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Dispute resolution mechanism for damage caused by space objects

Armel Kerrest
Professeur des universités

Institut de Droit des Espaces internationaux et des Télécommunications
Université de Bretagne Occidentale
B.P.816 - F 29285 Brest cedex France
Armel.Kerrest@univ-brest.fr

Introduction

After these brilliant presentations by my predecessors, I will try to follow a practical path in order to organise my few remarks on this so interesting issue of dispute settlement.

Of course, we can hope that no dispute will occur, but we all know that whatever the good faith of every one may be, in some cases, it may be difficult or impossible, when an accident had happened, to obtain an agreement without using a settlement of dispute mechanism.

Moreover, the very existence of such a mechanism may be a strong impetus for the parties to find an agreement without having to enter into a dispute.

For the time being, space activities are mostly conducted under every participant's own risk. Most of the time, it is the case when very dangerous activities are conducted, like for sea activities a few centuries ago. As far as activities are increasing, as far as these activities are becoming more and more usual, normal, as far as private actors are more and more involved, this situation is going to change. Dispute will arise. Some will not be solved by agreement, strong and efficient techniques of settlement of dispute are required.

To take into consideration the increase of activities conducted by private persons in outer space, I will take the case of an accident caused by a private space object and try to examine how the dispute will be solved if no agreement can be found. I will try to have a practical point of view, which is not, as you know, the usual skill of academics. It is the reason why I only intend to put out some points for discussion and not to give a solution.

To avoid any complication, I will focus on a **damage caused to a private person by a space object of a non-governmental entity.**

I The procedures open to the victim.

Of course the first possibility is the liability convention. The nature of the mechanism of settlement of dispute is then a State to State relationship.

The question is then: is this procedure the only one when a damage is caused by a space object. We have the answer in article XI § 2 of the liability convention which can be read as follow:

2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or

administrative tribunals or agencies of a launching State.

The text is clear: it is possible to pursue a claim before a domestic judge. This interpretation is confirmed by article XI § 1 which states that *"prior exhaustion of any local remedies" "are not required"* thus they are possible.

Nevertheless, if we go on reading article XI § 2 we have a precision, a limitation:

A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned.

When a claim is "being pursued"[1] the State cannot present a claim according to the liability convention. When the claim is no more pursued, when for instance it is decided by the courts or administrative tribunals or agencies of the launching State, the State of the victim can present a claim under the liability convention.

So a natural or juridical person or even a State can trust the domestic courts of the launching State. He may obtain satisfaction. The dispute is then settled. Of course the State of nationality of the person having obtained satisfaction cannot ask for compensation under the liability convention because there is no more damage and in application of the general principle of law "non bis in idem".

If the domestic claim is not successful, the competent State can take the case to the launching State under the convention: through diplomatic negotiation and then to a Claims Commission.

All that seems very well and rather easy. If the victim obtains satisfaction under the domestic law, the procedure would be much more efficient. Only if this first level procedure does not work, the long and uncertain international law procedure would be used.

This solution is very much in accordance with the idea that in the case of private space activities, the launching State's liability would not always apply, but should only stand as a last time "safety net" if the ordinary domestic law liability system does not work as hoped.

In the case of a damage caused by a private entity, it is not really necessary to ask the State of the victim to sue the launching State under a rather complicated international law procedure and generally without a compulsory decision of the Claims Commission[2].

In practice, this well organised system cannot be used because of a technical rule set in article X § 1 of the liability convention.

1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

Unfortunately, this article is clear enough. As, a domestic claim cannot be judged within the time limit of one year, the claimant must choose one way but cannot expect to use both.

Trying to find an other solution, I could find two arguments to escape from this interpretation: a possibility should be an interpretation of article XI § 1 whose wording *"shall not require* prior exhaustion of local remedies" may give a solution. If we interpret strictly the

[1] in French: "est déjà introduite" which is slightly different but conducts to the same conclusion.

[2] If the damage is caused by a governmental activity the situation is different as States have an immunity and cannot be sued before a foreign domestic judge.

possibility to present a claim, the words " shall not require" are meaningless because they suppose that, if the exhaustion of local remedies is not compulsory, it is nevertheless possible. However the time limit of article X seems precise and clear.

An other possibility should be to use the strong wording of article XI § 2 first phrase: "*nothing* in this convention shall prevent a State ..." does this *nothing* includes the time limit of article X. It may be argued, but on the other side, the wording of the text of article X on the time limit is also rather strong (especially at its point 3).

Thus, I live to your appreciation the possible interpretation of these 'escape lanes'. I fear that, in the present state of space law, they do not enable us to escape from this vicious circle and that the victim has to make a choice and cannot expect to use both procedures.

II The victim must choose between the liability convention and an other procedure.

What are the other possible procedures ? Article XI indicates : *"in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned."*

Let us have a look to these other **"international agreements"**. To my knowledge there is no such a case for the time being. The Liability Convention is always recognised as a good protection for the victim. There is no international agreement passed to take its place.[3]

Procedures before **courts or administrative tribunals or agencies of the launching State** are of course the most interesting issue.

It reminds me of a precedent which was very important to me. A long time ago, as I taught international law of the sea, as I still do. We used to empathise the interest of the International Convention on Civil Liability for Oil Pollution Damage (Brussels 1969). It also provides for objective liability. When the accident of the Amoco Cadiz append, we were strongly confident on the protection given by the convention and by the fund created in 1971. Then we saw the lawyers in charge of the claim for the coastal cities of Brittany, instead of going before the French tribunals to ask for compensation according to the convention, they tried to escape from the application of the convention and went before the American judge of Chicago, Michigan. The situation is largely different here but we have to consider the possibility for the victim to prefer a claim before a domestic judge.

III Liability Convention vs. Domestic litigation

Let us have a look to the advantages and disadvantages of both procedures. (see table at the end of this text.)

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[3] In the case of an agreement between States conducting a common activity in outer space, the Liability Convention is anyway difficult to implement as both States should be launching States for the same launch. This posses the question to know whether a launching State of an object can sue an other launching State of the same launch within the framework of the liability convention. Given the fact that, at least for a damage on earth, both are equally, absolutely and jointly liable for the whole same damage, I cannot see how it may be possible.

The resolution of the ESA council on the liability of the agency may be an example of such a provision. The possibility for ESA or France as a launching State for the same launch to sue each other under the liability convention seams to me quite doubtful. It confirm the fact that when more than one State are involved in a launch, they should pass an agreement *regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable (liab.conv.article V)* but also about the liability *inter se*.

A Who acts ?

According to the liability convention the dispute is a State to State dispute. International law is applicable, the private entity cannot be a party she or he has to ask a State to act for her or him.

Article VIII goes a little bit further than general international law[4]. Is authorises to present a claim not only the State which has suffered a damage, the State whose nationals have suffered a damage (§ 1) but also, and if the first one did not act, the State of the territory of the damage (§ 2) and also in addition the State of residence of the victim (§ 3). Compared with the usual national link used for international law diplomatic protection, it increases the possibility to act but this possibility stays narrow. However, in most cases only the first condition is present.

I will make two remarks about this rule:

There is no time schedule indicated for the second or third rank State to consider that the first and second ranked did not act.

The second remark is more important : Strictly speaking we are not in a case of diplomatic protection as the liability convention do not distinguish between direct State's claim for damage to the State itself and indirect claim for damage to a national. Nevertheless the principles of international law related to diplomatic protection would apply here for that purpose. A State is always free to take the case of its nationals. For any reason and without explanation, it may refuse. It is often the case for diplomatic protection, for political reasons States often refuse to take the case of their nationals at the international law level, in that respect the various political and economical power of both States are of course relevant.

It is obviously quite different if the victim acts directly before the judge of the launching State. It may be either a claim against an other private entity or a claim against the State but it remains a domestic dispute settled under domestic law before a domestic judge.

B The judge

In the case of an application of the liability convention, the claim is at first presented through diplomatic channel, it is the general rule in international law. The possibility to present a claim thanks to an other State if there is no diplomatic relations between both is classical. The possibility to use the UN Secretary General is also useful and makes no difficulties. (article IX)

Fortunately the liability convention puts a time limit of one year to the diplomatic negotiation. If no settlement is obtained within one year, a Claims Commission may be establish at the request of either party. The time limit of one year and the possibility to establish a Claims Commission may be highlighted because it is not very frequent in international law. Both are very good. Thus the transmission of the claim to the Claims Commission is compulsory.

It is of course the case of a domestic judge whose jurisdiction is also compulsory.

The main question is of course the weakness of the liability convention : the legal status of the decision of the Claims Commission. As we know this decision may be compulsory, "final and binding" if both States so decided. It may also be a

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[4] Article VIII

1. A State which suffers damage, or whose natural or juridical persons suffer damage, may present to a launching State a claim for compensation for such damage.
2. If the State of nationality has not presented a claim, another State may, in respect of damage sustained in its territory by any natural or juridical person, present a claim to a launching State.
3. If neither the State of nationality nor the State in whose territory the damage was sustained has presented a claim or notified its intention of presenting a claim, another State may, in respect of damage sustained by its permanent residents, present a claim to a launching State.

"final and recommendatory award which the parties shall consider in good faith". Of course I very much regret that this decision is not always binding. Some States and International Organisations already made a declaration of acceptation of a compulsory nature of the decision.

But as a question of half empty or half full bottle, I also would like to remind you that, in international law, the acceptation of a compulsory conciliation commission is not so common, especially when this commission may make a decision on the merit of a claim and determine the amount of compensation. Moreover, on the political point of view, the influence of international public opinion is growing. It will be rather difficult for a launching State having been find liable for a damage to escape paying compensation.

Of course it should be better that every launching State or potential launching State accepts as compulsory the decision of the Claims Commission. Nevertheless, I would like to draw your attention to the fact that this acceptation should be done by most of the main launching States. Within a competitive market, and because of the joint and several nature of the liability, it will not be sustainable for one launching State to make this declaration if the others do not. In the case of such an acceptation the reciprocity is to be considered between launching States and not only between a launching State and States conducting no activity in outer space.

If the decision of the Claims Commission is not always compulsory, the decision of the domestic judge is of course compulsory. It is also enforceable which is not the case for a decision of an international judge.

C Applicable rules

It is not our subject here to day, as we wanted to concentrate on the settlement of dispute issue, but we have to consider that the choice of a procedure may be influenced by the rules applicable to the case.

As we know, when the damage is caused on earth, on this issue, the liability convention is second to none.

- No ceiling
- Absolute liability
- No act of God
- No fault of at third party
- Even the fault of the victim must be a gross negligence or an intentional act.
- This exoneration is even impossible in the case of activities conducted in violation of international law.

Before the domestic judge the domestic law would apply. In some cases it requires a fault. In many, an objective liability is recognised, for instance because of the hazardous or even ultra-hazardous nature of space activity. But in any case, to my knowledge, no domestic law can afford such a liability as set in the liability convention, especially for the exoneration issue.

D Compensation

Within the rules of international diplomatic protection, which should apply here *mutatis mutandis* to the relationship between a claimant State and its nationals, the State is free to deal with the compensation it has get. The private entity can not, at least under international law, be sure that she or he will get the whole amount of money. The compensation so obtained is considered as the State's compensation for what is considered as its own damage.

In the case of a domestic judgement, the claimant is the private entity which will receive the whole compensation.

With respect to the amount of compensation, it is difficult to know if a decision of a domestic judge should be more interesting for the victim than the decision of a Claims Commission. Given the composition of a Claims Commission,

for many cultural reasons it may be foreseen that, in many cases it would certainly be more interesting to go before the domestic judge than before a Claims Commission; specially because the victim can make what we call "forum shopping" and choose his domestic judge. Moreover the liability convention seems to refuse compensation for damage to the environment which is not necessarily the case before a domestic judge. (article 1)

The issue of the financial capacity of the defendant is of course relevant. We can suppose that a State, especially if it has the capacity to launch a spacecraft, would be more solvent than a private company. Before choosing to sue a private company before a domestic judge the victim will have to consider this issue. [5]

If we examine some domestic space legislations currently applicable we can find a solution.

IV The US commercial space launch Act gives us a solution.

The US commercial space launch Act makes a good way to avoid the problem and conciliate the launching State's obligations under the liability convention with the possibility for the victim to obtain compensation before a domestic judge.

Despite the references to the necessity to *"ensure compliance with international obligations of the United States"*[6], as stated in the purposes of the Act, the system created by the US CSLA does not directly refers to the liability convention and to the State to State procedure contained in this convention.

The system supposes that the victim will act before a domestic judge, that the insurance or the company will pay until the Maximum Probable Lost.

For the damage over this amount,

"the Secretary of Transportation shall provide for the payment by the United States Government of a successful claim (including reasonable litigation or settlement expenses) of a third party against a licensee"[7]

If a damage is caused by a licensee under the US law, the victim will certainly choose the US domestic way instead of the international liability system. He will have the advantages of both.

Only two points are questionable : the relative uncertainty introduced by the intervention of the Secretary of Transportation and by the necessity to obtain a Compensation Plan from the Congress.

The other one is the ceiling of 1.5 billion $ which is set by the CSLA. I already discussed this issue with people involved in this mater, they told me that according to the liability convention, the US government would have to pay under the liability convention even over the ceiling. I agreed.

We were both wrong. Given the fact that the victim must choose to act under the CSLA or under the liability convention, in fact, the ceiling will play its full role.

The victim will be in the same situation that the victim of a sea pollution by oil. If he wants to use the possibility open by the CSLA and renounce to ask his State to claim under the liability convention, then the ceiling applies. As it will not be possible any more to put a claim under the liability convention, there is no possibility to ask afterwards for

[5] If we compare with the situation at sea, we can fear that some private actors would find a solution to avoid a too heavy burden by creating "one-satellite companies" like ship owners did creating "one-ship companies". Are we going to see such an evolution ?

[6] Us code chapter 701 Sec. 70101. Findings and purposes at point a 7

[7] At § 70113. : *Paying claims exceeding liability insurance and financial responsibility requirements.*

compensation over the ceiling. Either the victim goes to the liability convention without a ceiling but with the practical difficulties of the settlement of dispute system of the convention (see before) or he must accept the ceiling under the CSLA.

However the US CSLA should be used as an example by other States. If they take such legislation the situation would be much clearer.

There is an other reason to use a law like the CSLA. In the *'Commercial Space Transportation Competitiveness Act of 2000'*. At section 7 the US Congress requires a report about *"liability regime for commercial space transportation"* and at point 4 asks the Secretary of Transportation to

> *(4) examine the effect of relevant international treaties on the Federal Government's liability for commercial space launches and how the current domestic liability risk-sharing regime meets or exceeds the requirements of those treaties;*

The answer is : the CSLA greatly exceeds the requirement of the treaties. As a potential victim I very much appreciate.

We can see where the CSLA exceeds the liability convention obligations. The first and considerable point is the definition of "third party". Under the liability convention, nationals can not claim for compensation against their own State, it is the usual rule in international law. Under the CSLA they can.

The procedure of settlement of dispute is also much more efficient under the CSLA as any judge may be used. His decision is compulsory which is not the case of the decision of the Claims Commission.

The compensation which may be obtained seems to be much higher than what may be obtained from the Claims Commission, as we saw, the definition of damage is rather narrow in the liability convention.

Conclusion

If my interpretation of articles XI and X of the liability convention is right, I fear it is, private victims will have to choose between asking their State to act under the liability convention or acting themselves before a domestic judge

If the damage is caused on earth by a non governmental entity, even if the procedure may be long and heavy, the liability convention keeps an interest (absolute liability without a ceiling, no exemption)

If the damage is caused in outer space, the liability convention seems to have the only interest of the Claims Commission which is rather weak compared with domestic law and judge.

Considering the issue on a *de lege ferenda* basis, it should be useful to clarify this issue.

It is perhaps possible for the parties to the liability convention to make an interpretation in order to precise the time limit rule and make both procedures possible. They can do that by an interpretation of articles XI and X.

An other solution would be to agree on a system on the basis of the US CSLA either by an international agreement or at the domestic level. This supposes that these rules should be accepted on a long term basis.

Under the liability convention :	**Before the domestic judge**
The actors	
The necessity for the private person's claim to be taken by a State, she or he cannot act himself. Will the State take enough care of the case ?	A private claim before a domestic judge
The State is free to take the case or not. It may be feared that in some cases the claimant State will not want to act against a State with which it has some common interest. (It is often the case when diplomatic protection is concerned)	No necessity to ask the State to act.
A State to State dispute with a political context which may be damageable to the private entity.	
The judge and his decision	
A compulsory conciliation commission : the Claims Commission	Use of a common compulsory judge
The decision of the Claims Commission may be of strong political weight but nevertheless is not always compulsory	A compulsory decision by the domestic judge
Enforcement of a decision is not possible against a State under public international law	An enforceable decision
The applicable rule	
No ceiling for the liability	*Possibility of a ceiling according to the domestic law*
Absolute liability (damage on earth)	*Application of the domestic law for liability: In most of the case it should be objective liability for hazardous activities. Nevertheless it may be a fault liability.*
No act of God (damage on earth)	*Act of God may be considered as an exemption*
The fault of a third party is not an exemption (damage on earth)	*Third party fault may be considered as an exemption*
Compensation	
The State having obtained compensation is free to deal with the compensation obtained	The compensation goes directly to the victim.
	A domestic judge may be more generous for compensation
A State which in principle is solvent	*Financial capacity of the defendant if the damage is huge (over the insurance ceiling)*

(*In italic the negative aspect*, in normal the positive one)