

## The possibility of European Community legislation on third party liability for nuclear damage

In the two previous editions of our Nuclear Law Briefing we reported on the efforts of European Institutions focused on the possible harmonisation of the rules on third party liability for nuclear damage within the European Community including through a Euratom Directive.

Burges Salmon is sponsoring a conference on 17 and 18 June organised by the Brussels Nuclear Law Association on behalf of the European Commission which will consider the prospects of a civil nuclear liability regime in the framework of the Community.

### LEGAL REPORT

The "legal study" commissioned by the European Commission in December 2007 was finally published in December 2009 as a Final (Legal) Report entitled "*Legal Study for the Accession of Euratom to the Paris Convention on Third Party Liability in the Field of Nuclear Energy*" (TREN/CC/01-2005).

1. To-date, no distinct and comprehensive European Community (Euratom) legal framework dealing with third party liability for nuclear damage has been established. Rather, such liability is addressed by a number of multilateral treaties comprising the current special international nuclear liability regime which itself comprises the *Paris and Vienna regimes*.
2. Prior to the 2004 and 2008 enlargements, European Institutions particularly the European Commission on occasion observed that to its general satisfaction, nuclear liability was reconciled under the treaties of the *Paris regime*. The introduction of new Central and Eastern European joiners all (with the exception of Slovenia) party to the treaties of the *Vienna regime*, however, highlighted the disparity of nuclear liability rules with the EU.
3. The recent Final Report is a response to the perceived lack of harmonisation of nuclear third party liability rules between the 27 EU Member

States (MSs) particularly following the 2004 enlargement (of Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) and the 2008 enlargement (of Bulgaria and Romania).

4. Within the Community partly, due to differences in the minimum liability amounts, the availability of supplementary funds, and time limits to submit a claim, potential victims have no guarantee of the same levels of compensation. Financial compensation is lower for victims in Vienna Convention states. Also, industry is exposed to different obligations such as operators with differing liability amounts and insurance requirements. Further, different types of damage are potentially not covered in different Member States.
5. Various Community legislative powers in the field of nuclear liability have been considered by commentators including (restrictive and extensive) interpretations of Article 98 of the Euratom Treaty and are also highlighted in the Final Report. However, whether the Community has sufficient competency to legislate in the field of nuclear third party liability still needs to be fully identified and analysed. It is possible that a ruling by the European Court of Justice may eventually be needed

### CONCLUSION

- The Final Report is a recent first attempt to chart a course which may lead to EU harmonisation efforts such as a Nuclear Insurance Directive.
- There is a risk that a wide-ranging and open investigation of possible Community legislative proposals may cause uncertainty, further hampering and undermining the ongoing process of ratification of the 2004 Paris Convention (PC) and 2004 Brussels Supplementary Convention (BSC). At the same time, it is feasible that the prospect of such action may help to hasten the process.
- However, the Commission clearly needs to demonstrate the legal basis to those stakeholders that question the Community's proposed powers and

**Disclaimer:** This briefing is not intended to be a complete coverage of the law in this area. Legal advice should always be taken in any particular case.

Burges Salmon LLP Narrow Quay House Narrow Quay Bristol BS1 4AH  
tel: +44 (0) 117 939 2000 fax: +44 (0) 117 902 4400

Chancery Exchange 10 Furnival Street London EC4A 1AB  
tel: +44 (0) 20 7685 1200 fax: +44 (0) 20 7685 1266

www.burges-salmon.com

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A list of the members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH



in respect of the areas for which it may be considered as having sufficient competence.

- The advantages and disadvantages of harmonizing the existing nuclear liability frameworks by means of a Directive (and also potentially addressing other nuclear liability matters) still need to be thoroughly analysed. It is possible that in the absence of sufficient competence or political will, soft law measures such as a Commission Recommendation could be considered but the potential practical effects also need to be considered.
- The much long-awaited entry into force of the 2004 PC and BSC alone will unlikely satisfy the concerns of the Commission particularly in view of its perspectives on ensuring the highest level of protection of potential victims and its past asserted identified aims in nuclear safety, waste, decommissioning and security. In fact, entry into force will further magnify the lack of nuclear liability harmonisation.
- It is also important that any possible "European solution" does not impair relations towards other states. Therefore, stakeholders need to fully explore the options including whether further development of nuclear liability can be realised within the framework of existing treaties.
- The potential role of the Joint Protocol therefore need to be considered. As does, the CSC (Convention on Supplementary Compensation) for Nuclear Damage, which (being the only instrument that lays the foundations for a Global nuclear liability regime) could also be a solution to address the lack of harmonisation within the EU.
- Finally, future discussions need to involve key stakeholders including: governments of the 27 EU MSs and relevant non-EU MSs such as the US, the Russian Federation and Japan; European Institutions such as the EESC and national, European and worldwide nuclear industry including NIA, Foratom, WNA and WANO; organisations such as the IAEA, OECD/NEA; and the civil society.

For now, specific and credible legislative proposals for European Community legislation on nuclear third party liability for nuclear damage remain on the horizon. The Final Report can be found at:

[http://ec.europa.eu/energy/nuclear/studies/doc/2009\\_12\\_accession\\_euratom.pdf](http://ec.europa.eu/energy/nuclear/studies/doc/2009_12_accession_euratom.pdf)

For further information, please **contact Ian Salter**, Head of Nuclear, on 0117 939 2225 or email him at [ian.salter@burges-salmon.com](mailto:ian.salter@burges-salmon.com)

### Anthony Wetherall returns to the International Atomic Energy Agency

Anthony Wetherall recently left Burges Salmon to rejoin the Office of Legal Affairs of the International Atomic Energy Agency (IAEA). Since leaving the IAEA 18 months ago to join our nuclear law team Anthony has been an active member advising our clients on a wide range of international and national nuclear law matters covering new-build, decommissioning and continuing operations. He also recently completed a successful secondment in the Legal Office of the UK Nuclear Decommissioning Authority and has been involved in a number of industry activities including acting as the Chair of the Task Force on Nuclear Liability of the World Nuclear Association. Anthony also presented at a number of industry events, most recently to delegates attending the Nuclear Industry Association's Nuclear New Build 2010 showcase conference in London.

Anthony's new role in the IAEA focuses on nuclear security, safeguards and nuclear non-proliferation, in addition to radiation protection, nuclear safety and liability. He will be responsible for implementing the IAEA's growing legislative assistance programme to its Member States, managing the Office's nuclear security projects and participating in the numerous missions of the International Team of (legal, policy and technical) Experts (ITE), as well as participating in other IAEA safety and safeguards missions. A key activity being to advise national policy makers, legislative drafters and diplomats on the implementation of various international legal instruments relevant to enhancing protection against nuclear terrorism, including, the CPPNM, the Nuclear Terrorism Convention and relevant resolutions of the UN Security Council. Finally, he will help IAEA Member States in establishing and maintaining national nuclear legislative and regulatory frameworks.

Anthony made a positive contribution to the Burges Salmon team and we wish him well in his new role. He can be contacted at:

Anthony Wetherall  
Office of Legal Affairs  
Offices reporting to the Director General  
IAEA, Vienna

tel +43 1 2600 21511  
email: [a.wetherall@iaea.org](mailto:a.wetherall@iaea.org)



## Environmental Permitting Regulations 2010 - [SI 675]

The Radioactive Substances Act 1993 (RSA) was replaced on 6th April 2010 by the coming into force of the Environmental Permitting Regulations 2010 (EPR). The effect of this legislative change was to bring radioactive substance regulation within the Environmental Permitting regime. The Environmental Permitting regime is one of DEFRA's 'better regulation' initiatives designed to improve regulatory activities and cut unnecessary red tape, whilst continuing to provide the necessary protection for human health and the environment.

### What are the Changes?

As the vast majority of the provisions from the RSA are included in Schedule 23 of the EPR, the extent of the changes are not significant. Indeed, the EPR does not change the legal requirements, Government Policy or the technical requirements in relation to the regulation of radioactive substances on nuclear sites. It should also be noted that these changes only relate to England and Wales.

Despite this, there are some changes introduced by the EPR which are worthy of note to radioactive substance users - these are summarised below.

1. In effect, three types of permit will be issued:
  - Standard permit, as a replacement for the fixed condition registration.
  - Security permit, for sealed source use and waste management.
  - Publicly available permit, for open source use and waste management.
2. Permits may be transferred between operators, for instance if one company takes over another.
3. If you cease to use radioactive substances you will need to formally surrender a permit by making an application to the Environment Agency. The requirement for conducting a clearance survey will remain, as under the RSA93.
4. New application forms and a range of Environment Agency guidance notes have been introduced, which seek to explain how the new regime works. Furthermore, the Environment Agency has changed the way they charge for applications and for annual subsistence.

5. The requirement for holders of a RSA permit related to sealed sources to post that licence on the premises has been abolished. In fact, users are encouraged not to do so for security reasons.

6. Under the EPR, existing registrations and authorisations automatically became 'environmental permits'. As a result, there is no requirement for current licence holders to convert their licence in order for it to be valid.

### Nuclear New Build

EDF is due to submit its planning application for a new nuclear plant (NPP) at Hinckley Point in North Somerset to the Infrastructure Planning Commission later this year. The proposed site is already a hive of activity with investigative works (both offshore and onshore) already well underway and major 'preliminary works' currently being tendered and planned to be carried out ahead of formal planning permission being granted.

This article considers the characteristics of the procurement strategy being adopted by EDF and those of the other procurement strategies being discussed and considered by the industry and by the other developers planning to develop NPPs in the UK. Given that the capital cost of an NPP is such a critical factor in the business case for a NPP compared with conventional power plants, choosing the right strategy and ensuring successful delivery is key to success.

There are two main strategies under consideration: the EPC ("engineer procure and construct") or 'Turnkey' model, and the A/E ("Architect Engineer") or EPCM ("engineer procure construct and manage") model, referred to in the remainder of this article as "Turnkey" and "A/E" respectively.

The A/E model has been adopted by EDF with EDF performing the A/E role itself with support from Amec, specialists in managing the delivery of complex infrastructure projects.

The A/E develops the technical requirements for the plant, divides the works and services up into individual packages and co-ordinates and manages the various members of the supply chain to meet the quality, budgetary and time constraints of the project. The contracts for the various works packages are entered into by the developer rather than the A/E, however.

Through its extensive nuclear new build programme in France, EDF has developed a highly sophisticated and

experienced in-house team which allows it to assume the pivotal A/E role itself. The attraction of this model is the tremendous flexibility it affords the developer as to how the project is delivered (particularly important when it comes to NPPs, where the safety and quality standards are sacrosanct), and the avoidance of a substantial risk premium that an EPC/Turnkey contractor would charge to take on whole-project delivery risk. However, this strategy does have a number of potential disadvantages.

A failure to properly co-ordinate the various package contractors or ensure effective communication between them could lead to significant delays, cost overruns and possibly performance issues. With such a disparate group of suppliers there is also a real risk of 'finger pointing' if things go wrong as well as major difficulties in disentangling and attributing the causes of delay and cost overruns. It is therefore vital to try and develop a collaborative ethos within the members of the supply chain to avoid such self-interested behaviour, although that can be extremely difficult to achieve in practice.

This strategy also makes it very difficult to obtain meaningful whole-plant performance warranties, as each provider will only be warranting its own part, which can be a real impediment where project finance is being considered. Finally, where the A/E role is performed by an external provider, such provider will typically only warrant that it will perform its role "exercising reasonable skill and care" to meet the project requirements relating to quality, time and cost rather than provide an absolute warranty like an EPC/Turnkey contractor.

Although the precise risk allocation between developer and contractor will vary from project to project, in broad terms, a Turnkey strategy seeks to transfer the risk of delivering the NPP to one provider who itself assembles and manages the supply chain with a view to achieving the developer's performance requirements within time and budget. This level of risk transfer is particularly attractive to providers of project finance who like to see a third party holding the key project delivery risks rather than the borrower.

Other advantages to the developer include: the availability of whole-plant technical warranties (e.g. availability guarantees and power output guarantees); the transfer of the risk of cost and time overruns; and the reduced level of input required from the developer, although the developer will still need to develop sufficient internal resource to meet the 'intelligent customer' requirement which is a standard condition of all nuclear site licences.

However, once again there are disadvantages to consider. The 'price' for transferring such a high level of risk will be a hefty risk premium as well as a significantly reduced level of control over the way the project requirements are achieved. The transfer of project delivery risk is not a guarantee that the project will be delivered on time. The Olkiluoto 3 project in Finland was procured on a turnkey basis, but is currently running three years late.

It will be interesting to see which strategy the other developers select. Horizon Nuclear Power (the joint venture between RWE npower and E.ON UK) is next out of the blocks. Much will depend on their attitude to risk, their funding strategy and the level of control they wish to retain.

For further information, please **contact Steven James**, Senior Associate, on 0117 307 6947 or email him at [steven.james@burges-salmon.com](mailto:steven.james@burges-salmon.com)

## News

### Burges Salmon advises on Springfields

Burges Salmon recently announced the successful conclusion of a nationally significant agreement between the Nuclear Decommissioning Authority and Westinghouse Electric Company. The primary purpose of the agreement, which had been in the making for over a year, was the acquisition of **Springfields Fuels Limited** and its business at the Springfields site by Westinghouse. This will enable Westinghouse and Springfields to invest in the site and grow the fuel manufacturing business – a cornerstone of the new nuclear renaissance, and in doing so not only secure the future of the nuclear facility, but preserve hundreds of jobs and create real long-term employment opportunities

A formal signing ceremony marking the occasion took place on 29 March at Springfields, involving the NDA, Westinghouse, and its parent company Toshiba Corporation Power Systems Company.

For further information, please **contact John Houlden**, on 0117 902 2796 or email him at [john.houlden@burges-salmon.com](mailto:john.houlden@burges-salmon.com)

### Burges Salmon advises NDA on Dounreay PBO Competition

In December, following the NDA's successful appointment of PBOs for its Sellafield and LLWR sites, the NDA announced its strategy for appointing further PBOs to the remaining licensed sites on its nuclear estate. Burges Salmon has been appointed by the NDA to advise on the first of these competitions, to select a

PBO for Dounreay Site Restoration Limited, the SLC for the former UKAEA site at Dounreay near Thurso in the far north of Scotland. The Dounreay site decommissioning program is expected to cost an estimated £2.5 billion over the next 20 years.

**Burges Salmon retained on NDA Legal Panel following tender exercise**

The Nuclear Decommissioning Authority (NDA) has unveiled its new-look legal panel, with the number of external firms the organisation uses cut back from nine to five. Burges Salmon has retained its place on the panel.

For further information, please **contact Ian Salter**, Head of Nuclear, on 0117 939 2225 or email him at [ian.salter@burges-salmon.com](mailto:ian.salter@burges-salmon.com)

**Events**

**Young Generation Network (YGN) evening seminar on the key issues of Planning**

Burges Salmon recently hosted a YGN evening seminar of three short presentations followed by an interactive panel discussion. The event was attended by around 50 guests from both the YGN and NIA, and from the sector generally. The organisers were delighted that Tim Proudler, the Planning and Consents Manager at Horizon Nuclear Power Limited, was able to attend and share his experiences of major infrastructure planning projects, and join the panel for the question and answer session.

Bristol is situated in the heart of nuclear new build territory, with RWE/EON new build joint venture, Horizon, based in Gloucester, EdF at Hinkley Point promising the first new nuclear power plant for a generation, and the Infrastructure Planning Commission (IPC) national headquarters being a close neighbour of the host, it seemed an ideal location to address the topical and much-talked about planning and consenting issues at the outset of the nuclear new build cycle. As such the themes for the evening were the planning regime under the IPC and the key considerations around site licences and the licensing process, the early hurdles in the new build programme.

The evening was opened and chaired by Tristram Denton of the YGN and NIA. The first presentation was given by Burges Salmon Head of Nuclear, Ian Salter. Ian presented a detailed overview analysis of the nuclear regulatory regime. He was followed by Burges Salmon YGN member Suzanne Leedham, a planning lawyer,

who discussed the IPC process and the differences with the previous regime. Suzanne discussed her role and the experience gained with the several applications that the Burges Salmon Planning team has made to the IPC on large infrastructure/energy projects.

Tim Proudler then discussed the issues facing Horizon at Wylfa and Oldbury.

If you would like any further information on the new planning regime or have any planning related enquiries, please **contact Patrick Robinson**, Head of Planning, on 0117 902 2740 or [patrick.robinson@burges-salmon.com](mailto:patrick.robinson@burges-salmon.com)

**Upcoming events ....**

Ian Salter, has been invited to present at two of the nuclear sector's key national conferences this summer.

The first is in London, on **24/25 June** – The Lawyer Conference, 'Nuclear Power Industry – Maximising Global Business Opportunities for the Legal Sector' – where Ian will be addressing 'Shaping Domestic and International Legislative and Regulatory Frameworks: Nuclear New Build'.

The second is in Manchester, on **30 June/1 July** – C5 2<sup>nd</sup> Annual Nuclear Decommissioning and Legacy Waste – 'Strategies for Overcoming the Legal and Regulatory Challenges Associated with the Clean-up of the UK's Nuclear Legacy' – here Ian will be talking about 'Legal Aspects Relating to the Commercial Development of Decommissioned 'Brown' Land on or Adjacent to Nuclear Sites'.

We are also pleased to announce our sponsorship of the joint Brussels Nuclear Law Association/European Convention (DG Energy) workshop hosted by the European Economic and Social Committee in Brussels on 17/18 June – Prospects for a Civil Nuclear Liability Regime in the Framework of The European Union.

**For further information, please contact ;**

**Ian Salter, Head of Nuclear**

(0117) 939 2225 [ian.salter@burges-salmon.com](mailto:ian.salter@burges-salmon.com)

**Patrick Robinson, Head of Planning**

(0117) 902 2740 [patrick.robinson@burges-salmon.com](mailto:patrick.robinson@burges-salmon.com)

**John Houlden, Partner**

(0117) 902 2796 [john.houlden@burges-salmon.com](mailto:john.houlden@burges-salmon.com)

**Gareth Davies, Barrister**

(0117) 307 6920 [gareth.davies@burges-salmon.com](mailto:gareth.davies@burges-salmon.com)

**Steven James, Senior Associate**

(0117) 307 6947 [steven.james@burges-salmon.com](mailto:steven.james@burges-salmon.com)