LEGAL AND INSURANCE PROBLEMS RELATED TO THE SALVAGE OF RADIOACTIVE MATERIALS FROM THE SEA

M. OEHM
Transnuklear GmbH,
Hanau

H. MATTO
NVD Nuklearer Versicherungsdienst GmbH,
Hanau

Federal Republic of Germany

Abstract

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The costs involved in salvaging radioactive materials from the sea are usually not covered by nuclear third party liability insurance, whereas transport insurance normally covers such costs. However, in specific cases, such as high level waste transports, even transport insurance might not provide sufficient protection. The issue then for the party concerned, which may be obliged to salvage, becomes complex. According to administrative laws concerning public order and security in the Federal Republic of Germany (FRG), the owner of cargo which represents a disturbance to the public order can be obliged to remove such a disturbance (in this case, salvaging the radioactive materials). These laws are applicable not only when the cargo is to be salvaged within the territorial waters of the FRG, but also for salvage operations on the open seas when the public order and security of the FRG is, or might be, negatively affected. The latter application does not conflict with international law. However, it should be mentioned that according to international law, no state is allowed to enforce its own administrative laws against persons or organizations residing in a foreign state. In such cases, the foreign state must be asked to enforce the salvage obligation. The owner of the cargo usually cannot take recourse with respect to the salvage costs against such third parties as the shipping companies involved in the accident or the shipping agent because, according to international treaties, the liability of these parties for nautical negligence that causes damage to the transport goods is excluded. Recently, it has become possible to buy special insurance coverage for salvage costs.

1. INTRODUCTION

The sinking of the French freighter Mont-Louis near the Belgian coast in August 1984 raised awareness of the existence of a specific transport risk, i.e. the salvage of radioactive materials from the sea. As long as the salvage costs are covered by transport or nuclear third party liability insurance, this risk does not cause any special problems. However, these types of insurance (as will be shown in more detail) either might not provide coverage for the salvage at all or might provide insufficient coverage.

If, in such a situation, the cargo can and must be salvaged, the question that arises is which party, on what legal basis, is obliged to salvage. In addition, it must be examined how far the responsible party has recourse with respect to the salvage costs against third parties. The answers to these questions depend very much on the national laws applicable to the specific case. This paper will discuss these questions mainly from the standpoint of laws in the Federal Republic of Germany (FRG) and international law.

2. NORMAL INSURANCE COVERAGE

Normally the transport of radioactive materials is covered by two types of insurance, nuclear third party liability and transport insurance.

2.1. Nuclear third party liability insurance

The legal provisions of nuclear third party liability insurance, as well as the corresponding insurance, only apply when a nuclear 'incident' has occurred. A nuclear incident, in turn, only occurs when the containers in which the radioactive materials are transported are so damaged in the course of the accident that they start to leak. However, that occurrence is rather unlikely. Thus, one can say that nuclear third party liability insurance most probably will not provide adequate coverage for salvage costs. This situation has also been found to hold when the salvage is performed to prevent a nuclear incident [1].

2.2. Transport insurance

Transport insurance provides coverage in case of damage to or loss of the insured transport goods. The coverage, at least 'all risk cover', also includes salvage costs. The payment obligation of the insurer is normally limited to the replacement value of the radioactive materials, plus the container value and all freight and transport costs, including other dispatching expenses. However, with respect to salvage costs, the payment obligation might even go beyond that limit because salvage costs which are reasonable and which do not lead to success are insured in principle without limitation. The restriction 'reasonable' salvage cost means that at the beginning of the salvage any exceeding of the insurance limit is not expected. If, during the course of the salvage, additional costs arise which exceed the insurance limit, the insurer must also bear these costs. However, the insurer takes part in the decision on whether to continue the salvage operation. However, should a salvage operation be broken off without success, the insurer has to pay not only for the costs of the salvage, but also pay full compensation for the total loss in materials, the container, etc. The insurance limit might also be exceeded if a second event on the same journey leads to damage of the shipment. On the other hand, costs which have nothing to do

with the actual salvage of the insured shipment are not the liability of the insurer, e.g. when the insured shipment must be salvaged only because a sunken ship must be removed from navigable waters.

Transport insurance normally should provide sufficient protection with respect to eventual salvage costs, especially in view of the higher value of radioactive materials. However, in specific cases the salvage costs, which will always be of a certain minimum amount, might exceed the insurance coverage, as for example when the insurance value of a shipment is low because only relatively small quantities are transported. Another example is the transport of spent fuel or high level wastes, where the insurance value could also be quite low.

It should be pointed out that the actual danger involved in the handling of the different radioactive materials is not discussed. For the purposes of this paper, only those radioactive materials will be taken into account which, by general understanding, represent such a danger that they must be salvaged (for example, high level wastes or spent fuel). Furthermore, the question of the water depth up to which a salvage operation can and must be performed will also not be discussed, though it will be assumed that the salvage is possible and necessary to eliminate a dangerous situation. The scenario described in the following does not assume that there has been a sea accident. It also includes cases of force majeure, where no party is responsible for the sinking of the cargo.

3. THE OBLIGATION TO SALVAGE

The obligation to salvage is investigated in a threefold manner. First, it will be determined how far such an obligation can be imposed within the territorial waters of a state — in particular the Federal Republic of Germany. The same question will then be answered with respect to the open seas outside territorial waters. Finally, the problem of enforcing this obligation outside the territory of the enacting state will be discussed.

3.1. Salvage within territorial waters

Territorial waters vary from state to state, extending anywhere between 3 and 12 miles from the coastline (the territorial waters of the FRG are 3 miles), and are considered by all states as being part of their territory and consequently governed by their national laws [2]. Thus, the obligation to salvage must be determined on the basis of the laws of that state in whose territorial waters the salvage is to be performed. However, the specific legal basis, upon which such an obligation can be imposed, must be determined. The Atomgesetz (Atomic Law) of the FRG does not contain any such basis. Since the salvage of dangerous goods is a question of public order and security, the obligation to salvage can only be found in the corresponding administrative laws.

'Public order and security' of the territorial waters of the FRG is regulated in the Bundeswasserstraßengesetz (Federal Law for Waterways). According to Section 25 of this law, a party which has caused a disturbance to public order and security — an example could be the owner of a vessel involved in an accident with the consequent sinking of the cargo — can be obliged to cease causing the disturbance, i.e. in this case to salvage the radioactive materials. In addition, the *owner* of the property (here the nuclear cargo) which represents a disturbance to the public order is obliged to end the disturbance, regardless of whether or not the disturbance has been caused by another party.

As result of the foregoing, one can say that in the case of a cargo sinking by reason of force majeure, or for similar reasons, the owner of the cargo will be the only party to which the obligation to salvage can be assigned, whereas in the case of an accident at sea, there will be a question as to which of the two parties, the owner of the vessel or the owner of the cargo, has to salvage the cargo. In principle, the party which has caused a disturbance of public order and security should be addressed first. Only if such a party cannot be found, or if the party is financially not able to support the cessation of the disturbance, can this obligation be imposed on the owner of the property [3]. However, as far as the salvage of dangerous goods, in particular of radioactive materials, is concerned, it would seem appropriate, considering the specific nature of the goods and the danger deriving from these goods, that the owner of the cargo should, in the first instance, be liable for salvage. Moreover, the owner of the cargo will usually have the best knowledge of the real danger of the cargo and will thus be in the best position to arrange appropriate salvage measures.

It should also be mentioned that pursuant to Section 28 of the Bundeswasserstraßengesetz, the state, by itself, in the event of an emergency, can perform the salvage and then take recourse with respect to the salvage costs against the responsible party (the owner of the cargo) [3]. A final comment is that according to international law, no state is entitled to enforce its own laws against persons or organizations outside its own territory.

3.2. Salvage outside territorial waters

Since the open seas do not belong to any national territory, there is a question whether a salvage on the seas is required by international law. In addition, it is necessary to discuss how far national laws can be applied to such salvages. However, it must first be noted that obligations arising from international law are directed only against states since only they are legal subjects under international law.

Traditionally, international law did not contain an obligation to salvage. However, in recent times, particularly in the area of environmental protection, the liability of states has become a topic of increasing discussion in legal literature [4, 5]. In a very recent study, the issue of whether a state that lawfully provides permission to transport might be strictly liable for the harmful consequences arising in another state as a result of that permission was discussed [5]. It was concluded that while

there was a due diligence obligation of states to prevent or mitigate environmental damages, there was no strict liability of states for environmental damages. Although the author of this study has convincingly demonstrated that, at least at the present time, the liability of states for environmental damages is still quite limited, his study has also shown that in the area of environmental protection, international law is moving in the direction of state liability.

The application of national administrative laws to a salvage operation on the open seas is now considered. Such an application of national administrative laws to events occurring outside the national territory does not conflict with international law; in particular, it does not violate the principle of the territorial limitation of administrative law. In the past, this principle was, in fact, understood as being a limit on such application. Today such a limitation is no longer accepted, as is demonstrated by state enforcement of antitrust laws [6].

A different question is whether a limitation of such an application arises from the national law itself. Although Section 1 of the Bundeswasserstraßengesetz defines as waterways only internal bodies of water and the territorial waters [3], this does not exclude an application of the law to a salvage on the open seas when it is deemed to be protecting public order and security within the territory of the FRG. Even if the Bundeswasserstraßengesetz is considered to be inapplicable, that would still not mean that a salvage on the open sea would in no event be covered by the laws of the FRG.

Indeed, instead of the Bundeswasserstraßengesetz, which is a special law, general laws for public order and security could be applied. Since the rules of interest here are the same in both laws [7], these general laws do not have to be discussed in detail. However, the sole difference that should be mentioned concerns the public authority responsible for imposing the obligation to salvage. For enforcing the Bundeswasserstraßengesetz, a special water police authority is responsible [3], whereas the regular police authorities enforce the general laws.

3.3. Enforcement of salvage obligations

As long as the salvage obligation is enforced against a person or organization within the state which imposed the obligation, there are no special problems. However, if, for example, radioactive materials from a foreign power station sink in or just outside the territorial waters of the FRG, the competent authority of the FRG cannot enforce salvage obligations against the foreign power station. Only the competent authority of the foreign state to which the power station belongs can assign this obligation. This restriction derives from international law, specifically the principle of the territorial limitation of administrative law, according to which no state is allowed to enforce its own law within the territory of a foreign state [6].

Although in practice it can be expected that states will assist each other in the case of a reasonable salvage order, there is still the question of whether states are *legally obliged* to enforce a foreign salvage order. As already mentioned in connec-

tion with the discussion of the strict liability of states in the area of environmental protection, international law is moving in the direction of some state liability. Therefore, it could be argued, bearing in mind the due diligence obligation of states to prevent or reduce environmental damages, that the enforcement of a foreign salvage order (provided it does not conflict with national public order) is required by international law. Such a position should prevail at least in the case of the salvage of high level radioactive wastes, since here it is also possible to refer to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (commonly known as the London Dumping Convention), which prohibits the sea dumping of high level radioactive wastes [8].

4. RECOURSE

In cases where a third party, e.g. the owner of the vessel the cargo is transported in, the other vessel involved in a collision, or the shipping agent, is responsible for the sinking of the cargo, the owner of the cargo would most probably have to take recourse against one of these parties. However, the liability of these parties is so limited that a recourse would not make very much sense.

The liability of the owner of a vessel is determined by the Hague Rules and has been taken over into national laws, for example in the Handelsgesetzbuch (Trade Law) of the FRG since 1936 [9]. According to Section 485 of the Handelsgesetzbuch, the liability of the owner of a vessel for the cargo is limited in any event to DM 1250 per packaging or unit. In the case of nautical negligence by his employees even this liability is excluded. According to Section 607 of the Handelsgesetzbuch, the liability of the shipping agent is also restricted to these limits.

5. SALVAGE INSURANCE

Legal analysis has shown that for the payment of salvage costs of radioactive materials, a pragmatic solution is necessary. Only comprehensive coverage, in connection with the transport insurance, can offer such a solution at acceptable conditions.

It is recommended that transport insurance be extended to salvage costs that exceed the value of the shipment when the insurance value of the shipment is below DM 30 million. Under current transport insurance, such an amount is considered to be sufficient protection against salvage costs. According to several discussions with insurance companies, the insurance terms and conditions would be the following. For goods which are insured under such a contract, salvage expenses, including costs for salvage from the seabed, can be additionally insured. The preconditions are that the costs should be incurred as the result of an insured case of damage and are necessary because of government or international regulations and/or the instructions of public

authorities. If such regulations do not exist, then these costs will be the policyholder's own responsibility, subject, however, to prior consultation with the insurer. In fact, such coverage is in force for some transports by companies in the FRG and the United Kingdom.

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