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COMMERCIAL SATELLITE CONTRACT ARBITRATION: SPECIAL LEGAL CONSIDERATIONS

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The commercial satellite industry has come of age since its inception in 1965.[1] Today, the industry consists of numerous satellite operators, large and small, in the United States and internationally – vying for shares of a growing global market for satellite capacity, data, and a variety of services.

Despite substantial consolidation in the U.S. satellite industry over the past decade[2] and relatively few new U.S. entrants in recent years, the need for replacement satellites and satellite fleet expansions nonetheless have resulted in a steady flow of satellite procurements with related transactions, including satellite purchase contracts, launch services agreements, loan facility agreements, satellite transponder leases, and satellite insurance policies. Also contributing to these transactions have been several new satellite operators on the international stage.[3] With the exception of transponder leases, these satellite contracts are typically valued at over $100 million and sometimes even in the billions of dollars.

Disputes arise from time to time over the interpretation of these contracts, e.g., when a launch fails, a satellite is defective, or one party terminates or defaults on the contract. While these disputes are usually settled, occasionally, they end up in arbitration.

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[1] The first commercial communications satellite, "Early Bird" (also known as Intelsat I), was launched on April 6, 1965. Encyclopedia Britannica, Satellite Communication, *available at* http://www.britannica.com/EBchecked/topic/524891/satellite-communication/224536/Development-of-satellite-communication#ref52603 (last visited Apr. 11, 2013); *Communications Satellite Corporation*, 38 FCC 1298 (1965). *See also Establishment of Domestic Communication Satellite Facilities by Nongovernmental Entities*, 22 F.C.C.2d 86 (Mar. 20, 1970) or "DOMSAT I" (paving the way for Federal Communications Commission licensing of privately owned and operated U.S. *domestic* satellite systems).

[2] *See, e.g.,* Press Release, Intelsat Ltd., *Intelsat Completes Acquisition of PanAmSat* (Jul. 3, 2006); *Loral, Telesat Merger Completed,* SATELLITE TODAY (Oct. 31, 2007); Press Release, Sirius XM Satellite Radio Inc., *SIRIUS and XM Complete Merger* (Jul. 29, 2008); Press Release, Viasat Inc., *ViaSat Completes Acquisition of WildBlue Communications* (Dec. 15, 2009); Press Release, Echostar Corp., *EchoStar Corporation Completes Hughes Communications, Inc. Acquisition* (Jun. 8, 2011); and Press Release, DigitalGlobe Inc., *DigitalGlobe and GeoEye Complete Combination* (Jan. 31, 2013).

[3] *See, e.g.,* O3b Networks Ltd. (Jersey, Channel Islands); NBN Co Ltd. (Australia); Asia Broadcast Satellite Ltd. (Hong Kong); Space-Communication Ltd. ("Spacecomm") (Israel); Ciel Satellite LP (Canada); Vietnam Posts and Telecommunications Group (Vietnam); Avanti (UK); and Nigerian Communications Satellite Ltd. (Nigeria).

Arbitration clauses are common in commercial satellite contracts for several reasons: Satellite disputes are often factually complex and highly technical in nature, which a blue ribbon arbitration panel is well suited to resolve; they typically require a high degree of confidentiality to protect proprietary and export-controlled information, which arbitration can easily accommodate; they often occur between parties with different legal systems (and views on discovery), who can benefit from the flexibility of arbitration to find middle ground on procedural matters; and they occur in an industry with relatively few players – and sometimes during ongoing business relationships – which makes timely resolution and finality (without appeal) all the more important.

Satellite contract arbitrations proceed in many respects like any other commercial arbitration involving expensive, high-tech equipment, but certain peculiar laws, regulations, and customary contract practices may impact the schedule, discovery and/or outcome of the arbitration. For example:

1) U.S. space technology export controls may delay the proceedings significantly where foreign parties are involved.
2) Contractual waivers of liability are pervasive in space contracts and may bar claims and form the basis for motions to dismiss or summary disposition (judgment).
3) Disclaimers of warranty designed to shield spacecraft manufacturers from liability for satellite defects are common and, likewise, may support dispositive motions.
4) "Satellite in-orbit incentive payment" clauses provide for a reduction in the price of the satellite if it does not perform to agreed criteria and may preclude other remedies.
5) Launch contracts may include "opt-out" clauses allowing the customer to terminate with a refund if the launch company has failed to meet criteria for launch vehicle reliability.
6) Satellite insurance policies place a high duty of care on the insured satellite operator as a condition of claims payment.

This article discusses these special legal considerations and how they may impact the arbitration or drive settlements.[4] The article leaves aside the more exotic provisions of international space law, which rarely come into play in satellite contract arbitrations, although they provide the international underpinning for commercial space ventures and related contracts and statutes.[5] Because

[4] *See also* Raymond G. Bender, *International Arbitration: Satellite Communications–Arbitrator Perspective*, *in* INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES, Ch. 39 (Horatio A. Grigera Naón & Paul E. Mason eds., 2010).

[5] *See, e.g.,* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205, Art. 1 (freedom of use of space), Art. 6 (national authorization of private sector satellite operations), Art. 8 (satellite ownership

satellite contract arbitrations typically are confidential, hypotheticals informed by the authors' experience are used to illustrate the impact of the satellite-specific laws and contract practices.

I. SATELLITE TECHNOLOGY EXPORT CONTROLS

Satellite arbitrations often require exchanges of technical information, e.g., on satellite design or performance, satellite anomalies, and/or launch failures. When the arbitration includes a foreign party – as is not uncommon for satellite arbitrations[6] – and the technical information reaches the threshold of "technical data,"[7] these exchanges of information are strictly controlled by the International Traffic in Arms Regulations[8] ("ITAR"). The ITAR is administered by the

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not affected by launch into or presence in space), Art. 8 (jurisdiction over the satellite); Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187, Arts. 2-4 (international liability for damage caused in space and on the surface of the Earth); and Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, T.I.A.S. No. 8480, 1023 U.N.T.S. 15, Arts. 2-3 (registration of satellites).

[6] The capability to manufacture and launch high-performance commercial geostationary communications satellites resides with only a few countries, e.g., the U.S., Europe (joint effort), Japan, Russia, and China. Therefore, many satellite customers need to contract internationally for satellite construction and launch services; other satellite customers do so to take advantage of export credit offerings (e.g., from the U.S. Export Import Bank or COFACE, France) or for other commercial reasons. Also, satellite insurance placements typically require contracting internationally with underwriters (e.g., in the U.S., UK, Germany, Switzerland or France); no one insurer will commit the entire insurance capacity for what is often a $300 million-plus satellite insurance placement. Satellite-related trade between the U.S. and China is restricted. *See* Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, P.L. 101-246, § 902; 22 U.S.C. § 2151 (Feb. 16, 1990); Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, P.L. 105-261 [hereinafter Thurmond Act], *codified at* §§ 1513-1516, 22 U.S.C. § 2778 (Oct. 17, 1998); National Defense Authorization Act for Fiscal Year 2013, P.L. 112-239 [hereinafter 2013 NDAA], §§ 1261(c), 1266(a) (Jan 2, 2013).

[7] "Technical data" is "[i]nformation . . . required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles." 22 C.F.R. § 120.10(a)(1) (2013). A "defense article" is defined as "any item or technical data designated in § 121.1 [the United States Munitions List]." *Id*. § 120.6 (1993). "Spacecraft, including communications satellites [and] remote sensing satellites," "specifically designed or modified" components for spacecraft, and related technical data are on the United States Munitions List. *Id*. § 121.1, Cat. XV(a), (e), (f) (2013). This applies equally to *commercial* satellites. *But see infra* note 14 (regarding pending changes). Technical data need not be of U.S. origin, so long as it is in the possession of a U.S. person or has entered the U.S. *See* Dept. of State, International Traffic in Arms Regulations: Defense Services, NPRM, 76 Fed. Reg. 20590, 20591 (Apr. 13, 2011).

[8] 22 C.F.R. §§ 120-130 (2013).

Department of State pursuant to the Arms Export Control Act[9] and ITAR violations carry civil and criminal penalties.[10]

ITAR control over satellite hardware and technology exports was mandated by law[11] until January 2, 2013, when new legislation restored to the President of the United States the authority to transfer jurisdiction over commercial satellite exports to the Department of Commerce.[12] The Department of Commerce's Export Administration Regulations[13] ("EAR") are less stringent than ITAR. On May 24, 2013, the Departments of State and Commerce published companion notices of proposed rulemaking, proposing to transfer certain commercial satellites, components and related technical data from ITAR to EAR jurisdiction.[14] That which is not transferred would remain controlled under ITAR. The satellite industry, while generally welcoming the transfer of jurisdiction, has expressed concerns that the proposed rules could lead to instances of dual licensing and jurisdictional uncertainty.[15]

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[9] 22 U.S.C. § 2778 (2010).

[10] 22 C.F.R. §§ 127.3 and 127.10(a) (2012).

[11] Thurmond Act, § 1513(a). The mandate was in reaction to reports that sensitive missile technology was transferred to the PRC in connection with failure investigations following the launch of U.S. commercial communications satellites on the Long March launch vehicle. *See* National Defense Authorization Act for Fiscal Year 1999, Report of the Committee on National Security, House of Representatives, on H.R. 3616, Together with Additional, Dissenting and Supplemental Views, H. REP. 105-532 (May 12, 1998), Additional Views, at 577.

[12] 2013 NDAA, § 1261(a) (repealing § 1513(a) of the Thurmond Act); 22 U.S.C. § 2778(a) and (f) (authorizing the President to designate which items will and will not be controlled by ITAR).

[13] 15 C.F.R. Parts 730-774 (2013).

[14] Department of State, Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV and Definition of ''Defense Service,'' Proposed Rule, 78 Fed. Reg. 31444 (May 24, 2013); and Department of Commerce, Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 78 Fed. Reg. 31431 (May 24, 2013).

[15] *See, e.g.*, Comments of the Satellite Industry Association to the Department of State Regarding the Revision of U.S. Munitions List Category XV and Definition of "Defense Service" (Jul. 8, 2013), *available at* http://www.pmddtc.state.gov/regulations_laws/documents/proposed_rules/CategoryXI_Comments2(2).pdf [hereinafter SIA Comments], at 2-3, 13-4; Letter from Gregory J. Sloan, Director, Global Trade Controls – Boeing Defense, Space & Security, to Sara Heidema, Acting Director, Office of Defense Trade Controls Policy, Dept. of State, ITAR Amendment – USML Category XV and Defense Service (Jul. 8, 2013), *available at* http://www.pmddtc.state.gov/regulations_laws/documents/proposed_rules/CategoryXI_Comments2(2).pdf [hereinafter Boeing Comments], at 7. For example, where a satellite generally qualifies for EAR regulation, several components may still require a separate State Department license (e.g., integrated GPS receivers). *See, e.g.,* SIA Comments, at 13-14. There is also uncertainty as to whether a

Under ITAR – and EAR to the extent it applies in the future – where the arbitration requires sharing satellite technical data[16] with a foreign party, the parties must first secure the requisite export clearances.[17] This is true whether the exchange takes place in the U.S. or abroad.[18] The claimant and respondents may choose to file their respective arbitration Demand[19] (to commence[20] the arbitration) and/or Statement of Defense[21] prior to obtaining these clearances, without including technical data. Under ITAR, export clearances will be required in order to begin discovery, e.g., where document requests, production or

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single ITAR controlled component could trigger ITAR jurisdiction for an entire satellite. *See, e.g.,* SIA Comments, at 21; Boeing Comments, at 7.

[16] *See supra* note 7 (definition of technical data under ITAR). *See also* 15 C.F.R. § 772.1 (2013) ("'Technology' [includes] [s]pecific information necessary for the 'development,' 'production,' or 'use' of a product. The information takes the form of 'technical data' or 'technical assistance.' . . . 'Technical Data' [m]ay take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.").

[17] *See* 22 C.F.R. § 123.1(a) (2013) (requiring a license to export technical data); *id*. § 124.1(a) (2010) (requiring a technical assistance agreement to export defense services). *See infra* note 26 (defining "defense services"). Export includes "disclosing or transferring technical data to a foreign person whether in the United States or abroad." *Id*. § 120.17(a) (1993). 15 C.F.R. § 736.1 (2013) ("A person may undertake transactions subject to the EAR without a license or other authorization, unless the regulations affirmatively state such a requirement.")

[18] 22 C.F.R. § 120.17(a); 15 C.F.R. § 734.2(b) (2011).

[19] The term "Demand" is used in the American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (2009) [hereinafter AAA COMMERCIAL RULES] (*see id*. R-4(a)). Other arbitration rules use "Notice/Statement of Claim." *See, e.g*., American Arbitration Association, International Dispute Resolution Procedures, International Arbitration Rules (2010) [hereinafter AAA INTERNATIONAL RULES], Art. 2.3; Swiss Chambers' Arbitration Institute, Swiss Rules for International Arbitration (June 2012) [hereinafter Swiss RULES], Art. 18.1; and United Nations Commission on International Trade Law, Arbitration Rules (2010) [hereinafter UNCITRAL RULES], Art. 20. Yet other rules use "Request." *See, e.g*., International Chamber of Commerce, Arbitration Rules (2012) [hereinafter ICC RULES], Art. 4.1 and London Court of International Arbitration, Arbitration Rules (1998) [hereinafter LCIA RULES], Art. 1.1.

[20] The Notice of Arbitration or Demand or Request for arbitration commences the arbitration. *See* AAA INTERNATIONAL RULES, Art. 2.2; AAA COMMERCIAL RULES, R-4(a); ICC RULES, Art. 4.2; LCIA RULES, Art. 1.2; SWISS RULES, Art. 3.2; and UNCITRAL RULES, Art. 3.2.

[21] The term "Statement of Defense" is used in AAA INTERNATIONAL RULES (*see id.* Art. 3.1). Other rules use "Answering Statement" (e.g., AAA COMMERCIAL RULES, R.4(b)); "Answer" (e.g., ICC RULES, Art. 5.1; SWISS RULES, Art. 3.7); or "Response" (e.g., LCIA RULES, Art. 2.1). Arbitration rules generally provide deadlines (e.g., 30 days) for responding to an arbitration demand. *See, e.g.,* AAA INTERNATIONAL RULES, Art. 3.1; AAA COMMERCIAL RULES, R-4(b); ICC RULES, Art. 5; LCIA RULES, Art. 2.1; and UNCITRAL RULES, Art. 4.1.

interrogatories would involve an exchange of detailed information on the design, performance or anomaly of the satellite at issue in the arbitration or its components.[22] Consider this scenario:

> A U.S. satellite manufacturer has commenced arbitration against its European satellite customer for failure to make "in-orbit incentive" payments – the remaining portion (10%) of the $240 million satellite purchase price. Under the satellite procurement contract, payment is due quarterly over the life of the satellite *provided the satellite performs to agreed criteria*. The satellite customer contends that it owes nothing because the satellite's performance is degraded, though it is making nearly full use of the satellite. After repeated efforts to collect payment, the manufacturer files for arbitration. The issue in arbitration is whether the satellite still meets the performance criteria for payment or, put differently, whether the performance degradation in the satellite's solar arrays relieves the satellite customer of making payments amounting to $24 million. To resolve this issue the parties will need to exchange technical data on satellite solar array performance.

In this scenario, export clearance becomes a threshold matter in the arbitration,[23] likely to be addressed during the preliminary conference or consultations, usually held shortly after the arbitration panel is constituted.[24] The arbitration panel may order counsel to agree on a plan for obtaining the requisite export clearances.

For arbitrations, under ITAR, such clearances take the form of technical assistance agreements ("TAA").[25] A TAA allows for limited exchanges of technical data and "defense services"[26] (interpretation, explanation, analysis and discussion of technical data) within a defined scope for purposes of document production, depositions, expert statements, briefs, hearing testimony, arguments, exhibits, and submissions to and discussions with or by the panel. The TAA must

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[22] Typically, such technical information will be considered technical data. *See supra* note 7 (defining technical data). *But see* 22 C.F.R. § 120.10(a)(5) (public domain and basic marketing information are not technical data).

[23] *See* Raymond G. Bender, *Conducting Satellite Industry Arbitrations Under the Watchful Eye of the International Traffic in Arms Regulations*, 61(4) DISPUTE RESOL. J. 1 (Nov. 2006-Jan. 2007), revised and republished in HANDBOOK ON INTERNATIONAL ARBITRATION & ADR 123 (American Arbitration Association 2010) (providing an arbitrator perspective on arbitration export controls).

[24] Preliminary conferences or consultations are used to discuss schedule, scope, organization, threshold matters, and applicable law. *See, e.g.,* AAA INTERNATIONAL RULES, Art. 16.2; AAA COMMERCIAL RULES, R-20(a); ICC RULES, Arts. 22.2 and 24; UNICTRAL RULES, Art. 17(2); and SWISS RULES, Art. 15(3).

[25] 22 C.F.R. § 124.1(a). *See* Dept. of State, Directorate of Defense Trade Controls, Guidelines for Preparing Electronic Agreements (Oct. 10, 2013, rev. 4.1) [hereinafter DDTC Guidelines], Sec. 10.1-10.2 (providing for the use of TAAs in arbitrations).

[26] *See* 22 C.F.R. § 120.9(a) (1997) (defining defense service).

be approved by the State Department, which may take 60 days, or longer.[27] The State Department's Directorate of Defense Trade Controls has issued directions for preparing TAAs.[28] TAAs will not be required under EAR.

For the time being, the ITAR regime will apply to satellite arbitrations. Though burdensome, it is known. The adoption of new satellite export regulations may well be followed by a period of uncertainty and requirements for jurisdictional determinations. Yet, one thing is certain: The party with the better command of the applicable export controls can gain tactical and procedural advantages in the arbitration.

II. WAIVERS OF LIABILITY

Satellite contract arbitrations involving a satellite loss due to a launch failure or defective satellite in orbit may bring into play – or even center on – contractual waivers of liability. Such waivers are pervasive in commercial satellite contracts; they are customary in launch services and satellite purchase contracts, and related subcontracts, and may bar claims against a party(ies) involved in a satellite launch and responsible for the loss or damage. Waivers are even mandated by the U.S. Commercial Space Launch Act of 1984, as amended ("CSLA"),[29] and by the laws of certain other countries.[30]

The CSLA mandates a comprehensive liability waiver scheme covering *participants* in the launch of the satellite. It requires a U.S.-licensed[31] launch provider, as a condition of the launch license, to execute a waiver of liability with

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[27] *See* DDTC Guidelines, Sec. 2.6; Dept. of State, Directorate of Defense Trade Controls website, License Processing Times, *available at* http://www.pmddtc.state.gov/metrics/ (last visited Apr. 11, 2013).

[28] DDTC Guidelines, *supra* note 27. There are at least two approaches to securing the requisite TAA clearances for the arbitration: 1) The U.S. party applies for approval for one TAA covering the arbitration for *both sides*; or 2) Each party applies (or has a U.S. subsidiary or agent apply, when the party is not U.S.) for approval for its own TAA covering *its half* of the arbitration, but the parties coordinate to create two mirror-image TAAs. With either approach, separate "work product" TAAs will likely be required for a foreign party and its U.S. counsel, experts, and consultants. Note: "Only U.S. persons . . . and foreign governmental entities in the United States may be granted licenses or [TAA] approvals." 22 C.F.R. § 120.1(c) (2013).

[29] 51 U.S.C. §§ 50901-50923 (2012) ("CSLA").

[30] *See, e.g.,* France's space law governing space activities, L No. 2008-518 of June 2008 relative aux opérations spatiales (relative to space operations), Art. 20. *See* for unofficial English translation, 34(2) J. OF SPACE LAW 453 (2008). The law is significant because the French launch provider, Arianespace, has a large share of the world's commercial launch market.

[31] 51 U.S.C. § 50904(a) (listing situations where a license is required; the Secretary of Transportation, and by delegation the Federal Aviation Administration, enforces the CSLA and issues the license).

its satellite customer(s)[32] whereby each party waives claims against and releases from liability the other party and its contractors and subcontractors involved in the launch and assumes the risk and financial responsibility for loss of or damage to its property – including the satellite – and for injury or death or property damage or loss of its employees.[33]

The launch provider and satellite customer further must undertake to extend the waiver to their respective contractors and subcontractors, involved in the launch, whereby they agree to the same waiver.[34] The CSLA waivers cover death and bodily injury and property loss or damage from activities at the launch site and during launch,[35] and apply regardless of fault.[36] Contractual waivers sometimes extend also to financial loss.

The purpose of the CSLA waiver scheme is: "(1) To *limit the total universe of claims that might arise as a result of a launch*; and (2) to eliminate the necessity for all of these parties to obtain property and casualty insurance to protect against these claims."[37]

Because a liability waiver is a potential bar to legal action, it may be used to support a motion to dismiss or for summary disposition (judgment). Arbitrators are reluctant to hear or grant such dispositive motions without full discovery[38] – as

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[32] The satellite customer is typically the satellite operator, but may be the satellite manufacturer where it undertakes to build the satellite and procure launch services ("turnkey" delivery). The definition of customer would include a satellite transponder lessee or a financial institution in a satellite sale-lease-back transaction. 14 C.F.R. § 440.3 (2012); *see also* FAA, Clarification of Reciprocal Waivers of Claims for Multiple-Customer Commercial Space Launch and Reentry, Technical Amendment, 76 Fed. Reg. 8629 (Feb. 15, 2011). *See* FAA, Financial Responsibility Requirements for Licensed Launch Activities, NPRM, 61 Fed. Reg. 38992, 39002 (July 25, 1996) ("the term 'customers' also includes a person to whom the procurer of launch services conditionally sells, leases, assigns, or otherwise transfers its rights in the payload or a part thereof. Another example is the purchaser of an interest in the satellite, e.g., transponders . . . .").

[33] 51 U.S.C. § 50914(b)(1) (2010); 14 C.F.R. § 440.17(b) (2011) (implementing this requirement and specifying a form of waiver).

[34] 14 C.F.R. § 440.17(b) (2013). *See* 14 C.F.R. § 440.3 (describing the contractors included); FAA, Financial Responsibility Requirements for Licensed Launch Activities, Final Rule, 63 Fed. Reg. 45592, 45606 (Aug. 26, 1998) (same).

[35] The waiver applies to "activity carried out under the applicable license." 51 U.S.C. § 50914(b)(1). The license covers the launch. 14 C.F.R. § 440.3. Licensed launches for commercial satellites begin "with the arrival of a launch vehicle or payload at a U.S. launch site" and end "after the licensee's last exercise of control over its launch vehicle." *Id*. § 401.5 (2012).

[36] 14 C.F.R. § 440.17(b).

[37] Commercial Space Launch Act Amendments of 1988, Report of the Senate Committee on Commerce, Science, and Transportation on H.R. 4399, S. REP. NO. 100-593 (Oct. 7, 1988) [hereinafter 1988 CSLA Senate Report], at 14 (emphasis added).

[38] THE COLLEGE OF COMMERCIAL ARBITRATORS, GUIDE TO THE BEST PRACTICES IN COMMERCIAL ARBITRATION, Hon. Curtis E. von Kann, ed. in chief (2006), at 108, James M. Gaitis, ed. in chief (2010), at 99 ("[A]n arbitrator should not grant a dispositive motion except in a clear case").

the motion may unnecessarily delay the arbitration proceeding, if not granted, or prejudice the non-moving party, if granted, and the grounds for vacature or appeal in arbitration are generally very limited.[39] Nonetheless, arbitrators have been held to have the authority to grant such motions,[40] based on the discretion many arbitration rules afford them in conducting the proceedings.[41]

The practice of pre-hearing dispositive motions in arbitration is increasingly encouraged by U.S. arbitration practitioners (in arbitration proceedings in the U.S. and abroad) to promote cost-effective dispute resolution.[42]

In deciding whether to hear such pre-hearing motions, arbitrators must balance the time and expense and potential for delay against the potential increase in efficiency in the arbitration process. Arbitrators are more likely to allow the motion when it is "directed to discrete legal issues, such as . . . *defenses based on clear contractual provisions*."[43] "In such circumstances, an appropriately framed dispositive motion can eliminate or limit the need for Pre-Hearing Disclosure."[44]

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[39] *See, e.g.,* U.S. Federal Arbitration Act, 9 U.S.C. § 10 (2002) (limited grounds for vacature).

[40] *See, e.g.,* Hodgson v. IAP Readiness Mgmt. Support, 2010 U.S. Dist. LEXIS 106095, *13-4 (N.D. Fla. Sept. 20, 2010) (use of summary judgment not basis for vacating arbitration award) (citations omitted); Sherrock Bros., Inc. v. DaimlerChrysler Motors Co., LLC, 260 Fed. Appx. 497, 501-2 (3rd Cir. 2008) ("Although the AAA Commercial Arbitration Rules do not specifically provide for dispositive motions, they do grant the arbitrator flexibility and discretion. Accordingly, federal courts have affirmed arbitration awards where the arbitrator ruled on a motion for summary judgment or on summary disposition.") (citations omitted).

[41] *See id. and also* Brian E. Maas & Amelia K. Seewann, *Rules of Prehearing Dispositive Motions in Arbitrations*, NYLJ, Vol. 239, No. 48 (Mar. 12, 2008), at n. 1 ("AAA arbitrators have found authority to consider dispositive motions in Rule 30 of the AAA Commercial Rules . . . .") (citing *Sherrock Bros., Inc.,* 260 Fed. Appx. at 501-2); D. Brian King & Jeffery P. Commission, *Summary Judgment in International Arbitration: The "Nay Case,"* ABA International Law Spring 2010 Meeting – Common Law Summary Judgment in International Arbitration (2010), at 2-3 (arbitration rules reviewed by the authors do not expressly provide for summary judgment style applications, but give arbitrators wide latitude in the conduct of the arbitration, e.g., AAA INTERNATIONAL RULES, Art. 16(3); LCIA RULES, Art. 14.2; ICC RULES, Art. 25 (previously Art. 20); and UNCITRAL RULES, Art. 15.2). *See also* Rule 18 of the JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES (Oct. 1, 2010), (expressly allowing motions for summary disposition).

[42] Edna Sussman & Soloman Ebere, 4(1) *Reflections on the Use of Dispositive Motions in Arbitration*, NEW YORK DISPUTE RESOLUTION LAWYER (NYSBA) 28 (2011).

[43] JAMS EFFICIENCY GUIDELINES FOR THE PRE-HEARING PHASE OF INTERNATIONAL ARBITRATIONS (Feb. 1, 2011), *available at* http://www.jamsadr.com/international-arbitration-guidelines (last visited Apr.11, 2013) (emphasis added). These guidelines are "adapted from the New York State Bar Association Guidelines for The Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations, dated November 6, 2010." *Id.*

[44] *Id.*

Consider this scenario where the launch company in arbitration moves to dismiss the claims against it by the satellite customer on the basis of the CSLA waiver requirement and a waiver of liability in the launch contract:

> A U.S.-licensed launch company delivered the satellite to the wrong geostationary transfer orbit,[45] having ignored express instructions from the satellite manufacturer and customer. As a result, the satellite needed to use a substantial amount of its own fuel to arrive at its designated location in the geostationary orbit.[46] The satellite manufacturer estimated that this fuel consumption would reduce the satellite's in-orbit life by 32-36%. The satellite customer had purchased Launch and In-Orbit insurance, but only for a "Total Loss" or a "Constructive Total Loss," and this loss did not meet the threshold.
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> The satellite customer demanded compensation from the launch company, in the amount of $90 million to compensate for the reduction in satellite life. The latter refused, invoking the CSLA waiver requirement and the waiver of liability in the launch contract. The satellite customer maintained it had the right to recover and filed for arbitration pursuant to the arbitration clause in the launch contract for: breach of contract, negligent misrepresentation, and gross negligence.
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> When the arbitration panel was formally constituted, the launch company sought permission from the panel to move to dismiss the claims on the basis that the CSLA waiver requirement and the waiver clause in the launch contract barred the claims.[47] The waiver clause in the launch contract provides:
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> > Each Party agrees not to claim against, and to release from liability, the other Party . . . for . . . property loss or damage arising out of Launch Activity, regardless of fault.
>
> The arbitrators allowed the motion to be heard.
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> In its opposition, the satellite customer argues that the motion must be denied and that an evidentiary hearing is required, among other reasons, because:
>
> (a) The launch company's failure to follow instructions was a breach of contract, and the liability waiver does not relieve the launch company of its *contractual obligations*;[48]

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[45] The launch vehicle places the satellite in an interim, highly-elliptical orbit (transfer orbit). The satellite's on-board thrusters are used to circularize the orbit and move the satellite to its designated location in the geostationary orbit. The geostationary orbit is 22,300 miles from the surface of the Earth, in the plane of the equator; in this orbit satellites appear "stationary" at a given location above the equator.

[46] *See, e.g.*, Fraser Cain, *Satellite Fails to Reach Proper Orbit*, UNIVERSETODAY.COM (Mar. 17, 2008), *available at* http://www.universetoday.com/13203/satellite-fails-to-reach-proper-orbit (last visited Apr. 11, 2013) ("fuel used to get the satellite into its proper orbit will shorten its broadcast lifetime, since it'll have less fuel for station keeping").

[47] *See* FED. R. CIV. P. 12(b)(6) (2009) ("failure to state a claim upon which relief can be granted").

[48] *See* 1988 CSLA Senate Report, at 14 ("The [CSLA] required waivers are not intended to prevent or encumber enforcement of the private entities' contractual rights and obligations").

(b) The waiver of liability applies to loss arising out of "Launch Activity" and the failure to input the correct data does not qualify;
(c) While the waiver applies "regardless of fault," it does not protect the launch company against its own *gross negligence*, *i.e.*, its reckless disregard for instructions; and
(d) At the very least, the waiver is *ambiguous*, requiring a hearing to determine the parties' intent when they entered into the contract.[49]

In ruling on this motion, the arbitration panel will apply the procedural law agreed by the parties. Absent such agreement, U.S. arbitrators may be guided, though they are not bound,[50] by the Federal Rules of Civil Procedure Rule 12(b)(6), which permits a responsive party to move to dismiss a case for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion, the claimant's "[f]actual allegations must be enough to raise a right to relief above the speculative level."[51] The claimant satellite customer meets that test here, especially given the ambiguity of the waiver and other issues of fact raised by the satellite customer's opposition. For purposes of the motion the arbitrators must accept the satellite customer's allegations as true and draw all inferences in its favor.[52]

Accordingly, the panel will likely deny this motion. An evidentiary hearing would be required to determine the scope of this waiver, including the meaning of

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[49] *See, e.g.,* Martin Marietta Corp. v. International Telecommunications Satellite Organization, 991 F.2d 94, 97 (4th Cir. 1993) ("The construction of ambiguous contract provisions is a factual determination that precludes dismissal on a motion for failure to state a claim") (citations omitted) and Ballard v. Devon Energy Prod. Co., L.P., 678 F.3d 360, 366 (5th Cir. 2012) (Ambiguous language requires "a factual determination . . . be made as to the parties' intent in entering into the contract").

[50] New York Typographical Union No. 6 v. Printers League Section of the Association of Graphic Arts, 1989 U.S. Dist. LEXIS 14816, *8 (S.D.N.Y. 1989) ("Factfinding before an arbitrator is less formal than judicial factfinding, and the arbitrator is not bound by the Federal Rules of Civil Procedure.") (*citing* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974)).

[51] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009). In *Twombly*, the Supreme Court abandoned the traditional standard of not dismissing the claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (Conley v. Gibson, 355 U.S. 41, 45-46 (1957)) – a standard more generous to plaintiff. The concern was that under *Conley* "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [hitherto-undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561 (citations omitted).

[52] Linares v. McLaughlin, 423 Fed. Appx. 84, 85 (2d Cir. 2011) (On a motion to dismiss, a court "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor.") (citations omitted). *But see* Catholic League for Religious & Civ. Rights v. City & County of San Francisco, 624 F.3d 1043, 1080 (9th Cir. 2010) (en banc) ("wholly vague and conclusory allegations are not sufficient to withstand a motion to dismiss").

ambiguous terms such as "Launch Activity" and "fault"[53] and whether the launch company's conduct amounted to gross negligence. Also, under most U.S. state laws,[54] a liability waiver does not bar a claim for gross negligence (on the rationale that a party should not be able to protect itself contractually from such conduct). In *Martin Marietta* v. *Intelsat*,[55] the Fourth Circuit denied the motion of the launch company, Martin Marietta, to dismiss the claims of the satellite customer, Intelsat, for gross negligence[56] and breach of contract.[57] Intelsat's satellite was lost due to launch failure and the satellite was not insured.

III. SPACECRAFT WARRANTY DISCLAIMERS

Satellite arbitrations concerning a defective satellite(s) may bring to the fore – or even turn on – warranty disclaimers. Satellite manufacturers customarily disclaim any warranty for their spacecraft *starting at launch*.[58] The manufacturer does not want to be responsible for any defects past this point as it has very limited ability to repair the spacecraft, which cannot be physically accessed or retrieved. Component suppliers (for both spacecraft and launch vehicles) generally follow a similar practice, as do launch service providers.[59]

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[53] *See supra* note 49 (resolving ambiguity is a factual determination).

[54] *See, e.g.,* Becker v. Tidewater Inc., 586 F.3d 358, 367 (5th Cir. 2009) ("a waiver of liability for gross negligence is void"); Massey v. On-Site Manager, Inc., 2011 U.S. Dist. LEXIS 104823, *7 (E.D.N.Y. Sept. 15, 2011) ("a waiver of the right to sue for prospective 'willful or grossly negligent acts' is 'wholly void.'") (*citing* Gross v. Sweet, 49 N.Y.2d 102, 106 (1979)); *Martin Marietta Corp*., 991 F.2d at 100 ("a party to a contract cannot waive liability for gross negligence"); and City of Santa Barbara v. Superior Court, 41 Cal. 4th 747, 776-7 (Cal. 2007) ("we conclude that public policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care."). *See also id*. at 761, n.19 ("Leading treatises are in accord; indeed, some of them state categorically that any attempt to release liability for future gross negligence is void as against public policy.") (*citing* several treatises).

[55] *Martin Marietta Corp.*, 991 F.2d at 100.

[56] *Id.* As for gross negligence, the Fourth Circuit stated: "[N]either the language of the [CSLA] Amendments nor their legislative history reflects a Congressional intent to protect parties from liability for their own *gross* negligence." (emphasis added). *Id*. *But see* FAA, Financial Responsibility Requirements for Licensed Reentry Activities, NPRM, 64 Fed. Reg. 54448, 54463 (Oct. 6, 1999) ("claims for gross negligence are intended to be comprehended by the reciprocal waiver of claims agreement in order to fulfill its statutory intent and purpose"). The launch contract in *Martin Marietta* was executed prior to the entry into force of the CSLA 1988 amendments that imposed the statutory waiver requirements (P.L. 100-657 (Nov. 15, 1988)). *Martin Marietta Corp.*, 991 F.2d at 100.

[57] The court dismissed Intelsat's negligence claim, noting the right of sophisticated business entities to allocate the risks among themselves and found that Martin Marietta owed no tort duty independent of the contract. *Id*. at 98.

[58] Launch is often defined as intentional ignition.

[59] Although contracts for launch services are considered service contracts, launch companies typically disclaim warranty for their vehicles, which are *expendable* and arguably akin to goods.

Because of the warranty disclaimers, the satellite operator's remedies for a defective satellite in orbit are typically limited. The "sole remedies" provided by the satellite manufacturer may be restricted to: (a) *On ground* fixes; and (b) relief from satellite in-orbit "performance incentive payments." The latter remedy refers to the portion of the satellite purchase price deferred by the manufacturer until after launch of the satellite (e.g., 10%[60]) and due only if the satellite performs to agreed criteria. (In a typical commercial satellite purchase contract, the satellite operator pays for the satellite through progress payments due at the completion of agreed satellite construction milestones and incentive payments for in-orbit performance).[61]

While warranty disclaimers and limited remedies for defects are typical in commercial satellite procurements, not all satellite purchase contracts follow the format. For example, the contract may provide a time-limited and/or a partial (e.g., for certain components) warranty for defects in orbit, or the manufacturer may take on additional contractual duties, the breach of which render it responsible for a satellite defect. Finally, the manufacturer may provide assurances that amount to an express warranty,[62] which may defeat a disclaimer.[63]

Consider the following scenario where the manufacturer of a defective satellite moves to dismiss an arbitration demand based on a warranty disclaimer:

> After 28 months in orbit, the satellite suffers a failure of its primary control processor (the satellite's brain), and three months later the back-up processors fail. A failure investigation by the satellite manufacturer reveals that, due to a change in satellite program management, the manufacturer had neglected to perform two tests and related quality control procedures that were standard practice at the company and in the industry and that the manufacturer conceded likely would have unveiled the problem that caused the defect in the control processors. The satellite was insured and the insurers paid $380 million (for the satellite and cost of launch).
>
> The insurers – standing in the shoes of the satellite customer[64] – demand recovery from the manufacturer for a portion of the proceeds. The manufacturer

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[60] The spacecraft manufacturer may agree to more generous deferment or other vendor financing to secure the business and build market share in what is a buyer's market.

[61] Construction milestones typically include successful completion, e.g., of spacecraft Preliminary Design Review, Critical Design Review, and Launch Readiness Review.

[62] *See* U.C.C § 2-313(1) (2011) ("Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise . . . .").

[63] *See infra* note 67 (if terms cannot be reconciled, express warranty trumps).

[64] When an insurer pays a claim it becomes subrogated to the rights ("steps into the shoes") of the insured against the party responsible for the loss. *See, e.g.*, 3-20 APPLEMAN ON INSURANCE § 20.05[1] (vol. 3, 2012) ("subrogation permits an insurer that has paid a loss to, or on behalf of, its insured to pursue whatever rights the insured had against third parties to recover the loss. . . . The subrogated insurer's claims against third parties are

refuses any liability, invoking the warranty disclaimer in the satellite purchase contract. Talks break down, and the insurers file for arbitration, in subrogation,[65] pursuant to the arbitration clause in the satellite purchase contract with a claim of $300 million, representing the replacement value of the lost satellite, alleging: breach of express warranty, breach of contract, negligent misrepresentation, and gross negligence.

The insurers cite the following spacecraft purchase contract provision as the basis for the breach of *express warranty claim*:[66] "The [manufacturer] shall furnish all Work to the highest industry standards." The contract defines "Work" to include the satellite. The insurers allege that the manufacturer, by its own admission, breached that warranty when it neglected to perform tests that were customary in the industry.

After the parties have completed document production and depositions of lay witnesses, the satellite manufacturer moves for summary disposition (judgment) – within the agreed deadline for pre-hearing motions under the arbitration schedule – based on the *warranty disclaimer* and *sole remedy* provisions in the spacecraft purchase contract:

> [The manufacturer] warrants that from completion of the Pre-Launch Review up to Launch . . . the Satellite shall be free of any defects in material and workmanship *** EXCEPT AS PROVIDED IN THIS SECTION, ALL WARRANTIES, WHETHER WRITTEN OR ORAL, EXPRESS OR IMPLIED . . . ARE HEREBY DISCLAIMED. *** CUSTOMER'S SOLE REMEDY IN THE EVENT OF . . . DEFECTS . . . SHALL BE [corrective measures and relief from in-orbit incentive payments].

The manufacturer argues that the insurers are precluded as a matter of law from recovery based on the disclaimer of warranty and sole remedy provision in the satellite purchase contract and that no fact has been uncovered or can be uncovered that will change that outcome.

Insurers argue that the motion must be denied. They argue that the express warranty overrides the disclaimer;[67] at the very least, they contend, the provision

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derivative of the insured's; *i.e.,* the insurer 'stands in the shoes' of the insured."); Avemco Ins. Co. v. Cessna Aircraft Co., 11 F.3d 998, 1000 (10th Cir. 1993) (having paid the loss, the insurer is subrogated to the rights of the insured); Securities Investor Protection Corp. v. BDO Seidman, LLP, 222 F.3d 63, 69 (2d Cir. 2000) (insurer is subrogated to "any right of action which the insured may have against a third person whose negligence or wrongful act caused the loss"); and The F.H. Stanwood, 49 F. 577, 579 (7th Cir. 1892) ("The insurer, paying the loss, is subrogated to the rights of the insured, and clothed with all his remedies for the negligent injury").

[65] *See supra* note 64 (insurer subrogation).

[66] *See supra* note 62 (defining express warranty).

[67] *See, e.g.,* Besicorp Group, Inc. v. Thermo Electron, Corp., 981 F. Supp. 86, 97 (N.D.N.Y. 1997) ("[W]henever possible, express warranties and the language disclaiming such warranties must be 'construed . . . as consistent with each other.' This means, that 'to the extent that the express warranties are inconsistent with the disclaimer . . . [the law] requires that the express warranties be given effect.'") (citations omitted) and Wilson

> conflicts with the manufacturer's attempted disclaimer creating an ambiguity whose resolution necessitates an evidentiary hearing.

If guided by the standards of the Federal Rules of Civil Procedure, the arbitrators will grant the motion "only when there is no genuine issue of material fact and the [manufacturer] is entitled to judgment as a matter of law."[68] The manufacturer has a heavy burden to prove that the disclaimer clearly and unambiguously bars the insurers' claims and that the claims must fail as a matter of law.[69] In deciding the motion, the panel will resolve ambiguities and draw all permissible inferences in favor of the insurers (the non-moving party).[70]

With these facts, the arbitration panel will likely deny the motion and let the arbitration proceed to a hearing. The hearing would be necessary to resolve any conflict[71] between the alleged express warranty and disclaimer: To determine whether the disputed clause – "furnish Work [*i.e.*, the satellite] to the highest industry standards" – was intended to be an express warranty for the satellite; whether the satellite operator relied on it; and whether it was intended to extend to the performance of the satellite.

Trading Corp. v. Ferguson, 244 N.E.2d 685, 689 (N.Y. 1968) ("warranty language prevails over the disclaimer if the two cannot be reasonably reconciled") (citations omitted).

[68] FED. R. CIV. P. 56(a) (2010); Diagne v. New York Life Ins. Co., 472 Fed. Appx. 56, 57 (2d Cir. 2012).

[69] "The party moving for summary judgment bears the 'heavy burden' of demonstrating that no genuine issue as to any material fact exists and that it is therefore entitled to judgment as a matter of law." LaSalle Bank Nat'l Ass'n v. Merrill Lynch Mortg. Lending Inc., 2007 U.S. Dist. LEXIS 59303, *18 (S.D.N.Y. Aug. 13, 2007) (*citing* Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc., 182 F.3d 157, 160 (2d Cir. 1999)).

[70] *See, e.g.,* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (resolve all ambiguities and draw all permissible inferences in favor of the non-moving party).

[71] "[A] contract is ambiguous when its provisions are capable of conflicting interpretations. Courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare ambiguity. Instead, contracts must be construed so as to give effect to every word or phrase as far as practicable. However, courts may not impose an ambiguity on clear contract language." Santander Consumer USA, Inc. v. Superior Pontiac Buick GMC, Inc., 2013 U.S. Dist. LEXIS 25, *17 (E.D. MI. Jan. 2, 2013) (quoting Chungag v. Wells Fargo Bank, N.A., 11-1353, 489 Fed. Appx. 820, 823 (6th Cir. June 19, 2012)). *See also* Wessman v. Massachusetts Mut. Life Ins. Co., 929 F.2d 402, 406 (8th Cir. 1991) ("Ambiguity may also result from irreconcilable conflict between terms or provisions within the contract"); Emplrs Mut. Cas. Co. v. Mallard, 309 F.3d 1305, 1310 (11th Cir. 2002) ("conflict between the provisions created 'an inherent ambiguity within the policy'").

IV. TERMINATION

Satellite arbitrations may also arise out of the unilateral termination of a commercial space contract. Satellite procurement and launch contracts allow for termination for default in the event of a material breach, e.g., if the satellite customer fails to pay and fails to cure the non-payment, or if the contractor fails to meet a milestone – assuming the failure is not due to an act or omission of the customer or a force majeure event – and fails to cure the breach.

Satellite procurement contracts and launch contracts typically allow the customer to terminate for convenience, subject to a termination charge. That charge may include: payment for work done and deliverables received (e.g., data); payment for items acquired by the contractor for the customer and still in inventory, which the contractor cannot reasonably sell or use for other purposes; the cost of terminating subcontractors and suppliers; and a profit. Satellite procurement contracts vary as to the customer's right to obtain the "work in progress" – e.g., hardware components or a partially completed satellite structure. At any rate, the customer's use of such uncompleted hardware may be severely limited unless the customer has been able to secure the associated intellectual property rights.

Sometimes launch contracts allow the satellite customer to terminate with a full refund where, to alleviate the customer's concern about reliability of the launch vehicle – e.g., because the vehicle model is new or has just experienced a launch failure – the contract includes an *"opt out*" clause. The customer may invoke the clause if the launch vehicle does not meet the criteria stipulated in the contract. Consider this scenario:

> A satellite customer procures launch services from a launch company whose launch vehicle, after a launch failure and a lengthy failure investigation, is being readied for "return to flight." To allay the concerns of the satellite customer about launch vehicle reliability, the contract allows the customer to "opt out" and receive a refund for payments made in the event the launch company is unable to demonstrate *at least two successive successful launches within 12 months of contract signing*. The customer's launch is scheduled 30 months from contract signing.
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> By the 13th month the launch company has produced only one launch, which was successful. The satellite customer, whose needs for satellite capacity have greatly diminished and whose satellite under construction is significantly behind schedule at the manufacturer's facility (due to a work stoppage for non-payment), takes advantage of the opt-out clause in the launch contract: It cancels the launch and requests a full refund of payments made to date.
>
> The launch company, whose second launch is scheduled for the following month, objects contending it has substantially complied with the contract. It argues that the opt-out is a veiled termination for convenience by a customer who does not want to pay the termination for convenience fee. The launch company asserts that this customer is not concerned about launch vehicle reliability, but rather its own convenience.

> After making several demands for a refund, including through its lawyers, but to no avail, the satellite customer – which now is experiencing severe financial difficulties – having nothing to lose, makes a demand in arbitration for a $55 million refund. The launch company counterclaims for the termination for convenience fee, arguing that this is a termination for convenience.

The arbitration panel will make a determination based on the opt-out clause in the contract, applying the rules of contract construction under the applicable law. New York law is not an uncommon governing law for commercial satellite contracts, even where one of the parties is a foreign company. Under New York law,[72] if the contract is ambiguous, as is likely the case here, the panel will look to establish the parties' intent at the time of contracting.[73] Issues for the panel include: whether the customer's motivation for terminating makes a difference; whether the launch company's substantial performance was sufficient; whether the launch company as the drafter of the opt out clause should have spelled out limitations on the use of the clause; and whether the customer is acting in good faith.

V. SATELLITE INSURANCE

Satellite launch and in-orbit insurance[74] gives the satellite operator and its lenders what launch liability waivers and satellite warranty disclaimers take away: Comfort that all is not lost if the launch fails or the satellite is defective. The satellite operator typically takes out all-risk satellite launch and in-orbit insurance for the launch plus one or more years in orbit. The policy may cover the cost of a replacement satellite, including the cost of the satellite, launch and insurance premium, often in excess of $250 million. The insurance may cover Total Loss, Constructive Total Loss, and/or Partial Loss. Satellite launch and in-orbit

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[72] Cronin v. Family Educ. Co., 105 F. Supp. 2d 136, 139 (E.D.N.Y. 2000) ("Moreover, courts generally interpret New York contractual choice of law provisions to choose only substantive law, not procedural law concerning matters such as burdens of proof") (citing Woodling v. Garrett Corp., 813 F.2d 543, 552 (2d Cir. 1987)).

[73] *See, e.g.,* Eastman Kodak Co. v. Kyocera Corp., No. 10-CV-6334 (CJS), 2012 U.S. Dist. LEXIS 152250, at *14 (W.D.N.Y. Oct. 22, 2012) ("Under New York law, the fundamental objective of contract interpretation is to give effect to the expressed intentions of the parties") (quoting Eastman Kodak Co. v. Asia Optical Co., Inc., No. 11 Civ. 6036 (DLC), 2012 U.S. Dist. LEXIS 36157, at *3-4 (S.D.N.Y. Mar. 16, 2012); and Hard Rock Cafe Intl (USA) Inc. v. Morton, No. 97 Civ. 9483 (RPP), 1999 U.S. Dist. LEXIS 8340, at *57 (S.D.N.Y. June 1, 1999) ("If the language of [agreements is] ambiguous as to the provisions disputed by the parties . . . extrinsic evidence may be considered to ascertain the parties' intent at the time such agreements were executed") (citing Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 429 (2d Cir. 1992)).

[74] *See* Philip Chrystal, Darren McKnight, & Pamela Meredith, *Space Debris: On a Collision Course for Insurers*, at 29, SWISS RE (Mar. 2011), *available at* http://cgd.swissre.com/events/Space_debris_On_Collision_Course_for_Insurers.html (last visited Apr. 11, 2013) (describing space insurance) [hereinafter Swiss Re Publication].

insurance typically is also required by the satellite operator's lenders under the loan facility agreement.

If the satellite is destroyed on launch or malfunctions in orbit, the insurer will pay pursuant to the policy, provided the insured has suffered a covered loss, satisfied the policy conditions, and no exclusions apply.[75]

Disputes may arise as to whether the satellite has suffered a "Constructive Total Loss" entitling the satellite operator/insured to a pay-out of the sum insured,[76] or only a "Partial Loss," entitling it to a lesser amount based on the Partial Loss formula in the policy. Or, an issue may arise as to whether the satellite operator has met the policy conditions, which hold a satellite operator/insured to a high standard of care: The satellite operator/insured must "act as if uninsured," exercise "due diligence," and advise the insurers of any "material change" which may affect the insured risk. Strict conditions are necessary in light of the high value of the satellite asset, the limited opportunity for the insurers to inspect the satellite, and the fact that it cannot be accessed physically or retrieved for repair once launched. Consider this scenario:

> An insured communications satellite is placed in the wrong geostationary transfer orbit due to a launch vehicle anomaly. The satellite operator/insured, a small Jersey (Channel Islands) registered company, seeks guidance from its U.S. satellite manufacturer with which it has contracted also to assist with the satellite deployment after launch. The manufacturer advises that the satellite may achieve its proper orbit by using some of its own station-keeping propellant to raise the orbit, although this will take time and, even if successful, will shorten the satellite's life by approximately two to three years.
>
> The satellite operator prefers to collect the insurance proceeds immediately so that it can purchase replacement capacity on another satellite to meet existing customer commitments. It does not have business interruption insurance for this event and the delay and uncertainty involved in the orbit raising would be detrimental to the small satellite company. Accordingly, the satellite operator, through its London brokers, files a Constructive Total Loss claim with its insurers.
>
> The insurers decline to pay the claim pending efforts to place the satellite in the correct orbit. They point to the insurance policy, which requires the satellite operator to "do all things possible to minimize the loss," to "act at all times as if uninsured," and "exercise due diligence."
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> The satellite operator dismisses the policy language as inapplicable in this situation. It offers up a second opinion by an American satellite engineering consulting firm, "STAR Consultants," which concludes that the orbit-raising procedure is risky, will take time, and in this case may well not succeed. The

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[75] *See* Pamela Meredith, *Space Insurance Law–With a Special Focus on Satellite Launch and In-Orbit Policies*, 21(4) ABA AIR & SPACE LAWYER 13 (2008) (discussing satellite insurance, including valued policies, and policy defenses); Swiss Re Publication, *supra* note 74 at 22-27 (discussing a hypothetical satellite collision liability dispute).

[76] Satellite insurance policies are typically valued policies, which means the insurer pays the agreed value and not the actual value.

> satellite operator accuses the insurers of requiring that it "jump through hoops" to get paid and this, it maintains, defeats the purpose of insurance. It demands immediate payment and threatens arbitration pursuant to the arbitration clause in the insurance policy.
>
> Justifiably believing that attempts must be made to rescue the satellite based on the opinion of the manufacturer of the satellite, but wishing to avoid a protracted arbitration, the insurers make a settlement proposal. They propose to: Make a partial payment of proceeds immediately, proportionate to the reduction in the satellite's life predicted by the manufacturer; pay all expenses involved in the satellite orbit raising; and adjust the payment amount up depending on the condition of the satellite within an agreed time frame. The satellite operator agrees and the parties settle their dispute, thereby avoiding the need to refer these difficult issues to an arbitration panel.

Disputes may also arise as to the rights of secured creditors of the satellite operator/insured to recover in the event of a satellite loss. A lender or lenders' agent or trustee may be a "loss payee" and/or an "additional insured" under a satellite launch and in-orbit insurance policy endorsement. An issue may arise as to whether or to what extent the lenders are subject to a condition or exclusion in the underlying insurance policy. The outcome may turn on, e.g., the language of the endorsement, whether additional premium was paid to secure the endorsement, and/or the significance attributed to any public policy favoring payment to secured lenders for their interest.[77] If the insurer is required to pay the lenders under an insurance policy endorsement in a situation where it is not liable under the underlying policy, the insurer will in key U.S. jurisdictions be subrogated to the lenders' claim against the insured to the extent of the insurance payment.[78]

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[77] *See, e.g.*, Aero International, Inc. v. United States Fire Ins. Co., 713 F.2d 1106, 1109 (5th Cir. 1983) (applying the limitation in the underlying policy to the bank and declining to apply the broader public policy rationale behind language originating with the standard mortgage clause used in fire insurance); American Nat'l Bank & Trust Co. v. Young, 329 N.W.2d 805, 811 (Minn. 1983) (interpreting the Breach of Warranty endorsement as a separate contract with the bank and declining to apply the exclusion in the underlying policy to the bank).

[78] *See, e.g.*, Merchants Nat'l Bank v. Southeastern Fire Ins. Co., 854 F.2d 100, 105 (5th Cir. 1988) ("An insurer who pays a mortgagee for loss under a fire insurance policy *while denying liability* to the mortgagor or owner is subrogated to all the rights of the mortgagee and is entitled to an assignment and transfer of the mortgage") (citing Tolar v. Bankers Trust Savings & Loan Ass'n, 363 So. 2d 732 (Miss. 1978)) (emphasis added). *Compare* 44A AM. JUR. 2D INSURANCE § 1807 (1982) (stating the general rule that an insurer, after paying proceeds to a creditor under a loss payable clause which *insurer acknowledges* are owed under the policy, does not have subrogation rights).

CONCLUSION

Satellite-specific laws, regulations, and customary contract practices exist and may influence the schedule, discovery and/or outcome of the satellite contract arbitration. These include, e.g., special export clearance requirements, pervasive use of liability waivers and warranty disclaimers, customary payment structures in satellite purchase contracts ("in-orbit incentive payments"), and heightened due diligence requirements under satellite insurance policies.

Knowledge of any such peculiar laws, regulations, and contract practices pertinent to the particular satellite contract dispute is critical to providing effective advocacy in arbitration; it is also helpful that at least one panel member be acquainted with them. It allows that panel member to make, and share with the rest of the panel, an independent assessment of the significance of arguments made by counsel as to a peculiar satellite-related contract practice or statutory requirement, such as the CSLA waivers of liability and the flow-down of such waivers. Although the panel is generally at liberty to hire experts, it is not common in satellite contract arbitrations. It is not uncommon for the parties to present expert testimony on satellite contract practice, and counsel who do not have expertise in the area sometimes involve expert counsel to assist them.