GAR Global Arbitration Review

The Arbitration Review of the Americas

2024

A survey of aviation disputes in the Americas

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Summary

IN SUMMARY

The aviation industry is the backbone of the travel industry – every day aeroplanes take off and land every few seconds, each carrying hundreds of passengers to foreign destinations. The players that make the industry thrive are diverse. States control airspace that airlines utilise, on aeroplanes manufactured using parts sourced from around the world. Then there are the services that bring each part together. The aviation industry is broad and complex, so it naturally gives rise to equally broad and complex disputes. This article discusses the use of arbitration and dispute resolution in the industry, and suggests that an increased use of mediation and inclusion of arbitration clauses across the industry would improve the efficiency of dispute resolution for parties in the aviation industry.

DISCUSSION POINTS

- The importance of international air travel in the tourism industry
- The wide array of disputes that fall under the aviation industry umbrella
- The use of arbitration and alternative dispute resolution in the aviation industry
- The future of alternative dispute resolution in the aviation industry

REFERENCED IN THIS ARTICLE

- Chicago Convention on International Civil Aviation of 1944
- Multilateral Agreement on the Liberalization of International Air Transportation
- *In Re the Application of the Federative Republic of Brazil Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944*
- *Capital Sec Sys WLL v L-3 Communs Sec & Detection Sys*
- *Airtourist Holdings, LLC, et al v HNA Group, et al*
- *Smartsky Networks, LLC v Wireless Systems Solutions, LLC, DAG Wireless Ltd, DAG Wireless USA, LLC and others*

INTRODUCTION

In an increasingly connected world, the air transportation industry has become a significant source of socio-economic growth and an important driver of economic development. Tourism is one sector in particular that marries the socio-cultural and economic significance of the aviation sector. As technology develops, interest in and accessibility to international travel has increased, leading to billions of people travelling internationally each year. Over the past quarter century, the number of international tourists traveling each year has nearly tripled, from 536 million in 1995 to 1.5 billion in 2019.[1] Though international tourism significantly declined during the covid-19 pandemic, it has steadily returned and is predicted to continue to increase.[2] In the first quarter of 2023, tourists traveling internationally reached 80 per cent of pre-pandemic levels, with an estimated 235 million tourists travelling internationally.[3] In addition to tourism-related travel continuing its ascent to pre-pandemic

levels and beyond, the pandemic also created awareness of the business-leisure travel sector. The increased hybrid working model has led many destinations looking to boost their economies to turn to work-and-play tourism, further increasing international travel.[4]

No, this is not a puff piece for the travel industry (though we wouldn't mind an upgrade on our next trips). Instead, this is the first of a series on international arbitration and the travel industry for the GAR *Arbitration Review of the Americas*. In this article, we focus on the aviation sector as it is the obvious starting point for the international travel industry. Aviation is a multifaceted industry that is vitally important to the world economy, providing 11.3 million direct jobs and contributing over US$960 billion to global GDP.[5] The disputes that arise in the sector are, inevitably, equally multifaceted and with broad reach. Indeed, the aviation industry (as far as we are concerned for purposes of this article) includes the companies that make air travel happen, such as aeroplane manufacturers, airport developers, airlines, airport services providers and designers of air traffic control technology.

With the many facets of the aviation industry comes many diverging and conflicting interests that often result in disputes. When it comes to dispute resolution, the aviation industry faces the challenge of being an inherently international industry with a wide span of agreements and transactions. Aviation is also a regulated industry and involves many state and state-owned entity participants. And with air travel continuing to increase, lasting effects of the pandemic impacting demand, supply chains and staffing issues, and new cyber threats, the number and complexity of disputes that fall under the aviation industry umbrella will continue to increase as well.

Of course, not all aviation disputes are cross-border, but we focus here on international dispute resolution in the aviation industry, particularly in the Americas. Aviation disputes are resolved through domestic courts, commercial arbitration, investment treaty arbitration, state-state treaty arbitration or other forms of alternative dispute resolution. What follows is a survey of select cases that demonstrate the types of disputes encountered in the industry and our suggestions for the increased use of alternative dispute resolution to facilitate efficient and effective outcomes in an industry that always seems to be taking off.

DISPUTES IN THE INTERNATIONAL AVIATION INDUSTRY

Aviation is a regulated industry. This makes sense given its importance to national defence, its inherent cross-border nature and the possibility (though rare) for disastrous accidents. The industry is governed by domestic laws and regulations that address the specificities of the industry on a domestic level.[6] At the international level, it is treaties, bilateral agreements and multilateral agreements that govern. Aviation law covers not only duties and rights with respect to air travel, but also encompasses the wide array of commercial transactions necessary to make air travel possible. As a result, disputes in the aviation industry are often as complex as the planes the industry runs on and touch on issues of aviation law, international law and commercial law, all the while influenced by geopolitical issues.

The foundation of international air travel is the Chicago Convention on International Civil Aviation 1944. Prior to the Chicago Convention, international air travel was governed by two international agreements: the Convention Relating to the Regulation of Aerial Navigation, signed in Paris on 13 October 1919 (the Paris Convention),[7] and the Pan American Convention on Commercial Aviation, signed in Havana on 20 February 1928 (the Havana Convention).[8] However, the nascence of transatlantic flights as an important form of transcontinental travel generated the need for an international agreement and supporting

organisation to assist in the facilitation of international air travel.[9] Thus, in the midst of World War II, 54 countries sent representatives to the International Civil Aviation Conference in Chicago. It was at this conference that the Chicago Convention was drafted and signed by 52 of the countries in attendance and where the framework for the International Civil Aviation Organization (ICAO), the United Nations agency charged with developing policies and standards for international civil aviation, was developed. Today, there are 193 member state signatories to the Chicago Convention.[10]

The ICAO is responsible for creating policies and standards that establish airspace, aircraft registration, and safety, security and sustainability rules that govern international air travel today. In addition to providing the framework for international cooperation in civil aviation, the ICAO is empowered by the Chicago Convention to adjudicate disputes between the member states. Member states are first required to attempt to resolve disputes through negotiations; should negotiations fail, an interested member state may submit an application to the ICAO Council, a permanent body of the ICAO composed of 36 member states elected by the assembly of member states for a three-year term. The ICAO Council adjudicates disputes by reviewing written submissions as well as hearing oral arguments. However, this judicial authority has only been put to use on seven occasions since its establishment in 1947, and even when an application has been submitted, the ICAO Council has not necessarily fully adjudicated the dispute. For example, one of the most recent disputes brought before the ICAO Council is ***Brazil v United States***, initiated in December 2016.[11] In ***Brazil v United States,*** Brazil sought to resolve a disagreement over the interpretation and application of the Chicago Convention and its Annexes following a tragic midair collision between a Brazilian-registered aircraft and a US-registered aircraft over Brazil on 29 September 2006. The collision involved a Boeing 737-8EH, which was manufactured in the United States, registered in Brazil and operated by the Brazilian airline Gol Transportes Aeros SA, and an Ebraer-135 BJ Legacy, which was manufactured in Brazil, registered in the United States and operated by the US company ExcelAire Services, Inc.[12] After submission of the application, the parties resumed negotiations, which are ongoing.[13]

Though the Chicago Convention provides the framework for international air travel, it does not provide for economic regulation among member states. Rather, decisions on the economics of international air travel, including routes, rates, frequency and capacity, are left up to member states to agree to on an ad hoc basis. While initially agreements between states tended to be restrictive, today, many countries have entered into open skies agreements, which are designed to eliminate government involvement in decisions regarding airline routes, capacity and pricing. For example, the 2001 multilateral open skies agreement called Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) between the United States, Brunei, Chile, New Zealand and Singapore promotes open skies arrangements between the member countries, including an open route schedule, open traffic rights, open capacity and minimal tariff filing regimes.[14]

Also important to the aviation industry are investment treaties. Disputes arising under the bilateral and multilateral treaties can involve a foreign investor and a host state or be state to state. The disputes are typically referred to arbitration and often subject to the Rules of the International Centre for the Settlement of Investment Disputes (ICSID) or the ICSID Additional Facility Rules, such as the dispute between Air Canada and the Venezuelan government. This dispute centered around Venezuela's refusal to permit the repatriation of funds received from the sale of airline tickets as it was required to do under the Canada-Venezuela Bilateral Investment Treaty (Canada–Venezuela BIT).[15]

In 2004, Air Canada received authorisation to operate flights between Toronto and Caracas under the Air Transport Agreement (ATA) between the Canadian and Venezuelan governments. Air Canada operated flights from 2004 until 2014, when, owing to challenges in continuing to conduct business in Venezuela, including changes to its currency control laws that altered the applicable exchange rates, Air Canada issued a notice of suspension to the Venezuelan government that it would suspend ticket sales but continue operating its flights as normal. Venezuela responded that under the ATA Air Canada was required to follow certain termination procedures and that as air transport was a public service, it was up to the state to decide when a private entity ceases to provide flight services. Venezuela further refused to process several of Air Canada's applications for fund repatriation. After several failed attempts to resolve the issues, Air Canada provided Venezuela with a written notice of dispute pursuant to the Canada–Venezuela BIT and initiated arbitration pursuant to that treaty alleging a breach of article VIII, which provides for the free transfer of funds, and article II(2), for fair and equitable treatment. Venezuela challenged the jurisdiction of the tribunal, arguing that the dispute was governed by the ATA, but the tribunal rejected this argument, finding that the dispute was ultimately an investment-related dispute and properly settled by arbitration under the BIT. The Tribunal found that Venezuela breached its obligations under articles VIII and II(2) and awarded Air Canada US$20,790,574 in damages – the sum Venezuela improperly withheld – as well as interest and costs.

Another example is the dispute between Latin American Regional Aviation Holding (Larah), a Panamanian-registered company that held a 75 per cent stake in Uruguay's national airline, Pluna Lineas Aereas Uruguayas, and the Uruguayan government.[16] In 2018, Larah submitted a notice of dispute against Uruguay invoking the 1998 Panama–Uruguay bilateral investment treaty accusing Uruguay of illegally expropriating Pluna. In May 2019, Larah submitted its request for arbitration to ICSID. The dispute arose when, in 2012, Pluna was hit by financial troubles and, according to Larah's allegations, Pluna's success was undermined by arbitrary and politically motivated measures by Uruguay. Pluna alleges that these measures ultimately destroyed Larah's investment and forced the sale of the airline to a government-owned trustee, with Larah receiving no compensation. Larah's claims include breaches of Uruguay's obligation to provide fair and equitable treatment to foreign investors and full protection and security of its investments.[17] As of the date of this article, a final award has not yet been issued.

Commercial disputes are also, of course, omnipresent in the aviation industry. Commercial relationships arise from transactions involving, for example: airport and aviation infrastructure construction, management and operation; aeroplane construction, purchase and sale, leasing, operation and maintenance; the development and sale of aeroplane engines, auxiliary power units and other critical parts; airline operation (private and public); and services for airports and airlines. Each of these types of commercial transactions can give rise to their own class of disputes. For example:

- Disputes over mergers and acquisitions, such as the ICC case between Embraer and Boeing.[18] In April 2020, Boeing announced it would be terminating the Master Transaction Agreement between Boeing and Embraer in which Boeing would acquire 80 per cent of Embraer's commercial division. Boeing claims that Embraer failed to meet certain contractual pre-conditions.[19]
- Disputes over commissions for the sale of baggage scanning equipment for use in airports, such as the case of *Capital Sec Sys WLL v L-3 Communs Sec & Detection*

Sys,[20] filed in a federal court in New York. This dispute arose out of the sale of baggage scanning equipment for use in the Doha Airport. Capital Security Systems (Capital) facilitated meetings for the sale of seven scanners to be used in the outbound terminal at the Doha Airport for L-3 Communications (L-3). Following that sale, L-3 sold an additional eight scanners to be used in other terminals of the airport without additional assistance from Capital. Capital claimed it was entitled to commissions on those additional eight scanners because the sale of equipment to the airport authority in Qatar was the result of Capital's relationships. The court ultimately found that the parties' sales agreement, which was reflected in an email from L-3 to Capital, limited commissions to only the initial seven scanners.

- Disputes under a collaboration agreement to create an online travel agency for the sale of airline tickets as in the case of ***Airtourist Holdings, LLC, et al v HNA Group, et al***, ICDR Case No. 01-18-0001-7018.[21] This dispute was brought before the ICDR under Delaware law with the seat of arbitration in San Francisco. This dispute arose out of a collaboration between Airtourist Holdings, LLC, et al (Airtourist) and HNA Group, et al (collectively, HNA) for the creation of an online travel agency called Travana for the sale of airline tickets. The collaboration involved the partial acquisition of a platform built by Airfast Tickets (AFT). HNA ultimately invested US$27 million into the project and Airtourist built up the business over 15 months. Airtourist alleged that when the company was ready for marketing, HNA refused to continue funding critical marketing expenses, leading to insolvency. Airtourist initiated arbitration pursuant to the Rules of the International Centre for Dispute Resolution, the international arm of the American Arbitration Association. Airtourist brought numerous claims against HNA, including for breach of fiduciary duty, breach of good faith and fair dealing, and fraud. The tribunal found in favour of Airtourist, collectively awarding the claimants US$594,385.
- Disputes arising from contractual agreements to develop air-to-ground communications systems such as the case of ***Smartsky Networks, LLC v Wireless Systems Solutions, LLC, DAG Wireless Ltd, DAG Wireless USA, LLC and others***, AAA Case No. 01-20-0014-8647.[22] This dispute arose from contractual agreements to develop, build, test and produce components for an air-to-ground (ATG) wireless communication network for in-flight travellers, airlines, flight crews and other data users. Claimant Smartsky Networks, LLC (Smartsky), is a Delaware company engaged in developing, deploying and selling wireless communication products for ATG communications and enabling tools. Respondent Wireless Systems Solutions (Wireless) is a North Carolina company engaged in developing, manufacturing and selling wireless technology products. The respondent, DAG Wireless Ltd, is an Israeli company, which the claimant asserted was an alter ego of Wireless. Smartsky contracted with Wireless to assist in the completion of its ATG system. Prior to working with Smartsky, Wireless had no experience designing or developing the technology it developed with Smartsky. Following a breakdown in the parties' relationship, ending in termination of the agreement, DAG issued a press release announcing a new system, which utilised the same technology Wireless developed with Smartsky. Smartsky initiated arbitration under the AAA Commercial Arbitration Rules for breach of contract, alleging Wireless failed to deliver ATG products and an ATG system, as well as misappropriation of Smartsky's intellectual property. Wireless claimed that its performance under the agreement was excused by Smartsky's failure to provide adequate assurances of performance and that the intellectual property it

was alleged to have misappropriated was in the public domain. The Tribunal held that Smartsky's failure to provide adequate assurances of performance did not excuse Smartsky from its obligations under the contract and Smartsky did not have the right to suspend its performance and therefore was in breach of contract. With respect to the intellectual property, the Tribunal found that Wireless was in breach by marketing and passing off the products as if they were its own. The Tribunal also found DAG liable as an alter ego of Wireless. The Tribunal awarded Wireless US$10 million in damages, as well as its costs and fees in the amount of nearly US$2.5 million.

- Disputes arising from personal injuries, such as the case of ***Mata v Avianca, Inc***. Mr Mata filed suit against Avianca (a Colombian airline) in a New York court claiming that he was injured when a serving cart hit his knee from El Salvador to New York. While the substance of the case may be atypical for this publication, we raise it here because of the involvement of ChatGPT, the generative artificial intelligence chat tool.[23] After the case was dismissed because Mata's claims were time-barred under the Montreal Convention (a multilateral treaty that governs the international carriage of persons by aircraft), Mata initiated a new case. Avianca again moved to dismiss the case and Mata opposed the motion. Mata's lawyers, however, used ChatGPT to conduct legal research and prepare the opposition brief. The programme put together a brief with extensive quotes from purportedly binding legal authorities. Yet, it was all a farce. A number of 'binding cases' were completely fabricated by ChatGPT. The AI programme did its job by preparing a persuasive brief with on-point case law. But the lawyers failed to do their job of actually confirming anything ChatGPT prepared was true. After a sanctions hearing, the court held that the attorneys acted with subjective bad faith and issued sanctions, including a penalty of US$5,000 and requiring the lawyers to write letters to all of the judges to which the false cases were attributed.

CURRENT STATE OF ALTERNATIVE DISPUTE RESOLUTION FOR COMMERCIAL DISPUTES IN THE AMERICAS

As most readers of this publication already know, arbitration can be an efficient, effective and confidential method of dispute resolution. Most importantly for international commercial disputes, awards rendered through arbitration may benefit from the enforcement mechanisms of the New York Convention. As a result, the use of international arbitration would seem to be the logical default dispute resolution method in the aviation industry. However, the industry has not adopted arbitration as the ***sine qua non*** method of dispute resolution across the board. The diversity in parties involved in aviation disputes, each with differing preferences, often results in a single company with multiple related contracts that provide for different fora to resolve their differences. For example, an aeroplane manufacturer may have an agreement with a company that designs aeroplanes parts containing an arbitration agreement designating the ICC Rules and seated in New York on the one side, but have a leasing agreement for the constructed aeroplane with an airline containing a forum selection clause designating the courts of Santiago, Chile, on the other side. Because this is not a world where all disputes are bilateral, what must the manufacturer do when there are back-to-back indemnity provisions triggered in a dispute over a defective part? If similar arbitration clauses were incorporated into each agreement, then the manufacturer may be able to consolidate cases. Doing so could have the desired effect of making arbitration the more efficient dispute resolution option.

Despite (or maybe because of) the inconsistent use of arbitration in the aviation industry, legal professionals have been developing a framework and infrastructure for industry-specific alternative dispute resolution. The development of specialised arbitration services aimed at the aviation industry appears to be on the rise with the newly created Hague Court of Arbitration for Aviation (HCAA).

- In May 1999, the International Air Transport Association, a trade association founded in 1945 comprised of around 300 airlines from around the world, adopted a set of arbitration rules for use in aviation arbitration.[24]
- In June 2014, the first specialised arbitral institution for aviation, the Shanghai International Aviation Court of Arbitration (SIACA), was created along with its own set of rules.[25] SIACA is supported by the International Air Transport Association and the China Air Transport Association. SIACA administers various types of disputes in the aviation industry, including air transportation, aircraft manufacturing, aircraft sales, aircraft financial leasing, aviation insurance, general aviation trusteeship, ground services and air ticket agents.
- In 2016, the AAA-ICDR formed a specialist panel of arbitrators called the Aerospace, Aviation, and National Security panel.[26] The panel was designed to ensure only arbitrators with significant and relevant experience would be listed, enabling parties to appoint an arbitrator that has the appropriate expertise.
- In 2022, the HCAA was created. HCAA is billed as a 'specialised court of arbitration and centre for mediation for the global aviation industry' with its own set of arbitration and mediation rules.[27]

While we welcome innovation and specialisation, we strain to see the need for aviation-specific arbitration rules. Of course, employing arbitrators and experts with specialised industry knowledge, particularly technical understanding of the machines and technology used in the industry, will be beneficial in many instances. The same is not necessarily true of arbitral rules. After all, arbitration is a creature of contract and significant discretion is given to the parties to design the procedure to fit their needs. Commercial disputes are, for the most part, commercial disputes regardless of the industry. And arbitration rules are, for the most part, procedural rules that guide the parties toward resolution of their dispute, regardless of the applicable law or industry. Do aviation arbitration rules fill a necessary gap in procedure unique to the aviation industry?

FUTURE OF DISPUTE RESOLUTION IN THE AVIATION INDUSTRY

As noted above, the international air travel industry continues to be the backbone of international travel and reliance on international air travel continues to grow. This is particularly true in the case of Latin America, which is emerging from the pandemic as one of the most dynamic markets in the industry.[28] With new investors and billions of dollars in new investments flowing into the region, there are increasing opportunities for emerging budget airlines and start-ups to enter the fray.[29]

As the industry continues to develop, new disputes will arise, presenting unique and complex issues. Industry participants can address new and old disputes in a variety of ways, but we suggest seriously considering mediation as a potential first step in resolving disputes. We are not advocating for two-tier clauses, requiring the parties to first mediate and if unsuccessful, pursuing arbitration. But we are advocating for the inclusion of mediation in your toolbox. A

collective shift towards utilisation of alternative dispute resolution within the industry could allow industry participants to resolve these disputes in a more efficient and effective manner.

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