

INTERNATIONAL COMMERCIAL
DISPUTES IN THE AVIATION
INDUSTRY:
A STRATEGY
FOR EFFICIENT AND EFFECTIVE
RESOLUTION



PRESENTED BY
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Briefing Booklet for the International Council

International Commercial Disputes in the Aviation Industry: A Strategy for Efficient and Effective Resolution

Executive Summary: Dispute Resolution and the Aviation Industry

An Industry Uniquely Well Suited for Dispute Resolution Design

The international commercial aviation industry is uniquely well suited to modify its dispute resolution processes – in other words for dispute resolution system design. Compared to many other industries, the international commercial aviation industry stands to gain more from implementation of such a system and appears to more readily lend itself to implementation. Aspects of the aviation industry that make it particularly suited for intervention include: long-term commercial relationships, few commercial alternatives, highly regulated nature, significant capital investment, and relationships spanning multiple legal jurisdictions, all in the context of a complex technical background. The new dispute resolution system could be designed to reach settlement at an earlier point in the dispute and with less rancor and, failing settlement, to provide an arbitration alternative more closely suited to the aviation industry.

In a sense, this will be a re-design. For a period following publication of *Varieties of Dispute Processing* (Frank Sander, 1976) and *Getting to Yes* (Roger Fisher & William Ury, 1981), dispute resolution gained popularity, was widely adopted, and for a time was credited with substantial reductions in litigation costs. Unfortunately, as dispute resolution matured, these processes often developed into something less useful – neither timely nor cost effective. Commercial parties have decreased their use of some dispute resolution processes such as arbitration while they have increased their use of others such as mediation, though often by court referral and with some dissatisfaction about the unevenness in quality. One goal of the International Council will be to address the criticisms head on, reinvigorating the procedures to retain the historical benefits and recapture the efficiencies.

Long-Term Relationships

Long-term commercial relationships are the building blocks of the aviation industry. Parties sometimes enter into contracts lasting decades, with aircraft fleet planning acquisition an obvious example. During a contractual relationship of this duration, it is not uncommon for disputes to arise. This project envisions a dispute resolution mechanism that would facilitate preservation of these long-term commercial relationships by intervening in the dispute at the appropriate time, tailoring the dispute resolution process to the individual dispute, and preventing the dispute from becoming so adversarial that the parties can no longer work together effectively, thus ruining their long-term relationship.

Few Commercial Alternatives

In addition to long-term relationships, when looking to enter into a contractual relationship for goods or services, a party in the aviation industry may realistically have only one or two providers of that good or service with whom they can contract. For example, for an airline looking to contract with an airport in a particular city, there is typically only one airport with which they can contract. If the contract fails for some reason, the airline simply cannot do business in that city. If a contract is created and a dispute threatens to disrupt such a relationship, parties are reluctant to turn to litigation, knowing that they will likely have to continue to do business with the other party for a number of years. This project envisions a dispute resolution system that would preserve these commercial relationships, recognizing that for most parties, there is no other option.

Highly Regulated Nature

In contrast to many other industries, the aviation industry is subject to regulation by a number of different entities: conventional international law, quasi-legal standards promulgated by international organizations, and national laws and regulations.¹ This high degree of regulation makes the industry uniquely well suited to implementation of a dispute resolution mechanism because it creates a culture in which organizations involved in the industry must learn to quickly conform to and adopt new rules and regulations. Plus, fair resolution of disputes must take into account the regulatory restraints imposed on participants operating in different legal environments – a consideration often requiring specialized legal knowledge. Entities in the aviation industry are constantly implementing new protocols and procedures, and, once developed, a dispute resolution mechanism could be easily internalized by the industry.

Significant Capital Investment

Because of the expensive equipment and extensive infrastructure that are inherent parts of the international commercial aviation industry, the industry necessarily receives a significant amount of capital investment. The high level of risk typically associated with litigation may deter some capital investors from participating in the industry. A reliable, flexible, and efficient dispute resolution system may encourage investors to participate in aviation-related endeavors, knowing that they have a variety of out-of-court options for resolution of any disputes that may arise.

International Character

The international character of the aviation industry also contributes to the aviation industry's uniquely strong need for optimal dispute resolution mechanisms. Parties to international commercial aviation disputes may be reluctant to engage in litigation in countries other than those in which they are domiciled for a number of reasons including: perceptions of inconsistent adherence to the rule of law, unfamiliarity with foreign legal systems, costs associated with litigation that occurs in a foreign country, difficulties having judgment that was awarded in one

¹ Paul Stephen Dempsey, *Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*. 30 N.J.C. INT'L L. & COM. REG. 1, 3 (2004).

jurisdiction enforced in another, or anxiety that a foreign legal system will favor a litigant from their own country. A dispute resolution mechanism tailored to international commercial disputes in the aviation industry could alleviate many of these concerns by giving parties more attractive alternatives to litigation than typical commercial arbitration protocols and the ability to tailor the process to their cultural norms and business needs.

Complex Technical Context

The complex technical context in which international commercial disputes in the aviation industry are likely to arise also makes the industry well suited for implementation of new dispute resolution mechanism. When parties in the aviation industry go to court, there is virtually no possibility that a technical expert in aviation will be the judge or on the jury that decides their case. In a court context, the parties might have to struggle to explain the nuances of their dispute to parties unfamiliar with the aviation industry and its related technology. In contrast, a dispute resolution process could include evaluation, facilitation, or testimony by a neutral expert in the field. This neutral would have the ability to understand the technicalities of the dispute as well as the potential effect that a certain outcome may have on the parties to the dispute and the aviation industry as a whole.

Because of these six characteristics, long-term commercial relationships, few commercial alternatives, highly regulated nature, significant capital investment, international character, and complex technical context, as well as others, the international commercial aviation industry stands to gain a great deal from implementation of a dispute resolution system with consistently applied, global processes that will promote just resolution, reduce disruption and rancor and increase settlements. Even in the cases where negotiated settlement fails, new procedures can still lead to fair consistent and efficient adjudication processes. The industry appears ready to implement such a system.

Lessons from the Construction Industry: A Brief Case Study

The contractual structure and interest of the aviation industry resemble in key ways that of the construction industry, which has been the subject of a great deal of revitalization and experimentation for dispute resolution mechanisms within the last thirty-five years. These shared characteristics include: long-term commercial relationships, highly regulated nature, significant capital investment, and complex technical context. One scholar describes how the construction industry is well suited to out-of-court approaches to dispute resolution as follows: “A critical path extending over months or years, the interaction of hundreds, perhaps thousands, of people and products, and the vagaries of climate, weather [. . .] and other contingencies make conflict inevitable and constructive methods for dealing with conflict necessary.”² The common attributes from both industries suggest that the aviation industry could productively assess recent changes in disputing processes in the construction industry.

² Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 72 (1996).

Despite the obvious parallels between the two industries, there are significant differences between the international commercial aviation industry and the construction industry. First, although both industries are characterized by long-term commercial relationships, the nature of those relationships is innately different. Designing a dispute resolution system for the construction industry may potentially be difficult because of the intricate web of contractor and subcontractor relationships that the system would have to accommodate. Although the relationships in the international commercial aviation industry may involve similar webs of relationships (for example, when airports are being built), many commercial relationships are not typically as complex or multi-layered as those in the construction industry.

Furthermore, the nature of competitiveness of the two industries is inherently different. Whereas in the construction industry, multiple contractors are often bidding against each other for the same job, the difficulty in designing a dispute resolution system that accommodates the relationships of the international commercial aviation industry lies mainly in that parties often have few or no commercial alternatives for contractual relationships if a relationship is ruined by a dispute. Therefore, although the systems that have been successfully implemented in the construction industry would help inform the discussion of a dispute resolution system for implementation in the international commercial aviation industry, there are significant differences that must be taken into account.

Like the aviation industry, the construction industry relied mainly on binding arbitration as its scheme of dispute resolution throughout the 20th century.³ Within the past two decades, however, binding arbitration has lost some of its luster in the construction industry for failure to live up to many of the touted benefits and for becoming more similar to litigation than a dispute resolution process.⁴ The industry has therefore been experimenting, with non-binding “rapid resolution” dispute resolution initiatives.⁵ These “rapid resolution” procedures are innovative, party-controlled, generally involve rapid intervention in the beginning stages of a dispute, and are typically non-binding.⁶ Modern dispute resolution methods now used in the construction industry fall on a continuum from informal to formal, and may be used either individually or in conjunction with one or more other methods.⁷

There are two studies that may be particularly helpful in examining industry perceptions of the efficacy of dispute resolution mechanisms implemented in the United States construction industry—a 1991 ABA-sponsored survey on dispute resolution in the construction industry, and a 1994 Multidisciplinary Study on Dispute Avoidance and Resolution in the construction industry.⁸ The studies examine a number of dispute resolution mechanisms in use in the industry, including traditional alternatives like informal adjudication by design professionals (the project architect or engineer), mediation, and binding arbitration, in addition to current initiatives created by the industry and for the industry, including: mini-trial, non-binding arbitration, standing

³ L. BASTIANELLI, III AND CHARLES M. SINK, CONSTRUCTION ADR xlvii (2014).

⁴ *Id.* at l.

⁵ *Id.*

⁶ *Id.* at lii-liii.

⁷ *Id.* at liv.

⁸ Stipanowich, *supra* note 2 at 66.

neutrals/early neutral evaluation, dispute review boards, incentive and step-clause, partnering, and others.⁹ Both studies encompassed a great deal of information from various professionals in the industry, including their experience with and perceptions of the different mechanisms.¹⁰

Dispute Systems Design Workshop, Spring 2014: Research Findings

In Spring 2014, when the project of designing an dispute resolution system tailored to the aviation industry was brought to the Ohio State University Moritz College of law, five students participating in Professor Nancy Rogers' Dispute System Design Workshop undertook the task of researching and assessing the interests of the aviation industry and developing dispute resolution tools to be implemented by the industry to effectively and efficiently resolve international commercial disputes.¹¹

Research Methods

Using the techniques outlined by Professor Nancy Rogers' textbook, *Designing Systems and Processes for Managing Disputes*,¹² the five students used the international commercial aviation industry as a case study for designing a dispute resolution system meeting the needs of an international industry. In doing so, the students worked to familiarize themselves with the aviation industry, conducted a stakeholder analysis, assessed stakeholder interests, and examined the practices currently used in the industry. With this foundation, the students then developed an interview questionnaire and survey. The students conducted interviews with major stakeholders in the industry, in order to obtain insider views on what dispute resolution mechanisms were working in the industry and which were not. (For a list of interviewees and organizations that participated in the research phase of the Dispute Systems Design Workshop, please see Appendix A.)

During these interviews, the students focused on the impressions of the current state of the dispute resolution process in the aviation industry for international commercial disputes, the parties who are affected by dispute resolution in the aviation industry, their goals and interests, and the relationships among these affected parties.

Key Takeaways

From their research, the students took away several key points that aided in the formation of their thought process when later creating the toolkit, which is the product of the students' research that makes recommendations of various dispute resolution mechanisms which have the potential to

⁹ *Id.* at 74-83.

¹⁰ *Id.*

¹¹ These five students were Brodi Conover, Michael Dallaire, Meaghan FitzGerald, Mariam Keramati, and Lauren Madonia.

¹² NANCY H. ROGERS, ET. AL, *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2013).

effect positive change in the aviation industry. These key takeaways consisted of the following points:

- relationships matter;
- most disputes are resolved *ad hoc*;
- industry buy-in is imperative;
- the process needs to promote discussions over battles;
- cost and time efficiency are central concerns;
- timing of the dispute is key;
- most industry participants prefer non-binding decisions or an appeals process;
- flexibility and options are essential; and
- further research is necessary.

Armed with the information learned in the interviews and these key takeaways, the students created the outline of a toolkit of dispute resolution mechanisms tailored to the needs and interests of the aviation industry.¹³ The students understood that the *ad hoc* resolution of the majority of disputes did not necessarily satisfy the interests expressed by the parties, and that such outcomes were not always efficient. Furthermore, the students understood that very few of the industry stakeholders recognized the potential of a dispute resolution mechanism to provide the flexibility or options necessary to meet the needs of the industry. Therefore, the outline of a toolkit was designed to meet all the needs reflected in all of the key takeaways, with an eye toward further research.

The creation of the International Council is only the first step in implementation of the students' toolkit. This report describes how the students' research from this past spring, combined with lessons from the construction industry, and additional research can be combined to create a unique dispute resolution mechanism, tailored to meet the needs and interests of the aviation industry.

Searching for a Solution

In the search for a mechanism that can be tailored to meet the interests of the aviation industry, one must first examine how and why the traditional dispute resolution mechanisms leave the industry wanting, and what industry needs have yet to be met.

Traditional Dispute Resolution Design Mechanisms Leave the Industry Wanting

Because the nature of the aviation industry readily lends itself to dispute resolution, as discussed above, there are many traditional dispute resolution mechanisms already in use in the industry.

¹³ A version of the students' toolkit is reproduced below, in the Section titled, *The Toolkit: Meeting the Unique Needs of the Aviation Industry*.

However, interviews with and surveys of key industry stakeholders indicate that these traditional methods are not effectively meeting the needs of the industry. What follows is a list of pre-dispute and post-dispute resolution mechanisms that are currently in use or have been considered for use in the industry, a definition and description of how they are used, and an explanation of why each is not necessarily leading to effective resolution of disputes.

Pre-Dispute Tools

A. Step Clauses

Step clauses may be written into dispute resolution agreements prior to a dispute arising. A step clause will usually provide one or two steps that must be completed prior to entering into a binding process such as arbitration or litigation.¹⁴ For example, a step clause may require that when a potential dispute arises, the parties must first attempt negotiation, then mediation if negotiation fails. Under such a step clause, only if and when the mediation fails to resolve the dispute are the parties allowed to proceed to a binding dispute resolution process such as arbitration or litigation.¹⁵

Step clauses are somewhat rare in the aviation industry; at the time of contract, most parties are not thinking far enough down the road to include something like a step clause in their agreement.

However, based on interviews with stakeholders and an analysis of the interests of the industry, step clauses may not provide a particularly efficient solution as now used. First, step clauses may be copied into an agreement without considering the suitability for the likely disputes, thus locking parties into less than optimal dispute resolution processes. Second, many interviewees expressed discomfort with being locked into a detailed series of processes; they preferred more post-dispute control of some aspects, including the ability to control the sequence more flexibly. Step clauses, therefore, may not be a panacea – at least in the traditional fixed sequential version – for the aviation industry.

B. “Partnering”

Partnering is a dispute resolution mechanism that has been used with great success in the construction industry in recent years.¹⁶ It is a concept pioneered by the U.S. Army Corps of Engineers and is often used in manufacturing and distribution industries. “Partnering was designed to encourage collaboration and team work by deliberate early efforts to create an atmosphere of trust and cooperation on projects.”¹⁷ Partnering is defined as

¹⁴ ROBERT B. DAVIDSON, PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION, §II-1.08.

¹⁵ *Id.*

¹⁶ Stipanowich, *supra* note 2 at 149 (citation omitted).

¹⁷ Thomas J. Stipanowich, *Managing Construction Conflict: Unfinished Revolution, Continuing Evolution*, 2 (unpublished, forthcoming 2014).

A process whereby parties entering into a contractual relationship take voluntary deliberate steps to identify mutual goals, establish channels of communication, and discuss methods of handling and avoiding controversy prior to beginning performance . . . usually . . . at one or more preliminary conferences involving designated representatives of both (all) parties, most often facilitated by a neutral advisor.¹⁸

Therefore, for example, in the construction industry, partnering often occurs between a contractor and a subcontractor, who agree to meet prior to the formation of the contract to discuss mutual goals, establish channels of communication, and discuss how to handle any dispute that may arise. The contractor and subcontractor may or may not bring legal counsel to these pre-contract meetings, and the meeting will likely be facilitated by a third party neutral, although it does not have to be.

While it is obvious that partnering could be extremely beneficial for parties in the aviation industry, it is difficult to implement because, as with step clauses, parties often are not thinking that far in advance at the time a contract is signed. Additionally, if implementation of a dispute resolution process is the goal of the aviation industry, “by definition, partnering is not a dispute resolution process at all. Rather, partnering is a system for planning to minimize disputes and for properly addressing those disputes that do arise,” and therefore a method that works to resolve active disputes as well as prevent them should be implemented.¹⁹

Post-Dispute Tools

A. Mediation

Mediation is a method of nonbinding dispute resolution involving a neutral third party or parties involving a neutral third party or parties who try to help the disputing parties reach a mutually agreeable solution.²⁰ During mediation, a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement to end their dispute.²¹ There are numerous reasons that parties may choose to mediate a dispute instead of litigate, including: confidentiality of the mediation communications and the possibility of keeping the fact of the dispute and the settlement confidential as well, time and cost savings, voluntariness, the potential for self-determination and creativity, the ability to express emotion, the opportunity for preserving relationships, and the flexibility and informality of the process.²²

Like the other options previously discussed, mediation does theoretically meet many of the interests of the aviation industry. But, as with other dispute resolution mechanisms, problems may arise regarding when the parties agree to send the dispute to mediation as well as if they do

¹⁸ Stipanowich, *supra* note 2 at 127.

¹⁹ *Id.* at 145.

²⁰ BLACK’S LAW DICTIONARY (9th ed. 2009), “mediation.”

²¹ UNIFORM MEDIATION ACT (2001), §1 Definitions, “mediation.”

²² Michael Roberts, *Why Mediation Works* (2009) available at <http://www.mediate.com/articles/roberts.cfm>.

not. If they agree before the dispute occurs, they may not define its use optimally. Conversely, if the parties do not agree to mediation before the dispute arises, they may become so adversarial by the time that mediation would be useful that they would prefer not to suggest mediation, believing that their eagerness to use the process conveys a lack of confidence in prevailing on the merits.

The students' research showed that some parties in the industry choose to use mediation, but most parties that mediate do so under orders of a court and would not choose to do so under other circumstances. The most common complaints about mediation were: 1) mediation was ineffective unless the parties had the good fortune to choose a skilled mediator, (which most interviewees described as a mediator that was familiar with the aviation industry in addition to traditional mediation skills); 2) mediation does not produce a "clear winner" (a statement that may reflect either that mediators push a compromise between numerical positions or that at least one party prefers to get a definitive ruling from a judge or arbitrator rather than settle); and (3) mediation was not utilized at the proper time in the dispute and therefore failed to reach a settlement agreement. Furthermore, parties were concerned about the wasted resources of a mediation that does not reach a settlement agreement. Specific interests of the aviation industry that mediation does not meet, according to those interviewed, include time and cost efficiency, industry buy-in, and potentially, flexibility and options.

A restructured mediation process could potentially meet some of these interests. Instead of utilizing a standard form of mediation, parties in the international commercial aviation industry could adopt a mediation process tailored to the interests and needs of the industry. Based on the interviews with stakeholders, this type of mediation would be characterized by early intervention, strict time limits, administration by a third party neutral with expertise in the international commercial aviation industry, financial incentives for the mediator consistent with terminating mediation when further discussions are not likely to be productive, and a part of a larger scheme of dispute resolution. Further, mediation might be modified to exclude pre-mediation briefing, a practice that some believe moves the parties to an adversarial orientation unnecessarily early in the dispute. The interviews also made clear that the parties did not have a common understanding and expectation of mediation; some viewed it as a mutual exchange of extreme positions with the mediator trying to persuade the parties to accept a middle figure. Broad education on mediation might help counsel structure mediation so that they can use it to attempt to find a mutually satisfactory solution.

B. Dispute Review Board

Like partnering, dispute review boards have been used mostly in the construction industry to resolve disputes. A dispute review board utilizes a standing panel of industry experts to periodically convene to review and render summary non-binding opinions on smaller disputes that are a part of a larger project.²³ The idea behind dispute review boards is that having expert

²³ Stipanowich, *supra* note 17 at 4.

decision makers on standby would stimulate a quick settlement of the dispute, avoid prolonged conflict and prevent formal binding adjudication of the dispute by arbitration or litigation.²⁴

Based on the students' initial research, there is little evidence to suggest that a mechanism like dispute review boards have ever been used in the aviation industry. But there are certain previously discussed needs of the industry that a dispute review board might not meet: namely, reducing expenses. The parties would need to identify and presumably pay the designed experts to be on "standby" for periodic review of the contractual relationship and activities; thus, this added expense might be appropriate only in situations in which frequent disputes are likely or the need to quick resolution is especially high. Alternatively, the Council might consider the use of dispute review boards for a segment of the industry with frequent disputes requiring special expertise to resolve quickly.

C. Mini-Trial

A mini-trial is "a carefully structured, private settlement negotiation where counsel for opposing parties present condensed versions of their cases in the presence of senior executives from each side who possess the ultimate authority to settle the dispute."²⁵ After each party presents their case to the senior executives, the executives meet and discuss settlement prospects without their attorneys present.²⁶ Usually, a neutral third party advisor participates in the mini-trial process by assisting in negotiations and, if necessary, offering non-binding conclusions regarding the probable outcome of the dispute.²⁷ "Mini-trials are similar to regular trials, but with the goal of negotiating settlement based on presented facts and law, rather than obtaining a verdict."²⁸

One potential problem with a mini-trial is that it could potentially last three months or longer, which does not meet the industry's interest of resolving disputes in a time and cost efficient manner.²⁹ Additionally, here are also some questions about the efficacy of mini-trials for certain types of disputes—evidence suggests that disputes that center on witness credibility, that involve more than two parties, or involve novel or purely legal questions may not be best suited to mini-trials.³⁰ Mini-trials of a single disputed issue of law or fact to provide a basis for further negotiations might have more promise.

Another of the potential challenges of conducting a mini trial is that the parties must conduct the trial at the appropriate time. Choosing to conduct the mini-trial before the parties could potentially settle the case would result in lost time and resources, and could have the effect of

²⁴ *Id.*

²⁵ Douglas A. Henderson, *Avoiding Litigation With the Mini-Trial: The Corporate Bottom Line as Dispute Resolution Technique*, 46 S.C. L. REV. 237, 238 (1995).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Lisa Pell, Note: *Is Dispute Resolution Really an Alternative for Federal Employees? Possible Suggestions for Encouraging Federal Employees to Participate in ADR Programs*, 6 CARDOZO J. CONFLICT RESOL. 313, 324 (2005).

²⁹ *Id.* at 325.

³⁰ Henderson, *supra* note 25 at 244-245.

pushing the parties closer to litigation or a more adversarial type of dispute resolution instead of encouraging settlement.

D. Arbitration

Based on the interviews and surveys that the students conducted of the aviation industry, arbitration is the most frequently utilized method of dispute resolution in the industry. Arbitration involves a private system of adjudication similar to litigation, but is typically chosen by parties who wish to resolve their disputes outside of a judicial system.³¹ Parties to arbitration agree on one or a panel of three third-party neutrals.³² The arbitrators then hear arguments by representatives of both parties, and render a binding decision (an “award”) based on substantive law.³³ Once the award is rendered, the losing party may choose to either voluntarily comply with the award, or the winning party will have to attempt to have the award recognized in a jurisdiction in which the losing party has assets.³⁴

Parties may expressly agree to arbitrate their dispute prior to the start of their contractual relationship, prior to a dispute arising, or after a dispute has already arisen.³⁵ In such an agreement, the parties agree that their disputes will be resolved privately, by arbitration, thereby giving up the right to have the dispute resolved judicially.³⁶

Arbitration clauses may be a necessary default option, especially in international contracts where at least one party wants to avoid the likely judicial system. There are, however, some inherent problems in current arbitration clauses. First, as with step-clauses, parties often do not discuss dispute resolution at the contract formation stage either because it does not occur to them or because they are concerned how such a discussion might taint their relationship in creating the contract. Second, if an agreement to arbitrate is not reached prior to the beginning of a dispute, the parties are unlikely to agree after the dispute has arisen, perhaps because one party believes it would be better off in the courts. Finally, even if pre-dispute agreement to arbitrate is reached by the parties, there is no guarantee that arbitration is the most effective or efficient method for resolving that individual dispute—stakeholders who were interviewed said that the pre-dispute

³¹ MARGARET L. MOSES, *PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 13 (2nd ed. 2012).

³² THOMAS H. OEHMKE & JOAN M. BROVINS, *1 COMMERCIAL ARBITRATION* §1:2 (2013).

³³ *Id.*

³⁴ Moses, *supra* note 31 at 13.

³⁵ In contrast to an express agreement to arbitrate, parties may be subject to arbitration based on party communications that occur during the course of business that do not have express mutual assent, such as bills of lading. See Christofer Coakley, Note: *The Growing Role of Customized Consent in International Commercial Arbitration*, 29 GA. INT’L & COMP. L. 127, 147 (2000). See also UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, Art. 7 (1985), “An [arbitration] agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.”

³⁶ Moses, *supra* note 31 at 18-19.

agreement to arbitrate does not always allow the parties in the aviation industry the options and flexibility that they desire when resolving disputes.

Furthermore, despite its utilization within the aviation industry, there are a number of stakeholder interests that arbitration, as currently structured, does not meet. The theoretical benefits of arbitration—simplicity, expediency, and cost-effectiveness—are not generally reflected in the experiences of the stakeholders who were interviewed for the Designing Disputes Systems Workshop.

In addition to timeliness and expense concerns, many parties expressed concern about the arbitrator's application of substantive law, the binding nature of the arbitrator's decision (with no opportunity to appeal unless that is specifically provided for in the arbitration clause), the unfamiliarity of most arbitrators with the technical and relational complexities associated with the aviation industry, and the limited scope of judicial review prior to enforcement of the awards. Therefore, even if the aviation industry continues to use arbitration as a dispute resolution mechanism, significant changes to the process of agreeing to arbitration or to the arbitral process itself would need to be made to meet stakeholder interests.

The above analysis of the dispute resolution mechanisms that are currently in use in the aviation industry or in similar industries demonstrates that there are numerous stakeholder interests that are not currently being met. Any new system that is potentially implemented would have to meet the above needs addressed by the students' key takeaways and by additional industry interests, described below.

Interests in the Aviation Industry that Must Be Met

Based on the research of the Spring 2014 Dispute Systems Design Workshop, there are numerous interests of the aviation industry that have been identified as not currently being met through the utilization of traditional dispute resolution mechanisms. Specifically, it is imperative that six particular industry interests be met by any dispute resolution mechanism that is considered for implementation. These interests are as follows:

- control of economic incentives of third party neutrals;
- employing neutrals with expertise;
- ability to take a universal aviation-centric protocol to various regional dispute resolution administrators;
- flexibility to move between processes;
- intervention in disputes as early as possible; and
- need to control venue and process more appropriately.

A. Economic Incentives of Third Party Neutrals

Dispute resolution mechanisms that are currently employed by the aviation industry do not effectively control the economic incentives of third party neutrals. Arbitration and mediation proceedings may take place in exotic locations with celebrity neutrals that have no aviation expertise and no incentive to end the proceeding in a timely manner. For example, the majority

of arbitrators are paid hourly. This may create a disincentive for the arbitrator to manage the arbitration efficiently—it does not matter how long the arbitration lasts for the arbitrator, because he or she is being paid for whatever time is spent. Thus, arbitrators may feel no obligation to adhere to deadlines delineated in the arbitration agreement. Meanwhile, the dispute is dragging out, negatively impacting the parties' pocketbooks, as well as their confidence in arbitral proceedings.

Understanding that this is a key concern of the international commercial aviation industry, the students who created the toolkit envisioned a process with built-in economic incentives for the third party neutrals. These incentives include: staff dispute resolution experts [what do they do?] who are paid on a salaried basis instead of hourly, bonuses for third party neutrals who complete the dispute resolution proceedings in a timely manner, and an independent and public review process of the neutral's performance in the parties' dispute, which theoretically motivates the neutrals to perform to the best of their abilities.

B. Employing Neutrals with Expertise

Research from the Spring 2014 Dispute Systems Design Workshop report indicates that parties are more comfortable with a process that involves an expert neutral. There are three types of expertise that should be considered when contemplating how to appoint neutrals: legal expertise, technical expertise, and dispute resolution expertise.

Legal expertise is often taken for granted by parties to international commercial disputes in the aviation industry. By the time any sort of dispute resolution proceeding has begun, whether litigation, arbitration, or another proceeding, lawyers and other legal experts are already involved. Whether this contributes to efficient resolution of disputes is debatable. Whereas some of the Spring 2014 interviewees indicates that they would not be comfortable participating in a dispute resolution proceeding without representation by a legal expert, others expressed the idea that once legal experts became involved in the dispute it was much less likely that the parties would be able settle without an adversarial proceeding like litigation or arbitration. These interviewees believed that the key to settling the dispute was to put off involving legal experts as far into the proceeding as possible, reasoning that sophisticated businesspeople would have enough incentive to settle the dispute on their own, if possible. These competing views regarding legal expertise seem to imply that the toolkit must provide for flexibility and options for the parties—therefore, those who do not feel comfortable proceeding without a legal expert do not have to, and those who believe the intervention of a legal expert precludes settlement could exclude lawyers as long as possible. These views led us to suggest creation of in-house dispute resolution officers within each company, an option discussed below.

Although there are conflicting views in the industry regarding usage of legal experts, interviewees from the industry almost unanimously called for processes that utilize neutrals with expertise in the aviation industry. Therefore any mechanism implemented would necessarily need to incorporate such experts. Parties in the aviation industry have indicated that, from their

experience, those neutrals with technical expertise contribute to the success of the proceeding.³⁷ There are a number of different ways to ensure access to technical experts for disputing parties in the aviation industry, discussed further in the toolkit³⁸.

Finally, any process implemented would necessarily require experts in the field of dispute resolution. These experts could also be technical or legal experts, or could simply be experienced at resolving large, international, commercial disputes. Because there are currently few dispute resolution experts with expertise in the aviation industry, the toolkit contemplates creating a training program to create such experts.³⁹

Based on the previously conducted research about the preferences of aviation industry participants regarding the use of experts, any mechanism contemplated by the toolkit must necessarily give the parties the option and flexibility to choose and use legal, technical, and dispute resolution experts, as they perceive them to be beneficial to the individual proceeding. It would be beneficial to have a resource that contains a comprehensive list of qualified neutrals and their certifications, contemplated in the “database” tool of the toolkit.⁴⁰

C. Ability to Take Aviation-Centric Dispute Resolution Proceedings to Various Regional Dispute Resolution Administrators

Because the aviation industry involves parties all over the world, any dispute resolution protocol must be easily and readily adoptable by various regional dispute resolution administrators. Sophisticated legal counsel must be able to trust that a regional body will fairly and efficiently administer the proceeding, regardless of the country in which the proceeding occurs. Since contracts often span continents, parties need to be able to rely on the convenience of a system that can be utilized anywhere in the world. If parties cannot trust in the fair and efficient administration of the system, they simply will not use it.

To meet this need, the toolkit contemplates a negotiated set of aviation-centric protocols for dispute resolution procedures, discussed in detail below.⁴¹

D. Flexibility to Move Between Processes

³⁷ Empirical evidence suggests that, although participants in dispute resolution proceedings often believe that having an expert in the field act as a neutral increases the proceeding’s chance of success, the rate of success and the parties’ satisfaction with the proceeding is completely unrelated to the relative expertise of the neutral. *See* Rogers, *supra* note 12 at 158. Despite this, if stakeholders in the industry are more apt to use a process that give them the option to choose a neutral with technical aviation expertise, that is the process that should be implemented.

³⁸ *See* “The Toolkit: Meeting the Unique Needs of the Aviation Industry,” *infra*.

³⁹ *See* “Certification and Training for Third Party Neutrals,” *infra*.

⁴⁰ *See* “Database of Third Party Neutrals Familiar with Aviation Industry,” *infra*.

⁴¹ *See* “Negotiated Aviation-Centric Protocols for Implementation by Arbitration Administrations,” *infra*.

Each dispute is unique, and the process should be flexible and provide for enough options to meet the needs of each individual dispute. While providing for a backstop of arbitration or litigation in case settlement cannot be reached, a flexible process may allow parties to move seamlessly between one process and another, as opposed to the conventional idea that moving between processes must occur in a linear fashion. For example, parties could pause mediation to determine a key disputed fact through an expedited adjudicative process and then return to mediation based on the established facts. To provide for that flexibility in advance, the parties might, for example, agree to seek a recommendation from a neutral dispute resolution advisor (discussed below) about the order of processes but provide in the dispute resolution clause for what to do in the event that they do not agree to accept that recommendation. That might include participating in an inexpensive mediation processes at some point before initiating litigation, for example.

E. Intervention in Disputes as Early as Possible

Intervention in disputes at an early point is key. As disputes smolder, their adversarial nature tends to increase, pushing the parties farther and farther away from settlement. As the parties and the dispute become more adversarial, the commercial relationship of the parties further deteriorates. Interviews with stakeholders in the industry indicated that there was a “sweet spot” in most disputes, where intervention by a neutral (perhaps one with technical expertise in the aviation industry) could focus the parties on negotiating a settlement or toward a process that was likely to lead to settlement. The dispute resolution mechanisms contemplated by the toolkit are designed to allow for such intervention at an early stage, thereby decreasing the likelihood of needing to resort to an adversarial process like litigation or arbitration, and increasing the chances that the parties can save their commercial relationship for the remainder of their contract. This emphasis on convening early discussions was another reason to suggest the proactive dispute resolution advisor, discussed below.

F. Control of Venue and Process

Finally, the toolkit contemplates offering the parties more control over the venue and process of dispute resolution. Numerous interviewees expressed concern about using foreign legal systems for a multitude of reasons, not the least of which include corruption, expense, finding knowledgeable local legal counsel and unfamiliarity with foreign laws or courts. In addition to allowing the parties to determine their own venue, the toolkit attempts to give parties maximum control of the process of their own dispute resolution proceeding. The intent is to develop a single set of new, flexible procedures tailored for dispute resolution in the aviation industry, including rules for cost-effective arbitration for cases that require adjudication, with these rules to be administered globally by existing regional centers for dispute resolution. This approach includes traditional methods based in self-determination that are utilized in most conventional dispute resolution processes like arbitration and mediation, as well as allowing parties the latitude to implement innovative dispute resolution processes tailored to the individual dispute, including the ability to use more than one process in the same dispute, if it appears that a multi-step proceeding would be beneficial.

The Toolkit: Meeting the Unique Needs of the Aviation Industry

As mentioned previously, the toolkit, as conceptualized by the Spring 2014 Dispute Systems Design Workshop, was a set of various instrumentalities of dispute resolution that could be easily tailored to and implemented in the international commercial aviation industry. The toolkit has seven critical components: the International Council; an International Center for Aviation Dispute Resolution; aviation-centric dispute resolution protocols and arbitration rules designed for implementation by dispute resolution administering authorities around the world; an industry wide dispute resolution officer; a certification and training program for third party neutrals familiar with the international commercial aviation industry; a database of such third party neutrals; and coordinated and trained in-house dispute resolution officers. Each of these tools, discussed further below, are in the beginning phases of conceptualization, and their contours will become clearer as additional research is done.

A. The International Council

Understanding that the research completed in the Spring 2014 Dispute Systems Design Workshop was not comprehensive or all-encompassing enough to carry the toolkit through to its inception, the students envisioned the International Council—a cadre of prominent professional from the aviation industry who would provide policy guidance and recommendations for implementing a comprehensive dispute resolution system, tailored to the aviation industry. On an ongoing basis, the Council will receive feedback from industry participants and continue to advise the Center on additional services, revisions, or additions to protocols and rules, and curriculum for the training courses.

The International Council is not the first group of its type to be created. The National Construction Dispute Resolution Committee was created as a part of the American Arbitration Association and includes representatives from thirty different organizations throughout the construction industry.⁴² However, whereas the National Construction Dispute Resolution Committee was designed to develop the Construction Industry Arbitration Rules and Mediation Procedures, the International Council’s mission is to act as an advisory committee instead of writing the rules, itself.⁴³

The students from the Workshop hoped that the International Council would be comprised of individuals selected from across the spectrum of the industry, to eliminate the appearance of bias toward one section of the industry or another. The participation from multiple sectors within the industry was expected to lend further legitimacy to the implementation of the toolkit and create buy-in from the necessary stakeholders in the industry.

In addition to lending legitimacy to the project and helping create buy-in from various industry stakeholders, the International Council was established to aid those actually working to implement the dispute resolution system within the industry and to act in an advisory capacity—giving the industry updates about new developments in the dispute resolution field and the

⁴² For an exhaustive list, see *Construction: Arbitration Rules & Mediation Procedures*, American Arbitration Association, *available at*, dispute.resolution.org/construction.

⁴³ *Id.*

implementation of the system in the industry. Biographies of the current members of the International Council, once recruited, will be added as Appendix B.

B. International Center for Aviation Dispute Resolution

The linchpin of the toolkit is the International Center for Aviation Dispute Resolution. As contemplated, the Center:

1. Maintains the common set of protocols and rules of arbitration, including reassessments of them and edits made over time⁴⁴
2. Trains neutrals⁴⁵
3. Provides ADR training for the dispute resolution specialists within each company⁴⁶
4. Maintains a roster of neutrals⁴⁷
5. Provides neutral administrative support for matters to ensure efficiency
6. Maintains a neutral dispute resolution advisor who can intervene to promote negotiation among disputing parties⁴⁸
7. Produces publications in support of its two training missions
8. Maintains a record of decisions, edited to preserve confidentiality for legal precedent and research purposes

The Center would not administer any dispute resolution proceedings, but instead would act as a resource for those seeking training in aviation-related dispute resolution or for those in the industry needing advice about how to best resolve a dispute. Thus, although the Center could, for example, recommend a proceeding or put a party in touch with an expert neutral, the Center itself would never actually administer an arbitral proceeding or any other dispute resolution proceeding. In general, the Center would facilitate the operation of the initiatives contemplated by this report.

Ideally, all organizations in the international commercial aviation industry would become members of the Center and would have access to its resources. The Center would help with implementation of coordinated, industry wide initiatives and efforts to improve dispute resolution in the context of international commercial disputes in the industry. A structured business model would ensure that the Center has continual access to funding. For example, each organization that wishes to be a member of the Center would pay a year membership fee, which would provide them access to specified services offered by the Center. In addition to the services included with the membership fee, members could purchase additional services or training for a fee.

Although the location of the Center has yet to be determined, the exact geographical location is less important than the services offered by the Center. As opposed to a place where parties would travel for training, the Center is more of a “thought center” whose various research,

⁴⁴ See section C, *infra*.

⁴⁵ See section E, *infra*.

⁴⁶ See section G, *infra*.

⁴⁷ See section F, *infra*.

⁴⁸ See section D, *infra*.

administrative, and problem-based work could be completed from a distance or at the location of the organization requesting intervention.

C. Aviation-Centric Protocols for Use by Arbitration Administrations

Another large piece of the toolkit would be negotiated aviation-centric protocols, created for implementation by arbitration administrations around the world. The first and likely most important such protocol would involve creation of a default set of arbitration rules, tailored to the disputes commonly seen in the aviation industry. A later-developed protocol may, for instance, deal with conventions for aviation-centric mediation. These rules would be written by independent contractors, who would work with the International Center for Aviation Dispute Resolution and the International Council to ensure that the default rules as tailored as possible to the needs of the industry.

Once the rules were written, members of the industry could agree upon the Aviation Arbitration Rules in dispute resolution sections of their commercial agreements. Arbitration administration agencies around the world would then administer arbitrations under such rules. Therefore, for example, if a dispute were to arise between an airline and an airport and the two parties had already agreed to binding arbitration in the event of a dispute, the parties could bring the Aviation Arbitration Rules to an administering agency, such as the Hong Kong International Arbitration Centre, who would then administer the arbitral proceeding in accordance with the Aviation Arbitration Rules.⁴⁹

As conceptualized, the International Center for Aviation Dispute Resolution would not act as an administering authority and preside over arbitration under the Aviation Arbitration Rules. Instead, the Center would revise and update the Rules as necessary, to ensure that the interests of the industry are being met and parties would take the Rules promulgated under the auspices of the Center to other administering authorities throughout the world. The Center may also choose to create and maintain a database of decisions rendered under the Aviation Arbitration Rules, in order to create a body of precedent upon which parties in the aviation industry can rely when choosing how to resolve their own disputes.⁵⁰

D. Industry-Wide Dispute Resolution Advisor

Another tool in the kit is the creation of a position of an industry-wide dispute resolution advisor. The advisor would be a salaried position housed at the International Center for Aviation Dispute

⁴⁹ The American Arbitration Association (“AAA”) is good example of an administrative body that would potentially be open to administering an arbitration under industry-specific rules, because they have done so in the past with the construction industry. A copy of the AAA’s rules tailored to the construction industry is *available at* http://images.go.disputeresolution.org/Web/AmericanArbitrationAssociation/%7Bc3f7f059-927d-4205-ac4e-290353c80aa0%7D_ConstructionRules_Web.pdf.

⁵⁰ If such a database were created, the awards issued by arbitral tribunals and published in the database would be published only with the consent of the parties to the arbitration or redacted so as to ensure the confidentiality of the parties’ arbitral proceedings.

Resolution. As a salaried member of the Center's staff, the advisor would be available to assist in the disputes that required his or her intervention, ensuring that the advisor's time and resources would be devoted to those disputes with strong prospects for settlement as the result of an intervention, thus not taking the time of parties unnecessarily (in other words, not prolonging settlement talks to justify more hourly fees). Additional salaried advisors could be added as demand warranted.

The advisor would also act as an on-call resource for parties in the industry and for the trained, in-house dispute resolution officers. Parties needing to resolve a dispute could contact the advisor for his or her opinion on how to best proceed in the designing a dispute resolution process tailored to the needs of the parties and the dispute, thereby ensuring that the conflict be resolve as quickly and inexpensively as possible.

In-house dispute resolution officers would also be able to use the advisor as a resource for programs implemented in their own organizations, and also as a potential contact or go-between when working with in-house dispute resolution officers from other organizations.⁵¹

The advisor would have all of the requisite expertise and connections to be successful in the position, including: extensive experience in the aviation industry, a legal background, and comprehensive training in the field of dispute resolution. Choosing a person who is already established in the aviation industry would enhance the likelihood that parties would feel comfortable turning to the advisor for information about how to best handle their disputes.

Finally, the advisor, potentially in connection with in-house dispute resolution officers from organizations throughout the industry, could conduct an annual survey of member organizations to ensure that the services provided by the Center are increasing efficiency and meeting the needs of the stakeholders. Publication of the annual survey results would guarantee that members are paying for the effective services that they need, and could potentially later be used as a tool for fundraising.

E. Certification and Training for Third Party Neutrals

The International Center for Aviation Dispute Resolution would also provide a training and certification program for third party neutrals. As discussed previously, parties in the aviation industry feel much more comfortable knowing that the neutrals handling their disputes have experience in the aviation industry, and the Center's training program would ensure that those with expertise in the industry could also gain valuable skills in various dispute resolution methods.

The training program could be offered either on an as-needed basis or at various times throughout the year, depending on the demand for such training. The training would likely last approximately a weekend, and would teach third party neutrals the intricacies of dealing with disputes in international commercial aviation. Depending on the need, the certification could be offered for arbitration, mediation, or other dispute resolution processes that become popular in

⁵¹ In-house dispute resolution officers are discussed at section G, *infra*.

the industry, or could contain a broad overview of all types of dispute resolution utilized in the industry. This training would ensure that the third party neutrals are competent to handle such disputes, and a certification process would enhance their legitimacy to parties in the industry.

F. Database of Third Party Neutrals Familiar with Aviation Industry

In addition to training and certifying neutrals, the Center would also create and maintain a database of third-party neutrals that have experience in the aviation industry have completed the training program and been certified. There are two main reasons for the creation of such a database: collection and storage of information about such experts in one place would ensure ease of use and access; the database will allow the experts to be reviewed for others in the industry to see, thereby increasing the legitimacy of the experts and acting as a check on neutrals who do not comply with the wishes of the parties.

Members of the Center would have access to the database either for a fee or as a part of a yearly membership subscription. The database would include the following information about third party neutrals: resume, training and certification, a list of dispute resolution processes previously involved in/presided over, possibly sample opinions/awards, reviews from parties that have utilized the experts in the past, and contact information.⁵² Members of the Center in need of a neutral could therefore peruse the database at their leisure in order to identify the third party neutral that best meets the needs of their dispute.

The publication of reviews would also act as a check on third party neutrals, to ensure that they are in compliance with the interests of the industry. Because the aviation industry is so closely knit, word about which neutrals were effective and efficient would travel quickly through the industry, aided by the database. Only those neutrals who were successful in meeting the interests of the parties would get good reviews, thereby incentivizing the neutrals to impress the parties by resolving the dispute as quickly and cost-effectively as possible, while still ensuring the parties' satisfaction.

Finally, the compilation of contact information of these aviation dispute resolution experts would allow updates within the field of aviation dispute resolution to be quickly and easily disseminated among the third party neutrals.

G. Coordinated and Trained In-House Dispute Resolution Officers

When the toolkit is implemented in its entirety, it would be extremely valuable for each and every organization to have coordinated and trained in-house dispute resolution officers.⁵³ This

⁵² All information contained in the database would be subject to agreements of confidentiality.

⁵³ The toolkit envisions such in-house officers as becoming as commonplace in the aviation industry as legal compliance officers have become in many other commercial industries. For more information about how the job duties and prevalence of compliance officers have changed in recent years and the reason behind such trends, see Gregory J. Millman & Samuel Rubinfeld, *Compliance Office: Dream Career? As Fines Sting, a Hiring Spree for Risk and Compliance*

dispute resolution officer would therefore have the requisite technical background desired by stakeholders in the industry, and would be trained by the International Center for Aviation Dispute Resolution.⁵⁴ This training would be multi-dimensional and would train officers to deal with any dispute that may arise, teach measures of resolving disputes informally both within their own organization and outside of their organization, and to coordinate and network with in-house officers at other organizations within the industry both proactively and as disputes arise. The in-house officers would have the requisite skills to work with one another and, if necessary, with the International Center, in order to design and tailor dispute resolution proceedings to the needs of individual disputes.

Because all in-house dispute resolution officers would have undergone the same training and all would have a technical background in the aviation industry, they would presumably have the ability to efficiently coordinate with the trained, in-house dispute resolution officers at the organizations with which potential disputes may arise, in order to diffuse disputes before they become adversarial enough to need further intervention. These dispute resolution officers would be salaried professionals, who are tasked with early and active engagement within their own organization and reaching out to other in-house dispute resolution officers to resolve the dispute in the most appropriate and efficient manner.

H. Research Topic: Should There Be Protocols for Cases in Litigation?

Interviewees noted that mediation often occurred for the first time during litigation and under court direction. A few interviewees expressed dissatisfaction with the timing and approach of this mediation. The Moritz workshop will deepen the research on this topic this winter, with an eye to including in the toolkit suggestions on how parties in litigation might interact with the judges on the most effective use of mediation.

Implementation Going Forward

*Timeline for International Council*⁵⁵

Staff, THE WALL STREET JOURNAL, Jan. 15, 2014, available at <http://online.wsj.com/articles/SB10001424052702303330204579250722114538750>.

⁵⁴ *Supra*, section B.

⁵⁵ For a concise graphical depiction of the timeline for the International Council, please see Appendix C.

Subsequent to the initial meeting of the International Council, the International Council will receive a quarterly update, detailing the process that has been made in the project. Depending on the amount of information that needs to be disseminated, the International Council may receive an emailed update, participate in a conference call, or attend a short briefing session.

In its advisory capacity, throughout the spring of 2015, the International Council will review and comment on one draft of the Dispute Systems Design Workshop's research project and will observe the Workshop's final project presentation at the beginning of May. The International Council can give the students valuable insight into the interests of the aviation industry and offer constructive criticism to improve the next stages of implementation of the toolkit.

*Timeline for the Dispute Systems Design Workshop*⁵⁶

The Dispute Systems Design Workshop, a class at the Ohio State University Moritz College of Law, taught by Professor Nancy Rogers, will continue the research and interview process, encompassing as many stakeholders in the international commercial aviation industry as possible. Picking up where the Spring 2014 class left off, the Spring 2015 class will begin interviewing additional stakeholders in the industry to determine where their interests lie and how implementation can most effectively be achieved.

In addition to conducting interviews and stakeholder analysis, the Workshop will prepare a final presentation of their research findings and present it to the International Council in May 2015, with the goal of informing the process of implementing the toolkit in 2015 and beyond.

2015 and Beyond

Following the presentation of the Dispute Systems Design Workshop in May 2015, the International Council will reevaluation their timeline for implementation and will determine the necessary next steps.

Conclusion

The international commercial aviation industry is uniquely well suited to implementation of a dispute resolution system for a multitude of reasons, not the least of which includes: long term commercial relationships, few commercial alternatives, highly regulated nature, significant capital investment, international character, and complex technical context. In addition to have the potential to benefit greatly from such a system, the industry appears ready for implementation. Other industries with similar characteristics, such as the construction industry, have implemented similar programs, to great effect.

Realizing the potential of such a mechanism in the international commercial aviation industry, the Dispute Systems Design Workshop, an Ohio State University Moritz College of Law class

⁵⁶ For a concise graphical depiction of the timeline for the Designing Dispute Systems Workshop, Spring 2015, please see Appendix D.

taught by Professor Nancy Rogers, began the process of interviewing stakeholders and creating a toolkit for implementation in the industry. The students found that traditional dispute resolution mechanisms leave the industry wanting. Stakeholders in the industry continually express the desire for a more efficient, cost effective, easily administrated, and flexible approach to disputes that may arise.

In response, the students offered a toolkit, brimming with suggestions for how various processes could be implemented within the industry to meet some of these interests. The students included in the toolkit the creation of the International Council as an oversight body for continuing research, hoping that a cadre of respected professionals from the industry would be willing to participate and aid in implementation of the techniques outlined in the toolkit. Aspects of the toolkit that are ripe for implementation by the International Council include: creation of the International Center for Aviation Dispute Resolution, negotiated aviation protocols for implementation by various dispute resolution administrations, an industry-wide dispute resolution advisor, comprehensive training and certification for third party neutrals who specialize in the aviation industry, a database of such professionals, and coordinated and trained in-house dispute resolution officers, stationed at organizations throughout the industry.

As the demand for a dispute resolution mechanism becomes more and more apparent, additional research must still be done. The Dispute System Design Workshop Class of Spring 2015 will continue this additional research in the form of interviews and stakeholder analysis, with the goal of giving the International Council the information that it needs to break ground on the International Center for Aviation Dispute Resolution. Once the Center is created, other devices in the toolkit can become reality, and the aviation industry will be well on its way to a comprehensive dispute resolution system, tailored to its specific interests and desires.

APPENDIX A

Interviewees and Organizations: Dispute Systems Design Workshop (Spring 2014)

Airlines

- Abby Bried, Assistant General Counsel, United Airlines
- Gary Bunce, Assistant General Counsel *Delta Air Lines*
- Scott Casey, Vice President, Air Group Legal *UPS*
- Katrina Manning, Former Vice President of Procurement *United Airlines*
- Wes Nobelius, Deputy General Counsel *Qantas*
- Rush O'Keefe, General Counsel *FEDEX*

Airports

- Rod Borden, Senior Vice President, COO *Columbus Regional Airport Authority*
- Monica Hargrove, Deputy General Counsel *Metropolitan Washington Airport Authority*
- Candace McGraw, CEO of CVG Airport *CVG Airport*

Private Aviation

- Ron Brower, Associate General Counsel *NetJets, Inc.*
- Bob Tanner, Vice President of Corporate and Government Affairs *NetJets, Inc.*

Law Firms

- Barry Alexander, Partner *Schnader Harrison Segal & Lewis LLP*
- Evelyn Sahr, Partner *Eckert Seamans*
- Matt Smith, Of Counsel to CVG Airport *Ziegler & Schneider*

OEM and Parts Manufacturers

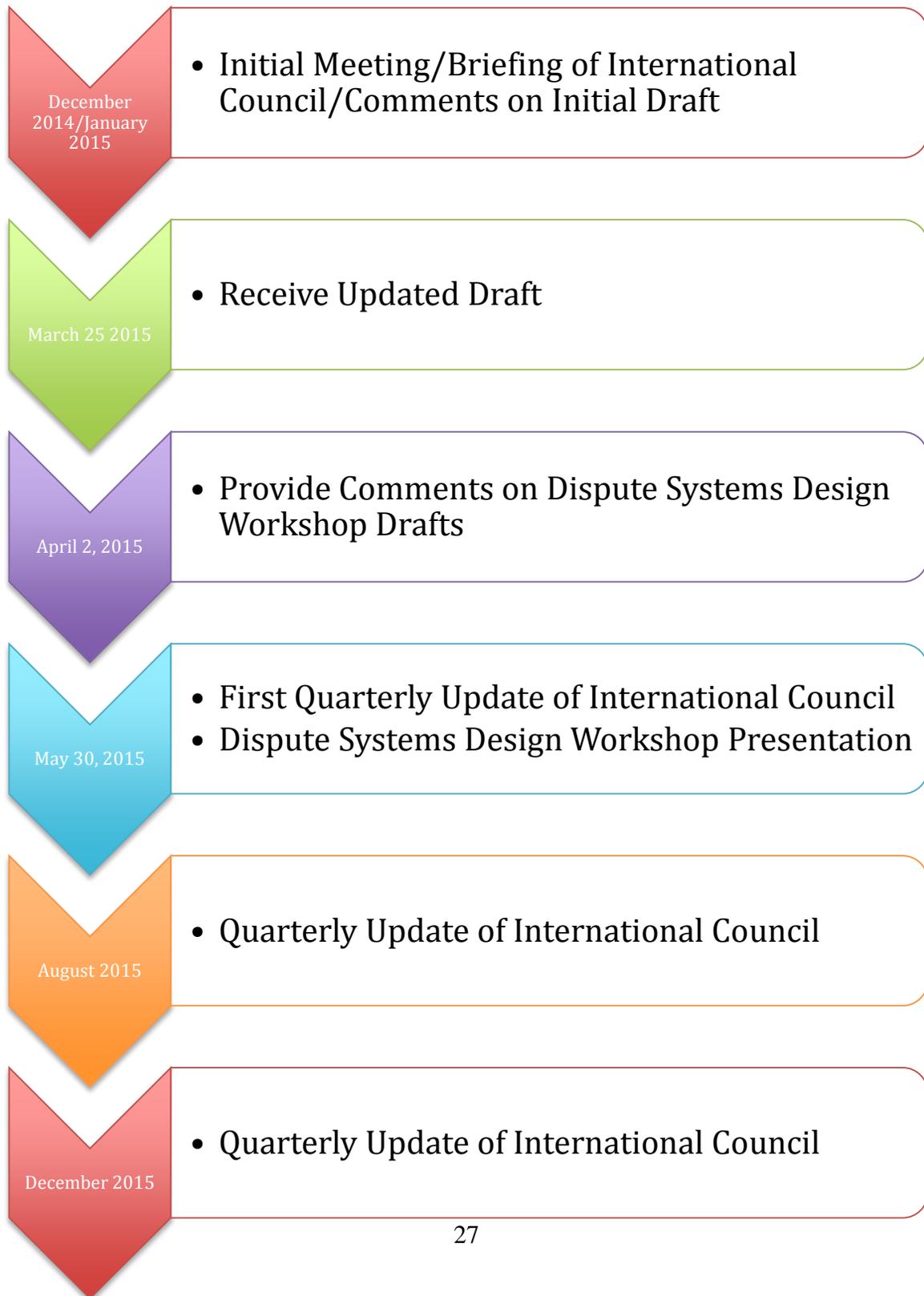
- Renee Martin-Nagle, Former General Counsel *Airbus North America*
- Joe Pallot, General Counsel *Heico*
- F. Scott Wilson, Legal *Pratt & Whitney*

Trade Associations

- Gary Doernhoefer, Independent Consultant, Former IATA General Counsel
- Greeley Koch, Executive Director for the *Association of Corporate Travel Executives*
- Carlos Tornero, Senior Legal Counsel *IATA*

APPENDIX B

International Council: Timeline for Implementation, 2014-2015



APPENDIX C

Dispute Systems Design Workshop, Spring 2014: Timeline

