

## **LESSONS LEARNED FROM JAPANESE SPACE ACTIVITIES AND EXPERIENCES WITH DISPUTE SETTLEMENT: THE NEED FOR APPROPRIATE DISPUTE PREVENTION AND SETTLEMENT MEASURES IN REGULATING SPACE ACTIVITIES**

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### **Abstract**

The Japanese space community recently experienced dispute settlement at the court level for the first time in its history. A dispute arose between the National Space Development Agency of Japan (NASDA) and the Government of Japan as represented by the former Ministry of Transport (currently the Ministry of Land, Infrastructure and Transport pursuant to the central government reforms of January 6, 2001) over the final payment of a launch services fee. NASDA submitted the resolution of this dispute to civil conciliation, at the Tokyo District Court, in accordance with a procedure set forth under the Civil Conciliation Law of Japan.

Although this conciliation case was purely domestic and restricted to the Japanese public sector, I believe that it raises some important points about dispute settlement for space activities. In this paper, among other things, I emphasize the importance of ensuring that the dispute prevention measures do not themselves generate

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disputes in similar cases. Emphasis is also placed on the elaborate consultation mechanism as part of the pre-conciliation or arbitration measures. In addition, I suggest certain considerations to be made in thinking about alternative dispute resolution (ADR) measures, such as the necessity of establishing a specific body for ADR on space activities, and the importance of involving experts on space law, space technology, and customs for international space activities in the ADR mechanisms to obtain proper and efficient judgment.

### **1. Summary of the Conciliation Case between NASDA and the Japanese Government**

#### **(1) Outline of Conciliation Procedure**

On September 13, 2000, NASDA (a Special Public Institutions with a legal status that differs from the Japanese government) submitted a dispute against the former Japanese Ministry of Transport ("MOT") to civil conciliation at the Tokyo District Court. This conflict with the Government concerned the final payment of a launch services fee, under a launch services contract whereby NASDA agreed to use its H-2 launch vehicle to put the government-owned MOT's satellite into orbit. It was the first time for

NASDA to undertake the launch of others' satellites since its foundation in 1969. Several submission of pleadings and evidence were made by each party, and oral hearings were held at the Court, until the conciliation was finally concluded on March 21, 2001.

## **(2) Civil Conciliation in Japan**

First, I should briefly introduce the mechanisms of civil conciliation in Japan. Civil conciliation is a procedure involving a conciliation committee, composed of a judge and two or more members, which mediates between the disputing parties with the aim of resolving the dispute in a reasonable manner, based on the spirit of give and take. When the two parties reach an agreement on the resolution of their dispute, and the results are entered into the court record, this entry will have the same validity as a final judgment of the court. In principle, all the procedures are made behind closed doors.

In Japan, civil conciliation is the most popular of all ADR measures. The judicial procedures to be followed for conciliation are stipulated in the Civil Conciliation Law.

As you may imagine, it is very rare that a public sector conflict like this one is resolved in court or even through conciliation. In this sense, the case was very extraordinary, so its result would not necessarily be binding for future disputes in general.

## **(3) Brief History of this Case**

On November 21, 1995, the MOT signed a launch services contract with NASDA. This contract was intended to put the MOT's Multi-purpose Transportation Satellite (MTSAT) into orbit, as a successor of the currently-operational geostationary meteorological satellite named GMS-5, with the help of NASDA's H-2 launch vehicle. When NASDA failed in its attempt to launch the MTSAT into orbit on November 15, 1999, the MOT suspended payment of the remaining 3.5 billion yen (approximately USD 30 million) that represented final payment on the total launch services fee of 10 billion yen (approximately USD 80 million, on the basis that these services were not performed properly as evidenced by the launch failure. NASDA objected to this claim, insisting that the contract did not guarantee a successful launch, and its legal obligation was performed simply by furnishing launch services in accordance with the contract.

In order to settle this controversy NASDA and the MOT sought resolution by means of mutual consultation over the course of several months. Furthermore, in this consultation process, the relevant department of the former Science and Technology Agency (currently the Ministry of Education and Science and Technology) also consulted with the MOT, which supervises NASDA. Through these consultations, however, it became clear that there was a crucial difference of interpretation over the contract between the parties. Although NASDA sought to persist in resolving this matter through consultation, the MOT strongly

desired to resolve this issue through civil conciliation as the agreed form of dispute resolution in the contract, to obtain the benefit of a reasonable judgment made by an appropriate and neutral third party.

In Japan, there are numerous public organizations that engage in arbitration, conciliation, intermediary arrangement and other forms of ADR for specific fields, such as the Environmental Disputes Coordination Commission, the Labor Relations Commission, the Construction Disputes Committees, the Japan Consumer Information Centre, etc. There is, however, no such public organization dedicated to space activities.

Therefore, both parties and the supervising Ministries determined to finally settle this dispute by judicial civil conciliation, and NASDA submitted the issue to civil conciliation at the Tokyo District Court pursuant to the relevant clause in its contract.

From the commencement of this conciliation process, several submissions of pleadings and evidence were made by each party, and oral hearings were conducted in the Court on seven separate occasions. In addition, unofficial consultations were held amongst representatives from both parties (i.e., the Ministry of Justice for the Government and some private Law Firms for NASDA) along with the Conciliation Committee members composed of a judge and two civil mediators, to seek a reasonable solution and reduce the time consumed.

#### **(4) Result of the Conciliation Case**

On March 21, 2001, this dispute was resolved when the Government and NASDA accepted a conciliation plan proposed by the Conciliation Committee of the Court, and its contents were entered into the court record. This resolution precluded civil litigation, which would consume much time as a "ten years battle" without any guarantee of a favorable judgment from the court. The conciliation plan seemed to be mainly based on the Committee's interpretation of the relevant contractual clause, following the principles of Japanese contract law. Several related aspects, like technical facts, international customs, and so on were also considered by the Conciliation Committee.

Because this resolution has the same validity as a final court judgment, the Government was obliged to execute its contents as follows:

- (a) The launch services contract signed by both parties is performed upon putting the satellite into a transfer orbit.
- (b) Services to be provided by NASDA can be categorized into two different categories: (i) manufacturing a launch vehicle and (ii) launch services. Because NASDA completed the manufacturing part, it has the right to claim payment for all the costs incurred. On the contrary, because the launch services part was not completed due to the failure of putting the satellite into a transfer orbit, NASDA may not claim payment for its costs in this connection.
- (c) Therefore, the Ministry of Land, Infrastructure and Transport

should reasonably pay to NASDA approximately 2.6 billion yen, corresponding to the costs of manufacturing a launch vehicle, out of the final expected payment of 3.5 billion yen. The balance of 900 million yen was regarded as the costs for launch services that could not be claimed.

- (d) Any other credit or debt between the parties does not affect this contract.

Thus, soon after this dispute resolution was made, the Government paid the above amount to NASDA.

## **2. Dispute Prevention Measures and the Consultation Mechanism as Pre-Conciliation /Arbitration**

Before considering ADR, we need to think about dispute prevention measures, as a way of avoiding the dispute itself. For example, concerning the conciliation case outlined above, the dispute between these parties might have been prevented by more careful attention to the terms of their contract. It would have been effective to ensure clearer terms and conditions, especially as to their legal rights and obligations in the contract, as well as to include a waiver clause for technically uncertain elements when in the business of offering launch services. From this point of view, NASDA is presently considering preventive guidelines, mainly composed of the following items, to avoid similar disputes in the future.

### **(1) Clear Terms & Conditions**

One of the reasons for this dispute seemed to be uncertainty

surrounding the terms and conditions of the contract. In future, NASDA shall include a clause in any contract or agreement for launch services concluded with customers, whether domestic or foreign, or government or private entities, to the effect that;

- (a) The responsibility of NASDA in providing services under the launch services contract is considered to be accomplished by NASDA once the order of ignition of the first stage engines of the launch vehicle has taken place, regardless of success or failure of the launch.
- (b) Once this responsibility of NASDA is accomplished, the customer becomes obligated to pay for the entire fee to NASDA under the launch services contract.

### **(2) Waiver of Liability**

Even if a party who lost its satellite due to launch failure becomes obligated to pay the entire launch fee as described above, that party can legally include the contractual fee as part of its damages suffered, which can be made subject to compensation based on tort law principles. Therefore, we need to include a waiver of liability clause in the launch services contract, such as:  
NASDA is not liable for any damages incurred by the customer arising from the implementation of this contract, except in the case of willful misconduct by NASDA.

### **(3) Consultation Mechanisms**

No matter how well we prepare in advance for dispute prevention measures, it is impossible to avoid all disputes. It would be helpful to develop an appropriate consultation mechanism as pre-conciliation or arbitration, in order to avoid unnecessary expenditures of time and money. A special disadvantage for space activities is to take the valuable time of technical experts or scientists working for disputing parties in the settlement dispute process.

In the conciliation case described above, there was only a general consultation clause in the contract as follows:

“The parties agree to consult with each other when a question of terms of this contract or their interpretation occur;” and,  
“For any question which has not been settled in consultation, either party may refer to civil conciliation at the Tokyo District Court.”

I believe that this dispute settlement mechanism cannot work well enough, because the description of a consultation mechanism is very vague as opposed to the conciliation specifically provided in the contract. Under such a mechanism, either party is likely to rely on conciliation without consultation to save time, since the vagueness of the latter contractual obligation does not prescribe any specific obligations to co-operate or otherwise move closer to resolution.

Therefore, the contract should have a specific consultation mechanism, as the one employed in the

Memorandum on Understanding (MOU) between the Government of Japan and the United States National Aeronautics and Space Administration (NASA) on the International Space Station. According to Article 18 of the MOU concerning consultation and the settlement of disputes, any question of implementation regarding that agreement will first be referred for settlement to certain officials designated by the Japanese Minister of Education and Science and Technology and the NASA Administrator, respectively; if it is not settled at that level, the dispute will next be referred directly to the Japanese Minister of Education and Science and Technology and the NASA Administrator. This level-up method is ordinary applied to agreements between NASDA and NASA, and it seems to have worked well so far. By this method, rather than a vague consultation mechanism, officials charged with consultation under the agreement may operate under stronger pressure to settle by consultation.

### **3. Need for ADR**

If a dispute nevertheless arises and cannot be settled by consultation, we must rely on lawsuits or ADR such as conciliation or arbitration.

Unlike rigid judicial procedures, ADR makes it possible to respond flexibly: with resolutions that recognize autonomy; resolutions that may be concluded behind closed doors to protect privacy and business secrets; resolutions that are simple and prompt and achieved at low cost; resolutions that are fine-tuned and make use of expert knowledge from various fields; and resolutions that

are made in line with actual circumstances regardless of legal rights and obligations.

In a highly-specialized field like space activities, I believe that technical and other experts must be substantially involved in ADR mechanisms, because any reasonable resolution needs to be informed by knowledge of technology and science, space law systems, and international customs in this area to settle disputes properly and efficiently.

### **(1) ADR for Specialized Areas in Japan<sup>1</sup>**

Although there is no ADR mechanism specific to space activities, Japan has institutional ADR for other specialized areas.

The major dispute resolution system is the judicial system, which is represented by civil litigation, but there are other systems administered by a neutral third party. Various ADR bodies include;

- (a) administrative hearings conducted by quasi-judicial organizations such as patent hearings by the Japanese Patent Office, or marine accident hearings by the Marine Accidents Inquiry Agency; and
- (b) the following organizations engaged in arbitration, conciliation, intermediary arrangement, etc.:
  - public organizations such as the Environmental Disputes Coordination Commission, the Labour Relations Commission, the Construction Disputes Committees, the Japan

Consumer Information Centre, etc.; and  
-private organizations such as the Japan Commercial Arbitration Association, Japan Shipping Exchange, Inc., the Japan Centre for Settlement of Traffic Accidents Disputes, the Japan Credit Counseling Association, etc.

Also, the arbitration centres managed by various Bar Associations, and the Arbitration Centre for Industrial Property jointly established by the Japan Federation of Bar Associations and the Japan Patent Agents Association, are classified as ADR's.

### **(2) Involvement of Space Law Experts in the ADR**

There are some options to involve experts in the ADR process<sup>2</sup>. The most efficient way, from the viewpoint of cost and time, is to appoint experts as mediators or arbitrators. This option seemed to be applied in the Eurocontrol Draft Arbitration Policy. The second option is to appoint an expert to sit with the arbitral tribunal. The Final Draft of the Revised Convention on the Settlement of Disputes Related to Space Activities, as amended at the 68<sup>th</sup> ILA Conference in 1998, employs this option. A third option is to have an expert provide professional evidence, as set forth in the IATA Arbitration Rules or the ESA Convention.

Any option will be very beneficial for dispute settlement in space activities and we should apply any of these options in the ADR process. Although the second option would

require greater investments of cost and time than the first and third options, I feel it is the most practical to operate.

#### 4. Conclusion

Dispute settlement becomes an increasingly important issue in space activities around the world, because many problems due to inexperience will likely occur in the future. Energetic efforts to establish a dispute settlement mechanism specially dedicated to space activities, such as the ILA Draft Convention on the Settlement of Disputes related to Space Activities, have already been made. Meanwhile, the occurrence of actual dispute settlement cases, like the Japanese conciliation described above, tends to increase as space activities progress and change their character towards commercialization. As a practitioner in space development, I hope to achieve greater synergy by an exchange of views and information between academic experts and practitioners of space law for the purpose of developing practical dispute settlement mechanisms in this unique field.

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infrastructure arrangement by defining the role of the judiciary for Japan in the 21<sup>st</sup> century. The agenda of the Council may include the realization of a more accessible and user-friendly judicial system, public participation in the judicial system, a definition of the legal profession and the reinforcement of its function.

The outline of recommendations can be seen at its web site:<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

<sup>2</sup> "Composition of Arbitral Tribunals: The Need for Experts" presented for the International Law Seminar "Arbitration in Air and Space Law including Telecommunications Activities: Enforcing Regulatory Measures" organized by the Permanent Court of Justice, The Hague, on February 23, 2001, by Prof. Gabrielle Kaufmann-Kohler, University of Geneva

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<sup>1</sup> On June 12, 2001, the Justice System Reform Council in the Cabinet reached a conclusion, after two years of deliberations, entitled "Recommendations of the Justice System Reform Council -For a Justice System to Support Japan in the 21<sup>st</sup> Century." Among other items, the Council made recommendations on the reinforcement and vitalization of ADR mechanisms. This Council was established under the Cabinet in July 1999 to deliberate upon legal reform. Its statutory mission is to consider fundamental measures necessary for judicial reform and judicial