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CROSS-WAIVERS OF LIABILITY

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I. INTRODUCTION.

Sheer pragmatism is developing a new principle in space law. That principle is that the parties to an activity in outer space, who stand to benefit from that activity, shall share some of the risk of that activity. These parties may enjoy more benefits from outer space activities if they themselves assume responsibility for damage that they may cause to the others involved in that same activity because litigation and insurance costs are saved. The National Aeronautics and Space Administration (NASA) has for a long time required contractual cross-waivers of liability between its launch operations and the owners of payloads being

launched. 1/ The principle of cross-waivers is developing in other areas: launches under the U.S. Commercial Space Launch Act, activities under the space station agreement, space shuttle operations, NASA expendable launch vehicle (ELV) programs, and the principle is being adopted in launch contracts outside of the United States. The cross-waiver principle has been received so favorably that even wider adoption can be predicted in the future.

II. MANDATORY CROSS-WAIVERS UNDER THE U.S. COMMERCIAL SPACE LAUNCH ACT.

The U.S. Commercial Space Launch Act, 49 U.S.C. App 2601-2623, requires each launch license issued under the Act (and each license subsequently transferred after issuance) to contain a reciprocal waiver of claims between the licensee and its contractors, subcontractors, and customers, and the contractors and subcontractors of the customers. This reciprocal waiver requires each party to the waiver to agree "to be responsible for any property damage or loss it sustains or for any personal injury to, death of, or property damage or loss sustained by its own employees resulting from activities carried out under the license." Thus, each provider of launch services must obtain a license from the Department of Transportation (DOT) and these licenses are subject to the reciprocal waiver requirement.

A good illustration is Martin Marietta v. INTELSAT, 763 F. Supp. 1327 (D.Md. 1991) in which INTELSAT contracted with Martin Marietta for launch service. Martin Marietta's launch failed to place the satellite in the proper orbit; the satellite did not separate from the Titan III rocket. Subsequently, INTELSAT was able to separate the satellite from the rocket, but INTELSAT could not place the satellite in the correct orbit. (In 1992, in a dramatic rescue operation, the NASA astronauts were able to stabilize the satellite and send it into its proper orbit where the satellite is now performing as intended).

INTELSAT sued Martin Marietta to recover for breach of contract and for negligence. Martin Marietta had failed to include a waiver provision in the contract with INTELSAT, but Martin Marietta argued that the Commercial Space Launch Act created mandatory reciprocal waivers in all contracts between the participants in a launch, even in those situations when the contracts fail to contain a reciprocal waiver. Martin Marietta argued that the statute automatically inserted waiver clauses into all launch contracts. Martin Marietta supported its claim by pointing to the statutory language " that each license shall require the licensee to enter into reciprocal waivers of claims," and that accordingly " each party agrees to be responsible for

any property damage or loss it sustains or for any personal injury to, death of, or property damage or loss sustained by its own employees resulting from activities carried out under the license" (48 U.S.C. app. 25125(a)(1)(C)).

The U.S. District Court rejected Martin Marietta's argument that the statute reads reciprocal waivers into the commercial launch contracts. The Court said that the statute itself does not support such an interpretation, 763 F.Supp. 1327, 1330. The Court furthermore pointed out that the launch license considered the possibility, and provided for the consequences, of failure to include reciprocal waivers into the launch contract, because the license provided that:

> "In the event that Martin Marietta fails to enter into, or fails to require other private party launch participants to enter into, waivers of claims required under this subparagraph (a), Martin Marietta shall indemnify and be responsible for any and all liability, loss or damage resulting from such failure."(Id.)

Thus the U.S. Commercial Space Launch Act strongly encourages but does not "operate to impute cross-waiver provisions into the contract if the contract itself does not have them." 2/

III. CROSS WAIVERS IN THE SPACE STATION AGREEMENT

Cross-waivers of liability, like the reciprocal waivers under the U.S. Commercial Space Launch Act, are established as an international principle in Article 16 of the 1988 Agreement among the Government of the United States of America, Governments of Member States of the European Space Agency, the Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station. Under Article 16(3) each Partner State agrees to cross-waivers of liability relating to activities in protected space operations as defined by the agreement. The cross- waivers apply to any claims for damage against (1) another Partner State, (2) related entities of another Partner State, 3/ and (3) their employees. Furthermore, each Partner State agrees to extend cross-waivers of liability to their own related entities by requiring those entities to agree to waive claims.

Interestingly, the cross-waiver of liability includes even that liability arising under the Liability Convention when the person, entity or property causing the damage is involved in protected space operations and the damage arises from involvement in protected space operations.

Excepted from cross waivers are (1) claims between a Partner State and its own related entities (2) claims made by natural persons and

their estates for injuries or death of natural persons, (3) claims for damage caused by willful misconduct, and (4) intellectual property claims.

The cross-waiver of liability under the space station agreement has been implemented in the United States by the Code of Federal Regulations, 14 C.F.R. 1206.102. The implementing regulation defines the terms: "related entity","launch vehicle", "payload", and "protected operations" for the United States.

IV. NEW NASA RULEMAKING CONCERNING CROSS WAIVERS OF LIABILITY DURING SPACE SHUTTLE OPERATIONS AND ELV PROGRAM LAUNCHES

On September 25, 1991 NASA published a final regulation extending the requirement of cross-waiver of liability to space shuttle operations, 14 C.F.R. 1266.103, and to NASA expendable launch vehicle (ELV) program launches, 14 C.F.R. 1266.104. The new regulation will apply to launches after July 1, 1994. The cross- waiver regulation will require changes to NASA procurement contracts for those launches. The objective is to make the cross- waivers for space shuttle operations and ELV program launches "more consistent with the cross-waiver provisions in effect for Space Station activities." 56 Fed. Reg. 48429 (Sept 25, 1991).

The two new cross-waiver provisions cover operations different from each other and thus the definitions of the terms "parties", "related entities", "damage", "payload", and "protected space operations" differ, because these terms are fitted to the special activities covered by each provision. Both provisions repeat the language in Article 16 of the space station agreement that the cross-waiver of liability "includes a cross-waiver of liability arising from the Convention on International Liability for Damage Caused by Space Objects [citation] where the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations." 14 C.F.R. 1266.103 and 1266.104. Lastly, to avoid any conflict with the cross-waivers required under the Commercial Space Launch Act (supra), the new NASA ELV regulation states that "This cross-waiver shall not be applicable when the Commercial Space Launch Act cross-waiver (49 U.S.C. app. 2615) is applicable." 14 C.F.R. 1266.104(c)(6).

V. THE CROSS-WAIVER PRACTICE IS SPREADING.

Recent comparison of the contracts of five different United States and foreign launch companies by Dr. Pamela Meredith 4/ shows that all five companies required cross-waivers of liability; these cross-waivers extended to the contractors and subcontractors of the contracting parties. Consequently, all of these participants in launches assumed the risks of their own

activities. 5/

VI. CONCLUSION

The areas of space activities described in this paper are motivated by the economic necessity of the participants in outer space activities to share some of the risks involved. This development in space law establishes "a known regime of liability limitation to encourage space exploration and investment by reducing insurance costs and the potential for litigation." 56 Fed. Reg. 48430.

FOOTNOTES

1. Robert Berman, Office of General Counsel, NASA, Contractually Contending with the Risk of Space Activity - The Tenuous Thread Between Insurance, Indemnification, Waiver, and Exculpatory Language; paper presented to the International Bar Association, Sept. 16, 1986, at 4. Mr. Berman stated that:

> "It was ascertained early in NASA's study of the liability ramifications between customer's payloads and the U.S. Government Space Shuttle that there was not enough capacity in the world-wide insurance market to cover the customers' liability or the customers' contractors' liability for loss of the Space Shuttle.... It would have been unreasonable to expect the customer to cover the risk if commercial insurance was unattainable."

What has developed out of these initial premises has become the NASA extended inter-party cross-waiver. Initially it required the customers to undertake the liability for their own payload. In return the U.S. Government agreed to self-insure the loss or damage to the Space Shuttle. In 1982, the inter-party cross-waiver additionally required the customers and the U.S. Government to flow the waiver of claim provision down to their respective contractors and subcontractors. The customer and their contractors have now been freed from insuring for third-party liability claims that could arise among themselves, the very parties whose personnel and equipment are within close proximity of each other.

The 1984 Joint Endeavor Agreement between NASA and Martin Marietta is an example of a NASA cross-waiver of liability. Section 19.03(b) provides that " the parties hereto agree to a no-fault, no-subrogation, inter-party waiver of liability pursuant to which each Party agrees not to bring a claim against or sue the other Party or other users and agrees to absorb the financial and any other consequences for Damage it incurs to its own property and employees as a result of participation in STS Operations during Protected STS Operations, irrespective of whether such Damage is caused by NASA, Martin Marietta, or other users participating in STS

operations, and regardless of whether such Damage arises through negligence or otherwise".

2. Martin Marietta v. International Telecommunications Satellite Organization (INTELSAT), 763 F. Supp. 1327, 1331 (D.Md. 1991). The Court finally determined the validity of INTELSAT's tort claim by referring to specific contract provisions. The Court concluded that because the contract did not place tort law duties on Martin Marietta, INTELSAT was precluded from tort recovery. This case is currently on appeal to the 4th Circuit Court of Appeals.

3. Related entities are (1) contractors or subcontractors of a Partner State at any tier, (2) users and customers of a Partner State at any tier, and (3) contractors or subcontractors of a user or customer of a Partner State at any tier.

4. Pamela L. Meredith, Risk Allocation Provisions in Commercial Launch Contracts, Proceedings of the 34th Coll. on the Law of Outer Space 264, 267 (1991). Dr. Meredith examined the launch contracts of U.S. and Russian launch companies, as well as the Arianespace satellite launch agreement. A more extensive comparison of launch contracts by F. Kenneth Schwetje supports and further amplifies Dr. Meredith's observations. See, F. Kenneth Schwetje, Launch Services Agreements: A Comparative Analysis, unpublished thesis, George Washington University Law Center, Feb. 13. 1989.

5. The impact of the U.S. Space Commercial Launch Act, 49 U.S.C. app. 2615, on the launch contracts is readily noticeable (but see discussion of Martin Marietta v. INTELSAT above).