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RESOLUTION OF DISPUTES ARISING IN OUTER SPACE

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Abstract

This paper discusses the legal framework for the resolution of disputes arising in outer space. The paper reviews existing national and international laws relating to dispute resolution, including the 1967 Outer Space Treaty, the 1973 Liability Convention, the 1988 Space Station Agreement, the 1984 International Law Association draft Convention on the Settlement of Space Law Disputes and United States laws which govern international arbitration. The paper also discusses institutions which provide possible forums for resolution of space disputes, including the International Court of Justice, international arbitration organizations, and municipal courts. The paper concludes that arbitration is the best forum for the resolution of disputes between private parties, and recommends improvements in the laws and procedures governing international arbitration.

Introduction

For many years, international lawyers have discussed methods of resolving disputes which relate to outer space.[1] Ultimately the volume of activity in outer space will increase, and institutions, laws and procedures for the resolution of disputes will have to address the unique aspects of this field. This article begins with a review of existing international laws which relate to dispute resolution, including the 1967 Outer Space Treaty,[2] the 1973 Liability Convention,[3] the 1988 Space Station Agreement,[4] and the 1984 International Law Association draft Convention on the Settlement of Space Law Disputes.[5] The article then discusses international arbitral organizations and recommends some procedural changes which would enhance those institutions' utility as a forum for space disputes. The final section of the article discusses United States arbitration laws and the UNCITRAL Model Law.[6] The paper concludes with recommendations for changes to the United States' statutes.

Existing International Law

Two of the broadly accepted multilateral space treaties have provisions which relate to disputes: the 1967 Outer Space Treaty and the 1973 Liability Convention. Another treaty with fewer signatories, the

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1988 Space Station Agreement, provides an example of current approaches to dispute resolution.

The Outer Space Treaty

Article VI of the Outer Space Treaty says that "States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities . . . ." Article VII of the treaty says that "Each State Party to the Treaty that launches or procures the launching of an object into outer space . . . and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies." Article IX of the treaty says "In the exploration and use of outer space . . . , States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities . . . with due regard to the corresponding interests of all other States Parties to the Treaty."

Finally, Article IX says:

"If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals . . . would cause potentially harmful interference with activities of other States Parties, . . . it shall undertake appropriate international consultations before proceeding . . . . A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party . . . would cause potentially harmful interference with [it or its nationals'] activities . . . may request consultation . . . ."

The Outer Space Treaty does not provide a procedure for resolution of disputes, other than the consultations required by Article IX. However, Article III says that parties to the treaty shall carry on activities "in accordance with international law, including the Charter of the United Nations. . . ." Article 33 of the U.N. Charter says that parties shall first "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." In the event that such means fail to achieve a resolution of the issue, Article 36(3) indicates that "legal disputes should as a general rule be referred by the parties to the International Court of Justice . . . ."

Of the dispute resolution methods suggested by Article 33, only two result in a binding decision: arbitration, and adjudication by the International Court of Justice. The U.N. Charter does not make either procedure compulsory. However, Article 36(2) of the Statute of the International Court of Justice (a part of the U.N. Charter) allows parties to declare that they recognize the Court's jurisdiction as compulsory.

The United States declared its acceptance of the Court's jurisdiction under this provision in 1946. However, the United States withdrew the declaration in 1985, in response to the court's disposition of the case *Nicaragua v. United States*. In its formal explanation, the United States offered the following reasons for its withdrawal: (1) the majority of other nations had never accepted the Court's compulsory jurisdiction; (2) the Court had been

misused for political reasons; (3) continued acceptance of the Court's jurisdiction was contrary to the United States' commitment to the principle of equal application of the law; and (4) continued acceptance of the Court's jurisdiction would endanger the United States' vital national interests.[7]

Other nations share similar views, and very few states have declared themselves subject to the Court's compulsory jurisdiction.[8] In fact, "[n]ot a single State with remarkable space activities has recognized the jurisdiction of the International Court of Justice according to the optional clause . . . ."[9] It is therefore not surprising that states have not utilized the Court to the extent which parties anticipated when the United Nations Charter was drafted.

The Liability Convention

The Liability Convention is the other multilateral space treaty which addresses the issue of disputes. The Liability Convention says, in Articles I and II, that a state which launches or procures the launching of a space object, or from whose territory a space object is launched, shall be absolutely liable for damage caused by its space object on the surface of the Earth or to aircraft in flight. With respect to damage caused in outer space or on celestial bodies, however, states are not absolutely liable but rather are liable on the basis of fault (Article III).

The Convention allows states to assert liability claims on their own behalf, or on behalf of corporations or individuals (Article VIII). The treaty specifically allows states to pursue claims in the municipal courts or administrative agencies of a launching state, but prohibits states from submitting claims pursuant to the Conventions' procedures during the time when they are pursuing their claim in local venues (Article XI).

Claims submitted under the terms of the Liability Convention must be presented to the launching state(s) through diplomatic channels (Article IX) within one year of the date on which the damage occurred (Article X). If the parties do not reach a settlement within one year from the date on which a claim is received by the launching state, then, at the request of either party, they must establish a Claims Commission (Article XIV). The Claims Commission is composed of three members: one chosen by each state and a chairman chosen jointly by both parties (Article XV). The Claims Commission must decide the merits of the case and the amount of compensation, if any (Article XVIII), on the basis of majority vote (Article XVI), within one year (Article XIX).

Article XIX of the treaty says that the Claims Commission's decision will only be binding if the parties so agree. Otherwise, the Commission's decision is only a recommendation which the parties must consider in good faith.

Many scholars have noted that the Liability Convention's procedures are not compulsory. They also observe that private parties must rely on the willingness and cooperation of states to assert their claims. As a result, the treaty's procedures will not necessarily resolve all of the disputes which arise, and the decisions which are rendered may not be enforceable.

One writer has compared the remedies offered by the Liability Convention to litigation in municipal courts. With respect to the Liability Convention, he observes that: (1) governments may not assert claims because of political considerations,

to the detriment of private parties; (2) the Claims Commission may define damages narrowly, resulting in smaller awards than one could expect in some municipal courts; and (3) diplomatic negotiations may proceed indefinitely because the Claims Commission is only formed if one of the parties so requests. The writer contrasts these aspects of the Liability Convention with the familiar uncertainties and complexities of international litigation, which include jurisdictional questions, sovereign immunity, the doctrine of forum non conveniens, and choice of law. He concludes that municipal litigation is subject to less uncertainty than the Liability Convention procedures, and therefore "provides the most beneficial avenue for recovery for private claims."[10]

The Space Station Agreement

The Space Station Agreement was drafted much more recently than the Outer Space Treaty and the Liability Convention, so it provides some indication of current approaches to dispute resolution. The agreement was drafted by the United States, Japan, Canada and member states of the European Space Agency, to coordinate the design, development, operation and utilization of Space Station Freedom. It was signed by the parties in 1988.

Article 5 of the agreement requires each Partner to register as space objects the elements of the station which it provides. Each Partner then retains jurisdiction and control over the elements which it registers, and over personnel in or on the station who are its nationals. In exchange for Partners' contributions to the station, each is accorded the right to use other Partners' station elements for a fixed percentage of the time that the elements in question are available for use (Article 9).

Article 16 of the agreement establishes a cross-waiver of liability for station Partners, their contractors, subcontractors at all tiers, and all employees and suppliers of those entities. The waiver applies to all launch vehicle activities, Space Station activities, payload activities in transit, and payload activities on Earth, including further development of payload products or processes in implementation of the Space Station agreement. Partners are required to extend the waiver through contract provisions (or other means) to contractors and, presumably through flow-down provisions, to subcontractors.

Intellectual property claims, wrongful-death claims, and claims for damage caused by willful misconduct are specifically excluded from the cross-waiver. Claims between a Partner State and its own related entities (e.g. contractors and subcontractors) are also excluded. Provisions for the protection of intellectual property are included elsewhere in the agreement, in Article 21. Wrongful-death claims, claims alleging willful misconduct, and claims between a Partner State and its entities, however, must be resolved outside the terms of the Space Station Agreement.

In addition to claims arising from exceptions to the cross-waiver, Partner States remain liable under the Liability Convention for claims brought by third parties.[11] Article 17 of the Agreement specifically incorporates the Liability Convention, and says that Partner States shall promptly consult with each other if a third party brings a claim for damages under the Convention. Article 17 further provides that Partners may enter into

"separate agreements regarding the apportionment of any potential joint and several liability arising out of the Liability Convention" with respect to the launch and return services provided by NASA to other Partners and their users.

The Space Station Agreement requires consultation in the event of disputes even if no third party is involved. Specifically, partners must use their "best efforts" to settle disputes through consultation among themselves. Partners may request governmental-level consultations. If an issue cannot be resolved through consultation, the Agreement says that Partners *may* submit to an agreed form of dispute resolution, such as arbitration.

Thus, the Space Station Agreement avoids many disputes through its cross-waivers and intellectual property provisions, but it still does not provide for compulsory, binding dispute resolution. Although some countries proposed an arbitration provision, the United States would not agree to its inclusion in the agreement. In the opinion of Edward Frankle, the General Counsel of NASA "[t]he United States has been consistently opposed to binding mechanisms, such as arbitration, in any of its international agreements and to having disputes settled by one set of courts over another. Disputes are usually resolved by negotiation in the political process and that is expected to continue."[12]

The ILA Draft Convention

There are several international agreements concerning space communications which contain compulsory arbitration provisions, including the INTELSAT, INMARSAT and EUTELSAT agreements.[13] However, as Professor Bockstiegel has noted, "[s]uch binding dispute settlement is only found in very specific instruments for highly limited areas of space activities"[14] "where functioning of the system is in the interest of all states concerned, and depends on disputes being settled without delay."[15] Because an increasing number of states and private enterprises are active or interested in space activities outside the sphere of communications, many space lawyers believe that a new multilateral agreement is necessary which will establish dispute resolution procedures for all areas of space activity.[16]

In 1984 the Space Law Committee of the International Law Association completed a draft "Convention on the Settlement of Space Law Disputes." The ILA Draft Convention uses dispute resolution provisions in the Law of the Sea treaty and its annexes as a model, with adaptations for application to outer space.

The Convention applies to all activities in outer space or with effects in outer space. It is based on reciprocity, in that it only allows a Party to benefit from the treaty "insofar as it is itself bound." The Convention does not apply to disputes which the parties have agreed to resolve in accordance with the procedures of another agreement, so long as those procedures result in binding decisions (Article 1).

The Convention offers the parties a spectrum of non-binding and binding procedures. It first obligates parties to exchange views and, if possible, to negotiate a settlement (Article 3). If negotiations are not successful, either party may invite the other party to submit the dispute to conciliation (Article 4). If these non-binding methods are unsuccessful, then either party has the option of requesting binding resolution of the dispute.

Pursuant to Article 6, parties may choose by declaration one or more of the following dispute resolution methods: adjudication by an "International Tribunal for Space Law," adjudication by the International Court of Justice, and arbitration in accordance with the procedures established by the Convention. Parties may submit a declaration at the time the agreement is signed or at any time thereafter; a party which is involved in a dispute not covered by a declaration shall be deemed to have accepted arbitration. If parties to a dispute have submitted declarations choosing different methods, then the dispute may only be submitted to arbitration unless the parties otherwise agree.

The "International Tribunal for Space Law" is a forum which is analogous to the International Tribunal for the Law of the Sea, except that the space law tribunal is only established if and when the parties choose to do so.[17] The Convention sets forth extensive procedures for the space law tribunal, for conciliation and for the arbitral tribunal.

In general states have been reluctant to submit to compulsory, binding procedures. Most states view such arrangements as a relinquishment of sovereignty,[18] and fear that arbiters will allow political considerations to influence their decisions.[19] By giving parties various options for dispute resolution, the ILA Draft Convention addresses nations' concerns, at least to an extent. The fact that national delegations favor further efforts to finalize the Convention support that view.[20] Nonetheless, this author believes that it will be many years before such an agreement enters into force.

International Arbitration

In the absence of an agreement establishing binding procedures for the field of space law, it is likely that most states will continue to resolve their disputes through diplomacy. It is unlikely, however, that private parties will rely on state governments to resolve their disputes. Private parties that have already had disputes have resorted to other venues. Many have filed claims in United States courts,[21] while at least one dispute has been submitted to international arbitration.[22]

In the broader field of international disputes, most private parties prefer arbitration over litigation. There are many reasons for this preference. Arbitration is confidential. It allows parties to select an arbitrator that they view as impartial, who has expertise in the subject matter of the dispute. Arbitration also avoids much of the complexity and uncertainty inherent in international litigation. Typically, jurisdiction, choice of forum and choice of law are not at issue in international arbitration, because parties have already resolved those issues, either by contract before the dispute arises or by agreement after the dispute arises.[23] Finally, arbitration tends to be quicker and less expensive.

There are many institutions around the world that administer arbitrations. These institutions include the American Arbitration Association, the International Centre for the Settlement of Investment Disputes, the London Court of International Arbitration, various national centers for international arbitration, and the most prominent, the Court of Arbitration of the International Chamber of Commerce (the "ICC"). The caseloads of all of these institutions have increased in

recent years, presumably for the reasons discussed above.

International arbitration does have its drawbacks, however, particularly as a forum for space law disputes. The first problem has to do with institutions' competence to hear space law disputes. All of the institutions listed above define the types of disputes which they will administer. In most cases arbitral organizations interpret those definitions liberally. The ICC, for example, only accepts "commercial" disputes, but as a practical matter, accepts virtually any dispute which is submitted for arbitration. Nonetheless, some parties may not choose to arbitrate space law issues because they do not believe that a given dispute falls within the categories of disputes eligible for arbitration.

A second weakness in the current scheme is the disputants' and arbitral forums' unfamiliarity with the field of space law. While many disputes arising in outer space will involve questions of contract interpretation or other issues which do not differ from terrestrial disputes, some will present questions which are unique to the field of space law. In those cases, parties to the dispute, and even the arbitral institution, may not know which arbitrators are best suited to resolve the dispute.

The final problem is that arbitration does not establish the precedents which court rulings provide.[24] Arbitral decisions are not published, and in some cases the arbitrator is not required to give the parties a written rationale for its decision. Consequently, even the parties to the dispute may not understand how to govern their conduct in the future, to avoid further disputes. This is unfortunate, because space law is a relatively new field with many unsettled questions, where legal opinions would be especially valuable.

These drawbacks can only be remedied through the voluntary action of the arbitral institutions. But the remedies are simple, and would seem to be in the institutions' best interest, because the most accommodating organizations will receive the most business.

Institutions could begin by specifically defining space law disputes as a category of claims which they will accept for arbitration. They could also develop a list of arbitrators with expertise in space law, to assist parties in selecting arbitrators. Finally, these institutions could establish a procedure for the publication of legal findings which would preserve the privacy and anonymity of the parties, while still providing non-binding precedents for the aerospace community.

United States Law

Another way to facilitate arbitration of space law disputes is to ensure that national laws encourage arbitration in general, and arbitration of space law disputes in particular. This section examines the law governing arbitration in the United States.

In 1970 the United States ratified the New York Convention which provides for recognition and enforcement of foreign arbitral awards.[25] In the same year, the United States enacted Chapter 2 of the Federal Arbitration Act (the "FAA"), which sets forth the procedures necessary for courts to implement the treaty.[26] Chapter 2 says that federal courts have original jurisdiction over actions or proceedings falling under the New York Convention. It provides for

removal of cases from state courts, and sets forth procedures for recognition and enforcement of foreign arbitral awards.

Chapter 1 of the FAA predates Chapter 2. It was enacted in 1925 to further the federal policy favoring arbitration. It contains provisions which ensure that agreements to arbitrate will be enforced and establishes procedures which allow federal courts to resolve disputes arising under arbitration clauses. Chapter 1 applies to maritime transactions and contracts involving interstate and foreign commerce.[27]

At the local level, most states have adopted the Uniform Arbitration Act ("UAA")[28] which provides for judicial enforcement of domestic arbitration procedures and awards. These state laws complement the Federal Arbitration Act. However, the FAA and related case law do not satisfactorily explain to what extent the federal law preempts the state laws, to the extent that they are inconsistent.[29]

Case law has determined that the FAA does not occupy the field of arbitration and seems to indicate that it only preempts state laws insofar as those laws do not ensure the enforcement of arbitration agreements and awards.[30] This line of cases allows states to enact and apply their own procedures for both domestic and international arbitrations, although the procedures set forth in Chapter 2 of the FAA will apply in federal court with respect to maritime cases and disputes involving interstate and foreign commerce.[31] This means that procedures governing international arbitration will differ in federal and state courts and from one state to another within the United States.

This inconsistency is complicated by the adoption of the UNCITRAL Model Law,[32] in part by Florida, Connecticut, and Texas, and with only minor changes by California.[33] The Model Act was drafted by the United Nations Commission on International Trade Law (UNCITRAL). It "establishes a unified practice and procedure for arbitration of international commercial disputes" and "was intended to serve as a model for national laws in countries without arbitration law or where existing law needed modernization." United States representatives participated in drafting the Model Law and were generally satisfied with the result.[34]

The Model law is a "code," in the civil law tradition, and is therefore more comprehensive than either the UAA or the FAA. It addresses many problems that arise only in the context of international arbitration, and is familiar to arbitrators throughout the world.[35] Because it reduces uncertainty, adoption of the Model Law will tend to make a jurisdiction more attractive as a location for arbitration.

Should the United States adopt the Model Law at the federal level? Or should it leave it to the states' discretion to adopt the law as they see fit? One must consider which option will be the most beneficial for the institution of international arbitration and which will encourage the most parties to arbitrate their disputes in the United States. Because the federal government has a significant interest in international commerce and arbitration, one can argue that the United States should adopt the UNCITRAL Model Law or some variation thereof at the federal level. The United States would thereby preempt the field of international arbitration and preclude the development of a bewildering array of differing state arbitration laws.

The United States could make one more modest change to the Federal Arbitration Act which would benefit arbitration of space law disputes. The legislature could amend the FAA so that it specifically applies to outer space activities. In various sections the Act already says that it applies to maritime disputes. Because the federal government has occupied the field of maritime law, this means that state courts must apply the FAA to maritime disputes.[36] Amending Section 2 of the FAA to specifically refer to space activities would make it clear that the Act applies to space disputes. Also, if the federal government ever occupies the field of space law, state courts would then have to apply federal arbitration laws to space law disputes, in the same way that they apply federal law to maritime disputes.

Conclusion

This article has reviewed the international laws relating to space law disputes. Because existing law does not provide for binding dispute resolution, and because it may be some time before such laws are adopted, the author has examined international arbitration as a forum for the resolution of private disputes.

The author concludes that international arbitral organizations could facilitate arbitration of space disputes by (1) specifically defining space law disputes as a category of claims which they will accept for arbitration, (2) developing lists of arbitrators skilled in space law, and (3) establishing procedures for the publication of legal findings which would preserve the privacy and anonymity of the parties while still providing non-binding precedents for the aerospace community.

This article also reviewed United States laws relating to international arbitration. In this connection, the author observed that differing state laws could make the United States an unfavorable location for international arbitration. To encourage parties to arbitrate in the United States, the author suggests that it may be advisable for the United States to adopt the UNCITRAL Model Law at the federal level, and thereby preclude the development of disparate state laws. The author also suggests that the United States amend the Federal Arbitration Act so that it specifically applies to outer space activities.

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