

Report on the 2012 ECSL Practitioners' Forum

The 2012 ECSL Practitioners' Forum was organised on 16 March at ESA Headquarters in Paris. The organisation was taken care of by the new ECSL Executive Secretary, **Mrs. K. Rybarova**, in close cooperation with the ECSL Chairman, **Prof. Dr. S. Marchisio**, of the University of Rome 'La Sapienza', and the Coordinator of the Practitioners' Forum, **Prof. Dr. F.G. von der Dunk**, of the University of Nebraska-Lincoln.

For the first time in its history, the Practitioners' Forum addressed the issue of insurance, under the heading of "Insurance of space activities from the cradle to the grave – legal aspects". The forum was attended by some 50 participants from various institutional, commercial and academic professions across Europe and the United States.

Prof. Marchisio welcomed the participants on behalf of ECSL, which he introduced briefly before handing the floor to the Chairman of the morning session, **Dr. M. Ferrazzani**, Legal Counsel and Head of Legal Department at ESA.

The first speaker was **Dr. Philippe Schallier**, of ESA's Legal Department, on 'ESA Insurance Policies'. He introduced the background to the legal discussions on insurance, by discerning no less than ten elements of a satellite activity which may all have an impact on insurance issues. He addressed the importance of verification of operational readiness for insurance matters, where three questions arise: (1) what can happen? (2) how likely or probable is that to happen? and (3) if it does happen, what are the consequences? Where usually 15% to 25% of total budget resources for a space project are spent on insurance, it is no wonder that within ESA all eleven directorates are involved in insurance issues, and five of them substantially so.

Prof. Von der Dunk then moved from this factual introduction to the legal issues by pointing out that space lawyers tend to think primarily about third-party liability when considering insurance, and perhaps secondarily about contractual liability (such as per the famous Martin Marietta *versus* INTELSAT case), where some national statutes impose contractual waivers. He noted however that for actual practitioners other insurance aspects and the legal framework therefore – if existing – are often at least of equal importance; hence the decision to have this forum address the issue of insurance of space activities in principle 'from the cradle to the grave'.

The next speaker was **Mrs. Elena Katsampani**, of ESA's Procurement Department, on 'Insurance issues in the integration and pre-launch phase as against cross-waivers of liability'. She addressed applicable categories of insurance, in particular the industry's liabilities from ESA contracts during the integration phase and as following from flow-down cross-waivers of liabilities with launch service providers. Here she urged that insurance policies should be tailored to the liability scheme that the parties agree on, not the other way around. Legally speaking, she concluded that insurance generally speaking is not so much obligatory, but rather a matter of common sense.

Following Mrs. Katsampani's statement that there was no standard definition of 'lift off' for the purpose of determining when a pre-launch phase becomes a launch phase, there was an interesting discussion where it also was pointed out that a definition of 'launch' in international law was still missing. Engineers actually preferred *not* to have a standard definition of 'lift-off', considering such a definition potentially 'dangerous' in view of

various technical configurations leading to various moments of irreversibility as the key element for insurance policy purposes.

Delving deeper still into the issue of definitions, Prof. Golda of the University of Genoa contributed to the discussion by briefly elucidating the question of insurance in the context of a two-satellite launch, where the low-cost launch service provider placed the satellites in the respective orbit intended for the other and the insurer refused to pay out because of lack of 'due care' or 'reasonable care' on the part of the insured, as one particular example of the complications real life events would present to the insurance lawyers.

After a coffee break, the session resumed with the presentation of **Mr. Philippe Clerc**, Head of Legal Department at CNES, on 'Insurance issues related to spaceport/launch site operations and national legislation obligations'. He addressed in particular the liability and insurance issues surrounding the Guyana Space Centre, which is now a true European spaceport under the latest version, applicable for the period 2009-2020, of the France-ESA agreement. In terms of third-party liability for development flights ESA would remain 100% liable, whereas for exploitation flights under Arianespace responsibility a first tier of liability exists for Arianespace up to 60 M € (to be insured against in accordance with the French Law on Space Operations), with a second tier above that where for Arianespace launches France would pick up any such liability, for Soyuz launches France and Russia would share any such liability 50-50, and for Vega launches ESA would be liable for 2/3 and France for 1/3 of that second tier.

After lunch the forum resumed for the afternoon session, chaired by **Prof. Marchisio** and kicking off with the presentation by **Mr. Andrew Corton**, Cargo Underwriter with Pembroke Syndicate 4000, Lloyd's, regarding 'Insurance perspectives on pre-launch phases'. The speaker explained that pre-launch insurance is placed in the cargo market, where usually three sub-phases are recognised: (1) assembly, integration and testing; (2) transport to the final launch site; and (3) final launch site preparations. He furthermore recounted that the insurance market of today is about 400 M € strong; 2011 was a poor year for global insurance – space insurance was a market where one loss in a year could eat away all the income earned with policies that same year. Finally, he explained that underwriters underwrite the spacecraft and assorted components, not the contract itself, so that for example delays are generally not covered.

The next speaker was **Mrs. MMag. Verena Cap** of the Ministry of Justice of the Federal Republic of Austria, on 'National regulatory aspects of insurance (obligations) – the Austrian example'. She explained the background to the brand new Austrian Outer Space Act in that Austria will become a launching state in 2012 due to two university satellite projects, both concerning nano-satellites to be launched from India into LEO. Prof. Brünner of Graz added that a 'contract' type of agreement exists between Austria and India on joint and several liability for the launches, but that the details thereof are unknown. Noting the different addressees of the Liability Convention and of domestic legislation, as being respectively states and private operators, Mrs. Cap then pointed out that after some discussion it was not decided to impose a general obligation of insurance by means of the Act, but rather confine the obligation to insure against liability as a condition for an authorisation.

Mr. Claude Dumais, Vice President Corporate and Legal Affairs with SES Astra of Luxembourg, then spoke on ‘Satellite industry perspective on third-party liability insurance: the SES Astra view’. He confirmed that SES uses insurance as a tool to mitigate (*inter alia*) third-party liability risks; whilst liabilities may in general terms (at least as far as outside of the Liability Convention’s regime on third-party liability) be the same as elsewhere in the insurance sector, the risks are quite different in character when it comes to space activities. He pointed out that in addition SES has to deal, partly through insurance, with risks associated with broadcast broadband activities such as regarding content or intellectual property right violations. He explained space insurance to be a very cyclical industry with large (annual) fluctuations, whereas space projects usually have long lead- and life-times, with satellites supposed to operate for a minimum of 15 years on average, which leads to special complications also in the insurance context.

The last speaker was **Mrs. Cecile Gaubert** of Marsh, Paris, on ‘Insurance industry perspective on third-party liability insurance’. She explained the legal environment for space liability – comprising launch site premises liability, launch liability, on-orbit liability spacecraft, property damage spacecraft and product liability – with reference to international treaties, national laws and contractual practices. Then focusing on the latter, she explained that in contracts limits to liability can be included, in addition to statutory limitations, which would also limit the exposure of the third-party liability insurers. She described the standard practice (even if not statutorily mandatory) as: ‘reciprocal, no fault, no subrogation inter-party waivers of liability, coupled with flow-down obligations as appropriate’. Exclusions can only refer to such exceptional circumstances as terrorism, war, hijacking and wilful misconduct of the insured.

Finally **Prof. Von der Dunk** summarised the intensive, extended and interesting discussions – which, in the end, had eaten away the time originally planned for a panel discussion! – and, on behalf also of Prof. Marchisio, thanked ESA for usage of the main Room at ESA Headquarters, ECSL for organising the Forum, especially Mrs. Rybarova, Executive Secretary of ECSL, as well as all speakers and the audience, and wished everyone safe travels.

Frans G. von der Dunk