CHAPTER 10

CONDUCTING SATELLITE INDUSTRY ARBITRATIONS UNDER THE WATCHFUL EYE OF THE INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

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I. Introduction

Arbitrations involving high-technology products and services can be challenging for even the most experienced arbitrators and seasoned counsel. Such cases often present difficult disputes over complex technical issues and large dollar amounts. The participation of non-U.S. parties introduces added complexity, particularly where the disclosure of sensitive technical information to foreign persons is controlled by statute or administrative regulations.

The satellite industry is one U.S. sector in which the transfer of technical data to foreign recipients is highly regulated. Satellites, launch vehicles and associated equipment have been designated as "defense articles" and thus appear on the U.S. Munitions List. As such, the exportation by U.S. spacecraft manufacturers of U.S. commercial satellites to operators around the world and the disclosure to non-U.S. persons of certain technical data concerning them are strictly controlled under the Department of State's International Traffic in Arms Regulations (ITAR).

Commercial agreements between participants in the satellite industry (such as spacecraft manufacturers, satellite system operators, launch service providers, insurers and others) often include arbitration

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provisions to govern the resolution of technical and other disputes that could arise between the parties. When a satellite industry arbitration involves both U.S. and non-U.S. participants, the arbitrators and counsel must be attuned to the special regulatory requirements that apply to ensure that the arbitration is conducted in accordance with applicable U.S. laws and policies.

II. The Statutory and Regulatory Framework

Section 38 of the Arms Control Export Act[1] authorizes the president of the United States to control the export of "defense articles" and "defense services." The president delegated to the secretary of state the authority to promulgate regulations to control the export of such articles and services.[2] The ITAR[3] implement that authority.

Under these regulations, the Department of State, with the concurrence of the Department of Defense, designates articles and services that are deemed to be "defense articles" and "defense services."[4] The designated items constitute the U.S. Munitions List, which appears in Part 121 of the ITAR. The intended use of an article or service after its export (i.e., for a military or civilian purpose) is not relevant in determining whether the article or service is subject to ITAR control.[5]

Because spacecraft systems and associated equipment have been designated as "defense articles" for purposes of the U.S. Munitions List, they are regulated under the ITAR.[6] Spacecraft systems include commercial communications satellites, remote sensing satellites, scientific satellites, research satellites, navigation satellites, experimental satellites and multi-mission satellites. Launch vehicles and ground control stations for telemetry, tracking and control of spacecraft or satellites also have been designated as "defense articles" for purposes of the U.S. Munitions List.[7]

Without the prior approval of the State Department's Directorate of Defense Trade Controls, the ITAR prohibits, among other things, the disclosure or transfer to foreign persons of "technical data" relating to

[1] 22 U.S.C. § 2778.
[2] Executive Order No. 11958, 42 FR 4311, 3 C.F.R., 1977 Comp., p. 79.
[3] 22 C.F.R. Parts 120-130 (2006).
[4] 22 C.F.R. § 120.2.
[5] 22 C.F.R. § 120.3.
[6] 22 C.F.R. § 121.1 (Category XV).
[7] 22 C.F.R. § 121.1 (Categories IV and XV).

any defense article on the U.S. Munitions List, and the furnishing to foreign persons of any "defense services," which includes any "assistance" in connection with a defense article.

The term "technical data" is defined broadly to include any information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles, including blueprints, drawings, photographs, plans, instructions and documentation.

However, "technical data" does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities, or information in the public domain. The term also does not include basic marketing information on function or purpose or general system descriptions of defense articles.[8]

Thus, U.S. persons seeking to divulge any technical data to a foreign person, or to provide assistance to a foreign person in connection with any defense article, whether in the United States or abroad, must first obtain the approval of the Directorate of Defense Trade Controls. To obtain such approval, a U.S. requester must submit to the Directorate a proposed agreement—known as a Technical Assistance Agreement (TAA)—delineating the terms and conditions under which technical data or assistance may be provided to the proposed foreign recipients. The TAA describes the context and purpose for which the technical data and defense services may be furnished, and the specific technical information and defense services that would be discussed or divulged to specified foreign entities or individuals. All U.S. and non-U.S. persons involved in the arrangement must sign and become parties to a TAA. This makes them subject to all of the terms, conditions and restrictions in the TAA governing the disclosure of technical data and the performance of defense services.

Congressional concern that a transfer of information regarding advanced communications satellites and related technologies to foreign persons could increase U.S. national security risks led Congress to enact special controls with regard to satellite export licensing.[9] Specifically, Public Law 105-261 provides, among other measures, for mandatory monitoring by the Defense Department of all aspects of a launch in any case where approval is given for the export of a satellite or related items

[8] 22 C.F.R. § 120.10.

[9] National Defense Authorization Act for Fiscal Year 1999, Public Law 105-261, 112 Stat 2173 (1998).

for launch in a foreign country.[10] Under a statutory exception, monitoring and other special controls do not apply to the export of a satellite or related items for launch in, or by nationals of, a country that is a member of NATO, or that is a major non-NATO ally of the United States.[11]

The ITAR provides for discretionary monitoring by the Defense Department in situations beyond those required by statute. For example, the ITAR states that, despite the statutory exception from mandatory monitoring stated above, such export controls may nonetheless be applied, as appropriate, in furtherance of the security and foreign policy of the United States.[12] These regulations further provide that the export of any article or defense service controlled under the ITAR to any destination also may require special export controls to be applied, including monitoring, in furtherance of U.S. security and foreign policy.[13]

The Defense Department has authority to monitor a wide range of satellite and launch activities, including technical discussions involving the design, development, operation, maintenance, modification and repair of satellites, satellite components, missiles, other equipment, launch facilities and launch vehicles. It also can monitor activities relating to launch failure, delay, or cancellation, and post-launch failure investigations or analysis with regard to either the launcher or the satellite.[14]

The actual monitoring of satellite and launch-related activities (including technical discussions and interchanges) is carried out by the Defense Technology Security Administration (DTSA), an agency within the Defense Department.

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[10] Public Law 105-261, § 1514(a)(2). The law also provides, in connection with the export licensing of satellites and related items, that all export licenses shall require a technology transfer control plan approved by the Secretary of Defense and an encryption technology transfer control plan approved by the Director of the National Security Agency. Public Law 105-261, § 1514(a)(1).

[11] Public Law 105-261, § 1514(b).

[12] 22 C.F.R. § 124.15(c).

[13] *Id*.

[14] Public Law 105-261, § 1514(a)(2); 22 C.F.R. § 124.15(a)(2).

III. Managing Satellite Industry Arbitrations Governed by the ITAR

The ITAR framework was promulgated to prevent the unauthorized transfer of technology to foreign persons in any situation involving the export of defense articles or services on the U.S. Munitions List. The ITAR applies in legal proceedings where the presentation of technically oriented claims and defenses poses a risk that ITAR-covered technology could be disclosed to non-U.S. persons. Thus, satellite arbitration proceedings involving technical disputes that include both U.S. and foreign participants (which could include, for example, foreign arbitrators, parties, counsel, witnesses and court reporters) are subject to all applicable ITAR requirements.

A. Formulating a Suitable Technical Assistance Agreement for the Arbitration

As noted above, the approval of the State Department's Directorate of Defense Trade Controls must be obtained before any covered technical data can be provided to, or discussed with, a foreign person involved in a satellite-related arbitration. Thus, the U.S. party proposing to produce or use such technical data during the arbitration (e.g., during discovery or at a hearing) must submit to the Directorate, as part of the ITAR-approval process, a proposed TAA to govern the conduct of the arbitration proceedings. The TAA would incorporate specific terms, conditions and restrictions governing disclosure and use of the technical data during the course of the arbitration.

The negotiation and preparation of a TAA for use during an arbitration generally takes place after a dispute arises. This means that the parties must be diligent in finalizing the TAA so that technical data may be used as the arbitration proceeds.

The proposed TAA for arbitration purposes should include a description of the satellite-related issues under consideration in the proceeding, particularly the claims and defenses that will require the furnishing of any technical data or defense services (i.e., assistance) to foreign persons. Under the regulations, a TAA must include, among other things, the following elements:

> A description of the specific technical data and assistance to be furnished to foreign parties or persons participating in the

arbitration.[15] The information provided in the TAA should be stated in terms that are as precise as possible.

The identity of the countries or areas where the technology transfer is to be licensed.[16] To the extent depositions or arbitration hearings will be conducted outside the United States, all foreign countries where such activities may take place should be specified in the TAA.

The duration of the TAA for arbitration purposes.[17] Sufficient time should be provided to permit completion of the arbitration proceedings.

As noted above, the TAA must be signed by all U.S. and foreign persons participating in the technical aspects of the arbitration, including the arbitrators, relevant staff of any administering institution (such as the American Arbitration Association), the parties, counsel, witnesses, court reporters, translators and others involved in the proceedings.

The TAA should cover the use of technical data in all (1) motions, prehearing and post-hearing briefs, pleadings and other submissions to the arbitrators or exchanges between the parties; (2) prehearing conferences and other discussions or interchanges between counsel and the arbitrators; (3) discovery (e.g., interrogatories and responses, document production, and depositions) and the resolution of discovery disputes; (4) presentations of evidence at hearings, including written exhibits, oral testimony and questioning of witnesses by counsel and the arbitrators; and (5) awards issued by the arbitrators.

Finally, as a practical matter, because the TAA must be approved prior to the disclosure or use of pertinent technical data, no discovery with respect to technical claims or defenses may proceed, and no technical aspects of the hearing may take place until approval of the TAA and other required approvals have been obtained from the Directorate of Defense Trade Controls.

B. Monitoring of Arbitration Activities by the DTSA

Depending on the nature and extent of the technical issues involved in a satellite-related arbitration, DTSA officials may be required, or may

[15] 22 C.F.R. § 124.7(2).
[16] 22 C.F.R. § 124.7(4).
[17] 22 C.F.R. § 124.7(3).

elect, to monitor some or all aspects of the proceeding. The monitoring by DTSA of satellite-related arbitrations usually has not been mandated pursuant to Public Law 105-261. However, after enactment of this law in 1998, and given concerns articulated by Congress at the time, DTSA normally exercised its discretionary authority to closely monitor arbitrations involving satellite-related technology. Indeed, DTSA pursued a relatively conservative approach for many years after the passage of Public Law 105-261, often reviewing discovery data and documents before they were delivered to foreign persons, attending deposition testimony, and participating in arbitration hearings, all for the purpose of ensuring that any transfer of technology had been sanctioned by the applicable TAA or other authorized ITAR requirements. More recently, however, following an extensive inter-agency governmental review, DTSA has substantially curtailed its monitoring activities in the case of satellite industry arbitrations. Thus, with experience gained over time, and given that severe sanctions may be imposed for violating the ITAR, DTSA no longer engages in extensive monitoring of satellite-related arbitration, but relies instead on the parties themselves to abide by the applicable TAA and other ITAR requirements.

In any case where DTSA might be required to monitor a satellite-related arbitration, or where it elects to do so, the U.S. person seeking authority to transfer technical data or provide related assistance to foreign persons in the context of a satellite-related arbitration must make arrangements for DTSA monitoring. The costs of mandatory monitoring services must be fully reimbursed to the Defense Department by the U.S. person receiving those services.[18] The costs of discretionary monitoring services, however, are borne by U.S. government appropriations.

In the past, with regard to discovery, DTSA monitoring involved prior review by DTSA officials of all technical information and documents proposed to be produced, exchanged or used during discovery, principally to ensure that all such technical data fell within the scope of the TAA. DTSA monitors refused to permit disclosure to foreign persons of any information or documents outside of the authorized technical parameters specified in the TAA. Also, DTSA monitors often attended depositions of parties and witnesses, specifically where foreign deponents or other foreign participants were involved, to ensure that technical discussions did not stray beyond the areas of inquiry approved under the TAA. Advance planning and coordination

[18] 22 C.F.R § 124.15(a)(2).

between counsel and DTSA officials were essential so that all contemplated forms of discovery—and the schedule for conducting discovery—had considered and accommodated any required DTSA monitoring.

Where DTSA monitored an arbitration hearing, the DTSA monitor responsible for ensuring compliance with ITAR requirements and the TAA was the final arbiter as to what technical data may be disclosed. If testimony, questioning or argument moved into technical areas beyond the scope of the TAA, the DTSA monitor would warn that the discussion was trending toward unauthorized technical areas, or provided guidance on how the discussion might proceed, or instructed that specific topics may not be addressed.

Because of a relaxation in DTSA monitoring of satellite-related arbitrations, many of the burdens imposed on arbitrations governed by the ITAR now have been lifted. While the parties still must comply with ITAR licensing, formulate a suitable TAA, and satisfy other ITAR arrangements, the lifting of routine DTSA monitoring is a welcome development that permits satellite-related arbitrations to be conducted in a more efficient and streamlined manner.

C. Arbitrators' Role in Arbitrations Affected by the ITAR

While any arbitration involving difficult technical issues can be demanding, arbitrations that fall under the ITAR present unique challenges. For this reason, there must be close cooperation among the arbitrators charged with managing the proceedings, counsel for the parties, and any DTSA monitor who might be involved. As noted above, standard prehearing procedures, especially discovery, need to be adapted to satisfy the ITAR requirements. In addition, the presence of a DTSA monitor at arbitration hearings demanded flexibility on the part of the arbitrators and counsel. In short, arbitrations governed by ITAR require management of the proceedings in a way that is protective of the important national security policies protected by the ITAR.

Arbitrators and counsel involved in ITAR-controlled satellite arbitrations may wish to consider the following factors to ensure the orderly conduct of the proceedings:

1. Understand and embrace the ITAR framework

The ITAR requirements, like any specialized area of law or regulation, can be perplexing without some explanation or guidance.

Therefore, arbitrators should invest the time and effort necessary to understand the ITAR regime and encourage counsel to do likewise.

Early in the proceedings, arbitrators should insist that counsel provide an overview of the ITAR process to enable the arbitrators to identify relevant ITAR issues, monitor the progress of TAA and related approvals, resolve any ITAR-related disputes between the parties, and generally assess the impact of ITAR compliance on the conduct of the arbitration.

2. Adopt a realistic schedule for discovery and the hearings

Since discovery involving technical claims and defenses may not proceed without approval from the Directorate of Defense Trade Controls, responses to interrogatories and documents produced in response to document requests may need to be reviewed by a DTSA monitor before they may be provided to a non-U.S. person. While this was standard practice for years following the enactment of Public Law 105-261, this level of information and document review by DTSA no longer is required in routine satellite-related arbitrations.

DTSA also has authority to monitor some or all depositions where it determines monitoring is appropriate in any given case, but DTSA generally does not monitor depositions in the current environment. Arbitrators and counsel, however, would need to accommodate these added steps in a realistic discovery schedule in any case where DTSA monitoring were to apply.

In the past, DTSA monitors were not always available precisely when needed, leading to delay in obtaining required government approvals. This could occur in complex cases where there were voluminous documents to be reviewed and numerous depositions to be monitored. For this reason, in any case where DTSA monitoring still might apply, arbitrators and counsel should provide a sizeable "cushion" in all discovery schedules to account for the possibility of regulatory delay. In any such case, arbitrators could direct the parties to proceed in the meantime with discovery on non-technical issues during any period of delay in obtaining a DTSA monitor to review discovery on technical matters.

In addition, the first hearing date should be set far enough into the future to permit all prehearing activities to be completed in accordance with the ITAR requirements. Moreover, in any case where DTSA monitoring might apply, the arbitrators should see that counsel make

arrangements for any required DTSA monitoring of the hearings sufficiently in advance of all scheduled proceedings.

3. Provide firm but flexible management of proceedings

Only advance planning and thoughtful management of a complex satellite arbitration will avoid surprises that can disrupt the progress of the proceedings. At the initial prehearing conference, throughout discovery, and at the hearing, the arbitrators should encourage the parties to promptly satisfy all ITAR requirements so the arbitration can proceed in an orderly fashion and conclude on schedule. Some management tools arbitrators should consider using are the following:

- Instruct the parties to promptly submit all required applications for State Department approval, including proposed TAAs, to permit pertinent technical claims and defenses to be considered during the arbitration.
- Direct counsel to cooperate with each other and use diligent efforts to secure all required ITAR approvals with respect to all contemplated pre-hearing and hearing activities.
- Require counsel to submit to the arbitrator's periodic progress reports on the status of all ITAR-related applications. Such reports should provide the arbitrators with (a) notice of all filings with the State Department of required applications for export approval, including any proposed TAA; (b) a report on all State Department decisions; and (c) the expected timing of action on all pending matters. In addition, arbitrators should require counsel to promptly disclose any risk of delay or other adverse impact that government action or inaction may have on the arbitration.
- In any case where DTSA monitoring might come into play, encourage counsel to cooperate with the DTSA to arrange for all required monitoring during discovery and hearings.
- Offer to assist counsel by communicating directly with the Departments of State or Defense, if necessary, to encourage timely governmental action in order to avoid disruption or delay in the arbitration.

4. Permit presentation of relevant evidence while accommodating the role of the DTSA monitor

The scope of permissible inquiry on technical issues should be resolved in the TAA, but it also could be clarified during discovery. Therefore, the appropriate technical bounds should be well understood before the hearings commence.

In the unlikely event that DTSA decides to monitor any arbitration hearing, then the arbitrators, while not authorized to countermand a monitor's specific directive, still can play a helpful role by suggesting workable compromises or resolutions acceptable to all involved. There are a number of practical steps arbitrators can take (working closely with counsel for both sides and in coordination with the DTSA monitor) to see that the hearing progresses in an orderly and productive fashion. Some of these steps are:

- At the beginning of the hearing, invite and encourage the DTSA, if it has not already volunteered to do so, to provide the arbitrators, the parties and counsel with a brief summary of all applicable ITAR requirements, an abstract of the limits imposed by the TAA, and an explanation of the role the DTSA monitor will play at the hearing.
- Make arrangements to advise each lay and expert witness, in writing or verbally, of any limits imposed on their testimony under the TAA, and direct that all testimony remain within the sanctioned technical bounds.
- Seat the DTSA monitor at an appropriate vantage point in the hearing room, and agree on a signal or interjection for voicing concerns about testimony or discussions moving into technical subjects beyond the scope of the TAA.
- In the event a party disputes a directive given by the DTSA monitor, facilitate an off-the-record discussion of possible ways to amicably resolve the technical matter at issue. As neutrals, arbitrators can facilitate this process by suggesting alternative means of settling the dispute.
- Make arrangements for expedited DTSA review of draft briefs that U.S. counsel desire to forward to non-U.S. clients for input.
- Include an appropriate legend on each page of motions, briefs or other submissions, and any interim or final award that gives notice that these documents are subject to ITAR restrictions and a TAA.

In today's environment, unlike in the past, DTSA does not normally intrude deeply into the discovery and hearing aspects of a satellite-related arbitration, but relies instead on the parties to comply with the terms of any applicable TAA and other arrangements specified in the ITAR. However, if DTSA were to decide that monitoring of discovery or hearings is necessary or appropriate in any given case, then experience can be drawn from earlier satellite-related arbitrations where DTSA's involvement and oversight was very much present.

IV. Conclusion

U.S. government officials who administer the ITAR play an important role in furthering the national security of the United States. Controlling the export of defense articles and services on the U.S. Munitions List has become a critical U.S. objective in recent years, particularly given the rise of international terrorism. The inclusion of commercial satellites, launch vehicles and related equipment on that list, and the adoption of special controls in connection with satellite export licensing, reflect a determined U.S. policy to prevent the transfer of advanced satellite technologies from U.S. sources to foreign recipients.

Arbitrators and counsel who conduct satellite industry arbitrations under ITAR restrictions must be adept at handling the unique challenges to which these proceedings give rise. The arbitrations must meet the needs and expectations of the parties, while also accommodating the national security interests reflected in the ITAR requirements.

Despite the added burdens imposed by these regulations, it is possible for skilled arbitrators, working cooperatively with knowledgeable attorneys, to manage these arbitrations in such a way as to avoid needless delay or disruption to the proceedings. Familiarity with the ITAR requirements, preparedness on ITAR issues raised in the case at hand, firm arbitrator control over the proceedings, and close cooperation and coordination among all of the principal participants—arbitrators, parties, counsel and government officials—are the key ingredients for a successful satellite industry arbitration under the ITAR.