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THE MARTIN MARIETTA CASE OR HOW TO SAFEGUARD PRIVATE COMMERCIAL SPACE ACTIVITIES

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Abstract

The US District Court for the District of Maryland recently gave its decision in the dispute between Martin Marietta and INTELSAT, and interpreted the provisions of the Commercial Launch Services Contract between these two parties in favour of Martin Marietta. The Titan III launcher of that company had failed to place an INTELSAT VI satellite into the geostationary orbit, and INTELSAT claimed *inter alia* that the liability limitations of the contract could not be invoked because Martin Marietta had been grossly negligent in the execution of the contract. The paper analyzes the litigation and the legal arguments put forward by the parties in this case, and discusses its significance for the private commercial launch industry. It argues that even though this case was decided in favour of private space enterprise, it is well possible that another court in another district or in another country would decide otherwise in similar disputes in the future. The significance of this case as a precedent for future jurisprudence is discussed, and the desirability of the adoption of an international objective standard for the settlement of these disputes is demonstrated. It is argued that such a standard will better safeguard this industry than the tendency to overprotect an allegedly immature industry.

1. The facts

On 10 October 1986, INTELSAT[1] issued a request for Proposals (RFP), seeking launch services for two INTELSAT VI satellites.[2]

Martin Marietta[3] submitted a proposal on 9 February 1987, and after extensive negotiations, a "Commercial Launch Services Contract between Martin Marietta Corporation and International Telecommunications Satellite Organization" was concluded on 10 August 1987.[4] Under the contract, Martin Marietta agreed to launch two INTELSAT VI satellites into geostationary orbit with its Titan III launch vehicle , and INTELSAT agreed to pay a fixed price of approximately US$220 million.[5]

On 14 March 1990, the launch of the first satellite took place, but failed. The satellite and the booster did not separate from the Titan III launch vehicle, and the payload was stalled in a useless low earth orbit instead of reaching the intended geostationary orbit. A wiring error by Martin Marietta had prevented the computers in the second stage from telling it to separate from the satellite's perigee kick motor and the satellite payload.[6] The satellite itself suffered no physical damage, but INTELSAT did sustain substantial economic losses; it had chosen to forgo commercially available launch insurance. Shortly after the launch, Martin Marietta accepted blame for the failure, which had apparently been caused by a lack of communication between software and hardware engineers regarding a change of wiring.

The second satellite was successfully launched on 23 June 1990, and achieved the geostationary orbit as intended.

On 3 July 1990, INTELSAT demanded that Martin Marietta pay damages to INTELSAT, and threatened to sue Martin Marietta for the failure of the first launch if it refused to pay these damages.

In order to protect itself, Martin Marietta made a pre-emptive legal strike only three days later, on 6 July 1990, and filed a complaint asking for a

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Declaratory Judgment at the US District Court or the District of Maryland. It sought confirmation that it had fulfilled its contractual obligations, and that the contract's limitations of liability and remedies and exclusions of damages were valid and enforceable. It also sought a declaration that the contract's reciprocal waiver, required by the 1988 Commercial Space Launch Act, barred INTELSAT from suing Martin Marietta for any damages or losses it sustained.

In response, INTELSAT filed a Counterclaim on 31 August 1990, demanding at least US$400 million from Martin Marietta to recover its financial losses. The claim was based on negligence, gross negligence, negligent misrepresentation and breach of contract. INTELSAT estimated its losses at about $145 million for the satellite and $115 million for the launch service. In addition, it faced loss of revenues from leasing transponder capacity, as well as the anticipated costs of the satellite rescue with the shuttle.

On 19 September 1990, Martin Marietta filed a motion to dismiss all INTELSAT's tort and contract-based counterclaims.

In a Memorandum and Order dated 30 April 1991, INTELSAT's tort-based counterclaims were dismissed by federal district court judge Marvin J. Garbis .[7]

Supplemental briefs on the contract-based counterclaim were submitted to the court on 10 June 1991.

This remaining counterclaim was dismissed on 19 November 1991[8]. The practical effect of this dismissal was that the declaratory judgment initially sought by Martin Marietta in July 1990 was now granted.

In January 1992, INTELSAT appealed the district court's decisions to the US Court of Appeals for the Fourth Circuit.

After a successful rescue mission on the maiden flight of NASA's newest Shuttle "Endeavour", the lost INTELSAT VI satellite was recovered and boosted into geostationary orbit mid-May 1992.[9]

2. The contract

Before discussing the litigation, it is important to analyze those legal provisions of the contract which are relevant for the liability question. The litigation is in fact based on 2 Articles of the contract, viz. Articles 6 and 17. These Articles embody the two legal theories on which a liability claim may be based, namely liability based on tort (Article 17) and liability based on contract (Article 6). INTELSAT based its counterclaim on both concepts, and therefore invoked both Articles in its legal argumentation. Since the tort claim initially received most of the court's attention, we will first discuss Article 17.

(a) Article 17

Article 17 is entitled "Allocation of Certain Risks". It provides for so-called "inter-party liability waivers" in its 5th paragraph, and limits liability in the 6th paragraph.

Inter-party liability waivers must be included in US launch services contracts pursuant to the 1988 amendments to the Commercial Space Launch Act of 1984.[10] Section 16(a)(1)(C)[11] of the amended Act requires US launch services providers which are licensed under the Act, as well as their customers, to enter into reciprocal waivers of claims under which each party assumes its own risk for damages and losses arising out of commercial space launch activities.

Article 17(5) of the contract under consideration provides in relevant part:

> "*17.5 Inter-Party Waiver for Damages Caused to the Persons, Goods, or Property of the Parties*
>
> 17.5.1 Martin Marietta and INTELSAT agree that, with respect to injury to or death of persons involved in, or damage to property used in connection with, Launch Services to be furnished under this contract, neither Party will make any claim against the other or against the contractors, subcontractors, officers, directors, agents, servants and employees of the other, or any of them, or against any other Titan III launch services buyers, and each Party shall bear its own risk of loss with respect to injury to or death of its

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own employees or damage to its own property howsoever caused.

17.5.2 INTELSAT and Martin Marietta shall each be responsible for such insurance as they deem necessary to protect their respective property. (...)".

Paragraph 6 of the same Article reads in part:

"*17.6 Limitation of Liability*

Martin Marietta's liability to INTELSAT and to persons claiming by or through INTELSAT, whether or not arising under contract, or in negligence, strict liability, or under any other theory or tort or liability, shall not include any loss of use or loss of profit or revenue or any other indirect, special, incidental or consequential damages. In no event shall Martin Marietta's liability to INTELSAT for any claim arising out of a particular Launch Services exceed the price for that Titan III Launch Services to be paid by INTELSAT (...)."

(b) Article 6

As stated earlier, INTELSAT's contract-based counterclaim was based on Article 6 of the contract. This Article provides two alternative contractual remedies in the event of a Titan III rocket mission failure, one of which applies at INTELSAT's choice. Alternative 1 offers a cash refund or guaranteed reflight, paid for by Martin Marietta, if INTELSAT purchases a refund/reflight option prior to the launch. In alternative 2, upon request by INTELSAT, Martin Marietta will exercize its "best efforts"[12] to secure a replacement launch within 12 months, but INTELSAT must pay for the replacement launch and Martin Marietta does not guarantee the availability of such a launch. Since INTELSAT did not make use of alternative 1, alternative 2 applies.

Paragraph 7 of Article 6 reads:

"6.7 The remedies set forth in this ARTICLE 6 shall be the sole and exclusive remedies of the Buyer from Martin Marietta in the event the Titan III mission fails for any reason."

After this short discussion of the two most important contractual provisions, we will now analyze the arguments of the parties and the deliberations of the court.

3. The litigation

At the heart of the action is the question of the enforceability of contractual limitations of liability and remedies contained in the contract between Martin Marietta and INTELSAT. In the following paragraphs, an analysis will be given of the legal arguments put forward by the parties and the court in the various stages of this case.

(a) Martin Marietta's complaint for declaratory judgment

Martin Marietta sought a declaratory judgment on two counts:[13]

- First, it sought confirmation of the validity and enforceability of the exclusive remedy provisions of the contract; it therefore asked the court to declare and adjudge that the remedies set forth in Article 6 of the contract are in fact the "sole and exclusive remedies" of INTELSAT;

- Second, it sought confirmation of the validity and enforceability of the allocation of risk provisions (i.e. the cross-waiver) of Article 17 of the contract; it therefore asked the court to declare and adjudge that pursuant to these provisions INTELSAT assumed the risk of loss to its property howsoever caused, including gross negligence, and bars any and all recovery by INTELSAT for its losses howsoever caused, including gross negligence.

Also on this second count, Martin Marietta asked the court to declare and adjudge that §2615(a)(1)(c) of the 1988 Commercial Space Launch Act, requiring cross-waivers, precludes INTELSAT from recovering for losses arising out of gross negligence under the doctrine of preemption. Martin Marietta in fact argued that cross-waiver s must be "read into" the contract and are valid even if they are not expressly mentioned in the contract.

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(b) INTELSAT's Counterclaim

INTELSAT claimed that:[14]

- The contract provisions on which Martin Marietta relied did not relieve it of liability for breach of its contractual obligations;

- Nor did these provisions relieve it of liability for negligence, gross negligence or negligent misrepresentations or omissions;

- The failure of INTELSAT's satellite to separate from the launch vehicle resulted from Martin Marietta's faulty computer programming and improper pre-launch testing, and that Martin Marietta therefore breached its contractual obligations to INTELSAT, including its obligation to use its "best efforts";

- The acts or omissions that allegedly caused the separation failure were negligent or grossly negligent, and Martin Marietta thereby failed to fulfil the "duty of care" it allegedly owed INTELSAT;

- Martin Marietta committed negligent misrepresentations and failed to disclose material information in describing the adequacy of its separation system and pre-launch testing.

INTELSAT therefore claimed compensatory damage for the loss of the price it paid for the launch, for the loss of the use of the satellite and damage to the satellite as well as costs for its rescue, and claimed that these damages exceeded US$400 million.

(c) Memorandum and Order of 30 April 1990

On April 30, 1991, federal district court judge Marvin J. Garbis dismissed INTELSAT's tort-based counterclaims. In summary[15], the court dismissed the tort claims because it found that INTELSAT's damages arising from the separation failure were essentially economic in nature. Under Maryland law (and the law of most states), a party to a contract may not sue in tort for purely economic loss unless a tort duty of care existed separate and apart from the other party's contractual duties. In this case, the district court determined that Martin Marietta and INTELSAT had defined the full scope of their duties in the contract. "Equally sophisticated parties who have the opportunity to allocate risks to third party insurance or among one another should be held to only those duties specified by the agreed upon contractual terms and not by general tort duties imposed by state law."[16]

The district court also dismissed INTELSAT's tort claims on the basis that they were barred by the cross-waiver in the contract that was required by the Commercial Space Launch Act. INTELSAT argued that Congress did not intend for the reciprocal waiver of claims to apply to gross negligence claims, and that public policy invalidated such exculpatory provisions in cases involving gross negligence. While the district court agreed with INTELSAT that the law of most states, including Maryland, does not permit parties to exclude liability for gross negligence, it rejected INTELSAT's gross negligence argument in this case.[17] After reviewing the legislative history underlying the Commercial Space Launch Act, the court concluded that Congress had created an exception to this general rule in §2615(a)(1)(C) of the Act.

Judge Garbis argued as follows:

"(I)n the special context of this case public policy strongly favors enforcement of waivers of all tort claims including those for gross negligence. This case presents that rare instance in which Congress has actually pronounced public policy via legislation, here by requiring the parties to agree to contractual waivers under which each party assumes its own risk of loss. (...) The legislative history of the Amendments indicates that Congress intended the mandatory waivers to bar recovery in all instances, including cases where parties were grossly negligent. The Senate Report accompanying the 1988 Amendments states that Congress intended the mandatory waiver requirement '(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'. S.Rep. No. 593, 100th Cong., 2nd Sess. 14 (1988). If the courts were to invalidate the subject tort claim waivers as they apply to gross negligence, the holding would substantially undermine the protections Congress intended for commercial space launches. By

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claiming under a gross negligence rather than an ordinary negligence theory, plaintiffs would be able to sue for damages on every imperfect space launch. The resulting costs of litigation, as well as the potential exposure would require launch providers to obtain expensive insurance, if available, or to self insure and "bet the farm" on every space launch. This is precisely the situation Congress sought to avoid."[18]

However, it should be noted that the court held that the liability waivers called for in the Commercial Space Launch Act could not be "read into" every launch services agreement, as Martin Marietta had contended: "Nowhere does the statutory language even begin to suggest that cross-waivers will be imputed into contractual agreements which do not contain express cross-waiver provisions."[19]

The court summed up by stating:
"The public policy of this country, as stated by Congress, requires that those using the service of a licensed space launch provider do so at their own risk. Accordingly, in order to carry out the Congressional intent behind the 1988 Amendments, the Court interprets the waivers in Article 17 of the contract to preclude liability for gross, as well as ordinary negligence."[20] For these reasons, the court dismissed all of INTELSAT's tort-based counterclaims.

Regarding INTELSAT's breach of contract claim, the court stated that if the contract imposed no duty at all on Martin Marietta to perform at some minimum level, the contract might well be illusory, and the party may no longer be entitled to the protection of contract limitations on liability. But since both parties were ill-prepared to deal with this question, the court requested further briefing from the parties on these issues.

(d) Memorandum and Order of 19 November 1991

This second Memorandum and Order dealt exclusively with the remaining contract-based counterclaim of INTELSAT.

In its supplemental brief, Martin Marietta argued that the only level of performance that would justify setting aside the protection of Article 6 was intentional and wilful misconduct, i.e. abandonment. It also argued that the contract was not illusory because it imposed substantial obligations upon Martin Marietta which were unaffected by Article 6 and which had been fulfilled. Thus, "INTELSAT cannot seriously claim that Martin Marietta abandoned the contract".[21] It is significant to note that INTELSAT allowed Martin Marietta to proceed with the launch of the second satellite before starting litigation. "INTELSAT cannot accept the benefits of Martin Marietta's performance, wait and see whether the performance was successful, and *then* claim that the exculpatory provisions were void *ab initio* (...)."[22]

INTELSAT argued in its supplemental brief that exculpatory provisions cannot be enforced in three cases, which were all present in this case:
- wilful or intentional misconduct;
- gross negligence;
- fundamental breach of contract.[23]

It said that the contract's limitation of liability provisions rendered it ambiguous and illusory because they relieved Martin Marietta of an obligation to perform at some minimum acceptable level. Moreover, as a matter of public policy, Martin Marietta's conduct with regard to the miswiring could not be excused by the terms of the contract.

The court rejected INTELSAT's arguments that the limitations of remedies and damages contained in the contract were ambiguous and unenforceable under Maryland law. The contract clearly and unambiguously limited INTELSAT's remedies in the event of a launch failure, and the limitations are valid and enforceable under Maryland law. The court thus rejected INTELSAT's arguments that Martin Marietta's performance constituted a fundamental breach of contract. "There is absolutely nothing to indicate that Martin Marietta did not attempt to provide two successful launches (one of which succeeded) or otherwise so fundamentally breached the contract that it must be stripped of the protection afforded it by the contract's remedy limitations provisions."[24]

On the basis of the supplemental briefs and the oral proceedings, Judge Garbis dismissed INTELSAT's remaining contract-based counterclaim on 19 November 1991. As a result, all

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counterclaims had now been dismissed, meaning in practice that Martin Marietta's request for a declaratory judgment was granted. Nevertheless, as stated above, in January 1992 INTELSAT appealed the district court's decisions to the US Court of Appeals for the Fourth Circuit.

4. The consequences

The consequences of this case are twofold: first, there are those concerning the private commercial launch industry, and second, those concerning space law in general.

(a) Private commercial launch industry

The decision in this case is especially significant for the US private commercial launch industry because it was the first Federal Court decision to interpret the cross-waivers scheme called for by the 1988 Amendments of the Commercial Space Launch Act. The court's reasoning that public policy underlying the Act favours the enforcement of waivers of all tort claims, including those for gross negligence, is especially important, because courts in most states normally find that public policy prohibits the enforcement of contractual waivers of liability in such cases.[25]

It is also important to note that whenever the manufacturer can demonstrate that it satisfied meaningful contractual obligations, the existence of exculpatory provisions is not likely to render the launch services contract illusory.

Of course, much will depend on the result of INTELSAT's appeal to the US Court of Appeals for the Fourth Circuit. It is especially uncertain whether the appeal court will agree with the validity and enforceability of liability limitations in case of gross negligence, because, as stated earlier, normally courts find that public policy prohibits the enforcement of liability waivers in such cases. The same may apply to a subsequent case which may be brought before another court. In addition, the distinction between negligence, gross negligence, wilful misconduct, intentional misconduct etc. remains a matter of interpretation and may well vary from one court to another. As long as there are no objective standards to determine whether certain behaviour should be allowed to enjoy the protection of liability limitations or not, the matter remains a highly subjective one. Probably, such objective criteria can only be developed over a long period of time and after a large number of cases.

Thus, the effect now obtained by the Martin Marietta case is far from permanent and does not provide any guarantee in the long term for private space enterprise. Of course, if Judge Garbis' decision is confirmed in appeal, the case may nevertheless prove to be a useful precedent for the private commercial launch industry. Courts normally attach great importance to earlier rulings in similar cases. But, once more, there is no guarantee for continued protection.

Therefore, despite this favourable decision, the private commercial launch industry should not relax its diligence; this would turn the Martin Marietta case into a 'blessing in disguise'. It is in the best interest of space enterprise to maintain a high standard of quality, and prove that a high degree of confidence and protection is justified.

It is generally contended that private space industry still needs a large degree of protection in order to be able to 'grow up' and become a mature branch of industry. It is a well-known fact that 'infant' industries need protection as long as the financial risks are of such importance that they may threaten their existence in case of a litigation like the one discussed here. An additional problem - especially in space enterprise - is the cost of insurance, if at all available.

However, what is mentioned above also means that, when the private commercial launch industry will have grown up, it will be appropriate to reconsider and maybe even abandon the liability limitations imposed by the Commercial Space Launch Act, at least in cases involving gross negligence. The major question then, is when the private space industry can be considered as a major industry. This author tends to believe that that day is not too far away; the pioneering period is clearly coming to an end, and space enterprise seems to flourish. It would be useful to start thinking about this new situation shortly.

(b) Space law

Besides the abovementioned direct consequences of the Martin Marietta case for the - especially US - private commercial launch industry, there

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are a few observations that need to be made with regard to space law in general.

The case confirms - for the time being - the justification of the liability limitations imposed by the Commercial Space Launch Act. The example of the Martin Marietta case is likely to be followed not only in the US, but also in other countries were private space activity exists. Thus, the consequences of the case may have a beneficial impact on space legislation and jurisprudence both internationally and nationally, and the concept of liability limitations will be recognized and confirmed world-wide.

However, the abovementioned thoughts on the limited value of the case also apply at the international level. The appeal may not confirm the present decision, another case in another court may be decided otherwise, or some court may decide one day that private space enterprise has grown up and requires no further protection.These developments may in their turn set precedents and examples which will be followed around the world. All these factors may result in a very unstable situation where enterprises cannot predict the outcome of the judgment of their behaviour. It is therefore desirable that some degree of security and uniformity is provided. Even if community interest would consider it appropriate to limit or reduce the degree of protection presently granted to the launch industry - and that day may not be far away - it is desirable that the industry is at least aware of that tendency and can behave accordingly by being even more diligent. It is submitted that it is not so much the degree of protection which is decisive for safeguarding the private commercial launch industry, but rather the degree of certainty about the behavioural standards which are required from them by the community.

Therefore, it is important that we do not sit back and be happy with this decision, praising its beneficial effect for the launch industry, and just wait and see what happens next. It is, on the contrary, essential to continue and reinforce our efforts to reach agreement on international objective standards and criteria for the settlement of disputes regarding space activities. In particular the establishment of an international arbitration tribunal for space law disputes would be valuable and would promote uniformity and security world-wide. Such a tribunal forms part of the proposals put forward in the draft convention on settlement of space law disputes which has been elaborated in the framework of the International Law Association (ILA).[26] Of course, a convention on this subject would be ratified only by states and not by private enterprises, but the draft recognizes the interests of private enterprises and allows them as parties in a dispute. Still, it is clear that disputes will more and more oppose private parties instead of states, as a result of the continuing privatization and commercialization of space activities. Therefore, it would be preferable to find a solution better suited to this kind of parties. In addition, it must be recalled that the present political climate does not seem favourable for the adoption of a new treaty.

There is one option which seems to solve these problems, and that is to include a clause in launch contracts making the arbitration rules of the International Chamber of Commerce applicable to disputes. These rules have proved their usefulness for many years and are applied worldwide. In this way, there will at least be some degree of uniformity in the standards to be applied to the resolution of a dispute. Moreover, a certain continuity in the argumentation may be expected. This proposal can be implemented without much difficulty, cost or loss of time, and will cause continuity, certainty and uniformity both in the form of dispute settlement and in the solution of the disputes.

5. Conclusion

The Martin Marietta case is significant and favourable for the (US) private commercial launch industry and for space law in general.

Much will depend on INTELSAT's appeal to the US Court of Appeals for the Fourth Circuit and of subsequent decisions in similar cases. If the present decision is confirmed, it will serve as a precedent and confirm the justification of cross-waivers of liability in launch contracts. This means that other courts in the US and abroad facing similar cases will adopt the same line of argument. If however the appeal turns out against Martin Marietta, other courts may adopt that line of reasoning. A confusing situation may thus result where private enterprise is never certain of the outcome of its disputes.

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In addition, it may be questioned for how much longer the private launch industry may still be considered as immature, needing the high degree of protection provided by the Commercial Space Launch Act. The day may come soon when grossly negligent behaviour, if present, no longer merits the benefit of limited liability. It is much more beneficial for the safeguarding of the private commercial launch industry to provide predictable standards for the judgment of their behaviour than to continue overprotecting a nearly mature industry, which will in fact result in unpredictable situations.

For these reasons, the efforts at the international level to reach agreement on an objective international standard for the settlement of disputes regarding space activities, and especially the establishment of an international arbitration tribunal, must be continued and reinforced. In addition, it will be wise to start including a provision in launch contracts to adopt the arbitration rules of the ICC in case of conflict.

This solution would have the great advantage of providing the predictable, uniform, objective and adequate standard for the settlement of disputes involving the private space industry which is so badly required now, and even more so in the near future.

Endnotes

[1] INTELSAT is an international intergovernmental organization and provides commercial international telecommunication services to its members as well as the lease and sale of satellite capacity to members and non-members of the organization. Its revenues exceed US$500 million per year.

[2] These are sophisticated geostationary communication satellites designed to provide telephone, telecommunications and television services.

[3] Martin Marietta (with the Titan III vehicle) is one of the three private commercial launch companies in the USA. The others are General Dynamics (with the Atlas vehicle) and McDonnell Douglas (with the Delta II vehicle). See for an analysis P.M. Meredith, "Risk Allocation Provisions in Commercial Launch Contracts", in *Proceedings of the Thirty-Fourth Colloquium on the Law of Outer Space* 264-273 (1992).

[4] Commercial Launch Services Contract between Martin Marietta Corporation and International Telecommunications Satellite Organization "INTELSAT", Contract No. MMC-CTS-87-001 INTEL-629, 10 Aug. 1987; hereinafter referred to as "the contract".

[5] Art. 7.1 of the contract specifies the cost of each launch: the first launch cost $111,530,000 and the second $108,430,000.

[6] This was determined by an internal investigation conducted by Martin Marietta. See *Space Law: Federal District Court Dismisses Claims Exceeding $400 Million Arising Out of Satellite Launch Mishap*, Case review prepared by Haight, Gardner, Poor & Havens, New York (23 Jan. 1992).

[7] Martin Marietta Corp. v. International Telecommunications Satellite Organization (INTELSAT), Civil Action No. MJG-90-1840, 763 F. Supp., 1327-1334 (D.Md. 30 April 1991, published in edited form May 13 1991). See for a general review of the case and the legal procedure: "Martin Marietta Sues Intelsat Over Satellite", *Washington Post* Sec. D1, Col. 1/D4, Col. 3. (July 10, 1990); "Deals & Suits: Martin Marietta Corp. v. Intelsat", VIII *Legal Times* No. 8 (July 16, 1990); "Intelsat Sues Martin to Recover Losses", *Space News* 1&19 (Sep. 10-16, 1990), and "U.S. Court Clears Martin Marietta of Negligence Claims", *Space News* 1&28 (May 6-12, 1991). For more detailed analysis, see especially *Space Law: Federal District Court Dismisses Claims Exceeding $400 Million Arising Out of Satellite Launch Mishap*, *supra* note 6; see also A.K. Sessoms, "Case Note: Martin Marietta Corporation versus International Telecommunications Satellite Organization (INTELSAT)", in 19 *Journal of Space Law* 173-176 (1991); R.K. Hufman, "Current Litigation Regarding Launch Services Agreements", *Third Annual Symposium on the Law & Outer Space*, Georgetown University Law Center (6 Sep. 1991), and "INTELSAT Counterclaim Dismissed", Adler, Kaplan & Begy's *Space Law News* 8-10 (Spring 1992).

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[8] Martin Marietta Corp. v. International Telecommunications Satellite Organization (INTELSAT), Civil Action No. MJG-90-1840 (D.Md. Nov. 19. 1991).

[9] "Endeavour: La NASA joue et gagne", *Air & Cosmos/Aviation Magazine* No. 1381, 20-24 (1-7 June 1992). INTELSAT signed a US$91 million contract with NASA for this rescue mission. The astronauts attached a beam to the satellite so that it could be grabbed by the shuttle's robot arm and placed in the cargo bay, where a new upper stage solid rocket motor was installed, which boosted the satellite into the intended geostationary orbit. See "INTELSAT Counterclaim Dismissed", *supra* note 7 at 8.

[10] Commercial Space Launch Act: 46 USC App. § 2601-2623 (1988); See K.M. Gorove, "The Commercial Space Launch Act Amendments of 1988: a Brief Overview", in 16 *Journal of Space Law* 184-185 (1988).

[11] Codified at 46 USC App. § 2615 (a)(1)(C).

[12] "Best efforts" is defined in Art. 1(2) of the contract as "Diligently working in a good and workman-like manner as a reasonable, prudent manufacturer of launch vehicles and provider of Launch Services". See also on this subject B. Schmidt-Tedd, "Best efforts principle and terms of contract in space business", in *Proceedings of the Thirty-First Colloquium on the Law of Outer Space* 330-340 (1989).

[13] Cf. Complaint for Declaratory Judgment, 6 July 1990.

[14] See Hufman, "Current Litigation Regarding Launch Services Agreements", *supra* note 7, at 2-3.

[15] Cf. *Space Law: Federal District Court Dismisses Claims Exceeding $400 Million Arising Out of Satellite Launch Mishap*, *supra* note 6.

[16] 763 F. Supp. 1327 (D.Md. 1991), *supra* note 7 at 1332.

[17] Note that Judge Garbis did not rule whether or not gross negligence was committed, he only ruled that the cross-waiver protected the launch service provider against gross negligence suits.

[18] Id., at 1333-1334.

[19] Id. at 1330.

[20] Id. at 1334.

[21] Martin Marietta's supplemental brief in support of its motion to dismiss counterclaim, 10 June 1991, at 7.

[22] Id., at 12-13.

[23] Supplemental memorandum in opposition to plaintiff's motion to dismiss counterclaims, 10 June 1991, at 2-6.

[24] Martin Marietta Corp. v. International Telecommunications Satellite Organization (INTELSAT), Civil Action No. MJG-90-1840 (D.Md. Nov. 19. 1991), *supra* note 8 at 11.

[25] Cf. *Space Law: Federal District Court Dismisses Claims Exceeding $400 Million Arising Out of Satellite Launch Mishap*, *supra* note 6 at 6.

[26] See ILA Report of the sixty-first Conference, Paris 1984 at 326 ff. See also K.H. Böckstiegel, "Proposed Draft Convention on the Settlement of Space Law Disputes", in Journal of Space Law 136 ff. (1984), and H.L. van Traa-Engelman, "Settlement of space law disputes", in 3 Leiden Journal of International Law 139 ff. (No. 3, 1990).