

Summary of Consultant's study on financial limits of liability under the Protocol

SUMMARY

This is a summary of the final version of the report. It highlights the policy issues and possible solutions with respect to the determination of the limits of liability and the levels of compulsory guarantees.

Preliminary

1. Much information was received from various sources. The author is grateful to the authorities and delegates from various countries as well as to members of the AIDA (International Insurance Law Association) Working party on Liability and Insurance for Pollution, Products and New Technologies and of members of a number of national chapters of the AIDA. Many insurers provided information and comments on their practises and products. Their contribution was essential.

Main conclusions of the report

1. The factors to be taken into account in determining the potential liabilities for which guarantees have to be established.
2. The level of financial guarantees should reflect, in so far as feasible, the nature and size of the actual risks presented by the movement and disposal of the wastes (nr. 2).

Response costs and other damages

3. Although both constitute damages in the meaning of art. 2 of the Protocol, in view of setting up a system of financial guarantees, a major distinction may be made between -response costs which governments will incur when the wastes are abandoned or improperly disposed of, and -accidental damages to humans, property and the environment which may be caused by accidents during the transportation and disposal.

The distinction between response costs and other damages is reflected in the statutory provisions on transboundary movements of waste of a number of countries such as Australia, China (Hongkong) and the UK. The EU requires guarantees with respect to response costs relating to transboundary shipment of waste and the management of landfills but has not yet enacted rules on compensation for damages (nr. 2, 3).

Ideally, the nature of the guarantees which are used to cover response costs should differ from those used in relationship with other damages. There are more particularly several reasons why a traditional liability insurance will not cover the foreseeable costs of the transportation and disposal of waste (nr. 2). In China (Hongkong), e.g., "a bond or other financial guarantee" is required with respect to response costs and a "liability insurance" is required to cover claims arising out of accidental damages. The formula "financial guarantee or equivalent insurance" used in the EU regulation 259/93 may be more flexible and allow for the use and development of other insurance products than liability insurance. Domestic law should set further rules.

The distinction between response costs and other damages is not made in the draft Protocol nor in the final text thereof; the report does not further elaborate on it.

The dangerous nature of the waste

4. It is necessary to take into account the risks actually presented by the waste (nr. 4, p. 6-7). It is useless to require costly insurance to cover accidental damages for waste which does not present more risks than normal non hazardous goods. Whether waste presents special risks or not, can be determined on the basis of the hazardous characteristics referred to in Annex III of the convention. In so far as wastes of Annex II can present these characteristics, one cannot simply use the distinction between "hazardous" and "other" waste (nr. 4). A fairly simple yet meaningful solution would be to set lower ceilings for solid and inert waste and for household waste, than for other categories of waste.

The transportation modus

4.1. With respect to transportation of goods, international and national legislation distinguishes according to the transportation modus and regulates separately marine transportation, transportation by air, road, rail and inland navigation vessel (nr. 5). Liability regimes generally also take into account the volume of the shipment (nr. 6). The same elements will have to be considered when setting up a system of liability and financial guarantees for waste.

4.2. With respect to disposal operations, the report suggests not to make, at the level of limits of liability, a further distinction according to the type of disposal operation, in order to avoid too complex a system (nr. 7). It should be emphasised, however, that the Protocol relates only to the disposal of individual shipments of waste and not to the whole of the operations of the disposal installation. It is said that it is generally possible to trace the shipment which has caused a given incident (nr. 19).

4.3. The report suggests to make the possibility of invoking the limitation of liability dependent on the establishment of guarantees as required (nr. 8).

II. The relationship between the Protocol and the transportation treaties.

5. In establishing limits for liability and financial guarantees, the protocol is to take into account a number of relevant existing international treaties. Several liability treaties indeed deal with liability arising during transportation of goods. Their importance is considerable, especially because of the rule set out in art. 11 of the Protocol: the liability mechanism of the protocol is excluded and replaced by that of any transportation treaty is in force. The liability rules of the Protocol thus do only apply for disposal operations and for sections of the transboundary movement for which the transportation treaties are not in force.

5.1. As waste does not present more risks for accidental damages than goods presenting the same hazardous characteristics, it would seem a logical solution to apply for waste the same limits as for goods in general. This would achieve a similar level of protection irrespective of whether the transportation treaties and the protocol or only the protocol are in force (nr. 10). If this reasoning were adopted, one would have to align the

limits from the protocol on those of the transportation treaties. With respect to marine transportation, the point of reference would be CLC for accidents during marine transportation of waste oils (Annex I, Y8 and Y9 of the Convention) and, until HNS comes into force, LLMC for marine accidents with other wastes. With respect to transportation by road, rail and inland navigation vessel, CRTD would be the model; with respect to transportation by air, the Rome Convention of 1952 (nrs. 12-17). Before adopting this solution, one should however verify whether the limits the reference to the transportation treaties lead to are acceptable from the viewpoint of the protection of the victim and realistic in view of the situation of the insurance market. If not, autonomous limits have to be developed, as is done by the Protocol (nr. 17).

5.2. With respect to disposal of waste, international treaties do not furnish examples for limits of liability and financial guarantees (nr. 18). One may turn here to the figures of one of the transportation treaties. As the liability does only apply to damages resulting from an individualised shipment and not from the whole of the operations of the disposal installation, the State of Import should be allowed to waive additional financial guarantees if the operations of the disposer are covered by a sufficient general insurance (nr. 19).

III. The relationship between the level of liability and the limit of financial guarantees.

6. The practice with respect to limiting liability varies substantially among legal systems. Fault liability generally is unlimited. Strict liability generally is limited in all the international treaties and in a number of legal systems. LLMC and the Rome Convention of 1952, however, even limit fault liability. It is doubtful whether this limitation should, through art. 12, be incorporated in the Protocol, especially for illegal traffic (nr. 21).

7. In the transportation treaties and in the domestic law of a number of countries (e.g. the Netherlands), the limits of financial guarantees coincide with the limits of liability. This is not the case in many other countries, especially those which have a system of unlimited liability. The policy choices in this connection are important. Limiting liability to the same level as the compulsory guarantees, fully protects the operator against personal losses except for the deductibles provided for in the insurance policy. It is a solution which promotes the development of the activity concerned. It at the same time limits the protection to the victim. If one wants to maintain a sufficient protection against major damages, there is the danger that the limits are set to high in view of the possibilities of the insurance market. If one takes the domestic insurance market as the decisive element, the victim may be without recourse in case of a major accident (nrs. 22, 23)

IV. The liability and compulsory financial guarantees in connection with the transportation of goods or waste and the disposal of waste in international conventions and in domestic law.

8. The report compares the limits of liability and of financial guarantees applied in international conventions and in a number of national legal systems, for the various modes of transportation of goods, hazardous goods and waste, and for the industrial installations in general or waste disposal installations in particular (nrs. 24-49). The report contains a summary table of the limits in the transportation treaties. The limits for a hypothetical cargo of 2000 tons would vary from 1.500.000 SDR under LLMC,

3.000.000 SDR under CLC, 10.000.000 SDR under HNS to a maximum of 30.000.000 SDR under CRTD. The minimum limits, for a same hypothetical cargo of 2000 tonnes, set out in the final Protocol are 10 M SDR for transportation and 2 M SDR for disposal operations.

8.1. A large number of countries does not have domestic legislation in this area; a substantial number does. Interesting examples are found in e.g. Australia, India, China (Hongkong), India, Germany, the U.S.A. In certain cases, the liability remains unlimited. Certain limits of liability are relatively high (e.g. India: 50 crore rupees - approximately 11.500.000 US \$) or very high (e.g. Germany, 160 million DM for property damage and 160 million DM for personal damage). When a very high limit of liability is used as level for compulsory insurance, it may appear impossible to implement the latter (e.g. Germany, art. 19 BundesUmweltHaftungsGesetz; see also CERCLA, sec. 08).

V. The availability of liability insurance and other financial guarantees for liabilities arising from transportation of waste.

9. The report describes the structure of the market for liability insurance for environmental damages and the present capacity thereof. Liability insurance for environmental damages cannot be dealt with in the same way as liability insurance for other liabilities. Insurers have, in the seventies and for a variety of reasons, experienced substantial problems in covering environmental liability (nr. 50). The impact of the difficulties on the insurance market (nrs. 51-54) has been the greatest in the area of CGL (commercial general liability) policies. In certain countries insurers, at the least temporarily, excluded coverage of environmental liability or covered it only under very restrictive conditions. The impact was less great in marine insurance where P&I clubs complement the commercial insurance. In certain countries environmental risks were excluded from automobile liability policies; in other countries, the compulsory liability insurance continued to provide unlimited cover for environmental damages as well as for other - in so far as the damages are linked to the traffic risk and do not result from the characteristics of the cargo only.

Since the mid-eighties, the market has better come to grasp with environmental liability insurance (nr. 55). This development was stimulated by legislation imposing new liabilities for environmental damages and requiring financial guarantees and by pressure from reinsurers. Underwriting practices and policy wordings changed. Essential became a careful technical screening, assessment and selection of the risks. Non properly managed operations do not get insurance. Policy wording (especially "claims made" clauses) excluding or severally limiting cover for liabilities which appear only after the policy has elapsed, is used, more particularly with respect to gradual pollution. Damages caused in the normal course of operations are not covered nor are those which result from a violation of environmental legislation.

Presently, the market for environmental liability has become a specialised one (nr. 56). In many countries the general commercial liability insurers continue to avoid environmental liabilities by excluding them or limiting cover. In some countries (Germany e.g.), insurers have completely excluded environmental liability from the normal CGL policy and have developed a special policy for environmental risks. In most countries, only a limited number of insurers offer special environmental policies. In France, Italy and Spain, insurers co-operate by forming insurance pools which cover and deal with industrial pollution liabilities. Mainly in the United States, a limited number of major insurance companies have emerged, who specialise in covering environmental liabilities

and generally have world-wide operations. They write policies under the domestic law of most countries but co-ordinate their operations internationally.

10. Taking into account the limitations which have been set out before with respect to the scope of the cover, there presently appears to be a substantial capacity available in the international insurance market for pollution liability insurance (nr. 57). The cover offered by the general liability insurers in most countries, remains limited. The insurers who have special policies and the specialised insurers however, regularly offer substantial cover, exceeding 25.000.000 or 50.000.000 US \$. For major installations coverage is available up to 100.000.000 US \$.

One should however be careful not to draw the conclusion that imposing routinely very high financial guarantees does not pose any problems. The insurance is costly. The price depends on a variety of factors. It is not available to operators who do not live up to technical and safety standards. Insurers will not accept to tie up their capacity in excessive cover for operations presenting limited risks. A generalised cover of 10.000.000 US \$ for e.g. all waste shipments may not find insurers. For this reason, at the least the distinction has to be made between hazardous and non hazardous waste.

11. The guarantees used to cover the accidental damages may be more diversified than those used specifically for response costs. Not only liability insurance but also bank guarantees and bonds may be used. The latter category of guarantees, however, may not be easily available and may be as costly as insurance. In this respect art. 14, 2 of the Protocol proposes "liability insurance or other equivalent financial guarantees". The national legislator may want to set further criteria which should be satisfied by the financial guarantees (the US regulation implementing RCRA, e.g., contains detailed provisions in this respect). One can accept that States fulfil their obligations by a declaration of self-insurance. One may question whether a waiver of sovereign immunity is not required in this respect.

VI. The limitations of liability insurance; the conditions under which it can be an effective tool for the protection of the victim.

12. To make liability insurance a useful tool for the protection of the general public and not only for the liable party himself, a number of additional measures should be taken. One should prevent that the validity of the guarantee is terminated prematurely by the guarantor.

The proceeds from the insurance should not be diverted to other creditors than the victims of damages. There must be a certificate evidencing the nature of the financial guarantees.

13. Of considerable importance are the issues of direct action by the victim against the insurer or the guarantor and the defences available to the latter (nrs. 60,61).

14. Compared to a system where the insurer has to reimburse the liable party for what he has paid the victim, the direct action provides protection against fraud by the liable party. HNS, CRTD and CLC all recognise a direct action against the guarantor. Under national law, the practice varies. In transportation insurance however, the direct action is very common. In motor liability insurance, almost every non common law country recognises a direct action. It is provided for by a draft EU directive on motor insurance. Both common law and non common law countries who have implemented the transportation treaties, use a direct action. In the US, more than fifteen states recognise

the direct action in motor insurance. A broad direct action is also in certain instances recognised under major US environmental liability laws.

15. The issue of defences available to the insurer is distinct from that of the direct action. The insurer can in any event invoke the defences which the liable party can invoke against the victim. It is, however, common in this respect to broaden the victim's right by not allowing the insurer to oppose against the victim all the defences the insurer might have opposed against the insured himself, on the basis e.g. of the insurance contract or principles of insurance law. Art. 14,4 takes a middle road by allowing the insurer to invoke the wilful misconduct of the liable party. The same solution is adopted in the transportation treaties and in sect. 108 CERCLA.