PARIS AND VIENNA NUCLEAR LIABILITY CONVENTIONS: CHALLENGES FOR INSURERS

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ABSTRACT

Insurers have actively contributed to the negotiations on the revision of the Vienna Convention on Civil Liability for Nuclear Damage and the Paris Convention on Third Party Liability in the Field of Nuclear Energy. In the course of these negotiations they have pointed out that some of the proposals for revision may have consequences for insurers and could prove incapable of finding insurance support.

This paper aims at explaining the revision related points, which could cause problems in respect of insurability. Furthermore, the writer takes the liberty to expand its scope to more generally include developments which have the potential to influence the availability of insurance capacity. Therefore, also the insurance implications of terrorist acts will be dealt with.

1 INTRODUCTION

The financial security to be provided to victims of an incident at a nuclear installation is the main objective of international nuclear liability conventions. As from the introduction of the Paris Convention on Third Party Liability in the Field of Nuclear Energy in 1960 and the Vienna Convention on Liability for Nuclear Damage in 1963 insurers have been prepared to provide the financial capacity needed to cover the liability under both Conventions. They did so in close co-operation with the competent national and international authorities, which has resulted in the insurability of as much of the nuclear liability under the Conventions as possible. At other conferences of the Croatian Nuclear Society I have explained why and how insurers have organised themselves in an international nuclear insurance pooling mechanism, which aims at amassing on a worldwide basis the highest possible amounts required for insuring the particularly sensitive nuclear liability risk. The purpose of this presentation is to distinguish the limits of insurability as insurers have done in the course of the revision negotiations, both regarding the Vienna and the Paris Convention, which were concluded in 1997 and in early 2004 respectively.

2 AVAILABILITY OF INDEMNITY LIMITS

The Conventions comprise an obligation to cover nuclear liability up to a minimum amount. Although in many states the sum actually insured exceeds the Convention amounts, the various legal, economic and market conditions in Convention States where nuclear installations are insured have resulted in different insurance limits per country. At the moment, the highest insurance limit for nuclear installations is the one in my country of residence, Switzerland. Since 2001 that limit equals CHF 1 billion (ca. € 634 million). It is higher than the maximum insurance limit in the Protocol to amend the Vienna Convention of SDR 300 million (ca. CHF 660 million) and just below the maximum amount of € 700 million (ca. CHF 1.1 billion), which has been agreed upon in the negotiations on the revision of the Paris Convention. In the course of those negotiations insurers have explained that this amount can be considered as a realistic estimate of the sum, which could be made available from the nuclear insurance pools on the basis of a lifetime aggregate limit. However, they have added that such a limit might not be available universally, even within the Paris Convention system, as capacity will vary between countries to reflect the respective size and strength of insurance markets and the available amount of reinsurance. Apart from the above and, of course, the

assumption of adequate premium rates, capacity availability also depends on a number of other conditions. They have been explained in the course of the revision negotiations pertaining to the Vienna and Paris Conventions and will be dealt with below.

3 CONCEPT OF NUCLEAR DAMAGE

The original Conventions do not comprise a specific definition of the concept of nuclear damage. Such a concept has now been explicitly introduced . Apart from loss of life or personal injury and loss of or damage to property, nuclear damage should include - inter alia - impairment to the environment, loss of profits arising from such impairment and the costs of preventive measures.

Impairment to the environment is not a precise term. Minimum levels of radioactivity might be suggested but the effects - and the acceptability or otherwise - of radioactive contamination is not a constant. Provision of payments for environmental damage may impinge upon amounts available for the compensation of death or bodily injury and prove of causation is likely to be a problem. Cover for environmental damage would not be universally available and, even where available, would be subject to a restriction to "sudden, fortuitous and unforeseen" damage with the specific exclusion of alleged damage arising from releases of radioactive materials within authorised limits as part of the day-to-day operations of the nuclear operator. Insurers are increasingly concerned that they might be obliged to meet liabilities incurred as a result of a build-up of gradual contamination over a period of years and it would be quite likely that they would exclude this coverage from their policies altogether, leaving this aspect of the operator's liability to be met by the Government or left uninsured.

Preventive measures taken by any person would not automatically be considered an insurable risk in many countries, especially when a nuclear incident has not yet occurred, even if the measures had been retroactively approved by the competent authorities. The limitation of liability for preventive measures to those which are found to be reasonable under the law of the competent court renders this liability dependent on unknown future judicial developments. It furthermore does not exclude the risk of speculative claims from people who might take any manner of action on the grounds that it was reasonable. Although actual compensation payments under such circumstances might not be significant, the costs of defending such actions could well be. It is because of these considerations that cover for the costs of preventive measures might not be readily available in all countries or be restricted to a limited amount of cover.

However, all heads of damage in the definition of nuclear damage other than loss of life/personal injury and property damage are subject to the discretion of the contracting party and will therefore, most likely, follow the normal legal precedent for the country concerned. Given the degree of co-operation between government and insurers in the nuclear field, it is unlikely that these aspects will present insurers with an insuperable problem.

4 PRESCRIPTION PERIODS

In both the Protocol to amend the Vienna Convention and the Draft Protocol to amend the Paris Convention a major revision has been introduced in the extension of the prescription period, the timeframe from the date of a nuclear incident in which actions can be brought. As far as personal injury and loss of life is concerned this period has been extended from 10 to 30 years. In the course of both revision negotiations insurers have maintained that they would not be prepared to extend the current 10-year prescription period in their policies. There are a number of considerations underlying this position.

The problem with the prescription period is that many cancers are likely to manifest themselves only decades after exposure to ionising radiation and, at the same time, these cancers will be no different from those suffered naturally by the population at large. It must be remembered that something in excess of one-third of the population will suffer from cancer and approximately 25% will die of the disease. There is likely to be a presumption of causality as regards the nuclear accident in a relatively small number of cases, i.e. those who,

at the time of the incident, received a comparatively high dose. For the vast majority of the population, it will be almost impossible to prove causality.

Also related to extended prescription periods, is the problem of "speculative claims". Unfortunately, the insurance industry has had more than its fair share of dealing with this characteristic of human behaviour. The accident at Three Mile Island in the USA in 1979 resulted only in a minute quantity of gases, released from the nuclear reactor and radiation exposure levels did not exceed normal background levels for most parts of the world. Nevertheless, American nuclear insurers have had to contend with many claims pertaining to alleged injuries or damage where causality was extremely dubious. One assumes that all these claims have been resisted, and indeed they successfully were, but the comparatively high burden to the insurance industry of legal and expert defence fees is easily overlooked. In the light of the Three Mile Island experience once could well imagine the size of the problem if there were to be a major off-site release of radioactive substances.

Perhaps even more worrying from an insurer's perspective is the possibility of having to defend claims where no actual incident has occurred at all. Nuclear installations routinely emit minute quantities of radioactive substances within limits prescribed by the regulatory authorities. The limits for such discharges have been set at a level where it is believed that no injury or damage can ensue but tend to be adjusted downwards, over a period of time, in accordance with the so called ALARA principle (As Low As Reasonably Achievable). Thus over decades, different limits might well have been set, which, in itself, could give rise to a growth in speculative claims from people, claiming that their cancer must have been caused by the activities of the nuclear operator as, quite clearly, those activities were "unsafe", it having been necessary to reduce the emission limits allowed in earlier years. Although insurers might mount a successful defence to such actions, the costs involved could well exceed the amount of damages claimed.

Because of the above reasons it should be taken into account that liability beyond 10 years has to be assumed by Government, as is the case in States which have already introduced a 30-year prescription period in their national legislation.

5 EXONERATION

The original Conventions exonerate operators - and indirectly insurers, covering their liability - from the liability for war and specifically defined warlike events as well as for a grave natural disaster of an exceptional character. The exoneration extension to natural disasters is optional. However, the option has been deleted in the revised Conventions. Whether States so far have opted for inclusion or exclusion is no doubt, at least partly, related to the geographical conditions of the country concerned. Insurance would be unlikely to be available for liability arising from grave natural disasters of an exceptional character in those cases where currently an exoneration has been given to a nuclear operator. Where insurance is not available generally for non-nuclear business, it would not be likely to be provided to the nuclear operator.

6 DEFENCE COSTS AND CLAIMS HANDLING EXPENSES

The provision of nuclear liability insurance involves insurers not only in indemnity for financial compensation claimed by third parties against the insured, but also in the administration of the claim including the payment of defence costs where a particular claim may go to Court when the parties are otherwise unable to negotiate a settlement. This basically conflicts with one of the main principles of the international nuclear insurance pools' mechanism, which is based on a known finite limit of each individual Pool Member's exposure as a condition for making available the highest possible capacity to meet the substantial insurance requirements in the nuclear insurance field. The higher the insurance limits, the higher the unknown corresponding claims regulation costs, the further away from the known finite limit principle.

In normal non-nuclear liability policies it is usual for the insurer to meet administrative expenses from his own resources. However, the number of individual claims which might arise under a single non-nuclear policy is very limited. Nuclear liability insurance is unique in that it envisages - however remote the

possibility- the requirement to meet hundreds of thousands of claims arising from the same incident should a nuclear catastrophe occur. Furthermore, the practice in non-nuclear insurance of covering administrative expenses in addition to the insurance limit ends when this limit exceeds a certain amount, which remains below USD 25 million. In those cases the insurance limit is inclusive of costs. Remembering that the liability/insurance limit, agreed upon in the revision negotiations pertaining to the Paris Convention seemingly amounts to € 700 million, one can imagine that nuclear insurers are increasingly concerned as regards this problem.

Their concern has certainly not been eased since the Chernobyl catastrophe in 1986, which added to the claims handling experience in the field of nuclear accidents. As in other western European countries, in Germany the effects of the accident were mainly limited to property damage. Some types of vegetables and dairy products were contaminated, travel agencies had to cancel trips too close to the area of the accident etc. As the State of the incident did not accept liability, the German Government agreed to provide for compensation, which, considering the simplicity of the type of claims involved, was a relatively straightforward matter, not requiring prolonged investigation. The Federal State provided 300,000 claimants with about DM 520 million (ca. € 266 million) in compensation. At the time of the accident German insurers calculated that, had the insurance industry provided coverage and compensation, the claims handling costs involved would amount to DM 150 million (ca. € 77 million). In view of today's price levels, that amount would certainly be considerably higher. However, one can imagine that it still remains limited compared to the claims handling cost level that would result from an accident on German territory, causing complicated property and personal injury damage, its regulation spreading out over many years, involving an accumulation of expert witness fees, medical examinations etc.

In short: claims settlement costs, legal fees and defence costs represent a problem which in the past has not been adequately addressed. In the course of the discussions on the revision exercise insurers have emphasised this. However, Contracting Parties decided not to have insurance concerns reflected in the revised conventions, leaving the solution of the matter to a national level. As will become apparent from presentations on recent changes in individual countries' liability legislation later, a trend to limit insurers' exposure to claims handling costs now seems to be developing on a national level.

7 TERRORISM

The damage caused by terrorism and politically motivated violent acts in recent years has hit the insurance industry to a, so far, inconceivable extent. The estimates pertaining to the total insured loss following the tragic events on 11 September, 2001, alone vary between USD 30 and 70 billion. Should losses in this order be repeated (and recent developments in terrorism give rise to the expectation that this cannot be excluded) it would threaten the very existence of the insurance industry. As a result, this industry aims at limiting its exposure to future claims caused by acts of terrorism.

As we have seen before, the Vienna and Paris Conventions comprise a liability exoneration for war and specifically defined warlike events, which is deemed not to include terrorism. At a meeting on the revision of the Paris Convention following the attacks in the USA on 11 September, 2001, insurers made a plea for extension of the war risk exoneration to the nuclear operator to embrace acts of terrorism. Awareness was expressed, that, should it have been foreseen that such acts could actually occur, they would have been included in the war exoneration. However, in view of the advanced state of the negotiations, meeting-participants preferred not to prolong discussions by introducing a new discussion item. Therefore, the problem of how to deal with possible capacity shortages for terrorism exposures had to be solved on a national level.

In the meantime in the majority of countries capacity for terrorism exposures has proven to be available from the international pooling mechanism up to the full amount of the statutory liability limit. However, capacity for covering terrorism could only be attracted to a higher price, in other words to additional premium, in particular since nuclear installations are considered to be terrorism target risks.

In a limited number of cases, only reduced capacity as compared to the statutory liability limit appeared to be available. As such cases will be dealt with in more detail later, when recent developments in individual countries' liability legislation will be explained, this presentation is limited to outlines.

Generally speaking capacity for third party terrorism exposures below the statutory liability limit is available in two categories of countries:

a) countries, which are considered to be particularly exposed to terrorism (USA, UK) and
b) countries, which have introduced a very high statutory liability limit (Switzerland).

At present no capacity to cover losses following terrorist acts is available at all in one country (Canada), where insurers follow what is usual in the national market.

Capacity for terrorism exposures is volatile. Should terrorism develop on a considerably larger scale, it cannot be excluded that insurers have to decide to protect their solvency (and therewith their long term existence) by reducing or even withdrawing capacity for terrorism exposures in their covers. Furthermore, under present market circumstances, state participation in terrorism exposures is likely to be called upon to an increased extent following the introduction of conditions of the revised Paris Convention, raising the minimum insurance/liability limit up to just over the present Swiss level.

8 CONCLUSIONS

The revisions of the Vienna and Paris Conventions will result in a substantially higher compensatory limit. At the same time they embrace a wider scope of liability. We have seen that some aspects of this extended scope of liability are not likely to attract insurance support. Insurers appreciate the traditional constructive co-operation with and the understanding of insurance limitations shown by their national governments. They therefore trust that the exposure following the extended scope of liability in the revised Conventions, insofar as they are unable to assume it by themselves, will be absorbed by government guarantees. Insurers will continue their endeavours to meet requests in order to increase the compensatory limit. However, it should be realised that the higher those limits, the more critical insurers will seek to balance the exposure to their solvency.