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Jesse Baez

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THE PCA'S OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES: BRINGING ARBITRATION TO INFINITY AND BEYOND

Jesse Baez*

I. INTRODUCTION

Arbitration and alternative dispute resolution do not have an established presence in disputes that reach above Earth's atmosphere. Traditionally, outer space was the purview of nation-states.¹ The foundation of space law consisted of international treaties, as well as domestic laws issued by various countries.² As a result, disputes that occurred in outer space were resolved by government agencies and diplomats while legal dispute resolution mechanisms were eschewed.³ There were some efforts to provide an alternative dispute mechanism for space related disputes; the Liability Convention of 1972 offered one such mechanism with its Claims Commission.⁴ The Commission was intended to fall under the United Nations' jurisdiction, but it has never been used to resolve a dispute.⁵ With private commercial interests expanding their activities into outer space, the need for an alternative legal dispute resolution mechanism outside of the traditional government and diplomatic channels has increased.⁶

The International Bureau of the Permanent Court of Arbitration (PCA), based in the Netherlands, responded to the need for non-governmental legal dispute resolution mechanisms in outer space disputes by issuing its Optional Rules for the Arbitration of Disputes Relating to Outer Space Activities in December 2011 (The Rules). The Rules use the 2010 UNCITRAL Arbitration rules as their basis with significant changes that reflect the reality of outer space disputes.⁷ These changes reflect that disputes may involve states, international organizations and private entities. The Rules include public international law elements that are relevant to outer space disputes. In addition, the Rules utilize the Secretary-General and the PCA at the Hague, provide freedom for the parties to have their arbitral tribunal consist of one, three or five persons, offer specialized lists of arbitrators and experts in science and technical fields, and the Rules also suggest procedures to protect confidentiality.⁸ Moreover, the Rules are not mandatory and emphasize flexibility and party autonomy.⁹ The Rules, as well as the services of the PCA and

* Jesse Baez is an Associate Editor of *The Yearbook on Arbitration and Mediation* and a 2013 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ Michael Listner, *A new paradigm for arbitrating disputes in outer space*, *SPACE REVIEW* (January 9, 2012), available at <http://www.thespacereview.com/article/2002/1>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES INTRODUCTION (Permanent Court of Arbitration 2011).

⁸ *Id.*

⁹ *Id.*

the Secretary- General, are made available to all types of entities, including states, international organizations and private entities.¹⁰

The PCA's Optional Rules for the Arbitration of Disputes Relating to Outer Space activities are an important step in providing a legal framework for entities that engage in operations above Earth's atmosphere. While the effectiveness of the Rules is still untested, the Rules have the potential to serve as an impetus for the commercialization of outer space. International arbitration brings economy, cost effectiveness, speed and solves thorny issues of jurisdiction. The existence of space arbitration will make it more attractive and less expensive for a company to invest in operations that extend beyond the atmosphere of our planet.

II. DIFFERENCES BETWEEN THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES AND THE 2010 UNCITRAL ARBITRATION RULES

A. Scope of Application

Parties may agree to adopt the Rules as they stand, or modify them by party agreement.¹¹ The dispute does not have to be characterized as relating to outer space in order for the arbitral tribunal to have jurisdiction under the Rules.¹² If a party agrees to arbitrate under the Rules, this agreement constitutes a waiver of any right of immunity from jurisdiction to which the party might otherwise be entitled.¹³ If there is a waiver of immunity that relates to the execution of an arbitral award, it must be explicitly stated in the arbitration agreement.¹⁴ In addition, the International Bureau of the Permanent Court of Arbitration serves as a registry for the arbitral proceedings and a provider of secretariat services.¹⁵

The first major difference between the UNCITRAL and the PCA Rules can be found in the first article regarding the scope of application. Unlike the PCA Rules, adopting the UNCITRAL rules does not constitute an automatic waiver of any right of immunity from jurisdiction, nor do the UNCITRAL rules have any mention of waiver of immunity relating to the execution of arbitral awards.¹⁶ Also, the UNCITRAL rules lack the designation of a body that serves as a registry for the proceeding and provides secretariat services.¹⁷ Another important difference that should be noted is the conflict of laws provision found in the UNCITRAL rules but not in the PCA Rules. The UNCITRAL rules state that if the rules "conflict with a provision

¹⁰ *Id.*

¹¹ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 1 (Permanent Court of Arbitration 2011).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Compare UNCITRAL ARBITRATION RULES ART. 1 (UNCITRAL, 2010), with OPTIONAL. RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 1 (Permanent Court of Arbitration 2011).

¹⁷ Compare UNCITRAL ARBITRATION RULES ART. 1 (UNCITRAL, 2010), with OPTIONAL. RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 1 (Permanent Court of Arbitration 2011).

of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.”¹⁸ In contrast, the PCA Rules do not contain a similar provision as to what happens if the Rules clash with the law applicable to the arbitration. From this lack of a conflict of laws provision, taken with the waiver of jurisdictional immunity, it can be inferred that in an arbitration under the PCA Rules the arbitrator would have the final say as to which rules would prevail in any conflict.

B. Appointing Authority

The Secretary-General of the Permanent Court of Arbitration serves as the appointing authority for arbitrators.¹⁹ The Secretary-General can require from either the parties or the arbitrators any information it requires, and the Secretary-General must also give the parties and arbitrators an opportunity to present their views.²⁰ Any communication with the appointing authority must also be shared with all other parties by the sender.²¹

The two sets of rules also differ as to who the appointing authority will be for the arbitration. UNCITRAL allows for party selection of the appointing authority, and mentions the Secretary-General of the PCA as a possible choice.²² In contrast, the PCA Rules state that Secretary-General “shall serve as appointing authority”, which indicates that there is no choice in appointing authority.²³ Furthermore, there are no provisions for the removal of the appointing authority in the PCA Rules as there are in the UNCITRAL rules. The PCA Rules are also silent as to what will occur if the Secretary-General fails to appoint an arbitrator within a reasonable time period.²⁴

C. The support role of the Secretary General and the International Bureau

Unlike the UNCITRAL rules, the PCA Rules support arbitration with specialized lists of personnel that are familiar with legal and technical aspects of outer space disputes. For instance, the Secretary-General gives the parties a list of arbitrators that have expertise in matters that are relevant to outer space disputes.²⁵ In addition, if the arbitrators need to appoint independent experts on technical or scientific matters, the Secretary-General will provide a list of experts that the arbitrators can choose from.²⁶ The support given by the PCA Rules is due to the highly technical nature of outer space disputes, and helps facilitate the arbitration process.

¹⁸ UNCITRAL ARBITRATION RULES ART. 1 (UNCITRAL, 2010).

¹⁹ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 6 (Permanent Court of Arbitration 2011).

²⁰ *Id.*

²¹ *Id.*

²² UNCITRAL ARBITRATION RULES ART. 6 (UNCITRAL 2010).

²³ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 6 (Permanent Court of Arbitration 2011).

²⁴ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 12 (Permanent Court of Arbitration 2011).

²⁵ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 10 (Permanent Court of Arbitration 2011).

²⁶ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 2, 29 (Permanent Court of Arbitration 2011).

D. Arbitrator disclosure and challenges

In the event an arbitrator on a three or five person tribunal can no longer participate in the arbitration, the other arbitrators may continue the arbitration and render a decision, ruling, and award, or decide not to continue the arbitration and have a substitute arbitrator appointed.²⁷ This substitute arbitrator will be appointed either by the list-procedure, other arbitrators, or, in exceptional circumstances the appointing authority may appoint the substitute arbitrator.²⁸ Unless the arbitral tribunal decides otherwise, upon replacement of an arbitrator, the proceedings resume at the stage where the replaced arbitrator ceased to perform his function.²⁹

The PCA Rules give the arbitrators more power to decide what happens in the event that an arbitrator can no longer serve than the UNCITRAL rules. Under the PCA Rules, in a three or five person panel, the arbitrators can either decide to continue the proceedings without the arbitrator, or halt the proceedings and appoint another arbitrator, unlike the UNCITRAL rules where the arbitrators are not empowered to make this decision.³⁰ Rather, under the UNCITRAL rules the arbitrator must be replaced with a substitute arbitrator, or, subject to the discretion of the appointing authority, the arbitration will continue without the missing arbitrator.³¹

E. Confidentiality

A party can invoke the confidentiality of any information it submits to the arbitration by making an application to render the information classified as confidential.³² The notice of confidentiality must contain the reasons why the information should be considered confidential, and this notice must be communicated to opposing parties and the International Bureau.³³ After receipt of notice, the arbitral tribunal will determine whether the information will be classified as confidential, and will determine under what conditions and to whom the confidential information may be disclosed, and will require persons to whom the confidential information is to be disclosed to sign a non-disclosure agreement.³⁴ The tribunal's decision about the confidentiality of the information must be communicated to both the parties and the International Bureau.³⁵ Furthermore, the tribunal can also appoint a confidentiality adviser as an expert in order to advise the tribunal without disclosure of the confidential information to either the parties or the arbitral tribunal.³⁶

A significant difference between the rules is the difference in invoking confidentiality. The PCA Rules contain a mechanism that allows for a party to invoke confidentiality over certain documents, subject to the tribunal's approval.³⁷ In addition, the PCA Rules also allow for the

²⁷ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 13 (Permanent Court of Arbitration 2011).

²⁸ *Id.*

²⁹ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 15 (Permanent Court of Arbitration 2011).

³⁰ UNCITRAL ARBITRATION RULES ART. 12 (UNCITRAL 2010).

³¹ UNCITRAL ARBITRATION RULES ART. 14 (UNCITRAL 2010).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 17

appointment of a confidentiality expert to review the confidential documents without disclosure of the documents to either the tribunal or the parties.³⁸ In comparison, the UNCITRAL rules lack any kind of confidentiality protection.

F. Costs and Deposit of Costs

Under the PCA Rules, costs are defined as fees of the arbitral tribunal, travel costs and other expenses incurred by the arbitrators, cost of expert advice and other assistance required by the tribunal, the costs of travel and expenses of witnesses subject to tribunal approval, legal and other costs incurred by the parties that are related to the arbitration, and the fees and expenses of the International Bureau which include the fees of the appointing authority.³⁹

The International Bureau may request the parties to deposit an equal amount as an advance for costs.⁴⁰ Amounts deposited by the parties are collected by the International Bureau and are dispersed for arbitrators' fees, fees for the appointing authority, and fees for the International Bureau.⁴¹ A security deposit is required for interim measures, which is to be directed to the International Bureau and dispersed to the arbitral tribunal upon the Bureau's order.⁴² Also, during the arbitration a supplementary deposit may be required by the International Bureau.⁴³ If a party does not pay in full within sixty days after a request, the Bureau will inform the party they must make the required payments, or the tribunal may order the suspension or termination of the proceedings.⁴⁴ After a final award has been rendered or a termination order has been issued, the Bureau will give the parties an accounting of the deposits received and return any unspent balance to the parties.⁴⁵

The major difference between the two types of rules in regards to deposit of costs is who collects the deposit of costs. The PCA Rules empower the International Bureau to collect any deposit of costs, while the arbitral tribunal is responsible for the collection of deposits under the UNCITRAL rules.⁴⁶ Finally, an important difference in the PCA rules is that the fees of the International Bureau are included along with the costs of the appointing authority and the tribunal.⁴⁷ The additional fees are due to the Bureau's role in providing secretariat services for the arbitration.

³⁸ *Id.*

³⁹ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 40 (Permanent Court of Arbitration 2011).

⁴⁰ OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 43 (Permanent Court of Arbitration 2011).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Compare UNCITRAL ARBITRATION RULES ART. 43, with OPT. RULES FOR ARB. OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 43

⁴⁷ Compare UNCITRAL ARBITRATION RULES ART. 43, with OPT. RULES FOR ARB. OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES ART. 43

III. ANALYSIS

When it comes to a topic as complex as outer space law, the support that the PCA Rules provide can help to facilitate the arbitration process. The presence of specialized lists saves the parties from having to conduct a search for arbitrators with experience relevant to outer space disputes, which would add to the time and cost of the arbitration process. Similarly, having a list of relevant experts available to the arbitrators is also likely to decrease the cost and time of the arbitration by saving the arbitrators from having to conduct a search for qualified experts. Thus the supporting role played by the International Bureau and the Secretary-General of the PCA could be a significant draw for parties to choose to arbitrate under the PCA Rules. However, one caveat is warranted. Legal practitioner Gerry Oberst observes that the lists of specialized personnel provided by the PCA may lose their value if they are not updated regularly.⁴⁸ As he states, “in practice, it is easy to put someone’s name down on a list but difficult to take it off.”⁴⁹ The PCA will have to ensure that these lists are updated on a regular basis, or arbitrating under the PCA Rules may lose some of its appeal.

While the rules do not leave much in the way of party choice when it comes to designating the appointing authority, Oberst states that this lack of choice comes with an advantage. Having the PCA as the sole appointing authority makes the arbitration more efficient than it otherwise would be; parties will not have to search for an appointing authority.⁵⁰ In addition, Oberst also notes that the arbitrators’ power to continue the arbitration even if one arbitrator can no longer participate is an effective tool against undue delay.⁵¹ However, the lack of choice in designating an appointing authority may be a double edged sword. If the Permanent Court of Arbitration were to fail or unreasonably delay the appointment of arbitrators, parties could be left without any alternative appointing authority, and have to accept the delay in resolving their claim. This lack of alternative could be remedied through party modification of the PCA Rules. Practitioners should take note of the lack of alternatives in the appointing authority and modify their arbitration clauses accordingly.

As the arbitration community has noted, the rules reflect the fact that entities other than corporations are involved in outer space transactions.⁵² Sending satellites into orbit involves companies, states, and international organizations working together.⁵³ The waiver of jurisdiction and lack of a conflict of laws provision found in the PCA Rules reflect this reality and are crucial to a space related arbitration process. In court litigation of a space-based dispute, a claim of immunity from jurisdiction by a governmental entity would throw a huge wrench in the legal proceeding and would possibly preclude the litigation from moving forward. Likewise, the drafters of the PCA Rules were wise not to include the conflict of laws provision contained in the UNCITRAL rules. Giving the arbitrators discretion to decide which rules apply when the PCA Rules and the law governing the arbitration conflict gives the arbitrators flexibility in an already complex arbitration process.

⁴⁸ Gerry Oberst, *Regulating the Final Frontier*, THE LAWYER (January 16, 2012), available at <http://www.thelawyer.com/regulating-the-final-frontier/1010913.article>.

⁴⁹ *Id.*

⁵⁰ Gerry Oberst, *New Arbitration Rules to Resolve Satellite Disputes*, SATELLITE TODAY (February 1, 2012), available at

http://www.satellitetoday.com/via/globalreg/New-Arbitration-Rules-to-Resolve-Satellite-Disputes_38178.html.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

The confidentiality provisions will also prove to be significant to parties who may encounter a space based dispute. Sending anything into space, be it a person or satellite, is expensive, and involves sensitive, technical details that a company would not want disclosed to a competitor. Having a confidentiality procedure in place helps assure parties that important trade details will not be disclosed to either the tribunal or opposing parties.

Finally, an important point that should be taken into consideration by parties and legal practitioners is the cost of arbitrating under the PCA Rules. Parties will have to pay not only for the Secretary-General's services as appointing authority and the tribunal, but also for the International Bureau's registry and secretariat services. Since an outer space based dispute is bound to be expensive even before the claim goes to arbitration, the costs involved in arbitrating under the PCA Rules should not be taken lightly.

IV. CONCLUSION

Overall, the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities seem to be an effective set of rules that reflect the reality and complexity of disputes in outer space. The rules have been adapted to the reality that space disputes often involve different players such as states, governmental entities and corporations. In addition, the PCA Rules also recognize the need for confidentiality in technical matters, as well as the need for experts and arbitrators who are well versed in space law matters. Above all, the rules incorporate flexibility and party autonomy that can be important in an outer space dispute. While the rules are untested, they could prove to be an important mechanism for resolving disputes not only between private corporations, but also between nations and governmental entities. If certainty and continuity as to how the legal process will function in outer space disputes can be established, private entities will be more likely to take a bold step and decide to operate above Earth's atmosphere.