

# Kluwer Arbitration Blog

## The Development of International Aviation Arbitration

Héctor Fernández (AFALEGAL S.C.) · Saturday, January 28th, 2023

According to *Aviation: Benefits Beyond Borders*, statistics from 2018-2020 demonstrate that the general aviation industry supports 87.7 million jobs worldwide and contributes around US\$ 3.5 trillion a year to the global GDP (equivalent to 4.1% of global GDP).

In parallel, the general aviation industry is increasingly turning to international arbitration. One clear manifestation of this trend is the establishment in recent years of aviation-specific arbitration institutions and arbitrator rosters like the [AAA-ICDR Aerospace, Aviation, and National Security Panel](#), launched in November 2016, the [Shanghai International Aviation Court of Arbitration \(SIACA\)](#), established in June 2014, and the [Hague Court of Arbitration for Aviation \(Hague CAA\)](#), which opened in July 2022.

In light of this growing trend, this post provides a brief overview of the evolution of international arbitration as a viable alternative to traditional dispute resolution mechanisms in the general aviation industry, such as consultation or direct negotiation between the governments or airlines, litigation, and, depending on the relative strength of the aviation trading partners, unilateral coercion.

### 1. The Provision for Arbitration in Multilateral Aviation Treaties: A Historical Perspective

In the aftermath of World War I, international air travel grew and became an important instrument of international transportation. This required the establishment of uniform regulations concerning aerial navigation. This resulted in two international agreements: [The Convention Relating to the Regulation of Aerial Navigation](#) (the 1919 Paris Convention) and [The Pan American Convention on Commercial Aviation](#) (the 1928 Havana Convention). Both Conventions included arbitration provisions for dispute resolution, the former in Article 37 and the latter in Article XXXVI.

These treaties were superseded by the 1944 Convention on International Civil Aviation, known as the [Chicago Convention](#). The Chicago Convention is supported by the core principle of the Paris Convention, which is that every nation retains sovereignty over the airspace above its territory. It also establishes rules focused on safety, navigation, and security. One of its most outstanding achievements was the establishment of the International Civil Aviation Organization (ICAO) in 1947, a specialized UN agency created to manage the administration and governance of this landmark agreement.

However, because of the delay expected in ratifying the Convention, the delegations attending the Chicago Conference presciently signed the [Interim Agreement on International Civil Aviation](#). In this agreement was established the Interim Council on the Provisional International Civil Aviation Organizations (PICAO), which began to function in 1945, to serve as a temporary advisory and coordinating body while ratification of the Chicago Convention proceeded. Article III thereof gave the Interim Council of the PICAO the power “to act as an arbitral body on any difference arising among member States relating to international civil aviation matters which may be submitted to it.” As [Ross Dicker](#) observed in 1970, “at this time arbitration won its first major entrance into the field of inter-governmental conventions when it was adopted.” On 4 April 1947, when sufficient ratifications to the Chicago Convention had been submitted, PICAO became ICAO. There are currently 193 Contracting States to the ICAO.

Chapter XVIII (articles 84 to 88) of the Chicago Convention empowers the ICAO Council to decide upon any disagreement between Contracting States regarding the interpretation or application of this Convention, if such a disagreement cannot first be settled by negotiation. The State parties can appeal the decision to an ad hoc arbitral tribunal or the International Court of Justice, whose rulings will be final and binding. ICAO may announce the termination of landing and overflight rights and may restrict or cancel other privileges as sanctions for non-compliance with the decision. The [Rules of Procedures for the Settlement of Differences](#), adopted in 1957 and revised in 1975, supplement the provisions of Chapter XVIII.

In over 70 years of ICAO history, only seven disputes on the public record have been submitted to the Council. They are *India v. Pakistan* (1952), *UK v. Spain* (1969), *Pakistan v. India* (1971), *Cuba v. US* (1998), *US v. Fifteen European States* (2003), *Brazil v. US* (2016), *Qatar v. Egypt, Bahrain, Saudi Arabia, and United Arab Emirates* (2017). Most were settled not by formal adjudication but by negotiations between the parties, as facilitated by the good offices of the ICAO Council.

## 2. [The Provision for Arbitration in Contracts between Governments](#)

As pointed out by [Stephen Dempsey](#), the Chicago Convention did not contain any agreement on two major economic issues facing international civil aviation: routes and rates. Therefore, routing, privileges, frequency of operations, and capacity of aircrafts, were usually prescribed in numerous Bilateral Air Transport Agreements (BATAs) between nations.

### 2.1 *The early system of BATAs of the Bermuda Type*

The basis of most early BATAs was the 1946 Air Services Agreement between the UK and the US, known as [Bermuda I Agreement](#). These early BATAs tended to restrict, rather than facilitate, international competition by limiting the frequency of operations, the capacity of aircraft, and other traffic rights of designated air carriers of each contracting State operating on international routes to and from the territory of the other contracting State, and beyond.

Nearly all BATAs that followed the model of Bermuda I provided for referral of any dispute to either an arbitration panel or the ICAO Council after the authorized ex post facto consultation between the contracting parties. Most BATAs contain arbitral clauses stating that any decision was advisory and only became final and binding if accepted by the parties.

In 1965, for example, a [dispute](#) arose between the US and Italy regarding the interpretation of their

BATA of 1948. By a vote of two-to-one, the Arbitrators upheld the US position. Nevertheless, instead of giving effect to the arbitral decision, which was a non-binding advisory report, Italy formally announced its intention to terminate the bilateral.

However, the first international aviation dispute submitted to arbitration was between the US and France in 1963. The controversy arose over interpretation of the traffic rights conferred by the US-France BATA of 1946. The US invoked Article X of the Agreement, which stated that disputes not settled by consultation would be referred to the PICAQ's Interim Council for an advisory report. However, the parties drew up a document outlining the way the issues would be arbitrated. Thus, the controversy was submitted to an ad hoc three-member arbitration panel and not to the institutional one envisioned in the original bilateral treaty. Furthermore, the parties, by an exchange of letters, explicitly bound themselves to accept any decision as binding. The **arbitral award** was rendered in Geneva on December 22, 1963. According to **Paul B. Larsen**, that day may be considered a landmark date in international arbitration, because even though "many air transport disputes are suitable for arbitration, it was not until the U.S.-France case that two parties demonstrated that it can be an effective means of settlement."

## ***2.2 The 1977 U.S. – U.K. “Bermuda II Agreement” and the Model Open Skies Agreement***

In 1977, Bermuda I was amended to become the **Bermuda II Agreement**. This agreement was considered a highly restrictive agreement that contrasted with the principle of open skies in the context of continued liberalization of the legal framework regulating the air transport industry. For example, it allowed only four airlines from the US and UK to operate flights between London Heathrow and Continental USA. It also contained clauses that made it illegal for any airline operating scheduled flights between the contracting parties to resort to predatory pricing or capacity dumping (the airline strategy of adding additional flights to a route to drive a competitor out of business or off the route). Other countries did not follow the Bermuda II Agreement as a model for their BATAs.

In contrast, Bilateral Open Skies Agreements began to proliferate during the early 1980s. They were designed to allow airlines to freely fly international routes and compete openly with each other, breaking down regulatory barriers and eliminating government involvement in airline decision making. The US has entered into **open skies agreements** with more than 120 countries or organizations around the world.

Numerous post-1977 liberal BATAs, including Bermuda II, the Model Open Skies Agreements, and a series of liberalizing agreements between several European states, provide for compulsory arbitration by an ad hoc tribunal, usually with three arbitrators, rather than dispute resolution before the ICAO Council. Such arbitral panels have the discretion to set the rules of jurisdiction and procedures. These rules typically provide that parties are bound by any decision rendered. In the event of non-compliance, the benefits granted under the agreement to one or more air carriers of the losing party for the performance of international air transport over the airspace of the winning party may be suspended or limited.

### **3. The Settlement of Aviation Disputes under the Umbrella of WTO Agreements**

Apart from the foregoing, the WTO establishes rules and procedures and provides a forum for resolving trade disputes between its member countries. The WTO Dispute Settlement Body is

responsible for settling disputes.

The WTO dispute settlement process has been used in many occasions to resolve aircraft and airport construction disputes.

The longest-running trade dispute in WTO history has been the conflict over aircraft subsidies between the US and the EU, commonly known as the [Airbus-Boeing dispute](#). The dispute commenced in 2004 when the US initiated the WTO dispute resolution process over subsidies provided by the EU to Airbus. The EU responded by filing a parallel complaint regarding subsidies provided to Boeing by the US. The WTO found that the world's two largest plane makers received billions of dollars in subsidies and ultimately allowed both sides to impose punitive tariffs on each other's exports, which affected \$11.5bn of trade between the two sides. At a June 2021 summit, the US and the EU [agreed](#) to a five-year suspension of the harmful tariffs.

#### 4. **General Commercial Arbitration between Private Parties**

##### ***4.1 Business-to-business disputes within the aviation industry***

As [Roy Goldberg](#) has pointed out, for aviation entities, it often makes business sense to insert an agreement to arbitrate when entering into cross-border contracts because of the international nature of the aviation industry, the complexity of disputes involving aircraft, and the time commitment, expense, and onerous “discovery” associated with the court system.

Arbitration in those kinds of disputes has been resorted to on an ad hoc basis. However, the increasing popularity of arbitration has led to the creation, in recent years, of platforms that provide international aviation arbitration services like the SIACA and the Hague CAA, as mentioned above. Their panels include only arbitrators and mediators with significant industry experience.

##### ***4.2 The use of arbitration to settle passenger consumer claims against airlines***

A recent article in [The New York Times](#) highlighted that “more and more carriers are adding clauses that require passengers to settle disputes with the airline in private arbitration rather than in court, and bar passengers from starting or joining class-action lawsuits.” The article remarks that American Airlines updated its contract of carriage with a class action waiver in April 2020. It also states that a month later, British Airways also incorporated a class-action waiver and binding arbitration agreement in the terms and conditions of executive club for residents of the US and Canada.

However, according to [Jessica Rapoport](#), the [Warsaw](#) and [Montreal](#) Conventions, which are international treaties that govern the liability of airline carriers for harm during international flights, disallow air carriers from limiting ex-ante a plaintiff's jurisdictional option via a forum selection clause. In [Rudolph v. United Airlines Holding](#), a US District Court came to the same conclusion.

#### 5. **Concluding Remarks**

[Experts](#) predict that for years to come, international aviation arbitration will only become more frequent as it has become the subject of the standard dispute resolution clause included in contracts within the general aviation industry and has achieved fruitful results in practice. Thus, practicing international arbitration in this multi-trillion-dollar industry may be worth considering.

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