



INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:	Since the issue of document 92FUND/EXC.36/4 three more judgements have been rendered by the French courts. This 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

Court of Appeal in Rennes

1.1 Claim by a student who had failed to obtain expected employment

- 1.1.1 At its October 2005 session, the Executive Committee noted that a claim for loss of income for €978 (£650)^{<1>} had been presented by a student who, contrary to what had been the case in 1998 and 1999, had not been employed in the summer of 2000 at a camping site in Névez, Department of Finistère, as a kitchen assistant. It was noted that this claim had been rejected by the 1992 Fund on the grounds that there was not a sufficient link of causation between the alleged loss and the oil pollution resulting from the *Erika* incident.
- 1.1.2 The Committee noted that the student had brought legal action in the Commercial Court in Rennes maintaining that, had it not been for the *Erika* incident, he would, as in previous years, have been employed at the camping site. It was also noted that he had maintained that, as he lived in Névez where the camping site was located, it was inconceivable for him to work in any other area, since the costs he would have incurred would have absorbed the major part of his salary and that since seasonal workers were engaged many months in advance, it had been too late for him to find alternative employment by the time it had been established that the 2000 tourist season would be affected by the oil pollution.
- 1.1.3 The Committee noted that in the proceedings the 1992 Fund had argued that the claim did not fulfil the Fund's criteria for admissibility and that, in any event, as a seasonal worker the student should have been able to find work outside the area affected by the oil spill.
- 1.1.4 It was noted that the Commercial Court had considered that the camping site was located in the contaminated area and that its activities had been greatly affected by the oil spill. The Committee noted that the Court had therefore concluded that the student's activity at the camping site was

<1> The French franc was replaced by the Euro on 1 January 2002. The rate of conversion is €1 = FFr6.55957. The rate of conversion of Euros into Pounds sterling has been made on the basis of the rate at 14 February 2007 (€1 = £0.6693), except in the case of claims paid by the 1992 Fund where conversions have been made at the rate of exchange on the date of payment.

highly integrated with the economy of the affected area, that as a student he was very dependant on this employment and that he could not have taken other employment as a kitchen assistant, since this would have made it necessary for him to leave the place where his parents lived and that for this reason it would not have been possible for him to find alternative, similar employment. It was noted that the Court had accepted the claim and had ordered the shipowner, Steamship Mutual and the 1992 Fund to pay the claimed amount of €978 (£650) plus legal interest and an amount of € 000 (£2 000) in costs. It was also noted that the Court had decided that the judgement was immediately enforceable whether or not an appeal was lodged.

- 1.1.5 The Committee noted that this claim, although for a very low amount, gave rise to a question of principle, namely whether claims by persons who as a result of an oil pollution incident were laid off work or had not been given expected employment were admissible for compensation under the 1992 Conventions.
- 1.1.6 The Committee noted that in the context of the *Prestige* incident claims had been presented for loss of income by employees in the fisheries sector, which had given rise to the same policy issue.
- 1.1.7 The Committee took note of the previous considerations by the 1971 Fund Executive Committee of the issue in the context of the *Aegean Sea* and *Braer* incidents, and the considerations by the 1971 Fund 7th Intersessional Working Group and the 1971 Fund Assembly as reproduced in paragraphs 1.3.7 to 1.3.23 of document 92FUND/EXC.30/6/Add.1.
- 1.1.8 The Committee noted that, in the Director's view, the decisive issue was whether there was a sufficiently close link of causation between the contamination and the losses suffered by employees who had been laid off or placed on part-time work and therefore had suffered what is known as 'pure economic loss' (ie economic loss suffered by persons whose property had not been contaminated by the oil).
- 1.1.9 Some delegations that had been in favour of admitting claims by employees when they were considered by the 1971 Fund Executive Committee in relation to the previous incidents and further considered by the 7th intersessional Working Group, reaffirmed their view that claims by employees who had been made redundant should be admissible in principle. Those delegations considered, however, that a distinction should be made between workers that had a contract of employment and those that merely had an expectation of employment. The point was made that the student fell into the latter category, that there was an insufficient link of causation between the loss and the pollution and that his claim was therefore inadmissible.
- 1.1.10 Most delegations considered that despite the fact that the claim was for a small amount in comparison with the likely legal costs involved in an appeal, an important question of principle was involved and for that reason it was necessary to go ahead with the appeal. Those delegations considered that because the claim was merely based on an expectation of employment, the decisive factor was the lack of a link of causation and not a question of whether or not it was a 'second degree' tourism claim.
- 1.1.11 Although there was insufficient support for revising the Fund's policy at this time as regards the admissibility of claims by employees laid off or made redundant, a number of delegations made the point that the Fund's admissibility criteria were not set in stone and that it would be appropriate to review the criteria from time to time so as to ensure that they remained relevant and up to date.
- 1.1.12 The Committee decided that the Fund's policy regarding claims for losses suffered by employees laid off temporarily, put on part-time work or made redundant should not be changed and that the Fund should continue to reject such claims.
- 1.1.13 The Committee instructed the Director to appeal against the judgement.

- 1.1.14 In a judgement rendered in February 2007, the Court of Appeal in Rennes accepted the appeal by the 1992 Fund, reversed the first instance judgement and rejected the claim.
- 1.1.15 The Court stated that the criteria for admissibility of claims contained in the Claims Manual could not be assimilated to agreements between the parties in the sense of Article 31.3 of the Vienna Convention on the Law of Treaties nor to international custom in the sense of the same Vienna Convention. The Court also stated that it was for the national courts to decide the interpretation of the term 'pollution damage', but that in doing so they should take into account the terms of the 1992 Conventions, which by virtue of the French Constitution had a higher value than internal law and that the criteria for admissibility of claims, in particular the criterion not to compensate 'second degree' tourism claims, was internal to the Fund.
- 1.1.16 The Court stated that under the 1992 Conventions the national courts were competent to determine whether there was a sufficient link of causation between the event and the damage and that in this case the link of causation had not been proved, since the student who was employed in August 2000 had not shown that the reason he had not been employed in July 2000 was as a consequence of the reduction in tourism resulting from the *Erika* incident and had not provided evidence that he attempted to obtain employment elsewhere.
- 1.1.17 When this document was issued, the claimant had not appealed against the judgement before the Court of Cassation.
- 1.2 Claim by a company letting commercial premises
- 1.2.1 At its February 2006 session, the Executive committee noted that the owner of a company letting commercial premises to a take-away business had submitted a claim for € 329 (£4 200) for loss of income allegedly suffered in 2000, 2001 and 2002 due to the *Erika* incident and that the Fund had rejected the claim on the grounds that the claimant provided services to other businesses in the tourist 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.
- 1.2.2 It was noted that in its judgement, rendered in December 2005, the Civil Court in Saint-Nazaire had stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund, which were internal to the Organisation and did not have a supranational character. It was noted that the Court had held that, under French law, a claim for compensation was admissible if the claimant could prove that there was a sufficient link of causation between the event and the damage. It was further noted that the Court had decided that, as far as the claim for loss of income in 2000, there had been a reduction in the letting of the premises and that this loss should be considered as directly related to the *Erika* incident. The Committee noted that the Court had ordered the shipowner, Steamship Mutual and the 1992 Fund to pay compensation to the claimant for loss of rental income in 2000 at €1 618 (£1 100) plus €1 300 (£870) for costs and had rejected the claim for losses in 2001 and 2002 on the grounds of a lack of a link of causation.
- 1.2.3 Since the judgement was at variance with the criteria for admissibility of claims adopted by the 1992 Fund governing bodies with regard to 'second degree' claims in the tourism sector, and bearing in mind that the 1992 Fund had rejected a number of other 'second degree' claims arising from the *Erika* incident, and in order to respect the principle of equal treatment of claimants, the Committee endorsed the Director's decision to appeal against the judgement in spite of the very low amount involved.
- 1.2.4 In a judgement rendered in February 2007, the Court of Appeal in Rennes accepted the appeal by the 1992 Fund, reversed the first instance judgement and rejected the claim.
- 1.2.5 The Court stated that the 1992 Fund criteria for admissibility of claims were not binding on the national courts. The Court considered that the premises had been let every year, even in 2000, the year after the *Erika* incident took place. The Court also considered that in 2001, although the tourism activity was similar to that before the incident, the premises were let for a similar amount

as in 2000. The Court considered that other factors unrelated to the incident, such as the annual increase in the letting price of FF5 000 (€762 or £500) for the low season period, had had an impact on the business. The Court decided the claimant had not established that there was a link of causation between the alleged loss and the contamination and for this reason rejected the claim.

1.2.6 When this document was issued, the claimant had not appealed against the judgement before the Court of Cassation.

1.3 Claim by the owner of a bar

1.3.1 At its February 2006 session, the Executive Committee noted that the owner of a bar in Carnac, which had commenced business in June 2000 had submitted a claim for €12 552 (£8 400) relating to losses allegedly suffered in 2000 as a result of the *Erika* incident. It was noted that the action had been brought before the Court on 8 September 2003. It was also noted that in accordance with the position taken by the Executive Committee in February 2003 the Fund had argued that as regards losses before 8 September 2000 the claim was time-barred under Article 6 of the 1992 Fund Convention. It was noted that the Fund had also maintained that the rest of the claim should be rejected on the ground that it had not been proved that there was a sufficient link of causation between the alleged losses and the contamination resulting from the *Erika* incident.

1.3.2 The Executive Committee noted that in December 2005 the Court had rejected the claim on the ground that the claimant had not proved that he had suffered any loss and that the Court had not addressed the issue of the time bar. It was noted that the claimant had appealed against the judgement.

1.3.3 In a judgement rendered in February 2007, the Court of Appeal in Rennes rejected the appeal.

1.3.4 The Court stated that the 1992 Fund criteria for admissibility of claims were not binding on the national courts. The Court, after stating that Article VIII of the 1992 Civil Liability Convention and Article 6 of the 1992 Fund Convention established a double condition, namely that a legal action should be presented within three years of the date when the damage occurred and within six years of the date when the incident took place, decided that the claimant's right to receive compensation for losses suffered before 8 September 2000 was time-barred since the legal action was presented on 8 September 2003. The Court also rejected the rest of the claim, ie for the losses allegedly suffered after 8 September 2000, since the claimant had not proved that he had suffered a loss nor that there was a link of causation with the *Erika* incident.

1.3.5 When this document was issued, the claimant had not appealed against the judgement before the Court of Cassation.

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 other instructions as regards the issues dealt with in this document as it may deem appropriate.
