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ADR is Out of this World: A Proposal For the Resolution of Outer-Space Disputes

BY GEORGE KHOUKAZ

Outer-space exploration has, for decades, been an issue of major interest at the international level.

The military-inspired space race was the hallmark of the Cold War, fueling the competition between the United States and the Soviet Union. Even after the Soviet Union's demise, the United States maintained an active role in outer-space exploration.

For example, in 2004, President George W. Bush announced ambitious space exploration goals. Nowadays, we are witnessing a new phenomenon, which is the increased role of private entities in space exploration and space-related activities, as well as the Trump Administration's interest in militarizing space.

In fact, as of 2013, the private-sector amounted to the 76% lion's share of all space-related expenses, while government expenditures were limited to the remaining 24% of the global space economy. Since these privately-funded space endeavors have a much larger scope, it is likely that their activities will result in more complicated legal consequences.

Assuming that such disputes are likely to arise in the near-future, we will need to think about their legal consequences. We will face difficulties relating to the choice of law: What law should apply? Which legal system has jurisdiction to address the dispute? If a judgment was somehow entered, how will the plaintiff enforce it in the defendant's home country?

The answers to these questions are unpredictable because there is no internationally agreed-upon structure that addresses these matters. This article will therefore formulate a proposal that calls for international efforts to develop a legal structure similar to the one in place for international commercial disputes.

Since space endeavors require effort from a number of international actors, it is likely that any outer-space dispute will result in a choice-of-law complication. For example, imagine this:

> An American biologist is conducting an experiment aboard an orbiting multinational space station built by the United States, Canada, Japan, and the European Space Agency. The biologist is passing through the Canadian module, where a French astrophysicist is repairing an instrument panel. The astrophysicist carelessly pushes aside a wrench, which floats away and injures the biologist. Which state's choice-of-law rules—and institutions—determine which state's substantive laws will apply to the issues of the astrophysicist's liability and the American's ability to recover damages?

The "jurisdiction-less" aspect of outer space will result in significant confusion

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areas where the ombudsman upholds high numbers of complaints.

Most U.K. financial services compensation claims never go near an ombudsman. Regulatory pressure to do the right thing under both the conduct-of-business rules and the complaint rules, or to carry out business reviews, has made a big difference.

There are, however, some areas where limits on the regulator's or ombudsman's powers catch out everyone. Small businesses have many of the same characteristics as consumers. Only recently did the Financial Ombudsman Service start receiving complaints from businesses with more than 10 employees and turnovers of above €2 million. Lending to businesses is not regulated.

So while an ombudsman can now deal with much bigger businesses, it has no rules to apply. The ordinary law is not particularly sympathetic to over-borrowed customers being badly treated by their lender. Here, the ombudsman has the weapon of being able to reach fair and reasonable decisions, given to it by the Financial Services and Markets Act 2000.

One could be concerned about the arbitrary nature of a fair and reasonable jurisdiction dealing with half a million cases a year. The Financial Ombudsman Service, however, has taken its predecessor ombudsman schemes' enthusiasm for publishing to greater heights.

By law, it has to publish almost all its decisions anyway. It produces a monthly bulletin with case studies and "technical resource" papers on its website to tell the public how it approaches particular issues (see Publications at https://www.financial-ombudsman.org.uk).

The Financial Ombudsman Service is really an alternative dispute resolution body although when one counts cases resolved each year, the question does sometimes arise as to what is alternative and what is mainstream.

The Consumer Insurance (Disclosure and Representations) Act 2012 (available at http://bit.ly/2AOGe3i) consciously tries to bring the law on insurance non-disclosure more into line with what the ombudsman is doing. The Financial Ombudsman Service in this sense is really an alternative dispute resolution body although when one counts cases resolved each year, the question does sometimes arise as to what is alternative and what is mainstream.

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So, why is there a difference between the United States and the United Kingdom here?

As a unified rather than federal state, the United Kingdom has much stronger consumer protection regulators whose resourcing and powers do not depend on political whim. It also does not have a class-action tradition. That tradition, though, grew up in a Jeffersonian world of devolved power that simply does not exist in the U.K.

The U.S. has one big advantage in the way in which it can use class actions beyond regulated spheres, which seems beyond the UK courts. Environmental damage, and product liability are the type of areas where the United States has an answer that the United Kingdom does not have.

Similarly, the near-absence of punitive damages from U.K. civil cases has kept the compensation bill down even in areas where regulatory and ombudsman pressure is leading to huge compensation payments. It has also hidden senior executives from the type of scrutiny that they would not otherwise enjoy.

Some on this side of the "pond" thought that the creation of Consumer Financial Protection Bureau might take the United States in a similar direction as the UK. This might yet happen in the future. Until then, the United Kingdom and the United States will just be different.

There is, though, one sense in which the United States can steal from the U.K. example where class actions have succeeded or been settled. The technique of setting up an organization to decide who receives what of the amounts paid by the wrongdoer has been used in a slightly top-heavy way by the Swiss Bank Holocaust Claims Resolution Tribunal and would work more efficiently if it was institutionalized by court decisions or settlements.

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regarding the applicable substantive and procedural laws in this dispute. If the plaintiff files suit in his or her own state courts, it is likely that the court will be biased in favor of its own nationals against the foreign party. Furthermore, if an award is entered by the court, the plaintiff will have a hard time enforcing that award in the defendant's foreign country.

An example in assessing how the international community addressed the choice-of-law problem is that of Antarctica and the High Seas. Both of these non-sovereign territories are governed by international treaties and agreements—a situation that is somewhat similar to the outer-space case.

Antarctica is an interesting example to rely on because a number of states claim sovereignty over it. The Antarctic Treaty, however, froze all these disputes resulting in no governing set of laws over the Antarctic territory. (See the treaty at http://bit.ly/2IAWfOw.)

Furthermore, the Antarctic Treaty binds signatory countries to a standard of conduct and provides a framework for punishing breaching states. Unfortunately, however, the Antarctic Treaty fails to regulate the wrongdoings of private actors from nonsignatory countries. It solely provides jurisdiction by a signatory state over its nationals who are performing scientific or exploratory missions.

In other words, the Antarctic Treaty does not offer legal remedies for wrongdoings by private actors from nonsignatory countries, and therefore could not serve as a model to be applied in outer-space disputes.

The high seas are another example of sovereign-less areas that are controlled by international treaties and agreements.

FLAG-STATE JURISDICTION

The relevant point from these international treaties is that the state under which the ship sails—also known as the flag state—has jurisdiction over that ship in the high seas.

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Concurrently, a flag state will maintain primary jurisdiction over a defendant for misconduct occurring on the ship while in the high seas.

Such a rule seems reasonable and practical at first. But since space activities require significant effort and financial investments, it is customary for private companies to team up with other companies, or even foreign state agencies.

When a space exploration mission is undertaken by an association of different private companies, it becomes much harder for a court to figure out the applicable state law. Subsequently, the choice-of-law method applied in the case of the high seas is unlikely to be effective in outer-space disputes.

The international community put scattered efforts throughout the years to address the sovereignty of outer space. Most of these efforts, however, have been driven by political efforts to prevent competing major powers from exerting dominion over outer-space, at the expense of other countries.

The Treaty on Principles Governing the Legal Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies—commonly known as the outer-space treaty ("OST")—was first introduced by the United Nations in 1967. (See https://bit.ly/2oghNq3.)

The treaty was so broad in scope and content that it became known as the "constitution of outer space." The OST was forged during an era of increased military tensions between the United States and the Soviet Union, and therefore reflects such diplomatic aspirations to deescalate the tensions.

The OST underlined the peaceful aspect of any future explorative mission and urged states to abide by that. From a legal perspective, the treaty solely addresses state liability and, understandably at the time, fails to address actions by private actors.

In 1972, the Claims Commission of the Convention on International Liability for Damage Caused by Space Objects—also known as the Liability Convention—was entered into force. (See https://bit.ly/2yrjZQl.) Like the OST, the Liability Convention fails to cover wrongdoings committed by private entities, the main actors of outer-space activities.

The Liability Convention, however, moves one step forward by laying out a dispute resolution process, in case of a space object-related dispute—either in outer space, in the air, or on the surface of the earth.

The process encourages the use of diplomatic channels to solve disputes peacefully.

ADR on the Final Frontier

The need: There is no dispute resolution mechanism for activity in space by private parties.

The current setting: It's not just NASA sending up rockets or government weather satellites. Private business is in a space race, and conflicts will arise.

The proposal: The groundwork for comprehensive international agreements on space are in place, with ADR analogies here on earth. The author suggests arbitration, with a new U.N. treaty to back it.

Only when diplomacy fails after one year of good-faith efforts is a state allowed to bring a claim under the Liability Convention.

The injured party can do so by relying on the Claims Commission—an ad hoc type commission—to solve the dispute. The commission will make its decision after evaluating the merits and has the authority to award a monetary compensation.

The commission's award is binding only if the parties agree to that, in writing, beforehand. The Liability Convention has never been called on, so far, and it is therefore hard to assess its efficiency at this point.

STRUCTURE NEEDED

Based on the information above, it is clear that the international community needs to develop a firm, reliable and efficient structure for resolving potential outer-space disputes. The proposed structure in this article is one that heavily relies on a binding arbitration process, similar in form to the one used for international commercial disputes.

Such aspirations are not newborn. In fact, in 2009, the Administrative Council of the Permanent Court of Arbitration (see https://bit.ly/2PcdOZN) called for the creation of an advisory group of legal experts who were tasked with considering the "desirability of, or need for, arbitration rules specifically targeted at the resolution of space-related disputes."

After an extensive study, the advisory group reached its conclusion, making three relevant points. It found that

(1) there is a need for an international forum to address outer-space disputes, and the forum should be equally applicable to both state and non-state actors;

(2) the scope of activity of this forum should be broad enough to address all space-related disputes rather than those covered by the narrow treaties in place; and

(3) despite the existence of other dispute resolution alternatives for private parties, a space-focused mechanism is worthwhile.

The advisory group concluded that establishing an international arbitral forum, specifically geared toward outer-space disputes, would be the most advantageous way to proceed forward.

Developing a new ADR-oriented forum to address outer-space disputes provides a number of benefits. A cooperative environment, rather than the confrontational aspect of litigation, could allow for better relief subsequent to a dispute—such as help in cleaning disasters.

That would trigger a series of positive reactions—due to the parties' understanding that the benefits of entering into the venture overcomes the costs of solving a potential dispute—between both private and public actors. Those reactions, hopefully, would reflect the initial aspirations of a peaceful, cooperative space exploration program.

ADR procedures could allow parties to negotiate the applicable substantive and procedural law, or in case they fail to reach an agreement, a panel of arbitrators could instead make the choice-of-law decision. Granted, the panel's role in deciding the applicable law is similar to a national court's role in making that decision.

But the panel would be relying on an internationally agreed-upon set of rules rather than the national laws of individual countries, resulting in much more predictability of outcome.

An arbitral structure also would allow for a speedy and final decision with a narrow possibility of appeals. Given that timing plays an important role in space activities, a speedy and final decision is well-received and beneficial in these circumstances.

Arbitrating parties will get to pick expert decision-makers—the arbitrators—who can better understand space matters, in contrast to a local judge who, despite legal expertise, might lack the technical and scientific knowledge about space activities.

Any future space-oriented ADR structure should rely heavily on previous experiences in the transnational commercial sphere, while incorporating the needs of the outer-space community. In fact, an interesting proposal would be to develop a hybrid system, which relies on both the Liability Convention and the United Nations Commission on International Trade Law dispute resolution rules.

The international community needs to develop a firm, reliable and efficient structure for resolving potential outer-space disputes. The proposed structure heavily relies on a binding arbitration process, similar in form to the one used for international commercial disputes.

The international enforceability of arbitral awards—by the signatory countries of the New York Convention—provides an excellent guarantee that arbitration awards will be respected.

The first step would be to formulate an international agreement, probably in the form of a U.N.-sponsored convention, where any entity harmed by a foreign party—both states and private actors—in the course of carrying on an outer-space activity would resolve its dispute through an arbitration process.

The arbitral tribunal's award will later be enforced in most countries, pursuant to the New York Convention, which was adopted in 1958 formally as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Currently, there is no internationally agreed-upon framework which forces claimants to submit themselves to arbitration; rather, they are allowed to pursue whatever course they wish, causing some unpredictability and a lack of uniformity.

Once this first step is met, the remaining steps to undertake will be a matter of procedure and brainstorming to tailor an effective dispute resolution procedure.

It is clear at this point that gigantic efforts still need to be made in order to come up with an effective end result. The road to this outcome will be lengthy and arduous, but the earlier the international community begins its work, the better it is for our societies.

Science is moving forward so quickly that, if society does not start thinking about these topics, technological developments will outpace the evolution of the law.

ADR Brief

THE FAIRNESS AGENDA: ARBITRATION LEGISLATION ADVANCES IN THE WAKE OF A CRITICAL REPORT

BY ANDREW GARCIA

Congress put arbitration fairness on its action agenda late in the summer and, after decades of proposals that attracted little leadership attention, finally moved a measure that restricts the use of consumer arbitration.

The House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act on Sept. 20 by a 225-186 vote, with nearly all Democrats backing the measure, and all but two Republicans opposing. (See http://bit.ly/2MeIiqI for the text and current status.)

If the bill passes the Senate and is signed by President Trump—two unlikely but not impossible prospects—it would ban pre-dispute arbitration agreements for employment, consumer, antitrust, and civil rights disputes.

The bill's House success comes on the heels of a report that strongly criticizes arbitration in the employment and consumer contexts.

The report, "The Truth About Forced Arbitration," released in September by the American Association for Justice, a Washington, D.C., nonprofit group lobbying and advocacy group of plaintiffs' trial lawyers, characterizes arbitration as a "rigged system" that is ultimately bad for workers and consumers who are seeking redress against corporations. (The AAJ's report is available at http://bit.ly/2VkzcwK.)

The AAJ report seems to be a response to a U.S. Chamber of Commerce-sponsored report, "Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration." (The chamber's report is available at http://bit.ly/2xwkeZp.) The report by the chamber's Institute for Legal Reform was published just before a May 16 House Judiciary Committee hearing, "Justice Denied: Forced Arbitration and the Erosion of our Legal System." The chamber sought to counter sharp criticism of arbitration from the majority of the witnesses with the report at the spring hearing. (A video of the committee session is available at http://bit.ly/2LF7wj9.)

Although the AAJ report never mentions the chamber report by name, it uses "Fairer Faster Better" as a theme that it purports to debunk. "Forced arbitration's proponents counter that the process is faster, fairer, and better for workers and consumers than going to court," the AAJ's executive summary states, continuing,

> However, this comprehensive analysis of the self-reported data provided by the arbitration organizations makes clear that forced arbitration is not an alternative judicial process, but instead eliminates claims, immunizes corporations, and allows abuse, discrimination, fraud, and essentially all other corporate wrongdoing to go

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