

The Impact of the New Nuclear Liability Regime on Nuclear Transport

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Introduction

As an in-house lawyer, my presentation will be based on a practical approach to the legal aspects of the transport of nuclear and other radioactive materials.

1. To begin, I would like to bring to your attention some general characteristics about the transport of nuclear materials.

First, transport activities and organisations are complex:

- A large number of players is involved: consignors, carriers, shippers, owners, regulators, forwarders, freight companies, shipping companies etc...;
- The comprehensive scale of nuclear and other radioactive materials is concerned, ranging from extracted uranium to spent fuel and nuclear residues,
- All the types of transport modes are utilised worldwide (road, rail, sea or air).

In this presentation, when I refer to “carriers” I include all transport logistics companies which may be involved in nuclear transport.

It must also be underlined that the carriage of nuclear materials is a vital activity for nuclear energy. Indeed, nuclear and other radioactive materials are transported daily around the world to connect nuclear installations and so to ensure their effective operation.

And one must keep in mind that carriage is the only time where nuclear materials stay outside the nuclear installations in the

public area.

International safety regulations regarding carriage of nuclear materials are for the large part unified and harmonised around the world, forming as such a consistent international transport safety regulatory regime, inspired by the IAEA Regulations for the Safe Transport of Radioactive Materials, and which include:

- the ADR (European Agreement Concerning the International Carriage of Dangerous Goods by Road);
- the IMDG Code (International Maritime Dangerous Goods Code);
- the DGR (Dangerous Goods Regulations);
- the INF Code (Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High Level Radioactive Wastes in Flasks on Board Ships);
- the RID (International Carriage of Dangerous Goods by Rail).

Then there are national regulations that form part of this inter-locking regulatory regime.

Regarding nuclear civil liability (NCL) regimes, international conventions set forth the principles applying in case of nuclear incident in the course of carriage of nuclear substances. As is apparent from reviewing the international conventions, nuclear transport matters represent a significant part of the international conventions.

Basically, these principles do not differ from those applicable in case of nuclear incident within the boundaries of a nuclear installation: strict and limited liability which is channelled on the operator of the nuclear installation.

However, regarding nuclear transports, it must be noted that the amounts of liability in case of nuclear incident are lower than the ones which would apply in case of nuclear incident within a nuclear installation.

Moreover, since several operators are involved in a nuclear transport operation, the conventions have defined rules for allocation of liability to determine the responsible operator. The principles of allocation of liability can be summarised as follows: basically, liability is imposed on the installation operator sending the nuclear substances, which passes on to the receiving operator upon contractual assumption of liability by that operator, or, in the absence thereof, when that operator takes charge of the shipment.

For carriers, the main areas of concern are to know which operator is liable in case of nuclear damages claim, to which extent and if it is well insured for this purpose.

As you know, the Vienna Convention on Civil Liability For Nuclear Damages (Vienna Convention), as well as the Paris Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention), together with the Supplementary Convention of Brussels (Brussels Convention), have been revised in recent years. The aim of the modernisation of these existing NCL regimes was to offer much better protection to victims in the event of a nuclear incident by allowing more victims to claim for compensation for damages, providing for a wider range of damage to be compensated than before, and by increasing the amounts of compensation and indemnification.

2. How do these revised conventions impact the NCL for transports?

I will approach this question by taking the main changes in the conventions and analysing the consequences for nuclear transports. In this respect, I will review in turn the modifications in terms of liability limits, definition of nuclear damage, scope of application of the conventions, and exoneration from liability.

3. Increase of the liability limits and financial security:

As you know, in the revised Paris and Vienna Conventions, the liability amounts and related financial security amounts have been increased considerably.

For nuclear transports, the liability of the operator has been increased from 5 million EUR in the Paris Convention and the Vienna Convention to 80 million EUR in Paris Convention and 300 million SDR in the Vienna Convention. The liability of the State follows the same trend under the Brussels Convention, increasing the total amount of compensation available to victims up to 1.5 billion EUR. These amounts are a

minimum and the Conventions expressly recognise a right for the contracting parties to define a higher, or even unlimited, amount of liability.

Obviously, such increase brings additional confidence to the carriers in the efficiency of the NCL regimes set up by the international conventions. In practise, the carriers systematically ask for the corresponding insurance certificate. The carriers are very sensitive to risk exposure and so, any move towards better protection is well accepted.

Under the Paris Convention regime, a practise existed whereby some operators from countries with low liability amounts accepted to bear the nuclear civil liability for transports in which they were not interested at all, only in order to have lower insurance premiums. The revision of the Paris Convention does not make it possible anymore by providing that the liable operator must have a direct economic interest in the nuclear substances that are in the course of carriage. For carriers, this is favourable since it improves transparency with regard to the liable operator.

4. Wider definition of damages:

While the Paris and Vienna Conventions at the origin only mentioned personal injury and property damages, the amended Conventions cover a broader range of damages. The new definition in the Paris Convention is almost identical to the definition in the revised Vienna Convention. In addition to the damages I already have mentioned, the revised Conventions include certain types of economic loss, the costs of measures to reinstate a significantly impaired environment, loss of income resulting from that impaired environment, and the costs of preventive measures, including loss or damage caused by such measures.

In general, a comprehensive definition of damages without doubt brings supplemental protection to victims, and better predictability to the companies involved. Notwithstanding the insurance issue, this avoids the previous situation where the scope of damages for which compensation could be claimed was left up to national law, which may be very different from one country to another.

In particular, the reference to environmental damages is very important for transport activities because an accident in the course of carriage will occur in the public area with the high possibility of environmental impact.

In transport matters, there is one specific category of damages, the so-called "salvage costs", representing the costs incurred to remove the goods and transport conveyance. In case of maritime accident, particularly on the high seas, salvage costs may be much higher than other costs. Salvage costs are not clearly included in the new definition of nuclear damages but hopefully, and this is my understanding, this type of damage should be considered either as preventive measures or

as costs to reinstate a significantly impaired environment.

5. Extended scope of application

The scope of application of the revised Conventions has been extended to ensure that more victims will be entitled to compensation.

First, regarding jurisdictional competence, the revised Conventions provide that where a nuclear incident occurs in the exclusive economic zone of a Contracting Party, jurisdiction over claims for nuclear damage arising from that incident shall lie exclusively with the courts of that state.

Second, regarding victims, both revised Conventions allow many more victims to submit nuclear damage claims than in the past, even if there are differences between the revised Vienna and Paris Conventions: while the Vienna Convention applies to all nuclear damages wherever suffered, the Paris Convention enumerates cases where it applies. Nevertheless, in practise, I think that implementation of the Conventions would lead to similar results.

For the carriers, it is favourable to extend the scope of application of the Conventions because these Conventions exonerate carriers from liability.

6. Exoneration from liability

The revised Vienna and Paris Conventions no longer allow a nuclear operator to be exempted from liability for damages resulting from a nuclear incident caused by a grave natural disaster of an exceptional character. The remaining causes of exoneration from liability for the operator are armed conflict, hostilities, civil war and insurrection.

This modification was justified by the fact that nuclear installations should be able to withstand natural disaster, but this will also impact the application of the NCL to nuclear transport since nuclear transports naturally face natural disaster as well as armed conflict.

7. Conclusion

And so, the revised nuclear liability Conventions have addressed a number of shortcomings and substantially enlarged their scope of application. By way of brief reminder, they include among others: increase in the liability caps; geographical extension to maritime areas; extension to victims of non-nuclear States and nuclear States (conditionally); and extension of the definition of nuclear damages.

As such, the modernisation of the international Conventions in the NCL field undoubtedly goes in the right direction by offering wider protection and better compensation to victims. For the stakeholders of the nuclear industry, among whom are carriers, the modifications offer the advantage of bringing improved

legal security and predictability. In addition, the new regime, once in force, also will bring greater transparency, which in turn may have some positive influence on public acceptance, notably also by including environmental damages within the definition of the nuclear damage.

Within the areas of Paris and Vienna Conventions, it can be considered that all these improvements lead to setting up a harmonised system which is favourable to transport of nuclear materials.

However, the situation unfortunately is quite different when we look from a global perspective. One must bear in mind that many nuclear transports are international, linking States wherein nuclear installations operate, while the international legal framework of the NCL remain a complex labyrinth of rules which could lead to a kind of shopping forum, as some commentators suggest, between different NCL regimes according to the circumstances. It is regrettable not to have a comprehensive and unified international NCL regime which would give a predictable and consistent framework for potential nuclear damages claims.

Indeed, the situation about NCL is different in every country: some states have signed and ratified an international Convention; other states have signed but not ratified; some others have their own legislation; a fourth category of states, mainly countries without nuclear production, have no legislation at all. Consequently, every international nuclear transport has a specific legal framework with regard to NCL, depending on the transit countries.

If you take, as example, a transport originating in a country with its own legislation transiting by sea through the territory of countries without any nuclear legislation, shipped to a Paris Convention country, one can imagine that victims may attempt to seek recourse against carriers, with potential chance of success, pursuant to a specific local legislation which do not provide for no strict liability and channelling of liability on the nuclear operator.

In practise, the implemented solution to remedy such uncertainties is to stipulate in contracts how the NCL is allocated between all the parties involved in the transport by liability and indemnification mechanisms. In particular, the most important concern for the carriers is to clearly determine in the transport contract which entity will be held liable in case of nuclear incident during the transport, and with reference to a reliable legislation on nuclear liability. The carriers must ensure that the responsible operator is known, the chain of responsibility is not broken, and the appropriate indemnification provision be stipulated.

But it is not satisfactory to resolve such inconsistencies between NCL regimes by contractual provisions, and there still remain significant areas of uncertainty. This is the reason why the ultimate solution to bring

confidence and predictability is the setting up of a harmonised international NCL regime, as it exists for the nuclear transport safety regulations.

To finish, the nuclear industry must pay attention that nuclear transports be never considered as a relatively small business with high attendant risk by the carriers and/or the public, because smooth transports are of crucial importance to ensuring the safe and efficient running of nuclear activities. One must keep in mind that carriers, which are not always very familiar with legislation about nuclear civil liability, need to feel sufficiently confident and protected against nuclear damage claim.

Conference Paper

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