

# HOW TO OVERCOME DISPUTES CONTINUING DOING BUSINESS TOGETHER

**Giulia Mauri and Frédérique Jos** look into alternative dispute resolution mechanisms and offer advice on the method particularly suitable to solve Business Aviation related matters



In the course of their daily activities companies active in the Business Aviation sector (operators, airports, FBOs, MRO facilities, brokers, clients, companies providing services such as catering etc.) are confronted to potential disputes. Some of these disputes will be solved through the course of normal business practice. But some of them will go through an escalation process that may lead to litigation.

Even if litigation is sometimes unavoidable, the draw-backs of litigation are numerous: the costs, the duration of the procedures and the diversion of valuable resources from more productive activities. Moreover, the final aim of litigation is to identify a winner and a loser and the commercial relationship between two parties are often definitely broken after litigation: Trust is lost and resentment will be long lasting.

Since the 1990's practitioners from one side and the other of the Atlantic have considering systems of dispute resolution alternative to litigation. Two main systems are nowadays considered as the most relevant alternative dispute resolution (ADR) mechanisms: mediation and arbitration.

## Arbitration v. Mediation

Arbitration and mediation are often referred to together when people talk about ADR systems since they are both alternatives to traditional litigation and employ a neutral third party to oversee the process.

The main difference between mediation and arbitration is that arbitration is very similar to a court process. The disputing parties are given an opportunity to present their case to a third party called the arbitrator who is appointed by the parties and who hears both parties' arguments and then issues a final 'judgment' (the arbitral decision). During arbitration, there are usually little if any out-of-court negotiations between parties. The arbitrator has the power to render a legally binding decision which could then be enforced in most courts.

As for the arbitration, also in the mediation procedure a neutral third party is chosen by the parties. However, the role of this third-party, called the mediator, is to listen to the parties' arguments and points of view and to actively facilitate (or try to reinstall) negotiations between the disputing parties in order to help them find-

ing a settlement. The mediator is a facilitator and an enabler which, by using conflict resolutions' techniques, helps the parties in finding their own solution to the conflict opposing them.

The mediator does not issue orders, find fault or makes determinations. Instead, the mediator helps parties to reach a settlement by assisting them in their communications and in the elaboration of possible solutions.

Mediation procedures vary and they are greatly linked to the personality and methods of each mediator. However, the mediator will generally start the procedure by meeting the parties and ask them to explain their respective point of view in relation to the dispute opposing them. Should the mediator feel that the situation is particularly tense and that a joint meeting would be counterproductive, the mediator may opt to meet each party separately so that the party may freely explain its views in relation with the dispute. The mediator discusses the dispute with the parties and explores with each party possible ways to resolve it. It is common for the mediator to go back and forth between sides a number of times. The

## AGREEMENT

*If negotiations have failed, alternate dispute resolutions can serve as a last ditch effort before going to litigation.*

main focus remains on the parties as they work towards a mutually beneficial solution. Most disputes are successfully resolved and often the parties will then enter formalize the solution found by concluding a settlement agreement.

The disputing parties can decide to go to mediation at any time. Either as a “last ditch effort” before going to litigation or even if litigation is already underway, mediation can be used to settle the lawsuit and avoid the cost, time and aggravation of prolonged litigation.

An example of how mediation may help solving very complex disputes is a case recently closed before the court of Courtrai in Belgium. The case is related to a dispute between several parties (buyer and seller and various subcontractors) in relation to damages to an equipment produced by one of the parties and installed at the premises of the other. The case had been lasting for several years. Various expertises had been carried out and the case was pending in appeal. The parties agreed to appoint a mediator and the case was solved in a few hours. The settlement reached between the parties was then acknowledged by the court and the case was closed.

### Business Aviation and Mediation

Mediation proves to be particularly successful in sectors of the industry where parties value confidentiality and wish to avoid disrupting relationships in a niche sector where the safeguard of economic relationships amongst companies is considered important. Mediation is also quite successful in sectors of the industry where small and medium size companies operate. SMIs do not have the same funds and resources of large corporations to be able to launch long and costly litigation procedures.

An example is the use of mediation in the diamond sector in Antwerp. Most disputes between diamond traders who are members of one of the four diamond exchanges are submitted to a “reconciliation council”. The reconciliation council is a mediation body that settles disputes arising between diamond traders who are members of one of the diamond exchange. Non-members may also be involved in the reconciliation pro-

cedure if the respective Diamond Exchange agrees thereto beforehand. If the reconciliation procedure fails to provide a positive outcome, the Diamond Exchange also offers an arbitration procedure.

We believe that, based on the above considerations, mediation would be particularly suitable to solve several Business Aviation related disputes. Indeed, the Business Aviation sector is composed mainly of SMIs, it is a niche sector where economic operators do not usually wish to break



working relationships with one another and it is a sector that values confidentiality.

The benefits for the Business Aviation sector of solving disputes through mediation may be summarized as follows:

- Time savings: Mediation typically takes a few days or weeks (in certain cases, it may last just a few hours) and if parties wish to invest their (human and financial resources) in more productive activities, mediation allows for a more reasonable timetable to solving disputes.

- Costs savings: Mediation is usually far less costly than a court or arbitration proceeding.

- Confidentiality: This is an element that could be of great importance for Business Aviation companies, especially if the dispute involves a client and an operator. In a mediation procedure, all the discussions and agreements reached are confidential. If desired by the parties, the entire case remains completely confidential. Any observation, evidence or admissions made during mediation cannot be used in any subsequent litigation or arbitration. And indeed, mediation is a completely voluntary

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procedure which does not usurp the right of the parties to proceed with litigation if mediation fails.

- Maintaining commercial relationships: Mediation is a non-adversarial procedure. The collaborative nature of mediation is of great importance in those situations where a continued or future relationship between the parties is desired. Indeed mediation can help preserve business and personal relationship that would be otherwise destroyed through years of continued litigation.

- Creative commercial solutions not limited to strict legal remedies: Because mediation is not driven by legal considerations, but by commercial ones, parties may come to very creative solutions that fit their businesses and their business relations.

- Parties in control of the process and solution: Parties usually report a higher degree of satisfaction with mediation than with arbitration or other court processes because they can control the result and they are the creators of the final solution.

- Greater compliance: This is an aspect that should not be forgotten. Since the final result of mediation is an agreed solution between the par-

**OPTION**  
*Mediation facilitates parties to reach their own resolution, while arbitration is a simplified version of a trial.*

# MEDIATION



mediator but should have an extensive background in Business Aviation.

Another positive aspect of mediation could also be to mitigate disputes in the Business Aviation sector. As a matter of fact, mediators faced with recurring issues leading to disputes in the industry could have for mission to alert the professional bodies and incite them to put in place anticipatory measures such as best practices and standards. This would have for indirect effect the decrease of volume of the most common disputes.

## Legal Aspects

The European Union has acknowledged the importance that mediation may have in disputes resolution. On 21 May 2008, the European Parliament and the Council approved Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the Mediation Directive). The application of the Directive was limited to cross-border civil and commercial disputes and disputes in which at least one of the parties is domiciled in a Member State other than that of any other party.

The main goal of the Directive was to encourage the use of mediation by “ensuring a balanced relationship between mediation and judicial proceedings”. For this the directive contains five substantive rules:

- It obliges each Member State to encourage the training of mediators and to ensure high quality of mediation.

- It gives every judge the right to invite the parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case,

- It provides that agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary.

- It ensures that mediation takes place in an atmosphere of confidentiality. It provides that the mediator cannot be obliged to give evidence in court about what took place during mediation in a future dispute between the parties to that mediation

- It guarantees that the parties will not lose their possibility to go to court as a result of the time spent in

mediation: the time limits for bringing an action before the court are suspended during mediation.

All Member States transposed the Directive into national laws by 21 May 2011. Although the Directive contains few compulsory rules, which all Member States complied with, many took further actions to promote mediation.

## Conclusion

The legal framework introduced by the Directive of 2008 has contributed in the professionalization of mediation services. Various organisations in different Member States now offer high level trainings aimed at teaching future mediators conflict resolution techniques as well as mediation methodology.

We have first hand experience in solving disputes through mediation and we strongly believe that this should be a method of conflict resolution that should be strongly encouraged by the industry and its representative bodies.



## Giulia Mauri

*Giulia has more than 20 years' experience in advising national and international clients on all aspects of aviation and transport related transactions, including asset-finance and leasing, regulatory issues, carrier's liability and litigation matters. Giulia has already intervened as a mediator and an arbitrator in several disputes. Together with Mrs Jos, she chairs the Aviation Lawyers Committee of the European Business Aviation Association and an active member of the Industry Affairs Group of the European Regions Airline Association.*

## Frédérique Jos

*Frédérique is an attorney qualified in France and Belgium and has an extensive practice of business aviation law. As a trained mediator she is also qualified to intervene in the resolution of legal disputes under the process of alternative dispute resolution. Together with Mrs Mauri, she chairs the Aviation Lawyers Committee of the European Business Aviation Association*

ties, voluntary compliance with the final settlement is higher than compliance with court decisions imposed on the parties.

For all the reasons described here-above, we believe that mediation would be a valid solution to solve disputes that could occur in a Business Aviation context as this industry;

- requires a high degree of confidentiality

- is by its nature a cross-border activity which requires flexibility and creative commercial solutions which are rarely available in national laws

- is a “niche” sector where business partners cannot afford to destroy long-term relationship through long litigation cases (e.g. an operator and a maintenance facility)

- has many active SMEs focused on offering the best possible services and trying to avoid potential disputes in an amicable manner (and not in complex and costly litigation before court or in expensive arbitration processes)

- suffers from a lack of experts (judges or arbitrators) with a thorough technical and commercial understanding of the industry and thus truly qualified to examine issues leading to dispute in this sector (such as for example, aircraft transactions, maintenance problems, etc). The key to a successful outcome of mediation is in the selection of the mediator who should be not only a trained

## TENDENCY

*The realm of Business Aviation is gravitating toward mediation in business-related disputes.*