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U.S. EXPORT CONTROLS AND LITIGATION OF CONTRACTS: ANOTHER EXAMPLE OF THE LAW OF UNINTENDED CONSEQUENCES

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ABSTRACT

Lawyers engaged in aerospace matters, whether involved in high-tech complex transactions with multiple contractors and subcontractors, or involved in complex transnational litigation through national court systems or international arbitration tribunals, take for granted certain procedural rights and guarantees fundamental to due process and a fair and impartial adjudication of contracts. However, these rights and procedures cannot be taken for granted in transnational transactions because the restrictions and licensing requirements of the current export control regime of the United States can seriously impede if not frustrate normal trial and arbitration procedures. This paper reviews the conflict between the current export control regime of the United States and normal dispute resolution mechanisms and procedures. Particular attention is given to contract issues to be considered in contemplation of potential disputes in which "defense" technology transfer will be an issue. The authors also suggest some corrective measures to alleviate and minimize the conflicts between fundamental due process rights and the need to protect against unauthorized transfers of military technology.

INTRODUCTION.

The United States has the most sophisticated and complex export control system in the world. Initially designed to ensure U.S. neutrality, adapted for two world wars and then the Cold War, the system has evolved as an instrument of U.S. diplomacy--and a major problem for the aerospace industry. The implementation of the various laws and regulations governing the export and retransfer of space qualified items often result in consequences far beyond the original intent of the legislators, and on some occasions have a counter productive result.

U.S. commercial space industries are suffering as foreign satellite manufacturers and launch service providers actively seek alternatives to superior U.S. technology in an effort to avoid unpredictable delays, and

sometimes denial of authorization to execute a carefully crafted business plan, due to the decisions made in the licensing process.

The U.S. State Department is not unaware, nor unfeeling, about the current situation. Within the Department of State, the Office of Defense Trade Controls works diligently to accommodate the policies of the US Government, as well as the needs of domestic and foreign industry. In cooperation with the U.S. Department of Defense, a series of initiatives have been developed to deal with the extreme cases.

EXPORT CONTROL REGIME

The *Arms Export Control Act, as amended*[i] *("AECA")* has been in place since 1968 and its predecessor legislation since the end of World War II. The AECA specifically authorizes the President of the United States to control the export and import of "defense articles and defense services" such as arms, ammunition and implements of war to protect U.S. national security and foreign policy. The Office of Defense Trade Controls ("ODTC"), in the Department of State administers the Act through implementing regulations called the International Traffic in Arms Regulations (the so called "ITAR").[ii] The ITAR contains a list of equipment considered to be arms, ammunition or implements of war. This list is called the "Munitions List" or "USML." Satellites (USML Category XV) and launch vehicles (USML Category IV) have been on the Munitions List for many years. In addition, "technical data" related to satellites and launch vehicles are also on the Munitions List.

In October 1996, the licensing responsibility for commercial communications satellites was transferred from the State Department to the U.S. Department of Commerce. The licensing requirements of the Department of Commerce were much less strict than those of the State Department. However, this transfer was to be short lived. Because of concerns in the U.S. Congress that the Commerce Department was not adequately scrutinizing satellite export licenses and because it was felt that the Department of Defense did not have an adequate role in the Department of Commerce licensing process, Congress required in *The Strom Thurmond National Defense Authorization Act of 1999*[iii] that the licensing responsibility for the communications satellites be transferred back to the State Department. In addition, special export controls were required for launch of U.S. satellites from or by countries other than NATO or major non-NATO allies of the U.S. The Act also required mandatory licensing for launch failure investigations.

This change was due in large part because in 1998, a bi-partisan investigative committee was formed in the U.S. House of Representatives, under the chairmanship of Congressman Christopher Cox (R-CA) to review the enforcement of the export control laws. The Cox Commission was formed as a result of allegations that the lax enforcement of the existing U.S. export laws had resulted in exports of critical technology without appropriate oversight and review. One of the concerns to be investigated was whether U.S. national security had been compromised by the participation of U.S. manufacturers and underwriters in the launch failure investigations for launch events involving China Great Wall Industries.

In general, the ITAR requires that no Munitions List items, including "technical data" can be exported from the United States without a prior license issued by ODTC. In addition, discussions or services involving "technical data," as defined by the ITAR, need a special prior authorization which can be granted only if the parties submit a Technical Assistance Agreement ("TAA") to ODTC for review and approval by various departments within the State Department, as well review by other U.S. government agencies such as the Department of Defense ("DOD"), NASA and branches of the military (i.e. Navy, and Air Force).

The regulations expand the scope of the Munitions List in several respects:

- All satellites (except the International Space Station) are covered;
- All ground stations for tracking, telemetry and control ("TT&C") of satellites are covered;
- The definition of satellite components and parts has been expanded to include: satellite fuel, ground support equipment, test equipment, payload adaptor or interface hardware, replacement parts, and non-embedded solid propellant orbit transfer engines, and
- The definition of "technical data" under the ITAR has been expanded to include (for the first time): technical data provided to launch providers on form, fit, function, mass, electrical, mechanical, dynamic, environmental, telemetry safety, facility, launch pad access, and launch parameters, as well as interfaces for mating and parameters for launch.

The practical consequences of the expansion of the definition of technical data is that virtually any discussion between a U.S. services supplier and a non-U.S. services customer must be covered by an approved Technology Assistance Agreement.

Special requirements may be imposed by ODTC, such as a Technology Transfer Control Plan ("TTCP"). Furthermore, the parties to the license must arrange and pay for DOD monitoring of all discussions, as well as DOD's review of all documents to be exported.

While special requirements are not automatically imposed with regard to services provided by NATO countries or major U.S. allies, the new regulations specifically note that such requirements may be applied, when appropriate, in furtherance of the security or foreign policy of the United States.

US LITIGATION

Evidentiary and Procedural Rules

In the early days of the commercial space industry lawsuits between and among the participants were rare. Various reasons for this included the fact that NASA was often involved and required a "cross waiver of liability" form all involved; and that there was a certain club atmosphere within the industry which made it less likely that

one company would make claims against another. This clubby atmosphere is changing as the commercial space segment matures and margins have decreased. Business practices typical in other sectors have become common, including the willingness to litigate.[iv]

In the past, litigants generally have been US persons within the meaning of the ITAR. Recently, the introduction of foreign plaintiffs and defendants into the US judicial system has created a problem unforeseen and unanticipated by the average litigator. The authors believe that export control issues in law suits involving controlled technology have been ignored due to a lack of awareness. Given sophisticated technical issues in a lawsuit involving space technology, it was inevitable that the issue would became part of the proceedings.

The application of the ITAR to arbitration and litigation present difficulties under the US system for civil (i.e., non-criminal) cases. At first impression, it appears that the export control regulations are inconsistent, if not in conflict with the Constitution of the United States, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence. Foremost among these is the fact that no foreign person may have access to ITAR controlled technical data without the written permission of the ODTC. This includes witnesses, experts, and even the foreign clients of US law firms.

US pre-trial procedure, which is covered by the FRCP, allows the parties to gather a great deal of information in preparation for the actual trial. Many non-US attorneys are amazed at the depth and breadth of the "discovery" process. One of the features of discovery under the US system is that facts may be learned which are eventually inadmissible at trial. The discovery process certainly lengthens the judicial process, but most lawsuits are never tried because the parties are encouraged to settle when they are able to determine the relative merits of the case for all sides. Discovery also enables US lawyers to make motions before the Court prior to the trial date that are dispositive of part or all of the issues in the case. An example of this is a "Summary Judgment" in which the parties agree that no facts are in issue and the Court need only to determine the law to be applied. Another example is a Motion to Dismiss because, after conducting the discovery phase, the Court may determine that there is no case. Great latitude is required to make this system work as envisioned. When discovery begins US lawyers often do not know where discovery will lead them, what witnesses will eventually be needed for trial, and what information is material to the issues that will be tried.

In contrast, under the ITAR, a lengthy and detailed process must be completed before the exchange of US technical data is authorized. The necessary ITAR approvals have the potential for introducing delays in discovery. In addition to the impediment of not being able to discuss many aspects of the case with foreign witnesses and clients, the litigation attorneys cannot predict at the time a license is applied for at the US State Department precisely what the scope of the inquiry will be.

Constitutionally, the application of the export regulations raise many issues of fundamental fairness. The right to a trial by jury is granted by the VII Amendment to the Constitution of the United States in all common law cases in Federal courts.

The right includes the ancillary right to be present at all stages of such trial, except the deliberation of the jury.[v] However, a foreign party may be barred from testimony involving evidence of controlled data if his presence is not authorized. Likewise, a foreign expert witness may be prevented from listening to the testimony of a witness for purposes of evaluating the credibility of such, unless authorized to do so.

The litigation is conducted pursuant to the rules of the Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Evidence ("FRE"). The Federal Rules of Civil Procedure govern the procedure in the United States district courts in all suits of a civil nature. The rules are required to be construed and administered to secure the just, speedy and inexpensive determination of every action.[vi]

FRCP Rules 26 to 37 provide the legal machinery whereby the parties may learn for themselves the real points of controversy. Each party is required to disclose witness lists, document lists and expert reports[vii]. Any party has the right to examine any other party or any witness, either orally or upon written interrogatories.[viii] Any party may inspect relevant document and other tangible things in the possession of a party.[ix] The court also may compel parties to comply with the rules and impose sanctions for failure to comply.[x]

The Federal Rules of Evidence govern proceeding in the courts of the Untied States and were adopted by the United States Supreme Court [xi] Rule 615 of the FRE provides that witnesses cannot be excluded from hearing testimony in the case if they are either the representative of a party that is not a natural person or is a person whose presence is essential to the presentation of the party's case. Rule 705 provides that any expert providing testimony in the form of an opinion may be required to disclose the underlying facts or data on cross-examination.

Parties and Their Counsel

An initial problem in any litigation involving a foreign client is whether the US firm can disclose ITAR controlled data to its own client without the consent of the State Department. The troubling issue has been raised whether trial counsel are providing "defense services" to their clients by their representation, or are "exporting" technical data. Adding to the confusion is the fact that much of the information is a product of discovery, so the defendants need to be a party to any Technical Assistance Agreement; thereby allowing adverse parties to have some influence over the prosecution of the plaintiffs' case.

A seminal question is whether US law firms are "exporters" under the regulations since they would directly provide the technical data to the foreign witnesses and parties. The implication is that the law firms would then be subject to the rules and regulations administered by the ODTC for defense and aerospace contractors. This included reporting requirements, which may have been in conflict with the lawyer-client privileges; the possibility of periodic audits; and the requirement for registration with the Department of State.

Fashioning the appropriate licenses and technical assistance agreements is another difficult problem. Normally, all of the persons and organizations that will share the technical data are identified in the application to the ODTC. Since the process for approval can be lengthy and amendments take additional time, the best practice is to be

as comprehensive in the initial application. For a trial attorney, this situation often reveals witnesses not immediately known to the adverse party; and may require an explanation of trial tactics far in advance of any requirements of the federal rules governing trials in US courts. Another awkward development results from the fact that all of the parties to the TAA must agree to the scope and application of the agreement submitted for approval. Litigants often have legitimate disagreement on these issues. There is always the potential that the negotiations over the TAA can be used to introduce more delay and uncertainty into the already complex litigation scenario.

As mentioned above, DoD has the right to review all documents for national security purposes and monitor discussions, which include testimony given during depositions, arbitration proceedings, or open sessions of a trial. The Defense Threat Security Agency (DTSA) has provided a monitor at hearings of arbitration tribunals and appears to be prepared to monitor any federal courtroom proceedings. This obviously presents an awkward and unusual situation for litigation attorneys and for the trial judge. While there is a procedure for government monitoring of classified testimony in federal trials, there is no statute that provides for the intervention of a DTSA official into the examination of witnesses or presentation of evidence. Unresolved issues include: (1) whether the DTSA monitor can "object" to evidence, (2) what are the consequences of notification to the Court that the evidence may be in violation of the ITAR, (3) is there any judicial review of the monitoring process, and (4) a host of other evidentiary and procedural issues.

Related to the participation of a DTSA monitor is the question of how the Court, the parties, ODTC or DTSA, guarantees that no spectator is an unauthorized recipient of the oral testimony. Under US law, most trials are open to the public and except for physical security measures no check is made of who may decide to participate as a spectator in a trial. Public trials are one of the recognized safeguards of fairness under American jurisprudence. Therefore, news reporters (who may then disseminate information further), industrial spies, and the curious are all given equal access to most proceedings. Judges and trial lawyers may therefore be surprised to learn that a U.S. trial is seen by some in the Deaprtment of defense as a potential "loophole" in the protection of national security screen for sensitive technical data.

Foreign Litigation

As difficult as the situation might be in the two actions described above, there is an extraterritorial aspect to the ITAR that foreign attorneys and their clients must be aware of. Arbitration often is governed by the Rules of the International Chamber of Commerce, or similar bodies. If a foreign arbitral body requires copies of testimony and exhibits, even if the arbitration is conducted in the United States and involves only U.S. parties, then the filing of the records would be considered an "export" under the generally accepted interpretation of the ITAR. The filing party or parties would need the permission of the ODTC. On a frequent basis, the ODTC will impose limitations on the handling of and access to such documents. Examples of these provisos include access being limited to the nationals of countries acceptable to the Department of State, special marking requirements, and periodic reports on the status of the file. This entire situation would also be subject to

inspection by the US Department of Defense.

Even if the foreign litigation or arbitration is conducted outside the United States, solely among non-US parties and their domestic counsel, the extraterritorial aspects of the ITAR might come into play. This would be true if the information used in the proceeding included US origin data that was originally obtained by one of the parties under a US license. In order to share this information with the other parties, their counsel, and the courts the foreign party would need to request permission for re-export or retransfer from the ODTC. This could be refused or severely limited, which may violate the evidentiary or procedural rules of the nation in which the trial or arbitration is being held.

CONCLUSIONS

- The evidentiary and procedural rules for litigation and arbitration are not necessarily compatible with the export control regulations in litigation related to sophisticated technology, such as spacecraft.
- The export control laws and regulations of the United States do not contain exceptions for litigation; therefore, law firms, courts and witnesses are treated as if they are involved in the export of aerospace technical data that might present a threat to the national security of the United States.
- Lawyers and the US government should begin a dialogue with the Department of State, Department of Justice, Department of Defense to establish a means whereby the legitimate needs of national security can be met without imposing additional burdens to the trial teams and courts.
- These problems are not isolated to proceedings in the United States, or involving US parties. All attorneys in the aerospace industry must be aware of the provision of the ITAR to protect their clients from inadvertent disclosure during judicial proceedings that might result in sanction from the US government.

REFERENCES

[i] *22 USC 2778, et. seq.*

[ii] 22 CFR 120-130

[iii] *Public Law105-261*

[iv] This included litigation against the US Government space agency, NASA (*See Hughes Communications Galaxy v. The United States*) insurance litigation (*See Appalachian Insurance v. McDonnell Douglas)*; contract disputes over cross waivers *(See Martin Marietta v. INTELSAT and Certain Underwriters at Lloyds v. McDonnell Douglas Corp.)* and litigation resulting for faulty satellites (*See Lexington Insurance Co. v. McDonnell Douglas)* Cites upon request.

[v] Carlisle v. Nassau County, 408 N.Y.S. 2d 114, 64 A.D.2d 15 (1978).

[vi] FRCP, Rule 1

[vii] FRCP, Rule 26.

[viii] FRCP, Rules 27 to 33.

[ix] FRCP, Rules 34 and 35.

[x] FRCP, Rule 37.

xi Order of November 20, 1972 pursuant to authority provided by statute (Title 18 Sections 3402, 3771 and 3772 and Title 28, Sections 2072 and 2075).