

The 10 Year Anniversary of the PCA Outer Space Rules: A Failed Mission or The Next Generation?

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Nearly a decade ago, the Permanent Court of Arbitration (“**PCA**”) published its Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (“**PCA Outer Space Rules**” or “**Rules**”). Unlike the five United Nations treaties on outer space, the Rules provide for a voluntary and binding dispute resolution process accessible to all space actors. Notably, they are specifically tailored to the space industry and represent a significant development in the field of space law. Curiously, however, the PCA Outer Space Rules have not made much traction in the space industry.

This article explains key provisions of the PCA Outer Space Rules, discusses their limited success to date, and explores opportunities for their use in the future. As the traditional 10-year anniversary gift is meant to symbolize preservation, longevity, and the ability to last through time, this article explores whether the Rules have been a failed mission or are the next generation for resolving space disputes.

Overview of the PCA Outer Space Rules

The PCA Outer Space Rules are based on the 2010 UNCITRAL Arbitration Rules (“**UNCITRAL Rules**”), which are well-established procedural rules that parties commonly use in international arbitration. The introduction to the PCA Outer Space Rules notes that the Rules reflect “the particular characteristics of disputes having an outer space component involving the use of outer space by States, international organizations and private entities” and “the public international law element that pertains to disputes that may involve States and the use of outer space, and international practice appropriate to such disputes.” The most notable aspects of the Rules account for the highly technical nature of space disputes:

- Specialized Panel of Arbitrators: Under Article 10(4) of the Rules, “[f]or the purpose of assisting the parties” in appointing arbitrators, the PCA Secretary-General shall maintain a list of individuals “considered to have expertise in the subject matters of the dispute at hand for which these Rules have been designed.” The PCA’s Specialized Panel of Arbitrators currently lists 12 lawyers and non-lawyers from Argentina, Australia, Brazil, Chile, China, the Dominican Republic, Israel, Korea, Paraguay, Spain, and Thailand. In appointing arbitrators, the parties to the dispute or the appointing authority may, but are not obliged to, choose persons from the list. Relatedly, pursuant to Article 6 of the Rules, only the PCA’s Secretary-General may serve as the appointing authority (unlike the UNCITRAL Rules which leave this choice to the parties).
- Specialized Panel of Scientific Experts: Under Article 29(1) of the Rules, an arbitral tribunal may appoint experts on “specific issues to be determined by the arbitral tribunal.” Under Article 29(7), the PCA Secretary-General maintains “an indicative list of persons considered to have expertise in the scientific or technical matters in respect of which these Rules might be relied upon.” The PCA’s Specialized Panel of Scientific Experts currently lists 10 scientific and technical experts from Austria, Brazil, Chile, China, Israel, Korea, the Netherlands, Paraguay, and Thailand. The tribunal may, but is not obliged to, choose expert witnesses from the list.
- Non-Technical Documents: Under Article 27(4) of the Rules, the tribunal “may request the parties jointly or separately to provide a non-technical document summarizing and explaining the background to any scientific, technical or other specialized information which the arbitral tribunal considers to be necessary to understand fully the matters in dispute.” This non-technical document can assist the tribunal in understanding the

complex technical issues involved and deciding whether it would be useful to appoint a scientific or technical expert in accordance with Article 29 of the Rules.

- Confidentiality: Under Article 17(6) of the Rules, a party may apply to the tribunal to have certain information in the arbitration classified as confidential. The tribunal will determine whether the information should be classified as confidential based on whether “the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party or parties invoking its confidentiality.” Alternatively, instead of a party disclosing the confidential information in the arbitration, the tribunal may appoint a confidentiality adviser as an expert (in accordance with Article 29) to review the confidential information and report to the tribunal on specific issues designated by the tribunal.

A Failed Mission?

States, international organizations, and private entities use international arbitration to resolve outer space disputes. In fact, several space-related disputes have been resolved through institutional and *ad hoc* arbitration rules and procedures, including those of the International Chamber of Commerce (“**ICC**”), the London Court of International Arbitration (“**LCIA**”), and the International Centre for Dispute Resolution (“**ICDR**”).

However, there currently are *no* publicly reported arbitrations that have been resolved using the PCA Outer Space Rules. The PCA has administered disputes relating to outer space, but in those cases, the parties arbitrated their disputes under the 1976 UNCITRAL Arbitration Rules rather than the PCA Outer Space Rules. (See, e.g., *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd., & Telecom Devas Mauritius Ltd. v. Republic of India*, PCA Case No. 2013-09; *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10)

What explains the low demand for the PCA Outer Space Rules? We believe that analyzing the successes and failures of the Rules involves further exploring three areas of inquiry.

First, who are the parties that currently use international arbitration to resolve their space-related disputes? Early evidence demonstrates that the current

landscape of space-related disputes is overwhelmingly dominated by private entities in the satellite and telecommunications sector. This raises the question of whether private entities are aware of, and refer to, the PCA Outer Space Rules and the PCA's International Bureau (Secretariat) in their commercial contracts and agreements, or alternatively, at the advent of a dispute in cases of existing contracts and agreements. Although the PCA is a well-established institution that enjoys the confidence of States and international organizations, do private entities know of – and hold – the PCA in the same regard? At least one informal survey of industry respondents suggests insufficient awareness of the PCA.

Second, what is the nature and complexity of such disputes? An analysis of the type and subject matter of disputes suggests that the disputes to date have primarily related to satellite launch and delivery, regulatory measures, and lease of satellite capacity. Are the PCA Outer Space Rules well suited to resolve the types of disputes arising out of existing legal relationships? What are the comparative advantages of the Rules in today's highly competitive dispute resolution market?

Third, do existing arbitration agreements and treaties adequately accommodate the Rules, which are optional in nature? The current United Nations treaties on space law hardly contain effective dispute resolution provisions. Although the Annex of the PCA Outer Space Rules contains a model arbitration clause for contracts, how often do parties incorporate such model clauses to resolve their disputes?

These questions require further research as part of this growing field.

The Next Generation!

Do the PCA Outer Space Rules hold any future promise? In our opinion, yes. We believe that the use of the PCA Outer Space Rules will likely increase as the types of disputants and the complexity of space disputes continue to evolve. This is because the future of international space law is rapidly transforming – as too is the space industry as a whole. To this end, and as discussed here previously, the recently signed plurilateral Artemis Accords signal the interest of several spacefaring States in promoting the “civil exploration and use of outer space,” including resource extraction and utilization conducted under the auspices of the 1967 Outer Space Treaty. Domestically, a number of States, including the United

States, have established legal and regulatory frameworks for space exploration and use of space resources.

If successful, this shift away from State monopolization will create new opportunities and relationships for private entities around the world and, in the process, generate scientific, technical, and legal advancements that are likely to surpass the scope of procedure envisaged in the generic institutional rules used today. Likewise, in order to keep up, future space treaties and governance mechanisms will require more robust dispute resolution mechanisms. Like the visionary drafters of the PCA Outer Space Rules, industry respondents overwhelmingly support a preference for arbitration in resolving space-related disputes. The Rules are well suited to meet this preference and resolve the next generation of space disputes.