

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?

A property owner who is disturbed by emissions from an officially approved facility must tolerate these emissions - the injunctive relief (§ 364 Abs 2) is withdrawn on the basis of official approval. As compensation for this obligation to tolerate, § 364a ABGB grants a no-fault claim for damages, provided that the immissions cause damage. So there is – apart from normal tort law – a strict tort liability independent of fault for neighborhood damage caused by the operation of a plant or a mining installation. In addition, there is strict liability for damage to three environmentally relevant protected goods, i. e. water, soil, protected species and natural habitats (this protected property is often referred to as biodiversity) – the Federal Environmental Liability Law. There are separate liability provisions for water use facilities, forest management, the handling of radioactive material etc.

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?

Environmental damage in terms of the Federal Environmental Liability Law: Damage to the environmentally relevant protected goods water, soil, protected species and natural habitats (this protected property is often referred to as biodiversity). Damage or injury is defined as a directly or indirectly occurring adverse change in a natural resource or impairment of the function of a natural resource.

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

The immediate disturber and, in certain circumstances, also the person who has a special relationship to the disturbing property, can be made liable. In addition to the interfering party, a legal entity under public law may also be responsible if, for example, necessary conditions or proper supervision have been omitted.

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

Liability presupposes that the damaging behaviour was causal for the environmental damage. Which behaviour was causal is determined by equivalence theory respectively the “condition sine qua non”: Behaviour is the cause of damage if it cannot be thought away without the damage then disappearing.

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

The Austrian Legislation provides strict and fault-based environmental liability. In the field of environmental law, strict liability dominates. As a rule, the risk liability applies in connection with officially approved plants and particularly dangerous activities. Special provisions also exist for the liability of pipelines for nuclear power plants, mining and water treatment plants.

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 is a special law act for the treatment of water /water pollution. Soil pollution is covered by the civil neighbouring law and by the Federal Environmental Liability Law. There is no special civil liability for air pollution.

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

These are, as a rule, the district administration authorities within the framework of the (indirect) federal administration (plant, water law), the state government (environmental impact assessment), the competent federal ministers (renovation of contaminated sites, environmental liability) and the municipalities (construction law/regional spatial planning).

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

These authorities shall check the compatibility of the project with environmental standards, issue operating permits where appropriate or establish its environmental compatibility. If necessary, the requisite conditions must be imposed, which may also apply retrospectively. The monitoring of compliance with the requirements and supervision of installations is also the responsibility of these authorities.

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

They operate on the ground of Ausitran Industrial Code, of the Environmental impact assessment law and various other laws (water law, forestry law, waste law, etc).

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

There exists a system of mechanism for environmental offenses related to water pollution and in some other cases (for example in the context of forests).

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

On the one Hand, the landowner and the plant operator are in charge of keeping the environmental protection. On the other hand, the authorities are also responsible for environmental protection.

1.5.2. How does this system work?

In general, the land- or plant operator is responsible to avoid environmental damages. If the owners/operator fail to protect the environment or to remediate environmental damages (if they are unwilling/unable to do so), authority will take alternative measures and take recourse to the owner.

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 specific legal framework to regulate environment insurance policies apart the generally valid Insurance Contract Act.

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.

There are special conditions for environmental insurance and General and Supplementary Terms and Conditions for liability insurance, which are no legal regulation but a non-binding agreement of general terms for the insurance industry.

2.3. Does the law provide for compulsory environmental insurance?

No, the law does not provide for compulsory environmental 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 such legal requirement.

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

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?

In the Austrian market is civil liability insurance is offered.

3.1.1. What kinds of risks should be covered thereunder?

See 4.1

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

No, it doesn't.

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?

In the case of private business administration, there is no difference in treatment state-owned and private ventures. If the state operates a venture within the framework of the sovereign administration, the Official Liability Act applies, which largely refers to general civil law.

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

Yes. The neighboring law and the strict liability of the general civil code only applies to fix facilities.

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

Yes, there is a special liability provision for mining damages (§§ 160 ff Austrian Mineral Resources Act)

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

Yes

3.6.1. Which are the most usual ones?

There are pre-contractual risk issues concerning:

- the storage of petroleum products and other other hazardous substances;
- distance of the establishment (s) to surface waters;
- effluent disposal;
- manufacture, supply, maintenance, installation, servicing of equipment with environmental hazard potential (e. g. tanks, sewage treatment plants, filter systems, etc.);
- history of use of the property (old contaminated sites);
- whether there is a protected area (water conservation area, nature reserve) within 500 metres of the plant?
- whether there is any knowledge about protected animal or plant species on the premises or in the immediate vicinity?

4. Coverage under pollution insurance (answer is required)

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

- Liability due to environmental disturbance (impairment of the quality of air, soil or water by emissions), which led to Personal injuries or Property damages.
- Obligations under public law incurred by the policyholder due to the remediation of environmental damage pursuant to the Federal Environmental Liability Act or other statutory provisions in implementation of the Environmental Liability Directive (RL 2004/35/EG) due to
 - Damage to protected species and habitats
 - Damage to of air quality in the event of environmental disturbance
 - Damage to soil quality in the event of environmental disturbance
 - Damage to water quality in the event of environmental disturbance

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

- Fulfilling the costs of obligations under public law
- Reimbursement of costs for rescue measures
- Coverage of the costs in case of claims due to the liability for environmental disturbance

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

- Operation of installations which, due to their environmental hazard, require a permit (risk of pollution of surface and groundwater, soil and air); these include in particular so-called IPPC installations as well as landfills and waste disposal facilities.
- Any type of activity relating to substances dangerous for the environment (especially chemicals, plant protection products and biocidal products, waste and genetically modified organisms)

4.4. Does the insurance cover fines?

No, it does not.

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, but only within the framework of (immaterial) personal injury (= in conjunction with killing, personal injury or harm to people's health.)

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, there' isn't.

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, there is no coverage for 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?

Partly the state, that had to undertake redevelopment measures, partly the owner of the polluted land, partly the damaged persons.

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 insurance against environmental disturbance is part of the basic cover of the company liability insurance, so the percentage of participation at the insurance market equal to the participation of the general company liability insurance. The percentage of participation of the environmental remediation insurance is however quite low, because the underlying Environmental Liability Act is almost a dead law.

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?

Industry, tradesmen, plant operators.

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

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.

The Johannes Kepler University Institute of Environmental Law.

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.

Hinteregger/Kerschner (Editors), Bundes-Umwelthaftungsgesetz B-UHG (2009)

Kerschner/Wagner, Kommentierung der §§ 364 ff ABGB in Fenyves/Kerschner/Vonkilch (Editors), ABGB³ (2009)

Fitsch/Troiß, (Editors), Besondere Bedingung Nr. 566 (Umweltsanierungskostenversicherung – USKV) (2009)
