

Turkey: What If It Leaks?

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The Turkish Law Perspective On Third Party Civil Liability In Nuclear Accidents

As Turkey embarks on the path to becoming a nuclear energy nation with the start of the pre-construction preparations of the nuclear power plant in Akkuyu, Mersin by the Russian Rosatom¹, the discussions on safety related issues are far from settled. The debate once again flared up in the wake of the unfortunate radiation leak on the Fukushima nuclear power plant following the devastating earthquake and the tsunami in Japan on March 11, 2011. As the world revisits the significance of safety measures in nuclear power plants and the adequacy of third party civil liability regulations in nuclear accidents, Turkey, too opens the gateway for national legislation further to the existing rules of international treaties. From that perspective, this article looks into the application of the Paris Convention on Third Party Liability in the Field of Nuclear Energy² (the "Paris Convention") in Turkey and the recent changes in Turkish law relating to peril liability which will be effective from July 1, 2012.

The Relevant Legislation

Turkey passed a nuclear energy law⁴ in 2007 to regulate the establishment and operation of nuclear power plants within its borders. That being said, this legislation does not provide for any rules regarding third party civil liability in nuclear accidents.⁴ Therefore, the matter falls under the realm of the Paris Convention which now lies at the top of the legislative hierarchy (after the constitution) following its ratification in 1961. Although the Paris Convention lays out the basics of legal liability arising from nuclear damages, it leaves room for the contracting states to make detailed domestic legislation in compliance with the Paris Convention. Unlike countries such as Germany, France or Switzerland, Turkey is yet to take legal measures specific to third party civil liability arising from nuclear accidents.

Though very general in scope and nature, the introduction of "peril liability" by the new Turkish Code of Obligations (the "New Obligations Code")⁵ may be deemed to herald further legislative action. The peril liability in the New Obligations Code is related to a facility, which, due to the nature of its activity or the materials, tools or powers used for this activity, is prone to causing frequent or dire damages regardless of any precautionary measures which may be expected to be enforced by an expert in the related field of activity.⁶ No doubt, nuclear installations would fall under this category. However, because the New Obligations Code's peril liability provisions fail to make specific reference to nuclear installations, the Paris Convention remains the first and foremost applicable law in Turkey in nuclear incidents. Therefore, the persons who will be liable for nuclear damages, amount and conditions of liability and compensation claims need to be

analyzed in light of the provisions of the Paris Convention, with reference to the regulations of the New Obligations Code, to the extent they are complementary.

What is a Nuclear Accident?

Any occurrence or succession of occurrences having the same origin which causes damage, provided that such occurrence or succession of occurrences, or any of the damage caused, arises out of, or results either from the radioactive properties, or a combination of radioactive properties with toxic, explosive, or other hazardous properties of nuclear fuel or radioactive products or waste or with any of them, is a nuclear accident.⁷ The Paris Convention deals only with damages arising from this scope and regular accidents in nuclear installations which do not arise from radioactive properties will be out of its realm, thus out of the scope of this article.

In that respect, nuclear installations comprise not only reactors and factories for processing of nuclear substances (including nuclear fuel, radioactive products and waste), but also the facilities for the storage of these substances.⁸

Who is Responsible?

The New Obligations Code holds the owner and the operator of a high-risk facility jointly liable for damages arising from the activities of this facility.⁹ The Paris Convention, on the other hand, does not set forth a joint liability and holds the operator accountable in most cases. Since the nuclear incident specific regulations of the Paris Convention stand above the general peril liability provisions of the New Obligations Code, the persons below will be the responsible parties.

1. Operator:

Save for some exceptional circumstances described below in this section, the liability for damages to a person or property caused by a nuclear accident will be borne by the operator of the nuclear energy installation¹⁰. The Paris Convention defines the operator as the person designated or recognized by the competent public authority as the operator of that installation. In the case of Turkey¹¹, TETAŞ (the state owned Turkish Electricity Trade Company) will initiate a tender to determine the grant of the license to establish and operate a nuclear power plant. The requirements for the applicants will be determined and reviewed by the Turkish Atomic Energy Institution, TETAŞ will then present to the Chamber of Ministers its proposal as to the designated licensee. Only upon the approval of the Chamber of Ministers, the Energy Market Regulatory Authority will issue the production license for the relevant company, which becomes the "operator of a nuclear installation" within the meaning of the Paris Convention. In the case of the Akkuyu Plant, though, the Turkish subsidiary of Rosatom¹² was designated as the operator by a treaty¹³ between Turkey and Russia and this company will be the responsible party for third party civil liability in the event of a nuclear accident.

In addition, the operator of the installation in which nuclear substances have recently been at the time of the nuclear accident, will be liable for damages.¹⁴ Furthermore, in case the nuclear substances which caused a nuclear incident have been in more than one nuclear installation and are not in a nuclear installation at the time damage is caused, the liable persons would be as follows: (i) the operator of the last nuclear installation in which the nuclear substances were before the damage was caused or (ii) the operator who has subsequently taken them in charge, or (iii) the operator who has assumed liability pursuant to the express terms of a contract in writing.¹⁵

2. The Carrier

In certain cases, a carrier of nuclear substances may be responsible for damages in place of the operator. Currently, this will not be possible in the Turkish example since the first and foremost requirement for this shift is domestic legislation to this effect.¹⁶

3. Insurer or Financial Guarantors:

Although the Paris Convention does not innumerate insurers or financial guarantors as liable parties, it allows domestic legislation to regulate the exercise of compensation claims against the insurer of the operator or its financial guarantors.¹⁷ The signatory states are compelled to provide in their domestic legislation, for the requirement of an insurer or guarantor for nuclear installations. Although case law in Turkey allows the damaged party to file a lawsuit directly against the insurer in third party liability insurances,¹⁸ the requirement itself is not yet codified specific to nuclear accidents. Due to the provisions of the Paris Convention¹⁹, Turkey, too, needs to adopt laws whereby maintaining an insurance or another form of financial security will be a must for the operator of a nuclear installation. For the claims arising from nuclear accidents, the insurer will be severally liable with the operator up to the amount covered with the insurance policy. Whether and how much the financial guarantor will be jointly and severally liable for third party civil liability claims arising from nuclear accidents will have to be determined on a contractual basis.

When Does Liability Arise?

Perhaps the most distinct and important aspect of third party civil liability arising from nuclear incidents is that it is an absolute liability, in that, the existence of fault is not required. The peril liability in the New Obligations Code is introduced parallel to this.

The conditions for liability are limited to the (i) occurrence of peril, (ii) occurrence of damage to a person or property as a result of this peril and (iii) existence of causality between the peril and the damage caused.²⁰

Peril, in this scope, is a nuclear accident occurring in a nuclear installation or during the carriage of a nuclear substance. This, as obvious, is a much more specific type of peril than what the New Obligations Code provides for.²¹

The extent of the scope of damage goes beyond direct damages.²² In this case, if damage to a person or property is caused jointly by a nuclear accident and another type of accident, and the damage from the nuclear accident itself cannot be separated from the damage as a whole, then the entire damage will be considered as damage caused by the nuclear accident and the liability will be tied to it accordingly.²³

Proof of casualty (i.e. that the damage is actually caused by the nuclear incident) is a precondition for liability and in this case, the burden of proof lies with the party claiming the damage.²⁴ In any event, the damaged party must prove that the nuclear damage to him/her or to his/her property was caused by a nuclear incident in the installation of the operator or involved nuclear substances coming from such installation.

What Are the Exceptions to Liability?

Due to the uniqueness of its nature, the occurrences that sever the relation of causality for nuclear damage liability are limited only to certain force majeure situations, namely (i) an act of armed conflict, hostilities, civil war or insurrection²⁵ or (ii) a grave natural disaster of an exceptional character (which brings to mind the Fukushima incident). Turkish soil, lying on one of the major fault lines and having an unfortunate track record of terrorist attacks surely stands a risk to that effect.

Another instance where the operator will not be liable for damages is the case of harm to the premises of the nuclear installation itself or the connecting buildings, including a nuclear installation under construction or its site.²⁶

In all of the foregoing cases (except for natural disasters), liability would lie with the third person(s) who cause the damage to life or property, acting, or omitting to act, with the intention to cause a nuclear damage.²⁷ Burden of proof would be on the claimant. As for natural disasters, the Paris Convention²⁸ leaves room for domestic legislation to exclude natural disasters from this scope, in which case the operator would be liable. However, Turkey has not taken legislative action to that effect.

What is the Limit to Compensation Claims?

The maximum liability of the operator in respect of damage caused by a nuclear incident is 15 million SDR.²⁹ The Paris Convention grants the signatory countries the possibility to establish a different amount on condition that the amount is not less than 5 million SDR,³⁰ which needs to be determined by taking into consideration the nature of the nuclear installation and the likely consequences of the incident.³¹

Turkish law does not provide for a specific regulation for determining the ceiling of compensation. Therefore, liability from third party claims arising from a nuclear accident in Turkey will be capped at 15 million SDR, excluding the interest and the costs of the legal action. This is not cumulative; that is, in the case a nuclear incident occurs in more than one nuclear

installation run by the same operator, the limit of the compensation will be applied separately for each nuclear installation.³²

Although a maximum limit of compensation has been determined, there is no provision under the Paris Convention nor under Turkish law, as to how the compensation will be distributed among the damaged parties in the case where the total amount of compensation exceeds the maximum limit determined by the Paris Convention.

Interim Compensation

A new mechanism introduced by the New Obligations Code is also worth mentioning in relation to damage claims. With the entry into force of the New Obligations Code, from July 1, 2012 onwards, a party seeking remedy for damages will be able to request the competent court to take an interim decision against the defendant to make a pre-payment to the claimant before the final decision on liability is rendered. The claimant will need to provide the court with convincing evidence as to the validity of his/her claims and that his/her economic condition necessitates a temporary payment of compensation. This mechanism will also apply to third party liability claims arising from nuclear accidents.

In the event the court rules against the defendant in its final decision, then the pre-payment will be deducted from the total amount of final compensation. If, however, the court rules that the defendant is not liable for damages, the claimant will return the interim payment together with the statutory interest.

Operator's Right to Recourse

The operator, who is the primary defendant in a claims suite, can seek recourse only from the persons acting, or omitting to act, with the intent of causing nuclear damage, or from the persons who undertake the liability explicitly with a written contract. In the latter case, the right of recourse will be limited to the scope and amount expressed in the relevant contract.³³

If the liability of the third party arises from a tortuous act, the operator must prove that such third party caused the nuclear damage intentionally. The conditions of liability of the third party differ from the operator in this regard. The operator's liability is an absolute liability; no fault is required to be held liable. However, in order for the third party's liability to arise under the Paris Convention, the operator must prove, before the competent court, the intention of that third party to cause the nuclear damage. The statute of limitations for claims on liability will be two years as of the date when the operator becomes aware of the identity of the third party and in any case maximum 10 years from the payment of compensation by the operator to the damaged party.³⁴

If a third party undertakes liability with a contract, the conditions of liability will be determined in accordance with the provisions of the contract. The statute of limitations for the contractual obligation will be 10 years from the date when the compensations is paid to the damaged party by the operator.³⁵

When does a Right to Claim Damages Expire?

The statute of limitations for third party civil liability claims is 10 years starting from the date of the nuclear incident. However, in case of damage caused by a nuclear incident involving nuclear fuel or radioactive products or waste which, at the time of the incident have been stolen, lost, jettisoned or abandoned and have not yet been recovered, the prescription period is increased to 20 years.³⁶

Some countries adopted domestic legislation that provides for a longer statute of limitations³⁷, though Turkey is not one of them. The prescription period relating to peril liability under the New Obligations Code is in parallel to the Paris Convention provisions: two years starting from the date when the claimant becomes aware of the damage and the person causing the damage, and a general statute of limitations of 10 years starting from the date when the event causing the damage occurs.³⁸

Venue

Paris Convention confers jurisdiction over claims arising from nuclear accidents to the country where the nuclear incident occurs.³⁹ Therefore, the conflict needs to be resolved by the designated courts under the domestic legislation of that country.

Among the changes to legislative and regulatory environment in Turkey, are the new regulations of the Civil Procedure Code⁴⁰ pertaining to tortuous acts, which also find application to cases arising from nuclear incidents. The Civil Procedure Code, which came into effect very recently (October 1, 2011), favours the claimant by granting jurisdiction not only to the court at the place where the tortuous act occurred (as did its predecessor) but also to the court at the address of the plaintiff. Thus, in case a nuclear incident occurs in Turkey, the competent court will be the court at the address of the defendant (the operator or the insurer as the case may be)⁴¹, or the court at the place of the incident or alternatively the court at the address of the damaged party.⁴²

A Final Word

As nuclear power plants become a reality of the Turkish energy production scene, so will the domestic regulations need to become more specific to the case of third party civil liability arising from nuclear accidents. The introduction of peril liability by the New Obligations Code and the amendments to the Civil Procedure Code allowing for forum-shopping in favour of the defendant are a step forward in that respect. Further changes to the legislative map are due, implementing in more precise terms, what the Paris Convention already stipulates in a general manner.

Footnotes

1.The State Atomic Energy Corporation.

2. Turkey signed the Paris Convention on July 29, 1960 (ratified by the Law numbered 299 and dated May 08, 1961) and the additional protocols respectively on April 10, 1964 (ratified by the Law numbered 878 and dated June 01, 1967), November 16, 1982 (ratified by the decision of Chamber of Ministers numbered 86/10513 and dated March 25, 1986) and February 12, 2004. The additional protocol signed in 2004 has not yet entered into force since the condition regarding ratification by 2/3 of the contracting parties was not satisfied. Turkey did not ratify that additional protocol either; therefore the version of the Paris Convention revised in 1982 is still in effect.

3. The Law on Installation and Operation of Nuclear Power Stations and Sale of Energy dated November 9, 2007 and numbered 5710 (the "Nuclear Energy Law").

4. The Nuclear Energy Law only makes a reference to the Paris Convention in relation to third party civil liability.

5. The Turkish Code of Obligations dated January 11, 2011 and numbered 6098, which will enter into force on July 1, 2012.

6. The New Obligations Code, Article 71(2).

7. For complete definition of nuclear accident, see Paris Convention, Article 1(a)/1.

8. For complete definition of nuclear installation, see Paris Convention, Article 1(a)/2.

9. The New Obligations Code, Article 71(1).

10. The Paris Convention, Article 3(a) and 6(a).

11. The Nuclear Energy Law, Article 3.

12. Akkuyu NGS Elektrik Uretim AŞ. The construction of the power plant has not yet commenced and electricity production license is yet to be obtained from TETAŞ.

13. The Treaty on Cooperation between The Russian Federation and the Republic of Turkey for Establishing and Operating a Nuclear Power Plant in Akkuyu, Turkey was signed on May 12, 2010 and ratified on July 15, 2010.

14. The Paris Convention, Article 5(a).

15. The Paris Convention, Article 5(c)

16. The Paris Convention, Article 4(d). Other requirements would be the consent of the operator and the decision of the competent authority.

17. The Paris Convention, Article 6(a).

18. The new Commercial Code dated January 13, 2011 and numbered 6102, which will come into force on July 01, 2012, explicitly stipulates that the damaged third party is entitled to make a claim directly against the insurer.

19. The Paris Convention, Article 10(a).

20. Paris Convention, Article 3

21. Please see section titled "The Relevant Legislation" on page 2 of this article.

22. Paris Convention, Article 3(a)

23. Paris Convention, Article 3(b)

24. Paris Convention, Article 3(a)

25. Bringing to mind the terrorist attacks of the PKK targeting oil pipelines in Sirnak and Mardin on August 11, 2010.

26. The Paris Convention, Article 3(a)/(ii)-(1) and (2).

27. The Paris Convention, Article 6(c).

28. The Paris Convention, Article 9.

29.1 SDR = TL 2.80 or USD 1.53, based on the currency ratio published by the Turkish Republic Central Bank on January 20, 2012 (<http://www.tcmb.gov.tr/kurlar/today.html>)

30. Paris Convention, Article 7(b)

31. Paris Convention, Article 7(b)/(ii)

32. Paris Convention, Article 7(g)

33. GÜNEYSU, Gülin, Nükleer Reaktörlerin Yol Açtığı Zarardan Dolayı Hukuki Sorumluluk (Civil Liability Caused by Nuclear Installations), p. 222

34. The New Obligations Code, Article 73.

35. The New Obligations Code, Article 146.

36. The Paris Convention, Article 8(b)

37. For example, the statute of limitations is 30 years in Switzerland, Austria and Germany.

38. The New Obligations Code, Article 72.

39. The Paris Convention, Article 13.

40. The Civil Procedure Code dated January 12, 2011 and numbered 6100.

41. The Civil Procedure Code, Article 6. This is by virtue of the general principle of jurisdiction applicable to all civil lawsuits be it tortuous act liability or otherwise.

42. The Civil Procedure Code, Article 16. This is the new rule specific to venue in tortuous acts.

