

The Optional Rules of Arbitration of Disputes Relating to Outer Space Activities of the Permanent Court of Arbitration, a Real Option for the Solution of Conflicts in Space Matters?

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For some years, a project to create optional rules of arbitration of disputes relating to outer space activities had been discussed. The development of this project constitutes a fundamental step in the solution of conflicts in space matters and was adopted in December 2011. Although article IX to XX of the Convention on International Liability for Damage Caused by Space Objects provides a system of solution of conflicts in space activities, this system has been highly criticized and rendered useless. Despite having some elements of arbitration, the failure of this system can be attributed to several major flaws. To begin with, the agreement does not foresee the creation of a real court but of a commission. Secondly, it lacks an adequate system of enforcing the award which is not obligatory until the States then accede to this. Finally, not all aspects of the procedure are clear and only states parties have access to the mechanism. By contrast, the new regulation solves the problems addressed in the liability Convention. The current regulation foresees the creation of a real court with a very precise procedure as well as a strong enforcement of the awards. Also, parties must resign their immunity of jurisdiction, however more importantly, the regulation foresees the possibility of the submission of a diversity of conflicts and not only cases of liability. In addition, the system is flexible and applies to not just countries but also to individuals, which is fundamental in a world in which the development of space activities is exponential.

Therefore, the document seems to be a definitive solution to the « lagoon » in the corpus iuris spatialis that existed in this field and can be in an important mechanism for interested persons and as a model worldwide. The analysis that will be done in this paper will demonstrate that the arbitration in space matters will become the principal method of solution of conflicts in space activities and it is probable that other courts, organisms and chambers of commerce will follow the movement.

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I Introduction

A great deal of potential legal conflicts is foreseeable from the significant development of outer space activities, the privatization of these, with the development of space tourism and international cooperation projects.

Although the Convention on International Liability for Damages Caused by Space Objects (1972) comprises a dispute settlement mechanism, this mechanism has not been really used and especially it does not respond to changes in the spatial reality.

Therefore, it was necessary to find a way to fill this void. Indeed, in several occasions the Convention and its treaties were subject to be amended and others solutions were brought into discussion. In 2009, after long reflections¹, the Permanent Court of Arbitration (PCA) decided to launch the project to create specific rules for outer space matters. The text was developed in conjunction with an Advisory Group of leading experts chaired by HE Fausto Pocar, judge of the International Criminal Tribunal for the Former Yugoslavia. Dr. Tare Brisibe, Prof. Frans von der Dunk, Prof. Joanne Gabrynowicz, Prof. Dr. Stephan Hobe, Dr. Ram Jakhu, Prof. Armel Kerrest, Mrs. Justine Limpitlaw, Prof. Dr. Francis Lyall, Prof. VS Mani Mr. Jose Montserrat Filho, Prof. Dr. Maureen Williams, and Prof. Haifeng Zhao.

This group included many of the most important professors in space law, hence their outcome should be analyzed and studied.

The aim of this paper, rather than making a thorough analysis is to give a schematic overview of the new rules of the PCA and encourage the use of these, for example, in cases of cooperation.

II The Settlement Dispute in the Liability Convention, a Limited Solution

The Liability Convention establishes from article IX to XX, the dispute settlement system. This system is original and comprises a diplomatic phase and another stage before the Claims Committee.

The Diplomatic Stage under the Liability Convention

The Liability Convention imposes for conflict resolution a mandatory first diplomatic stage. We must keep in mind that the liability convention is only aimed at states, that explains the establishment of a diplomatic stage. In some ways this stage can be treated as a prerequisite to initiate a legal stage of dispute settlement solution.

1 Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures, Third International Law Seminar held at the Peace Palace on February 23, 2001, Kluwer Law International, 2002.

This stage takes place as follows:

- The claim for compensation should be presented to a launching State through diplomatic channels
- If the demandant State does not have diplomatic relations with the launching state, it can ask another state to start the diplomatic stage or may request it to the Secretary General of the United Nations.
- The claim must be presented no later than a year following the date of the occurrence of the damage or the identification of the launching State.
- The claim presentation does not require the prior exhaustion of any local remedies, which differs from traditional international law. However, nothing prevents a State or its nationals from filing complaints with the authorities and jurisdiction of the launching State. Yet, it's forbidden to use the settlement dispute of the Convention in parallel.
- The compensation shall be determined in accordance with the principles of international law, justice and equity.
- The resolution to claims must be achieved within the year following the notification, or else, the claim should turn to the next stage.

The Arbitration Stage

- It can be initiated by either party if it fails the diplomatic stage. A Claims Commission is established.
- The Claims commission shall consist of three members, unless any of the countries does not pronounce its choice for one of the members. In which case, the Commission is composed by a single member.
- Each State must choose one member and the third, who fulfills the functions of Chairman, is selected by the States together. If they cannot reach an agreement within four months, the States can request to the UN Secretary General to appoint the Chairman to a further period of two months.
- The commission shall determine its own procedure, the place or places where It shall sit and all others administrative matters.
- All decisions and awards shall be by majority vote
- The Claims Commission decides the merits of the claims for compensation and determines the amount of compensation payable.
- The final decision of the Claims Commission is only a recommendation unless the parties agree for it to be mandatory.
- Once constituted, the Commission has a year to take a decision.

The System Flaws of the Liability Convention

The system established by the Convention, is an *ad hoc* mechanism, which attempts to take into account the specificity of the liability for outer space activities. However, this mechanism is not sufficiently attractive and perfected to be used by States. This is due to several reasons:

- The time of a settlement of dispute can be very long, up to three years and six months and other six more months if it's an international organization².

2 CHENG B., *Studies in International Space Law*, Oxford University Press, 1997, p. 352.

- The Settlement dispute mechanism is reserved for States and international organizations.
- The final decision is not compulsory, therefore the Claims Commission cannot be considered as a real tribunal of arbitration.
- It can only be used if the two States have ratified the liability Convention.
- It is uncertain to decide on the category of law to be applied, when, for example, one of the countries is not a signatory to the space UN treaties.
- Some basic notions from the treaty are hard to disentangle, such as the concept of launching State.
- The difficulty of determining the launching State.
- The settlement dispute mechanism cannot be applied to contractual disputes.

III The Optional Rules, a Real Solution to the Conflicts in Space Matters

The new optional rules of arbitration of disputes relating to outer space activities, adopted December 6, 2011, provides innovative solutions to the shortcomings of the Liability Convention. Several important points can be highlighted:

The Flexibility of the Process

- In the introduction of the optional rules, the first indication given is that the regulation is based on the 2010 UNCITRAL Arbitration Rules, which is guaranty of a modern arbitration. In addition, the optional rules are also characterized by their flexibility and party autonomy.
- It gives freedom to the parties to choose the number of arbitrators.
- The parties may modify the rules to what they agree (Art. 1).
- The characterization of the dispute as relating to outer space is not necessary for jurisdiction where parties have agreed to settle a specific dispute under these rules. Thus avoiding endless discussions to decide whether it is an outer space activity or not, and the decision is left to the discretion of the parties (Article 1).
- The arbitration tribunal sets its own procedures provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case (Article 17).
- There is freedom to pick the site of arbitration (Article 18) and the language to be used (art. 19)

Persons Entitled to Use the Optional Rules

- It is in the introduction that the regulation seeks to adapt arbitration to the particular characteristics of disputes having an outer space component involving the use of outer space by States, international organizations and private entities. This constitutes one of the major advances since it allows the use of rules by private persons, even when this is not the usual before the PCA³.

3 Von der Dunk F, settlement mechanisms Space for Dispute - Dispute Resolution Mechanisms for space? A few legal considerations, (2001). Space and Telecommunications Law Program Faculty Publications. Paper 38. <<http://digitalcommons.unl.edu/spacelaw/38>>, p. 450.

- The creation of a list of arbitrators and a list of experts in space law, which is a very important advancement.

Types of Disputes Comprised

- The first article provides that the optional rules can be used in litigation on contractual and non contractual matters. This is also a very important because unlike the liability convention, here it is possible to submit, to the arbitration tribunal, contractual issues.
- Another important innovation comes from the possibility of using the rules for resolving disputes between two or more States-parties to a multilateral agreement relating to the use of outer space or access to the interpretation or application of that agreement, obviously with an international *inter alia* effect. This means that, in a sense, complying arbitration tribunals will become the leading interpreters of the UN treaties, which means greater relevancy to their decisions.

The Effect of Awards

- All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay (to rt. 34)
- Awards or judgments must be adopted by the majority of arbitrators (art. 33)

Applicable Law

- The parties can choose the applicable law to the case
- If the parties fail to decide, the arbitration tribunal will choose whether to apply national or international law.
- The arbitrators must take into account the contract provisions and international trade practice (art 35).

IV Conclusions

After the analysis of the two systems of dispute resolution on outer space matters several conclusions can be drawn:

- The two mechanisms coexist and the mechanism of the Liability Convention is still in force.
- Each mechanism has its advantages, it is up to the parties to choose the most favorable system.
- The new rules of the PCA are an optimal solution to the conflicts arising from space activities as it takes into account not only the evolution of arbitration, but also the evolution of space activities and actors in space matters.
- The optional rules are a very important tool because its flexibility accommodates all needs regarding justice in the space activities.
- It can be expected that in case of international cooperation and agreements on provision of services and the selling of spatial technology, the reference to the optional rules will be automatic.
- Certainly the arbitration tribunals judgments will build very important precedents and will allow a very positive evolution of space law and its basic concepts.
- States, organizations and individuals should follow these rules as it is a real option for the solution of conflict.