

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?

.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?

The Polish lawmaker and the doctrine use the concepts of damage to the environment, environmental damage, ecological disaster and the relation between those concepts is not clear. The legal definition implemented in the Act of 13 April 2007 on the Prevention and Remedying of Environmental Damage, which states that damage to the environment is ‘*a negative, measurable change in state or function of the natural elements, evaluated in relation to the initial state, which has been caused directly or indirectly by the activities carried out by the user of environment(...)*’, does not solve the problem due to its incompatibility with the principles of liability for damages resulting from the Polish Civil Code.

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

Polluters (entity using the environment).

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

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

It depends on form of polluters

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?

The Water pollution

The Water Law is the regulatory regime for business activities that involve water management. The use of water resources may require a special permit known as a water-legal permit. Different authorities are entitled to issue a water-legal permit, for example a *staroste* or the marshall of a *voivodship*.

Water and the environment around water are stringently protected. The Water Law lists specific types of prohibited activities. In general, it is prohibited to: cause water pollution, breach the scope of a permit, and not comply with the activities covered by a permit.

The regulator can require a polluter to pay compensation for engaging in prohibited activities under the Water Law. The polluter must remedy the damage caused to the environment (including water) (Act of 13 April 2007 on the Prevention and Remediating of Environmental Damage).

Air pollution

A permit is required to release gases and dust from an industrial installation into the air. The head of the district where the installation is sited generally issues the permit. The permit must specify the type and amount of gas or dust that will be released into the air and the locations of measuring stands. Companies must measure the level of air pollution if they carry on an activity that may cause air pollution. Certain installations do not require a permit. These are listed in regulations issued under environmental law.

Environmental law prevents air from being over-polluted and prohibits air pollution outside the scope of the permit (if a permit is required). It sets the standard level of acceptable air pollution.

Companies that pollute air are obliged to pay compensation for use of the environment. Compensation rates are set out in environmental law. Under the Act of 13 April 2007 on the prevention and remediating of environmental damage the polluter must remediate damage caused to the environment..

Climate change, renewable energy and energy efficiency

Poland has obligations as a member of the EU in addition to initiatives it has taken under the UN policy for reducing greenhouse gas emissions. So far, Poland has reduced greenhouse gas emissions by 32% since 1990. This exceeds the EU target of 20%. Poland has also taken various steps to prepare a more efficient framework for further reductions.

The main programmes related to the reduction of greenhouse gas emissions are:

National Programme for the Development of a Low-Carbon Economy.

Polish Climate Policy. This is the plan to reduce greenhouse gas emissions in Poland by 2020.

Polish Energy Policy until 2030.

The most recent development in this area is the Act on Renewable Energy Resources, passed on 20 February 2015.

Poland also has a binding target on energy efficiency and the support scheme relating to promotion of energy efficient projects. This is based on the Energy Efficiency Act of 15 April 2011.

Waste

An installation requires a waste production permit to operate if it produces more than 1Mg of hazardous waste or more than 5000Mg of other waste each year (*Environmental Protection Law*). A waste production permit is not required if the activities of the installation are conducted under an integrated permit. Under the Act on Waste, there are two different permits related to waste collection and disposal: a permit for collecting waste and a permit for the treatment of waste. An entity that wants to offer both of these activities can apply for a combined permit. The authority entitled to issue the relevant permits depends on the type of permit.

There is a wide range of prohibited activities related to waste. Most are activities that are harmful to the environment. Others are more procedural in nature, for example failing to comply with standards or providing services related to waste without permits.

The operator must comply with certain criteria set out in the Act on Waste. The criteria mainly relate to the location of landfills and the type of management required to prevent environmental pollution in the course of the activity. The preliminary phase of the procedure to obtain permission examines these criteria.

The Act on Waste creates a different regime for certain types of waste that are regarded as dangerous or which require special treatment, for example asbestos or medical waste.

Asbestos

Under Environmental Protection Law, asbestos is one of two substances that present a significant risk to the environment. The second is polychlorinated biphenyls (PCBs).

It is forbidden to sell asbestos or reuse products that contain asbestos. Asbestos waste is continuously eliminated with an obligation to stop using it and clean up the installations in which it was used by 31 December 2032. Entities that use asbestos must keep specific documentation on the use, storage locations, type and use of asbestos.

Matters related to asbestos are regulated on a national and a regional level. The Ministry of the Environment and the Ministry of the Economy are both responsible for registering and providing procedures to eliminate asbestos. Governmental and local authorities carry out these procedures to prevent the spread and reuse of asbestos.

Contaminated land

Contamination caused since 30 April 2007 is dealt with under the Act of 13 April 2007 on the prevention and remedying of environmental damage. The regional directorates of environmental protection deal with contamination issues.

The landowner must notify the contamination, or suspicion of contamination of land, to both the regional director of environmental protection and to the *voivodship* (province) inspectorate of environmental protection. An investigation is obligatory following a notification. Every contamination must be cleaned up and remediated. The owner is not released from its liability when it disposes of land. The obligation to remedy the contamination is unlimited. Civil

liability rules allow an individual to pursue claims against a polluter. They can claim for compensation and for remediation of the contaminated land.

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

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

Polish administrative authorities strongly emphasise compliance with national and EU environmental law and regulation. The many authorities concerned with environmental protection specialise in a wide range of queries and are well staffed and organised. Enforcement varies depending on the legislation concerned. However, there is a general tendency towards stricter compliance with environmental protection measures.

Numerous central and local administrative bodies deal with environmental protection under powers and duties derived from the relevant legislation. The most important authorities are: Ministry of Environmental Protection (*Ministerstwo Ochrony Środowiska*) (www.mos.gov.pl), the central body at governmental level, which supervises the activity of other authorities concerned with environment protection.

Main Inspector of Environmental Protection (*Główny Inspektor Ochrony Środowiska*) (www.gios.gov.pl). Its main activities include supervising compliance with, and inspecting and evaluating environmental protection provisions. It also supervises the remediation of any breach of the provisions.

Main Director of Environmental Protection (*Główny Dyrektor Ochrony Środowiska*) (www.gdos.gov.pl). Its main activities include supervision to ensure that environmental protection policy is put into practice, supervising investment processes and participating in issuing Environmental Impact Assessments (EIAs).

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

The key pieces of environmental legislation are:

The Act on the Protection of the Environment, 27 April 2001 (*Ustawa z dnia 27 kwietnia 2001 r. – Prawo ochrony środowiska*) (Environmental Protection Law).

The Act on the Prevention and Remedying of Environmental Damage 13 April 2007 (*Ustawa z dnia 13 kwietnia 2007 r. o zapobieganiu szkodom w środowisku i ich naprawie*).

The Act on the Protection of Nature, 16 April 2004 (*Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody*).

The Water Law, 18 July 2001 (*Ustawa z dnia 18 lipca 2001 r. - Prawo wodne*).

The Act on Waste, 14 December 2012 (*Ustawa z dnia 14 grudnia 2012 r. o odpadach*).

The Act on Greenhouse Gases and Emissions of other Substances Management System, 17 July 2009 (*Ustawa z dnia 17 lipca 2009 r. o systemie zarządzania emisjami gazów cieplarnianych i innych substancji*).

The Act on the System of Trading in Greenhouse Gas Emission Allowances of 28 April 2011 (*Ustawa z dnia 28 kwietnia 2011 o systemie handlu uprawnieniami do emisji gazów cieplarnianych*).

Regulation of the Minister of Environment of 30 April 2008 on the criteria for assessing whether any damage to the environment has occurred

Regulation of the Minister of Environment of 4 June 2008 on the types, conditions and implementation of remedial action,

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

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

1.5.2. How does this system work?

Poland has one of the more detailed system of reporting and registering environmental damages and the associated risks. Apart from Hungary, Poland is the leader among the member states considering the number of such damages and the number of court cases conducted in that respect.

Administrative fines and criminal liabilities are the most serious penalties for breach of the Water Law. Authorities can revoke permits and issue administrative fines. Criminal liability leads to fines, restriction of liberty and imprisonment. There can also be civil liability for torts. Environmental law creates three regimes for liability for air pollution:

Administrative liability for non-compliance with the scope of a permit, breach of a permit, or failure to obtain a permit. The most common penalties are a fine and restrictions on carrying out business activity.

Civil liability for damages caused by the activities of the polluter. It is still possible to incur civil liability even if the pollution is within the scope of a permit.

Criminal liability for breaching provisions in environmental legislation. In this case, the most common penalties are fines, restrictions of liberty and imprisonment.

There is administrative and criminal liability for failure to comply with the Act on Waste. Administrative liability can be financial and the regulator can prohibit certain kinds of activity.. Legislation forbids the production, use and trade in asbestos. Asbestos must only be stored in locations specifically intended for that purpose. Individuals that breach these provisions are subject to criminal liability that can result in fines, restriction of liberty, arrest and imprisonment.

There are two categories of penalties for contaminating land: 1. administrative fines and the possible revocation of permits; 2. clean-up and remediation of the contaminated land.

Criminal liability can also result from the contamination of land and can result in fines, restriction of liberty and imprisonment.

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.

Act of 14 December 2012 on waste and the Act of 13 April 2007 on the prevention and remedying of environmental damage has contributed significantly to the development of the Polish market of ecological insurance.

Financial security can be required when justified by the “important social interest related to environmental protection “. This concept is undefined in the Act on the prevention and remedying of environmental damage, but Minister responsible for the environment is instructed to “take into account the probability of occurrence and extent of potential damage to the environment and be guided by the need to ensure” (cost recovery). Under Polish law the financial security regime applies to “users” of the environment. Under the Act on Waste financial security regime applies to manager of manger of the waste landfill. According to the Act on the Protection of the Environment. The security may take the form of a deposit, bank guarantee, insurance guarantee or insurance policy. A bank guarantee or insurance policy should state that in the event of a negative impact on the environment the bank or the insurer shall settle the obligations to the licensing authority.

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?

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?

User of the environment in a manner beyond ordinary use should obtain a permit that specifies the scope and conditions of use of the environment (e.g. discharge of waste water, pollutant emissions into the air). It is issued by the competent entity of the environment. The obtained permission obliges the user of the environment to prevent the negative impact on the environment and may provide for the obligation to provide the financial security.

Financial security for the manager of the waste landfill should be submitted to the authority which (by decision) approves the instruction of the waste landfill.

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, first party insurance, insurance guarantee

3.1.1. What kinds of risks should be covered thereunder?

The costs of corrective actions in case of environmental damage and the costs of preventive measures

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?

No data

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?

The Act of 11 September of 2011 on used electronic equipment, which also provides for financial security (in the form of, among others, an insurance guarantee) for entities that market electronic household equipment. There is financial security in the event of failure to pay a product fee.

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

Yes. – Under the Act of 9 June 2011 on the mining and the geological law. concessions for underground storage of the waste or the carbon dioxide (or other concession if it is justified by a particularly important public interest, a particularly related to environmental protection) are granted subject to the establishment of a financial security of claims that may arise as a

result of such activities. The financial security may in particular take the form of business liability insurance.

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

3.6.1. Which are the most usual ones?

No data

4. Coverage under pollution insurance (answer is required)

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

The liability for damage resulting directly or indirectly from the emission, leak, release or other form of penetration into the air, water or land of any hazardous substances

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

Still, the most popular form of including the risk of damages to the environment in the insurance activity of the Polish insurance companies are the additional clauses to the general terms and conditions of the entrepreneur's civil liability insurance¹.

Significantly, the separate insurance agreements for pollution of natural environment (the so-called standalone cover), can be found in the portfolios of the branches of insurance companies, operating in Poland on the basis of the principle of freedom to establish businesses.

The use of the environmental guarantee, which uses the less popular type of insurance operations that is the insurance guarantee contract, by one of the insurers can be considered a positive symptom. The object of the environmental guarantee is the obligation of the insurer to pay an amount specified in the guarantee, in case the entity, on the request of which it was granted, did not remove the negative effects in the environment, caused by the conducted activity or which despite the written request for payment, did not pay within the specified period of time the entirety or part of the claims resulting from the costs incurred with reference to the remedying of the damage to the environment. The environmental guarantee is the security of receivables of the State Treasury represented by the environmental protection authority.

The answer to the demands of the market is the insurance, the aim of which is the supplementation of the protection guaranteed by the common civil liability motor insurance.

¹ An exemplary clause from one of the insurance is: *The inclusion of liability for damage resulting directly or indirectly from the emission, leak, release or other form of penetration into the air, water or land of any hazardous substances 1. Other than is provided for in § 4 (2)(8) GIC, of the general conditions of insurance under this clause shall be included in the scope of the insurance liability of the Insured in respect of: 1) personal and property injuries arising directly or indirectly from the emission, leak, or other form of penetration into the air, water or land of any hazardous substances; 2) the costs of removal, neutralization or soil remediation from pollutants incurred by third parties.*

From the statutory extent of coverage of those insurance are excluded the damages to the environment caused during the transport of harmful substances².

The insurance which are in the portfolio of one of the Polish insurers are to fill that gap, and are addressed at entrepreneurs who transport harmful substances. They allow for the insurer to cover the costs charged to the perpetrator of the accident for the clearing of the damaged area - performed by a specialist entity, which often reach high amounts.

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

4.4. Does the insurance cover fines?

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 honour or personality?

Yes, as a harm according to the Polish Civil Code

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?

If the threat or breach concerns the environment as a common good, the State Treasury, local self-government units, as well as an environmental organizations can claim compensations.

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?

Individuals. legal entities, state-owned or private institutions, State Treasury, local government units, ecological organizations

²Art. 38, par. 1 subpara. 4 of the Act of 22 May 2013 on Compulsory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau i.e. Dziennik Ustaw of 2013, item 392

6. Market status (answer is required)

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

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

No data

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

producers - heavy industry, chemical industry, petrochemical industry,
producers - food industry,
energy and gas suppliers,
companies dealing with waste management,
companies running construction projects,
companies from the water and sewage sector, sewage treatment plants,
companies dealing with landfill waste management, retail trade, warehouses,
transport and logistics companies,
property owners, developers and tenants of the area,
companies specializing in consulting and environmental engineering,
oil and gas production (including shale gas).

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

No data

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

No data

7. Academic development (answer is required)

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

Due to the fact that insurance constitute an economic and legal category, the majority of research has been conducted so far by the representatives of the economic sciences and the management sciences. They dominate over the research conducted by the representatives of legal sciences. The analysis of the Polish literature indicates a several interpretations of the issue of ecological (environmental) insurance. Hence, the close connection of the ecological insurance with the concept of ecological (or environmental) risk, crucial to the economic approach to insurance. The adoption of a specified model of ecological risk taken over by the insurer determines the scope of the distinguishing of the ecological insurance. The analysis of

the Polish literature on the subject allows for the distinguishing of several interpretations of that issue.

The first most broad approach results from the concepts of ecological (environmental) risk, the source of which is found in all the interactions taking place between people and the remaining elements of the natural environment, including also in the impact of the natural forces not connected to the pollution - e.g. lightning, hurricane or hail. With such an understanding of the concept of ecological (environmental) risk, elements of protection against the effects of the implementation of the environmental risk can be looked for in the structure of almost all the insurance conditions (so-called insurance products) available on the insurance market³. The flaws of such a broad approach is the contradiction with the business practice and the idea of the distribution of insurance into homogeneous groups, the objective of which is the precise determining of the object of research (scientific approach) and management of the insurance activity (business approach). A moderate approach sees within the ecological (environmental) insurance the civil liability insurance for damages in the environment and property insurance protecting property against the effects of pollution⁴. Also the view in accordance with which the ecological insurance should include the administrative liability insurance for damages to the environment should be taken into consideration⁵. It is controversial in that the Polish national insurance law regulations provide no bases for the functioning of such insurance⁶. The group of the moderate approach can include also the supporters of including the personal insurance protecting the personal rights against the pollution risk into the ecological insurance⁷. The narrowest approach to ecological insurance is limited to the civil liability insurance for damages to the environment¹⁸ and is in compliance with the current insurance practice in Poland.

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.

The research initiated by the D.Maśniak in the last decade of the 20th century, published in the monograph entitled *Ecological insurance (Ubezpieczenia ekologiczne)* constitute the

³ Compare A. Doś, *Ryzyko ekologiczne przedsiębiorstw na rynku ubezpieczeń majątkowych*, Warszawa 2011, p. 17, 81; a slightly narrower approach: G. Borys, *Ryzyko ekologiczne i jego systematyka na gruncie teorii ubezpieczeniowej*, [in:] *Instrumenty rynkowe w ochronie środowiska*, S. Czaja (ed.), Jugowice-Wrocław 2002, p. 41.

⁴ Compare D. Maśniak, *Ubezpieczenia ekologiczne*, Kraków 2003, p. 140; K. Rosiek, *Zakres pojęcia „szkoda ekologiczna” w ubezpieczeniach ekologicznych*, „Zeszyty Naukowe Akademii Ekonomicznej w Krakowie” 2006, No. 708, p. 102-103; T. Żebrowska, *Ubezpieczenia ekologiczne a ochrona środowiska naturalnego*, „Wiadomości Ubezpieczeniowe” 1997, No. 3-4, p. 11.

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⁶ M. Lemkowska, *Ubezpieczenia odpowiedzialności administracyjnej za szkody w środowisku – problemy prawne*, *Prawo Asekuracyjne* 1/2013, p. 57 et seq.

⁷They cannot be classified as any of the types of insurance included in the closed catalogue, constituting an appendix to the act on insurance and reinsurance activity of 11 September 2015, *Dziennik Ustaw* of 2015, item 1844

starting point for more precise research, which take into consideration the current legal status and the current insurance practice. The legal barriers of the development of the ecological insurance, which although are noticed by the economists who study insurance relations, should be diagnosed with the use of legal methods.

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