



INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:	Since the issue of document 92 FUND/EXC.34/6 three judgements have been rendered by the French courts. The document contains a summary of these judgements.
Action to be taken:	Information to be noted.

1 Court judgements in respect of claims against the 1992 Fund

1.1 Commercial Court in Saint Brieuc

Property letting

- 1.1.1 The owners of two commercial properties in Morbihan submitted claims for losses suffered in their activity of seasonal lettings of commercial properties to businesses in the tourist industry (but not directly to tourists), allegedly as a result of the *Erika* incident. The Fund had rejected the claims on the ground that they were 'second degree tourism claims'. The claimant requested the Civil Court in Les Sables d'Olonne to appoint a court expert. The Court appointed such an expert who in his report considered that some losses had been suffered by the claimants as a consequence of the *Erika* incident.
- 1.1.2 In May 2006 the claimants brought legal action against the Fund in the Commercial Court in Saint Brieuc for €9 000 (£6 000) and €4 200 (£3 800) respectively. The Court dealt with these claims in two judgements rendered in September 2006. Concerning one of the claims the Court considered that the claimants' business had only an indirect link with tourists and that the claimant had not proved that he had suffered a loss as a result of the *Erika* incident. For these reasons the Court rejected the claim. As regards the other claim the Court considered that there was not sufficient evidence of the alleged loss. In addition the Court held that even if a loss had been proven the claimant's business had only an indirect link with tourists. For these reasons the Court rejected the claim.
- 1.1.3 When this document was issued, the claimants had not appealed against the judgements.

1.2 Commercial Court in Saint-Nazaire

Water sports equipment retailer/Boat seller

- 1.2.1 A company selling water sports equipment had submitted a claim for €35 487 (£24 000) for losses suffered in 2000 as a result of the *Erika* incident, in its dual activity of sales of sailboards, fittings and apparel and sales of boats to individuals and sailing schools. The 1992 Fund had assessed the claim for loss of income due to reduced sales of sailboards, fittings and apparel at €6 479 (£4 400). The Fund had however rejected the claim for loss of sales of boats on the grounds that the purchase of boats was a long-term investment and therefore less likely to be affected by a short-term event, such as the *Erika* incident, and since the sales were mostly aimed at sailing clubs and other business in the tourism industry (but not directly to tourists).
- 1.2.2 In its judgement in September 2006, the Commercial Court of Saint Nazaire stated that the loss suffered by the claimant for the activity of sales of sailboards, fittings and apparel was higher than that assessed by the Fund. The Court ordered the Fund to pay €17 668 (£12 000) to the claimant. The Court also ordered the provisional execution of the judgement.
- 1.2.3 With regard to the sale of boats, the Court stated that the rules adopted by the Fund, and reflected in the Claims Manual, do not categorically reject claims by those providing services to other business in the tourist industry (in the Fund's terminology 'second degree tourism claims') since the Manual states that claims of this type will 'normally' not qualify for compensation and that the text allows some margin to interpret that compensation could be available to these claimants. The Court considered that 20% of the boat sales were to individuals and that the claim in respect of reduction of such sales was admissible for compensation in principle. The Court also held that the other 80% of the boat sales were to sailing clubs and that the reduction of such sales was also admissible for compensation within the limit of the amounts available after compensation had been made to first degree claimants ('dans la limite disponible après indemnisations des victimes au premier degré'). The Court decided to request the Fund's experts to reexamine this part of the claim. It was also decided that the Court would hold a new hearing if no settlement had been reached within two months from the date of the judgement.
- 1.2.4 The Director intends to appeal against the judgment in the light of the statement by the Court that part of the claim, which is in the Fund's terminology a second degree tourism claim, was admissible 'within the limit of the amount available after compensation had been payable to all first degree claimants'. In the Director's view this statement does not respect the principle laid down in the 1992 Conventions that claims are either admissible or not and that all claims should be treated equally, ie Article V.4 of the 1992 Civil Liability Convention and Article 4.5 of the 1992 Fund Convention.

2 Action to be taken by the Executive Committee

The Executive Committee is invited

- (a) to take note of the information contained in this document; and
 - (b) to give the Director such instructions as regards the appeal referred to in paragraph 1.2.4 as it may deem appropriate.
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