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An Overview of International Civil Aviation Arbitrations

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ABSTRACT

International Civil Aviation is a vital global commercial industry that tends to connect the global market, this makes it more complex and expensive to operate a business in this industry. This civil aviation industry includes passengers, airlines, aircraft manufacturers, and airport authorities all around the globe, all of these are regulated by International Civil Aviation Organisation (ICAO). Being diversified with various regulations and laws under public international law and private international law, this industry needs a vital dispute settlement mechanism to adapt to its requirements with low cost and confidentiality. This question is answered through arbitration as it provides essentially what this industry needs which are party autonomy, confidentiality, cost-efficient and flexible dispute settlement mechanism. The International Civil Aviation industry needs Arbitration as it involves more technical persons to adjudicate because all judges may not have the expertise and knowledge in the field of aviation, further Arbitration makes it more flexible and has no time-consuming procedures like conventional courts. Major aircraft manufacturers tend to choose arbitration as their primary dispute settlement mechanism between client airlines because each and every aircraft designed for the airlines with their registered country's safety specifications will involve millions of dollars in cost and market competition decisions. Each Airport Authority of every nation will have internal dispute settlement mechanisms in which arbitration deals with disputes arising from passengers, selected airlines, and air traffic control related. Recent developments in the judiciary and global markets made it mandatory to settle disputes primarily with arbitrations and it further added it as a buffer layer before conventional litigation for avoiding pending litigations which can be observed by the decrease of 12% approx. in both international and domestic courts.

Keywords: *Civil Aviation, ICAO, International arbitration, Aviation Arbitration, International Commercial Arbitration.*

I. INTRODUCTION

International Aviation is one of the fundamentals for the origin of international laws and which also a vital enabler of global connectivity. This field of law requires basically confidentiality,

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simplicity, uniformity, and a sustainable cost-efficient legal framework for the effective delivery of redressal in a balanced form. International Civil Aviation holds 4.16 % of the global GDP further it involves more regulations by International Regulatory Bodies like the International Civil Aviation Organisation (ICAO) and Domestic Regulatory bodies corresponding to the Directorate General of Civil Aviation (DGCA).

Simultaneously, the general aviation business is increasingly relying on international arbitration. The establishment in recent years of aviation-specific arbitration institutions and arbitrator rosters such as the Aviation, and National Security Panel launched in November 2016, AAA-ICDR Aerospace, the Hague Court of Arbitration for Aviation (Hague CAA), which opened in July 2022, and the Shanghai International Aviation Court of Arbitration (SIACA), established in June 2014, is one clear manifestation of this trend.[2]

In conjunction with this ongoing development, the following article provides an in-depth discussion of the evolution of international arbitration as an attractive option to conventional dispute resolution mechanisms in the civil aviation industry, such as consultation or direct negotiation between governments or airlines, litigation, and, depending on the relative strength of the aviation industry, alternative dispute resolution mechanisms.

Aviation Arbitrations provisions are present in:

(A) Multilateral Treaties :

1. Chicago Convention 1944:

Following World War, I, international aviation expanded and became a significant mode of international transportation. This necessitated the development of uniform regulations for air navigation. This culminated in two international treaties: the Convention Concerning to the Regulation of Aerial Navigation (Paris Convention, 1919)[3] and the Pan-American Convention on Commercial Aviation (Havana, 1928)[4]. Arbitration procedures for dispute settlement were established in both Conventions, the initial in its Article 37 and the later in Article 36.

The 1944 Convention on International Civil Aviation, sometimes known as the Chicago Convention[5], supplanted these accords. The Chicago Convention was backed by the Paris Convention's core principle, which states that each nation preserves sovereignty across the airspace above its territory. It also provides security rules, safety, and navigation. One of its

[2] Boies Schiller Flexner LLP - Hague CAA: A New Option for International Arbitration in the Aviation Sector (bsfllp.com)
[3] Convention Relating to the Regulation of Aerial Navigation Signed at Paris, October 13, 1919
[4] Convention Regarding Commercial Aviation, Signed at Habana, February 20, 1928
[5] Convention on International Civil Aviation - Doc 7300 (icao.int)

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most notable accomplishments was the creation of the International Civil Aviation Organisation (ICAO) in 1947, a specialized UN body designed to administer the administration and control of this historic accord.

However, anticipating the probable delay in ratification of the Convention, the delegates attending the Chicago Conference adopted the interim pact on International Civil Aviation. The Interim Council on the Provisional International Civil Aviation Organisations (PICAO) was founded in this agreement to serve as a temporary advising and coordinating body while the Chicago Convention was ratified.

Article III empowered the PICAO Interim Council "to act as an arbitral body on any dispute arising among the member countries pertaining to international civil aviation subjects which may be submitted to it." "At this time," Ross Dicker remarked in 1970, "arbitration won its first significant breakthrough into the domain of inter-governmental conventions when it was adopted." PICAO became ICAO on April 4, 1947, when adequate approvals to the Chicago Convention Ratifications. The ICAO currently has 193 Contracting States.

The ICAO Council is empowered by Chapter XVIII (articles 84 to 88) of the Chicago Convention to resolve any controversy between Contracting States regarding the interpretation or implementation of this Convention if such a disagreement cannot first be resolved via discussion. The judgment can be appealed to the International Court of Justice or an ad hoc arbitral tribunal, whose decisions are final and binding. As a consequence, for non-compliance with the decision, ICAO can notify the termination of landing and overflight rights, as well as restrict or cancel other privileges. The Rules of Procedure for Dispute Settlement, introduced in 1957 and updated in 1975, enhance the regulations of Chapter XVIII.

Only seven disagreements on the public record have been filed to the Council in over 70 years of ICAO existence. They include Qatar v. Egypt, Bahrain, Saudi Arabia, and the United Arab Emirates (2017), Cuba v. US (1998), Brazil v. US (2016), UK v. Spain (1969), US v. Fifteen European States (2003), Pakistan v. India (1971), and India v. Pakistan (1952). Most were resolved by dialogue between the parties, assisted by the ICAO Council's good offices.

2. Tokyo Convention Act, 1975:

This convention was adopted to grant penal provisions for acts and offenses committed on board airplanes. When an act or omission occurs on an Indian-registered aircraft, the Tokyo Convention Act imposes Indian criminal law, whether it occurs in India or overseas.

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(B) **Bilateral Treaties :**

As Stephen Dempsey pointed out, the Chicago Convention lacked agreement on two important economic concerns confronting international civil aviation: fares and routes. As a result, multiple Bilateral Air Transport Agreements (BATAs) involving states normally specified the frequency of activity, aircraft capacity, routing, and privileges.

1. Bermuda I Type BATAs:

The 1946 Air Services Agreement between the United Kingdom and the United States, known as the Bermuda I Agreement, served as the foundation for the majority of early BATAs. These early BATAs tended to limit, rather than facilitate, international competition by restricting the frequency of operations, aircraft capacity, and other traffic rights of designated air carriers emanating from every contracting State functioning on international routes to and from the territory of the other contracting State and beyond.

Following the authorized ex post facto dialogue between the contracting parties, nearly all BATAs that followed Bermuda I model provided for the referral of any disagreement for resolution to an arbitration panel or the ICAO Council. The majority BATAs have arbitration clauses that state that any ruling is advisory and only becomes final and binding if the parties accept it.

In 1965, for instance, a disagreement occurred between the United States and Italy over the interpretation of their 1948 BATA. The Arbitrators affirmed the US position by a vote of two to one. Nonetheless, rather than implementing the arbitral decision which was only an advisory report and not-building, Italy publicly declared its desire to cancel the bilateral.[6]

However, the primary international aviation issue to be arbitrated was between the United States and France in 1963. The dispute stemmed from the interpretation of the transportation rights granted under the 1946 US-France BATA. The United States applied Article X of the Agreement, which specified that disagreements that could not be resolved through dialogue would be sent to the PICAO's Interim Council for an advisory report. However, the parties drafted a contract explaining how the concerns would be resolved through arbitration. As a result, the dispute was referred to an ad hoc three-member arbitration panel rather than the institutional one envisaged in the original bilateral contract. Furthermore, the parties officially obligated themselves to comply with any judgment as binding by a letter exchange.

On December 22, 1963, the arbitral judgment was issued in Geneva. In the words of Paul B.

[6] legal.un.org/riaa/cases/vol_XVI/75-108.pdf

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Larsen, that day may be remembered as a watershed moment in international arbitration because, while "many air transport disputes are appropriate to arbitration," it wasn't until the United States-France case that "two parties directed that it can be a positive form of settlement."[7]

2. Bermuda II Type BATAs:

Bermuda I was revised in 1977 to create the Bermuda II Agreement. This agreement was viewed as excessively restrictive, contradicting the ideal of freedom of Aviation on the skies in the context of the ongoing liberalization of the legal structure governing the air transport industry. For example, it permitted just four airlines from the United States and the United Kingdom to fly flights between London Heathrow and the Continental United States. It also prohibited any airline running scheduled flights between the contractual parties from engaging in predatory pricing or capacity dumping (the airline tactic of introducing extra flights to a route in order to force a competitor out of business or off the route). The Bermuda II Agreement was not used as a model by other countries.

Bilateral Open Skies Agreements, on the other hand, began to flourish in the early 1980s. They were created to let airlines autonomously fly international routes and compete freely with one another, removing regulatory hurdles and removing government participation in airline decision-making. The United States has signed open skies treaties with over 120 nations or organizations across the world.

Several post-1977 liberal BATAs, including Bermuda II, the Model Open Skies Agreements, and an assortment of liberalising agreements between several European states, mandate mandatory arbitration by an ad hoc tribunal, generally with three arbitrators, rather than dispute resolution before the ICAO Council. These arbitral tribunals have the authority to establish the norms of jurisdiction and procedures. These guidelines often state that any decision made is binding on the parties. In the case of non-compliance, the advantages awarded to one or more air carriers of the party that loses under the agreement for the conduct of international air transport across the winning party's airspace may be terminated or curtailed.

(C) WTO Agreements:

Besides from that, the WTO creates rules and processes and serves as a venue for settling trade disputes among its member nations. The WTO Dispute Settlement Mechanism is in charge of resolving disputes.

Many times, the WTO dispute settlement mechanism has been utilized to settle aircraft and

[7] Paul B. Larsen, Arbitration of the United States - France Air Traffic Rights Dispute, 30 J. AIR L. & COM. 231 (1964)

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airport development conflicts.[8]

The debate over aircraft subsidies between the United States and the European Union, known colloquially as the Airbus-Boeing dispute, has been the long-term trade dispute in WTO history. The controversy began in 2004 when the United States started the WTO dispute settlement procedure against EU subsidies to Airbus. The EU replied by bringing a comparable lawsuit against the US for subsidies supplied to Boeing. The WTO discovered that the world's two major plane manufacturers got billions of dollars in subsidies, allowing both sides to apply punitive duties on each other's exports, affecting $11.5 billion in commerce between the two sides. The US and the EU agreed on a five-year reprieve/ suspension of the detrimental tariffs at a meeting in June 2021.

(D) Private Parties Agreements:

1. Business-to-Business Agreement:

Considering the global character of the aviation industry, the intricate nature of disputes related to aircraft, and the time involvement, expense, and onerous "discovery" associated with the court system, it often makes business sense to include an agreement to arbitrate while entering into cross-border contracts.

Arbitration has been used on an ad hoc basis in these types of disputes. However, the growing popularity of arbitration has resulted in the establishment of institutions providing international aviation arbitration services, such as the SIACA and the Hague CAA, as previously indicated. Their panels exclusively comprise arbitrators and mediators with extensive industrial expertise.[9]

2. Customer claim and Airlines Arbitrations:

The increase in air travel has made grounds for various customer disputes as the existing Aviation industries tend to increase their outsourcing of customer redressal mechanisms to avoid clashes with internal administrations, here is where the institutional arbitration centres play a vital role in establishing the balance between the customer and the Service provider Airline by providing a neutral platform for redressal.

II. INEVITABLE DEVELOPMENT OF INTERNATIONAL AVIATION ARBITRATION

The development of the Aviation Industry has increased the need for a supernational organization to assist the International Civil Aviation Industry, which it tends to cover the loops and overlapping junctions of Aviation disputes to avoid extra costs for airlines.

[8] Highlights of the 17-year Airbus, Boeing trade war | Reuters
[9] Open Skies Agreements Currently Being Applied | US Department of Transportation

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1. **Supernational Structure For Air Law Arbitration By Mandatory Application:**

A mandatory supernational organization to supervise the application of institutional arbitration should be established and further, it should also be binding in nature on its decision to bring in a strict and unique regime for Air law maintenance.

It also suggested that the application should be of a standoff in the enforcement of its rulings in operation even in domestic issues and must sever as a precedent and make a case laws reference database for future applications.

2. **Accommodatable domestic policies and regulations to adapt International Air law Arbitrations:**

The international decision should be binding in nature and the domestic regulations relating to the Air law and associated laws like Aircraft manufacturing disputes must be settled through internal arbitration and appeals can be made to the international forums.

These awards should be binding in nature and the Airlines should be given all equal priority as a sovereign.

III. CIVIL AVIATION ARBITRATION IN INDIA

In Indian Civil Aviation industry is confined itself within the scope and operations of the Arbitration and Conciliation Act 1996, as the Indian civil aviation industry is dominated by Indian Origin Airlines, so major disputes are covered under domestic laws. An International Commercial Arbitration needs two essentials which are, the first involvement of the Alien party to Indian citizenship and the second that the parties refuse to settle it in a domestic court and resort to Arbitration.

Another important Selected Airlines Operation Agreement(SAOA) and Communication Navigation Surveillance (CNS) give rise to the arbitration. Further CNS and Air Traffic Management (ATM) which is signed between the Airport Authority of India (AAI) and the Selected Airlines binds the parties under this agreement to settle within 30 days. [10]

Most Indian Airlines tend to settle their disputes within domestic provisions for Arbitrations as it adds the following advantages:

1. Low cost than International Commercial Arbitration.
2. Private documents are secured within confidentiality.

[10] Narayanan, Nithya and Ramanathan, Ashwin, Aviation Disputes in India: Flying Uncharted Skies (June 1, 2014). Acquisition International, June 2014, at 86, Available at SSRN: https://ssrn.com/abstract=2509006

3. Viable solution for dispute resolution within the boundaries.
4. Safeguards the reputation of the Airlines.

(A) What are the enablers which make Civil Aviation Manufacturers to adopt Arbitrations as their viable ADR mechanism:

1. Party Autonomy:

In arbitration, the parties have more autonomy to choose, substitute and challenge the Award granted or the Arbitrator itself if they found any of the grounds mentioned in section 12 of the Arbitration and Conciliation Act 1996. These all are done in private which will not be disclosed to the by the institution, whereas in the conventional court system everything is made public further the parties don't have any sort of control over the proceedings which plays a vital role when the media will try to expose certain details of the Aircraft manufacturing companies submitted in the court, which will certainly affect the market share of the company.

2. Confidentiality:

The confidentiality of the Aircraft blueprints, technologies and other non-patentable designs which is unique will be protected, further all the transactions of an Aircraft manufacturer will involve more sophisticated complex decisions which connects all the stakes holders of it with huge capital per aircraft.

3. Cost Efficiency:

The cost which involves in each cases of Aviation law is very high because it involves more complexity and procedures to be followed. Arbitration tends to decrease considerable proportion of legal cost in a company which will increase its net profit.

4. Time-saving:

Ever minute in an aviation industry is million-dollar profit, any delay in handing over the aircraft to the client airlines will tend to decrease reputation of the manufacturer and it will also involve more cost in clearance for production line of the manufacturer unit itself by a cascading effect over it, which is avoided positively by arbitrations.

IV. CONCLUSION

Arbitration should be considered a viable platform for dispute resolution in the field of Aviation as its time efficiency is relatable and cost-effective compared to other conventional dispute

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settlement mechanisms.[11]

This Research Article Concludes that:

"The future of aviation law vests on the endurance of International Civil Aviation Arbitration, as it is developed as an inevitable option for the civil Aviation Industry, even with the formation of the International Civil Aviation Organization still there prevails of legal application and procedural lacuna which can be effectively and efficiently addressed by ADRs."

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[11] Zhang, Luping and Uva, Rita, The Role of Arbitration in International Civil Aviation Disputes (December 18, 2015).