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# **Liability, Indemnification and Insurance.**

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**I A very protective liability regime**

**II Which must be implemented at the international and domestic levels.**

## History of the space law liability regime

- » The 1963 declaration
- » The Outer Space Treaty,
- » the rescue agreement
- » The liability convention
- » The registration convention

were mainly proposed by the space faring States of the time and accepted by the others.

The space faring States wanted an undisputed freedom of use of outer-space

They recognised therefore a very much « victim oriented » liability regime for victims not taking part in the risky adventure (damage on earth)

We have to keep in mind that this regime is therefore a counterpart of the freedom of use.

The regime for liability for damage in outer space is quite different: a fault of the launching State must be proven

# **I A very protective liability regime**

## **Presentation of the liability regime for space activities**

**The liability convention is very efficient for the victim not taking part in the adventure ( damage on earth) .**

- Because of the choice of the liable entity**
- Because of the extend of the liability**

**The choice of the imputation of liability is  
very protective :**

**The launching State.**

**The interest of the choice.**

**» A State**

**» A well known State**

# **the notion of Launching State.**

- A State that launches**
- A State that procures the launching**
- A State from whose territory**
- A State from whose facility an object is launched,**

# **the difficulty for the victim to prove the Launching State**

**Importance of the easy to prove criteria :**

- State of Territory and**
- State of registration.**
  
- Difficulty of the notion of “procuring the launch”**



**When there is more than one Launching State, they are jointly and severally liable**

**i.e. any of them may have to pay compensation for the whole damage**

**The victim may choose among the Launching States the most likely to pay**

- **The plurality of Launching States is a guarantee for the victims**
- **It is a problem for the Launching States**

# **The extent of the liability**

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**The Liability Convention is very efficient for the victim not taking part in the adventure ( damage on earth) .**

## **A large liability**

- ○ Objective liability**
- ○ liability is unlimited in amount**
- ○ The liability is unlimited in time**
- ○ No exoneration**

**The liability convention does not  
apply to damage**

**To a launching State's national**

**To foreign nationals taking part**

**Space law must deal with this issues**

**The Liability Convention does not deal with damage caused to another Launching State of the same launch or its nationals**

# Definition of the « damage » (1)

## Damage « *caused by* » a space object

- « *caused by* »
- Definition of the space object

### Liability convention article 1 :

*« The term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof ».*

### *Bin Cheng, Vladimir Kopal :*

*« Any objects launched by humans into outer space, as well as any component part thereof, together with its launch vehicle and parts thereof »*

## Definition of the « damage » (2)

The term "damage" means

- loss of life, personal injury or other impairment of health;
- or loss of or damage to property
- Damage to the environment ?

## The compensation :

### « Restitutio in integrum »

*Restore the person, to the condition which would have existed if the damage had not occurred.*

( Liab conv Article XII )



# **The settlement of dispute mechanism**

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**The victim may choose to ask for compensation**

- **under the liability convention or**
- **through another way.**

## **The settlement of dispute mechanism under the liability convention**

- **Diplomatic negotiation** (article IX)
- **No exhaustion of local remedies** (article XI)
- **One year from the damage** (article X)
- **The Claims Commission**

# **The possibility for the victim to obtain compensation through other ways.**

- A State at the international law level**
  - Under responsibility of OST article VI**
  - Under general international law**
- A victim under domestic law before a domestic judge**

# Damage in orbit

- **Fault liability**
- **It was an error to deal with both systems in the same articles**
- **The Convention is far less efficient**
- **The mechanism should be improved**
- **Will the insurers go on accepting to pay in the case of space debris ?**

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## **The system is very much victim oriented**

- It protects the victim (cf law of the sea)**
- It encourages responsibility and control of every activity whether conducted by governments or by non governmental entities.**

## **II Its implementation at the international and domestic levels.**

**Some people argue that the current system is unfair.**

**In a certain sense they are right.**

**The system must be completed**

# Who determines which State is a Launching State ?

- Not the Launching State itself
- *In fine* : the judge
- The proof of the quality of Launching State
  - The victim has to prove
  - The importance of registration
- If there are many: the victim have the choice

**If a State is at risk to be considered as a Launching State it should consider it carefully to avoid the obligation to pay for compensation.**



**A State cannot avoid being considered as a Launching State by an international judge**

**Instead of trying to declare that it does not consider itself as a Launching State, which has no efficient legal effect, a State would be better off trying to escape from paying compensation.**

# **A Launching State may avoid paying compensation in case of damage :**

*It can transmit the « hot potato » to somebody else*

## **How ?**

- The licence and domestic law when private activities are concerned**
- The agreements referred to in article V of the liability convention.**

# The sharing of the risk between a State and its private companies

- Liability to third parties according to the liability convention
- Liability to other third parties including the State itself
- The case of cross waivers of liability among persons taking part to the activity

- Most States want to be reimbursed if they had to pay as launching States or responsible State for damage caused by a private activity
- They sometimes accept to put a ceiling to the amount of this reimbursement
- They usually ask private companies to have an insurance covering third parties liability

- Some States especially the USA and France support their launching operators by accepting to pay for a damage over the ceiling even if the victim prefers to sue the operator before a domestic judge
  - Article XI of the liability convention enable a victim to pursue “a claim in the courts or administrative tribunals or agencies of a launching State”
  - If the victim chooses this solution the cap to reimbursement to the State is useless
  - The US and French governments accept to guarantee the payment of claims over the ceiling even if the legal action is directed toward the operator

- An insurance is often required.
  - Sometimes it is eased by possibility to reduce the obligation of insurance if the insurance market is insufficient or for some activities.
  - In France insurance may be replaced by a financial guarantee or even assets.
  - The obligation of insurance is cancelled for geostationary satellites when no manoeuvre is conducted.

# The sharing of the risk among Launching States

**Article V § 2 of the liability convention  
establishes a principle :**

« A launching State which has paid  
compensation for damage shall have the  
right to present a claim for indemnification  
to other participants in the joint launching. »

**Contrary to what is provided in article IV there is no precision on the way to obtain this indemnification**

**The text only indicates :**

*The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation ...*



## These agreements are of major interest

They do not prejudice the right of the State of the victim

They do not share the liability itself

**but**

**they share what is the most important :**

**The obligation of compensation**

## **These agreements may**

- **put the risk of the launch phase on the State which launches / State of the installations**
- **put the risk of the space object when launched on the State which controls the space object**
- **protect the other launching States from having to pay for damage caused by other States' pay loads.**
- **protect the State of the territory when it does not really take part to the launch**
- **Etc...**

# **The effects of these agreements**

**In law they do not transfer the liability but the obligation of compensation**

**In fact the result will be often the same**

**The State victim / of the victim will most of the time choose to sue the State designated by the agreement**

- so doing it will avoid having to prove the status of launching State**
- and it will easier get its money.**
- the parties to the agreement may agree to facilitate the action in this case**

## **Resumé**

**The liability mechanism under the liability convention is efficient for the victim not taking part in the activity.**

**In connection with the obligation of article VI it imposes efficient control on any space activities**

## Résumé (2)

**But it is far less efficient for other purposes**

- **Relations between space faring States**
  - Liability for damage in space
  - Relations between launching States
  - Sharing of the burden of the risk between Launching States
  
- The solution : systematic arrangements according to article V

## **Résumé (3)**

### **Relations between a State and its private entities**

- **Indemnification of victims who are nationals of the LS or taking part in the launch**
  - **Possibility for the State to be reimbursed**
  - **Possibility for private entities to be protected by efficient ceilings in case of an action before a domestic judge**
- The solution : Licensing and control process through domestic legislation, regulations or agreements**



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