

Contribution to:
Liber Amicorum for Ulf Franke:

**SOME REFLECTIONS ON DISPUTE SETTLEMENT
IN AIR, SPACE AND TELECOMMUNICATION LAW**

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I. PRELIMINARY NOTE

It is with great pleasure that I contribute to this book honoring Ulf Franke. I have known Ulf for many years and we have met and co-operated in a number of functions, particularly on cases of the Stockholm Chamber, as members of ICCA, and representing our national arbitration institutions at various levels.

At all these occasions, the cooperation with Ulf was professionally extremely efficient and personally very pleasant. Ulf, in spite of his great knowledge and qualifications and the highly important functions at the national and international level he has held, has always kept a low profile personally and a “no nonsense” approach in addressing procedural and substantive problems.

To his peers, therefore, it is no surprise that, to a great part due to Ulf’s leadership, the arbitration system of the Stockholm Institute has become – as for example is illustrated by the Energy Charter Treaty - one of the major players accepted worldwide for international commercial and investment disputes.

II. THE TOPIC

Since my contacts and work over the years with Ulf have been dealing with many of the usual fields and subjects of international arbitration, commercial and investment arbitration, disputes between states and investors, publications and conferences, particularly of ICCA, in this Liber Amicorum I will contribute some reflections regarding dispute settlement in less common areas of the law of international commercial and economic relations, i.e. air law, space law, and telecommunication law. Obviously, in the limited context available here, only some short and rather eclectic observations may be offered which, however, may at least give an impression of what is happening and what may be perspectives regarding dispute settlement in these less known areas.

There is little need to explain the enormous and still growing volume and relevance of air transport both at the national and international level and that its legal framework both in domestic law, European law, and international bilateral and multilateral treaty law has been existing for decades and continues to grow. Much of the legal work has been done at the governmental level in the framework of the International Civil Aviation Organisation (ICAO), at the non-governmental level by the International Air Transport Association ("IATA") and the Air Law

Working Group of the International Chamber of Commerce (ICC) and their cooperation over many years.

The exploration and use of outer space was initially carried out by states through their institutions, and the major codifications of space law still reflect that practice. However, with the commercialization of space activities, including the increased participation of private business in the field, the legal framework needs to be re-examined and developed. Just to mention one example particularly familiar to me, the Institute of Air and Space Law at the University of Cologne, along with institutions and experts from all over the world, engaged in an international research project entitled *Project 2001 -Legal Framework for the Commercial Use of Outer Space*,¹ and continues to explore and develop the respective legal framework further in cooperation with national space agencies and international institutions such as the European Space Agency and the annual meetings of the Committee on the Peaceful Uses of Outer Space (COPUOS) of the United Nations².

International telecommunications has virtually "exploded" as a branch of international business, and it is becoming more and more space-related due to the growing use of satellites and the allotment by the International Telecommunication Union of slots and frequencies in the Geostationary Orbit. In some of its areas, therefore, it overlaps with space law.

Thus, as air transport, space activities, and telecommunications emerge as ever growing fields of international business, there is an evident need not only for a substantive legal framework, but also for an effective dispute settlement framework to ensure that participants in these new international businesses can evaluate and, if need be, enforce their legal rights.

III. OPTIONS AND DEVELOPMENTS

In the field of aviation, rules for dispute settlement and actual cases have been a regular feature both between states and between private enterprises and private persons variously involved in aviation. The IATA dispute settlement mechanism is regularly used by members of the organization. And at least to some extent, the contracts between airlines and manufacturers contain arbitration clauses.

At the governmental level, some will remember the arbitration between the United States and the United Kingdom concerning Heathrow Airport user charges, which marked the end of a chapter in the on-going dispute regarding such user charges.³

¹ K.H.Böckstiegel (ed), *Project 2001 – Legal Framework for the Commercial Use of Outer Space*, Cologne 2002.

² Hobe/Schmidt-Tedd, Schrogl (eds), *Project 2001 Plus – Global and European Challenges for Air and Space Law at the Edge of the 21st Century*, Cologne 2006.

³ *Heathrow Airport User Charges*, 102 I.L.R. p. 216 (1996), summarized in *THE PERMANENT COURT OF ARBITRATION: INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION- SUMMARIES OF AWARDS, SETTLEMENT AGREEMENTS AND REPORTS* p. 170 (P. Hamilton et al. eds., Kluwer Law International 1999).

In a quite different area, I recall the dispute in the United States between the Civil Aeronautics Board ("CAB") and IATA in a legislative hearing in 1979⁴, dealing with the status of IATA as an international NGO and particularly on the order issued by the U.S. Department of Transportation granting antitrust immunity to IATA and. For much later, in the long and continuing efforts to update the Warsaw Liability System in international air transport, the discussions between governmental and non-governmental and academic institutions continued at the national, European and international level directed towards producing a uniform set of passenger liability limits⁵. These were the initiating factors for more recent codifications in this field, both by the European Community and particularly by the Montreal Convention establishing new standards of passenger liability⁶ at the Montreal international conference on air law, a major topic of which was the "fifth jurisdiction"⁷. Recent mergers, take-overs, alliances and franchises between airlines, as well as the building, opening and outsourcing of the management of new airports, have also led to disputes that are familiar in the international arbitration community such as the much discussed Fraport ICSID Case, but also include confidential proceedings in ICC and LCIA cases familiar to me from my arbitration practice.

Not every effort has been a success: For example, when certain among us were involved in a common effort of IATA and the ICC to draft new arbitration rules for a quick settlement of disputes arising from aircraft accidents, no acceptable practical solution could be reached.

As regards space activities, differences of opinion were, during the initial exploratory stage, mostly academic in nature and revolved around disputed principles. With the growing use of outer space, however, and with the increasing number of states and private enterprises active or interested in space activities, a situation evolved where disputes on various aspects of space activities can no longer be left open, as conflicting views and uses of outer space will not only be incompatible in theory, but incompatible in practice. Thus, the growing demand for developing dispute settlement techniques has led to several affirmative measures: the International Law Association, which in 1984 had already adopted a preliminary draft for the settlement of space law disputes,⁸ later adopted a *Final Draft*

⁴ See Karl-Heinz Böckstiegel, CAB v. IATA- Documentation on Air Law Aspects into the Legislation Hearing, Washington, October 1979 on IATA Traffic Conference, ZLW p. 3 (1980).

⁵ See, e.g., Karl-Heinz Böckstiegel, A Historic Turn in International Air Law: The New IATA Intercarrier Agreement on Passengers Liability Waives Liability Limits, ZLW p. 18(1996).

⁶ Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, signed May 28, 1999 (not yet in force), ICAO Doc. 9740. For the text of the Convention, see <http://www.dotrs.gov.au/aviation/montrealconvention.htm> (visited November 1, 2001).

⁷ Montreal, May 10 – 28, 1999.

⁸ Proposed Draft Convention on the Settlement of Space Law Disputes, 12 J.

*Convention for the Settlement of Disputes Related to Space Activities.*⁹

Those involved in the work of the International Court of Justice ("ICJ"), may also recall that the ICJ, when celebrating its fiftieth anniversary by an international colloquium, included a special session on space law disputes in the context of examining how the procedures of that Court could be made more effective.¹⁰

With the use of mobile phones, satellite television and navigation systems and other areas of telecommunication having become one of the most important and fastest growing business areas throughout the world, it is not surprising that, in recent years, both commercial and investment arbitrations on national and international telecommunication contracts have become a regular feature of the pending caseload of the established institutions of international arbitration.

V. PERSPECTIVES FOR THE FUTURE

Since the dispute settlement framework in these areas is far from complete and satisfactory, a few reflections and tentative predictions regarding future perspectives may also be appropriate.

Regarding disputes **involving states and state institutions**, first, it must be stressed that any new dispute settlement efforts are to be realistic, not only in order to develop academically satisfying rules, but also to find frameworks for dispute settlements that will be accepted in practice by states and private enterprises alike. Second, in order to take into account political feasibility and practical relevance, some major criteria will have to be designed for the development of any new system of dispute settlement. One may try to identify such criteria by posing the following sixteen questions:

1. Are we looking for a universal formula for all states or is only a limited number of states involved and in the latter case, do they have common denominators with regard to

SPACE L. p. 136 (1984). *See also* Maintaining Outer Space for Peaceful Uses (United Nations University, Tokyo 1984).

⁹ Final Draft of the Revised Convention on the Settlement of Disputes Related to Space Activities, as amended at the 68th International Law Association Conference, Taipei (1998). *See further* Karl-Heinz Böckstiegel, *Neue weltraumrechtlichen Arbeiten der International Law Association (ILA)*, ZLWp. 331 (1998).

¹⁰ *See* ROY S. LEE & CONNIE PECK, INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJUNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT, The Peace Palace, April 16-18, 1996, (Kluwer Law International 1997).

factual, political, economic or legal circumstances?

2. What is the character and the political importance of the interest involved for the states?
3. How strong is the pressure to come to a solution? Or, vice versa: Which negative effects, if any, will the states have to face in practice in case no solution is reached?
4. How wide is the gap between legal equality and factual inequality in the respective area of activities between the states concerned?
5. Are the types of disputes predominantly or even exclusively either political or legal?
6. Is an international institution or organization available for the respective area that might host the dispute administration?
7. Will the type of dispute be exclusively relevant for the parties concerned or will the interests of other states be directly or indirectly involved by any decision?
8. Do the disputes concern well codified areas of law or areas of law still in an early development?
9. Can a non-binding settlement procedure be expected to be followed by the parties?
10. Does the nature of the disputes require a fast and final decision?
11. Do the disputes concern questions of law to which many states have already expressed a definite view?
12. Will it require special technical or other expertise to adequately deal with the disputes in procedure and substance?
13. Would a flexible or a well codified set of rules of procedure seem preferable for the types of disputes concerned?
14. Must difficulties as to the applicable substantive law be expected?
15. Are only states to be expected to be parties to disputes or also international organizations, private enterprises, individuals?
16. Have the states concerned already expressed a preference for a specific settlement method at some recent other

occasion?¹¹

In disputes **between** states, although other means of settlement known in public international law such as negotiations and conciliation should not be forgotten, the decisive question is: how can a binding solution be achieved in cases where the parties cannot agree on a settlement between themselves? As for compulsory and binding third-party settlement, one must choose between three basic options, namely:

1. adjudication, be it by the ICJ or by a specific international court;
2. arbitration, be it *ad hoc* or institutional; or
3. a combination of both, allowing the parties to choose between the two methods but obliging them to accept one of them.

The experience from the United Nations Convention on the Law of the Sea¹² and from other existing treaties seems to indicate that the third option may have the best chances of being accepted by states¹³ and that, in cases where two states cannot agree on a particular method, arbitration may be the preferred binding method.

As regards disputes between **private enterprises** as well as disputes between private enterprises on one side and on the other side states or state institutions, there is perhaps less of a need for major new developments. The international business community - including private enterprises involved in air transport, the space industry and telecommunication industry - has for many years chosen and made use of the major institutions of international commercial arbitration. For the areas discussed in this contribution, this is illustrated by cases between airlines, between airlines and manufacturers, and between space agencies, telecommunication companies and insurance companies on one side and satellite manufacturers on the other side.

The arbitration rules of ICC, LCIA and the Stockholm Institute as well as others have been regularly updated and, together with some other national arbitration institutions, offer options for an accepted and predictable dispute settlement machinery. Presently, with the ever-increasing involvement of developing countries in the field, the UNCITRAL Arbitration Rules, used already in many commercial and investment disputes, may perhaps be expected to take on a

¹¹ See the similar reflections in: Karl-Heinz Böckstiegel, *Developing a System of Dispute Settlement Regarding Space Activities*, in PROCEEDINGS OF THE WASHINGTON 1992 SESSION OF THE INTERNATIONAL INSTITUTE OF SPACE LAW p. 27 (Washington, 1993), reprinted in ECSL SPACE LAW AND POLICY SUMMER COURSE, BASIC MATERIAL p. 187 (European Center for Space Law, 1994).

¹² United Nations Convention on the Law and Sea, Montego Bay, December 10, 1982, U.N. A/CONF. 62/122, reprinted in 211.L.M. p. 1261 (1982).

¹³ See *id.* art. 287, para. 1.

relatively greater importance because of their elaboration by specialized practitioners in both the industrialized and developing world.