



ALTERNATIVE DISPUTE RESOLUTION PROCEDURE IN THE FIELD OF AIR TRANSPORT: QUESTIONS ABOUT ITS CONFIGURATION AND CONSTITUTIONALITY

This newsletter examines some of the questions raised by the new ADR of the Spanish Aviation Safety and Security Agency (AESA). It will briefly outline its scope of application and analyse the suitability and feasibility of this new ADR mechanism in our legal system.

The Alternative Dispute Resolution (ADR) procedure, regulated in Order TMA/201/2022 of 14th March, concerning passenger complaints arising from EC Regulation 261/2004¹ and EC Regulation 1107/2006² and the approval and appointment of AESA as the body empowered for this purpose, is an issue that continues to generate controversy, concerns and questions in the aviation sector, not only regarding the development and effectiveness of the procedure itself, but also, in particular, regarding its suitability and fit within our constitutional order.

For the sake of clarity, let us begin by recalling that its incorporation into Spanish law, and the designation of an entity responsible for the procedure, is provided for by Directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution for consumer disputes, transposed into Spanish law by Act 7/2017 of 2nd November³ (hereinafter, 'Directive 2013/11/EU and Act 7/2017').

As can be seen, the European legislator obliged the Member States to guarantee EU consumers' rights through independent, transparent, effective, and fair out-of-court alternative dispute resolution procedures. According to the Directive, it was intended to ensure minimum standards of coverage, quality, and knowledge about this type of procedure in the different Member States, to remove some of the difficulties that hinder the development and proper operation of the Union's internal market.

Following these requirements, Act 7/2017 established the need to

appoint an entity responsible for the alternative dispute resolution procedure in the field of air transport user protection, defining, through its 2nd Additional Provision, some of the characteristic features of the process, which would be developed by Ministerial Order TMA/201/2022.

Alternative Dispute Resolution Procedure (ADR)

Although for the sake of brevity we will not refer in this newsletter to all the phases of the ADR procedure, it is worth mentioning its scope of application, i.e. (i) all incidents occurring after its entry into force; (ii) in case of (1) outbound flights from Spanish territory, regardless of whether it is a Community or non-EU air carrier, and (2) inbound flights from a non-EU country to Spanish territory, provided that it is a Community air carrier, and that there is no system similar to that provided for in EC Regulation 261/2004 in the country of origin; (iii) referring to air passengers' rights provided in the aforementioned EC Regulation 261/2004 and EC 1107/2006, as long as with the case law of the Court of Justice of the European Union⁵.

AESA, as foreseen in the Order, will be ADR's responsible entity in the field of air transport users' protection and, therefore, will render a decision, stating the pecuniary obligation or the reasons why, given the evidence submitted, the passenger's claim is not admitted.

Regarding the above, it should be noted that AESA's decision is binding on airlines⁶. In the event of non-compliance, the passenger will be able to enforce it before the court (as a court decision). This

¹ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11th February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

² Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5th July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

³ Act 7/2017 of 2nd November 2017 transposing into Spanish law Directive 2013/11/EU of the European Parliament and of the Council of 21st May 2013 on alternative dispute resolution in consumer matters.

⁴ The procedure was originally scheduled to enter into force on 2nd March 2023. However, this date has been delayed due to pending legislative procedures, such as the appointment of the Agency as the authorised entity for ADR. The appointment will be effective shortly and ADR may come into force on 2nd May 2023 or, at the latest, on 2nd June of the same year.

⁵ Incidents relating to damage, destruction, damage, loss, or delayed transportation of baggage and/or claims for non-material damages of passengers cannot be brought before this ADR.

⁶ Passengers are always free to decide whether or not to accept the Decision of the ADR or to pursue the case in Court.

binding nature of the decision -which is not imposed as a requirement by Directive 2013/11/EU- means that, although the airline may challenge the decision⁷, it is obliged to make the payment within a maximum period of one month. Otherwise, the passenger can request the enforcement of the decision in court, exposing, in addition, the airline to a severe penalty regime in case of late payment or non-payment to the passenger⁸.

Main questions and possible unconstitutionality of the ADR procedure

Given the above and setting aside the concerns regarding the legal uncertainty generated by the obligation to comply coercively with a decision of a non-judicial body, it should be pointed out some of the raised doubts with the regulation as set out by the legislator.

For example, which courts will handle airlines' challenge against AESA's decision? As an administrative decision, the appropriate course of action would be to bring a claim to this jurisdiction (administrative). However, the legislator does not clarify this point in the Order and refers to the commercial courts regarding the enforcement of the decision by the passenger, which also clashes head-on with the recent readjustment of the competence in air transport claims, changed to the courts of first instance⁹.

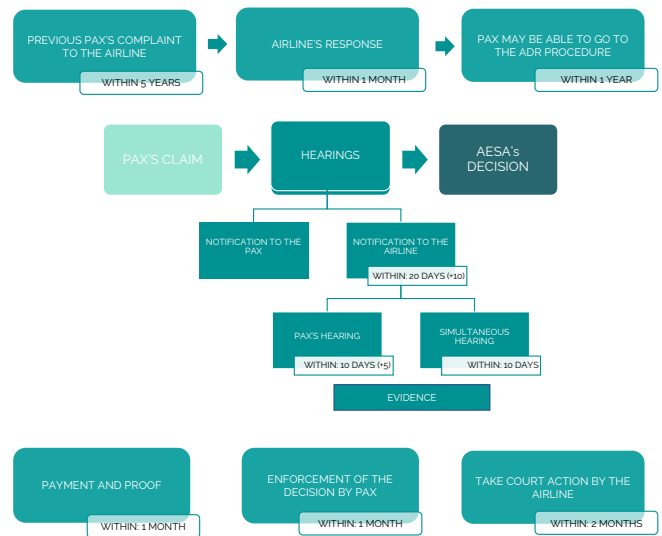
Other inevitable questions that come up are: what happens if the judge revokes AESA's decision, obliging the passenger to return the payment and it is impossible to contact him?, has the potential risk of paying thousands of passenger claims been assessed if these decisions are revoked and the passengers are untraceable?, has the legislator considered adopting alternative measures to allow the airlines to deposit the amounts claimed in court, or even in an account set up by the Agency itself, in order to avoid exposing them to the risk of receiving a sanction bearing in mind the severity of the penalties -a minimum of no less than €70,001 in the event of non-payment-? If it does not, will the Agency stand firm in its criterion adopted for a flight when the Courts have already adopted decisions against it, and if it does not, will there be damage caused by the Administration knowing that its criterion is judicially superseded and, even so, using it to punish an administered party -the airline- repeatedly? These and other questions undoubtedly justify the concern that exists in the airline industry.

In addition, as we pointed out at the beginning, it is essential to analyse, from a constitutional point of view, the viability of the designation of an administrative entity as the responsible body for resolving passenger complaints.

In this regard, it should be mentioned the recent legal report issued on 30th March 2023 by the General Council of the Judiciary (CGPJ) on the Draft Bill for the Creation of the Independent Administrative Authority for the Defence of Financial Customers, which undoubtedly has some similarities with the ADR procedure¹⁰.

Following, therefore, the argument of the CGPJ and taking into account that the appointment of AESA as the authorised entity for ADR derives from the transposition of Directive 2013/11/EU (from which the administrative authority in the banking framework analysed by the Council also derives), it is important to remember that the integration of European Union law cannot be used as a reason for violating national constitutional principles.

It should be emphasised that, in the constitutional scheme of the



Scheme of AESA's ADR procedure

separation of powers that exist in our country, the exercise of jurisdictional power in all types of proceedings is "exclusively" reserved for the Courts and Tribunals established by law (Article 117.3 of the Spanish Constitution). This means that the power to forcefully settle disputes between private parties and enforce court rulings corresponds exclusively to the Judiciary, which is not compatible with the AESA ADR procedure ruled by the legislator in the air transport framework.

We must bear in mind that this jurisdictional power, which entails the right to jurisdiction, i.e., the right to have a court or tribunal resolving a conflict impartially, independently and in accordance with the law, constitutes an indispensable guarantee of effective judicial protection, a fundamental right enshrined in Article 24 of the Spanish Constitution. The need to safeguard the exclusivity of judicial power on the part of the Courts and Tribunals is therefore essential to guarantee, in turn, our judicial system, protect citizens' rights and preserve the rule of law.

In addition, it should also be noted that ADR does not fall within any of the exceptions provided for in our legal system, i.e.:

(i) On the one hand, arbitration, since the mandatory and binding character of ADR is contrary to the very of the arbitration which is configured as a voluntary mechanism, impartial and independent, in which the so-called "arbitration award" can be challenged before the civil jurisdiction.

(ii) On the other hand, the power of declaratory and enforceable self-protection which, in certain cases, falls to the Administration, displacing, exceptionally, the Jurisdiction, insofar as it allows it to issue declaratory acts on the existence and limits of its rights and to enforce them.

There is no doubt that ADR is not an arbitration procedure subject to that specific legislation, but rather an administrative procedure, in which a public law entity (AESA) is given the power to issue a mandatory and binding decision for airlines¹¹.

⁷ The airline could challenge AESA's Decision within 2 months in court.

⁸ Articles 45bis and 55.2 of the Aviation Safety Act 21/2003 of 7th July 2003 provide penalties from 4,500€ to 70,000€ for non-compliance in a timely manner and penalties from 70,001€ to 250,000€ for non-compliance with the required payment of AESA's decision.

⁹ For more information, please be referred to the newsletter, published in September 2022, entitled: [The readjustment of the competences of the Commercial Courts and its impact on airlines - Pionair Law](#)

¹⁰ For the sake of brevity, we will not analyse the creation of this entity in the financial framework. For further details, please be referred to the [CGPJ's Legal Report](#).

On the other hand, it should be noted that the Administration's power of self-administration is based on the presence of the Administration as one of the parties involved in the relationship, which, obviously, would not be the case in incidents handled by the AESA ADR, as it is a conflict between two private parties (passenger and airline).

In light of the above, and fully in line with the statements of the CGPJ, the claim to exempt the exclusivity of the Jurisdiction by attributing to a public entity the power to coercively resolve a controversy in a private relationship between private individuals is not viable in our constitutional legal system. Indeed, the aforementioned article ^{117,3} of the Constitution, in relation to its article 24.1, which guarantees the fundamental right of citizens to effective judicial protection, does not allow the Administration to attribute to itself the power to resolve coercively conflicts between private parties, excluding the Judiciary in that constitutional task which, exclusively, is reserved to it by those provisions.

For all these reasons, we consider that the ADR procedure in the field of protection of air transport users constitutes an infringement of the exclusivity of the jurisdiction and effective judicial protection established in our constitutional legal system as the legal basis to protect the rule of law.

Furthermore, it should be noted that the transposition of Directive/2013/11/EU, and the consequent configuration of ADR, in Spain differs from the regulations in the rest of the EU member states, where, mostly, a mandatory not binding procedure has been established¹², which, in our opinion, would be not only more reasonable and appropriate, but also will would comply with our legal system.

However, and despite the concerns raised above, the Spanish legislator seems determined to go ahead with the implementation of the AESA ADR in the field of air transport in our country. For this reason, and while we will continue working to clarify the possible unconstitutionality of this procedure, we will be helping and supporting our clients to defend their interests.



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¹¹ Similarly, it should be noted that the provision for its enforceability in Article 517.9 of Act 1/2000 of 7th January, on Civil Procedure, cannot be an enabling condition for the judicial enforcement of the decision, given that the unconstitutionality of the process will have occurred *ex ante*.

¹² Although the constitutionality or otherwise of a procedure must be assessed according to the legal framework of each country, we can refer to the alternative dispute resolution procedures existing in Germany (Schlichtungsstelle für den öffentlichen Personenverkehr e.V., SÖP), Austria (Agency for Passenger Rights, APF), Norway (Norsk Reiselivs Forum, NRF) or Sweden (National Board for Consumer Disputes, ARN). It seems that none of them meets the three conditions of binding, mandatory and public ownership that justify our position in this newsletter.