INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

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1992 Fund Executive Committee	**92EC58**	•
1971 Fund Administrative Council	**71AC30**	
1992 Fund Working Group 6	**92WG6/5**	
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INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

ERIKA

Submitted by Conference of Peripheral Maritime Regions of Europe (CPMR)

Objective of document:	This document summarises the proceedings related to compensation for damages resulting from the *Erika* incident. For that purpose, it presents the following elements relating to: • The incident • The proceedings commenced at international level under the 1992 Civil Liability (1992 CLC) and Fund Conventions • The parallel proceedings commenced in France, which ended with the judgement rendered on 25 September 2012 by the French Court of Cassation. This judgement is of considerable importance and could inspire changes in national, international and, where applicable, European law. Indeed, in accordance with Article 55 of the Constitution, it applies the international Conventions of UNCLOS (Montego Bay), MARPOL, the 1992 Civil Liability and the 1992 Fund Conventions in the light of French law (Act No. 83-583 of 5 July 1983 on pollution from ships (now article L.218-10 and subsequent articles of the Environment Code), and Article 113-12 of the French Criminal Code) in order to recognise in particular: o France's territorial jurisdiction to hear proceedings for pollution which affects its coasts, even in the case of an incident occurring in France's Exclusive Economic Zone, but outside its territorial waters; o The criminal liability of the parties in the shipping chain and their joint sentencing to bear the cost of compensation due to the victims, by virtue of an act of recklessness under the meaning of the 1992 CLC; o The existence and possibility of obtaining compensation for pure environmental damage or damages for violation of the natural heritage, in addition to other types of damage for which compensation has been granted at international level and in France.
Action to be taken:	1992 Fund Executive Committee Information to be noted.

1 Summary of the incident

On 12 December 1999, the *Erika*, a tanker laden with a cargo of 30 884 tonnes of heavy fuel oil and flying the Maltese flag, sank some thirty nautical miles off the west coast of France. Over 19 000 tonnes of oil were spilled into the sea and polluted French territorial waters and over 400 kilometres of shoreline from the Pointe de Bretagne to the Ile de Ré. More than 250 000 tonnes of oily waste was collected and stockpiled[<1>]. The amount of the damage caused is estimated at some €850 million.

2 Summary of proceedings commenced at international level[<2>]

At international level, compensation proceedings were commenced under the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 CLC) and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention)[<3>]. These Conventions provide two mechanisms:

- Firstly, under the 1992 CLC, the shipowner is strictly liable for any damage due to oil pollution, ie he is liable even if the ship was not defective or no fault was committed by the members of the crew. In return, the liability is limited to an amount determined by the capacity of the ship. This amount is guaranteed by an insurer. In the case of the *Erika*, the maximum amount was fixed at €12 843 484.

- Secondly, the 1992 Fund Convention provides another level of compensation, financed by the 1992 Fund, which can also be activated without fault being demonstrated. In return, the compensation paid is subject to maximum levels of compensation. To be eligible for compensation, the pollution damage must, however, involve a real and quantifiable economic loss and the claimants (individuals, companies, local authorities or States) must provide proof of the amount of their loss or damage by means of accounting documents in accordance with the claims manual. Pure environmental damage is not compensated in the framework of the IOPC Funds. In the case of the *Erika*, by October 2012, 7 331 claims for compensation had been lodged for a total amount of €388 million. At that date, compensation had been paid totalling €129.7 million, of which €12.8 million were covered by the insurer under the limitation of liability procedure.

3 Summary of proceedings commenced in France

3.1 Parallel to the proceedings commenced at international level, criminal proceedings were commenced in France against the charterer (TOTAL), the shipowner (Tevere Shipping), the classification society (RINA) and the ship management company (Panship) for unintentional oil pollution of navigable waters and waterways. Initially 114 claimants joined the action as civil parties to the proceedings, then 34 claimants (French Government, local authorities, environmental protection associations and individuals) did so when the proceedings reached the Court of Cassation. On this basis, compensation totalling €203.8 million was awarded: €165.4 million for material damages, €34.1 million for moral damages and €4.3 for pure environmental damage.

A definitive judgement rendered in law

3.1.1 The judgement rendered on 25 September 2012 by the French Court of Cassation brought to a close the proceedings commenced in France. The Court of Cassation is the highest authority in the French legal system. It decides only matters of law and not of fact, concerning purely legal aspects.

<1> Source: document 'Incidents involving the IOPC Funds – 2012', IOPC Fund.

<2> Source: document 'Incidents involving the IOPC Funds – 2012', IOPC Fund.

<3> The IOPC Funds are three intergovernmental funds (1992 Fund, Supplementary Fund and 1971 Fund) established by States to compensate the victims of pollution damage resulting from persistent discharges of oil from tankers. At 31 December 2012, the 1992 Fund comprised 109 States and the Supplementary Fund 28 States. The United States of America is not party to either of them, and operates its own system of liability.

A judgement rendered in the context of criminal proceedings

3.1.2 The proceedings commenced in France were of a criminal nature, given that it was a matter of determining the liability of the parties concerned with regard to a criminal offence under Act No. 83-583 of 5 July 1983 on pollution from ships. In the course of the proceedings, the competence of the French criminal judge to pronounce on civil interests was challenged, on the grounds that the 1992 CLC established a specific liability regime offering victims the possibility of taking legal action, but any fault recognised in this context could not be likened to a criminal offence. The French Court of Cassation, however, considered that the competence of the criminal judge was only excluded in cases where the parties concerned enjoyed the benefit of the channelling of liability to the shipowner via the 1992 CLC. Consequently, those persons who cannot benefit from the channelling of liability set out in the 1992 CLC (which is the case of the parties involved in the *Erika* case, as explained below in this note) may be ordered to pay compensation in the context of criminal proceedings.

3.1.3 A proceeding involving three essential elements: territorial jurisdiction, liability of all the accused as authors of the damage, and recognition of the pure environmental damage. These points are considered below.

3.2 Recognition of France's jurisdiction in an incident occurring outside its territorial waters

Question raised

3.2.1 The question was whether France could have jurisdiction to judge the case, given that the incident occurred in France's Exclusive Economic Zone, but outside its territorial waters. The alternative to the jurisdiction of France would have been the jurisdiction of Malta, the *Erika*'s flag State. Malta did not ask to exercise its jurisdiction. For the victims (individuals, local authorities…) the possibility of taking action in the courts of their own country is naturally essential, as it considerably facilitates their action. The judgement of the Court of Cassation confirms the competence of the French courts to judge the case.

3.2.2 In a situation where Malta did not ask to exercise its jurisdiction, the Court of Cassation based the competence of France on the application of Act No. 83-583 of 5 July 1983 on pollution from ships (now article L.218-10 and subsequent articles of the Environment Code) which authorises proceedings in the case of 'pollution of territorial waters'. For the Court of Cassation, this must also be read in the light of the provisions of article 113-12 of the Criminal Code which states that:

> "French criminal law is applicable to offences committed outside territorial waters where contemplated in international conventions and the law".

3.2.3 The arguments put forward in the course of the proceedings to contest the application of the Act of 5 July 1983 were:

- Under the UNCLOS (Montego-Bay) Convention, no State may validly purport to subject any part of the high seas to its sovereignty. As the incident of the *Erika* occurred outside French territorial waters, it was the courts of the flag State, in this case Malta, which should have been competent.

- The MARPOL Convention only authorises coastal States to impose penalties for discharges, but not for the possible ensuing consequences in terms of pollution[<4>].

3.2.4 On these two points, the Court of Cassation considers that:

[<4>] "Coastal States, for the purpose of enforcement (…) may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards (…)."

- The application in conjunction of articles 220(6) and 228 of the UNCLOS (Montego Bay) Convention authorises the jurisdiction of the coastal State in the case of 'major' damage.

- Consequently, the French judge applies the MARPOL Convention strictly, but the standards of protection imposed by international law remain *minimum* standards of protection which in no way preclude national law from going further.

3.2.5 In the light of these elements, the Court of Cassation considers that the application of the French Act of 5 July 1983 is not incompatible with the UNCLOS and MARPOL Conventions, and that France therefore has competence to judge.

3.3 Recognition of the liability of all the parties in the shipping chain

Question raised

3.3.1 The question was whether parties other than the shipowner himself could be recognised as liable and ordered to pay compensation. For the victims (individuals, local authorities…), this possibility is essential. It prevents any dilution of liability and recognises that a group of parties other than the shipowner (in this case, the charterer, shipowner, classification society and shipping management company) also have power to exercise control and authority over the ship and are also liable for the consequences of the incident.

3.3.2 By recognising the liability of the charterer, shipowner, classification society and shipping management company, the Court of Cassation confirmed the existence of criminal liability for unintentional oil pollution by parties other than the shipowner who did not directly cause the damage. This is one of the key points in the establishment of the criminal liability of these parties. The Court also affirmed that the channelling of civil liability to the shipowner did not preclude other operators recognised as criminally liable for the pollution being ordered to bear the cost of compensation due to the victims. It thus jointly orders the accused to remedy the consequences of the damage caused.

3.3.3 The principal points addressed by the Court of Cassation concerning the chain of liability are as follows:

- **The absence of sovereign immunity of the classification society RINA:**
  RINA asked to be granted immunity by virtue of the fact that it had acted on behalf of the flag State and not as an independent operator. The Criminal Court did not grant it the benefit of immunity on the grounds that the issuing of classification certificates was an activity of a private nature. However, the Court of Appeal subsequently considered that the issuing of classification certificates contributed to an act of public service, namely improvement of safety of navigation. Nevertheless, it did not grant immunity from the jurisdiction, a decision confirmed by the Court of Cassation, because RINA had unequivocally renounced immunity from the jurisdiction by taking part in all the preparatory phases and proceedings in the Courts on the substantive aspects of the case. Matters relating to jurisdiction must be invoked at the commencement of the proceedings, before the matters of substance.

  Another point which could have been made for the case that RINA hadn't renounced immunity from the jurisdiction could have been that RINA remains a private company which acts in the framework of economic activities and not exclusively government activities. It is thus not accepted that the issuing of ship classification certificates could be recognised as an act of public service such that its liability is comparable to that of a pure State entity and that it could thus benefit from immunity from the jurisdiction.

- **The recognition of liability of the charterer, shipowner, classification society and the ship management company compatible with the MARPOL Convention and 1992 CLC:**
  The charterer, shipowner, classification society and the ship management company were convicted under a broad interpretation of the MARPOL Convention. French judges convict all persons 'exercising authority over the ship' on the basis of Act No. 83-583 of 5 July 1983

while the MARPOL Convention does not refer to any specific individual. French law thus applies the MARPOL Convention strictly but in a manner which is workable. The liability of the charterer, TOTAL, in particular, was established with regard to the authority which it exercised in practice over the ship. For the Court of Cassation, this act of exercising authority is established, in particular, by the fact that TOTAL:

- chose a voyage charter and not a time charter as a means of limiting its liability;
- decided to carry out vetting in addition to the certificates issued by classification societies.

3.3.4 Given that these parties have authority over the ship, the channelling of liability to the shipowner under the 1992 CLC cannot be applied. In fact, the 1992 CLC creates a special liability regime for the shipowner and institutes immunity in favour of a group of parties. However, it also provides that compensation claims can be addressed to these parties when the damage resulted from their personal act or omission, committed with the intent to cause such damage, or 'recklessly' and with knowledge that such damage would probably result. On this point, the Court of Cassation finds the existence of a fault of recklessness, an interpretation of the inexcusable fault defined above by the 1992 CLC in the case of the *Erika*. In so doing, it does not invent any new legal notion and gives full effect to the provisions of the 1992 CLC.

3.4 Recognition of environmental damage

Question raised

3.4.1 The question was whether environmental damage (distinct, for example, from economic or moral damage) could give rise to compensation. Compensation for pure environmental damage is an important question in legal proceedings relating to oil spills. Its recognition assumed, in particular, that a link could be identified between the loss and the damage to the natural heritage, the parties with cause of action in law to claim compensation, and a method for evaluating the damage. The conclusions of the Court of Cassation do not impose new obligations on the 1992 Fund, which was not a party to the proceedings.

3.4.2 The principal points addressed by the Court of Appeal and confirmed by the Court of Cassation concerning environmental damage are as follows:

- **The establishment of a link between the environmental damage and the pollution of the natural heritage:**
  The Court of Cassation considers that pure environmental damage was subject to compensation in the *Erika* case, given that:
  - It is not fair to give immunity to persons liable through their fault for damage caused to the environment on the pretext that nature does not belong to anyone in particular. Any act of wrong-doing must be subject to a penalty. In particular, Article L110-1 of the Environment Code provides a legal qualification for the common heritage for natural spaces, resources and environments, sites and landscapes, air quality, animal and plant spaces, diversity and biological equilibrium.

- It represents

> "all non-negligible damage to the natural environment, that means notably the air, the atmosphere, water, the soil, and, the countryside, natural sites, the biodiversity and interaction between these elements, which has no repercussions on any specific human interest but affects a legitimate public interest".

Environmental damage is distinct from the moral damage also found in the *Erika* case.

- **Recognition of the cause of action of local authorities and environmental protection associations:**
  The Court of Cassation recognises that local authorities and environmental protection associations (article L.142-4 of the French Environment Code, resulting from Act No n°2008-757 on environmental liability) may take legal action. Associations which have been registered at least 5 years at the date of the incident may exercise the rights recognised to the civil party provided that their statutes sets out the safeguarding of all or part of the interests mentioned in article L.211-1 of the French Environment Code.

- **A fixed rate method of quantification of damages:**
  The method adopted to quantify damages is a flat-rate evaluation method based on specific criteria for each of the different types of victim. The judgement by the Court of Appeal, and on this point confirmed by the Court of Cassation, states that:

> "In order to arrive at a fair monetary evaluation of the environmental damage suffered by each of the civil parties, the Court will retain various parameters relevant to communities and, when available, the area of the tidal shoreline affected, the scale of the effect of the oil spill on the sites, as shown in the report, their maritime vocation and their population, for other communities it undertook a comparison with those for which it possessed information, for other local authorities, the scale of the pollution of their shorelines, the degree to which they engage in maritime activities and their population and, for associations, the number of members when available, the public profile and specific nature of their work, and an assessment of the violation of their society's mission and the inherent reason for their existence".

3.4.3 In France, a bill submitted on 23 May 2012 to the Senate is currently being debated to follow up the judgement rendered by the Court of Cassation by including the following elements in the Civil Code:

> "Any act whatsoever by a person which causes damage to the environment obliges the person by whose fault the damage occurred to make reparation for it. Reparation of damage to the environment shall preferably be effected in kind"[<5>].

4 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited to take note of the information contained in this document.

[<5>] Draft article 1382-1 of the Civil Code (http://www.senat.fr/leg/ppl11-546.html)