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ADMIRALTY—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972—CONGRESS ABROGATES DOCTRINE OF SEAWORTHINESS FOR LONGSHOREMEN

Since the 1946 Supreme Court decision in *Seas Shipping Co. v. Sieracki*,[1] the seaman's traditional remedy based on absolute liability of the vessel[2] for an unseaworthy condition[3] also has been available to longshoremen. Limited to longshoremen working aboard the vessel, the *Sieracki* opinion emphasized that the work of loading and unloading vessels was a maritime service formerly and historically rendered by seamen, and reasoned that because the work now performed by longshoremen involved risks commensurate with those undertaken by seamen, longshoremen injured on board ship should be entitled to unlimited recovery under the seaworthiness doctrine.[4] The seaworthiness doctrine was expanded further in *Gutierrez v. Waterman Steamship Corp.*[5] In *Gutierrez* the Supreme Court, finding jurisdiction under the Admiralty Extension Act,[6] extended the seaworthiness

1. 328 U.S. 85 (1946).

2. The term "vessel" means "any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member." Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902 *et seq., as amended*, Pub. L. No. 92-576 (Oct. 27, 1972).

3. A vessel is considered unseaworthy if it is not reasonably fit for its intended use. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). However, the term unseaworthiness has expanded to include such conditions as: cramped quarters in *Guidry v. Texaco, Inc.*, 430 F.2d 781 (5th Cir. 1970); insufficient manning in *Waldron v. Moore-McCormack Lines*, 386 U.S. 724 (1967); trick knee in *Dillon v. M.S. Oriental Inventor*, 426 F.2d 977 (5th Cir. 1970); and collapsible shore-based ladder in *Shaw v. Lauritzen*, 428 F.2d 247 (3d Cir. 1970).

4. 328 U.S. 85 (1946).

5. 373 U.S. 206 (1963).

6. Basically, the Act provides that the "admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1970). For a discussion of the effect of the Admiralty Extension Act of 1948 on the seaworthiness doctrine see Comment, 5 VAND. J. TRANSNAT'L L. 513 (1972).

doctrine to include injuries causally connected with the ship, but incurred on shore. Therefore, a longshoreman injured on shore was held to have a right of action for unseaworthiness against the shipowner, despite the exclusive remedy clause of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) under which he also was covered.[7] Moreover, actions by longshoremen against the vessel generated frequent third-party indemnification actions by the shipowner against the stevedore company,[8] thus shifting the burden of a successful unseaworthiness action to the longshoreman's employer[9] and circumventing the limited liability provisons of the workmen's compensation laws.[10] Under the amended Act the longshoreman's exclusive right to compensation is under LHWCA; and his right of action against the vessel is restricted to negligence. The right of the vessel to proceed against the longshoreman's employer for indemnity also is extinguished.[11] Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902 (1970), *as amended*, Pub. L. No. 92-576 (Oct. 27, 1972).

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7. The courts circumvented the exclusivity provision by holding that it did not apply to the longshoreman vis-à-vis the vessel.

8. A shipowner held liable to a longshoreman for unseaworthiness may bring a third-party action against the stevedore company for indemnity if the longshoreman's injury was caused by a breach of the stevedore's warranty of workmanlike conduct to the shipowner. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). For a discussion of the circularity problem see Comment, 5 VAND. J. TRANSNAT'L L. 513 (1972).

9. Although the initial theory of seaworthiness placed the burden of risk on the maritime industry, in fact, this burden was shifted to the stevedore company via the indemnification action of the shipowner. *Cf.* Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

10. By allowing this shift to the employer, the Court also permitted a circumvention of the states' workmen's compensation statutes, which limited the amount of recovery available to longshoremen. In *Ryan* Justice Black strongly objected to this judicial misconstruing of the exclusivity provision and declared that the Court's decision broke "promises the Act made both to employers and employees." 350 U.S. at 135.

11. For convenience the term "longshoreman" is used in this comment to represent the employees covered by this Act. The term "employee" means "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew or any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." LHWCA § 2(3), *as amended.*

Reversing a long line of decisions which have supported—for declared humanitarian purposes[12] —the longshoremen's inclusion within the seaworthiness doctrine, Congress enacted provisions which fundamentally reshape the remedies available to injured longshoremen. In reshaping these remedies, Congress dealt specifically with three controversial aspects of the present law: the seaworthiness doctrine, circular liability suits, and the limits of coverage under LHWCA. The longshoreman is deprived of reliance on the seaworthiness doctrine which imposed an absolute, nondelegable liability on the vessel.[13] In return Congress increased the benefits,[14] extended the coverage,[15] and improved the certainty of protection and recovery for longshoremen.[16] The longshoreman's exclusive action for compensation under the Act is against the stevedore-employer. If coverage is not maintained, the longshoreman may sue the employer for damages at law or in admiralty, and the employer cannot rely on the traditional defenses of contributory negligence, assumption of risk, and fellow-employee doctrine.[17] The injured longshoreman also retains the right to bring an action based on the vessel's negligence.[18]

In such suits the courts shall apply the maritime rule of comparative negligence.[19] To prevent the vessel from continuing the circularity problem, Congress has amended section 5.[20] The vessel may no longer sue the stevedore company based on a breach of its warranty of workmanlike conduct.[21] This amendment ends circularity by providing that the stevedore company will not be liable to the vessel,

12. Essentially, the humanitarian policy was that subjecting longshoremen to seamen's risks called for equal protective measures. In 1971 the Supreme Court did begin to limit the remedies available to longshoremen in its decision in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971).

13. LHWCA § 5 (a), *as amended.*

14. LHWCA § 6(b)(1), *as amended.*

15. LHWCA § 2, *as amended.* The prior law's coverage was limited to employees working on navigable waters, including those working on dry docks.

16. LHWCA § 5, *as amended.* The longshoreman may sue his employer if the employer fails to maintain the coverage required under the LHWCA. Also the longshoreman may maintain a negligence action against the vessel.

17. Previously, these defenses were stumbling blocks to possible recovery for the longshoreman against his employer. By removing these defenses, a longshoreman has a much better chance of recovery against the stevedore company. LHWCA § 5(a), *as amended.*

18. LHWCA § 5(b), *as amended.*

19. LHWCA § 5, *as amended.*

20. LHWCA § 5(a), *as amended. See* notes 8 & 9 *supra.*

21. LHWCA § 5(b), *as amended.*

either directly or indirectly.[22] Additionally, Congress has extended coverage of LHWCA to include wharves, terminals, marine railways and other adjoining areas customarily used in building, repairing, loading, or unloading vessels.[23]

This amendment of the Longshoremen's and Harbor Workers' Compensation Act is a commendable legislative attempt to resolve a long standing judicial dispute surrounding the seaworthiness doctrine. In reshaping the protection of injured longshoremen, the amendment significantly affects the maritime community. First, Congress has shifted the direct burden of compensating longshoremen for injury without fault from the merchant marine industry to the stevedore-employer companies. Clearly, this shift in the direct burden has long been needed: under principles comparable to those embodied in workmen's compensation, this amendment places the risk on the employer who can best bear the cost and who has elected to direct a risk-exposure activity. Indirectly, the shift in the burden of risk had already occurred through the process of indemnification, but at the expense of prolonged litigation and of judicial circumvention of the limited liability and exclusivity provisions. Secondly, Congress has eliminated the circularity problem, exempting the employer from liability to the vessel. To offset the removal of the seaworthiness doctrine, Congress has given this protection to the employer in exchange for his increased responsibility in maintaining compensation coverage for his employees. Moreover, in extending the coverage, Congress has eliminated the disparity of recovery between longshoremen covered under state workmen's compensation statutes and those covered under the LHWCA. Uniformity is achieved by amending the Act to extend coverage beyond the dry dock edge to encompass other adjacent areas where longshoremen work. Thirdly, in removing the warranty of seaworthiness Congress has made the public policy determination that absolute liability concerning the temporary working conditions of longshoremen should not attach to a vessel. The longshoreman still has certainty of recovery because participation in the compensation act is required of the employer, and the longshoreman may bring an action against his employer if the employer fails to maintain coverage under the Act. Although objections have been made to removal of the seaworthiness umbrella on the grounds that the doctrine encourages safety, such objections appear unfounded. Not only is the vessel still required to exercise the same care as land-based persons in maintaining a safe place to work because an unseaworthi-

22. LHWCA § 5(b), *as amended.*
23. LHWCA § 2(4), *as amended.*

ness remedy is still available to seamen, but also it is clear that the final incidence of liability under prior law was on the stevedore, not the shipowner. Finally, this amendment appropriately readjusts a distorted maritime legal relationship and insures the longshoreman improved coverage to meet his need in time of injury. Congress, in legislatively defining the longshoreman's rights vis-à-vis his employer and the vessel, has successfully realigned the interests of the three parties into a more equitable and realistic legal framework than that provided by prior law.

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SPACE LAW—CONVENTION ON LIABILITY—PROCEDURE ESTABLISHED TO ENFORCE LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS

International liability for damage caused by space objects[1] was officially recognized[2] in the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[3] at the eighteenth session of the United Nations General Assembly on December 13, 1963. The fifth and eighth principles of the 1963 Declaration were later incorporated in the Outer Space Treaty of 1967,[4] which imposed international responsibility for national activi-

1. For an analysis of the term "space object" see Letter from David M. Abshire, Assistant Secretary of State, to the Hon. J. W. Fulbright, Sept. 6, 1972, in SENATE COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, EXEC. REP. NO. 92-38, 92d Cong., 2d Sess. 8 (1972) [hereinafter cited as S. REP.].

2. Several writers had noted the potential for damage caused by space objects and called for rules and procedures for the imposition of liability and the settlement of claims. *See, e.g., Report of the Comm. on the Law of Outer Space, Recommendations,* ABA INTERNATIONAL AND COMPARATIVE LAW SECTION 215 (1959); Beresford, *Liability for Ground Damage Caused by Spacecraft,* 19 FED. B.J. 242 (1959); de Rode Verschoor, *The Responsibility of States for the Damage Caused by the Launched Spacebodies,* LEGAL PROBLEMS OF SPACE EXPLORATION: A SYMPOSIUM, S. DOC. NO. 26, 87th Cong., 1st Sess. 460 (1961); Meyer, *Legal Problems of Outer Space,* 28 J. AIR L. & COM. 339 (1961-1962).

3. G.A. Res. 1962, 18 U.N. GAOR Supp. 15, at 15, U.N. Doc. A/5515 (1963) [hereinafter cited as 1963 Declaration].

4. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *signed,* Jan. 27, 1967 (1967) 18 U.S.T. 2410, T.I.A.S. No. 6347 (effective Oct. 10, 1967) [hereinafter cited as the Outer Space Treaty]. Pursuant to article VI of the Outer Space Treaty, States Parties agreed to "[b]ear international responsibility for national activities in outer space, . . . whether such activities are carried on by governmental agencies or by non-governmental entities. . . ." Article VII provides, in part: "Each State Party to the Treaty that launches or procures the launching of an object into outer space, . . . and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its national or juridical persons by such object or its component parts on the Earth, in air space or in outer space. . . ." Article VI of the Outer Space Treaty evolved from the fifth principle of the 1963 Declaration, while article VII of the Outer Space Treaty was based upon the eighth principle of the Declaration.

ties in outer space.[5] This treaty neither defines the concept of "international liability"[6] nor establishes a mechanism for the presentation of the claims[7] and the prompt payment of appropriate compensation. Although no formal claims for damage caused by space objects have been presented so far, the potential for damage is manifest,[8] and this danger should increase as more objects are launched into outer space. Realizing that the existing law was unable to provide adequate remedies for damage caused by space objects, the United Nations General Assembly urged the Committee on the Peaceful Uses of Outer Space[9] to create a convention on liability that "should contain provisions which would ensure the payment of a full measure of compensation to victims and effective procedures which would lead to the prompt and equitable settlement of claims."[10] The result of that committee's effort is the Convention on International Liability for Damage Caused by Space Objects. This Convention subjects parties to absolute liability[11] for damage caused on the

5. Outer space has not been legally distinguished from air space, although major proposals for such a distinction were tabulated in Lipson & Katzenbach, *The Law of Outer Space*, LEGAL PROBLEMS OF SPACE EXPLORATION: A SYMPOSIUM, S. DOC. No. 26, 87th Cong., 1st Sess. 779, 793 (1961). Various international agreements or instruments regarding space liability have avoided the question of where air space ends and outer space begins by directing their provisions at damage caused on earth, in air space or in outer space.

6. General Assembly Resolution 1721 (XVI) of December 20, 1961 recommended that States apply principles of international law for their guidance in the exploration and use of outer space. G.A. Res. 1721, 17 U.N. GAOR Supp. 17, at 6, U.N. Doc. A/5100 (1961).

7. A few writers have suggested the application of air and maritime legal principles to space activities. *But see* N. MATTE, AEROSPACE LAW 47-54, 58-62 (1969); A. HALEY, SPACE LAW AND GOVERNMENT 55 & n.59 (1963); G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 117 (5th ed. 1967).

8. Contrary to the belief that space objects would totally disintegrate upon reentry into the atmosphere, there have been numerous reports of fragments of space vehicles and objects that have fallen to earth. *See* S. LAY & H. TAUBENFELD, THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE 137 n.7 (1970).

9. The United Nations Committee on the Peaceful Use of Outer Space (COPUOS) was created by resolution 1472 of the General Assembly on December 12, 1959. Through its Legal Sub-Committee, COPUOS has been the major instrument in drafting international rules and policy governing space activities.

10. G.A. Res. 2733B, 25 U.N. GAOR Supp. 28, at 20, U.N. Doc. A/8028 (1970).

11. Liability is imposed without regard to fault.

surface of the earth by their space objects and to liability based on fault for damage sustained above the earth's surface. Moreover, the Convention effects a mechanism for the negotiation of claims[12] through diplomatic channels, or, upon the failure of negotiation, for settlement by a panel selected by the parties.[13] Convention on International Liability for Damage Caused by Space Objects, signed at Washington, London, and Moscow, March 29, 1972.[14]

The Convention, with a preamble and twenty-eight articles, establishes specific rules of liability and procedures for recovery of damages. Article I sets forth both the "damage"[15] covered by the Convention and the items that are deemed "space objects";[16] these definitions are broad and attempt to place an injured party in the most favorable legal position.[17] Articles II through VII establish two systems of liability. The first imposes a system of absolute liability[18] when damage is caused by a space object to persons or property on the earth's surface or to aircraft in flight.[19] The second system bases

12. For a discussion of negotiation as a method of resolving international disputes see 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW § 1064 (1906).

13. For a general discussion of arbitration see *id.* at § 1069.

14. G.A. Res. 2777, 26 U.N. GAOR, Annex, Supp. 29, at 25, U.N. Doc. A/8429 (1971) [hereinafter cited as Liability Convention].

15. "The term 'damage' means loss of life, personal injury or other impairment of health; or loss of or damage to property of states or of persons, natural or juridical, or property of international intergovernmental organizations." Liability Convention, art. I(a).

16. "The term 'space object' includes component parts of a space object as well as its launch vehicle and parts thereof." Liability Convention, art. I(d).

17. The chairman of the Legal Sub-Committee of COPUOS noted in his address to the Committee on September 1, 1971, that the draft convention was often referred to as "victim-oriented." Statement by the chairman of the Legal Sub-Comm. at the 98th meeting of the Comm. on September 1, 1971, 26 U.N. GAOR, Supp. 20, Report of the Comm. on the Peaceful Uses of Outer Space 29, U.N. Doc. A/8420 (1971) [hereinafter cited as 1971 Report].

18. For a discussion of absolute liability in international law see Kelson, *State Responsibility and the Abnormally Dangerous Activity,* 13 HARV. INT'L L.J. 197 (1972).

19. Liability Convention, art. II. When damage is caused to a third state on the surface of the earth as the result of colliding space objects of two launching states, absolute liability is applied. Liability Convention, art. IV(1)(a). *But see* Liability Convention, art. VII (which precludes from recovery (1) nationals of a launching state and (2) foreign nationals who participate in the operation of the space object or are in the immediate vicinity of a planned launching or recovery area at the invitation of the launching state).

responsibility for damage on fault[20] when the damage is caused above the earth's surface to the space object, or persons on board the space object, of one launching state[21] by the space object of another launching state.[22] Joint and several liability is imposed[23] in all instances in which two or more states share the responsibility for damage to a third state or to its natural or juridical persons, and the amount of compensation is apportioned between the responsible states in accordance with their respective degrees of fault.[24] For example, states that jointly launch[25] a space object are jointly and severally liable for any damage caused,[26] and a launching state that already has paid compensation for the damage may claim indemnification from the other participants in the joint launching.[27] If a launching state establishes either gross negligence[28] by the claimant, or an act or omission done by the claimant with the intent to cause damage, the Convention exonerates the launching state from absolute liability.[29] Exoneration will be prohibited, however, if the launching

20. Traditionally, international responsibility for the injurious act of one state to another state was based upon fault or intentional or negligent wrong-doing. When a state engages in activities that subject the international community to increased danger, however, the fault standard may produce inequities in determining whether a state should be held responsible for damage caused by its ventures. *See* Kelson, *supra* note 18, at 200.

21. "The term 'launching state' means: (i) A state which launches or procures the launching of a space object; (ii) A state from whose territory or facility a space object is launched." Liability Convention, art. I(c).

22. Liability Convention, art. III. On the other hand, if a space object of the third state is damaged in air or outer space as the result of the collision of space objects of two other states, the liability imposed shall be based on the fault of the two launching states. Liability Convention, art. IV(1)(b).

23. Liability Convention, art. IV(1).

24. Liability Convention, art. IV(1).

25. A state from whose territory or facility a launching occurs will be regarded as a participant in a joint launching. Liability Convention, art. V(3).

26. Liability Convention, art. V(1).

27. Liability Convention, art. V(2).

28. "Gross negligence" is not defined by the Convention. The major draft proposals submitted to the Legal Sub-Committee may be helpful in defining the term. The Belgian proposal used the phrase "rashly and in full knowledge that damage will probably result" to describe conduct on the part of a claimant which may wholly or partially extinguish the launching state's liability. Report of the Comm. on the Peaceful Uses of Outer Space, art. 1(c), at 33, 24 U.N. GAOR Supp. 21, U.N. Doc. A/7621 (1969) [hereinafter cited as 1969 Report]. The United States employed the term "reckless." *Id.* art. II(2), at 38.

29. Liability Convention, art. VI(1).

state's conduct producing the damage is not in conformity with international law, particularly the Charter of the United Nations and the Outer Space Treaty of 1967.[30] The Convention establishes a procedure for the presentation of claims that utilizes a system of negotiation through diplomatic channels.[31] If diplomatic relations are not maintained between the launching state and the claimant state, the claimant state may request that another state present its claim; if both the claimant state and the launching state are members of the United Nations, the claim may be presented through the Secretary-General.[32] The traditional rule of international law that the claim of an injured individual may be presented only by his state of nationality[33] is modified by the Convention by allowing other states to present claims for damage sustained by any person within their territory or for damage sustained by their permanent residents.[34] If no settlement is reached through diplomatic channels a Claims Commission is to be established.[35] The Claims Commission is to consist of three members, one to be selected by the claimant state or states, one to be chosen by the launching state or states, and the last, the chairman, to be appointed jointly.[36] The Commission's purpose is to decide the merits of the claim and to determine the amount of compensation payable.[37] A decision or award of the Claims Commission is final and binding, however, only if the parties have agreed to be bound by the Commission's decision.[38] Any state, upon ratifying the

30. Liability Convention, art. VI(2).

31. Liability Convention, art. IX.

32. Liability Convention, art. IX.

33. Under classic international law, the individual benefits from his association—generally through nationality—with a subject of international law. On the international level, the individual must look to his state to assert his rights against another state. G. SCHWARZENBERGER, *supra* note 7, at 80-81.

34. Liability Convention, art. VIII(1).

35. Liability Convention, art. XIV. There is possibly a third system for presenting claims, *i.e.* directly in the courts, administrative tribunals or agencies of a launching state. A state that pursues a claim in this manner, however, may not present the same claim under the Convention. *See* Liability Convention, art. XI(2).

36. Liability Convention, art. XV. If no agreement is reached on the appointment of the chairman within four months of the request that a Claims Commission be established, either party may request the Secretary-General to make the appointment within two months of the application to the Secretary-General.

37. Liability Convention, art. XVIII.

38. Liability Convention, art. XIX(2).

Convention, may declare its acceptance of the Commission's decisions as binding in any controversy between it and any other state that also has accepted the same obligation;[39] in the alternative, the parties to a dispute may agree after the claim arises to be bound by the Commission's actions. After reaching a decision the Commission will make public its findings or awards and deliver a certified copy to the Secretary-General of the United Nations.[40] The amount of compensation for which a launching state is liable is determined "in accordance with international law and the principles of justice and equity"[41] in order that a person, state or international organization may be restored to the condition that would have existed had the damage not occurred. No ceiling is placed upon the recovery allowable.[42] Furthermore, if the damage caused by a space object places a community in extraordinary danger, then states that are parties—particularly the launching state—shall render all possible assistance to the damaged state upon its request.[43] The Convention also applies to damage caused by the space activities of an international intergovernmental organization,[44] if that organization declares its acceptance of the rights and obligations under the Convention and a majority of the members of the organization are states that are parties to the Convention and to the Outer Space Treaty of 1967.[45] The last few

39. G.A. Res. 2777, 26 U.N. GAOR Supp. 29, at 25, U.N. Doc. A/8429 (1971).

40. Liability Convention, art. XIX(4).

41. Liability Convention, art. XII. The chairman of the Legal Sub-Committee considers article XII the "heart of the convention." Statement by the chairman of the Legal Sub-Comm., 1971 Report, *supra* note 17, at 28.

42. The proposal of the United States provided for a limitation of liability with respect to each launching, although no amount was suggested. *See* 1969 Report, *supra* note 28, art. VIII(1), at 40.

43. It has been suggested that use of the word "examine" indicates that a state is under no obligation to actually render such assistance. STAFF OF SENATE COMM. ON AERONAUTICAL AND SPACE SCIENCES, 92d Cong., 2d Sess., REPORT ON CONVENTION ON INT'L LIAB. FOR DAMAGE CAUSED BY SPACE OBJECTS 38 (Comm. Print 1972) [hereinafter cited as S. REP. ON LIABILITY CONVENTION].

44. International intergovernmental institutions are nontypical subjects of international law, although those organizations that participate in space activities should be held responsible for damage caused by their enterprises. *See* S. LAY & H. TAUBENFELD, *supra* note 8, at 151.

45. Liability Convention, art. XXII governs the liability of international intergovernmental organizations that accept the Convention provisions.

articles of the Convention set forth rules that govern the Convention's effect on agreements already in force,[46] ratification,[47] amendment[48] and review.[49]

The Convention appears to achieve its primary goal—to "[e]laborate effective international rules and procedures concerning liability for damage caused by space objects."[50] Certain provisions of the Convention, however, are unclear and the construction given them when applied to actual claims may lead to the disallowance of recovery. First, the interpretation of the term "damage"[51] presents a problem. The Convention does not mention nonphysical loss[52] in the definition of "damage," and this raises the question whether the Convention was intended to compensate victims for such injury.[53] The Convention invites a broad interpretation of "damage" through its failure to offer an adequate definition of the term, but the scope of this definition can be circumscribed by a narrow application of the principle of causation in a particular case.[54] It would be equitable to

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Organization members may subject the organization to international law by recognition of and acquiescence to international legal principles. *See* G. SCHWARZENBERGER, *supra* note 7, at 79-80.

46. Liability Convention, art. XXIII(1). This provision asserts that the Convention shall not affect other international agreements in force concerning the relations between states that are parties to those agreements.

47. Liability Convention, art. XXIV(2). This article also deals with entry into force.

48. Liability Convention, art. XXV.

49. Liability Convention, art. XXVI.

50. Liability Convention, Preamble.

51. For a definition of "damage" see note 15 *supra*.

52. Nonphysical damage would include such injury as interference with radio communication or mental distress.

53. The Hungarian draft convention included loss of profits and moral damage within the scope of compensable loss whenever the law of the state responsible for the damage allows recovery for such loss. U.N. Doc. A/AC.105/C.2/L.10/Rev.1 and Corr.1, L.24 and Add.1; 1969 Report, *supra* note 28, at 44. The proposal by the United States, on the other hand, recognized only more direct physical damage without regard to conflicting national laws. U.N. Doc. A/AC.105/C.2/L.19 and L.58; 1969 Report, *supra* note 28, at 37. The Japanese delegation, in another approach, suggested that all damage that has an "adequate relationship of cause and effect with the space activities should be covered in this convention." U.N. Doc. A/AC.105/C.2/L.61 and Corr.1; 1969 Report, *supra* note 28, at 69. In effect, the Japanese proposal attempted to limit compensable damage to injury "arising out of or resulting from" the space activities of a launching state. *Id.*

54. The provisions of the Convention that imposed liability expressly state that damage must be "caused" for recovery to be had. *See, e.g.,* Liability Convention, arts. II, III, IV, V.

allow recovery for any reasonably forseeable loss occasioned by the activities of a launching state. Whether a launching state could reasonably foresee the injury will depend upon the specific facts of each claim.[55] The elements of compensable damage may vary in each situation until some workable standard of compensable damage is developed by the action of the negotiators or the Claims Commission. Secondly, once compensable damage is established, there is the additional problem of identifying the launching state, particularly as more nations engage in space activities.[56] Therefore, COPUOS has directed that the Legal Sub-Committee give priority to matters relating to the registration of objects launched into space.[57] Thirdly, article XII,[58] the section that describes the formula used to calculate damages, leaves unclear whether damages for loss of profits or interest, loss of consortium, or moral damage are recoverable. Again it will be necessary for future mediators to advance uniform standards. Fourthly, although the Convention intended to devise a procedure for the prompt determination of just and equitable compensation, a period of two years or more may elapse before a claim is presented to the Claims Commission because of opportunities for extension of the stipulated time limits[59] and because the various time limits run

55. *See, e.g.,* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). Judge Cardozo suggested that for the claimant to recover the respondent's fault must not only endanger some interest of the claimant, but the resulting injury must be within the scope of the interest invaded.

56. *See* S. LAY & H. TAUBENFELD, supra note 8, at 168-69. Some of the evidence that would aid in the determination of the state from which a space object originated would include data relating to metallic composition, structure, and orbital path. *Id.* The Department of Defense of the United States currently reports the space launches by this country to the Secretariat of the United Nations. Moreover, the Department tracks space objects, estimates their condition, and passes this information on to various organizations such as the Smithsonian Institute or the Goddard Space Center. *See* S. REP., *supra* note 1, at 6.

57. 1971 Report, *supra* note 17, at 16. It has been suggested that a convention on registration could be a helpful—though not infallible—device in the identification of space objects. S. LAY & H. TAUBENFELD, *supra* note 8, at 169.

58. The correct measure of damages places the claimant in the condition that would have existed had the injury not occurred.

59. Liability Convention, arts. X, XIV, XV, and XIX(3). Pursuant to article X of the Convention, a period of one year is allowed for the presentation of claims. Parties are given an additional year from the date a claim is presented to negotiate a settlement. If no settlement is reached, then four to six months are allowed to establish a Claims Commission (art. XV) which has a period of one year to give a decision or award notwithstanding an extension of time if necessary (art. XIX).

consecutively. At first glance this generous period appears to benefit the claimant, but it also allows the respondent to delay settlement, which increases the possibility of a harsh result. The individual claimant will find his recovery barred if a state is unwilling to present his claim through diplomatic channels within the limited period, and a state may not desire to present a claim when already involved in a diplomatically delicate situation with the launching state. Fifthly, the Convention also may burden a smaller nation that joins a larger nation in space activities with a disproportionate exposure to liability. Regardless of the extent to which the smaller state participates, it is subject to joint and several liability.[60] The partners in a joint launching may agree among themselves on some equitable apportionment of liability, but this agreement would not preclude a damaged party from seeking the entire compensation from one of the liable states or organizations.[61] The burden upon smaller states possibly could be relieved if the Convention officially recognized as binding agreements between countries apportioning liability according to standards such as ability to pay, relative participation in a particular space venture, or some other basis that would be equitable to all parties. Some authorities note that the potential risk of unlimited liability may deter smaller nations from participating in space activities, or, in the alternative, from signing the Convention.[62] Finally, the Convention fails to make the decisions and awards of the Claims Commission binding in all situations. Some delegations argued that binding awards were a damaged party's only guarantee of just compensation or, indeed, of any compensation at all.[63] Although the awards are published by the Claims Commission, which adds moral force to the Commission's decrees, article XIX(2) weakens the Convention because the Commission cannot rely in all instances upon the willingness of the international community both to recognize its awards or findings and to exert available pressures upon the launching

60. *See* notes 26 & 27 *supra* and accompanying text. No standards are provided by the Convention to determine whether a state is a joint participant in a launching.

61. *See* Liability Convention, art. V(2).

62. *See, e.g.*, S. REP. ON LIABILITY CONVENTION, *supra* note 43, at 38; S. LAY & H. TAUBENFELD, *supra* note 8, at 178.

63. *See* Report of the Secretary-General on the Work of the Organization, 27 U.N. GAOR Supp. 1, at 220, U.N. Doc. A/8701 (1972). Canada, Iran, Japan and Sweden regarded the lack of binding awards as a major weakness of the Convention and abstained from voting for its adoption.

state to comply with the final decision.[64] Despite these problem areas, the Convention is a significant development in the field of space law. As outer space becomes more crowded and as nations increase their space activities, the Convention may prove to be a workable mechanism for the settlement of claims arising from damage caused by space objects. For the Convention to achieve its full potential, however, areas of coverage must be clarified and states that engage in space ventures must accept responsibility for the damage that may result.

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64. For example, countries that allow launching states to use their sovereign territory for tracking operations or other matters related to space activities could revoke this privilege of the launching state. It is unlikely, however, that such pressures would be applied.