

Towards “flags of convenience” in space?

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Introduction

■ Background: law of the sea

- Registration ships → nationality
- Traditionally considered sovereign right of state
 - ◆ Application jurisdiction – e.g. for criminal law purposes ... but also on safety requirements, crew licenses, employment conditions etc.
 - ➔ Increasing registration of ships with states without substantial link because of lower standards – ‘flags of convenience’
 - ➔ Concerns with cheap & untrained labour, lack of high-level safety standards (incl. for environment)



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→ “Genuine link”

■ 1958 Geneva Convention, Art. 5(1)

- “Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a ***genuine link*** between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”

→ 1982 UNCLOS, Artt. 91(1) & 94(1)-



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High seas ↔ outer space

- Registration: not very substantial ...
- Focus on liability issue → launch
 - Liability Convention: state(s) liable, without limit
 - ◆ Launching State: launch, procurement, territory, facility
 - ➔ National derogation *vis-à-vis* private operators
 - ◆ Policy choice 1: reimbursement proper
 - Unlimited? → problems for private party
 - Limited? → state *de facto* partial insurer
 - ◆ Policy choice 2: insurance
 - Obligatory – to a limit? Also if liability unlimited?
 - Optional → allow for betting the company ...



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Divergence in practice...?

- National space laws on liability & caps
 - **USA:** MPL, with max. max. of US\$ 500 M
 - ◆ From Pegasus US\$ 10 M to Delta 4-M US\$261 M
 - **Australia:** MPL, with max. max. of A\$ 750 M
 - **France:** € 50-70 M – Arianespace: € 60 M
 - **Austria:** max. € 60 M
 - **S Korea:** max. 200 B SKWon
 - **United Kingdom:** *insurance* up to € 60 M
 - **Others:** no specific reference to an amount; some suggest limitations, others do not



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Need for action?...

Contra:

- Launch threatens launching state most
- Practice so far seems to be relatively coherent
- ‘The beauty of the Liability Convention’: state liability

Pro:

- At 2nd level more divergence – e.g. insurance
- Divergence grows – more states involved
- ‘Competition’ may drive down standards



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... Yes, if well-considered!

■ All in all:

- Arguments *contra* actually also present opportunity for agreement!
- Risk of launchings overseas grows
- Space debris high on the agenda; & one important aspect is guaranteeing safety of launches – through national licensing regimes
- Now is the time to consider inclusion ‘genuine link’ requirement in the legal system, to prevent future ‘flags of convenience’ from ever arising...



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First shot at a proposal

“Each State shall fix the conditions for the grant of its registration to space objects. There must exist a genuine link between the State and the space object; in particular, the State must effectively exercise its jurisdiction and control over space objects registered by it.

In doing so, the State shall in particular ensure due compliance by the operator of the registered space object – preferably by means of a system of authorisation, licensing and supervision – with the applicable rules of international space law.”



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