

INTERNATIONAL INSURANCE LAW ASSOCIATION/ AIDA  
WORLD CONGRESS

Rio de Janeiro, Brazil – October 2018  
Topic IV - POLLUTION INSURANCE  
- MEHODS, COVERAGE AND BENEFICIARIES

General Reporter: Luis Felipe PELLON

Answerer: Kinzo KUWANA (Kansai University)

**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?

**[Answer]**

The rules center on general tort law, which in turn centers on Article 709 of the Civil Code.

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?

**[Answer]**

No separate regulations deal with environmental damages. Accordingly, damages under the Civil Code's general tort law is understood as damages.

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

**[Answer]**

Parties causing pollution bear liability for compensatory damages. There are, of course, cases in which the manufacturer of a product causing pollution may also be held responsible. Unlike in the United States, parties providing financing are not held responsible.

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

**[Answer]**

Courts make use of the theory of "probable cause." The victim as plaintiff demonstrates, to substantial level of probability, a causal link between the pollution produced by the defendant and the damages suffered by the victim, and if the defendant cannot disprove the assertion, the causal link is acknowledged. In some cases, causal links are established on epidemiological grounds in establishing evidence to a high degree of probability.

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

**[Answer]**

Strict liability is adopted in the Mining Law, the Atomic Energy Damages Compensation Law (Law on Compensation for Nuclear Damages), and the Act on Liability for Oil Pollution Damages (Law for the Reparation and Compensation of Damages by Oil Pollution). Strict liability also applies to some of the damages prescribed in the legislation on the prevention of atmospheric pollution and the prevention of water pollution. Strict liability also applies in cases involving the particular tort specified in Article 717 of the Civil Code, viz. liability of possessor and owner of structure on land. Furthermore, strict liability is also adopted in cases where the Product Liability Act is applied. Negligence is applied in cases other than the above.

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?

**[Answer]**

Because large numbers of victims are a common feature of environmental pollution, there may be cases in which the court acknowledges a comprehensive claim, which calculates individuals' damages by a simple rather than an accumulative method. This applies regardless of the source of pollution (air, ground, water).

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

**[Answer] ?**

The Ministry of the Environment is the main supervising agency for environmental policy. A range of different government bodies are in charge of issuing permits to individual business operators etc.

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

**【Answer】 ?**

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

**【Answer】 ?**

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

**【Answer】 ?**

Criminal penalties are stipulated in a number of laws, including the Air Pollution Control Law. However, criminal penalties for major acts of contamination which are harmful to human life and health are stipulated in the “Law for the Punishment of Environmental Pollution Crimes relating to Human Health.”

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

**【Answer】 ?**

1.5.2. How does this system work?

**【Answer】 ?**

## **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.

**【Answer】**

Business operators are required to take out liability insurance (specifically nuclear power insurance and ship-owner’s liability insurance) to cover the forms of damages stipulated in the Atomic Energy Damages Compensation Law (Law on Compensation for Nuclear Damages) and the Act on Liability for Oil Pollution Damages (Law for the Reparation and Compensation of Damage by Oil Pollution). Other than the above two laws, there are no regulations on insurance coverage against environmental pollution.

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.

**【Answer】**

It is possible for local governments, by mandate, to oblige parties to get environmental pollution coverage. However, there are no local governments currently doing so.

2.3. Does the law provide for compulsory environmental insurance?

**【Answer】**

Please refer to the answer to 2.1 above.

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

**[Answer]**

The nuclear power insurance mandated by the Atomic Energy Damages Compensation Law constitutes liability insurance for the relief of victims of nuclear accidents. The insurance pay-out is 120 billion yen. The Act on Liability for Oil Pollution Damages is a domestic application of the International Convention on Civil Liability for Oil Pollution Damages (CLC). Accordingly, the insurance pay-out is equivalent to the responsibility (varying in line with a ship's tonnage) of the shipowner under the CLC.

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

**[Answer]**

Nuclear power insurance is provided through the Japan Atomic Energy Insurance Pool (primary carrier pool) by private Japanese insurance companies, and there is no difficulty in obtaining coverage. Ship owners' liability insurance is mainly available from the P&I Club etc. Unlike the OPA in the United States, high insurance amounts are not required, so there is no difficulty in obtaining this coverage.

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

**[Answer]**

Any nuclear power operator with a national government license to operate can obtain nuclear power insurance. New entries to the market have no difficulty in obtaining shipowners' liability insurance, either.

**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?

**[Answer]**

The compensation mechanism required by law is liability insurance; surety bonds are not required.

3.1.1. What kinds of risks should be covered thereunder?

**[Answer]**

Nuclear power insurance has the characteristic of disclaimers for earthquakes and gradual pollution. The coverage offered under shipowners' liability insurance does not differ from that generally provided by the P&I Club.

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

**[Answer]**

Criminal penalties are in place.

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

**[Answer]**

Please refer to the answer to 2.3.1 above.

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

**[Answer]**

If the state is liable for compensation, the matter is handled in accordance with the State Redress Act.

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

**[Answer]**

Legal regulations in some cases differentiate between fixed and mobile sources of pollution. For example, in the Air Pollution Control Law there is a separate stipulation on mobile sources of pollution such as automobiles etc. However, there are no regulations on compensatory damages which differentiate between fixed and mobile sources of pollution.

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

**[Answer]**

The Mining Law applies to mine operators. This law stipulates strict liability for such businesses. However, general tort law applies for environmental pollution caused by other operations underground (e.g., underground work carried out by a construction company).

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

**[Answer] ★**

In general, when a business etc. seeks to take out environmental pollution compensation liability insurance in Japan, a prior survey of their place of business to be insured is a condition of obtaining such insurance. There are of course products which dispense with the need for such survey by setting high costs for the client.

3.6.1. Which are the most usual ones?

**[Answer] ★**

A prior survey is the most commonly adopted approach.

**4. Coverage under pollution insurance (answer is required)**

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

**[Answer] ★**

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

**[Answer] ★**

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

**[Answer] ★**

4.4. Does the insurance cover fines?

**[Answer]**

They are not covered.

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?

**[Answer]**

Japanese tort law recognizes consolation payments as a form of compensation for damage caused by psychological distress etc. In other words, in some cases damages subject to insurance payment may include damages such as those caused by psychological distress etc.

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?

**[Answer]**

There is no coverage for class action lawsuits.

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?

**[Answer]**

Punitive damages are not recognized in Japan.

**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?

**[Answer]**

It is the insured party who collects insurance money. In other words, in many cases, it is the party who caused the pollution. Yet, there are also policies which include contractual clauses on direct claims, whereby the victim can claim insurance money directly from the insurer.

**6. Market status (answer is required)**

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

**[Answer] ★**

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

**[Answer] ★**

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

**[Answer] ★**

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

**[Answer] ★**

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

**[Answer] ★**

**7. Academic development (answer is required)**

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

**[Answer]**  
No, there aren't.

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

**[Answer]**  
Please refer to the attached list.