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ASSEMBLY — 41ST SESSION

LEGAL COMMISSION

Agenda Item 41: Work Programme of the Organization in the Legal Field

STUDY ON DISPUTE SETTLEMENT SYSTEM UNDER CHICAGO CONVENTION

(Presented by the Republic of Korea)

REVISION NO. 1

EXECUTIVE SUMMARY

The Chicago Convention provides a dispute settlement clause in Article 84. However, it is rarely applied on a practical level in the event of actual disputes. In this respect, there is a need to discuss how the existing dispute settlement clause under the Chicago Convention works and how it is applied. Further, it is necessary to discuss matters pointed out as limitations of the current dispute settlement clause.

Action: The Assembly is invited to:

- a) support and facilitate the work currently being conducted by the Legal Committee's Working Group for the Review of the ICAO Rules for the Settlement of Differences (WG-RRSD);
- b) request ICAO, upon completion of the WG-RRSD work, to prepare a workshop/seminar at which all Contracting States will have an opportunity to exchange views on the outcomes of the WG-RRSD, especially with regard to the current dispute settlement provisions of the Chicago Convention and how they can be applied in a more efficient way.

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| <i>Strategic Objectives:</i> | This working paper is not related to Strategic Objectives. |
| <i>Financial implications:</i> | Not determined. |
| <i>References:</i> | Doc 7300/9, <i>Convention on International Civil Aviation</i> A41-WP/125-LE/9 |

1. INTRODUCTION

1.1 Since the Convention on International Civil Aviation (Chicago – 1944, “the **Chicago Convention**”) was adopted on 7 December 1944, it has played a leading role in the development of the international aviation industry. There are currently no multilateral aviation treaties other than the Chicago Convention which are binding upon all of the Contracting States.

1.2 The Chicago Convention contains a dispute settlement clause in its Article 84. However, its practical application is rare in the event of actual disputes. In this respect, there is a need to examine the actual application of the dispute settlement clause on a practical level and the relevant details as to the application of the clause.

2. ARTICLE IN CHICAGO CONVENTION RELATED TO THE DISPUTE RESOLUTION

2.1 The provisions governing the settlement of disputes in the Chicago Convention are Article 84 - Settlement of disputes, Article 85 – Arbitration procedure and Article 86 – Appeals (see Attachment).

2.2 To sum up, the dispute settlement procedure under the Chicago Convention is as follows:

- a) First of all, negotiation attempts to settle a disagreement between the contracting States are tried.
- b) If the disagreement is not resolved by negotiation, it shall be decided by the ICAO Council on the application of any State concerned in the disagreement.
- c) Any contracting state may appeal from the decisions of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the ICJ. If any contracting State party to the dispute has not accepted the Statute of the ICJ and the contracting States to the dispute cannot agree on the choice of the arbitral tribunal, a compulsory arbitral tribunal shall be formed pursuant to the provisions of Article 85. The decisions of the ICJ and of an ad hoc arbitral tribunal shall be final and binding.

2.3 The important point is that the *jurisdiction razione materiae* that the ICAO Council can handle is limited to the application and interpretation of the Chicago Convention. Of course, if a case deals with matters as to whether bilateral air service agreements or EU Regulations constitutes a violation of the Chicago Convention, matters regarding the application and interpretation of the Chicago Convention are mainly dealt with, along with some possible references to bilateral air service agreements or local legislation, even domestic legislation. Since the ICAO Council is not the International Court of Justice in a strict sense, it is not strictly required to make a decision only based on the sources of the international law in dealing with disputes regarding the application and interpretation of the Chicago Convention; it can consider various sources of law, which differentiates it from the Court of Justice.

2.4 With respect to the hearing procedures at the ICAO Council concerning referred disputes, the ICAO Council adopted the Rules for the Settlement of Differences in 1957. Under the Rules, the Council may request parties to a dispute to participate in a direct negotiation at any stage for the settlement of the dispute. And if the parties to the dispute are in negotiation in response to such a request, the dispute settlement process before the Council as set out in Article 84 of the Chicago Convention is suspended.

2.5 In addition, the ICAO Council may designate organizations as well as individuals that can play a role as appropriate conciliators for successful and smooth negotiations between the parties to the dispute. Further, the Council is allowed to provide other support for the progress of negotiations as it deems necessary. In other words, the ICAO Council performs a fairly active role in resolving disputes through negotiations.

3. **DISPUTE SETTLEMENT CASES UNDER THE CHICAGO CONVENTION**

3.1 It is a very rare case that the dispute settlement mechanism is invoked under the Chicago Convention. Even if the settlement mechanism proceeded, the ICAO Council has never made a decision for a dispute, while the ICJ has made a decision only on the jurisdiction of the ICAO Council. In addition, the Chicago Convention does not clearly provide whether decisions on the jurisdiction of the ICAO Council are subject to appeal; however, the ICJ has held in the Appeal Relating to the Jurisdiction of the ICAO Council Case that such an appeal is also possible.

3.2 The above limitations may be attributable to the following:

- a) In general, a court of justice can forcibly summon a witness or has power to require a witness to attend court, and if one of the parties to a dispute does not appear before court, the court can render judgement in favour of the party present at the court. However, the ICAO Council is only entitled to invite the parties involved in the dispute, but cannot oblige their attendance. In particular, the relevant parties may refuse such an “invitation” by the ICAO Council for negotiation, as it is not a compulsory “summon”, which is a distinctive difference from a court of justice.
- b) The ICAO Council is essentially a “political” institution in its nature, and this is well represented in the relevant provisions such as Articles 84 and 85 of the Chicago Convention and the 1957 Rules for the Settlement of Differences stating the Council’s active role in dispute resolution through non-judicial measures. In other words, the ICAO Council is distinguished from a court of justice in that its role is more focused on non-judicial dispute resolution measures including negotiation, arrangement or mediation rather than its function as a judicial body.

3.3 Whereas the International Court of Justice renders judgement based on a strict interpretation of legal principles in judging an issue, the ICAO Council makes its decision based on its consideration of relevant policies and equity rather than based on a strict application of legal principles, which may imply that the Council is better at facilitating dispute settlement in a sense.

4. ICAO'S EFFORT TO REVISE THE DISPUTE SETTLEMENT SYSTEM

4.1 ICAO is aware of the limitations of the dispute settlement system and as such further to the 37th Session of the Legal Committee, which was held in September 2018, a Working Group for the Review of the ICAO Rules for the Settlement of Differences (“**WG-RRSD**”) was established in 2019.

4.2 The WG-RRSD has since been working on the revision of the ICAO Rules for the Settlement of Differences, considering issues including but not limited to best practices, comparable documentation that is in use for similar purposes elsewhere in the United Nations system as well as international governmental organizations, and in particular the Rules of Court of the International Court of Justice.

5. CONCLUSION

5.1 The Chicago Convention provides a dispute settlement clause in Article 84. However, it is rarely applied on a practical level in the event of actual disputes. Nevertheless, the ICAO Council has until today worked efficiently by assisting and encouraging the parties to engage in further negotiation to settle their disputes. The ICAO Council has offered a viable avenue for contracting States to settle their disputes and thus has been functioning well as a political body. Yet, there is a need to discuss a way to further improve the functioning of the dispute settlement system of the Chicago Convention.

5.2 It is a very rare case that the dispute settlement mechanism is legally invoked under the Chicago Convention. Even if the settlement system proceeded, the ICAO Council has never made a decision for a dispute, as it has been functioning well as a political body by means of negotiation, arrangement, or mediation. In other words, the ICAO Council's role in relation to the non-judicial dispute settlement measures including negotiation, arrangement, or mediation has been working well compared to its role as a judicial body, and it renders its decision based on its consideration of relevant policies and equity rather than based on a strict application of legal principles, bearing significance in facilitating the dispute resolution.

5.3 In an effort to improve the functioning of the dispute settlement system, the ICAO Legal Committee established a WG-RRSD in 2019 to undertake the revision of the ICAO Rules, taking into account, inter alia, best practices, comparable documentation that is in use for similar purposes elsewhere in the United Nations system as well as international governmental organizations, and in particular the Rules of Court of the International Court of Justice.

5.4 When WG-RRSD completes its work, it would be helpful for ICAO to prepare a workshop/seminar at which all Contracting States will have an opportunity to exchange views on the outcomes of the WG-RRSD, especially with regard to the current dispute settlement provisions of the Chicago Convention and how they can be applied in a more efficient way.

APPENDIX

Articles related to the dispute settlement in the Chicago Convention.

Article 84 (Settlement of disputes)

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, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, 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. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

Article 85 (Arbitration procedure)

If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties to the dispute shall name a single arbitrator who shall name an umpire. If either contracting State party to the dispute fails to name an arbitrator within a period of three months from the date of the appeal, an arbitrator shall be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate an umpire from the list previously referred to. The arbitrators and the umpire shall then jointly constitute an arbitral tribunal. Any arbitral tribunal established under this or the preceding Article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.

Article 86 (Appeals)

Unless the Council decides otherwise, any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding”