose, by common agreement, a high ranking Scandinavian civil aviation official resulting in resolution of the matter within weeks and in both parties accepting the conclusions. One observer of this dispute argued that 'in order to be accepted, an arbitration must be

quick, cheap and … the most important thing is that both parties trust the Arbitrator.'[54] Under this view a single arbitrator would provide an effective, less expensive and timely approach – all outcomes that are acceptable to states.

Further, the formal dispute resolution system for dispute resolution of these big picture disagreements between states allows no recourse to other additional or alternative dispute resolution techniques, such as mediation or early case appraisal. ICAO itself needs to realise there is a need to develop this underdeveloped part of the governing regime.

The World Trade Organisation approach also provides food for thought with its use of a specialised dispute resolution body and its mix of consultative and mandatory practices.

It is difficult to read much into the role of ICAO in the current dispute resolution regime other than that it may be comfortable with existing options and that it does approach its diplomatic role very seriously. Comfortable as existing dispute resolution options are, under both the Chicago Convention and the bilateral air services agreements, they are woefully behind the times. Perhaps the enduring nature of the major Air Law Conventions should not blind us to the need to open a debate on the use of ADR in international aviation disputes. Too frequently the major conventions, such as the Chicago Convention, the Warsaw Convention, the Montreal Convention 1999 and the aviation security conventions provide very weak or limited options.

Despite the lethargy of states, the need to modernise the system remains. We can no longer hide behind the excuse that the drafters of these conventions could not have foreseen contemporary developments or that there are more pressing issues, for there always will be more pressing issues. In a recent survey the author sent to airlines, targeted aviation litigators, government regulatory agencies and ADR experts recognised by ICAO, one response to the question, 'In your view, is there a place for the development and use of ADR processes in air law?' was as follows:

> I wish so, but I acknowledge, with a certain frustration, that nobody seems to have been interested.

Perhaps a shrug of the shoulders and indifference will no longer be viewed as a satisfactory response in an era of aviation in which nothing is more certain than change itself. These challenging times call for the development of appropriate, flexible, fast and efficient ADR options and for ADR to be placed on the international aviation agenda. Voltaire once wrote:

> On presse l'orange, et on jette l'écorce.[55]

Let one party not throw away the skin of the orange, the very thing the other party craves. ●

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Endnotes

1. For example 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], note 94 at 194, while conceding that it differs in some respects, argues that it is a legal means of settlement characterised by the 'presence of third parties with the authority to issue binding decisions on settlement of their dispute.'

2. See National Alternative Dispute Resolution Advisory Council, 'Alternative Dispute Resolution Definitions', Canberra, March 1997 <www.nadrac.gov.au>.

3. NADRAC, note 22 at 7.

4. Ibid.

5. Ibid.

6. Ibid.

7. Ibid.

8. See Appendix 2 for full text of provisions relating to its dispute settlement mechanism.

9. Both the International Air Services Transit Agreement 1944, and the International Air Transport Agreement 1944, state that the Chicago Convention 1944 dispute resolution provisions will apply to disputes that occur under them.

10. Article 85 reads: 'If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties to the dispute shall name a single arbitrator who shall name an umpire …The arbitrators and the umpire shall then jointly constitute an arbitral tribunal.'

11. Article 88 reads: 'The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter.'

12. 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], note 94 at 83.

13. Ibid.

14. Balfour, note 94 at 87.

15. Ibid.

16. Ibid. See also Buergenthal T, *Law-Making in the International Civil Aviation Organization*, Syracuse University Press, Syracuse New York, 1969 [Buergenthal] pp 174-9.

17. Cheng B, *The Law of International Air Transport*, Stevens & Sons, London, 1962.

18. Ibid pp 454-64. Arbitration was a feature of a significant number of bilateral agreements at that time as witnessed by Professor Cheng's insightful analysis of individual agreements.

19. Balfour, note 94 at 94.

20. The dispute grew out of French objections to Pan Am flying from the US via Paris to Rome and Beirut, France contending that Beirut was not part of the 'Near East' – the authorisation in the bilateral between the states only extending to flights to the 'Near East'.

21. Balfour, note 94 at 90.

22. Maniatis, note 94 at 199.

23. Ibid.

24. The final composition of the arbitral tribunal was Mr Riccardo Monaco, Mr Stanley D Metzger and Mr Otto Riese.

25. Diederiks-Verschoor I H Ph, 'Settlement of Disputes in Aviation and Space', *The Use of Air and Outer*

Space: Cooperation and Competition, Kluwer, The Hague, 1998 [Diederiks-Verschoor] at 231 note 94 at 239.

26. Ibid.

27. For summaries of the dispute see both Maniatis, note 94 at 200 and Balfour, note 94 at 90-91.

28. Bilateral jargon, 'gauge' meaning 'type of aircraft'.

29. Maniatis, note 94 at 200.

30. Ibid.

31. Balfour, note 94 at 91.

32. Source: respondent to confidential survey.

33. Extracted from response to confidential survey conducted as part of this study. The reservations of this respondent are worth recording while respecting the confidentiality requirements.

34. Ibid.

35. Diederiks-Verschoor, note 94 at 240. Henry Winberg was a former Director-General of Civil Aviation (Sweden) and a former President of the European Civil Aviation Conference (ECAC).

36. Balfour, note 94 at 91. See also Naveau J, 'Away from Bermuda? An Arbitration Verdict on Capacity Clauses in the Belgium/Irish Air Transport Agreement', (1983) VIII (1) *Air Law* at 44.

37. Balfour, note 94 at 91.

38. Ibid.

39. Ibid at 93.

40. Naveau J, 'Arbitration in Air Law Conflicts', in International Bureau of the Permanent Court of Arbitration (ed), *Arbitration in Air, Space and Telecommunications Law*, Kluwer Law International, The Hague, 2002 at 97.

41. Naveau, note 191 at 97 quoting from Balfour, note 94 at 81.

42. Ibid at 98. Naveau's personal involvement as co-counsel for one of the disputants placed him in a unique position to assess the effectiveness of the arbitration.

43. Ibid.

44. Ibid at 99.

45. See Balfour, note 94 at 94.

46. Balfour, note 94 at 92 notes that the Council of ICAO has 'never had to reach a final decision exercising its adjudication function'. He suggests that this is not surprising, given its political rather than legal make-up.

47. Balfour at 94 quoting Buergenthal, note 167 at 197.

48. See text of each convention. Article 14(1) of the Montreal Convention 1971 reads: 'Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.'

49. Article 14(2) allows for this derogation from the procedures envisaged by Article 14(1) and reads: 'Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.'

50. I refer to the compulsory preliminary reference to the ECJ under Article 177 of the EC Treaty and the principles of 'direct effect' and supremacy of EU law over domestic law.

51. Maniatis, note 94 at 212.

52. Ibid at 213.

53. Ibid.

54. Respondent to confidential survey of airlines, aviation litigators, government regulatory agencies and ADR experts recognised by ICAO. Survey conducted by author in 2002.

55. Francois-Marie Arouet (aka Voltaire) Letter to Mme Denis, about his quarrel with Frederick the Great, 2 September 1751. In English, '*They squeeze the orange and throw away the skin*'.