

## CHANGES TO THE UK NUCLEAR LIABILITY REGIME: IMPLICATIONS FOR THE INDUSTRY

### Introduction

A number of changes to the liability regime for damage as a result of nuclear incidents in the UK are likely to come into force at the beginning of 2018 at the earliest.

As background, the nuclear liability regime in the UK and internationally is well established. The Paris and Brussels Conventions<sup>1</sup> on nuclear liability (the **Conventions**), to which the UK is a contracting party, set out key aspects of the liability regime, including rights to compensation, time limits for bringing claims and liability caps. The terms of the Conventions are implemented in the UK through the Nuclear Installations Act 1965 (**1965 Act**).

In 2004, two Protocols to the Conventions were agreed (the **2004 Protocols**<sup>2</sup>), which will make significant changes to the existing liability regime. The 2004 Protocols are still to be ratified, but in preparation for their ratification, the UK Government made the Nuclear Installations (Liability for Damage) Order 2016 (the **Order**) in May 2016. Once the Protocols have been ratified and are in effect in the United Kingdom, the Order will amend the existing UK liability regime under the 1965 Act in line with the Protocols by increasing operators' levels of liability and broadening the scope of coverage in the event of a nuclear incident.

As part of our series focused on the key issues facing the nuclear industry, this briefing considers the implications of these proposed changes for participants in the UK nuclear industry.

### Key issues

- Significant increases proposed in nuclear operator liability:
  - Increased compensation
  - Extended limitation periods
  - New categories of damages
  - Widened group of claimants
- UK Government to arrange to cover insurance 'gaps' on commercial basis
- Potential exposure to claims from non-contracting countries within and outside of the liability regime

<sup>1</sup> The Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (the **Paris Convention**) and the Convention of 31 January 1963 Supplementary to the Paris Convention of 29 July 1960, as amended by the Additional Protocols of 28 January 1964 and by the Protocol of 16 November 1982 (the **Brussels Convention**).

<sup>2</sup> The Protocol of February 12, 2004 to amend the Paris Convention and the Protocol of February 12, 2004 to amend the Supplementary Brussels Convention.

## Overview of the international nuclear liability regime

### The Paris and Brussels Conventions

The Conventions establish the international regime for liability, which provides for liability to be 'channelled' to the operator in the event of a nuclear incident. The regime is founded on two key principles:

- the operator of the relevant nuclear installation is exclusively liable<sup>3</sup> for damage resulting from 'nuclear incidents' at the installation, or during the transport of nuclear substances to and from the installation; and
- this liability is 'strict', which means that liability attaches to the operator regardless of fault (except in very limited circumstances such as nuclear incidents caused directly by armed conflict).

The operator is required to pay compensation to victims in respect of specified heads of damage up to a capped amount, and operators must have in place financial security to cover their potential liability. Once the operator's capped amount is reached:

- host Governments are required to provide compensation from public funds (up to a maximum amount) for damage caused by a nuclear incident in their country; and
- if the amount claimed is still not covered by the host Government's contribution, other parties to the Conventions are required jointly to contribute public funds (to a maximum amount) to meet the claim.

### The 2004 Protocols

As part of international efforts post-Chernobyl both to improve access to compensation for victims of nuclear incidents and to increase the amount of compensation to which they are entitled, the Conventions were amended by the 2004 Protocols. The 2004 Protocols increase the level of compensation available to victims and allow a broader range of victims to be compensated.

In order for the amendments implemented by the 2004 Protocols to become effective in respect of:

- the Brussels Convention, the relevant protocol must be ratified by all signatories; and
- the Paris Convention, the relevant protocol must be ratified by 2/3 of its signatories.

EU member state signatories have agreed pursuant to an EU Council decision 2004/294/EC (the **Council Decision**) to ratify the 2004 Protocols together but, in the event of this not happening before Brexit, the UK Government may not be bound by such agreement.

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<sup>3</sup> Exclusivity does not prevent nuclear operators from contracting out of liabilities for activities undertaken by contractors and service providers. However, as a general rule, industry practice to date has been for operators to indemnify contractors and service providers against all liabilities in respect of a nuclear incident.

## Amendments made by the Order

The Order, once in full force, will make a number of amendments to ensure that the liability regime set out in the 1965 Act reflects the position under the 2004 Protocols, including:

- **Increased liability for operators:** The maximum liability for operators will increase:
  - from €163 million to €1,200 million per incident for operators of nuclear power plants (which will be introduced progressively over a 5-year period from when the Order comes into force);
  - from €11.6 million to €70 million per incident for low hazard installations, such as research reactors; and
  - from €11.6 million to €80 million per incident for low risk transport of nuclear substances.
- **New categories of damage:** In addition to personal injury, death and damage to property, the following four additional categories of nuclear damage will now be compensated:
  - economic loss arising from property damage or personal injury;
  - loss of income from an economic interest in any use or enjoyment of the environment (for example, fishermen could seek compensation for loss of income caused by a nuclear incident);
  - costs of environmental reinstatement; and
  - costs of preventative measures and further loss or damage caused by such measures.
- **Extended limitation periods:** The limitation period for death or personal injury claims will be extended from 10 to 30 years from the relevant incident. For all other claims, the current 10-year period will continue to apply.
- **Widened geographical scope:** Claimants from non-contracting states will now be entitled to compensation in respect of nuclear incidents in contracting states. For the UK, this means, for example, that even though Ireland is not itself a contracting state, Irish persons and entities suffering loss or damage due to a nuclear incident in the UK would be able to bring a claim in the UK courts.
- **Transitional insurance coverage:** The Secretary of State will be able to approve or make arrangements to enable operators to put in place insurance or other financial cover to meet the increased liabilities.
- **Foreign state action:** Contracting parties will be able to bring claims for compensation on behalf of their nationals or residents.

As noted above, the revised liability regime under the Order will only come into full force and effect in the UK when both of the 2004 Protocols come into effect. The Council Decision requires EU member state signatories to the 2004 Protocols to ratify them simultaneously. Therefore:

- whilst the UK is still a member state of the EU, the provisions of the 2016 Order will automatically become fully effective on ratification of the 2004 Protocols;

- after the UK leaves the EU, the UK may no longer be bound by the Council Decision (in the absence of any agreements made to the contrary as part of the Brexit negotiations). The coming into effect of the 2016 Order will thus depend on all of the EU member state signatories and the UK ratifying the 2004 Protocols. This is of particular relevance to the Brussels Convention given ratification by all signatories is required in order for the relevant protocol to become effective.

A handful of procedural provisions in the Order are already in force to enable the UK Government to take the necessary preparatory steps to ensure that operators are able to comply with the revised liability regime immediately following ratification.

### **Insurability of the increased liabilities**

As noted above, operators are required to maintain sufficient insurance or other financial security to ensure that they are in a position to meet their liabilities in the event of a nuclear incident. Prior to making the Order, the UK Government carried out an extensive consultation process which identified that the commercial insurance market was likely to be unable, at least in the short-term, to provide coverage for:

- personal injury claims beyond the existing 10 year limitation period; and
- claims in relation to damage caused by authorised discharges (i.e. permitted discharges or disposals of radioactive substances which are not considered to be an unforeseen event).<sup>4</sup>

The potential short-term 'uninsurability' of these two heads of liability would mean that the UK Government could not fully implement the 2004 Protocols or ensure that the increased liabilities will be fully covered by operators of nuclear installations. In the absence of commercial insurance market coverage, the UK Government has therefore confirmed that it would intervene and "*subject to any EU or UK legal requirements such as state aid, consider arrangements to fill any gap in cover, but on commercial terms*".<sup>5</sup> Accordingly, the Order includes powers for the Secretary of State to make arrangements to enable operators to put in place insurance and other financial cover (such as the provision of insurance, reinsurance, guarantees or indemnities) where coverage cannot be provided by the commercial insurance market.

Although no formal arrangements have yet been put in place pursuant to that power, the UK Government has announced that it intends to offer a reinsurance product at a commercial premium, and has been in discussions with Nuclear Risk Insurers (the UK nuclear insurance pool) and the European Commission over the structure and nature of such product. We understand that further details about the reinsurance product will be released ahead of the expected ratification of the 2004 Protocols by the UK in early 2018. As commercial insurers are typically averse to 'long-tail' liabilities, there is a risk

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<sup>4</sup> *Report to the Department of Energy and Climate Change on the commercial insurability of the increased liabilities following implementation of the Paris and Brussels Conventions in the UK*, INDECS Consulting Ltd, October 2011 and *Report to the Department of Energy and Climate Change on structure, and pricing of suggested solutions to gaps arising from Paris and Brussels implementation*, INDECS Consulting Ltd, November 2011.

<sup>5</sup> *Explanatory Memorandum to the Nuclear Installations (Liability for Damage) Order 2010*, 2016 No.562, p.9

that the UK Government will need to retain this commitment, if no insurer steps in to provide replacement cover at the end of the initial period of Government commitment.

This issue is not unique to the UK, and other contracting states will also be grappling with whether and in what form state intervention may be appropriate. We expect that contracting parties will be closely monitoring progress in this area and we may see insurance products emerging to address this issue.

### **Implications of the Order for the UK nuclear industry**

While the commercial insurance market is developing new products to cover the increased liabilities, the effect on insurance premiums is still unknown. Given the highest liability cap has increased from £140 million (about €160 million) to €1,200 million (a 650% increase), the revised liability regime will inevitably make an operator's insurance obligations more onerous and premiums more expensive which will ultimately be reflected in pricing.

Contractors and service providers generally rely on operator indemnities to avoid liability in the event of a nuclear incident. Other industries with similar approaches to significant potential liabilities, such as the offshore oil and gas industry, have made tentative steps in moving towards making contractors and service providers liable for a first tier of losses caused by the contractor's negligence or wilful misconduct. It will be interesting to see whether, in light of the increased liabilities, nuclear operators look to do similar. The argument for such an approach is that the prudent owner of a nuclear installation would want to ensure its contractors are aligned to avoid any risks arising. Against this, it can be argued that it is not economically efficient to ask the supply chain to take on such liabilities. In addition, contractors and service providers may also look to review their current indemnities to ensure that they are adequate to meet the increased liabilities under the Order.

The expansion of permitted claimants under the Order is particularly significant given that claimants from non-contracting states (such as Ireland) are now entitled to seek compensation in the event of a nuclear incident in the UK. As non-contracting states are not subject to the 'channelling' principle and liability caps under the Conventions, there is a risk that non-contracting states and individual persons/entities suffering loss or damage could also or alternatively bring claims in their own courts for losses that exceed the liability caps and/or avoid the 'channelling' principle by claiming directly against the responsible contractors rather than the nuclear operator. Where claims are lodged in the jurisdiction of non-contracting states, those Courts may arguably be more influenced by local, possibly negative attitudes to nuclear energy.

Finally, it is important to remember that this is not just a 'new build' issue. Lenders, operators and commercial insurers involved with existing installations will need to review their portfolios to understand the potential risks to which they may be exposed as a result of the revised liability regime.

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