**Can Arbitration resolve International Aviation disputes?**

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**Abstract**

On systematic classification, aviation disputes are either commercial or non-commercial. Whereas the former requires interpretation of bilateral arrangements, the latter concerns the Chicago convention. In any case, ADR methods are unique to aviation disputes. A careful reading of Article 84 and 85 of the Chicago convention portray the importance of arbitration while appealing a decision of the ICAO. Furthermore, the fact that commercial disputes are increasingly resorting to international arbitration cannot be disputed. In cases of non-commercial disputes, the Chicago convention is silent on the scope of appellate review i.e. whether or not new matters could be introduced. This is a grey area where international arbitration could score brownie points for solving disputes over matters that are hindering future growth. This paper seeks to study the pattern of dispute resolution in the international aviation sector. The researcher believes that arbitration holds the key to future international dispute resolution in the aviation sector. Any doubts to the contrary can be removed by studying the landmark aviation disputes resolved by arbitration. It is not assailed that arbitration has been used infrequently under the bilateral agreements; however it has demonstrably been successful in each case at fashioning an acceptable outcome.

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**Introduction**

*“It is well established in international law that no state can without its consent, be compelled to submit its disputes with other states either to mediation or arbitration, or to any other kind of pacific settlement”[[1]](#footnote-2).*

Aviation is inherently international in character, shrinking the planet and drawing together disparate peoples, cultures, and economies. As aircraft cross borders into foreign airspace and land at foreign airports, conflicts inevitably arise at both commercial and political levels.

The settlement of international aviation disputes generally takes place under the multiple umbrellas of the *Convention on International Civil Aviation (*the Chicago Convention) and multilateral and bilateral agreements between states, including bilateral air services agreements.[[2]](#footnote-3) Aviation disputes may be classified as either commercial that is arising out of the application and interpretation of bilateral agreements, or non-commercial, that is, between states and involving interpretation of obligations under the Chicago Convention.

Non-commercial air transport disputes generally involve the application and interpretation of the Chicago Convention with Articles 9 (prohibited zones) and 15 (airport and similar charges) generating inter-state disputes.[[3]](#footnote-4) *Maniatis* suggests that conflicts involving Article 15 of the Chicago Convention often result from revenue generating actions,[[4]](#footnote-5) with the state whose designated airline is subjected to increased charges objecting on the grounds that they are discriminatory. Sometimes these kinds of disputes have political differences at their core.[[5]](#footnote-6)

Major commercial aviation disputes revolve around the bilateral air transport agreements which themselves incorporate provisions from the Chicago Convention. While many of these agreements are very similar in important respects, there may be differences in how they handle dispute resolution. Back in 1952 ‘the Secretariat of the International Civil Aviation Organisation (ICAO) analysed over two hundred such agreements and classified them according to their provisions on dispute settlement’.[[6]](#footnote-7) While some failed to address dispute resolution at all, others provided for recognition of the competence of an arbitral tribunal or provided for the exclusive competence of the ICAO in the event of a dispute.[[7]](#footnote-8) Subsequently, in 1962, the eminent scholar Bin Cheng found that ‘almost all contained dispute settlement provisions, principally providing for arbitration.’[[8]](#footnote-9) The Bermuda II Agreement, which is the current Air Services Agreement between the US and the UK, provides an example of dispute resolution under a bilateral agreement structure.[[9]](#footnote-10) In the event of a disagreement it provides for -

(1) formal consultations or

(2) if formal consultations fail, arbitration by a tribunal of three arbitrators.

If arbitrators are not appointed then either party may request the President of the International Court of Justice (ICJ) to make such appointment. The approach embodied in the Agreement is one of negotiation and if that fails, arbitration.

**History**

Prior to 1970 aviation disputes were relatively few and far between.[[10]](#footnote-11) During the first 30 years of international aviation the aviation industry, both domestically and internationally, the sector was subsidized and regulated to such a degree that disputes rarely occurred. However, post that period, both the agreements increased and disputes engendered.[[11]](#footnote-12)

A historical landmark of legal ex post facto oddities is the 1946 Bermuda Air Transport agreement between the United States and the United Kingdom.[[12]](#footnote-13) This agreement sets the standard for bilateral air transports agreements, although it contains little reference to arbitration and relies heaving on consultation.[[13]](#footnote-14) It may seem strange to modern practitioners that disputes concerning airfares and rates were subject to elaborate rules of negotiation between states and that contracts contained “best effort” provisions, which had the effect of allowing disputed rates to be put in the market and ultimately referred to ICAO for an advisory report.[[14]](#footnote-15) This agreement provided that “each party will use their best efforts under the powers available to it to put into effect the opinion expressed in such report”.[[15]](#footnote-16)

As to arbitration itself, the early bilateral air transport agreements contained a clause compromissoire which created two levels of settlement: an arbitral tribunal and, if the parties did not agree to the procedure or to the composition of the tribunal, the possibility of submitting the disputes to an arbitral tribunal competent to decide it which may hereafter be established within the ICAO or, if there is no such tribunal, to the council of the said organization.[[16]](#footnote-17) Such a council was never set up in ICAO, as the council was reluctant to follow this path. In one instance, however, the ICAO council did establish an ad hoc college and the outcome was satisfactory.[[17]](#footnote-18)

**Treaty references and resolution**

Treaty references to arbitration can be very terse indeed. A typical example of unspecified resort to potential ad hoc arbitration is contained in the multilateral, development, operation and utilization of the permanently manned civil space station which provides in Article 23 that the partner states should “consult with each other” on “any matter arising out of space station cooperation”, while unresolved issues may be submitted to an agreed form of dispute resolution such as conciliation, mediation or arbitration.[[18]](#footnote-19) Other institutions add the designed no of arbitrators, while again declining to nominate a permanent arbitral tribunal. For example, a single arbitrator is provided for in the European agreement concerning an aeronautical satellite programme and the international telecommunications satellite programme and the international telecommunication convention, the more conventional format of a three member panel, with one arbitrator picked by each side and one neutral member, appears in the protocol on privileges and immunities of the European space research organization and the agreement relating to the international telecommunications satellite organization and the convention for the establishment of the European space agency. The convention for suppression of Unlawful acts against the safety of civil aviation (Sabotage) which entered into force in 1973, contains a simple sequence which allows six months for an ad hoc arbitration to be organized, with the recourse thereafter to the ICJ.[[19]](#footnote-20)

A review of 128 bilateral agreements in force between the Unites States and its aviation partners[[20]](#footnote-21) reveals that arbitration is the only dispute settlement mechanism explicitly considered by the parties. The templates for arbitration, as in multilateral agreements, range from the laconic to the detailed. In more recent bilateral agreements concluded during the open sky era, no specific international tribunal has been designated as the compulsory forum.[[21]](#footnote-22) The arbitral tribunal in these agreements will therefore serve in an ad hoc capacity. Within the US bilateral agreements, the bilateral arbitral clause is typically captioned “Settlement of Disputes” rather than “Arbitration”. Here, two paradigms can be isolated. The abbreviated paradigm, which appears infrequently, simple, specifies that disputes will be resolved by mediation, conciliation or arbitration.[[22]](#footnote-23) In the elongated paradigm, consultations are required preliminary, followed by selection of one arbitrator by each side who by agreement select the president of the arbitral tribunal.[[23]](#footnote-24) The appointing authority in the event of any failure to select arbitrators is typically the president of ICAO.[[24]](#footnote-25) The tribunal determines the limits of its own jurisdiction as well as its procedures, default provisions specify a schedule for pleadings, hearings and a written decision.[[25]](#footnote-26) The decision need not be formally reasoned, although either party may request a “clarification”[[26]](#footnote-27) of the decision. Each party is required to give full effect to any decision or award of the tribunal, although that imperative is undermined by the accompanying imprecise formula that the effect given must be consistent with the party’s national law.[[27]](#footnote-28)

**Conclusion**

The researcher agrees with Brian Havel[[28]](#footnote-29) in suggesting that what is needed in the context of international AST transactions is a neutral sector supranational forum armed with mandatory jurisdiction.[[29]](#footnote-30) Arbitration in other words, would transcend its historical perception as the *faute de lieux* option that springs into whatever the parties doubt the neutrality or the rationality of their respective national systems. For all of its short term usefulness ad hoc arbitration, it can safely be said,it should never become the settlement matrix for a sophisticated international sector; “institutional arbitration generally does a better job of maximizing certainty than ad hoc proceedings not supervised by an arbitral institution”.[[30]](#footnote-31) Institutional arbitration, accomplished through respectful supranational tribunals, provides not only certainty, but also the development of a pattern of normative coherence through the arbitral process.[[31]](#footnote-32)

In proposing a system of compulsory AST dispute settlement, therefore, it is quite clear that arbitration should be preferred to the kind of rigid, hierarchical adjudication that mimics domestic enforcement system.[[32]](#footnote-33) It is telling, indeed that there is no multilateral treaty providing for recognition and enforcement of civil and commercial judgments.[[33]](#footnote-34) By contrast, the New York convention on the recognition and enforcement of foreign arbitral awards has widespread state support and provides a useful model for a recognition process for supranational arbitrations.[[34]](#footnote-35) The convention allows domestic enforcement of international commercial arbitration awards in contract and other transactional disputes.[[35]](#footnote-36)

However, it is not asserted dogmatically that arbitration is invariably the best procedure, or even the only procedure, that can be envisaged for AST transnational dispute settlement. The strong and recursive preference for arbitration reflected in series of multilateral and bilateral instruments suggests, however, that arbitration may be the preferred procedure and the one most likely to garner broad state support.[[36]](#footnote-37) The principal arguments for the settlement in favour of permanent arbitral mechanisms are therefore that firstly that arbitration is currently the dominant selected dispute settlement mechanism within existing AST treaty instruments. Secondly, that the demonstrated weakness of AST ad hoc arbitration and the structural and strategic advantages of a sectorialised arbitral tribunal handling a contingent and unknowable future docket.[[37]](#footnote-38)

1. Advisory Opinion No. 5 Eastern Carelia, P.C.I.J (Ser.B), No.5, p.27; accord Western Sahara, 197 I.C.J. Reports p.12, at p.23 (Oct 16). [↑](#footnote-ref-2)
2. Balfour, J, ‘Arbitration in Aviation: The Ultimate Remedy?’ in International Bureau of the Permanent Court of Arbitration (ed), Arbitration in Air, Space and Telecommunications Law, Kluwer Law International, The Hague, 2002 81 [↑](#footnote-ref-3)
3. Maniatis, D, ‘Conflict in the Skies: The Settlement of International Aviation Disputes’ (1995) 20 (2) Annals of Air and Space Law 167, p.180. [↑](#footnote-ref-4)
4. Ibid. [↑](#footnote-ref-5)
5. Ibid. [↑](#footnote-ref-6)
6. ICAO Doc. C-WP/1171(1952). [↑](#footnote-ref-7)
7. Ibid. [↑](#footnote-ref-8)
8. Ibid. [↑](#footnote-ref-9)
9. Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Relating to Air Services Between their Respective Territories, July 23, 1977, 28 UST 5367, TIAS No 8641. [↑](#footnote-ref-10)
10. Diederiks- Verschoor, I H Ph, ‘Settlement of Disputes in Aviation and Space’, The Use of Air and Outer Space: Cooperation and Competition, Kluwer, The Hague, 1998 p. 231. [↑](#footnote-ref-11)
11. Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-12)
12. Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Relating to Air Services Between their Respective Territories, July 23, 1977, 28 UST 5367, TIAS No 8641; Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-13)
13. Jacques Naveau, Arbitration in Air Law conflicts, “Arbitration in Air, Space and Telecommunicaion Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 94. [↑](#footnote-ref-14)
14. Ibid, p. 94. [↑](#footnote-ref-15)
15. Ibid; Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-16)
16. Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-17)
17. Ibid, p.95. [↑](#footnote-ref-18)
18. Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-19)
19. Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-20)
20. Table of Bilateral Aviation agreements, 3 Av. L. Rep. (CCH) para 26, 100, at para. 21, 701 (2001). [↑](#footnote-ref-21)
21. In other treaties, for example the 1948 US/Chile agreement, the parties have the option of submitting their dispute to the ICAO council for an advisory report or for arbitration, they can also submit their dispute to some other organization designated by agreement (Air transport agreement between the Government of United States of America and the Government of Chile, Dec. 30, 1948, art. XI, 3 Av. L. Rep. (CCH) para 26, 252a, at para. 22, 012. [↑](#footnote-ref-22)
22. Agreement between the governments of United States of America and the Government of People’s Republic of China relating to Civil Air transport, Spet. 17, 1980, art. 16(3), 3 Av. L. Rep. (CCH) para 26, 255a, at para. 22, 301 (1999) [↑](#footnote-ref-23)
23. Agreement between the governments of United States of America and the Government of Chile, Sept 27, 1989, art. 14(2), 3 Av. L. Rep. (CCH) para 26, 252b, at para. 22, 022 (1999). [↑](#footnote-ref-24)
24. If the president is of same nationality as the parties, the appointing authority will be the “the most senior Vice president of ICAO who is not disqualified on that ground” [↑](#footnote-ref-25)
25. Agreement between the governments of United States of America and the Government of Chile, Sept 27, 1989, art. 14(3)(4) (5) , 3 Av. L. Rep. (CCH) para 26, 252b, at para. 22, 022 (1999). [↑](#footnote-ref-26)
26. Agreement between the governments of United States of America and the Government of Chile, Sept 27, 1989, art. 14(6), 3 Av. L. Rep. (CCH) para 26, 252b, at para. 22, 022 (1999). [↑](#footnote-ref-27)
27. Agreement between the governments of United States of America and the Government of Chile, Sept 27, 1989, art. 14(7), 3 Av. L. Rep. (CCH) para 26, 252b, at para. 22, 022 (1999). [↑](#footnote-ref-28)
28. Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-29)
29. William W. Park, Symposium: International Commercial Arbitration, Illusion and Reality in International Forum Selection, 30 TEX. INT’L L.J. p. 135, at p.137 (1995). [↑](#footnote-ref-30)
30. Ibid, p.174. [↑](#footnote-ref-31)
31. Supra, n.16; Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-32)
32. Supra, n.16. [↑](#footnote-ref-33)
33. Ibid, p.144; Andreas Lowenfeld, Editorial Comment: Forum Shopping, Antisuit Injunctions, Negative declarations, and related tools of international litigation, 91 A.J.I.L. p. 314, at p.322 (1997). [↑](#footnote-ref-34)
34. Supra, n.16. [↑](#footnote-ref-35)
35. Supra, n.16; Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-36)
36. Supra, n.16. [↑](#footnote-ref-37)
37. Supra, n.16; Brian Havel, International Instruments in Air, Space and Telecommunications Law: The Need for a mandatory Supranational Dispute settlement mechanism, “Arbitration in Air, Space and Telecommunication Law: Enforcing Regulatory measures”, 3rd PCA International Law Seminar, February 23, 2001, Kluwer Law International, p. 11. [↑](#footnote-ref-38)