Nuclear liability regime: Major changes for the UK regime finalised - in force soon

Executive summary

The nuclear liability regime in the UK (which is based on the Paris and Brussels Conventions) provides that the operator of a nuclear installation is strictly liable for nuclear damage to third parties caused by radioactive emissions from the installation. This is regardless of whether the operator is at fault. The operator’s liability for personal injury and property damage for any one incident is capped and limited in time. Operators must have insurance or other financial security in place covering their potential liability.

The Paris and Brussels Conventions were amended by a protocol in 2004. The long-anticipated implementation of these changes to the nuclear liability regime in the UK mean that, in the event of a nuclear incident, an increased amount of compensation must be made available to a wider category of claimants, for higher amounts, in respect of a broader range of damage than is currently the case. In this briefing we highlight the main changes which include:

- **Increased cap on operator liability.** The cap on liability of an operator in the event of a nuclear incident will increase significantly – from approximately £140m to €1.2bn.
- **Wider geographical scope.** The new liability regime will broaden to include non-Paris Convention countries.
- **Limitation period extended.** The right to claim compensation will be extended from 10 years to 30 years for personal injury claims.
- **Changes to the insurance market.** With the increased limitation period, to the extent that insurance is not available from the market, the government is empowered to provide insurance itself on commercial terms.
- **New rules for nuclear substances.** The Energy Secretary has the power to set lower liability amounts for installations (and transport of nuclear substances) where, in the event of an incident, there is unlikely to be significant damage.
- **Jurisdiction, and representative actions by a foreign state.** The courts of only one country where a nuclear incident has occurred will deal with claims arising from an incident. Countries can also bring an action on behalf of persons; this will provide an alternative avenue for claiming compensation and allowing the coordination of large volumes of claims.

As this new liability regime will require many nuclear operators to have insurance in place for a much greater amount, it may be prudent for operators to begin discussing the implications of the new regime with insurance brokers and ensure supply chain contracts take account of the changes.

For suppliers to nuclear operators, it will be important to understand how the changes

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affect exposure through contracts.

As more categories of damage and a greater level of liability is now channelled to operators, and is the subject of mandatory insurance, there is less exposure to unchannelled liability.

Finally, claimants will have greater potential for recourse than under the existing regime.

Introduction

The Nuclear Installations (Liability For Damage) Order 2016 (the NIO) is the statutory instrument intended to implement the 2004 Amending Protocol to the Paris Convention on nuclear third party liability (the Paris Convention) and the Brussels Supplementary Convention (the Brussels Convention) (together, the Conventions) by amending the Nuclear Installations Act 1965 (the NIA 65). The NIO is now in final form having been made on 4 May 2016.

The changes to the Conventions upgrade the existing liability regime. This means that in the event of a nuclear incident (meaning any release of radioactive materials, or damage caused by such materials), an increased amount of compensation will be available to a wider category of claimants in respect of a broader range of damage than is currently the case.

The majority of the NIO comes into force on the day the Amending Protocol to the Conventions comes into force with respect to the United Kingdom, which is expected to be at the start of 2017 (the UK government’s target date is 1 January 2017). A European Commission decision requires simultaneous ratification of the Amending Protocol by all member state parties to the Conventions. The relevant member states currently expect to be able to ratify during 2016.

However, some procedural provisions of the NIO have been in force since 25 May 2016. This enables the UK government to take the necessary preparatory steps to give effect to the revised liability regime as soon as the Amending Protocol to the Conventions comes into force.

Main changes

The main changes to the liability regime made by the NIO are as follows:

Introduction of three new categories of compensable damage

The existing regime only applies to personal injury and property damage. The new regime introduces three new categories of damage:

- costs of measures of reinstatement of the impaired environment;
- loss of income deriving from a direct economic interest in any use or enjoyment of the environment; and
- costs of preventive measures and further loss or damage caused by such measures.

This means that there is greater scope for strict, channelled liability for operators.

For the first two of these new categories, in order for there to be a successful claim in damages, the impairment has to be of at least such a degree that it would be eligible for compensation as property damage. The Court of Appeal has held that in order to qualify as property damage under the NIA 65 there needs to be ‘some alteration in the physical characteristics of the property… which render it less useful or valuable’. Blue Circle Industries plc v Ministry of Defence [1998] 3 All ER 385.

Increase in cap on operator liability and funds available for compensation

Under the existing regime, there is a £140m cap on liability for operators for any one incident; that will rise to £1.2bn. The amount available for compensation for claimants will rise to €1.5bn with the additional €300m coming from public funds (the Conventions give countries discretion to impose a higher limit or unlimited liability). As before, operators must put in place insurance or other financial security to cover their potential liability. The following liability levels are set for operators under the Conventions:
Intermediate sites will include those for fuel fabrication, uranium enrichment and the manufacture of radioactive isotopes for non-nuclear purposes. What is categorised as ‘low risk transport’ will be based on criteria in the International Atomic Energy Agency Regulations for the Safe Transport of Radioactive Materials that are linked to the activity levels of the nuclear matter being carried. As mentioned above, certain sites for the disposal of low level radioactive waste will be designated as low risk nuclear sites. Additional regulations will be made prescribing these various sites and bringing the lower liability levels into effect.

Where a lower level of liability has been prescribed, public funds must be available to top up the level of compensation to either €700m (Paris Convention only claims) or €1.5bn. Amendments to the NIA 65 provide that claims on public funds are now brought through ordinary court proceedings. Contributions from all Brussels Convention countries will be used to top up the funds from €1.2bn to €1.5bn (but note that, as mentioned above, contracting parties are permitted to impose a higher liability level or unlimited liability which would have to be covered by their own public funds).

The UK approach (which is similar to most other contracting parties) is to cap liability to ensure that operators can put in place insurance or other financial security specifically to cover their third-party liabilities, even if a certain amount of such insurance needs to be provided commercially through the UK government.

Extension of geographical scope

At present, the regime only applies in countries which are party to the Paris Convention. This means that claimants from non-Paris countries cannot seek compensation under the regime. Equally they are not bound by the restrictions and caps so could sue non-operators or operators in the claimant’s home country courts, thereby exposing non-operators to channelled liability, and operators to liability for amounts greater than the cap.

The geographical scope of the Paris Convention will now be increased to include all ‘qualifying territories’, which is broader than the previous ‘relevant territories’. Qualifying territories includes all ‘relevant territories’ that were previously within scope, and also includes non-nuclear countries and countries that have equivalent and reciprocal liability arrangements. This means claimants can now seek compensation in the UK under the regime, although it does not bar home-country claims (although it may make them less likely, as compensation claims will be more straightforward).

One example of the practical effect of this from a UK operator’s perspective is that people suffering damage in Ireland (which is a non-nuclear and non-Paris country) because of a nuclear incident in the UK can now make a claim in the UK under the nuclear liability regime, but are still not barred from making a claim in the Irish courts outwith the regime and could, for example, still attempt to claim an amount above the cap through the Irish courts.

The same expansion of scope does not apply to the Brussels Convention, which deals with the sharing of government liability for claims above the operator cap (i.e. for amounts above €1.2bn up to €1.5bn). Claimants from non-Brussels Convention countries will not have access to this additional amount. The amended NIA 65, therefore, differentiates between claims covered by both Conventions as opposed to those just covered by the Paris Convention.

<table>
<thead>
<tr>
<th>Site</th>
<th>Liability level increase</th>
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<tbody>
<tr>
<td>power plants and other standard sites</td>
<td>increase from £140m to €700m, rising by a further €100m annually up to €1.2bn</td>
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<tr>
<td>intermediate sites</td>
<td>increase from £140m to €160m</td>
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<td>low risk nuclear sites</td>
<td>increase from £10m to €70m</td>
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<tr>
<td>low risk transport</td>
<td>increase from £10m to €80m</td>
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The geographical scope of the Paris Convention will now be increased
Limitation periods

The current Paris Convention limits the right to claim compensation to 10 years from the date of a nuclear incident. This has been extended by the Amending Protocol to 30 years for personal injury claims. For all other claims the 10 year limitation continues to apply.

“Occurrences”

The NIO resolves an outstanding uncertainty around potential new scope for liability every time nuclear matter that had been discharged on a previous occasion was disturbed and moved to a new place. It had the effect that limitation periods could be reset each time that happened and subsequent operators could end up assuming liability from previous operators. Both of these issues were of particular concern in the context of nuclear new build next to legacy sites. The NIO attempts to resolve this by clarifying that only operators who contribute to a release will be liable. A new section states: ‘if nuclear matter is in a place at a particular time as a consequence of an occurrence falling within section 7(1B) (including section 7(1B) as applied by section 7B, 8 or 9), 10(1) or 11, neither the presence of the matter in that place at that time nor any effect that the matter produces at that time is to be treated as a separate occurrence falling within any of those provisions’. This effectively reverses the broad approach taken in Magnohard Limited and Others v the United Kingdom Atomic Energy Authority and the Scottish Environmental Protection Agency 2004 SC 247, 2003 SLT 1083.9 where the court took an expansive view of the meaning of ‘occurrence’ and held that an occurrence took place every time nuclear matter that had been discharged on a previous occasion was disturbed and moved to a new place.

Cover for operators’ liabilities

The UK government is aware of difficulties for operators obtaining insurance for the 30 year period for personal injury claims, the increased liability cap, and the increased scope of the regime. Therefore, it is empowered to provide such insurance itself on commercial terms to the extent it is not available from the market. It is expected there will be a phased increase of liability for operators of power plants and other standard sites over five years to give the market time to increase its capacity for this type of insurance.

Jurisdiction

The establishment of exclusive economic zones under international law and other types of maritime zone are now taken into account when it comes to allocation of jurisdiction. It is also now specified that the courts of only one Paris Convention country where a nuclear incident has occurred should deal with claims arising from that incident. In the UK, the default court will be the High Court of England and Wales, unless it is clear that the greatest impact is not in England and so the Court of Session or the High Court of Justice in Northern Ireland should have jurisdiction.

Installations for the disposal of nuclear substances

Operators of nuclear waste disposal facilities which do not require a nuclear site licence will be included in the liability regime. Countries do have the power to set lower liability amounts for installations (and transport of nuclear substances) where, in the event of an incident, there is unlikely to be significant damage. The UK intends to introduce regulations which will prescribe sites for the disposal of low level radioactive waste that will attract a lesser liability of €70m.

Representative actions by a foreign state

The principle that ‘any State may bring an action on behalf of persons who are nationals of that State or have their domicile or residence in its territory, and who have consented thereto’ will be included. The UK government will have the equivalent power to bring representative actions in other Paris Convention countries.

Transport

A general rule will be introduced that the operator sending nuclear substances remains liable other than in certain limited circumstances. An ‘anti-avoidance’ provision will be implemented so that liability may only be transferred from one Paris country to another where the receiving operator has a ‘direct economic interest’ in the nuclear substances being carried.
Further changes

The Conventions are also implemented through a number of instruments made under the NIA 65, in particular:

- The Nuclear Installations (Prescribed Sites) Regulations 1983 (SI 1983/919) (made under section 16(1) of the 1965 Act);
- The Nuclear Installations (Insurance Certificate) Regulations 1965 (SI 1965/1823) (made under section 21(3) of the 1965 Act); and

Prior to ratification the UK government considers that it will be necessary to amend at least the first two of these sets of regulations. The UK government has stated that it intends to make the amending instruments after the NIO has been made, but it is unclear exactly when this will happen.

Changes will also need to be made to the court rules that apply in each part of the UK, to allow representative actions to be brought. The UK government has stated that the changes will be dealt with in the usual course of updating the court rules.