

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?

Ley de bases Generales del Medio Ambiente Ley 19.300.-

Ley de Navegación DL 2222

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?

According to the Article 1.d Law 19.300 “Environmental damages:

any loss, decrease, detriment or significant impairment inferred to the environment or to one or more of its components;”

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

Only the one that cause the damage directly maliciously or wrongfully.

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

The link is based in the guilty.

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

Most of the doctrine will state that for environmental liability in the sea is a strict liability and a fault – based for inland (nevertheless for inland oil infrastructure the liability will be strict)

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?

In case of pollution, for vessels there is a limit of liability, for inland pollution there is not limit.

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

There are several entities, but all are in the Servicio de Evaluación de Impacto Ambiental,

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

Article 10 of the 19.300 defines which projects need to enter in the scope of the SEIA.

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

The law 19.300 and 20.417 created the new system of evaluation of the environmental impact of an specific project. Is a complex system with different steps.

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

There are almost three different procedures, one in the Ambiental Court (Tribunal Ambiental) one related to sea pollution in a civil court, and one for fines in the administrative authority.

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

There are several entities, not only one in charge, it depends on the activity you are doing.

1.5.2. How does this system work?

The system works in the SEIA, according to the law, if you are in a project related to one or more activities listed in the Law, you will need to file previously to begin your project, a study of environmental impact, this study will be reviewed by a regional or national environmental commission.

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 there is no a specific law for environmental insurance 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.

No there is no a specific regulation, the only regulation is in maritime issues, in which all the vessels that are under the Chilean jurisdiction, needs to have a pollution insurance policy, normally the P&I coverage will be enough.

2.3. Does the law provide for compulsory environmental insurance?

Yes article 15 Law 19.300, The activities that needs a “provisory” authorization of the environmental system needs to obtain an insurance for environmental damages.

The DS (Decreto Supremo) N°30 “Reglamento del Sistema de Evaluación de Impacto Ambiental”, defines the conditions, legal requirements, and terms of this insurance.

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?

There is no legal requirement for environmental insurance, only if you need a provisory authorization of the SEIA)

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

When you file the request of authorization of the environmental impact commission, and in the same request you ask for a provisory authorization to begin your work prior to finish the procedure.

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?

Liabilities for environmental damage, CAD 120131309

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

No no administrative rule define limits. Nevertheless Chile is part of the CLC 1969; 1976; 1992

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

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 only difference is between vessels and ground facilities, the vessels could limit the liability.

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)?

No

3.6.1. Which are the most usual ones?

4. Coverage under pollution insurance (answer is required)

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

Liabilities for environmental damages, cost of cleaning, defences, fines, moral damages.

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

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

4.4. Does the insurance cover fines?

Yes

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?

Yes

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

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?

Under the Chilean Law we do not recognize punitive damages.

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?

For environmental damages, the state (Consejo de Defensa del Estado) will be entitled.

For moral damages, and personal damages, each person.

6. Market status (answer is required)

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

There is no official information.

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

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

Mining, Oil, ocean carriers.

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

This sums are normally private and are not well known by the market, nevertheless in the last pollution cases (involving more than 6.000 fishermen's, the total paid amount was USD3.000.000.-

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

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.

1.- La responsabilidad por daño ambiental (Jorge Femenías)

2.- **Civil Actions Arising From Environmental Damage in Act N° 19.300**; Revista de Derecho de la Pontificia Universidad Católica de Valparaíso

XXIX (Valparaíso, Chile, 2do Semestre de 2007)

[pp. 119 - 140] **Álvaro Vidal Olivares.**

http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-68512007000100003.

3. Jurisprudencia Ambiental. Casos destacados 2013-2014” (Editorial Metropolitana). Rafael Vargas Miranda.
