IISL-99-IISL.3.17

International Law and Domestic Laws Governing Commercial Space Activity by Space Stations

Gyula Gál

As a preliminary question to the system of legal rules governing commercial space activities by space stations two notions should be clarified: what is *space station* and what is commercial activity?

Though space law sources repeatedly refer to it, we find no definition of space station in treaty-law. Generally accepted view is, that space stations are space objects. All legal consequences follow from this classification. "As far as jurisdiction and control are concerned, space object is an object launched into outer space." (*I. H. Ph. Diederiks-Verschoor*) (1) Space stations differ from other space objects by their habitability, long duration of flight. Theoretically and practically following definition seems to be acceptable: *manned space object, an orbiting space laboratory with a long lifetime on which people can live and work carrying out of mission a long duration.* (2) In broader sense unmanned space devices often are qualified in space literature as automatic space stations. However, the etymology of this term verifies above definition. Unmanned space objects, space probes, space ships do not belong to this category of space devices.

The other notion is: *commercial.* Commerce is profit-making transfer of goods and services and connected activities. Commercial as adjective anything concerned with commerce. Commercialization: transformation of a non-profit activity into a profit-seeking one. Commercialization and privatization are often confused in the literature. Commercialization does not postulate privatization, i. e. "transfer of existing programs and services out of government into the private sector." (*E. R. Finch*) (3) "Profit-seeking entity" may be the state itself or a state-owned company, i. e. an entity not belonging to the private sector. (4)

Space stations can be *national* or *international.* International stations will be launched and operated by more than one state which have the right to use the station according to conditions agreed upon by them.

The most important agreement of this kind is the Agreement of Canada, Japan, Russian Federation, U. S. of America and Member States of ESA concerning cooperation on the Civil International Space Station of 29th January 1998. (ISS-Agreement) The object of the Agreement is to establish a long-term international cooperative framework among the Partners for development, operation and utilization of a permanently inhabited civil international Space Station for peaceful

purposes *in accordance with international law*. The ISS will enhance scientific and technical use, also the *commercial use of outer space*. Certain elements of ISS-Agreement refer to potential commercial activities. E. g. transfer of ownership of elements of the station (Art. 6.3), the right to barter or sell any portion of the respective allocation of the Partners (Art. 9.3)

The ISS-Agreement states that development, operation and utilization of ISS will be *in accordance with international law* including *Space Treaty*, *Rescue Agreement*, *Liability Convention* and *Registration Convention*. (Art. 2.1) All major space law instruments and U. N. Resolutions in the same way refer to international law and to the most important contracts. Without this stereotype references international law and space law would oblige the parties to such contracts or agreements. This stipulations have mere declarative character.

Concerning *Space Treaty* one can put the theoretical question: is commercial space activity free? "Outer space shall be free for exploration and use by all states", however, these activities shall be carried out *for the benefit and in the interests of all countries* (Art. 1.) Do the commercial activity implement this treaty-postulate? In reality from the use of outer space nothing in the Space Treaty or other space law instruments do exclude commercial utilizations. On the contrary: other articles such as Art. 6 and 9 show the admissibility of private use of outer space which means commercial use by private activities in a private economic system. (*Böckstiegel*) (5) Welfare-clauses –as Professor *Hobe* rightly states – do not originate "self-executing duty", but general principles for treaties to be concluded (6). Space commercialization is the logical consequence of the progress of space activities. (*Tatsuzawa*) (7)

International law and space law governing commercial activities by space stations have no direct influence on commercial transactions. Their subjects are states or international organizations. Commercial activities, however, should be carried out inside the limits by general international law and space law rules directly governed by domestic law.

The Space Treaty (Art. 8.) lays down two principles of the legal link between launching states and space objects: 1. The state on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object while in outer space. 2. Ownership of objects launched into outer space is not affected by their presence in outer space. The Registration Convention (Art. 2) stipulates: Where there are two or more launching states, they shall jointly determine which one of them shall register the object.

The *meaning of jurisdiction*, its relation to sovereignty are not defined in space law instruments. Jurisdiction seems to be less than sovereignty. "Being one of the forms of manifestation of sovereignty in international relations, derived from sovereignty though it cannot identified with it." (*V. D. Bordunov*) (8) To quote opinions of two other distinguished space lawyers: *Quasi-territorial jurisdiction* of a state over its spacecraft which is designed for travel in areas not subject to the territorial jurisdiction of any state and which has a special relationship with the state concerned through a recognized link (*Bin Cheng*)" (9) and "jurisdiction may be seen in the ability of a state to enact laws and have them applied in respect of certain persons and certain places. It is *one aspect of sovereignty* while control is the power of a state to give instructions to persons placed under

its authority... it has a primarily technical aspect." (*Bourély*) (10)

Theoretical considerations do not call in doubt that jurisdiction and control involve the *application of domestic law*. (11) In case of national space stations this is the law of launching state, for international stations law of launching states according to the agreement of participant states. In both cases *special rules of domestic space law* and *general law* rules of the states concerned.

The ISS-Agreement (Art. 5) demonstrates this sequence as follows: 1. Each partner shall register as space objects the flight elements which it provides, the European Partner delegated this responsibility to ESA acting in its name and on its behalf. 2. Each partner shall retain jurisdiction and control over the elements it registers – subject to any relevant provisions of the Agreement. Clearly the partners Canada, Japan, Russia, U. S. will have jurisdiction over the elements they provide. (It is not clear concerning the European Partners, since a single European jurisdiction does not exist.) The partners shall own the elements they provide – transfer of ownership shall not affect the rights and obligations of the partners under the Agreement. This is equivalent with maintaining jurisdiction and control on the elements transferred.

The ISS-Agreement otherwise in some respects *refers to domestic laws*. E. g. funding procedures in fulfilling financial obligations (Art. 15), national laws or regulations of transfer of technical data and goods (Art. 19), the Code of Conduct for the Space Station crew developed in accordance with the individual partner's internal procedures (Art. 11) and criminal jurisdiction over personal in or on any flight element who are their respective nationals (Art. 22)

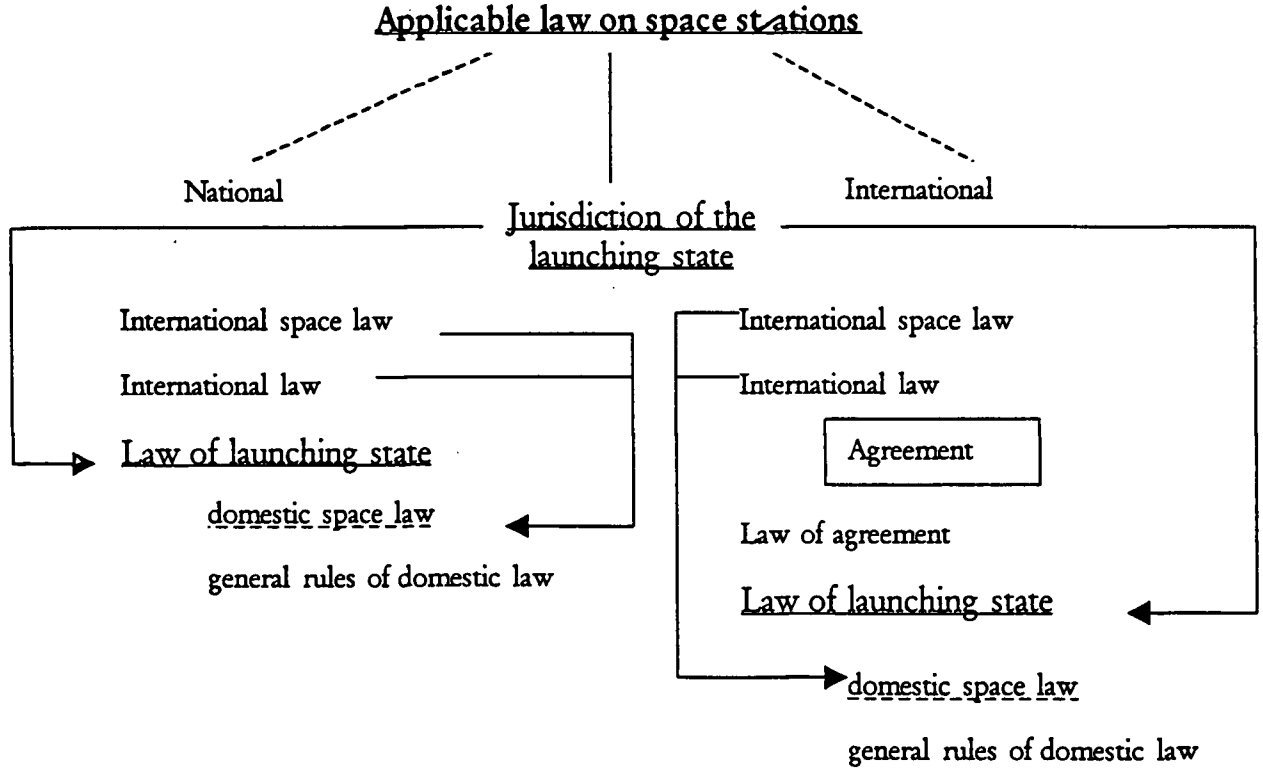
No doubt establishment and operating of an international space station necessitates the conclusion of many *civil (commercial) law contracts* in the partner states. The legal relations based on these contracts will be governed by domestic law, namely national civil law. International responsibility of states for national activities in outer space or authorization and continuing supervision (S. T. Art. 6) do not apply directly to such contracts aiming the commercial exploitation of products of any space activity achieved by space stations.

As in other commercial activities, also for commercial space activities private enterprises make use of the *contractual autonomy* according to their domestic laws, "within the framework of mandatory law, which can be public international law if transferred into the national law for private enterprises" (*K.-H. Böckstiegel*) (12) For the international space stations such mandatory law is mainly the law of agreement prescribing conditions which *directly oblige the states* parties to the agreement. Partner states have to provide for conformity of civil law contracts with obligations undertaken by the agreement through procedural channels according to domestic space law. (13)

The ISS-Agreement contains such elements especially in respect of exchange of data and goods or intellectual property. (Art. 19, 21) *Rules of liability* deserves attention. Art. 16 of the Agreement established 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. Related entities are: contractors, subcontractors, users or customers at any tier. This system of cross-waiver concerns claims based on damage arising out of so called protected space operations. (Essentially the partners become "self-insurers" for their own damages.) The cross-waiver of liability includes a cross-waiver of liability arising from the Liability Convention too. Contrary to this Convention (Art. 1) the term damage extends to loss of revenue or profits, other direct, indirect or consequential damages. Consequently: opposite civil law contracts – otherwise correct according to domestic law – would offend against the governing law of agreement. (14)

Concluded from above considerations the hierarchy of governing rules in sequence of applicability (see figure below) may be summarized as follows: 1. *International space law* (jus speciale), 2. *International law* (jus generale), 3. *Domestic space law*, 4. *General rules of domestic law*. For international space stations the *law of the Agreement* (being international treaty-law) precedes domestic law. Domestic law or laws in both cases are the laws of the launching state (states).

As it appears to me, differences of domestic laws applicable to commercial space activities in not too distant future will necessitate the elaboration of a uniform civil code or at least principles of civil law for outer space. (15) To make a convention similar to the Vienna Convention on Contracts for the International Sale of Goods of 1980 would be to-day an utopist idea. The complexity of rules governing commercial space activities for a long time will be a challenge and profitable task for lawyers.



Footnotes

1. *I. H. Ph. Diederiks-Verschoor*: An Introduction to Space Law. Deventer-Boston 1993, p. 9. See *G. Gál*: Space Objects While in Outer Space. Proceedings IISL 37. Coll. 1994, p. 84-86.

2. SALYUT (first launched 1971), SKYLAB (1973), MIR (1986)

3. *E. R. Finch – A. L. Moore*: Astrobusiness. A Guide to the Commerce and Law of Outer Space. New York etc. 1985, p. 93.

4. See: *V. D. Bordunov*: Legal Aspects of Private Activities in Outer Space. Proceedings IISL 29. Coll. 1986, p. 154. "... a trend can be traced in legal literature to apply the term "commercialisation" to... activitiesof private firms in Outer Space while we hold that commerce of Outer Space means the rendering or selling certain services... for certain remuneration."

5. *K.-H. Böckstiegel*: Reconsideration of the Legal Framework for Commercial Space Activities. Proceedings IISL 33. Coll. 1990, p. 5. See also: *H. L. Traa-Engelman*: Commercial Utilization of Outer Space – Legal Aspects. Rotterdam 1989, p. 205.

6. *S. Hobe*: Die rechtlichen Rahmenbedingungen der wirtschaftlichen Nutzung des Weltraums. Berlin 1992, p. 105. For views of businessmen on "general clauses" see: *A. Dula*: Private Sector Activities in Outer Space. The International Lawyer Vol. 19, 1985, p. 185.

7. *K. Tatsuzawa*: The Regulation of Commercial Space Activities by the Non-Governmental Entities in Space Law. Proceedings IISL 31. Coll. 1988, p. 341.

8. *V. D. Bordunov*: Rights of States as Regards Outer Space Objects. Proceedings IISL 24. Coll. 1981, p. 91.

9. *Bin Cheng*: For Delimiting Outer Space in "Earth-Oriented Space Activities and their Legal Implications." Proceedings of the Symposium October 15-16. 1981 McGill University, p. 250.

10. *M. Bourély*: The Legal Status of Personnel on International Space Station Missions. In: Manned Space Flight, Legal Aspects in the Light of Scientific and Technical Development. Ed. by K.-H. Böckstiegel, Köln etc. 1992, p. 79.

11. *H. Bittlinger*: Hoheitsgewalt und Kontrolle im Weltraum. Köln etc., 1988, p. 19.

12. *K.-H. Böckstiegel* op. cit., p. 6.

13. It is questionable to what extent space acts apply to civil law contracts. E. g. Outer Space Act 1986 of the United Kingdom applies beside launching and operating a space object to any activity *in outer space*. The interpretation seems to be possible that contracts not affecting directly operations in outer space do not constitute activities under this law. (E. I.1)

14. Bilateral agreements of ESA intend to grant conformity. E. g. Arrangement of 17 April 1997 with the Italian Space Agency: "The cross waiver of liability established by Article 16 of the IGA will apply "mutatis mutandis"... as if the text of this cross waiver was repeated in this Arrangement". *F. Pocar–G. Venturi–M. Pedrazzi*: Gli accordi bilaterali dell'Italia in materia spaziale. Milano 1999, p. 310. Art. 16.3b of the Agreement oblige the Partner States to extend the cross-waiver to their related entities "by contract or otherwise". How they contract with the entities and what is "otherwise" for this aim rests with the Partners.

15. *E. Fasan* under the superscription "Privatrecht im Weltraum" referred very early to the necessity of a "Code Civil of Outer Space." Weltraumrecht. Mainz 1965, pp. 119-132.