

(FINLAND – Answers by Matti Sjögren, If P&C Insurance)

INTERNATIONAL INSURANCE LAW ASSOCIATION/ AIDA

WORLD CONGRESS

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Topic IV - POLLUTION INSURANCE

- METHODS, COVERAGE AND BENEFICIARIES

General Reporter: Luis Felipe PELLON

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?

A: There is a specific ACT ON COMPENSATION FOR ENVIRONMENTAL DAMAGE (737/1994). (EDCA)

The scope in § 1: Compensation shall be paid for a loss defined in this Act as environmental damage, caused by activities carried out in a certain area and resulting from:

- 1) pollution of the water, air or soil;
- 2) noise, vibration, radiation, light, heat or smell; or
- 3) other similar nuisance.

The keeper of a road, railway, port, airport or other comparable traffic area shall also be considered to be carrying out activities referred to above in paragraph 1.

This Act does not apply to contractual liability for compensation.

The liability is based on strict liability.

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?

A: The said Act has not exactly defined the environmental damage.

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

A: See above; the operator who carries out the activity which causes the damage.

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

A: It is defined as follows: “if it is shown that there is a probable causal link between the activities and the loss referred to in section 1, paragraph 1. In assessing the probability of causality, consideration shall be given, among other things, to the type of activity and loss and to the other possible causes of the loss.”

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

A: 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?

A: All are covered basically in the same way. Of course, there may be variations what would be the ways to actually in practice measure the compensations, if it handles “air” versus soil which can be repaired like a property damage. Those issues would be solved in each claim.

It is also good to bear in mind Environmental Liability Directive (ELD, 2004/35/CE) on the prevention and remedying of environmental damage. It does not concern civil liability, but it makes it possible for the authorities to pursue, at the cost of the polluter, remedying environmental damage caused to biodiversity and assets not considered anyone’s property like flora and fauna. ELD has been implemented to Finnish legislation in addition to the civil liability rules.

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

A: n/a

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

A: n/a

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

A: n/a

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

A: Environmental civil liability is handled in the normal civil procedure.

Criminal offences are handled in the criminal proceedings including then also the compensations.

ELD based actions are handled in the administrative procedure.

There are other administrative methods for breaches of environmental permits etc.

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

A: n/a

1.5.2. How does this system work?

A: n/a

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.

A: there is not any legal frameworks for standard environmental liability policies.

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.

2.3. Does the law provide for compulsory environmental insurance?

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

A: There is a statutory scheme to cover environmental liability caused by an unknown or insolvent polluter. (Environmental damage insurance act, 81/1998)

It is based on the civil liability according to the Environmental Damage Act. However, it covers also possible pure financial damage in addition to injuries and property damage.

The limits are EUR 6M per occurrence and 10M in the annual aggregate. The policy year is the calendar year.

The scheme is financed by the premiums from those companies, which need to have an environmental permit from the state authorities, about 1.400 companies. But damage caused by any other unknown or insolvent polluter is also covered!

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

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

A: When a company starts operating and needs an environmental permit for it, it needs to take out also this insurance

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?

A: Environmental liability for sudden and accidental pollution is included in the standard General Liability insurance policies. It is not a performance bond.

3.1.1. What kinds of risks should be covered thereunder?

A: Typically bodily injuries and property damage are covered including financial loss to the suffering party. Pure financial loss is not covered, like any loss to others than the one suffering the primary injury or damage.

Authorities costs are often excluded even if the polluter must pay them.

ELD based coverage is available in the market, but it is not standard.

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

A: There is no administrative rule for upper limit. However, the authorities may require collaterals (not liability insurance) with set values for restitution of the environment after the operation has ended.

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

A: n/a

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

A: No

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

A: EDCA is based on the concept of damage caused by activities carried out in a certain area. So pollution from vehicles like cars (statutory Motor third party liability) or railways (Railways liability) or aircraft are not included in the general EDCA.

But if the mobile facility operates temporary on a certain area EDCA applies.

So also the liability insurances follow the actual operations.

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

A: Not from the insurance perspective. There is, however, specific legislation on mines.

In the underwriting there are plenty of issues taken up by the insurers.

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

A: this is an underwriting issue. Regarding specifically environmental risks and liability insurance, there aren't usually any specific pre-contractual disclosure provisions due to the fact that only sudden and accidental damage is covered. In case of gradual pollution, there definitely would be more requirements of the existing conditions on the site.

3.6.1. Which are the most usual ones?

A: n/a

4. Coverage under pollution insurance (answer is required)

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

A: Bodily injuries and property damage including the financial loss to the same suffering party.

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

A: these are not insured by liability insurance products. There are some guarantee/fidelity products available in the market to fulfil the authorities' permit requirements for collaterals.

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

A: Bodily injuries and property damage including the financial loss to the same suffering party.

4.4. Does the insurance cover fines?

A: No

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?

A: Typically not. This issue is not prevalent in Finland.

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?

A: No

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?

A: Not in Finland. There aren't punitive damages here.

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?

A: all of them. However, according to the Insurance contract act the policyholder of the liability policy has the right to use or not use his/her insurance. In case of insolvency, authorities' requirement or use in the marketing, the claimant gets the direct action right against 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?

A: As explained, the environmental liability for sudden and accidental pollution is included in the General Liability insurances. Thus, the penetration is close to 100%.

For gradual pollution or for ELD liability the penetration is low.

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

A: n/a

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

A: All, but the significance varies widely.

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

A: n/a

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

A: n/a

7. Academic development (answer is required)

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

A: 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.

A: n/a
