SETTLEMENT OF DISPUTES REGARDING SPACE ACTIVITIES

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Introduction

Differences of opinions and disputes regarding space activities have occurred from the very beginning of such activities. For a long time during which only the exploration and much less the practical use of outer space took place, such differences and disputes were more of an academic and abstract nature. Natural scientists, legal scholars, politicians, and diplomats disagreed at the national or international level on what could or should be done, what was permitted or forbidden, and which technical, political, and legal steps should be made in the future. All this had little practical impact. Every state, institution, enterprise, and person proceeded as they felt appropriate.

This situation has changed in recent years. With the growing practical use of outer space and the growing number of states, state institutions, international organizations, and private enterprises indirectly or directly involved or at least interested in space activities situations occurred and occur where the various views and uses are practically incompatible. If, as an example, only a limited number of locations are available on the Geostationary Orbit for certain satellites for technical reasons, the diverging views of the states as to the right of access to this Orbit cannot any longer stand beside each other and be implemented, if it is foreseeable that they interfere with each other or even exclude each other. In such a case a solution has to be found in order to assure that an orderly and effective exploration and use of outer space can continue in the future for the benefit of all concerned and for the benefit of the international community.

Space activities and space law, in this context, are of course not in a historically unique or unknown situation. Often in the history of

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international relations states have found themselves in a situation where new fields of international cooperation and international competition were in need of a legal framework and, in case no agreement could be reached between disputing partners, in need of a machinery for the settlement of disputes. It is a well-known weakness of public international law that, contrary to national law, rights and duties of a party cannot automatically be enforced against another party by access to and decision by courts. Again, to find a similar situation
in space law, is not a surprising problem. International law has developed a number of methods for the settlement of disputes at the international level most of which are already mentioned in Art. 33 of the Charter of the United Nations and in Resolution 2625 (XXV) of the UN General Assembly on "Principles of International Law Concerning Friendly Relations and Cooperations Amongst States in Accordance with the Charter". Not all of these methods can be dealt with here. In any case, decisive and the real tests are those which assure that a decision is achieved, even if one of the parties does not agree. These methods are international adjudication and international arbitration. These two methods are also possible options, if disputes occur regarding space activities.

2. Disputes Between States

Present codified space law - and there is quite a large volume of it by now - presents a diversified picture as far as dispute settlement is concerned. On one hand, one can list not less than 57 international instruments which in some way deal with the settlement of disputes regarding space activities. I have listed all of them in a paper[1] which I presented here in Washington in 1992 at the International Astronautical Congress and we have dealt with most of them in more detail at a research and international colloquium of the Cologne Institute of Air and Space Law some years earlier.[2] At first sight, this may look quite an impressive list. However, closer scrutiny soon reveals major weaknesses: The major space law treaties, including the Liability Convention, do not provide a machinery for binding dispute settlement. Such binding dispute settlement is only found in very specific instruments for highly limited areas of space activities.

Anyhow, as the issue of liability is of great practical importance and, in other fields of international law, very seldom is the subject of substantive and procedural rules, it must be considered as an important progress that the Space Liability Convention does indeed contain some provisions on dispute settlement. These provisions contain a similar solution as we find it in the Convention on the Law of Treaties, namely to

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1 35 PROC. COLLOQ. L. OUTER SPACE 27 (1993).

2 SETTLEMENT OF SPACE LAW DISPUTES - THE PRESENT STATE OF THE LAW AND PERSPECTIVES FOR FUTURE DEVELOPMENT. PROCEEDINGS OF AN INTERNATIONAL COLLOQUIUM IN MUNICH (K.-H. Böckstiegel ed., Cologne, 1980).

the effect that the only procedure really assured is that of conciliation: If no settlement of a claim is arrived at through diplomatic negotiations as provided for in Art. XI of the Liability Convention, at the request of either party a Claims Commission has to be established. Arts. XV to XVII deal with the details of the appointment and the procedure of this Claims Commission in a similar way as it is known from international arbitration. Contents and form of the decision of the Commission are also similar to what one is used to in an international arbitral award. Art. XVIII provides that the Claims Commission shall decide the merits of the claims for compensation and determine the amount of compensation payable, if any. As Art. XIV para. 1 refers to Art. XII, this determination has to be made "in accordance with international law and the principles of justice and equity". And the last sentence of Art. XIX para. 2 provides that the Commission shall state the reasons for its decision or award. The decisive weakness of this machinery for dispute settlement is caused by Art. XIX para. 2 which provides in its first sentence:

"The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the Commission shall render a final and recommendatory award which the parties shall consider in good faith."

In other words: the decision is only binding if both parties agree. If the two parties so agree before the commencement of the procedure, one might consider the Claims Commission as an ad hoc arbitral tribunal. If the parties only so agree, after the Commission has decided, or if no agreement can be achieved between the parties so that the second alternative becomes applicable, the procedure before the Claims Commission can only be considered as conciliation. Therefore, conciliation only is assured in the Liability Convention, not, however, a binding decision. Under these circumstances it is not surprising that in the only actual dispute that has so far occurred under the Liability Convention, namely when the Soviet satellite Cosmos 954 with a nuclear power source fell on the territory of Canada, the two states negotiated until finally agreement was reached to the effect that the Soviet Union paid half of the amount originally claimed by Canada.[3]

Another international instrument of high practical relevance which fails to assure a binding decision in case of a dispute is the Agreement Among the Government of the USA, Governments of Member States of the European Space Agency, the Government of Japan and the Government of Canada on Cooperation in the Detailed Design, Development, Operation and Utilization of the Permanently Manned Civil Space Station of 29 September 1988. In order to assure from the very beginning that the cooperation on this space station be disturbed as little as possible by disputes, Art. 16 of

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3 For further details, see K.-H. Böckstiegel, *Case Law on Space Activities*, in: SPACE LAW - DEVELOPMENT AND SCOPE 205, 206 (N. Jasentuliyana ed., Westport and London, 1992).

the Space Station Agreement provides for a very general cross-waiver of liability:

> The objective of this Article is to establish a cross-waiver of liability by the Partner States and related entities in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the Space Station. This cross-waiver of liability shall be broadly construed to achieve this objective.

In the very long and detailed further wording of Article 16 the states concerned waive not only all claims against other partner states but also against "a related entity of another Partner State and the employees of any of the entities identified". In addition, each Partner State shall extend the cross-waiver of liability to its own related entities by requiring them, by contract or otherwise, to agree to waive all claims against the entities or persons of the other Partner State. And the Article adds, in para. 3 c: "For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of liability arising from the Liability Convention...". Should, nevertheless, still disputes arise regarding the Space Station, Art. 23 of the Space Station Agreement provides that primarily consultations should be used and then adds in par. 3: "If an issue not resolved through consultations still needs to be resolved, the concerned Partners may submit that issue to an agreed form of dispute resolution such as conciliation, mediation, or arbitration."

Thus it becomes clear that, similarly to the Liability Convention, a binding dispute settlement by arbitration can only be used if all Partners concerned agree. That, in fact, means that a binding dispute settlement is not assured. A special provision, Art. 22, deals with criminal jurisdiction over personnel on the Space Station.

In so far as not by these or similar provisions specific rules have been codified, what remains applicable are only the - weak - provisions of general public international law and of space law both of which are characterized by the lack of binding dispute settlement. The United States had suggested during the negotiations on the Outer Space Treaty in Art. 11 of the Draft they presented that "any disputes arising from the interpretation or application of this Agreement may be referred by any contracting party thereto to the International Court of Justice for decision". However, no agreement could be reached and what resulted was only the provision in Art. III of the Outer Space Treaty to the effect that "states parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other Celestial Bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."

That leaves us with Art. 2 para. 3 of the UN Charter calling for the settlement of international disputes by peaceful means and Art. 33 of the Charter with its non-mandatory listing of possible options for dispute settlement including "arbitration" and "judicial settlement". As is well

known, this has not led to many states submitting to the jurisdiction of the International Court of Justice, though the Court has had some more cases in recent years, specifically in certain areas like border disputes. The ICJ has had some more cases since it institutionalized in 1978 the option for Ad Hoc Chambers[4] a procedure which enables the parties to select certain judges from the Court for such a Chamber to decide their case. Such a procedure which has been used several times brings of course the Court close to arbitration, because - as typically in arbitration - the parties really select their own judges for their specific case. On the other hand, international arbitration shows certain developments which are moving it closer to permanent international courts. One aspect of this development is that, for decades already, administered or institutionalized arbitration, rather than ad hoc arbitration is being used more often as illustrated by the well-known international arbitration institutions such as that of the International Chamber of Commerce[5] whose arbitration rules are referred to in a great number of international business contracts including those concluded by states. A further step in this direction has been the institution of specific arbitration machinery for investment disputes with states by the Washington Convention which established the International Centre for Settlement of Investment Disputes in 1965. Lastly the arbitral process moved even closer to a permanent court when Iran and the United States in 1981 agreed to establish the Iran-United States Claims Tribunal in The Hague for disputes both between the two states and between one state and nationals of the other state,[6] in the thus far largest international dispute with regard to the number of cases and the amounts of many billion dollars in dispute. As I have been the President of that Tribunal myself and all decisions of the Tribunal are published and in view of the many publications on the Tribunal both in the United States and elsewhere I will refrain from dealing with that experience in more detail.[7]

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4 *See* S. Schwebel, 81 AM.J. INT'L L. 831 *et seq.* (1987).

5 In ICC arbitration, involvement of states as parties has a long tradition [*see* K.-H. Böckstiegel, *Arbitration of Disputes between States and Private Enterprises in the International Chamber of Commerce,* 59 AM.J.INT'L L. 579 (1965]) and goes up to 30 % of all ICC cases as the regular statistics of the ICC Court of Arbitration show.

6 Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration); Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration); Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria (Undertakings); reprinted in 20 I.L.M. 224 *et seq.* (1981).

7 As examples for recent publications, see J. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES - CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (Washington, D.C., 1991); C. Brown, *The Lessons of the Iran-United States Claims Tribunal,* 32 VA. J. INT'L L. 421 *et seq.* (1992). Not an

What does all this mean for future dispute settlement regarding space activities between states? When the Space Law Committee of the International Law Association, some years ago, took up this matter for the first time and elaborated a Draft Convention on the Settlement of Space Law Disputes,[8] this instrument followed as much as possible and as closely as possible the dispute settlement procedure of the Law of the Sea Convention. In this context it should be pointed out that the difficulties the Law of the Sea Convention has encountered in not finding ratification by major industrial states is in no way connected to the dispute settlement procedure. The solution offered in the Law of the Sea Convention is, of course, to give the state parties an option between adjudication by the International Court of Justice or by a specific Tribunal or arbitration, supplemented by the rule that, if the parties cannot agree on one of these methods, arbitration is the mandatory method of dispute settlement. In its Draft Convention on the Settlement of Space Law Disputes, the International Law Association made certain adaptations in comparison to the Law of the Sea Convention. Contrary to the International Tribunal for the Law of the Sea, the ILA Draft provided for an "International Tribunal for Space Law" only as an option of the state parties if they wished to establish such a tribunal at a later stage. Otherwise, the Draft gave the state parties a choice between the International Court of Justice and an arbitral tribunal constituted in accordance with section V of the Draft Convention. Similarly to the Law of the Sea Convention, the ILA Draft provides that arbitration is the mandatory method of dispute settlement, if a party has not expressed a choice or if two parties in dispute have not chosen the same method of dispute settlement.

The world of international relations and specifically the environment of space activities has changed considerably since the time of the early 80's when the ILA Draft was elaborated. It may therefore be time to take a new look of what is considered a feasible dispute settlement machinery between states regarding their space activities.

3. Disputes Within International Organizations

As in other areas of international law - one may only mention the Court of Justice of the European Community as an example - also in space law greater progress regarding a mandatory method of dispute settlement can be expected within the framework of international organizations. This

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evaluation, but a selective resume of issues in the decisions of the Tribunal can be seen in: K.-H. Böckstiegel, *Zur Bedeutung des Iran-United States Claims Tribunal für die Entwicklung des internationalen Rechts*, FESTSCHRIFT DER RECHTSWISSENSCHAFTLICHEN FAKULTAT ZUR 600-JAHR-FEIER DER UNIVERSITAT ZU KÖLN 605 (Cologne 1988); K.-H. Böckstiegel, *Practice of International Dispute Settlement - Thoughts after Resigning as President of the Iran-United States Claims Tribunal, in* LIBER AMICORUM HONOURING NICOLAS MATEESCO MATTE 17 (Montreal 1989).

8 INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 61ST CONFERENCE 325 *et seq.*, 334 *et seq.* (Paris 1984)

is less true for global organizations with a wide field of aims and functions, but applies for organizations which are either regional or created for a concrete specific field of space activities.

A good example is the Convention for the Establishment of the European Space Agency ESA. Art. XVII of that Convention provides that any dispute between two or more Member States which is not settled by the ESA Council shall, at the request of any party to the dispute, be submitted to arbitration. If not otherwise agreed, the arbitration tribunal shall consist of three members. Each party to the dispute shall nominate one arbitrator and the first two arbitrators shall nominate the third arbitrator who shall be the chairman of the arbitration tribunal. Member States of ESA which are not parties to the dispute may intervene in the proceedings with the consent of the arbitration tribunal if it considers that they have substantial interest in the decision of the case. The arbitration tribunal shall determine its seat and establish its own rules of procedure. The award of the arbitration tribunal shall be made by majority of its members and this award shall be final and binding on all parties to the dispute and no appeal shall lie against it. Thus, the ESA Convention provides for a typical arbitration procedure as it has been and is used in other fields of international law between states and in international business relations between private enterprises.

Arbitration is also the chosen method of dispute settlement for ESA's external contracts. Art. IV of Annex I to the ESA Convention grants ESA a far-reaching immunity from jurisdiction and execution, but Art. XXV of the same Annex provides as follows:

> 1. When concluding written contracts, other than those concluded in accordance with the Staff Regulations, the Agency shall provide for arbitration. The arbitration clause or the special arbitration agreement concluded to this end shall specify the law applicable and the country where the arbitrators sit. The arbitration procedure shall be that of that country.
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> 2. The enforcement of the arbitration award shall be governed by the rules in force in the state on whose territory the award is to be executed.

ESA practice has complied with this ruling: The "General Clauses and Conditions for ESA Contracts" have continuously, including their latest Revision 5, included a mandatory arbitration clause which, if no other arbitration is foreseen in the specific contract, refers to the Arbitration Rules of the International Chamber of Commerce in Paris.

An example of a global international organization with a dispute settlement procedure is presented by the INTELSAT Convention. The Convention rules as follows in this respect:

> Art. XVIII
> (Settlement of Disputes)
> a) All legal disputes arising in connection with the rights and obligations under this Agreement or in connection with obligations undertaken by Parties..., or between INTELSAT and one or more Parties, if not otherwise settled within a reasonable time, shall be submitted to arbitration in accordance with the provisions of Annex C to this Agreement.

This ruling is supplemented by a provision for non-mandatory arbitration for other disputes in the same Article:

> Any legal dispute arising in connection with the rights and obligations under this Agreement or the Operating Agreement between one or more Parties and one or more Signatories may be submitted to arbitration in accordance with the provisions of Annex C to this Agreement, provided that the Party or Parties and the Signatory or Signatories involved agree to such arbitration.

The details regarding the arbitration procedure are then found in Annex C to the INTELSAT Convention. Art. 3 of that Annex rules that the INTELSAT Assembly of Parties selects 11 persons to be members of a Panel from which presidents of tribunals shall be selected, Art. 7 provides for confidentiality of the proceedings and Art. 13 provides that the decision of the arbitral tribunal is binding. Though INTELSAT therefore has a rather sophisticated dispute settlement machinery available, it should be added that, in practice, an arbitration procedure never was conducted, as I know very well since I am a member of the INTELSAT Panel myself.

4. Disputes Between Private Enterprises

Disputes between private enterprises in connection with space activities have in the past mostly occurred, because private enterprises delivered products and services as subcontractors or consortium members for space activities of states or international governmental organizations. With the growing direct participation of private enterprises in space activities disputes are bound to occur also in this context. In relative perspective, dispute settlement plays a greater role for private enterprises than for state institutions, because private enterprises do not have available diplomatic and political means and because private enterprises rely much more on calculating the exposure to costs and risks on the fulfillment of contractual obligations and, if necessary, on the enforcement for the other to fulfill the contract or pay damages. For dispute settlement between private enterprises regarding their activities for space or in space mostly the same legal sources and criteria are relevant which play a role in

the business cooperation and contractual relations between private enterprises in other areas of business.

The basic option available to private enterprises is that between adjudication by state courts and arbitration. While adjudication by courts is available without any specific agreement between the parties, arbitration is only mandatory if chosen by the parties in an arbitration agreement or in an arbitration clause in a contract. In business relations between private enterprises, arbitration is more and more the preferred method of dispute settlement both at the national and international level.

At the national level, normally companies choose the arbitration rules of national arbitration institutions such as the American Arbitration Association (AAA)[9] in the United States and the German Institution of Arbitration (DIS)[10] in Germany. In international business contracts, contractual practice mostly chooses the arbitration rules of the International Chamber of Commerce (ICC)[11] in Paris, of the London Court of International Arbitration (LCIA).[12] and of the United Nations Commission for International Trade Law (UNCITRAL)[13] or of national institutions in certain preferred states such as Switzerland, Austria, and Sweden. While arbitration institutions will offer, in addition to their arbitration rules, certain administrative services to ensure that the arbitral procedure can be conducted effectively, not seldom the parties also choose ad hoc arbitration. In this latter case they would have to agree on provisions regarding all important details of the arbitral procedure within their contract or could agree on an UNCITRAL Arbitration Clause, because the UNCITRAL Arbitration Rules have been elaborated by experts from industrialized and developing countries to assure an effective procedural framework for ad hoc arbitration. Finally, it may be mentioned in this context that with the growing popularity of arbitration, many further rules

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9 The AAA has several arbitration rules for various kinds of disputes at the national level and separate rules specifically for international cases.

10 The Deutsche Institution für Schiedsgerichtsbarkeit (DIS) has one set of rules (in German and English) applicable both to national and international disputes.

11 ICC arbitration is the most widely used in international business relations and is available already for more than 60 years.

12 The LCIA is an international arbitration institution with headquarters in London, Users Councils in the various regions of the world and rules for arbitration conducted anywhere in the world.

13 The UNCITRAL Arbitration Rules have been developed by practitioners from industrialized and developing countries. As they are made for ad hoc arbitrations which are not administered by a specific institution, they provide for an "appointing authority" in case problems arise regarding the appointment of the arbitrators. An adapted version of the UNCITRAL Rules has also been used by the Iran-United States Claims Tribunal at The Hague.

and institutions of arbitration have been created in recent years both at the national and international level most of which, however, have very little or no acceptance in international contract practice and therefore exist more or less only on paper without actual cases being conducted.

5. Concluding Remarks

On the basis of these short considerations regarding the settlement of disputes on space activities and on the basis of the material and information collected over recent years in publications and meetings, one may come to the following conclusions:

While certain regional and specific international instruments of codified space law provide for an efficient dispute settlement machinery, mostly choosing arbitration, most areas of space law, though codified on many other aspects, lack such a machinery or at least lack provisions for mandatory binding dispute settlement.

As more and more practical disputes have to be anticipated in the exploration and use of outer space by a growing number of states, international organizations and private enterprises, frameworks for effective dispute settlement will have to be developed at the international level in the near future.

This may be less necessary for commercial space activities, especially as far as the participation of private enterprises is concerned, because the international business community has developed and used for many years international commercial arbitration as the preferred method of dispute settlement. The space industry and state institutions active in commercial space activities including international organizations like ESA are already using this option as well.