

## CREATING AN INTERNATIONAL SPACE AND AVIATION ARBITRATION COURT

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### Abstract

By deciding to create the International Space and Aviation Arbitration Court, the French Air and Space Law Society (Société Française de Droit Aérien, or SFDAS) has sought to fill a gap resulting from the fact that it is extremely difficult for national or arbitration courts to take into account the specific characteristics of international disputes arising in the aerospace field.

The Court that has just been created (and which is totally independent of the SFDAS) is exclusively aimed at settling private disputes, whether directly or indirectly connected to space or aviation activities.

It is not intended as a substitute for existing courts aimed at settling controversies between States. On the other hand, it hopes to be of help to all those -individuals or legal entities, private or public enterprises - who are involved in disputes arising from the performance of aviation and space activities.

Such specialization is the Court's "raison d'être", and results from various factors:

- *its international nature* - even though it is based upon French law and located in France,

- *the selection of arbitrators and experts* based on their specialization in the aerospace field,

- *the adoption of procedural rules* adapted to the specific nature of the disputes, such as, among other things, emergency arbitration proceedings,

- *the possibility to choose experts* according to their special field,

- *its concern for fast investigation and trial* of cases,

- *its desire to minimize the Parties' expenses*.  
The SFDAS hopes that its initiative will be welcome and that it will usefully contribute to establishing a sense of security in the legal relations between all those working in the aviation or space field.

### Introduction

The International Institute of Space Law has shown interest for many years in the problems arising from the settlement of disputes that occur on the occasion of the application of space law to space activities<sup>1</sup>. Experience has shown that this was not a purely theoretical issue, at least as far as certain categories of disputes are concerned<sup>2</sup>. It is therefore absolutely legitimate that the 36th IISL colloquium devote a whole session to the settlement of disputes that may be qualified as "space-related", meaning by this disputes that arise in the field of space.

The purpose of the present report is not to study once more the various aspects of this issue, which have already been thoroughly examined in several previous reports<sup>3</sup>. My goal is only to inform you of a recent initiative by the French Air and Space Law Society (SFDAS)<sup>4</sup> which, in my opinion, constitutes a positive contribution to the solution of this difficult question.

It deals with the creation of an *International Space And Aviation Arbitration Court*. As the name indicates, the jurisdiction of this Court is not limited to disputes connected to the practice of space activities but it also encompasses those arising from the practice of aviation activities.

This dual jurisdiction is obviously justified by the great similarity existing between these two types of activities, but it stands to reason that I shall only deal with the case of "space-related" disputes in the present report.

I shall first state the reasons that motivated the SFDAS's decision to create a new arbitration court (Part I), and will then describe the institutional structure that was used for setting it up (Part II).

### Part I - The SFDAS's Initiative

The SFDAS had long noticed that, more than their amount, it is the specificity and complexity of the controversies arising from aviation and space activities that create difficulties in the settlement of disputes that are usually brought before national courts and existing arbitration courts.

After discussing this point during its General

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Meetings as well as in a Task Group set up for that purpose, the SFDAS came to the conclusion that resorting to an international and specialized arbitration court should provide a remedy for such situation. It is however necessary to clearly define the type of cases that may be brought before this Arbitration Court.

1 - As a matter of fact, the term "space-related disputes" includes several very distinct types of situations, as far as the nature of the disputes, as well as the Parties involved, are concerned.

1 - The dispute can focus on the application or interpretation of a legal document (international agreement) that is part of space law. *This dispute is therefore a space law matter, strictly speaking*<sup>5</sup>. A request from one State to another asking for the return of a space object in accordance with the Rescue Agreement would be an example of this kind of dispute.

The dispute can also deal with a fact arising from the performance of legal relations (whether contractual or not) that were established at the prospect of space activities. *Such dispute therefore concerns the law of space activities* (which includes space law, but is not limited to it). A contract to build space equipment or a contract for the launching of a satellite would illustrate this kind of relations.

2 - As for the Parties concerned, they may either be States<sup>6</sup>, individuals or legal entities governed by private law and performing space activities of a financial, industrial or commercial nature.

3 - This having been said, it is obvious that disputes between States, being international by nature, must be settled in accordance with public international law rules, that is to say by negotiations leading either to an amicable arrangement or to international arbitration.

The present rule therefore applies to the disputes between States that are based upon one of the international space law texts, which, in fact, all provide for resort to international arbitration<sup>7</sup>.

There are several courts before which such arbitration can possibly be brought; but they are all courts of general jurisdiction, since none of them is specialized<sup>8</sup>, and nothing indicates that their decisions are to be binding.

This is the reason why suggestions have been made, by the International Law Association among others, to create an international arbitration Court specialized in settling space-related controversies. This Court could not

only be referred disputes between States, but private businesses could have direct access to it - that is to say without having to ask the State they are legally connected with to be a party to the dispute on their behalf. The advantage of this suggestion would be that the Court would settle all the disputes brought before it, whether public or private, and that its decisions would be enforceable by law<sup>9</sup>.

It would of course be necessary to conclude an international agreement in order to set up such a Court, as well as to possibly amend existing international space agreements<sup>10</sup>.

However, one has to remain aware of the fact that any suggestion of this type might be opposed by many States, on account of their sovereignty. Some will also question the need for such creation, arguing that, up to now, no dispute of this kind has ever been brought before a court<sup>11</sup>. In any case, the adoption and the coming into force of the necessary international agreement(s) would take a very long time.

4 - Whatever the merits of these suggestions may be, it is certain that due to the increase of commercial activities in space, international space-related disputes are no longer an exception.

As things currently stand, such controversies cannot be settled by the same means as those occurring between States and concerning the enforcement of space law. The solutions to be applied in order to settle them - as well as disputes between States (or state entities) that are not exclusively governed by public international law - are those that already exist in all the other fields of international relations, i.e.:

- either to resort to national courts - which will then be chosen in accordance with the jurisdiction rules determined by the law of the States involved;

- or to resort to arbitration, whether national or international, when such solution is not banned by the rules applying to the case at stake.

This second possibility should obviously be the fastest expanding one, since it is now common practice, in the field of space activities, to provide for the resort to arbitration in any contract of some importance<sup>12</sup>.

When compared with national courts, arbitration courts have the advantage of allowing controversies to be settled in a simple, fast and discreet way. Moreover, arbitration can even be used to settle disputes with no contractual origins - for example a difference relating to intellectual property.

But on the other hand, resorting to arbitration is only possible if all the parties have agreed to it - whether before or after the dis-

pute arose - and the arbitral award is not binding as such to the parties, except if they agree to it in advance.

II - This initiative by the SFDAS is therefore aimed at making it easier to settle space-related disputes, arising on the occasion of space activities, through arbitration. It therefore does not concern space-related disputes taking place between States and based on the enforcement of the international agreements constituting space law, or of any other text belonging to public international law.

1 - The disputes brought before the Court are mainly of international nature, though nothing prevents it from being also referred disputes of a national nature.

Whether the space activities from which the controversy originated have taken place on the ground or in space is irrelevant. Disputes instigated by the performance of a specifically space-related activity - for instance the launching of a satellite - are therefore not the only ones to be taken into account. All the other forms of activities taking place in space or by space-related means - i.e. mainly - but not exclusively - activities of an industrial or commercial nature, are also included. This may be illustrated with the following examples: building launchers and satellites, launching them, operating them, organizing space telecommunication from the ground or receiving space remote sensing data on earth.

2 - Indeed several national or international institutions that were set up in order to settle any dispute of an industrial or commercial nature through arbitration are already available<sup>13</sup>, but none of these arbitration courts is specialized in the fields of aviation and space.

Some authors consider the current situation as satisfactory, and are not in favour of the creation of an arbitration court reserved for these fields<sup>14</sup>. Others would be favourable to it, under certain conditions<sup>15</sup>.

3 - For reasons that I am about to explain, the SFDAS is convinced that the interest of Parties to a space (or air)-related dispute is to be able to have access to an arbitration Court that would deal exclusively with this kind of cases.

III - As a matter of fact, space (as well as aviation) activities present several characteristics that differentiate them from other industrial or commercial activities.

1 - They call for the design and manufacturing of high-technology equipment, which must meet very high quality and safety standards and the use of which must follow strict requirements. They therefore

involve considerable investments.

2 - A controversy dealing with the research, development, manufacturing, launching or the operation in orbit of satellites and their launchers can only be fully understood by specialists with the necessary scientific and technical knowledge in the field in question, so that they are familiar with its specific problems. This applies, among other things, to product liability cases.

3 - Space activities create risks, not only to the people who perform them, but also to third parties, for instance in the case of launchings. They can therefore result in the payment of extremely costly indemnities.

4 - They are also "risky" in the sense that the current development of technology does not always make it possible to guarantee that the expected results will be achieved, justifying the insertion of the so-called "best efforts clause" in contracts. But in case of a launch failure or malfunction of a satellite, the financial consequences can be much more important for the owner of this satellite than for the other party, since there is no real balance between their respective commitments.

5 - Hence the importance of space insurance, though it can also turn to be a source of important disputes as far as the performance of policies is concerned.

6 - Whether applying to equipment delivery, launchings or satellite operation, the "time factor" plays a decisive part. It is therefore essential that any controversy be settled as rapidly as possible.

7 - Whether taking into account their direct cost or the expenses they may lead to, space activities bring extremely important sums of money into play. The individuals or legal entities that finance them therefore need to be guaranteed that complete legal security is available.

For all the above-mentioned reasons, the possibility to request arbitration from a specialized institution ensures all those performing space activities that, should a difference with their partners occur, the interests of all parties will be taken into account in a competent, fair and unbiased way.

## Part II - The International Space and Aviation Arbitration Court.

The initiative taken by the SFDAS in view of the creation of the *International Space And Aviation Arbitration Court* is to be appreciated in the context that I have previously described. I shall now present the Court's organization and main characteristics:

I - The idea to create a specialized arbitration court materialized within the French Air and Space Law Society and was thoroughly studied by a Task Group, who concluded that such creation should be realized according to the following guidelines:

1 - The Court's legal structure is an Association governed by the French law of July 1st, 1901. It therefore involves a group of people who do not seek to draw any personal financial gain from the Court's operation, but who gather in order to achieve the objective provided for in the Bylaws, that is to say "the fast and inexpensive settlement of any dispute directly or indirectly related to space and aviation activities".

2 - *The administrative operation of the Court* is run, as in any other association, by the organs provided for in the Bylaws, i.e.: the General Meeting of members, the Board of Directors, a Bureau assisted by secretarial staff.

3 - *The jurisdictional operation of the Court* is run by an Arbitration Committee and by Arbitration Tribunals.

The Arbitration Committee is composed of ten members and is a standing committee. Its function is to take, under supervision by the Board of Directors, the administrative and jurisdictional measures which are necessary to allow the Court to fulfil its task, for instance: to draw up and revise the list of experts and arbitrators, to write up the necessary legal documents, to appoint the arbitrators required to sit in each arbitration tribunal, to supervise the unfolding of arbitration proceedings.

The Arbitration Tribunals are formed on the occasion of each dispute.

4 - Lastly, *the procedure* to follow in order to settle the cases brought before the Court is covered by Arbitration Rules, the text of which is prepared by the Arbitration Committee and approved by the Board of Directors.

II - Although the Court, as an institution, is organized according to a very classic pattern, it must be noted that it is unique in presenting certain characteristics which are its very own.

1 - The Court's main original feature is its *specialization*. This is its "raison d'être" and the justification for its creation. Being the only one to have been conceived and set up to be of assistance in the settlement of space and aviation-related disputes, the Court thus fills a gap and, for this reason, offers absolutely unique guarantees to the Parties. Such specificity is naturally also to be found in the *qualifications* required from the people who take part in the Court's existence. To become an association member,

one must be or have been involved in activities directly or indirectly connected to the aviation and space fields<sup>16</sup>.

Whether French or foreign, the names of arbitrators and experts approved by the Court are put down on lists drawn up by the Arbitration Committee and approved by the Board of Directors after their abilities have been checked. The competence of these approved arbitrators and experts is therefore carefully checked before they are granted the Court's approval<sup>17</sup>.

To make their appointment by the arbitrators easier, experts are classified according to their specialty on a periodically revised list<sup>18</sup>.

2 - Another of the Court's distinctive features is that it is *internationally oriented*, which is essential, given the nature of the cases it deals with. Though the association in which it originates is based in Paris, it is widely open to non-French members whose participation, for that matter, is most welcome<sup>19</sup>.

Moreover - and above all - the parties to a dispute have the possibility to come to an agreement and decide that the arbitration will take place somewhere else than in Paris. They are also totally free to determine the applicable law together, as well as the number of arbitrators and the language to be used in the arbitration proceedings. They can also appoint one or several arbitrators who are not mentioned on the list drawn up by the Arbitration Court itself. In any case, the secretarial work will be carried out in Paris<sup>20</sup>.

3 - Special proceedings, called "*emergency arbitration proceedings*" have been instituted in order that emergency or temporary measures be taken, when connected to a dispute likely to be brought before the Court for arbitration and that has not been referred to it yet<sup>21</sup>.

4 - In order that cases be rapidly investigated, *time periods* provided for throughout the whole proceedings were made as short as possible, except if the arbitration tribunal decides to grant their extension<sup>22</sup>.

5 - In order, once again, to *provide the fastest way to settle disputes*, and to avoid that they last for an unnecessary long time, it is clearly specified that the arbitral awards pronounced by the Court are final, cannot be appealed and must be enforced within thirty days<sup>23</sup>.

6 - Lastly, one of the Court's founders' main concerns was to guarantee the Parties that they will know in advance the *expenses* that they will have to face, and that such expenses will remain within reasonable

limits.

For this reason, the scale of fees and arbitration expenses is annexed to the Arbitration Rules. The amounts appearing on such scale have been calculated according to French standards, which are usually considered as quite reasonable. The cost of having a case settled by the Court will consequently be lower than that of lawsuits brought before some countries' national courts, or before some arbitration organizations.

III - Besides the distinctive features that I have just described, the Court is operated in accordance with the same principles as any other arbitration institution.

1 - Any matter dealing with a dispute for which the Court has jurisdiction according either to an arbitration clause or to an arbitration compromise can therefore be brought before it for arbitration<sup>24</sup>.

2 - The arbitration tribunal can consist of either a sole arbitrator or three members<sup>25</sup>. It applies the law agreed upon by the Parties or, for lack of such agreement, the law it deems applicable according to the conflict-of-law rule it finds appropriate to the case before it<sup>26</sup>.

3 - The arbitration tribunal usually pronounces an "arbitral award". At the Parties' request, it can also rule according to equity principles, or render an award reflecting the Parties' prior settlement of the dispute<sup>27</sup>.

4 - The award pronounced by the arbitration tribunal is to be enforced in accordance with the international and national law rules applying to the case involved. The New York Convention on the "Recognition and Enforcement of Foreign Arbitral Awards" dated June 10, 1958, will thus be possibly applicable.

### Conclusion

By deciding to create the *International Space And Aviation Arbitration Court*, the French Air and Space Law Society has sought to fill a gap resulting from the fact that international disputes occurring in the aerospace field present specific characteristics that national or arbitration courts have difficulty taking into account. In order to remedy such situation, Parties therefore needed to be offered the possibility to refer matters to an arbitration court that would be both international and specialized.

The Court that was just created is exclusively aimed at settling disputes directly or indirectly connected to aviation or space activities. It therefore does not claim to meet the expectations of people wishing to form a

court devoted to controversies between States and dealing with the application or the interpretation of space (or air) law. On the other hand, it hopes to be a useful tool for all those - individuals or legal entities, public or private enterprises - who are involved in private law disputes originating in the performance of aviation or space activities.

The Court derives its specificity from several features:

- *its international nature* - even though it is based upon French law and is located in France,

- *the selection of arbitrators and experts* according to their specialization in the fields dealt with,

- the adoption of *procedural rules adapted* to the special nature of these disputes, such as, among other things, emergency arbitration proceedings,

- the possibility to *select experts* based upon their specific skills in the aerospace field,

- the desire to provide *prompt* investigation and trial of disputes, as well as *fast* enforcement of awards,

- the will to *minimize the Parties' expenses*.

The SFDAS hopes that its initiative will be welcome and that it will play a useful part in establishing safe legal relations between all those performing activities in the aviation or space field.

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### Notes and references

1 - See in particular: Proceedings of the 35th Colloquium of IISL, Washington, D.C, 1992, which contain several reports on this topic.

2 - See, for a description of several recent US cases:

- the article by K.H BOCKSTIEGEL, in *Space Law Development and Scope*, (ed. by Nandasiri JASENTULIYANA, Praeger, 1992),

- the report by T.L MASSON-ZWAAN published in the Proceedings, *supra* note 1,

- chapters IV and V in *An Introduction to Space Law*, by I.H.Ph. DIEDERIKS-VERSCHOOR (Kluwer, 1993).

3 - See the report by K.H BOCKSTIEGEL, *Developing a System of Dispute Settlement regarding Space Activities*, in Proceedings *supra* note 1.

4 - The French Air and Space Law Society is an association governed by French law (Law of July 1st, 1901). The initiative it took falls into its purposes which are, among other things: "the studying of any issue dealing with air and space law, or possibly connected to it". The association upon which the Arbitration Court is based is entirely independent of the SFDAS.

5 - About the texts that constitute space law, see the article by S. GOROVE, Sources and Principles of Space Law, in Space Law: Development and Scope, *supra* note 2.

6 - State space activities are not limited to those directly performed by States (for instance military activities), but they can also include those performed by state entities or other entities governed by public law and acting on behalf of these States (for instance national space agencies).

7 - See the report by K.H. BOCKSTIEGEL, *supra* note 3.

8 - A Commission for the settlement of claims for damages originating in the performance of space activities does exist, provided for in the Liability Convention, March 29, 1972, but the decisions reached by this Commission are not legally binding.

9 - This suggestion aims at creating within space law a similar court to the one provided for in the Convention on the Law of the Sea. See the text of the main articles from the ILA draft in the report by K.H. BOCKSTIEGEL, *supra* note 3.

10 - After signing an international agreement providing for the creation of a specialized arbitration court, it might be necessary to specify within the text of all prior space agreements that disputes regarding any of them ought to be brought before this particular court.

11 - Even though Canada initially cited the Liability Convention, its controversy with the USSR following the fall of the Soviet satellite COSMOS 954 was settled through negotiations between both countries without any further reference to this Convention.

12 - Various Arbitration Rules exist, the most widely used of them being the UNCITRAL Rules.

13 - For instance: the American Arbitration Association, the International Center for the Settlement of Investment Disputes, the London Court of International Arbitration, the Court of Arbitration of the International Chamber of Commerce (ICC), as well as several national Centers for international arbitration.

14 - See for example K.H. BOCKSTIEGEL in his report *supra* note 3.

15 - See for example W.N. WHITE in his report: Resolution of Disputes Arising in Outer Space, in the Proceedings *supra* note 1.

16 - Court Bylaws, art 5.

17 - Arbitration Rules, art 3 and 4.

18 - Arbitration Rules, art 4.

19 - Court Bylaws, art 5.

20 - Arbitration Rules, art 11.

21 - Arbitration Rules, art 21 to 27 included.

22 - Arbitration Rules: see, among other articles, art 10 to 13 included.

23 - Arbitration Rules, art 20.

24 - Arbitration Rules, art 6.

25 - Arbitration Rules, art 8 and 11.

26 - Arbitration Rules, art 19 ¶ 1

27 - Arbitration Rules, art 19 ¶ 2 and 3.