

INTERNATIONAL INSURANCE LAW ASSOCIATION/ AIDA

WORLD CONGRESS

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**Topic IV - POLLUTION INSURANCE
- METHODS, COVERAGE AND BENEFICIARIES**

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QUESTIONNAIRE

Introduction

The topic relating to environmental damage insurance covering losses resulting from pollution was selected by AIDA's Brazilian Chapter for discussion during the World Congress to be held in Rio de Janeiro, in October 2018.

Such choice was justified by the growing frequency and intensity of environmental damages worldwide that sometimes affect entire communities and stop the production of goods and the supply of basic public services. History has been disclosing events of great impact relating to chemical industries (such as Seveso/1976 and Bhopal/1984), to oil industries (such as black tides from oil spill in several locations, and Exxon Valdez in the Gulf of Alaska/1989), to nuclear industry (such as Three Miles Island, Chernobyl), and, recently, the explosion at Deepwater Horizon in 2010, in the Gulf of Mexico, that produced a significant repercussion.

In Brazil, environmental pollution has been raising great awareness and discussions, particularly in view of the last relevant event occurred in Mariana city (State of Minas Gerais), in November 2015, resulting from the collapse of the Fundão dam, that spilled 50 million cubic meters of mine wastes downstream, contaminated the Doce River in its whole extension, and caused huge environmental, social and economic impact to populations and cities.

This context requires an analysis on how national legislations address the matter, as well as on the contribution provided by the insurance industry to either remedy or mitigate the impact from environmental damages. The local reports shall be particularly useful to the

assessment of an issue whose perceptions may vary on a significant basis, depending on national legal and administrative peculiarities. Please prepare your report in such a way as to submit the information as required for a correct and full understanding of the answers to the questions made herein.

This questionnaire contains only indicative questions. Please try to inform all the issues you may deem as important to the study of the topic, in the light of your country's scenario. Any information and comments shall be relevant. As the purpose of this questionnaire is to know the situation in your country, we kindly ask you to provide answers that specifically refer to such scenario.

PRELIMINARY REMARK:

Please note that the questions under “1. Environmental Legal Aspects” relating to liability issues are aimed at ensuring a better understanding of the pollution insurance law and practice in different countries. Answering those questions is left to the sole discretion of the national reporter who may freely choose to answer only questions relating to insurance law aspects (i.e. to questions from “2. Legal aspects on environmental insurance policies” to “7. Academic development”).

1. Environmental legal aspects (answer is optional)

1.1. Which are the major general rules on civil liability arising from environmental damages in your country?

There are two major general rules.

The first is the common law tort system. The common law torts of negligence, nuisance, Rylands v Fletcher and Trespass combine to compensate individuals suffering from property damage, personal injury and harm to amenity arising from pollution.

The second is the statutory liability system. This has developed comparatively recently in response to criticism of the tort system's reactive (rather than preventative) nature, its high evidential hurdles, and its focus not on pollution itself but on the effects of pollution. Run by regulators like the Environment Agency of England and Wales, the statutory liability system encompasses the clean up of contaminated land, contaminated water and waste, the restoration of natural habitats and species, and the abatement of nuisance.

1.2. Please describe the main characteristics and objectives of environmental civil liability in the light of national legislation and court precedents.

1.2.1. How are environmental damages described under the law?

Under the statutory liability system, there is no universal definition of environmental damage. However, it is comprised of (i) damage to water; (ii) damage to land; and (iii) damage to protected species, natural habitats and sites of special scientific interest. Various sets of Regulations set out the relevant thresholds for damage to have occurred. Environmental damage also encompasses “nuisance” that occurs without there necessarily having been accompanying damage to water, land, protected species etc.

Under the common law tort system, there is no definition of environmental damage. As set out above, the system targets subsequent property damage, personal injury and harm to amenity rather than the pollution/environmental damage itself.

1.2.2. Who may be (either directly or indirectly) made liable?

The polluter is the focus of liability under both the tort system and under the statutory system. The latter system also makes provision for liability of “knowing permitters” (i.e. persons who did not pollute themselves but who know about the existence of pollution and have the power to rectify it but fail to act) and, in some cases, innocent owners of the polluted land.

1.2.3. How is the determination of causal link of environmental damages?

As a general rule, a causal link is not presumed between alleged polluter and pollution (and any resulting personal injury or damage to property) in any given situation and must be proved on the balance of probability with appropriate factual and expert evidence.

1.2.4. Does your legislation provide for strict or fault-based environmental liability?

The tort system is heavily (but not exclusively) fault based. The statutory system, on the other hand, is one of strict liability.

1.3. Are there peculiarities regarding environmental damages resulting from pollution? If so, are there differences in the legal treatment to air, soil or water pollution?

There are two peculiarities of note:

First, not only does pollution of air per se not lead to liability in tort, it does not lead to statutory liability. This distinguishes it from pollution of water and soil which can lead to statutory liability.

Second, in relation to statutory liability for water pollution, there is a significant distinction between water damage arising from contaminated land and water damage arising from other pollution sources. The clean up trigger in the latter case is generally easier to satisfy.

1.4. Which are the governmental entities in charge of authorizing and supervising activities that produce environmental impacts or pollution?

The principal regulator is the Environment Agency of England and Wales. The other important environmental regulators are local authorities and Natural England.

1.4.1. What is the scope of activity of these entities?

The Environment Agency issues environmental permits to operators that have the potential to pollute and monitors compliance with these permits. It enforces the clean up of unlawful waste activities and water pollution issues and some types of contaminated land.

Local authorities issue some environmental permits. They also play a role in the regulation of contaminated land and nuisance.

Natural England plays the lead role in relation to nature conservation.

1.4.2 How do they operate, and on which legal grounds?

All of the above regulators have significant powers to investigate pollution matters. Each has issued detailed enforcement policies that set out the priorities for enforcement.

1.5. Is there a legal system of procedural mechanisms in case of environmental offenses?

Yes.

1.5.1. Who is in charge of keeping the environmental protection?

The three regulators outlined above.

1.5.2. How does this system work?

All three regulators have the power not just to require clean up of pollution and restoration but also (in respect of certain types of pollution) to prosecute polluters (and “knowing permitters”). The powers are exercised most often in relation to unlawful waste activities and water pollution activities.

The Environment Agency and local authorities monitor compliance with the environmental permits that they have issued. Non compliance can result in enforcement proceedings and ultimately a fine.

2. Legal aspects on environmental insurance policies (answer is required)

2.1. Is there a specific legal framework to regulate environment insurance policies? If so, please describe such legislation, as well as the major features thereof.

No.

2.2. In the event of a negative response to the question 2.1, please inform if there is any administrative rule, or any other kind of legal regulation that applies to environmental insurance policies. In this case, please describe such regulation, as well as the major features thereof.

None.

2.3. Does the law provide for compulsory environmental insurance?

No.

2.3.1. If so, which would be the relevant risks, covered items and limits?

Not applicable.

2.4. In case of a legal requirement or regulation, when should an environmental insurance policy be obtained?

Not applicable

2.4.1. In which step of a venture should such policy be submitted under the law?

Not applicable

3. Operational methods for pollution insurance (answer is required)

3.1. Which are the pollution insurance's modalities that are offered in the market? Performance bonds or civil liability insurance?

Civil liability insurance.

3.1.1. What kinds of risks should be covered thereunder?

In basic terms, insurance covers three types of liability:

- (i) *Tort liabilities arising from pollution conditions;*
- (ii) *Statutory clean up liabilities arising from pollution conditions; and*
- (iii) *Biodiversity damage liabilities.*

3.2. Does the law or administrative rule define upper limits for losses or coverage?

No.

3.2.1. Which are the criteria that should apply to limits' definition?

Not applicable.

3.3. Is there any difference in the legal treatment to state-owned and private ventures?

No.

3.4. Is there any difference in the legal treatment to fix and mobile facilities?

No.

3.5. Is there any difference in the legal treatment to underground works, mines or underground quarries?

No.

3.6. Do insurers use to insert pre-contractual provisions in the policy (pre-contractual disclosure)?

There are no such provisions specific to environmental policies.

3.6.1. Which are the most usual ones?

Not applicable.

4. Coverage under pollution insurance (answer is required)

4.1. Which are the major covered risks relating to civil liability arising from pollution?

In basic terms, the following risks are covered:

- (i) *Tort liabilities arising from pollution conditions;*
- (ii) *Statutory clean up liabilities arising from pollution conditions; and*
- (iii) *Biodiversity damage liabilities.*

To be covered, risks usually have to present in connection with:

- (i) *Specific locations;*
- (ii) *Specific covered operations; or*
- (iii) *Transportation activities.*

4.2. Which are the major covered guarantees for events arising from pollution?

See above.

4.3. Which are the major covered operational risks arising from pollution?

See above.

4.4. Does the insurance cover fines?

Not criminal fines. Civil penalties can be covered in certain circumstances.

4.5. Is there coverage for individual moral damages, being understood as such any physical or psychological suffering experienced by the victim and/or injury against his/her honor or personality?

No, unless amounting to personal injury.

4.6. Is there coverage for collective moral damages, being understood as such any moral injury undergone by a group of certain persons who are interconnected by a fundamental legal relationship or by a same event experienced by all of them, or any injury to non-determinable trans-individual rights?

No, unless amounting to personal injury.

4.7. Is there coverage for punitive damages, being understood as such any penalty levied on the agent of the illicit conduct, in addition to the compensation of damages themselves?

No.

5. Beneficiaries (answer is required)

5.1. Who is entitled to be beneficiary of losses recoverable under pollution insurance? Any individuals, legal entities, state-owned or private institutions, collectivities?

As long as the claim is for one of the covered risks, the policy should respond regardless of the regulator or third party making the claim.

6. Market status (answer is required)

6.1. What is the percentage of participation of environmental insurance at the insurance market in its whole?

The percentage is very low (<1%). There are 14 carriers in London.

6.1.1 As regards the figures thereof, what is the yearly participation of premiums collected under environmental insurance?

£100m approximately.

6.2. Which are the sectors of economic activity that use to obtain environmental insurance?

Waste management; energy and natural resources; real estate; heavy manufacturing; utilities; logistics.

6.3. During the last 5 (five) years, what is the sum of losses paid by virtue of environmental damages?

This figure is unknown.

6.3.1. What percentage of the aforesaid losses was covered under insurance?

The percentage is not known, but is certain to be very low.

7. Academic development (answer is required)

7.1 Are there research institutes focused on the study of environmental insurance? Please identify them.

No.

7.2 Are there academic and scientific works produced in the fields of law, economy, environment or other similar area, that specialize in environmental insurance? Please indicate some reference legal manuscripts and books, and the main authors thereof.

Environmental Liabilities and Insurance in England and the United States, by Valerie Fogleman.
