

Dispute Resolution: Commercial In-orbit Space Activities

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Conference Question

Is there a need for a dedicated international settlement mechanism for dispute resolution arising from space commercialization?

Answer: NO

- There would be no work for such an organization.
- There has yet to be an incident in space with enough economic damage to warrant a law suit.
- And the probability of near-term incidents is still very low!

Economics: A Key Consideration

- *If there is an accident, will there be a formal legal dispute?*
 - Loss or damage to space assets/hardware
 - Low value—most are not insured
 - Loss of terrestrial revenues
 - Depends—resilience, back-up, insurance
 - Space environmental damage
 - Very difficult to value in monetary terms
- *If no economic damage, no formal dispute likely*

Historical Odds

- Loss of satellite on launch $\approx 6\%$
- Loss of satellite 1st year in orbit $\approx 6\%$
- Loss of satellite after 1st year $\approx 2\%$
- Loss of satellite from direct collision $\approx 0\%$
- Kessler effect -- it hasn't occurred yet
 - If it occurs, where are the risks highest?

Current Regulations Focus on Access to Space (Launches)

- Access to space and return from space
 - Absolute (strict) liability for any “space object” that causes terrestrial damage
 - Insurance/indemnification for 3rd party liability
- No recommendations for changes
 - Current national systems for financial responsibility are working

Access to Space vs. In-Orbit Commercial Activity

- Do we need a different financial responsibility regime for in-orbit commercial activities?
 - *Yes; risks, liability, and potential damage are different*
- And, following that, do we need a better international dispute resolution system for private activities in space?
 - *Yes, but use existing international commercial mechanisms*

Future Commercial Issues will Focus on In-Orbit Activities

- *Transporting people and cargo through space*
- *Active debris mitigation*
- *Satellite servicing*
- *Diverting Near Earth Objects*
- *Resource extraction and processing*
- All currently face similar unresolved regulatory and legal issues
- *These are activities that will change space law*

Examples of What Will Change

- Definitions/interpretations of treaty terms
- Systems for transparency to avoid misunderstandings, especially w/r/t “weaponization” and “peaceful purposes”
- Rules for clarifying the ownership of resources and underlying obligations of stewardship
 - Recognize that sovereignty, property rights, and liability are very different things.
- Methods for resolving disputes

Situations of Particular Concern

(legal lacuna where regulatory standards and enforceable dispute resolution are yet to be defined)

- A commercial space asset, and
 - Accident or incident occurs in outer space
 - Incident is well defined and is not a political conflict
 - International dispute--2 or more parties with different launching states involved
 - There are no clear contractual agreements between the parties
 - Significant economic damage occurs, and
 - The accident or incident involves a finding of fault

Developing a Dispute Resolution System Without New Treaties

- Long recognized that a new or amended space treaty at the U.N. level would be impractical and difficult to implement in the near-term
- Soft law, non-binding, and “optional” solutions will not be sufficient for reducing risks and stimulating investment for private firms

For Space Activities Today: International Settlement Mechanisms

- Diplomatic negotiations:
 - Political issues including conflicts between nations
 - Incidents involving only government assets
 - Commercial space assets with dual-use, dual-financing, or hosted payload governmental purposes
- International Court of Justice
 - Mainly for incidents between governments
- Private actions:
 - Arbitration
 - National courts

Dispute Resolution Possibilities

- Existing Int'l. Organizations With Dispute Provisions

- ICJ—including special chamber option
- ICAO
- ITU
- WTO
- UNCLOS
 - Arbitration required
 - Sea Bed Authority and Tribunal
- French Air & Space Law Society (Int'l. Aviation & Space Court)
- + Others

- No formal tribunal—
Case-based adjudication
 - Conciliation, Fact-finding, Mediation
 - 1958 NY Convention on Binding and Enforceable Arbitration
 - Other arbitration options
 - Various sponsoring organizations with formal arbitration system.

International Models

(Better than nothing, but all with serious deficiencies)

- Treaty based systems—States have taken reservations and/or made system non-binding
- Non-binding; no enforcement mechanisms
 - (Liability Convention, ITU, ICJ special chamber model)
 - Optional systems are essentially useless for private/commercial cases
 - For example: ICJ environmental panel never used
- UN/International Tribunals limited to State Representation
 - (ICJ, PCA, Liability Convention)

Binding International Arbitration Can Be Enforceable

- 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (ratified by 188 nations)
 - To apply this to commercial space may require an amendment of the Convention
- Commercial practice—arbitral systems
 - Domain name disputes
 - Maritime salvage
 - Wall Street securities industry arbitration (FINRA)
 - Sports arbitration (Court based in Switzerland)
 - Commodities markets (London Metals Exchange and National Futures Association, for example)

Advantages of Binding Arbitration

- Relatively fast process (compared to formal courts)
- Relatively less expensive (but complex litigation will still be costly)
- Judges selected by agreement among the parties
- Use of “list” of neutral experienced professionals for the very special technical issues of outer space
- No need for a new special tribunal or system

Issues to be Considered

- Selection of judges (special experts, how many on panel, etc.)
- Handling of classified or proprietary information
 - 2011 PCA Optional Rules for Outer Space Activities
 - Based on UNCITRAL arbitration proceedings
 - Art. 17, §6, §7, §8 address confidential information
 - IBA Rules of Evidence
 - Rules need to be agreed upon by parties to arbitration
 - Art. 3 and Art.9 are specific to proprietary, confidential, and classified information and are stronger than PCA Optional rules, above.
- Transparency and publication of judgment
 - Important because decisions can set legal precedents, but
 - Precedents might also conflict with existing treaties

Addressing the Issue Before the Big Accident Occurs

- If we wait there will be no agreement possible since parties have too much to lose
- Commercial world has workable systems
- Governments could also agree to be bound by decisions
- National Laws are the key and
 - Before-the-fact binding agreements should be part of the licensing process
- International treaties can wait, but they would be very helpful in providing uniform guidelines.

Recommendations for Space-faring Nations

- Nations, acting in parallel. should use national laws to specifically address adopting binding arbitration, particularly in licensing private space operations
- Agree on which arbitral process to be used for space disputes and on the specific choice of rules
- Don't wait for a major space incident to happen
- Adopt the IADC Guidelines, continue to develop “codes of conduct,” and encourage transparency and confidence-building measures (TCBMs) to minimize future accidents; all before-the-fact actions, but

Summary

- An after-the-fact dispute resolution system that is enforceable is also an incentive for national and corporate responsible behavior.
- This leads to a more stable and predictable space environment for both business and government.