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Optional Rules for Arbitration of Disputes Relating to Outer Space Activities Permanent Court of Arbitration (PCA). An Excellent Opportunity for Progressive Development of Space Law*

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Introductory Remarks

On 6 December 2011, as the result of a successful effort by a distinguished group of international experts, the PCA *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* came into effect.[1] Under Article 35 of these Rules, the advantages of arbitration as a means for dispute settlement and, in particular, the benefits of having a tribunal composed of experts in the field, offer an excellent opportunity for advancing in the development of the law of outer space.

International tribunals involved with dispute settlement only between sovereign states, such as the International Court of Justice (ICJ), have so far shown limitations in the field of space law. For this reason, the application of the Rules of the Permanent Court of Arbitration (PCA) may well establish important precedents and provide for other arbitration possibilities, to break new ground. Among other examples the PCA Rules would go a long way in strengthening recently established regulations -to which some authors refer to by the rather

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1 The Advisory Group of Experts in charge of drafting PCA Rules on Outer Space was composed by H.E. Fausto Pocar, Dr. Tare Brisibe, Prof. Frans von der Dunk, Prof. Joanne Gabrynowicz, Prof. Dr. Stephan Hobe, Dr. Ram Jakhu, Prof. Armel Kerrest, Mrs. Justine Limpitlaw, Prof. Dr. Francis Lyall, Prof. V.S. Mani, Mr. Jose Montserrat Filho, Prof. Dr. Maureen Williams and Prof. Haifeng Zhao.

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controversial name of 'soft law'- or by generating new realistic binding rules in this area of international law where consensus has so far proved extremely difficult.
This paper explores alternative approaches to the arbitration of disputes related to outer space activities with a view to producing feasible proposals given that current 'soft law' is inadequate for achieving internationally recognized legal standards.

As is known, the success of a regulatory system depends largely on three main factors: (a) that rules are adapted to the social reality they attempt to regulate; (b) that actors in the field adhere to the current regulations and (c) that if the standards are not respected, there is an effective enforcement mechanism in place to ensure compliance. Taking these general terms to space law, at least in conventional terms, it is easy to conclude that the situation remains unchanged since 1979 when the Moon Agreement was adopted. Since then the members of the international community have been unable to reach consensus on new conventions within the framework of space activities and procedures for dispute settlement arising in the field.
By contrast -and, possibly, to make the problem worse- is the fact that technology and space activities have evolved at a rapid pace thus increasing the distance between the binding rules in force (i.e. conventional law and customary international law) and the social reality, thus leaving important gaps to be covered. The gap between social reality and the current law increases the probability of disputes arising on the matter. As Judge Pocar has observed:

> "We first noted that the past few decades have seen a steady rise in space-related activity, primarily due to an Increase in the commercial use of outer space, especially in the industries of satellite communications, launching services, and remote sensing. It seems reasonable to suppose that this increase in activity augments the risk of disputes"[2].

One of the current issues at stake is the role of space law in filling these gaps. Interesting enough, and as a possible answer to the assertion that rules adapt to the social reality they intend regulating, is the fact that should standards not be respected, an effective enforcement mechanism should exist to ensure their compliance. This leads to the conclusion that the gap between existing standards and the needs and protection of those involved in space activity can be resolved through two key mechanisms. The first and most important is the power of self-regulation on the part of private entities involved in outer space activities. Briefly, this concerns the freedom of the parties in choosing the applicable law.
The second is the importance of implementing a useful, fast, easy to access and effective dispute resolution system able to enforce the rules created through

2 POCAR, F (2012), '*An introduction to the PCA Optional Rules for Arbitration of Disputes relating to Outer Space Activities*'. *Journal of Space Law,* Vol. 38, 174.

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the above process. In fact, this shall be the approach to be followed by the present writer when analyzing the extent to which the PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities now in force, elaborated by the Permanent Court of Arbitration (hereinafter the 'PCA') and its Group of Experts, may contribute to the progressive development of the law of outer space.

In the first place it should be noted that any future PCA awards or decisions related to the progressive development of space law will be closer to sectors involving private actors and, therefore, are likely to be more relevant to private than to public law. While the distinction between public and private law is extremely difficult in many areas, it is anticipated that, in this context, and given the predominantly commercial nature of space activity, the possibility of self-regulation by private actors is higher, as is the likelihood of future awards by the PCA being of a commercial nature as well. This would certainly be the case of commercial contracts dealing with services such as remote sensing activities and telecommunications.

Per contra, where the public sector dominates, such as, for example, in issues concerning space security, state participation becomes essential in laying down the new law.

Based on these premises the following issues will be addressed in the next paragraphs: (1) the advantages of using the PCA Rules as a dispute resolution mechanism; (2) the possibility of adding new rules to govern the legal relationship between parties involved in space activities; (3) the application of general principles of law and/or international customs that may be incorporated by the parties in awards stemming from arbitration tribunals within the scope of the PCA. Finally, (4) some problems regarding recognition of awards given by the PCA will be mentioned[3].

The Advantages of Using the PCA Rules

International law publicists generally concur on the advantages of arbitration for disputes arising from the use of space technologies. Notably, among the various advantages of the PCA Rules the following should be mentioned:

- Arbitration is open to all parties involved in space activities, both public and private.
- Arbitration results in final and binding decisions, as set, forth in Article 4 (2) of the Rules, in contrast with the recommendatory nature of decisions under, for example, the 1972 Liability Convention.
- Arbitration awards are internationally recognized and enforceable in all signatory states of the New York Convention, currently one hundred and forty-six.

3 Indeed the issues underlying recognition of arbitral awards in different countries are beyond the scope of this paper and shall be dealt with in a following presentation on the topic by the present author.

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- Parties to arbitration choose their own decision makers. Unlike in a court, parties in arbitration have the option of selecting specialized arbitrators with relevant competencies which may be as diverse as economics, cutting-edge space technology, and the complex related scientific branches.
- Arbitration can serve to preserve the confidentiality of sensitive information. Hearings need not be public and awards need not be published, per PCA Articles 28 (3) and 34 (5)[4].

In this framework there are other additional advantages worthy of being considered, as follows.

- The process of arbitration ensures the neutrality of arbitrators.
- With some frequency arbitral awards can be more easily executed than foreign judgments ordering, for instance, the payment of a sum of money[5].

The foregoing premises shall be taken as points of departure to highlight the desirability of using international arbitration in the various contexts for resolving space law disputes. These contexts will be looked at from the optic of national solutions and international jurisdiction, and finally through arbitration.

Questions of National Jurisdiction

National courts and tribunals are limited by the provisions of their national law. This is the case not only as regards the rules of procedure to be applied but also concerning the substantive law. Whereas the autonomy of the parties to choose their own applicable law is recognized by the national legislation of a good number of states, domestic laws may still establish insurmountable barriers in this field, generally connected to matters of public order. Should the parties agree to submit a dispute to a national court, the extent of their autonomy in choosing the applicable law will depend on conditions such as, for example,

- That the national law of the forum, or the law applicable to the dispute, recognize autonomy of the parties to choose their own laws.
- That the rules incorporated in the contract are not in breach of rules of national and international public order.
- Rules concerning policy matters.

4 WILLIAMS, Maureen. In book format, see *Report of the 75th Conference of the International Law Association, Sofia 2012, 281-320.* See Part 1, 282-307, by the mentioned author (as Committee Chair) entitled *'Introduction - Remote Sensing-Satellite Data in Court-Space Debris-Dispute Settlement'*. Also available at: <www.ila-hq.org>.

5 UZAL, M.E. *Solución de Controversias en el Comercio Internacional., 55,* Ad Hoc. Buenos Aires 1992.

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In this case the judge shall have to decide on a 'conflict of laws' issue, and consequently look for answers within rules of private international law. As Fernandez Arroyo indicates:

> "The admission or not of conflict autonomy, and its terms and scope, will depend on the forum where the matter is submitted: the parties can only exercise conflict autonomy within the limits of international private law under which the established judge may rule".[6]

It should also be taken into account that, due to the random way in which national courts assign the different cases, these are rarely given to judges having expertise in space law matters.
For these reasons the election of a national forum is not recommended for private entities involved in disputes related to space activities.

International Courts

Parties deciding to resort to international courts will find a completely different scenario. Disputes between sovereign states may be submitted to the International Court of Justice (ICJ) when the parties have so agreed. The Court in this case shall be applying the sources indicated in Art. 38 of its Statute, i.e. international treaties, international customary law and general principles of law and, as auxiliary sources, it would have a look at case law and the doctrine.
Thus, it remains to be wondered whether, in this setting, there is room for self-regulation. It will be most difficult for the ICJ judges to apply the general principles mentioned in Article 38 of its Statute to space law questions. Therefore the principles or new rules incorporated by the parties may only be applied by the ICJ when the parties have done so in advance, within an agreement to this effect. The jurisdiction of the ICJ, however, is not open to disputes between private parties, as observed earlier. Consequently, the only option remaining is recourse to arbitration procedures.

Arbitration Procedures

For the above reasons arbitration mechanisms appear today as the best option for dispute settlement between private entities in the field of space law. It is therefore valid to ask how does self-regulation fit in within these procedures.

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6 FERNANDEZ ARROYO, D.P. (2003). *Derecho Internacional Privado de los Estados del Mercosur*. Zavalía, Buenos Aires, 976.

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As far as the PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities are concerned, the possibility of self-regulation is clearly recognized in Art. 35[7].

The first paragraph of this Article states that the arbitration tribunal shall apply the law chosen by the parties. Autonomy is therefore fully respected and arbitrators must follow the decision of the parties as to the specific binding law. Unlike cases before national courts, international arbitrators will find no barriers to the application of the rules chosen by the parties in the PCA Rules on Outer Space.

Respect for the autonomy of the parties is absolute. Hence the arbitrator could sometimes be faced with dilemmas such as abuse of power by one of the stronger parties to the contract (in a contract for space tourism, for example, to which a weaker actor is also a party). In this case the weaker party would remain unprotected given the lack of a basic or applicable law by default. The arbitrator, for his part, would be a prisoner of the 'autonomy of the parties in choosing the law' with no possibility of correcting abuses. Article 35 of the PCA Rules is clear on this point, whereas national or international law would only apply in the absence of a choice of law by the parties.

The third paragraph of Article 35 states that the tribunal shall decide the dispute based on the terms of the contract and the uses and customs applicable to the transaction[8]. This is a field where what is known as lex mercatoria acquires significance. To briefly describe this concept, Ruiz Lopez observes: '*After the Second World War, but mainly in the sixties and seventies, commercial uses will acquire a much greater importance, mainly due to the enormous development of international trade ... These economic factors lead to the use of new forms of laws that in some manner cause the following phenomena: a) the revival of international trade practice, contributing to the shaping of independent private codes of national laws, b) international commercial practice consisting of self-regulating parties*' [9].

Indeed, Article 35.3 of the PCA Rules is leaving the door wide open for the application of international custom -one of the principal sources of international law- and providing an ideal field for private entities to develop their own practices. In similar manner, Article 35.3 is paving the way for a future *lex mercatoria spatialis*.

In the transnational legal order *lex mercatoria* is in itself a phenomenon of self-regulation of international trade agreements and the arbitrator, through his/her

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7 35.1 *In resolving the dispute, the arbitral tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the national and/or international law and rules of law it determines to be appropriate.*

8 35.3 *In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.*

9 LOPEZ RUIZ, Francisco (2010). *El papel de las societas mercatorum en la creación normativa: la lex mercatoria.* Cuadernos Electrónicos de Filosofía. Pag. 73.

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practice, is one of its greatest promoters[10]. Feldstein de Cardenas mentions different definitions of this concept. For example, that '*lex mercatoria is the law of international economic relations*' and quoting Berthold Goldman explains that "*the lex mercatoria is precisely a set of principles, institutions and rules from different sources that constantly nourishes the legal structures and the specific activity of the community of those operating in international trade*"[11]. Furthermore, '*It is in short, transnational norms that commercial partners are gradually developing, especially in the context of their professional bodies and that the arbitrators appointed by them to resolve their disputes, confirm, and define the norms to include those made by them*'[12].

It is submitted that both the IISL and the International Law Association (ILA) appear as an appropriate forum to develop this *specific lex mercatoria* on settlement of space law disputes to which arbitrators could resort when called upon to resolve disputes between private entities.

In fact, it is on the field of international arbitration where the self-regulatory power of the parties should do best. In this setting the parties may agree to apply customs relating to international trade or some of the principles developed in the area of space law, such as the 1986 UN Principles on Remote Sensing, Direct television transmissions (1982) or other non-conventional rules. Moreover, arbitrators may include terms used in the awards and introduce them as part of the contract.

Final Thoughts

Since 6 December 2011, there is a new mechanism for dispute settlement in the field of outer space, namely the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities of the Permanent Court of Arbitration (PCA). In this paper we have stressed the value of awards from this Court may have aimed at the progressive development of space law, particularly in those areas of space activity where private parties are the main actors.

In fact, the parties may, by means of the incorporation of contractual rules, achieve a breakthrough in the law that binds them. With the adoption of the Optional Rules such agreements may be part of binding rules for the settlement of their disputes. In turn, the dispute shall be decided by experts in space law and awards shall be final and binding upon the parties to the dispute. This, no doubt, is an excellent opportunity for the progressive development of this new branch of international law.

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10 DE JESUS, Alfredo (2008), '*La contribución del árbitro a la autorregulación y unificación del derecho de los contratos del comercio internacional', Anuario Español de Derecho internacional Privado*. El Dial, 321. Online: <www.ohadac.com>.

11 FELDSTEIN DE CÁRDENAS, Sara (1995). *Contratos Internacionales*. Editorial Abeledo Perrot. Buenos Aires, 159-160.

12 Ibid.

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