Now that Japan’s Diet, as of November 21, 2014, has approved Japan’s ratification of the Convention on Supplementary Compensation for Nuclear Damage (CSC) and implementing domestic legislation, Japan presumably will soon deposit its instrument of ratification with the International Atomic Energy Agency (IAEA). Ninety days following such action by Japan, the CSC will enter into force, since its requirement for entry into force (a minimum of five ratifying parties collectively having at least 400,000 MW(t) of installed nuclear generating capacity) will have been satisfied. While the additional compensation aspect of the CSC’s impending entry into force has attracted global attention, less consideration has been given to the CSC’s impact on the nuclear liability of sellers and purchasers of components, nuclear fuel and related technology and services for the construction and operation of nuclear power stations. This client alert provides our views concerning the most significant near-term implications of the CSC’s entry into force.

Benefits for the Nuclear Industry

While the long-awaited entry into force of the CSC—which was originally adopted by the participating countries and opened for signature in 1997—will clearly be a “watershed” event, the immediate benefits (and costs) to nuclear suppliers and purchasers will be relatively modest, except with respect to U.S. and other suppliers that (1) are located in a country that has ratified the CSC; and (2) provide products or services for the construction, operation, maintenance or decontamination/decommissioning (D&D) of a nuclear power station in a country that has ratified the CSC. Since only five countries (the United States, Romania, Argentina, Morocco and the United Arab Emirates) have ratified the CSC, Japan’s ratification of the CSC will cause the CSC, once in force, to be applicable only to nuclear incidents at facilities within...
those six countries, as well as certain nuclear incidents that occur during transportation of nuclear material to or from facilities in those countries. Unless additional countries that have leading roles as consumers or suppliers of such components, services and nuclear materials become parties to the CSC, the protective effect of the CSC will be geographically narrow. Progress toward the goal of near-universal adherence to the CSC is likely to be quite slow, especially in view of the apparent reluctance of the Western European countries to become CSC parties.

Despite the limited geographic reach of the CSC, upon its entry into force with the above-mentioned six countries as CSC parties, the benefits of CSC adherence are likely to be significant, in some situations. Suppliers in CSC countries that provide such support to nuclear power stations in other CSC countries will immediately benefit, in two principal ways: (1) lawsuits against such suppliers in their own countries or other CSC countries should be dismissed since the CSC directs or “channels” jurisdiction over such lawsuits exclusively to the courts of the CSC country in which the nuclear incident took place; and (2) a second tier of “supplementary” compensation will be paid by the CSC parties if the first tier amount that must be maintained by CSC parties (at least 300 million Special Drawing Rights [SDRs] or about $440 million) is exhausted. Since a large nuclear incident comparable to the incidents at the Chernobyl or Fukushima Daiichi plants would likely produce nuclear damage greatly exceeding both the CSC’s required first and second tiers of compensation, the supplementary compensation aspect of the CSC may not be sufficient to reduce the risk to suppliers of lawsuits being filed against them in countries that are not parties to the CSC (“third countries”). While the benefits of the CSC’s supplementary compensation provisions have received more attention than the “jurisdiction channeling” aspect of the CSC, the latter aspect may be more significant for vendors of materials and services to nuclear power plants in CSC countries.

**Reevaluation of Nuclear Liability Contractual Provisions in Light of the CSC**

In our view, the CSC’s entry into force provides a prime opportunity for both suppliers and consumers of such nuclear materials, components and services to reconsider the nuclear liability provisions of the contracts that have been the basis for such sales. For many years, these provisions were sometimes considered to be “legal boilerplate” that required far less attention than the price, delivery and other commercial terms that were unique to each contract. However, the nuclear incident at Fukushima Daiichi Nuclear Power Station and the resulting compensation (currently totaling about $38 billion) plainly provide a strong rationale for all nuclear suppliers and consumers to evaluate the extent to which such nuclear liability provisions actually protect them, or conversely, expose them to risk.

In the absence of any widely used “model” terms, the text of such provisions usually results from case-by-case negotiations. In some instances, the terms date from the 1960’s or 1970’s, and the origins of many nuclear liability provisions currently in use may be traced to contracts executed decades previously.
However, “old” contract terms often do not adequately address “modern” circumstances, including the presence or absence of protection pursuant to modern nuclear liability laws or international nuclear liability conventions. Accordingly, it would behoove suppliers and customers to “mind the gaps” that expose the parties to risk, as such gaps often are not adequately or correctly understood. Proper assessment of these risks at least will enable parties to consider their ability or willingness to share these “residual” risks under indemnification provisions, waivers or other contractual provisions.

Responsibility of Some Industry Participants to Fund CSC Supplementary Compensation Payments

A second major near-term task for nuclear vendors (as well as operators of nuclear power stations in CSC countries) is to assess their potential financial liability for their countries’ payments toward the CSC’s “international fund” of supplementary compensation following a nuclear incident in a different CSC country. The extent of such liability of nuclear industry participants depends on the manner in which their governments, upon adherence to the CSC, will allocate the cost of such countries’ payment of supplementary compensation in response to any future requests by other CSC parties for supplementary compensation, following a nuclear incident that exceeds the “first tier” of nuclear liability protection in the CSC country in which the nuclear incident took place.

In the United States, Congress passed legislation in 2007 requiring U.S. nuclear vendors to bear the cost of such supplementary compensation payments following a nuclear incident in another CSC country that exceeds that country’s national compensation threshold. More than three years following the date when the U.S. Department of Energy (DOE) was required by Congress to promulgate a rule to allocate such costs among U.S. nuclear vendors, DOE has not published a proposed rule. DOE published a Notice of Inquiry in 2010 that sought to obtain comments on certain aspects of a proposed rule. However, according to a knowledgeable DOE official, DOE will soon publish the proposed rule, likely before the end of 2014. The industry will have an opportunity to comment on the proposed rule. Based on the industry’s responses to DOE’s previous Notice of Inquiry, DOE’s proposed rule will likely be opposed by some major nuclear vendors, particularly if commercially available insurance continues to be unavailable to fund such payments.

Additional information concerning the purpose and status of the CSC is set out below.

Purpose of the CSC

The goal of the CSC is to create an “umbrella” nuclear liability regime that covers any country currently party to (1) the Paris Convention; (2) the Vienna Convention; or (3) no international convention on nuclear liability, but which is party to the Convention on Nuclear Safety, and whose national laws comply with the requirements of the Annex to the CSC (including a minimum liability limit of 300 million SDRs,
with strict or absolute [no fault] liability exclusively channeled to the Operator of the nuclear installation at which a nuclear incident occurs).

The CSC also seeks to harmonize international nuclear liability laws, many of which are presently subject to key ambiguities. Another key objective of the CSC is to channel exclusive jurisdiction to courts of the CSC party within which the nuclear incident occurs (the “Installation State”).

Much of the commentary on the CSC has focused on its establishment of a system of supplementary compensation in the event of a nuclear incident to ensure that adequate compensation for third parties suffering nuclear damage is available, as follows:

- 1st tier: national compensation amount (minimum 300 million SDRs or approximately $440 million)
- 2nd tier (if 1st tier is inadequate): international fund established under the CSC to which all parties contribute based on each party’s (1) installed nuclear capacity and (2) United Nations rate of assessment

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