

The New PCA Rules and their Application to Satcom Disputes

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Introduction

- Satellite communications multi-faceted sector
 - Terrestrial vs space infrastructure
 - ➔ National jurisdictions vs global commons
 - Governments, IGOs & private operators
 - ➔ Public (int'l & nat'l) & private (incl. contract) law
 - Technical/operational (radio frequencies); trade/commercial (service provision); political/security (critical infrastructure; dual-use); social (public service) aspects ➔ many legal regimes



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Existing mechanisms (1)

1. International Court of Justice

- Primary judicial organ of the UN as per Statute
- ‘Shortcomings’:
 1. Not available to IGOs, NGOs or private entities
 2. Even for states: only if jurisdiction has been accepted by both states parties to a dispute
 3. No party autonomy
 - Possibility Chambers, but choice from 15 judges only
 4. Focus on public law aspects
 5. Expertise with technology largely absent
 - Always need for experts



Existing mechanisms (2)

2. ITU dispute settlement system

- ITU Constitution, Art. 56, lists various options
- ‘Shortcomings’:
 1. Only for ITU member states
 2. Arbitration = option, as per Art. 41, Convention / **Optional** Protocol
 3. Expertise beyond technological aspects...?

3. WTO dispute settlement system

- Further to Prof. Malanczuk – mind focus of WTO on trade & commercial aspects



Existing mechanisms (3)

4. Liability Convention mechanism

- ‘Shortcomings’:
 1. Only disputes on **damage caused by satellites**
 2. Only as such available to states
 3. Not necessarily giving rise to binding decision
 - ◆ Mind: Convention explicitly allows option of priority other – national – dispute settlement mechanisms

5. National dispute settlement systems

- ‘Shortcomings’:
 1. **Difficulties in handling international aspects**
 2. Possible issues with sovereign immunities



Existing mechanisms (4)

6. Existing international arbitration rules

- 2010 UNCITRAL Arbitration Rules
- ‘Shortcomings’:
 1. **Difficulties to properly reflect any of the overarching public aspects of space activities**
 2. Ensuring confidentiality of information (security & commercial), if desired, not sufficiently guaranteed
 3. Involvement several categories of experts not sufficiently facilitated

➔ Used as baseline for PCA initiative



PCA Optional Rules (1)

- ‘Optional Rules for Arbitration of Disputes Relating to Outer Space Activities’, 6/XII/2011
 - Art. 1(1): “The characterization of the dispute as relating to outer space is not necessary for jurisdiction where parties have agreed to settle a specific dispute under these Rules.”
 - *Id.*: Based on agreement: “disputes between [parties] in respect of a defined legal relationship, whether contractual or not”.



PCA Optional Rules (2)

■ On the arbitral tribunal

- PCA SG = ‘appointing authority’ (Art. 6(1))
- Default: 3 arbitrators (Art. 7(1))
 - ◆ Other panel-sizes may also be opted for (Artt. 7-10)
- ‘Usual’ clauses on obligatory disclosures by (Art. 11) & challenges of (Art. 12) arbitrators, incl. replacement if necessary (Art. 14)
- Art. 16: full waiver of liability arbitrators & “any person appointed by the arbitral tribunal” for “any act or omission” connected to arbitration
- List of arbitrators (as options) (Art. 10(4))



PCA Optional Rules (3)

■ On the procedure

- Tribunal discretion subject to Rules, if 'equality of parties' & 'fair opportunities to present arguments' are guaranteed (Art. 17(1))
- Confidentiality issue:
 - ◆ Party may call for information to be classified as confidential (Art. 17(6))
 - ◆ Tribunal decides on such classification (Art. 17(7))
 - ◆ Tribunal may, at request of party / *proprio motu*, appoint confidentiality adviser – independent expert who decides on disclosure / may report instead of disclosing (Art. 17(8))



PCA Optional Rules (4)

■ On the applicable law

- Law / rules of law designated by parties, otherwise int'l law & nat'l law as deemed appropriate by Tribunal (Art. 35(1))
- Tribunal “shall decide as *amiable compositeur* or *ex aequo et bono* **only** if the parties have expressly authorized [it] to do so” (Art. 35(2))
- 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” (Art. 35(3))



PCA Optional Rules (5)

■ On evidence – & expertise

- Tribunal decides on “admissibility, relevance, materiality and weight of the evidence offered” (Art. 27(5))
 - ◆ Non-technical documents may be requested from parties to explain information (Art. 27(4))
- Experts on scientific or technical matters may be called upon (Art. 29(1))
 - ◆ May be challenged (Art. 29(3))
 - ◆ List is being drawn up of such experts – freedom to call upon experts outside of list remains (Art. 29(7))



PCA Optional Rules (6)

■ On the measures & awards

- Interim measures (Art. 26)
- Award(s)
 - ◆ Award “final and binding on the parties” (Art. 34(2))
 - Unless ‘simple’ error detected (Art. 38)
 - ◆ By majority if more than one arbitrator (Art. 33(1))
 - ◆ Separate awards possible (Art. 34(1))
 - ◆ Default: reasons for award provided (Art. 34(3))
 - ◆ Request for (further) interpretation possible (Art. 37)
 - ◆ Additional award may be requested (Art. 39)



PCA Optional Rules (7)

■ On costs

- Default allocation: to “unsuccessful “ party/ies; Tribunal may apportion otherwise (Art. 42(1))
- Art. 40(2): “The term ‘costs’ includes only;”
 - ◆ Fees Tribunal
 - ◆ Reasonable travel & other expenses Tribunal
 - ◆ Reasonable costs expert advice & other assistance
 - ◆ Reasonable travel & other expenses witnesses
 - ◆ Legal & other costs incurred by parties in relation to arbitration
 - ◆ Fees & expenses Int’l Bureau + appointing authority



Concluding remarks

- PCA Optional Rules offer most comprehensive coverage of aspects satcoms possible
 - Taking into account ground vs space; nat'l law & jurisdiction vs int'l law & global commons; various categories of actors; public & private (incl. contract law); technological complexities
 - Flexibility & party autonomy maximized, within coherent system
 - Confidentiality issue main weak spot...

