



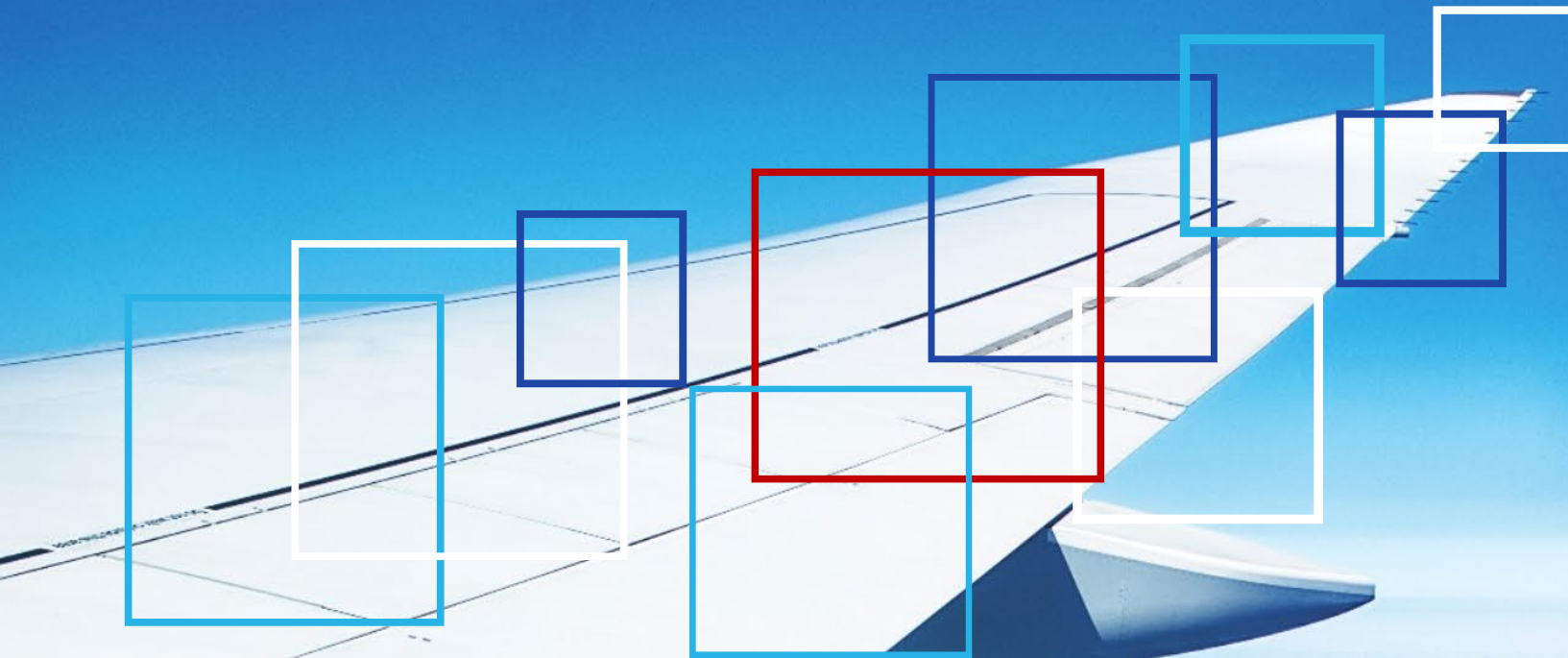
# The ICAO Council and Settlement of Differences between States

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# THE LAW

## Articles 84-88 Chicago Convention

- ICAO Council: mandatory power to resolve “any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes”
  - Resolving disputes by negotiation takes priority as per Article 84 and the ICAO Rules for the Settlement of Differences
    - See, for example, Articles 2(g), 6 and 14 of the Rules – Mr. David Low will elaborate on the Rules
    - The ICJ seems to take a wide view of what constitutes “negotiations”.
- A decision of the Council may be appealed before the International Court of Justice (ICJ) or an ad hoc arbitral tribunal(?)
  - While the appeal is pending, the first-instance decision of the Council:
    - remains in effect, if an international airline is in breach of the Convention;
    - is suspended, if a contracting State is in breach of the Convention or its Annexes.
  - 60 days from receiving notification of the decision of the Council to file an appeal;
  - The decision of the ICJ on appeal “shall be final and binding” – no such reference for the decision of the Council.
- Penalties
  - An international airline that is not conforming with a decision of the Council or the ICJ shall be suspended from operating in the airspace of contracting States
  - The Assembly shall suspend the voting power in the Assembly and the Council of any contracting State that has been found in breach of the Convention or its Annexes (following the exhaustion of the right to appeal)

# ROLE OF THE COUNCIL IN DISPUTE RESOLUTION

The ICAO Council has extensive powers in the settlement of international aviation disputes

- “Formal” dispute resolution role
  - Articles 84-88
- “Informal” dispute resolution role
  - Article 54(n): the Council has distinguished its formal from its informal role in the build-up to *Bahrain, Egypt, Saudi Arabia, United Arab Emirates v Qatar* (2020 ICJ decision)
- Given dispute resolution roles by several “external” to the Chicago Convention agreements
  - See for example, the International Air Services Transit Agreement 1944 and the International Air Transport Agreement 1944 (via Article 66 and Parts II and III of the Rules); Bermuda I Air Services Agreement; the Rome Convention 1952 on ground damage [Article 15(7)] etc
- The ICAO Council has not issued any decisions on the merits of a dispute yet;
- It has issued decisions on its jurisdiction to hear a dispute and has facilitated several settlements
  - The decisions on jurisdiction have been confirmed by the ICJ, most recently in the 2020 ICJ decision;
  - Mr. Yaw Nyampong will elaborate on the case law.

# ROLE OF THE COUNCIL IN DISPUTE RESOLUTION

Several views have been expressed about the nature of the Council's dispute resolution role

- judicial role?
  - political role?
  - settlement/conciliation role?
  - combination of the three?
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- **Sui generis (quasi-judicial) role with emphasis on the settlement of disputes**
    - Article 14 of the Rules plays an important role

# ROLE OF THE COUNCIL IN DISPUTE RESOLUTION

Its sui generis role has been confirmed by the 2020 ICJ decision which has acknowledged that it is not “a judicial institution in the proper sense of that term”

- “The Court observes that it is difficult to apply the concept of judicial propriety to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes”.
- The ICJ also supported an expansive interpretation of the “jurisdiction” of the Council

**Not everyone agreed** [Judge *ad hoc* Franklin Berman in obiter]:

- the Council rather than having jurisdiction over a dispute is “carrying the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings as to what the Convention means and requires, whether or not such issues form part of specific disputes between member States over their particular rights and duties towards one another”
- “It can be remarked in this connection that, whereas the Chicago Convention goes out of its way, in Article 86, to confer ‘final and binding’ status on appellate decisions of this Court (or an arbitral tribunal), it says nothing at all a few lines earlier about the status in law of a decision arrived at by the Council on a ‘disagreement between two or more contracting States relating to the interpretation or application of the Convention’”.

# PROPOSALS FOR CHANGE (?)

The absence of a first-instance judicial institution for aviation disputes has triggered several (academic) proposals for amendment over the years

- most of them propose the creation of arbitration-focused systems either within ICAO or via external bodies
- most of them would require an amendment of the Chicago Convention (Article 94(a)) and financial investment from contracting States

Suggestions for reform are motivated by the wide use of arbitration as a dispute resolution mechanism in air services agreements, aviation security conventions, and private aviation disputes, as well as the creation of judicial fora by other international organisations and public international conventions

- WTO Dispute Settlement System
- International Centre for Settlement of Investment Disputes (ICSID) of the World Bank
- UN Law of the Sea Convention which provides for a plurality of options following the failure of negotiations between the parties:
  - 1. arbitration under Annex VIII is the default forum;
  - 2. the International Tribunal for the Law of the Sea (ITLOS);
  - 3. the ICJ;
  - 4. a special arbitral tribunal for disputes related to issues of environment, fisheries, scientific research, and navigation

# PROPOSALS FOR CHANGE (?)

The fact that the Council has never decided a case on merits and the relatively low number of disputes being referred to it has been highlighted as a problem

- But is it a real problem or part of the ethos of aviation?
- WTO and ICSID have an increased workload, but there is a suggestion that this is the result of factors unique to them: the disputes are usually of significant financial value (in both cases) and private parties have locus standi (in the case of ICSID)
  - It has been argued that the increased adjudication levels they experience are the result of inadequate drafting, compliance, and the quasi-private nature of the ICSID disputes;
  - UNCLOS has not experienced such high levels of adjudication, although it contains over 300 Articles and is the result of significant drafting compromises;
  - No evidence that the small number of disputes before the Council is the result of dissatisfaction with the dispute resolution mechanism of the Chicago Convention;
  - The small number of disputes and their settlement via the Council contributes to the overarching aim of the peaceful settlement of disputes that are usually part of a larger debate;
  - The ICJ plays an auditing role in terms of the operation of the dispute resolution mechanism of ICAO.

# PROPOSALS FOR CHANGE (?)

The amendment of the ICAO Rules for the Settlement of Differences might be the best way forward for the time being:

- decision to contain reasons of law and fact (even the preliminary decisions on jurisdiction) – secret ballot;
- clarify the Council majority required for decisions to be taken in disputes;
- clarify the relation between “formal” and “informal” dispute resolution mechanisms;
- ITLOS has the power to take interim measures, yet its authority is derived from UNCLOS.



Thank you very much for your attention

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