NEW EU FRAMEWORKS FOR CONSUMER COMPLAINTS: TIME FOR AN AIR OMBUDSMAN?

Professor Christopher Hodges

This article is based upon a lecture given at the Royal Aeronautical Society on 2 July 2014

The starting point for this article is that the landscape of dispute resolution is in the process of undergoing major change, especially for consumer-to-trader complaints. This in turn provides a major opportunity to review how passenger complaints are dealt with in the aviation sector.

The ADR and CDR Landscape

Many lawyers may be familiar with alternative dispute resolution (ADR). It is a wide concept that encompasses a range of techniques for settling a dispute any way other than through adjudication by a state court. The principal techniques include arbitration, mediation, conciliation, early neutral evaluation, and mini-trial. These techniques are familiar and regularly deployed in commercial disputes. Mediation has also been included within the institutional armoury of civil procedure, in England and Wales since the Woolf reforms and throughout the EU since implementation in 2011 of the Mediation Directive.[1]

Although legal systems are built on the fundamental premise that civil disputes are resolved by strictly applying the law, the practice is that very few cases are 'black and white', involving an outcome in which one side wins 100% and the other loses 100%. The overwhelming majority of disputes are resolved by agreement, and, at least in a common law system, only a few percent as a result of judicial determination. Hence resolution through mediation and agreement 'somewhere in the middle' can be seen to uphold concepts of *fair* and *just* outcomes and the rule of law. Against this background, law can be applied by (sometimes specialist) arbitrators or ombudsmen.

One should also note that many states have long had an ADR mechanism in relation to complaints by citizens against state entities, through *public* ombudsman systems. Further, some states have long-established ADR structures for *consumer-to-trader* (C2B) complaints. It is important to distinguish ADR from CDR (Consumer Dispute Resolution). Leading examples here are the four Nordic states, which have national ADR bodies that can handle every type of consumer-trader dispute, and form a matrix together with some sectoral ADR bodies. These ADR systems for breach of contract claims are complemented by a related network of compensation schemes for road traffic, medical and medicine personal injuries. As a result, almost no consumer contract or tort claims have been processed through the courts for some

1. Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

40 years. The ADR system in the Nordic states is mainstream, and certainly not alternative. A different ADR architecture exists in the Netherlands, where close to 60 business sectors are now covered by a matrix of sectoral ADR complaint boards, almost all of which are administered under a unified model by a single and highly efficient private sector foundation.

Further, the rapid development of many *online trading* businesses could not have occurred without underpinning of buyer confidence through ADR systems that are embedded in e-commerce transactions through online dispute resolution (ODR) arrangements. ODR systems are based on arbitration models, and embedded in the transaction from the start. This model is used extensively across the world, and was led by traders such as Amazon, eBay and, in China, Alibaba, and the payment provider PayPal. These automated online systems resolve a massive 60 million disputes a year. A number of ODR businesses now provide global services, such as Modria and Youstice.

The European concept of Consumer ADR has developed its own architecture, which is why I refer to it as Consumer Dispute Resolution (CDR).[2] The architecture within which, or alongside which, traditional ADR takes place is that of the traditional court systems. CDR systems, however, are quite distinct from courts and have little direct relationship with court proceedings. You can engage in ADR before or during a court case, but you can resolve your dispute within a CDR or ODR system without there being any background court system or reference to one.

In short, CDR is no longer alternative, but mainstream.[3] Traditional courts and lawyers are being replaced by information technology and new structures. Numbers of claims in courts in England and Wales have been falling consistently for some time, as CDR cases have risen. County court claims commenced have fallen from 1.9 million in 2000 to 1.4 million in 2012. Contacts and cases for the Financial Ombudsman Service doubled from 2010 to 2013, to roughly 2.5million and 500,000 respectively. The FOS now works in 45 languages, since that is the number spoken by UK residents. It also covers some foreign financial providers, such as PayPal, which is based in Luxembourg.

Some commentators are concerned about possible implications for constitutional order and society. Who are these new providers of justice? Are they identifiable or anonymous? Are they sufficiently qualified, and subject to necessary independence and scrutiny? How can some of them be impartial if they are paid by business? Do they reach decisions that apply 'the law' and reach just and fair decisions? In view of considerations of space, answers to these important questions will not be discussed here. However, CDR systems are widely established and are clearly going to form a major part of the future legal landscape.

There are two basic types of CDR: an arbitration model and an ombudsman model. In general, the older European CDR systems are based on the arbitration model (such as in Nordic states and the Netherlands), and more recent systems (other than for e-commerce) are based on ombudsman systems. Both models can include a preliminary mediation stage: not all arbitration models include mediation but all ombudsman models do. In the UK, the current picture is

2. Extensive details of existing systems in ten EU Member States are to be found in C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

3. This statement is being increasingly made within the ombudsman 'industry'. A published example is in *Remapping consumer redress* (Legal Services Consumer Panel, 2014).

somewhat confusing since both models exist: many business sectors (such as travel agents and motor vehicle manufacturers) have arbitration models, but some sectors have ombudsmen. The analysis is also somewhat confusing since some ombudsmen are creatures created by statute (Financial Ombudsman Service, Pensions Ombudsman, Legal Ombudsman) and others are private sector providers who operate under agreements with traders or groups of traders (notably Ombudsman Services, which has divisions dealing with communications, energy, Green Deal, intellectual property rights, and property letting agents).

It is clear that consumer-trader complaints and dispute resolution systems are generic. There are no design features that are unique to any one sector. The basic managerial technique involves a progression through triage, mediated conversation, to decision. In some systems, the decision by a third party is legally binding under normal arbitration principles, in others it is merely an authoritative independent recommendation, and in others it is legally binding on the trader if the consumer accepts the 'award' but not otherwise. The clear trend is towards businesses accepting awards, either by law,[4] by trade practice, by prior agreement, or as a result of a guarantee from the trade association.[5]

The new reform: Consumer Dispute Resolution systems

The EU has decided to construct a comprehensive pan-EU matrix of CDR bodies, that can handle every type of C2B contract-based dispute. The major reasons for this change are as follows. First, ODR is vital to support the digital economy, and the system has to be regulated. A leap forward is required in order to maintain European economic development in the digital age.

Second, there is widespread dissatisfaction with existing litigation and court systems: they are too slow, too costly for consumers, not sufficiently user-friendly and accessible.[6] In comparison, ODR and ADR systems provide dispute resolution that is fast, cheap, usually free to consumers, accessible, and user-friendly. The vast majority of consumer-trader problems involve very small sums of money, and fall well below a threshold of viability in relation to involving court processes or lawyers.[7] But existing systems vary considerably, and quality needs to be assured. Hence, a regulatory system for CDR is needed.

Third, CDR and ODR afford considerable advantages in underpinning regulation of market standards and behaviour. The aggregation of multiple complaints can reveal what problems are emerging for whom. If this information is published, the power of the market (acting on the commercial imperative of maintaining brand reputation in a competitive market) can affect consumers' and traders' behaviour. Similarly, if the information is made available to

4. In UK under the statutory schemes for Ombudsmen covering Finance, Pensions, Legal Services.

5. This clever approach applies in the Netherlands.

6. See a review of the statistical evidence in C Hodges, 'Consumer Redress: Ideology and Empiricism' in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation* (Springer, 2014), ch 39.

7. See *The Consumer Conditions Scoreboard 2013*, available at http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf; *Special Eurobarometer 342. Consumer empowerment* (European Commission, 2011), available at http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf 175; *Consumer Detriment 2012*, Prepared for Consumer Focus by TNS BMRB April 2012 (Consumer Focus, 2012), available at http://www.consumerfocus.org.uk/files/2012/10/TNS-for-Consumer-Focus-Consumer-Detriments-2012.pdf.

traders, self-regulatory or public regulatory systems, appropriate action can be taken. Courts have not so far been able to provide such aggregated information but it is now standard practice for ombudsman systems. Similar information systems have supported high standards of trading in other sectors and enabled the rogues or less good to be identified, to the advantage of maintaining a competitive market with high standards and fairness in trading

Fourth, CDR systems can form a reliable source of consumer advice. Many sectoral CDRs have found that a significant proportion of the contacts that they receive are requests for advice or an independent view on whether their problem in fact has legal substance or not. Unnecessary litigation and cost can be prevented by this triage review stage.

Further, fifth, a well-operated CDR system can strengthen customers' adherence to traders – irrespective of who wins or loses the particular dispute. Ombudsmen systems operating in diverse business sectors consistently report that if they handle complaints well, then irrespective of whether a consumer wins or loses an individual complaint, the consumer's trust in the underlying service provider is increased and the consumer is more likely to buy from the trader in future. This has been a common experience by CDR systems across numerous sectors. A clear example in relation to the change in attitudes of airlines has been reported by the German Transport Ombudsman. Before he was joined by airlines in late 2013, comments were 'CDR is too expensive', 'CDR lacks expertise', 'CDR is biased' or 'CDR is not necessary'. From 2014, he reports that feedback from airlines tends to be: 'We have to admit that your conciliation proposals are well-balanced and not only considering the consumer's perspective', 'My boss said that we should get more cases to söp', 'If a passenger is not satisfied with our decision, we suggest conciliation at söp', 'We are impressed by the expertise and sector-specific knowledge of the söp team', and 'How can we advise more passengers to contact söp?'.[8]

Sixth, of course, most CDR systems are funded by business, sometimes through sectoral arrangements involving trade associations. This saves public funds on courts and advice systems, but also provides market incentives to keep operating costs low and proportionate.

Adoption of more modern dispute resolution systems is now a global phenomenon. ODR is already global since e-commerce is global: both occur to a huge extent every day. As part of implementing a policy of adopting a market economy, China has recognised that it needs to adopt regulatory and CDR systems, especially in financial services and travel. They have expressed great interest in using the EU system as a model. That has significant implications for trade. But it requires EU and Chinese CDR architectures to be similar and compatible, so as to allow interaction between them.

Reform of the wider legal landscape

The idea of modernising not only the procedures for resolving disputes but also the intrinsic techniques and hence their architectures opens up the prospect of significant reform. A future can be envisaged with the spread of ADR globally and for different types of disputes across legal landscapes. For example, in England and Wales mediation is now required before the

8. Presentation by C Berlin of Schlichtungsstelle für den öffentlichen Personenverkehr e.V. (söp) at the Workshop "Trusting the 'middle man': Impact and Legitimacy of Ombudsmen", University of Oxford, 30th April 2014.

instigation of legal proceedings, as is notification of ACAS in relation to employment claims, thereby providing opportunities for the intervention of mediation. Further, ODR is widely used in China, where discussions are now taking place on introducing comprehensive CDR. Linking up the EU and Chinese CDR systems might facilitate significant enhancement in mutual trade and travel.

It is possible to see a vision of a legal landscape that comprises new dispute resolution techniques that replace existing structures and procedures for small disputes. Thus, citizen-state disputes would be handled by a reformed public sector ombudsman, consumer-trader disputes would be resolved by a private sector ombudsman and ODR system, and personal injuries would be investigated by an ombudsman-type body leading to payments from insurance companies.[9] Mediation is already widely used as a prioritised first stage in family and employment disputes, and perhaps the supporting architecture can be improved. Other types of dispute could also be included within modernised systems. Once Pandora's box is opened, many ideas are released. So far, however, the system for resolving commercial disputes is relatively developed and stable, since it has already widened to combine courts, arbitration and many forms of ADR. But who knows what innovations might appeal here, especially since the cost of commercial arbitration is remains notoriously untransparent, high and difficult to reduce.

The EU's CDR landscape

The EU has realised the power and advantages of CDR in encouraging economic growth. It has supported the growth of ADR for around 15 years, with Recommendations dating from 1998[10] and 2011,[11] a mediators' Code in 2004,[12] the Mediation Directive applicable from 2011,[13] and now the 2013 Consumer ADR Directive[14] and ODR Regulation.[15]

The CDR Directive creates a pan-EU matrix of CDR entities, to which traders may belong. The network of national CDR entities will have the ability to handle *any* type of consumer dispute across all 29 Member States. CDR entities are subject to regulation by national competent authorities, and listed on a list maintained by the Commission. CDR entities must comply with quality requirements: expertise, independence and impartiality (Art. 6); transparency (Art. 7); effectiveness (Art. 8); fairness (Art. 9); liberty (Art. 10); and legality (Art. 11).

9. This is largely the system for road traffic, medical and drug injuries in all Nordic states, and for medical and drug injuries in France (the ONIAM system).

10. Commission Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, [1998] OJ L 155/31.

11. Commission Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes, [2001] OJ L 109, 56-61.

12. European Code of Conduct for Mediators, 2004.

13. Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

14. Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

15. Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

For cross-border intra-EU disputes, the consumer must have access to assistance (Art.14) and will from 2016 be able to utilise the Commission's ODR platform in order to send a complaint to a trader located in another Member state, and if the trader so wishes, to utilise that facility as a means of dispute resolution.[16]

Evidence of relevant customer dissatisfaction in the passenger aviation sector

To what extent are these CDR developments of relevance to the passenger aviation sector? Do passenger services give rise to complaints? Certainly, they do. One only has to look at the need for Directive 261/2004 to conclude that the satisfactory delivery of service to passengers can run into problems that are inherent in the sector and may arise from a number of possible causes. In the UK, 80% of the complaints received by the CAA concern delayed boarding. Some of the causes are, of course, not the fault of airlines, traffic controllers, airport operators, or others in the industry – they just occur. But this situation suggests that being able to fall back on a mechanism whereby independent advice can be given to passengers can assist in cooling things down.

Indeed, complaints by consumers against airlines have consistently scored highest in those recorded by the members of the ECC-Net. In 2012 problems with air transport (including problems with luggage) constituted 21.6% of the complaints to ECC-Net.[17]

The position is that airline services do sometimes give rise to customer dissatisfaction – not necessarily through anyone's fault – so providers should be motivated to seek ways of addressing the issues effectively. Some of the dissatisfaction may arise from causes outside a provider's control, but some will not. In either case, a significant number of customers end up being dissatisfied with the service provided, since it was not the service that they wished for or expected.

CDR and the Passenger Aviation Sector

Two legal issues arise here and one issue on trading policy and consumer expectation. First, does the CDR Directive apply to airlines? Second, how does amendment to Regulation 261 affect the position?

It would be difficult to maintain a convincing case that the CDR Directive does not apply to consumer air travel. However, there is a subtlety here. On the one hand, Member States are obliged to 'facilitate access by consumers to ADR procedures and shall ensure that disputes covered by this Directive and which involve a trader established on their respective territories can be submitted to an ADR entity.'[18] On the other hand, the CDR Directive itself does not require the participation of traders in ADR procedures to be mandatory or the outcome of

16. The Regulation on consumer ODR.

17. *Help and Advice on your Purchases Abroad. The European Consumer Centres Network 2012 Annual Report*, available at http://ec.europa.eu/consumers/ecc/docs/report_ecc-net_2012_en.pdf

18. CDR Directive, art 5.1.

such procedures to be binding on traders.[19] However, traders should be encouraged as far as possible to participate in ADR procedures.[20] Any trader who adheres to a CDR scheme is, however, subject to an obligation to inform consumers about the ADR entity or entities by which the trader is covered, when those traders commit to or obliged to use those entities to resolve disputes with consumers, on his website or in general terms and conditions or service contracts.[21]

Regulatory requirements in quite a number of business sectors have included specific reference to CDR, on either a voluntary[22] or mandatory[23] basis. So there is nothing unusual if the revision of Regulation 261 were to include a specific requirement in relation to ADR. Germany introduced a law along these lines in 2013,[24] as a result of which many airlines swiftly joined the pre-existing German Transport Ombudsman (SöP), which established an aviation section referred to above.

Irrespective of the legal position, it can be asked what consumers, passengers, airlines, regulators and politicians will expect in the future trading environment? If it is right that expectations exist of a 'high level' of consumer rights and service exist in Europe, and that consumers will increasingly come to expect their complaints to be dealt with quickly, and for an easily-accessible CDR scheme or ombudsman to be available, does it follow that it is in the interests of all leading traders who value their reputations in a highly competitive sector to provide the options of leading CDR systems?

It is interesting here to note that for many years leading British retailers have maintained strong reliance on in-house customer care departments as means of attracting as much information as possible about consumer preferences, good or bad, and have resisted a need for outside ADR schemes. They have said that they can handle all complaints in house and have no need for external dispute resolution mechanisms. But now that the CDR Directive has arrived, they are shifting into the CDR system, and they note that, although it is highly unlikely that there will be many complaints going to any consumer ombudsman, such a system has useful functions as a long stop and as a means of improving standards by traders whose standards are not as good as the leading pack.

19. *Ibid*, recital 49.

20. *Ibid*.

21. *Ibid*, art 13.

22. Such as Distance Marketing of Financial Services Directive 2002/65/EC; Timeshare Directive 2008/122/EC; E-commerce Directive (EC) 2000/31; Postal Services Directive EC) 2008/6 amending 97/67/EC; Insurance Mediation Directive 2002/92/EC; Markets in Financial Instruments Directive (MiFID) (EC) 2004/39 on markets in financial instruments amending 85/611/EEC, 93/6/EEC and 2000/12/EC and repealing 93/22/EEC.

23. Directive (EC) 2009/136 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services; Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] OJ L211/55; and Directive (EC) 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; Directive (EC) 2008/48 on credit agreements for consumers; Directive (EC) 2007/64 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC; Regulation (EU) No 181/2011 on bus and coach passenger rights [complaints function either in house or external; also complaints and enforcement authority].

24. German Air Traffic Act (Luftverkehrsgesetz), s 57 ff.

Policy Decisions and Implications for European Aviation

In creating the pan-EU CDR system, a series of design decisions have to be taken. In considering these issues, it can be useful to reflect on two points. First, a great deal of knowledge, learning and expertise is readily available in CDR from other sectors. Thus, it is unnecessary to (re)invent too many wheels. Second, solutions that can be applied in relation to aviation do not necessarily need to be too sector-specific in relation to the aviation sector. The shift to CDR is a generic phenomenon, and generic solutions and schemes can be envisaged.

Should a competent authority that runs an existing complaints scheme continue to do so? This may be an opportunity to outsource all complaints to a specialist CDR provider, probably funded by the private sector. For those regulators that have state funding such a move would save money. But it would also conform to a political ideology of preferring services to be delivered by markets. It might also raise the profile of CDR/ombudsman schemes in consumers' minds and provide a more easily identifiable source of independent advice for queries and channel for all complaints.

Should airlines establish or join a CDR? How many ADR entities should there be? How many national CDRs are needed in a business sector that operates internationally? A strong consideration here is the advisability of looking for simplicity and economies of scale across the European, or even wider, landscape. Does there need to be one CDR for every trader, or national trade association? Might one (or maybe a few) CDR entities, subject to a review of their franchise every few years, be sufficient and satisfactory? Airlines – in every Member State – do not need to reinvent the wheel here. Instead of establishing one's own CDR system, one can simply join an existing CDR or ombudsman operation, and benefit from economies of scale, pre-existing expertise in mediation and complaint handling systems, and the increasing profile and reputation for expertise, efficiency and independence that these systems will attract. Is this not an opportunity to realise further gains in economies of scale and customer reputation by ensuring that the CDR system encompasses not just airlines but also airport, air traffic control and all other relevant suppliers, so that an ombudsman could in a single decision allocate the responsibility to make redress to the passenger to whichever supplier should respond in relation to a given incident?

How should ADR be funded? First, the clear trend in ADR across Europe is that consumers access CDR free. The Directive requires CDR to be provided 'free or at a nominal charge'.[25] Second, CDR entities are therefore paid for by businesses. Most schemes are structured around an annual (overhead) charge and a 'polluter pays' fee-per-case. Some schemes provide a certain number of cases free to traders, on the basis that some spurious claims can be anticipated and should not be subject to 'polluter pays' since they may be made arbitrarily against any trader.

What model of CDR should be adopted: sectoral mediation-arbitration, ombudsman, or something else? Both the mediation-arbitration and ombudsman models can satisfy the quality requirements and deliver effective outcomes. More subtle differences might arise between them in relation to cost, visibility, and ability to feed back aggregated market and regulatory information. For a number of reasons, in my view, there is a trend towards ombudsman systems. I expect various existing arbitration-based CDR systems to migrate to ombudsmen systems fairly soon. This would have the advantage of simplifying and clarifying the landscape, and making it easier for consumers and others to understand.

Should joining CDR be mandatory? Should adherence to awards be mandatory? The legal requirements are, of course, set by legislation, whether at EU or national level. It is open to trade bodies to establish their own rules. One should be aware that the current CDR legislation, highly significant as it is, is an early step in what may be expected to be a developing and innovative framework. The current legislation establishes a framework and a regulatory system for CDR. It does not harmonise national CDR schemes, which vary quite widely in architecture and internal operative arrangements. A number of aspects can be expected to develop further in coming years. Irrespective of whether businesses are subject to the CDR Directive or not, consumers may increasingly expect *all* service providers, in both the private and public sectors, to respond quickly and effectively to dissatisfaction, and be subject to an ombudsman regime. In some regimes, decisions are binding on both sides because the procedure is (normal, binding) arbitration. In other systems, the independent party's 'awards' are non-binding recommendations. However, many trade associations enforce such awards on members, informally or formally, and in the Netherlands they also provide a guarantee of payment to the consumer in the event that the member fails to pay a monetary award. Adherence to such non-binding awards is statistically high is most responsible business sectors in most countries that have such systems. A third model is that operated by statutory ombudsmen in the UK. Decisions are not binding unless the consumer accepts the award, but if so accepted are binding on both parties, and enforceable as a judgment. It is relevant to note also that a power for regulatory authorities to order traders to make redress to consumers is spreading as one of the enforcement powers that are triggered by breaches of trading law.

If CDR is to be the model, what effect does this have on the substantive rules on compensation? Should they be changed? This is a tantalising issue. The approach to care and compensation for delay and cancellation has been devised in the context of formal rights and litigation. But if more informal CDR systems become the context, might a different approach be taken? If, for example, all service suppliers were members of an ombudsman scheme, so that delays in baggage handling or fuel supply or routing could be allocated to the correct originator, why should the legal focus merely be on carriers under Regulation 261? What should the triggers be for providing care, redress or compensation, by whom, and to what extent? Such matters deserve some thought before too long.

Is it right that lawyers and courts disappear from the landscape? By no means, but they might work in different entities. The largest employer of legal graduates in the UK is currently the Financial Ombudsman Service. It is important that significant issues of law should be decided in appropriate ways, such as by legislatures, regulators and courts, and that processes be subject to controls such as transparency, debate, impact assessment and Better Regulation requirements of proportionality. Thus, it is important that decisions on major issues of substantive law should not be taken by ombudsmen or individual arbitrators. That idea suggests that there should be an efficient mechanism for referring such major legal issues to courts, regulators and so forth for speedy determination. Lawyers should, as now, remain involved in such matters.[26]

25. CDR Directive, art 8(c).

26. For example, clarification of various aspects of 261 has been necessary by national courts and the ECJ. This requirement will remain, and needs to be more precisely included in the design of CDR and ODR systems.

Implications and Choices in the Passenger Aviation Sector

Summarising the above, suggests the following courses of action for the aviation sector at this time. All major players in the aviation sector should join an effective ombudsman system, and establish an aviation section. The terms and conditions can be negotiated with a reputable existing private ombudsman provider, without any need for statutory intervention. The scope should be pan-EU, and be capable of being extended to global coverage. All suppliers of services relevant to the supply of aviation services should join, so that a single determination of responsibility can be made that would avoid any follow-on indemnity complexities. Decisions could be individual or collective, thereby avoiding any need for collective litigation. Access should be free to consumers. It would be expected that a significant part of the ombudsman function would be an independent source of advice to consumers, and this would have inherent cost implications. Existing funding mechanisms (based on annual subscriptions and individual case fees) should be satisfactory. The legal basis for complaints and providing compensation should be reviewed.

The above systems are for contract claims. A similar review should be carried out for personal injury claims (passengers, workers and third parties). If, as seems possible, a new national architecture emerges for a no fault compensation scheme approach, fronted by an inquisitorial ombudsman system and backed by insurance, the aviation sector should support and join this.

The ideas set out here may seem startlingly revolutionary. Those who have not encountered ideas like this before may find them surprising. Lawyers are inherently conservative, and believe that law, legal rights and legal systems should conform to unshakeable principles of justice and permanence. There is, of course, every reason why the substance of legal rules should reflect the intrinsic values of the society to which they apply. But there is no reason to expect innovation not to occur in the systems and architectures and techniques that support those values, norms and rules. The aviation industry is at the forefront of innovation. What we are seeing now is simply modernisation of our legal systems so as to deliver the values that society expects – swift, accurate, fair and cheap justice and resolution of disputes.

Professor Hodges is Head of the CMS/Swiss Re Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford