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Major developments in UK nuclear liability legislation



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SUBSTANTIAL CHANGES TO CURRENT legislation governing nuclear liability in the UK are afoot, following the recent release of the government's public consultation 'Implementation of changes to the Paris and Brussels Conventions on nuclear third party liability' in January (the consultation). The proposed amendments are significant and will impact throughout the nuclear sector, from those involved in decommissioning and the transport of nuclear material, through to new build.

'Nuclear liability' – the responsibility of nuclear installation operators to third parties in the event of a nuclear incident – is governed in the UK by the Nuclear Installations Act (NIA) 1965, implementing the international Paris Convention (Convention on Third Party Liability in the Field of Nuclear Energy of 1960) and Brussels Convention (Brussels Supplementary Convention on Nuclear Third Party Liability of 1963), to which the UK is party. NIA 1965 also contains the licensing regime for nuclear installations.

On 12 February 2004, parties to the Paris and Brussels Conventions signed protocols to amend them. For the amendments to come into force, they require ratification into each party's national law. Those signatories who are also member states of the EU have agreed to jointly ratify the amendments at the same time, potentially affecting the timing of the UK's ratification of the amendments.

The consultation sets out in detail how the government proposes to implement the amendments into UK law, which will be achieved by amending NIA 1965 through secondary legislation (by virtue of s76 of the Energy Act 2010). The Draft Order: The Nuclear Installations (Liability for Damage) Order 2011 (the Order) containing these amendments forms part of the consultation and will be required to be approved by both Houses of Parliament before it can be passed as legislation.

PARIS CONVENTION

The Organisation for Economic Co-operation and Development's Paris Convention creates a framework to compensate the public for harm resulting from a nuclear incident. Each contracting party to the Paris Convention is bound to adopt all the substantive and

procedural rules to ensure compliance in its domestic legal system, with some discretion of implementation provided. It is based on the following core principles:

- **Exclusive operator liability and strict liability**
The nuclear operator is exclusively liable for injury or property damage resulting from accidents occurring at its installation, or during the transport of nuclear substances to and from that installation. The liability is channelled to the operator regardless of any fault or negligence on its part for the damage caused.
- **Minimum amounts**
The liability of a UK nuclear site operator is currently limited at £140m. Where the value of claims rises above this amount, they will be met by the government and contracting states to the Conventions in accordance with the Brussels Convention tiered system (see p22).
- **Time limited**
The right to compensation for injury or property damage under the Paris Convention is extinguished if the claimant does not bring its claim within ten years of the date of the nuclear incident. The Convention permits national legislation to establish a longer period and, under NIA 1965, a claimant can bring an action within 30 years of the date of the nuclear incident. However, any claims brought beyond ten years, but before 30 years, are subject to government discretion.
- **Mandatory financial coverage**
The operator is required to have financial security in place to ensure that sufficient funds are always available to meet its liability. This is currently covered in the UK by insurance.
- **Channelling of jurisdiction**
The general principle is that the courts of the state where the nuclear incident occurred are awarded jurisdiction to deal with compensation claims arising from the incident.
- **Geographical scope**
Compensation claims can be made against a Paris Convention operator in

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respect of injury or damage from the nuclear incident incurred in another Paris Convention country only.

BRUSSELS CONVENTION

The Brussels Convention is supplementary to the Paris Convention and provides additional funds to those available under the Paris Convention where the maximum operator liability amount (the 1st tier) has been exceeded. The Convention currently provides compensation of up to 300 million Special Drawing Rights (SDRs, approximately £300m) in three tiers:

- 1st tier is provided by the liable operator up to its liability limit;
- 2nd tier is the difference between the 1st tier and 175 million SDRs provided by public funds from the operator’s state; and
- 3rd tier is a further 125 million SDRs contributed to by all contracting states to the Convention.

The same core principles of the Paris Convention also apply to the Brussels Supplementary Convention.

PROPOSED AMENDMENTS

There are several substantial changes to be made to NIA 1965 to implement the amended Conventions. The general approach of the government is to adopt the wording and definitions of the Conventions as much as possible to avoid under or over implementation, and to ensure consistency with other Convention countries. The main changes include the following.

Heads of damage

The new types of damage for which site operators can be liable are some of the most significant changes. Section 7 of NIA 1965 currently places a duty on the operator of the licensed nuclear site:

‘To secure that no such occurrence involving nuclear matter causes injury to any person or damage to any property of any person other than the licensee, arising out of or resulting from the radioactive properties... of that nuclear matter.’

In addition to the existing heads of damage:

‘Another major amendment to the combined Paris and Brussels regime is the change in liability limits, and subsequently compensation, for damage arising from a nuclear incident.’

- a) loss of life or personal injury; and
 - b) loss of or damage to property;
- the changes now also include:
- c) economic loss arising from loss or damage referred to in a) and b);
 - d) the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken;
 - e) loss of income deriving from a direct economic interest in any use or enjoyment of the environment, incurred as a result of significant impairment of that environment; and
 - f) the costs of preventive measures, and further loss or damage caused by such measures.

To implement these changes, the consultation notes the following:

- In relation to implementing c), the consultation emphasises that this provides compensation for consequential economic loss rather than pure economic loss, only to be made available where not already included in compensation claimed for personal injury and damage to property. The consultation considers that this head of damage is sufficiently covered by the existing provisions in s7 of NIA 1965 and is well established under case law, which imposes liability for the foreseeable loss caused by the breach, provided that it is not too remote.¹
- To implement the new categories d) and e), the government proposes to amend s7 of NIA 1965 to place these on the same level as the existing heads

of damage. Therefore, a duty will be placed on the operator to ensure that such costs or losses do not arise and compensation payable for such costs or losses will be available under a new s11.

- In interpreting the application of d), the government considers that this aims to compensate expense incurred in reinstating the environment in the public interest, as opposed to protecting a private interest (already covered by the current duty not to cause property damage). This will therefore be extended to those authorities who have powers or duties to take reinstatement measures, ie under the Radioactive Contaminated Land Regime, recognising that this will differ according to the various legislative regimes and jurisdictions in the UK.
- The consultation proposes to treat impairment of the environment as significant, where it is ‘of such a degree that it would be eligible for compensation as property damage’. Rather than defining this in the legislation, case law stating that to qualify as property damage under NIA 1965 there needs to be ‘some alteration in the physical characteristics of the property which render it less useful or valuable’, will be relied on.² Other relevant factors including radioactivity levels, effect on human health and geographical extent of the impact will also be taken into account.
- Furthermore, the costs of reinstatement will only be awarded if they are

NOTES

- 1) For relevant case law see *Blue Circle Industries plc v Ministry of Defence* [1998] EWCA Civ 945.
- 2) As above.

reasonable, which has been interpreted as ‘appropriate and proportionate’ in the circumstances. The new Order also specifies that, before an operator is required to pay compensation, the measures of reinstatement must be approved by the Secretary of State.

- Damage e) – loss of income deriving from a direct economic interest in any use or enjoyment of the environment – is distinguished from the economic loss under c), relating to personal injury or property damage. The consultation provides the example of losses suffered by fishermen as a result of a nuclear incident at sea where they do not own the fish or the sea. It is emphasised that this is limited in scope by the reference to ‘direct’ economic loss, meaning a supplier of goods to the fishermen that suffered a loss of profits due to the fishermen’s direct loss would be unable to claim.
- ‘Preventative measures’ under the convention are defined as:

‘Any reasonable measures taken by any person after a nuclear incident or an event creating a grave and imminent threat of nuclear damage has occurred, to prevent or minimise nuclear damage... subject to any approval of the competent authorities required by the law of the state where the measures were taken.’

The head of damage f) has therefore been inserted into the new compensation section in the draft Order, enabling claims to be made for such measures. In addition, the government intends to provide that claims for consequential losses may be brought directly against the operator, rather than the person who

took the preventative measures. These will, however, be limited, with the order specifying that claims may only be made for personal injury or property damage caused by preventative measures reasonably taken after a breach of duty. As the range of preventative measures that can be taken where there is a nuclear incident, or a grave or imminent threat of one, are specific, the government does not propose to require the approval of such preventative measures as provided for in the definition of the convention.

- The consultation also notes that there is currently no system of prioritisation of one category of damage over another, meaning that claims will be met on a first-come, first-served basis.

Liability amounts

Another major amendment to the combined Paris and Brussels regime is the change in liability limits, and subsequently in compensation, for damage arising from a nuclear incident. This is set out in the table below.

The consultation proposes that operator liability in the UK will be increased from the current £140m per incident to €1,200m for standard installations, phased in over several years. Lower levels will be set for low-risk installations and transportation of low-risk material.

By amending the operator liability amount to €1,200m (above the minimum amount of €700m specified by the amended Paris Convention), the UK operator will be liable for both tier 1 and tier 2. The consultation states that this is because the government considers that public funds should not be used to fund the 2nd tier of compensation.

Jurisdiction

Currently, only claimants in a Paris Convention state can claim for damage arising from a nuclear incident. However, the amendments now render the operator liable to non-Paris Convention claimants if that state:

- i) is party to the Vienna Convention and the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention;
- ii) has no nuclear installations in its territory at the time of the nuclear incident; or
- iii) has, in force at the time of the nuclear incident, national nuclear liability legislation that affords equivalent reciprocal benefits and is based on principles identical to those contained in the Paris Convention.

The provisions on jurisdiction are updated to take into account the exclusive economic zones of the signatories, with the government noting its view that the Paris Convention will no longer cover nuclear damage suffered on the high seas. However, note that the jurisdiction of the Brussels Convention has not been extended and the additional funds discussed above cannot be used to meet claims in countries that are not party to the Brussels Convention.

Financial security

The operator will still be required to hold and maintain financial security up to the prescribed limit of liability. While insurance is available to cover most of the new categories of damage, the government acknowledges that gaps will now exist. For example, it is understood that insurance is not available to cover the costs of measures of reinstatement of the impaired

LIABILITY AMOUNTS		
Tier number	Current Paris and Brussels Conventions	Amendments
Tier 3: signatories’ contribution (Brussels)	Special drawing rights (SDR) 125 million	€300m (~£273m)
Tier 2: government (Brussels)	SDR 25 million	€500m (~£455m)
Tier 1: operator liability (Paris)	SDR 150 million (£140m UK)	€700m (~£637m)
Total	SDR 300 million	€1,500m (~£1,365m)

environment outside of the UK and personal injury beyond ten years, as the market is wary of covering such long-term liabilities. The operator will therefore be expected to identify alternative financial security for such gaps, although the consultation recognises that the ability to do so will affect the implementation of the amendments. The availability of insurance has been, and continues to be, the topic of much discussion in the nuclear sector, and potential options for consideration are detailed in the consultation. For example, if a solution cannot be found, the government may consider stepping in as a last resort to fill any gap in the provision of commercial insurance in return for a charge that reflected its assessment of the probability of a major incident occurring and its potential magnitude. To facilitate this, it is proposed to insert a new provision conferring a power on the Secretary of State to make arrangements for the purpose of enabling licensees to comply with this obligation.

‘Nuclear installation’

The new provisions will now also apply to nuclear installations that are in the process of being decommissioned and to all installations used for the disposal of nuclear substances. However, certain installations post-closure, which no longer pose a significant risk, can be excluded. The consultation states that the government will seek an exemption for low-level waste repositories.

Limitation period

NIA 1965 currently goes beyond the ten year (minimum) period set by the Paris Convention, permitting claims to be brought from ten years up to 30 years, subject to government discretion. The consultation now proposes to realign more closely to the amended Paris Convention by setting a general limitation period for all claims, except for personal injury of ten years from the date of the incident. For personal

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injury claims, the limitation period will be extended to 30 years.

Transport

With respect to nuclear liability in transport, current Paris Convention operators can agree at which point of the transport liability transfers from one operator to another. The amendments will now only permit liability transfer from one operator to another, where the receiving operator has a direct economic interest in the material transported.

The government considers that direct economic interest would apply where the operator is being paid to process or treat the substances in some way, but not where it is being paid simply to transport or store the substances.

CONCLUSION AND NEXT STEPS

The proposed amendments affect all areas of the nuclear sector in the UK. Of particular interest, in respect of current developments in the nuclear sector, is non-UK contractors working in both decommissioning and new build, especially as recent years have witnessed the request for nuclear indemnities from such foreign contractors before entering the UK nuclear market. There has been concern that the current channelling of operator liability limited only to personal injury and property damage could potentially lead to further unlimited civil claims, ie for environmental damage arising from a nuclear incident being made outside the remit of NIA 1965. Such claims

would be unlimited, could be brought against several potential defendants, including the contractors working on the sites, and would not necessarily be protected by insurance as under NIA 1965.

Furthermore, the current arrangements do not compensate victims from non-Paris Convention states, such as the US. The risk of these victims issuing claims back in the US against the entities with the ‘deepest pockets’ was perceived by contractors as being high enough to warrant requesting indemnities to protect against such risk. As the proposed amendments will increase the claims channelled to the site operators in NIA 1965, this may go some way to reduce the risk of claims brought outside NIA 1965, providing more certainty and protection for contractors, and further improving the UK’s access to the international nuclear skills base.

The consultation will end on 28 April 2011, with the aim of placing the Order before Parliament in the summer. Following the Parliamentary debates, it is hoped that the new legislation will come into force by spring 2012. However, it is noted that this is dependent on the other EU Convention states being ready to ratify and the development of outstanding issues such as the financial security arrangements.

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