



INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:	Eleven judgements were rendered in September 2005 by the Commercial Court in Lorient, the Commercial Court of La Roche sur Yon and the Civil Court in Paris. One judgement relates to a claim by a company selling water sports equipment to sailing schools. The claim had been rejected by the 1992 Fund in accordance with the Fund's admissibility criteria since it was a 'second degree tourism claim'. The Director considers that, since the judgement relates to a matter of principle, the Fund should appeal in spite of the modest amount involved.
Action to be taken:	Decide whether the 1992 Fund should appeal against the judgement relating to the company selling such equipment.

1 Further court judgements in respect of claims against the 1992 Fund

The document summarises the judgements in respect of claims against the 1992 Fund made public since the issue of document 92FUND/EXC.30/6/Add1.^{<1>}

2 Judgements by the Commercial Court in Lorient

Sculptor

- 2.1 A sculptor in Morbihan had claimed €10 278 (£7 000)^{<2>} for losses allegedly suffered in 2000 as a result of a decline in the sales of his works of art due to the reduction of tourism in the area caused by the *Erika* incident. The 1992 Fund had assessed the claim at €7 488 (£5 100). The claimant subsequently presented in court a claim for a total of €46 733 (£31 700) of which €21 666 (£14 700) was for losses allegedly suffered in 2000 and €25 067 (£17 000) was for losses allegedly suffered in 2001. In the court proceedings the Fund maintained its assessment of the losses suffered in 2000 and rejected the claim for 2001 on the ground that there was not a sufficient link of causation between the alleged losses and the contamination, since according to

<1> The judgements were rendered also against the shipowner and Steamship Mutual. In order not to burden the text reference is made only to the 1992 Fund.

<2> Conversion of Euro into Pounds sterling has been made on the basis of the rate at 5 October 2005 (€1 = £0,6788).

the information collected by the experts engaged by the Fund the *Erika* incident had not, except in a few restricted areas, had any negative impact on tourism activity after the 2000 season.

- 2.2 In a judgement rendered in September 2005 the Commercial Court in Lorient noted that even if there had not been any traces of oil on the beaches in the south of Brittany by the end of the summer of 2000, which had not been proven, this would not be sufficient to exonerate the Fund if it was proven that the claimant had suffered a loss directly as a result of the *Erika* incident and that it was for the Court to decide whether such a direct link existed. However, the Court held that the claimant had not proved the existence of any loss for 2001 and noted that the sale of works of art was not necessarily proportional to the tourist activities on the beaches. For these reasons the Court rejected the claim.
- 2.3 At the time this document was published, the claimant had not appealed against the judgement

Four other tourism businesses

- 2.4 In September 2005, the Commercial Court in Lorient rendered judgements in respect of four claims from businesses in the tourism sector relating to 'pure economic loss' allegedly suffered in 2000 and 2001 in which the Court appointed a court expert to examine whether there was a link of causation between the alleged losses and the contamination caused by the incident and to assess the losses incurred. The 1992 Fund had already compensated three of the claimants for losses suffered in 2000.
- 2.5 One of the claims, by a hotel owner in Finistère, for €13 034 related to alleged losses in 2000 and 2001 and moral damages. The Fund had assessed the claim for losses in 2000 at €8 552 (£39 745), but had rejected the claim for losses in 2001 on the ground that there was not in the Fund's view a sufficient link of causation between the alleged losses and the contamination. The part of the claim relating to moral damages had also been rejected by the Fund since such damage cannot be considered as falling within the definition of 'pollution damage' in the 1992 Conventions.
- 2.6 The three other claims were presented by businesses letting sailing boats to tourists in respect of losses allegedly suffered in 2001. In all three cases, the 1992 Fund had already compensated the claimants in respect of losses in 2000. The Fund had rejected the claims in respect of losses in 2001, since there was not, in the Fund's view, a sufficient link of causation between the alleged losses and the contamination.
- 2.7 Details of the four claims are summarised in the table below.

Business activity	Amount claimed €	Fund's assessment €	Court decision
1 - Hotel owner	2000 } 414 850	2000 } 58 552	Court expert appointed
	2001 } 0	2001 } 0	
	Moral damages 198 184	Moral damages 0	
2 - Selling and letting of sailing boats	2001 14 986	0	Court expert appointed
3 - Letting of sailing boats	2001 5 946	0	Court expert appointed
4 - Letting of sailing boats	2001 5 222	0	Court expert appointed

- 2.8 In the four judgements the Commercial Court in Lorient stated that it was not bound by the 1992 Fund's criteria for admissibility, which were internal to the Fund. The Court also stated that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to

apply it to the various claims by determining whether there was a sufficient link of causation between the event that led to the damage ('le fait générateur') and the damage, as regards both material damage and moral damage. In the case of the second and third claims referred to in paragraph 2.7 the Court also considered that even if there had not been any traces of oil on the beaches of south Brittany by the end of the summer of 2000, which had not been proven, this would not be sufficient to exonerate the Fund if it was proven that there had been a reduction in turnover directly as a result of the *Erika* incident, and that it was for the Court to decide whether such a direct link existed. The Court held, however, in respect of all four cases that the facts had not been established and appointed a court expert to assess whether those claimants had suffered losses in the period covered by their respective claims compared to previous years and, in the case of the second and third claim referred to in paragraph 2.7 compared also to 2002 and, if so, to determine whether the losses were due to the pollution resulting from the *Erika* incident.

- 2.9 The expert appointed by the Court is examining the four claims.

3 Judgements by the Commercial Court in La Roche sur Yon

- 3.1 In September 2005, the Commercial Court in La Roche sur Yon rendered judgements in respect of five claims from businesses in the tourism sector relating to 'pure economic loss'.

Water sports equipment retailer

- 3.2 A company selling water sports equipment had submitted a claim for €9 291 (£13 095) for losses suffered in 2000 as a result of the *Erika* incident, in its dual activity of sales of such equipment to individual tourists and to sailing schools in Vendée. The 1992 Fund had assessed the claim for loss of income due to reduced sales to individual tourists at €549 (£370), but had rejected the claim for loss of sales to sailing schools on the ground that such sales related to services provided to other businesses in the tourism industry but not directly to tourists and that, for this reason, there was not a sufficient link of causation between the contamination and the alleged loss.
- 3.3 In its judgement the Commercial Court in La Roche sur Yon stated that it was not bound by the 1992 Fund's criteria for admissibility. The Court stated that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it to the individual claim by determining whether there was a sufficient link of causation between the event that led to the damage ('le fait générateur') and the losses suffered, and by assessing the extent of the damage suffered by the victims according to the criteria of French law. The Court held that there was no doubt that there was a direct link of causation between the contamination caused by the *Erika* incident and the losses suffered and that the losses suffered could not be doubted. For these reasons the Court accepted the claimed amount in its entirety and ordered the Fund to compensate the claimant accordingly.
- 3.4 It will be recalled that as regards claims in the tourism sector, the governing bodies of the IOPC Funds have decided as follows (Claims Manual, 2005 edition, page 28):

A distinction is made between (a) claimants who sell goods or services directly to tourists (for example the owners of hotels, campsites, bars and restaurants) and whose businesses are directly affected by a reduction in visitors to the area affected by an oil spill, and (b) those who provide goods or services to other businesses in the tourist industry but not directly to tourists (for example wholesalers, manufacturers of souvenirs and postcards and hotel launderers). It is considered that in the case of category (b) there is not a sufficiently close link of causation between the contamination and any losses suffered by claimants. Claims of this type will therefore normally not qualify for compensation in principle.

The claim by the company in respect of the sales to sailing schools falls within the second category referred to above ('second degree tourism claims') and should therefore not normally qualify for compensation in principle. The Director considers that there are no particular facts in this case which would justify a departure from the position taken by the Funds that the claim is not admissible. For this reason, and in spite of the modest amount involved and subject to any instructions which the Executive Committee may give him, the Director considers that the 1992 Fund should appeal against this judgement.

Seasonal letting activities

- 3.5 Four other judgements relate to claims by estate agencies in Vendée for losses suffered in their activity of seasonal lettings of furnished apartments and villas in the year 2000, allegedly as a consequence of the reduction in the number of tourists in the affected area due to the *Erika* incident. The Fund had as regards three of the claims assessed the losses at amounts lower than those claimed. The fourth claim was rejected by the 1992 Fund since, in the Fund's opinion, the claimant had not proven any losses.
- 3.6 Details of the four claims are summarised in the table below.

	Amount claimed €	Amount assessed by the Fund €	Amount awarded by the Court €
1 – Property letting	12 096	5 851	12 096
2 – Property letting	39 179	12 016	39 179
4 - Property letting	17 080	12 550	17 080
5 - Property letting	25 338	0	11 696

- 3.7 In the four judgements, the Commercial Court in La Roche sur Yon made the same statements concerning the 1992 Fund's criteria for admissibility and the interpretation of the concept of 'pollution damage' in the 1992 Conventions as set out in paragraph 3.3. The Court stated that no doubt had been raised as to the existence of a link of causation between the contamination caused by the *Erika* incident and the losses suffered. The Court considered that the assessment of the loss could not be calculated only on the basis of the number of property owners' requests for lettings received by the agent, but that account should also be taken of the number of weeks that the apartments or houses were let. The Court therefore awarded the full claimed amounts to three of the four claimants and decided that the judgements were immediately enforceable, whether or not appeals were lodged. In the case of the claimant whose claim had been rejected by the 1992 Fund, the Court awarded the claimant an amount of €11 696 (£7 900), compared to the claimed amount of €25 383 (£17 200).
- 3.8 As regards these judgements the Director would like to make the following observations. It should first be pointed out that in these four cases the question is not of the Fund's admissibility criteria but only of the evaluation of the quantum. With respect to three of the claims the Court did not make any assessment of the losses suffered but accepted the amounts claimed, as calculated by the claimants' accountants. As regards the fourth claim, the Fund had concluded that no loss had been suffered, whereas the Court accepted a figure of €11 696, ie lower than the claimed amount, without a clear explanation as to how the amount was arrived at. Subject to any instructions which the Executive Committee may wish to give him, the Director intends to instruct the Fund's experts to examine the judgements and advise him as to whether the amounts awarded

by the Court, or some of them, are not unreasonable, in order to enable him to decide whether the Fund should lodge appeals.

4 Judgement by the Civil Court in Paris

- 4.1 A claim for €142 185 (£96 500) had been submitted by a company whose main activity was construction and sales of ultra light aircraft and sales of equipment for such aircraft. As a secondary activity, the company undertook aerial towing of advertising banners in Loire-Atlantique. The claim related to loss of income from the latter activity allegedly suffered from 2000 to 2003 as a result of the *Erika* incident. This claim had been rejected by the 1992 Fund on the ground that the claimant supplied goods and services to other businesses in the tourism sector but not directly to tourists, and that therefore there was not a sufficient link of causation between the contamination and the alleged loss.
- 4.2 In a judgement rendered in September 2005, the Court specifically referred to the Fund's criteria for admissibility of claims for pure economic loss. The Court noted that the 1992 Fund distinguished between, on the one hand, claimants who sold goods or services directly to tourists and whose businesses were directly affected by a reduction in visitors to the area affected by an oil spill and, on the other hand, those who provided goods or services to other businesses in the tourist industry, but not directly to tourists. The Court referred to the fact in the latter case the 1992 Fund considered that there was generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by the claimants and that claims of this type would normally not be admissible in principle. The Court stated that although the Fund's criteria for admissibility were not binding for the national courts, they nonetheless could be used as a reference and that in any event they did not constitute an obstacle to compensation if a link of causation between the alleged damage and the contamination resulting from the *Erika* incident was proven. The Court noted that the claimant had as a basis for his claim invoked cancellation of contracts for the aerial towing of advertising banners without providing any evidence of such cancellations. The Court considered that since the claimant did not sell its services directly to tourists but only to other businesses in the tourism sector (such as casinos and leisure parks), the claimant had not proven that there was a direct link of causation between the alleged decrease in aerial towing of such banners and the contamination and that the claimant had not shown that the pollution had had any impact on tourism beyond 2000. For these reasons the Court rejected the claim.
- 4.3 At the time this document was published, the claimant had not appealed against the judgement.

5 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider whether the 1992 Fund should appeal against the judgements concerning the water sports equipment retailer (paragraph 3.3);
 - (c) to note the Director's considerations in respect of the four judgements by the Commercial Court in La Roche sur Yon concerning claims by letting agencies (paragraph 3.8); and
 - (d) to give the Director such other instructions in respect of this incident as it may deem appropriate.
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