Baker & McKenzie

Contaminated Land

2015

Baker & McKenzie's International Guide to Contaminated Land

2015

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Table of Contents

Introduction 1

Asia Pacific 7

- Australia 8
- Indonesia 16
- Japan 22
- Malaysia 27
- People's Republic of China 32
- Philippines 37
- Singapore 44
- Taiwan 48
- Thailand 52
- Vietnam 57

EMEA 63

- Austria 64
- Azerbaijan 69
- Belgium 73
- Czech Republic 92
- Egypt 99
- England & Wales 102
- France 115
- Germany 122
- Hungary 125
- Italy 131
- Kazakhstan 137
- Luxembourg 140
- The Netherlands 144
- Poland 150
- Russia 155
- South Africa 165
- Spain 169
- Sweden 178
- Switzerland 181
- Turkey 185
- Ukraine 192

Latin America 197

- Argentina 198
- Brazil 202
- Chile 210
- Colombia 214
- Mexico 219
- Peru 222
- Venezuela 226

North America 233

- Canada 234
- USA 237

Firm Profile 242

Editor 243
Visit the Baker & McKenzie firm website..... 246
Baker & McKenzie Offices Worldwide..... 247

Introduction

Dear User of Baker & McKenzie's International Guide to Contaminated Land:

Thank you for your interest in the 2015 Edition of Baker & McKenzie's International Guide to Contaminated Land. This guide is addressed to professionals with responsibility for international real estate portfolios, mergers and acquisitions involving properties and environmental compliance within a multi-jurisdictional group of companies.

Our guide provides you with a unique overview of national legal frameworks for the handling of contaminated land. In this edition, we have added three countries – Luxembourg, Peru and South Africa – so the new version now covers 40 countries from around the globe.

We have chosen the easily accessible format of "question & answer" and asked our colleagues and environmental specialists in these 40 countries to answer the same 16 questions for their respective jurisdictions. The guide addresses the following aspects of soil contamination, which we consider to be of particular interest to the professional reader: the respective national legislative framework; the statutory responsibility for clean-up of contaminated land; applicable clean-up standards; penalties; agency enforcement and third-party claims; mandatory investigations; and contractual allocation of liability in case of acquisition of contaminated land.

We hope you will find the new 2015 edition of Baker & McKenzie's International Guide to Contaminated Land a useful tool for gaining an initial overview on how a particular country deals with soil contamination issues. As a promotional tool, the guide is supposed to showcase our international reach and capabilities. Obviously, it is not made to, and shall not replace, legal advice. If you are looking for further information or need specific assistance, please send us an email. Our internationally experienced team of environmental specialists will be glad to provide seamless and custom-tailored advice for all countries that you find represented in this guide, and beyond. Contact details of all authors can be found in the guide.

Kind regards

Your global team of Baker & McKenzie's environmental lawyers

16 Questions about Land Contamination

Legislative framework

1. Do you have any statutes specifically relating to land contamination?

2. Is there a definition of contaminated land in your laws?

Statutory responsibility for cleanup

3. Are there any cleanup or remediation laws with regard to contaminated land?

4. If so:

4.1 Who is primarily responsible for the cleanup?

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Cleanup standards

5. How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

6. What level of cleanup is required?

7. Are there different provisions relating to the cleanup of water?

Penalties, enforcement and third-party claims

8. Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

9. Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

10. What authority enforces cleanup?

11. Are there any defenses?

12. Can third parties / private parties enforce cleanup?

13. Can third parties claim damages?

Acquisition of contaminated land

14. Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

15. Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

15.2 Contractually?

16. Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Contributing Offices

Asia Pacific

Australia

Jennifer Hughes
Baker & McKenzie, Sydney

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

There is no Commonwealth law that deals directly with contaminated sites, although there are a number of policy documents and guidelines that have influenced state laws.

Each state and territory in Australia regulates contaminated land. New South Wales (NSW) and Western Australia are the only states that have legislation specifically relating to contaminated land, while the rest of Australia's states and territories regulate the issue with more general environmental protection and management Acts and subordinate legislation. The following table sets out the relevant Australian legislation.

Jurisdiction	Legislation
NSW	Contaminated Land Management Act 1997
Victoria	Environment Protection Act 1970
Queensland	Environmental Protection Act 1994
Western Australia	Contaminated Sites Act 2003
South Australia	Environment Protection Act 1993
Tasmania	Environmental Management and Pollution Control Act 1994
Australian Capital Territory	Environment Protection Act 1997
Northern Territory	Waste Management And Pollution Control Act 1999

The state regimes all differ, but where a general principle can be extracted, this is noted in the answers below. Where state-specific examples are given to the questions below, the examples are drawn from states where foreign corporations are more likely to operate, namely: New South Wales, Victoria, Western Australia and Queensland.

2 Is there a definition of contaminated land in your laws?

The definition varies slightly in each jurisdiction. Generally, each jurisdiction in Australia uses a definition of contamination similar to "a condition of land or water where any chemical substance or waste has been added as a direct or indirect result of human activity at above background level and represents, or potentially represents, an adverse health or environmental impact." (See National Environment Protection [Assessment of Site Contamination] Measure 1999, s 3.)

Statutory responsibility for clean-up

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes, all states have laws with respect to cleanup and remediation of contaminated land. These laws are listed in the table set out above.

4 If so:

4.1 Who is primarily responsible for the cleanup?

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The answers to questions 4.1 and 4.2 are set out in the table that follows.

Jurisdiction	Responsible persons
NSW	A person is responsible for contamination of land if that person: (a) caused the contamination of the land; (b) performed an act or activity that resulted in the conversion of a substance that did not cause contamination of the land into a substance that did cause contamination of the land; (c) is the owner or occupier of the land and knew or ought reasonably to have known that contamination of the land would occur and then failed to take reasonable steps to prevent the contamination; or (d) carried on activities on the land that generate or consume: (i) the same substances as those that caused the contamination; or (ii) substances that may be converted, by reacting with each other or by the action of natural processes on the land, into substances that are the same as those that caused the contamination; unless it is established that the contamination was not caused by the person. If the polluter cannot be found, the Environment Protection Authority (EPA) can pass on liability to other persons in the following order: (a) an owner of the land; (b) a notional owner of the land.
Victoria	EPA Victoria may issue a cleanup notice to the following persons: (a) The occupier of any premises upon or from which pollution has occurred or has been permitted to occur (b) The person who has caused or permitted the pollution to occur (c) Any person who appears to have abandoned or dumped any industrial waste or potentially hazardous substance on the land (d) Any person who is handling industrial waste or a potentially hazardous substance in a manner that is likely to cause an

Jurisdiction	Responsible persons
	environmental hazard If the polluter cannot be found, the authority may hold responsible another person in the above hierarchy. In some circumstances, a corporation that did not directly cause or permit the pollution to occur may also be issued with a cleanup notice if the relevant conduct was by one of their subsidiaries or a related entity.
Queensland	The administering authority may issue a written clean-up notice to the following persons: (a) A person causing or permitting or, who caused or permitted, a contamination incident to happen (b) A person who, at the time of the incident, is or was: (i) the occupier of the contamination site; or (ii) the owner, or person in control, of a contaminant involved in the contamination incident (c) If a cleanup notice is issued to a corporation (the first corporation) in relation to the incident and it fails to comply with the notice: (i) a parent corporation of the first corporation; and (ii) an executive officer of the first corporation If the polluter cannot be found, the authority may hold responsible another person in the above hierarchy.
Western Australia	The hierarchy of responsibility for remediation of the site is as follows: (a) The person who caused or contributed to the contamination of the site (b) The owner or occupier of the site who has changed, or proposes to change, the use to which land that comprises all, or part, of the site is put (c) The person who is the owner of the site, or of a source site If the polluter cannot be found, the authority may hold responsible another person in the above hierarchy.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

There is no statutory provision in any of the jurisdictions that apportions liability between the appropriate persons. Rather, each jurisdiction's environmental authority is given discretion to apportion responsibility based on the facts, as is appropriate.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Liability for a cleanup can extend to historical contamination. In NSW, in determining the appropriate person to serve with a management order, the EPA is, "as far as practicable," to specify a person who is responsible for the contamination over the owner of the land or the notional owner of the land (such as a mortgagee in possession).

A similar principle applies in Western Australia, where the legislation establishes a hierarchy for determining responsibility for remediation, and allows for the transfer of that responsibility. In addition, in Western Australia, if an owner or occupier has changed or proposes to change how it will use all or part of the land, then the owner or occupier will be liable for remediation of the land to the extent that the remediation is required because of the change, or proposed change, of use. To the extent that remediation is required because of the change of use, the people who caused or contributed to the contamination, as well as the state, are released from any liability they may otherwise have had.

In Victoria, there is a greater risk to owners and occupiers of land. The Victorian Environment Protection Authority may serve a notice directing the recipient to clean up the contaminated area and the person so directed need not necessarily be the person who caused the contamination. There is no hierarchy of responsibility and the notice may be served on the occupier. The definition of occupier includes a controller of premises, which may be an owner or a lessee, and in certain circumstances, can include a financial institution that is a mortgagee in possession.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The relevant authority directs the cleanup process in accordance with regulations in each state. In general, the threshold test is whether contamination presents a significant risk of harm to human health and/or the environment.

In NSW, the EPA is able to require remediation of a site (among other powers) if it has reason to believe the site is contaminated and that the contamination is significant enough to warrant regulation. It must take into account various factors before making its decision, including whether the contaminating substances have or are likely to cause harm, the use of the site and surrounding sites, and whether the substances have migrated or are likely to migrate from the site.

In NSW, if the environment minister considers that it is not practicable to remediate the contamination within a reasonable time, the minister can enter into an offset arrangement with a person who is responsible for the contamination of land. An offset arrangement could, for example, require the person to carry out environmental projects or provide facilities or services to a local community.

In Victoria, the EPA may specify the method to be used for cleanup of contaminated land. Cleanup notices and environmental audits typically include risk assessment. The Victorian government is currently devising a contaminated environments framework to ensure that the effort spent in investigating and managing contaminated environments is commensurate with the risk they present and that those involved understand those risks.

6 What level of cleanup is required?

A cleanup is required to a suitable-for-use level, and therefore, there is a different level for industrial land to that required for land used for residential purposes. In most states, the public authority has issued guidelines to assist with determining levels of cleanup.

7 Are there different provisions relating to the cleanup of water?

In general terms, the same principles as discussed above pertain to the cleanup of land and water.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Most state environmental laws contain provisions enabling criminal prosecution to be brought by the administering authority for any contravention of legislation that results in serious environmental harm.

In Victoria, contamination of land is an indictable offense, the maximum penalty for which is presently AUD36,008, with a daily penalty of AUD182,004 for a continuing offense.

It is not in itself a criminal offense to own contaminated land, but a criminal offense may arise from the effects of contamination.

Owners generally have the obligation to inform the relevant state authority if they are aware of any site contamination. In NSW, this obligation to inform concerned authorities is extended to circumstances where the owner ought reasonably to have been aware of the contamination. There are significant penalties, amounting up to AUD1 million, for failing to report contamination.

In Western Australia, land owners or occupiers of contaminated sites, people who caused or contributed to the contamination of a site, and auditors engaged to provide a report with respect to a site, must report known or suspected contaminated sites. If these people fail to report sites that they know or suspect to be contaminated, they may be fined up to AUD250,000 and a daily penalty of AUD50,000 for a continuing offense.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Generally, failure to comply with a cleanup order is a criminal offense.

In NSW, it is an offense to fail to comply with an order to remediate land that has been declared a "significantly contaminated land." The maximum penalty for failing to comply with such an order is presently AUD1 million for a corporation or AUD250,000 for an individual.

In Western Australia, if a company fails to comply with what a notice requires, it can be prosecuted for a criminal offense carrying a maximum penalty of up to AUD500,000, with daily penalties of up to AUD100,000.

In all states, in certain circumstances, directors and managers of corporations can be held personally liable for offenses committed by the corporation. This may include an offense of failing to comply with a cleanup order.

10 What authority enforces cleanup?

The particular state government's EPA issues and enforces cleanup notices. Local councils may also deal with less serious contamination (such as contamination that has been determined not to present a significant risk of harm), generally when landowners need approval to undertake a new development project.

In some states, if a person fails to comply with a cleanup order, the EPA or another public authority can step in, carry out the works required themselves, and recover the costs from the person responsible.

11 Are there any defenses?

In NSW, there may be a defense to some of the most serious pollution offenses if the person establishes:

- that the commission of the offense was due to causes over which the person had no control; and
- that the person took reasonable steps to prevent the contamination.

In Queensland, there are defenses for failing to comply with cleanup notices, including where the contamination was caused by a natural disaster, by a terrorist act or deliberate sabotage.

It is a defense to an offense of releasing a prescribed contaminant in Victoria, if the release occurred under an authorized person's emergency direction.

In relation to the liability of directors and managers of corporations, in most states, in order to successfully defend a prosecution, the director or manager would need to prove either that they were not in a position to influence the conduct of the corporation or that they used all due diligence to prevent the commission of the offense by the corporation.

12 Can third parties / private parties enforce cleanup?

Generally, the regulatory authority enforces a statutory cleanup notice. However, in some states, for example, NSW, members of the public can bring proceedings to challenge or to enforce a decision made by the EPA under the legislation, such as a decision relating to a cleanup notice.

13 Can third parties claim damages?

Common law claims of negligence, nuisance and trespass have historically been made for breaches of general environmental duties, and have been used to claim damages. For example, if contamination was to migrate off a site onto adjoining land and:

- the contamination caused damage to the adjoining landowner's property or business (by a diminution in the value of the land or actual harm to persons or property); and
- the owner was shown to owe the adjoining landowner a duty of care; and
- the owner was shown to have breached that duty, for example, by failing to appropriately monitor the contamination or take steps to prevent its migration off the land,

then the adjoining landowner may be able to bring an action against the owner for damages and hold the owner liable for remediating the adjoining land.

These types of actions could potentially be maintained against a prior owner in relation to land it has previously disposed of, although a claimant may have more difficulty proving negligence in those circumstances.

These cases are typically based on the facts at hand in those circumstances, and they are complicated actions that are very expensive to defend. With the development of specialized contaminated land laws around Australia, common-law actions are being used less often in the resolution of contaminated land issues.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

It is not a legal requirement, but it is prudent practice.

In Western Australia, any transaction that will involve the sale, lease or mortgage of a site that has been classified as contaminated or possibly contaminated under the relevant legislation must include formal disclosure of the contamination at least 14 days before completion.

In Queensland, it was recently held that a vendor is required to give written notice to any buyer or lessee of land that has been recorded on the Contaminated Land Register.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Ordinarily, liability is determined under the statute in each state and it is generally based on the "polluter pays" principle, so the owner or occupier of land who causes contamination is liable for the cleanup. There are exceptions to this principle. For example, if the polluter cannot be located or legal requirements have changed since the pollution occurred, a subsequent owner or occupier may be issued a cleanup order.

15.2 Contractually?

It is possible to provide contractually that the buyer accepts and undertakes cleanup requirements in some states. In Western Australia, responsibility for cleanup can be transferred with a written agreement and with the approval of the Department of Environment and Conservation.

Similarly, in South Australia and Tasmania, responsibility can be transferred to a purchaser if appropriate notices have been provided to the respective environment protection authorities.

Conversely, in NSW for example, a contract cannot operate to transfer liability for contamination under the *Contaminated Land Management Act 1997*.

In our experience, a purchaser will only take on contractual responsibility for contamination for which it is not responsible if it has confirmed the level of contamination (if any) and has been compensated appropriately for taking on that liability (whether by direct payment or by adjustment of the purchase price).

It is usual for landlords to take responsibility for existing contamination (as between the parties – a contract is not enforceable against persons who are not party to it) and for tenants to take responsibility for contamination they cause or to which they contribute (but only to the extent that they contribute). It is also common practice that each party agrees to indemnify the other for contamination for which they have agreed to be contractually responsible.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Contamination registers

Several states in Australia, including NSW, Western Australia, Victoria, Queensland and Tasmania, have a contamination register where the public can search for sites with known contamination. In general, these registers are not exhaustive. If a site is not listed in a register, this cannot be relied upon

as conclusive evidence that the site is not contaminated, and conversely (as noted above), nor will listing a site in the register automatically satisfy disclosure obligations.

Importance of due diligence investigations

The "polluter pays" principle is the over-arching standard running through all contaminated land management legislation in Australia. However, liability may flow to an owner or occupier who was not responsible for causing the contamination and, in some jurisdictions, this may result in charges being registered on the title and/or, in certain circumstances, obligations being imposed upon other entities that have a degree of control over the land, such as a financial institution that is a mortgagee in possession.

We stress the importance of conducting due diligence investigations when purchasing land or acquiring an entity that holds property assets. Where contamination is suspected, environmental audits can be carried out and can be a useful measure for the purposes of determining and allocating liability.

Indonesia

Mochamad Fachri and Ferdy Prawirakusumah
Baker & McKenzie, Jakarta

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

There is a general law on environmental management (which includes contamination), i.e., Law No. 32/2009 on Environmental Management ("Law No. 32/2009"), issued on 3 October 2009. This law replaces Law No. 23/1997 with regard to the same subject.

Law No. 32/2009 mandates the government to revise existing regulations on the environment within the next few years. In the interim, however, existing regulations will remain in force. The following discussions are based on these existing regulations, modified where necessary to take Law No. 32/2009 into account.

According to recent clarification from the Ministry of Environmental affairs, pending new regulations, the ministry will refer to Government Regulation No. 150 of 2000 regarding Control of Contamination of Land Used for Biomass Production specifically for land being used for agriculture, plantation and forestry to produce plants or parts of plants (e.g., flowers, seeds, fruits, leaves, sticks and roots).

2 Is there a definition of contaminated land in your laws?

Government Regulation No. 150 of 2000 defines contamination of land used for biomass production as contamination that changes the basic characteristics of the land and exceeds standard criteria. This should be read in conjunction with Law No. 32/2009, which defines environmental contamination as the insertion of a substance (e.g., organism, substance or energy) into the environment due to human activities such that environmental quality standards are exceeded.

There is currently no general definition of land contamination.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

There is no specific law/regulation on the cleanup of contaminated soil/land. However, Law No. 32/2009 stipulates the imposition of administrative penalties in the form of recovery actions or the reimbursement of recovery costs and cleanup costs for any environmental damage (which includes land contamination).

The Ministry of Environment issued Ministry of Environment Regulation No. 13/2011 on the Compensation of Environment Contamination or Damage ("MOE Regulation No. 13"). Based on this MOE Regulation No. 13, anyone who is responsible for a violation of law by contaminating/damaging the environment that harms other people and/or the environment or state is required to do certain actions, and/or pay compensation. The actions could be in the form of prevention, countermeasures or recovery of the contaminated environment. The compensation must be calculated by an expert who has the certificate of competence, and/or has done scientific research or has the expertise in the related field of environmental contamination or economic environment valuation.

4 If so:

4.1 Who is primarily responsible for the cleanup?

There is no specific law/regulation on this matter.

Law No. 32/2009 provides that the polluter shall be responsible for the necessary restoration. Law No. 32/2009 provides strict liability in which a party will be strictly liable for losses if the party's operation has a significant impact and uses hazardous and toxic substances, or generates hazardous and toxic waste. The party can be released from strict liability if it can prove that the pollution and environmental damage were caused by natural disaster or war, *force majeure*, or a third party's action.

Government Regulation No. 18/1999 as amended with Government Regulation No. 85/1999 and lastly amended with Government Regulation No. 101/2014 ("GR 101/2014"), which was issued under Law No. 32/2009 on management of hazardous and toxic waste, stipulates that hazardous and toxic waste are supervised from their creation to their ultimate storage and disposal, and licenses are required for the production, transport, storage, processing and land filling of such materials.

Companies are prohibited from disposing of hazardous and toxic ("B3") waste into the environment without conducting any preliminary processing of the waste. The polluter of hazardous and toxic waste is responsible for the management of such waste from its creation to its ultimate storage and disposal. The government issued Government Regulation No. 30/2009 on the Licensing and Supervision of Hazardous and Toxic Waste Management Procedure. The regulation stipulates that in order to deal with hazardous and toxic waste, a business is required to obtain specific licenses from the governor or regent/mayor.

Based on MOE Regulation No. 13, the management of the business and/or activity that contaminates/damages the environment is the one who is responsible for the clean up.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

There is no specific law/regulation on this matter. However, Indonesian environmental law recognizes the principle of joint and several liabilities for environmental damage. This principle may apply when more than one party is involved in environmental damage. Arguably, if the owner or occupier has some participation in the polluter's operation, it could be held jointly and severally liable.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

There is no specific law/regulation on this matter. Arguably, the liability can be apportioned based on the degree of participation of the owner and the occupier in the polluter's operation.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

There is no specific law/regulation on this matter. Arguably, the liability to clean up includes historical contamination. In this case, the current owner and occupier may have to pay for this cleanup if they have participated in certain operations.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

For land used for biomass production, Government Regulation No. 150/2000 stipulates standard criteria of land contamination in dry land and wet land, which contain some contamination parameters, such as quantity of microbe and land pH.

For general environmental contamination, in practice, the relevant environmental officials could decide on the requirement to clean up as one of the administrative penalties. Before conducting the cleanup, the officials may request an environmental audit on the contaminated land.

6 What level of cleanup is required?

There is no specific law/regulation on the level of a cleanup.

Law No. 32/2009 provides that the purpose of a cleanup is to restore the functions of the environment and includes the following steps:

- Stopping the source of pollution and clearing the air land of any pollutants
- Remedying environmental conditions
- Rehabilitating the environment
- Other remedies as appropriate

These steps are to be further specified by a government regulation which will be issued within the next few years.

Government Regulation No. 150/2000 stipulates certain methods to clean up contaminated land caused by biomass production, among which are the following:

- Planting plants that are suited to land condition and surrounding environment.
- Conducting amelioration by spreading fertilizer and organic materials.
- Conducting land conservation

In practice, the level of cleanup will depend on the discretion of the officials who ordered the cleanup, that is, to the level that meets the expectation/satisfaction of such officials, with the possibility of a third party challenging this expectation/satisfaction in court.

7 Are there different provisions relating to the cleanup of water?

In general, there is no difference. However, there are more specific provisions in relation to contamination at sea, especially oil spills.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is a criminal offense to contaminate land, although there is no specific criminal offense in relation to the ownership of contaminated land. The criminal offense could occur if such owner contaminates the land that he or she owns (with or without any specific intention).

Any party who intentionally carries out an action resulting in pollution and damage to the living environment (such as contamination of land) is subject to a minimum of three years' imprisonment and a maximum of 10 years' imprisonment, and a minimum fine of IDR3 billion (USD300,000). A minimum of five years' imprisonment and a maximum of 15 years' imprisonment and a minimum fine of IDR5 billion (USD500,000) can be imposed if the above action has severely injured a person or caused his or her death. Profits arising from these criminal offenses may be forfeited in favor of the Republic of Indonesia.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Law No. 32/2009 does not provide noncompliance with cleaning up as a separate criminal offense.

10 What authority enforces cleanup?

In practice, officials of the Ministry of Environment and Local Environment Office (under the auspices of the governor of the affected province) can enforce a cleanup. Law No. 32/2009 provides for the possibility of enforcement by the local government in line with the local autonomy.

Specifically, the Ministry of Environment has issued Ministry of Environment Regulation No. 2/2013 on the Procedure to Impose Administrative Sanctions in the Sector of Environmental Protection and Management ("MOE Regulation No. 2"). Based on MOE Regulation No. 2, the minister, governor or regent/mayor based on their authority are authorized to enforce cleanup.

11 Are there any defenses?

Law No. 32/2009 stipulates that the polluter can be released from strict liability if it can prove that the pollution and environmental damage were caused by natural disaster or war, *force majeure*, or a third party's action.

12 Can third parties / private parties enforce cleanup?

Law No. 32/2009 recognizes the right of the public, including environmental NGOs, to make environmental claims in court or to report environmental problems to law enforcement officials. The claims and reports to the court could include an order for a cleanup at the contaminated site.

Specifically, Ministry of Environment Regulation No. 4/2013 on the Environment Settlement Dispute Procedure ("MOE Regulation No. 4") stipulates that any one (including a third party/private party) has the right to file a complaint based on the allegation of contamination and/or environment damages to the ministry, governor, regent/mayor, or head of the local institution who is responsible in the environment sector. This complaint may be followed with a settlement of dispute. Based on the complaint or the settlement of the dispute, there might be an order to force a cleanup of the contaminated land.

13 Can third parties claim damages?

The civil court, based on third parties' claims, can order the polluter to pay damages and/or to conduct certain actions (Article 84 of Law No. 32/2009). It is emphasized in Regulation No. 13 that the polluter can be ordered to pay the damages that were calculated based on the procedure set out in the Annexure of Regulation No. 13. Regulation No. 13 stipulates that in calculating the damages, the expert has to consider whether there has been contamination or damage; who caused the contamination or damage; who suffered the losses due to contamination or damage; land ownership status of the contaminated land; types of loss (direct or indirect); amount of losses; duration of the environmental damage or contamination; types of environmental damage (water, soil or air); and ecosystem value (whether it can be economically assessed or not).

From a civil law perspective, a party may raise a claim on an unlawful act for compensation of damages. The basis of such claim is Article 1365 of the Indonesian Civil Code (ICC), which stipulates that:

"Any unlawful act, which causes loss to other party(ies) will oblige the party who did the unlawful act to compensate for the loss."

The definition of "unlawful act" is extensive. Article 1366 of the ICC provides that an "unlawful act" includes any negligent or careless act. Under this concept, no element of "intention" is needed for a party to commit an unlawful act (although unlawful acts also include breaches of criminal law, which generally require an element of "intention").

Pursuant to Article 1367 of the ICC, the polluter may be held liable for the loss and damage associated with the contamination if it can be shown that the losses and damages are caused by:

- the polluter's assets, including machinery; or
- acts or omissions of the polluter's employees if an act or omission has been committed by employees while performing their duties within their scope of work as employees of the polluter.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There is no specific legal requirement in Indonesia on this matter. However, it would be prudent for the purchaser before purchasing a property to conduct proper due diligence on whether there is any potential contamination in the property, and if so, specific actions should be taken to remediate the contamination.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

There is no specific law/regulation on this matter. Arguably, it is possible for the polluter to pass on the cleanup liability to the purchaser, particularly if the purchaser does not have any information on past usage of land and did not conduct any environmental audit/due diligence before the purchase.

15.1 Under the general law?

Yes. It is possible for the polluter to pass on the cleanup liability to the purchaser, particularly if the purchaser does not have any information on past usage of land and did not conduct any environmental audit/due diligence before the purchase.

15.2 Contractually?

The parties can incorporate the liability provisions in their contract. These can include a provision on "Indemnification of Liability," which states that any liability in relation to the operations, whether caused by gross negligence, willful misconduct, or omission/negligence, is indemnified by the operator. Arguably, the other party can be entitled to bring in the operator as a third party in any civil claim and receive indemnification from it. Please note, however, that this may not enable the other party to evade any criminal or environmental liability, but only to be compensated if it is found liable.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

It is recommended that a potential purchaser conduct an environmental due diligence or audit before it purchases the land, to find out, among others, whether the land is contaminated or not and if contaminated, to take action to remediate such contamination. Usually, this due diligence or audit will also be needed for the drafting of the Environmental Impact Analysis (AMDAL) or Environmental Management Efforts (UKL) and Environmental Monitoring Efforts (UPL), which are some of the prerequisites required before the purchaser applies for a license to develop such land further (e.g., for the construction of a building/factory). Further, Law No. 32/2009 provides for an "Environmental Permit," which will be mandatory for all businesses that are subject to AMDAL, UKL and UPL requirements due to their scope and possible environmental impact.

Japan

Kana Itabashi, Mihoko Ida and Hideo Ohta
Baker & McKenzie, Tokyo

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes. The Soil Contamination Prevention Law (*dojo osen taisaku ho*), Law No. 53 of 2002 (the "SCPL"), and the Farm Land Soil Contamination Law both specifically regulate land contamination.

2 Is there a definition of contaminated land in your laws?

There is no definition of "contaminated land." However, land will be registered as a "designated area" and/or subject to remediation orders if any of the 26 "specified harmful substances"[1], [2]are found in concentrations greater than the standards set out in the SCPL.[3]

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes (please see 1).

4 If so:

4.1 Who is primarily responsible for the cleanup?

The landowner is primarily responsible. The polluter will only be ordered to implement remedial measures where: (i) the identity of the polluter is known; (ii) the landowner submits that it is the polluter who is responsible for undertaking such remedial measures; and (iii) the local prefectural governor considers such an order appropriate (in consideration of the financial status of the polluter).

Where the landowner is required to carry out remedial measures as a result of an order issued by government authorities under the SCPL, he or she may also claim compensation from the polluter for remedial measures the landowner carries out.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Please see 4.1 above. The landowner is primary responsible.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

In principle, the landowner will be liable. However, depending on the terms of the lease agreement for the land, the occupier may bear liability.

[1] The 26 substances are cadmium; lead; chromium (VI); arsenic; total mercury; alkyl mercury; selenium; fluorine; boron; cyanide; dichloromethane; carbon tetrachloride; 1,2-dichloroethane; 1,1-dichloroethylene; cis 1,2-dichloroethylene; 1,1,1-trichloroethane; 1,1,2-trichloroethane; trichloroethylene; tetrachloroethylene; benzene; 1,3-dichloropropene; PCB; thiram; simazine; thiobencarb; and organic phosphorus.
[2] Dioxan and vinyl chloride monomer are under discussion to be added to the specified harmful substances.
[3] The Standard set out in the SCPL for 1,1-dichloroethylene has been revised from 0.02mg/l to 0.1mg/l. in March 2014. The revision of the standard for trichloroethylene and cadmium are now under discussion.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes. In principle, the landowner will be primarily responsible for the remediation, even if he or she is not the polluter (i.e., where cleanup orders are made, the landowner will be responsible for this cleanup even where contamination results from the activities of prior users or owners). The SCPL has retrospective application in the sense that it applies to historical contamination even if the contamination was not unlawful at the time it first occurred.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The SCPL sets out specific limits for the 26 specified harmful substances. If any of these substances are found in concentrations exceeding the relevant limits, and there is a risk to human health, then land will be classified as a "designated area." Designated areas are further divided into the two subclassifications of:

- areas requiring remediation; and
- areas whose development must be notified to the authorities,

depending on, among others, the extent of the contamination and the existence or likelihood of a risk of harm to human health.

Areas requiring remediation

Land is placed in this category when the soil is contaminated by one or more of the 26 specified substances at levels above the statutory threshold in the SCPL and this contamination causes, or will likely to lead to, damage to human health either by inhalation, ingestion, bodily contact or as a result of drinking contaminated groundwater.

Areas whose development must be notified to the authorities

This designation applies to land that is contaminated by one or more of the 26 specified substances at levels above the statutory threshold in the amended SCPL, but where contamination does not cause, or is unlikely to cause, damage to human health. For land in this category, remediation is not required until the land is to be developed, at which time the area must be remediated in accordance with the stipulations of the relevant ministerial ordinance.

An amendment (which came into force on 8 July 2011) to the enforcement regulations of the SCPL divides "areas whose development must be notified to the authorities" into four subcategories, as follows:

- Landfill controlled areas, which were established by reclamation or drainage and (i) which are located in restricted industrial zones; or (ii) where the groundwater in such area will not be potable in the future
- Special naturally derived areas that are affected by naturally occurring contamination
- Special landfill areas that were established by reclamation or drainage, and are contaminated by land reclamation material
- Appropriately controlled areas other than those listed above

Before taking any action that may change the character of land in these defined areas, the prefectural governor must be notified of the type of development (i.e., how the character of the land will be changed), the location of the land, the methods that are being proposed to be used, the scheduled date of commencing the development, and other matters defined in the relevant ministerial ordinance. If the prefectural governor deems that the methods described in the notification do not conform to the standards prescribed in the ministerial ordinance, he or she may order the person who has filed the notification to revise the development plan. However, where the land falls into any of the categories (a) to (c) above, development that will change the character of the land will be permitted to some extent, so the likelihood of an order to revise the development plan is less likely than for other areas.

6 What level of cleanup is required?

This will depend on the substance(s) found, the extent of contamination, and the present use of the land (e.g., a children's playground will require a much higher standard than land in an industrial zone).

The primary objective of cleanup measures is to prevent harm to human health. As a result, under the SCPL, where soil contains any one of nine direct-ingestion-risk substances in concentrations exceeding the statutory threshold, and there is a risk of inhalation, ingestion or bodily contact with the soil, resulting in harm to public health, prefectural governors will order the implementation of remediation measures in accordance with the provisions of applicable ministerial ordinances.

To the same end, under the SCPL, where remediation is required or ordered under the SCPL, landowners will be required to implement the specified measures within a clearly stipulated time frame.

The details concerning cleanup obligations under the SCPL are set out in ministerial ordinances. Remediation measures for substances on the abovementioned direct ingestion risk list include the following:

- Capping/sealing off or covering topsoil
- Declaring an area off-limits
- Replacing contaminated soil with soil from other layers
- Excavating and removing contaminated soil
- Replacing contaminated soil with soil from outside the designated area

The landowner may use substitute remedial measures that will result in an equivalent or a better level of remediation than the remedial measures the landowners are instructed to implement.

7 Are there different provisions relating to the cleanup of water?

Where there is a risk of harm to public health from ingesting contaminated groundwater, remediation measures are stipulated by the prefectural governor in accordance with ministerial ordinances, as referred to in section 6.

The SCPL also regulates remediation measures for lawful substances (volatile organic compounds or VOCs and agricultural chemicals), where their concentration in the soil exceeds the statutory threshold. Remediation measures for such substances are also stipulated based on the levels and extent of soil and groundwater contamination. The list of standard remediation measures includes the following:

- Measurement of groundwater quality

- Physical containment by seepage control measures
- Containment using liner facilities
- Measures to prevent the spread of groundwater pollution
- Excavation and removal of contaminated soil
- Insolubilization

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

No.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Yes. The penalty is imprisonment for a maximum period of one year or a maximum fine of JPY1 million.

10 What authority enforces cleanup?

The Ministry of Environment, acting through the prefectural governments, enforces cleanups.

11 Are there any defenses?

There are none.

12 Can third parties / private parties enforce cleanup?

No.

13 Can third parties claim damages?

Third parties cannot claim damages under the SCPL. However, third parties may claim damages on the basis of tort law.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Yes.

15.2 Contractually?

Yes.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

The SCPL contains a provision that requires landowners to provide advance notice to prefectural government authorities when they plan to develop any area in excess of 3,000 square meters. In such a case, the purchaser would be obliged to conduct a survey to check the site's history of use, and determine whether the area is likely to be contaminated. If the investigation indicates that the area is likely to be contaminated, the purchaser or landowner is further required to investigate potential contamination and carry out appropriate remedial measures under the SCPL.

The SCPL allows landowners to apply voluntarily for their land to be designated as an "area requiring remediation" or as an "area with respect to which notification is required at the time of development."

In addition to the SCPL, purchasers should investigate any applicable prefectural environmental ordinances that may impose requirements that are stricter than those under the SCPL.

The Law Concerning Special Measures Against Dioxins of 2000 may also be applicable to contaminated land. This law sets out environmental quality standards for the purpose of preventing and remediating contamination of the environment that is caused by dioxins, and provides remediation measures for dioxin-contaminated soil and groundwater.

Malaysia

Andre Gan and Prem Kumar Ramasamy
Baker & McKenzie, Kuala Lumpur

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Land contamination is addressed in the Environmental Quality Act 1974 ("EQA"). The EQA is the primary legislation that addresses the prevention, abatement and control of pollution, as well as the protection of the environment in Malaysia. Section 24(1) of the EQA stipulates that a person will be liable if he or she pollutes, or causes, or permits the pollution of any soil or surface of any land in contravention of the acceptable conditions specified under the EQA.

Land contamination is also addressed in the Contaminated Land Management and Control Guidelines ("Guidelines"). The Guidelines are issued by the Department of Environment (DOE) and compliance with its provisions is only voluntary. The DOE is, however, seeking to make compliance with the Guidelines mandatory in due course. The Guidelines apply to the following:

- Any land that is currently being used or was previously used, to perform polluting activities with the potential to cause soil and groundwater contamination
- Any land that will change with regard to use, from polluting activities to non-polluting activities, or from non-polluting activities to polluting activities

"Polluting activities" is defined in the Guidelines to mean any activity involving extracting, mining, manufacturing, storing, using, handling and disposing of chemicals, pollutants and scheduled waste in land as part of their operating processes. The Guidelines provide a list of industries that would potentially contaminate subsurface soil and groundwater.

2 Is there a definition of contaminated land in your laws?

There is no specific definition of "contaminated land" under the EQA. The EQA, however, defines "soil" and "pollution."

"Soil" is defined under the EQA to mean earth, sand, rock, shale, minerals and vegetation in the soil.

"Pollution" is defined to mean an act or process, whether natural or artificial, resulting in the introduction of any pollutant into the environment in contravention of the acceptable conditions, as specified in the regulations made under the EQA.

"Pollutant" is further defined under the EQA to mean any natural or artificial substance, whether in a solid, semi-solid or liquid form, or in the form of gas or vapor, or in a mixture of at least two of these substances, or any objectionable odor or noise or heat emitted, discharged or deposited or is likely to be emitted, discharged or deposited from any source that can directly or indirectly cause pollution and includes any environmentally hazardous substances.

Further, the EQA provides that a person shall be deemed to pollute any soil or surface of any land if:

- he or she places in or on any soil or in any place where it may gain access to any soil any matter, whether liquid, solid or gaseous; or
- he or she establishes on any land a refuse dump, garbage tip, soil and rock disposal site, sludge deposit site, waste-injection well, or otherwise used land for the disposal of or a repository for solid or liquid wastes as to be obnoxious or offensive to human beings or

interfere with underground water or be detrimental to any beneficial use of the soil or the surface of the land.

For purposes of the Guidelines, "contaminated land" has been defined to mean a site at which substances occur at concentrations that:

- are above natural occurring metal concentrations and pose or are likely to pose an immediate or long-term hazard to human health or the environment; or
- exceed levels specified in the Guidelines as "Site Screening Levels."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes, Section 31(1) of the EQA empowers the director general of the DOE ("Director General") to issue a notice to the owner/occupier of land ("Notice") requiring the owner/occupier of the land to take steps to reduce, mitigate, disperse, remove, eliminate, destroy or dispose of pollution within a period specified under the Notice.

Pursuant to Section 31A (2) of the EQA, the Minister of Natural Resources and Environment ("Minister") may also, in his or her discretion, direct the Director General to issue an order that will require a person to cease all acts that have resulted in the release of environmentally hazardous substances, pollutants or wastes. The Minister may also direct the Director General to effect and render any machinery, equipment, plant or process inoperable if he or she considers that the operations of such machinery, equipment or plant is a threat to the environment, public health or safety.

The Guidelines prescribe a remedial plan in the event of a contamination. However, as discussed, compliance with the provisions of the Guidelines is not mandatory at this juncture.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Section 31 of the EQA stipulates that the Notice (to clean up) is issued to the owner/occupier of the contaminated land. The Notice can still be issued to the owner or occupier even if he or she was not the owner/occupier who polluted the premises. The Guidelines state that the current land owner should be responsible for identifying the polluter if the current land owner claims that the contamination is not caused by its current on-site operations.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The polluter, if convicted, will remain liable under the EQA. Such criminal liability is attached to the polluter and will not be passed on to the owner/occupier. As discussed in question 4.1, regardless of which party is responsible for committing the offense, the DOE may pursue the owner/occupier of the land, as opposed to the polluter (if he or she is not the same party), for purposes of issuing the Notice. If the owner/occupier contravenes the Notice, the owner/occupier will be liable for failing to comply with the requirements under the Notice.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

The EQA does not contain any provision apportioning the cleanup liability and responsibility between an owner and an occupier.

We wish to highlight that Section 46E of the EQA allows a court to order a person convicted of an offense under the EQA to pay damages to a person who has suffered loss or damage to any property as a result of that offense.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The EQA is silent on historical contamination. In practice, the DOE will not undertake additional work and effort to identify the previous owner/occupier who caused the contamination. The current owner/occupier is ultimately liable for the cleanup under the EQA once the Notice is issued.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Section 21 of the EQA empowers the Minister to issue regulations that will specify the acceptable conditions for the emission, discharge or deposit of environmentally hazardous substances, pollutants or wastes, or the emission of noise into any area, segment or element of the environment. As discussed previously, there are currently no acceptable conditions and parameter standards that are imposed by the Director General in respect of the discharge of waste onto land. Pending the issuance of such conditions and standards, the circumstances in which a cleanup is required is decided on a case-by-case basis at the discretion of the Director General.

6 What level of cleanup is required?

The DOE may specify the cleanup level under the Notice. The cleanup level should satisfy the conditions imposed under the Notice.

7 Are there different provisions relating to the cleanup of water?

Section 25 of the EQA prohibits the emission, discharge or deposit of any environmentally hazardous substances, pollutants or wastes into any inland waters. The Environmental Quality (Sewage) Regulations 2009 and the Environmental Quality (Industrial Effluent) Regulations 2009 ("Regulations") provide for the permitted levels of emission, discharge and deposit of hazardous substances into inland waters.

Similar to the cleanup of contaminated land, the Director General may issue a Notice to the owner/occupier to clean up contaminated water. Further, under the Regulations, an application can be filed with the DOE for a "contravention license," i.e., a license for contravening the acceptable conditions of effluent discharge specified in the Regulations. The license will enable the owner/occupier to continue with its business operations while the owner/occupier remedies the contamination/pollution. As far as we know, the DOE has issued this license only in very limited circumstances.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is a criminal offense to contaminate or cause the contamination of any land. Note, however, that there are currently no acceptable conditions and standards under the EQA that have been imposed by the Director General in respect of land contamination. Nevertheless, the EQA does specify the acceptable conditions and parameter limits of effluent to be discharged from prescribed premises, such as premises occupied for processing crude palm oil and raw natural rubber, and the discharge of

effluent and waste into Malaysian waters. Such conditions and environmental standards are set out in various regulations made pursuant to Section 51 of the EQA.

The EQA further provides that a person who attempts to commit an offense punishable under the EQA or supports the commission of such offense shall be penalized accordingly.

On the other hand, it is not a criminal offense under the EQA to own contaminated land. However, under the EQA, the Director General is empowered to issue a notice requiring the owner/occupier to take steps to reduce, mitigate, disperse, remove, eliminate, destroy or dispose of pollution within a period specified under a notice issued by the DOE.

Section 24(3) of the EQA provides for the following penalties where a person is found liable for land contamination:

- A fine not exceeding MYR100,000 or imprisonment for a period not exceeding five years, or both penalties
- A further fine not exceeding MYR1,000 a day for every day the offense is continued after a notice from the DOE is served on the owner/occupier

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Where a person fails to take steps to reduce, mitigate, disperse, remove, eliminate, destroy or dispose of pollution in respect of environmentally hazardous substances, pollutants or wastes within a period specified under the Notice, that person shall be guilty of an offense and the penalties are as follows:

- A fine not exceeding MYR25,000 or imprisonment not exceeding two years, or both penalties
- A further fine not exceeding MYR1,000 a day for every day the offense is continued after the offender is served the Notice

Where an offense is committed by a body corporate, the director, manager or officer of that body corporate shall be deemed to be guilty of that offense unless he or she can prove that the offense was committed without his or her consent or connivance and that he or she had exercised all diligence to prevent the commission of the offense.

10 What authority enforces cleanup?

The Director General who issues the Notice is responsible for the enforcement of the cleanup. In practice, this is delegated to and carried out by the Enforcement Division of the DOE.

11 Are there any defenses?

While there are specific defenses to offenses under the EQA (for example, in respect of discharge of oil into Malaysian waters), there are no specific defenses to offenses relating to land contamination/soil pollution. However, as in any prosecution of an offender of a criminal offense, the prosecutor must prove beyond reasonable doubt that the offender committed the offense.

12 Can third parties / private parties enforce cleanup?

Third parties may seek to claim damages through common law claims of negligence, nuisance or trespass. In bringing a claim, the third party must show that the contamination is an unlawful interference with his or her use of, comfort in, enjoyment of or interest in his or her land. For example, if contamination was to "migrate" from the owner's land to an adjoining owner's land and:

- the contamination causes damage to the adjoining landowner's property or business;

- the owner is shown to owe the adjoining landowner a duty of care; and
- the owner is shown to have breached that duty, (e.g., the owner's failure to appropriately monitor the contamination or take steps to prevent its "migration" to the owner's land),

then the adjoining landowner may be able to bring an action against the owner for damages and hold the owner liable for remediating the adjoining, effected land.

13 Can third parties claim damages?

Please refer to our response to questions in paragraphs 4.3 and 12.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There is no such legal requirement.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

The EQA imposes liability on the polluter of land. If the polluter sells the land, such sale will not absolve him or her of the liability. Also, as discussed, the cleanup obligations rest with the owner/occupier of the land even if he or she is not the party who caused the contamination.

15.2 Contractually?

It is possible to contractually provide that the buyer should accept and undertake any cleanup obligations. However, in our experience, it would be fairly uncommon for a purchaser to take on contractual responsibility for contamination for which it was not responsible, unless it has confirmed the level of contamination (if any) and has been compensated appropriately for taking on that liability (e.g., by adjustment of the purchase price).

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Apart from the issues discussed above, we do not see any other issue that we would highlight when talking with a potential purchaser of land in respect of land contamination/liability attached to land contamination in Malaysia.

People's Republic of China

Danian Zhang
Baker & McKenzie, Shanghai

Scott Silverman
Baker & McKenzie, Beijing

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The People's Republic of China (PRC) has recently begun issuing ministerial rules addressing land contamination, which include the following:

- In November 2012, the Ministry of Environmental Protection (MEP) issued the Notice Regarding Environmental Security Protection for Site Redevelopment of Industrial Enterprises.
- In January 2013, the State Council released the Recent Arrangement for the Soil Environmental Protection and Comprehensive Treatment Work.
- In February 2014, the MEP issued the Glossary of Contaminated Sites (the "Glossary") and four related, mandatory, technical guidelines covering environmental site investigation (HJ 25.1), environmental site monitoring (HJ 25.2), risk assessment of contaminated sites (HJ 25.3) and site soil remediation (HJ 25.4).
- In May 2014, the MEP issued the Notice Regarding Strengthening Pollution Prevention and Control of Industrial Enterprises in the Process of Closing, Relocation and Site Redevelopment.
- In October 2014, the MEP issued the Notification Regarding Issuance of 2014's First Directory of Technology Applications in Contaminated Sites Remediation.

Besides the above, various other laws and regulations of the PRC have provisions that govern or at least mention the general concept of soil contamination, including the Environmental Protection Law, PRC Solid Waste Pollution Prevention and Control Law, the Measures for the Prevention and Treatment of Environmental Pollution from Discarded Hazardous Chemicals, the PRC Agriculture Law and the PRC Criminal Law.

2 Is there a definition of contaminated land in your laws?

The Glossary provides that the term "contaminated site" refers to a site in which the pollution is ascertained to exceed the risk level acceptable to human health or ecology through investigation and risk assessment of the potential contaminated site. The term "potential contaminated site" refers to a site that has been polluted by: manufacturing, operation, disposal or storage of hazardous substances; piling up or disposing of potentially hazardous wastes; or by activities like mining, and thus poses a potential risk to human health or ecology. The "acceptable risk level" refers to the risk level that will not cause adverse effects to the exposed population, including the acceptable risk level of carcinogens and the acceptable hazard quotient of non-carcinogens.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. The PRC Environmental Protection Law, the PRC Solid Waste Pollution Prevention and Control Law, the Measures for the Prevention and Treatment of Environmental Pollution from Discarded

Hazardous Chemicals, the Opinion Regarding Strengthening Soil Pollution Prevention and Control Work ("Opinion"), and the Notification Regarding Issuance of Guidelines for the Environmental Assessment and Remediation for Soil at Manufacturing Facilities (For Trial Implementation) address issues concerning cleanup and/or remediation of contaminated land. However, the relevant provisions in these laws and regulations are not very detailed, and generally state either that companies causing "environmental pollution or public hazards" must adopt prevention and control (including cleanup) measures or, when a company has caused "severe" environmental pollution, it is required that they eliminate and control the pollution within a certain time frame. It should be noted, however, that clear definitions are not stated for what constitutes "environmental pollution or public hazards" or "severe" environmental pollution.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Under the "polluter pays" principle set out in Article 6 of the PRC Environmental Protection Law, the polluter will be held primarily responsible for the cleanup.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

In practice, where the polluter is not easy to identify, the occupant or holder of land use rights may be responsible for the cleanup. For example, local environmental protection regulations in Hebei Province stipulate that a lessor of land use rights should reach an agreement with the lessee on the liability for the prevention and cleanup of discharges causing contamination of the property. If such an agreement is not reached, the lessor shall be held liable for the prevention and remediation of the property. In addition, the PRC Solid Waste Pollution Prevention and Control Law provides that if an entity acquires land use rights and the polluter has been terminated prior to the law's effectiveness, then the liability for existing untreated industrial solid waste lies with the transferee unless the parties have allocated this responsibility differently. The Opinion similarly provides that if an entity that causes pollution has been terminated, the transferee of the polluter's land will be responsible for cleanup, but also provides that if the polluter cannot be identified due to historical reasons, the government authorities concerned will be responsible for cleanup and remediation. Given that site remediation principles are yet evolving and emerging in the PRC, forced cleanups are not common and are usually implemented only if a severe health risk exists.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

In such a situation, liability for property contamination could be contractually apportioned. If no contract exists, the holder of the land use rights ultimately will be liable, unless it can be shown that the contamination was done by the tenant. The parties are not allowed to allocate the responsibility for "prevention" of further environmental pollution, as this responsibility rests with the current holder of the use rights to the land.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The holder of the land use rights to the site would be responsible if the polluting party could not be found. Cleanup or remediation would pertain only to those sites that pose an immediate serious threat to human life or property.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

In practice, cleanup or remediation would only pertain to those sites that pose an immediate serious threat to human life or property. Risk assessment and remediation should comply with the mandatory technical guidelines that took effect on 1 July 2014, namely the HJ 25.1, HJ 25.2, HJ 25.3 and HJ 25.4.

6 What level of cleanup is required?

According to the Glossary, "site cleanup and remediation" means to remove, reduce or fix the site contamination, or to keep the risk within the acceptable risk level. The "acceptable risk level" refers to the risk level that will not cause adverse effects to the exposed population, including the acceptable risk level of carcinogens and the acceptable hazard quotient of non-carcinogens. HJ 25.3 specifies that the acceptable risk level of a single kind of carcinogen is 10-6 and the acceptable hazard quotient of a single kind of non-carcinogen is 1.

7 Are there different provisions relating to the cleanup of water?

Yes. Under Article 76 of the PRC Water Pollution Prevention and Control Law, the cleanup of water pollution is required within a specified time limit. Fines and other penalties are decided according to the toxicity of the pollutants discharged into the water body. If the discharger is not able to remediate the spill/discharge, then the relevant environmental bureau has the authority to appoint a qualified company to clean up the spill/discharge.

Also, under Article 31 of the PRC Water Law and Article 12 of the PRC Marine Environment Protection Law, persons causing water pollution in excess of approved discharge limits are responsible for cleanup measures.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is a criminal offense to contaminate land. Under Article 338 and Article 346 of the PRC Criminal Law and under Article 46 of the Amendment to the PRC Criminal Law (8), any entity who discharges, dumps or disposes of radioactive waste, wastes containing infectious disease pathogens, toxic substances or other dangerous wastes, in violation of state regulations and causing severe environmental pollution, shall be sentenced to fines, and the responsible persons of the said entity shall be sentenced to a fixed-term imprisonment of not more than three years or criminal detention, and/or a fine. If the consequences of such discharging, dumping or disposing are exceptionally serious, then such persons shall be sentenced to a fixed-term imprisonment of not less than three years but not more than seven years, and a fine. Owning the land use rights to contaminated land is not classified as a criminal offense under PRC law.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Generally, it is not. The PRC Criminal Law currently does not explicitly address situations where cleanup requirements are not met. However, it is conceivable that if land contamination is very serious (and has damaged property or living things), a cleanup requirement could be part of a criminal penalty levied in relation to that severe contamination.

10 What authority enforces cleanup?

The main PRC government bureaus that might be involved in cleanup are the MEP and environmental protection bureaus at the local level. Generally, the local environmental protection bureaus take the lead role in overseeing cleanup. However, other government bureaus at the central and local levels could be involved, depending on the specific circumstances and issues implicated by the spill/discharge.

11 Are there any defenses?

Yes. Under Article 16 of the PRC Criminal Law, where pollution was not the result of intent or negligence, but is attributable to factors that could not have been prevented or foreseen, the polluter could be exempted from liability.

12 Can third parties / private parties enforce cleanup?

Generally, a third or private party cannot enforce cleanup. Under applicable PRC laws and regulations, only certain government bureaus are designated and authorized to have the power to enforce cleanup.

13 Can third parties claim damages?

Yes, under Article 124 of the PRC General Principles of the Civil Code, anyone who pollutes the environment in violation of state regulations regarding environmental protection and the prevention of pollution, and such pollution results in damage to others, shall assume civil liability according to law.

Further, under Article 65 of the PRC Law on Tortuous Liability, it is similarly specified that the polluter bears tortuous liability to the extent that the pollution of the environment causes damage and thus infringes upon the civil rights or interests of third parties.

Unlike some other jurisdictions, the causal connection between the contamination and injury does not have to be proved by the plaintiff; but rather, the defendant will be required to prove there is no causal connection. This is specifically provided for under Article 66 of the PRC Law on Tortuous Liability, which states that if pollution gives rise to a dispute, the polluter shall bear the burden of proof as to the existence of exonerating or mitigating circumstances provided for in laws and the absence of causation between the act and the damage.

In 2015, the amended Environmental Protection Law took effect, which allows for the filing of public interest lawsuits by qualified non-governmental organizations.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

Generally, it is not. However, the main exception would be a situation where the property was used by an entity that manufactured, stored or used hazardous chemicals, and then such property will no longer be used for such operations. Under those circumstances, the company is required to test the soil and groundwater, conduct environmental risk assessment, and report the findings to the local environmental authorities before leaving/transferring the property. If contamination is found, the company then must design a remediation plan that needs to be approved by environmental authorities and then implemented. Once remediation is completed, the site shall be tested by a qualified testing institution.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Generally, if an entity acquires land use rights, then the liability for existing untreated industrial solid waste lies with the transferee unless the parties have allocated this responsibility differently. If an entity that causes pollution has been terminated, or cannot be identified due to historical reasons, the government authorities concerned will be responsible for cleanup and remediation.

15.2 Contractually?

No. Under Article 35 of the PRC Solid Waste Law, no party is exempted from cleanup liability through a contractual agreement.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Potential purchasers are advised to conduct, prior to their purchase, proper environmental due diligence and other surveys on the property to be purchased. Also, land users should be prepared for major changes in the PRC environmental laws in relation to property contamination. It is anticipated that such changes will cause liability obligations to move more in the direction of strict liability, coupled with joint and several liability.

Philippines

Dennis A. Quintero, Alexandra Castro and Tristan Matthew Delgado
Baker & McKenzie, Manila

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The Philippines is replete with environmental laws and has one of the most voluminous sets of environmental laws in Asia. However, the Philippines does not have a specific statute on land contamination. Nevertheless, there are related statutes that provide for a sound mechanism in the control of land, air and water pollution in accordance with the policy of the state to ensure the protection of public health and of the environment.

The Clean Water Act, for instance, prohibits discharging, injecting or allowing to seep into the soil or subsoil any substance in any form that would pollute groundwater. In the case of geothermal projects, and subject to the approval of the Department of Environment and Natural Resources (DENR), regulated discharge for short-term activities (e.g., well testing, flushing, commissioning and venting) and deep re-injection of geothermal liquids may be allowed, provided that safety measures are adopted to prevent the contamination of the groundwater.

The Pollution Control Law also provides that no person shall throw, run, drain or otherwise dispose of into any of the water, air and/or land resources of the Philippines, or cause, permit, suffer to be thrown, run, drain, allow seeping or otherwise dispose thereto any organic or inorganic matter or any substance in gaseous or liquid form that shall cause pollution thereof.

2 Is there a definition of contaminated land in your laws?

Land contamination has not been specifically defined by any statute, decree or regulation issued by the DENR. However, under the Pollution Control Law, pollution is defined as "any alteration of the physical, chemical and biological properties of any water, air and/or land resources of the Philippines, or any discharge thereto of any liquid, gaseous or solid wastes, as will or is likely to create or to render such water, air and land resources harmful, detrimental or injurious to public health, safety or welfare, or which will adversely affect their utilization for domestic, commercial, industrial, agricultural, recreational or other legitimate purposes."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

We are not aware of any cleanup or remediation laws that deal specifically with contaminated land. However, the government has directed agencies and bureaus to implement environmental laws and policies. For instance, the Environmental Management Bureau (EMB), as provided under applicable legislation, can require program and project proponents to put up financial guarantee mechanisms that will finance any need for emergency response, cleanup or rehabilitation of areas that may be damaged during the program or project's actual implementation. Meanwhile, the National Chemical Safety Management and Toxicology Policy's Sub-sector on Toxic Substance and Hazardous Waste (TSHW), under the Inter-Agency Committee on Environmental Health (IACEH), is responsible for developing protocols for cleanup, remediation and rehabilitation.

Further, in line with the state's policy to protect the environment, and further to the Philippine Environmental Impact Statement (EIS) system, proponents of environmentally critical projects (ECP) and projects within environmentally critical areas (ECA), are required to obtain an environmental compliance certificate (ECC) prior to the commencement of the project. The ECC, which is issued by the EMB, is a document certifying that based on the representations of the proponent, the proposed

project or undertaking will not cause significant negative environmental impact. The ECC also certifies that the proponent has complied with all the requirements of the EIS system and that it has committed to implementing its approved environmental management plan. The ECC contains specific measures and conditions that the project proponent has to undertake before and during the operation of a project, and in some cases – during the project's abandonment phase – to mitigate identified environmental impacts, including cleanup. Plans for environmental rehabilitation, cleanup and restoration following accidents are normally part of the application for the ECC and the environmental impact assessment.

Some laws and regulations (e.g., the Clean Water Act) provide that the DENR shall require program and project proponents to put up an environmental guarantee fund (EGF) as part of the environmental management plan attached to the ECC issued pursuant to Presidential Decree (PD) No. 1586 and its implementing rules and regulations.

The EGF shall finance the maintenance of the health of the ecosystems and especially the conservation of watersheds and aquifers affected by the development, and the needs of emergency response, cleanup or rehabilitation of areas that may be damaged during the program or project's actual implementation.

Liability for damages shall continue even after the termination of a program or project and until the lapse of a given period indicated in the environmental compliance certificate, as determined by the DENR.

The EGF may be in the form of a trust fund, environmental insurance, surety bonds, letters of credit, self-insurance and any other instruments that may be specified by the DENR. The choice of the guarantee instrument or combinations thereof shall depend, among others, on the assessment of the risks involved and financial test mechanisms devised by the DENR; the entity required to put up guarantee instruments shall furnish the DENR evidence of availment of such instruments from accredited financial instrument providers.

In addition, Presidential Decree No. 825[1] directs persons, establishments and institutions to take responsibility for cleaning up their respective surroundings, including their yards and gardens, as well as the canals, roads or streets in their immediate premises.

It should also be noted that the Ecological Solid Waste Management Act of 2000 provides, that pursuant to the Local Government Code, all provinces, cities, municipalities and *barangays* (the smallest unit of government), through appropriate ordinances, are mandated to consolidate or coordinate their efforts, services and resources for purposes of jointly addressing common solid waste management problems and/or establishing common waste disposal facilities.

The National Building Code of the Philippines also provides that where the land or site is polluted, unsanitary, unhygienic, unsafe or hazardous, conditions contributing to or causing its being polluted, unsanitary, unhygienic, unsafe or hazardous shall be reasonably improved or corrected, or proper remedial measures shall be prescribed or incorporated in the design or construction of the building or structure in accordance with the provisions of the code.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Under Philippine law, the general rule is that any person (polluter) who violates the law and disobeys orders and directives of the proper authorities should be responsible for the cleanup. If the polluter

[1] Providing penalty for improper disposal of garbage and other forms of uncleanliness and for other purposes. 7 November 1975.

refuses to control or abate the pollution made, he or she shall be subject to criminal and civil penalties.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The law does not provide for the liability of the polluter being passed to the landowner or occupier in case the former cannot be found. In the absence of specific provisions, liability cannot be passed to the landowner or occupier. Nonetheless, as a practical matter, there are other entities that may be held responsible for the cleanup, control or abatement, or which may be subject to the sanctions imposed by law. The CEO, president, general manager, managing partner or officer-in-charge is held liable in case the offense is committed by a corporation, partnership or any juridical entity. Local government officials who fail to enforce or comply with the implementing rules and regulations shall also be held administratively liable in accordance with existing laws.

Some laws provide that cleanup operations are necessary in emergencies,. If the polluter fails to immediately undertake the same, the DENR, in coordination with other government agencies concerned, will conduct containment, removal and cleanup operations. Expenses incurred in said operations will be reimbursed from the persons found to have caused such pollution, upon proper administrative determination in accordance with the laws.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

There are no specific laws on owners/occupiers or landlords/tenants. The law presumes that whoever has violated the provisions in any of our environmental laws and who is assumed to be the polluter by any statute or administrative order incurs the liability.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The law does not define historical contamination nor does it specify the person responsible for this cleanup. Under the principle that the polluter pays, it can be argued that the person who caused the contamination should be liable for said cleanup. Assuming such person cannot be identified or can no longer be found, it can be assumed that whoever is directed by concerned agencies to remedy the pollution of land incurs the costs.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Generally, the DENR will determine whether cleanup is required. The DENR can also specify allowable limits to polluting substances. Generally, some form of risk assessment will be carried out by the DENR. For example, DENR regulations have technical guidelines on solid waste disposal. DENR will provide these guidelines to the local government units (LGUs) that are converting open dump sites to environmentally sound landfills, adhering to prescribed engineering and environmental standards. LGUs shall formulate regulations to facilitate and support the closure and conversion of open dumps. All LGUs shall comply with the timeline that will be set by the DENR.

6 What level of cleanup is required?

The level of a cleanup will generally vary, depending on the amount of pollution or contamination as may be determined by the DENR.

7 Are there different provisions relating to the cleanup of water?

The Philippine Clean Water Act of 2004 (RA 9275) provides for cleanup operations by any person who causes pollution in or pollutes water in excess of the applicable and prevailing standards at his or her own expense, to the extent that the same body of water has been rendered unfit for utilization and beneficial use. The DENR shall conduct the containment, removal and cleanup operations for emergency cleanup operations when the polluter fails to immediately undertake the same. In this case, expenses incurred shall be reimbursed by the polluter to the Water Quality Management Fund or to such other fund where the disbursement was sourced. The Philippine Environment Code (PD 1152) contains similar provisions.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Philippine law imposes civil and criminal penalties on violators of Philippine environmental laws generally.

We are not aware of any penalties solely on account of owning contaminated land, unless the owner has caused contamination in violation of applicable Philippine environmental laws.

Penalties differ, depending on the particular law violated (e.g., the Clean Water Act, the Solid Waste Management Act, etc.). Generally, penalties may be in the form of a fine and/or imprisonment.

On the other hand, Philippine jurisprudence shows that responsible individuals, including officers of a corporation, either Filipino citizen or alien, may be held criminally liable for reckless imprudence resulting in damage to property and may thus be imprisoned.[2] Under Philippine criminal law, reckless imprudence is that which "consists in voluntary, but without malice, doing or falling to do an act from which material damage results by reason of inexcusable lack of precaution on the part of the person performing or failing to perform such act, taking into consideration his employment or occupation, degree of intelligence, physical condition and other circumstances regarding persons, time and place." If the offense is committed by a corporation, partnership or other juridical identities duly recognized in accordance with the law, the CEO, president, general manager, managing partner or officer-in-charge will generally be liable for the commission of the offense penalized under the law.

If the offender is an alien, he or she shall, after serving the sentence prescribed above, be deported without further administrative proceedings.

Government officials may also be subject to prosecution.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Some laws, such as the Clean Water Act, make it a criminal offense to not comply with the requirement to clean up. The Clean Water Act provides that the failure to undertake cleanup operations, willfully or through gross negligence, will be punishable by imprisonment of not less than two years but not more than four years, as well as a fine that is not less than PHP50,000 but not more than PHP100,000 per day for each day of violation. Such failure or refusal that results in serious injury or loss of life and/or irreversible water contamination of surface, ground, coastal and marine water will be punishable by imprisonment of not less than six years and one day but not more than 12 years, and a fine of PHP500,000 per day for each day during which the omission and/or contamination continues.

[2] *Loney vs. People of the Philippines*, G.R. No. 152644, 10 February 2006.

In case of gross violation of the Clean Water Act, the Pollution Adjudication Board will issue a resolution recommending that the proper government agencies file criminal charges against the violators. Different penalties are imposed for gross violations.

10 What authority enforces cleanup?

The Pollution Control Law has created the National Pollution Control Commission (now the EMB), which has the power and function to determine the location, magnitude, extent, severity, causes, effects and other pertinent information regarding pollution of the water, air and land resources of the country. The EMB takes such measures, using available methods and technologies, as it shall deem best to prevent or abate such pollution and conduct continuing research studies on the effective means for the control and abatement of pollution. It also has the power to issue orders or decisions to compel compliance with the provisions of the law and its implementing rules and regulations only after proper notice and hearing.

11 Are there any defenses?

We are not aware of any specific defenses.

12 Can third parties / private parties enforce cleanup?

A third party/private party can file a complaint. But the DENR will need to impose the penalty and mandate the cleanup.

Citizens will also have the right to bring action in court or quasi-judicial bodies to remedy all activities in violation of environmental laws and regulations, to compel the rehabilitation and cleanup of affected area, and to seek the imposition of penal sanctions against violators of environmental laws. They also have the right to bring action in court for compensation of personal damages resulting from the adverse environmental and public health impact of a project or activity.

13 Can third parties claim damages?

Those who suffer damage may claim damages under applicable provisions of civil law.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There is no legal requirement to investigate potential contamination in connection with the sale of property. However, under the National Building Code of the Philippines, for instance, there is a requirement that must be met by every property owner who undertakes the construction of any structure over a piece of land. The Building Code provides that "the land or site upon which will be constructed any building or structure, or any ancillary or auxiliary facility thereto, shall be sanitary, hygienic and safe. Where the land or site is polluted, unsanitary, unhygienic, unsafe or hazardous, conditions contributing to or causing its being polluted, unsanitary, unhygienic, unsafe or hazardous shall be reasonably improved or corrected, or proper remedial measures shall be prescribed or incorporated in the design or construction of the building or structure."

Every buyer or lessor of land, therefore, is enjoined to conduct his or her own investigation on the status of the land about to be purchased, because he or she, upon the construction of any structure over such land, will be bound to meet the requirements of the Building Code. However, such measure is not a legal requirement, but more of an exercise of prudence on the part of the potential buyer, because the cost of improving, correcting or remedying pollution of the land will be shouldered by him or her and should be factored in when considering the purchase or lease of the land.

For properties wherein Hazardous Waste Treatment, Storage and Disposal Facilities (TSD) were formerly located, the DENR's rules and regulations require that within one year from cessation of its operation, a comprehensive site investigation study should be performed. This study establishes the environmental condition of the area, indicating the absence of any traces of contamination. Should evidence show any presence of contamination, the TSD facility shall perform remedial action until such time that the environmental condition of the site become acceptable to the DENR. Therefore, potential purchasers of this kind of property should, as part of its due diligence, inquire about whether the requisite site investigation study was performed.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

We are not aware of any provision under Philippine law that will prohibit a party responsible for a cleanup from contractually passing the responsibility therefor to a purchaser. However, the party responsible or the polluter will remain liable to the authorities and to third parties in case contamination is determined.

As regards construction under the Building Code, it should be noted that the requirement to improve, correct or remedy the polluted, unsanitary, unhygienic, unsafe or hazardous condition of the land prior to the construction of any structure on it is a responsibility that is attached to the ownership of the structure about to be constructed.

15.1 Under the general law?

There is no express provision of law that authorizes the passing of this responsibility. Failure to meet this requirement will result in the undertaking of enforcement measures against the polluter or, in the case of the Building Code provisions, the owner of the structure being constructed; whoever possesses legal title evidencing ownership will be deemed the owner for purposes of enforcement.

15.2 Contractually?

As mentioned, it is possible that responsibility for a cleanup will be contractually passed. However, this liability to the government or third parties cannot be modified by contractual stipulation.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

A potential purchaser of land should conduct its own due diligence and ensure that it obtains the necessary representations and warranties, as well as indemnification for damages. Further, a party interested to use land for purposes where land contamination may become a consequence should also consider the following:

The Philippine Supreme Court traditionally strikes down contracts between the government and a private party where the land project, first, has adversely affected its environs, and second, where there is a detriment to sources of water.[3] Second, under the Local Government Code, national government projects that affect the environmental or ecological balance of a particular community require consultations with the appropriate local government unit. Such projects include those that (1) may cause pollution; (2) may bring about climatic change; (3) may cause the depletion of non-renewable resources; (4) may result in loss of crop land, range-land or forest cover; (5) may eradicate certain animal or plant species from the face of the planet; and (6) other projects or programs that may call for the eviction of a particular group of people residing in the locality where these will be implemented.

[3] *Province of Rizal vs. Executive Secretary*, G.R. No. 129456, 13 December 2005.

Other than prior consultation with the affected local communities, the national government project also requires the prior approval of the project by the appropriate *sanggunian* (local legislative council).[4] Thus, the prior consultation and prior *sanggunian* approval comprise the twin mandatory requisites at the level of the local government for national government projects affecting the environmental or ecological balance of a particular community.

Lastly, the Ecological Solid Waste Management Act of 2000 has already absolutely prohibited open dumps and/or sanitary landfills located within an aquifer, groundwater reservoir or watershed area.

Any landfills developed subsequent to the passage of the said law in 2000 must comply with the minimum requirements that the site selected must be consistent with the overall land use plan of the local government unit, and that the site must be located in an area where the landfill's operation will not detrimentally affect environmentally sensitive resources such as aquifers, groundwater reservoirs or watershed areas.

[4] *Bangus Fry Fisherfolk vs. Honorable Enrico Lazanas*, G.R. No. 131442, 10 July 2003.

Singapore

Ken Chia, Yi Lin Seng and Hazmi Hisyam
Baker & McKenzie, Singapore

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes. The Environmental Protection and Management Act (Cap. 94A) (the "Act") governs land contamination. The Singapore Standard SS 593:2013 Code of Practice for Pollution Control (the "Code") provides further guidance on land contamination controls in Singapore.

2 Is there a definition of contaminated land in your laws?

There is none. An indirect definition is, however, found in the term "pollution of the environment," defined as "pollution of the environment due to the release (into any environmental medium) from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment." As land is likely to be deemed an "environmental medium," the contamination of land should be covered by this definition.

Guidance may also be obtained from Section 20 of the Act where it is stated that the National Environment Agency (NEA) may make regulations to control the pollution of land "whereby the condition of the land is so changed as to make or be likely to make the land or the produce of the land obnoxious, noxious or poisonous."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. Section 18 of the Act states that the director-general of Environmental Protection ("Director-General") may, by notice in writing, require the polluter to remove and clean up the polluting matter, within a specified period to be determined by the Director-General as he considers fit.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter is primarily responsible for cleanup. However, the owner may be liable as a person who permits to be discharged: (i) any trade effluent, oil, chemical, sewage or other polluting matters into any drain or land without a written permission from the Director-General; or (ii) any toxic substance or hazardous substance into any inland water so as to be likely to cause pollution of the environment.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The liability may be passed to the owner since unless the contrary is proven (which may be difficult if the polluter cannot be found), under Section 15(2) of the Act, the occupier of the premises (other than a principal contractor) is presumed to have discharged or caused or permitted to be discharged such polluting matter.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Under Section 51 of the Act, all compensation, damages, fees, costs and expenses to be paid, the amount and the apportionment of the amount, and any question of liability can, in the case of a dispute, be summarily ascertained and determined by a Magistrate's Court, or if the amount claimed exceeds the limit of the Magistrate's Court, by a District Court.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The liability to clean up may include historical contamination unless the occupier can show that he or she did not discharge or cause or permit to be discharged any trade effluent, oil, chemical, sewage or other polluting matters in contravention of the Act.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

There are regulations specifying the limits of polluting substances that are permissible. Monitoring exercises and site assessment studies can also be carried out in various circumstances to decide if cleanup is required. Standards and technical guidelines for assessment and remediation of sites are provided in Annex T of the Code.

Under Section 21 of the Act, hazardous substances that are governed under the Act are listed in the Second Schedule. Under Section 26 of the Act, the Director-General may, by notice in writing served on the owner or occupier of any installation that is used or intended to be used to carry out activities involving the storage, handling and use of hazardous substances, require the owner or occupier to carry out an impact analysis in relation to any potential hazards.

Under Section 37 of the Act, the Director-General may, by notice in writing, require an owner or occupier of any premises from which any trade effluent or hazardous substance is generated and discharged into any land to install suitable monitoring equipment or system at any point along the line of discharge, to monitor the quality or quantity of such discharge. Records of such monitoring results have to be submitted to the Director-General, and any monitoring result that shows that any standard prescribed in the regulations has not been complied with may be admissible as evidence in any proceeding against the owner or occupier for failure to comply with the Act.

Section 7 of the Code states that when a site used for polluting activities is to be redeveloped, rezoned or reused for a non-polluting activity, a study should be conducted on the site to assess the extent of land contamination. If the site assessment study shows that the land is contaminated, the contaminated land needs to be cleaned up to comply with the authority's requirements.

Under Paragraph 17.1 of the Code, when a piece of contaminated land is to be leased, transferred or sold to another party for the same or other polluting activity, a site assessment study should be conducted to allow the parties involved to ascertain the extent of the existing contamination, if any. When a site is to be developed for a polluting activity, it is recommended that a site assessment study be conducted to establish the baseline soil conditions for future assessment of land contamination.

6 What level of cleanup is required?

Where a site is to be redeveloped, rezoned or reused for a non-polluting activity, the contaminated site must be cleaned up to comply with the authority's requirements.

Where a site used for polluting activity is to be leased, transferred or sold to another party for the same or other polluting activity, the standards for such assessment and remediation of the site are provided under Annex T of the Code.

7 Are there different provisions relating to the cleanup of water?

There are none. Section 18 of the Act applies to the cleanup of water as well.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is a criminal offense to contaminate land, unless a written permission has been obtained. Under Section 15(1) of the Act, any person who discharges, causes or permits to be discharged any trade effluent, oil, chemical, sewage or other polluting matters into any drain or land, without a written permission from the Director-General, will be guilty of an offense.

Ownership of contaminated land *per se* does not constitute an offense.

Under Section 17 of the Act, where the land has been contaminated due to the discharge of a toxic or hazardous substance into any inland water causing pollution to the environment (including land contamination), the offender will be liable to a fine not exceeding SGD50,000 or to imprisonment for a term not exceeding 12 months, or to both for a first conviction. For a second or subsequent conviction, the offender will be liable to both imprisonment for a term of not less than one month but not more than 12 months, and a fine not exceeding SGD100,000.

Where the land has been contaminated pursuant to Section 15(1) of the Act, or where the requisite written permission under Section 6 of the Act was not obtained, the general penalties under Section 67 of the Act apply:

- On the first conviction, the offender is liable to a fine not exceeding SGD20,000, and in the case of a continuing offense, to a further fine not exceeding SGD1,000 for every day or part thereof during which the offense continues after conviction.

- On a second or subsequent conviction, the offender is liable to a fine not exceeding SGD50,000, and in the case of a continuing offense, to a further fine not exceeding SGD2,000 for every day or part thereof during which the offense continues after conviction.

The court may, in addition to the above fines, order the offender to pay to the Director-General the amount of any expense incurred in connection with the execution of any work, together with any interest due thereon or any interest certified by the Director-General to be due from the offender at the date of his or her conviction.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Under Section 18 of the Act, any person who fails to comply with a notice issued by the Director-General in relation to the cleaning up of polluting matter is guilty of an offense and liable on conviction to a fine not exceeding SGD50,000.

10 What authority enforces cleanup?

The Director-General enforces cleanup duties.

11 Are there any defenses?

Under Section 75 of the Act, NEA may, subject to the directions of the Minister, exempt either permanently or for a period of time, any person, thing, premises or works or any class of person, thing, premises or work from any provision of the Act.

12 Can third parties / private parties enforce cleanup?

No.

13 Can third parties claim damages?

They may potentially do so under general tort law.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

Generally, it is not required , except in the following situations:

- Where a site used for polluting activities is to be redeveloped, rezoned or reused for a non-polluting activity
- Where a site used for polluting activities is to be leased, transferred or sold to another party for the same or other polluting activity
- Where a site is to be developed for a polluting activity.

Annex S of the Code has a list of "polluting activities," which includes oil installations, chemical plants, gas works, power stations and landfill sites.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

The purchaser could potentially find himself liable, given the presumption under the Act that the occupier of contaminated land is viewed as the party that discharged or caused or permitted to be discharged any trade effluent, oil, chemical, sewage or other polluting matters, unless he or she can prove that it was someone else's fault.

15.2 Contractually?

Yes it can, for financial liability, presumably by way of an indemnity from the purchaser to cover any subsequent fines, penalties, costs or expenses incurred as a result of any regulatory action. It is unlikely that the criminal penalties, that is, imprisonment, can be contractually passed to the purchaser.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

A potential purchaser of a piece of contaminated land may wish to carry out a site assessment study and cleanup with the help of experts. Standards and technical guidelines that may be adopted for site assessment and remediation of contaminated land are provided in Annex T of the Code.

Taiwan

Tiffany Huang and Su-Fen Chen
Baker & McKenzie, Taipei

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes.

2 Is there a definition of contaminated land in your laws?

Yes. The Soil and Groundwater Pollution Remediation Act (SGPRA) provides a definition of "soil pollution" (i.e., contaminated land) as the introduction into soil of substances, biological organisms or forms of energy that alter soil quality, impact the normal use of the soil, or endanger public health and the living environment.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter is primarily responsible for the cleanup.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

No. If the polluter cannot be found, the governmental agencies concerned will take the necessary cleanup measures. However, if an owner, administrant or user of a piece of land fails to demonstrate due diligence as a good manager, in the event that a piece of polluted land is officially declared a control site or remediation site, he or she, along with the polluter, shall be held jointly and severally liable by the competent authorities for the costs incurred in the cleanup.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

The owner and the occupier will be jointly liable. However, the nonpolluting party can claim reimbursement of his or her cleanup expenses from the polluter.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

No. The polluter who has caused the historical contamination will be liable for the cleanup; if the polluter is not available, a fund established by government will pay for that.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The Environment Protection Administration (the central competent authority) promulgated The Standards for Soil Pollution Control and The Standards for Groundwater Control, which specify the limits to polluting substances allowed in the soil and groundwater, respectively.

6 What level of cleanup is required?

A cleanup is usually required at a level when the concentration of the contaminant substance has been reduced to below the permitted concentrations stipulated in the Standards for Soil Pollution Control and the Standards for Groundwater Control.

However, where factors such as the geological conditions, pollutant characteristics or pollution remediation technologies preclude remediation until pollutant concentrations are less than soil and groundwater pollution control standards, the party who is responsible for the cleanup may provide soil and groundwater pollution remediation goals based on environmental impact and health risk assessment results, and submit the same for the authority's approval. After obtaining the central competent authority's approval, the cleanup will be required at the level set forth in the remediation goals, instead of below the applicable control standards.

7 Are there different provisions relating to the cleanup of water?

The requirements for the cleanup of groundwater are the same as those for soil, and both are provided under the SGPRA.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is not a criminal offense to own contaminated land.

It is an offense, however, to contaminate land, but criminal punishment applies only when the polluter deliberately contaminates the land.

The SGPRA stipulates: "Those that pollute the soil deliberately with the intention to change the classification of land use shall be punished by one to five years of imprisonment and may be fined a maximum of NTD1 million."

Further, "…those who pollute soil or groundwater deliberately, causing land to become a pollution control site or remediation site, shall be punished with one to five years of imprisonment." In addition, "If the violations in the foregoing paragraph cause death, the violators shall be punished by life imprisonment or a minimum of seven years of imprisonment, and may be fined a maximum of NTD5 million; those that cause severe injury shall be punished by three to 10 years of imprisonment and may be fined a maximum of NTD3 million."

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Noncompliance with cleanup ordered by the authorities may subject the noncomplying party to fines not exceeding NTD1 million. If such noncompliance causes death or injuries, the noncomplying party may be subject to criminal penalty that may extend to a life sentence in prison.

10 What authority enforces cleanup?

The Environment Protection Bureau of the local government concerned enforces cleanup.

11 Are there any defenses?

As cleanup is the absolute liability of the polluter, under such a situation, we believe the defenses shall pertain only with regard to: (i) whether the named polluter is the actual polluter or the only polluter; and (ii) the extent to which the polluter shall be required to clean up, including whether the method requested by the regulator is feasible or practical.

12 Can third parties / private parties enforce cleanup?

The SGPRA provides that the victims or public interest groups may request the authority concerned to implement a cleanup measure, and if the latter fails to do so, the victims or public interest groups may file a suit in court to seek a ruling that orders the authority to perform its duty.

13 Can third parties claim damages?

No.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

Yes. The SGPRA requires land owners/users to conduct investigations under the following circumstances:

- The transferor of a piece of land who is in one of certain industry sectors designated by EPA should provide soil contamination investigation data when turning over the land. If the land is declared a control site or remediation site after the transfer, the transferor who fails to provide such data during the transfer will still be treated as the owner of the contaminated land, even though the ownership of the land has been transferred.

- An entity that is in one of certain industry sectors designated by EPA shall submit the soil contamination investigation data for the local environmental regulator's review before it applies for establishment and cease of operations, changes its line of business, or changes the boundary of its site. Without such data, the authorities may not grant the license needed for the entity's establishment or cease of operations (e.g., factory license).

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No. The polluter will still be liable even after he or she sells the land; the polluter cannot pass the cleanup liability to the purchaser.

15.2 Contractually?

No. Even if the polluter and the land purchaser enter into a contract that passes the liability to the purchaser, the government agencies concerned will still hold the polluter liable for the cleanup.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

If the land is used by enterprises designated by the EPA, the current land owner shall provide investigation data before the land is turned over; otherwise, the land owner will not be released from possible liability afterward.

Thailand

Peerapan Tungsuwan, Jidapa Surasathian, Nam-Ake Lekfuangfu and Theeranit Pongpanarat
Baker & McKenzie, Bangkok

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

No, there is no specific legislation relating to land contamination.

The primary legislation in relation to establishing an administrative framework and a basis for action on all environmental issues is the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992) (NEQA). Notification of the National Environment Quality Committee No. 25 (B.E. 2547) regarding Standards of Soil Quality (the "Notification"), issued under NEQA, sets out acceptable levels of soil contamination. For this purpose, the Notification divides soil into two main categories:

- Soil used for the purposes of living and agriculture
- Soil used for other purposes

In this respect, the acceptable level of contamination for each category of soil depends on the amount of certain compounds in the soil. In addition, the Notification establishes specific methods of testing soil for contamination with regard to each type of compound.

Moreover, the Land Development Act B.E. 2551 (2008) (LDA) also empowers the Ministry of Agriculture and Cooperatives to regulate the utilization of the land that uses or is contaminated by chemicals or other materials that could cause derogation to the land's agricultural utilization. LDA also prescribes appropriate measures to remedy the said land.

2 Is there a definition of contaminated land in your laws?

No, there is no definition given for "contaminated land." The Notification defines "standard of soil quality," but does not define substandard soil as "contaminated land." The quality standards set under NEQA merely indicate a benchmark for desirable environmental conditions. As such, NEQA imposes no punishment on someone who degrades the soil of a particular piece of land to a level that does not meet the quality standards. However, strict civil liability may apply if such degradation causes harm to an individual's life, health or property.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Although there is no specific piece of legislation regarding land contamination, the general remedy for environmental contamination/pollution provided under NEQA is that of compensation. Generally, the owner or possessor of the source of pollution is liable to compensate for damages, regardless of whether the leakage or contamination is the result of a willful or negligent act committed by the owner or possessor. Such compensation includes reimbursement for all expenses incurred by the government to clean up any pollution arising from the leakage or contamination.

Moreover, under the LDA, a polluter is required to restore the said land back to its original condition or compensate the state or persons suffering damages from the contamination in the case of land contamination.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Under NEQA, land owners or persons who possess the land (e.g., tenants) are liable for compensation and cleanup costs. For example, the owner of a factory is responsible for compensation and cleanup costs related to the emission of wastewater that causes damage to the public. However, if the owner leases the factory to a tenant, and during the time the tenant occupies the premises, the factory emits harmful wastewater, the tenant will be responsible for compensation and cleanup costs.

Under the LDA, the polluter will also be responsible for the restoration of the contaminated land to its original condition.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The LDA is silent on the situation in which the polluter could not be located. In this regard, it is possible that the land owner or the person possessing the land would still be held responsible under the NEQA.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

If it is found that both the owner and the tenant caused such contamination, they will equally share responsibility for the cleanup costs (as well as compensate injured/damaged third parties).

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The LDA broadly states that the polluter is required to restore the land to its original condition. However, it is currently unclear whether the polluter would be required to restore the contaminated land back to the condition just before his/her action, or before the land was contaminated in the first place. However, it is often difficult to determine when the land is contaminated. Therefore, based on the LDA, it is possible that all of the polluters (to the extent that they can be found) may be jointly liable for the cleanup of the land until it is restored to its original, non-contaminated condition. Moreover, pursuant to the NEQA, the person/entity that owned or occupied the land at the time it was contaminated may also be held jointly liable with the polluters for the cleanup of the land as well.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

There is no regulation in place that specifically determines when or whether cleanup is required. In this regard, the LDA merely provides that in the case of land that uses or is contaminated by chemicals or other materials that could cause derogation to the land's agricultural utilization, cleanup or compensation would be required, without prescribing a specific level of polluting substances that is permissible or a form of risk assessment. In practice, however, cleanup may be required by the local authority upon the occurrence of contamination or by a court order. If a case has not been filed with the court, the task of cleaning up will depend on the discretion of the relevant authority. In this regard, the court or the official may use the level of compounds within the soil as prescribed under the NEQA as reference to determine whether land has been contaminated and/or whether cleanup is required.

6 What level of cleanup is required?

As there is no specific regulation deciding whether cleanup is required, the level of cleanup is determined on a case-by-case basis. Please see Item 5.

7 Are there different provisions relating to the cleanup of water?

Yes, there are, and they are as follows:

- With respect to wastewater treatment, according to NEQA, the owner or the possessor of wastewater has a duty to put a wastewater treatment system, as prescribed by law, in place. Otherwise, the owner will be punished by imprisonment not exceeding one year, or a fine not exceeding THB100,000, or both.

- In respect of oil spills into water, the Regulation of the Office of the Prime Minister on the Prevention and Combating of Water Pollution Caused from Oil, B.E. 2547 (2004) sets out how government authorities can establish contingency plans in the event of water pollution caused by oil spills. The relevant governmental authorities or state enterprises are authorized to take legal action to claim compensation from the polluter, provided they took action to remedy the consequences of such pollution.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

No, it is not a criminal offense to own contaminated land or to contaminate land. However, under the LDA, in the event that the Ministry of Agriculture and Cooperatives has issued a rule/measure governing the utilization or prohibition of certain contaminated land, violators of such a rule/measure could be subject to a maximum of three months of imprisonment and/or a maximum penalty of THB5,000.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

There is no direct penalty for not complying with a requirement to clean up contaminated land. However, government authorities can close a factory temporarily or permanently if its operations has caused, is causing and/or may cause serious harm, injury or trouble to persons or property in the factory or in its vicinity, as well as prohibit certain actions/activities in relation to the contaminated land. If the polluter, land owner or possessor refuses to clean up or to pay cleanup costs, the relevant authority can also request that a Thai court issue an order seizing the assets of the polluter, land owner or possessor, as the case may be, and sell such assets by public auction, in order to obtain remuneration for the cleanup expenses.

10 What authority enforces cleanup?

Under NEQA, the authorized agency overseeing environmental enforcement is the Department of Pollution Control. Under the LDA, the responsible authority is the Land Development Committee, Ministry of Agriculture and Cooperatives.

11 Are there any defenses?

The polluter may not be liable under the LDA if he or she can prove that he or she did not cause the land contamination. Pursuant to the NEQA, the land owner or possessor will not be liable for cleanup costs (or compensation to injured/damaged third parties), if he or she can prove that the contamination was the result of:

- *force majeure* or war;
- an act done in compliance with an order of the government or a state authority; or
- an act or omission of the person who sustained injury or damage, or of any third party (e.g., the previous land owner).

12 Can third parties / private parties enforce cleanup?

No. Only the government has direct authority in respect to cleanup enforcement. However, a private party suffering damages from the land contamination may indirectly enforce the cleanup by requesting the relevant governmental authority or the court to look into the issue and enforce the cleanup.

13 Can third parties claim damages?

Yes. Third parties may claim damages on the grounds of wrongful acts, under Section 420 of the Civil and Commercial Code, if the contamination causes injury to the life, body, health, liberty, property or other rights of a person (even if the quality of the land meets the benchmark prescribed by the Notification).

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No, there is no such requirement. Under general principles regarding sales contracts, the seller is liable for any defect, including contamination, in the land sold that impairs either its value or its fitness for the purposes of the contract, unless the buyer knew of the defect at the time of sale, or would have known of it if he or she had exercised such care as might be expected from a person of ordinary prudence. However, the burden of proof could become a problem for the buyer. If the buyer cannot prove that the land contamination was caused by the seller, the buyer would eventually be liable or responsible for the contaminated land.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No.

15.2 Contractually?

As the LDA specifically states that the polluter is liable for cleanup, in case the polluter is the seller, it would not be possible for the seller to contractually pass this cleanup liability under the LDA to the purchaser. However, the polluter may contractually request the purchaser to subsequently indemnify him or her against any loss or compensation that it may suffer as a result of this cleanup obligation.

However, under the NEQA, since the owner/possessor of the contaminated land is also assumed to be liable or responsible for the contaminated land, unless the purchaser (i.e., the current owner/possessor of the land) can prove that the land contamination was caused by the seller (i.e., the previous owner), the purchaser would generally be liable or responsible for the cleanup.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

It is generally advisable for purchasers of land to conduct environmental due diligence in order to determine the status of the land at the time of purchase. However, there is no legal requirement in this regard. An environmental assessment will establish baseline contamination levels on the land at the time of purchase. If the purchaser is subsequently accused of land contamination, he or she can prove his or her non-involvement based on such environmental due diligence.

Vietnam

HoangKimOanh Nguyen and Hien Ly Dinh
Baker & McKenzie, Ho Chi Minh

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

There are no specific statutes on land contamination in Vietnam. However, the Law on Environmental Protection[1] (LEP) and its implementing regulations form the legislative foundation for environmental regulation.

2 Is there a definition of contaminated land in your laws?

There is no specific definition of contaminated land. The LEP provides the following general definitions:

- Environmental composition refers to material elements that comprise the environment, such as land, water, air, sound, light, living beings and other forms of material.[2]
- Environmental pollution pertains to a change in environmental composition that does not conform to environmental technical standards and environmental standards and adversely affects human beings and other living beings.[3]

The LEP provides a national set of environmental technical standards[4] that include quality standards for the ambient environment as well as for waste.[5] Quality standards for the ambient environment are classified into groups of technical standards for the following[6]:

- Land
- Water surface and underground water
- Sea water
- Air
- Sound, light and radiation
- Noise and vibration

Although there is no specific definition of land contamination, based on the general definitions above, it seems that any change in the composition of the environment that causes the quality of the land to fall below the quality standard for that land's specific use will be considered land pollution or land contamination.

[1] Law No. 55/2014/QH13 on Environmental Protection, adopted by the National Assembly on 23 June 2014, and taking effect on 1 January 2015 (LEP).
[2] LEP, Article 3(2).
[3] LEP, Article 3(8).
[4] LEP, Article 113(1).
[5] LEP, Article 113(2).
[6] LEP, Article 113(1).

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes, the LEP and Decree No. 179[7] provide for the remediation of contaminated environments, including contaminated land. In particular, such remediation may be undertaken by either the polluter or the government, depending on what or who caused the pollution. If the polluter caused the contamination, it would be responsible for the cleanup.[8] If the pollution is caused by a natural disaster or an unidentified source, the government would be responsible for the cleanup.[9]

Governmental agencies are the only entities empowered to conduct investigations of environmental pollution.[10]

4 If so:

4.1 Who is primarily responsible for the cleanup?

Under environmental protection legislation, the polluter has primary responsibility for cleanup.[11] Under other sets of legislation, such as the Civil Code[12] and the Land Law,[13] it is implied that the landowner[14] would not be responsible for the cleanup if the landowner did not cause the pollution.[15]

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The liability would probably not be passed. In cases where the cause of the contamination could not be identified (including cases where the polluter could not be found), the government would be responsible for the cleanup.[16]

However, Vietnamese environmental legislation does not explicitly state who would bear the ultimate liability in cases where the polluter could not be found. As mentioned above, landowners seem to be exempted from such liabilities.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

There is no Vietnamese law on whether and how the landowner and the occupier may apportion the cleanup liability between themselves. The landlord and the tenant may agree under the lease agreement that whichever party causes land pollution during the lease term will be liable for the cleanup. Such an agreement is not inconsistent with the abovementioned principles of the LEP and the Civil Code. Therefore, if the occupier is the *de facto* land user and the owner is not allowed to interfere with the occupier's business on the land during the lease term (as usually agreed in the land lease agreement), it is very likely that the occupier will be fully liable for the land contamination.

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[7] Decree No. 179/2013/ND-CP dated 14 November 2013 of the Government, Sanctions of Violations in the Field of Environmental Protection ("Decree No. 179".)
[8] LEP, Article 4(8); Article 59(4).
[9] LEP, Article 112(3).
[10] LEP, Article 111(2).
[11] LEP, Articles 4(8) and 59(4).
[12] Law No. 33/2005/QH11 on the Civil Code, adopted by the National Assembly on 14 June 2005, and effective 1 January 2006 ("Civil Code").
[13] Law No. 45/2013/QH13 on Land, adopted by the National Assembly on 29 November 2013, and effective 1 July 2014 ("Land Law").
[14] Please note that under Vietnamese law, no one is entitled to own land. Instead, the people, as represented by the government, are the actual owners of all the land in Vietnam. Therefore, although we do not revise this term, please always bear in mind that the correct term is "land user."
[15] Civil Code, Article 263.
[16] LEP, Article 93(4).

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Vietnamese law does not allocate liability to any specific entity for cleaning up historical contamination. However, based on the abovementioned provisions, landowners should not be liable for cleaning up past contamination because they were not responsible for the corresponding contamination. If the past polluter could be identified and fails to implement rectification at the request of the authorities within the time frame provided by the authorities, the authorities would take the necessary enforcement action.[17] If a government-sanctioned investigation determines that the land needs cleanup, and the past polluter could not be found, the government would be responsible for the cleanup and should therefore bear the corresponding expenses.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Remediation is required after an investigation (conducted by the government) concludes that the land is contaminated and needs remediation.[18]

The law does not provide specific guidance on the forms that such remediation should take. It provides only that polluters must remedy the contamination in accordance with the form requested by competent authorities.[19] Therefore, it is up to the authorities to determine whether remediation is required and which form of remediation to apply.

Remediation takes many forms, including cleanup, re-export of pollutants (if they are imported) and destruction of pollutants.[20]

Limits to polluting substances are specified in national and industry environmental standards and are still being developed and constructed. Currently, there are three soil-related national technical standards:

- QCVN 03:2008/BTNMT – These are national technical standards on the allowable limits to heavy metals in the soils (issued according to Decision No. 04/2008/QD-BTNMT, adopted by the Ministry of Natural Resources and Environment on 18 July 2008, promulgating the National Environmental Technical Standards).

- QCVN 15:2008/BTNMT – These are national technical standards on the pesticide residues in the soils (issued according to Decision No. 16/2008/QD-BTNMT, adopted by the Ministry of Natural Resources and Environment on 31 December 2008, promulgating the National Environmental Technical Standards).

- QCVN 45:2012/BTNMT – These are national technique regulations on the allowable limits to dioxin in soils (issued according to Circular No. 13/2012/TT-BTNMT, adopted by the Ministry of Natural Resources and Environment on 7 November 2012, promulgating the national technical standards on allowed limits of dioxin in soils).

- QCVN 54:2013/BTNMT – These are national technical regulation on remediation target values of persistent organic pesticides according to land use (issued according to Circular No. 43/2013/TT-BTNMT, adopted by the Ministry of Natural Resources and Environment on 25

[17] Decree No. 179, Article 55(5)(d).
[18] LEP, Chapter X.
[19] LEP, Article 106(1).
[20] Decree No. 179, Article 4(3).

December 2013, promulgating the national technical standards on remediation target values of persistent organic pesticides according to land use).

Pollution can be classified into three levels: pollution, serious pollution and extra-serious pollution.[21]

6 What level of cleanup is required?

In general, cleanup level shall be set by competent authorities on a case-by-case basis,[22] but this should also be based on the statutory national standards or the condition of the soils before being contaminated.

7 Are there different provisions relating to the cleanup of water?

There is none. The LEP and Decree No. 179 do not provide separate provisions on the cleanup of soil/land. The provisions on cleanup apply to both water and soil/land.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Yes, under the Penal Code,[23] contaminating land may be a criminal offense, but owning contaminated land that was not polluted by the owner is not. If contamination is not serious enough to warrant criminal liabilities, administrative sanctions may apply.[24] There are two provisions of the Penal Code that may apply to an act of contaminating land.

In particular, the Amended Article 182 provides that anyone who discharges into the air, water, and/or land, pollutants or radiation in excess of the national standards for waste at a serious level, or severely pollutes the environment or causes other serious consequences, is subject to a fine of up to VND500 million (about USD23,585[25]) or imprisonment of up to five years, or both.[26] In aggravated circumstances (where the act is committed in an organized manner, or the consequences are extra-serious), the term of imprisonment is up to 10 years.[27] Additional penalties, such as prohibitions on holding certain posts, practicing certain professions or performing certain jobs for up to five years may also apply to convicted offenders in such cases.[28]

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

See Sections 4.4 and 8.

10 What authority enforces cleanup?

The following authorities have the right to enforce a cleanup:

[21] LEP, Article 105(2).
[22] Decree No. 179, Article 4(3)(c).
[23] Law No. 15/1999/QH10 on the Penal Code, adopted by the National Assembly on 21 December 1999, and effective 1 July 2000, and amended by Law No. 37/2009/QH12 on Amendments of and Supplements to a Number of Provisions of the Penal Code ("Penal Code").
[24] Law No. 15/2012/QH13 on Administrative Sanction Proceedings, adopted by the National Assembly on 20 June 2012, and effective 1 July 2013 ("Law on Administrative Sanction Proceedings", Articles 62 and 63).
[25] USD1 = VND21,200 (source: https://www.vietcombank.com.vn/exchangerates/ on 17 June 2014).
[26] Penal Code, Amended Article 182(1).
[27] Penal Code, Amended Article 182(2).
[28] Penal Code, Amended Article 182(3).

- Local authorities – Chairperson of People's committees at the ward, district and provincial levels[29]
- Police – Chiefs of commune, district and provincial police, border gate police, export processing zone police, Environmental department police, etc.[30]
- Environmental authorities – Environmental inspectors of the Ministry of Natural Resources and Environment and provincial departments of natural resources and environment, etc.[31]
- Other officials empowered to apply administrative sanctions when they find violations of environmental regulations in their respective fields or jurisdictions[32]

11 Are there any defenses?

Only the Penal Code provides defenses for criminal liability. Decree No. 179 provides defense only in cases where the administrative sanction's prescription has expired; however, there is no prescription for remediation as a form of sanction.[33]

The following arguments are provided as defenses against the application of criminal penalties: (i) unforeseen events[34]; (ii) lack of capacity for criminal liabilities due to mental illness[35]; and (iii) emergency situations.[36]

In the case of administrative sanctions, if the violator does not accept the investigation results and/or the applied administrative sanctions, the violator is entitled to appeal the decision of the competent authority on imposing administrative sanctions, in accordance with the Law on Administrative Proceedings.[37]

12 Can third parties / private parties enforce cleanup?

No. Only government authorities have the right to enforce a cleanup.[38]

13 Can third parties claim damages?

Yes. Third parties/private parties may claim damages under the principle that a polluter is liable for damages, even if he or she is not at fault.[39]

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No. There is no such requirement.

[29] Decree No. 179, Article 50.
[30] Decree No. 179, Article 51.
[31] Decree No. 179, Article 52.
[32] Decree No. 179, Article 53.
[33] Law on Administrative Proceedings, Article 65.2.
[34] Penal Code, Article 11.
[35] Penal Code, Article 13(1).
[36] Penal Code, Article 16(1).
[37] Law on Administrative Proceedings.
[38] Decree No. 117, Articles 40, 41, 42, 43.
[39] Civil Code, Article 624.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

It probably cannot pass the liability to another party, unless such party gains approval from the authorities.

The Civil Code allows an obligor to transfer its civil liabilities to a third party if the obligee approves.[40] However, it is unclear whether the cleanup liability is considered a civil liability because this liability is, first and foremost, a liability to the government. Moreover, the LEP is silent on whether such liability is transferable. In practice, the authorities may, at their discretion, allow the landowner (who is also the polluter) to pass its cleanup liability to the purchaser, provided the landowner-polluter has settled all other penalties imposed by the authorities.

15.1 Under the general law?

See Section 15 above. If the government allows such transfer, the purchaser will replace the landowner-polluter as the obligor for the cleanup liability.[41]

15.2 Contractually?

See Section 15.1.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Although an investigation of land contamination is not a legal requirement, potential land purchasers, especially industrial zone and residential developers, are strongly advised to conduct environmental/land surveys of their target property prior to purchase, and to report the results of such surveys to the competent authorities if contamination is found. This practice is meant to prevent any potential confusion and liabilities should contamination be found later and determined to have been caused by the purchaser.

[40] Civil Code, Article 315(1).
[41] Civil Code, Article 315(2).

EMEA

Austria

Franz Josef Arztmann
Baker & McKenzie, Vienna

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

There is no unified codification relating to land contamination. The most important provisions regarding land contamination are split among the following statutes:

- The Water Act (*Wasserrechtsgesetz*)
- The Waste Management Act (*Abfallwirtschaftsgesetz*)
- The Industrial Code (*Gewerbeordnung*)
- The Forestry Act (*Forstgesetz*)
- The Rehabilitation of Historic Contamination Act (*Altlastensanierungsgesetz*)
- The Federal Environmental Liability Act (*Bundes-Umwelthaftungsgesetz*)

Further provisions for protection can be found in the Chemicals Act (*Chemikaliengesetz*), the Law on Fertilizers (*Düngemittelgesetz*), the Plant Protection Act (*Pflanzenschutzgesetz*) and the associated directives issued. Aside from these, there are numerous waste management laws and environmental protection laws in the federal provinces, which are amended rather frequently.

2 Is there a definition of contaminated land in your laws?

There is a definition for historical contamination (*Altlasten*):

"Historic contamination means existing waste deposits and abandoned polluted areas as well as soils and groundwater vessels from which substantial danger to human health or the environment are emitted according to the results of an assessment of endangerment. (see Section 2 Paragraph 1 of the Rehabilitation of Historic Contamination Act [*Altlastensanierungsgesetz*], in the Federal Law Gazette version I No. 40/2008)."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

All of the laws enumerated under 1 stipulate direct or indirect provisions dealing with the cleanup or remediation of contaminated land. The most important laws are the Federal Environmental Liability Act (*Bundes-Umwelthaftungsgesetz*), the Rehabilitation of Historic Contamination Act (*Altlastensanierungsgesetz*), the Water Act (*Wasserrechtsgesetz*), the Waste Management Act (*Abfallwirtschaftsgesetz*) and the Industrial Code (*Gewerbeordnung*). In addition to these laws, other laws stated under 1 may apply, of which especially the Environmental Protection Laws of the Federal States have to be observed.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The Federal Environmental Liability Act (*Bundes-Umwelthaftungsgesetz*): Primarily the polluter, that is, the operator in terms of the Act

The Water Act (*Wasserrechtsgesetz*): Primarily the polluter or whoever else has the factual power to immediately stop any pollution and restore the original state of the land

The Waste Management Act (*Abfallwirtschaftsgesetz*): Primarily the person who has handled the waste in an unlawful manner, which is, in most cases, the polluter

The Industrial Code (*Gewerbeordnung*): Primarily the operator of an industrial plant, who is *ex lege* deemed to be the polluter, unless he or she can prove the pollution already existed before the launch of the plant

The Rehabilitation of Historic Contamination Act (*Altlastensanierungsgesetz*): The law refers to the laws mentioned above; as a consequence, the polluter is primarily responsible in the majority of cases.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The Federal Environmental Liability Act (*Bundes-Umwelthaftungsgesetz*): In case the polluter (i.e., operator in terms of the Act) cannot be identified or the costs cannot be recovered from the operator for any reason, the owner/s of the affected premises may be held liable.

The Water Act (*Wasserrechtsgesetz*): The liability is passed on under the conditions stated in Section 31 Paragraph 4 of the Water Act; if the owner or his or her legal successor agreed to the action causing the pollution or voluntarily tolerated it and did not take reasonable countermeasures, the liability is passed on to him.

The Waste Management Act (*Abfallwirtschaftsgesetz*): The liability is passed on to the owner according to Section 74 of the Waste Management Act. The liability is passed on if the owner agreed to the unlawful storage or to the disposal of waste, or if he or she tolerated any of these actions and did not take reasonable countermeasures. The liability is also passed on to the legal successor of the owner if he or she knew about the unlawful storage or disposal of waste, or if he or she could have noticed these storages or disposals if he or she had paid proper attention.

The Industrial Code (*Gewerbeordnung*): The operator and his or her legal successor are liable under the conditions stated above under 4.1. A legal successor is not liable under the Industrial Code if the predecessor has obtained a decision according to Section 83 Paragraph 6 of the Industrial Code.

The Rehabilitation of Historic Contamination Act (*Altlastensanierungsgesetz*): According to Section 18 of the Historic Contamination Act, the liability is passed on to the owner if he or she agreed to the disposal causing the historic contamination or if the owner tolerated such disposal. With respect to the latter, caution is advisable; the courts have yet to determine to what extent "tolerance" of an existing disposal may lead to the liability of the land owner. In practice, it is therefore advisable to report any known disposal without undue delay (note that aside from a land contamination point of view, such as any threats to a water body, should be reported immediately).

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

See above.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes. In this context, note that in principle, there is public funding for the cleanup of historic contamination, in particular, for contamination caused prior to 1 July 1989. In summary, the level of funding depends, *inter alia*, on the applicant's role in causing the historic contamination, the priority level of the cleanup, and whether the applicant is carrying out a business activity. For example, the highest funding is, in general, available to non-profit organizations that had no role whatsoever in the

origin of a historic contamination caused prior to 1960 and for which the cleanup is classified to have a priority level 1. However, business operators may be eligible for funding as well, in particular, if their operations are considered to have been in compliance with the relevant regulatory framework (laws and permits) prior to 1 July 1989.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Local authorities decide during the course of an administrative procedure to what extent cleanup is required. Please note that various threshold values are set forth in a large number of ordinances. Depending on the nature of the potentially polluted land, these threshold values vary (e.g., lower threshold values generally apply in protected areas). Industrial plants in terms of the Water Act and the Waste Management Act are periodically checked for compliance with the applicable threshold values. Historic contaminations in terms of the Historic Contaminations Act are determined by a risk assessment and disclosed in the Historic Contaminations Register (*Atlastenatlas*).

6 What level of cleanup is required?

Generally, cleanup is required as to reach the level where applicable threshold values are met. Under the Historic Contaminations Act, the removal of the source of endangerment and the removal of its surroundings is stipulated. Under the Federal Environmental Liability Act, all contaminations of the soil shall be removed as to reach a level at which all significant risk to human health is eliminated. Waters shall be restored to the status prior to the pollution.

7 Are there different provisions relating to the cleanup of water?

Yes. For example, competent authorities can order specific measures under the Water Act to improve the quality of groundwater. Under the Federal Environmental Liability Act, the impaired water bodies shall be remediated by restoring the body to its initial state.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Willful and unlawful contamination of waters, soil or air can be punished by a criminal sentence of up to five years in prison or a fine. If the offense was committed by negligence, this can be punished by imprisonment of up to two years or a fine. The contamination is punishable only if it alternatively triggers: (i) danger to life or grievous bodily harm to another human or danger to the health of a large number of people; (ii) significant danger to fauna or flora; (iii) long-lasting impairment of the soil, water or air; or (iv) costs for cleanup of more than EUR50,000 or damage to third-party property or protected monuments exceeding this amount.

It is important to know that the mere possibility of causing one of the dangers above is punishable. Further provisions punish other acts considered to be crimes against the environment.

The mere ownership of contaminated land does not constitute a criminal offense; what is punishable is the willful or negligent act of contamination or – under certain circumstances – willful or negligent omission to prohibit a contamination.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

If the failure to clean up causes the possibility of one of the dangers stated above occurring, then yes. Generally, the violation of an order to clean up an instance of contamination is an administrative offense, punishable with fines of up to EUR21,800 (by the Historic Contaminations Act), EUR36,340 (by the Waste Management Act) or even more.

10 What authority enforces cleanup?

Depending on the applicable law, the respective district administrative authority will enforce a cleanup in the vast majority of cases. As soon as a site is registered to contain Historic Contamination under the Historic Contamination Act, the provincial governor (*Landeshauptmann*) is the competent authority.

11 Are there any defenses?

A variety of defenses may be available, depending on the nature of the specific case. Possible defenses range, from appeals against an order to clean up a site to the competent administrative court, to the mitigation of regress to the provincial government, if a contamination has been previously decontaminated under the Rehabilitation of Historic Contamination Act. Furthermore, the time at which a contamination occurred may have a significant impact on the defense.

12 Can third parties / private parties enforce cleanup?

Yes. Pursuant to Section 364 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), third parties may obtain orders prohibiting detrimental effects resulting from sewerage, smoke, gas, heat, odors, noises, vibrations or poisons (broad terms that refer to a group of emissions) emitted by a neighboring property. Moreover, under the Federal Environmental Liability Act, aggrieved parties have the right to initiate proceedings to clean up contaminations and have the right to be heard in such proceedings.

Besides this, claims for removal and compensation of damages may be asserted if the corresponding prerequisites are fulfilled (according to the Civil Code, this may also proceed pursuant to the individual material laws). With regard to emissions by permitted and lawfully operated industrial plants, the rights of third parties are somewhat restricted.

13 Can third parties claim damages?

Yes. Depending on the applicable law, the responsible person may also be liable regardless of his or her fault. Note that under certain circumstances, third parties may also claim damages from the owner of a site, even if the damage was caused by the tenant or a legal predecessor.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No. Although caution is advisable, if the seller suspects that a property is possibly contaminated, the Supreme Court tends to interpret a seller's obligation to give information rather broadly and therefore, in many cases, rule in favor of the purchaser of a property.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No.

15.2 Contractually?

No. It may be possible to pass on the costs for cleanup, depending on the nature of the case. The obligations under public law, however, cannot be passed on under any circumstances and the authorities are not bound by contractual agreements between the parties.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

In the course of the due diligence process, the kind of industrial activities carried out on the property should be investigated. A potential purchaser is also well advised to check for Historic Contaminations in the Historic Contaminations Register and gather further information from the competent authorities.

Due to frequent changes to laws regarding land contamination and environmental protection as such, it is highly advisable to consult a local attorney before purchasing land.

Azerbaijan

Gunduz Karimov and Jamil Alizada
Baker & McKenzie, Baku

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Law No. 678-IQ, On Protection of Environment, dated 8 June 1999, addresses general protection issues of the environment. Furthermore, Law No. 788-IQ of the Republic of Azerbaijan, On Fertility of Land, dated 30 December 1999, governs specific issues of land fertility and the factors affecting it.

2 Is there a definition of contaminated land in your laws?

There is no universal definition of "contaminated land" or of "contamination of land." The Law on Fertility of Land defines "contamination of land" as a process of accumulation in ground of chemical compounds of various origins, heavy metals, radioactive elements, household and industrial wastes, pathogenic and other hazardous organisms in quantities detrimental to human health, environment and fertility of land. Variations of this definition are used in the Criminal Code of the Republic of Azerbaijan, approved by Law No. 886-IQ, dated 26 May 2000, and the Code of the Republic of Azerbaijan of Administrative Violations, approved by Law No. 906-IQ, dated 11 July 2000.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes, they are the Law on Protection of Environment, the Law on Fertility of Land and the Land Code of the Republic of Azerbaijan, approved by Law No. 695-IQ, dated 25 June 1999. It should be noted that these laws provide for remediation and are not specifically limited to cleanup.

4 If so:

4.1 Who is primarily responsible for the cleanup?

It is generally the polluter who is liable for damage to land. It is unclear when a land owner, user or lessee can be required to share liability for damage where his/her/its inactions (such as failure to report an environmental impact where such was required, pursuant to law, or to monitor a condition of land) contributed to the damage. Businesses engaged in handling hazardous materials and substances must insure their civil liability.

In specific cases of damage to a land's fertility, remediation (conservation) required pursuant to an "anthropogenic process" will be borne by the "delinquent person"; where the damage is the result of a natural process, remediation will be borne by the state budget.

A party held responsible for environmental damage is not restricted from seeking redress from a delinquent party.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Legally, the liability would not be passed on to the land owner, user or lessee; in actuality, the liability is likely to be passed on to the owner, user or lessee.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

If the polluter cannot be held liable, as a practical matter, the owner (user or lessee) would be liable. If the land is state-owned, the liability would be passed to a private (or municipal) land user or lessee (tenant).

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes, remediation includes historical contamination.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Under the Law on Protection of Environment, the State Committee of the Republic of Azerbaijan for Land and Cartography determines the limits and quotas establishing, for a particular period of time, maximum limits to the use of land, disposal of hazardous substances, and emission of household and industrial wastes. Additionally, specific limits to the emission and disposal of harmful substances are established for each source of contamination. The Ministry of Ecology and Natural Resources of the Republic of Azerbaijan monitors compliance with the Law on Protection of Environment and can "implement restoration" of land.

Under the Law on Fertility of Land, specific standards, limits, rules and requirements are established for protecting the fertility of land. Land that is no longer fertile as a result of natural or anthropogenic processes is conserved by the decision of a relevant local executive authority. Three periods are established to restore and improve land fertility: up to three years, three to five years, and over five years.

6 What level of cleanup is required?

The Law on Protection of Environment provides that contamination levels must be prescribed by relevant regulations; however, no such regulations are publicly available.

7 Are there different provisions relating to the cleanup of water?

Yes. Water is a specific type of a natural resource. As with land, no specific levels of contamination with regard to water have been made publicly available.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Yes, it is a criminal offense to pollute, contaminate or otherwise damage land with hazardous substances from business or other activities by violating the rules of handling fertilizers, as well as hazardous chemical and biological substances during their storage, use or transportation, resulting in substantial damage to public health or the environment. Such is punishable with a fine in the amount AZN[1]100 to AZN1,000, prohibition from holding a certain position or deprivation of the right to engage in another activity for a period of up to three years, or correctional labor for a period of one year. Only individuals are subject to criminal liability.

[1] Manat; as of 5 August 2015, AZN1=USD0.9525.

There is no criminal liability for owning or possessing contaminated land.

Polluting land with industrial and household wastes and contaminating it with chemical and radioactive substances, sewage, bacterial-parasitic or harmful quarantine organisms are administrative violations under the Code of Administrative Violations and are fined at the following rates: (i) individuals – AZN500 to AZN800; (ii) executives – AZN2,000 to AZN2,500; and (iii) entities – AZN7,500 to AZN10,000.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

No, unless it involves: (i) a qualifying failure to comply with an effective court decision; or (ii) negligence.

Failure to comply with the requirements or decisions of the Ministry of Ecology and Natural Resources adopted pursuant to law is an administrative violation, for which: (i) individuals are fined in the amount of AZN600 to AZN900; (ii) executives at AZN3,000 to AZN4,800; and (iii) entities at AZN15,000 to AZN18,000.

10 What authority enforces cleanup?

The Ministry of Ecology and Natural Resources enforces cleanup.

11 Are there any defenses?

There are none that have been developed in practice.

12 Can third parties / private parties enforce cleanup?

No. Enforcement is possible only by a relevant executive authority.

13 Can third parties claim damages?

In the absence of any damage to a party, no.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No. If the seller was the polluter, he or she remains liable as the polluter under statutory law.

15.2 Contractually?

The polluter can agree with a third party that such party indemnifies and/or holds harmless the polluter in case of remedial action requirements. The authority, however, is not bound by such contractual agreements.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Ecological examination is important prior to the acquisition of a title to land.

Belgium

Pascal Mallien and Mario Deketelaere
Baker & McKenzie, Antwerp

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Flemish Region: In the Flemish Region of Belgium, land contamination has, since 1995, been specifically governed by the Decree on soil decontamination of 22 February 1995 and its implementing regulation of 5 March 1996 (*Vlaams reglement rond bodemsanering en bodembescherming* or VLAREBO). As of 1 June 2008, this legislation has been replaced by the Decree of the Flemish Parliament of 27 October 2006, relating to soil cleanup and soil protection ("Flemish Soil Decree") and by a new version of the implementing regulation VLAREBO, adopted by the Flemish government on 14 December 2007. By Decree of the Flemish Parliament of 25 May 2012, the European Industrial Emissions Directive (2010/75/EU) was implemented, introducing a new obligation for operators of Integrated Pollution and Prevention Control (IPPC) installations to prepare a soil situation report. The Flemish Parliament adopted several changes to the Soil Decree (Decree of 19 March 2014, validated by the Flemish government on 28 March 2014), which became effective on 1 January 2015.

Walloon Region: In the Walloon Region of Belgium, land contamination is governed by the Decree of 5 December 2008, relating to the management of soil ("Walloon Soil Decree"). The Soil Decree replaces a former Decree of 1 April 2004 on soil cleanup, which never took effect.

The Walloon Soil Decree entered into force on 18 May 2009, except for the important Article 21 regarding the origin of the cleanup obligation. The Soil Decree also needs further execution by the Walloon government. A first executive regulation concerning the acknowledgement of soil cleanup experts and the soil inspection certificate was approved on 27 May 2009. As from 1 January 2013, the Walloon Code of Good Practices, which includes the standard procedures for the different soil investigations, the soil cleanup project, the risk study and the final evaluation, became effective. By the Decree of the Walloon Parliament of 24 October 2013, the Soil Decree was amended in view of the implementation and application of the European Industrial Emissions Directive (2010/75/EY). At this moment, the Walloon Soil Decree is still not fully effective since the Walloon government have yet to decide on the entry into force of Article 21 (see hereafter under 14.). While awaiting this decision of the Walloon government, a soil cleanup procedure can be started on a voluntary basis or on demand of the competent authority if it finds evidence of severe soil pollution and/or unauthorized waste disposal.

Furthermore, land contamination in the Walloon Region also remains regulated through the following regulations and decrees:

- Specific and limited zoning regulations pertaining to the cleaning up of former industrial sites
- The Decree of 25 July 1991, relating to the cleanup of dumping grounds
- The regulation of 4 March 1999 pertaining to the obligation to clean up the soil of gas stations
- The Decree of 11 March 1999, relating to environmental permits
- The Decree of 22 March 2007, relating to the taxation of waste (There is no taxation of waste if a soil sanitation plan has been approved by the Walloon government.)

In view of their limited importance, we shall not further comment on all these specific regulations. Our answer to the following questions will focus mainly on the Soil Decree.

Brussels Region: The Brussels Region approved soil cleanup legislation in 2004, laid down in the Ordinance of 13 May 2004, on the management of contaminated land. Together with the most important implementing provisions (relating to the list of risk activities, soil cleanup standards and public access to the inventory of contaminated land or land for which there is a strong indication of contamination) laid down in some decrees of the Brussels government, this ordinance became fully effective on 13 January 2005.

The ordinance had important consequences for the transfer of real rights on land, as well as for the transfer of activities requiring an environmental permit, and for the starting up and closing down of risk facilities. The ordinance, however, mainly focused on the management (control) of contaminated land. This means that decontamination is not always required. Other solutions such as delimitation of the contamination and the limitation of the use of contaminated land will also have – and previously had – to be investigated.

The Brussels government prepared an important revision of the Ordinance, which resulted in the adoption by the Brussels Parliament of the new Ordinance of 5 March 2009, on the management and cleanup of polluted soils ("Soil Ordinance"). The Soil Ordinance has replaced the former Ordinance of 2004 as from 1 January 2010. Important executive regulations relating to the list of risk activities and cleanup and intervention standards were adopted on 17 December 2009. By implementing the regulation of 8 July 2010, the government laid down the contents of the risk management proposal, the cleanup proposal and the limited proposal. The "soil certificate" is regulated by an executive regulation of 24 September 2010. By the regulation of 15 December 2011, the government has adopted provisions relating to the acknowledgement of soil cleanup experts and the registration of soil cleanup contractors. An executive regulation of 2 March 2014, lays down the conditions for granting subsidies for the execution of soil investigations and the treatment of so-called orphan pollution.

Furthermore, land contamination is also partially regulated through the following regulations:

- Specific and limited zoning regulations pertaining to the cleaning up of former industrial sites
- The regulation of 21 January 1999, pertaining to the obligation to clean up the soil of gas stations

In view of their limited importance, we shall not further comment on all these specific regulations. Our answer to the following questions will focus mainly on the legislation as laid down in the Soil Ordinance.

2 Is there a definition of contaminated land in your laws?

Flemish Region: Soil contamination is defined as the presence – as a result of human activities – of substances or organisms on or in the soil or the buildings and structures erected on it, which adversely affect or may affect the quality of the soil, either directly or indirectly.

For contamination that occurred prior to 29 October 1995 (historical contamination), decontamination will be required only when clear indications of severe contamination exist. For contamination that has been occurring since 29 October 1995 (new contamination), decontamination will be required if the contamination exceeds the soil remediation standards (as laid down in the annexes of VLAREBO). For mixed contamination (i.e., contamination that has occurred in part before 29 October 1995, and in part as from the same date) decontamination is required if the contamination exceeds the soil remediation standards (in the event the mixed pollution is predominantly new) or when clear indications of severe contamination exist (in the event the mixed pollution is predominantly historic).

Severe soil contamination is that which constitutes or may constitute a risk of adversely affecting man or the environment.

When evaluating the severity of soil contamination, the following factors shall be taken into account:

(a) The characteristics, functions, uses and properties of the soil

(b) The nature and concentration of the contaminating factors

(c) The possibility of dispersion of the contaminating factors

As from 1 January 2015, the new concept of "mingled pollution" was introduced, meaning a pollution for which several persons can qualify as one of the persons who are responsible for carrying out soil cleanup. A mingled pollution will be qualified as such by the Flemish Public Waste Company (OVAM) and may cover a historical, new or mixed pollution. The different persons responsible for cleaning up an instance of mingled pollution will have to carry out soil investigation and further measures jointly and they will have to bear the costs in accordance with a formula. The entry into force of the new procedure for mingled pollution requires further implementing regulations by the Flemish government, such as the formula on how to divide costs.

Walloon Region: Soil contamination is defined as the presence on or in the soil of substances, waste products, chemical elements or organisms originating from human activities that may influence, directly or indirectly, the quality of the soil in a negative manner.

For contamination that occurred prior to 30 April 2007 (historical contamination), decontamination will be required only if:

(i) the descriptive soil investigation reveals that the limit values are exceeded for at least one parameter and the background values for those parameters are lower than the measured concentrations; and

(ii) the decision of the competent authority points out that the soil contamination constitutes a serious threat.

In every circumstance, a serious threat to public health and the environment, taking into consideration the characteristics of the land, has to be addressed.

For contamination that has been occurring since 30 April 2007 (new contamination), the pollution has to surpass the mentioned limit values, taking into consideration the background values.

Brussels Region: Soil contamination is defined as any soil contamination that has or can have a strong negative effect on human health or could influence the ecosystem, the chemical or quantitative nature, or the ecological potential of water bodies in a severely negative manner, since substances, preparations, organisms or microorganisms have been brought onto the surface or into the ground. No distinction is made between historical and new pollution (contrary to legislation passed in the Flemish and Walloon Regions).

The Soil Ordinance differentiates between three kinds of pollution:

- "One-off pollution" – Pollution exclusively caused by the current operator of the ground
- "Mixed pollution" – Pollution caused by different persons, not exclusively by the current operator of the ground, and without the possibility of determining what part of the pollution was caused by the current operator
- "Orphan pollution" – Pollution not caused by the current operator of the ground

If an exploratory soil investigation reveals a contamination of soil and/or groundwater that exceeds the intervention standards or the cleanup standards, as well as an increase of the contamination, a detailed soil survey has to be carried out.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

See answers to Q1.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Flemish Region: For new contamination, the (physical or legal) person primarily responsible for the cleanup is the person who is required to obtain an environmental permit (or who is required to file an environmental notification) pursuant to the Decree of 28 June 1985 on environmental permits, i.e., the operator as defined in the mentioned decree.

If no such activity requiring an environmental permit is performed on the site, or if the operator has been released from the obligation to carry out soil investigation or remediation, the user of the land where the contamination originated is responsible for the cleanup.

In the event there is no operator or user, or if the operator and the user have been released from the obligation to carry out investigation or remediation, the owner of the land where the contamination originated is responsible for the cleanup.

The operator or the user shall not be obliged to carry out a descriptive soil investigation or a soil remediation, respectively, if OVAM, on the basis of the records of the land or the motivated arguments of the operator or the user, considers that the said operator or user complies with the following conditions in a cumulative manner:

1. He or she has not caused the soil contamination himself or herself.

2. The soil contamination originated before the time he or she received the land for operation or use.

The owner shall not be obliged to carry out a descriptive soil investigation or soil remediation if OVAM, on the basis of the records of the land or the motivated argument of the owner, considers that he or she complies with the following conditions in a cumulative manner:

1. He or she has not caused the soil contamination himself or herself.

2. The soil contamination originated before the time he or she became the owner of the land.

3. He or she was not aware and was not supposed to be aware of the soil contamination at the moment he or she became the owner of the land.

With regard to historical contamination, the primarily responsible person for the cleanup is the same as for new contamination, but the triggering thresholds are slightly different for the owner. The owner who acquired contaminated land before 1 January 1993, even though he or she was or should have been aware of the soil contamination, shall not be obliged to carry out a descriptive soil investigation nor the soil remediation if OVAM, on the basis of the records of the land or the motivated argument of the owner, considers that he or she did not cause the contamination himself or herself and that, since its acquisition, he or she has only used the land for private purposes.

Before 1 January 2015, the person responsible for the soil cleanup was responsible for the cleanup of the whole contamination, that is, including the portion of the pollution that was caused before he or she became the operator, the user or the owner of the land (meaning that the person legally responsible for the cleanup could not be exempted partially). Since 1 January 2015, the person responsible for the soil cleanup also has the chance to obtain an exemption from cleanup obligation

for a portion of the contamination, such as for the contamination that was caused before he or she became the operator, user or owner of the land.

Walloon Region: The person who wants to apply the provisions of the Walloon Soil Decree also has the obligation to perform decontamination.

In the first instance, the decontamination has to be started by the (presumed) person of the pollution or the one that left any waste. If that person cannot be identified or in the event it is very difficult to identify the polluter, the operator will have to perform cleanup. This is also the case when the author is no longer liable or cannot provide sufficient financial securities.

Last but not least, the owner, the ground lessee, the usufructuary or the lessee, as designated by the competent authority, would need to take up cleanup obligations.

Brussels Region: Soil contamination is determined by carrying out an exploratory soil survey, which is required in the following situations:

- An event or accident, contaminating the soil or groundwater
- The discovery by chance of contamination during excavation works
- A transfer of ownership rights to land (or transfer of any real rights to the land) where a risk activity was or is carried out
- A transfer of an environmental permit (merger, division, acquisition of the facility with change of operator) for a risky activity
- Environmental permit application for an activity on certain land considered to be at risk
- Building permit application for certain works on land pertaining to certain soil categories
- The prolongation of an environmental permit for risky activities
- Periodic survey obligation for risky activities
- Closing down a risk activity
- Bankruptcy of an operator of risk activities or an owner of risk grounds

Not every “transfer of risk land” is subjected to the obligation to carry out an exploratory soil survey. This obligation is restricted to transfers of ownership as such and transfers of real rights on land, as well as transfers of environmental permits (see also under 14.).

The obligation to carry out an exploratory soil survey is imposed on the holder of a real right on the land or on the operator in the event of a transfer or an extension of the validity period of an environmental permit.

If an accident causes pollution, the person causing that accident will be responsible for carrying out an exploratory soil investigation. If that person cannot be identified, the operator remains responsible for the cleanup. The same persons responsible for the exploratory investigation will also be obliged to carry out a detailed soil survey (if required) and certain cleanup measures (if required).

4.2 if it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Flemish Region: The primary responsibility for a cleanup can be different from the ultimate financial liability. The primary responsibility for a cleanup may not necessarily rest with the polluter. In such a case, the person who has performed the cleanup has a recourse against the polluter.

The ultimate financial liability is described as follows:

- For new contamination, the polluter (the person who has caused the soil contamination) shall be strictly liable for the costs made pursuant to the Soil Decree, governing descriptive soil investigations, soil remediation and any damage due to such measures, including use restrictions or precautionary measures. However, if the polluting source causing the soil contamination originates from an operation that requires an environmental permit, the operator of this facility shall be held liable.

- For historical contamination, general torts law shall apply. Compensation from the polluter can be obtained only if one can demonstrate fault, damages and a causal relationship between fault and damages.

Walloon Region: See 4.1. If the polluter cannot be found (or is not liable, or even not solvent), the operator will be obliged to clean up the contaminated land.

With regard to last-resort measures, when there is no operator, the responsibility for cleanup is passed to the owner, the ground lessee, the usufructuary or the lessee of the land.

In accordance with the general torts law, compensation from the polluter can be obtained only if one can demonstrate fault, damages and a causal relationship between fault and damages.

Both historical and new contamination are governed by these principles.

Brussels Region: See 4.1. If the polluter cannot be identified, the operator remains responsible for the soil investigation and possible further cleanup measures; if there is no operator, the obligations rest with the owner of the real rights on the land. Furthermore, in accordance with the general torts law, compensation from the polluter can be obtained only if one can demonstrate fault, damages and a causal relationship between fault and damages.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

See answers to Question 4.1.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

See answers to Question 4.1.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Flemish Region: With regard to land with historical soil contamination, a descriptive soil investigation shall be carried out when clear indications of severe soil contamination exist.

Soil remediation shall be carried out when a descriptive soil investigation indicates the presence of severe soil contamination. OVAM shall identify land with severe historical contamination, where soil remediation must be carried out with high priority.

A severe soil contamination is that which constitutes or may constitute a risk of adversely affecting people or the environment.

When evaluating the severity of the soil contamination, the following factors shall be taken into account:

(a) The characteristics, functions, uses and properties of the soil

(b) The nature and concentration of contaminating factors

(c) The possibility of dispersion of contaminating factors

For new contaminations, remediation shall be required if the soil remediation standards (as defined in Annex 4 of the implementing decree VLAREBO) are exceeded. These soil remediation standards correspond to a level of soil contamination that entails considerably harmful effects on people or the environment, taking into account the characteristics of the soil and the functions it fulfils. If there are clear indications that the soil contamination exceeds or threatens to exceed soil remediation standards, a descriptive soil investigation shall be carried out immediately. If the descriptive soil investigation shows that the soil remediation standards have been exceeded, soil remediation shall be initiated without delay. If, due to its special nature, the soil contamination cannot be verified against soil remediation standards, a descriptive soil investigation shall be carried out when clear indications of severe soil contamination exist and soil remediation shall be carried out when the descriptive soil investigation indicates the presence of severe soil contamination.

Walloon Region: For contamination that occurred prior to 30 April 2007 (historical contamination), decontamination will only be required if the descriptive soil investigation reveals that the limit values are exceeded for at least one parameter and the background values for those parameters are lower than the measured concentrations, and the decision of the competent authority points out that the soil contamination constitutes a serious threat.

For contamination that has been occurring since 30 April 2007 (new contamination), pollution has to surpass the mentioned limit values, taking into consideration the background values.

Brussels Region: If an exploratory soil investigation reveals a contamination of soil and/or groundwater exceeding the intervention standards or exceeding the cleanup standards, as well as an increase of the contamination, a detailed soil survey has to be carried out.

If a detailed soil survey reveals the existence of a one-off pollution, a cleanup proposal and soil cleanup works with respect to the contamination have to be carried out on behalf of the following people:

- The operator who has caused the pollution
- The owner of rights *in rem* who has caused the pollution
- The identified author who has caused the pollution

In the event of mixed pollution (i.e., pollution caused by different persons, not exclusively by the current operator, and without the possibility of determining what part of the pollution is caused by the current operator of the land) or in the event of an orphan pollution (i.e., pollution that is not caused by the current operator of the land), there is no obligation to take cleanup measures as such. The operator will be obliged to carry out a risk study and to propose and implement risk management measures.

Only in the event of one-off pollution not completely caused before 1 January 1993, and mixed pollution, all authors thereof should know there is a real cleanup obligation. The obligation to decontaminate the land is imposed on the operator and the owners of rights *in rem* who have caused this pollution, as well as on the person who has been causing the pollution since 20 January 2005.

6 What level of cleanup is required?

Flemish Region: In cases of historical soil contamination, soil remediation shall be aimed at avoiding any potential risk (posed by contaminated land), effectively or potentially constituting a risk of adversely affecting people or the environment by using the best available techniques not entailing excessive costs (BATNEEC) principle. If the land, in the framework of a provisional draft of a land-use or implementation plan, is assigned a different use, soil remediation shall be aimed at avoiding any potential risk (posed by contaminated land) effectively or potentially constituting a risk of adversely affecting people or the environment within this future use. If it is not possible to obtain the targeted level of soil quality as mentioned by using the BATNEEC principle, land use or town planning restrictions may be imposed if necessary.

In the event of new soil contamination, soil remediation shall be aimed at achieving the target values for the desired level of soil quality (Annex II of VLAREBO). If, due to the nature of the soil contamination or the characteristics of the contaminated land, it proves impossible to achieve the target values for soil quality by using the BATNEEC principle, soil remediation shall at least be aimed at obtaining better soil quality than that specified by the applicable soil remediation standards. If the land, in the framework of a provisional draft of a land-use or implementation plan, is assigned a use to which stricter soil remediation standards apply, the stricter soil remediation standards shall be taken as the remediation objective. If, due to the nature of the soil contamination or the contaminated land, it is not possible to obtain the soil quality mentioned above by using the BATNEEC principle, soil remediation shall be aimed at avoiding any potential risk (posed by contaminated land) effectively or potentially constituting a risk of adversely affecting people or the environment by using the BATNEEC principle.

If it is not possible to obtain the soil quality as mentioned, inclusively by using the BATNEEC principle, restrictions with respect to the use of the land may be imposed if necessary. If, due to its special nature, the soil contamination cannot be verified against the targets for soil quality, soil remediation shall be aimed at avoiding any potential risk (posed by contaminated land) effectively or potentially constituting a risk of adversely affecting people or the environment by using the BATNEEC principle. The selection of the BATNEEC principle is independent of the financial capacity of the person who is under the obligation to carry out the remediation.

Walloon Region: The cleanup of new contamination is aimed at the recovery of the soil for contaminating substances that exceed the reference standards with regard to the level of the reference standards measured by the background concentrations or to the level that approaches those standards as close as possible through best available techniques.

An exemption can be granted in the soil inspection certificate provided by the competent authority (with particular limit values).

The cleanup of historical contamination is aimed at the recovery of the soil for contaminating substances that exceed the limit values, to the level established by the competent authority. That level should reach the reference standards and at least make it possible to remove any serious threat to human health and the environment, taking into account the characteristics of the soil, particularly: relating to the presence of a building, an installation or a regular activity; how long the contamination has taken place; the possibility that the contamination will disappear (by way of natural attenuation); the existence of a project for which an environmental permit and/or building permit is applied; and the future condition of the land.

Brussels Region: The aim of a soil cleanup will depend on the type of pollution. In the event of an orphan pollution or a mixed pollution, the risks posed by the pollution should not severely affect public health and the environment if the risk values are exceeded. This will result in the preparation of a risk management proposal and the implementation of risk management measures, or possibly, the execution of a cleanup proposal and cleanup measures.

A cleanup operation in the event of one-off pollution will aim to comply with certain cleanup standards. In the event of an increase in pollution levels, a cleanup may also be intended to curb such increase.

7 Are there different provisions relating to the cleanup of water?

Flemish Region: The Flemish Soil Decree also applies to groundwater (and to water bottoms). Surface water does not fall within the scope of the Soil Decree. Surface water pollution is governed by the law of 26 March 1971, on the protection of surface water and its implementing decrees, and by the regulation of the Flemish government pertaining to environmental conditions (VLAREM II).

Walloon Region: The Walloon Soil Decree also applies to groundwater. Surface water does not fall under the scope of the decree. Surface water pollution is governed by the Decree of 7 October 1985, relating to the protection of surface water against pollution, and by the Decree of 11 March 1999, relating to environmental permits and its implementing decrees.

Brussels Region: The Soil Ordinance also applies to groundwater. Surface water does not fall within the scope of the ordinance. Surface water pollution is governed by the law of 26 March 1971, on the protection of surface water and its implementing decrees, and by the Ordinance of 30 July 1992, relating to environmental permits and its implementing decrees.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Flemish Region: To contaminate land is not a specific offense under the Soil Decree. However, contaminating land may well constitute a criminal offense under waste regulations or because it may constitute a breach of the operator's environmental permit conditions. Since 1 May 2009, the criminal provisions for environmental crimes have been included in title XV of the Decree of 5 April 1995, containing the General Provisions on Environmental Policy. Article 16.6.2.§1 of this decree mentions that any person who, contrary to the legal provisions or contrary to a permit, directly or indirectly pollutes water, soil or atmosphere will be punished with imprisonment of one month to five years and/or imposed a criminal fine of EUR100 (to be multiplied by 6) to EUR500,000 (also to be multiplied by 6).

Walloon Region: To contaminate land is not a specific offense. However, contaminating land may well constitute a criminal offense under waste regulations or because it may constitute a breach of the operator's environmental permit conditions.

Brussels Region: To contaminate land is not a specific offense. However, contaminating land may well constitute a criminal offense under waste regulations or because it may constitute a breach of the operator's environmental permit conditions.

In the Flemish, Walloon and Brussels Regions, it is not a criminal offense to own contaminated land.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Flemish Region: Noncompliance with the cleanup requirement is no longer considered a criminal offense. Since 1 May 2009, violations of the provisions of the Flemish Soil Decree have been regarded as environmental infringements that are sanctioned in an administrative way under Title XVI of the Decree of 5 April 1995, containing the General Provisions on Environmental Policy. Annexes III and XII of the regulation of the Flemish government of 12 December 2008, implementing Title XVI of the Decree of 5 April 19995, contain a list of the infringements to soil cleanup legislation that are regarded as environmental infringements and for which violators can be sanctioned with an administrative fine of up to EUR50,000 (to be multiplied by six).

Walloon Region: Noncompliance with the investigation and cleanup requirements under the Soil Decree and with the information obligations under the Walloon Soil Decree is considered a criminal offense of the second category under Book I of the Walloon Environmental Code. Criminal offenders with regard to the second category are sanctioned with imprisonment of from eight days to three years and/or imposed a criminal fine of a minimum of EUR100 and a maximum of EUR1 million (multiplied by six).

Brussels Region: Article 75 of the Soil Ordinance lists persons who can be punished with imprisonment of from one month to five years and/or imposed a criminal fine of EUR100 to EUR10 million (to be multiplied by six):

- People who carry out soil investigations without the required certification or registration
- Soil cleanup experts or contractors who do not comply with the conditions of the certification or registration
- Transferors of a right *in rem* or an environmental permit who did not inform the acquirer or did not deliver the soil certificate
- People who do not fulfil the obligation to carry out an exploratory soil survey, a detailed soil survey or a risk survey

10 What authority enforces cleanup?

Flemish Region: OVAM is the governing and enforcing authority with regard to soil cleanup (www.ovam.be). OVAM can also carry out the cleanup on behalf of the responsible entity and have the costs refunded.

Walloon Region: The governing and enforcing authority with regard to soil cleanup is the Walloon environmental administration, *Direction de la Protection des Sols* or DPS (dps.environnement.wallonie.be). The competent authority can also impose financial guarantees on the responsible party, as well as carry out the cleanup on behalf of the responsible person and have the costs refunded in urgent cases.

Brussels Region: The governing and enforcing authority with regard to soil cleanup is Environment Brussels (www.leefmilieubrussel.be), formerly known as the Brussels Institute for Environmental Management or BIM. Environment Brussels can also carry out a cleanup itself on behalf of the responsible person and have the costs refunded.

11 Are there any defenses?

Flemish Region: When requested to perform a descriptive soil survey, the operator or the user may argue that he or she does not need to perform a descriptive soil survey if he or she can prove the following in a cumulative manner:

1. He or she has not caused the soil contamination himself or herself.

2. The soil contamination originated before the time he or she received the land for operation or use.

The owner shall not be obliged to carry out the descriptive soil investigation or the soil remediation if OVAM, on the basis of the records of the land or the motivated argument of the owner, considers that he or she complies with the following conditions in a cumulative manner:

1. He or she has not caused the soil contamination himself or herself.

2. The soil contamination originated before the time he or she became the owner of the land.

3. He or she was not aware and was not supposed to be aware of the soil contamination at the moment he or she became the owner of the land.

In the event of historical contamination, the owner who acquired contaminated land before 1 January 1993, even though he or she was or should have been aware of the soil contamination, shall not be obliged to carry out a descriptive soil investigation or soil remediation if OVAM, on the basis of the records of the land or the motivated argument of the owner, considers that he or she did not cause the contamination himself or herself and that, since its acquisition, he or she has used the land only for private purposes.

Since 1 January 2015, the person responsible for the soil cleanup also has the option to obtain exemption from cleanup obligations for a portion of the contamination, such as for contamination that was caused before he or she became the operator, user or owner of the land.

Walloon Region: The responsible person does not need to perform a cleanup if he or she proves that a third person has engaged himself or herself formally, unconditionally and irrevocably to decontaminate the concerned polluted land. A special act of the competent authority is required, as well as financial securities.

For the author of the pollution or the operator, three possibilities are provided for:

(a) The soil pollution or the waste left is attributed to a third party, notwithstanding appropriate security measures.

(b) A document has been given by the competent authority confirming that decontamination has been executed well.

(c) The pollution does not constitute a serious threat, taking into consideration the scientific and technical knowledge at the moment that the pollution has been caused.

For the owner, ground lessee, and usufructuary, there are four possibilities:

(a) The pollution is due to a migration from outside.

(b) A soil control certificate has been given with regard to the land.

(c) A document has been given by the competent authority confirming that decontamination has been well executed.

(d) The pollution does not present any serious threat, taking into consideration the scientific and technical knowledge at the moment that the pollution occurred.

Brussels Region: The Soil Ordinance mentions only one possibility to obtain an exemption from cleanup obligations (contrary to the legislation passed in the Flemish Region and the Walloon Region), that is, in the event of voluntary takeover of the cleanup obligation by a third party.

12 Can third parties / private parties enforce cleanup?

No, in all three regions.

13 Can third parties claim damages?

Flemish Region: The person who is responsible for the cleanup of new contamination is strictly liable to third parties for damage resulting from the remediation or from the restrictive measures imposed by OVAM.

Damages claimed with regard to the pollution itself are governed by general torts law. Compensation for damages will, in particular, require evidence of fault, damages and a causal link between the two or, in the event of damage to a neighboring parcel of land, evidence that the normal balance of inconvenience between neighboring parcels has been breached.

Walloon Region: The Walloon Soil Decree does not contain specific provisions relating to liability for soil cleanup costs. The definition of persons who are obliged to carry out soil investigation and/or cleanup does not restrict the application of general civil torts law.

Damages claimed with regard to the pollution itself remain governed by general torts law. Compensation for damages will, in particular, require evidence of fault, damages and a causal link between the two or, in the event of damage to a neighboring parcel of land, evidence that the normal balance of inconvenience between neighboring parcels has been breached.

Brussels Region: The liability regime under the Soil Ordinance is similar to the one applicable in the Flemish Region. In both regions, strict liability is introduced and is ascribed to the author of the pollution for the costs of soil investigations and cleanup and other measures, including the damage caused by these measures. In the event soil pollution is caused by a facility that is required to obtain an environmental permit or is subject to a notification obligation, the operator of the facility is liable for these costs and damages.

Damages claimed with regard to the pollution itself remain governed by general torts law. Compensation for damages will, in particular, require evidence of fault, damages and a causal link between the two or, in the event of damage to a neighboring parcel of land, evidence that the normal balance of inconvenience between neighboring parcels has been breached.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

Flemish Region:

(a) Transfer of all land

The Decree requires the owner of land to apply for a soil certificate from OVAM prior to entering into a transaction entailing a transfer of the land and to inform the prospective buyer of the contents of the soil certificate that need to be cited in the private and notary transfer deed.

"Transfer of land" is broadly defined to include: the transfer *inter vivos* of the right of ownership of a piece of land, the establishment *inter vivos* of a right of usufruct, ground lease or a building and planting right of a piece of land, as well as the termination *inter vivos* of such rights established in the

aforementioned manner; establishing or terminating a right of concession of a piece of land; the transfer of the right of ownership of a piece of land, the merger of legal persons, the division of legal persons, and actions equivalent to a merger or division in which the legal person(s) whose assets will be transferred is/are owner(s) of land; and the acquisition or transfer of another company's assets and liabilities or of autonomous parts of that company, insofar as this involves a right as mentioned before.

Share transactions do not, however, qualify as a transfer of land under the Flemish Soil Decree. Contrary to the former Soil Remediation Decree (1995), the conclusion and/or termination of lease agreements is no longer considered a transfer of land, as of 1 June 2008. Failure of the transferor to comply with these obligations entitles both the acquirer and OVAM to claim the nullity of the transaction.

The soil certificate reflects the data on the land that OVAM has in its land information register.

(b) Transfer of high-risk land

In addition to the general transferor's duty set forth under (i), another procedure needs to be followed with regard to land on which a risk activity or risk facility is being conducted or operated. These activities and installations are defined and included in the so-called list of hazardous activities of Annex 1 of the VLAREM I (implementing regulation of the Environmental Permit Decree) and in the list of risk activities of Annex 1 of VLAREBO (implementing regulation of the Flemish Soil Decree). These lists essentially cover the activities and installations that require an environmental permit and are limited to industrial activities or activities involving dangerous and/or hazardous substances.

Land on which such risk activity or installation is located can, in principle, be transferred only after the owner has observed the following procedure:

- The owner must obtain an exploratory soil survey performed by a recognized expert and submit this report to OVAM. Since 1 January 2015, the owner is no longer obliged to notify the authorities of his or her intention to proceed with the transfer of the land. The obligation to carry out cleanup has become an independent obligation arising from the provisions of the Soil Decree itself and the evaluation of the results of the soil surveys as reflected in the decisions following the declaration of conformity of these surveys and in the land information register.

- OVAM will evaluate the report of exploratory soil survey within 60 days as of receipt. If the evaluation of the report of the exploratory soil survey demonstrates that further measures are required (e.g., clear indications of severe contamination in the event of historical contamination or that which exceeds soil cleanup values in the event of new contamination), the transfer of the land cannot take place before the transferor had carried out a descriptive soil investigation in order to further define the contamination.

Exoneration from the obligation to remediate:

- With respect to historical contamination

The transferor or his or her agent shall not be obliged to respond to the order to carry out a descriptive soil investigation if OVAM, on the basis of the record of the land or the motivated argument of the transferor or his or her agent, considers that any of the following conditions has been fulfilled:

1. The soil contamination did not originate from the land to be transferred.

2. The transferor cumulatively fulfils the conditions mentioned above in the event of transferor is a user.

3. The transferor cumulatively fulfils the conditions mentioned above, in the event the transferor is an owner.

4. The operator or user of the land to be transferred does not fulfil the conditions mentioned above, and the entire soil contamination started during the time the operator or the user had the land at his or her disposal for operation or use, respectively, in the event the transferor is an owner.

- With respect to new contamination

The transferor shall not be obliged to respond to the order to carry out a descriptive soil investigation, if OVAM, on the basis of the records of the land or the motivated argument of the transferor or his or her agent, considers that any of the following conditions has been fulfilled:

1. The soil contamination did not originate from the land to be transferred.

2. The transferor cumulatively fulfils the conditions mentioned above, in the event the transferor is a user.

3. The transferor cumulatively fulfils the conditions mentioned above, in the event the transferor is an owner.

4. The operator or user of the land to be transferred does not fulfil the conditions mentioned above, and the entire soil contamination started during the period the operator or the user had the land at his or her disposal for operation or for use, respectively, in the event the transferor is an owner.

- If, after the report on the descriptive soil investigation has been sent for examination or analysis, the evaluation of OVAM demonstrates that soil remediation standards (in the event of new contamination) have been exceeded, or that the contamination is not to be considered severe (in the event of historical contamination), the transfer of the land may not take place until the transferor:

  (i) has drawn up a soil remediation project or a limited soil remediation project and a certificate of conformity of this project has been delivered;

  (ii) has committed *vis-à-vis*, OVAM to carry out another soil remediation and possible aftercare activities; and

  (iii) has provided financial securities as a guarantee in compliance with the undertaking mentioned in (ii).

Remark: Accelerated transfer procedure

The Soil Decree also provides for an accelerated transfer procedure. The transferor and the acquiring party shall jointly notify OVAM of their intention to apply the accelerated transfer procedure. With this notification, they are to submit the following documents:

1. A report of the exploratory and descriptive soil investigation or a report of the descriptive soil investigation if OVAM is not yet in possession of the same

2. An estimate of the cost for soil remediation and possible aftercare, drawn up by a soil remediation expert

Within a period of 60 days after receiving all the documents mentioned, OVAM shall decide on the conformity of the soil investigation and the request for the application of the accelerated transfer procedure.

Walloon Region: Article 21 of the Walloon Soil Decree, defining the origin of the investigation and cleanup obligations related to transfer of land, transfer of environmental permit, among others, are not yet effective. When Article 21 of the Decree will have entered into force (to be determined and decided by the Walloon government) an exploratory soil survey will be obliged for land where risk activities are or have been exercised, in case of:

- transfer of the risk land;
- transfer of risk activities;
- closing of risk activities; and
- application for an environmental permit.

While awaiting the entry into force of Article 21 of the Walloon Soil Decree, a soil cleanup procedure can be started:

- on a voluntary basis; or
- at the request of the competent authority when it finds evidence of severe soil pollution and/or unauthorized waste disposal.

The soil cleanup procedure includes the following steps and/or obligations:

(a) Exploratory soil survey

- There is an obligation to carry out an exploratory soil survey within 90 days after the occurrence of the fact generating this obligation, and the report must be sent to the competent authority, which will have to communicate its decision relating to the exploratory soil survey within 30 days to the responsible party.
- The decision of the competent authority may: (i) conclude that the survey is not in compliance with the provisions of the Walloon Soil Decree; (ii) order an additional investigation; (iii) conclude that there is no need for further investigation; and (iv) conclude that a descriptive soil survey is required if for one or more of the analyzed substances exceeds the limit values and the background concentrations are lower than the limit values. In this case: (i) safety measures can also be imposed until there is a decision on the descriptive soil survey; (ii) the responsible person can be obliged to provide financial security; and (iii) it can also be concluded that a risk investigation is necessary.

(b) Descriptive soil investigation and risk investigation

- The descriptive soil survey, which, in principle, must be sent to the competent authority within 90 days from the time it is demanded, aims at: (i) acquiring profound knowledge of the nature and level of contamination; (ii) evaluating whether there is a need to carry out a soil cleanup; and (iii) providing the data required for carrying out soil cleanup measures (geographic expansion and volume of the contaminated land and groundwater). It contains a “report” (with an account of the analytical results, the possible need for a cleanup, the different techniques for said cleanup, the techniques proposed by a certified soil cleanup expert, the objectives of the cleanup, the conclusions and suggestions of the certified soil cleanup expert) and – if necessary – a

"risk investigation" (including the need and urgency for a soil cleanup and recommendations on safety measures).

- Within 60 days after receipt of the descriptive soil survey, the competent authority notifies the responsible person of its decision on said survey. This decision may: (i) conclude that the survey is not in compliance with the provisions of the Decree; (ii) order another investigation; (iii) conclude that there is no need for further investigation, nor for decontamination; (iv) conclude that decontamination is necessary as well as the term for drawing up a soil cleanup project. The decision also mentions if the contamination constitutes a serious threat. If the historical contamination needs no cleanup and the intervention values are exceeded, the decision mentions at least that the parcels of ground where the intervention values are exceeded, are subject to safety measures or follow-up measures (or both). In this case, a certificate is attached to the decision, determining the particular values.

(c) Soil cleanup project

- If decontamination is required, a soil cleanup project must be submitted to the competent authority, which communicates or relays its decision on said project within 120 days from the day the project is declared admissible.

- If the competent authority approves the soil cleanup project, it: (i) may determine the time limit for carrying out the soil cleanup; and (ii) may impose all conditions necessary to avoid harm or damage to humans and the environment, and the constitution of a financial security. The approval of the soil cleanup project qualifies as an environmental permit, a building permit, a unique permit or registration and in which soil decontamination is required.

(d) Final evaluation and soil control certificate

- After completion of the soil cleanup works, a final evaluation is made by the soil expert entrusted with certain control tasks. This evaluation report is sent to the competent authority tasked to deliver a soil control certificate within 60 days from receipt of the final evaluation. This certificate: (i) establishes whether the cleanup is carried out according to the decision approving the soil cleanup project and the particular values; and (ii) imposes, if necessary, the restrictions of use or follow-up measures.

Brussels Region:

(a) Exploratory soil investigation

As already mentioned, soil contamination is established by carrying out an exploratory soil survey, which is required in the following situations:

- An event or accident, contaminating the soil or groundwater
- The discovery by chance of contamination while excavation works are being performed
- Transfer of ownership rights on land (or transfer of any rights *in rem* on land) where a risk activity was or is carried out
- Transfer of the environmental permit (merger, division, acquisition of the facility with change of operator) for a risk activity
- Environmental permit application for an activity on a risk ground

- Building permit application for certain works on land pertaining to certain soil categories
- The prolongation of an environmental permit for risk activities
- Periodic survey obligation for risk activities
- Closing down a risk activity
- Bankruptcy of an operator of risk activities or an owner of risk grounds

However, not every "transfer of a risk ground" is subject to the obligation to carry out an exploratory soil survey. This obligation is restricted to transfers of ownership as such and transfers of rights *in rem* on land, as well as transfers of environmental permits.

The obligation to carry out an exploratory soil survey is imposed on the holder of a right *in rem* on the land or on the operator in the event of transfer of the land or of an environmental permit. In the event of an accident that caused pollution, the person causing that accident will be responsible for carrying out the soil investigation. If that person cannot be identified, the operator remains responsible for the cleanup. The same persons responsible for the exploratory soil investigation will also be obliged to carry out the risk study (if required) and the cleanup measures (if required).

An exploratory soil survey is aimed at defining the existence, the concentration and the expansion of soil and groundwater pollution.

(b) Detailed soil survey and/or risk survey

If an exploratory soil investigation reveals a contamination of soil and/or groundwater that exceeds the intervention standards or that of the cleanup standards, and an increase in the contamination, a detailed soil survey has to be carried out.

If a detailed soil survey reveals the existence of a one-off pollution, a cleanup proposal and soil cleanup works with respect to the contamination have to be carried out on behalf of:

- the operator who has caused the pollution;
- the owner of rights *in rem* who has caused the pollution; and
- the identified author who has caused the pollution.

In the event of mixed pollution (i.e., pollution caused by different persons, not exclusively by the current operator, and without the possibility of determining what part of the pollution is caused by the current operator of the ground), or in the event of orphan pollution (i.e., pollution that is not caused by the current operator of the land), there is no obligation to take cleanup measures as such.

The transferor will be obliged to carry out a risk study and to propose and implement risk management measures (see Chapter IV of the Soil Ordinance: "Risk management").

(c) Treatment of the pollution

If cleanup measures are required, a cleanup proposal has to be elaborated by a certified soil contamination expert and presented to Environment Brussels, within the period Environment Brussels has specified on the basis of previous soil investigations. Subsequently, Environment Brussels will evaluate the soil cleanup proposal and deliver a declaration of conformity or impose changes and amendments to this proposal.

(d) Soil cleanup works

The soil cleanup works are carried out by a soil cleanup contractor under the supervision of a soil contamination expert, within the period specified by Environment Brussels in the declaration of conformity of the soil cleanup project.

Remark 1: As from when can the transfer of land take place?

The transfer of the land cannot take place before the two soil investigations have been conducted, the soil cleanup plan is approved or the risk management plan is executed. If treatment is required (i.e., cleanup or risk management), these measures also have to have been carried out completely before the transfer, if so required.

Remark 2: Accelerated transfer procedure

The Soil Ordinance also provides for an accelerated transfer procedure, which can be applied after the declaration of conformity of the exploratory soil survey. The person who is obliged to carry out the treatment of the soil must undertake the cleanup within the time schedule approved by Environment Brussels. For this purpose, the person who is obliged to carry out the soil cleanup obligations must also provide for financial security.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Flemish Region: The obligations for cleanup under statutory law can be assigned by the transferor to the transferee but OVAM needs to be notified of such assignment.

Walloon Region: The obligations for cleanup under statutory law can be assigned by the responsible person to a third party under the following conditions:

- The third party has declared officially, unconditionally and irrevocably to carry out all obligations resting with the responsible person.
- The competent authority has approved the substitution and the identity of the third party.
- The third party has provided financial security, if required.

Brussels Region: Yes, but binding only upon the parties.

15.2 Contractually?

Only in the Flemish Region did a clear provision exist that the sale could be annulled by a judge on request of the competent authority or the purchaser if the procedure wasn't followed as provided for in the Decree on soil decontamination of 22 February 1995.

The new legislation (Flemish Soil Decree), in force since 1 June 2008, only provides that the contractual clauses not in accordance with the Flemish Soil Decree are not opposable to the Flemish Region and its competent authority. The same is stipulated in the legislation for the Brussels Region.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Flemish Region: When purchasing a company, it is important to review whether the company has sold land (and therefore has been a transferor under the Flemish Soil Decree) prior to the transaction

since liabilities under the Flemish Soil Decree (clauses indemnifying the purchaser of the land for hidden defects) may surface long after such purchase.

Also in situations where the Flemish Soil Decree, which entered into force on 1 June 2008, does not apply, such as in some transfers of personal user rights on land (e.g., lease or renting), it is recommended that an environmental audit and/or soil investigation be carried out in this respect, at least if risk activities have been performed or hazardous products have been stored on that land (under the "old" Soil Remediation Decree of 1995, such leases – such as those involving offices in an office building in which some risk activity is performed – triggered the mandatory provisions relating to transfer of risk ground).

Walloon Region: Also in situations where the Walloon Soil Decree does not yet apply (e.g., Article 21 of the Decree defining the origin of the investigation and cleanup obligations related to transfer of land, transfer of environmental permit, etc., are not yet effective), it is strongly recommended that an environmental audit and/or exploratory soil investigation be carried out in this respect at least if risk activities have been performed or hazardous products have been stocked on that land.

Brussels Region: Also in situations where the Soil Ordinance does not apply, such as in some transfers of personal user rights on land (e.g., lease or renting), it is recommended that an environmental audit be carried out in this respect at least if risk activities have been performed or hazardous products have been stocked on that land.

Czech Republic

David Simonek, Alexandr Cesar and Barbora Brezinova
Baker & McKenzie, Prague

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

One of the features of Czech law in the area of environmental protection (including liability for contamination and pollution) is that the regulation is not consolidated in any one piece of legislation, but rather dispersed among various acts and regulations. Accordingly, provisions relating to liability for land contamination can be found in various laws, including: Act No. 17/1992 Coll., on Environment; Act No. 114/1992 Coll., on the Protection of Nature and the Environment; Act No. 185/2001 Coll., on Wastes; Act No. 334/1992 Coll., on Protection of Agricultural Soil Fund and its Implementing Regulation of the Ministry of Environment No. 13/1994 Coll.; Act No. 156/1998 Coll., on Fertilizers and its Implementing Regulation of Ministry of Agriculture No. 275/1998 Coll.; Act No. 167/2008 Coll., on Environmental Harm Prevention and Remedy and Implementing Regulation of Ministry of Environment and Ministry of Health No. 17/2009 Coll., on Determination and Remedy of Ecological Harm on Soil; Act No. 157/2009 Coll., on Disposal of Mining Waste; Act No. 76/2002 Coll., on Integrated Pollution Prevention and Control; Act No. 100/2001 Coll., on Environmental Impact Assessment, Act No. 200/1990 Coll., on Offenses; Act No. 40/2009 Coll., the Criminal Code; and Act No. 418/2011 Coll., on Criminal Liability of Legal Entities, plus other special acts (nuclear energy) and implementing regulations. Each of the aforementioned laws contains its own procedure for assessing environmental liability by administrative (as opposed to court) action.

2 Is there a definition of contaminated land in your laws?

There is no general definition of "land contamination" in the relevant Czech laws. However, there are definitions of ecological harm and pollution of environment sources stipulated by the relevant laws (e.g., Protection of Agricultural Soil Fund Act, Environment Act, Environmental Harm Prevention and Remedy Act, Integrated Pollution Prevention and Control Act, and the Criminal Code) that can also be applied to contamination of land and soil in a particular case.

According to the Environment Act, "pollution of environment" means bringing the physical, chemical or biological components into the environment, as a result of human activity, that are extraneous to the given environment by their nature or quantity. In addition, "harming the environment" means the worsening of its state by pollution or other human activity in excess of the level allowed by applicable laws. "Ecological harm," which is defined as "a loss or weakening of the natural functions of ecosystems caused by damage of their individual elements or by infringement of their internal bonds and processes as a result of human activity," arises as a result of harming the environment.

For example, under the Environmental Harm Prevention and Remedy Act, the general definition of ecological harm is provided. It is defined as adverse measurable change of an environmental source or measurable deterioration of its functions, which may show directly or indirectly. The change may occur, among others, on soil, by pollution, which represents a serious risk of adverse effect on human health resulting from direct or indirect induction of substances, preparations, organisms or microorganisms on the earth's surface or underneath it.

In addition, there are certain provisions in the respective laws and regulations (e.g., Regulation of the Ministry of Environment No. 13/1994 Coll. relating to the contamination of agricultural land) listing the substances, the presence of which (or a presence exceeding stipulated limits) in, on or under the land, as the case may be, is considered pollution causing ecological harm.

Following an amendment to the Protection of Agricultural Soil Fund Act that will, with regard to this particular obligation, become legally effective as of 1 January 2016, the owners and other users of the

land that is included in the agricultural soil fund, will have to use the land in accordance with the characteristics of the relevant plot of land type (as registered in the Czech Real Estate Register). With legal effect already as of 1 April 2015, there is a general (i.e., not only with respect to the owners/users of the land) prohibition to (i) pollute the agricultural land by introducing substances or organisms in an amount exceeding the levels stipulated by law; (ii) cause threat of erosion to the agricultural land by exceeding the permitted levels (determined by considering the average long-term annual loss of land in tonnes per hectare); (iii) use agricultural land for non-agricultural purposes without the required permit; and (iv) adversely affect the physical, biological and chemical qualities of the soil by techniques such as drying, wetting, covering or condensing. The aforementioned amendment also introduced the competence of the Czech Environmental Inspectorate in the area of agricultural soil fund protection (in addition to other competent authorities such as the relevant municipal authority).

Given the foregoing, the competent public authority, authorized on the basis of an applicable law, identifies (or investigates based on a third person's notification) the existence of land/soil contamination, its cause and its originator. Based on its findings, the authority issues a decision imposing remediation works required for cleanup of the identified pollution.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

The following acts, although some indirectly, include provisions that can be applied to the cleanup of contaminated land procedure: Protection of Agricultural Soil Fund Act, Wastes Act; Environment Act, and Protection of Nature and Environment Act; Environmental Harm Prevention and Remedy Act (including implementing regulation on Determination and Remedy of Ecological Harm on Soil); and Disposal of Mining Waste Act.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Subject to certain special conditions regulated in the applicable laws, the principle of "the polluter pays" is generally applied in relation to pollution control, including contamination of land/soil. The foregoing reflects the fact that, under Czech law, environmental liability has similar features and is based on the same principles as liability for damage regulated in the Civil Code; however, environmental liability applies also with respect to pollution caused by the owner to its own property (as a matter of fact excluded from the civil liability principles).

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Generally, if the polluter cannot be found, the owner may be obligated to implement certain remedial measures.

According to the Environmental Harm Prevention and Remedy Act, the obligations thereunder shall be passed on to a legal successor of the polluter (operator) and, if there are more of them, and the person to whom the relevant obligation has been transferred is not agreed upon, they are liable jointly and severally. The polluter also bears the costs of the remedial works, with exception of the specific cases stipulated by the Environmental Harm Prevention and Remedy Act.

With regard to agricultural land (including land temporarily unused but intended for agricultural purposes), again the polluter bears liability that is also transferred to its legal successor and bears the costs of the remedial works. There are no provisions addressing the situation when the polluter cannot be identified anymore. However, the owners and users of the affected property who are not polluters

at the same time, are obliged to allow access to the property for the purpose of the cleanup and bear limitations in the ordinary use of the property.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Generally, if the polluter cannot be found, the owner may be obligated to implement certain remedial measures.

There are no specific rules in the applicable laws regarding the allocation of costs for the environmental cleanup of contaminated land between the owner and the tenant of the particular land. Generally, the decision of the competent authority is relevant (the authority actually chooses who will be responsible for the cleanup and how the costs will be apportioned, including state budget incentives if applicable), and the owner and the tenant will settle their mutual rights (especially should the tenant be ordered to conduct the cleanup) on the basis of the terms of their contractual relationship or under the general principles of civil law.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes. Remedial obligations also concern historical contaminations; however, this is a very sensitive topic in former communist countries and no specific regulations have been adopted so far. There is no definition of "historical contamination" provided in the applicable legal regulations. The competent authority has the right, subject to the conditions set out in the particular act, to order remediation of any contamination (including pollution caused, for example, by the former owner or lessee) that it considers ecologically harmful in the terms described above.

There exists a special category of "historical ecological harm" regulated under Czech law that relates to privatization of state property, according to Act No. 92/1991 Coll. on Conditions of the Transfer of Property from the State to Other Persons (the "Privatization Act"), which is subject to special financing conditions. According to the Privatization Act, the Czech government, when deciding about the privatization of a state enterprise or other assets, may decide that the Ministry of Finance (formerly the National Property Fund) will enter into an indemnity agreement with the private acquirer of the privatized assets, under which the acquirer will be indemnified by the state for the costs sensibly expended in connection with the settlement of the environmental liabilities occurring prior to privatization.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

As mentioned above, the applicable laws stipulate, in certain cases, the limits to polluting substances that are permissible in, on or under the land and that, if exceeded, will require cleanup. Under the Environmental Harm Prevention and Remedy Act, the competent authority can order, prior to commencement of the administrative proceedings, that cleanup be carried out in the case the authority identifies a danger of ecological harm to a particular site.

Further, if there is a justified suspicion that as a result of an operational activity stated in the relevant annex to the Environmental Harm Prevention and Remedy Act, ecological harm to soil was caused, the relevant authority shall ensure that a risk analysis be prepared without undue delay. Under such circumstances, the administrative proceedings concerning remedial measures are interrupted until such risk analysis is completed. In addition, if remedial measures under the Environmental Harm Prevention and Remedy Act are imposed, no remedial measure with respect to the relevant ecological harm may be imposed under the Protection of Agricultural Soil Fund Act.

In relation to the construction of certain new buildings and facilities (determined by the Integrated Pollution Prevention and Control Act and by the Environmental Impact Assessment Act) on plots of land, the environmental impact assessment needs to be carried out according to the applicable law. The opinion issued by the respective environmental impact assessment authority serves as an expert underlying document and is binding for the subsequent issuance of a building permit.

6 What level of cleanup is required?

The level of contamination must fall within the limits stipulated by the applicable law or, as the case may be, in the decision of the competent authority or relevant methodology of such authority, if applicable.

Under Section 11 of the Environmental Harm Prevention and Remedy Act, the competent authority (i.e., the Czech Environmental Inspectorate [CIZP]) shall carry out a risk analysis for such contaminated land and propose possible methods for the cleanup. CIZP consequently orders the polluter to perform the cleanup in accordance with the proposals.

In relation to agricultural land, Regulation of the Ministry of Environment No. 13/1994 Coll. stipulates the list of substances that are considered land contaminants, including the maximum threshold for their presence in the soil. According to the said regulation, the critical contaminants are divided into a group of inorganic substances (including As, Be, Cd, Co, Cr, Cu, Hg, Mo, Ni, Pb, V and Zn) and organic substances (including, among other things, aromatic hydrocarbons and their derivates, polycyclic aromatic hydrocarbons, chloride hydrocarbons and pesticides).

7 Are there different provisions relating to the cleanup of water?

Regulation of water contamination is primarily included in Act No. 254/2001 Coll. on Waters, as amended, and its implementing regulations. According to the Act on Waters: if the competent water administration authority cannot identify the polluter, the acquirer of the property to which the contamination of water is related (who is not, at the same time, the polluter) or their legal successors, and if the circumstances require immediate action (i.e., there is a threat of extensive pollution of over-ground or groundwater), the authority can order that an entity licensed according to the specific law conduct the cleanup of the polluted water source or lode at the expense of the special fund (which each regional municipality must maintain, at least in the amount of CZK10 million or approximately EUR370,000). The owners of the affected property who are not obligated to conduct the cleanup themselves are obliged to allow access to their property for the purpose of the cleanup and bear limitations of use for reasonable compensation.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

In a strict legal sense, it is not a criminal offense to own contaminated land if such contamination originated prior to the acquisition of the land or by the act of another party.

Nevertheless, if the level of land contamination caused by the particular polluter meets the criteria of environmental harm or endangerment as defined in Act No. 40/2009 Coll., the Criminal Code, such contamination will then be prosecuted as a criminal offense under the rules set forth in the Criminal Code and will be decided by the relevant court.

Since 1 January 2012, legal entities can be criminally prosecuted under Act No. 418/2011 Coll. on Criminal Liability of Legal Entities, which, among other things, establishes liability of legal entities for explicitly listed environmental criminal offenses. These offenses under Czech law can also be committed by foreign legal entities that have their registered office, enterprise, branch office or property in the Czech Republic, or which only perform their activities therein.

A legal entity is, in principle, liable for criminal offenses committed in its name or in its interest, or within its activities by the following persons:

- Statutory bodies, members of statutory bodies or other persons authorized to act on behalf of the legal entity
- Persons conducting management or control functions
- Persons exercising decisive influence on the management of the legal entity
- An employee of the legal entity when performing his/her employment duties, provided that:
    - such employee acted upon the decision, approval or order of the legal entity (or persons listed immediately above); or
    - the legal entity (or persons listed immediately above) failed to perform measures required by the applicable legal regulations or measures that it can be reasonably expected to take, in particular; it failed to conduct mandatory or necessary supervision of activities of its employees or other subordinates or failed to conduct necessary measures for avoidance of damage and consequences of the criminal offense.

The Act on Criminal Liability of Legal Entities refers to the Criminal Code with respect to defining environmental criminal offenses. Thus, certain environmental criminal offenses listed in the Criminal Code apply to both natural individuals and legal entities. Moreover, in the case of legal entities, their criminal liability will be passed to their legal successors.

According to the Criminal Code, a criminal offense is committed by whomever who, in contradiction with other statutory regulations, willfully:

- damages or endangers soil, water, air or other environmental elements in a substantial area or extent, or in a manner that can cause serious injury or death, or if the elimination of effects of such action requires substantial expenses; or
- increases such environmental damage or endangerment, or hampers diversion or abatement thereof.

Natural individuals shall be punished by imprisonment of up to three years or by a ban on the activity. According to the same provision of the Criminal Code, and subject to the qualified conditions provided therein (e.g., long-lasting ecological harm, ecological harm that requires enormous funds to remedy, repeated commission of this offense or commission of this offense with intention of gaining substantial profit), the offense is punishable by stricter punishments (i.e., longer imprisonment, a longer ban on the activity or a fine).

In addition, if the above offense of causing ecological harm is committed as a result of gross negligence, the natural individual who committed the offense can be punished by imprisonment of up to six months or by a ban on activity. Again, the stricter punishments are based on certain qualified conditions (e.g., the offense is committed in connection with the person's profession or function).

A separate criminal offense is committed, regardless of whether by willful misconduct or gross negligence, in case of breaching a special legal regulation by damaging or destroying a significant element of the landscape, a cave, a specifically protected area, a Site of Community Importance or Special Protected Area (both latter types of areas are established pursuant to the EU legislation). For this criminal offense to be committed, the reason for protecting such part of the environment must either cease to exist or be substantially weakened by the actions described in the previous sentence.

The applicable punishments for a natural individual include imprisonment of up to three years, ban on activity or forfeiture of an asset.

Furthermore, in connection with the Wastes Act, unlawful transport, misplacement, storage or other handling of waste (regardless of whether it is willful or negligent) causing damage to or endangering the environment and requiring enormous funds to remedy, is punishable by a ban on the activity or by imprisonment of up to two years. If certain aggravating circumstances are present, the punishment is more severe.

In general, pursuant to the Criminal Code, endangering of or damage to soil, water, air or other elements of the environment also includes the operation of an installation in which dangerous activities are carried out, or in which hazardous substances or mixtures are used or stored, unless a permit pursuant to the applicable legal regulations is duly obtained.

A legal entity may be sanctioned by a fine, forced publication of the court's decision, prohibition of its business activities, prohibition of participation in public tenders, prohibition of receiving public funding or, in extreme cases, forfeiture of assets or forced dissolution.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Yes, provided that the noncompliance with the requirement to clean up means, at the same time, a willful or negligent increase in or complication of remedy of the environmental harm. Such noncompliance with the requirement to clean up may be considered a criminal offense of harm and endangerment of the environment (please see above).

10 What authority enforces cleanup?

The competent public authority that issued the decision imposing remediation works required for the cleanup of the identified contamination (pollution) enforces the cleanup.

11 Are there any defenses?

The activities of the competent authorities are primarily regulated by the Administrative Proceedings Act, which provides certain instruments of defense against the authorities' decisions. In addition, if the particular person/entity feels harmed by the decision of the particular authority and its appeal with the superior authority is not satisfactorily decided, then such person/entity may file a special action with the competent Regional Court seeking the cancellation of the particular administrative decision.

As far as criminal offenses are concerned, criminal liability ceases to exist if the legal entity voluntarily refrains from continuing the unlawful act and either: (i) averted the danger that occurred to the interest protected by the Criminal Code, or prevented the occurrence of, or remedied the detrimental consequence; or (ii) reported the criminal offense to the state prosecutor or to the police authority at such a moment when the relevant danger could have been averted or the relevant detrimental consequence could have been prevented.

12 Can third parties / private parties enforce cleanup?

Yes, but generally only by filing a court action. This applies, in particular, to the so-called "neighbor's rights" regulated in the Civil Code. The owner of a plot of land is required to refrain from causing emissions of waste, smoke, dust or smell affecting other persons' enjoyment of their property. If there are emissions resulting from the operation of an enterprise or an installation approved by the relevant authorities, the neighbor is entitled to pecuniary damages only. This restriction of neighbor's rights even applies if the harm was caused by circumstances that had not been considered when such authorization was provided. The situation is different if the operation exceeds the boundaries of its

authorization. In extreme cases of distress and necessary defense, the affected party may be entitled to clean up the property itself.

13 Can third parties claim damages?

Yes. The general provisions of liability for damage regulated in the Civil Code (including real damage, lost profits and, in specific cases, immaterial damage) also apply in the case of damage caused by the polluter to a third party by breaching its obligation in the special law (i.e., the applicable environmental law).

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No.

15.2 Contractually?

The seller (polluter or not) and the purchaser of the contaminated land can agree in the purchase agreement that the purchaser will be liable for any cleanup costs ordered by the competent authorities, if there are any. However, such an agreement would be enforceable only between the parties. The competent authority would still be authorized to hold the seller (former owner of the contaminated land) liable if the cause of the pollution can be proved.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

There is no special regulation on land contamination limits relating to all types of land. The only currently applicable provision is Section 2 of Regulation of the Ministry of Environment No. 13/1994 Coll., relating to the contamination of agricultural land.

Egypt

Samir Hamza and Lamyaa Gadelhak
Baker & McKenzie, Cairo

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Law No. 4 of 1994 regarding the protection of the environment (the "Environmental Law") contains a chapter specific to the protection of land from contamination. The definition of "competent authority" for the protection of the environment under said law includes a number of agencies. However, the main regulator is the Egyptian Environmental Affairs Agency (EEAA).

2 Is there a definition of contaminated land in your laws?

Although there is no definition for "land contamination," the Environmental Law contains a general definition for "environmental pollution," which is described as "any change in environmental properties in a manner which may directly or indirectly result in harming human health, impact the ability of people to lead a normal life, damage natural habitats or living organisms, or biological biodiversity."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

The Environmental Law provides the EEAA with measures to have the polluter remedy the contamination. Such measures include notification of the violation with a remedy period of 60 days. The EEAA may extend such period and may, in the case of failure to remedy, carry out the same at the expense of the liable entity. It may also suspend the activities of the entity until the violation is remedied and such without affecting the latter's obligation to pay salaries to its employees. In the case of gross environmental danger, the EEAA must immediately suspend the activities causing the same, using all available means and procedures.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter is primarily responsible for any violations of the law.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

If the polluter was not identified, the land owner will be assumed to be the polluter unless he proves otherwise. However, if the polluter is identified (as not being the land owner) but cannot be found, such will not shift the liability in this case to the land owner.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

The polluters will both be liable, each to the extent of its actions or inactions that have resulted in the violation. The division of the liability will be decided by the judge in light of the merits of the case.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Each entity is required prior to the construction of its project (or any expansions thereto) to submit an environmental impact assessment study to the EEAA based on which it obtains an environmental

approval to carry out the project. Starting from operation, the entity is required to hold an environmental register, which is a log in which it registers the impact of its activities on the environment. The EEAA inspects such register and carries out its own test to verify the credibility of the information reflected therein.

Based on the mentioned process, it is possible to determine land condition prior and post activities. Therefore, it is possible to determine what would be deemed historical and possibly identify the liable person for historical contamination.

If no person was identified as liable for historical contamination, it strictly should be the state that carries out the cleanup and its expense, assuming the land is owned and possessed by it. For privately owned land, the owner will carry such burden and depending on its contractual arrangements with the seller of the land may pursue the same for indemnification before the courts.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The Environmental Law provides for limits for polluting, dangerous and hazardous substances, as well as requirements on how they should be handled. The EEAA carries out inspection visits and may take samples to test in order to identify violations. The EEAA decides then on whether and what kind of remedy is required.

6 What level of cleanup is required?

This is assessed and determined by the EEAA on a case by case basis depending on the magnitude of the violation.

7 Are there different provisions relating to the cleanup of water?

Yes, the law has a separate chapter for water pollution. Also, there is a law specific to the protection of the river Nile water and tributaries. Egypt is party to international treaties regulating the topic .

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is a criminal offense to commit violations of the provisions of the Environmental Law, and such are punishable by fines and possible incarceration, depending on the gravity of the violation.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Please see response to question 8. The usual course of action is that the EEAA provides a warning to the entity, setting out the cleanup requirements that if not complied with within a set timeline could lead to the EEAA taking charge of the cleanup at the cost of the entity and shutting down the entity.

10 What authority enforces cleanup?

Mainly the EEAA; however, there may be other competent agencies, depending on the activity and sector in question.

11 Are there any defenses?

The entity will need to demonstrate that it is not liable for the contamination. This will depend on the type of violation and the elements of the case.

12 Can third parties / private parties enforce cleanup?

That is not possible unless contractually agreed upon. Third parties' and private parties' complaints and claims for cleanup must be directed to the EEAA.

13 Can third parties claim damages?

Third parties can claim damages from the polluters before courts if they have suffered injury resulting directly from the polluters' action or inaction.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

Being the regulator, the EEAA is generally able to carry out investigations for cases of suspected threatening contamination.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

No, because failure to comply with statutory cleanup is a criminal offense that, in principle, is personal in nature. It can carry out the cleanup through subcontractors. However, such does not shift the liability.

15.1 Under the general law?

Please see response to question 15.

15.2 Contractually?

Please see response to question 15.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

It is advised that potential purchasers of land appoint an environmental consultant to carry out a due diligence exercise from an environmental perspective on the target land. Prior to purchase and delivery, the environmental status of the land should be documented in the delivery minutes to evidence transfer of possession. Moreover, an undertaking must be carried out by the seller to indemnify and defend the purchaser against any claims with respect to the land condition prior to transfer of possession.

England & Wales

Graham Stuart and Rachel Barlow
Baker & McKenzie, London

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The primary law on land contamination was introduced by the Environment Act 1995, which inserted a new Part IIA into the Environmental Protection Act 1990.

Known as the "Contaminated Land Regime," this system requires local authorities to identify and investigate contaminated land and, in appropriate cases, require "appropriate persons" to remediate the land (see below). The provisions of the Contaminated Land Regime came into force on 1 April 2000, and are accompanied by the Contaminated Land Statutory Guidance published by the Department for Environment, Food and Rural Affairs (DEFRA) in April 2012 (the "Statutory Guidance").

Note that certain other pieces of legislation provide the authorities with powers to require cleanup of contamination, including the Pollution Prevention and Control Act 1999, the Environmental Permitting (England and Wales) Regulations 2010, and the Wildlife and Countryside Act 1981.

The implementation of the Environmental Liability Directive also has an effect on the way contaminated land is dealt with in England & Wales. The directive and its implementation are discussed further in question 16.

2 Is there a definition of contaminated land in your laws?

For the purpose of the Contaminated Land Regime, "contaminated land" is defined as "any land, which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land that:

- significant harm is being caused or there is a significant possibility of such harm being caused; or
- significant pollution of controlled waters is being caused, or there is a significant possibility of such pollution being caused."

In determining whether land is contaminated, a local authority must act in accordance with the Statutory Guidance, which includes strict prescriptions as to what will amount to "harm," "significant" harm and "significant" pollution of controlled waters. In addition to satisfying itself that the above definition is met, the local authority is required to identify that there is a "contaminant linkage," consisting of:

- a source (i.e., a contaminant or pollutant in, on or under the land);
- a receptor or target (i.e., an organism, human being, ecological system, crops, livestock, property or controlled waters, which are being, or could be, harmed by the contaminant); and
- a pathway (i.e., a route by which the receptor is being, or could be, exposed to or affected by, a contaminant).

Unless the local authority finds this "contaminant linkage," the land is not contaminated for the purposes of the regime.

The Environment Agency has developed several analysis tools to assist in determining and categorizing the levels of contamination present at sites. This non-statutory technical guidance is intended to assist in interpreting the definition of contaminated land and includes an ecological risk assessment (ERA) framework and associated soil screening values (SSVs) used to assess the threat to ecosystems posed by various contaminants in soil. In addition, the contaminated land exposure assessment (CLEA) model uses soil guideline values (SGVs) to assist in determining the risk to human health from contaminants in soil. For contaminants where screening levels are specified, Category 4 screening levels (C4SLs) are used instead of SGVs to assess the level of risk. The Statutory Guidance acknowledges that local authorities may use generic risk assessment criteria of this nature to inform certain decisions under the Contaminated Land Regime, provided they use these tools in accordance with the Statutory Guidance.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. As mentioned above, there are a number of statutory provisions that govern remediation of contaminated land, but the Contaminated Land Regime is the primary vehicle for requiring cleanup.

While there is no positive duty of disclosure of contamination in the UK (i.e., polluters and owners/occupiers are not required to inform the enforcing authorities of the presence of contamination on, in or under land, although there is an exception to this in relation to the Environmental Liability Directive identified in question 16), authorities have a duty to investigate, designate, and in certain circumstances, require remediation of contaminated land. Remediation of contaminated land may also be triggered by:

- redevelopment of the land, in that planning permission for redevelopment of contaminated land is typically granted subject to conditions requiring remediation of the site to a standard, making it "fit for purpose"; or

- the undertaking of certain industrial activities on the land; surrender of Environmental Permits, formerly PPC Permits, can trigger remediation obligations, and certain other permits relating to environmental matters can include a reporting obligation where limits are or may be exceeded, or harm has been or may be caused to the environment.

The Contaminated Land Regime provides that if a local authority identifies land as contaminated, it has a duty to identify the "appropriate person" (see question 4), who will be the person responsible for carrying out any necessary remedial works and for the costs of those works. For particularly polluted sites that are designated as "special sites," the Environment Agency takes over the role of the enforcing authority in place of the local authority. The local authority must undertake a three-month consultation period with the appropriate person (except where there is imminent danger of serious harm or contamination), a period designed to enable the appropriate person to reconcile the scope of the remediation work with that prescribed by the relevant enforcing authority. If an agreement is reached, the appropriate person is required to complete a binding remediation statement. If an agreement has not been reached by the end of the three-month consultation period, the local authority will serve a Remediation Notice on each "appropriate person," apportioning liability between them in accordance with the Statutory Guidance, and specifying what each is required to do.

The Remediation Notice can require that the state of the site and that of the affected neighboring sites be assessed, remediated and/or inspected. The work specified must be reasonable, taking into consideration the cost involved and the seriousness of the harm. The enforcing authority is also required to have regard to the hardship rules under the regime.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The Contaminated Land Regime incorporates a limited "polluter pays" principle and provides that the "appropriate person" is liable for remediation of contaminated land. In the first instance, persons who "caused" or "knowingly permitted" the contaminant to be in, on or under the land ("Class A persons") will be held liable for remediation. The High Court delivered some commentary on the application of these tests in *Crest Nicholson Residential Ltd. (R on the application of) v. Secretary of State for Environment, Food & Rural Affairs* [2010] EWHC 561, specifically that: (a) persons need not necessarily have "introduced" a contaminant to a site to cause it to be in, on or under the site; and (b) persons may cause contaminants to be in, on or under a site by "both action and inaction." If no Class A persons can be found after reasonable inquiry, then the appropriate person will be the owner and/or occupier of the land for the time being (i.e., a "Class B person," per question 4.2 below).

Where there is more than one appropriate person in a liability class, the enforcing authority will give effect to any Agreement on Liabilities between the parties. If no such agreement is in place, there are complex rules in the Statutory Guidance for excluding persons within a liability class and apportioning liability between the remaining persons in that class; most importantly, the "sold with information" and "payments for remediation" tests, which apply to Class A persons, as discussed in question 15.1. However, the exclusion rules can be applied only to the extent that there is at least one remaining person in a liability class.

If there is more than one appropriate person left in a liability class after application of the exclusion tests, the authority will apportion liability between them in accordance with the rules in the Statutory Guidance, which seek to allocate relative responsibility for causing and/or continuing contamination, taking into consideration factors such as the length of time that each person had control over the land, the area of the land under control, and the opportunity that each had to prevent or mitigate the harm caused by the pollution. (See also comments in question 4.3.)

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

If the original polluter(s) cannot be found after reasonable inquiry and no other Class A persons (including "knowing permitters") exist or can be found, then the appropriate person will be the owner or occupier of the land for the time being. If land has been contaminated over a long period of time or was contaminated a long time ago, it may be difficult to find the polluter/knowing permitters, or prove that such Class A persons caused or knowingly permitted the contamination. Note that it is likely that where land is held on a long lease at ground rent, and the long leaseholder has sublet at a rack rent (or has the right to do so), the long leaseholder, rather than the freeholder, will be the "owner" for the purposes of the Contaminated Land Regime.

The term "occupier" is given its "natural" meaning in that it generally physically occupies the site. We note that an innocent owner/occupier (i.e., who has not caused or knowingly permitted contamination) will be liable under the Contaminated Land Regime only for the contamination of their own land, not any third-party land or any water to which the contamination has migrated.

As mentioned above, the appropriate person designations are subject to any Agreement on Liabilities in place between the parties as well as the statutory exclusion tests, as discussed further in relation to Class A persons in question 15.1. The single exclusion test for Class B persons excludes from liability persons that have no interest in the capital value of the relevant land. However, if the application of this test would have the effect of excluding all members of the Class B liability group, the regulator must not apply it and consequently, no exclusion would be made. If more than one person remains in Class B, liability is apportioned in accordance with the Statutory Guidance as discussed in questions 4.1 and 4.3.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Please see comments on apportioning liability in question 4.1.

In addition, where: (a) no Class A persons can be found; (b) both the owner and the occupier are not responsible for the contamination (i.e., landlord and tenant or licensee); (c) there is no Agreement on Liabilities; and (d) none of the exclusion tests apply to either/any of the parties, then liability is apportioned in relation to the capital value of each party's interests. Thus, if an innocent tenant is paying full market rent for the property with no other beneficial interest in the land, and therefore has no capital interest in the property, the tenant will not be liable under statute.

However, the terms of many leases in England and Wales pass on the obligation and cost of complying with the statute to the tenant. As such, even if the innocent tenant is not a Class A person and is excluded as a Class B person, it may still have an obligation to reimburse the landlord for the cost of the cleanup under the terms of the lease.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes. The Contaminated Land Regime is retrospective in that it gives the enforcing authorities the power to require the remediation of contaminated land, including where the contamination is historical. While there is no requirement to alert the authorities to the existence of contaminated land, should the authorities discover historical contamination (for example, through their own investigations, in assessing planning applications or applications for Environmental Permits), they could require remediation of that land.

Even if the original polluter cannot be found after reasonable inquiry, subsequent polluters, knowing permitters, owners and/or occupiers could be held liable in accordance with the "appropriate person" definition, and exclusion and apportionment tests under the Statutory Guidance, or as a result of Agreements on Liabilities in place between persons in the same liability class.

In *R (on the application of National Grid Gas plc) v. The Environment Agency* [2007] 3 All ER 877, the High Court originally held that National Grid Gas plc was liable for remediation of contamination that had been caused decades earlier by public gas undertakers who no longer exist (i.e., the Class A person who could no longer be found). The court held that the Contaminated Land Regime intended that liability for contamination caused by bodies that, had they remained in existence would have been liable as "appropriate persons," should be borne by their statutory successors, even where those successors neither caused nor knowingly permitted the contamination, nor ever owned or occupied the site in question (as was the case in this matter).

The case was appealed directly to the House of Lords (the judicial function of which has now moved to the Supreme Court), which overturned the decision and held that National Grid Gas plc had not taken on responsibility for contamination caused by its nationalized predecessor on the basis of the construction of the Gas Acts under which National Grid Gas plc was established.

The House of Lords stated that it was Parliament's clear intention that the Gas Acts limited transfer liabilities to those "immediately before" the date of transfer. This case relates primarily to the transfer of liabilities between statutory successors according to the Gas Acts and it is not a judgment that affects other types of historical liabilities for contaminated land.

The Environment Agency can, in certain circumstances, undertake remedial action itself and recover the costs from the appropriate person(s) (although it is required to consider various hardship rules under the Contaminated Land Regime before recovering costs). The Environment Agency may need to pay for remediation for orphan sites.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The Contaminated Land Regime does not prescribe limits to permissible polluting substances. Instead, land will be deemed to be "contaminated" only for the purposes of the regime where, following a risk analysis and in consideration of the Statutory Guidance, the relevant authority determines that the contamination satisfies the definition of "Contaminated Land" in Part IIA of the Environmental Protection Act 1990 and that a pollution linkage exists. (See question 2.)

However, as mentioned, remediation of land and water can be required, pursuant to a number of other pieces of legislation in England & Wales. For example, under certain environmental permits, a regulated installation may be subject to emission and discharge thresholds. Breach of such thresholds will amount to an offense under the relevant act or regulations and could require cleanup as a result.

6 What level of cleanup is required?

The Contaminated Land Regime states that the local authority may only require actions in a remediation notice that are reasonable with regard to the cost and the seriousness of the pollution or harm. This requirement is in addition to the broader responsibility on the enforcing authority, as a public regulator, to act in a reasonable manner.

Under the Contaminated Land Regime, cleanup is required to a level that ensures the land is in such a condition that, in its current use, it no longer falls within the statutory definition of "Contaminated Land." The general principle underlying the standard of remediation required is often described as "suitable for use." The local authority is required to ensure that remediation achieves this standard but, while a person may voluntarily effect remediation to a higher standard, the local authority cannot require this.

Where the authority considers that it is not practicable or reasonable to remediate land to a degree where it stops being "Contaminated Land," the authority should consider whether it would be reasonable to require remediation to a lesser standard. The broad aim should be to manage or remediate the land in such a way that risks are minimized as far as reasonably practicable.

The local authority may only require remediation action in a remediation notice if it is satisfied that those actions are reasonable. In deciding what is reasonable, the authority must consider various factors, having particular regard to: (a) the practicability, effectiveness and durability of remediation; (b) the health and environmental impacts of the chosen remediation options; (c) the financial cost that is likely to be involved; and (d) the benefits of remediation with regard to the seriousness of the harm or pollution of controlled waters in question.

Notable to these requirements are the following principles:

- The relevant authority must undertake a cost-benefit analysis of the initial and ongoing maintenance costs of the remediation prescribed against the benefit of mitigating the harm caused or likely to be caused. If the costs are not warranted as against the likely benefit, the authority cannot direct such remediation to be undertaken.

- Remediation should, by means of the "best practicable technique" (having regard to the above factors) remove or treat the pollutant, or remove or break the pathway, or remove or protect the receptor. Unless there are strong grounds to consider otherwise, the best practicable technique in such circumstances is likely to be the technique that achieves the required standard of remediation to the appropriate timescale, while imposing the least cost on the persons who will pay for the remediation.

Note that the identity or financial standing of any person who may be required to pay for remediation are not relevant to the consideration of whether the costs of a remediation action are reasonable (although they may be relevant in deciding whether the cost of remediation can be imposed on such persons).

7 Are there different provisions relating to the cleanup of water?

The Contaminated Land Regime covers the cleanup of water polluted by "contaminated land" and there is also a separate regime for water under Sections 161 to 162 of the Water Resources Act 1991, which enables either the Environment Agency to clean up at the polluter's cost or to require the polluter to carry out remediation works. The Environment Agency has published a policy statement as to which regime should be used in cases where both the Contaminated Land Regime and the Water Resources Act 1991 are potentially applicable.

Note that certain other pieces of legislation provide the authorities with powers to require cleanup of contamination, including the Environmental Damage (Prevention and Remediation) (England) Regulations 2015, the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (see question 16), and the Wildlife and Countryside Act 1981.

Although not a "cleanup" regime as such, the Environmental Permitting (England and Wales) Regulations 2010 provide a consolidated system for environmental permits and exemptions for water discharge activities and groundwater activities. It is a criminal offense under the Environmental Permitting (England and Wales) Regulations 2010 to cause or knowingly permit a water discharge activity unless this is done in compliance with an Environmental Permit, or there is an exemption from the need for an Environmental Permit. The types of water discharge activities that are covered are listed in a Schedule to the Regulations and include, for example, discharging poisonous, noxious or polluting matter into inland, coastal or other territorial waters.

In the same way, it is also an offense under the Environmental Permitting (England and Wales) Regulations 2010 to cause or knowingly permit a groundwater activity, unless this is done in compliance with an Environmental Permit or there is an exemption from the need for an Environmental Permit. There is a defense, however, if the activity was done in an emergency in order to avoid danger to human health, provided that reasonable steps were taken to minimize pollution and notify the regulator promptly.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is not in itself a criminal offense to own contaminated land, but a criminal offense may arise from the effects of that contamination.

It is also not an absolute offense to contaminate land (except with respect to illegally depositing waste on land under Section 33 of the Environmental Protection Act 1990), as the law recognizes that industrial processes and other activities will cause contamination. Generally speaking, industrial activity is regulated through the environmental permitting regime under the Environmental Permitting (England and Wales) Regulations 2010.

Criminal liability with respect to contamination of land may attach in the following circumstances:

- Failing to comply with a Remediation Notice under the Contaminated Land Regime
- Operating without, or in breach of, requisite permits (e.g., Environmental Permits)

- Causing or knowingly permitting a water discharge activity or groundwater activity without the necessary permit or exemption (under Regulation 12(1) of the Environmental Permitting (England and Wales) Regulations 2010)

- Causing or knowingly permitting the deposit of controlled waste in or on any land without there being a waste management license in force for the deposit, under Section 33 of the Environmental Protection Act 1990

If pollution emitted from contaminated land adversely affects the reasonable comfort of a class of people, then the Attorney General or local authority has the power to bring a case for prosecution for public nuisance.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

The Contaminated Land Regime requires regulatory authorities to enter into a three-month consultation period with "appropriate persons" following the designation of land as contaminated, with a view to agreeing on a voluntary remediation program. If agreement cannot be reached after this time, the relevant authority will serve a Remediation Notice on appropriate persons. It is a criminal offense under the Environmental Protection Act 1990 not to comply with the terms of a Remediation Notice without a reasonable excuse, with the following penalties:

- Criminal prosecution for the offense, on summary conviction before the Magistrates Court (i.e., local court level) with an unlimited fine (and a daily fine of up to one-tenth of the fine imposed for continuing to breach the Remediation Notice) for offenses at industrial, trade or other business premises, and in all other cases an unlimited fine (and a daily fine of up to GBP500 for continuing breaches)

- The enforcing authority may seek a mandatory injunction in the High Court where the enforcing authority considers that a fine is insufficient to secure compliance with the Remediation Notice.

- The enforcing authority can carry out the remediation itself and recover the costs from the offender (subject to the hardship rules in the regime).

The regime provides limited grounds of appeal against the service of a Remediation Notice.

10 What authority enforces cleanup?

The local authority identifies contaminated land and enforces cleanup. However, if the land is highly contaminated, it can be designated as "a special site," in which case, the Environment Agency will be the enforcing authority.

11 Are there any defenses?

As discussed above, the Contaminated Land Regime contains complex rules on excluding "appropriate persons" from liability along with certain grounds for appeal against the service of a Remediation Notice. With respect to the offense of failing to comply with a Remediation Notice, it is a defense where the Remediation Notice is served on more than one person and states the proportion of the cost those persons are required to pay (where, for example, joint action is required by the notice), that the only reason the appropriate person did not take the requisite action is that another appropriate person who was liable to bear a proportion of that cost refused or was not able to comply with the requirements imposed on them.

12 Can third parties / private parties enforce cleanup?

In addition to the statutory system, the main action used to require cleanup is private nuisance under the common law. Private nuisance consists of the unreasonable use of land, resulting in the reasonably foreseeable physical damage of or interference with another's use or enjoyment of land or of some right connected with land.

The nuisance must be "reasonably foreseeable" by the person who carried out the act, rather than the public at large, and therefore, the operators of industrial plants will be expected to have a more thorough knowledge of the effects of their processes than members of the public. The perpetrator will usually have possession and control of the land from which the nuisance emanates, but the original creator of a nuisance will remain liable even when no longer in occupation or control of that land. Nuisance can arise whether activities carried out on the land under dispute cause gradual pollution or a one-off escape of harmful material.

The rule in *Rylands v Fletcher* is generally seen to be an extension of the law of nuisance. The rule provides that a person, who for his or her own purpose, brings onto his or her land, and collects and keeps anything likely to do mischief if it escapes, is *prima facie* liable for the damage, which is the natural consequence of its escape. Liability under the rule is strict (as in nuisance), but is also subject to the additional requirement that the damage caused by the escape must be reasonably foreseeable. The rule applies only to the non-natural use of land and is subject to a number of defenses.

The party affected by the nuisance may seek a prohibitory injunction and/or damages, and cleanup may be required to avoid further claims or future breach of any injunction awarded.

Under the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 and the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (per question 16), individuals who may be directly affected by actual or possible damage that is within the scope of the Environmental Damage Regime, and certain entities who are otherwise sufficiently interested (e.g., NGOs) may request a competent authority to take action under that regime.

13 Can third parties claim damages?

Yes. Third parties can sue for damages under the law of tort, including bringing an action in nuisance, the rule in *Rylands v. Fletcher*, and/or negligence. Third parties can also sue for damages for breach of contract. For example, a tenancy agreement may contain provisions imposing obligations on the tenant, such as an obligation not to contaminate the land. Breach of such a contractual obligation can result in an award of damages.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There is no legal requirement to conduct Phase I or Phase II investigations on the sale of land in the UK *per se*. However, if the sale of land is accompanied by an application for planning permission or an Environmental Permit, site condition reports will be required.

It should be noted that the Law Society for England and Wales' Contaminated Land Practice Note (2014) indicates that, as a matter of best practice, solicitors must consider whether contamination is an issue in every property transaction.

As a result of the fact that UK property law imports the principle of *caveat emptor* (buyer beware), it is important (and in accord with market practice) for buyers to check to their satisfaction the state and condition of the land to be purchased or leased. Generally, a buyer or tenant will make pre-acquisition/lease inquiries of the seller or landlord, which the seller/landlord is either obliged to

disclose or to make no representation and require the buyer/tenant to rely on its own investigations. Typically, sale/lease documents will include environmental representations and warranties by the seller/landlord, which act as a contractual mechanism for requiring disclosure of information by the seller/landlord. The buyer/tenant can bring a claim for damages or rescission of the sale or lease contract for the failure to disclose material matters (unless the seller/landlord has made no representation), or for breach of contract for misdescription, misrepresentation or fraudulent concealment.

In addition, in order to confirm that the land to be purchased will be good security, lenders may require that the land be investigated for potential contamination.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

As mentioned, although the principle of "polluter pays" remains, there is a tradition under English law that buyers purchase land at their own risk (*caveat emptor*). The Contaminated Land Regime balances these principles by giving effect to Agreements on Liabilities (see Section 15.2) and, where no such agreement exists, by applying six exclusion-of-liability tests between Class A persons as prescribed in the Statutory Guidance. A more limited range of tests apply to Class B persons.

The authorities are required to assess the balance of probabilities whether the tests apply, then apply the tests in sequence and only to the extent that at least one person is left in a liability class. Three of the most important exclusion tests for Class A persons are:

- The "Sold with information" test: A polluter is excluded from liability where the polluter sells the land (or provides a long lease of more than 21 years such that the tenant satisfies the definition of "owner") in circumstances where it is reasonable that the buyer bears the liability. The test is that: (i) the land has to be sold on the open market at "arm's length" (i.e., a willing buyer and a willing seller); (ii) the seller must retain no interest in the land (which means that, with limited exceptions, the test does not apply in a sale-and-leaseback situation or where the seller retains the right to inspect the property post-completion); (iii) before the sale becomes binding, the buyer must have had information that reasonably allowed him to be aware of the presence of the contamination; and (iv) the seller must not have materially misrepresented the information about that contamination.

  The Statutory Guidance provides that if a sale took place after 1 January 1990, and the buyer is a large commercial organization or a public body and has permission from the seller to carry out its own investigations then, whether or not the buyer has carried out those investigations, the buyer will be deemed to have sufficient information that reasonably allowed him or her to be aware of the presence of the contamination, and provided the other requirements set out above are met, the property will be "sold with information" and the risk of liability is passed on to the buyer. It is thus likely that in many major commercial property transactions, in the absence of misrepresentation, the risk will be deemed to have been passed on to the buyer (subject to the general rules on the applicability of the liability exclusion tests and the existence of any alternative Agreement on Liabilities, see Section 15.2).

- The "Payments for remediation" test: A polluter is excluded from liability if he or she has transferred the responsibility for the contamination to the buyer by reducing the price of the land in question or by agreeing to pay for remediation.

- The "Introduction of pathways or receptors" test: The buyer may also assume liability under the exclusion tests (subject to limitations) where the original contaminant only becomes a significant risk after the introduction of later substances, pathways or receptors by the buyer.

15.2 Contractually?

The exclusion tests that were discussed are relatively untested in the UK, and it is not advisable for parties to rely on them alone without ensuring that other mechanisms for protection are also put in place. As such, it is common place for parties to a transaction to enter into an express Agreement on Liabilities, which allocates environmental liability for contaminated land and generally takes the form of risk transfer and allocation provisions in a sale and purchase or lease agreement, making reference to the Statutory Guidance, and may include environmental indemnities.

The Statutory Guidance requires the authorities to "generally" give effect to such agreements, but only where "none of the parties inform the authority that it challenges the application of the agreement." In addition, the guidance directs authorities to disregard Agreements on Liabilities where giving effect to the agreement would increase the proportion of costs to be borne by a person who would be able to claim the benefit of the hardship provisions of the regime.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

The Contaminated Land Regime in practice

The Environment Agency cannot state with certainty how many contaminated sites there are in the UK, but it estimates that around 325,000 sites (300,000 ha) have been subject to current or former use that could have resulted in contamination.

The Contaminated Land Regime, however, was never intended to effect the remediation of all contaminated sites; only those that pose significant risks to human health or the wider environment are dealt with under the regime. Less significant contamination issues are left to the planning system, which imposes conditions on planning permission required when the land is redeveloped. The Environment Agency estimates that around 33,500 sites have been identified as contaminated to some extent, and that 21,000 sites have been treated, predominantly through the planning regime.

Clearly, progress in implementing and enforcing the regime has been slow, most likely due to the complexity of the regime and the fact that most of the labor-intensive responsibility lies with local authorities (rather than the Environment Agency), who have limited budgets and represent competing interests. The majority of Brownfield sites in the UK continue to be dealt with through the planning regime as land is redeveloped and through Environmental Permitting provisions in the case of industrial sites.

Public access to information

The public can gain access to information from authorities on environmental issues and this will, of course, include land designated as contaminated. As part of applications for the redevelopment of land that may be contaminated, many local authorities are requiring an environmental audit to be submitted together with the planning application so that they can determine whether the land is too polluted to be suitable for the proposed use. The audit could, however, be used by the local authority to determine whether the property falls under the definition of contaminated land.

In addition, as information from a public body, environmental audits included in planning applications would be available for inspection by the public. It is recommended that advice be sought on what information to include in such audits.

Incentives for development of Brownfield sites

The UK government has said that it wishes to see development of Brownfield sites, in particular the building of new homes. Tax benefits are available to people who clean up contaminated land where they did not cause the contamination and limited grants are available for the regeneration of sites in cases of absolute emergency and for ongoing remediation projects of the highest priority.

The Environmental Liability Directive

The Environmental Liability Directive (2004/35/EC) came into force in April 2004. The directive establishes a framework designed to prevent significant environmental damage or to rectify damage after it has occurred. The directive does not apply to damage caused by environmental harm prior to 30 April 2007, and is not limited to ground contamination issues.

The directive is based on the "polluter pays" principle and allows regulatory authorities to step in and take action and recover costs from the polluter. Strict liability applies in respect of damage to land, water and biodiversity from activities regulated by specific EU legislation, whereas fault-based liability would apply in respect of biodiversity damage from any other activity. Individuals who may be directly affected by actual or possible damage and certain entities (e.g., NGOs) may request a competent authority to take action.

Under Article 19(1) of the directive, member states were required to bring into force laws, regulations and administrative measures necessary to transpose the directive's provisions by 30 April 2007. The UK missed this deadline for transposition and in June 2008, the European Commission decided to refer the UK and eight other member states to the European Court of Justice for failing to transpose the directive into national law. The fact that the scope of the directive overlapped with existing domestic law governing contaminated land was, in part, the reason for the delay.

In England, the Environmental Damage (Prevention and Remediation) Regulations 2009 (SI 2009/153) came into force on 1 March 2009, and in Wales, the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (SI 2009/995) came into force on 6 May 2009, to transpose the directive into national law. Note that the English regulations have been replaced by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (SI 2015/810), which came into force on 19 July 2015. These regulations (the "Environmental Damage Regime") closely follow the provisions of the directive and apply to damage to protected species, natural habitats, sites of special scientific interest, surface water, groundwater or land in England after 1 March 2009, or in Wales after 6 May 2009. They also apply to damage to marine waters in England on or after 19 July 2015.

The 2008 impact assessment for the Environmental Damage Regime reports that there are over 30,000 cases of environmental damage every year in the UK, of which only about 1 percent are estimated to be covered by the Environmental Damage Regime. The Environmental Damage Regime principally affects a limited number of activities, which are already subject to various types of environmental regulatory regimes (set out in Schedule 2 of the relevant regulations).

DEFRA guidance on the Environmental Damage Regime states that the three main regimes for dealing with land contamination should be considered in the following order:

- The Environmental Damage Regime
- Remediation under the planning system where appropriate
- Remediation using Part IIA of the Environmental Protection Act 1990 (i.e., the Contaminated Land Regime)

Aspects of the Environmental Permitting (England and Wales) Regulations 2010 also cover land contamination issues, particularly the permit surrender provisions. The regulators should consider any voluntary agreements to remediate in all the above cases.

The DEFRA guidance indicates that the Contaminated Land Regime is likely to be used to address historical contamination while the Environmental Damage Regime is more likely to apply in the context of current pollution incidents.

Importantly, under the Environmental Damage Regime, if an operator of an activity causes an imminent threat of environmental damage (as defined under the Environmental Damage Regime) or an imminent threat of damage, in which there are reasonable grounds to believe that this will cause environmental damage, he or she must immediately take all practicable steps to prevent the damage and unless the threat has been eliminated, notify the appropriate enforcing authority of all relevant details. This duty to disclose is an exception to the principle that there is generally no duty of disclosure in respect of contamination in the UK. (See answer to question 3.)

Soil Framework Directive

The proposals for an EU Soil Framework Directive (Directive (COM (2006) 232) were shelved in early 2008 after the European Council and Parliament failed to reach a common position due in part to particular concerns over the need for a new directive and the consistency of the draft directive with existing EU directives and the domestic contamination regimes of member states.

Also, it was felt that the directive was too prescriptive and the cost of giving effect to the directive in domestic law will be high. If the draft directive is revived in the form last considered by the European Council, it will require member states (among other things) to:

- take measures to limit the contamination of soil, establish a national inventory of "contaminated sites;"
- measure the concentration levels of all dangerous substances at every site;
- require a soil status report to be made available by buyers and sellers of potentially contaminated sites to be sold;
- ensure that on-site risk assessments are carried out at every site where there may be sufficient reason to believe that the levels pose a significant risk to human health or the environment;
- place sites found to pose such risk on the inventory; and
- remediate all sites on the inventory.

The proposed directive would impose liability for the costs of remediation on the polluter or on the state where the polluter cannot be identified.

If revived, the proposed directive would overlap considerably with the UK's existing Contaminated Land Regime. The UK was opposed to the proposal at the time it was shelved and DEFRA subsequently published "Safeguarding our Soils: A Strategy for England" (the "Soil Strategy") in September 2009. Although not legislation, the Soil Strategy sets out the government's approach to the protection and sustainable management of soil in England around the key principles of:

- better protection for agricultural soils;
- protecting and enhancing stores of soil carbon;
- building the resilience of soils to a changing climate;

- preventing soil pollution;
- effective soil protection during construction and development; and
- dealing with legacy-contaminated land.

France

Arnaud Cabanes, Marie-Laetitia de La Ville-Bauge and Eline Robin
Baker & McKenzie, Paris

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

French law has been recently modified in order to create specific legislation on the protection of contaminated land, independent from classified facilities and waste regulations.

Law No. 2014-366 of 24 March 2014 defines a real framework related to contaminated soils, completing the existing regulation.

Before 2014

Certain articles of the Environmental Code (in particular, Articles L. 511-1 subs., L. 512-7-6 and L. 512-12-1), which deal with classified facilities for the purpose of environmental protection, directly or indirectly, refer to the prevention and the sanction of contaminated land. Articles R. 512-1 and seq. of the Environmental Code govern the operation of plants that may represent a nuisance or a danger to their neighborhood or to general public health and safety, and also deal with contaminated land.

Classified installations appear on a specific list provided for by the Attachment to Article R. 511-9 of the Environmental Code. The presence of an industrial activity on the list indicates that such activity is subject to a declaration, a registration or an authorization – depending on the level of risk the plant poses to the environment – issued by the Local State Representative (the "*Préfet*"). At any time during or after the operation of such plants (for 30 years after the site closure), and most of the time upon termination of the activity, the *Préfet* can order that the land be cleaned up.

Circulars issued by the Ministry of the Environment to the *Préfets* on 8 February 2007, give them new instructions for the management of potentially polluted sites. Such circulars highlight that this issue has to be integrated during the entire life cycle (creation, modification, change of operator, incident, and closure) of classified installations.

Regarding the identification and the remediation of polluted soils, the choice of the sites for such identification surveys is to be determined by the local authorities, based on the deemed risk of pollution associated with the activities.

Depending on the results of the survey, the administration may order rehabilitation works on the site. The main principle is the proportionality between the risk to the environment and the recommended evaluation. The second principle is the adequacy between the rehabilitation works and the future use of the site.

Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage has established a framework for environmental liability, and it will amend the applicable legislation for contaminated land in France.

The directive was implemented by Law No. 2008-757 on 1 August 2008. Law No. 2008-757 does not modify the rules applicable to classified facilities, but provides for new rules applicable to other sites that may be polluted. The law distinguishes among several options, depending on the kind of the pollution and the nature of the polluter. Moreover, as the objective of this law is compensation in kind, third parties cannot claim damages based on this legislation.

New regulation

New Article L. 556-1 and seq. of the Environmental Code aims to facilitate the remediation and the rehabilitation of old industrial sites. In this respect, appropriate measures of soil pollution management must be carried out to preserve public safety and health, as well as the environment, depending on the future use of the land.

These provisions clarify the definition of the entity liable in case of pollution by stating a priority order. The law also allows the transfer of cleanup obligations to a third party (as stated below).

These provisions should be implemented by decrees by the end of 2014.

The *Préfet* now may also define information areas, and identify precisely contaminated lands, as well as which soil studies and pollution management measures have to be carried out.

2 Is there a definition of contaminated land in your laws?

There is no legally binding definition of contaminated land. However, we may gather indications in order to define the French comprehension of contaminated land:

- The Ministry of the Environment published in 2007 guidelines for the identification and the management of polluted sites (circulars dated 8 February 2007). New tools have now been developed in order to improve the remediation of polluted sites.

- The Ministry of the Environment's official website related to contaminated land defined, for information purposes, a polluted site as "a site that presents a potential or real, perennial risk for human health or environment caused by pollution, resulting from a former or actual industrial activity." (http://www.sites-pollues.developpement-durable.gouv.fr/)

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

As indicated above (see point 1), new Article L. 556-1 and seq. of the Environmental Code have recently implemented a specific framework related to polluted soils. In addition, Articles L. 511-1 subs., L. 512-7-6 and L. 512-12-1 of the Environmental Code, directly or indirectly, also refer to contaminated land. Moreover, many circulars have been issued by the Ministry of the Environment regarding contaminated land and the liabilities related thereto.

4 If so:

4.1 Who is primarily responsible for the cleanup?

As beneficiary of the operating permit, the operator is primarily subject to the obligations of rehabilitation and cleanup.

In case of liquidation of a company, the judicial liquidator, who represents the operator during the insolvency procedure, must arrange for a specialist company to prepare an environmental report, taking into account the remediation work that needs to be carried out on the site. This report allows the court, which deals with the liquidation of the company, to take into account the cost of remediation work and make sure that the corresponding amount is secured.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

New Article L. 556-3 II of the French Environmental Code provides a priority order of persons liable for a contamination incident:

1. The last operator is liable for the cleanup of contaminated land in the case of pollution from a classified facility.

2. When the pollution is caused by waste (or a place of origin other than a classified facility), the waste holder or producer are responsible for the cleanup.

3. The land planner who takes the initiative of changing the way land will be used may also be required to carry out appropriate soil pollution management measures, depending on the planned future use of the site.

4. On a subsidiary basis, when the person liable for the pollution stated in 1. and 2. cannot be identified, the owner of a contaminated land can be regarded as responsible for the site remediation.

However, the owner could be exempted from remediation obligations if it is proved that he has not been negligent and was not involved in the pollution activity.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As stated above, the operator of the plant (who may own or rent it) is liable for cleaning up the contaminated land. Therefore, according to case law, the lessee who has notified the local authorities of its operation of the site is liable for its cleanup.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The content of the obligation to clean up the land is set by the local authorities on a case-by-case basis. However, in the case of historical pollution, it is necessary to distinguish between two situations:

- The succession of different operators on the site premises

- The substitution of different operators within the activity

In the case of a substitution of operators, (i.e., the new operator either buys the former operator's company or asks for a transfer of the classified facility authorization order to his or her name), the former operator "disappears" in the eyes of the administration and the new operator will be liable for decontaminating the site polluted by past activities.

In the case of a succession of operators, cleanup measures ordered by the *Préfet* must be justified and, pursuant to the "polluter pays" principle, the polluter should only have to clean up the pollution directly caused by its activity. In practice, however, local authorities often ask the last operator of the plant to clean up even historical contamination; case law has not been clear on this matter.

Finally, in certain cases, when the last operator can prove with certainty that the pollution was not caused by its activity, the cleanup of the contaminated land will be carried out with public funds by the French Environment and Energy Management Agency (ADEME) if the actual polluter cannot be found or is not solvent.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

At any time during the operation, rehabilitation may be required by the local authorities. The prescribed measures must be essential for environmental protection. At the end of the operation, the cleanup of the site by the operator is mandatory; sites must be left in a state that does not represent a nuisance or a danger to the environment.

If there is a proven risk of nuisance to the environment, the *Préfet* may order a diagnosis and an evaluation of the nuisance. If the results of such surveys are above the limits cited by the guidelines that were issued by the Ministry of the Environment, the *Préfet* may request a cleanup. During the operation, diagnosis and soil surveys are generally requested when modifications or extensions are declared or in the case of an accident or incident on the facility site.

6 What level of cleanup is required?

During the operation of the site, the level of the cleanup is decided on a case-by-case basis. The purpose of the cleanup is to ensure that there are no more risks or nuisances for human beings or to the environment on the site.

The Environmental Code states that at the end of the operation, the site must be cleaned in order to not endanger the environment, human health, security, sanitation, etc., and to allow the future use of the site, as decided by the mayor and the operator, or the owner of the site if there is no operator. Should these parties not agree on the level of cleanup, such level of cleanup would have to allow a use of land comparable with the use of the latest operating period, except if such use is not consistent with the use stated by the applicable zoning documents. In such a case, a sensitive use level of remediation may be required.

Since 17 March 2006, the operating permit has set forth the terms of future use of the site at the end of the operation by any new facility subject to authorization or registration.

7 Are there different provisions relating to the cleanup of water?

The abovementioned rules applicable to classified facilities apply to water and groundwater cleanup, as well as to soil cleanup.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

There are no specific criminal sanctions related to contamination of land. Nevertheless, operating a classified facility without the relevant permit/declaration is a criminal offense, as acts of negligence or noncompliance with safety obligations or with orders issued by local environmental authorities in connection with cleanup are. Pursuant to the law on waste, abandonment and storage of waste contrary to the provisions of the law, as well as disposal or recovery of waste not in compliance with the provisions of the law, are also considered criminal offenses.

There are no specific criminal sanctions related to the sole fact of ownership of contaminated land. However, owners of contaminated land may be subject to administrative obligations if they participate in the operation of the classified facility.

If they do not comply with orders issued by the local authorities regarding, for example, the cleanup of contaminated land, plant managers, company presidents, and eventually, certain company employees, may incur criminal sanctions, including fines of up to EUR100,000 and up to two years' imprisonment for managers, and up to EUR500,000 in fines for companies.

Criminal courts may also close down the plant or order the operator to take remedial measures within a limited period of time.

French and foreign companies may be directly sued by the public prosecutor for crimes, misdemeanors and offenses, such as acts of negligence or noncompliance with safety obligations. This regime applies cumulatively with the personal liability of the individuals who committed the offenses.

Penalties include fines (up to five times as those imposed on individuals), limitations on the right to perform certain activities, exclusion from public procurements, temporary or permanent prohibition to conduct certain activities, judicial scrutiny, temporary or permanent cessation of business activity, or dissolution of the company.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

There are administrative and criminal sanctions (see point 8 above), depending on the level of noncompliance. In the case of noncompliance with an order served by the *Préfet*, the *Préfet* may: (i) require the plant operator to deposit an amount of money equal to the cost of the work needed to clean up the land; (ii) take the necessary measures to ensure that the plant complies with the requirements – or cleans up the land – at the operator's expense; or (iii) suspend the operating permit. Such decisions may be challenged before the administrative tribunals.

10 What authority enforces cleanup?

The *Préfet* identifies contaminated land and enforces cleanup.

The mayor may also enforce cleanup when the pollution is caused by waste.

11 Are there any defenses?

It depends on the situation, since some courts have stated that local authorities can ask the last operator to clean up the land even if the pollution was not caused by its activity. That operator may, in turn, sue the former operators for reimbursement. As indicated above, there is almost a presumption of liability of the last operator. To avoid liability, he or she would have to prove that he or she has performed a totally different activity from the activity that polluted the land and that the pollution does not relate to his or her activity. Such evidence, in practice, is very hard to produce.

12 Can third parties / private parties enforce cleanup?

The *Préfet* remains the sole authority that can enforce cleanup. Nevertheless, pursuant to tort principles, the person or entity that caused the damage is liable to put matters right. Any third party who suffers damage because of contaminated land may bring a court action against the operator of the land to obtain damages and/or ask it to clean the contaminated land if the absence of such cleanup would cause damage to them. However, third parties may not enforce cleanup.

Besides, pursuant to Law No. 2008-757 on environmental liability, third parties may inform the *Préfet* of any pollution or of an imminent risk of pollution. In addition, they can request the *Préfet* to implement prevention or reparation measures. To be successful, such requests have to be supported by relevant elements.

13 Can third parties claim damages?

Yes (see above). The courts tend to, in the environment field, apply the strict liability principle, based on the so-called "abnormal neighborhood inconvenience." If it is proved that the damage is caused by an installation, its "holder" is liable for repairing such damage. The courts have decided that when the origin of the pollution is hard to determine, it is the defendant who has to prove that the damage could not have been caused by its installation and prove that other causes are likely.

Such tort actions must be made within five years after the discovery of the damage.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

As mentioned below, for Seveso-classified facilities, quarries and waste storage facilities, pre-sale agreements and deeds of sale must contain a status report on the contamination of the soil. Further, the seller of land on which a classified installation subject to authorization or registration has been operated must inform the purchaser of that aspect and of any danger to the environment (see 15.2).

In addition, pursuant to Article L. 125-6 of the Environmental code, the *Préfet* may identify areas on which information on soil condition must be provided (*secteurs d'information sur les sols*), facilitating the precise identification of such contaminated lands. The existence of known pollution on these lands justifies (in particular, in the case of change of land use) conducting soil studies and applying pollution management measures to preserve the environment as well as ensure public safety and health. However, lands where a classified facility is still in operation are excluded from the scope of information areas.

In the case of the sale or rental of a land located within such information areas, the seller must provide written information on the soil condition made public through soil studies.

If the seller fails to comply with its information obligation, and if a pollution making the land unsuitable for its use has been identified, within a period of two years following the pollution discovery, the purchaser may ask the judge to grant him or her a partial refund of the purchase price, a cancellation of the sale, or the cleanup of the land at the seller's expense if the cost of such a cleanup is not disproportionate to the purchase price.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

The principle is that the cleanup liability is passed on to the purchaser if the purchaser, replacing the former operator of the plant, performs the same pollution-making activity. If the purchaser only owns the land without operating the plant or operates it for a different activity, liability is not passed on to him or her. Indeed, as indicated above, simply being the owner of contaminated land does not allow the local authorities to order a person to carry out the cleanup. In these cases, the former operator is still liable.

15.2 Contractually?

Article L. 514-20 of the Environmental Code sets forth that the seller of land on which a classified installation subject to authorization or registration has been operated must inform the purchaser of that aspect and of any danger to the environment. If the seller is the operator of the site, he or she must also notify the purchaser in writing of any use and storage of chemical or radioactive substances

carried out on the site. For Seveso-classified facilities, quarries and waste storage facilities, pre-sale agreements and deeds of sale must also contain a status report on the contamination of the soil.

If the seller fails to comply with such information obligations, and if a pollution making the land unsuitable for its use has been identified, within a period of two years following the pollution discovery, the purchaser may ask the judge to obtain for him or her a partial refund of the purchase price, a cancellation of the sale, or the cleanup of the land at the seller's expense if the cost of such a cleanup is not disproportionate to the purchase price.

The contractual transfer of environmental risks is a thorny and evolving subject. Indeed, case law has so far remained consistent on the fact that the legal obligation to remediate a site could not be transferred by the site operator to another party. Only the cost of such decontamination could be contractually transferred to the new owner, even though the former site operator will still be legally liable for the site remediation *vis-à-vis* the French authorities.

New Article L. 512-21 of the French Environmental Code now lays down a "third party pays" scheme. A draft decree implementing Article L. 512-2 is currently being drawn up and should be adopted by the end of the year

At the end of the operation of a classified facility, or subsequently, a third party may ask the *Préfet* to bear the operator obligations to carry out remediation works on all or parts of the site, depending on the future use of the land envisaged by the third party and with the prior consent of the last operator. The draft decree implementing Law No. 2014-366 extends the "third party pays" scheme to the case where the last operator cannot be identified; in this case, the third party must ask for the approval of the landlord and the mayor of the city where the site is located.

Under such "third party pays" scheme, the whole environmental risk (financial and administrative remediation obligations) can now therefore be transferred to the third party when the site is sold. In this respect, the third party must define, under the control of the *Préfet*, the cleanup measures in accordance with the current soil condition and the contemplated use of the land. The last operator may also decide to keep assuming certain monitoring obligations on the site.

The *Préfet* can refuse the substitution plan submitted by the third party. The substitution plan and the proposed use of the land are regarded as rejected if the *Préfet* fails to respond within a four-month period. If the third-party substitution plan is rejected, the last operator will remain liable for the remediation works.

In addition, the third party has to demonstrate its technical capacity, as well as sufficient means to provide financial guarantees. The amount of the financial guarantees is stated through an order issued by the *Préfet*, for at least the planned duration of remediation works.

However, the last operator remains subsidiarily liable for the remediation works if the third party fails to comply with its obligations.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

As stated above, in case there is a succession of operators on an industrial site, the last operator in a legal succession is liable for cleanup. Therefore, the purchaser of land in France should carry out in-depth due diligence concerning the history of the site and its current use, prior to any acquisition. Moreover, it is advisable to negotiate appropriate representations and warranties with the vendor and to clearly set out the liability of the vendor for any pollution it has caused or which has been caused by a former activity carried out on the site, not by the vendor, but endorsed by it. However, such contractual arrangements are not binding upon the French state.

Germany

Ulrich Ellinghaus
Baker & McKenzie, Frankfurt

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes. They are the Federal Soil Protection Act (*Bundes-Bodenschutzgesetz* or BBodSchG) of 17 March 1998 (Federal Gazette, Vol. 1, p. 502), as amended, and additional soil protection acts at state level.

2 Is there a definition of contaminated land in your laws?

There are definitions for "historic contamination" (*Altlasten*):

- "Decommissioned waste disposal sites and other plots of land on which wastes have been treated, stored or disposed of (historic depositions); and
- sites of decommissioned installations and other plots of land on which substances hazardous to the environment have been handled, with the exception of installations the decommissioning of which requires a permit under the Atom Act (historic sites),

provided such depositions/sites cause adverse changes to the soil or other dangers for the individual or the general public." (Section 2 paragraph 5 BBodSchG).

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. They are the Federal Soil Protection Act, State Soil Protection Acts, the Federal Environmental Damages Act, the Federal Closed Circle Economy Act, State Waste Acts, the Federal Water Resources Act and State Water Acts, the Federal Emission Control Act, and General Police Law.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The following parties are primarily responsible for cleanup of contaminated premises: the polluter, his legal successor, the land owner, and under certain circumstances even the former land owner (if he or she sold the land after 1 March 1999, and knew or should have known about the contamination). The authority has discretion as to which party it requires to take remedial actions. In most cases, it will first try to hold the polluter responsible, but if it seems more practical to have another party, such as the land owner, organize the cleanup, it may also require such party to carry out remedial measures. Internally, any party that was held responsible for cleanup by the authorities may file a reimbursement claim against the polluter(s).

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

See 4.1.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

See 4.1. Typically, if the polluter cannot be held responsible, the authority will request the owner of the land to take remedial actions, also because the tenant may decide to avoid his responsibility by terminating his or her lease agreement.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes. The liability to clean up includes historic contamination.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The authority will carry out a risk assessment on the basis of threshold values. For some substances and scenarios, such threshold values are listed in the Federal Ordinance Concerning Soil Protection and Historic Contamination (*Bundes-Bodenschutz und Altlastenverordnung* or BBodSchV). This ordinance also sets forth procedural rules for the course of action to be followed by the authority in case of established or suspected soil contamination.

6 What level of cleanup is required?

If possible, contamination shall be removed to safe levels. Alternatively, it may be admissible to secure contaminated soil, such as by sealing the ground, so that it cannot harm health or environment. Certain thresholds are contained in BBodSchV (see above, 5). Required levels will vary depending on the envisaged use of the respective land (kindergarten/industrial area).

7 Are there different provisions relating to the cleanup of water?

Yes. There are particular provisions in the respective State Water Acts and accompanying ordinances empowering the competent authorities to require cleanup measures with regard to water.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

According to Section 324a of the Criminal Code, the following course of action is a criminal offense punishable with up to five years' imprisonment or a fine: to willfully release substances into the soil or to let substances enter the soil in violation of administrative obligations if these lead to a contamination or adverse change of the soil which may damage the health of another person, animals, plants or other things of significant value or if the contamination is of significant extent. If such act was committed negligently, the offense is punishable with up to three years of imprisonment. Owning contaminated land may only be criminally relevant in cases where the owner remains inactive even though he has a duty to actively avoid the release of substances into the soil.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

The authority can impose an administrative fine of up to EUR50,000 upon a party that is not complying with an administrative order to clean up contaminated land. It may also order a contractor to implement its orders and recover its expenses from the responsible party. If the failure to comply causes extensive or hazardous contamination, the responsible party may be subject to criminal liability (see 8.).

10 What authority enforces cleanup?

The district authority of the respective state or, in major cities, the municipal administration enforces cleanup.

11 Are there any defenses?

The Federal Supreme Court has ruled that the financial responsibility of the owner of the land must be restricted if such owner did not engage in a business that typically involves the risk of soil and groundwater contamination, or tolerated such business.

12 Can third parties / private parties enforce cleanup?

Under Sections 823 and 1004 of the Civil Code, the owner of the contaminated land and the neighbors, respectively, can require the polluter to remove substances originating from the plot of land of the polluter if the use of their own land is adversely affected.

13 Can third parties claim damages?

Depending on the circumstances of the individual case, a third party may be in a position to claim damages from the polluter or the owner of the land from which the contamination originated for impairment of its land, if it can prove that the other party caused the damage negligently or even willfully or under violation of a law that protects the interests of the claimant.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

If the seller was the polluter, he remains liable as polluter under statutory law. If the seller was not the polluter, he or she can, by way of selling the land, pass on to the new owner his or her liability as the owner of land. Under certain circumstances, however, the seller of land remains liable as the "former owner," if he or she knew or ought to have known that the land was contaminated.

15.2 Contractually?

The polluter can agree with a third party that such party indemnifies and/or holds harmless the polluter in case of remedial action requirements. The authority, however, is not bound by such contractual agreements, which leaves the polluter with the risk of insolvency of his contractual partner.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

In most states, it is mandatory to report contamination of soil and/or groundwater to the competent authorities, with the possible effect that the authorities will order further investigations and/or cleanup measures. This should be kept in mind when commissioning environmental consultants to undertake a phase II environmental due diligence.

Hungary

Peter Vörös, Geza Kajtar and Anita Benko
Baker & McKenzie, Budapest

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Act LIII of 1995 on the General Rules for the Protection of the Environment (the "Environment Protection Act") contains the framework and the basis of Hungarian environmental legislation, including legislation on contaminated land.

The rules on the liability for environmental damages have changed as of 30 April 2007. The new rules apply to incidents of contamination after this date. For incidents that took place prior to this date, however, or as a result of negligence prior to this date, the previous rules apply. The special rules on soil and groundwater contamination are contained in Government Decree No. 219/2004 (VII. 21) on the Protection of Subsurface Water (the "Decree") and Joint KVVM-EüM-FVM Decree No. 6/2009. (IV.14) on the Limit Values for the Protection of Geological Substances and Subsurface Water and on the Measurement of Contaminants (the "Limit Values Decree"). Furthermore, Government Decree No. 219/2004 on the Protection of Groundwater (the "Groundwater Decree") also lays down important rules on the protection of groundwater and soil.

2 Is there a definition of contaminated land in your laws?

Pursuant to Section 4 of the Environment Protection Act, contamination means the status of the environment or any element thereof that can be identified by the contamination level resulting from the pollution of the environment. Such contamination level is established on the basis of contamination limit values. Pursuant to Section 4 of the Environment Protection Act, contamination limit value means the level of pollution of any element of the environment by hazardous substances that, if exceeded, may, on the basis of current scientific knowledge, result in environmental damage or health impairment. The maximum permitted concentration of a hazardous substance is defined by law or, in the absence of a statutory limit value, may be provided in an administrative decision of the environmental protection authority.

Pursuant to Section 3 of the Decree, groundwater damage is any direct or indirect significant, measurable adverse change to the quality or quantity of groundwater or any direct or indirect significant and measurable damage to services provided by the groundwater.

Section 3 also cites that damage refers to any land contamination that creates significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under the land of substances, preparations, organisms or microorganisms if the concentration of the contamination exceeds the threshold value of (B) or (E).

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes, there are. The provisions concerning remediation are set forth in the legislation indicated in Section 1.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Section 101 of the Environment Protection Act contains the "polluter pays" principle. However, according to the current text of Section 102 of the Environment Protection Act, in the absence of evidence to the contrary, the actual owner and the occupier (user) of the real property are jointly and severally liable for activities conducted in that property in violation of environmental laws. The owner may be exempt from this liability if it names the actual user of the land and is able to prove that it is not responsible for the unlawful activities.

Section 21 of the Decree sets out that the above are responsible under administrative law for the cleanup. The current text of the Decree does not define a "primarily responsible" entity. However, it is clear from the wording of the Environment Protection Act that the actual owner and the actual user (if any) are primarily jointly and severally responsible, unless they can prove that someone else caused the contamination. Regarding soil and groundwater contamination, there is an enormous environmental accident case pending before the court that could significantly impact the case law.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Yes; see point 4.1 above.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

See point 4.1 above.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes, the liability to clean up also covers historical contamination. If no one can be obliged to remediate the contamination, the government itself must handle the environmental damage or environmental hazard.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

A cleanup is required if the so-called pollution limit values to polluting substances are exceeded and, based on a fact-finding report including risk assessment, the authority decides so. Limit values are established in the Limit Values Decree, or, pursuant to authorization in a ministerial decree, by the environmental protection authority in administrative decisions.

6 What level of cleanup is required?

According to Section 101 of the Environment Protection Act, the cleanup must be continued until the original or almost-original status of the environment or of the environmental element is restored or the services provided by the environmental element are restored ("primary cleanup"). In practice, the authority decides on the target limit values (which must be reached) on the basis of risk assessment.

7 Are there different provisions relating to the cleanup of water?

The basic rules are the same. The limit values differ, depending on whether soil or groundwater is contaminated.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is a criminal offense to contaminate land. However, it is not a criminal offense to own contaminated land. Act C of 2012 on the Criminal Code (the "Criminal Code") contains several specific provisions concerning contamination:

- Damaging the Environment (Section 241 of the Criminal Code)

Any individual commits a crime if he or she willfully: (i) endangers the soil, air, water, flora or fauna, or any element thereof through significant pollution or otherwise; (ii) damages the soil, air, water, flora or fauna, or any element thereof through significant pollution or otherwise, to such an extent that the natural or previous state of the environment can be restored only through intervention; or (iii) damages the soil, air, water, flora or fauna, or any element thereof through a significant pollution or otherwise, to such an extent that the natural or previous state of the environment cannot be restored. The punishment can be imprisonment for: (i) up to three years; (ii) up to five years; (iii) two to eight years; or (iv) up to three years, respectively.

Any individual who negligently engages in the above conduct may be punished with imprisonment for up to one year in the case of (i) and (iv), up to two years in the case of (ii) or up to three years in the case of (iii).

- Damaging Nature (Section 242 - 243 of the Criminal Code)

Section 242

Any individual who willfully and unlawfully obtains, keeps, markets, imports, exports, transits, trades with, endangers, damages or destroys: (i) a highly protected living organism; (ii) a protected living organism; (iii) a living organism covered by the EU CITES Regulation, commits a crime and may be punished with imprisonment for up to three years. The penalty shall be imprisonment between one to five years if the damage caused to the natural environment results in the destruction of the species of living organisms, such as when:

  - highly protected living organisms or protected living organisms will be destroyed, and the aggregate value of such destroyed species of living organisms, when expressed in monetary terms, is equal to double of the highest amount determined by specific other legislation for such highly protected living organisms under special protection; or

  - it threatens the survival of the living organisms covered by the EU CITES Regulation.

Section 243

Any individual who unlawfully and significantly alters Natura 2000 areas, protected caves, protected sites and the population or natural habitat of protected living organisms, commits a crime that is punishable with imprisonment for up to three years. The penalty shall be imprisonment between one and five years if the damage caused to the natural environment results in the significant deterioration or destruction of Natura 2000 areas, protected caves, protected sites or the population or natural habitat of protected living organisms. Any individual who negligently commits the above may be punished with imprisonment for up to two years.

- Misappropriation of Radioactive Materials (Section 250 of the Criminal Code)

Any individual who, without notification or by exceeding the scope of the authorization: (i) produces, stores, disposes of or transports hazardous radioactive substances; (ii) acquires, possesses, manages, distributes, processes or otherwise uses hazardous radioactive substances, or transfers such to an unauthorized person, treats, imports or exports such materials or transports them in transit through the territory of the country, commits a crime and may be punished with imprisonment between one to five years. If the abovementioned crime is committed in criminal association with accomplices, the punishment shall be imprisonment between two to eight years. Any individual who engages in preparations for the above crime may be punished with imprisonment for up to three years. Any individual who commits a crime defined under (i) or (ii) by way of negligence may be punished for misdemeanor with imprisonment for up to two years.

  - Illegal Operation of Nuclear Installations (Section 251 of the Criminal Code) - Crimes in Connection with Nuclear Energy (Section 252 of the Criminal Code)

  - Violating the Rules on Waste Management (Section 248 of the Criminal Code)

An individual commits a crime and may be punished with imprisonment for up to three years if he or she deposits waste at a location that is not designated for this purpose by the competent authority, or treats waste without the appropriate permit or conducts any other unlawful activity involving waste. If the crime involves hazardous waste, the punishment can be imprisonment for up to five years.

Any individual who negligently commits the above may be punished with imprisonment for up to two years.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

No, but an administrative fine can be imposed. In addition, based on the Groundwater Decree the competent authority may restrict the use of the land concerned if the user fails to fulfil his/her clean-up obligations. Furthermore, if the contamination was the result of an activity subject to permit(s), the competent authority may restrict, suspend or withdraw such permit(s) if the user of the environment fails to clean up the contaminated land.

10 What authority enforces cleanup?

The competent regional environmental authority enforces cleanup. There are 10 regional authorities in Hungary and the National Environmental Inspectorate is the authority of second instance.

11 Are there any defenses?

According to Section 102/A of the Environment Protection Act, the person liable for the cleanup shall be exempted from administrative liability if he or she is able to prove that the threat to the environment or the environmental damage:

- was caused by an act of armed conflict, war, civil war, armed hostilities, insurrection or natural disaster; or

- is the direct result of the enforcement of a final and compulsory resolution of an authority or court.

12 Can third parties / private parties enforce cleanup?

Civil law instruments may also be used for environmental purposes; however, they are not frequently applied to enforce land contamination cleanup, but rather, they are used to stop or prevent noise or air

pollution. Theoretically, the following civil law claims may form a legal basis of enforcing a cleanup: protection of persons (the right of individuals for a healthy environment) under civil law; neighbors' rights, i.e., the right of neighbors for the undisturbed use of their property; nuisance (the protection of possessors), because contamination or pollution originating from another site is considered undue disturbance of possession; and torts, which are actionable *per se*.

13 Can third parties claim damages?

Yes. Any person whose health, corporal integrity or property is damaged by an unlawful act or omission can claim damages. An unlawful act or omission can be, among other things, an act in violation of or the omission of activities prescribed by environmental laws. Therefore, any person suffering damage as a result of unlawful contamination may claim damages from the polluter.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No, but it is highly recommended to do so in order to avoid liability.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Pursuant to the Environment Protection Act, the actual owner of the land is liable for remedying its contaminated land (see Section 4.1 above). By acquiring ownership of a land, the new owner will take over the liability for the possible contamination. However, the purchaser may exercise warranty claims against the seller if it turns out that the purchased land was contaminated, and, ultimately, may also rescind the sale and purchase contract under certain conditions. If the court accepts the warranty claims, the seller will have to clean up the land.

In addition, according to the Hungarian Civil Code, in the course of exercising civil rights and fulfilling obligations, all parties have to act in the manner required by good faith and honesty, and they are obliged to cooperate with each other. Before entering into a sale and purchase agreement, the seller is obliged to inform the buyer about the essential characteristics of, and all important requirements pertaining to, the land, which includes possible contamination and cleanup obligations as well. If the seller does not inform the buyer of the essential characteristics of the land, the court considers the omission of the seller as a breach of contract and may oblige the seller to pay damages, or, based on the omission or misinformation and the other facts of the case, it may establish the invalidity of the agreement.

The existence of permanent environmental damage may be registered with the Land Registry. (Note that the concept of environmental damage differs from that of environmental contamination. Environmental damage means the change in, or the pollution of, the environment to such an extent that its natural or previous state [quality] can be restored only through intervention or cannot be restored at all.) In this case, the purchaser cannot invoke the above arguments and must perform the cleanup tasks, because it was or could have been aware of the contamination from the public registry.

15.2 Contractually?

Under the regime applicable for the contamination that took place before 30 April 2007, the Decree expressly enabled the contractual takeover of the liability for the cleanup, but the authorities were not obliged to accept such takeover. This express reference was deleted from the Decree with regard to contaminations that took place on or after 30 April 2007, although nothing precludes the authorities from accepting such a contractual arrangement.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

There is public access to the real estate registry in which the fact, extent and nature of any permanent environmental damage established by a definitive official decision or court ruling are also registered.

Italy

Pierfrancesco Federici, Francesco Goisis, Mario Cigno and Gherri Magaraggia
Baker & McKenzie, Milan

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

All land contamination legislations are described in Sections 239 to 266 of the Consolidated Act (*Testo Unico*) on Environment ("Consolidated Act") (Legislative Decree No. 152, dated 3 April 2006).

2 Is there a definition of contaminated land in your laws?

Article 240 of the Consolidated Act states that land is considered "contaminated" when one or more of the risk concentration values (polluting capability + risk analysis) of polluting substances in the soil, subsoil, groundwater or superficial waters exceed the acceptable limits of concentration to be determined case by case, in relation to a given site. A piece of land is potentially contaminated only when the so-called tabular concentration values exceed the limits of concentration indicated in the law.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Article 242 of Decree No. 152/2006 provides for a special cleanup procedure to be followed in cases of contamination or actual and current risk of contamination.

4 If so:

4.1 Who is primarily responsible for the cleanup?

According to Article 242 of Decree No. 152/2006, and in conformity to the EU principle of "polluter pays," the polluter is primarily responsible for the cleanup. However, there is a minority of case law that identifies the "polluter" not only with the subject actively polluting a piece of ground, but also with the subject that passively aggravates the said pollution. Therefore, the same subject could be considered a guiltless owner *vis-à-vis* the plot of land A, but a polluter *vis-à-vis* of plot of land B or *vis-à-vis* the aquifer/groundwater in case his or her idleness has allowed pollution to spread. This should be considered, bearing in mind that that some offenses regarding soil pollution are sanctioned both in the case of willful misconduct and negligence.

Moreover, the guiltless owner is far from being exempt from any obligation in case of pollution. Pursuant to Decree No. 152/2006, both the polluter and the owner and/or occupier of the site where the pollution took place/was discovered are subject to obligations of reporting pollution to authorities and implementing preventive measures to avoid the worsening of the situation (see point 16).

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

In the event that the authorities discover the contamination, they will order the responsible party to adopt the necessary prevention and cleanup measures. According to Article 242, if the polluter cannot be found (or does not carry out the cleanup), the competent local authority (municipality or region, if the pollution occurred in an area bigger than one municipality) must carry out the cleanup. However, the land will then be subject to a lien (see Article 253) for the cost of the cleanup, and the authorities can instruct that the debt be paid ultimately by the owner (in the event of failure to accomplish spontaneous payment, the authorities could proceed with land expropriation). Such lien has to be

indicated in the public records so it can be easily detected by any party. Moreover, it has to be indicated in the Certificate of Urban Planning Destination ("CDU"), which must be compulsorily attached to deeds transferring the rights of any plot of land.

In detail, the guiltless owner must accommodate the remediation activities put in place by the authorities on his or her plot of land and bear the costs of the same up to the market value of the land after the reclamation. This disciplinary act clearly aims to prevent subjects from speculating by buying polluted plots of land and having them reclaimed using community funds.

The above-described framework (in which the owner only has reporting obligations [alongside the obligation to implement preventive measures to avoid the worsening of the situation] and a residual obligation to refund to the authorities the costs of the reclamation up to the market value of the plot of land after reclamation) is currently under the scrutiny of the Court of Justice of the European Union. The Grand Chamber (*Adunanza Plenaria*) of the Italian Council of State has referred to the Court of Justice the evaluation of the compatibility of the Italian legislative framework with the European principles governing land reclamation and environmental protection according to: (i) the polluter pays principle; (ii) the preventive action principle; and (iii) the rectification at source (of environmental damages) principle.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As already mentioned, the environmental liability generally remains with the polluter and this is irrespective of whether the polluter is the owner of the land or just a tenant. Italian legislation has already adopted the EU's polluter pays principle.

In the eyes of the authorities, the person who operates the activities on the land is often considered the responsible party. The operator may nevertheless prove that someone else caused the contamination by demonstrating that the polluting substances found at the site are not, or have not been, used by his or her company. This may be difficult to prove, particularly from a technical point of view, especially if the operator is using, or has used in the past, the polluting substances found by the authorities. Furthermore, the European Court of Justice, in a case related to an Italian cleanup (9 March 2010, Case C 378/08), has upheld such (not always sufficiently rigorous) an approach of the authorities (i.e., "Directive 2004/35 does not preclude national legislation that allows the competent authority acting within the framework of the directive to operate on the presumption, also in cases involving diffuse pollution, that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area"). This could make the position of the owner and occupier weaker.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

According to the EU's polluter pays principle, the liability to clean up does not include historical contamination caused by other operators. Nevertheless, we have already mentioned how difficult it may sometimes be to prove that the contamination has not been caused by the current operator of the land. As mentioned in point 4.3, if the polluter cannot be found and the competent authority proceeds to clean up the land, the relative costs would be recovered by the authorities by enforcing a special lien on the land. In the last analysis, the land owner would likely shoulder the cleanup expenses up to the value of the site after the reclamation (if necessary, by land expropriation). Finally, as mentioned in point 4.1, the guiltless owner could be viewed as a polluter if he or she allows pollution to spread, and is, in any case, far from being exempt from any obligation in case of pollution. Pursuant to Decree No. 152/2006, both the polluter and the owner-occupier of the site where the pollution took place/was discovered are subject to obligations of reporting pollution to authorities and implementing preventive measures to avoid the worsening of the situation (see point 16).

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Section 242 of the Consolidated Act states the need to verify both relevant parameters, which are the pollution concentration (*concentrazione soglia di contaminazione* or CSC) and the pollution risk (*concentrazione soglia di rischio* or CSR). Legislative innovation consists of considering not only instances where pollution thresholds are exceeded, but also the risk to the population that the said excess could trigger.

6 What level of cleanup is required?

Cleanup is required if one or more of the concentration values of polluting substances in the soil, subsoil, groundwater or superficial waters exceed the acceptable limits of concentration indicated in Enclosure 1 of Decree No. 152/2006 (see point 2).

Each polluting substance can be present on the site up to a certain level. However, if any polluting substance exceeds the acceptable limits, the cleanup procedure must be carried out in accordance with the abovementioned law. The acceptable level varies, depending on the intended use of the site (i.e., residential or industrial).

7 Are there different provisions relating to the cleanup of water?

Consolidated Act No. 152/2006 sets forth a specific regulation for water issues (Article 73 onward). Nevertheless, the water cleaning procedure is, so to speak, "attracted" by the land contamination regulation when it refers to underground water, by means of Article 243, which sets forth the burden of underwater cleaning when a land emergency cleaning procedure is carried out.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

According to Article 257 of Decree No. 152/2006 (see point 9), anyone who contaminates land or causes a current and real danger of contamination without performing the necessary remediation activities commits a criminal offense.

On 19 May 2015, the Parliament gave final approval to the new "Provisions related to crimes against the environment," introducing modifications to the Italian Criminal Code and extending the list of predicate crimes for the imposition of administrative liability of a company, pursuant to Decree 231/2001. The main offenses introduced are:

a. the offense of environmental pollution, meaning the impairment or significant and measurable deterioration of the previous state: (i) of the water or air, or extended or significant portions of the soil or subsoil; or (ii) of an ecosystem, biodiversity (also agrarian) flora or fauna;

b. the offense of environmental disaster, or (i) an irreversible alteration to the equilibrium of an ecosystem; (ii) an alteration to the equilibrium of an ecosystem whose elimination is particularly costly and achievable only with exceptional measures; or (iii) the offense of injury to public safety, determined with reference to the relevance of the extent of the compromise to the environment or its harmful effects, to the number of persons both injured and exposed to danger;

c. the offense of impeding controls, which includes denying or hindering access to places, or artificially changing the condition of premises, to thwart or circumvent the supervision and control of environmental and occupational health and safety, or to affect outcomes; and

d. the offense of failure to decontaminate, as a breach of the commitments of remediation, restoration and recovery of locations; this obligation of intervention can be derived directly from the law, or the order of a court or public authority.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Article 257 of the code establishes guidelines regarding penalties for noncompliance with the requirement to clean up site pollution. If the responsible party fails to accomplish a cleanup procedure in line with the law, he or she will be punished accordingly. Penal sanctions of imprisonment will be imposed for six months to one year, as well as fines ranging from EUR2,600 to EUR26,000.

In case contamination is caused by dangerous substances, the penalties become more severe. The person responsible may be imprisoned from one year to two years and fined up to EUR52,000.

Moreover, under the Decree 231/2001, the company for whom the culprit has committed the offense will be punished with an administrative pecuniary sanction ranging from EUR24,800 to EUR387,250, depending on the severity of the offense and the turnover in the company.

In addition, failure to comply with the obligation to decontaminate established under the law, or the order of a court or of a public authority, is punishable with imprisonment from one to four years and a fine ranging between EUR20,000 and EUR80,000.

The polluter will be exempt from penalties or the penalty may be reduced if he or she carries out the cleanup of the contaminated land. This provision aims to encourage polluters to facilitate the cleanup of the site. It does not only apply to the existing incident of contamination (as a kind of amnesty), but also to contamination that may occur in the future.

Depending on the actual circumstances and charges, the polluter may be exempted from penalties, and the operation required for that exemption may not necessarily be a complete cleanup of the affected area. In the case of industrial sites that are still in operation, it is acceptable for a cleanup project to provide only partial remedial action in the form of a plan to make the site environmentally secure.

10 What authority enforces cleanup?

Depending on the different regional laws, cleanup is enforced by the region, province or municipality where the polluted area is located.

11 Are there any defenses?

Defenses can be brought before the civil, criminal or administrative courts, depending on the case. In particular, any order imposing a remediation activity can be (and is often) challenged before administrative courts.

12 Can third parties / private parties enforce cleanup?

Third parties cannot directly enforce a cleanup procedure but can certainly inform the competent environmental authorities of the risk of possible contamination. This would trigger an investigation that might lead to criminal consequences for the polluter on the one hand, and to an order being served to the polluter/owner to clean up the polluted area on the other.

13 Can third parties claim damages?

In the event that third parties have been damaged by the contamination of the land, they can sue the responsible party before civil courts. Industrial activities may be easily considered dangerous activities for the purposes of Article 2050 of the Italian Civil Code; in such cases, the polluter is subject to strict liability, that is, the polluter has to prove that he or she has exhausted all available technical means to prevent any accident and damage.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No, it is not.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Environmental laws do not expressly address this issue. However, the lien put on the real estate in order to guarantee the cleanup procedures stays with the land and will not be released until the cleanup is performed by the debtor or by someone on his or her behalf.

15.2 Contractually?

It is always possible for the party responsible for the cleanup to pass its cleanup liability (i.e., the expenses and costs) to third parties, as long as it remains responsible before the public administration for the favorable outcome of the cleanup operations. In other words, environmental clauses passing cleanup liabilities are binding between the parties, but not enforceable *vis-à-vis* the public authorities.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

As mentioned in point 4.1, the guiltless owner is far from being exempt from any obligation in case of pollution. Pursuant to Decree No. 152/2006, both the polluter and the owner-industrial operator active on the site where the pollution took place/was discovered are subject to obligations of reporting pollution to authorities and of implementing preventive measures to avoid aggravating the situation.

The legislative framework of these obligations can be found in the combined provisions of Articles 242, 245 and 257.

Pursuant to Article 242, the party responsible for a potentially polluting accident must immediately report the fact to the authorities. The same obligation arises for the detection of previous contaminations that could cause a worsening of the existing contamination.

Pursuant to Article 245, the owner and the operator active in the facility in which pollution is detected are also subject to the same obligation of reporting that applies to the responsible party under Article 242.

Article 304 lays down significant administrative sanctions, such as fines ranging from EUR1,000 to EUR3,000 per day of delay in reporting. Although this provision is difficult to interpret , we cannot exclude the possibility that these sanctions may apply even to the owner or operator in the facility who is not responsible for the contamination.

With regard to the sanctions imposed by Article 257, please refer to point 9.

Even if some lower courts have ruled differently (and in any case, the *stare decisis* principle does not apply in Italy, and so the case law is often inconsistent), *Corte di Cassazione* (the Italian Supreme Court) decided in its ruling of 11 May 2011, that the criminal sanctions provided under Article 257 are applicable only to the person responsible for the pollution and not to the owner or the operator active on the site (i.e., if they are not polluters themselves). In particular, the Court stressed the fact that notwithstanding the reference in Article 257 to Article 242 (which mention not only who is responsible for the current pollution incident, but also who has detected previous contaminations), the wording of Article 257 is nevertheless sufficiently clear in excluding its applicability to individuals other than the polluter. Applicability to the owner and operator on the site who are not polluters would represent applicability by analogy, which, as such, is prohibited by the general principles of the Penal Code.

In summary, under Article 245, the owner and operator on the site who are not responsible for the contamination are, in principle, subject to an obligation to report the contamination, as well as implement preventive measures to avoid the worsening of the situation. However, it may be disputed that if they fail to fulfill their obligation, they may be subject to heavy financial sanctions provided for by Article 304, as well as to the criminal sanctions provided for in Article 257.

Finally, we are concerned about the new offense of failure to decontaminate; the formulation of this offense is not clear. It is not clear, in particular, if the crime is attributable only to the polluter or also to the owner to whom a request for restoration has been sent (even if the latter is not responsible for the pollution). The differentiation between these two subjects has been recently confirmed by the European Court of Justice, which has signaled, on this point, the persistence of the polluter pays principle. Presently, Italian law requires the owner of a plot to start remediation or restoration only if directly responsible for the pollution; otherwise, it provides a limited financial liability, with the obligation to repay the costs of the actions taken by the competent authority within the limit of the increase in value of the site after the execution of these actions – notwithstanding the duty to "implement preventive measures." In accordance with the principles of legality, culpability and proportionality, it would be appropriate to clarify that the "preventive measures" – defined as "initiatives to counter an event, act or omission that has created an imminent threat to health or the environment, understood as a sufficient likelihood that damage will occur from the health or the environment in the near future, to prevent or minimize the materialization of that threat" – do not fall within the criminal case to the extent not attributable "to the reclamation, restoration or recovery of the locations." The clarification would be particularly useful in order to prevent an operator (e.g., an owner not responsible for the pollution) from being placed in difficulty by an illegitimate order from an authority. The new penal provision, in fact, does not expressly identify the agent as being the polluter, but as the person that is forced to decontaminate (by law, by court order, or by order of the authority). Thus emerges the risk that in the event of an order of restoration – in violation of the polluter pays principle – received by a person not responsible for the pollution, the latter could be held criminally responsible. In order to limit this risk, the recipient of the measure should promptly bring the order for remediation before the administrative judge and ask for disapplication of the unlawful measure instead of merely relying on defense in a criminal court. Note that the power to set aside, albeit sometimes exercised by the criminal courts, presents a great deal of uncertainty, and the decision of a criminal court is difficult to predict.

Kazakhstan

Azamat Kuatbekov and Nurgul Abdreyeva
Baker & McKenzie, Almaty

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

General provisions on environmental protection, land protection and land contamination have been established under the Environmental Code of the Republic of Kazakhstan dated 9 January 2007 (the "Environmental Code").

Issues specifically relating to land contamination are regulated by the Land Code of the Republic of Kazakhstan dated 20 June 2003 (the "Land Code") and Rules of Land Preservation approved by the resolution of the Kazakhstani Government dated 29 September 2003 (the "Rules of Land Preservation"). Various aspects of the land contamination are also regulated by other legal acts (e.g., Rules of Economic Assessment of Damage Caused by Environment Contamination approved by the Government Decree dated 27 June 2007).

2 Is there a definition of contaminated land in your laws?

There is a definition for "land contamination" in the Rules of Land Preservation:

"Land contamination – the accumulation of various substances and organisms in the land that occur as a result of anthropogenic activities, given that the quantities of such accumulation exceed the maximum limits of detrimental substances, which may reduce the value of the land, worsen the quality of agricultural products, and other environmental objects as well as conditions of people's habitation."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Cleanup/remediation provisions relating, among other things, to contaminated land, are established under the Environmental Code, Land Code, Tax Code and a number of special decrees, rulings and regulations.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter has primary responsibility for cleanup and other remedial actions.

While the law is not entirely clear on this issue, the existing practice suggests that where a polluting party cannot be identified (in other words, where it cannot be determined who is responsible for causing the pollution in question), the liability may be imposed on the owner/operator (especially where the owner/operator is engaged in activities with a high risk of causing environmental damage, in which case liability is presumed under the law).

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

See point 4.1.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As noted in point 4.1 above, generally it is the polluter who is liable.

The owner may be liable to the extent that the polluter cannot be identified and/or if the owner is engaged in an activities with a high risk of causing environmental damage. In such a case, the owner should generally have a reimbursement claim against the tenant.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Generally, Kazakhstani laws prescribe no liability for historical contamination. Each polluter is responsible for his/her own activities and contamination originating from those activities, as confirmed by the rulings of the Kazakhstani Supreme Court. According to the Land Code, lands with a high level of contamination shall not be used for any industrial, agricultural or other purposes before remedial actions have been successfully completed. The owner shall not be responsible for such remedial actions, and these actions are normally performed by state authorities within the framework of a "conservation" procedure. However, the owner may request the authorities to proceed with such conservation. The procedure of eminent domain is normally applicable to such lands, with compensation of related losses to the owner.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Limits to permitted polluting substances are defined in special permits for emissions into the environment, issued by the Ministry of Energy. The permits are issued to the environment users. Compliance with these limits is verified by compliance inspection carried out by state authorities. On the basis of results of such inspections, the authorities may decide that cleanup is required.

6 What level of cleanup is required?

The level of contamination must fall below the threshold values that originally triggered the cleanup requirement (normally defined in the permits for emissions into the environment). Different threshold values are applied depending on the designation of the relevant land.

7 Are there different provisions relating to the cleanup of water?

The provisions relating to the cleanup of water are basically the same.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is a criminal offense (punishable by a fine or, in an aggravated case, by imprisonment of up to seven years) to contaminate soil if such contamination is of a major scope and/or if it leads to serious damage to health (or death).

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

The authority can impose an administrative fine, which might include the cost of environmental damage for release of substances into the soil without causing death or substantial damage. If the

failure to comply causes extensive or hazardous contamination or death, the responsible party may be subject to criminal liability (see point 8).

10 What authority enforces cleanup?

The Ministry of Energy and its local departments enforce cleanup.

11 Are there any defenses?

The Supreme Court has ruled that the owner of the land may not be financially responsible for the results of contamination if such owner did not engage in business that has resulted in the contamination.

12 Can third parties / private parties enforce cleanup?

Under Section 13 of the Environmental Code, third parties can require the polluter to stop contamination and reimburse the aggrieved parties for damages originating from the contamination.

13 Can third parties claim damages?

Depending on the circumstances of each case, a third party may be in a position to claim damages from the polluter or the owner of the contaminated land, or a land from which the contamination originated, for impairment of its land or other property or for damage to health.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Kazakhstani law does not specifically address this issue. However, in general, if the seller was the polluter, he remains liable as polluter under statutory law. If the seller was not the polluter, he or she can, by way of selling the land, pass on to the new owner his or her liability as the owner of land.

15.2 Contractually?

While the law is unclear, we believe that the liability for contamination is not transferable by agreement between seller and purchaser in case the seller is a polluter.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Before the start of a construction/development/mining or subsoil project, a special environmental investigation/environmental impact assessment should be conducted by the project company and the results of such assessment should be approved by authorities. The contamination limits relating to future activities of the facility will be defined based on the results of such assessment. This mitigates, to a certain extent, the risks relating to the eminent domain of contaminated land, since any historical contamination could be discovered in the process of such an assessment. However, an environmental due diligence is still recommended as a condition precedent to acquisition of the land.

Luxembourg

Jean-Francois Findling and Hélène Grandmaire
Baker & McKenzie, Luxembourg

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The main Luxembourg legislation dealing with land contamination is the Law on Environmental Responsibilities (*responsabilité environnementale en ce qui concerne la prevention et le reparation des dommages environnementaux* or the "Environmental Law"), dated 20 April 2009.

The following laws may also be relevant for certain types of land contamination or activities:

The Law on Protection of Nature and Natural Resources (*protection de la nature et des ressources naturelles*), dated 19 January 2004

The Law on Pollution, Protection and Management of water (*loi relative à l'eau*), dated 19 December 2008

The Law on Classified Establishments (*établissements classés*), dated 10 June 1999

The Law on Waste Management (*gestion des déchets*), dated 21 March 2012

The details of these laws are included in Grand Ducal decrees and in the circulars of the Luxembourg Environment Ministry.

2 Is there a definition of contaminated land in your laws?

Pursuant to Article 2, 1.), c.) of the Environmental Law, contaminated land is defined as a contamination that may cause a risk of negative alteration of (i) human health; (ii) certain natural habitat; or (iii) specific sensible areas due to the direct or indirect spread above or underneath the soil of substances, organisms or microorganisms.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

The Environmental Law also governs land cleanups and remediation matters.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The operator (*exploitant*) is primarily responsible for cleaning up polluted land.

The operator is defined by the Environmental Law as an entity (private body or company), either private or public, that operates or controls a professional activity or that has received economic power over the technical functioning of such activity, including the holder of a permit or authorization for such an activity, or the entity registering or notifying of such an activity.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The last operator will be liable for cleanup activities and there are no legal provisions providing that if this operator cannot be found, then the liability is passed to the owner. This being said, it is common

in such cases for the authorities to request that the owner pay for the cleanup, although there are no legal grounds for that.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As stated, legally speaking, only the operator is liable for cleanup duties.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The operator is not liable for cleanup duties due to pollution caused by a third party (e.g., a previous operator). Therefore, the current operator will have to demonstrate that he or she is not responsible for such pollution.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Cleanup standards used by the Luxembourg Environment's Administration are based on the values retained by the Environment Administration of the German region of Rhénanie Palatinat (*Merkblatt Alex 02, Altablagerungen und Altstandorte*).

http://www.lgb-rlp.de/fileadmin/cd2009/download/alex/alex02.pdf.

6 What level of cleanup is required?

The level of cleanup needed will depend on what the land will be used for in the future. This will be determined by the Luxembourg Environment Ministry and the guidelines they will be using, which will also be presented in circulars, are as follows:

- Maximum level – protected natural areas
- Intermediary level – residential areas
- Low level – industrial areas

7 Are there different provisions relating to the cleanup of water?

The abovementioned rules are also applicable to cleanup of water. The Law on Pollution, Protection and Management of water (*loi relative à l'eau*), dated 19 December 2008, also provides for additional regulation.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Contamination of land is a criminal offense, and the penalties are imprisonment from eight days to six months, and /or a fine of EUR251 to EUR750,000.

There are no specific criminal sanctions related to the owning of contaminated land.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

There are no criminal sanctions in the case of noncompliance with the requirements to clean up but there are administrative sanctions that may be imposed by the Luxembourg Environment Ministry, such as a deposit equal to the costs required to clean up the land.

10 What authority enforces cleanup?

The Luxembourg Environment Ministry enforces cleanup or remediation.

11 Are there any defenses?

The operator may, in turn, sue the former operator if he or she has sufficiently demonstrated that the pollution was caused by the latter.

The operator can also prove that he or she did not make any mistake or was negligent, and that the damage stems from an activity that was not likely to cause damage to the environment in light of scientific knowledge available at that time.

12 Can third parties / private parties enforce cleanup?

No, only the Luxembourg Environment Ministry is entrusted to enforce cleanup.

13 Can third parties claim damages?

Pursuant to the general principle of tort's responsibility, a third party that would suffer a damage related to the contamination of land has the right to bring a court action against the operator of the contaminated land for redress or reparation.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

An investigation is mandatory only in certain cases, such as for classified establishments (*établissement classés*) and waste storages, but purchasers often require an investigation even in cases where this is not strictly legally required.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Cleanup responsibility passes to the purchaser only if the latter becomes a new operator of the land. As indicated above, mere ownership of the land does not make one liable for pollution.

15.2 Contractually?

The law sets forth that the operator is liable for cleaning up of the land. Furthermore, the purchaser often becomes the new operator.

In our view, if the purchaser and the operator are two different parties, a contractual agreement setting forth the cleanup liabilities could be valid between the parties, although it would not be enforceable against third parties.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

In addition to the legal principles regarding contamination of land, there is a broad scope of administrative regulations and practices, which often require the purchaser to consult the Luxembourg Environment Ministry.

The Netherlands

Cynthia de Witt Wijnen
Baker & McKenzie, Amsterdam

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

In the Netherlands, the rules governing contaminated soil and groundwater are laid down in the Soil Protection Act (*Wet Bodembescherming*) or SPA. The SPA aims to protect the soil as well as regulate the remediation of contaminated soil and groundwater. The SPA is the legal basis for a number of decrees that provide specific rules relating to soil protection. Such rules pertain to, among others, cleanup levels and the obligation of certain companies to conduct a soil investigation. The SPA distinguishes between historical soil and groundwater contamination (caused before 1 January 1987) and new soil and groundwater contamination (caused from 1 January 1987 onward). The difference between historical and new soil and groundwater contaminations is relevant for the rules that apply: all new soil contamination must be prevented as far as possible, and in the event that new soil and/or groundwater contamination occurs nonetheless, all new contamination must be cleaned up. For historical soil contamination, cleanup only applies in the event that the soil contamination is considered severe and urgent cleanup is required.

2 Is there a definition of contaminated land in your laws?

There is no general definition of soil contamination. In fact, any substance that is not found in the soil by nature and that constitutes a danger to the environment, including public health, may be regarded as soil contamination. Dutch law does, however, provide for a definition of severe soil contamination, in which case, immediate remediation of the soil is required. This obligation is laid down in the SPA and the criteria to judge severe soil contamination have been laid down in the decree *Circulaire Bodemsanering, per 1 juli 2013*. The criteria relate to the type of substances, the concentration, and the amount of soil and groundwater that is affected.

Please note that Dutch policy toward soil protection and contaminated land is changing. This change of policy involves, among others, a further decentralization of responsibilities, and more interrelationships and connections between soil protection and policies in other fields such as energy, water and spatial planning.

The new policy also leads to a shift in cleanup policies and related legislation from a case-oriented approach (which mainly aims at a location-specific approach of the source of contamination at the surface) to an integrated and broader territory-specific approach (which aims to tackle all contamination and imminent harmful effects in a specific territory in the long term, at a higher scale). An agreement between the minister and all other relevant authorities (*Convenant bodemontwikkelingsbeleid en aanpak spoedlocaties*) was signed and published in September 2009. The parties agreed to remediate the most severely contaminated sites with the gravest health risks by 2015.

As a follow up on the *Convenant bodemontwikkelingsbeleid en aanpak spoedlocaties*, the minister and all other parties agreed on a new convenant (*Convenant Bodem en Ondergrond*) in March 2015. The new convenant will be introduced next year and addresses the period from 2016 until 2020.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

The SPA stipulates that anyone who intends to initiate remediation or take action to limit or move the contamination must notify the competent authorities. A remediation plan cannot be initiated unless it

is reported to and approved by the authorities. Such a plan must be in conformity with the requirements laid down in decrees based on the SPA, and provide an accurate measure to clean up the land until the target levels set by the authorities are met. Starting 1 January 2006, the aims of cleanup have changed from a multifunctional cleanup to a functional one. Once the authorities have approved the cleanup plan and have set the date when it may be initiated, the actual cleanup may commence. During the cleanup, the company or person conducting the cleanup must report the progress and developments to the authorities. Upon completion of the cleanup, a final report must be issued to the authorities. The authorities will only approve the final report when it meets the conditions stated in the cleanup plan and if they agree on the restrictions on use of the soil to be sufficient in preventing decrease in the quality of the soil. Without the approval of the authorities, the cleanup cannot be considered completed. In some cases, a level of contamination remains even after cleanup. In these cases, a follow-up (cleanup) plan is required.

Although the SPA provides rules for cleanup in parts or cleanup in phases, cleanup may only begin when the authorities have approved a specific cleanup plan.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The SPA does not, in principle, hold either the landowner (or leaseholder) or the polluter as being primarily responsible for the cleanup. However, the Act clearly holds the polluter primarily responsible for the contamination, and that if the polluter no longer exists, cannot be found or is not creditworthy, the landowner will be held responsible. The authorities have the discretion when deciding whether to assign the responsibility to either the polluter or the landowner or the lessee

N.B. Per Article 55b, the landowner or the leaseholder of (a part of) an employment zone, for the purposes of the SPA, is responsible for the remediation of severe contamination that needs urgent remediation, regardless of whether this owner or leaseholder can be considered the polluter. Even when the (relevant part of the) employment zone is transferred to a third party, the initial landowner/leaseholder remains responsible for the remediation, until the third party has placed a financial deposit for the (costs of) remediation and the provincial authorities have so approved.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

As described in Section 4.1, the landowner is, in principle, responsible for the cleanup of the contamination if the polluter no longer exists, cannot be found or is not creditworthy. Apart from the landowner or the leaseholder of (a part of) an employment zone, for the purposes of Article 55b (see Section 4.1), the SPA does not grant the authorities the power to require an occupant who is not the polluter and who is able to prove that he or she is not the polluter, to conduct a cleanup. However, the occupant can be required to conduct a soil investigation or take measures in order to prevent migration of the contamination to adjacent sites.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

See Section 4.2. Apart from the landowner or the leaseholder of (a part of) an employment zone for the purposes of Article 55b (see Section 4.1), an occupant, such as a lessee, can, in principle, not be held responsible for the cleanup of a site if he or she is not the polluter and is able to prove this. In such event, the occupant can only be required to conduct a soil investigation or take measures to prevent the migration of the contamination to adjacent sites. It is therefore recommended that provisional arrangements with regard to the liability concerning (possible) soil contamination be made in the lease agreement between the lessor and the lessee.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Apart from the landowner or the leaseholder of (a part of) an employment zone for the purposes of Article 55b (see Section 4.1), an occupant is, in principle, not responsible for historical contamination, provided he or she is not the polluter and is able to prove this. This is, however, more complicated with respect to landowners. Pursuant to the SPA, any landowner can be ordered to clean up his or her site if severe contamination is involved and urgent remediation is required. Such an order cannot be given if the owner is able to prove that he or she did not have a permanent legal relationship with the polluters at the time the contamination was caused; that he or she was not – directly or indirectly – involved in the activity that caused the contamination; and that at the time the landowner became the owner, he was unaware of the contamination and could not reasonably be expected to have knowledge of the contamination. It can be argued that if the above three criteria apply, the landowner cannot be held liable for historical soil pollution. At any rate, in such case, the landowner cannot be ordered to conduct a cleanup. The authorities can call for a cleanup by the government. The authorities will shoulder the costs of such an operation. The government can under circumstances bring legal actions against the polluter, or the party that benefits from the cleanup, to recover their expenses.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Pursuant to the SPA and other Dutch regulations, an exploratory soil survey must be conducted in case certain works relating to the ground are being carried out. These works include, among others, ground (construction) work, foundation work, mining and drainage work. After analyzing the results of the exploratory survey, it is decided whether further inquiry is required. A remediation is usually required in case this further inquiry shows that the "intervention values" have been exceeded, the authorities consider the contamination severe and urgent remediation is required. The "intervention values" are laid down in the directive *Circulaire Bodemsanering per 1 juli 2013*.

6 What level of cleanup is required?

Since 2006, Dutch law no longer requires a complete, multifunctional cleanup of historical contamination (caused prior to 1987) . Currently, a cleanup must be carried out to a level such that the soil will be fit for the purpose for which it will be used in the future (*functiegericht saneren*).

Contamination caused from 1987 onward must be removed completely (if technically possible).

7 Are there different provisions relating to the cleanup of water?

In general, groundwater is subject to the same rules as soil and is always treated in combination with the soil contamination.

Since the Water Act came into force in 2009, regulations with respect to (the prevention of) contamination of the waterbed have been moved from the SPA to the Water Act.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

The violation of a number of obligations under the SPA constitutes either a crime or a misdemeanor under the Economic Offences Act (*Wet op de economische delicten*). Furthermore, the willful and illegal contamination of soil, air and the surface water is prohibited under the Dutch Criminal Code.

The penalties comprise imprisonment or fines amounting to a maximum of EUR81,000. The severity of the penalties imposed depends on, among others, whether the contamination was caused by a natural person or a legal entity; on whether it was caused accidentally or deliberately; and on the gravity of the contamination. The Dutch government has issued guidelines containing amounts to be paid when certain offenses are committed, to enable the Public Prosecutions Department to reach settlements in order to prevent legal proceedings.

Mere ownership of a contaminated property is not considered a criminal offense.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

See Section 8. Under Dutch law, noncompliance with described requirements to remediate (in various situations) is a crime or a misdemeanor. The penalties are imprisonment or fines amounting to a maximum of EUR81,000.

10 What authority enforces cleanup?

Generally, the cleanup of soil contamination is enforced by the provincial authorities (specifically, the Provincial Executive or *Gedeputeerde Staten*).

11 Are there any defenses?

There are a number of defenses against cleanup orders, which may or not may be successful, depending on the circumstances. The most common defense is that the party ordered to conduct a cleanup did not cause the contamination. Another defense pertains to the owner (or leaseholder), if he or she can prove that the following three criteria are met: (i) the owner did not have a permanent legal relationship with the polluters at the time the contamination was caused; (ii) the landowner was not – directly or indirectly – involved in the activity that caused the contamination; and (iii) at the time the landowner became the owner, he or she was unaware of the contamination and could not reasonably be expected to have knowledge of the contamination. Also, if the owner is able to demonstrate that he will run substantial financial risks and may even face bankruptcy as a result of conducting the cleanup, it may have a defense against a cleanup order, provided that the evidence demonstrating the financial risks is (sufficiently) convincing.

12 Can third parties / private parties enforce cleanup?

The SPA only entitles the competent authorities defined therein to enforce cleanup. However, if a party has contractually bound itself to conduct a soil investigation and/or cleanup, the other party can enforce that obligation in the event of noncompliance.

13 Can third parties claim damages?

If the contamination has migrated to an adjacent site, this is considered a breach of the other party's right of ownership. The same applies if the contamination may otherwise cause damage to the owner or user of that site, for which the owner or polluter of the contaminated site may be responsible. The third party involved can claim damages for the reduced value of its premises or costs incurred for having the contamination cleaned up, or require the polluter to perform a cleanup.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There is no written requirement laid down in Dutch law for a purchaser or seller to conduct investigations. However, as a rough-and-ready rule, the purchaser has a research obligation whereas the seller has an obligation to provide information. In principle, the obligation of the seller to inform comes before the obligation of the purchaser to perform research.

In case of doubt, the purchaser is, in principle, required to have the soil investigated. If he or she fails to meet this obligation, he or she may not be able to claim compensation from the former owner in case the soil turns out to be contaminated. On the other hand, the seller of a property may not withhold any information available to him or her regarding the state of the property (including any soil contamination). If he or she does so nonetheless, he or she may be held liable by the purchaser for any damages that result in not having shared this information at the time of the purchase. In a claim for breach of contract, the buyer will have to prove that the soil contamination impedes him or her from using the land as contractually agreed upon. The two-year limitation period may be a procedural hurdle for the buyer (if the contamination is discovered too late).

There is a lot of case law on this issue. In many cases, it comes down to whether the seller had a duty to inform. To answer this question, all conditions must be considered. Whether there was a duty to investigate or a duty to inform may depend on the following factors:

- Social attitudes
- Science and the extent of the contamination
- The social position of parties
- Their legal knowledge

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

If a polluter sells and transfers land, he or she will not relinquish his or her obligations to and liability for the property under the SPA. He or she can be held responsible for conducting soil investigations, and if the contamination turns out to be severe and a cleanup is urgently required, he or she will be responsible for conducting the cleanup, even if he or she is no longer the owner.

Furthermore, the landowner or lessee of (a part of) an employment zone for the purposes of Article 55b will remain responsible for the cleanup even when the property is sold and transferred to a third party, until the third party has placed a financial deposit for the cleanup and the provincial authorities have approved so.

15.2 Contractually?

Contractually, the polluter can make arrangements with the purchaser of the land with respect to the liability for soil contamination. However, as the polluter will remain responsible for conducting the cleanup pursuant to the SPA, such contractual arrangements will not prevent it from receiving orders from the authorities in relation to the cleanup. The same applies to the landowner or lessee of (a part of) an employment zone for the purposes of Article 55b. If these parties wish to relinquish their liability in its entirety, the only way to do so is to request an indemnification from the purchaser for

any costs incurred as a result of orders from the authorities or claims from third parties in relation to the contamination.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

A party buying land should be aware of the fact that in the Netherlands, there is no prohibition on selling polluted land. However, Dutch law requires the seller to deliver land that is fit for the intended (known) use of the purchaser. Therefore, if contamination prevents the buyer from using the land for the intended purpose, the seller can be given notice of default. In practice, however, before entering into a contract of sale, the seller or the buyer will conduct a soil investigation. Depending on the outcome of that investigation, the parties can decide to transfer the entire risk relating to soil contamination to the purchaser, to oblige the seller to indemnify the purchaser for any costs, or to oblige the seller to clean up the land.

Increasingly, the government has been trying to recover its cleanup costs from companies that have been "unjustifiably enriched" by such cleanup. Obviously, the market value of a site increases after a cleanup. The government intends to continue benefiting from this windfall and has been increasingly successful doing so. It should be noted that the government enrichment action is not imposed to just the owner at the time of the cleanup, but may be extended to anyone who benefits from a cleanup; this may include a shareholder or a future owner. In a share or asset transaction, both the seller and the buyer should be aware of any possible (latent) enrichment claim by the government and make appropriate arrangements.

Poland

Jacek Korzeniewski
Baker & McKenzie, Warsaw

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The Environmental Law of 27 April 2001 (the "Environmental Law") and the Act on Prevention of Environmental Damages and their Repair of 13 April 2007 (the "Environmental Liability Law") include regulations on contaminated land in Poland. Both acts provide for different legal regimes for land contamination cases – depending on when the contamination occurred.

2 Is there a definition of contaminated land in your laws?

The definition of contaminated land is provided in the Environmental Law and the Ordinance of the Minister of Environment on Standards of Equality of Land of 9 September 2002 (the "Ordinance 2002"). Ordinance 2002 stipulates that the land or ground beneath the surface is considered contaminated if the concentration of at least one substance exceeds the permitted limit, as specified in the annex of this ordinance. If the pollution is a result of a naturally high concentration of a substance occurring in the environment, then the permissible limit is not deemed exceeded.

It should be noted that with regard to contamination caused on or after 30 April 2007, the definition of damage to environment is included in the Environmental Liability Law, whereby damage to environment means any negative and measurable change in the existing state or a change of a destination of land determined in comparison to its original state. Ordinance 2002 still remains applicable in the matter of contamination standards.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. The Environmental Liability Law and the Environmental Law regulate the cleanup and remediation regime in Poland and set forth guidelines on who should perform the cleanup and remediation and bear the costs.

Cleanup occurs when the user of the environment negatively affects the environment. In such case, the environmental protection authority may impose an obligation to restore the environment to a proper state by way of issuing a relevant decision.

Remediation is applied when the contamination exceeds the acceptable level and creates a risk to human health or the environment. Remediation involves actions aimed at removing or reducing contamination, as well as limiting its spread so that the land does not pose a threat to human health or the environment. Pursuant to the Environmental Law, with respect to contamination caused before 30 April 2007, only remediation is applied.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Under the Environmental Law, in the case of contamination caused before 30 April 2007, the primarily responsible party is "the person controlling the surface of the land" (the "controlling person"). The controlling person could be the owner of the land, a holder of a perpetual usufruct right, or another party listed in the land and building register (the number of cases in which another entity may be listed in the land and building register is rather limited).

The person controlling the surface of the land may be released from the responsibility if it proves that the contamination was made by the other person after the date of taking possession of the land by the controlling person. However, if the contamination was caused by the other person acting upon the consent or knowledge of the controlling person, the person controlling the surface of the land will be responsible jointly and severally with the other person that caused the contamination.

It should be noted that the person controlling the surface of the land is obliged to immediately report the contamination to the Regional Director of Environmental Protection (the "Regional Director"). However, that does not release such a person from the above liability.

In the case of land contamination occurring on or after 30 April 2007, the primarily responsible party is "the person using the environment," that is, the polluter. The person using the environment could be an entrepreneur, a legal entity, or a physical person performing commercial, agricultural or other activities that may have an impact on the environment.

The person controlling the surface of the land will be, however, responsible jointly and severally with the person using the environment, if the contamination, or a threat of contamination, was caused by the person using the environment, acting upon the consent or knowledge of the controlling person. In such a case, the controlling person may avoid responsibility only in the event it immediately notifies the authorities of the damage (or a threat of damage) to the environment.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

With respect to damage to the environment caused on or after 30 April 2007, the liability can be passed on to the "controlling person" only in the event the land contamination was caused: (i) upon consent of the controlling person; or (ii) upon knowing of the controlling person in case this person failed to notify the authorities about the contamination.

With respect to damage to the environment caused prior to 30 April 2007, the liability basically rests with the controlling party unless it proves that the contamination was made by another person.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As discussed in item 4.1, the environmental regulations do not use the terms "owner" or "occupier." Accordingly, there are no rules for apportionment of liability. In the event of land contamination caused on or after 30 April 2007, a tenant may be liable as a polluter. In this case, the landlord will be liable on a secondary basis, as discussed in item 4.2.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Under the Environmental Law, the cleanup obligation of the controlling person will generally include historical contamination and is limited to remediation only. Liability may be evaded or limited in four situations.

- First, with respect to land contaminated prior to 30 April 2007, if the controlling person can prove to the authorities that the contamination was caused by another party after he or she gained control over the surface of the land. In this case, the liability for contamination and the obligation to perform the cleanup of the contaminated land will be passed to the party that actually caused the contamination. However, if the controlling person consented to the contamination, the controlling person and the polluter will be held jointly and severally liable for the contamination and cleanup. This rule provides for an "auxiliary" application of the "polluter pays" rule in relation to the damage caused prior to 30 April 2007.

- Second, if the party responsible for the cleanup proves to the regional director that the land became contaminated prior to 1 September 1980, the regional director may agree that the cleanup obligation applies only to the extent that the contamination does not cause any harm and the land is protected against migration of contamination.

- Third, the person controlling the surface of the land on 1 October 2001, will not be responsible for contamination caused by third parties prior to 1 October 2001, if that controlling person reported the contamination to the competent district governor (*starosta*) by 30 June 2004. The report should have included results of tests confirming that the land is contaminated and describing the circumstances that will point to the fact that the land was contaminated by another person.

- Finally, a 30-year limitation period will be applied and the cleanup order cannot be issued with respect to land contaminated before that period. However, as this rule was introduced in 2007, it relates only to contamination caused after that time.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Under the Environmental Law, the cleanup or remediation obligations are triggered as a matter of law when the applicable soil or earth standards are not met, that is, if the concentration of at least one substance exceeds the permitted limit level by the Minister of the Environment in Ordinance 2002. A party responsible for such cleanup or remediation should agree to the terms of the cleanup or remediation with the respective environmental authority.

The authorities will periodically monitor soil and earth quality. The Regional Directors are obliged to maintain records of land where the applicable standards have been exceeded. In areas where the level of contamination goes beyond the applicable standards, the Regional Director may require the person responsible for the cleanup to monitor the environmental state of the land.

The Regional Director will perform cleanup or take other preventive or remedial actions when one of the following situations occurs:

- The party that contaminated the land is not authorized to enter that area to perform cleanup (this party will instead be charged for the expenses incurred during the cleanup).

- The obligation to perform the cleanup cannot be enforced or the enforcement proceedings are ineffective (in this case, the State Treasury pays for the cleanup).

- The contamination is the result of a natural disaster (in this case, the State Treasury pays for the cleanup).

- The cleanup must be performed immediately because human life or health is at risk or because there is a threat of irreversible harm to the environment (the party that actually contaminated the land will be charged for the expenses incurred during the cleanup).

At this point, it should also be mentioned that the Regional Director will perform remediation actions with respect to historical contamination, *inter alia*, when one of the following events occurs:

- Enforcement proceedings concerning the obligation to conduct remediation cannot be brought against the controlling person, or the enforcement has proved ineffective.

- Due to the risk to human health or the possibility of irreversible damage to the environment, it is necessary to immediately carry out remediation.

6 What level of cleanup is required?

The cleanup should be performed to the extent that the soil or earth is restored to a condition that complies with applicable standards. There are some exceptions with regard to historical contamination, as described in item 4.4.

Regulations in Ordinance 2002, which set quality levels for real estate, require that the current and planned function of the land be taken into account in the local zoning plan. A significant number of local zoning plans in Poland have expired and are no longer applicable. New zoning plans are being drawn up, but until they are approved, it is hard to determine precisely the standards according to which real estate should be cleaned up. In such cases, drafts need to be analyzed in order to check the purpose of the land according to the new zoning plan.

7 Are there different provisions relating to the cleanup of water?

The Regional Director may order the relevant preventive or remedial actions in the event of water contamination. The liability rules are similar to those in the case of land contamination.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Contaminating land is not considered a crime. However, in some cases, it may constitute a criminal offense as regulated by the Polish Penal Code. For example, a person who causes an environmental disaster in a plant or animal environment, or who stores, removes or otherwise deals with waste in an illegal manner that may cause environmental danger is subject to criminal liability.

It is not a criminal offense *per se* to own contaminated land in Poland. However, pursuant to the Environmental Law, if a party is obliged to clean up the land or perform other preventive or remedial actions and fails to do so, this is considered a criminal offense. Individuals will also be subject to a fine in case they fail to notify the authorities about an imminent threat to the environment.

The penalty in a specific case depends on the outcome of the illegal acts causing contamination and may include imprisonment (in severe cases) or a fine.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Criminal courts may impose fines on individuals who (as private persons, or acting on behalf of legal entities) fail to meet cleanup obligations or do not take preventive measures. Also, the performance of the cleanup may be enforced through administrative executive proceedings, where fines may be imposed either on individuals or on entities.

10 What authority enforces cleanup?

Cleanup may be enforced by the Regional Director. The Regional Director may also order any other appropriate preventive and/or remedial actions.

11 Are there any defenses?

The means of avoiding or limiting cleanup or remediation liability have been discussed above. From the procedural point of view, the cleanup or remediation order must be imposed in the form of an

administrative decision, which may be appealed to the administrative body of the second instance (the General Director for Environmental Protection), and subsequently, to administrative courts.

12 Can third parties / private parties enforce cleanup?

Besides statutory liability, some Civil Code provisions may apply if land contamination causes, or may cause, harm to people or property. Theoretically, a civil action for cleanup is possible if the contamination constitutes a threat to a third party.

13 Can third parties claim damages?

Civil damages for harm caused by contaminated land may be imposed if causation between the activities of a polluter and the damage is established. There are no legal presumptions or "shifting burden of proof" that would facilitate the establishment of causation specifically in environmental cases. Under the Civil Code, in the majority of cases, the liability of the enterprise operator is unalterable.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No such requirement exists under Polish law.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

The environmental laws and the administrative procedural laws do not address this issue.

15.2 Contractually?

It is always possible for the party responsible for cleanup to pass the liability to third parties, but this will only mean that the damage suffered by the party responsible for the cleanup will be recovered; such party will remain responsible before the authorities for the performance and outcome of the cleanup actions.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

It is important to note that under the previous Polish regulations (in the 1980s and 1990s), there were no binding soil or earth standards and that the entire liability for the cleanup rested with the actual polluter. Under such circumstances, cases of cleanup enforcement were rare, although large areas of land have been contaminated in some regions of Poland.

The number of reported cases of land contamination to obtain a release from the liability for cleanup was rather limited; the deadline for such reporting expired in 2004 (as mentioned in item 4.4).

It is recommended that appropriate due diligence investigations be conducted and that appropriate indemnification clauses be negotiated when entering into real estate transactions in Poland.

Russia

Maxim Kalinin, Olga Pankova and Olga Anikina
Baker & McKenzie, St. Petersburg

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

No, there are no statutes in Russia relating solely to land contamination.

However, many relevant provisions concerning environmental contamination (including contamination of land) are contained in different statutes, which provide regulations regarding different types of contamination (e.g., chemical, radioactive). The main law in this field is Russian Federation (RF) Law No. 7-FZ of 10 January 2002, "On the Protection of the Natural Environment" (the "Environmental Protection Law"). A substantial number of environmental/land protection provisions are also included in RF Land Code No. 136-FZ of 25 October 2001.

Among other legal acts regulating land contamination are the following:

1) General issues

- RF Civil Code (Part I) No. 51-FZ of 30 November 1994
- RF Civil Code (Part II) No. 14-FZ of 26 January 1996
- RF Criminal Code No. 63-FZ of 13 June 1996
- RF Administrative Offenses Code No. 195-FZ of 30 December 2001
- Federal Law No. 78-FZ of 18 June 2001, "On the Land Planning"
- Federal Law No. 4-FZ of 10 January 1996, "On the Melioration of Lands"
- Russian Government Resolution No. 830 of 2 October 2002, "On Approval of Regulations on the Procedure for Land Conservation and Taking It Off from the Turnover" ("Resolution 830")
- Russian Government Resolution No. 1 of 2 January 2015, "On Approval of Regulations on State Land Control"
- Russian Government Resolution No. 262 of 7 May 2003, "On Procedure of Compensation to Land Owners, Land Holders, Land Users and Tenants for Losses Suffered upon Withdrawal or Temporary Occupation of Land Plots, Restrictions on Rights of Land Owners, Land Holders, Land Users and Tenants, or upon Deterioration in the Quality of Land as a Result of the Activities of Other Parties"
- Russian Government Resolution No. 140 of 23 February 1994, "On Land Renewal and on Removal, Preservation and Rational Use of Fertile Topsoil"
- Order No. 525/67 of the Russian Ministry of the Environment and Natural Resources (the "Ministry of Nature") and the Russian Committee on Land Resources and Land Uses (the "Land Committee") of 22 December 1995, "On Approval of Basic Provisions on Land Renewal and on Removal, Preservation and Rational Use of Fertile Topsoil"

- Order No. 238 of the Ministry of Nature of 8 July 2010, "On Approval of the Guidance for Calculation of Damage Inflicted to Soil as an Environmental Protection Object"

- Methods for Determining Damage from Degradation of Soil and Land (as approved by the Ministry of the Natural Environment on 11 July 1994)

- Letter No. 3-15/582 of the Land Committee dated 27 March 1995, "On Recommendations on Methods for Identification of Degraded and Contaminated Lands"

2) Agricultural lands

- Federal Law No. 101-FZ of 16 July 1998, "On State Regulation for Ensuring Fertility of Agricultural Lands"

- Federal Law No. 101-FZ of 24 July 2002, "On the Turnover of the Land of Agricultural Designation"

- Russian Government Resolution No. 736 of 19 July 2012, "On Criteria of Significant Degradation of Ecological Situation Resulted from the Use of Land Plots of Agricultural Lands with Violation of the Rational Land Use Provisions Established by the Land Law"

3) Chemical and radioactive contamination

- Federal Law No. 109-FZ of 19 July 1997, "On the Safe Handling of Pesticides and Agrochemicals"

- Russian Government Resolution No. 112 of 27 February 2004, "On the Use of Lands Which Were Exposed to Radioactive and Chemical Contamination, Performance of Reclamation Works and Clearing Operations on These Lands, Establishment of Protection Zones and Preservation of Facilities Located thereon"

- Procedure for Determining Damage from Land Contamination by Chemicals (as approved by the Land Committee on 10 November 1993, and the Ministry of the Natural Environment on 18 November 1993)

- Rules of exploitation, inspection, repair and discard of oilfield pipelines RD 39-132-94 (as approved by the Ministry of Fuel and Energy of the Russian Federation on 30 December 1993)

4) Sanitary norms and standards

- Federal Law No. 52-FZ of 30 March 1999, "On the Sanitary-Epidemiological Welfare of the Population"

- Sanitary Norms SanPiN 2.1.7.1287-03 "Sanitary-Epidemiological Requirements to the Quality of Soil" (as approved by the Russian Chief State Environmental Health Physician on 16 April 2003)

- Sanitary Norms GN 2.1.7.2041-06 "Maximum Permissible Concentrations of the Chemical Elements in the Soil" (as approved by the Russian Chief State Environmental Health Physician on 19 January 2006)

- Advisory Instruction MU 2.1.7.730-99 "Environment Health Assessment of Soil Quality in Residential Areas" (as approved by the Russian Chief State Environmental Health Physician on 7 February 1999)

5) Waste treatments issues

- Federal Law No. 89-FZ of 24 June 1998 "On Production and Consumption Waste"

2 Is there a definition of contaminated land in your laws?

There is none. There is no common definition of contaminated land in Russian law. In many legal acts, "contaminated" is used as a common notion that needs no further explanations. Still, there are some definitions related to different aspects of contamination that may be useful.

The Environmental Protection Law defines only the general term "contamination of environment," which is the entry of substances and (or) energy, whose characteristics, location or quantity negatively affects the environment.

Furthermore, Federal Law No. 101-FZ of 16 July 1998, "On State Regulation for Ensuring Fertility of Agricultural Lands" uses the term "soil pollution," which is close to "land contamination" and defined in the law (Article 1) as:

> "the content in the soil of chemical compounds, of radioactive elements or of pathogenic organisms in amounts which exert a harmful influence upon human health, upon the environment or upon the fertility of agricultural lands."

Another close term – "degradation of agricultural lands" – is also used in the aforementioned law, which defines it as "a deterioration of the properties of agricultural lands as a result of natural or anthropogenic impact."

Finally, the term "contamination," with respect to not only agricultural lands, is also used in subordinate legislation. In particular, Advisory Instruction MU 2.1.7.730-99[1] contains definitions of "chemical and biological contamination of soil," which apply to soil in urban areas, agricultural lands, health resort territories and industrial lands. This Advisory Instruction defines dangerous contamination as that which has a potential negative influence on the environment, foodstuffs, any human being, biological activity in the soil or the self-rejuvenation of the soil.

The definition of contaminated agricultural lands is provided in the Interstate Standard GOST 26640-85 "Lands. Terms and definitions" (as approved by the Resolution of the USSR State Committee for standards No. 3453 on 28 October 1985). According to the Clause 21 of this Standard, contaminated agricultural lands are lands containing physical, chemical and biological agents, which have an adverse effect on the environment.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

There are no laws specifically devoted to the cleanup of land. However, the legal acts, listed in point 1 of this summary, do contain some general principles and regulations relating to the cleanup of contaminated land (e.g., Russian Government Resolution No. 140 of 23 February 1994, "On Land Renewal and on Removal, Preservation and Rational Use of Fertile Topsoil").

The main law in this field, the Environmental Protection Law, provides for full compensation for damage, including lost profit, caused by pollution and/or contamination of land (Articles 77 and 78).

A similar principle is repeated in the RF Land Code. Article 13 of this statute requires that all landowners, land holders, land users and tenants perform land protection measures. Such measures

[1] Advisory Instruction MU 2.1.7.730-99 "Environment Health Assessment of Soil Quality in Populated Areas" (as approved by the Russian Chief State Environmental Health Physician on 7 February 1999).

include maintenance of soil fertility and protection from erosion, contamination by chemical, radioactive and other substances, and elimination of the consequences of land contamination, including biogenetic contamination and land pollution.

Additionally, pursuant to Article 76 of the RF Land Code, legal entities and individuals are obliged to provide full compensation for damage caused by their violation of land legislation (which includes pollution and contamination of land) and restore/clean up contaminated land by their own means or at their expense.

The above principles are further developed at the level of subordinate legislation. For example, under Regulations on the Procedure for Land Conservation approved by Russian Government Resolution No. 830, governmental authorities may make a decision to withdraw land from turnover if such land cannot be used and conserved. In particular, the Federal Service of State Registration, Land Register and Mapping, together with other federal authorities, are obliged to prepare proposals for land conservation if such land is contaminated or polluted.[2]

4 If so:

4.1 Who is primarily responsible for the cleanup?

The landowner shall be deemed primarily responsible for the cleanup, unless another responsible person is duly identified under the applicable rules.

- Liability of landowners

According to Article 210 of the RF Civil Code, the burden of maintenance of land is placed on the owner of the property unless any other applicable laws or contracts alter this situation.

This obligation is attached to land and applies regardless of whether the landowner is actually responsible for the pollution or contamination, or whether he or she knew about the contamination prior to purchasing the land.

Furthermore, as mentioned, not only landowners but also land users and tenants are obliged to perform land protection measures (see Article 13 of the RF Land Code). These include eliminating the consequences of land contamination and pollution.

Therefore, usually the landowner and/or land users and tenants (as the case may be), rather than the polluter, is primarily responsible for cleanup.

- Liability of polluters

The abovementioned general rule stated in the Environmental Protection Law (Articles 77 and 78) implies that a person causing damage to the natural environment (including land) must compensate the aggrieved party for the actual costs of restoring the damaged natural environment and all other losses incurred, including lost profits.

This rule is further developed in the RF Land Code (Articles 62 and 76), which states that a wrongdoer is obliged to provide full compensation for damage caused by their violation of land legislation (which includes pollution and contamination of land) and restore/clean up contaminated land by his or her own means or at his or her expense.

Under Russian law, therefore, polluters are not strictly responsible for the cleanup of contaminated land by themselves, but could be compelled to pay compensation only. Usually, the court decides

[2] Land that is conserved in such a way remains to be held by owners, users or tenants if the land has been exposed to radioactive or chemical contamination and may no longer be used. It may be transferred to the land reservation fund and thus withdrawn from the turnover.

whether the damage should be compensated in cash or in kind (i.e., by placing on the polluter the duty of restoring the natural environment at his or her own expense).

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Since under Russian law the landowner is primarily responsible for the cleanup, failure to identify a polluter does not change anything, and the landowner remains responsible for the cleanup in this case as well. Furthermore, since the polluter is not identified, the landowner will be unable to recover compensation from the polluter for the damage and the cost of decontamination.

Therefore, it is always prudent for a purchaser to undertake environmental due diligence of the land prior to purchase and to allocate clearly the liability for any required cleanup in the contract of sale. Indeed, the cost of cleanup may be an important factor in determining the purchase price of the land.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

According to the general rule specified in the RF Civil Code (Article 210), the burden of maintenance is placed solely on the landowner, unless any other applicable laws or the contract of lease or other forms of occupancy provide otherwise.

The applicable law, namely the RF Land Code, places the obligation to perform land protection measures on landowners, land holders, land users and tenants (see Article 13). The RF Land Code does not, however, define how performance of this obligation should be apportioned between these parties.

Therefore, under Russian law, the liability in the matter in question could be finally apportioned between a landowner and an occupier only by a respective agreement. The RF Civil Code, for its part, establishes, for example, certain general rules for lease agreements, including land lease. These rules shall apply unless a landowner and a tenant agree otherwise.

In particular, under these rules, the tenant shall be obliged to maintain land in good condition, to carry out an overhaul at his or her own expense and to bear expenses for the maintenance of land (Article 616 [2]). Furthermore, with the termination of the lease agreement, the tenant shall be obliged to return the land to the owner in the same condition in which he or she received it, with allowance for normal wear and tear or in the condition specified in the agreement.

In view of the above, one may conclude that by default, the liability to clean up under a land lease agreement is on the tenant's side. However, parties to the lease may alter this in the way they consider more appropriate.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Russian law does not contain any specific rules on historical contamination concerning land plots owned by entities or individuals. Thus, common rules on cleanup and decontamination in a situation where a polluter may not be identified shall apply (see answer to question 4.2).

There are certain recommendations on how to estimate cumulative damages from historical contaminations. The relevant amounts are calculated on the basis of the harm that befell the environment by business or other past activities, including damage from the violation of

environmental laws and losses (costs) for rectification and prevention of further adverse consequences.[3]

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Yes, there are certain regulations specifying limits to polluting substances, based on how it is decided whether land and/or soil is contaminated.

In Russia, these regulations are specified in a form of Sanitary-Epidemiological Rules and Norms ("SanPiN" in Russian transliteration), which are part of subordinate legislation (the most relevant of them are listed in the answer to question 1 above). These SanPiN statutes specify permitted limits to polluting substances for different types of situations.

Furthermore, under the Environmental Protection Law (Articles 22 and 23), the respective land users who perform the relevant activities on the land are obliged to obtain permitted limits for disposal and/or storage of waste and/or sewage water if such activities eventually cause or may cause land pollution. Such limits are established individually on the basis of the overall analysis by the authorities of acceptable man-made impact on a specific territory.

If the limits are violated, the entity may be fined or its activities suspended or terminated, depending on the type of violation. The worst-case scenario is that the respective land may be withdrawn from the user and even from the owner.

From a procedural standpoint, the question of whether cleanup is required is decided by the appropriate state authorities, acting on the basis of law and subordinate legislation.[4] State land control is carried out in the form of regular checkups, which may be scheduled and unscheduled (e.g., in response to the received information or report).

6 What level of cleanup is required?

No direct answer to this question is provided in Russian law.

However, since there are officially established threshold limits to polluting substances (specified in SanPiN), cleanup shall be deemed sufficient if pollution levels are brought into compliance with these limits.

7 Are there different provisions relating to the cleanup of water?

Yes, there are.

[3] Methodological recommendations regarding taking inventory of the historical cumulative environmental damage objects approved by the Order of the Federal Service for Supervision of Natural Resource Usage No. 193 on 25 April 2012

[4] Under Russian government resolution "On Approval of Regulations on State Land Control", the powers to conduct state control over use of land are apportioned among several authorities, each of them being responsible for a specific area of control, namely: (a) the Federal Service for Supervision over Use of Nature is responsible for state control over the observation of requirements related to cleanup and recultivation of land and land protection; (b) the Federal Service on Veterinary and Phytosanitary Supervision performs control over land use and land protection with respect to agricultural lands and lands with the permitted use "for agricultural purposes"; and (c) the Federal Service of State Registration, Land Register and Mapping may also undertake control measures within its powers, as stated by legislation.

As mentioned in the answer to question 5 above, under the Environmental Protection Law (Articles 22 and 23), the respective land users are obliged to obtain permitted limits for disposal of sewage water, which are established individually. Similar to the case with the land, there are respective statutes (SanPiNs) establishing threshold limits to water pollution for different situations.[5]

With respect to the cleanup of water, we note that Article 35 of RF Water Code No. 74-FZ of 3 June 2006 (the" Water Code"), provides for the establishment of permitted limits on the impact on water bodies, which has to be defined by water protection authorities taking into account characteristics of the precise water body (their group). In respect of those water bodies where such limits have not been established yet, the respective sewage discharge standardizations shall be based on the threshold limits of chemicals, radioactive materials and microorganisms that have already been established,[6] i.e., based on the respective SanPiNs.

Furthermore, there are additional laws that apply specifically to water and place more onerous obligations of cleanup on polluters. Article 11 of Federal Law No. 52-FZ of 30 March 1999, on the "Sanitary-Epidemiological Welfare of the Population," obliges individual entrepreneurs and legal entities, in keeping with their activity, to draw up and implement environmental and counter-epidemic (preventive) measures. These measures are aimed at removing or reducing the harmful influence of environmental factors on man and preventing the rise and spread of infectious diseases and poisoning. These include cleaning up any pollution that has occurred.

Separate rules contained in Federal Law No. l55-FZ of 31 July 1998, "On Inshore Sea Waters, Territorials and Adjacent Zone of the Russian Federation" govern the pollution of seas. This law (Article 34) states that any kind of activity in inshore or territorial waters may be carried out only in the presence of a positive final report by a state environmental assessment made at the expense of the user of these natural resources. The polluter under this law will be liable for reparation, but is under no obligation to clean up.

As a general rule, water pollution also attracts civil, administrative and criminal liabilities under the applicable legislation.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is not a criminal offense to own contaminated land, but land contamination may be subject to criminal law.

In particular, Article 254 of the RF Criminal Code provides that:

> "poisoning, polluting, or causing any other deterioration of land through harmful products of economic and any other activity, due to the violation of the rules for dealing with fertilizers, plant growth stimulators, chemical weed-killers, any other dangerous chemical or biological substances during their storage, use, or transportation, which entails the infliction of harm to human health or the environment is punishable by a fine of up to RUB200,000 (approximately EUR5,160 or USD6,830), or the equivalent amount of the wage or salary or any other income of the convicted person for a period of up to 18 months, or by

[5] See, for example, SanPiN 2.1.4.1175-02 "Sanitary-Epidemiological Requirements to the Water Quality of Non-centralized Water Supply; Sanitary Protection of Water Sources"; SanPiN 2.1.5.980-00 "Sanitary-Epidemiological Requirements to the Protection of Surface Waters"; and SanPiN 2.1.7.573-96 "Sanitary-Epidemiological Requirements to the Usage of Discharged Waters and Its Fallout for Irrigation and Fertilization."

[6] Article 6.2 of Federal Law No. 73-FZ of 3 June 2006, "On Putting into Force of the Russian Water Code." Such limits were expected before 1 January 2015; however, they were not established.

disqualification from holding specified offices or from engaging in specified activities for a term of up to three years, or by unpaid community service for a term of up to 480 hours, or by corrective labor for a term of up to two years."

Moreover, the same acts, committed in a zone of environmental distress or in a zone of environmental emergency, shall be punishable by restriction on certain actions for a term of up to two years, or by imprisonment for the same term or (beginning from 1 January 2017) by mandatory labor for the same term.

If any of these acts cause a person's death through negligence, imprisonment for a term of up to five years or (beginning from 1 January 2017) mandatory labor for the same term is possible.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

No. Noncompliance with the requirement to clean up is not a criminal offense.

10 What authority enforces cleanup?

In accordance with the RF Land Code and other land and environmental protection legislation, control and supervision over the use and protection of lands is carried out by the authorized governmental bodies and their territorial subdivisions. Such authorized governmental bodies include the following:

- Federal Service for Supervision in the Sphere of Natural Resource Use
- Federal Service on Veterinary and Phytosanitary Supervision
- Federal Service of State Registration, Land Register and Mapping
- Federal Service on Ecological, Technological and Atomic Supervision
- Federal Service on Hydrometeorology and Environmental Monitoring
- Federal Agency of Forestry
- Federal Agency of Water Resources
- Federal Service on Supervision in the Sphere of Protection of Consumer Rights and the Human Welfare

They cooperate with other executive bodies at the federal, the RF constituent or local (municipal) levels.

11 Are there any defenses?

Yes, there are, depending on the situation.

In general, the mere fact of an unlicensed level of pollution or contamination of the land makes the landowner or occupier liable for cleaning it up.

However, the landowner or occupier may undertake certain actions to protect himself strongly, both prior to the acquisition of a land plot (see answer to question 4.2), during the land purchase contractual negotiations (see answers to questions 4.3 and 15.2) and after the land plot is acquired (see answer to question 4.1).

From the standpoint of a polluter, the following could be used for the purpose of defense in the event of land pollution:

a) Proving that a breach of environmental legislation did not take place

To find that someone is in breach of environmental legislation, the courts must fully and objectively investigate the facts of each case. In order to establish the amount of damages, the court could give orders for carrying out an expert examination.

The elements that must be proven to establish the liability of a polluter for compensating for damage caused to third parties are the following:

- The level of contamination is outside acceptable or permitted limits.
- There is a causal link between the action/inaction of the polluter and the contamination (polluter may argue that the damage is a result of force majeure or the actions of another person).
- The polluter's actions were intentional, careless or negligent.

If the court is unable to prove these elements, the individual, entity or organization will not be liable.

b) Proving that a breach of environment legislation has been identified and/or recorded with the violation of applicable procedural rules

On appeal, the court shall determine, among others, if an environmental offense has occurred, how it was manifested, and whether all procedures for its identification and recording were duly observed. If the court is unable to verify any of the above elements, the claim against the polluter could be rejected.

12 Can third parties / private parties enforce cleanup?

Yes.

For example, the Environmental Protection Law (Article 11) empowers individuals to demand that the appropriate bodies take measures to protect the natural environment. Such a right includes the right to make demands in administrative or judicial proceedings, requiring the appropriate body to restrict, suspend or terminate the activities of enterprises that exert a negative influence on the natural environment (Articles 34 and 80).

13 Can third parties claim damages?

Yes.

The Environmental Protection Law (Article 77) states that anyone causing damage to the natural environment, personal property, human health or the national economy by breach of environmental law is obliged to provide compensation in full (including to any third parties).

Furthermore, according to Article 79 of the Environmental Protection Law, the costs of the damage caused to the health or property of an individual by a negative environment influence arising from the activity of individuals or legal entities must be reimbursed in full. The amount of such reimbursement payment must be determined in accordance with the present legislation (e.g., in accordance with the available methods for determination of damage).

As discussed above, Article 76 of the RF Land Code provides that legal entities and individuals are obliged to provide full compensation for the damage (including to any third parties) caused by their violation of land legislation (which includes pollution and contamination of land), and restore/clean up contaminated land by their own means or at their expense.

The right of a third party to claim damages in the situation in question is also specified by the general provisions of the RF Civil Code on obligations arising as a consequence of causing harm, namely by Article 1064: "The injury inflicted on the personality or property of an individual, and also the damage done to the property of a legal entity, shall be subject to full compensation by the person who inflicted the damage."

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No, there is no such requirement under Russian law.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Yes.

When a land plot purchase contract is concluded, all the rights and obligations connected with the land plot are transferred to the new landowner, including the obligation to perform land protection measures. Hence, the obligations of cleanup and renovation of the land are transferred to the purchaser.

However, the purchaser will have a right of action against the seller (as the polluter) under Article 62 of the RF Land Code for compensation for losses and Article 76 of the RF Land Code for compensation for damages and costs of the cleanup. Article 78 of the Environmental Protection Law establishes a 20-year statute of limitation for claiming compensation for damage caused to the natural environment by violation of environmental legislation.

Also, if the seller does not notify the purchaser about the contamination of land sold, the purchaser has the right to file a claim connected with the purchase of an item of substandard quality, including the right to rescind the purchase contract (Articles 475 and 557 of the RF Civil Code; Article 37 of the RF Land Code).

15.2 Contractually?

Yes.

As mentioned, the obligation to clean up and decontaminate the land transfers default to the new landowner. The same may be repeated in a land plot purchase contract.

Parties to the contract of sale have the right to allocate liability for cleanup and renovation expenses to either party (Article 210 of the RF Civil Code). Where the seller of land is the polluter, the purchaser should certainly include a term in the contract of sale, allocating the liability for cleanup to the seller, and should withhold a portion of the purchase price until the cleanup is completed. Alternatively, the purchaser could deduct cleanup expenses from the purchase price.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

None.

South Africa

Mike van Rensburg, Janine Howard, Tanya Seitz, Morne van der Merwe and Darryl Bernstein
Baker & McKenzie, Johannesburg

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes, the National Environmental Management Waste Act, 59 of 2008 (NEMWA) regulates waste management in order to protect the environment and the health of the people by providing reasonable measures regarding the remediation of contaminated land. The Contaminated Land Provisions of NEMWA was enforced on 2 May 2014. The Department of Environmental Affairs has also promulgated two sets of draft regulations, namely, the Regulations for Site Assessments and Reports and the Draft National Norms and Standards for the Remediation of Contaminated Land and Soil Quality, on 9 March 2012. To date, the draft regulations have not been enacted.

Although the National Environmental Management Act, 107 of 1998 (NEMA) does not specifically deal with land contamination, it introduces a number of guiding principles into South African environmental legislation. Further, NEMWA must be read with NEMA, unless it is indicated that NEMA does not apply. NEMA places a duty of care on any person who has caused or may cause significant pollution or degradation to the environment in general to take reasonable measures that will prevent such pollution or degradation from occurring, continuing or recurring. Where pollution cannot be reasonably avoided or stopped, measures must be put in place to minimize or rectify such pollution or degradation of the environment.

2 Is there a definition of contaminated land in your laws?

NEMWA provides that "contaminated" in relation to land means:

> "the presence in or under any land, site, buildings or structures of a substance or microorganism above the concentration that is normally present in or under that land, which substance or microorganism, directly or indirectly, affects or may affect the quality of soil or the environment adversely."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

NEMWA regulates the remediation of contaminated land and has as one of its objects the remediation of land where contamination presents, or may present, a significant risk of harm to health or the environment.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Section 36(5) of NEMWA requires an owner of land that is significantly contaminated, or any person who undertakes an activity that caused the land to be significantly contaminated, to notify the Minister of Environmental Affairs and Tourism (the "Minister") and a member of Executive Council (the "MEC") of the affected province as soon as that person becomes aware of the contamination. Once the land has been identified as a possible contamination site, the Minister/MEC may order a site assessment, or instruct the owner of the land/person who may have caused the contamination to conduct a site assessment. Section 38 of NEMWA provides that upon consideration of the site assessment, should the Minister/MEC decide such area is contaminated and requires remediation, the Minister or MEC must declare the land to be a remediation site and make such remediation order as is necessary to neutralize the risk. Unless the remediation order provides otherwise, the cost of the

remediation must be borne by the person to whom the remediation order is issued, which can be the landowner or the polluter.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

NEMWA does not specifically provide for a situation where the original polluter cannot be found. However, the remediation order referred to above can be issued to the person who caused the degradation OR the land owner.

Further, Section 28 of NEMA allows the Director-General of Environmental Affairs and Tourism (the "Director-General") to issue a directive under Section 28(4) of NEMA that will order the following persons to take reasonable measures to remedy contaminated land:

- Any person who was directly or indirectly responsible or contributed to the pollution
- The owner of the land at the time the pollution occurred, or the owner's successor to the title
- Any person in control of the land or who had the right to use the land when the degradation was caused
- Any person who negligently failed to prevent the degradation from occurring

That is, if the above person(s) failed to take reasonable measures to prevent the degradation from occurring.

Finally, the Director-General may take reasonable measures to remedy the situation and recover the costs from any of the aforesaid person(s).

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Section 11 of NEMA holds that if more than one person is liable under Section 28, the liability must be apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment, resulting from their failure to take measures that could have prevented the degradation.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Any owner/previous owner may be held liable for remediation if a remediation order has been issued against such person(s). In this regard, see questions 4.2 and 4.3.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

There are currently no regulations specifying pollutant limits. The decision that a cleanup is required lies within the discretion of the Minister and MEC, following a site assessment or investigation of land that is suspected/reported to have been subjected to land contamination.

6 What level of cleanup is required?

Sections 38(2) and 39 of NEMWA provides that when issuing a remediation order, the Minister or MEC shall set out the measures that must be taken to remediate the land and/or the standards that

must be complied with when remediating the land. Therefore at present, the level of cleanup required falls within the Minister or MEC's discretion. If the Draft Norms and Standards for the Remediation of Contaminated Land and Soil Quality should be enacted, this will provide a more uniform national approach to the remediation of contaminated land.

7 Are there different provisions relating to the cleanup of water?

Section 19(1) of the National Water Act, 36 of 1998 provides that an owner of land, or person in control of or who occupies land on which any activity or situation exists, which caused or is likely to cause water pollution, must take all reasonable measures to prevent any such pollution from occurring or continuing. In this regard, a catchment management agency (bodies responsible for implementing catchment management strategies within a given water management area), or the Minister of Water Affairs and Forestry where such a body has not been established, may issue a directive, instructing any person who fails to take such measures to comply with Section 19. Such directive will specify the level of cleanup required. Should such person fail to comply, the catchment management agency can take its own measures to remedy the situation and recover the costs from the offender.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

(a) No, it is not a criminal offense to contaminate land. However, Section 28 of NEMA assigns a statutory duty to every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures that will prevent such degradation from occurring or continuing to occur, in so far as can reasonably be expected. Breach of the aforesaid duty can result in a remediation order being issued against the polluter, as described in question 4.1, and contravention thereof will result in the penalties described in question 9.

(b) No, it is not an offense to own contaminated land. However, the purchaser of land should be aware that successors to the title can be held liable in terms of a remediation order, and contravention of the aforesaid will lead to the penalties as set out in question 9.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Section 67(a) of NEMWA holds that it is an offense to contravene a remediation order issued under Section 38, or any order requiring measures to be taken to monitor and manage the risk to the environment. Such contravention can result in a fine not exceeding ZAR10 million, imprisonment for a period not exceeding 10 years, or both. Further, it will be considered an offense by the owner of the land or person conducting the contaminating activity if he or she does not notify the Minister and MEC of contamination as soon as that person becomes aware of it, an offense that is punishable by a fine not exceeding ZAR5 million, imprisonment not exceeding five years, or both.

10 What authority enforces cleanup?

The Environmental Management Inspectorate was established by Chapter 7 of NEMA. It comprises environmental officials from the national, provincial and municipal spheres of the government. The Minister and MEC can also designate individuals to act as Environmental Management Inspectors.

11 Are there any defenses?

There are no specific defenses provided for by NEMA or NEMWA, but any person may apply in writing to the Minister or MEC for exemption from the application of the provisions of this legislation. Further, any decision by a body acting under delegated power from the Minister, pursuant

to NEMA or NEMWA, may be taken on appeal to the Minister or MEC, who may rule on such appeal within their discretion. Section 68(5) of NEMWA furthermore stipulates that a court may review the penalty described in question 9. The court has to consider two factors when exercising its discretion on review, namely: (a) the severity of the offense in terms of its impact or potential impact on the environment and on the health, well-being, safety of people; and (b) the monetary or other benefits that the convicted person enjoyed through the commission of the offense. Therefore, there is room to motivate a reduction in the penalty.

12 Can third parties / private parties enforce cleanup?

Yes. Section 28(12) of NEMA provides that a third party may apply for a court order compelling the Director-General or provincial head of department to issue a directive or take action in terms of Section 28.

13 Can third parties claim damages?

Yes. Damages can be claimed through private prosecution allowed under Section 33(1) of NEMA. A third party must prove that a private prosecution is in the public's interest or in the interest of the protection of the environment. Such party can institute and conduct a prosecution proceeding in respect of any breach or threatened breach of a duty, provided that the duty is concerned with the protection of the environment and the breach of that duty constitutes an offense.

Further, a third party that has suffered damages can file a civil suit based *in delict*.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No. However, as the new owner can be held liable for the cleanup of historically contaminated land, it is advisable that should there be suspicion of contamination, to either conduct an investigation or obtain a warranty from the seller that the land is not contaminated.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

The party responsible for cleanup is the party identified as such by the Minister in the remediation order. The only way this statutory liability to clean up can be passed to the purchaser is if the Minister amends the order. Section 38(4) allows for the amendment of a remediation order if: (a) ownership of the land is transferred and the new owner assumes responsibility for remediation, in writing; or (b) new information or evidence warrants amendment of the order.

15.1 Under the general law and contractually?

Yes, provided that the remediation order is awarded as described in question 15.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Section 40 of NEMWA states that no person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated. Further, land, in respect of which a remediation order was served, cannot be transferred without the written authorization of the Minister.

Spain

Xavier Junquera, Ruth Urbano and Elisabet Cots
Baker & McKenzie, Barcelona

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The Waste and Contaminated Land Act (Law 22/2011, of 28 July), applicable at the national level, dedicates a whole chapter (Articles 33 to 38) to regulating contaminated land. The Waste and Contaminated Land Act is the framework of any autonomous community's development and must be respected and complied with in any event.

Also, Royal Decree 9/2005, of 14 January, approved by the Spanish government, establishes a list of activities that may contaminate land, as well as criteria and quality standards required to declare land as contaminated.

In addition, the Spanish Constitution vests the autonomous communities with regulatory authority in all areas concerning the protection of the environment, including contaminated land. Some autonomous communities have already passed regulations concerning contaminated land, establishing their own statutes, as well as notification and cleanup procedures.

2 Is there a definition of contaminated land in your laws?

Article 3.x) of the Waste and Contaminated Land Act, dated 2011, defined contaminated land as:

"…all land, the characteristics of which have been negatively altered by virtue of the existence of dangerous chemical components of human origin in a concentration such that it puts human health or the environment at unacceptable risk, according to the criteria and standards set forth by the government and established in an administrative resolution."

For the purpose of the definition, it is important to note that Article 2 of Royal Decree 9/2005 defines land as "the upper layer of the earth's crust between the bedrock and the surface," excluding the part of the earth's surface permanently covered by a layer of water.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Royal Decree 9/2005, of 14 January, is composed of nine articles, three additional provisions and eight annexes. Annex I is the list of 105 activities deemed to potentially contaminate land. These are commercial or industrial activities that may cause land contamination due to the use of hazardous substances or waste generation. Annex II establishes the contents of the preliminary soil quality report to be provided for sites by those engaged in the activities listed in Annex I. Annexes III to VIII establish the criteria and quality standards by which to declare land as contaminated, including the technical requirements that must be taken into account.

Some autonomous communities have passed additional regulation, developing national laws.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Cleanup procedures are imposed on the liable party, as follows: (i) the party that caused the contamination, that is, the polluter; (ii) in the event there are various parties involved, all of them

jointly and severally; and (iii) alternatively and in this order, the owners of the contaminated land and the actual possessors of such contaminated land.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

- The Waste and Contaminated Land Act establishes the following liability scheme for land contamination:

- The individual or legal entity that has directly caused the land contamination shall be held liable. If there are more than one, the liability shall be jointly and severally distributed.

- If the individual or legal entity that has directly caused the land contamination cannot be found, the owner of the contaminated site shall be held liable.

- If the owner cannot be found, the possessor of the land shall be held liable.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

See above.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

At present, historical contamination is not specifically dealt with in Spanish environmental legislation. When land contamination is detected, environmental authorities may impose cleanup procedures on the current owner or possessor. Such detection of contamination could take place when a license for a new activity or the change of use of a property is applied for, since the application may entail the need to report on and to investigate soil conditions. The regulations passed in some autonomous communities provide that co-payment of decontamination with public funds is possible under certain circumstances.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Generally, once the environmental authorities become aware, by any means (third parties, the waste producer or the police), of the existence of land contamination, an administrative procedure will be initiated. In the course of this procedure, the environmental authorities will determine the existence of land contamination, the liable party, the fines to be imposed and the cleanup procedures to be conducted by the liable party at its own expense.

Royal Decree 9/2005 sets general reference levels for the corresponding substances, listed in Annexes V and VI, which must be taken into consideration during the land contamination evaluation. Moreover, the environmental authorities of the autonomous community must determine what generic reference levels must be taken into account for each specific case, considering the present and future use of the land.

In addition, when land is classified as "contaminated," cleanup procedures must be carried out, applying the best available techniques. The scope of the recuperation activities must also guarantee acceptable risk levels for the remaining contamination.

Land will be declared decontaminated when cleanup activities guarantee that it is does not present an unacceptable risk to human health or the environment, and has been so declared in an administrative resolution.

Article 34.1 of the Waste and Contaminated Land Act establishes that the autonomous communities must prepare and approve a public list or inventory of contaminated industrial sites and real estate properties in their respective jurisdictions. This inventory shall provide information in connection with the location of the contaminated land, the owner thereof, the date and details of the administrative resolution by which the land has been classified as contaminated, and the cleanup procedures that have been imposed. The autonomous communities have started passing their inventories gradually.

6 What level of cleanup is required?

Article 54.1 of the Waste and Contaminated Land Act establishes that the person in charge of remedial measures are obliged to restore the land to the circumstances existing before the administrative infraction. Use-related standards are also taken into account when defining the scope of the cleanup obligation so that the final result is compatible with the use to which the area is dedicated (i.e., industrial, residential, etc.).

7 Are there different provisions relating to the cleanup of water?

Law 29/1985, on Water, as amended by Legislative Royal Decree 1/2001, which approved the revised water regulations (the "Water Act"), also establishes sanctions for those dumping or spilling waste material into water sites – coastline, hydraulic resources (rivers, lakes, etc.) – thus causing water contamination.

Article 92 of the Water Act, as amended by Articles 97 and 100 of Legislative Royal Decree 1/2001, forbids "any direct or indirect spill of water or waste material or of any waste product that contaminates continental waters or any other element of the hydraulic public domain, unless said spill has been previously authorized by the competent administration," as well as "any activity which may cause contamination or degradation of the hydraulic public domain."

If there is an uncontrolled spill or discharge, or a spill or discharge contravening the procedure and limitations established in the mandatory discharge authorization, the competent water agency (*Organismos de Cuenca*) shall initiate an administrative procedure in which the damage caused to the hydraulic public domain will be evaluated. The water agency is the administrative body vested with jurisdiction to authorize discharges, revoke discharge authorizations or even revoke a special water concession.

Article 108 f) of the Water Act, as amended by Articles 116 and 117 of Legislative Royal Decree 1/2001, describes the infraction consisting of a spill that deteriorates water quality or draining conditions, without due authorization. Moreover, Paragraph a) penalizes actions that cause damage to the hydraulic public domain, and Paragraph c) penalizes the failure to comply with administrative authorizations.

The infringements contained in the Water Act are categorized as very serious, serious and slight, depending on the repercussions to the hydraulic public domain and public order, the risk to human safety, the circumstances of the liable party, degree of malice, obtained profit, participation and deterioration caused to the natural resource (Article 109).

Fines range from EUR10,000 to EUR1 million, depending on the infringement.

Article 110 of the Water Act, as amended by Article 118 of Legislative Royal Decree 1/2001, provides that regardless of the fine, the transgressor shall also repair the damage caused to the hydraulic public domain.

In connection with underground water contamination, please note that Royal Decree 9/2005 establishes that if there are signs of contamination in underground waters, this shall be reported to the Water Agency.

Royal Decree 1514/2009 on underground water was passed on 2 October 2009. It came into force on 23 October 2009, and implements Directive 2006/118/EC, and Paragraphs 2.3, 2.4 and 2.5 of Annex V to Directive 2000/60/EC. The Royal Decree sets out measures to prevent and limit pollution of groundwater and establishes the criteria and procedures to assess its chemical state.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

- To contaminate land

Criminal offenses regarding environmental damage are contained in Articles 325 through 340 of the Spanish Criminal Code. Article 325 of the Criminal Code establishes that:

"Punishment will consist of sentences of prison terms of from two to five years, from eight to twenty-four months of [*per diem*] fines and specific professional or trade disqualification for a period of from one to three years, for the person that, in violation of the laws and other regulations of a general nature protecting the environment, directly or indirectly provokes or produces: (i) emissions; (ii) spills; (iii) radiation; (iv) extractions or excavations; (v) land removal; (vi) noise; (vii) vibrations; and (viii) injections or deposits, in the atmosphere, the ground, the subsoil, or terrestrial, maritime or subterranean waters, including any incidence in their peripheral boundary areas, as well as (ix) the collection or capture of water to a degree that may seriously damage the balance of natural systems. If the great risk of damage is to human health, the higher half of the prison term scale shall be imposed."

Therefore, land contamination will be considered a criminal offense whenever it results from a contravention of environmental laws, such as waste disposal without the corresponding administrative waste disposal permit or waste disposal exceeding the limits set forth in the administrative waste disposal authorization.

- To own contaminated land

According to the current criminal liability scheme regarding environmental offenses, and in a scenario in which a criminal offense has been committed through an industrial activity, criminal liability may be assigned to:

- the individual within an offending company's organizational structure considered to be the perpetrator of the offense due to his/her direct responsibility and singular capacity to fulfill the action or omission deemed an offense;

- the individual within an offending company's organizational structure who fulfills functions, the consequences of which constitute a specified offense, even though the individual does not meet the requirements necessary to be considered directly responsible. In such cases, individual liability shall be assigned whenever the individual is a director, corporate agent or business representative, and meets the necessary requirements for such accusation. In any event, such liability will only be assigned if the action is found to be an offense. Thus, it will be necessary to prove the effective fulfillment of the functions, the exercise of which has led to the offense, as well as to the causal relationship between the failure to comply with environmental regulations and the occurrence of the offense; or

- the offending company, as of the amendment of the Criminal Code, effective 23 December 2010.

The foremost element in the specified offense is the infraction of environmental regulations, which constitutes the basis of the accessory relationship between criminal law and administrative law.

Otherwise, the specified offense may consist of any action in a long list considered to fall under this category.

Articles 326 and 328 of the Criminal Code establish various types of serious offenses specified by Article 325, the majority of them having to do with industrial pollution and waste. A particularly serious offense is the concealment of relevant information regarding the industry's effects on the environment.

Investigation of environmental offenses may be triggered by the initiative of environmental agencies, the public prosecutor's office and by any individual acting in defense of the damaged environment, regardless of the fact that the individual may or may not have suffered any damage as a result of the environmental offense (e.g., non-governmental organizations or NGOs).

Finally, pursuant to the toxic and hazardous waste regulations, criminal proceedings do not paralyze other proceedings (of either an administrative or civil nature) that might have been initiated previously, seeking the restoration of the state of the environment prior to the damage or seeking economic compensation. In such event, the criminal jurisdiction will determine the corresponding civil liability resulting from the environmental offense subject to criminal investigation.

In light of the above, if criminal proceedings were to be initiated to investigate and determine criminal liability arising from or associated with land contamination, the liability would be imposed on the company's officers found liable for and guilty of the criminal offense.

- The penalties:

The penalties established for any person declared guilty of an environmental crime are:

- prison term of two to five years;
- fines ranging from eight to 24 months (fines are established at *per diem* rates, which may range from approximately EUR1.50/day to EUR300/day); and
- specific professional or trade disqualification for a period of one to three years.

Legal entities may face:

- fines ranging from two to five years for offenses punished with prison terms of more than five years;
- fines ranging from one to three years for other offenses; or
- obligation to wind up, suspension of activity for up to five years, closing of establishments for up to five years, professional or trade disqualification for up to 15 years; and prohibition from entering into contracts with public entities, from benefiting from subsidies and social bonifications, and court intervention of the company.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

The Waste and Contaminated Land Act establishes that infractions regarding land contamination may be regarded as slight, serious or very serious, depending on the resulting damage, the situation of the transgressor, the degree of participation and a repeat of the incident, as well as the benefit obtained by the polluter (Articles 46 and 48 of the Waste and Contaminated Land Act).

Failure to comply with directives regarding cleanup procedures is deemed a very serious infraction, since Article 46 of the Waste and Contaminated Land Act makes "the failure to comply with the autonomous authorities' orders to clean up or remedy the contamination or with any other agreement established by the contaminator and the environmental authorities" a very serious administrative offense.

According to Articles 46.2 c) and f), 47.1 a) and 54 of the Waste and Contaminated Land Act, fines to be imposed on the liable party may total EUR1.75 million.

Furthermore, Article 55 of the Waste and Contaminated Land Act grants the competent environmental agency the authority to impose dissuasive fines on transgressors that do not comply with the cleanup obligation.

10 What authority enforces cleanup?

Cleanup obligations are enforced and monitored by the competent environmental agency of the autonomous community where the site is located.

11 Are there any defenses?

In principle, if a person is found to be liable for land contamination, this person shall be responsible for carrying out the cleanup procedures. Once a disciplinary procedure starts, however, the liable party may propose cleanup procedures to the environmental agency. This proposal will normally trigger negotiations with the environmental agency to seek an agreed-on remediation plan. This is a convenient approach in cases presenting a historical contamination problem.

12 Can third parties / private parties enforce cleanup?

Even though the legal regime on civil liability in connection with activities with adverse impact on the environment still mainly follows fault-based criteria (i.e., for a party to be held liable, there must be guilt or negligence), the Supreme Court resolutions and regulations recently passed are introducing and applying strict liability criteria, which consider only the cause-effect relationship between the activity and the damage caused, and disregard other considerations in connection with the diligence or guilt of the polluter.

13 Can third parties claim damages?

Third parties are entitled to claim damages for land contamination.

Historically, the Spanish Civil Code, regarded as the basis for Spanish private law, has addressed the civil liability arising from land contamination through the provisions regarding non-contractual obligations or tort, contained in Article 1902 of the Civil Code, which establishes that: "Who causes damage to another through act or omission, with the intercession of guilt or negligence, is obliged to offer reparation for the damage thus caused."

In order for a third-party claim regarding land contamination to succeed under civil law provisions on tort, the third party must prove:

- the action or omission of the party causing damage;
- the existence of a real damage to his or her interest; and
- a causal link between the polluter's action or omission and the damage caused to the third party.

More recently, Law 26/2007 of 24 October on Environmental Liability established a strict liability pattern, following the pattern of the German law on environmental civil liability.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No investigation is legally required in the event of sale, although Royal Decree 9/2005 provides that the owners of land in which some potentially polluting activity has been developed in the past shall declare this circumstance during the sale of the land.

When requesting a license or authorization for the establishment of any activity other than those potentially pollutant, or entailing a change in land use, the submission of a status report will be required.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

If the polluter sells contaminated land, Article 33.2 of the Waste and Contaminated Land Act would apply.

According to this article and Royal Decree 9/2005, in order to ensure the parties' knowledge of a land's contamination at the time of purchase, owners of properties where the activities established in Annex I of said Royal Decree have been conducted must declare that fact in the public deed of sale. Furthermore, this declaration must be registered as a marginal note in the purchase's registration at the Property Registry.

If the land is declared contaminated by the relevant environmental authorities of the autonomous community, this declaration shall be registered in the land's entry as a marginal note. The marginal note will only be removed from the registry when the contamination has been remedied and certified as such by the relevant environmental authorities.

The Real Estate Registry is a public record, and a potential purchaser may therefore become aware of the declaration of the land as contaminated even before the purchase.

15.2 Contractually?

From a Civil Law perspective, if a land's contamination is not disclosed by the seller to the purchaser and the land is accepted by the purchaser prior to the sale and purchase, the purchaser would be entitled to bring an action, which is the so-called *Acción por Vicios Ocultos* (Action for Hidden or Latent Defects), against the seller.

Pursuant to this action, individuals and companies selling their land or industrial venture are liable to the purchaser for any possible site contamination or for any damage that their industry may have caused to the environment before its sale, even if the damage does not show until after the sale. This liability stems from the obligation to sell goods free of encumbrance, as established by Articles 1461 and 1474 of the Civil Code, and consists of the selling party's liability to the purchaser with regard to: (i) peaceful possession of the sold goods; and (ii) hidden or latent defects that the sold goods may have.

The selling party is obliged to deliver goods in the physical or legal conditions assumed to be true by the parties entering into the sale and purchase agreement. In any event, even in a case of good faith, the selling party must answer to the purchaser for any economic disruptions caused by the purchased goods or any defects unknown or unforeseen by the purchaser. Such problems shall constitute breach of contract, which must then be remedied. A possible termination of the agreement may take place, even though provisions had not been made for such a situation.

Application of the theory of hidden defects requires that:

- a hidden or latent defect or damage exists;
- the existence of the said defect or damage is unknown to the purchaser; and
- the defect or damage had existed prior to the sale and purchase contract. The defect or damage must also be of a serious nature. That is, it must be a defect or damage that would have dissuaded the purchaser from making the purchase, had he or she known of its existence.

Repercussion for hidden or latent defects shall take place within six months of the date of the contract, and, if such is the case, it will result in either the annulment of the agreement with the return of the purchase price, called *acción redhibitoria* (action for recovery), or a reduction of the original price, called *acción estimatoria* (action in equity).

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

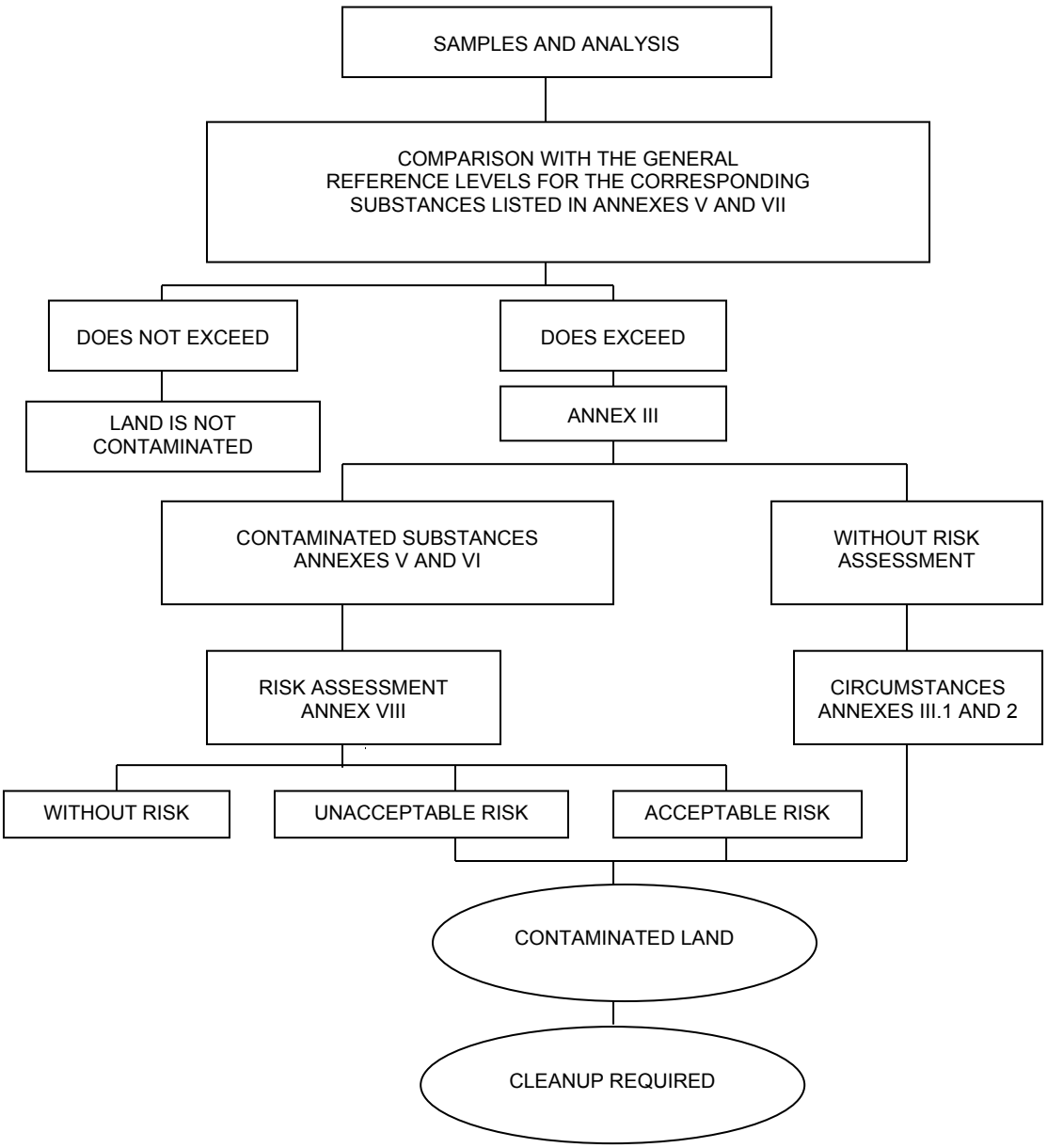
It is important that prior to the execution of the sale and purchase agreement, the potential purchaser of land in Spain carry out an investigation into the zoning classification of the land. This must be done at the city hall with jurisdiction in the territory where the land subject to the sale and purchase transaction is located. Often, zoning plans approved by municipal governments contain valuable information about environmental issues relating to the land included in these plans. In addition, a visit to the corresponding environmental agency should be considered.

Furthermore, if the sale and purchase relates to the acquisition of an industrial facility, it is recommended that the sale and purchase agreement include a clause whereby the seller holds the purchaser harmless against any liability arising in connection with the operation of the industrial facility during the five-year period after the closing date, provided that such liability derives from facts that occurred prior to the closing.

Moreover, Royal Decree 9/2005 established the obligation of those engaged in the activities listed in Annex I to provide a preliminary report on the soil quality of their sites to the environmental agency before February 2007. This preliminary report had to include general information on waste and contaminating substances produced by or used in the site's activity, as well as the storage of the same. After reviewing the information provided in the preliminary report, the environmental agency was entitled to request further data, or even order that analyses be carried out. In addition to the preliminary report, status reports shall also be provided to the environmental agency with the frequency to be determined by the autonomous communities as a general rule, or on a case-by-case basis. Having available the information related to the preliminary report and subsequent requirements (as the case may be) may also serve the interest of the potential purchaser.

While the implementation of Royal Decree 9/2005 is pending development of procedural matters and parameters in many autonomous communities, the Ministry of Environment approved in January 2008 the Technical Guidelines for the Application of the Royal Decree. This document provides the methodology, criteria and standards for the declaration of contaminated land.

Please see the scheme below showing the procedure for land to be considered contaminated.


SAMPLES AND ANALYSIS
COMPARISON WITH THE GENERAL REFERENCE LEVELS FOR THE CORRESPONDING SUBSTANCES LISTED IN ANNEXES V AND VII
DOES NOT EXCEED
DOES EXCEED
LAND IS NOT CONTAMINATED
ANNEX III
CONTAMINATED SUBSTANCES ANNEXES V AND VI
WITHOUT RISK ASSESSMENT
RISK ASSESSMENT ANNEX VIII
CIRCUMSTANCES ANNEXES III.1 AND 2
WITHOUT RISK
UNACCEPTABLE RISK
ACCEPTABLE RISK
CONTAMINATED LAND
CLEANUP REQUIRED

Sweden

Tobias Edenman and Jonatan Loor
Baker & McKenzie, Stockholm

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Chapter 10 of the Environmental Code clarifies the liability to remedy environmental damage, that is, to perform investigation, cleanup (*efterbehandling*) and other measures to remedy such damage. The regulations are applicable to environmental damage through contamination of, among others, land and water areas, groundwater, buildings and structures. The rules are based on the "polluter pays" principle.

2 Is there a definition of contaminated land in your laws?

Environmental damage is stipulated in Chapter 10 of the Environmental Code and divided into contamination damage (*föroreningsskador*) and serious environmental damage (*allvarlig miljöskador*). Contamination damage is defined as environmental damage that may cause damage or detriment to human health or the environment by contamination of land and water areas, groundwater, buildings or structures. Serious environmental damage includes that which constitutes a considerable risk to human health by, for example, contamination of land.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Liability for remediation rests primarily with the party conducting the activity (the polluter).

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The landowner is secondarily responsible. If the party conducting the activity is unable to perform the cleanup, someone who has acquired the land after 1 January 1999, may be held responsible for the cleanup of contamination damage if he or she was aware of the contamination at the time of the acquisition or ought to have discovered it when inspecting the land before entering into any acquisition agreement.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

If there are several polluters, they will as a general rule be jointly liable. As among the polluters, the liability will be shared on the basis of what is reasonable based on each party's contribution to the pollution and the circumstances in general. The landlord could also be held responsible in accordance with what is stated in Section 4.2.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes.

However, the transitional provisions of the Environmental Code indicate that the remedy for damage and the performance of remediation is applicable to ongoing environmentally hazardous activities that have continued after 30 June 1969.

If no one can be held liable for historical contamination, it is ultimately the authorities that will have to pay for the cleanup.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The County Administrative Board (*Länsstyrelsen*) decides, and it bases its decision on an assessment of whether a cleanup must be performed.

6 What level of cleanup is required?

Normally, the level of cleanup that is required is set to guidelines set forth by the Environmental Protection Agency (*Naturvårdsverket*).

7 Are there different provisions relating to the cleanup of water?

No.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Owning contaminated land is not a criminal offense. However, it is a criminal offense to contaminate land if it has been done intentionally or through negligence. Contamination is not regarded as a criminal offense if the action resulting in the contamination was permitted or could be held justifiable. The possible penalties are a fine or imprisonment not exceeding two years. If the offense is serious, the penalty shall be imprisonment of not less than six months but not more than six years.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

It is not a criminal offense to defy an order from the administrative authorities to perform a cleanup. However, such an order may be issued under penalty of a fine.

10 What authority enforces cleanup?

The County Administrative Board enforces cleanups.

11 Are there any defenses?

Yes, it is possible to appeal a decision handed down by the County Administrative Board to the Environmental Court.

12 Can third parties / private parties enforce cleanup?

No.

13 Can third parties claim damages?

Yes. Damages can be claimed by third parties.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No. Please note what is stated in Section 4.2. It is, of course, important for a buyer of land to inspect it properly.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

If a party has been found responsible to clean up contaminated land, this responsibility cannot be transferred to another party that acquires the property.

15.2 Contractually?

The buyer and seller of land are, of course, free to agree that the buyer shall carry out the cleanup on behalf of the seller. However, this is not binding in relation to the authorities.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Since the buyer of land could end up responsible for the cleanup of contaminated land, it is important to inspect the land properly and to negotiate appropriate warranties in the purchase agreement.

Switzerland

Daniel Peregrina
Baker & McKenzie, Geneva

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Since the enactment of the Federal Law on Environmental Protection (FLEP) in 1983, Swiss law has tried to regulate soil contamination. In that year, the Swiss legislator introduced, under Chapter 5 of the FLEP, an initial regulation that seeks to safeguard soil fertility. In order to achieve such goal, a federal decree on soil contamination adopted in 1986 set limit values for 11 metals and required the cantonal authorities to continuously monitor soil conditions. If those limits were exceeded, the cantonal authorities were authorized to impose certain abatement measures in the area of air pollution and waste management. Those rules, however, were not directly applicable to contaminated industrial areas and did not set any obligation to clean up contaminated sites.

This gap in the Swiss environmental legislation was filled in 1997 by the introduction of Articles 32c to 32e in the FLEP. These articles were again amended in December 2005 in order to improve the situation of the innocent owner who discovers the pollution of his land.

According to this regulation implemented by the Swiss government, the cantons have to ensure the supervision and cleanup of waste sites and contaminated sites where there are damaging or dangerous emissions or risks of future emissions. The cantons must also establish a public register of waste sites and contaminated sites.

Furthermore, the costs of any measures are to be borne by the polluter. Where there are several contributors to the pollution, the costs have to be divided among them. The owner of a waste site or a contaminated site may also be liable. However, he or she may escape liability if he or she can show that despite a careful due diligence, he or she did not know of the contamination. In order to finance the cleanup of waste sites, operators of waste sites and waste exporters may be asked to pay a fee for the storage of waste.

Based on the above, the federal government adopted the federal decree on contaminated sites on 26 August 1998. This federal decree entered into force on 1 October 1998.

2 Is there a definition of contaminated land in your laws?

According to Article 2 of the Federal Decree on contaminated sites (the “Federal Decree”), the following sites are considered polluted:

- All waste disposal sites
- Industrial sites where substances hazardous to the environment are being or have been used
- Sites polluted consequent to an accident or a catastrophe

According to Article 2, paragraphs 2 and 3 of the Federal Decree, those polluted sites are officially considered contaminated sites if the pollutants in the soil exceed specific values or if the air emissions linked to the soil contamination exceed the limit values provided by the same decree.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Please refer to 1.

4 If so:

4.1 Who is primarily responsible for the cleanup?

According to Article 20 of the Federal Decree, the preliminary investigations, as well as the cleanup of a contaminated site, rely primarily on the company or the individual controlling the site, which is usually the landowner or the lessee of the land. However, the authorities can ask a third party to proceed with the investigations and cleanup of the sites if it is clear that the third party is at the origin of the contamination of the land, provided that the landowner agrees.

The cantons may also proceed with the investigations and the cleanup of the polluted sites if it is necessary to prevent undesirable situations, i.e., if the person who has to proceed is unable to execute the measures, or if the latter does not act despite a warning.

It is very important to stress that Swiss law clearly makes a distinction between the obligation to proceed with the investigations and the cleanup of the sites with the liability for the payment of the said measures. In this respect, the payment liability is primarily on the polluter. The owner of the land, who is generally in charge of financing the said measures, can escape such a liability if he or she can show that despite a careful due diligence, he or she did not know of the contamination of the land. The landowner, who is required to proceed with a cleanup, is authorized to request the authorities to issue a decision determining the company or the individual who will, in the end, have to indemnify the land owner for the investigation measures, as well as for the cleanup of the contaminated sites. If the individuals liable for the payment of the measures cannot be identified or are bankrupt, the authorities have to indemnify the landowner for the costs he or she has incurred.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The landowner is generally liable for the payment of the investigations and the cleanup. If the landowner is not the polluter, he or she can escape such a liability if he or she can show that despite a careful due diligence, he or she did not know of the contamination of the land. In such a scenario, if the individuals liable for the payment of the measures cannot be identified or are bankrupt, the authorities have to indemnify the landowner for the costs he or she has incurred.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

An occupier can be held liable for the cleanup of the sites from a financial point of view only if he or she is also the polluter. If there are various polluters, the authorities will determine the share to be paid by each polluter, based on the origin of the contamination. According to recent case law, a landowner who acquires land knowing that it is polluted may have to pay up to 20 percent of the clean-up costs, even if her or she has not participated in the actual pollution act.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The cleanup liability does include historical contamination. An innocent landowner may nevertheless be in a position to avoid his or her liability according to what has been discussed under 4.1. As mentioned above, the recent amendment aims to exclude historical contamination from the cleanup liability of an innocent owner. According to the amendment, if the polluter cannot be found or is bankrupt, it is up to the cantonal authorities to finance the cleanup of historical contamination. This obligation is financed via the tax paid by the owners of waste disposal sites in Switzerland or by the exporters of waste. These taxes are then allocated to the investigations and cleanup paid by the cantons for polluted sites on which no waste has been disposed of after 1 February 2006, and for which the polluters could not be found or is bankrupt, as well as for polluted sites that have been mainly used for the disposal of urban waste.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

If there is a suspicion of soil contamination, the cantonal authorities are authorized to request a preliminary investigation of the site, including some analyses of the soil and the underground water. The Federal Decree provides limit values; if the said values are exceeded, the site has to be cleaned up.

6 What level of cleanup is required?

According to Articles 15 and 16 of the Federal Decree, the objective of the cleanup is to avoid any further substantial risk to the environment and, more specifically, to groundwater. A complete cleanup of the site is not necessary if it is possible to regularly monitor the site in order to avoid any future risk to or contamination of groundwater. The objective of the cleanup is not to restore the fertility of the land, but only to avoid any future risk of air or groundwater contamination due to contaminated soil.

7 Are there different provisions relating to the cleanup of water?

There are none, as long as the contamination of the water is linked to a contaminated site. However, there are various decrees ensuring the quality of water in Switzerland.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

As such, the contamination of land is not a criminal offense, so owning contaminated land is therefore not a criminal offense. But when land is contaminated, this usually means that the polluter has not complied with other obligations provided for by the FLEP, such as the obligation to take the necessary measures in order to avoid a major accident, and the interdiction to dispose of waste outside authorized waste disposal sites. Violation of these obligations is considered by the FLEP as a criminal offense. The maximum penalty is a fine of CHF1,080,000 (EUR900,000) or imprisonment for a maximum of three years.

Please note that criminal law is usually not used by the Swiss authorities in enforcing environmental legislation.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Not proceeding with a mandated cleanup is considered a criminal offense. The maximum penalty is a fine of CHF10,000 (EUR8,300).

10 What authority enforces cleanup?

According to the Federal Decree, it is ultimately up to the cantonal authorities to enforce the cleanup of contaminated sites. If the land owner refuses to proceed with a cleanup ordered by the cantonal authorities, or if it is not in a position to do so, the authorities can proceed to clean up the sites themselves and recover the costs from the polluter.

11 Are there any defenses?

Please refer to 4.1.

12 Can third parties / private parties enforce cleanup?

No.

13 Can third parties claim damages?

According to Article 59a of FLEP, the owner of a facility posing particular risks to the environment is strictly liable for any damage caused by emissions resulting from the realization of this risk. These rules also apply to contaminated sites. However, this liability does not include purely environmental damage, that is, damage that cannot be attributed clearly to one individual or to several individuals, but only to the public.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No, it is not. According to a new amendment to Article 32d *bis* FLEP entered into force on 1 July 2014, the sale of land registered as a polluted site into the Swiss register of polluted sites is subject to prior authorization by the cantonal authorities. The authorization is granted if the site is not deemed to be a risk for air or groundwater contamination or if a sufficient guarantee for the potential cleanup costs is provided to the authority. A historical analysis and preliminary investigation of the soil or groundwater may therefore be requested by the authorities prior to the issuance of the authorization.

This new amendment has also introduced the possibility for cantonal authorities to request any polluter of a land to submit, in advance, a guarantee covering the necessary investigation and cleanup costs of the pollution. Furthermore if a landowner may be held totally or partially liable for the clean-up costs, the authorities may subject any sale of the contaminated property to the delivery of a guarantee covering the liability of the landowner for the investigation and cleanup costs.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

If a polluter sells his land, he or she remains, from a contractual point of view, liable *vis-à-vis* the purchaser for the cleanup of the land. Nevertheless, this guarantee lapses after one year. The parties are free to agree, either to renounce such a guarantee, or to extend the validity of the said guarantee for more than one year. Nevertheless, please note that the polluter cannot be held liable for contamination that the purchaser could have discovered by conducting due diligence review of the land (Article 200 of the Swiss Code of Obligation).

15.2 Contractually?

The polluter can agree with a third party that such party indemnifies or holds harmless the polluter in case of remedial action requirements. The authorities, however, are not bound by such contractual agreements, which leaves the polluter with the risk of being required to remedy a site in the case of insolvency of his or her contractual partner.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

In order for an innocent landowner to avoid any possible liability, as described under 4.1, it is highly recommended that prior to a purchase of land in Switzerland, a careful due diligence be carried out, including examining some soil samples if there are reasonable grounds to think that the land may be contaminated.

Turkey

Hasmet Ozan Guner, Ismail Esin, Daniel Matthews, Birturk Aydin, Sertac Kokenek and Gokce Serez
Baker & McKenzie, Istanbul

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The principal legislation regarding land contamination under Turkish law is the Environment Law, dated 9 August 1983 and numbered 2872. "Land" falls within the scope of definition of "environment" in this law. The Environment Law's main framework has been conserved despite numerous amendments. In this respect, the Environment Law's provisions – especially Article 8, which imposes the duty to prevent contamination if there is any such risk and remove or mitigate the results of the contamination, and Article 28, which deals with the responsibility of the polluter – are applied in cases of land contamination. In addition, Article 1, enacted by an amendment dated 26 April 2006, refers to the legal basis of the regulation explained below, and sets forth the concrete principles relating to the conservation of lands. Furthermore, Article 2 bestows an obligation on enterprises, institutions and corporations to establish departments for environmental management/conservation or to obtain the relevant services from an outside source.

Article 16 of the Law on the Land Use and Conservation dated 3 July 2005 and numbered 5403, which entered into force on 19 July 2005, instructs the governorships to take relevant measures required for the prevention and the removal of the issues contaminating and polluting the land. The said article confirms that land polluters shall be subject to the provisions of the Environment Law.

As to applicable secondary legislation, the Regulation on the Control of the Land Contamination and the Fields Contaminated by Point Source Pollution, dated 8 June 2010 (the "Regulation"), replaced the Regulation on the Control of the Land Contamination, dated 31 May 2005.

2 Is there a definition of contaminated land in your laws?

The Regulation defines "contaminated land" as follows: "The fields or installations that pose serious risks for human and environment health, taking into consideration the actual use of the land and use of the land in the future, as well as the results of the assessment process set forth in the Regulation, in which it has been confirmed that the polluting substances resulted from human activities and in which a decision to clean up has been made."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes, the Regulation deals with the cleanup issues regarding contaminated land and the liability arising therefrom. Furthermore, the land polluter's liability based on Article 28 of the Environment Law for the damages resulting from the pollution they have caused is reserved. Within scope of this provision, it is possible to claim not only the cleanup costs, but all damages arising from the pollution. In addition to the Environment Law provisions, a claim may be raised against the land polluters on grounds that: the land has been used in breach of the legal limits of immovable property ownership (Turkish Civil Code (CC) Article 730); the pollution results from premises that are in need of repair (Code of Obligations (CO) Article 69); the pollution harms the claimant's assets (CO Article 49); and the impact of the pollution on the claimant's assets must be prevented (CC Article 683), provided that the conditions of the mentioned articles are satisfied.

4 If so:

4.1 Who is primarily responsible for the cleanup?

Pursuant to the Article 25 of the Regulation, the operations for the cleanup must be completed by "the field owner," under the supervision of the relevant province's Contaminated Lands Surveillance and Evaluation Commission (the "Commission"). The field owner is described under the Regulation as the person who causes the pollution or the potential for pollution. Therefore, under Turkish laws, those who generate the pollution are liable for the cleanup operations. As explained below, however, new field owners who acquire the relevant fields are also deemed liable for the cleanup per Article 38 of the Regulation. The other sources of liability, such as the Environment Law, the CC or the CO, cannot be raised against the new field owners.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Article 25 and 4(e) of the Regulation holds the land polluters liable in line with the liability regime prescribed by the Environment Law. The owner or occupier cannot be held liable solely on the grounds that they hold the title to the property, as long as their conduct does not lead to the contamination. If the polluter does not fulfill his or her obligation, or the polluter cannot be identified (in this case the relevant field is named an un-owned field), the administration itself carries out the required cleanup operations, and the costs arising therefrom as a public receivable will be collected from the polluter, if identified.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Despite its unclear wording, it is accepted that the polluters are jointly liable under the Environment Law. The scope and conditions of the joint liability will be determined in line with the CC's relevant provisions. Thus, the administration may oblige each polluter to implement the cleanup, or claim from each polluter all costs of the cleanup operations that have been carried out by the administration.

Apportioning the liability to each polluter will be determined by the judge *pro rata* relative to the danger created by each polluter. However, it must be stated that the fault of the polluters will not be an important determinant since the applicable laws and regulations provide for strict liability of the polluters without regard to their fault. It must also be noted that the polluter who has paid damages more than the amount that he or she should have incurred is entitled to claim reimbursement of his or her excessive payments from the other polluters.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

There is no specific provision governing historical contamination. In this respect, it must be stressed that the principle of "the polluter is liable," which is stipulated by the Environment Law, will be applied to contaminations that have occurred after the entry into force of the said law. The costs resulting from the cleanup and other damages may be requested in this context. The land owner, however, remains liable for the contamination that occurred before the Environment Law was enacted, but the owner may claim compensation from the seller of the land. Furthermore, the new field owners will be held liable for the cleanup as explained above, if the polluter field or facility is acquired after 8 June 2015.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The issue of whether cleanup is necessary is determined by a risk assessment based on criteria, such as the impact on fauna, the quantity of the pollution and the polluted surface. In this context, the procedure is as follows:

The owners of facilities conducting the activities listed under Annex 2 Table 2 of the Regulation must notify the City Directorate of Environment and Urbanization of their activities. Following the notification, the directorate will assess the activity, and decide whether the field is suspected of being polluted or not in line with Annex 4 of the Regulation. Furthermore, the fields where the administration has observed inconsistencies with the applicable laws and regulations, and where industrial accidents have occurred, will also be deemed as suspect fields. Pursuant to the Regulation, other fields where the land or the groundwater are contaminated (the un-owned fields) and fields where the source of contamination is unknown are also classed as suspect fields.

In the suspect fields, which have been determined as explained, the administration will do a preliminary assessment of each source of contamination. If the preliminary assessment shows that the field does not need to be controlled, no other act will need to be carried out. If it is understood that the field is contaminated, the cleanup process will need to be carried out. However, the preliminary assessment may lead to the second phase assessment if the preliminary evaluation does not provide sufficient results. Following the second phase assessment, the final decision on the suspected fields will be issued.

It must also be noted that the second phase assessment must be implemented by the field owner.

If the source of contamination and the polluter substances are known, the grading system set forth by Annex 8 of the Regulation will be used for the assessment.

If the pollutant substances cannot be identified or they are among the substances marked as M under Annex 4 of the Waste Management Regulation, and if a sample of pollutant substance or waste can be extracted, it will be categorized pursuant to the Regulation and the Hazardous Substances and Preparations' Classification, Packaging and Labeling, and the Regulation on the Control of Hazardous Wastes. After classification, if it is understood that the pollutant substance or waste is hazardous, the abovementioned assessment based on the grading system will be made.

If no sample of the pollutant substance or waste can be extracted, soil, and if possible, groundwater and soil gas samples will be obtained instead. These samples will be evaluated in line with the parameters set forth in Annex 2 of the Regulation and compared with the values in Annex 9 of the Regulation.

6 What level of cleanup is required?

There is no threshold regarding cleanup in applicable laws. The aim of land cleanup is determined according to reports prepared by organizations and institutions appointed by the field owner, and such cleanup activities are performed with the approval of such reports by the Commission in order for the level of cleanup to be determined.

7 Are there different provisions relating to the cleanup of water?

The procedures set forth by the Regulation are for land cleanup only. However, contamination of the groundwater must be considered as a criterion to determine if there is land contamination. Moreover,

liability under the general provisions and the Environment Law for water contamination may give rise to claims against water polluters.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

According to the Turkish Criminal Code (TCC), contaminating land constitutes a criminal offense. Pursuant to Article 181/1 of the TCC, anyone who intentionally contaminates land, air and/or water by means of disposing waste and residual materials in violation of legally established technical procedures, and harms the environment, will be punished with imprisonment of six months to two years. Pursuant to Article 181/3 of TCC, if the wastes and leftovers disposed cause permanent harm to land, air or water, the penalty will be doubled. Pursuant to Article 181/4 of TCC, anyone who, by their acts, causes: (i) irremediable illnesses to humans and animals; (ii) atrophy of reproduction; or (iii) waste to be processed in such a manner that changes the nature of plants or animals, will be punished with imprisonment of at least five years and a judicial fine of up to 1,000 days. In this regard, it can be said that if the act is committed deliberately, it will constitute criminal offense. If such a crime is committed through the misuse of a license or permit that a legal entity holds due to its field of activity, such a license or permit may be cancelled as a precautionary measure.

Under Turkish law, notwithstanding the general principle to punish intent, if the contamination is committed by negligence, it, too, shall be punished. Pursuant to Article 182/1 of the TCC, anyone who acts negligently and thus, causes contamination will be punished with a judicial fine; if the waste and residual materials disposed of cause permanent harm to land, air and water, the punishment will be imprisonment of two months to one year. Pursuant to Article 182/2 of the TCC, anyone who causes, by negligence: (i) irremediable illnesses to humans and animals; (ii) atrophy of reproduction; or (iii) waste to be processed in such a manner that changes the nature of plants or animals, will be punished with imprisonment of one year to five years.

Since Article 181/1 and Article 182/1 of the TCC came into force on 12 October 2006, and Article 181/3-4 and Article 182/2 of the TCC did so on 1 June 2005, such an act committed prior to these dates will not be considered a crime.

It must be stressed that owning or buying contaminated land is not a criminal offense under Turkish law. The owner of the contaminated land will not be criminally liable unless he or she intentionally or negligently contaminates the land or participates in such criminal act by committing in common, abetting or contributing to the contaminating act. The criminal liability applies to intentional or negligent polluters and those who participate in the commitment of the criminal act. As to the obligation of the land owner to clean up, please refer to our explanations made above.

If the abovementioned crimes are committed by a legal entity, that legal entity's criminal liability will be limited to security measures only. However, persons who constitute the bodies of that legal entity will face criminal liability. In this case, members of the board of directors who decide to commit this crime, or otherwise commit the board of directors' similar decision to commit this crime, and executive directors, employees and anyone who constitutes a relevant body of the legal entity have the criminal liability.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Under Turkish law, failure to comply with the requirement to clean up is not a criminal offense. However, this will lead to administrative fines, as provided for under the Environment Law.

10 What authority enforces cleanup?

The land owner bears the burden of cleanup; however, this process is enforced by the capable expert corporations or organizations. At this point, the Commission acts as a supervisory, observing and approving authority. If the polluter cannot be detected or does not fulfill its obligations, the governorship takes over the necessary measures for cleanup when a complaint is filed, or at its own discretion by virtue of its authority.

11 Are there any defenses?

Under relevant provisions of Turkish law, the liability of the polluter is irrespective of whether he or she has fault in the pollution . The polluter may only defend himself or herself on the grounds that pollution has not occurred, or there is no causal link between his or her act and the pollution. Also, it is possible to file a nullity suit against the Commission's acts, which are within the scope of Regulation, based on the grounds that pollution does not exist, or there is no causal link between its act and contamination. Moreover, in respect to penal responsibility, the polluter can claim that there was no intent or negligence in the acts causing pollution, and in any case, the polluter can claim that pollution has not occurred.

12 Can third parties / private parties enforce cleanup?

As explained above, if the polluter refrains from fulfilling its obligations, the administration enforces the cleanup operation by means of capable expert corporations or organizations on behalf of the polluter. The administration shall act when a complaint is filed, or at its own discretion by virtue of its authority.

The administration can enforce the cleanup on behalf of the polluter by obtaining a court order, based on the grounds of tort, enforcement of title in the immovable property, or improper use of immovable property against legal restrictions. If this provision is not fulfilled by the polluter, pursuant to Article 30 of Bankruptcy and Enforcement Law, cleanup should be enforced by a third party and the polluter will be liable for paying the third party's service fee. Anyone may demand compensation for the losses arising out of costs incurred in having cleanup enforced by themselves or third parties.

13 Can third parties claim damages?

As briefly mentioned above, there are sufficient legal grounds for third parties to claim losses arising from pollution under Turkish law.

Pursuant to Article 28 of the Environment Law, those who pollute the environment will be held liable, regardless of their fault, for the losses arising out of such an act. In this regard, third parties may claim compensation, provided they prove that the requirements mentioned before have been fulfilled. Such a claim will not be subject to the statute of limitation of liability for tort according to the amendments made in 2006, and subject to the five years of statute of limitation starting from the cognition of damages and offender.

On the other hand, claims arising out of general provisions regarding contractual liability or liability for tort are reserved.

Furthermore, pursuant to Article 69 of the Code of Obligations, if the contamination arises from failure in the construction during the building process, the owner may be held liable for the losses, regardless of whether the contamination is his or her fault, and if the contamination arises from lack of maintenance of a structure, the owner and the beneficial owner may be held liable jointly for the losses, regardless of their fault. In this case, according to Article 72 of the Code of Obligations, such a claim is subject to a two-year statute of limitation starting from the cognition of damages and offender, and will, in any case, expire within 10 years from the date the damaging act was committed.

Contamination is also a violation of the rules on uses of real property by owners. In this regard, Article 730 of the CC will apply. The person affected by contamination may file a lawsuit seeking restitution from the owner, claiming compensation, as well as prevention and removal of the contaminating pollution. The liability of the owner in this case is irrespective of whether he or she has fault in the pollution. Furthermore, the owner will also be liable for the acts of the owners of the personal rights on the land that are in violation of Article 730 of the CC. It is also stated that other owners of limited property right in the land are liable to the extent of their rights. Such claims will expire two years from the cognition of damages and offender, and, in any case, expires 10 years from the polluting act.

Lastly, any claim of compensation for damages due to the administration's liability for not preventing contamination may be addressed to the administration, pursuant to Article 69 of the CO. Third parties' privileges regarding clearance activity are explained in the previous question above.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There is no regulation pursuant to Turkish law that imposes an obligation to the purchaser or the seller of a property to conduct investigations for potential contamination.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

As we mentioned above, the principle is "the polluter is liable." On the other hand, if the fields and installations that are causing contamination are transferred to another person, the new owner will be liable for cleanup, pursuant to the Regulation. However, in this case, the purchaser can raise claims to the seller for the defective/bad performance, as explained below.

In addition, the claims for damages due to the lack of maintenance of the buildings based on Article 69 of the CO should be addressed by the new owner of the building. Other claims should be addressed by the polluter.

15.2 Contractually?

The parties may have an agreement regarding the liability arising from the damages resulting from contamination; however, such an agreement has *inter partes* effect only.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

The contamination of land, and especially land liable for cleanup, constitutes a defect of the purchased land. Moreover, it means that the purchaser has an essential error. Besides, this may constitute misrepresentation by the seller, where the seller has intentionally hidden such a defect. In this regard, the purchaser may retroactively (*ex tunc*) cancel the sale agreement and claim damages from the seller.

On the other hand, the purchaser may claim a reduction in the sale price, termination of the agreement or cleanup of the land, within the context of free reparation. In the case of termination of the agreement, the purchaser may claim direct damages without any fault attributable to the seller, whereas the seller is not liable for indirect damages upon proving that no fault is attributable to him. However, examination and announcement obligations must be fulfilled by the purchaser to avail of the remedies arising from the defect.

But the purchaser may, at anytime, rely on general provisions regarding breach of agreement to hold the seller liable.

Ukraine

Serhiy Piontkovsky
Baker & McKenzie, Kyiv

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

General provisions concerning environmental contamination (including contamination of land) are contained in the Law of Ukraine "On Environmental Protection," dated 25 June 1991 (the "Environmental Protection Law"). Specific requirements for land protection are stipulated in the Land Code of Ukraine, dated 25 October 2001 (the "Land Code"), the Law of Ukraine "On Land Preservation," dated 19 June 2003 (the "Land Preservation Law"), and the Law of Ukraine "On State Control over Land Operation and Land Preservation," dated 19 June 2003 (the "State Control Law"). Relevant norms are also included in the Code of Administrative Offences of Ukraine, dated 12 December 1984 (the "Administrative Offences Code") and the Criminal Code of Ukraine, dated 5 April 2001 (the "Criminal Code").

The Law of Ukraine "On Legal Regime of Territories Suffered from Radioactive Contamination Caused by Chernobyl Disaster" (the "Law on Radioactively Contaminated Land") may apply to radioactive contamination of land.

Among other legal acts regulating land contamination are the following:

- The Law of Ukraine "On Waste Products," dated 5 March 1998
- The Law of Ukraine "On Pesticides and Agro-Chemicals," dated 2 March 1995
- The Tax Code of Ukraine, dated 23 December 2010
- Resolution of the Cabinet of Ministers of Ukraine No. 284 "On Procedure for Determining and Compensating Damage to Land Owners and Land Holders," dated 19 April 1993
- Resolution of the Cabinet of Ministers of Ukraine No. 661 "On Approval of Regulation on Land Monitoring," dated 20 August 1993
- Order of the Ministry of Agricultural Policy of Ukraine No. 51 "On Approval of Regulation on Agricultural Land Monitoring," dated 26 February 2004
- Order of the Ministry of Agricultural Policy of Ukraine No. 283 "On Approval of Procedure of Land Conservation," dated 26 April 2013
- Methods for Determining Damage Caused by Contamination and Clogging of Land Resulting from Environmental Legislation Violations as approved by Order of the Ministry of Environmental Protection No. 171, dated 27 October 1997 (in a restated version approved by Order of the Ministry of Environmental Protection No. 149, dated 4 April 2007)
- Maximum Permissible Concentrations of Chemical Elements in Soil (as approved by the USSR Chief State Sanitary Inspector on 30 October 1980 under No. 2264-80, as supplemented on 1 February 1985 under No. 3210-85)
- Sanitary Norms Regarding Permissible Concentrations of Chemical Elements in Soil (as approved by the USSR Chief State Sanitary Inspector on 30 October 1987 under No. 4433-87)

2 Is there a definition of contaminated land in your laws?

According to the Methods for Determining Damage Caused by Contamination and Clogging of Land Resulting from Environmental Legislation Violations (as approved by the Ministry of Environmental Protection on 4 April 2007), land is considered contaminated if there is a negative quantity and quality change in the composition thereof resulting from commercial activity or other factors.

According to Article 169 of the Land Code, "technologically contaminated land" means land that is contaminated pursuant to the economic activity of an individual, which resulted in the degradation of land and negatively affected the environment, as well as human health. Technologically contaminated lands include radioactively dangerous land, radioactively contaminated land, and land contaminated with heavy metals and other chemical elements, etc.

According to Article 4 of the Law on Radioactively Contaminated Land, "land contaminated with radioactive elements" pertains to land that requires protective measures against radiation and other specific interventions therein, with the purpose of restricting any additional radiation caused by the Chernobyl disaster and to ensure normal commercial activity.

Article 1 of the State Control Law also provides for the term "land contamination" and defines it as the accumulation of pesticides, agrochemicals, heavy metals, radionuclide, and other elements in the soil and subsoil waters that is caused by an anthropogenic influence in the amount exceeding their natural levels, leading to the change of their quality and quantity therein.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes, there are. Legal acts specified in Section 1 contain provisions concerning cleanup.

4 If so:

4.1 Who is primarily responsible for the cleanup?

According to Section XV of the Environmental Protection Law, Article 157 of the Land Code and Article 45 of the Land Preservation Law, the actual polluters are responsible for cleanup and should bear the costs related thereto.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The Land Preservation Law obliges the land owners and users to take measures preventing negative and ecologically dangerous impact on land, and to eliminate the consequences thereof. If the land user is not guilty of land contamination, he or she has the right to receive compensation from the polluter for the costs incurred in decontaminating the land. In case the polluter cannot be found, the land user will bear final responsibility for cleanup of the land.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As mentioned, the Land Preservation Law envisages both the users' and the owners' responsibility for eliminating the consequences of ecologically dangerous impact on land. At the same time, it does not establish any guidelines on how this obligation should be apportioned between such responsible parties. Therefore, this may be addressed in a land use (e.g., lease) agreement.

As a general rule, the risk of accidental damage to property is borne by the owner, unless otherwise set forth by the applicable law or agreement (Article 323 of the Civil Code). This notwithstanding, in

case it is proven that contamination is caused by the land user, the owner has the right to claim compensation from such user for all costs of land decontamination.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Ukrainian laws do not specifically address the cleanup of historical contamination. Therefore, the general rules on cleaning up, as described above, will apply.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Sanitary norms, listed in Question 1, specify the list of polluting substances and their maximum permissible concentrations in soil.

The state authorities responsible for (i) the realization of the state policy in the area of state control over land (the State Service of Ukraine for Land Survey, Cartography and Cadaster); (ii) the realization of the state policy in the area of environmental protection (the Ministry of Ecology and Natural Resources); and (iii) agricultural policy (the Ministry of Agrarian Policy and Food of Ukraine, the National Academy of Agricultural Science) monitor land on the national, regional and local levels in order to reveal changes in soil condition in a timely manner, as well as assess its quality and prevent the negative impact of land contamination (if such risk exists). In case land contamination is found, such state authorities may suspend or terminate the operation of the enterprise, hold the polluter liable, initiate cleanup or conservation of contaminated land, and establish conditions for further operations of the contaminated land.

6 What level of cleanup is required?

The applicable law does not have any express requirement on the level of necessary cleanup. As discussed, however, the law identifies acceptable limits to contaminating substances in soil that will be taken into account upon determining the required cleanup of land.

7 Are there different provisions relating to the cleanup of water?

A special law regulating water protection in Ukraine is the Water Code of Ukraine. Additionally, several provisions of the Environmental Protection Law will also apply.

The liability provisions for water cleanup are similar to those applied to contaminated land. It should be noted, however, that in case of insufficient treating of wastewater or water overuse by the relevant entities, such enterprises will be penalized in addition to requiring that they pay a special fee for water use.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is not a criminal offense to own contaminated land. However, contamination of land may constitute a criminal offense if, as a result of violation of special rules, land is contaminated or damaged with substances, waste products or other elements that are harmful and dangerous to human life, human health or the environment, and such contamination or damage causes danger to the same (Article 239 of the Criminal Code).

This crime is punishable with a fine of up to 200 nontaxable minimum incomes of individuals (as of 1 August 2015, amounting to UAH3,400, which is approximately USD160.90) or with restriction from occupying certain positions or from conducting certain types of activities for up to three years.

Moreover, in the case such acts caused human fatalities, human mass infection or any other drastic consequences, such crime may then entail imprisonment for up to five years, which may also be followed by restriction from occupying certain positions or from conducting certain types of activities for up to three years.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Failure to comply with cleanup requirements will constitute a criminal offense if one evades or fails to carry out decontamination or other recovery measures with the purpose of eliminating the consequences of ecological contamination of land polluted by hazardous elements or irradiation in case it caused human death or other drastic consequences (Article 237 of the Criminal Code).

Such actions are punishable with imprisonment for up to five years, which may also be followed by restriction from occupying certain positions or from conducting certain types of activities for up to three years.

10 What authority enforces cleanup?

State control and supervision over the operation and preservation of land is carried out by the State Service of Ukraine for Land Survey, Cartography and Cadaster and its territorial agencies.

11 Are there any defenses?

The applicable legislation does not establish any exemptions or available defenses. Defenses may exist in particular cases, depending on the background of the dispute.

12 Can third parties / private parties enforce cleanup?

Any third party may inform relevant authorities of contamination of land, negligence or trespass of the environmental legislation and demand that said contaminated land be cleaned up.

13 Can third parties claim damages?

Yes.

General provisions of the Civil Code of Ukraine authorize any person to pursue claims of damages, health harm or other negative aftermath caused by the actions of a legal entity or an individual.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No, there is no such requirement under Ukrainian law.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Upon the conclusion of the sale and purchase agreement of a land plot, all rights and obligations connected to the land plot, including those related to cleanup thereof, are transferred to the purchaser.

However, in case the seller is the polluter, the purchaser has a right to compensation from the seller for all losses suffered with regard to the decontamination of the purchased land.

15.2 Contractually?

Parties to the sale and purchase agreement of a land plot are free to set provisions regarding the guarantees of the seller with regard to the condition of the land, its obligation to compensate for damages caused by the land defects, to perform cleanup, as well as to establish other conditions regarding cleanup and compensation for the improper condition of the land plot, except those that are directly established by legislation.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

None.

Latin America

Argentina

Alejandra Bugna and Gustavo Boruchowicz
Baker & McKenzie, Buenos Aires

Legislative framework

The responses below are provided taking into consideration that a new Civil and Commercial Code has been passed in Argentina. It came into effect on 1 August 2015, and will be subject to interpretation and debate.

There is a specific provision in the new Civil and Commercial Code that states, "Limits to the exercise of individual rights on assets. The exercise of individual rights on the assets mentioned in Sections 1 and 2 must be compatible with collective rights. It must be adequate to the federal and local administrative rules enacted on the public interest, without affecting the functioning nor the sustainability of the ecosystems, flora, fauna, biodiversity, water, cultural values, landscapes, among others, according to the criteria provided on special regulations" (Section 240).

1 Do you have any statutes specifically relating to land contamination?

There are none. Under Argentine laws and regulations, there are no statutes specifically relating to land contamination. However, both the Federal General Environmental Law No. 25,675 (*Ley General del Ambiente*) and the Federal Hazardous Waste Law No. 24,051 (*Ley de Residuos Peligrosos*) provide for certain environmental protection principles and a special liability regime for environmental contamination, which are applicable to land contamination.

2 Is there a definition of contaminated land in your laws?

There is no express definition of contaminated land at the national level. However, Executive Order No. 831/93 (that implements Federal Hazardous Waste Law No. 24,051) provides for certain guidelines regarding soil quality to determine the existence of contaminated land. Recently enacted Law No. 14,343 of the province of Buenos Aires (where a considerable number of industries are located) defines contaminated sites as those whose physical, chemical and biological characteristics have been negatively altered by contaminating substances of human origin, in concentrations representing a risk to human health and/or the environment.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

There are none. There are no specific statutes related to the remediation of contaminated land. As mentioned above, however, Section 41 of the Federal Constitution and the Federal General Environmental Law No. 25,675 set forth the general obligation to remediate any environmental damage that has been caused.

4 If so:

4.1 Who is primarily responsible for the cleanup?

As a general principle, polluters are primarily responsible for cleaning up contaminated land. As mentioned above, Section 41 of the Federal Constitution and Section 28 of the Federal General Environmental Law No. 25,675 provide for the obligation of the polluter to clean up and remediate any environmental damage caused. There is no specific legal provision that provides for the imposition of a similar obligation on the actual owner of the contaminated land. However, Section 1758 of the Argentine Civil and Commercial Code provides for a strict liability regime for the "owner" or "custodian" of a property (e.g., contaminated land) that causes damage to a third party,

triggering therefore, the obligation to pay for damages. It could be interpreted that this general principle could be used to impose liability for cleanup on the owner of the contaminated land.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

If the polluter cannot be found, there is no specific regulation that provides that liability passes to the owner or the occupier. The extent of liability of the owner or the occupier shall be established separately. For example, they could be held liable on the basis of the abovementioned Section 1758 of the Civil and Commercial Code. Please also note that Federal General Environmental Law No. 25,675 provides for a liability principle for environmental damages. This principle sets forth that if the actual extent of the liability cannot be apportioned among different parties, all of them shall be held jointly and severally liable.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As a general principle, the polluter is liable for remediating the damages caused, irrespective of whether the polluter is the owner or the occupier. Therefore, the liability shall be apportioned between the owner and the occupier depending on their own specific responsibility. Such responsibility would be based on the different set of general liability principles that are referred herein. In addition, please note that General Environmental Law No. 25,675 provides for the release of liability of the "custodian" or "owner" if the damages were caused as a direct consequence of a third person's negligence, despite all necessary measures having been taken to prevent the damages, considering the circumstances.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

This is a matter that has not been specifically addressed by the legislation and shall be analyzed on a case-by-case basis by the courts, based on the general liability principles under the Civil and Commercial Code and under the environmental legislation.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The courts shall decide if land cleanup is required. As indicated above, Executive Order No. 831/93 (which implements the Hazardous Waste Law No. 24,051) provides for certain guidelines of soil quality that, in practice, set forth limits to permissible levels of polluting substances. To determine the existence of pollution, the court might order environmental assessments and other appropriate measures.

6 What level of cleanup is required?

As a general principle, Federal General Environmental Law No. 25,675 establishes that whoever causes environmental damages shall be held strictly liable for restoring the environmental situation to its original condition prior to the damage. However, further regulations implementing obligations established by the Federal General Environmental Law have somehow limited the broad scope of cleanup required therein. The joint Resolution No. 98/2007 and 1973/2007 issued by the Secretariat of Finance and the Secretariat of Environment and Sustainable Development, for instance, provides for a cleanup level that consists of re-establishing the conditions of the affected environment to acceptable risk levels for human health and to allow self-regeneration of natural resources, in order for the negative alteration not to be declared significant. This resolution establishes the guidelines to be met

by insurance policies that should be purchased under the Federal General Environmental Law by any person/legal entity whose activities pose a risk to the environment.

However, the constitutionality of this provision could eventually be challenged for providing less stringent environmental protection standards than those established by the Federal General Environmental Law, in compliance with Section 41 of the National Constitution.

7 Are there different provisions relating to the cleanup of water?

Executive Order No. 831/93 (which implements Federal Hazardous Waste Law No. 24,051) also provides for guidelines of water quality to determine the existence of contamination by establishing allowed limits for polluting substances. Said guidelines vary according to the type of water source involved (sea water or fresh water, for human consumption or not). The abovementioned provisions regarding soil protection also apply to water protection.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

To contaminate land is not a criminal offense under Argentine laws and regulations. However, Sections 55 through 58 of Federal Hazardous Waste Law No. 24,051 provide for certain criminal penalties for those who, in using hazardous waste (as defined by the referred law), contaminate land, posing a danger to individuals' health.

Pursuant to the Penal Code, the penalties for those who contaminate land, posing a danger to individuals' health, range from three to 10 years of imprisonment. In addition, if a person dies as a consequence of the referred land contamination, penalties range from 10 to 25 years of imprisonment.

If land contamination occurs as a consequence of a negligent or reckless conduct (*impericia*) from a certain art or profession, or as a consequence of the lack of compliance with municipal regulations (*reglamentos u ordenanzas*), penalties range from one month up to two years of imprisonment. If the affected individuals get sick or die, the penalties range from six months to three years of imprisonment.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

If the court order is not complied with, the court could impose daily fines. In addition, this might trigger further liability for damages.

10 What authority enforces cleanup?

Federal General Environmental Law No. 25,675 empowers local courts to enforce cleanup. However, if the environmental resources contaminated are interjurisdictional, federal courts will be the enforcement authority.

11 Are there any defenses?

This must be decided on a case-by-case basis. However, as a guideline, General Environmental Law No. 25,675 provides for the release of liability of the "custodian" or "owner" if the damages were caused as an exclusive consequence of a third person's negligence, despite all necessary measures having been taken to prevent such damages, considering the circumstances.

12 Can third parties / private parties enforce cleanup?

No. However, according to Section 43 of the Federal Constitution, any citizen is entitled to file a summary action (*acción de amparo*), provided there is no other available legal remedy, against any act or omission of public authorities, private entities or individuals affecting or threatening to affect environmental rights. This action can also be filed by non-governmental organizations.

13 Can third parties claim damages?

As a general principle provided by Argentine civil law, any and all individuals or legal entities that suffer damages on their person or property are entitled to file an action for damages.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There is no legal requirement at the national level to conduct investigations for potential contamination upon the sale of property. However, it is customary for buyers of property where an industry operates to conduct investigations for potential contamination. At the provincial level, however, the recently enacted Law No. 14,343 of the province of Buenos Aires regulates the identification and registry of abandoned contaminated sites (environmental liabilities) and the existence of contaminated sites within the province's territory It likewise establishes a mandatory closing audit to be filed before the provincial implementing authority upon the definitive ceasing or transfer of activities. The closing audit shall describe the activities performed at the site and analyze samples of soil and underground waters to determine any existing contamination at the site. If contamination was proved, the responsible party for the contaminating activities would have the obligation to remediate the site. As of 27 April 2012, the law had not been implemented nor further regulated by the provincial Executive Power, but it is expected to do so soon.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

No.

15.1 Under the general law?

No. Neither the transfer nor the voluntary abandonment of hazardous waste by its generator shall be effective *vis-a-vis* third parties to be released from liability. Therefore, the polluter would still be liable after the sale of the contaminated land.

15.2 Contractually?

No. Contractual provisions shall not be enforceable *vis-á-vis* third parties in order to pass cleanup liability.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

In order to prevent potential claims for damages in connection with environmental contamination, it is advisable to conduct a thorough technical due diligence on the land. Likewise, it is advisable to include an indemnification clause in the transaction documents by which the seller represents and guarantees to the buyer the nonexistence of any type of contamination within the property limits.

Brazil

Renata Amaral and Camila Steinhoff
Baker & McKenzie, Sao Paulo

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes. There are federal and state regulations related to land contamination.

According to the Brazilian Federal Constitution of 1988, the union, state and federal entities have the power to legislate concurrently on environmental matters. Within the scope of concurrent legislation, the union has jurisdiction to set general rules, not excluding the supplementary jurisdiction of the states.

Currently, the only federal rule regarding land contamination is the National Environmental Council (*ConselhoNacional do Meio Ambiente* or CONAMA) Resolution No. 420/2009. This resolution establishes criteria and standard values for soil and groundwater quality, as well as guidelines for the management of contaminated sites – which includes investigation and remediation procedures.

At the state level, the São Paulo State Environmental Protection Agency (*Companhia Ambiental de São Paulo* or CETESB), issued in 2007 Directive Decision No. 103/2007/C/E/, which provides rules for the management of contaminated areas within that state. In July 2009, São Paulo State Law No. 13,577 (the "State Law"), which establishes guidelines and procedures for the protection of soil quality and the management of contaminated land located in the state of São Paulo, came into force. Among numerous provisions related to the protection of soil quality from contamination, the State Law obliges legally responsible parties (i.e., the owner or operator, whoever benefits from the property direct or indirectly, among others) for the contaminated area to immediately notify environmental and competent authorities when suspicious of contamination is detected.

On 6 June 2013, State Decree No. 59,263, (the "Decree"), which regulates the abovementioned State Law, came into force. This Decree, among other relevant provisions, determines that: (i) communication regarding the existence of contamination to CETESB and to the responsible health authority shall be presented (as soon as evidence or suspicions of contamination are detected) through the submission of a Preliminary Assessment Report; and (ii) the lack of referred immediate communication to CETESB will be considered an aggravating circumstance in the application of penalties.

Another relevant aspect included in the Decree concerns the obligation of those responsible for the contaminated area to present warranties (insurance bond, environmental insurance or bank guarantee) in the amount corresponding to 125 percent of the estimated cost of the Intervention Plan. The Decree also establishes the CETESB's obligation to inform the District Attorney's Office about the existence of severe instances of noncompliance (characterized by noncompliance with the imposed requirements, technical disability or bad faith of the environmental expert responsible for the project), in order to investigate the possible commitment of an environmental crime.

According to the law, any action or omission contrary to its provisions shall be considered an administrative environmental violation that will be subject to administrative penalties In addition to confirming the penalties provided by the State Law, the Decree authorizes CETESB to stipulate daily fines in the case of continuous infractions in the amount limited to 10,000 *Unidade Fiscal do Estado de São Paulo* (UFESPs[1]) per day, as well as sets forth that simple fines may be imposed in an amount ranging from 4 to 4 million UFESPs (limited to BRL50 million).

[1] 1 UFESP is currently equal to BRL21.25.

São Paulo's environmental legislation is historically considered as a trend for the other states in the country. Therefore, following the publication of the State Law, the states of Minas Gerais, Rio de Janeiro and Rio Grande do Sul also published their own legislation about contaminated land, and several states are working on specific regulations related to this matter based on São Paulo's existing rules.

2 Is there a definition of contaminated land in your laws?

There is no specific definition of contaminated land under federal regulation. Nevertheless, the broad definition of pollution provided by the Federal Law No. 6,938/1981 (the "National Environmental Policy Law") may apply to cases of land contamination. According to the National Environmental Policy Law, pollution is the "deterioration of environmental quality resulting from activities that directly or indirectly: (i) impair the health, safety, or well-being of the population; (ii) create adverse conditions for social and economic activity; (iii) have an adverse effect on flora and/or fauna of a region; (iv) affect the aesthetic or sanitary conditions of the environment; and (v) discharge energy or matter in conflict with established environmental standards."

Under state regulations, the State Law defines a contaminated area as "an area, land, place, facility, edification or building that contains material in concentration or quantity that cause or may cause harm to human health, to the environment or to another asset subject to protection."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. At the federal level, CONAMA Resolution No. 420/2009 provides for the remediation of contaminated areas.

At the state level, the CETESB's Decision No. 103/2007/C/E/ establishes guidelines for the investigation and management of contaminated areas, while the State Law and the State Decree establish rules for the protection of soil quality and management of contaminated land located in the state of São Paulo.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The National Environmental Policy Law establishes strict civil liability for polluters. According to this law, a polluter is obliged to indemnify or repair the damage it causes the environment and the public regardless of its fault, degree of care or intent. According to the same law, a polluter is the individual or legal entity, private and public, that is directly or indirectly responsible for an activity that causes environmental damage (Article 3, IV). A polluter's successor or whoever contributes to the damage may also be liable for damages. Therefore, one whose acts contribute to pollution is not exempt from liability solely on the basis that such an act is not the sole cause of environmental harm.

In addition, in the state of São Paulo, the State Law and the State Decree also attribute joint and several liability to the polluter and its successors, the land owner, the tenant, the actual possessor and whoever else benefits directly or indirectly from using the contaminated area.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Pursuant to the National Environmental Policy Law, the polluter's successor or whoever contributes to the damage may also be liable for damages. Environmental liability is also considered "*propter rem*," which means that is transferred along with the property.

In the state of São Paulo, the State Law and the State Decree also attribute joint and several liability to the landowner, the tenant, and whoever else benefits directly or indirectly from using the contaminated area.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Brazilian environmental legislation does not provide specific requirements on how the liability may be allocated among those involved. Environmental civil liability (obligation to repair the damage) should be initially attributed to the one that caused the environmental damage. For the characterization of liability, the existence of the damage and the link of causation between the action or omission of the responsible party and said damage are sufficient.

The understanding that joint liability is distributed among all that caused the damage has been broadly adopted in courts. Under the joint liability regime, any of the responsible parties may be required to proceed with the payment of the total amount of damages, having the option, at the end, to sue all or the others for compensation under the rules of civil law.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes. Before the authorities, the company that is currently operating at the site is likely to be held liable for present and past contamination. The company may try to recover its losses from past owners by enforcing respective contractual clauses with former owners, foreseeing the allocation of past environmental liabilities, or by proving the causality link of the environmental damage to past activities performed at the site.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

CONAMA Resolution No. 420/2009 establishes the criteria and standard values for soil and groundwater quality as well as guidelines for the management of contaminated sites, which include investigation and remediation procedures. In principle, if the existence of components at levels above those prescribed in said resolution is confirmed, some remediation action should be taken.

In addition, in the state of São Paulo, CETESB has developed a guidance document that defines the standard values for soil and groundwater quality. Such ruling has been updated on 21 February 2014 (CETESB's Decision No. 045/2014/E/C/I, which replaced the values used since 2005 [CETESB's Decision No. 195/2005/E]).

CETESB's values corroborate the concepts of: quality reference value (VRQ), regarding the values for soil and groundwater; prevention value (VP), regarding the values above which there may be damage to soil and groundwater; and intervention value (VI), regarding the values above which there may be direct or indirect potential risks to human health.

According to CONAMA Resolution No. 420/2009, the criteria and values used for soil quality evaluation will be analyzed through the concepts of VRQs, VPs and VIs. The VRQs of chemical substances shall be established by state agencies after the resolution has been published.

Several state environmental protection agencies have been adopting these values for remediation standards. In addition, these agencies have been also adopting the Dutch and the US EPA on a supplementary basis. For groundwater, agencies also consider the Brazilian Health Ministry's Ordinance 2,914, dated December 2011, which establishes drinking water quality standards in Brazil.

Environmental protection agencies may accept cleanups based on risk assessment that demonstrates the absence of risk to the environment and to human health, considering the future use intended for the property (i.e., industrial, residential or agricultural).

6 What level of cleanup is required?

If the presence of contaminants exceeding their respective reference values for soil and/or groundwater is confirmed, in theory, remediation activities should be carried out until the existent compounds drop to permitted levels.

Environmental protection agencies may accept cleanups based on risk assessment that demonstrates the absence of risk to the environment and to human health, considering the future use intended for the property (i.e., industrial, residential or agricultural).

However, there is a trend in the state of São Paulo where district attorneys require remediation of the contamination down to very low levels (aiming at, to the extent possible, reverting the soil and groundwater quality to the *status quo ante*), despite concurrence from EPA on the risk-based standards mentioned above. As a consequence of this trend, district attorneys have been requesting the payment of compensation for past, ongoing and future non-remediated damage. This claim has not been analyzed by courts yet.

7 Are there different provisions relating to the cleanup of water?

CONAMA Resolution No. 420/2009 provides the acceptable parameters for groundwater. If the water is to be used for drinking purposes, the Brazilian Health Ministry's Ordinance 2,914/2011, dated 31 December 2011, is applicable.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Solely owning contaminated land is not considered a crime. On the other hand, to contaminate land may be included in the concept of pollution and may be considered a crime against the environment. The Environmental Crimes Law (Federal Law No. 9,605/1998) establishes in its Article 54 a penalty of imprisonment from one to four years and a fine in case of any form of pollution to such an extent that it results or could result in damage to human health, or that could cause the death of animals or a significant destruction of flora.

The law also foresees an increase in penalties in case the crime: (i) renders a rural or urban area unsuitable for human habitation; (ii) causes water pollution so that it is necessary to interrupt public water supply in a community; and (iii) occurs due to the dumping of solid, liquid or gaseous wastes, or debris, oil, or oily substances contrary to what relevant laws or regulations require.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Yes. The Environmental Crimes Law also foresees penalties for anyone who does not adopt precautionary measures required by competent authorities in cases of serious or irreversible environmental damage.

10 What authority enforces cleanup?

Environmental protection agencies at state and federal levels have concurrent jurisdiction to: (i) control the quality of water destined for public water supply and other specific uses; (ii) establish environmental standards and discharge limitations governing air, water and soil; (iii) issue installation and operating licenses for new and existing pollution sources; (iv) monitor polluting activities; (v)

apply penalties for violation of pollution standards and limitations; and (vi) request the temporary or permanent shutdown of facilities in cases of serious environmental violations. State and local environmental authorities are authorized to issue standards and requirements that are more stringent than those established by the federal government.

All agencies that are part of the National Environmental System (SISNAMA) have the duty to implement the National Environmental Policy and are responsible for the environmental licensing of companies' activities at different levels of the government. Supplementary Law No. 140, dated December 2011, alters the National Environmental Policy and establishes rules for cooperation among the three levels of government (federal union, state and municipal). Additionally, Supplementary Law defines federal, state and municipal competences regarding administrative actions and imposition of sanctions resulting from the exercise of the common competence set forth by the Brazilian Federal Constitution mainly on environmental protection and pollution control. According to its Article 13, the licensing proceeding will be performed at only one level of government, which will also be responsible for the inspection of the activity.

The main regulatory agencies are: the Ministry of Environment (MMA), CONAMA, and the Environmental State and Municipal Secretariats and their respective boards. The main inspection agencies are: the Brazilian Environmental and Renewable Natural Resources Institute (IBAMA, which is similar to the US Environmental Protection Agency or EPA), State Environmental Protection Agencies (i.e., CETESB, INEA, FEPAM, etc.) and municipal agencies.

Federal and state district attorneys' offices also act on behalf environmental protection, both in civil and criminal spheres

11 Are there any defenses?

Yes. At the administrative level, the State Environmental Protection Agency usually enforces the cleanups and imposes warning or infraction notices with penalties in the case of a company's noncompliance. In this case, the company may present an administrative appeal to the agency contesting the sanction imposed. Companies may also defend themselves at criminal and civil levels before the judiciary branch.

12 Can third parties / private parties enforce cleanup?

Usually, federal and state district attorneys, as well as Brazilian non-governmental organizations (NGOs) registered with Brazilian public record offices have the standing to sue polluters for damages in public civil actions (similar to US class actions), as regulated by Federal Law Nos. 7,347/1985 and 8,078/1990. Although individuals are not entitled to sue under Federal Law No. 7,347/1985, they may sue to recover personal damages under Brazilian nuisance and tort laws.

In public civil actions against polluters, the plaintiff may demand that polluters comply with specific performance requirements, such as: (i) ceasing activities that cause pollution; (ii) carrying out site cleanup activities; or (iii) conducting environmental restoration activities.

Sometimes, regardless of the level of efficiency of the recovery activities, money damages are imposed on grounds that compensation be granted to remedy past contamination. Money damages recovered in class actions are funneled into a special fund for environmental protection projects. A plaintiff may also obtain preliminary or temporary injunctions by producing evidence of the existence of irreparable injury. Punitive damages are not provided for under Brazilian laws.

District attorneys may investigate the facts before filing a class action through a "civil inquiry," an investigation procedure aimed at ascertaining damage to the environment.

Owners of contaminated land may also be liable under Brazilian property law (the "Neighbor's Law"), which states that owners must eliminate any problems in their property that may endanger the

community. The primary enforcement target under the Neighbor's Law will be the operator or entrepreneur that caused the contamination.

13 Can third parties claim damages?

As mentioned above, although individuals are not entitled to sue under Federal Law No. 7,347/1985, they may sue to recover personal damages under Brazilian nuisance and tort laws.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No, there is no such obligation in connection with the sale of property. However, in some states, such as São Paulo and Rio de Janeiro, entrepreneurs of activities that have the potential to contaminate soil and groundwater (and therefore, were subject to an environmental license) shall present a conclusive technical report of the soil and groundwater quality in case the company ceases to operate.

In this regard, in the state of São Paulo, companies are required to conduct an environmental assessment in case they resume operations, as well as present a "Deactivation Plan" followed by a communication describing the environmental conditions of the area in case of partial and/or total interruption of activities. In addition, such communication must also indicate the measures to be taken to restore the environmental quality of the property area, if it is necessary.

The state of Rio de Janeiro has a specific procedure for the closure of potentially polluting or degrading activities. The state ordinance lists some activities for which the Term of Closure must be obtained. This Term of Closure is the title issued by the environmental agency that evidences the conclusion of all environmental obligations and requirements made by such agency. In case environmental damage will be recovered or is being recovered, the applicant must also present a plan of recovery of the area to be completed in no more than two years, and provide quarterly reports on the activities conducted.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Federal law imposes cleanup obligations to the polluter. The polluter's successor or whoever contributes to the damage may also be held liable for damages. Scholars and court decisions have indicated that the civil liability for environmental damages is also connected to the ownership of the property and, therefore, considered *propter rem*, which means that in case of transfer of the property, the obligation to meet cleanup standards will be transferred along with the ownership.

The law does not foresee the possibility to transfer the liability to clean up a land that was contaminated by the polluter's action.

15.2 Contractually?

Yes. It is possible to allocate liability contractually. Such allocation, however, is not enforceable before governmental authorities or third parties. Therefore, environmental agencies and district attorneys may seek the recovery of the environmental damage from the polluter and/or from the acquirer of the property, individually or jointly. In the case of a contractual allocation of the liability, the party that contractually is not to be considered liable, but has been procured by environmental authorities, may seek indemnification before the party contractually responsible.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Brazilian environmental legislation does not provide specific requirements on succession of liability. This issue must be reviewed under the environmental liability regime of the law in connection with the corporate law succession requirements.

As mentioned above, the National Environmental Policy Law established strict civil liability for polluters and the role of state and federal district attorneys in suing polluters for causing damage to the environment. Thus, a polluter is obliged to indemnify or repair the damage to the environment and to the public, regardless of the level of its fault, degree of care or intent. According to the same law, a polluter is the individual or legal entity, private and public, directly or indirectly responsible for an activity that causes environmental damage (Article 3, IV). It is important to note that there is no statute of limitations for claims on environmental damage.

Joint and several liability means that each individual party is wholly liable for all parties' liabilities. Thus, where there is joint and several liability, any of the responsible parties may be sued for the entire amount of damages, with the right to proportionally recover the losses from other responsible parties. The polluter's successor or whoever else contributes to the damage may also be held liable.

Criminal liability in Brazil, until 1998, has not affected the company itself, but only the individuals who own and/or hold management positions. The Federal Environmental Crimes Law, which was enacted in 1998 (Law No. 9,605/1998; see below), provides for administrative and criminal sanctions against legal entities and individuals violating its provisions regarding polluting activities and the protection of natural resources. Other environmental criminal law requirements include Article 15 of Law 6,938/1981 and the Criminal Code's provisions regarding pollution of potable water.

As a general rule, there is no criminal liability succession under Brazilian law, because a crime can be attributed only to the individual who has caused it. Different from the environmental civil liability, in criminal liability there is the need to assess the fault, degree of care or intent of the agent conducting the crime.

Acquisition of Shares or Quotas

In general, in cases of acquisition of shares or quotas, the buyer will fully inherit the civil environmental liabilities. The polluter's successor will not inherit criminal liability for individuals. Although the successor remains liable before authorities and third parties, civil and administrative environmental liability can be allocated between the seller and the buyer in the purchase agreement, granting the buyer the right to recover its losses from succession of these environmental liabilities, or exempting the seller from future losses related to environmental damage.

Acquisition of Assets

In transactions structured as acquisition of assets, the seller remains the primarily liable entity. Past damage remains the responsibility of the seller, mainly if it continues after the transaction and with enough capital to support claims regarding past environmental liabilities.

Under certain circumstances, however, an interpretation may be done in regard to the buyer's succession of civil liabilities if there is evidence that: (i) the buyer has, in practical terms, acquired the business of the seller; or (ii) the sale of assets was construed to leave the seller with assets that were not enough to support environmental liabilities resulting from damage caused prior to the transaction.

In addition, some assets may have environmental liability attached to them (*propter rem* obligations), regardless of the transaction structure. Thus, in the case of purchase of contaminated land, the buyer and the seller will be jointly and severally liable for damage caused to third parties (e.g., migration of pollutants to other properties) as well as for remediation activities. In this case, the buyer could recover its losses from the seller if the civil environmental liability is properly allocated in the transaction.

Chile

Antonio Ortuzar Jr.
Baker & McKenzie, Santiago

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes, and in 1980, Chile's Political Constitution (the "Constitution") for the first time recognized the importance of protecting the environment as part of the state's duty to promote welfare. The Constitution guarantees all people the "right to live in an environment free of pollution." It adds that "[t]he State is duty-bound to assure that such right not be affected and to care for the conservation of nature."

The constitutionally guaranteed right to a pollution-free environment potentially conflicts with other constitutional rights, such as the right to engage in economic activity and the right to property. In this regard, the Constitution provides that a basic constitutional right may be limited for environmental reasons only by "law" (not by any hierarchically inferior norm), and then only to the extent that the limitation does not affect the essence of the right.

On the other hand, Law N° 19,300, which is about the general environment, regulates this constitutional guarantee and establishes the different environmental managing instruments. Further, it regulates liability for damages to the environment. In addition, Law N° 20.551 regulates closure of mining labor, establishing the need to appraise the job which would make possible the closure of the activity and financially guaranty such closure before the regional mining authority.

2 Is there a definition of contaminated land in your laws?

There is none. There is no specific definition of contaminated land, but there is one of contamination. According to Section 2, letter c) of Law 19, 300: "the presence of substances, elements, energy or a combination thereof in the environment, in concentrations and for periods being higher or lower, as the case may be, than those established in the prevailing laws"

There is a Methodological Guide for the management of land with potential presence of contaminants, approved by Exempt Resolution N° 406, of 2013 issued by the Ministry of Environment. The guide defines "land with presence of contaminants" as "the place or piece of land geographically delimited in which, through an environmental risk evaluation, relevant risk level for the people or the environment has been determined."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Law N° 19, 300 establishes the Environmental Impact Assessment System as an environmental managing instrument. All projects or activities listed in its Section 10 must be evaluated for their impact on the environment. Letter o) of said section makes it obligatory to evaluate environmental sanitation projects, among which is the restoration or recovery of areas containing contaminants that cover a surface equal or larger than 10,000 square meters.

Law N° 20,551 establishes how the mining industry must guarantee the closure plan of its respective facilities, with the purpose of ensuring the physical and chemical stability of its installations.

The Chilean Ministry of Environment, may issue through Supreme Decrees, decontamination and prevention plans, whose fulfillment are mandatory in zones described as "latent or saturated," of air pollution. The elaboration of these plans and the proposal of their establishment to the competent environmental authority will be submitted to the Ministry of the Environment, with the previous

report of the Ministerial Regional Environmental Secretariat. To date, however, there is no quality norm for soils that would make these plans applicable to this matter.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter is responsible.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The liability will not be transferred to the new occupant. If the new occupant, however, must recover the land to be able to execute a project, the occupant must abide by general environmental regulations.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Section 51 of the Law No 19.300 states that, "Any person that willfully or negligently causes an environmental damage shall be liable therefor in accordance with this law." In this regard, the provision of extracontractual liability contained in the Civil Code are supplementary law. These rules provide that if two or more people have committed an offense, they shall be jointly liable.

Once the court determines the existence of environmental damage, it will order its repair to those responsible. The affected may ask for compensation, if applicable.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The liability for historical contamination goes only to the person who has caused the contamination, due to willful misconduct or fault.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

It all depends on the usage you want to give the land. The Ministry of Environment is performing a cadastral survey, for which it has approved a methodology, over lands with potential presence of contaminants. There is no specific law however, that regulates the recovery of contaminated land; therefore, there is no authority empowered to order the cleanup. The need to clean land could be decreed by a judicial order, within the scope of a liability suit for environmental damage. In addition, it could be enforced by an instrument of territorial planning (e.g., urban legislation).

As an example, the Decree No 656, 2009 issued by the Ministry of Health, prohibits the use of asbestos in construction material.

6 What level of cleanup is required?

This depends on the specific rules for the different area types (industrial, natural reserves, etc.). The Law refers to the "rehabilitation of the damage caused."

By "rehabilitation of environmental damage," the Chilean Supreme Court means a material reparation, not a pecuniary compensation as equivalent. The pecuniary compensation is not supported in place of the environmental restoration. Nevertheless, in the case of irreparable environmental damage, the compensatory condemnations may result in compensatory payments.

7 Are there different provisions relating to the cleanup of water?

Yes, and these measures are primarily in Environmental Law (Law N° 19,300) and the Water Code, plus special environmental provisions. There are rivers for which a water quality standard is established. If this standard is exceeded, the authority must issue a decontamination plan (e.g., Maipo River).

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

In Chile, a "crime" against the environment itself does not exist. Once environmental damage is produced, a civil action is granted to make reparations to the damaged environment, in addition to the "ordinary compensation action," which can be filed by the affected party.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

In the case of a contaminated soil recovery project that has been submitted for environmental evaluation, corresponding environmental norms must be fulfilled. Fulfillment of the resolution that authorizes the project is regulated and sanctioned by the Superintendence of the Environment. In the case of judgment for environmental damage that orders the repair of the environment, its fulfillment is guaranteed and there is offense associated with the failure to comply.

10 What authority enforces cleanup?

The Superintendence of the Environment enforces cleanup in the case of a project submitted for environmental evaluation. Meanwhile, the Environmental Courts do so in the case of a lawsuit for environmental damage.

11 Are there any defenses?

There is a defense procedure in the law of environment.

12 Can third parties / private parties enforce cleanup?

In the case of the Superintendence of the Environment, any individual can report noncompliance with environmental authorities.

In the case of a lawsuit for responsibility for environmental damage, cleanup can be enforced by any natural or legal entity that has suffered the damage; Town Halls for the acts that occurred in their territory; and the Estate Defense Council.

13 Can third parties claim damages?

Any person may request the Municipality to deduct the appropriate environmental action on its behalf for activities that may cause environmental damage.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No.

15.2 Contractually?

This can be done, but before the authority, the person who caused the damage remains responsible.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

In the case of known contamination, this situation must be reported to the environmental authorities, with the aim of taking mitigation measures.

Colombia

Jaime Trujillo
Baker & McKenzie, Bogota

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Under Colombian regulations, there are no statutes specifically related to land contamination. However, environmental legislation,[1] which includes hazardous waste regulations,[2] provide environmental protection principles and a special liability regime for environmental contamination that are applicable to land contamination.

2 Is there a definition of contaminated land in your laws?

There is none. There is no specific definition of contaminated land, but there is a definition of contamination within the environmental regulations, which includes air, water and soil contamination.

Contamination[3] is the alteration of the environment by substances or shapes of energy resulting from human activity or nature, in amounts, concentrations or levels capable of interfering with the wealth and health of humans, threatening the flora and fauna, degrading the environment, or affecting the resources of the nation or individuals.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

There are none. There are no specific statutes related to remediation of contaminated land. As mentioned above, however, environmental and hazardous waste regulations set forth the general obligation to remediate any environmental damage that has been caused (see Question 1).

Specifically, hazardous waste regulations establish that people found responsible for the contamination of a site as a result of handling or inadequate management of hazardous waste, shall be required to diagnose, remedy and repair the damage caused to health and the environment, according to the statutory provisions. Also, the regulation defines "remediation" as all measures taken to undergoing contaminated sites to remove or reduce contaminants to a safe level for health and the environment, or prevent their release into the environment.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter is primarily responsible for the remediation of any environmental damage.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Hazardous waste regulations consider as "generator" any person whose activities produce hazardous waste. In case contamination has been produced by hazardous waste, if the generator cannot be found,

[1] The most important provisions that regulate contamination are, in chronological order: Law 23 of 1973; Decree 2811 of 1974 (Code of Renewable Natural Resources and Environment Protection); Law 9 of 1979; Political Constitution -1991; Law 99 of 1993; Law 599 of 2000 - Criminal Code; Decree 1443 of 2004; Decree 4741 of 2005; Law 1252 of 2008; and Law 1333 of 2009.
[2] Decree 1443 of 2004; Decree 4741 of 2005; Law 1252 of 2008.
[3] Law 23 of 1973; Decree 2811 of 1974.

the person in possession of this waste is responsible for any damage caused to the environment. However, this person can opt to claim damages against the generator or polluter.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

As a general principle, the polluter is liable for remediating the damages caused, irrespective of whether the polluter is the owner or the tenant.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

There are no specific provisions under Colombian regulations regarding historical contamination. In any case, however, the polluter will be the party liable for the environmental damage caused by such contamination.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

In Colombia, there are various regulations that set up limits to polluting substances that may be contained in water and air. Also, hazardous waste regulations establish the rules under which waste will be considered hazardous, and therefore will need specific management when used, handled, treated and finally disposed of. In this case, for example, if hazardous waste is not treated and adequately disposed of, it will probably bring contamination into the land and/or groundwater.

However, the environmental authority has the obligation to investigate each particular case in order to verify the absence of any risk to the environment and to human health, and determine whether cleanup is required.

6 What level of cleanup is required?

If feasible, cleanup should be kept up until the affected area is restored to the conditions that existed prior to the environmental damage. If this is not feasible, cleanup should be done until the presence of contaminants does not exceed the respective reference limits to soil and/or groundwater permitted by legislation. However, the environmental authority must verify the absence of any risk to the environment and to human health, as well as determine the level of cleanup required.

7 Are there different provisions relating to the cleanup of water?

There are provisions[4] relating to cleanup of water, particularly in the case of hydrocarbons or substances harmful to health and aquatic resources. Those who handle these substances must have a contingency plan and spill control system. The provisions related to contamination in general are also applicable to water contamination issues.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

According to the Colombian Criminal Code,[5] it is a criminal offense to contaminate the environment, which includes air, atmosphere, soil, water and natural resources. Criminal penalties can include fines

[4] Decree 321 of 1999, Decree 3930 of 2010.
[5] Colombian Criminal Code Section XI, modified by Law 1453 of 2011.

of approximately up to USD14 million, or imprisonment of up to nine years. The criminal penalty does not exclude administrative sanctions. These consequences will depend on the magnitude and severity of the infringement.

Environmental damage (which is the case of land contamination) can also trigger administrative sanctions[6] such as the suspension of the activities, the revocation of the environmental licenses or permits, or the demolition of constructions, and daily fines of an approximate amount of up to COP3,221 billion (or approximately USD1,073,000). These sanctions are without prejudice to any civil, criminal and disciplinary actions. As mentioned, the imposition of these sanctions may be accompanied by the obligation to perform works or actions ordered by the environmental authority to restore the environment, the natural resources or landscape affected.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

It is not a criminal offense, per se, to fail to comply with the cleanup requirements of the environmental authority. However, if a party has incurred a criminal offense mentioned above (contamination of the environment), the punishment will be more severe when the order of the environmental authority regarding the correction or suspension of the activities of contamination has been disobeyed.

10 What authority enforces cleanup?

The authorities in charge of enforcing cleanup are the environmental authorities. These are the Ministry of Environment and Sustainable Development, the Regional Autonomous Corporations (within rural locations), Environmental Public Establishments (within the urban cities) and the National Parks System (within national parks).

However, within criminal or civil claims, courts are those that enforce cleanup, taking into account all the evidence available, which includes environmental authority concepts and assessments.

11 Are there any defenses?

Colombian law[7] has established a series of situations under which a person cannot be held responsible for contaminating the environment (exoneration from responsibility). These special situations are: (1) the events of *force majeure* as defined by the laws; and (2) damage caused by a third party, sabotage or terrorist acts.

However, within the administrative sanction process, there is a phase where the alleged offender has the right to defend itself and ask for evidence that he/she considers necessary to prove it is not responsible.

12 Can third parties / private parties enforce cleanup?

No. It will require either a governmental authority order or a court order.

13 Can third parties claim damages?

Yes. Damages can be claimed based upon the general laws on civil liability.

The polluter is responsible for all the damages caused to a third person due to the contamination. Therefore, a third party can claim damages against the polluter before the competent courts.

[6] Law 1333 of 2009.
[7] Law 1333 of 2009.

However, every person that alleges to be affected by the contamination, or that notices the contamination situation, can report it to the competent environmental authority in order to initiate a proceeding that will sanction the polluter. Parallel to the aforementioned proceeding, in Colombia with the National Constitution of 1991, there is a group of actions established to protect fundamental rights (in this case, the fundamental right to a healthy environment). These actions are: (i) *acción de tutela*, an action that allows the protection of fundamental rights and can be filed by an individual (however, *tutela* action shall be filed as a last resort to solve the problem or in those circumstances, in which any other action will not be efficient enough to avoid an irreversible harm); (ii) class action or *acción popular*, which allows the protection of collective interests, without having to demonstrate a particular harm, but the main interest of which is the common wellness; (iii) compliance action or *acción de cumplimiento*, to request before a judicial authority the compliance of a law or an administrative act; and (iv) group action or *acción de grupo*, which was instituted in order to make it possible for a group of persons to exclusively claim damages against another person who violated one of their fundamental rights. All of them are applicable if the fundamental right of a healthy environment is being violated by the contaminating situation.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No. Considering that the main responsibility for the cleanup is the polluter's and not the purchaser's, the cleanup obligation will subsist over the polluter, notwithstanding the purchase of the property by another person.

However, as mentioned in Section 4.2, in case contamination has been produced by hazardous waste, if the generator cannot be found, the person in possession of this waste is responsible for any damage caused to the environment, and maintains the possibility of claiming damages against the generator or polluter.

15.2 Contractually?

Under the principle of freedom of will of the parties, the cleanup liability can be passed to the owner. Nevertheless, the polluter will remain responsible under the eyes of the governmental authority; the contract will only bind the parties.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

If the land is contaminated and the new owner of the land does not take any remedial actions or notice with the competent environmental authority, the new owner can be held liable for the land contamination, at almost at the same level as the prior owner or the polluter, as outlined in Section 4.2.

From an institutional point of view, there is currently a draft "Environmental Policy for Land Management" that is in process to be filed before the National Environmental Council for subsequent adoption. This policy aims to promote an integrated management for soil conservation in Colombia, in the social, ecological, economic and political dimensions, based on the principles of biodiversity

conservation, water and air quality, land planning, and risk management, in order to ensure security, autonomy and food sovereignty, sustainable economy and welfare of Colombians.

Mexico

Federico Ruanova-Guinea
Baker & McKenzie, Tijuana

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes. Title V, Chapter VI of the General Law for the Prevention and Integral Management of Waste ("Waste Law") contains several provisions that deal with soil contamination liability and remediation requirements. The Regulations of the Waste Law also contains several provisions that deal with these topics.

2 Is there a definition of contaminated land in your laws?

Although the Waste Law does not define contaminated land, it does contain a definition of "contaminated site," which is "a place, space, soil, water body, installation or any combination thereof that has been contaminated with hazardous materials or waste, which, due to their quantities and characteristics, may represent a risk to human health, living organisms or to the use of a person's goods or properties."

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes.

4 If so:

4.1 Who is primarily responsible for the cleanup?

According to the Waste Law, a party that causes soil contamination may be primarily liable for such cleanup and may incur administrative, civil or criminal liability. However, owners or occupiers of private land or holders of concessions over federal property are jointly liable for remediation, regardless of fault, and may bring a legal action against the party that caused soil contamination.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

Yes.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

The Waste Law is not specific as to how the liability will be apportioned between these parties. In practice, however, the remediation obligation would fall on the party actually occupying the site.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

There is no legal definition of "historical contamination." The current owner and/or occupier of the property would be jointly liable for the cleanup regardless of which party is at fault and regardless of the length of time contamination has been present at a site.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

There are currently two standards in force regarding soil contamination/cleanup. One is NOM-138-SEMARNAT/SS-2003, which regulates hydrocarbons in soils, and the other is NOM-141-SEMARNAT-SSA1-2004, which regulates heavy metals in soils.

6 What level of cleanup is required?

The required levels of cleanup are specified in the standards.

7 Are there different provisions relating to the cleanup of water?

There are no standards in force regarding groundwater cleanup. However, in many instances, regulators have applied as a baseline the limits established in Standard NOM-127-SSA-1994 applicable to water that may be suitable for human use and consumption.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Owning contaminated land does not generate criminal liability. However, in some specific cases, causing soil contamination may be considered a criminal offense.

According to the Federal Criminal Code, a prison term of one to nine years and a fine equivalent to up to 3,000 days (calculated on the basis of revenue, not salaries) may be imposed on whoever undertakes or orders the discharge, deposit or infiltration of hazardous chemicals into the soil or groundwater, causing environmental harm.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

In some cases, the failure to comply with a remediation obligation may generate criminal liability.

Under the Federal Criminal Code, a prison term of one to four years and a fine equivalent to up to 3,000 days may be imposed on whoever fails to carry out or comply with any technical corrective or safety measures ordered by an environmental authority to prevent environmental harm, which may include soil remediation activities.

10 What authority enforces cleanup?

At the federal level, the Federal Bureau of Environmental Protection (PROFEPA) enforces cleanup.

11 Are there any defenses?

Yes. There are administrative appeals available to parties against whom penalties have been imposed. There is also an annulment lawsuit that may be filed before the Federal Fiscal and Administrative Justice Court. Finally, an *amparo* lawsuit (a type of constitutional challenge) may be brought against rulings that resolve appeals or annulment complaints.

12 Can third parties / private parties enforce cleanup?

Yes, they can, but only through a class action procedure. As of March 2012, it is possible for a group of affected individuals to bring a collective action (similar to a "class action") against a person that has caused soil contamination, for the purpose of forcing him or her to clean up a contaminated site. Collective actions may be brought before Federal Civil Courts by groups of 30 individuals or more, by PROFEPA or by any non-governmental environmental group.

In addition, purchase and sale agreements may contain environmental clauses requiring that a seller or purchaser of a site assume responsibility for cleanup if the site is contaminated by hazardous materials or waste. These agreements may be enforced through a judicial procedure.

13 Can third parties claim damages?

Yes they can, but only through a civil individual action or through a collective action.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No. However, a person transferring contaminated land to another must inform the purchaser of the environmental conditions of the property. Similarly, no contaminated land may be transferred without express written authorization from the Ministry of Environment and Natural Resources (SEMARNAT).

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

Yes.

15.1 Under the general law?

No.

15.2 Contractually?

Yes.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

The importance of conducting preliminary studies prior to the purchase to determine if the land is contaminated should also be brought to the attention of the potential purchaser. Furthermore, it is important to incorporate adequate indemnity provisions in purchase and sale or lease agreements.

Peru

Teresa Tovar and Diana Lizarraga
Baker & McKenzie, Lima

Legislative framework

Please note that this review relies solely on general legal provisions on soil contamination and remediation. Mining and hydrocarbon activities have additional reclamation standards that are not included in the scope of our answers.

1 Do you have any statutes specifically relating to land contamination?

Yes. The Ministry of Environment passed Supreme Decree No. 002-2013-MINAM (on 25 March 2013) and Supreme Decree No. 002-2014-MINAM (on 24 March 2014), which regulate the application of the Environmental Quality Standards for Soil ("EQS-Soil"). These environmental quality standards provide a broad framework for projects that may cause or potentially generate a risk of land contamination. Compliance with EQS-Soil is progressive and involves three different phases:

- The identification phase–The objective of this phase is to determine whether the EQS-Soil are being met or not in a site. It involves a historical investigation, a technical uplifting and the analysis of samples.
- The characterization phase – If EQS-Soil are not being met, then the extent and depth of the pollution have to be determined and a Soil Decontamination Plan has to be filed before the corresponding authority.
- The remediation phase – During this phase, the Soil Decontamination Plan is carried out and verification samples are taken.

According to these regulations, new project holders shall perform the identification phase as part of the activities intended for the elaboration of their environmental management tools. They are not liable for any pre-existing pollution.

Companies with ongoing activities at the time of enactment of the regulations must perform the identification phase in the site and in the areas of influence of their extractive, producing or service activities. If the results show that the EQS-Soil are exceeded, they must proceed to conduct phases (ii) and (iii). In principle, EQS-Soil are mandatory unless the project holder provides substantiated, studied, and appropriate reasons to deviate from the general standards through a Health and Environmental Risk Assessment (*Evaluación de Riesgos a la Salud y el Ambiente* or ERSA), which must be approved by the corresponding authority.

2 Is there a definition of contaminated land in your laws?

Yes. EQS-Soil define *contaminated site* as the land whose chemical characteristics have been adversely affected by the presence of chemical pollutants deposited by any human activity in such concentrations that, according to the current or intended use of the site and its surroundings, involves a risk to human health or the environment.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. The regulations establish that whenever the existence of a contaminated site is determined, the title holder of the polluting activities shall file a *Soil Decontamination Plan* to the corresponding authority.

The determination of a contaminated site may arise from the inspection powers of the administration or from the completion of the identification phase.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter is responsible for cleanup duties, without regard to who owns the contaminated land. Nevertheless, from a practical point of view, there is always a risk for the landowner considering that in some cases he or she is the visible party *vis-a-vis* neighbors and other stakeholders.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

If the polluter cannot be found, then the liability will not be passed to the landowner or occupier. The responsibility for cleanup is given to whoever conducted the polluting activity.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

This would be determined case-by-case by the authority. There are no specific rules.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

The regulations establish that: (i) title holders of new projects are not liable for historical pollution found in the land where they envisage to carry out their activities; and (ii) companies with ongoing activities must remediate contaminated land to attain EQS-Soil values, which may include historical contamination.

In the mining and hydrocarbons sectors, specific laws provide that the reclamation due to historical contamination will be the government's responsibility if the polluter cannot be found.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

A site may be determined as contaminated after inspection by the administration or the execution of the identification phase.

The sampling results will have to be compared to EQS-Soil values. If the results show a concentration of pollutants that exceed the EQS-Soil values, the polluter will have to undertake cleanup activities. Exceptionally, EQS-Soil values will not be enforceable if an ERSA is conducted. ERSA is an exceptional assessment tool prepared by any interested party that will have to show substantiated reasons to deviate from EQS-Soil levels. The specific remediation targets and other measures proposed in the ERSA to reduce the risks of harm to human health and the environment are subject to the approval of the corresponding authority and will define concrete clean up responsibilities.

6 What level of cleanup is required?

"How clean is clean" is prescribed in the EQS-Soil levels and, exceptionally, in the ad hoc ERSA levels remediation targets.

7 Are there different provisions relating to the cleanup of water?

Yes. Peru has a specific regulatory framework called EQS-Water.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

The Criminal Code provides that any person who breaches EQS-Soil regulations and causes or generates a risk of severe damage to the environment will be punished with no less than four but no more than six years of imprisonment (*pollution crime*). This sanction is focused on penalizing the action of contamination and does not apply to the mere fact of owning contaminated land.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

No. However, failure to comply with cleanup may amount to the crime of polluting the environment.

10 What authority enforces cleanup?

For the mining, hydrocarbons, power, fishing and manufacturing sectors, the corresponding authority is the Agency for Environmental Evaluation and Enforcement (*Organismo de Evaluación y Fiscalización Ambiental* or OEFA).

For other sectors, the enforcing authority is the specific office of environmental affairs within each Ministry (e.g., for transportation projects, the competent authority is the Directorate of Socio-environmental affairs of the Ministry of Transports and Communications).

11 Are there any defenses?

Yes. Polluters may invoke *causation or statutes of limitation*.

12 Can third parties / private parties enforce cleanup?

No. Only the authorities may enforce cleanup.

13 Can third parties claim damages?

Yes. Third parties can claim damages if damages result from the contamination of the site.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

No.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

Yes. However, even if a party responsible for cleanup may pass his or her cleanup liability to a third party through a contract, it will still be liable *vis-à-vis* the government for any pollution.

15.1 Under the general law?

Yes.

15.2 Contractually?

Yes.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

EQS-Soil is fairly new and although the process of implementation is not completely developed yet, progress has been observed.

Venezuela

Maria Eugenia Reyes
Baker & McKenzie, Caracas

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The Constitution of the Bolivarian Republic of Venezuela (the "Constitution")[1] provides that the state shall protect the environment, biological and genetic diversity, ecological processes, national parks and natural monuments, and other areas of particular ecological importance. The state must also ensure that the population lives in a pollution-free environment.

Additionally, the Constitution contains other provisions that may be construed as basis for the protection of the environment, such as the provision establishing that environmental education is mandatory and the provision that subordinates economic freedom to the protection of the environment. Furthermore, the obligation to preserve the ecological balance and to restore the environment to its original state is deemed to be included in all contracts executed by the republic, with Venezuelan or foreign individuals or legal entities and in all permits involving natural resources.

In turn, the Organic Law of the Environment (OLE)[2] gives the Ministry of Environment (the "Ministry") the power to stop illegal contaminating activities and to impose conditions or restrictions it deems necessary to protect the environment.

The Ministry is the highest-ranking agency authorized to curb activities that are capable of contaminating the environment and to monitor and control compliance with environmental regulations. It also has discretion to order environmental audits to determine environmental damage and to require their respective remediation or cleanup.

2 Is there a definition of contaminated land in your laws?

According to Venezuelan regulations, there is no definition of the term "contaminated land." However, the following are some related definitions contained in the OLE:

- Environmental damage refers to all changes that cause loss, degradation, deterioration, detriment or impairment to the environment or to any element thereof.
- Contamination or pollution pertains to the release or introduction into the environment of matter, in any state, that modifies or degrades the natural components of the environment.
- Pollutant refers to all matter, energy or combination thereof, either natural or man-made, which when released to or acting on the atmosphere, water, soil, flora, fauna or any other element of the environment, alters, modifies or degrades its natural components.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. The accessory and the safety measures provided for under the OLE and the Criminal Law of the Environment[3] (CLE) are designed to ensure the cleanup or remediation of contaminated land.

[1] Constitution of the Bolivarian Republic of Venezuela reprinted in Special Official Gazette No. 5,453 of 24 March 2000.
[2] Organic Law of the Environment published in Special Official Gazette No. 5,833 of 22 December 2006.
[3] Criminal Law of the Environmental published in Official Gazette No.39,913 of 2 May 2012.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The polluter is the party liable under civil law for the redress of environmental damage caused by its activities, when redress is necessary. Criminal penalties or administrative measures for the damage caused by its activities may be imposed as well.

Under Venezuelan civil law, the polluter can either be an individual or a legal entity. In the case of a legal entity, the liability would fall upon the partners or its directors, managers or administrators, depending on the case. Consequently, when purchasing the shares of a corporation, the owner of such shares could be held liable for the pollution caused by this corporation. Therefore, we highly recommend that the potential purchaser execute an environmental audit or due diligence before purchasing shares in order to guarantee that the corporation is free from environmental liabilities.

This would release the purchasers or the possessors of polluted land from civil, administrative or criminal liability for environmental damage arising from activities performed by the polluter prior to the purchase of such land.

If the polluter is a corporation, its directors, managers and administrators may also be criminally penalized for the environmental damage caused by the polluter's activities, to the extent of their culpable participation in the event that caused the damage.

It is possible for a contaminating activity performed prior to the date on which the shares or the assets of the polluting corporation were transferred to the purchasers to have damaging effects after said date. In such case and due to the difficulty posed in proving the exact date on which the event causing the damage occurred, there would be a risk that the portion of damage caused after the date of transfer of the shares or acquisition of the assets would imply liabilities for the possessor. These responsibilities could affect the polluter's directors, managers and administrators appointed by the purchasers, to the extent to which they would be deemed to have been culpably involved in the event causing the damage, or to cause an economic setback for the polluter that could indirectly affect the purchasers if they were acting in their capacity as shareholders of the polluter.

The same principle is applicable to the acquisition of assets from corporations or persons that may have caused damage to the environment prior to the date on which the acquisition is agreed on or executed.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The polluter is the party liable under civil law for the redress of the environmental damage caused by its activities, when redress is necessary. Indeed, the possessors or owners of polluted land are not civilly, administratively or criminally liable for environmental damage arising from activities performed by the polluter.

However, the Ministry could initiate a proceeding based on its discretionary power of environmental control, and thus require the occupier to become a party to such a proceeding. The occupier shall thus argue or prove that the land had suffered environmental damage arising from activities performed by the former occupier of such land, and consequently, the liability would fall on the former occupier.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

The polluter is the party liable under civil law for the redress of the environmental damage caused by its activities, when redress is necessary. Nonetheless, in this case and due to the difficulty posed in proving the exact date on which the event causing the damage occurred, there would be a risk that the portion of damage caused after the date of transfer of the shares or the acquisition of the assets would

imply liabilities either for the polluter or the non-polluter, regardless of whether this is the landlord or the tenant of the land.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

There are currently no specific provisions under Venezuelan laws and regulations regarding historical contamination. In any case, however, the polluter will be the party liable under civil law for the redress of the environmental damage caused by such contamination, when redress is necessary.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Although the OLE does not describe the standards or the limits to permissible pollution, there are various norms and regulations that set up guidelines to determine these limits in Venezuela. The Ministry, however, has the discretionary power to specifically determine the limits to pollution and to decide if cleanup is required for a polluted environment.

6 What level of cleanup is required?

Cleanup must be carried out until the affected area is restored to the conditions that existed prior to the environmental damage.

7 Are there different provisions relating to the cleanup of water?

Yes, the main laws and regulations in this regard are: the Forest, Soil and Water Law[4]; Water Law[5] ; the Rules for the Classification and Quality Control of Water Bodies and Liquid Sewage or Effluents; and the Rules for the Regulation and Control of the Use of Water Resources and Hydrographic Basins.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

It is considered a criminal offense to cause any kind of environmental damage, pursuant to Venezuelan environmental laws and regulations, specifically pursuant to the CLE which in Articles 63, 99 and 102 criminalizes the pollution of the land. In connection with the applicable penalties, please note the following:

- The CLE sets forth the imposition of sanctions of both imprisonment and fines as main sanctions. Sanctions of imprisonment are applicable to individuals and fines are applicable to corporate entities.

- Without prejudice to the measures of restoration, restitution and indemnification, as well as any other measure necessary for assuring the results of a decision, the main sanctions may result in: (i) the confiscation of equipment, instruments and objects used for the commission of the criminal offense; and (ii) the disqualification from obtaining new permits for the use of natural resources for a term of two years after the term of the main sanction has elapsed.

[4] Forest, Soil and Water Law published in Special Official Gazette No. 1,004 of 26 January 1966
[5] Water Law published in Official Gazette No. 38,595 of 2 January 2007

- Finally, please note that based on the CLE, regardless of an enterprise's liability, the owners, presidents and administrators will be criminally liable for their culpable participation in the criminal offenses committed by their enterprise. The CLE is not clear as to whether the term "owner" refers to the shareholders or quotaholders of an enterprise; however, in our view, this interpretation should not be dismissed and it will probably end up being enforced in the future.

It is not a criminal offense to own contaminated land, as long as the pollution of the land does not arise from activities performed by the owner in the absence of the due authorizations that would allow him/her to perform such activities.

The criminal laws issued in furtherance of the OLE include sanctions of imprisonment, and the dissolution of the respective legal entity, as well as fines, applicable both to individuals and legal entities. The main sanctions are found in the CLE. According to the OLE, however, the penalties set by the regulations on this matter shall not exceed 10 years of imprisonment, or 10,000 Venezuelan Tax Units regarding monetary penalties (the current value of a Venezuelan Tax Unit is of VEF150). If the damage caused cannot be redressed, the administrative or judicial authority may impose an additional fine equivalent to double the value of the damage caused. Additionally, the OLE provides that the competent agencies may apply measures of an administrative or criminal nature, such as the following:

- Precautionary measures – The competent agency may adopt, from the moment it becomes aware of the occurrence, at the beginning or throughout the course of the relevant proceeding, the measures necessary to avoid the degrading consequences of the occurrence under investigation, including the temporary, full or partial occupation of the sources of the contamination, until the degrading cause is eliminated; temporary closure of the establishment whose activities are degrading the environment; and temporary prohibition from performing the activities that degrade the environment.

- Accessory measures – Some of these measures include the revocation of the administrative decision granting the authorization; prohibition, for up to two years, from requesting and obtaining new administrative authorizations for activities to degrade the environment; the effective redress of the damage caused; and the seizure of the equipment, instruments, weapons, materials, devices and facilities used to commit the infraction or offense.

- Safety measures – These are the measures needed to prevent the appearance or continuance of the damage or to repair it, as well as to prevent the danger and to counteract the harmful effects of the penalized action. Some of these measures include the temporary occupation of the contaminating sources until the degrading cause is corrected or eliminated, or the necessary guaranties to avoid the recurrence of the events are granted; temporary or definitive closure of the facilities or establishments whose activities alter the environment; temporary or definitive prohibition from the activity that degrades the environment; and modification or demolition of the constructions that breach the provisions for environmental management and planning.

The penalties imposed that are contemplated in the environmental laws shall be applied without impairment to the civil or criminal actions applicable or the penalties sanctioned in other laws.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Among the measures aimed at correcting and compensating for environmental damage caused, the Ministry has the authority to demand that the party responsible for the damage restore the affected area to the conditions existing prior to the environmental damage. If the responsible party refuses to willingly comply with this measure, the Ministry has the power to close the industry or the

establishment that caused the contamination; however, it does not have the authority to compel the responsible party to perform the restoration activities himself/herself.

The administrative responsibility that may arise from the refusal to comply with the cleanup duty does not impair the civil liability that may also arise therefrom.

10 What authority enforces cleanup?

The Ministry enforces cleanup.

11 Are there any defenses?

The authorizations granted by the Ministry to perform activities that may contaminate the environment are a proper defense in the event of criminal accusations arising from damage to the environment. Hence, the Ministry indicates in the authorizations the parameters within which the pollutant activity is authorized. Therefore, this legitimizes the actions of the party responsible for the environmental damage.

The environmental damage caused in the performance of activities authorized by the Ministry are obviously excluded from the obligation to provide compensation as stated in the civil liability legislation, to the extent that the activities are carried out within the parameters of the respective authorization.

12 Can third parties / private parties enforce cleanup?

No.

13 Can third parties claim damages?

Yes. Damages can be claimed based upon the general laws on civil liability.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

There are currently no provisions under Venezuelan laws and regulations regarding mandatory investigations of potential contamination in connection with the sale of property. It is possible, however, for the parties involved in the sale of property to agree upon the conduct of such investigations.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

As mentioned in answer 5.1, the polluter is the party liable under civil law for the redress of environmental damage caused by its activities, when redress is necessary. The penalties or administrative measures for the damage caused by the polluter's activities may be imposed on the person who is responsible for the environmental damage.

Nonetheless, in this case and due to the difficulty posed in proving the exact date on which the event causing the damage occurred, there would be a risk that the portion of damage caused after the date of the acquisition of the land would be attributed to the new owner, who will be liable for such.

15.2 Contractually?

It is convenient for the purchasers of shares or those acquiring the assets of an individual or a corporation to set forth in the purchase agreement the obligation of the sellers to provide indemnification for damage that could have been caused by the purchasers.

Depending on whether the seller is an individual or a legal entity, the liability would fall upon the: (i) individual; (ii) the legal entity; or (iii) the legal entity's partners, directors, managers and administrators.

It must be taken into account, however, that the environmental laws and regulations in Venezuela are strict public policy and, therefore, the liability would always lie with the polluter.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

We highly recommend that the potential purchaser execute an environmental audit or due diligence before purchasing the land in order to guarantee that it is free from any environmental damage. Additionally, the purchaser should obtain all required authorizations granted by the Ministry, since in such authorizations, the Ministry indicates the parameters within which the polluting activity is authorized. Therefore, this would legitimize the actions of the party responsible for the environmental damage.

North America

Canada

Jonathan Cocker
Baker & McKenzie, Toronto

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

Yes. As most environmental matters, including land contamination, are regulated by each Canadian provincial or territorial government, these respective governments all have environmental protection legislation that specifically address land contamination matters, such as pollution release limits, reporting requirements and remediation obligations.

2 Is there a definition of contaminated land in your laws?

Typically, Canadian environmental protection legislation does not contain a specific definition of land contamination, though the broader, more general notion of a "contaminant" is frequently adopted. There is also a general term of "adverse effect," which includes but is broader than contamination. Land contamination is most often effectively delineated by noncompliance with one or more soil, sediment or groundwater quality standards.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

Yes. Under the various environmental protection laws across Canada, environmental protection agencies are provided with a clear grant of power to compel any party to clean up or remediate contaminated land, or pay the remediation costs.

4 If so:

4.1 Who is primarily responsible for the cleanup?

The environmental regulators have jurisdiction to order any party to clean up contaminated land. In practice, the occupier polluter of the site is typically the first party subject to the cleanup order, though the owner and/or other occupier will be included where the regulator has concerns regarding compliance with the order or where the polluter is no longer in possession of the land.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

The owner or other occupier of the site will have regulatory liability for the cleanup or remediation of a contaminated site if the polluter cannot be found. The regulators have the ability to make joint and several liability assessments of both of them, which is often done where there are uncertainties regarding the ability of one or more of the parties to comply with an administrative order.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

The environmental regulator may determine how it wishes to apportion liability between an owner and an occupier. In making this assessment, the regulator typically looks at the historical on-site contamination, the polluting activities of the occupier, and the consent in regard to these activities, if any, provided by the owner.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

A cleanup order will include historical contamination, as well as that which can be attributed to the present owner and/or occupier.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

Each regulator establishes soil, sediment and groundwater contamination limits for each polluting substance. Technically, every owner and occupier of a site that exceeds one or more of these limits are obligated to voluntarily remediate the site in compliance with certain requirements and standards. In practice, many sites, including brownfields, will be in noncompliance for extended periods.

6 What level of cleanup is required?

Cleanup is typically required only to ensure that the site complies with the regulator's contamination standards. Where there is a concern of an adverse effect to human health or the natural environment, however, the regulator could impose a more onerous cleanup obligation, even potentially requiring that the land meet a greenfield standard.

7 Are there different provisions relating to the cleanup of water?

Yes. In most provinces and territories in Canada, groundwater and gray water discharge standards are dealt with under separate provisions of applicable environmental legislation. Drinking water is often dealt with under separate legislation, often administered by specialist agencies.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

Not generally. While there are federal Criminal Code provisions that make certain types of harmful contamination practices offenses, most types of land contamination activities would be subject to either quasi-criminal or administrative sanctions by specialist tribunals that specifically address environmental matters.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

Not generally. Failure to clean up a contaminated site does not constitute a criminal offense. However, failure to comply with a regulator's order to clean up a site may attract contempt proceedings, for which serious sanctions may apply. Further, the sanctions for violation of environmental laws typically include fines and, where individuals are charged, possible incarceration.

10 What authority enforces cleanup?

The provincial or territorial ministry charged with environmental matters is typically responsible for enforcing a cleanup.

11 Are there any defenses?

While there are defenses, such as due diligence, to charges alleging deliberate or willful pollution activities, there are generally no defenses to a cleanup order from a regulator. Civil claims may be

made by the ordered party against others who may be responsible for some or all of the contamination.

12 Can third parties / private parties enforce cleanup?

Generally, yes. Parties can privately contract to apportion responsibility for the costs of cleanup and can seek civil orders for performance of these obligations.

13 Can third parties claim damages?

Yes. Third parties, such as adjacent land owners, can make civil claims for alleged damage arising from a contaminated site. The claims are usually made in tort for nuisance, strict liability, trespass and negligence.

Third parties may also file complaints with environmental regulators.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

Generally, no. In most provinces, there is no general positive obligation upon either a seller or a buyer of contaminated property to conduct investigations into the environmental condition of the site prior to transfer. Notably, there is a compliance certification obligation in Quebec where the activities on the acquired land will change. Compliance representations and filings are, however, increasingly required in transferring any environmental-related permit or license.

Environmental site assessments are typically done by the purchasing party where there is some concern with the environmental quality of the land.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

Yes, but not specific orders. The general obligation to clean up contaminated sites effectively passes from an asset seller to a purchaser at the time of transfer of the contaminated land. The asset seller of a contaminated site does not, however, have the ability to pass on a statutory order requiring a purchaser to clean up, though there is nothing to prevent the purchaser from serving as the asset seller's agent in complying with the order.

15.2 Contractually?

Yes, but not specific orders. As discussed, the asset seller cannot transfer an obligation to pass an order requiring it to clean up a contaminated site, but it can enter into contractual agreements to require a contribution or indemnity from the purchaser.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

There is a growing acknowledgment in Canada that environmental regulation must facilitate the redevelopment of brownfields sites. As a result, we are seeing increasing initiatives across Canada to limit the liability of purchasers and redevelopers of contaminated land.

USA

John Watson and Jessica Wicha
Baker & McKenzie, Chicago

Legislative framework

1 Do you have any statutes specifically relating to land contamination?

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA), also known as "Superfund," provides a framework for the cleanup of the release or threatened release of hazardous substances into the environment. CERCLA authorizes the federal government to remediate a property when immediate action is needed and to bring actions to require cleanup by potentially responsible parties (PRPs). Private parties may also initiate remedial actions to address releases of hazardous substances and may pursue the recovery of costs from PRPs in cost recovery or contribution actions.

- "Release" – Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of hazardous substances into the environment
- "Environment" – Surface water, groundwater, land surface, soil or ambient air
- "Hazardous Substance" – Any "hazardous substance" under the Clean Water Act (excluding petroleum), any hazardous waste under the Resource Conservation and Recovery Act, any "hazardous air pollutant" under the Clean Air Act, and any imminently hazardous chemical designated by the US Environmental Protection Agency (EPA); this definition does not include petroleum, including crude oil.

Individual states also have laws and regulations imposing cleanup obligations to statutorily liable parties. Historically, most state laws mirrored the wide-ranging liability reach of the federal Superfund scheme. In recent years, however, numerous states have abandoned the CERCLA scheme and adopted instead arguably more equitable "polluter pays" laws, limiting liability to those parties actually responsible for site impacts.

2 Is there a definition of contaminated land in your laws?

CERCLA imposes liability for the cleanup of contaminated "facilities." A "facility" is defined as:

- any building, structure, installation, equipment, pipe or pipeline, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft; or
- any site or area,

where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be located.

Statutory responsibility for cleanup

3 Are there any cleanup or remediation laws with regard to contaminated land?

CERCLA authorizes the federal government to remediate a contaminated property when immediate action is required and to bring enforcement actions to require cleanup by PRPs. Third parties may also remediate sites and pursue other liable parties in cost recovery or contribution claims.

4 If so:

4.1 Who is primarily responsible for the cleanup?

CERCLA liability is strict, joint and several, thus exposing non-culpable parties to liability for environmental impacts caused by others. CERCLA imposes liability to four classes of PRPs:

- Current owners and operators of the contaminated property ("facility") (i.e., the landowner)
- Past owners and operators of the contaminated property at the time the hazardous substances were released (i.e., the polluter)
- Generators of the hazardous substances and parties that arranged for the disposal or transport of the hazardous substances
- Transporters of the hazardous substances that selected the site where the hazardous substances were disposed of

Because of CERCLA's wide-ranging liability scheme, any PRP may be held liable for the entire cleanup. Assuming all parties are financially viable, however, the percentage share usually depends on causation, which is fact-specific, with liability issues being resolved in cost recovery or contribution litigation. In fact, a 2009 US Supreme Court decision confirmed that CERCLA liability may be apportioned among PRPs if there are facts reasonably supporting the apportionment. This may result in the US government recovering less than 100 percent of its cleanup costs. Factors that will be considered include the percentage of land within the larger contaminated parcel that was owned or operated by the PRP and the percentage of contamination attributable to the PRP.

4.2 If it is the polluter, what happens if the polluter cannot be found? Is the liability passed on to the owner or the occupier?

As discussed in 4.1, the CERCLA liability scheme is strict, joint and several. Accordingly, if the polluter cannot be located or is no longer financially viable, then liability can be passed on to one or more identified PRPs, including the owner and/or operator of the property.

4.3 If the polluters are both the owner and the occupier (e.g., the landlord and a tenant), how is the liability apportioned between them?

Technically, both parties are jointly and severally liable for site environmental impacts. Liability among such parties will likely be apportioned based on a variety of factors, including, among others, the responsibility of each party for the release of hazardous substances, the extent of cooperation of the parties in addressing any releases, and the ability of the parties to pay for the cleanup.

4.4 Does the liability to clean up include historical contamination? If not, who pays for this cleanup?

Yes, CERCLA liability is strict and retroactive, therefore imposing liability for past acts regardless of fault.

Cleanup standards

5 How is it decided whether cleanup is required? For example, are there regulations specifying limits to polluting substances that are permitted, or is some form of risk assessment carried out?

The EPA relies on generic screening levels to assess cleanup obligations at contaminated sites. Risk assessment methodologies are also regularly utilized to develop site-specific standards for remediation activities. Most states have well-developed risk-based remediation programs that rely on generic

residential and industrial cleanup objectives and also allow parties to develop alternative standards through formal risk assessments.

6 What level of cleanup is required?

Cleanup standards are typically tied to the nature of the property use – residential versus industrial – and are ultimately based on whatever risks are posed by contaminants present at a site.

7 Are there different provisions relating to the cleanup of water?

Generic and risk-based cleanup standards also exist for groundwater cleanups. In many instances, prohibitions on the use of groundwater will eliminate any obligations to remediate identified impacts.

Penalties, enforcement and third-party claims

8 Is it a criminal offense to contaminate land or to own contaminated land? If so, what are the penalties?

CERCLA authorizes the federal EPA to criminally prosecute a person in charge of a vessel or facility who fails to report to the agency a release of a reportable quantity of a hazardous substance as soon as the person has knowledge of the release. The person can be fined or imprisoned for up to three years (or up to five years in the case of a subsequent conviction), or both.

CERCLA also authorizes the EPA to criminally prosecute the following parties who fail to report to the agency the unpermitted storage, treatment or disposal of hazardous waste: current owners or operators of the facility; former owners or operators at the time of disposal of the hazardous waste; and transporters of the hazardous waste that selected the site where the hazardous substances were brought. The EPA may impose a fine of up to USD10,000 or imprisonment for up to one year, or both.

9 Is it a criminal offense not to comply with the requirement to clean up? If so, what are the penalties?

CERCLA imposes civil liability, but not criminal liability, for failure to comply with a required cleanup.

10 What authority enforces cleanup?

The EPA and relevant state environmental agencies enforce cleanup.

11 Are there any defenses?

A PRP may avoid CERCLA liability if it can establish that the release of hazardous substances was caused solely by an act of God, act of war, or act or omission of a third party with whom the PRP has no contractual relationship.

In addition to these affirmative defenses, CERCLA provides certain exemptions from the far-reaching liability scheme, including the "innocent landowner," "contiguous property owner," "bona fide prospective purchaser," and "secured creditor" exemptions. To take advantage of these exemptions, the landowner must comply with various pre- and post-acquisition obligations.

- Innocent Landowner Defense – A current landowner may avoid CERCLA liability if, at the time the party acquired the property, it did not know and had no reason to know that any hazardous substances were released on the property. To establish that the landowner did not know and had no reason to know of the release, the landowner must have conducted all appropriate inquiries into the prior ownership and uses of the facility before acquiring the

property, with the results of that inquiry resulting in no information on the presence of the environmental impacts.

- Contiguous Property Owner Exemption – A current landowner may avoid liability for contamination migrating from an adjacent parcel if, at the time of acquisition, the party had no reason to know of the release. Similar to the innocent landowner defense, the owner must have undertaken all appropriate inquiry into the past uses and ownership of the property prior to property acquisition.

- Bona Fide Prospective Purchaser Exemption – A current landowner may avoid CERCLA liability even if it purchased the property with knowledge of the contamination. Pre-acquisition requirements include conducting all appropriate inquiries into the prior ownership and uses of the facility by commissioning a Phase I Environmental Site Assessment in accordance with the current ASTM standard. A new ASTM standard was issued in November 2013, which introduces new terminology for evaluating risks and potentially expands the scope of required environmental review. EPA has determined that this new ASTM E1527-13 standard satisfies all appropriate inquiries for purposes of the Bona Fide Prospective Purchaser Exemption. Post-acquisition continuing obligations include cooperation with PRPs on site cleanup work and the management of imminent risks to the environment or health of site occupants.

- Secured Creditor Exemption – A lender that takes indicia of ownership of a contaminated property by way of its lending activities or foreclosure is generally exempt from CERCLA liability.

12 Can third parties / private parties enforce cleanup?

CERCLA authorizes any person to bring a citizen suit against a PRP or the EPA to enforce a cleanup pursuant to the statute.

13 Can third parties claim damages?

Third parties have the right to pursue claims in cost recovery under Section 107 of CERCLA or contribution under Section 113 of CERCLA to seek the management of past costs and the allocation of future costs associated with the cleanup of impacted sites from those parties deemed to be responsible for any contamination.

Acquisition of contaminated land

14 Is it a legal requirement in your jurisdiction to conduct investigations for potential contamination in connection with the sale of property?

US law does not require that a potential buyer conduct an environmental investigation prior to the purchase of property. However, as discussed in the response to Question 11, in order for a buyer to avoid potential CERCLA liability as a current owner, it must have completed a Phase I Environmental Site Assessment in accordance with the ASTM standard prior to the acquisition.

15 Can a party responsible for cleanup under statutory law pass on its cleanup liability to the purchaser?

15.1 Under the general law?

No. Agreements to transfer environmental liabilities are not enforceable against the government.

15.2 Contractually?

Agreements are nonetheless negotiated all the time to provide for the retention or assumption of environmental liabilities in connection with the purchase and sale of contaminated property.

16 Is there anything else about contaminated land that you would bring to the attention of a potential purchaser of that land?

Expanded liability exemptions, maturing risk-based remediation programs and emerging risk management tools, such as environmental insurance, have all been responsible for creating a regulatory and business climate that actively promotes the purchase and sale of environmentally impaired real estate. Creative solutions exist and are regularly employed, with the assistance of technical consultants and legal counsel, to address and manage environmental risks and facilitate these transactions.

Firm Profile

Baker & McKenzie has been global from our inception. We offer clients and talent both the uncompromising commitment to excellence expected of a top firm and a distinctive way of thinking, working and behaving — as a passionately global and genuinely collaborative firm.

We seamlessly combine an instinctively global perspective with the nuanced local insights of more than 4,200 locally qualified lawyers in 77 offices around the world. This includes the knowledge and experience of more leading lawyers in more countries in the Chambers Global Directory than any other global Top 20 law firm. Chambers lists 23 of our practices in its global rankings of the world's leading practices.

But being global is not only about size or geography. It requires thinking, working and behaving in a distinctively global manner. Over six decades, we have organized, governed and managed our Firm to cultivate the global mindset, awareness of distinct business cultures, collaborative nature and practical knowledge required to navigate complexity across issues, practices and borders with ease.

We understand the challenges of the global economy because we have had a global presence from the start. Since our founding in 1949, we have been advising leading multinational and domestic companies on the issues of an integrated global market. Nearly two thirds of our fees come from clients we serve in five countries or more. We serve more than 500 of the world's largest companies.

As a community of citizens of 60 nations, we have a deep understanding and appreciation for the language and culture of business all over the world. This gives us a distinctive ability to help clients anticipate and address the nuances of local markets as they pursue their global and regional business objectives with confidence.

We also are leaders in talent management, with a focus on developing both top-tier technical legal skills and sophisticated interpersonal skills, allowing us to deliver consistently, everywhere we operate, world-class service tailored to the preferences of our clients.

Our clients and lawyers appreciate these differences. Surveys of general counsel and other law firms rate our client service among the "absolute best." We are frequently cited for the quality of our training and workplace experience.

Editor

Ulrich Ellinghaus
Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern und Steuerberatern mbB
Bethmannstraße 50-54
60311 Frankfurt/Main
Germany
Tel.: +49 69 2 99 08 109
Ulrich.Ellinghaus@bakermckenzie.com

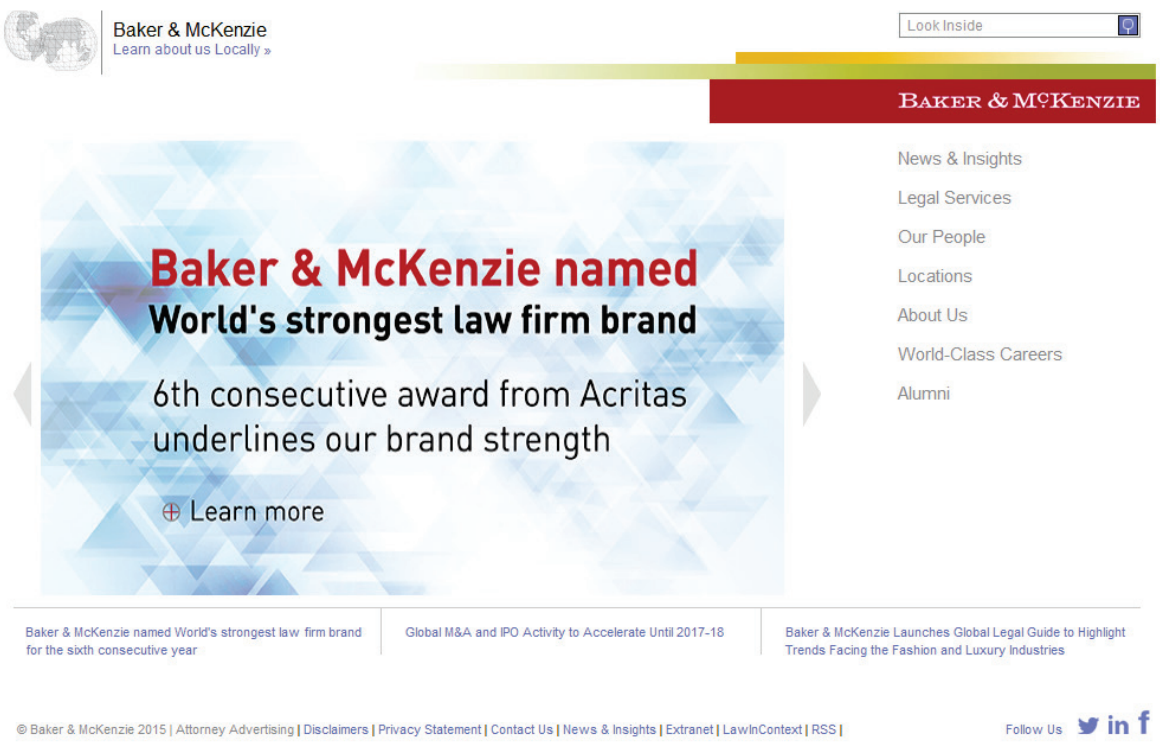
Contributors

Country	Office	Contact person	E-mail address
Argentina	Buenos Aires	Alejandra Bugna Gustavo Boruchowicz	Alejandra.Bugna@bakermckenzie.com Gustavo.Boruchowicz@bakermckenzie.com
Australia	Sydney	Jennifer Hughes	Jennifer.Hughes@bakermckenzie.com
Austria	Vienna	Franz Josef Arztmann	FranzJosef.Arztmann@bakermckenzie.com
Azerbaijan	Baku	Gunduz Karimov Jamil Alizada	Gunduz.Karimov@bakermckenzie.com Jamil.Alizada@bakermckenzie.com
Belgium	Antwerp	Pascal Mallien Mario Deketelaere	Pascal.Mallien@bakermckenzie.com Mario.Deketelaere@bakermckenzie.com
Brazil	Sao Paulo	Renata Amaral Camila Steinhoff	Renata.Amaral@trenchrossi.com Camila.Steinhoff@trenchrossi.com
Canada	Toronto	Jonathan Cocker	Jonathan.Cocker@bakermckenzie.com
Chile	Santiago	Antonio Ortuzar Jr.	Antonio.Ortuzar.Jr@bakermckenzie.com
People's Republic of China	Shanghai Beijing	Danian Zhang Scott Silverman	Danian.Zhang@bakermckenzie.com Scott.Silverman@bakermckenzie.com
Colombia	Bogota	Jaime Trujillo	Jaime.Trujillo@bakermckenzie.com
Czech Republic	Prague	David Simonek Alexandr Cesar Barbora Brezinova	David.Simonek@bakermckenzie.com Alexandr.Cesar@bakermckenzie.com Barbora.Brezinova@bakermckenzie.com
Egypt	Cairo	Samir Hamza Lamyaa Gadelhak	Samir.Hamza@bakermckenzie.com Lamyaa.Gadelhak@bakermckenzie.com
England & Wales	London	Graham Stuart Rachel Barlow	Graham.Stuart@bakermckenzie.com Rachel.Barlow@bakermckenzie.com
France	Paris	Arnaud Cabanes Marie-Laetitia de La Ville-Bauge Eline Robin	Arnaud.Cabanes@bakermckenzie.com Marie-Laetitia.deLaVilleBauge@bakermckenzie.com Eline.Robin@bakermckenzie.com
Germany	Frankfurt	Ulrich Ellinghaus	Ulrich.Ellinghaus@bakermckenzie.com

Country	Office	Contact person	E-mail address
Hungary	Budapest	Peter Vörös Geza Kajtar Anita Benko	Peter.Voros@bakermckenzie.com Geza.Kajtar@bakermckenzie.com Anita.Benko@bakermckenzie.com
Indonesia	Jakarta	Mochamad Fachri Ferdy Prawirakusumah	Mochamad.Fachri@bakernet.com Ferdy.Prawirakusumah@bakernet.com
Italy	Milan	Pierfrancesco Federici Francesco Goisis Mario Cigno Gherri Magaraggia	Pierfrancesco.Federici@bakermckenzie.com Francesco.Goisis@bakermckenzie.com Mario.Cigno@bakermckenzie.com Gherri.Magaraggia@bakermckenzie.com
Japan	Tokyo	Kana Itabashi Mihoko Ida Hideo Ohta	Kana.Itabashi@bakermckenzie.com Mihoko.Ida@bakermckenzie.com Hideo.Ohta@bakermckenzie.com
Kazakhstan	Almaty	Azamat Kuatbekov Nurgul Abdreyeva	Azamat.Kuatbekov@bakermckenzie.com Nurgul.Abdreyeva@bakermckenzie.com
Luxembourg	Luxembourg	Jean-Francois Findling Hélène Grandmaire	Jean-Francois.Findling@bakermckenzie.com Helene.Grandmaire@bakermckenzie.com
Malaysia	Kuala Lumpur	Andre Gan Prem Kumar Ramasamy	Andre.Gan@wongpartners.com Premkumar.Ramasamy@wongpartners.com
Mexico	Tijuana	Federico Ruanova-Guinea	Federico.Ruanova-Guinea@bakermckenzie.com
The Netherlands	Amsterdam	Cynthia de Witt Wijnen	Cynthia.deWittWijnen@bakermckenzie.com
Philippines	Manila	Dennis A. Quintero Alexandra Castro Tristan Matthew Delgado	Dennis.Quintero@quisumbingtorres.com Alexandra.Castro@quisumbingtorres.com TristanMatthew.Delgado @quisumbingtorres.com
Peru	Lima	Teresa Tovar Diana Lizarraga	Teresa.Tovar@bakermckenzie.com Diana.Lizarraga@bakermckenzie.com
Poland	Warsaw	Jacek Korzeniewski	Jacek.Korzeniewski@bakermckenzie.com
Russia	St. Petersburg	Maxim Kalinin Olga Pankova Olga Anikina	Maxim.Kalinin@bakermckenzie.com Olga.Pankova@bakermckenzie.com Olga.Anikina@bakermckenzie.com
Singapore	Singapore	Ken Chia Yi Lin Seng Hazmi Hisyam	Ken.Chia@bakermckenzie.com YiLin.Seng@bakermckenzie.com Hazmi.Hisyam@bakermckenzie.com
South Africa	Johannesburg	Mike van Rensburg Janine Howard Tanya Seitz Morne van der Merwe Darryl Bernstein	Mike.vanRensburg@bakermckenzie.com Janine.Howard@bakermckenzie.com Tanya.Seitz@bakermckenzie.com Morne.vanderMerwe@bakermckenzie.com Darryl.Bernstein@bakermckenzie.com

Country	Office	Contact person	E-mail address
Spain	Barcelona	Xavier Junquera Ruth Urbano Elisabet Cots	Xavier.Junquera@bakermckenzie.com Ruth.Urbano@bakermckenzie.com Elisabet.Cots@bakermckenzie.com
Sweden	Stockholm	Tobias Edenman Jonatan Loor	Tobias.Edenman@bakermckenzie.com Jonatan.Loor@bakermckenzie.com
Switzerland	Geneva	Daniel Peregrina	Daniel.Peregrina@bakermckenzie.com
Taiwan	Taipei	Tiffany Huang Su-Fen Chen	Tiffany.Huang@bakermckenzie.com Su-Fen.Chen@bakermckenzie.com
Thailand	Bangkok	Peerapan Tungsuwan Jidapa Surasathian Nam-Ake Lekfuangfu Theeranit Pongpanarat	Peerapan.Tungsuwan@bakermckenzie.com Jidapa.Surasathian@bakermckenzie.com Nam-Ake.Lekfuangfu@bakermckenzie.com Theeranit.Pongpanarat@bakermckenzie.com
Turkey	Istanbul	Hasmet Ozan Guner Ismail Esin Daniel Matthews Birturk Aydin Sertac Kokenek Gokce Serez	Ozan.Guner@esin.av.tr Ismail.Esin@esin.av.tr Daniel.Matthews@bakermckenzie.com Birturk.Aydin@esin.av.tr Sertac.Kokenek@esin.av.tr Gokce.Serez@esin.av.tr
Ukraine	Kyiv	Serhiy Piontkovsky	Serhiy.Piontkovsky@bakermckenzie.com
United States of America	Chicago	John Watson Jessica Wicha	John.Watson@bakermckenzie.com Jessica.Wicha@bakermckenzie.com
Venezuela	Caracas	Maria Eugenia Reyes	MariaEugenia.Reyes@bakermckenzie.com
Vietnam	Ho Chi Minh	HoangKimOanh Nguyen Hien Ly Dinh	HoangKimOanh.Nguyen@bakermckenzie.com HienLy.Dinh@bakermckenzie.com

Visit the Baker & McKenzie firm website



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Baker & McKenzie Offices Worldwide

(Offices denoted with asterisks are associated firms)

Argentina - Buenos Aires
Baker & McKenzie Sociedad Civil
Avenida Leandro N. Alem 1110, Piso 13
Buenos Aires C1001AAT
Argentina
Tel: +54 11 4310 2200
Fax: +54 11 4310 2299

Australia – Brisbane
Baker & McKenzie
Level 8
175 Eagle Street
Brisbane QLD 4000
Australia
Tel: +61 7 3069 6200
Fax: +61 7 3069 6201

Australia - Melbourne
Baker & McKenzie
Level 19
181 William Street
Melbourne VIC 3000
Australia
Tel: +61 3 9617 4200
Fax: +61 3 9614 2103

Australia - Sydney
Baker & McKenzie
Level 27, A.M.P. Centre
50 Bridge Street
Sydney, NSW 2000
Australia
Tel: +61 2 9225 0200
Fax: +61 2 9225 1595

Austria - Vienna
Diwok Hermann Petsche Rechtsanwälte
LLP & Co KG
Schottenring 25
1010 Vienna
Austria
Tel: +43 1 24 250
Fax: +43 1 24 250 600

Azerbaijan - Baku
Baker & McKenzie - CIS, Limited
The Landmark Building
96A Nizami Street
Baku AZ1010
Azerbaijan
Tel: +994 12 497 18 01
Fax: +994 12 497 18 05

Bahrain - Manama
Baker & McKenzie Limited
18th Floor
West Tower
Bahrain Financial Harbour
P.O. Box 11981
Manama
Kingdom of Bahrain
Tel: +973 1710 2000
Fax: +973 1710 2020

Belgium - Antwerp
Baker & McKenzie CVBA/SCRL
Meir 24
2000 Antwerp
Belgium
Tel: +32 3 213 40 40
Fax: +32 3 213 40 45

Belgium - Brussels
Baker & McKenzie CVBA/SCRL
Louizalaan 149 Avenue Louise
11th Floor
Brussels 1050
Belgium
Tel: +32 2 639 36 11
Fax: +32 2 639 36 99

Brazil - Brasília*
Trench, Rossi e Watanabe Advogados
SAF/S Quadra 02, Lote 04, Sala 203
Edificio Via Esplanada
Brasília - DF - Brasil - CEP 70070-600
Brazil
Tel: +55 61 2102 5000
Fax: +55 61 3323 3312

Brazil - Porto Alegre*
Trench, Rossi e Watanabe Advogados
Av. Borges de Medeiros, 2233 - 4º andar
Porto Alegre - RS - Brasil - CEP 90110-150
Brazil
Tel: +55 51 3220 0900
Fax: +55 51 3220 0901

Brazil - Rio de Janeiro*
Trench, Rossi e Watanabe Advogados
Av. Rio Branco, 1 - 19º andar -
(Ed. RB1 - Setor B)
Rio de Janeiro - RJ - Brasil - CEP 20090-003
Brazil
Tel: +55 21 2206 4900
Fax: +55 21 2206 4949

Brazil - São Paulo*
Trench, Rossi e Watanabe Advogados
Rua Arquiteto Olavo Redig de Campos
105 - 31 floor - (Ed. EZ Towers - Torre A)
São Paulo - SP - Brasil - CEP 04711-904
Brazil
Tel: +55 11 3048 6800
Fax: +55 11 5506 3455

Canada - Toronto
Baker & McKenzie LLP
Barristers & Solicitors
Brookfield Place
Bay/Wellington Tower
181 Bay Street, Suite 2100
Toronto, Ontario M5J 2T3
Canada
Tel: +1 416 863 1221
Fax: +1 416 863 6275

Chile - Santiago
Baker & McKenzie Ltda.
Nueva Tajamar 481
Torre Norte, Piso 21
Santiago
Chile
Tel: +56 2 2367 7000
Fax: +56 2 2362 9876

China - Beijing
Baker & McKenzie
Suite 3401, China World Office 2
China World Trade Center
1 Jianguomenwai Dajie
Beijing 100004, PRC
China
Tel: +86 10 6535 3800
Fax: +86 10 6505 2309

China - Hong Kong - SAR
Baker & McKenzie
14th Floor, Hutchison House
10 Harcourt Road, Central
Hong Kong SAR
Tel: +852 2846 1888
Fax: +852 2845 0476

China - Shanghai
Baker & McKenzie
Unit 1601, Jin Mao Tower
88 Century Avenue, Pudong
Shanghai 200121, PRC
China
Tel: +86 21 6105 8558
Fax: +86 21 5047 0020

Colombia - Bogota
Baker & McKenzie S.A.S.
Avenue 82 No. 10-62 6th Floor
Bogota
Colombia
Tel: +57 1 634 1500 / 644 9595
Fax: +57 1 376 2211

Czech Republic - Prague
Baker & McKenzie, s.r.o., advokátní kancelár
Klimentská 46
110 02 Prague 1
Czech Republic
Tel: +420 236 045 001
Fax: +420 236 045 055

Egypt - Cairo
Helmy, Hamza & Partners
Nile City Building, North Tower
21st Floor 2005C, Cornich El Nil
Ramlet Beaulac
Cairo
Egypt
Tel: +20 2 2461 9301
Fax: +20 2 2461 9302

France - Paris
Baker & McKenzie SCP
1 rue Paul Baudry
75008 Paris
France
Tel: +33 1 4417 5300
Fax: +33 1 4417 4575

Germany - Berlin
Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern und Steuerberatern mbB
Friedrichstraße 88/Unter den Linden
10117 Berlin
Germany
Tel.: +49 30 2 20 02 810
Fax: +49 30 2 20 02 81 199

Germany - Dusseldorf
Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern und Steuerberatern mbB
Neuer Zollhof 2
40221 Dusseldorf
Germany
Tel: +49 211 3 11 16 0
Fax: +49 211 3 11 16 199

Germany - Frankfurt
Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern und Steuerberatern mbB
Bethmannstrasse 50-54
60311 Frankfurt/Main
Germany
Tel: +49 69 2 99 08 0
Fax: +49 69 2 99 08 108

Germany - Munich
Baker & McKenzie
Partnerschaft von Rechtsanwälten,
Wirtschaftsprüfern und Steuerberatern mbB
Theatinerstrasse 23
80333 Munich
Germany
Tel: +49 89 55 23 80
Fax: +49 89 55 23 8 199

Hungary - Budapest
Kajtár Takács Hegymegi-Barakonyi
Baker & McKenzie Ügyvédi Iroda
Dorottya utca 6.
1051 Budapest
Hungary
Tel: +36 1 302 3330
Fax: +36 1 302 3331

Indonesia - Jakarta*
Hadiputranto, Hadinoto & Partners
The Indonesia Stock Exchange Building
Tower II, 21st Floor
Sudirman Central Business District
Jl. Jendral Sudirman Kav. 52-53
Jakarta 12190
Indonesia
Tel: +62 21 2960 8888
Fax: +62 21 2960 8999

Italy - Milan
Studio Professionale Associato a
Baker & McKenzie
Piazza Meda, 3
Milan 20121
Italy
Tel: +39 02 76231 1
Fax: +39 02 7623 1620

Italy - Rome
Studio Professionale Associato a
Baker & McKenzie
Viale di Villa Massimo, 57
Rome 00161
Italy
Tel: +39 06 44 06 31
Fax: +39 06 4406 3306

Japan - Tokyo
Baker & McKenzie
(Gaikokuho Joint Enterprise)
Ark Hills Sengokuyama Mori Tower, 28th Floor
1-9-10 Roppongi, Minato-ku
Tokyo 106-0032
Japan
Tel: +81 3 6271 9900
Fax: +81 3 5549 7720

Kazakhstan - Almaty
Baker & McKenzie - CIS, Limited
Samal Towers, 8th Floor
97 Zholdasbekov Street
Almaty Samal-2, 050051
Kazakhstan
Tel: +7 727 330 05 00
Fax: +7 727 258 40 00

Luxembourg
Baker & McKenzie
10 - 12 Boulevard Roosevelt
2450 Luxembourg
Luxembourg
Tel.: +352 26 18 44 1
Fax: + 352 26 18 44 99

Malaysia - Kuala Lumpur*
Wong & Partners
Level 21, The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
Kuala Lumpur 59200
Malaysia
Tel: +603 2298 7888
Fax: +603 2282 2669

Mexico - Guadalajara
Baker & McKenzie Abogados, S.C.
Av. Paseo Royal Country 4596
Torre Cube 2, 16th Floor
Fracc. Puerta de Hierro
Zapopan, Jalisco 45116
Mexico
Tel: +52 33 3848 5300
Fax: +52 33 3848 5399

Mexico - Juarez
Baker & McKenzie Abogados, S.C.
P.O. Box 9338 El Paso, TX 79995
P.T. de la República 3304, Piso 1
Juarez, Chihuahua 32330
Mexico
Tel: +52 656 629 1300
Fax: +52 656 629 1399

Mexico - Mexico City
Baker & McKenzie Abogados, S.C.
Edificio Virreyes
Pedregal 24, Piso 12
Lomas Virreyes / Col. Molino del Rey
Mexico, D.F. 11040
Mexico
Tel: +52 55 5279 2900
Fax: +52 55 5279 2999

Mexico - Monterrey
Baker & McKenzie Abogados, S.C.
Oficinas en el Parque
Torre Baker & McKenzie Piso 10
Blvd. Antonio L. Rodríguez 1884 Pte.
Monterrey, N.L. 64650
Mexico
Tel: +52 81 8399 1300
Fax: +52 81 8399 1399

Mexico - Tijuana
Baker & McKenzie Abogados, S.C.
P.O. Box 1205 Chula Vista, CA 91912
Blvd. Agua Caliente 10611, Piso 1
Tijuana, B.C. 22420
Mexico
Tel: +52 664 633 4300
Fax: +52 664 633 4399

Morocco - Casablanca
Baker & McKenzie Maroc SARL
Ghandi Mall - Immeuble 9
Boulevard Ghandi
20380 Casablanca
Morocco
Tel: +212 522 77 95 95
Fax: +212 522 77 95 96

Myanmar - Yangon
Baker & McKenzie Yangon
1203 12th Floor Sakura Tower
339 Bogyoke Aung San Road
Kyauktada Township
Yangon
Myanmar
Tel: +95 1 255 056
Fax: +95 1 255 057

The Netherlands - Amsterdam
Baker & McKenzie Amsterdam N.V.
Claude Debussylaan 54
1082 MD Amsterdam
P.O. Box 2720
1000 CS Amsterdam
The Netherlands
Tel: +31 20 551 7555
Fax: +31 20 626 7949

Peru - Lima
Estudio Echecopar
Av. De la Floresta 497
Piso 5 San Borja
Lima 41
Peru
Tel: +51 1 618 8500
Fax: +51 1 372 7171/372 7374

Philippines - Manila*
Quisumbing Torres
12th Floor, Net One Center
26th Street Corner 3rd Avenue
Crescent Park West
Bonifacio Global City
Taguig City 1634
Philippines
Tel: +63 2 819 4700
Fax: +63 2 816 0080

Poland - Warsaw
Baker & McKenzie Krzyzowski i Wspólnicy
Spólka Komandytowa
Rondo ONZ 1
Warsaw 00-124
Poland
Tel: +48 22 445 3100
Fax: +48 22 445 3200

Qatar - Doha
Baker & McKenzie
Al Fardan Office Tower
8th Floor
Al Funduq 61
Doha, PO Box 31316
Qatar
Tel: +974 4410 1817
Fax: +974 4410 1500

Russia - Moscow
Baker & McKenzie - CIS, Limited
White Gardens
9 Lesnaya Street
Moscow 125047
Russia
Tel: +7 495 787 2700
Fax: +7 495 787 2701

Russia - St. Petersburg
Baker & McKenzie - CIS, Limited
BolloevCenter, 2nd Floor
4A Grivtsova Lane
St. Petersburg 190000
Russia
Tel: +7 812 303 9000
Fax: +7 812 325 6013

Saudi Arabia - Jeddah*
Legal Advisors in Association with
Baker & McKenzie Limited
Bin Sulaiman Center, 6th Floor,
Office No. 606
Prince Sultan Street and Rawdah Street
Intersection
Al-Khalidiyah District
P.O. Box 128224
Jeddah 21362
Saudi Arabia
Tel: + 966 12 606 6200
Fax: + 966 12 692 8001

Saudi Arabia - Riyadh*
Legal Advisors in Association with
Baker & McKenzie Limited
Olayan Complex
Tower II, 3rd Floor
Al Ahsa Street, Malaz
P.O. Box 4288
Riyadh 11491
Saudi Arabia
Tel: +966 11 265 8900
Fax: +966 11 265 8999

Singapore
Baker & McKenzie.Wong & Leow
8 Marina Boulevard
#05-01 Marina Bay Financial Centre Tower 1
Singapore 018981
Singapore
Tel: +65 6338 1888
Fax: +65 6337 5100

South Africa - Johannesburg
Baker & McKenzie Johannesburg
1 Commerce Square
39 Rivonia Road
Sandhurst
Sandton
Johannesburg
South Africa
Tel: +27 11 911 4300
Fax: +27 11 784 2855

South Korea - Seoul
Baker & McKenzie LLP
Foreign Legal Consultant Office
17/F, Two IFC
10 Gukjegeumyung-ro
Yeongdeungpo-gu
Seoul 150-945
South Korea
T +82 2 6137 6800
F +82 2 6137 9433

Spain - Barcelona
Baker & McKenzie Barcelona S.L.P.
Avda. Diagonal, 652
Edif. D, 8th floor
Barcelona 08034
Spain
Tel: +34 93 206 0820
Fax: +34 93 205 4959

Spain - Madrid
Baker & McKenzie Madrid S.L.P.
Paseo de la Castellana, 92
Madrid 28046
Spain
Tel: +34 91 230 4500
Fax: +34 91 391 5149

Sweden - Stockholm
Baker & McKenzie Advokatbyrå KB
P.O. Box 180
Vasagatan 7, Floor 8
Stockholm SE-101 23
Sweden
Tel: +46 8 566 177 00
Fax: +46 8 566 177 99

Switzerland - Geneva
Baker & McKenzie Geneva
Rue Pedro-Meylan 5
Geneva 1208
Switzerland
Tel: +41 22 707 9800
Fax: +41 22 707 9801

Switzerland - Zurich
Baker & McKenzie Zurich
Holbeinstrasse 30
Zurich 8034
Switzerland
Tel: +41 44 384 14 14
Fax: +41 44 384 12 84

Taiwan - Taipei
Baker & McKenzie, Taipei
15/F, 168 Tun Hwa North Road
Taipei 105
Taiwan
Tel: +886 2 2712 6151
Fax: +886 2 2712 8292

Thailand - Bangkok
Baker & McKenzie Ltd.
25th Floor, Abdulrahim Place
990 Rama IV Road
Bangkok 10500
Thailand
Tel: +66 2636 2000
Fax: +66 2636 2111

Turkey - Istanbul
Baker & McKenzie Consultancy Services
Attorney Partnership
Ebulula Mardin Cad., Gül Sok. No. 2
Maya Park Tower 2, Akatlar-Beşiktaş
Istanbul 34335
Turkey
Tel: + 90 212 339 8100
Fax: + 90 212 339 8181

Ukraine - Kyiv
Baker & McKenzie - CIS, Limited
Renaissance Business Center
24 Bulvarno-Kudriavska (Vorovskoho) Street
Kyiv 01054
Ukraine
Tel: +380 44 590 0101
Fax: +380 44 590 0110

United Arab Emirates - Abu Dhabi
Baker & McKenzie LLP - Abu Dhabi
Level 8, Al Sila Tower
Abu Dhabi Global Market Square, Al Maryah Island
P.O. Box 44980
Abu Dhabi
United Arab Emirates
Tel: +971 2 612 3700
Fax: +971 2 658 1811

United Arab Emirates - Dubai
Baker & McKenzie Habib Al Mulla
Level 14, O14 Tower
Al Abraj Street, Business Bay
P.O. Box 2268
Dubai
United Arab Emirates
T +971 4 423 0000
F +971 4 447 9777
and
Level 3, Tower 1
Al Fattan Currency House, DIFC
P.O. Box 2268
Dubai
United Arab Emirates
Tel: +971 4 423 0005
Fax: +971 4 447 9777

United Kingdom - London
Baker & McKenzie LLP
100 New Bridge Street
London EC4V 6JA
United Kingdom
Tel: +44 20 7919 1000
Fax: +44 20 7919 1999

United States - Chicago
Baker & McKenzie LLP
300 East Randolph Street, Suite 5000
Chicago, Illinois 60601
United States
Tel: +1 312 861 8800
Fax: +1 312 861 2899

United States - Dallas
Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
United States
Tel: +1 214 978 3000
Fax: +1 214 978 3099

United States – Houston
Baker & McKenzie LLP
700 Louisiana, Suite 3000
Houston, Texas 77002
United States
Tel: +1 713 427 5000
Fax: +1 713 427 5099

United States - Miami
Baker & McKenzie LLP
Sabadell Financial Center
1111 Brickell Avenue
Suite 1700
Miami, Florida 33131
United States
Tel: +1 305 789 8900
Fax: +1 305 789 8953

United States - New York
Baker & McKenzie LLP
452 Fifth Avenue
New York, New York 10018
United States
Tel: +1 212 626 4100
Fax: +1 212 310 1600

United States - Palo Alto
Baker & McKenzie LLP
660 Hansen Way
Palo Alto, California 94304
United States
Tel: +1 650 856 2400
Fax: +1 650 856 9299

United States - San Francisco
Baker & McKenzie LLP
Two Embarcadero Center, 11th Floor
San Francisco, California 94111
United States
Tel: +1 415 576 3000
Fax: +1 415 576 3099

United States - Washington, DC
Baker & McKenzie LLP
815 Connecticut Avenue, N.W.
Washington, District of Columbia 20006
United States
Tel: +1 202 452 7000
Fax: +1 202 452 7074

Venezuela - Caracas
Baker & McKenzie SC
Centro Bancaribe, Intersección
Avenida Principal de Las Mercedes
con inicio de Calle París,
Urbanización Las Mercedes
Caracas 1060
Venezuela
Tel: +58 212 276 5111
Fax: +58 212 993 0818; 993 9049

Venezuela - Valencia
Baker & McKenzie SC
Urbanización La Alegria
Postal Address: P.O. Box 1155
Valencia Estado Carabobo
Venezuela
Tel: +58 241 824 8711
Fax: +58 241 824 6166

Vietnam - Hanoi
Baker & McKenzie (Vietnam) Ltd.(Hanoi)
Unit 1001, 10th floor, Indochina Plaza Hanoi
241 Xuan Thuy Street, Cau Giay District
Hanoi 10000
Vietnam
Tel: +84 4 3825 1428
Fax: +84 4 3825 1432

Vietnam - Ho Chi Minh City
Baker & McKenzie (Vietnam) Ltd. (HCMC)
12th Floor, Saigon Tower
29 Le Duan Blvd.
District 1
Ho Chi Minh City
Vietnam
Tel: +84 8 3829 5585
Fax: +84 8 3829 5618

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