

## NOTES

### DESTINATION ADR: CHARTING A NEW COURSE FOR AIRLINE PASSENGER DISPUTES<sup>†</sup>

CHENG-CHI (KIRIN) CHANG\*

#### ABSTRACT

*Airline passenger rights in the United States lag behind protections in the European Union (EU), leaving consumers vulnerable. Since the 1978 Airline Deregulation Act (ADA), limited federal oversight and reliance on airline contracts have weakened recourse for passengers facing issues like disruptions, mishandled baggage, and unfair practices. The complex regulatory landscape and high costs of litigation pose barriers to dispute resolution, exemplified by failed attempts at a Passenger Bill of Rights (PBOR). In contrast, the EU has expanded protections through legislation and dedicated alternative dispute resolution (ADR) systems, including Online Dispute Resolution (ODR) platforms.*

*This Note analyzes the EU framework, using Spain as a case study, where recent regulations strengthened ADR by binding authority to resolutions. This analysis extends to pertinent observations from the German legal landscape. Insights from the EU model highlight the potential for specialized aviation ADR bodies and mandatory airline participation to level the playing field for passengers. However, imposing similar reforms in the United States may conflict with the hands-off approach rooted in deregulation policies. More modest yet impactful changes emphasizing incentives over mandates could promote voluntary airline adoption of binding arbitration procedures approved by the Department of*

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\* Associate Director & Research Fellow of the AI and the Future of Work Program, Emory University School of Law; J.D., University of Florida Levin College of Law; LL.M., University of Arizona James E. Rogers College of Law; LL.B., National Chung Hsing University School of Law in Taiwan. I would like to express my sincere gratitude to Professors Donna Erez-Navot and Christopher D. Hampson for their invaluable guidance and support in the preparation of this article. I am also thankful for the insightful feedback provided by Rachel Cohen, Youyang Zhong, Yilin (Jenny) Lu, Nanfeng Li, Edison Li, Shijie Xu, Yenpo Tseng, Jeffrey Chang, Chun-Ting Cho, Zih-Ting You, Arron Fang, and Ai-Jing Wu, which enriched the content of this paper. Additionally, my appreciation extends to all participants of the Alternative Dispute Resolution Seminar, whose diverse perspectives and rigorous discussions have significantly contributed to the depth and breadth of this research. I would like to further extend my appreciation to the editors of the *Georgetown Journal of International Law* for their assistance in bringing this Note to publication. Any errors or omissions are my sole responsibility. © 2024, Cheng-chi (Kirin) Chang  
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*Transportation (DOT). Targeted legislative adjustments maintaining deregulation principles while expanding accessible dispute resolution would align with the EU's emphasis on passenger rights. Though substantial gaps remain, enhancing ADR access can gradually improve protections consistent with the U.S. regulatory philosophy. This incremental approach represents an attainable progression toward more equitable aviation dispute resolution.*

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## I. INTRODUCTION

Since the 1978 Airline Deregulation Act (ADA), the airline industry has undergone massive changes that eliminated federal control over routes, fares, and market entry.<sup>1</sup> While deregulation succeeded in promoting competition and reducing airfares, it also triggered a decline in airline service quality and passenger protections.<sup>2</sup> Today, passengers face increasingly inhospitable conditions, including cramped seating, burdensome fees, and uncertain recourse for delays, cancellations, and other service disruptions.<sup>3</sup> Against this backdrop, the contrast between European Union (EU) and U.S. policies on airline passenger rights has become more pronounced. The EU actively fortifies passenger protections through comprehensive legislation and specialized alternative dispute resolution (ADR) systems. Meanwhile, the United States only provides limited safeguards, leaving passengers in a vulnerable position with few cost-effective remedies.

While the United States adheres to a hands-off approach rooted in the free market policies of deregulation, targeted legislative changes that provide incentives and safeguards for ADR could incrementally empower consumers. The EU offers a roadmap of how non-litigation dispute resolutions can effectively supplement traditional enforcement mechanisms. By facilitating access to expert mediation and arbitration forums, the United States can adapt key aspects of the EU model to its own regulatory landscape. Though political hurdles exist, enhancing ADR procedures remains a viable path forward for buttressing passenger protections.

This Note compares the EU and U.S. approaches to airline passenger rights, focusing on dispute resolution mechanisms. Part II examines the challenges passengers face under the current U.S. framework, which centers on airline contracts and lacks robust oversight. Part III provides background on ADR and details the EU’s framework, using Spain as a case study. Part IV outlines the EU model’s essential features, such as

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1. Jennifer González, *Economic Regulation of the Commercial Aviation Sector and the 1978 Airline Deregulation Act*, LIB. OF CONG. BLOGS (June 2, 2022), <https://blogs.loc.gov/law/2022/06/economic-regulation-of-the-commercial-aviation-sector-and-the-1978-airline-deregulation-act>.

2. See Melvin Brenner, *Airline Deregulation - A Case Study in Public Policy Failure*, 16 TRANSP. LAW J. 179, 215–16 (1988).

3. See Greg Iacurci, *Canceled, Delayed Flights Are Likely over July 4 Holiday Weekend. What to Know about Your Rights*, CNBC (June 30, 2023), <https://www.cnbc.com/2023/06/30/delayed-and-canceled-flights-what-to-know-about-your-rights.html>.

obligatory airline involvement in ADR and the creation of specialized aviation ADR entities, while also examining the debates surrounding the extent of the ADR's authority in enforcing airline compliance. Finally, Part V draws lessons from the EU experience and proposes reforms to strengthen U.S. passenger rights through increased access to binding ADR procedures.

## II. CHALLENGES OF U.S. AVIATION PASSENGER DISPUTE RESOLUTION MECHANISMS

This Part critically examines the multifaceted challenges inherent in the U.S. aviation passenger dispute resolution mechanisms. It provides a granular look at the nature of aviation passenger disputes, the entities involved, and the types and characteristics of these disputes. Further, it delineates the legal framework governing U.S. aviation passenger rights and scrutinizes the efficacy of the existing dispute resolution processes.

### A. Overview of Aviation Passenger Disputes

Aviation passenger disputes span ticket purchases, airport wait times, and in-flight transportation, which involve legal conflicts between passengers and various entities, primarily airlines and airport authorities.<sup>4</sup> These disputes may stem from personal or property damage resulting from an operator's tortious actions or contractual disagreements related to passenger transportation and baggage agreements.<sup>5</sup>

Moreover, airports bear the responsibility of ensuring passenger safety and responding to emergencies.<sup>6</sup>

#### 1. Parties Involved in Aviation Passenger Disputes

Key participants in disputes are carriers, airport management entities, airline sales agents, and operators of airline sales platforms. Carriers, defined as enterprises utilizing civil aircraft for passenger and baggage transport, frequently find themselves at the center of complaints.<sup>7</sup> Grievances may include lost luggage, flight delays, cancellations, subpar

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4. See Matthew Schoonover, *Oversold, Delayed, Rescheduled: Airline Passenger Rights and Protections*, 35 WASH. UNIV. L. J. & POL'Y 519, 520–21 (2011).

5. Tory Weigand, "No Waif in the Wilderness": Contractual Doctrine and the "Self" Versus "State" Imposed Obligation, 86 J. AIR L. COMM. 67, 68, 132–34 (2021).

6. See Jeffrey C. Price & Jeffrey S. Forrest, *Airport Emergency Planning, Part II: Emergency Management Functions*, in PRACTICAL AIRPORT OPERATIONS, SAFETY, AND EMERGENCY MANAGEMENT 427 (2016).

7. 14 C.F.R. § 1.1 ("Air carrier means a person who undertakes directly by lease, or other arrangement, to engage in air transportation."). See also William Mann, *All the (Air) Rage: Legal*

service, or passenger refusal to board.<sup>8</sup> The onus falls on airlines to safeguard the legal rights of passengers and resolve passenger claims. When remedies are needed, compensation such as free accommodations, rebooking, refunds, or other remedies may be offered.<sup>9</sup> Airport management authorities act as intermediaries, ensuring order and offering services such as efficient processing, navigational assistance, and staff interactions, along with amenities for shopping, dining, leisure activities, and internet access.<sup>10</sup>

In aviation passenger disputes, airline sales agents and online platform operators play crucial roles.<sup>11</sup> Passengers often book and modify flights through these intermediaries, avoiding direct airline contact.<sup>12</sup> Consequently, they typically address initial complaints about overbooking, delays, or cancellations on the booking platform.<sup>13</sup> This pattern of intermediary-based complaint management underscores the complexities of aviation passenger disputes and the variety of entities involved. To effectively navigate this intricate landscape, a comprehensive understanding of the roles and responsibilities of each entity is essential for the resolution of disputes and the protection of passenger rights.

## 2. Types and Characteristics of Aviation Passenger Disputes

The five most common types of disputes include: (1) disruptions to air travel experience; (2) mishandled baggage; (3) refunds and

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*Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 J. AIR L. COMM. 857, 886 (2000).

8. Teresa Murray, *The Plane Truth 4*, U.S. PIRG EDUC. FUND (2023), <https://pirg.org/edfund/resources/the-plane-truth-4/> (last visited Jun 8, 2024); Today, *How to Protect Against Flight Delays, Cancellations, Lost Luggage*, NBC (Oct. 4, 2023), <https://www.nbc.com/today/video/how-to-protect-against-flight-delays-cancellations-lost-luggage/NBCN396741807>.

9. See Iacurci, *supra* note 3.

10. See Nigel Halpern & Deodat Mwesummo, *Airport Service Quality and Passenger Satisfaction: The Impact of Service Failure on the Likelihood of Promoting an Airport Online*, 41 RES. TRANSP. BUS. MANAG. 100667 (2021).

11. See generally *Buying a Ticket*, U.S. DEP'T OF TRANS. (Mar. 4, 2020), <https://www.transportation.gov/individuals/aviation-consumer-protection/buying-ticket>. ("Passengers often book air travel through travel agencies. When you purchase a ticket through a travel agency or agent, you are not buying a ticket directly from the airline. You are allowing the agency or agent to find and book air travel on your behalf. If you encounter any problems with your ticket during your travel, you should first contact the travel agency or agent directly.")

12. Christopher Elliott, *The Great Booking Debate: Is Direct Better than a Third-Party Site?*, WASH. POST (Jan. 11, 2023), <https://www.washingtonpost.com/travel/tips/booking-direct-travel-websites-flights-hotels/>. See also U.S. DEP'T TRANS, *supra* note 11.

13. See *Air Travel Complaints*, U.S. DEP'T OF TRANS. (May 6, 2023), <https://www.transportation.gov/airconsumer/complaint-process> ("For the fastest resolution of many air service-related issues, contact an Airline or Ticket Agents' Customer Service Representative.").

fares; (4) disability accommodations; and (5) consumer protection violations.<sup>14</sup> Aviation passenger disputes encompass various categories, each triggering distinct legal rights and responsibilities as defined by airline consumer protection regulations. Analyzing consumer complaint data reveals prevalent areas of conflict between passengers and air carriers.

Disruptions to the air travel experience, constituting the primary source of disputes, contributed to 52.5% of December 2022 complaints, paralleling the heightened figures seen in 2020 and 2021 where refunds were the highest category of complaints.<sup>15</sup> In 2022, the overall rate for these complaints stood at 31.7%, reflecting an escalation from pre-pandemic levels. Passengers experienced missed connections, additional expenses, and inconvenience, often stemming from inconsistent airline policies.<sup>16</sup> Mishandled baggage alone accounted for 13.8% of the complaints in December 2022 and 15.5% of the overall complaints in 2022.<sup>17</sup> These complaints included issues such as lost, damaged, or delayed luggage. Moreover, disputes arose when airlines failed to compensate passengers for such baggage issues, despite existing baggage liability rules.<sup>18</sup> This trend of increasing complaints has been consistent since the pandemic, with flight problems remaining the second highest category of complaints after refunds.<sup>19</sup>

Refund and fare-related disputes, involving unjust denials and improper fare practices, encompass contract law and specific regulations on refunds and price transparency.<sup>20</sup> Passengers rightly expect adherence to advertised fares and service contracts. Despite forming a smaller percentage, disability accommodation disputes saw a 50% increase in 2022.<sup>21</sup> These conflicts arise when airlines inadequately accommodate individuals with disabilities, violating anti-discrimination regulations.

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14. *Air Travel Consumer Report: December 2022, Full Year 2022 Airline Complaint Data*, U.S. DEP'T OF TRANS. (Apr. 12, 2023), <https://www.transportation.gov/briefing-room/air-travel-consumer-report-december-2022-full-year-2022-airline-complaint-data>.

15. *Id.*; *DOT Announces First-Ever Bill of Rights for Passengers with Disabilities, Calls on Airlines to Seat Families Together Free of Charge*, U.S. DEP'T OF TRANS. (July 8, 2022), <https://www.transportation.gov/briefing-room/dot-announces-first-ever-bill-rights-passengers-disabilities-calls-airlines-seat>.

16. U.S. DEP'T OF TRANS., *supra* note 14.

17. *Id.*

18. *Id.*

19. *Id.*

20. See RACHEL Y. TANG, CONG. RSCH. SERV., R43078, AIRLINE PASSENGER RIGHTS: THE FEDERAL ROLE IN AVIATION CONSUMER PROTECTION, 1 (2016).

21. U.S. DEP'T OF TRANS., *supra* note 15.

Separately, consumer protection violations involve breaches of airline consumer protection regulations, such as overbooking/bumping and truth in advertising.<sup>22</sup> Passengers seek accountability when transparent information and fair dealings are not met.

B. *U.S. Aviation Passenger Rights: Legal Framework and Oversight*

Before delving into the intricate layers of airline passenger protection, it is essential to understand the multifaceted legal framework and oversight mechanisms that safeguard U.S. aviation consumer rights. This section provides an overview of the federal laws, regulations, and policies that constitute these protections, highlighting the roles of Congress and the Department of Transportation (DOT). It also examines the implications of the ADA on contracts of carriage and the interplay between federal oversight and state law in the enforcement of passenger rights. This framework sets the stage for an in-depth analysis of the current protections, the proposed Passenger Bill of Rights (PBOR), and the challenges faced by passengers in resolving disputes with airlines.

1. Multiple Levels of Airline Passenger Protection

The legal framework and oversight of U.S. aviation passenger rights involve multiple levels of protection, stemming from federal laws, regulations, and airline policies.<sup>23</sup> Congress, authorized under the Commerce Clause, governs these rights, limiting state and local involvement in air carrier pricing and services.<sup>24</sup> Congress shapes airline passenger rights, authorizing federal agencies to enforce them.<sup>25</sup> Congressional oversight falls under the authority of the House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation.<sup>26</sup> Congressional scrutiny extends to issues such as tarmac delays, flight schedules, and airline mergers, exemplified by the 2013 American Airlines and U.S. Airways merger.<sup>27</sup>

The DOT also plays a crucial role in enforcing airline passenger rights, operating under 49 U.S.C. § 41712.<sup>28</sup> The DOT issues regulations, with

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22. See *Fly Rights*, U.S. DEPT. OF TRANS. (May 6, 2023), <https://www.transportation.gov/airconsumer/fly-rights>; 49 U.S.C. § 41712.

23. Tang, *supra* note 20, at 1.

24. *Id.* at 1–2.

25. *Id.*

26. *Id.*

27. *Id.* at 2.

28. *Id.*



the Office of the Secretary administering this authority independently of the Federal Aviation Administration (FAA).<sup>29</sup> The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (OAEP) monitors airline compliance, investigating violations and imposing penalties based on factors such as the severity and frequency of the violation, the harm caused, the airline's compliance history, and its willingness to cooperate with the enforcement process.<sup>30</sup> For the purpose of these penalties, a "large carrier" refers to an airline that is not a "small business concern" as defined by relevant regulations, and may face penalties up to US\$27,500 per violation. A "small carrier" is considered a 'small business concern' and faces a maximum US\$1,100 penalty, with exceptions for discrimination and deceptive practices.<sup>31</sup> The DOT's enforcement includes investigations initiated from various sources, such as complaint letters to airlines, potentially resulting in warning letters or enforcement hearings.<sup>32</sup>

Airline passenger rights are outlined in contracts of carriage (CCs), the legal agreements between airlines and passengers.<sup>33</sup> CCs are no longer federally regulated due to the ADA.<sup>34</sup> However, CCs conflicting with federal laws or regulations are unenforceable.<sup>35</sup> Deregulation led to price competition, which took precedence over service competition, as airlines began to charge separately for services that were previously included. Airlines charge separate fees for previously included services, leading to complaints.<sup>36</sup> Since the ADA, which shifted control from the federal government to the airlines, carriers have minimized excess capacity to cut costs, exacerbating the impact of flight delays and cancellations—frequent sources of passenger grievances.<sup>37</sup>

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29. *Id.* at 2–3.

30. *Id.* at 3–4.

31. *Id.* at 3; 49 U.S.C. § 46301; 14 C.F.R. 383.2(b); *Legal Enforcement Actions*, FED. AVIATION ADMIN. (Dec. 02, 2021), [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/enforcement/enforcement\\_actions](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/enforcement/enforcement_actions).

32. Tang, *supra* note 20 at 3–4.

33. *Id.* at 4.

34. *Id.* The 1978 Airline Deregulation Act removed federal control over aspects such as fares, routes, and market entry of new airlines from commercial aviation, allowing for a free market in the airline industry and leading to a significant reshaping of the airline business. *Id.* This shift to a market-driven industry meant that many regulations that previously governed airline passenger rights and contracts of carriage were no longer mandated at a federal level, giving airlines more freedom to define their own terms of service. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*



The airline-passenger relationship is governed by a mix of federal regulations and state laws.<sup>38</sup> The DOT has the power to regulate airline contracts and prevent unfair practices.<sup>39</sup> State laws play a role in common contract claims against airlines.<sup>40</sup> There is an ongoing legal debate about the extent of federal and state authority in airline contracts.<sup>41</sup> In *Am. Airlines v. Wolens*, the U.S. Supreme Court has set some limits allowing states to enforce contract terms but not impose extra obligations.<sup>42</sup> The DOT can investigate complaints but cannot compensate passengers for contract breaches.<sup>43</sup> This limitation may disincentivize passengers from filing claims, as they must rely on state law, which can be costly and burdensome, especially for minor financial losses due to airline breaches, such as not providing cash refunds or overbooking.<sup>44</sup>

## 2. The Passenger Bill of Rights

The PBOR refers to proposed U.S. legislation aimed at enhancing and protecting the rights of airline passengers.<sup>45</sup> This proposed legislation includes measures such as ensuring reasonable seat sizes, addressing extra charges for parents sitting with children, providing refunds and alternative transportation for delays, and safeguarding passengers from unfair practices in the airline industry.<sup>46</sup>

Despite repeated attempts since 1989 to establish a PBOR, no bill has made it to a congressional vote.<sup>47</sup> The lack of progress on PBOR legislation

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38. See Tang, *supra* note 20, at 1. See generally Timothy Ravich, *Re-Regulation and Airline Passengers' Rights*, 67 J. AIR L. COM. 935 (2002).

39. Guidance Regarding Interpretation of Unfair and Deceptive Practices, 87 Fed. Reg. 52677, 52678 (Aug. 29, 2022).

40. Weigand, *supra* note 5, at 69.

41. *Id.* at 71–72. See also Charles Rhyne, *Federal, State and Local Jurisdiction Over Civil Aviation*, 11 L. CONTEMP. PROBS. 459, 465 (1946).

42. Grant Glazebrook, *Friendly Skies, Unfriendly Terms: Class Action Waivers and Force Majeure Clauses in Airline Contracts of Carriage*, 43 NORTHWEST. J. INT'L LAW BUS. 185, 189 (2023); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995).

43. *Air Travel Complaints*, U.S. DEP'T OF TRANS. (May 6, 2023), <https://www.transportation.gov/airconsumer/complaint-process>.

44. Glazebrook, *supra* note 42, at 190.

45. Schoonover, *supra* note 4, at 534.

46. See U.S. DEPT. OF TRANS., *supra* note 22. See also Vanessa Romo, *An Airline Passengers' Bill of Rights Seeks to Make Flying Feel More Humane*, NPR (Feb. 7, 2023), <https://www.npr.org/2023/02/07/1154974524/an-airline-passengers-bill-of-rights-seeks-to-make-flying-feel-more-humane>.

47. See generally Airline Passenger Bill of Rights Act of 2007, 110 S. 678 (2007); Airline Passenger Bill of Rights Act of 2007, 110 H.R. 1303 (2007); Airline Passenger Bill of Rights Act of 2009, 111 S. 213 (2009); Airline Passenger Bill of Rights Act of 2009, 111 H.R. 624 (2009); Airline Passenger Bill of Rights Act of 2011, 112 H.R. 729 (2011).

in Congress can be attributed to various factors, such as the strong lobbying efforts of the airline industry, timing issues, and the complexities of the legislative process. One significant factor is the strong lobbying efforts of the airline industry. Since 1998, airlines have collectively spent US\$1.7 billion on lobbying, ranking as the fourteenth-highest spending industry.<sup>48</sup> In 1999, when opposing the PBOR legislation, airlines invested over US\$3 million in lobbying, arguing that it would lead to re-regulation of commercial air transportation.<sup>49</sup> These efforts have played a role in impeding the advancement of PBOR bills.

Other factors that have influenced Congress' lack of progress on PBOR legislation include a potential prioritization of the interests of airline passengers. Professor Timothy Ravich, an aviation litigation expert, speculates that members of Congress, frequent flyers themselves, have a personal stake in enhanced passenger protections.<sup>50</sup> Representatives who have experienced poor airline service firsthand can empathize with passengers' stories and concerns.<sup>51</sup> But timing and the complexities of the legislative process have posed challenges. For instance, the 2001 PBOR bill coincided with the September 11, 2001 (9/11) attacks, shifting Congress' focus to foreign policy and national security.<sup>52</sup> And bills introduced between 2007 and 2010 overlapped with the Great Recession, further diverting attention and resources.<sup>53</sup> The most recent PBOR bill, led by Senators Ed Markey (D-MA) and Richard Blumenthal (D-CT) and co-sponsored by a group of Democratic senators, currently sits at the introduction stage in the Senate.<sup>54</sup> It aims to enhance consumer protections significantly compared to past legislation and faces opposition from industry groups such as Airlines for America.<sup>55</sup>

Although standalone PBOR bills have struggled to pass, the DOT has actively incorporated PBOR principles into its regulatory framework

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48. Glazebrook, *supra* note 42, at 207.

49. *Id.*

50. Ravich, *supra* note 38, at 940.

51. *Id.*

52. Glazebrook, *supra* note 42, at 208.

53. *Id.*

54. Edward J. Markey, *Senators Markey, Blumenthal Lead Democratic Senators in Introducing Legislation to Bolster Airline Passenger Protections*, U.S. SENATOR ED MARKEY OF MASS. (Jan. 31, 2023), <https://www.markey.senate.gov/news/press-releases/senators-markey-blumenthal-lead-in-introducing-legislation-to-bolster-airline-passenger-protections>; Airline Passengers' Bill of Rights, S.178, 118th Cong. (2023).

55. See *A4A Statement on Competition Within the U.S. Airline Industry*, AIRLINES FOR AM. (Feb. 1, 2023), <https://www.airlines.org/a4a-statement-on-competition-within-the-u-s-airline-industry/>. See also Romo, *supra* note 46.

for passenger protection.<sup>56</sup> This includes the recent publication of the first-ever Bill of Rights for Airline Passengers with Disabilities and the issuance of a notice to airlines to facilitate family seating at no extra charge.<sup>57</sup> Thus, while standalone PBOR bills face hurdles, the DOT has taken steps to enhance passenger rights through regulatory means.

C. *Issues with U.S. Aviation Passenger Dispute Resolution Mechanisms*

In the United States, airline passengers face substantial challenges in protecting their rights due to high legal costs and inadequate dispute resolution methods.<sup>58</sup> The main issue is not just the lack of robust safeguards for ADR but also ineffective enforcement. The DOT has limited capacity to effectively redress breaches of airline contracts, primarily focusing on regulatory infractions through enforcement actions and civil sanctions.<sup>59</sup> These measures, namely enforcement actions and civil sanctions, however, offer limited remedies for passenger grievances.<sup>60</sup>

Moreover, the lack of specific passenger rights legislation and the complex interplay between federal regulations and state common law further complicate the situation. The ADA allows for common law contract claims against airlines but creates legal ambiguity, often leading to lengthy litigation and leaving passengers with few options for redress.<sup>61</sup> The minor financial harm to individuals from airline contract breaches does not justify the high costs of legal action.<sup>62</sup>

Assessing U.S. aviation dispute resolution mechanisms reveals weaknesses in enforcement opportunities, a significant disadvantage for passengers, due to high expenses and a lack of legislative oversight. There is a clear need for alternative mechanisms, such as those in Europe, to resolve disputes more effectively and equitably. Adopting ADR practices could address these deficiencies, benefiting passengers and the industry alike.

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56. U.S. DEP'T OF TRANS., *supra* note 15.

57. *Id.*

58. See Sarah Firshein, *In Fine Print, Airlines Make It Harder to Fight for Passenger Rights*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/travel/virus-airlines-private-arbitration.html>.

59. Glazebrook, *supra* note 42, at 189.

60. *Id.*

61. See Aubrey Colvard, *Trying to Squeeze into the Middle Seat: Application of the Airline Deregulation Act's Preemption Provision to Internet Travel Agencies*, 75 J. AIR L. & COMM. 705, 715 (2010).

62. Glazebrook, *supra* note 42 at 190.

### III. ADR IN AVIATION DISPUTES: AN OVERVIEW WITH A FOCUS ON THE EU SYSTEM

#### A. ADR: Definition and Evolution

ADR, which first gained traction during the 1970s in the United States, provides an efficient way to resolve legal disputes outside courtrooms.<sup>63</sup> It emerged due to the high costs, delays, and contentiousness of traditional litigation. ADR methods include negotiation, mediation, arbitration, and their combinations.<sup>64</sup>

The post-World War II surge in U.S. civil disputes, particularly during the economic boom, necessitated ADR's evolution.<sup>65</sup> The government, acknowledging ADR's efficiency, integrated ADR into the legal framework of law, such as the National Labor Relations Act of 1935 and the Alternative Dispute Resolution Act of 1998.<sup>66</sup> These laws mandated ADR programs in the U.S. federal district courts. The continuing success of court ADR programs encouraged the creation of similar arrangements throughout the country, including in federal district courts and U.S. courts of appeal.<sup>67</sup> In such courts, administrative offices selected and trained volunteer mediators and evaluated their ADR programs.<sup>68</sup>

Today, ADR is integral in employment, family, and commercial law.<sup>69</sup> Its modern form dates back to the 1960s and 70s, marked by significant developments, such as the establishment of the first community

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63. *Alternate Dispute Resolution Handbook*, U.S. OFF. OF PERS. MGMT., 1, <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf>.

64. *Alternative Dispute Resolution*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) (last visited Mar. 27, 2024).

65. See Louis Kriesberg, *The Evolution of Conflict Resolution*, in THE SAGE HANDBOOK OF CONFLICT RESOLUTION 15, 22 (Jacob Bercovitch et al. eds. 2009).

66. JEROME T. BARRETT & JOSEPH BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT 119 (1st ed. 2004) ("This last measure in the Wagner Act established as national policy the practice of negotiations between employers and unions, thus placing this ADR precursor on a very prominent footing and opening the door for mediation."); *Alternate Dispute Resolution Handbook*, *supra* note 63, at 1.

67. BARRETT & BARRETT, *supra* note 66, at 235 ("Before the end of the 1980s, federal district courts, and even U.S. courts of appeal, were establishing similar mediation programs to handle major public policy and other complex cases").

68. *Id.* at 235 ("administrative offices were selecting and training volunteer mediators, as well as evaluating their ADR programs.").

69. Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URBAN L. J. 895, 899 (2001). See also Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URBAN L. J. 915, 918 (2001).

mediation center in 1967, and gaining further momentum with Chief Justice Warren Burger's endorsement of ADR during the 1976 Pound Conference, alongside Professor Frank Sander's "multi-door courthouse" concept, which envisions one courthouse with multiple dispute resolution doors or programs.<sup>70</sup> ADR addresses litigation's major flaws—high costs, slowness, complexity, adversarial nature, unpredictability, and limited remedies. It has evolved from an alternative to a primary method for resolving disputes, offering faster, simpler, and more collaborative resolution processes.<sup>71</sup>

### B. Framework of the EU Aviation Passenger Dispute ADR System

Before delving into the specific mechanisms of the EU aviation passenger dispute ADR system, it is instructive to outline the regulatory framework that governs it. This framework is crucial for understanding the context within which the ADR system operates, as well as the rights and obligations it creates for passengers and airlines alike. The following section provides a roadmap of the EU Regulation on the Protection of Passenger Rights, specifically Regulation (EC) No. 261/2004, which is the cornerstone of passenger rights in the EU aviation sector.

#### 1. EU Regulation of the Protection of Passenger Rights: Regulation (EC) No. 261/2004

The EU Air Passenger Rights System, a comprehensive framework conferring enforceable rights within national courts, has evolved in response to the dynamic growth of the EU aviation market since its liberalization in 1992.<sup>72</sup> This period witnessed a surge in new airlines, business models, routes, and passengers, accompanied by a proportional increase in

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70. See Richard Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 978 (2000). See also Thomas Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 333–35 (2005); *Multi-Door Program*, AM. BAR ASS'N, [https://www.americanbar.org/groups/dispute\\_resolution/resources/dispute-resolution-overview/multi-door\\_program/](https://www.americanbar.org/groups/dispute_resolution/resources/dispute-resolution-overview/multi-door_program/) (last visited Mar. 27, 2024).

71. See Louis Kriesberg, *supra* note 65, at 21 ("Alternative dispute resolution (ADR) practices quickly expanded, partly as a result of the increase in litigation and court congestion in the 1970s and the increased attraction of non-adversarial ways of handling disputes."). See also Jacqueline Nolan-Haley, *Book Review, Discussions in Dispute Resolution: The Foundational Articles*, 38 NEGOT. J. 137, 138 (2022) (reviewing DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES (Art Hinshaw et al. eds., 2021)).

72. Sara Drake (Directorate-General for Internal Policies of the Union, European Parliament), *Empowering Parliaments and Enforcing Citizen's Rights in the Implementation and Application of Union Law*, at 2, PE 608.843 (2018), <https://op.europa.eu/en/publication-detail/-/publication/83f38493-f452-11e8-9982-01aa75ed71a1>.

disputes.<sup>73</sup> To initially address these issues, the EU enacted Regulation (EEC) 295/91 in 1991, establishing a compensation system for denied boarding.<sup>74</sup> Despite the implementation of Regulation (EEC) 295/91, issues such as frequent flight cancellations, overbooking, and inconsistent enforcement of passenger rights remained problematic, leading to the enactment of Regulation (EC) 261/2004.<sup>75</sup> This regulation, a testament to the EU's commitment to consumer protection, granted air passengers rights to assistance and compensation.<sup>76</sup> Unlike its predecessor, Regulation (EC) 261/2004 expanded its coverage beyond incidents regarding boarding denial to encompass flight cancellations and delays.<sup>77</sup> Serving as a legal foundation for passenger protection, it applies to departures from EU Member State airports and even extends to flights from third-party states to EU Member State airports.<sup>78</sup> Despite its noble intentions, Regulation (EC) 261/2004 faced challenges from the outset, marked by non-compliance, uncooperative airlines, under-resourced enforcement agencies, and intricate court proceedings.<sup>79</sup>

Since its inception, Regulation (EC) 261/2004 has significantly augmented the rights of passengers on European airlines and within EU Member States.<sup>80</sup> Heralded as providing “the highest standard of consumer protection in the world,” this regulation has created a robust statutory framework offering various protections, such as assistance in case of disruptions, compensation, and rebooking for canceled flights.<sup>81</sup> Moreover, Regulation (EC) 261/2004 establishes a private right of action, allowing plaintiffs to bring claims in the national courts of any EU Member State.<sup>82</sup>

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73. *Id.*

74. *See id.* at n.2, 2 (“In response, the EU introduced Regulation 261/2004 which confers on air passengers the right to assistance and compensation. It reflects the EU’s commitment to a high standard of consumer protection.”).

75. *See id.*

76. Jeffrey Brownson & Dylan Pearl, *What Is EU 261 And How Does It Work?*, FORBES (Nov. 14, 2023), <https://www.forbes.com/advisor/credit-cards/travel-rewards/eu-261/>.

77. *Id.*

78. *See Air Passenger Rights: Frequently Asked Questions*, EUR. COMM’N: REPRESENTATION IN IR., [https://ireland.representation.ec.europa.eu/live-work-study-eu/air-passenger-rights-frequently-asked-questions\\_en](https://ireland.representation.ec.europa.eu/live-work-study-eu/air-passenger-rights-frequently-asked-questions_en) (last visited Mar. 18, 2024).

79. Sara Drake, *Delays, Cancellations and Compensation: Why Are Air Passengers Still Finding It Difficult to Enforce Their EU Rights under Regulation 261/2004?*, 27 MAASTRICHT J. EUR. COMPAR. L. 230, 233–40 (2020).

80. *Id.* at 231.

81. *Id.* at 231.

82. *Id.* at 240–41.

While Regulation (EC) 261/2004 has enhanced passenger rights, its effectiveness is lessened by enforcement issues. Critics, including scholars and consumer rights advocates, have highlighted the regulation's "weak, decentralized enforcement regime."<sup>83</sup> Reliance on national regulatory bodies often results in ineffective sanctions against airlines for violations, diminishing the regulation's overall efficacy.<sup>84</sup>

## 2. The EU's First Consumer ADR Directive: Directive No. 2013/11/EU

On November 29, 2011, the European Commission proposed the Consumer ADR Directive as part of the Europe 2020 strategy.<sup>85</sup> This directive replaced previous non-binding recommendations on consumer dispute ADR mechanisms in the EU and aimed to promote high-quality consumer ADR mechanisms.<sup>86</sup> It established an accreditation process and required regular monitoring by Member States.<sup>87</sup> Key objectives included saving consumers approximately EUR 22.5 billion annually and addressing concerns about independence and fairness in dispute resolution.<sup>88</sup>

Member States are granted flexibility in creating their own accreditation and supervision procedures under this directive.<sup>89</sup> This flexibility has led to significant differences across the EU in how ADR schemes are implemented.<sup>90</sup> Competent authorities in each Member State ensure that ADR entities meet legal requirements and safeguard consumer rights.<sup>91</sup> Crucially, the directive applies to both binding and non-binding ADR processes.<sup>92</sup> This broad scope ensures comprehensive coverage of various types of dispute resolution mechanisms, from

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83. *Id.* at 234.

84. *Id.*

85. Rafal Morek, *ADR and ODR for EU Consumers: Proposals for New Directive and Regulation*, KLUWER MEDIATION BLOG (Dec. 9, 2011), <https://mediationblog.kluwerarbitration.com/2011/12/09/adr-and-odr-for-eu-consumers-proposals-for-new-directive-and-regulation/>.

86. Alexandre Biard, *Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK*, 42 J. CONSUM. POL'Y 109, 109 (2019).

87. *Id.*

88. Naomi Creutzfeldt, *Implementation of the Consumer ADR Directive*, 5 J. EUR. CONSUM. MKT. L. 169, 169 (2016).

89. Pablo Cortés, *Directive 2013/11/EU on Alternative Dispute Resolution for Consumers and Regulation (EC) 524/2013 on Online Dispute Resolution*, in EU REGULATION OF E-COMMERCE 230, 235 (Arno R. Lodder et al. eds., 2nd ed., 2022).

90. *Id.* at 254.

91. *Id.*

92. *Id.* at 235.



consensual methods to more formal arbitration processes.<sup>93</sup> Additionally, Member States have the discretion to determine the extent of the authority vested in these ADR schemes.<sup>94</sup> They can decide whether the ADR schemes established in their states have the power to impose a decision, thereby distinguishing between consensual ADR schemes and arbitration schemes that can enforce decisions.<sup>95</sup> This distinction is crucial as it directly impacts the nature and outcome of the dispute resolution process.

The directive imposes fundamental requirements on ADR entities, such as privacy, fairness, independence, professionalism, accessibility, and transparency.<sup>96</sup> ADR procedures should be free or carry only nominal charges for consumers, and results should be provided within ninety calendar days.<sup>97</sup>

In summary, Directive 2013/11/EU provides a comprehensive framework for consumer dispute resolution in the EU. It allows for adaptation to the state's specific needs, including decisions on empowering ADR schemes with the ability to enforce decisions, significantly affecting the consumer dispute resolution landscape across the EU.

### 3. Current ADR Avenues for Resolving Aviation Passenger Disputes

Passengers whose rights are violated have several recourse options under the Commission Notice Interpretative Guidelines on Regulation (EC) No 261/2004.<sup>98</sup> Initially, they should file a complaint with the airline. If dissatisfied or ignored, they can complain to the national economic department, sue in civil court, seek an ADR organization, or engage a claims management company.<sup>99</sup>

The ADR process in aviation disputes offers speedy, cost-effective conflict resolution between airlines and passengers. Central to this is the European Online Dispute Resolution (ODR) framework, established in 2016.<sup>100</sup> It primarily offers an online platform, as required by Regulation

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93. *Id.*

94. *Id.*

95. *Id.*

96. Biard, *supra* note 86, at 109.

97. Cortés, *supra* note 89, at 241.

98. *Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council*, 2016 O.J. (C 214) 5, 17–18.

99. *Id.*

100. Michael Bogdan, *The New EU Regulation on Online Resolution for Consumer Disputes*, 9 MASARYK UNIV. J. L. TECH. 155, 155 (2015).

(EU) No. 524/2013, to facilitate the resolution of online trade disputes. However, the ODR framework does not make decisions; it merely connects parties with suitable mechanisms for resolving their disputes.<sup>101</sup> This platform significantly improves the process of connecting with ADR entities, marking a notable change in how the EU approaches dispute resolution.<sup>102</sup> Online traders must link to the EU's ODR website on their platforms and provide a direct email for consumers, simplifying and economizing contractual dispute resolution without courts.<sup>103</sup>

In the aviation sector, the ODR platform streamlines the online ADR processes.<sup>104</sup> When a consumer lodges a complaint, the platform plays a crucial role by suggesting a suitable dispute resolution body from over 350 registered entities.<sup>105</sup> When a consumer files a complaint on the ODR platform, the online trader receives a notification and must respond within ten days, initiating an efficient timeline.<sup>106</sup> Both parties have thirty days to select a dispute resolution body, with the platform offering recommendations but allowing flexibility in their final choice.<sup>107</sup> Upon selection, the chosen body reviews the complaint, confirms its jurisdiction within three weeks, and then follows its standard procedures to propose a solution within ninety days.<sup>108</sup> The final decision's legally binding status varies according to the rules of the respective dispute resolution body.<sup>109</sup>

The ODR platform's architecture allows for the ADR process to proceed without solely relying on it, even after selecting an appropriate entity. It permits traditional methods, compliant with various state laws and regulations. Its main role is to facilitate the selection and connection of ADR processes, whether binding, non-binding, or involving mediation.<sup>110</sup> This complies with the EU's First Consumer ADR Directive, Directive No.

101. *Id.* at 159.

102. *Id.*

103. *Id.*

104. *See id.* at 160.

105. *Report From the Commission to the European Parliament, the Council and the European Economic and Social Committee*, at 11, COM (2019) 425 final (Sept. 23, 2019).

106. Bogdan, *supra* note 100, at 160 ("The platform will invite the respondent to state within ten days whether he is willing to use any such entity or is committed to use any particular entity. Upon receipt of the respondent's answer, the platform communicates the information to the complainant").

107. *Resolving your Dispute on the ODR Platform*, EUR. COMM'N: ONLINE DISP. RESOL., <https://ec.europa.eu/consumers/odr/main/?event=main.complaints.screeningphase> (last visited Aug. 5, 2024).

108. Bogdan, *supra* note 100, at 157, 160.

109. *Id.* at 160.

110. *Id.*

2013/11/EU.<sup>111</sup> Additionally, the regulation indicates that physical presence is optional, unless the dispute resolution body's rules require it and the parties agree.<sup>112</sup> This feature underscores the platform's capacity to support diverse dispute resolution methods, ensuring a systematic and user-friendly ODR framework throughout the EU.

### C. Spain's ADR System for Aviation Passenger Disputes

#### 1. Overview of Spain's New Regulation TMA/201/2022

Spain's legislative framework for resolving aviation passenger disputes has evolved with new regulations aimed at enhancing consumer protection. Law No. 7/2017, enacted on November 2, 2017, incorporated Directive 2013/11/EU into Spanish law.<sup>113</sup> This directive established the ADR system for consumer disputes and made it applicable to disputes covered by the EU Air Passenger Rights Protection Regulation.<sup>114</sup> To be recognized as a suitable ADR entity for aviation passenger disputes, the State Aviation Safety Agency of Spain (AESA) must comply with the requirements of this law.<sup>115</sup> The ADR process is mandatory and binding for airlines, as stated in a ministerial decree.<sup>116</sup>

Law No. 3/2020, issued on September 18, 2020, addresses issues related to the COVID-19 pandemic in the field of justice.<sup>117</sup> It includes passenger disputes within the scope of the EU-recognized ADR system.<sup>118</sup> Decisions made by AESA, as an ADR entity, are considered enforceable judgments, and passengers can seek enforcement through a competent commercial court.<sup>119</sup> This regulation allows passengers to file complaints with AESA, ensures airline compliance with ADR decisions, and upholds

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111. *See id.* at 156.

112. *Id.* at 160–61.

113. *Legislation*, AESA, <https://www.seguridadaerea.gob.es/en/ambitos/derechos-de-los-pasajeros/normativa> (last visited Aug. 5, 2024).

114. B.O.E. 2017, 12659 (Spain).

115. *Id.*

116. *Id.*

117. B.O.E. 2020, 250 (Spain).

118. *Id.*; Jaime Fernández Cortés, *The New ADR Proceeding for Passenger Claims Some Comments on the Legality of the New Regulation*, AUGUSTA ABOGADOS (May 9, 2022), <https://www.lexology.com/library/detail.aspx?g=a3427ff9-8b7e-407c-96f3-6e9b6ce533be>.

119. B.O.E. 2020, 250 (Spain) (Decisions made by AESA, as an ADR entity, are considered enforceable judgments, and passengers can seek enforcement through a competent commercial court, as indicated by Order TMA/469/2023, which accredits AESA as an ADR entity, and supported by Royal Legislative Decree 1/2007 and Law 7/2017, which provide the legal basis for enforcement through the courts.).

the principles of independence, fairness, transparency, and efficiency in resolving aviation passenger disputes through ADR.<sup>120</sup>

On March 17, 2022, Order TMA/201/2022 was published in the Official State Gazette of Spain (BOE).<sup>121</sup> This order establishes the rights to compensation and assistance for air transport users in cases of denied boarding, flight cancellations, or prolonged delays, as well as ADR procedures related to the rights of persons with disabilities or reduced mobility.<sup>122</sup>

To streamline the resolution of air passenger disputes, Spain introduced Order TMA/201/2022, a new set of regulations enhancing the ADR framework.<sup>123</sup> This order is pivotal in safeguarding passenger rights, as delineated in Regulation (EC) No. 261/2004, which covers compensation and assistance in cases of denied boarding, flight cancellations, or long delays. It also incorporates the mandates of Regulation (EC) No. 1107/2006, regarding the rights of persons with disabilities and reduced mobility, and Regulation (EU) No. 524/2013, which pertains to online dispute resolution.<sup>124</sup> With the objective of protecting air transport passengers effectively, Order TMA/201/2022 mandates adherence to principles such as proportionality, legal certainty, efficiency, and transparency.<sup>125</sup> The regulation stipulates that hearings should involve consumer associations and airline and airport management representatives to ensure comprehensive participation and implementation of these rules.

## 2. Aviation Passenger Dispute ADR System Under the Spain's New Regulations

AESA has implemented efficient ADR for passenger claims under Regulation (EC) 261/2004, streamlining resolution compared to traditional legal methods.<sup>126</sup> This ADR covers issues like cancellations, significant delays, denied boarding, and the rights of disabled persons under Regulation (EC) 1107/2006.<sup>127</sup> However, it excludes claims like personal

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120. *See id.* *See also* Cortés, *supra* note 118, at 3.

121. Cortés, *supra* note 118, at 1.

122. *See* Delphine Defossez, *Passenger Claims and Alternative Dispute Resolution: An Ongoing Broomance or a Bad Idea?*, 22 ISSUES AVIAT. L. POL. 17, 26–28 (2022).

123. *Id.* at 26.

124. *Id.*; AESA, *supra* note 113.

125. Defossez, *supra* note 122, at 26–28.

126. *Id.*

127. *See* Jaime Fernández Cortés, *Latest Updates on Spain's New ADR Procedure for Air Passenger Disputes*, LEXOLOGY (Feb. 1, 2023), <https://www.lexology.com/commentary/aviation/spain/augusta-abogados/latest-updates-on-spains-new-adr-procedure-for-air-passenger-disputes>.

injury or baggage damage under the 1999 Montreal Convention, and those outside EU 261/2004's purview, such as mental anguish and loss of profits.<sup>128</sup>

To start the ADR process, passengers lodge a complaint with the airline, then proceed to file with AESA if unsatisfied, giving the airline a month to respond.<sup>129</sup> In case of a rejection, passengers can choose ADR via AESA within a year.<sup>130</sup> AESA targets resolving claims in ninety days, with a possible extension for complex cases.<sup>131</sup> Airlines must adhere to AESA's rulings within thirty days, regardless of any court appeals, and face fines between EUR 4,500 and EUR 70,000 for non-compliance.<sup>132</sup>

Passengers initiate ADR by filing a complaint with the airline, followed by contacting AESA within a year if dissatisfied. Airlines have a month to respond to complaints.<sup>133</sup> The process, executed entirely online via AESA's platform, promotes accessibility and efficiency.<sup>134</sup> After collecting necessary information and verifying all documents, AESA conducts an arbitration process and makes a decision on the claim.<sup>135</sup> This structured yet flexible system ensures that passenger rights are protected while also obliging airlines to engage in a fair and efficient dispute resolution process. The ADR system presents a distinct method for resolving airline-passenger disputes. Passengers voluntarily engage in ADR or pursue court action, while airlines must participate if a claim is made through AESA.<sup>136</sup> However, while the AESA's decision is binding on the airline, passengers are not bound and may choose to pursue court action. Air carriers may challenge AESA's decisions in the ordinary courts within two months, although this legal action does not suspend their obligation to pay any AESA-ordered compensation.<sup>137</sup>

In summary, Spain's aviation passenger ADR system represents a significant advancement in facilitating streamlined dispute resolution and timely compensation during air travel disruptions. By vesting binding authority in AESA, the system not only enhances access to justice for passengers but also ensures rigorous adherence to EU passenger rights regulations by the aviation industry.

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Cortés, *supra* note 118, at 4.

133. Cortés, *supra* note 127.

134. *Id.*

135. *See id.*

136. *Id.*

137. *Id.*

## D. Germany's ADR System for Aviation Passenger Disputes

In addressing aviation passenger disputes, the Federal Aviation Office in Germany rigorously enforces EU regulations but does not adjudicate individual claims, directing passengers to seek redress directly with airlines or through civil proceedings.<sup>138</sup> Germany has developed a comprehensive ADR framework, including both public and private ADR entities.<sup>139</sup> At the forefront of Germany's private ADR initiatives is the Conciliation Body for Public Transport (Schlichtungsstelle für den öffentlichen Personenverkehr, or "söp"), the first ADR body certified by the government to address airline-passenger disputes.<sup>140</sup>

To facilitate this process, the German government mandates the involvement of airlines and passengers in dispute resolution procedures for claims under EUR 5,000.<sup>141</sup> Significantly, airlines have the autonomy to select their preferred ADR body, with many opting to join the söp. Membership entails a fee for carriers, while consumers can access the service free of charge.<sup>142</sup>

The söp intervenes only if an airline fails to respond to a direct complaint or provides an unsatisfactory answer.<sup>143</sup> When a passenger submits an online claim to the söp, the organization meticulously assesses the merits of the case before deciding whether to accept it.<sup>144</sup> If a passenger's claim is denied, they can still sue.<sup>145</sup> In cases where both parties choose a third-party neutral, this person acts as a non-binding arbitrator, tasked with gathering data and assessing each side's position.<sup>146</sup> The arbitrator's non-binding decision serves as a suggested resolution.<sup>147</sup> Crucially, this decision is not legally enforceable, allowing either

138. *Customer Protection Rights in Aviation*, FED. MINISTRY FOR DIGIT. & TRANSP. (Aug. 19, 2016), <https://bmdv.bund.de/EN/Topics/Mobility/Aviation/Customer-Protection-Rights/customer-protection-rights.html>.

139. Glazebrook, *supra* note 42, at 211–12.

140. *The Primary Functions of Söp*, SÖP: SCHLICHTUNGSSTELLE FÜR DEN ÖFFENTLICHEN PERSONENVERKEHR E.V., (2024), <https://soep-online.de/en/the-primary-functions-of-sop/>.

141. Glazebrook, *supra* note 42, at 212.

142. *The Conciliation Procedure*, SÖP: SCHLICHTUNGSSTELLE FÜR DEN ÖFFENTLICHEN PERSONENVERKEHR E.V., <https://soep-online.de/en/the-conciliation-procedure/> (last visited Aug. 5, 2024).

143. SÖP, RULES OF PROCEDURE 2023 1 (2023), [https://soep-online.de/wp-content/uploads/2023/01/soep-Rules-of-Procedure\\_2023.pdf](https://soep-online.de/wp-content/uploads/2023/01/soep-Rules-of-Procedure_2023.pdf). ("The söp only processes the subject of complaint if the complainant has already addressed his/her matter to the respondent and the respondent was given the opportunity to comment on the issue within a reasonable period of time or the legally specified period of time.")

144. *Id.*

145. *Id.*

146. SÖP, *supra* note 143, at 2, 4.

147. See *id.* at 4.

party to dismiss it.<sup>148</sup> Should this occur, the claimant may still take legal action.<sup>149</sup> Therefore, non-binding arbitration offers a pathway to an amicable settlement, while preserving the option of legal recourse if no agreement is reached.<sup>150</sup>

### E. *Evaluating the German and Spanish Models*

In analyzing the German and Spanish models for resolving aviation disputes, a key observation is that both states prioritize arbitration over mediation within their ADR frameworks. This alignment underscores a fundamental commitment to structured passenger rights resolution. However, a notable divergence emerges in the binding nature of their ADR outcomes. In Germany, the ADR framework operates on a non-binding basis, wherein the outcomes typically function as recommendations without compulsory force.<sup>151</sup> Conversely, Spain's ADR system is structured to produce binding outcomes, thereby granting the decisions of its appointed bodies with definitive enforceability.<sup>152</sup>

Germany's system requires passengers to approach the airline before an arbitration body intervenes.<sup>153</sup> This body can suggest solutions but cannot decide cases.<sup>154</sup> Such private mediation, common in some U.S. industries, poses fewer constitutional issues. However, adapting this system to the United States could be problematic.<sup>155</sup> In the United States, the arbitration body's non-binding recommendations have limited impacts, as court rulings are more influential.<sup>156</sup> Conversely, in Germany, the principle that the losing party must cover all legal costs and fees incentivizes consumers to seek litigation when airlines ignore a neutral third party's counsel.<sup>157</sup> This differs from the United States, where consumers bear all legal costs regardless of the outcome, making legal action financially risky.<sup>158</sup>

In Spain, the basic passenger rights system aligns with the German model, yet two critical distinctions emerge. First, the AESA is not merely

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148. *The Conciliation Procedure*, *supra* note 142.

149. *Id.*

150. *Id.*

151. *Id.*

152. Cortés, *supra* note 118, at 3.

153. *The Conciliation Procedure*, *supra* note 142.

154. *See id.*

155. Glazebrook, *supra* note 42, at 213.

156. *Id.*

157. *Id.*; MATHIAS REIMANN ET AL., COST AND FEE ALLOCATION IN CIVIL PROCEDURE: NATIONAL REPORT FOR GERMANY 1, 1 (2010).

158. Glazebrook, *supra* note 42, at 213.



an enforcement agency but has attained accreditation as an ADR entity in air transport.<sup>159</sup> This accreditation grants the AESA authority in resolving ADR procedures for claims based on EU regulations. Second, unlike the German system, ADR decisions in Spain bind airlines.<sup>160</sup> While consumers retain the option to reject ADR rulings and resort to court proceedings, airlines are obligated to accept the neutral third party's decision.<sup>161</sup>

In essence, the Spanish model introduces a more assertive stance by making ADR decisions binding on airlines. This stands in contrast to the German approach, where recommendations lack binding force. This comparison between German and Spanish frameworks reveals a valuable insight into the diverse methodologies within the EU, with Spain's binding ADR decisions exemplifying a model that ensures airline accountability and compliance, offering a potent strategy for safeguarding consumer interests.

#### IV. ADR PROPOSALS FOR U.S. AVIATION PASSENGER RIGHTS

The EU's aviation dispute resolution models provide valuable insights that can guide efforts to improve passenger rights protections in the United States. While establishing a comprehensive PBOR faces challenges, targeted reforms focused on ADR may offer a more feasible path forward.

##### A. *Specialized ADR Bodies for Aviation Passenger Disputes*

The development of specialized ADR bodies for aviation passenger disputes within the EU, particularly the model led by Spain's AESA, showcases a shift toward enhancing expertise and efficiency in resolving aviation-related conflicts. This transition, echoed in Germany, has been propelled by EU Directive 2013/11/EU, which mandates a move from general consumer arbitration to specialized aviation ADR agencies. Spain's regulatory framework, especially Order TMA/201/2022, represents a significant step forward. It not only empowers passengers to engage in the ADR process but also allows them to challenge AESA's decisions in court, addressing the imbalance of power between passengers and airlines by ensuring that airlines comply with compensation directives even during the appeal process.<sup>162</sup>

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159. See Jaime Cortés, *New ADR Proceeding Aims to Improve Resolution of Air Passenger Disputes*, LEXOLOGY (Mar. 30, 2022), <https://www.lexology.com/commentary/aviation/spain/augusta-abogados/new-adr-proceeding-aims-to-improve-resolution-of-air-passenger-disputes-1>.

160. Cortés, *supra* note 127.

161. *Id.*

162. *Id.*

The United States could benefit from Germany's approach, which mandates airline participation in ADR and allows consumers to move to court litigation at any stage. Similarly, adopting Spain's model, which results in binding decisions in the ADR process, could further benefit the United States by ensuring that the resolution of disputes are final and must be adhered to by the airlines. The EU's strict certification standards for ADR organizations ensure fairness and adherence to international norms. A similar certification process in the United States, focusing on privacy, fairness, professionalism, and accessibility, could enhance aviation passenger dispute resolution. In summary, specialized ADR bodies within the EU, especially in aviation disputes, offer a valuable model for the United States to develop a more efficient and passenger-focused ADR system.

*B. Promoting Private ADR Systems Through Legislative and Regulatory Changes*

Taking inspiration from European models, the U.S. Congress could pass legislation to allow the DOT to endorse private ADR bodies for aviation disputes, with the Spanish model offering a blueprint for granting these bodies binding authority. The EU has underscored its commitment to safeguarding passenger rights by enhancing legislative efforts, particularly by advocating for the use of ADR systems, such as ODR platforms. These platforms not only provide passengers with more accessible dispute resolution options but also prompt a reevaluation of the ADR institutions' role, especially the extent to which these institutions should exert binding authority over their resolutions.

In Spain, recent regulations have effectively addressed this issue by enforcing ADR institution resolutions.<sup>163</sup> This approach bridges the gap between ADR proceedings and judicial processes, as the resolutions undergo judicial review, confirmation, and enforcement by the courts. By utilizing the judicial system, Spain ensures the effectiveness and legality of ADR resolutions, providing additional reassurance to all parties involved.

The United States, when contemplating the creation of a private ADR system for aviation disputes, could benefit from examining the European model, especially the Spanish framework. In the context of the ongoing efforts to pass a PBOR, incorporating legally binding ADR resolutions within this legislation could ensure compliance from airlines, thereby enhancing accountability and fostering trust in the dispute resolution process. A legally binding ADR mechanism within the PBOR could offer

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163. See Cortés, *supra* note 127.

passengers enforceable avenues for redress, akin to those found in the EU, while maintaining the benefits of a less litigious and more efficient resolution system.

While the issue of mandatory airline participation in the ADR system is still under discussion in the EU, states like Germany and Spain are taking steps to address this matter, primarily to protect the interests of passengers who may be at a disadvantage.<sup>164</sup> The main objective is to facilitate dispute resolution, as relying solely on private remedies may not always ensure fair treatment of passenger grievances. National involvement can help level the playing field, enabling passengers to effectively resolve disputes through ADR mechanisms.

Specialized ADR bodies with aviation expertise can offer passengers a meaningful alternative to court proceedings. To address the shortcomings of deregulation, the DOT could consider relaxing current rules that prohibit arbitration clauses, aligning with market-based solutions under the ADAt.

In contrast, the United States has not placed the same level of legislative focus on airline passenger rights. Currently, there is no dedicated section for passenger rights within civil aviation regulations, and the resolution of airline passenger disputes typically falls under general consumer dispute resolution mechanisms. However, airline passenger disputes have unique characteristics that require specific measures to empower passengers, reduce the cost of pursuing their rights, and establish a convenient, cost-effective, and efficient dispute resolution mechanism. Such initiatives encourage passenger engagement and further protect passenger rights.

The deregulation of airline CCs has weakened passenger protections. However, ADR systems can provide a balanced approach to addressing these shortcomings without imposing excessive regulations. By allowing carriers to require binding ADR and avoiding class actions, the United States can promote market-based solutions consistent with the principles of deregulation.

### *C. Developing ODR Systems*

The EU's endorsement of ODR has been mirrored by the U.S. Department of State's interest in similar initiatives.<sup>165</sup> Although the

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164. See Niall Kearney, *Air Passenger Rights in the European Union – Developing a Customer Friendly Model for Airline Carriers within the Context of Judicial, Extra-Judicial and Trader Redress* 1, 63 (Sept. 2014) (M.A. thesis, Independent College Dublin) ([https://www.academia.edu/9138066/Air\\_Passenger\\_Rights\\_in\\_the\\_European\\_Union\\_Developing\\_a\\_customer\\_friendly\\_model\\_for\\_Airline\\_carriers\\_within\\_the\\_context\\_of\\_judicial\\_extra-judicial\\_and\\_trader\\_redress](https://www.academia.edu/9138066/Air_Passenger_Rights_in_the_European_Union_Developing_a_customer_friendly_model_for_Airline_carriers_within_the_context_of_judicial_extra-judicial_and_trader_redress)).

165. See U.S. Department of State Advisory Committee on Private International Law (ACPIL): Online Dispute Resolution (ODR) Study Group, 75 Fed. Reg. 66420 (Oct. 28, 2010).

DOT has not initiated a specific ODR platform for aviation disputes, its current online adjudication processes suggest a foundational readiness for such technologies, which could provide cost-effective and accessible dispute resolution for consumers.<sup>166</sup> ODR is valuable for aviation disputes. It serves as a low-cost legal alternative for complex cases, although direct communication is preferable for simpler complaints. It is vital for establishing initial contact between consumers and traders. In today's social media-driven world, where reputation is critical, ODR enables traders to quickly resolve complaints, thus protecting their reputation.<sup>167</sup> Understanding ODR's mechanism is key. It starts with a consumer's online complaint, leading to voluntary trader participation. ODR acts as a structured environment for dialogue and negotiation, despite its non-binding outcomes. The platform thrives by fostering conversation and targeting mutually beneficial outcomes. It promotes the exchange of information and evidence, resulting in well-informed decisions.

In summary, focusing on ADR reforms can bolster passenger rights while aligning with market-driven deregulation. Providing access to quality ADR offers effective consumer solutions without the need for strict regulations.

## V. CONCLUSION

This Note has analyzed the aviation passenger rights landscape, contrasting the proactive EU approach with the relatively limited protections in the United States. While comprehensive reform in the United States faces hurdles, targeted changes to facilitate ADR offers a promising path forward. Establishing specialized ADR bodies and granting them binding authority, as seen in the EU, would meaningfully empower consumers. However, given the United States' adherence to airline deregulation, a balanced approach involving incentives and measured legislative changes to promote ADR may prove more feasible. Though substantial gaps remain, modest steps to enhance access to expert ADR forums can gradually strengthen passenger rights in a manner consistent with the U.S. regulatory philosophy.

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166. See Matthew A. Gluth, *Online Processes in Agency Adjudication*, ADMIN. CONF. OF U.S., 1, 27–28 (2023).

167. Colin Rule & Larry Friedberg, *The Appropriate Role of Dispute Resolution in Building Trust Online*, 13 A.I. L. 193, 202–04 (2005); *The Impact of Reputation*, AIRLINES (May 22, 2014), <https://airlines.iata.org/2014/05/22/impact-reputation>.