

# The Hague Court of Arbitration for Aviation Continues to Soar



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In conjunction with the appointment of O'Melveny's Patrick Brophy as Co-Chair of the Task Forces at the Hague Court of Arbitration for Aviation (the "HCAA") and to celebrate the HCAA's one-year anniversary, O'Melveny's International Arbitration and Aviation Groups have provided an overview of the HCAA and its successes over the past year.

## Background

Launched in July 2022, the HCAA is a specialized, independent, and neutral dispute resolution centre designed for the aviation industry. The centre is based in the Hague and administered by the Netherlands Arbitration Institute — one of the oldest arbitral institutions in the world.

As a cross border industry prone to complex disputes, the global aviation sector is a natural fit for specialised arbitration. Due to their highly technical nature, aviation-related disputes will benefit from experienced mediators and arbitrators who are familiar with the technical issues and factual scenarios typical to aviation disputes. The HCAA offers participants numerous benefits, such as:

- Confidential and cost-efficient solutions for aviation-related disputes;
- Access to decision-makers with specialised knowledge in the aviation industry;
- Arbitration and mediation conducted using the HCAA Rules, developed specifically to resolve aviation-related disputes;
- HCAA model arbitration and mediation clauses tailored to aviation contracts;
- Lists of vetted neutrals to serve as arbitrators and mediators;
- Flexibility to hear disputes anywhere around the world; and
- Established mechanisms to enforce arbitral awards (including interim measures) in over 170 jurisdictions.

## Services and Features

### *Mediation*

The HCAA's mediation services offer a forum for voluntary settlement of contractual disputes. Although the parties are free to select and agree to appoint any available mediator or mediators, the HCAA also offers a vetted pool of qualified, neutral mediators with aviation industry expertise across various disciplines. Among other elements of optionality, the parties may decide whether the mediation includes neutral case evaluation by the mediator(s), or whether legal counsel may participate and/or be present during parts of the mediation. In any instance, mediators do not impose a solution on the parties.

Mediation may be utilised at any time by parties who have either already committed to seek the mediation of their dispute by virtue of the inclusion of a mediation clause in their underlying contract(s), or where no such contractual provision exists but the parties, nevertheless, agree to mediation on an ad-hoc basis – either to avoid, or during the course of, arbitration or court litigation. In either scenario, the dispute may still be settled in proceedings before the HCAA, in other arbitration proceedings, or in court litigation if the parties do not reach a formal settlement in whole or in part.

The HCAA is in the process of refining its mediation rules in light of industry feedback, demonstrating the high level of consultative engagement that the HCAA has with the aviation community.

### *Arbitration*

Arbitration under the HCAA Rules, which were revised in February 2023, offers specialised arbitration as a fast, fair, flexible, and final form of binding dispute resolution conducted before an expert neutral tribunal, in private, pursuant to the HCAA's rules and procedures. Arbitration emanates from the contractual agreement of the parties, but is regulated and enforced by national laws and international treaty.

Unlike traditional judgments issued by courts, arbitration awards are capable of being enforced in over 170 countries under the New York Convention, making arbitration an attractive choice for resolution of international disputes. The New York Convention is often described as the most successful treaty in all private international law. Many believe that it is now time that aviation, the most international of industries, finally, fully avails itself of such a far-reaching and widely accepted treaty. Additionally, in arbitral proceedings, the parties to the dispute have discretion in appointing the arbitral tribunal (often with assistance from the arbitration centre), enabling cases to be heard and decided by specialists with the relevant subject matter expertise, technical knowledge, and experience. By adopting arbitral rules and procedures “specifically tailored to the unique needs of a unique industry,”<sup>1</sup> the HCAA is able to provide a “deeply specialised arbitration”<sup>2</sup> forum for resolving aviation-related disputes. The HCAA maintains two lists of approved neutral arbitrators, which it recommends for use in proceedings: the first list comprises an impressive portfolio of legal and technical experts from the aviation sector to serve as co-arbitrators, while the second list provides an extensive and diverse range of senior arbitrators — many of whom have experience arbitrating aviation disputes — to act as sole arbitrator or chair of the arbitral tribunal. Tribunals composed of individuals from these lists will be armed with the substantive and procedural expertise to offer the disputing parties the highest quality process for resolving their disputes.

The HCAA's rules provide for expedited proceedings which — by default — require a final and binding award to be rendered within only six months of the first case management conference, as well as offer cutting-edge features such as emergency arbitration for immediate emergency relief, electronic filings, and hybrid hearings. In addition, the HCAA rules offer suggested model clauses for inclusion in contracts, together with detailed guidance on the issues to be addressed under these model clauses. This emphasis on industry expertise, efficiency, and user-friendliness sets the HCAA apart as a modern and bespoke dispute resolution centre for the global aviation industry.

### *Location of Arbitration or Mediation*

Given the international nature of aviation disputes, the HCAA rules allow for flexibility with regard to hearings. As a result, hearings can be held at any location around the world, and participants are allowed to attend virtually.

### *Model Clauses*

As arbitration is a consensual dispute resolution mechanism, a necessary pre-cursor to any arbitration proceedings is an agreement to arbitrate. To this end, an arbitration clause should be included in the underlying contract. The HCAA provides standard arbitration clauses, which have been drafted and vetted by aviation and arbitration experts, which can be easily incorporated into the relevant aviation contract(s).<sup>3</sup>

A mediation clause may also be included as a standard clause in aviation contracts.<sup>4</sup> Mediation may also be agreed when a dispute has already arisen and no mediation clause has been included in the contract.

## CTC and The HCAA

The interplay between the Cape Town Convention (“CTC”) and the HCAA will be a positive for the aviation sector as whole. Arbitration is not intended to undermine the CTC in any way, but serves as a valuable adjunct tool. The CTC, through its asset-based remedies, seeks to enable enforcement, recovery, and redeployment of aviation assets, while arbitration draws its strength from the New York Convention and focuses on addressing rights beyond the scope of any CTC remedies available, such as for contractual disputes outside of an aircraft enforcement or airline insolvency scenario. For the time being, no arbitration centre is defined as a “court” under the CTC. This means that the CTC’s Article 42 jurisdiction provisions do not apply to any arbitration centre. As such, any arbitral order seeking enforcement lacks the CTC-backed authority of an equivalent court order. Furthermore, the New York Convention provides guardrails to prevent overreach, by limiting the enforcement of arbitral awards in certain scenarios.

## Highlights

The HCAA announced that the total value of aviation transactions that it was aware of that had included provision for its arbitration and/or mediation already surpassed \$1bn within nine months of its launch. For the majority of these transactions (of which the HCAA is aware), HCAA arbitration has been selected by the parties as the agreed dispute resolution mechanism in lieu of court litigation.

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<sup>1</sup> HCAA’s website: <https://haguecaa.org/arbitration.html>.

<sup>2</sup> *Ibid.*

<sup>3</sup> <https://www.haguecaa.org/ASSETS/Documents/ArbitrationClausesHCAA.pdf>.

<sup>4</sup> <https://www.haguecaa.org/ASSETS/Documents/MediationClausesHCAA.pdf>.

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*This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Patrick Brophy, an O’Melveny counsel licensed to practice law in Ireland, England, and Wales, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.*

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