

Navigating the skies: Arbitration in aviation disputes

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Abstract: While the International Civil Aviation Organization (ICAO) Council is sometimes criticized for the potential influence of political agendas on its decisions, while the International Court of Justice (ICJ) is criticized for its limited jurisdiction and dependence on the party's willingness to accept the ICJ's jurisdiction, a crucial concern is raised over the efficiency of the current Dispute Resolution Mechanisms (DRM) for aviation industry related disputes. Unravelling the compelling inquiry that hangs in the air: Just how efficient is the current aviation arbitration legal system? Is the efficiency of this system available to ad hoc arbitration¹ or arbitral tribunals²? The authors aim to analyze the existing legal guidance to navigate the complex arbitration system. This article sheds light on precedent cases by the ICAO Council and the ICJ studying challenges, such as the lack of efficiency of the ICAO Council and the criticism of the Council's ineffectiveness for being hampered by the political interests of Member States. As well as the ICJ as it may be a more powerful authority in resolving such disputes, it also faces multiple challenges including the lack of enforcement, jurisdiction issues, and political influence, which in return makes it unlikely for dispute parties to seek the ICAO or the ICJ for resolution of their disputes, instead parties have now mostly adopted arbitration clauses as their primary dispute resolution method under Air Services Agreements (ASAs) and other aviation related agreements. While ad hoc arbitration has shown effectiveness and success, its secrecy and confidentiality might result in inconsistency and the inability to develop a case law system. The authors note the urgent need for an arbitration institution³ under the United Nations (UN) umbrella specialized in air law and aviation technology disputes, with the power to issue an enforceable, legally binding ruling. The article also examines the realm of arbitration in the aerospace industry, analyzing legal resources, current aviation arbitration systems, centres, and platforms, and further analyzing case studies to assess the results of the efficiency of each Dispute Resolution Mechanism.

Keywords: arbitration in aviation; alternative dispute resolution mechanism in aviation; supranational mandatory arbitration; Council on the ICAO; International Court of Justice

1. Introduction

The tourism industry is one of the global economic engines, connecting nations and people. This industry adds immense value to the worldwide economy. The commercial aviation industry (carrying passengers, cargo, and mail by air carriers) supports \$3.5 trillion in world economic activity (4.1% of global gross domestic product), as well as attracting more than 1 billion international tourists – from more than 4 billion global aviation passengers⁴—annually and driving growth across diverse destinations. The United Nations World Tourism Organization (UNWTO) reported a staggering increase in international tourists (overnight visitors) by 34% from 2022 to around 1.3 billion as of 2023⁵. The sector's growth trajectory

underscores the industry's significance, reflecting the complex interplay of multiple parties and stakeholders involved in ensuring the seamless facilitation of travel experiences worldwide. However, alongside the flourishing opportunities within the tourism realm, the surge in interactions has also led to a rise in disputes and conflicts among these diverse entities.

From air carriers juggling flight safety and operation protocols and further passenger services to regulators governing airspace management, safety oversight, aviation regulations and compliance, each performer group faces unique challenges and legal issues within the dynamic aviation ecosystem. The aviation industry performers are creating a delicate balance of interests among air carriers, airports, air navigation service providers, regulators, manufacturers, suppliers, and more. This multifaceted nature gives rise to a myriad of disputes encompassing various areas such as contractual agreements, safety regulations, maintenance issues, operational procedures, labour relations, environmental concerns, and intellectual property rights. Amidst the hustle and bustle of this rich mixture of roles, the need for effective and equitable dispute resolution mechanisms becomes apparent.

The aviation industry performers⁶ are facing various challenges at operational, financial, and regulatory levels. Air carriers confront fluctuating fuel prices, intense competition, security threats, and regulatory compliance, impacting operational efficiency and profitability. Airports grapple with infrastructure limitations, capacity constraints, environmental concerns, and adapting to changing passenger demands. Air Navigation Service Providers (ANSPs) facing single sky initiatives, technological challenges, punctuality issues, etc. Manufacturers encounter pressure to deliver innovative and cost-effective solutions while meeting safety and quality standards. Service providers strive to deliver exceptional customer experiences amidst shifting consumer preferences, technological advancements, and the need to optimize operational processes to enhance efficiency and competitiveness.

With the rise in disputes related to safety, regulations, operational procedures, and contracts, effective resolution mechanisms are paramount. These mechanisms safeguard the industry's sustainable development by addressing conflicts efficiently. The number of cases has fluctuated over the years, and 15% of the cases recorded were filed between 2011 and 2020. Being straightforward and official, arbitration serves as a crucial private mechanism for resolving disputes⁷.

2. Key legal frameworks of aviation arbitration

Arbitration in aviation-related disputes has a rich historical background, shaped by key international treaties (conventions, agreements, protocols, etc.) that have laid the foundation for the resolution of conflicts within the aviation industry. Dating back to the early 20th century, these seminal agreements have played a vital role in defining the principles and mechanisms for arbitration in aviation-related disputes, setting the stage for the evolution of arbitration practices in the sector.

International law may influence the jurisdiction of arbitration tribunals in aviation disputes. Treaty provisions, jurisdictional clauses in contracts, and international legal principles can determine the scope of the arbitration tribunal's authority to hear and decide disputes related to international aviation matters⁸. In

cases where disputes in aviation arbitration involve the interpretation of international treaties or conventions, international law provides the basis for resolving these disputes. Arbitrators may need to consider the relevant international treaties and customary international law principles to determine the applicable legal standards⁹.

The following international treaties related to arbitration in aviation are the most relevant: (1) Chicago Convention (1944)¹⁰; New York Convention (1958) and Montreal Convention (1999).

The Chicago Convention on International Civil Aviation (1944) is the main governing public legal source of international civil aviation. The contracting States regulated the settlement of disputes in the Chicago Convention¹¹. It establishes a framework for resolving disputes between contracting states arising from interpreting or applying the Convention. Articles 84 to 88 in Chapter XVIII of the Chicago Convention specifically address the settlement of disputes between contracting States¹², outlining procedures for negotiation. Through the evolution of arbitration practices and the integration of formalized procedures, the aviation industry has continued to uphold the principles of international law and collaboration in fostering a safe, secure, environmentally friendly, efficient, and harmonized air transport system around the globe¹³. However, this cornerstone in civil aviation poses distinct challenges for aviation arbitration. For example, sovereignty concerns over national airspace, the complexity of regulatory frameworks, ambiguity in jurisdictional matters, ensuring the enforceability of awards, and navigating cross-border complexities present hurdles in resolving disputes under the Chicago Convention.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)¹⁴ is an important treaty in dispute settlement and a landmark source of international law. It provides a unified framework for the recognition and enforcement of arbitral awards in contracting States, in different jurisdictions, enhancing the efficacy of arbitration as a dispute resolution mechanism in aviation¹⁵. The significant challenges lie in the limited scope of the Convention, such as addressing the intricacies of aviation-related disputes, as aviation disputes often involve complex technical and regulatory issues that may not be adequately covered by the Convention's provisions. Leading to potential gaps in addressing aviation-specific matters in arbitral proceedings, the enforcement of arbitral awards in the aviation sector can be hindered by recognizing foreign awards in jurisdictions with stringent aviation regulations.

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999)¹⁶ is a pivotal international treaty governing liability and compensation in air carriage by establishing uniform rules for passenger rights, liability limits, and procedural requirements in the event of accident, damage, destruction, loss and delay¹⁷. However, the process of applying this Convention to recent incidents highlighted a few challenges, including interpretations of liability limitations¹⁸, the definition of accident and exclusive remedy¹⁹, etc., further determining applicable law in complex disputes, addressing inconsistencies in court decisions, and enhancing compensation adequacy and enforceability.

3. Dispute resolution mechanisms in aviation conflicts

For the purpose of the authors, the aviation industry's disputes must be dissected, and we should differentiate between State-to-State disputes and those disputes that involve private parties, whether legal or natural. Disputes can arise between natural persons and private legal entities such as those related to passenger rights²⁰, or commercial disputes amongst private legal entities, however, some of these disputes may have a State as party to the conflict such as disputes between a private legal person and a State, which may arise from the construction of airports or facilities or other services that are provided to a State by a private legal entity.

This part focuses on State-to-State disputes, analyzing the existing mechanisms available for such disputes through a comparison between arbitration and other dispute resolution methods.

3.1. The ICAO council

The ICAO Council is the governing body of ICAO. It consists of 36 Member States elected by the Assembly for a three-year term. It meets at least once a year to set policies and programs to achieve the organization's goals. The Council's mandatory and permissive functions²¹ are broad and include supervision of implementing the Chicago Convention (1944) and its 19 Annexes, adopting Standard and Recommended Practices (SARPs)²², and resolving disputes related to civil aviation²³. The Council's membership includes representatives from different geographical regions, ensuring fair and balanced state representation in decision-making²⁴.

The ICAO Council is also tasked with resolving disputes related to civil aviation through negotiation and mediation. However, its effectiveness has been criticized for being hampered by the political interests of Member States, as the concern arises on these political interests' ability to influence the decision-making processes and that the involvement of politics may lead to biased outcomes hindering the impartial resolution of disputes.

Such a challenge was recorded in the case of *India v. Pakistan* (1952), as the situation resulted in a delay in the process as some of these representatives were forced to wait for instructions from the States they were representing²⁵.

Furthermore, the Council's inability to enforce its decisions and recommendations poses a major obstacle to effective dispute resolution. Member States may choose to disregard or delay implementing the Council's decision, undermining the mechanism's authority and prolonging unresolved conflicts. This lack of enforcement mechanisms undermines the Council's effectiveness in resolving disputes between State parties²⁶.

As Professor Michael Milde (1931–2018), former Director of the ICAO's Legal Bureau, stated: "The Council of ICAO cannot be considered a suitable body for adjudication in the proper sense of the word—i.e., settlement of disputes by judges and solely on the basis of respect for law. The council is composed of states (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on pure legal grounds... Truly legal disputes... can

be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence, and expertise²⁷”.

The challenges faced by the ICAO Council raise important questions about its overall effectiveness as a dispute-resolution mechanism. Is the ICAO Council truly able to provide fair and impartial resolutions in the face of political agendas and a lack of enforcement mechanisms? How can the international community address these obstacles to ensure timely and effective resolution of aviation disputes?

Reflecting on these questions highlights the need to re-evaluate existing mechanisms and introduce new approaches to improve efficiency and credibility in aviation dispute resolution. While the ICAO Council serves a crucial role in resolving aviation disputes, its challenges and inefficiencies underscore the need for a critical examination, addressing the issues of political involvement, enforcement capabilities, and technical expertise to strive towards a more effective and impartial resolution of disputes.

3.2. The international court of justice (ICJ)

Seated in The Hague, The Netherlands, the International Court of Justice (ICJ) was established in 1945 under the United Nations Charter²⁸ with the mandate to oversee two types of cases: (1) Contentious cases, which are disputes between States; and (2) advisory proceedings, where the ICJ provides advisory opinions to questions referred to it by United Nations (UN) organs and specialized agencies²⁹.

The ICJ consists of fifteen (15) judges who are elected by the UN General Assembly and the Security Council. The candidates are nominated by non-Member States and are elected based on their qualifications, experience, and expertise in international law. They are elected for a term of nine years and may be re-elected for additional terms³⁰.

Despite its important role in resolving international aviation disputes, the ICJ faces several challenges. One of the key challenges is the lack of enforcement mechanisms for its decisions. While States are obligated to comply with ICJ judgment, there is no direct enforcement authority to ensure compliance. Additionally, the politicization of international disputes and the complexity of aviation regulations can make it difficult for the ICJ to reach a consensus or enforce its ruling effectively. The Court also relies on State cooperation and willingness to engage in the judicial process, which can vary depending on the political climate and interests of the parties involved, as some States have accepted the compulsory jurisdiction of the Court, there remain States that have the option of choosing to accept or reject its jurisdiction³¹.

In the realm of aviation, the ICJ has been instrumental in resolving conflicts that arise between nations regarding airspace rights, air safety regulations, and other aviation-related issues, however, a factor that influences the number of cases that can be brought before the ICJ remains as only state-to-state disputes can be brought before the court which excludes disputes that involve private parties such as those disputes between a State and an air carrier or disputes amongst airlines. This affects the function of the court and limits its role in this regard.

Furthermore, the interactions between the ICAO Council and the ICJ in handling aviation disputes raise questions about the division of responsibilities and the clarity of legal proceedings. Parties seeking to challenge ICAO decisions and bring them before the ICJ may encounter procedural hurdles and jurisdictional ambiguities, leading to uncertainties in the dispute resolution process.

In light of these challenges, it is important to explore options for enhancing the effectiveness of aviation dispute resolution mechanisms that go beyond traditional state-to-state litigation.

3.3. Arbitration

Arbitration serves as a cornerstone of the Alternative Dispute Resolution (ADR) landscape within the aviation industry, offering a robust and efficient mechanism for resolving conflicts that may arise among airlines, passengers, consigners and various industry stakeholders. Unlike traditional court litigation, arbitration provides a structured and neutral platform where parties can address disputes in a confidential and expedited manner. In addition to its ability to offer a tailored approach to conflict resolution, and its efficiency, arbitration is valued for its confidentiality. Dissimilar to court proceedings, which are typically a matter of public record, arbitration offers parties a level of privacy and discretion in handling their disputes. This confidentiality can be especially beneficial in the aviation sector, where sensitive commercial information and reputational concerns are often at stake.

Overall, arbitration stands out as an indispensable tool for resolving disputes in aviation. Its tailored approach, procedural efficiency, and confidentiality make it a preferred choice for parties seeking a reliable and effective means of addressing conflicts in a sector as complex and dynamic as aviation. By offering a fair, expedited, and confidential forum for resolving disputes, arbitration contributes to the continued stability and growth of the aviation industry, fostering trust and cooperation among industry players and stakeholders³².

Bilateral Air Transport Services (ASAs) agreements are legally binding treaties between nations establishing the mechanism by which these nations will perform commercial air services between their jurisdictions. These agreements may take the form of treaties, executive agreements, exchange of political notes, or protocols.

Arbitration has been resorted to on an ad hoc basis in aviation disputes, but it became the standard clause in Open Skies (OS) Agreements because of its successful results in conflict resolution. Arbitration refers to the process of resolving conflicts and disagreements within the aviation industry through a formalized and structured mechanism that involves impartial third-party adjudication. It offers parties in aviation-related disputes a private, non-judicial forum to seek a resolution outside of traditional court proceedings.

4. Selected examples of aviation arbitration

The aviation industry developed specialized aviation arbitration institutions and services, which appeared to be the rise of the following centres.

4.1. The international court of air and space arbitration (1994)

The International Court of Air and Space Arbitration (ICASA) was established in 1994 under the proposal of the Société Française de Droit Aérien et Spatial—in Paris—France, to address the disputes arising from air and space activities. According to Zhang: “However, in practice, there is no public record that this court has heard any cases³³”. The ICASA Rules provide that any proceedings thereunder would be subject to “absolute secrecy”. As a result, no case information is publicly available³⁴. Furthermore, it should be emphasized that the court follows French procedural law and welcomes individuals, companies, or entities of any nationality, including corporations, societies, trade organizations, government authorities, and public or private entities involved in aviation and space activities.

4.2. The arbitration rules for aviation arbitration by the international air transport association (IATA) (1999)³⁵

The IATA arbitration rules recognize and address the unique dynamics of aviation disputes, such as regulatory compliance, safety concerns, and international implications, guiding arbitrators to consider these factors while making decisions.

The rules have significantly impacted aviation arbitration by introducing key milestones. These rules provide a specialized framework for resolving disputes within the aviation industry. They offer a specialized and tailored approach to resolving aviation disputes, offering industry-specific expertise, efficiency, and a deep understanding of the complexities within the aviation sector that may differ from traditional arbitration practices.

4.3. International aviation court of arbitration in Shanghai (2014)

Through a collaboration by IATA, the China Air Transport Association, and the Shanghai International Arbitration Centre, the International Aviation Court of Arbitration in the Shanghai Free Trade Zone was established on 28 August 2014. While having its own set of rules³⁶ the International Aviation Court of Arbitration Represents a major development in Aviation Arbitration, it is equipped to handle complex disputes related to Aviation, such as those disputes between airports and private entities including oil-supplying companies or caterers³⁷.

4.4. The aerospace, aviation, and national security panel (AAA–ICDR) (2016)³⁸

Another aviation specialized Arbitrators panel was created and designed to ensure that legal professionals involved in aviation disputes possess the required relevant experience in Aviation. Those are the ones listed in the panel. The panel not only provides members that possess in-depth knowledge of the regulatory framework, technical aspects, and operational dynamics relevant to aviation, but it also upholds strict principles of confidentiality and neutrality in resolving disputes, protecting sensitive information and maintaining impartiality throughout the arbitration process.

The panel can facilitate expedited dispute resolution, recognizing the time-sensitive nature of issues within the aviation industry and the importance of swift and efficient conflict resolution.

Overall AAA–ICDR serves as a valuable resource for parties involved in disputes related to the aviation industry.

4.5. Hague court of arbitration for aviation (HCAA) (2022)³⁹

In a recent step taken towards the development of aviation arbitration, located in The Hague, the HCAA was established in 2022 to be another milestone in Ad hoc Arbitral institutions specializing in aviation-related dispute resolution, the goal of this institution, is to provide an aviation center for arbitration and mediation services. It is a non-governmental center located in a State that is known for its pro-arbitration stands which is also supported by the Netherlands Arbitration Institute⁴⁰. The HCAA has established its rules customized especially for aviation-related disputes, starting with developing modern arbitration clauses to suit better the existing disputes and disputes to come⁴¹. It had given the right to the parties of the dispute to set out specific requirements and qualifications for the arbitrators, including specific legal and technical knowledge, to ensure that those who take on the task are equipped with the relevant expertise. Another success factor, the HCAA has established an electronic system for the parties of the dispute to submit their requests, documents, and communications, a gigantic step towards keeping up with the digital world. Considering the above factors of sufficient expertise and digital transactions, the HCAA, therefore, provides an expedited process for dispute resolution; moreover, the HCAA has set its rules regarding proceedings where disputes that are at the value of less than EURO 10 million, the tribunals are required to issue their award within five months of the initial conference, assuring the parties of an expedited process in finalizing the dispute and resolving it⁴².

Lastly, the HCAA gives the right to the tribunal to issue interim and emergency measures offering the parties of the dispute if deemed necessary a way of protection for their assets until the dispute is finalized and determined and an award is issued, the tribunal, for example, can order such measures for preventing lessors from placing seisor of the aircraft in the dispute or issue an order of granting access to runways during the process of arbitration until an award is issued.

5. Case Studies

5.1. ICAO case studies

5.1.1. Qatar v. Egypt, Bahrain, United Arab Emirates, and Saudi Arabia

On 5th June, Saudi Arabia, the UAE, and Bahrain cut ties with Qatar. Moreover, these countries, along with Egypt, implemented a closure of their airspace to Qatari aircraft. They also stipulated that foreign airlines would need clearance for overflights to and from Qatar. Consequently, Qatar Airways, the nation's flagship carrier, had to cancel flights to 18 regional cities and redirect others to alternate destinations due to the imposed airspace limitations⁴³.

Qatar argued that the airspace restrictions imposed by the four states violated international aviation agreements and principles, causing significant disruptions to Qatar's Air Transport sector. It asserted that these restrictions hinder the freedom of overflight and the right to access international airspace, directly impacting the operations and commercial viability of Qatar-registered aircraft.

The Quartet raised two preliminary objections to Qatar's applications: Firstly, that the applications sought to address issues pertaining to the broader dispute beyond ICAO's jurisdiction, including the legality of countermeasures undertaken pursuant to the Riyadh Agreements; and secondly, that Qatar did not fulfil the negotiation precondition stipulated by the Chicago Convention⁴⁴. The Council dismissed the Quartet's preliminary objections with 23 votes in favour, four against, and six abstentions, with the three disputing parties disqualified from voting.

Following this, the Quartet argued that the underlying dispute extends beyond civil aviation matters and that the ICAO Council lacks jurisdiction to adjudicate cases concerning Qatar's alleged breaches of obligations under other international treaties. The Quartet primarily focused on procedural deficiencies, particularly the lack of due process and the right to be heard. They highlighted insufficient time for negotiation among the parties as the initial flaw. Subsequently, they criticized the ICAO Council for conducting the voting process through a secret ballot. Additionally, they contended that the Council neglected to furnish a transparent rationale for its decision and refrained from deliberating prior to issuing its rulings⁴⁵.

The appeal, which pertains to ICJ case studies, will be examined in section 5.2 below.

5.1.2. The Hushkit Dispute: United States v. 15 European States

In 1999, Northwest Airlines filed a case before the ICAO Council against the European Union (EU) Council and 15 Member States, alleging discriminatory acts related to noise regulations under the Federal Aviation Act⁴⁶.

The critical issue that Northwest Airlines raised before the ICAO was discriminatory regulations as they alleged that the regulations that the EU adopted, Council Regulation (EC) 925/1999⁴⁷, were discriminatory as they unfairly targeted their operations, creating obstacles that other airlines did not have to face in other words they raised the concern of equal treatment⁴⁸. Northwest claimed that this regulation created a barrier hindering their ability to conduct flights impacting their competitiveness in the market⁴⁹. In their claim, they alleged that Council Regulation (EC) 925/1999 set rules requiring more stringent standards to reduce noise pollution. This regulation did not match the ICAO standards but required air carriers to use a higher-standard engine, which was viewed as an attempt to restrict market access by non-EU air carriers to protect the aircraft manufacturers in the EU.

In response to the claims raised by the United States, the European Union and Member States, responded with an objection alleging:

- Absence of sufficient negotiations between the parties in accordance with Article 84 of the Chicago Convention;
- The ICAO Council found that the exhibits submitted by the parties show that they fulfilled the requirements of negotiations and therefore denied the first objection that the ICAO has no jurisdiction to handle the matter, claiming that

the ICAO Council is not a court of equity, but it can only rule on disagreements concerning the application and interpretation of the Convention and its Annexes;

- The ICAO Council agreed with the US that this was not a preliminary objection; therefore, it deferred judgment until it reached its merits regarding the US's failure to exhaust local remedies⁵⁰;
- The ICAO Council found that exhaustion of local remedies was not a condition precedent to filing disputes before the council, therefore rejecting the third objection.

The ICAO Council rendered its decision on the preliminary objections and voted 20–6 in favour of the United States. Following this decision, the President of the ICAO Council, Dr Assad Kotaite (1924–2014), invited the parties to use his “good offices” to negotiate and attempt to resolve the dispute peacefully. In December 2003, the United States withdrew its complaint at the ICAO Council following negotiations with the EU and Member States, where the EU revoked its noise regulation⁵¹, and the US settled the dispute with the EU and all 15 Member States⁵².

5.1.3. Cuba v. United States (1998)⁵³

For National Security reasons, the United States banned Cuban aircraft from the United States airspace in the 1960s. Accordingly, in 1995, Cuba filed a complaint at the ICAO Council alleging the restriction of Cuban aircraft from the US airspace was a violation of the Chicago Convention and IASTA, as Cuba claimed that the restriction of its flight over US airspace violated the first freedom of the air and that it was injustice for the restriction to be imposed on Cuban air carriers while the US carriers were flying over Cuban Airspace, as the US was utilizing Cuban airspace, it was saving approximately \$150 million a year, while the restriction of Cuban aircraft from the US airspace for example for Cubans flights to Toronto and Montreal added extra 200 miles costing Cuba US\$ 500,000 a year⁵⁴.

The President of the ICAO Council acted as a conciliator in this case and brokered an agreement between the United States and Cuba. In this agreement, the restriction on Cuban aircraft was lifted, and Cuba was to utilize two designated routes over the United States airspace to Canada⁵⁵.

These precedents show that, in practice, the Council's effectiveness in resolving international disputes depends on the cooperation and engagement of Member States, as well as the implementation of its recommendations by involved parties. The Council's role is more aligned with facilitating dialogue, promoting cooperation, and offering guidance to resolve disputes rather than acting as a formal judicial body with the power to enforce binding decisions.

5.2. ICJ case study

5.2.1. UAE, Saudi Arabia, Bahrain, and Egypt v. Qatar (2018)

This case is the second case of an appeal of the ICAO Council decision after *India v. Pakistan* in 1972, where the ICJ decided that the ICAO was competent to hear the dispute, with no other formal proceedings, in 2018 the United Arab Emirates (UAE), Kingdom of Saudi Arabia (KSA), Bahrain and Egypt appealed the

ICAO Council's decision in Qatar's favour to the ICJ, basing their appeal on three grounds, the initial basis of the appeal, they challenged the rulings of the ICAO Council, arguing that they were issued through a process that was evidently flawed and breached fundamental principles of due process and the entitlement to a fair hearing. On the subsequent two grounds, they alleged that the ICAO Council had made factual and legal errors in dismissing, respectively, the first and second preliminary objections to its jurisdiction concerning Qatar's applications⁵⁶.

All three grounds of appeal were dismissed; for the second and third grounds, the ICJ relied on prior rulings where it established that its jurisdiction hinges on the nature of the dispute presented rather than defences on the merits or other factors relevant only after addressing jurisdictional issues. The third ground is that Qatar failed to fulfil the negotiation prerequisite before submitting its Article 84 application for a Council decision. The ICJ concluded that the precondition was met as Qatar made sincere efforts to negotiate.

As for the first ground, the ICJ had also dismissed it, providing a brief rationale stating that the issues raised by the preliminary objections constituted objective legal questions, and the procedures followed by the Council did not substantially prejudice the requirements of a fair process⁵⁷.

In ICJ's decision affirming the competence of the ICAO Council to consider Qatar's claims, the ICJ confronts the nuanced complexities inherent in this dispute. While the ruling underscores the ICAO's jurisdiction over aviation matters, it also highlights the broader dimensions of the conflict, which extend beyond mere airspace restrictions. The countermeasures taken by the four states in response to Qatar's alleged violations of other international laws and treaties underscore the multifaceted nature of the dispute.

One of the central questions raised by this decision is whether the ICAO has the jurisdiction to address issues beyond the realm of civil aviation. This challenge underscores the need for a comprehensive approach to adjudicating the dispute, one that considers all relevant legal considerations. If the ICAO were to exclude non-aviation-related issues from its purview, its decision-making process could be perceived as incomplete and potentially unfair.

The controversial decision of the ICJ, adds to the uncertainty of the legal status of the Council, as it decides that the Council may look into issues that are not within its functions if it is raised while the Council is resolving disputes under the Chicago Convention.

Therefore, the ICJ's decision regarding the ICAO's competence holds significant implications for the fairness and effectiveness of the dispute resolution process. It underscores the importance of ensuring that the ICAO's jurisdictional framework is sufficiently broad to address the full scope of the dispute, thereby enabling a comprehensive and equitable resolution that upholds the principles of international law.

5.2.2. Aerial Incidents: EL AL flight (402)

In 1955, an EL AL civilian aircraft, operated by a Lockheed Constellation and registered as 4X-AKC, was destroyed when it was en-route from its flight path from Vienna, the incident took place when it was in Bulgarian airspace where it was shot

down by Bulgarian military aircraft. Bulgaria should have refrained from using force against the aircraft; the state's actions cannot be justified by any standard of aviation or international law⁵⁸. Moreover, this conduct raises several ethical concerns, which could also establish grounds for liability for damages⁵⁹. After the attack the United States, the United Kingdom and Israel brought three complaints to the ICJ, and again all of the three were dismissed for lack of Jurisdiction⁶⁰, to bring the total of the cases to nine cases dismissed by the ICJ⁶¹ for the reason that the respondents had not accepted the jurisdiction of the ICJ⁶². After these series of cases, it took more than three decades for the ICJ to be asked again to adjudicate an aviation dispute⁶³. The case presents another instance of the challenges faced as a result of the lack of jurisdiction of the ICJ, preventing this route of successfully resolving disputes in the aviation sector.

5.3. Arbitration case studies

5.3.1. Smartsky Networks LLC v. Wireless Systems Solutions LLC, DAG Wireless Ltd, DAG Wireless USA LLC and others

The dispute was brought before the American Arbitration Association (AAA) in the AAA case.

The case centred around allegations of breaches of contract, intellectual property disputes, and other claims between the parties. SmartSky Networks LLC sought redress for various grievances, including violations of contractual obligations and intellectual property rights by the defendants. Under the administration of the AAA, known for its expertise in handling complex arbitration cases, the parties presented their arguments and evidence to an impartial tribunal. After a thorough evaluation of the merits of the case, the tribunal rendered its decision in favour of SmartSky Networks LLC, providing resolution and compensation for the claims raised.

Additionally, the tribunal awarded Wireless USA LLC US\$10 million in damages, along with costs and fees amounting to US\$2.5 million. This outcome underscores the significance of arbitration in addressing intricate disputes within the telecommunications sector and underscores the AAA's role in delivering fair and enforceable decisions for all parties involved⁶⁴.

5.3.2. Aviation Holdings S de RL v. Uruguay, ICSID case No. ARB/19/16⁶⁵

The dispute between Latin American Regional Aviation Holding (LARAH) registered in Panama holds a 75% stake in Uruguay's National airline (Pluna Lineas Aereas Uruguayas)⁶⁶. In May 2019, Larah submitted its request for arbitration to ICSID, when in 2012, Pluna was affected by financial issues and as alleged by Pluna's investment had been destroyed due to the undermined success by arbitrary and politically motivated measures by Uruguay, and these measures destroyed Larah's investment which forced the sale of the airline to a government-owned trustee, without any compensation to Larah. This dispute involved complex legal and factual issues related to aviation investments in Uruguay.

The case presents a nuanced examination of investment protection provisions, jurisdictional issues, and potential remedies for the alleged breaches. The parties' arguments, the legal principles at stake, and the potential implications for

international investment law make this dispute a noteworthy and consequential matter within the realm of investor-state arbitration. The specifics of Uruguay's alleged breaches involve several key elements, including a range of issues related to expropriation, breach of contract, regulatory interference, failure to provide protection and security, and violations of the fair and equitable treatment standard.

6. Assessment of the fora

6.1. Assessment of the ICAO Council

The ICAO Council, while serving as a key forum for resolving international disputes related to civil aviation, does not have the power to resolve disputes as a judicial body in the same manner as a court or arbitration tribunal. The Council's role is more advisory and diplomatic, focusing on facilitating negotiations and providing recommendations to parties involved in disputes. While the Council can issue recommendations and directives to address disputes and promote compliance with international aviation standards, its decisions are not legally binding in the same way as a judicial body's rulings. Instead, the Council relies on the willingness of Member States to engage in diplomatic negotiations and voluntarily comply with its recommendations.

Moreover, the ICAO Council lacks judicial transparency as the weakness in the ICAO Council's ability to render a fair ruling lies in the fact that its composition primarily consists of governmental representatives chosen for political reasons rather than legal qualifications⁶⁷. This political selection process means that the members may prioritize their allegiance to their home countries over impartiality and neutrality in decision-making. As a result, the Council may lack the necessary independence and autonomy to make unbiased judgments, resembling more of a diplomatic body than a judicial one. This inherent bias towards political considerations could potentially influence the Council's rulings, leading to concerns about the fairness and impartiality of its decisions in resolving disputes within the aviation community.

6.2. Assessment of the ICJ

The fact the ICJ is an authoritative figure in international adjudication, as an international court it remains subject to law, which is the reason why it is preferred over the ICAO Council for aviation dispute resolution, however, weaknesses in the ICJ are highlighted in its limited scope of jurisdiction of the cases that can be brought before the ICJ, which are only state-to-state disputes, that in fact excludes all other disputes that a private entity is a party to it.

Moreover, it is a condition that both state parties to each dispute must accept the ICJ's jurisdiction for the case to be accepted, as shown in the case study, in two incidences the ICJ had to dismiss nine different cases that were filed for the absence of acceptance to its jurisdiction by the other parties, unless the states are willing to submit the dispute to the ICJ, it is unlikely to be able to address the merits.

Additionally, like the ICAO, the ICJ has limited power to enforce its decisions, and it remains dependent on the parties' willingness to accept. Unlike the ICAO

Council, the ICJ as a general court may lack the specialization and expertise required for such a technical and specialized field.

6.3. Assessment of Ad hoc arbitration

The combination of specialized expertise, tailored arbitration policies, procedural flexibility, and confidentiality makes ad hoc arbitration an optimal choice for handling bilateral air law disputes effectively. By leveraging these unique strengths, ad hoc arbitration not only offers a robust framework for resolving conflicts within the aviation industry but also enhances the overall integrity and efficiency of the dispute resolution process in a manner that prioritizes expertise, precision, and confidentiality.

Ad hoc arbitration in bilateral air law disputes emerges as a superior choice for resolving conflicts when compared to other methods due to its unique advantages. One significant strength lies in the ability to appoint arbitrators with specialized expertise in both aviation and international arbitration. This ensures that the resolution process is guided by individuals who possess an in-depth understanding of the intricacies of the aviation industry, differing from bodies like the ICAO Council or the ICJ, whose members may lack such specific knowledge.

Moreover, the confidentiality maintained throughout the arbitration process is a crucial factor, particularly in the context of international aviation disputes that may involve sensitive security or economic interests. This aspect is vital. The promise of keeping information confidential during ad hoc arbitration creates a safe space for resolving disputes without putting critical interests at risk.

Ad hoc arbitration also stands out for its adaptability in procedures, giving states the freedom to start the dispute resolution process without feeling pressure on jurisdiction. The ability to speed up the arbitration process based on the complexity of the case and the parties' willingness to move things along makes it a more efficient way to settle disputes.

Lastly, ad hoc arbitration stands out for its procedural adaptability, offering states the freedom to initiate dispute resolution without facing jurisdictional pressure. The expedited nature of the arbitration process, which can be tailored based on the complexity of the case and the parties' willingness to hasten proceedings, ensures a more efficient and responsive mechanism for resolving disputes. This agility in procedural terms further enhances the overall effectiveness of ad hoc arbitration in addressing bilateral air law conflicts.

In summary, there is an overview about primary assessment and differences in **Table 1** of the forums mentioned above⁶⁸.

Table 1. Overview about primary assessment and summarizes the differences.

	ICAO Council	International Court of Justice	Arbitration
CASES	Typically, public air law disputes (aviation security), but sometimes commercial (traffic rights, economic rights, environmental issues).	In all legal disputes submitted to it by States. + Give advisory opinions to UN organs and specialized agencies.	Generally, private law disputes.
SELECTION	Parties cannot choose; there is a permanent body with 36 Representatives on the Council of ICAO. (Elected for 3 years). Representatives are not experts (some may have aviation backgrounds). Forum is seated in Montreal/Canada, at the headquarters of ICAO.	Parties cannot choose; there is a permanent body with 15 Judges (members) on the Court. (Elected for 9 years). Judges are professionals. Forum is seated in The Hague/The Netherlands, seated in the Peace Palace.	Parties freely select Arbitrators. Arbitrators are competent. Forum is Neutral (place/seat). It can be any Forum of their choice (“no home advantage”).
LEGAL PROCEDURE	Legal source <ul style="list-style-type: none"> • Chicago Convention • Rules for the Settlement of Differences • Council’s Rules of Procedure Representatives must follow strict but insufficient rules. Transparent The ICAO Council decision is not final and can be appealed to <ul style="list-style-type: none"> • International Court of Justice; or • Arbitration. The appeal shall be notified to the Council within 2 months of receiving notification of the Council’s decision. The decision’s enforceability is limited, and this mechanism is sensitive, making enforcement difficult.	Legal source <ul style="list-style-type: none"> • Statue of the Court • Rules of the Court • Practice • Presedents Rules and procedures are strict and systematic. Transparent The judgement is final and legally binding. The judgement is enforceable. No jurisdiction for non-governmental organizations, individuals, corporations or any other private entity). States must accept the Jurisdiction of the ICJ.	Specific arbitration rules (international treaties and institutional rules). Arbitrators can tailor their procedural rules. Flexible process. Confidential (the entire process, docs., proceedings, award). [But it can enter to the public, if it has commenced or there is a legal obligation to disclose]. The award is final and legally binding (No appeal, only under limited circumstances; it must be challenged within 3 months). The award is enforceable. (The award does not have automatic powers). If not followed, the winning party can seek enforcement before the National Court.
COST	Each Party shall bear its own cost.	Parties shall bear their own cost.	The cost is moderate. The winner is fully compensated by the losing side.
SPECIAL POWERS	Representatives have limited powers (exercise voting powers).	Judges exercise wide powers.	Arbitrators exercise wide powers.
REPRESENT- ATION	Representatives have various backgrounds. (career diplomats, state or civil aviation professionals, politicians, lawyers, etc.).	Professional Judges (selected on high standards and UN principles/policies like geographic distribution).	Can be anyone (lawyer, expert, technical or academic person, etc.).

Source: Alshamsi, K. and Sipos, A. (2024), *AJEE*, 7 (3), 453-454.

7. Conclusion

In the landscape of resolving bilateral aviation law disputes, the challenges observed within institutions like the International Civil Aviation Organization (ICAO) and the International Court of Justice (ICJ) highlight the need for a more specialized and effective approach. The shortcomings of ICAO, such as its low level of procedural judicialization, issues with independence, political influence, and lack of judicial transparency, raise concerns about its ability to provide a robust framework for resolving complex aviation disputes.

Following the ICAO Council case studies, we can conclude that the Council’s role in dispute resolution is more effective as a mediator in the settlement of disputes, however, without the amendment of the Chicago Convention (1944), this

option will contradict the text of Chapter XVIII, where it states that sanctions may be imposed for non-compliance with the Council decisions, which in return stands in the possibility of the Council's role of being a mediator. Therefore, an amendment to the text of this chapter is required for this to be functional.

Similarly, the limitations of the ICJ in terms of jurisdiction, mechanisms for enforcement, and the requirement of mutual acceptance by involved states underscore the need for alternative mechanisms that can offer more tailored and efficient solutions.

While many authors thought that aviation disputes in recent times are no longer of a political nature and more of a commercial nature, the Qatar v. Gulf Cooperation Council (GCC) case brings us back to the fact that aviation might always be affected by non-commercial factors, this makes the need for an impartial forum more urgent and necessary.

Arbitration emerges as a compelling alternative due to its array of benefits, including the assurance of confidentiality, the alleviation of jurisdictional concerns, procedural flexibility, the ability to tailor arbitration policies to suit specific cases, and access to specialized expertise in both aviation and international arbitration. These advantages make arbitration a promising option for addressing the challenges experienced within the existing institutional frameworks⁶⁹.

Recommendation

Arbitration as a primary mechanism and a valuable addition to the framework for resolving aviation disputes⁷⁰. Advocated by Havel and endorsed for its potential to enhance dispute resolution mechanisms in the aviation sector, this proposed regime could offer significant advantages in ensuring consistent and effective resolution of disputes.

By embracing arbitration as a complementary mechanism to address the shortcomings of existing frameworks, and by exploring the establishment of a dedicated institution for aviation dispute resolution, the industry can move towards a more robust and efficient system for handling disputes. This approach is intended to enhance procedural integrity and effectiveness within aviation dispute resolution, fostering a transparent and reliable framework for bilateral air law matters.

In consideration of the recommendations proposed, the establishment of a new institution specialized arbitration institute under the ICAO structure to be the future of aviation dispute resolution mechanisms, which may follow a mandatory step taken by the ICAO Council as a mediator may hold significant potential for enhancing the resolution process. This new institution should prioritize principles of judicial detachment to ensure impartiality, expertise to navigate the complexities of aviation law, and a commitment to due process to uphold fairness and transparency in proceedings. By concentrating on these key aspects, the institution can offer a more effective and specialized approach to resolving aviation disputes.

Such institute should be given a supranational status considering that aviation disputes carry a multi-state nature, the institute specializing in aviation disputes should be carried out by only expertise in the same field, without the paralyzing effect of political influence, these international aviation laws, and aviation

technology experts to look at the disputes and issue legally binding rulings empowered by all means for the enforcement of their rulings, lastly, unlike the challenges with the ICJ, the institute shall not be exclusive to state-to-state disputes, rather, non-state parties should be able to file their disputes at the institute.

Incorporating the concept of the establishment of a specialized institution and the adoption of arbitration as a preferred mechanism for dispute resolution presents a comprehensive and forward-thinking strategy for enhancing the overall effectiveness and credibility of the aviation industry's dispute resolution framework. This holistic approach aims to address the existing challenges, leverage expert insights, and promote a culture of transparency and fairness in resolving disputes within the aviation sector.

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Conflict of interest: The authors declare no conflict of interest.

Notes

- ¹ Ad hoc arbitrations are conducted without recourse to institutional arbitration rules and without the oversight of an arbitral institution. Institutions may, however, provide administrative or logistical services to ad hoc tribunals. Duggal, K. A. N. & Cleis, M. N. (2024). Ad Hoc Arbitration. <https://jsumundi.com/en/document/publication/en-ad-hoc-arbitration>
- ² Arbitral tribunals refer to panels of one or more arbitrators responsible for adjudicating disputes between parties. The arbitral tribunal's jurisdiction, powers, and duties are prescribed by:
 - the agreement between the State parties to the relevant treaty;
 - the agreement between the parties to the dispute;
 - the applicable arbitration rules, e.g., the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; and
 - the law of the place/seat of arbitration, or, if it is an ICSID arbitration, the ICSID Convention.Willcocks, A., Chiu, R. & Cheung, K. (2024). Arbitral Tribunal. www.jsumundi.com/en/document/publication/en-arbitral-tribunal
- ³ Institutional arbitrations are conducted pursuant to institutional arbitration rules and overseen by an arbitral institution with responsibility for various aspects such as arbitrator appointments, fixing of arbitrators' fees, and administrative support. Duggal, K. A. N. & Cleis, M. N. (2024). Ad Hoc Arbitration. www.jsumundi.com/en/document/publication/en-ad-hoc-arbitration
- ⁴ IATA. (2023). Global Outlook for Air Transport Highly Resilient, Less Robust. IATA, 3, 15.
- ⁵ UNWTO. (2024). Un World Tourism Organization. World Tourism Barometer and Statistical Annex. UNWTO, 22 (1).
- ⁶ The most important performers of the civil aviation industry are the following: Air carriers, airports, and air navigation service providers (ANSPs); furthermore, the maintenance, repair, and overhaul companies (MROs), the aircraft manufacturers, the ground handling service providers, the travel and transport service providers (agents), civil aviation authorities (CAAs), and last but not least, the passengers themselves. Insurance, telecommunication, and aircraft financing companies also have an important role in attending to air transport activity besides the States. Sipos, A. (2024). International Aviation Law – Regulations in Three Dimensions. Springer Nature, Switzerland, Cham, 1st ed., Introduction, 1.2 Aviation Law, 8.

- 7 Blackaby, N. K. C. (2022). *Constantine Partasides and Alan Redfern: Redfern and Hunter on International Arbitration*. Oxford University Press. 2.
- 8 For an interesting discussion on the Chicago arbitration model and the likelihood of creating an international organization with regulatory and enforcement powers and specific jurisdiction on disputes over the cross-border provision of ATC services. Antwerpen, N. V. (2008). *Cross-border provision of Air Navigation Services with specific reference to Europe*. Wolters Kluwer. Law & Business, 39–40, 212–214.
- 9 Chicago Convention (1944), Article 84: “If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation”.
- 10 ICAO Doc 7300 Chicago Convention on International Civil Aviation. 9th ed., 2006.
www.icao.int/publications/Pages/doc7300.aspx
- 11 Chicago Convention (1944), Article 66.
- 12 Chicago Convention (1944) dealing with the issue of settlement of disputes (Article 84), there is an appeal from the decision of the Council to an ad hoc Arbitral Tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice (Article 85). Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.
- 13 193 States have ratified the Chicago Convention (1944), therefore, the International Civil Aviation Organization (ICAO) has 193 Member States. www.icao.int/publications/Documents/chicago.pdf
- 14 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (the New York Convention), is described as the most successful treaty in private international law. It is adhered to by more than 140 nations. The more than 1400 Court decisions reported in the Yearbook: Commercial Arbitration show that enforcement of an arbitral award is granted in almost 90 per cent of the cases.
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- 17 The Montreal Convention (1999) governs air carrier liability in cases of accident (Article 17), destruction, loss or damage to baggage [Article 18 (1)], destruction, loss, or damage to goods [Article 18 (1)], and liability for damage caused by delay in the carriage by air of passengers, baggage and goods (Article 19).
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