Acceleron Aerospace Journal || AAJ.11.2106-2438
Volume 3, Issue 2, pp (436-440)
Review Article
E-ISSN- 2583-9942 || DOI: 10.61359/11.2106-2438

Cross-Waiver Clause of Liability in the Launch Contract: A Sustainable Contractual Practice for the Space Industry

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Abstract: For many years, the cross-waiver of liability clause in the space transport sector has been widely used by the entire space industry. It has a significant influence on the health of the space market, allowing for secure investments and legal certainty during the execution of a space launch contract. This clause is therefore essential in space launch contracts, as without it, predicting a sustainable economy in this sector for all stakeholders would be challenging. Thus, it will be highly beneficial in securing future lunar and Martian missions.

Table of Contents

1. Introduction

According to Mr. Eric Loquin, "the entire space sector has been built, for reasons of legal certainty on these contracts" (Loquin.et.al.2008). In this sense, launch contracts are the primary agreements in the space industry, contributing to the sustainable economic security of the space sector, particularly through "usual clauses" (Ravillon.et.al.2009) that encourage investment by space operators without endangering the health of their companies. The space industry involves understanding the risks generated by space activities. To regulate this inherent risk, clauses aimed at limiting the liability of operators have been developed. For instance, launch contracts include waiver clauses designed to protect the satellite launch industry (Ravillon.et.al.2009). These clauses allow "particularly for complex and high-risk industrial operations in which a plurality of companies will have to intervene side by side simplify the allocation of responsibilities to avoid the costs of litigation involving lengthy and costly proceedings." Regardless of the field, it can be observed that these liability clauses will always remain a means of better predicting the cost of non-performance, thereby facilitating the conclusion of insurance, and limiting the cost of non-performance, thus encouraging risk-taking (such as launching a satellite), innovation (such as manufacturing a prototype), and more broadly, negotiations (Aubin & Portwoode.et.al.2001). This waiver of recourse clause, made possible by the mutual trust and collaboration of the parties in the performance of the mission, helps avoid litigation and pacifies relations between the parties. Freedom of contract is derived from the autonomy of the will. In France, the Constitutional Council has recognized its constitutional value by linking it to Article 4 of the Declaration of the Rights of Man and of the Citizen (Council.et.al.2006). It allows the contracting parties to form their contracts as they see fit, including the insertion of non-recourse clauses. In accordance with the principle of autonomy of will, the parties to the launch contract may freely include a mutual waiver of non-recourse clause, a customary clause in the entire space sector. This mutual non-recourse clause is defined as "a waiver of the right to take legal action on the basis of or in connection with the contract" (Buffelan-Lanore.et.al.2020 & Larribau-Terneyre.et.al.2021). The mutual non-recourse agreement affects the legal enforcement of a safeguarded right by stipulating that each party waives any recourse to contractual liability in the event of non-performance or poor performance of the launch contract (Delebecque.et.al.2006). Each party to

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** Received: 16-August-2024 || Revised: 23-August-2024 || Accepted: 25-August-2024 || Published Online: 30-August-2024.

the contract agrees not to take action against the other in the event of failure of the obligation provided by the clause, thus maintaining the contractual balance (Brunaux.et.al.2019).

The cross-waiver of recourse clause is extremely useful for regulating the contractual balance in space launch contracts. This clause is always "mutual," meaning it is reciprocal and waives recourse in matters of launch. For example, within the launch contract, the launch company's customer cannot exercise recourse against the latter if the satellite loss is due to a launcher failure. Similarly, the launch company cannot take action against its customer if the launcher loss is caused by the satellite's deficiency. Additionally, these clauses specify that the launch company ensures that persons involved in the launch refrain from any claims or actions for damages against the client or its collaborators in connection with the performance of this contract, regardless of the cause. In return, the customer makes the same commitment. Thus, both parties pass on the obligation of non-recourse to all their sectors, including their subcontractors (Couston.et.al.2021).

This exemption from liability is a matter of public policy, as the provision does not allow for derogation by an express stipulation to the contrary, but it is neither general nor absolute, since liability may be called into question in the event of intentional fault. By limiting the right to compensation while preserving this right in cases of serious misconduct, such as intentional misconduct, this provision aligns with the French Constitution. It is also compatible with Community law, as the rules on defective products are interpreted as dealing with goods used for private use or consumption, to which space objects are not attached (Labordes.et.al.2009).

In addition, American law institutes, with the same objective, a "guarantee agreement," requiring that the authorization issued to an operator include a provision obligating the holder to refrain from taking action against one of its contractual partners. The Senate adopted this article in 2009 without modification. The progress of this article compared to current contractual practice is notable, as its wording includes construction contracts in its scope, whereas the non-recourse clauses currently in force only concern launch contracts. It also emphasizes that it encourages participants in space activities to focus on the risks they may suffer rather than seeking to cover themselves against all risks of liability, while avoiding the excessive use of the State guarantee (Labordes.et.al.2009).

French law also provides for a mutual non-recourse agreement between the parties to the launch contract when damage is caused to a third party under Article 19 of the OSL I (operational space law) since 2009. This contractual practice has proven effective, as the recent law named "OSL II" of August 1, 2023, has not amended this article. The legal certainty provided by the mutual non-use clause thus strengthens the economic security of the space sector in the long term. This clause is therefore a keystone of security in launch contracts and represents an essential economic lever for the space sector, creating sustainable economic security between the partners of the entire sector.

2. Cross-waiver Clause of Liability Ensuring Sustainable Economic Security for the Entire Space Industry

The cross-waiver clause of liability serves to protect the contracting parties from potential difficulties arising from contingencies during the performance of the contract. This clause allows the parties and their insurers to address all types of damage and avoid incurring contractual liability. Contingency management can thus be handled directly between the parties or, more broadly, with the insurers. It is essential for the parties to verify whether the risk being waived is properly identified or sufficiently covered by insurance. For example, hazard is a critical factor in space transport contracts, where the high risks associated with space launches are considered by both parties before the launch.

Insurance protection against contingencies during the performance of the launch contract offers economic protection to those involved in the space operation or the production of the space object that caused damage to a third party. Article 19 of the OSL II, for instance, shields participants from recourse in cases of damage to a third party, provided that compensation is covered by insurance, financial guarantees, or the State guarantee (Labordes.et.al.2009). Limiting recourse among those benefiting from the State guarantee aligns with capping space operators' liability. This approach prevents hindering the development of commercial space activities by ensuring that insurance remains affordable. The goal is to avoid rising insurance costs that could result from each

sector player covering the risk of others seeking liability, despite the liability ceiling. Operators bound by a space launch contract, through the mutual non-recourse agreement, thus do not commit their financial assets in the event of damage to third parties.

Each partner understands that any damage they incur will be their responsibility, establishing a balanced distribution of risks. The mutual non-recourse clause is an economical choice that can reduce insurance premiums. The insurance premium thus guarantees security and the preservation of financial assets. In exchange, the policyholder agrees to adhere to the contract's conditions and limits (deductibles, exclusions, definitions, covered events) in the event of a claim. However, the mutual non-recourse clause may apply only beyond a threshold defined by the parties, necessitating adjustments to the insurance contract accordingly. Similarly, before incorporating a mutual waiver clause in launch contracts, the parties must assess the risks of contractual liability they might incur.

3. Cross-waiver Clause of Liability Ensuring Sustainable Legal Certainty between Partners

In the event of a dispute, the mutual non-recourse clause may be submitted to the judge. Judges have the authority to set it aside in cases of fraudulent practices or gross negligence, or if it confers a manifestly excessive advantage to one party or removes an essential obligation from the contract. Unlike the limitation of liability clause, which generally prohibits the victim from taking action not only against the debtor but also against the liability insurer, the waiver of recourse clause has "a purely individual effect" (Buffelan-Lanore.et.al.2020 & Larribau-Terneyre.et.al.2021). The mutual waiver of recourse clause does not, unless otherwise stipulated, entail a waiver of recourse against the insurer of the responsible party (1st Civil, 1993).

Specifically, when a partner has used insurance to compensate a third party, they cannot bring an action against another participant related to the space operation or the production of the object. This is based on the principle of insurance law, where the insurer's subrogatory recourse deprives the insured victim of further recourse (Labordes.et.al.2009). The subrogation claim mechanism requires the insurer to have detailed documentation from the insured to assess, for example, the satellite's share of operational capacity.

Moreover, the mutual waiver of recourse clause does not always absolve the debtor from all faults, including serious ones, especially if intentional misconduct is involved. Serious negligence should negate the waiver of recourse clause because it threatens the overall balance of the contract (Astegiano-La Rizza.et.al.2021 and 2022). Case law reflects this nuance. For instance, in the Intelsat/Martin Marietta case, following the failure of the Intelsat VI satellite launch by the Titan rocket, the District Court of Maryland initially upheld the waiver of recourse clauses. However, the Court of Appeal ruled on October 21, 1992, that these clauses could not prevent remedies in cases of serious negligence (US Court of Appeals, 1992; Masson.et.al.993).

This jurisprudential trend is affirmed by OSL I, with Article 19 of the law stating that liability may only be questioned in cases of intentional misconduct, which aligns with the current OSL II (Labordes.et.al.2009). According to the Court of Cassation and French law, exoneration clauses are generally valid as long as they do not absolve the contracting party of the consequences of fraud or intentional fault. In space transport contracts, there is an option where the waiver of recourse clause releases the debtor from fault during a launch: the "reflight/cash refund guarantee." Under this option, customers can choose a refund or a second launch at the company's expense in case of mission failure.

Finally, proving gross negligence remains challenging. This concept is often cited to avoid the application of the mutual non-recourse agreement. In the event of a launch accident, commissions of inquiry are established to analyze the causes, such as component instability under extreme conditions, short circuits, or procedural errors. For satellite failures, similar commissions may investigate the causes, such as loss of attitude control or payload failures. These inquiries aim to determine whether the incident was due to a design defect, manufacturing flaw, or human error, and to make recommendations. Forensic experts then establish responsibility and damages (Durand.et.al.1994).

4. Perspectives

The cross-waiver of liability will be highly beneficial for securing future Lunar and Martian space missions. Such clauses will likely be extensively used in public/private partnerships between space agencies and private companies. For instance, a contract for launching spacecraft to the Moon and/or Mars may include a non-recourse clause. For example, the Artemis Accords anticipate the use of such clauses for future space missions. Section 1 of the Artemis Accords authorizes launch activities initiated by partner states (Government, 2020), which could include missions to the Moon and Mars. According to Section 2 of the Artemis Accords, these launch activities require the parties involved to sign a Memorandum of Understanding (Government, 2020). In 2021, NASA signed a $2.89 billion service contract with SpaceX for the development of the Starship and for two Moon missions in 2025 and 2027. This contract aims to deliver the spacecraft and transport US astronauts to the Moon's surface. It includes a mutual non-recourse agreement in case of default or non-performance (the United States, 2011). Similarly, there is potential for another mutual non-recourse agreement between NASA and SpaceX within the Artemis program framework for the development of a spacecraft on the Moon intended for orbiting or landing on Mars.

5. Limits

Despite significant economic interest and the presence of reliable players in the space sector, the mutual non-recourse agreement within space transport contracts could potentially be used to justify abuses and overproduction that harm the celestial environment. For instance, future space missions will require signatories to adhere to environmental protections as stipulated in Sections 2b) and 10.1 of the Artemis Accords (Government, Blue Police.2020). Sustainable environmental stewardship remains a primary obligation of the contract, even with the inclusion of a mutual waiver clause. Ultimately, cross-waiver clauses might need to be reconsidered or neutralized in the face of human overproduction on celestial bodies.

6. Conclusion

The cross-waiver clause of liability included in launch contracts has a sustainable influence on the entire space sector. On one hand, it provides lasting economic security for the industry, and on the other, it ensures long-term legal certainty between partners. This clause serves as a crucial economic lever for the space industry: it fosters long-term mutual trust between space operators and secures their assets by excluding personal liability, which is covered by an insurance premium against third-party damage. Furthermore, this clause is central to the contractual balance between parties, maintaining legal certainty throughout the performance of the launch contract. The parties are shielded from legal recourse, except in cases of gross negligence by one of the partners, which can invalidate the mutual waiver of recourse clause due to its potential threat to the overall balance of the contract. In practice, if one partner fails to fulfill their obligations during the launch contract, they are required to reimburse the customer or conduct another launch at their own expense, thereby avoiding litigation.

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8. Conflict of Interest

The author declares no competing conflict of interest.

9. Funding

No funding was received to support this study.

10. Author Biography

Jean Michel Haziza holds a PhD in private law and criminal sciences, with a specialization in air and space criminal law. He is a researcher at the Bordeaux Institute of Criminal Sciences and Justice and has been an Associate Researcher for the SIRIUS Chair since June 2024. His research encompasses various areas of private law, including civil contract and liability law, personal criminal law, and transport law (maritime, air, and space). He is also the author of two scientific works. He is based in Bordeaux, France.