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DEEP LOSSES SEARCH FOR DEEP POCKETS: ASSESSING LENDER LIABILITY FOR SATELLITE PROJECTS

Abstract

New market entrants commonly use project financing to fund the construction, launch and operation of commercial satellites. To secure this funding, lenders typically require a comprehensive security package, comprising the satellite itself, associated licences and project company shares. Lenders also impose strict reporting requirements concerning the satellite's health, alongside satellite utilisation restrictions. The lender's motivation is to ensure repayment in the event of default. But the security package's breadth, and the obligations imposed on borrowers, may present unforeseen risks to lenders. In particular, lenders who exercise control over a project could be held responsible for any adverse consequences arising in respect of that project. Indeed, the common view of lenders as having 'deep pockets' makes them attractive targets for litigation.

This lender liability is a known risk in all project financing transactions. However, three factors magnify this risk in the context of space activities. The first factor is the nature of satellites as orbiting objects that lenders cannot physically inspect or repossess. This fact motivates lenders to seek the broadest possible security, and to impose stringent obligations on borrowers, as outlined above. The second factor is the sheer size of the potential damage resulting from launch or orbital mishaps. Space is a capital intensive and particularly unforgiving operational environment. Seemingly minor events can (and do) result in significant losses; insolvencies often follow. The third factor is the unique legal regime that governs liability for space activities. Per the Liability Convention, liability for space activities can be both absolute in nature and unlimited in quantum. This liability accrues to launching states, and national space laws often limit damages under domestic law. However, they are not uniform; some jurisdictions lack any such laws whatsoever.

In light of these factors and the increasingly liberalised market for space-based commercial operations and services, this paper first explores the various international and national legal avenues through which lenders may be exposed to liability regarding their space projects. This paper then analyses how lender liability, when fully assessed, may impact the availability and forms of funding for commercial satellite projects. Finally, this paper provides practical insight into how lenders can manage satellite-related lender liability through insurance, careful contractual drafting, and refining the security package's scope.