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From Chaos to Calm In One Injunction

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Abstract

Given the public nature of their operations, transporters of nuclear cargos have many responsibilities to discharge, not least the safety and security measures required to protect the conveyance and its cargo. However these measures extend beyond the shipment itself, to the need to ensure the safety and security of any nuclear protestors. Transporters must recognise that individuals and organisations have a right to peaceful protest, and where those protests potentially impact directly on transport operations; transporters have a duty of care to ensure that protests are conducted safely and without risk of injury to those taking part.

Transporters such as INS often have little or no warning of when a protest is going to be staged and so are unable to take planned action to limit the risks taken by protestors as such action would lead to publicity around shipment dates - international best practice as identified in INFCIRC 225 rev 5 is to keep shipment dates confidential. Consequently INS has been forced to apply for emergency injunctions through the courts to prevent protestors from coming into contact with its ship and risking injury.

This paper considers how transporters can take actions to protect protestors without endangering the transport operations or the cargo. Several protests that have taken place over recent years in respect of INS shipments will be used as case studies to identify some of the extreme risks that protestors are prepared to take to the detriment of their own safety, the steps which can be taken to secure injunctions and the main issues involved.

Introduction

Historically, transport operations associated with nuclear fuel recycling have been the subject of protest from organisations such as Greenpeace and others. Sometimes these protests have taken the form of direct action against shipments putting at risk transport operators, protestors themselves and agencies such as police forces who must aim to maintain law and order. Examples of these activities include:

- Three protestors boarded MV Pacific Swan in Panama in 1998.
- Use of the vessel MV Greenpeace to block the port of Barrow-in-Furness in England to prevent the export of MOX fuel in 1999.

- Australian Parliamentarian Ian Cohen, assisted by Greenpeace, entered the water in front of a PNTL vessel in the Tasman sea, causing it to take avoiding action to avoid a collision in 2002,
- In 2004, an anti-nuclear protestor was killed after his leg was severed by a train carrying high level waste from France to Germany.

Similar activities have disrupted other industries, including the boarding of the Brent Spar for three weeks in 1995 and a large scale protest against coal shipments in May this year, blockading Newcastle Port in New South Wales, Australia.

Provided it is compliant with regulation, transporters have a legitimate business to carry out shipments of nuclear material. It is important that this can be done despite protest. Just as protesting is a democratic right, companies are entitled to carry out their legitimate business without illegal interference.

In planning such shipments transporters want to ensure a safe and secure transport that is completed smoothly and quietly.

Transporters are looking to:

- complete their legitimate transport business safely and securely.
- ensure the safety of their staff and property.
- Ensure the security of their cargoes.
- protect members of the public, including protestors.
- minimise bad publicity, either through injury to protestors, or by being seen to be heavy handed in their approach to protestors. Such heavy handedness could be either physical or through legal process.
- remain within the law in everything they do.
- ensure order, calm, predictability, safety and security throughout a shipment.

However disrupting the above and causing chaos is the primary focus and best case scenario for some organisations that seek to voice their concerns about the movement of nuclear materials and the nuclear industry as a whole. Ultimately their desire is to stop the enterprise they are protesting against. Either through direct physical action or more likely through raising public concern such that the public in general becomes opposed to the enterprise and it becomes difficult if not impossible to continue. In some cases, protest may even result in changes to the law or government policy (for example sea dumping of waste in the 1970s).

Some protestors may even be prepared to break the law in order to achieve their aims.

Conflict

Protestors and Transport operators are likely to come into conflict due to the above different aims, and in particular where protestors are willing to break the law to further their aims. Even where protestors do break the law however, there remains a duty of care on the part of the Transporters to maintain the safety of the protestors as far as reasonably practicable. Providing advice and taking action in these areas of conflict presents a different challenge for nuclear lawyers to the normal routine of contracts and nuclear liability law. There are two main functions for the lawyers here:

- 1) Providing advice and guidance to Transport Operators (and indeed security teams) on how to deal with protestors who gain access to the transport operations.
- 2) Taking injunctive court action to prevent protests physically interfering with transport operations.

Dealing With Protestors

Clearly the first of these needs to be considered well in advance of any transport operation through the establishment of company policies for how protestors will be dealt with until such time as support can be obtained from relevant authorities. In the case of land based operations, it is to be hoped that such support can be obtained quickly. For protests at sea however, such a quick response cannot be guaranteed and policies need to take account of how to ensure the safety and welfare of any protestor who manages to get on board a ship, to whom the vessel owner has a duty of care, whilst of course maintaining the safe operation of the vessel and the safety and security of its cargo and crew.

This can be a difficult balance, especially where any physical threat from a protestor to the vessel or crew is not immediately obvious leading to the requirement for last minute decisions by the vessel master and security teams. As an example, in October 2007 INS was shipping spent fuel from Sweden to the UK using their vessel the Atlantic Osprey. Near Denmark, Greenpeace activists boarded the vessel twice on 2 consecutive days. They boarded as the Osprey was travelling at full speed risking harm to themselves and their colleagues.

The crew and security teams of the vessel are required to evaluate the risk of harm to the protestors together with risk to the cargo and crew from the protestors. They are required to balance the legal duty of care the vessel owner will have to the protestors, with the duty of care towards the crew of the vessel and the cargo itself. In these particular circumstances after due consideration of the relevant legal issues and duty of care, the protestors were allowed to board the vessel, to make their peaceful protest and each time they were eventually removed by the Danish coastguard leading to

delays, costs and of course risk of harm to themselves.

It's of course not just the safety of the individuals climbing onto the vessels, but to the crew of the vessel. It's never obvious who is trying to climb on board, they may have peaceful intentions, or not. The primary aim of vessel owners is therefore to avoid getting to the point where protestors are able to board the vessel rather than having to deal with protestors who reach the vessel and are able to board.

Injunctive Action

This can be done through injunctive action. However injunctions cannot be prepared so far in advance. Most courts (at least in Europe) will only consider an injunction if there is reasonable evidence of intent in the very short term to disrupt on the part of the protestors. It is therefore necessary to gather evidence, prior to seeking an injunction. Often this is only available at a late stage, meaning action needs to be taken quickly. Two examples of such scenarios are below.

Cherbourg, 2010

In March 2010, an INS shipment was planned to go into Cherbourg in France from the UK. Shortly before the shipment was due to arrive, the Greenpeace vessel the Rainbow Warrior appeared off the French coast.

Some Greenpeace activists had managed to chain themselves to a railway line disrupting another movement in France at that time and it seemed that Greenpeace were in a disruptive mood.

Greenpeace were carrying out practice drills of boarding vessels on the Rainbow Warrior and INS jointly with partners in France decided to proceed with an injunction application in the local court at Cherbourg.

The general feeling was that the judge was not interested in granting such application due to lack of evidence of Greenpeace's intention to interrupt the shipment. However on the morning of the hearing, some Greenpeace activists injured themselves while practising boarding their vessel. In the light of this information, the judge granted the injunction partly to prevent further risk of injury to Greenpeace activists.



Figure 2 : 'Bulbous Bow' – Aerial View



Figure 3: Bulbous Bow – Front elevation

In figure 3 the 2 large diagrams in white on the vessel show this position is just above the bow thrust propeller of the vessel. Had the protester slipped for a moment and fallen into the water, he could have been dragged into the blades of that propeller, or been trapped under the vessel and dragged into the main propulsion propeller with potentially fatal consequences.

The Greenpeace boat was also in a dangerous position. The captain of the INS vessel could not see where they were or what they were doing. Any movement the wrong way by the captain and/or the Greenpeace boat, could have damaged and sunk the Greenpeace boat, injuring the occupants, who could also have been dragged into the propeller blades. The actions of the protestors created national news and as far as they were concerned it was a good day at the office. For the vessel owner INS,

however, it was a very concerning series of events as another shipment was being planned to the same port 2 months later.

Protection of the next Shipment

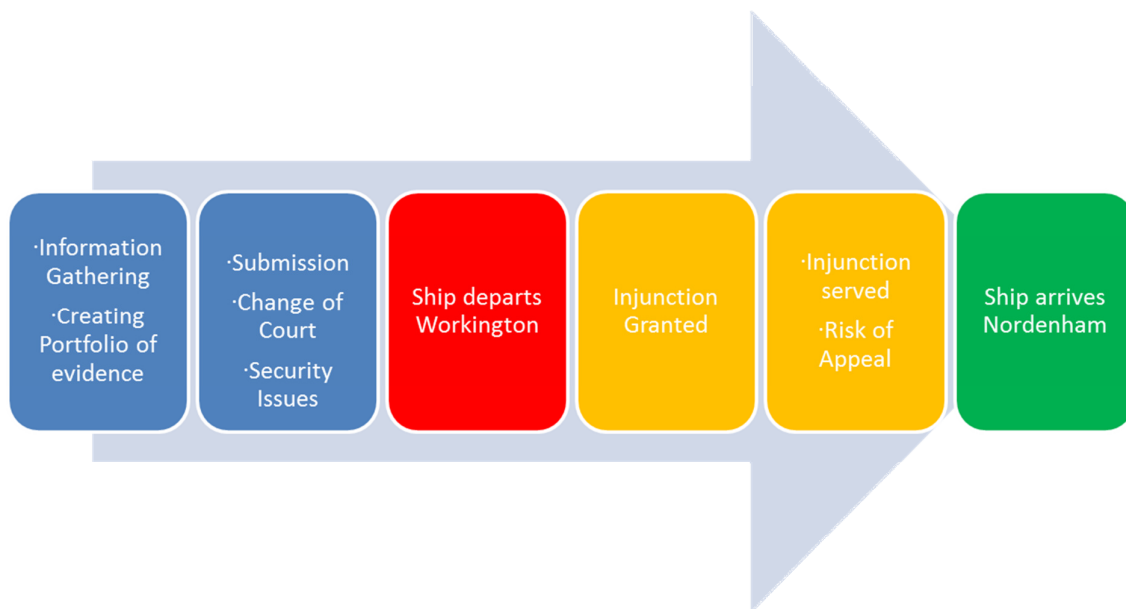
The next shipment was due in November 2012 from Workington, UK to Nordenham. A decision was taken to seek injunctive relief from the German courts to prevent protestors from coming into contact with the vessel again. Jurisdictionally, the injunction would only be valid once the vessel was within the 12 mile zone of Germany.

Injunction Objectives

- To prevent protestors from interfering with the shipment.
- To prevent unlawful interference with the transporter’s lawful business.
- To ensure the safe passage & security of the vessels and the safety of any demonstrators, members of the public and crew.

Application Process

Figure 4 provides an overview of the process followed in making the injunction application.



Between 23 September 2012 and 12 October 2012 detailed discussions were required on whether to proceed with the application in Germany. German lawyers were clear that it was not a straightforward process.

On 12 October, it was decided to proceed with the application and to begin the process of collating the necessary information and evidence. It was a tight timescale and a hugely time consuming exercise due to amount and range of information required such as:

- protocol of the events of previous shipments, logbook entries , detail of radio-traffic, affidavits, media reports, shipment details etc.
- Internal approvals required from security regulators who were concerned for security reasons about revealing to the court the date the vessel would reach Nordenham.

On 12 November an application was submitted to the Hamburg Court. The judge decided that he would require an oral hearing the following week to consider the matter further. That was not going to be helpful as the vessel was arriving at Nordenham the same weekend. Without disclosing the date the Judge would not reconsider. So the application was withdrawn & re-submitted on Tuesday 13 November, in the Oldenburg court.

The judge considered the papers until the Wednesday morning (14 November) when the vessel was departing the UK. He decided that without knowing the date of the shipment he could not see the urgency and therefore would not be granting an injunction.

INS discussed with their regulator the possibility of revealing the date to the Judge. Eventually on Thursday (15 November) INS were able to reveal the date to the Judge in accordance with UK security procedures. The judge however still had a concern about German legislation on freedom of speech but eventually granted the injunction on the following basis:

- Greenpeace to keep 300m away from the bow of the vessel and 100m from the sides of the vessel subject to an exception for a maximum of 30 minutes.
- However, Greenpeace were at all times prohibited from:
 - putting up banners or obstructions at the harbour and landing facilities.
 - from entering the vessel or making visual or other changes to the ship.
 - from interfering with communications between persons aboard the ship and other third parties e.g. no loud sirens.

In the judge's view this still allowed Greenpeace to protest without interfering with the vessel but complying with German legislation on freedom of speech. The injunction was served on Greenpeace on Friday morning & INS had a nervous wait until 5pm before they were certain that Greenpeace would not be launching an appeal.

The vessel arrived on the 18th November into Nordenham safely and securely as a result with

Greenpeace making a peaceful protest at a safe and secure distance from the vessel as shown in Figure 5.



Figure 5: Greenpeace protest, 18 November 2012, Nordenham.

Conclusions

It is important to clarify that there is never any intention to stop lawful protests through legal or any other means. The intention is always to manage transports safely and securely and to ensure any protests are conducted safely without serious risk to the personal safety of individuals voicing their opinions.

Transporters always need to support rights to democratic protest, but they should also be entitled to exercise their rights to carry out legal authorised and safe transport operations without interference. Lawyers can help in these situations to protect a company's business, reputation and ultimately the lives of protestors but it requires a spirit of tolerance on all sides as per the words of one Dr Einstein: 'Laws alone cannot secure freedom of expression; in order that every man present his views without penalty there must be spirit of tolerance in the entire population.'