

Transposition into Swiss Law of the Paris Convention and the Brussels Supplementary Convention, as amended

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1. General situation and law applicable

The Federal Act on Nuclear Third Party Liability of 18 March 1983 [LRCN, *Recueil systématique du droit fédéral* (RS) 732.44; see *Nuclear Law Bulletin* Nos. 23, 25, 29, 31, 33 and 49, the text of this act is reproduced in the Supplement to NLB No. 32] is based on the following principles:

- channelling of liability to the operator of a nuclear installation;
- causal liability of the operator of a nuclear installation;
- unlimited liability;
- limitation of the amount of cover to 1 billion Swiss francs (CHF) (approx. EUR 660 million) plus CHF 100 million (approx. EUR 66 million) to cover interest and legal costs.

The act is implemented by the Ordinance of 5 December 1983 on Nuclear Third Party Liability [ORCN, RS 732.441; see *Nuclear Law Bulletin* No. 61].

Under Section 11(1) LRCN, operators of nuclear installations must take out private third party liability insurance to cover insurable (or contractual) risks. When the act came into force (1 January 1984), private insurers were not in a position to insure the whole mandatory cover of CHF 1 billion (plus 100 million). The difference between the amount which private insurers could cover and the figure of CHF 1 billion was covered by the Swiss Confederation through federal insurance. Pursuant to an amendment of the ORCN, the amount to be covered by private insurance was raised in stages to reach CHF 1 billion. Thus, since 1 January 2001, the sum of CHF 1 billion has been covered entirely by private insurance.

For its part, the Confederation continues to insure non-contractual risks for up to CHF 1 billion, i.e. those which private insurers may choose not to cover (and which are indeed excluded from the

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cover offered by private insurance). These include: nuclear damage caused by exceptional natural phenomena or acts of war; claims in respect of which no action has been brought within ten years of the event causing damage or the end of prolonged exposure; claims in respect of which no action has been brought within 20 years of the loss, theft, abandonment or end of the possession of nuclear substances. As from 1 January 2003, the Confederation has also insured nuclear damage between CHF 500 million and 1 billion (EUR 330-660 million) caused by terrorist acts against which protection at a bearable cost is impossible [Sections 11(3) LRCN, and 4 ORCN]. Private insurance covers nuclear damage caused by terrorist acts of whatever kind up to CHF 500 million only.

As an insurer, the Swiss Confederation charges the operators of nuclear installations or transport licence-holders annual or occasional insurance premiums. These premiums, together with any interest they earn, are paid into the nuclear damage fund [Sections 14 and 15 LRCN]. At 31 December 2003, the nuclear damage fund amounted to CHF 321 million (approx. EUR 215 million). This money can be used only to compensate the victims of nuclear damage as defined in the LRCN.

2. Reasons for a revision of the Nuclear Third Party Liability Act

By adopting the principle of unlimited liability and establishing the amount of cover at CHF 1 billion, the 1983 Act on Nuclear Third Party Liability still corresponds today with international standards. When introducing unlimited liability, parliament was fully aware that Switzerland could not then ratify the international conventions on third party liability for nuclear damage which were in force at the time, given that these conventions were based, *inter alia*, on the principle of limited liability.

That is why the Swiss authorities have started work on revision to improve further the high level of protection enjoyed by victims under the present LRCN. Improvement is possible in two spheres in particular.

2.1 Raising the amount of cover

While the present cover of CHF 1 billion is high by international standards, it nevertheless remains relatively low compared to the huge potential damage a nuclear accident could create. At the request of the Federal Energy Office, the University of Zurich carried out a study of the costs involved in raising the amount of cover. If cover were doubled to CHF 2 billion (approx. EUR 1 320 million), this would lead to an increase in the price of electricity produced by nuclear power plants of around CHF 0.01 cents per kWh (approx. EUR 0.006 cents). Increasing the amount of cover to CHF 4 billion (approx. EUR 2 640 million) would lead to marginal costs of EUR 0.017 cents per kWh (approx. EUR 0.011 cents). The study concluded that such marginal costs would have almost no negative effect on the competitive capacities of nuclear energy.

To ensure enhanced protection for victims and in light of the planned ratification of the revised Paris and Brussels Conventions, it has been decided to increase the amount of cover at least up to the level offered under the revised Brussels Supplementary Convention, namely EUR 1 500 million (CHF 2.25 billion). A higher cover amount is, nevertheless, being discussed within the federal administration.

2.2 Ratification of the revised Paris and Brussels Conventions

The Paris and Brussels Conventions, as amended, expressly allow for a State Party to adopt, in its national legislation, the principle of the unlimited liability of nuclear installation operators. Article 7 of the revised Paris Convention no longer contains a maximum liability amount, but now lays down a minimum liability amount for nuclear installation operators. In Article 10 of the revised Paris Convention, there is even a provision relating to the amount of cover to be established where the liability of the operator is unlimited.

Ratification by Switzerland of the two revised Conventions would have the following advantages:

- a guarantee of equal treatment for Swiss victims in the event of a nuclear accident occurring abroad but with repercussions in Switzerland;
- the possibility of claiming compensation on the basis of the material and formal rules laid down by the conventions and which are applicable independently of national borders;
- the guarantee of non-discriminatory treatment and of the assessment of Swiss or foreign compensation claims by a single competent court;
- access to the third tier of the revised Brussels Supplementary Convention should nuclear damage caused by a foreign nuclear installation have prejudicial consequences in Switzerland.

The fact of Switzerland's not belonging to an international scheme for nuclear third party liability is a major disadvantage not only for Swiss victims of any nuclear accident but also for the operator responsible for a Swiss nuclear installation. In the absence of a public international law provision, it is extremely complicated to claim compensation given that victims have no choice other than to use ordinary foreign civil procedures to bring an action. They have, moreover, no guarantee that they will be treated on the same footing as victims of the state in which the accident took place, nor, indeed, do they have any guarantee of receiving any compensation whatsoever.

3. Incorporating the international conventions into Swiss law

The operative part of the revised Paris Convention [Articles 1 to 15] is formulated in such a way as to be directly applicable as if it were national law. National legislators do not have to transform this international Convention into national legislation for the courts to be able to apply it directly. This self-executing application means that there is no danger of misinterpreting the text of the Convention when reformulating it in national law.

This does not, however, apply to the Brussels Supplementary Convention. This Convention creates rights and obligations between Parties to the Convention exclusively, namely states. It does not apply to individuals, which explains why the Brussels Supplementary Convention needs to be reformulated in national law.

Ratifying the two Conventions therefore has a direct effect on the form and content of the revised Federal Act on Nuclear Third Party Liability. The directly applicable provisions of the Paris Convention will not be reformulated in the new draft LRCN, thereby avoiding difficulties of implementation and interpretation. The revised act refers as often as possible to the international

conventions and gives practical expression only to those few provisions of the conventions which are not directly applicable. The new bill also regulates areas which are not dealt with by the conventions or which the conventions leave to the jurisdiction of the national legislator.

Switzerland formulated two reservations when signing the Protocols to amend Paris and the Brussels Conventions:

Under Article 8(f) of the revised Paris Convention, any person suffering nuclear damage who has brought an accident for compensation within the time period provided may amend his claim in respect of any aggravation of such damage after the expiry of this period provided that final judgment has not been entered by the competent court. This does not, however, authorise any national legislation to provide that a final and enforceable judgment may be subject to review (appeal). The possibility of requesting final and enforceable judgments to be reviewed corresponds, however, to Swiss legal tradition. That is why both the current and revised LRCN provide that a request for a final and enforceable judgment to be reviewed can be made when the state of health of the victim deteriorates or when new facts or evidence are submitted [Section 10(3) LRCN].

The second reservation concerns Article 9 of the revised Paris Convention. This article excludes the operator's liability for any nuclear damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war or insurrection. Under the current LRCN, operators are also liable for damage caused by an incident due to acts of war. This liability must be maintained in the revised LRCN so as to maintain a degree of protection for victims which is as high as under the present act. That is why Switzerland formulated a reservation to Article 9 of the revised Paris Convention.

4. Work on revision of the Federal Act on Nuclear Third Party Liability

As part of the preparations for a first draft of the revised LRCN, a working party was set up under the supervision of the Federal Energy Office. It comprises a representative of nuclear operators, the Swiss Nuclear Insurance Pool, the Federal Finance Administration, the Federal Justice Office and the Public International Law Directorate. The working party engaged the services of Mr. Norbert Pelzer, from the University of Göttingen, as an expert in the field of nuclear third party liability.

The draft revised LRCN, together with an exhaustive explanatory report, were completed in mid-2004, but are only at an internal stage. It is now planned to distribute these documents as part of a large-scale external consultation procedure. Under this procedure, the cantons, political parties, organisations representing business and workers, economic policy organisations and associations for consumer and environmental protection, will all be consulted. Apart from these persons consulted officially, anyone may express an opinion about the documents made available for consultation. After analysing the results of the consultation procedure, the government will decide on any amendments to be made to the bill and explanatory report, before submitting them to parliament, probably in the course of the year 2005. The revised LRCN could enter into force in 2007.

5. Problem areas and pending questions

The main problem arising in relation to the incorporation into Swiss law of the revised Paris and Brussels Conventions lies in the complexity of the subject matter. These Conventions are difficult for the layperson to understand. Since the revised Paris Convention is directly applicable but not the revised Brussels Supplementary Convention, the draft revised LRCN appears as being incomplete and

not very detailed. The result is that it is a real challenge to draft the explanatory report on the bill and the revised Conventions. It was nevertheless necessary to make this report extremely clear to ensure that the project did not founder already during the consultation procedure.

Private insurers will not be in a position to make available the amount of cover required under the Brussels Supplementary Convention and equivalent to EUR 1 500 million or a higher amount. The Swiss Confederation will therefore have to substitute itself for private insurance and cover the difference between the amount available under such insurance and the maximum amount provided for under the revised Paris/Brussels system. Calculating the federal premium, to be paid into the nuclear damage fund (see Section 1, *in fine*), will be extremely delicate and complex given that it will have to take account of all non-treaty risks (those which are excluded from insurance policies) as well as the amount of damage arising from treaty risks but not covered by private insurance.

6. Conclusions and thanks

Apart from the considerable increase in the amounts of cover, two basic factors lie behind the Swiss government's decision to propose shortly to parliament a draft revised LRCN. These are, firstly, that the revised Paris/Brussels system still incorporates the principle of the limited liability of the operator of a nuclear installation but now contains a minimum liability amount (liability threshold) and no longer a maximum amount (liability ceiling), and secondly, that the States Parties are allowed to provide in their national legislation for the unlimited liability of operators. One of the aims of ratifying the revised Conventions is to enable most victims to obtain fair compensation on an egalitarian basis for damage caused by a nuclear incident, and also to join an international system for compensating nuclear damage based on solidarity between states, most of them nuclear.

The authors of this article wish to express their warm thanks to the Revision Group for the Paris/Brussels Conventions constituted by the States Parties (CPPC Group) for allowing Switzerland to take part in its work. This participation enabled the Swiss authorities to become more familiar with the highly complex compensation rules and mechanisms. This greatly assisted understanding of the texts and, in turn, their explanation to the working party responsible for revising the LRCN. We trust that our participation in the work of the CPPC Group will help us to explain better the need for our country to adhere to an international mechanism for compensating nuclear damage which applies in most European nuclear states and which, we are convinced, is set to spread further to some other of the states which joined the EU on 1 May 2004.