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Need for Foreign Nuclear Liability Insurance

This paper addresses the many inquiries we receive about nuclear liability exposures and coverages outside the United States. The paper is addressed to U.S. domiciled suppliers who provide products or services to foreign nuclear facilities. It reviews what potential nuclear exposures these suppliers have, and whether they should consider purchasing foreign nuclear liability insurance.

The Nuclear Liability Conventions

Unlike the United States, where the federal Price-Anderson Act governs nuclear liability, many other countries with established nuclear regimes are governed both by their own legislation, and by compliance with international conventions on civil nuclear liability. These conventions are reviewed briefly below.

The ***Convention on Third Party Liability in the Field of Nuclear Energy***, or Paris Convention, entered into force in 1968. It includes all Western European countries except Ireland, Austria, Luxembourg and Switzerland. It is the first international convention to regulate civil nuclear liability.

The Convention's Preamble describes the Convention's objective as providing "adequate and equitable compensation for persons who suffer damage caused by nuclear incidents whilst taking the necessary steps to ensure that the development of the production and uses of nuclear energy for peaceful purposes is not thereby hindered." Like Price-Anderson, the Convention thus has a two-fold purpose, that of providing adequate compensation to the public and of promoting nuclear energy.

Under the Paris Convention, the operator of a "nuclear installation" as defined is strictly liable for damages from a nuclear incident. Nuclear installations include power reactors, fuel enrichment and manufacturing facilities, and fuel reprocessing facilities. The operator is liable for incidents both at the facility and during transportation. All legal liability, in other words, is channeled to the facility operator. This legal channeling is quite different from the situation in the United States, where Price-Anderson provides economic (but not legal) channeling of liability.

The ***Vienna Convention on Civil Liability for Nuclear Damage*** is similar to the Paris Convention. This convention entered into force in 1977, and includes countries with nuclear regimes outside Western Europe (excluding the United States and Canada). Like the Paris Convention, the Vienna Convention provides for the nuclear operator's exclusive and strict liability. Its definition of "nuclear installation" is similar to Paris's, and the end result is the same: legal channeling of liability to the facility operator. A supplier cannot be held liable, regardless of whose product or service caused the nuclear incident.

To ensure adequate compensation for damages, both conventions require financial security in the form of insurance or other resources. Beyond amounts set by the conventions, each country can establish additional financial security. These amounts vary considerably, but the point is that they involve compensation to the public. They do not affect a supplier's liability, which regardless of financial security remains legally channeled to the facility operator.

There are certain limitations to the operator's strict liability. Both the Paris and Vienna Conventions exonerate the operator in the event of war, civil war or insurrection, or if the injured party's gross negligence can be established. Both conventions impose limitations in time and amount for recovery of damages. Finally, the conventions can be modified by an individual country's nuclear legislation. For instance, both conventions eliminate compensation if an action is not brought within ten years of a nuclear incident. But that period can be shortened under a participating country's national regime.

Originally, the Paris and Vienna Conventions operated independently of each other. If, for instance, a person in a Paris Convention country suffered injury because of a nuclear incident in a Vienna Convention country, that person could not claim compensation in the country where the incident occurred. After the Chernobyl accident in 1986, however, a **Joint Protocol** was enacted. This protocol links the geographical scope of the two conventions, to ensure broader protection for victims of nuclear incidents covered under the two conventions.

There finally is the **Convention on Supplementary Compensation for Nuclear Damage (CSC)**. Although not yet in force, the CSC will require parties to have nuclear liability laws that conform with international standards. The CSC also will establish a two-tiered system of compensation. The first tier will be at least 300 million Special Drawing Rights (SDRs), which will compensate victims of a nuclear accident. A second assessed tier of about 300 million SDRs will be available should the first tier be exhausted. The total amount will depend upon which countries are parties and what those countries' installed nuclear capacities are.

The CSC will enter into force when ratified by at least five countries with at least 400,000 units of installed nuclear capacity. Thus far, Argentina, Morocco, Romania and the United States have ratified the CSC. The CSC is the only international nuclear liability convention that the U.S. has ratified.

National Regimes

Besides adhering to the international conventions, most countries with commercial nuclear programs also have their own legislative regimes for nuclear liability. These national regimes implement the conventions' principles, and impose the financial security requirements that vary from country to country.

For discussion purposes here, countries can be divided into three categories. The first category includes those countries that are parties to one or more of the conventions, and which have their own legislative regimes. Prominent examples are France, Germany, Spain and the United Kingdom, all of which are parties to the Paris Convention; and the Czech Republic, Hungary and Romania, all of which are parties to the Vienna Convention. Romania also is a party to the CSC.

The second category includes those countries that are not parties to the conventions, but which have their own legislative regimes. Prominent examples are Canada, Japan, South Korea and Taiwan. All four countries impose strict liability on their nuclear installation operators. So they conform with the channeling requirements of the Paris and Vienna Conventions, despite not being parties to those conventions.

The final category includes those countries that neither are parties to the conventions nor have their own legislative regimes. Although these countries are relatively few, China is the most prominent example. China has certain directives stating its position on nuclear liability, but has not yet developed a specific regime. Nor is China a party to any of the conventions.

Foreign Nuclear Exposures

What does all this mean for a supplier? If their products or services are provided to a nuclear installation in a country subject to the Paris or Vienna Convention, the supplier likely does not need nuclear liability insurance. The supplier should not be held liable for damages resulting from a nuclear incident. Liability should be channeled to the facility operator.

There are several countries, however, which have established nuclear programs and yet are not subject to the conventions. Japan, South Korea and Taiwan as mentioned are three prominent examples. All three have nuclear legislation that legally channels liability to the facility operator. But without adherence to the international conventions, the protection afforded a supplier might be perceived as less secure than what the conventions guarantee.

There also is some question about victims in states that are not parties to the conventions. If a person from a non-contracting state is injured because of a nuclear incident in a contracting state, and brings claim against a supplier alleging that supplier's responsibility for the injury, can the supplier be held liable?

Finally, an operator's available financial security is both finite and subject to market conditions. Although insurance or other financial security is to be available for each nuclear incident, in practice insurance might be available only for a specific time period. The absence of insurance does not relieve the operator of responsibility to maintain financial security. But the end result might be that victims seek recourse against a supplier, particularly one whose product or service arguably caused the victims' damages.

All of this argues for several situations where the supplier's own insurance might be helpful. The decision whether to purchase insurance often reflects how risk averse an individual supplier's risk management philosophy is. If a supplier is comfortable with the protection afforded by the conventions and by a specific country's legislative regime, that supplier might very well forego their own insurance. If, on the other hand, a supplier is uncomfortable relying upon the conventions, or is uncertain where they supply products or services, that supplier might very well purchase the insurance. For those who choose the latter course, ANI makes available a foreign Supplier's and Transporter's policy.

Foreign Supplier's and Transporter's (S&T) Insurance

The foreign S&T policy indemnifies the insured for third-party bodily injury or property damage resulting from the nuclear energy hazard, which is defined as "the radioactive, toxic, explosive or other hazardous properties of nuclear material." The policy is continuous from inception until cancellation or termination, at which time the insured has ten years to report claims for damages that took place during the policy period. The policy is an occurrence policy with a ten-year discovery period or tail.

The policy's current maximum limit of liability is \$50,000,000. This limit is available in all insured countries except France, Spain and Sweden, where the available limit is \$15,000,000 because of reinsurance commitments. The policy does exclude certain countries, most notably the U.S., Canada, China, India and Japan. The U.S. is excluded because ANI has a separate pool and policy to insure U.S. nuclear liability exposures. Canada is excluded because there is a Canadian market to insure nuclear liability exposures in Canada. China and India are excluded because they have questionable legislative regimes, nor are they parties to either nuclear liability convention. (China is covered if claims are brought and enforced outside China and certain other countries.) And Japan is excluded because of the exposure brought to light by the March 2011 earthquake and tsunami there.

There are several other exclusions worth noting.

- Worker's compensation and employer's liability.
- Contractual liability, other than a warranty of materials, parts or equipment.
- Bodily injury or property damage arising out of any nuclear weapon, or resulting from nuclear material used for military purposes.
- Bodily injury or property damage arising out of war.
- Bodily injury or property damage arising out of a "terrorist act" as defined.
- Bodily injury or property damage arising out of any radioactive isotope.
- Bodily injury or property damage with respect to which any government indemnity or available insurance applies.
- Any obligation arising out of the ***Convention on Supplementary Compensation for Nuclear Damage (CSC)***.
- Property damage (including business interruption and loss of use) to any nuclear facility or to any property at the facility, arising out of nuclear material at the facility.

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This last exclusion is particularly important. The policy cannot be purchased to afford property damage protection to a supplier at a nuclear facility where that supplier has furnished products or services. To our knowledge, the sole recourse is contractual risk transfer, because conventional liability policies also normally exclude nuclear property damage to a nuclear facility.

Coverage is available for an insured's majority-owned subsidiaries. Two endorsements are available, one for U.S. domiciled subsidiaries or one for all subsidiaries. Coverage can be limited to transportation only of nuclear material. Finally, any payment for loss or loss expense under a foreign S&T policy reduces that policy's limit of liability. Reinstatement of that limit is solely at ANI's discretion.

Policy premiums are based upon the limit of liability, the product or service supplied, the dollar volume of the product or service, and the countries where the product or service is supplied. There is no "typical" premium. But assume that a supplier provides products to power reactors in Britain and Germany. Sales total \$1,000,000. For that exposure, the estimated annual premium would be \$43,000 for a limit of \$25,000,000, and \$66,000 for a limit of \$50,000,000.

The information provided in this paper is intended to be helpful in evaluating a supplier's need for foreign nuclear liability insurance. If questions arise, please feel free to contact us.